No. 10-1337

In the Supreme Court of the United States

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
SCOTT R. MCINTOSH
DANIEL TENNY
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether an Internet-based music service "perform[s] * * * [a] copyrighted work publicly" within the meaning of Section 106(4) of the Copyright Act, 17 U.S.C. 106(4), when it electronically transmits a digital file containing a sound recording of that work and the recording is not audible during the transmission.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Treaties and statutes—Continued: Page

Miscellaneous:

Miscellaneous—Continued: Page

In the Supreme Court of the United States

No. 10-1337

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-38a) is reported at 627 F.3d 64. The opinion of the district court (Pet. App. 39a-55a) is reported at 485 F. Supp. 2d 438.

JURISDICTION

The judgment of the court of appeals was entered on September 28, 2010. A petition for rehearing was denied on December 2, 2010 (Pet. App. 56a-57a). 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, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Copyright Act of 1976, 17 U.S.C. 101 *et seq.*, confers on the owner of a copyrighted musical work various exclusive rights, including the rights to reproduce the work, to distribute it, and to "perform [it] publicly." 17 U.S.C. 106.[1] The definitional section of the Copyright Act provides 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 or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible." 17 U.S.C. 101. The Act further provides that "[t]o perform or display a work 'publicly' means"

> (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.

Ibid.

---

[1] A "musical work" consists of the notes and lyrics of a song, distinct from an artist's performance of that work. When a musical work is performed by a particular artist and the ensuing "series of musical, spoken, or other sounds" is fixed in a recording medium, the resulting work is a "sound recording." 17 U.S.C. 101. Although both a "musical work" and a "sound recording" are embodied in a phonorecord, they are distinct works under the Copyright Act, 17 U.S.C. 102(a)(2) and (7), and may be owned and licensed separately.

2. Petitioner, the American Society of Composers, Authors, and Publishers (ASCAP), is a membership organization that represents music publishers, songwriters, and composers. The company operates what is in essence a clearinghouse, providing a mechanism by which those who want to perform a copyrighted work publicly can pay petitioner's members for the right to do so. Petitioner collects royalties on those transactions, which it distributes to the copyright holders (music publishers) and the authors (composers and songwriters) that it represents. See 17 U.S.C. 101 (defining "performing rights society" to include petitioner); Pet. App. 3a, 42a.

Petitioner licenses only the right to perform a copyrighted work publicly and does not license so-called "mechanical rights," *i.e.*, the rights to reproduce and distribute the work (17 U.S.C. 106(1) and (3)). Musical works traditionally have been distributed on physical media such as sheet music, records, tapes, and compact discs. More recently, however, they have also come to be distributed electronically through Internet downloads of sound recordings. For most of the twentieth century, there were sound reasons to divide the licensing of mechanical and performing rights between separate entities. Radio stations and other commercial establishments would turn to clearinghouses like petitioner to license public performances of musical works, and record companies would secure separate licenses from music publishers to reproduce and distribute phonorecords (commonly referred to as copies) of the same musical works for private listening.

3. a. In 1941, the United States brought suit against petitioner under the Sherman Act, 15 U.S.C. 1 *et seq*. To settle that antitrust action, petitioner entered into a con-

sent decree governing various aspects of its business. *Inter alia*, the decree required petitioner to provide, on a negotiated fee schedule, a license to any person who sought to perform copyrighted musical works publicly. If fee negotiations reach an impasse, the decree provides for the United States District Court for the Southern District of New York, on an application from an aggrieved party, to take evidence and set an appropriate licensing fee. Since 1941, the decree has been amended several times, but its basic structure (as relevant here) remains intact. Although the United States has no pecuniary or similar tangible interest in the district court's licensing-fee decisions, it remains a party to the case by virtue of its role in initiating the antitrust action. Pet. App. 6a n.4, 40a.

b. The present dispute arises out of applications filed in the district court, pursuant to the consent decree, by petitioner. AOL and respondents Yahoo! Inc. and RealNetworks, Inc. are Internet companies that, as part of their businesses, provide downloads of recorded music to their customers.[2] As a general matter, a download occurs when a customer purchases a song from an on-line music service (such as iTunes) and a file containing a digital recording of the song is transferred from a remote server to the hard drive on the customer's computer. Pet. App. 3a-5a, 41a-42a.

For the downloads at issue here, the contents of the file are not played during the download. Rather, after the download is complete, the customer may use software on his computer to play the recording. Then, and only then, can the customer perceive the music. See Pet.

---

[2] AOL subsequently settled and is not a respondent in this Court. Gov't C.A. Br. 10.

App. 5a, 12a, 42a. The transfer of a digital recording over the Internet, and the resulting creation of a copy on the customer's local hard drive, constitute the "distribution" and "reproduction" of the work. See 17 U.S.C. 115(d) (2006 & Supp. III 2009); 17 U.S.C. 106(1) and (3); *Metro-Goldwyn-Mayer Studios Inc.* v. *Grokster, Ltd.*, 545 U.S. 913, 921-923, 928-929, 939 (2005); Pet. App. 9a. As a result, respondent Internet companies and AOL are required to (and do) pay copyright holders for licenses to distribute and reproduce their works via downloading.

Respondent Internet companies and AOL applied to petitioner for a license to publicly perform the musical works in petitioner's repertory. The parties disagreed, however, as to whether downloading a song over the Internet is a "public performance" of the copyrighted musical work (in addition to being a reproduction and a distribution, rights which are not licensed by petitioner). When the parties were unable to reach agreement on an appropriate licensing fee, petitioner applied to the district court for a reasonable-fee determination. Pet. App. 41a.

c. The district court granted partial summary judgment for respondent Internet companies and AOL, agreeing with their contention that the downloading of a digital music file does not itself constitute a "public performance" of the musical work embodied therein. The court explained that "to constitute a public performance, an event must first satisfy the definition of 'performance' under the [Copyright] Act." Pet. App. 45a. Noting that this was an issue of "first impression," the court looked to the definition of "perform" in 17 U.S.C. 101. It concluded that, "in order for a song to be performed, it must be transmitted in a manner designed for contem-

poraneous perception." Pet. App. 46a. The district court could "conceive of no construction that extends [the term 'perform'] to the copying of a digital file from one computer to another in the absence of any perceptible rendition." *Id.* at 47a. Rather, the court explained, "the downloading of a music file is more accurately characterized as a method of *reproducing* that file." *Ibid.*

4. The court of appeals affirmed in relevant part. Pet. App. 1a-38a.[3] The court observed that it was "undisputed that these downloads create copies of the musical works, for which the parties agree that copyright owners must be compensated." *Id.* at 9a. The disputed question, the court explained, was "whether these downloads are also public performances of the musical works, for which the copyright owners must separately and additionally be compensated." *Ibid.*

Looking to the definition of "perform" in 17 U.S.C. 101, the court of appeals explained that "[a] download plainly is neither a 'dance' nor an 'act.'" Pet. App. 9a. The court further explained that the other terms in the statutory definition ("recite," "render," and "play"), particularly when read in context, all "refer to actions that can be perceived contemporaneously." *Id.* at 10a; see *id.* at 10a-11a & n.8. The court continued: "Music is neither recited, rendered, nor played when a recording (electronic or otherwise) is simply delivered to a potential listener." *Id.* at 11a. Because the downloads at issue "are not performed in any perceptible manner during the transfers," the court concluded that they are "not a performance of that work, as defined by [Section] 101." *Id.* at 12a.

---

[3] The court of appeals vacated and remanded with respect to certain rate calculations that are not at issue here. See Pet. App. 17a-38a.

The court of appeals rejected petitioner's reliance on the separate definition of "publicly" in Section 101 of the Copyright Act. The court explained that the definition "simply defines the circumstances under which a performance will be considered public; it does not define the meaning of 'performance.'" Pet. App. 13a. The court determined 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." *Ibid.* (quoting *Cartoon Network LP* v. *CSC Holdings, Inc.*, 536 F.3d 121, 136 (2d Cir. 2008), cert. denied, 129 S. Ct. 2890 (2009)).

Finally, in a footnote, the court of appeals addressed and rejected the argument of "[s]everal amici" that treatment of the relevant downloads as "public performances" was necessary for the United States to comply with its obligations under the World Intellectual Property Organization Copyright Treaty, Dec. 20, 1996, S. Treaty Doc. No. 17, 105th Cong., 2d Sess., 36 I.L.M. 65 (1997) (WIPO Copyright Treaty). Pet. App. 17a n.10. The court explained that "the Copyright Act already permits copyright holders to control the reproduction and distribution of their musical works over the Internet." *Ibid.* For that reason, the court held, "the conclusion that a download does not also trigger the public performance right does not infringe on Article 8 of the WIPO Copyright Treaty." *Ibid.*

ARGUMENT

The court of appeals correctly held that a traditional Internet download of a sound recording does not itself constitute a public performance of the recorded musical work. That decision does not conflict with any decision

of this Court or any other court of appeals. Further review is not warranted.

1. The court of appeals' decision is correct. Under the plain terms of the Copyright Act, a copyrighted musical work is "perform[ed]" only when it is "recite[d], render[ed], play[ed], dance[d], or act[ed], either directly or by means of any device or process." 17 U.S.C. 101. As the court of appeals recognized, all of the verbs ("recite," "render," "play," "dance," and "act") contained in that statutory definition refer to conduct that can be "perceived simultaneously," *i.e.*, that is capable of being heard or seen in real time. See Pet. App. 11a; *id.* at 10a-11a (citing dictionary definitions). A book is "recited" when its contents are audibly spoken; a dramatic piece is "rendered" when actors perform it; and a musical work is "played" when a musical instrument or voice reproduces the notes set forth on a page of sheet music. See *id.* at 12a.

In contrast, when recorded music is downloaded, an electronic file containing a digital copy of the musical work is transferred from a remote server to a local computer's hard drive. Pet. App. 12a. For the downloads at issue in this case, the musical work is not played during the transfer, but rather can be heard by the customer only after the file has been saved on a local computer's hard drive. *Ibid.* Because the download itself involves no dancing, acting, reciting, rendering, or playing of the musical work encoded in the digital transmission, it is not a performance of that work. See 17 U.S.C. 101; Pet. App. 11a ("Music is neither recited, rendered, nor played when a recording (electronic or otherwise) is simply delivered to a potential listener.").

That interpretation comports with common understandings and sound copyright policy. An Internet

download of a music file is the modern-day equivalent of the making and distribution of a compact disc, a cassette tape, or a vinyl record. The manufacture of a compact disc, like the download of a music file, exercises the copyright holder's reproduction right. And the sale of a compact disc, like the download of a music file, exercises the copyright holder's distribution right. But in downloading a music file, the underlying musical work is not "performed" (publicly or otherwise) any more than it is "performed" when a customer purchases a compact disc. Performance of the work occurs only when (and if) the recipient undertakes the subsequent act of playing the disc or downloaded music file, *e.g.*, in a stereo at home (a private performance) or through the sound system of a theater (a public performance). An Internet download of a music file from iTunes has the same practical effect as the delivery of a compact disc ordered from Amazon.com, and both forms of distribution require payment of royalties to the copyright holder. But neither the statutory text nor sound copyright policy justifies requiring respondent Internet companies to pay copyright holders a *second* royalty (either directly or through an intermediary) simply because copies of the relevant musical works were transmitted in digital form rather than on a tangible storage medium.

For that reason, the Copyright Office and other federal agencies responsible for intellectual property have repeatedly advanced a view consistent with the court of appeals' decision. In 2001, the Copyright Office transmitted to Congress a report on Section 104 of the Digital Millennium Copyright Act (DMCA Section 104 Report). In that report, the Copyright Office explained that it did "not endorse the proposition that a digital download constitutes a public performance even when no contempora-

neous performance takes place." DMCA Section 104 Report, at xxvii, http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf. The Register of Copyrights has adhered to that view in testimony before Congress. *E.g.*, *Reforming Section 115 of the Copyright Act for the Digital Age: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 110th Cong., 1st Sess. 28-29 (2007); *United States Copyright Office: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 107th Cong., 1st Sess. 15 (2001). And in 1995, an intergovernmental working group "chaired by [the] Secretary of Commerce * * * and consist[ing] of high-level representatives of the Federal agencies that play a role in advancing the development and application of information technologies" concluded in an exhaustive report that "[w]hen a copy of a work is transmitted over wires, fiber optics, satellite signals or other modes in digital form so that it may be captured in a user's computer without the capability of simultaneous 'rendering' or 'showing,' it has rather clearly not been performed." Information Infrastructure Task Force, *Report of the Working Group on Intellectual Property Rights* 1, 71 (Sept. 1995). That has also been the consistent position of the United States throughout this litigation.

The 1995 working-group report was before Congress when it enacted the 1995 amendments to the Copyright Act. Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336; see S. Rep. No. 128, 104th Cong., 1st Sess. 17 (1995) (*Senate Report*) (discussing working-group report). Those amendments incorporated digital transmissions into the Copyright Act's compulsory licensing scheme (which

generally requires most owners of copyrights in musical works to provide a license to anyone who would make and distribute phonorecords) and confirmed that a download of a musical work constitutes a reproduction and distribution of that work. See 17 U.S.C. 115 (including "digital phonorecords"), 115(d) (2006 & Supp. III 2009) (defining "digital phonorecords" to include downloads). The amendments did not suggest, however, that downloads implicate the public-performance right. The compulsory-licensing scheme was designed to ensure that anyone who seeks to distribute and reproduce copyrighted works over the Internet can secure a fairly priced license to do so. See *Senate Report* 37 (noting that "the changes to section 115 are designed to minimize the burden on transmission services"). It would disserve that objective to require respondent Internet companies and similarly-situated entities to negotiate and pay for a separate license with petitioner or one of its competitors (in addition to the licensing fee established by Section 115) before distributing digital copies of musical works over the Internet.

2. Petitioner's contrary arguments lack merit.

a. Petitioner does not contend that the statutory definition of "perform" encompasses the downloads at issue here. Instead, petitioner suggests that an entity can "perform [a copyrighted] work publicly" without "performing" the work at all. See Pet. 14 ("The separate definition of '[t]o perform . . . a work publicly,' however, encompasses a broader range of activity than the definition of '[t]o "perform."'"). That contention reflects a misunderstanding of the relevant definitional provisions.

The portion of 17 U.S.C. 101 on which petitioner relies, which establishes the meaning of the phrase "[t]o

perform or display a work 'publicly,'" is specifically intended as a definition of the word "publicly." That is clear both from the quotation marks around the word "publicly" and from the provision's placement (after the definition of "publication" and before the definition of "registration") within the alphabetical list of definitions contained in Section 101. The provision does not encompass conduct falling outside the separate definition of "perform," but "simply defines the circumstances in which a performance will be considered public." Pet. App. 13a.

The first clause of the statutory definition specifies that a performance is public when it occurs "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." 17 U.S.C. 101. The second clause specifies that a performance is also public if it is transmitted to such a place or to the public, as when a phonorecord is played over the radio. Neither clause purports to enlarge or otherwise alter Section 101's definition of "perform," or to suggest that it is possible to "perform * * * a work 'publicly'" without actually "perform[ing]" it. Thus, as the court of appeals correctly concluded, a transmission must be a "performance" in order to be a "public" performance. Pet. App. 13a.

The fact that a public performance may be received by the public "at the same time or at different times," 17 U.S.C. 101 (cited at Pet. 15), does not eliminate the need for a performance. If "a given work is repeatedly played (*i.e.*, 'performed') by different members of the public, albeit at different times, this constitutes a 'public' performance." *Columbia Pictures Indus., Inc.* v. *Redd Horne, Inc.*, 749 F.2d 154, 159 (3d Cir. 1984) (quot-

ing 2 Melville B. Nimmer, *Nimmer on Copyright* § 8.14[C][3], at 8-142 (1983)). For example, a cable company that offers on-demand services publicly performs a copyrighted work when it transmits a performance of that work to one of its subscribers, even though a viewing by a single customer might not otherwise be regarded as "public." The work is "perform[ed]" publicly because (and when) it is played on the user's television by means of a device or process and is perceived by the user in the course of the transmission. See H.R. Rep. No. 83, 90th Cong., 1st Sess. 29 (1967) (explaining that the clause clarifies that the transmission "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" is a public performance). Here, by contrast, the download itself does not involve any contemporaneous playing of the work.

b. The "[n]eighboring [Copyright Act] provisions" on which petitioner relies (Pet. 15-16) likewise do not support its position, but rather stand only for the unobjectionable proposition that some "digital audio transmissions" may implicate the public-performance right. See Pet. 16 (quoting 17 U.S.C. 114(d)(4)(B)(i)). For example, digital audio transmissions by music services may result in a contemporaneous rendition of a musical work in the course of the transmission. If such a transmission also delivers a copy of the work to be retained on the recipient's computer or device, then that transmission will implicate both the public-performance and the distribution rights. That possibility explains why the distribution right is implicated by providing copies of phonorecords via digital transmission "regardless of whether the digital transmission is also a public performance." Pet. 16 (quoting 17 U.S.C. 115(d) (2000 & Supp.

III 2009)). But the language in Section 115(d) (and similar provisions) in no way suggests that *all* "digital audio transmissions" are public performances.

c. Petitioner also relies on the Copyright Act's legislative history. Pet. 16-17. As the court of appeals concluded, resort to legislative history is unnecessary here because the statutory language is unambiguous. See Pet. App. 10a n.7. In any event, the materials on which petitioner relies do not support its position.

Petitioner cites (Pet. 16-17) the statement in a 1976 House Report that "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." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 63 (1976) (*House Report*). That statement begins by referring to "the definitions of 'perform,' 'display,' 'publicly,' and 'transmit,'" and it simply emphasizes that a transmission (and subsequent re-transmission) of a past performance can constitute a public performance. See *ibid.* There is no dispute, for example, that playing a phonorecord is a performance, and the definition of "publicly" ensures that it will constitute a public performance if the resulting music is later broadcast over the radio. The examples provided in the House Report clarify this point:

> Thus, for example: a singer is performing when he or she sings a song; a broadcasting network is performing when it transmits his or her performance (whether simultaneously or from records); a local broadcaster is performing when it transmits the network broadcast; a cable television system is performing when it retransmits the broadcast to its subscribers; and any individual is performing whenever he or

> she plays a phonorecord embodying the performance or communicates the performance by turning on a receiving set.

House Report 63. At no point does the House Report suggest that a transmission is a performance even if the "performance" cannot be seen or perceived by anyone in the course of the transmission. To the contrary, each of the examples involves conduct that can itself be heard in real time.

d. Petitioner is likewise wrong in arguing (Pet. 17) that Internet downloads must be treated the same as streaming transmissions. When a sound recording embodying a musical work is streamed, transmission protocols ensure that the incoming digital information is converted into audible sound and played as it is received, without any additional act by the recipient. A listener seated at his computer thus hears the work in real time—in the parlance of the Copyright Act, the work is "perform[ed]" because it is "play[ed] * * * by means of [a] device or process" as it streams. 17 U.S.C. 101. Just as the Internet download of a music file is the modern-day equivalent of the making and distribution of a compact disc, a streaming transmission of a music file can be analogized to a radio broadcast. The former does not involve a "performance" of the underlying musical work; the latter does.

The facts that the user may elect to play downloaded songs shortly thereafter, and that the laws of physics do not permit transmissions to be sent and received in the very same instant (Pet. 18), does not undermine the fundamental difference between streaming and the downloads at issue here. In a streamed transmission, it is the contemporaneous rendition of audible sound on the listener's machine that makes the stream a performance.

Conversely, it is the absence of a contemporaneous rendition of audible sound that prevents the downloads at issue here from being performances. As the court of appeals recognized, some "transmission[s] could constitute both a stream and a download, each of which implicates a different right of the copyright holder." Pet. App. 14a n.9. But that possibility does not make the court of appeals' distinction "unworkable" (Pet. 17). This case provides an unsuitable vehicle for the Court to consider Section 101's application to those more nuanced technologies, both because those sorts of transmissions are not at issue here and because the court of appeals did not purport to decide the distinct questions that such technologies would raise. Cf. *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

e. Petitioner (and its amici) argue that the court of appeals' decision conflicts with the United States' treaty obligations, and that this Court's review is needed to avoid "international ramifications." See Pet. 12, 19-23. Petitioner did not adequately press that argument below, the court of appeals addressed it only in a footnote, and petitioner's treaty-based arguments lack merit.

In the court of appeals briefing, petitioner did not cite the Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris on July 24, 1971 and amended in 1979, S. Treaty Doc. No. 27, 99th Cong. 2d Sess. (1986) (Berne Convention), or any of the bilateral and multilateral agreements on which it now relies. See Pet. 19-23. Petitioner's only discussion of the WIPO Copyright Treaty was contained in a single footnote in petitioner's opening brief. The entirety of that discussion was as follows:

> The [WIPO Copyright Treaty], ratified and implemented by Congress in 1998, guarantees American music authors a right of "communication to the public of their works, by wire or wireless means." This right closely parallels the Section 106(4) right of public performance, and as binding federal law, should inform the Court's interpretation of the Copyright Act. The [WIPO Copyright Treaty's] "right of communication" carries no requirement of simultaneous perception.

Pet. C.A. Br. 29 n.8 (citations omitted); see Gov't C.A. Br. 27 n.3 (suggesting that this argument was "inadequately raised for appellate review") (citation omitted). The court of appeals addressed the issue in a footnote, referring to it as an issue raised by "[s]everal amici." Pet. App. 17a n.10.

In any event, the court of appeals' decision does not place the United States in violation of its international obligations. None of the international agreements cited by petitioner requires the United States to characterize and protect as a "public performance" an Internet download of a music file that does not itself convey real time audio. Article 11 of the Berne Convention requires recognition of the right of public performance (Berne Convention, art. 11(1); see Pet. 19-20), but it does not speak to whether or under what circumstances the electronic transmission of a copy of a musical work constitutes a public performance of that work.

Article 8 of the WIPO Copyright Treaty encompasses, *inter alia*, Internet downloads, and it requires contracting parties to ensure that downloads are subject to an exclusive right of authorization by the work's author. See WIPO Copyright Treaty, art. 8 ("[A]uthors 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 a time individually chosen by them."); Pet. 20; see Pet. 22 & n.1, 23 n.2 (describing other international agreements with similar language). That treaty, however, does not specify whether the exclusive right to transmit copies of works to the public should be protected as part of the public-performance right, rather than (or in addition to) the distribution right. The absence of any such specification resulted from a deliberate drafting choice. In response to a proposal by the United States that digital transmissions be covered expressly by the distribution right, and in light of disparities among existing national laws and the rights afforded thereunder, the drafters adopted an "umbrella solution." See WIPO, *Guide to the Copyright & Related Rights Treaties Administered by WIPO* 207-210 (2003) (WIPO Guide); 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, 207-214 (1997) (Ficsor). Under the "umbrella solution," contracting parties are free to implement their obligations under Article 8 through application of a right other than the public-performance right (or, as recognized in other countries, the right of communication to the public), as long as the acts covered by Article 8 are fully covered by *some* exclusive right.[4] As discussed, the

[4] See WIPO Guide 208-209 (describing "compromise solution" as recognizing that "in respect of the legal characterization of the exclusive right—that is, in the actual choice of the right or rights to be applied—sufficient freedom should be left to national legislation"); Ficsor 210-

United States has complied with that obligation—an Internet download of a music file implicates the author's exclusive right to distribute and to reproduce that work.

Petitioner asserts (Pet. 21) that Article 6 of the WIPO Copyright Treaty "*separately*" provides a right of distribution and thus "makes clear that a download transmission * * * implicates *both*" the right of distribution and the public-performance right.[5] That argument reflects a misunderstanding of the scope of Article 6, and it ignores important distinctions between different kinds of digital transmissions. Article 6 applies only to the distribution of "fixed copies that can be put into circulation as tangible objects," such as compact discs, DVDs, or hard copies of books. See WIPO Copyright Treaty art. 6 n.5; Ficsor 213. Thus, unlike the distribution right under United States law, Article 6's distribution right does not extend to the electronic transmission of files; and Article 8's recognition of an exclusive right to transmit files electronically (including Internet downloads) leaves the legal characterization of that exclusive

---

214 (same); Summary Minutes of Main Committee I, *Records of the Diplomatic Conference on Certain Copyright & Neighboring Rights Questions* ¶ 301 (1999) (Article 8 can be implemented "in national legislation through application of any particular exclusive right * * * or combination of exclusive rights") (unopposed statement of U.S. delegate Jeffrey P. Kushan).

[5] Petitioner also speaks of the reproduction right in Article 6 (Pet. 21), but that provision is about distribution. The agreed statement concerning Article 1(4) provides that "[t]he reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention." WIPO Copyright Treaty art. 1(4) n.1.

right to the discretion of the contracting party. More fundamentally, the WIPO Copyright Treaty's recognition of several different exclusive rights (*e.g.*, distribution, reproduction, and public performance) does not dictate whether all (or some combination thereof) should apply to any given transmission of electronic files. As discussed, digital transmissions come in different forms and, accordingly, implicate different exclusive rights. Nothing in Article 8's "umbrella solution" dictates which domestic rights should apply to which transmissions.

3. As petitioner acknowledges (Pet. 27), there is no conflict among the courts of appeals on the question presented here. Indeed, as the district court noted, this case presents an issue of "first impression" (Pet. App. 46a). This Court should not grant further review in the absence of a circuit conflict.

Contrary to petitioner's contention (Pet. 26-28), a denial of certiorari will not leave the Second Circuit with the "final word" (Pet. 28) on this issue. Although proceedings to determine the appropriate rate for licensing public performances may be confined to the Second Circuit with respect to copyrighted musical works in the repertoires of petitioner and Broadcast Music, Inc. (BMI), that is not true with respect to the third performing rights organization (SESAC, Inc.). More importantly, the question presented here is not limited to the context of rate-setting. A music publisher, composer, or songwriter could file an infringement action against a person who transmitted music over the Internet without obtaining a license to perform the work publicly. A music publisher could claim that the download of a movie constituted a public performance of the musical works contained therein. Neither case would have to be brought in the Second Circuit. Cf. *Metro-*

Goldwyn-Mayer Studios Inc. v. *Grokster, Ltd.*, 545 U.S. 913 (2005) (suit against distributors of software that facilitated Internet downloads brought in the Central District of California by, *inter alia*, songwriters and music publishers). Thus, this case is not comparable to suits within the exclusive jurisdiction of the Federal Circuit or the Court of Appeals for the Armed Forces (Pet. 27).

Petitioner further contends (Pet. 24-26) that this Court's immediate review is needed because the court of appeals' decision will "dramatically" reduce royalties to its members. As explained above, however, downloading music files clearly implicates the authors' rights to reproduce and distribute copies of those musical works. Petitioner's *members* are therefore paid each time a copyrighted work is lawfully downloaded. To be sure, a different agent licenses those mechanical rights, but the composer or author ultimately benefits regardless of which agent grants the license.[6]

Petitioner asserts (Pet. 25-26) that certain composers of music for television may have bargained away their distribution or reproduction rights on the assumption that royalties from public performances would be the more important stream of revenue. But any disappointment of such composers' expectations arises at least as much from the increasing sale and rental of DVDs (which petitioner does not contend are public performances) as from the Internet downloads at issue here. In any event, the possibility that some composers made

[6] It is also unclear how the court of appeals' decision would "reduce[]" (Pet. 24) royalties (dramatically or otherwise) given that the technological predecessor to an Internet download of a music file was the making and distribution of a compact disc, which did not give rise to any additional public-performance royalty.

bargains that in hindsight seem ill-advised does not prevent composers in the future from retaining the reproduction right or obtaining fair value for it. And it provides no support for petitioner's contention that a copyrighted work is "perform[ed] * * * publicly" whenever a download occurs, or for granting further review absent a circuit conflict on a matter of first impression.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
TONY WEST
Assistant Attorney General
SCOTT R. MCINTOSH
DANIEL TENNY
Attorneys

JULY 2011