# 09-0539-cv(L),

09-0542-cv(CON), 09-0666-cv(XAP), 09-0692-cv(XAP), 09-1527-cv(XAP)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES,
Plaintiff-Appellee,

v.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,
Defendant-Appellant-Cross-Appellee,

In Matter of the Applications of
REALNETWORKS, INC., YAHOO! INC.,
Applicants-Appellees-Cross-Appellants.

On Appeal from the United States District Court
for the Southern District of New York (Conner, J.)

**BRIEF FOR THE UNITED STATES**


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On Appeal from the United States District Court
for the Southern District of New York (Conner, J.)

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**BRIEF FOR THE UNITED STATES**

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## JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. §§ 1331, 1337, and 1345. The court entered final judgment as to Yahoo! on January 16, 2009 and as to RealNetworks on January 20, 2009. ASCAP filed notices of appeal on February 9, 2009, within the time provided by Rule 4(a)(1) of the Federal Rules of Appellate Procedure. This Court has jurisdiction under 28 U.S.C. § 1291.

## STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether downloading an electronic file containing a digital sound recording of a copyrighted musical work constitutes "perform[ing] the copyrighted work publicly" within the meaning of the Copyright Act.

## STATEMENT OF THE CASE

In 1941, the United States brought an antitrust action against the American Society of Composers, Authors and Publishers (ASCAP), which is in the business of licensing the rights to publicly perform musical works. ASCAP entered into a consent decree under which it agreed to provide, on a negotiated fee schedule, a license to anyone seeking to publicly perform the copyrighted works that it has authority to license. Should negotiations over licensing fees fall through, the consent decree provides that an aggrieved party can ask the United States District Court for the Southern District of New York to set a fair rate for a license to publicly perform copyrighted works. The consent decree remains in effect today.

These appeals arise out of applications from three internet companies asking the district court to determine, among other things, whether the companies "perform [a] copyrighted work publicly" within the meaning of the Copyright Act—and thus are required to obtain licenses from

ASCAP—when they allow their customers to download over the internet files containing digital copies of those works. The district court held that they did not, and ASCAP has appealed that determination.

## STATEMENT OF FACTS

### A. Statutory Background.

The Copyright Act confers upon the owner of a copyrighted musical work various exclusive rights, chief among them the rights to reproduce the work, to distribute it, and to "perform [it] publicly." 17 U.S.C. § 106. For copyright purposes, a "musical work" consists of the notes and lyrics of a song, distinct from any single 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." *Id.* § 101 (definition of "sound recording"). Although both a "musical work" and a "sound recording" are embodied in a phonorecord, they are distinct works under the Copyright Act, *id*. § 102(a)(2), (7), and may be owned and licensed separately.

In its definitional section, 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 performing 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.

*Id.*

**B. The Current Proceeding.**

In 1941, the United States brought an action against the American Society of Composers, Authors and Publishers (ASCAP), for alleged violations of the Sherman Act. ASCAP, like Broadcast Music, Inc. and SESAC, Inc., is a membership organization that represents music publishers, songwriters, and composers. ASCAP's business is licensing the right to publicly perform its members' musical works. The company runs what is in essence a clearinghouse, providing those who want to publicly perform a copyrighted work with a straightforward mechanism to pay ASCAP members for the right to do so. ASCAP collects royalties on those transactions, which

it distributes to the copyright holders (music publishers) and authors (composers and songwriters) that it represents. *See* 17 U.S.C. § 101 (defining "'performing rights society'" to include ASCAP).

ASCAP only licenses the right to publicly perform a copyrighted work, and does not license the so-called "mechanical rights," which is to say, the rights to reproduce and distribute the work—traditionally on compact discs or sheet music, but more recently through downloads. Dividing the licensing of mechanical and performance rights made sense for most of the twentieth century: Radio stations would turn to clearinghouses like ASCAP to license public performances of musical works, and record companies would secure separate licenses to reproduce and distribute musical works for private listening.

To settle the original antitrust action, ASCAP entered into a consent decree governing many aspects of how it could conduct its business. In part, the decree required ASCAP to provide, on a negotiated fee schedule, a license to anyone seeking to publicly perform copyrighted musical works. If fee negotiations reached 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 (at least as relevant here) remains intact. Consistent with the decree, the district court has acted from time to time as a rate-making body, and this Court has entertained appeals from decisions issued in connection with the consent decree. *See, e.g., United States* v. *ASCAP*, 442 F.2d 601 (2d Cir. 1971).

These appeals arise out of applications filed in the district court pursuant to the consent decree by AOL, Yahoo! Inc., and RealNetworks, Inc. The applicants are internet companies, and, as part of their businesses, they provide downloads of recorded music to their customers. As a general matter, a download occurs when a consumer 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 consumer's computer. In the downloads at issue in these appeals, the contents of the file are not played during the download; rather, after the download is complete, the customer uses software on his computer to play the recording, at which time—and only at which time—he perceives the music. *See United States* v. *ASCAP*, 485 F. Supp. 2d 438, 441 (S.D.N.Y. 2007) (providing a detailed technical description of an internet download).

The transfer of a digital recording over the internet and the resulting creation of a copy on a local hard drive amount to the "distribution" and "reproduction" of the work. *See* 17 U.S.C. § 115(d). As a result, the applicants are required to pay copyright holders—and do pay them—for licenses to distribute and reproduce their works via downloading. ASCAP, however, does not license distribution or reproduction rights; it only licenses public performance rights. ASCAP has accordingly taken the position that each and every download of a musical work also amounts to a public performance of that work. In so arguing, ASCAP seeks to compel the applicants to pay it (or one of its competitors) a licensing fee for each song that is downloaded from the applicants' services. This 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.

The applicants disagreed with ASCAP over whether downloading a song over the internet is a "public performance" of the copyrighted musical work, and that disagreement contributed significantly to the breakdown of licensing negotiations. The applicants therefore turned to the district court, arguing *inter alia* that a download does not constitute a "public performance"

and hence that they are not obligated to obtain an additional license from ASCAP.

### C. The Decision on Appeal.

On April 25, 2007, the district court granted partial summary judgment for the applicants and held that "principles of statutory construction, as well as analogous case law and secondary authorities, dictate that, in order for a song to be performed, it must be transmitted in a manner designed for contemporaneous perception." *United States* v. *ASCAP*, 485 F. Supp. 2d 438, 443 (S.D.N.Y. 2007). The court began its analysis by noting that the Act defines "perform" to mean "to recite, render, [or] play" a musical work, 17 U.S.C. § 101, and that digitally downloading a work without listening to it does not fit within the ordinary meaning of any of those words. "All three terms require contemporaneous perceptibility." *Id*.

For support, the court also pointed to statements by the Copyright Office that a digital download of an electronic music file does not constitute a public performance. In a 2001 report to Congress, for example, the Copyright Office stated that "we do not endorse the proposition that a digital download constitutes a public performance even when no contemporaneous performance takes place." U.S. Copyright Office, Digital Millennium

Copyright Act Section 104 Report to the United States Congress, at xxvii-xxviii (2001). Similarly, a federal interagency working group concluded in 1995 that "[w]hen a copy of a work is transmitted * * * 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, *The Report of the Working Group on Intellectual Property Rights* 71 (Sept. 1995).

The court concluded its analysis by noting that it "agree[d] with the position set forth in the brief of the Recording Industry Association of America, Inc. ('RIAA') as amicus curiae," 485 F. Supp. 2d at 446-47, which argued in part that ASCAP's position was inconsistent with § 115 of the Copyright Act. Section 115 establishes a compulsory licensing scheme for the mechanical rights, i.e., the rights to duplicate and reproduce phonorecords. (A phonorecord is an object like a compact disc or record from which a musical work "can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. § 101.) This compulsory licensing scheme expressly covers "digital phonorecord delivery" by means of internet downloads. *Id*. § 115(d). Accepting ASCAP's view, however, would mean that full compliance with the compulsory licensing

scheme would not authorize the digital download of copyrighted musical works upon the payment of a reasonable licensing fee. Instead, the applicants would *also* have to secure the rights (from ASCAP or from one of its competitors) to publicly perform the works. RIAA therefore argued that adopting ASCAP's position would thwart the congressional purpose of facilitating digital downloads. The court agreed with this analysis, and concluded that § 115 demonstrates that "Congress did not intend the two uses"—reproduction and public performance—"to overlap to the extent proposed by ASCAP in the present case." 485 F. Supp. 2d at 447.

Final judgment on the music services' applications was entered in January 2009. ASCAP has appealed from, among other things, the ruling that a download is not a public performance. Yahoo! and RealNetworks have cross-appealed on unrelated issues; AOL has settled with ASCAP and is not a party to these appeals.[1]

[1] Although the United States did not participate in the district court proceedings on these particular applications, the United States brought the underlying antitrust suit, has participated in connection with various issues associated with the consent decree in the intervening years, *see, e.g.*, *United States* v. *ASCAP*, 32 F.3d 727 (2d Cir. 1994), and remains a party. The United States is submitting this brief in that capacity. The brief nonetheless conforms to the rules governing amicus filings, and is properly before the Court whether construed as a party brief or an amicus brief in support of the applicants. *See* Fed. R. App. P. 29(a) (authorizing the United States to "file an amicus-curiae brief without the consent of the parties or leave of court").

## SUMMARY OF ARGUMENT

The applicants in this case offer their customers the ability to download music over the internet. As required by the Copyright Act, they already pay for two separate licenses whenever they send an electronic file containing a digital copy of a song to a customer—one to reproduce and distribute the musical work, and the other to reproduce and distribute the particular sound recording.

In ASCAP's view, however, a musical work is not only reproduced and distributed when it is downloaded. ASCAP also believes that the work is "perform[ed] * * * publicly." 17 U.S.C. § 106(4). ASCAP therefore urges that, to comply with the Copyright Act, the applicants must secure yet another license—and pay a second fee to the holders of copyrights in musical works, this time through ASCAP or one of its competitors—if they want to continue to allow their customers to download songs.

ASCAP's contention finds no support in the Copyright Act, which is explicit that a copyrighted musical work is performed only if it is "recite[d], render[ed], [or] play[ed]." *Id.* § 101. As the district court properly recognized, the ordinary meaning of this statutory language is that a performance occurs only if the musical work is capable of being heard in real time. Because no one

can hear a conventional internet download of a file containing a digital copy of a musical work, a download does not infringe on a copyright holder's exclusive right to publicly perform her work.

ASCAP does not appear to contest that a download falls outside the statutory definition of "perform." ASCAP instead clings to the Copyright Act's definition of "publicly," which provides that a person performs a musical work "publicly" if, among other things, he "transmit[s] or otherwise communicate[s] a performance or display of the work * * * to the public." *Id*. For ASCAP, a download is a transmission of a performance and, as such, qualifies as a "public performance."

ASCAP's argument suffers from several flaws, the most notable of which is that a download is simply not a performance. The Copyright Act confers the exclusive right "to *perform* the copyrighted work publicly,"*id*. § 106(4) (emphasis added), meaning that a transmission must *also* result in a performance before it can be said to be a public performance. If this were in doubt, the very definition upon which ASCAP relies requires the transmission of "performance[s] or display[s] of the work"—not the transmission of *copies* of the work. Indeed, Congress in 1995 established a compulsory licensing scheme for internet downloads that would not function properly if every

download implicated not only the rights to distribute and reproduce a copyrighted musical work, but also the right to perform it publicly. And both the Copyright Office and an intergovernmental working group have, after careful review of the Copyright Act, concluded that a download does not constitute a public performance of a musical work.

Stymied by the statute, ASCAP claims that affirming the district court's decision will mean that the authors of musical works are not fairly compensated for their compositions. But a digital download of a copyrighted musical work creates a physical copy of the work on a customer's computer, and for that reason the applicants *already* pay copyright holders for licenses to secure the exclusive rights to distribute and reproduce their works. Rates to secure compulsory licenses are either negotiated between private parties—and thus presumptively fair—or established in administrative proceedings. ASCAP's apparent concern that the rates set in those proceedings are too low to fairly compensate the authors of musical works should be addressed in an administrative forum, not by this Court.

## STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment based on its interpretation of the Copyright Act de novo. *See Larry Spier, Inc.* v. *Bourne Co.*, 953 F.2d 774, 775 (2d Cir. 1992).

## ARGUMENT

### DOWNLOADING A MUSICAL WORK OVER THE INTERNET DOES NOT CONSTITUTE "PERFORM[ING] THE COPYRIGHTED WORK PUBLICLY."

#### 1. A Download Is Not a Performance.

The straightforward issue on appeal is whether a copyrighted musical work is "performed"—meaning "recite[d], render[ed], [or] play[ed], * * * either directly or by means of any device or process," 17 U.S.C. § 101—whenever an electronic file containing a recording of the work is downloaded. The answer is no. As a result, and contrary to ASCAP's submission, a firm that has already obtained a license from a copyright holder to reproduce and distribute the musical work through a download is not required to pay the same holder, either directly or through an intermediary, for a second license to perform the same musical work contained in the download.

As the district court recognized, the words "recite," "render," and "play," when used in their ordinary sense, refer to acts that an audience can perceive in real time. 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 on a page of sheet music. *See also* Webster's New World College Dictionary 1196, 1213, 1104 (4th ed. 2006) (defining "recite" as "to repeat or say aloud from or as from memory"; "render" as "to perform or interpret by performance"; and "play" as "to give out sounds, esp. musical sounds"); *see also Broadcast Music, Inc.* v. *Claire's Boutiques*, 949 F.2d 1482, 1486 (7th Cir. 1991) ("One obvious example of a public performance is a live musical concert before a substantial paying audience.").

The balance of the definition of "perform," which encompasses "danc[ing] and act[ing]" a work, bolsters the conclusion that a performance occurs only when a musical work is made audible. *See Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307 (1961) (noting that "a word is known by the company it keeps"). Both dancing and acting—although not strictly applicable to musical works—cause the underlying dance or play to be perceptible to human eyes and ears. Similarly, the definition provides that a movie is

performed when "its images [are shown] in any sequence" or "the sounds accompanying [it are made] audible," *id.*—in other words, when it is capable of being seen or heard.

In and of itself, however, a download is not perceptible. When a download occurs, an electronic file containing a digital copy of a musical work is transferred from an on-line server to a local hard drive. (In this, downloading a music file is no different than downloading any other type of file over the internet.) At least as to the downloads at issue in these appeals, the musical work is not played during the transfer; only once the file has been saved on a hard drive can a software program on the local computer play it. Because the download itself involves no recitation, 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.

In contrast, streaming music over the internet (also known as "webcasting") *does* give rise to a performance. 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. A listener seated at her computer thus hears the work as it unfolds 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.

ASCAP insists that the distinction between downloading and streaming is illusory because both involve the transfer of data over the internet and the creation of copies on the resident computer. ASCAP Br. 37-44. But ASCAP itself acknowledges the important difference in the transmission protocols that govern the two methods of distributing music files. As ASCAP explains, "[i]n a stream transmission, incoming data is stored in pieces in the client computer's temporary memory—its 'RAM'—and converted back to audible sound piece by piece." *Id*. at 9. As a result, the copyrighted work is made "audible" as it is received "piece by piece." It is this automatic conversion to audible sound—not the fact that data is transmitted or buffer copies are temporarily created—that makes a stream a performance. And it is the absence of an automatic of conversion to audible sound that disqualifies the downloads at issue in these appeals from being performances.

ASCAP also invokes the maxim that "[s]trictly speaking, no transmission can support playback at exactly the same time it is transmitted," and posits that "[i]f true 'contemporaneous perceptibility' were required, neither a stream nor a download would count as a public performance."

ASCAP Br. 40. ASCAP is right that the laws of physics do not permit transmissions to be sent and received in the same instant, and doubly right the Copyright Act does not require instantaneousness. It *does*, however, require an act to be a real-time performance before it implicates a copyright holder's exclusive right "to perform the copyrighted work publicly." 17 U.S.C. § 106(4). Transferring packets of electronic data over the internet and fixing them in magnetic form on a computer's hard drive does not, without more, fit the bill.

Finally, ASCAP finds it significant that some downloads contain limitations on their use (e.g., restrictions on copying, limited playbacks). ASCAP Br. 40. It is difficult to see the relevance of this observation. Limitations on the use of a downloaded file have nothing to do with whether the act of downloading constitutes a performance. ASCAP also notes that the district court did not address "progressive downloads," which mix features of downloading and streaming, and suggests that it reached its conclusion only by "overlook[ing] an increasingly commonplace technology." ASCAP Br. 42-43. The district court did not "overlook" progressive downloads, however. To the contrary, the court recognized that progressive downloads might "constitute both a stream *and* a download, each of which implicates a different

right of the copyright holder," 485 F. Supp. 2d at 446 n.5, but declined to resolve a question not presented in the case. That principled determination by no means impeaches the court's analysis of pure downloads.

### 2. The Definition of "Publicly" Does Not Eliminate the Need for a Perceptible Performance.

ASCAP does not appear to challenge the district court's conclusion that the download of a musical work falls outside the Copyright Act's definition of "perform." *See* ASCAP Br. 24 ("The Act does not require that the transmission itself be a 'performance' in the sense of a rendition or playing of a musical work."). Instead, ASCAP skips ahead to the Copyright Act's definition of "publicly." In relevant part, that definition 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.

17 U.S.C. § 101. In ASCAP's view, the use of the phrase "transmit or otherwise communicate" in the second clause suggests that Congress meant to include

within the meaning of "public performance" the transmission of electronic information containing a previously recorded performance.

In so arguing, ASCAP stretches the Copyright Act past the breaking point. The Act's definition of "publicly" serves to distinguish a public performance from a private performance, not to dictate what is or is not a performance. And the mere fact that a musical work is transmitted does not mean that it is also "*perform[ed]* * * * publicly." 17 U.S.C. § 106(4) (emphasis added). Because a work is performed *only* when it is "recite[d], render[ed], [or] play[ed]," *id.* § 101, the Copyright Act requires the transmission of a performance that can be heard in real time—not simply the transfer of data—before a public performance occurs.

This Court concluded as much in *Cartoon Network LP, LLLP* v. *CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008). "[W]hen Congress speaks of transmitting a performance to the public," the Court explained, "it refers to the performance *created by the act of transmission*." *Id.* at 136 (emphasis added). A radio broadcast is a quintessential public performance because the public transmission and the perceptible performance occur contemporaneously—the performance is "created by the act of transmission." *See also id.* at 134 ("The fact that the statute says 'capable of receiving the performance,' instead of

'capable of receiving the transmission,' underscores the fact that a transmission of a performance is itself a performance."). In contrast, a performance is not "created" by a download transmission; the transmission instead creates a computer file. A pure download therefore does not amount to "perform[ing] the copyrighted work publicly." 17 U.S.C. § 106(4).

ASCAP repeatedly denies that the Act requires the contemporaneous transmission of a performance, arguing instead that, "once an initial performance (e.g., a rendition of a song in a recording studio) is transmitted to members of the public, there has been a 'public performance' as the Act defines it." ASCAP Br. 24 n.6. ASCAP is mistaken. When a recording of a past performance is downloaded, the work is performed at one time and transmitted at another. The work is not "perform[ed] * * * publicly" as a result of the download. 17 U.S.C. § 106(4). Amazon.com, for example, does not publicly perform a copyrighted work whenever it mails a compact disc containing that work, notwithstanding that a digital copy has been "transmitted or otherwise communicated." *Cf. Columbia Pictures Industries, Inc.* v. *Professional Real Estate Investors, Inc.*, 866 F.2d 278, 281 (9th Cir. 1989) (holding that renting videos does not constitute the communication of a public performance). The performance occurs only after undertaking a

subsequent act—putting the disc into a stereo at home, for example. Yet adopting ASCAP's reading of § 101 would suggest that even sending a compact disc through the mail is a public performance of the musical works contained on the disc.

ASCAP moreover acknowledges that the first clause of the definition of "publicly"—which provides that a performance is public if it is made "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—demands a contemporaneous performance. *See* ASCAP Br. 33 ("*This* clause requires a performance simultaneous with the public's perception of it."). ASCAP nonetheless urges the Court to read the second clause to eliminate that very requirement. *Id*. Nothing in the statute, however, requires the Court to read two provisions of the same definition to diverge in such a marked fashion. As is readily apparent, the purpose of the second clause is to underscore that a real-time transmission to the public—like, for example, a radio or television broadcast—is also public, even when the performance itself does not occur in a public place. *See* H.R. Rep. No. 94-1476, at 64-65 (1976) (observing that, under the transmit clause, "a performance made available by transmission to the public at large is 'public'

even though the recipients are not gathered in a single place"). It does not drain from the phrase "perform the copyrighted work publicly" the need for a performance. 17 U.S.C. § 106(4).

Lending still further support for this view, *all* of the cases that ASCAP identifies in which courts have found a transmission to be a public performance involved transmissions that were potentially perceptible in real time. In *NFL* v. *PrimeTime 24 Joint Venture*, 211 F.3d 10 (2d Cir. 2000), for example, the defendant was broadcasting pre-recorded tapes of football games into Canada. In *WGN Continental Broadcasting Co.* v. *United Video, Inc.*, 693 F.2d 622, 624 (7th Cir. 1982), the defendant "pluck[ed] broadcast transmissions off the air * * * and transmit[ted] them to cable systems" for real-time retransmission. And in *Columbia Pictures Industries, Inc.* v. *Redd Horne, Inc.*, 749 F.2d 154 (3d Cir. 1984), the defendant played movies on a VCR in the front of the store for groups of viewers in private booths in the back.[2] The common thread is that "the performance [was] created by the act of transmission." *Cartoon Networks,* 536 F.3d at 136.

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[2] *See also Coleman* v. *ESPN, Inc.*, 764 F. Supp. 290 (S.D.N.Y. 1991) (transmissions from cable network to local cable companies for real-time retransmission); *David*, 697 F. Supp. 2d 752 (real-time cable transmissions); *Hubbard Broadcasting, Inc.* v. *Southern Satellite Systems, Inc.*, 593 F. Supp. 808, 813 (D. Minn. 1984), *aff'd*, 777 F.2d 393 (8th Cir. 1985) (retransmissions in real time of works from broadcast stations).

ASCAP finds it significant that this Court has explained that "the most logical interpretation of the Copyright Act is to hold that a public performance * * * includes 'each step in the process by which a protected work wends its way to its audience.'" *NFL*, 211 F.3d at 13 (quoting *David* v. *Showtime/The Movie Channel, Inc.*, 697 F. Supp. 752, 759 (S.D.N.Y. 1988)). But *NFL* only underscores why a download is *not* a performance. The case stands for the proposition that each part of a single, continuous, and automatic *process* —there, the broadcast of a pre-recorded NFL game—resulting in a contemporaneously perceptible public performance constitutes an infringement. Yet the process of a download results in the creation a computer file, not a perceptible performance. Only when a download recipient instructs her computer to play the file does a performance occur—and that at-home performance is emphatically not public.

In arguing to the contrary, ASCAP relies heavily on the clause providing that a transmission is made "'publicly' * * * whether the members of the public capable of receiving the performance * * * receive it * * * at the same time or at different times." 17 U.S.C. § 101. But the "at the same time or at different times" clause does not do away with the need for a performance. The Third Circuit, drawing on the leading treatise on copyrights, has

explained that the clause instead stands for the proposition that 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.'" *Redd Horne, Inc.*, 749 F.2d at 159 (quoting M. Nimmer, 2 Nimmer on Copyrights § 8.14[C][3], at 8-142 (1983)).

For example, "the transmission of a performance to members of the public, even in private settings such as hotel rooms * * * , constitutes a public performance," and "the fact that members of the public view the performance at different times does not alter this legal consequence." *Id*. Similarly, 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 it might otherwise be hard to see how a single viewing by a lone viewer is "public." *See also* H.R. Rep. No. 90-83, at 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). When a song is downloaded, however, no performance of any kind occurs, and no "given work is repeatedly played (i.e. 'performed') by different

members of the public, albeit at different times." 2 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 8.14[C][3] (2006).

Finally, ASCAP draws attention to the legislative history of various amendments of the Copyright Act, and in particular to a 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. 94-1476, at 63 (quoted at ASCAP Br. 29). ASCAP claims that this "conclusively refute[s] the notion that a transmission must itself be a 'rendering' or 'playing' of the work in order to be a public performance." ASCAP Br. 30. But Congress meant by this statement only to emphasize that a transmission (and subsequent re-transmission) of a *past* performance could still constitute a public performance, as the next sentence in the report clarifies.

> 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.

H.R. Rep. No. 94-1476, at 63. At no point does the House Report suggest that a transmission is a public performance even if the transmission cannot be seen or heard by anyone. To the contrary, each of the examples provided in the Report involved the conveyance of a performance that could be heard in real time. If the legislative history "conclusively refutes" anything, it is ASCAP's position, not the district court's conclusion.[3]

### 3. The District Court's Conclusion Finds Additional Support in the Compulsory Licensing Scheme for Downloads.

The district court also properly invoked 17 U.S.C. § 115 to support its construction of the Copyright Act. In broad strokes, § 115 establishes a compulsory licensing scheme requiring most owners of copyrights in musical works to provide a license, at rates set by the Copyright Royalty Judges, to anyone who would like to make and distribute phonorecords—including "digital phonorecords"—of the copyrighted musical work. A "digital

[3] Although this Court has "held that an argument made only in a footnote was inadequately raised for appellate review," *Norton* v. *Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998), ASCAP observes in a footnote that the 1997 World Intellectual Property Organization Copyright Treaty, which the Senate has ratified and Congress has implemented, confers on copyright owners a right of "communication to the public of their works, by wire or wireless means." WIPO, art 8., Dec. 20, 1996. As Congress has recognized, the treaty did not "require any change in the substance of copyright rights," *see* H.R. Rep. No. 105-551, at 9 (1998), in part because the Copyright Act already permitted copyright holders to control the reproduction and distribution of their musical works over the internet. Because a download implicates *those* rights, the district court's conclusion that a download does not trigger *other* rights does no violence to any treaty obligations.

phonorecord delivery" is in turn defined to include a download. *Id*. § 115(d) (providing that a "'digital phonorecord delivery' is 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 * * * musical work embodied therein").

One of the principal purposes of § 115 is to guarantee that anyone who wants to distribute and reproduce copyrighted works over the internet can secure a fairly priced license to do so. *See* S. Rep. No. 104-128, at 37 (1995) (noting that "the changes to section 115 are designed to minimize the burden on transmission services"). If ASCAP's interpretation of the Copyright Act were adopted, however, those seeking to distribute digital copies of musical works over the internet (by permitting downloads, for example) would not just have to pay to copyright holders the licensing fee established by the Copyright Royalty Judges. They would also have to negotiate for a license with ASCAP or one of its competitors—and pay yet another fee to those very same copyright holders. This would thwart Congress's effort to clear the path for digital music downloads.

### 4. The District Court's Decision Accords with Past Determinations of Expert Agencies.

The district court's holding that a pure download does not implicate the right "to perform [a] copyrighted work publicly" is fully consistent with the considered views of the Copyright Office and other federal agencies responsible for intellectual property.

In 2001, the Copyright Office transmitted to Congress a report on § 104 of the Digital Millennium Copyright Act (DMCA Report). In the report, the Copyright Office explained that "we do not endorse the proposition that a digital download constitutes a public performance even when no contemporaneous performance takes place." DMCA Report, at xxvii-xxviii. ASCAP attempts to avoid the import of this determination by characterizing it as a mere "suggest[ion] in passing." ASCAP Br. 37 n.9. But the Register of Copyrights has expressed the identical view at least four separate times in testimony to Congress.[4] Far from a passing suggestion, this is a considered

[4] *See Digital Millennium Copyright Act Section 104 Report: Hearing Before the House Subcommittee on Courts, the Internet, and Intellectual Property*, 107th Cong. 15 (2001) (available at www.copyright.gov/docs/regstat121201.html); *Copyright Office Views on Music Licensing Reform, Hearing Before the House Subcommittee on Courts, the Internet, and Intellectual Property*, 109th Cong. 20 (June 21, 2005) (available at www.copyright.gov/docs/regstat062105.html); *Music Licensing Reform: Hearing Before the Senate Subcommittee on Intellectual Property*, 109th Cong. 118-19 (July 12, 2005) (available at www.copyright.gov/docs/regstat071205.html); *Reforming Section 115 of the Copyright Act for the Digital Age, Hearing Before the House Subcommittee on Courts, the Internet, and Intellectual Property*, 110th Cong. 28-29 (Mar. 22, 2007) (available at

and authoritative agency position—and one that the United States reiterates here. *See also Cartoon Network*, 536 F.3d at 129 (observing that, at a minimum, the Copyright Office receives deference to the degree its position has "the power to persuade" (quoting *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944)).

Furthermore, 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, *The Report of the Working Group on Intellectual Property Rights* 1, 71 (Sept. 1995). Significantly, the report—which was published only after public hearings and the consideration of public comments, *id*. at 3-4—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 (Nov. 1, 1995); *see also* S. Rep. 104-

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www.copyright.gov/docs/regstat032207-1.html).

128, at 17 (discussing report). Those amendments confirmed that a download of a musical work amounts to a reproduction and distribution of that work. 17 U.S.C. § 115(d). Congress nonetheless declined to delineate a public performance right for downloads, lending further support to the district court's decision not to impute one here. *Cf. Bob Jones* v. *United States*, 461 U.S. 574, 599-602 (1983) (finding that Congress' studied refusal to correct an IRS determination suggested its acquiescence in that determination).

**5. Music Authors Are Already Fairly Compensated for Downloads.**

Bereft of textual or legislative support, ASCAP concludes by claiming that the music authors that it represents will not be "fairly compensated" if they garner no royalties on the public performances that ostensibly occur when their songs are downloaded. ASCAP Br. 46-48. But because a download implicates music authors' rights to reproduce and distribute their musical works, they are *already* paid each time a copyrighted work is lawfully downloaded. It is just that a different clearinghouse—not ASCAP—licenses the mechanical rights, at rates either negotiated between the interested parties, 17 U.S.C. § 115(c)(3)(B), or set by the Copyright Royalty Judges pursuant to the compulsory licensing scheme, *id*. § 115(c)(3)(C).

Congress charged the Copyright Royalty Judges with establishing "reasonable rates and terms of royalty payments," *id.*, and the judges have recently done just that. *See* 74 Fed. Reg. 4510, 4515 (Jan. 26, 2009) (determining that "the appropriate section 115 license rate is the greater of 9.1¢ per song or 1.75¢ per minute of playing time (or fraction thereof) for * * * permanent digital downloads"); *see also* 74 Fed. Reg. 4537, 4537-38 (Jan. 26, 2009) (providing the Register of Copyright's correction of portions of the judges' determination). In so doing, the judges explicitly aimed, among other things, "to afford the copyright owner a fair return for his creative work." 74 Fed. Reg. at 4515. If ASCAP believes the rates established in those proceedings are insufficient to fairly compensate music authors, its quarrel is with the Copyright Royalty Judges—not with the district court's sensible determination that a copyrighted work is not "perform[ed] * * * publicly" whenever a download occurs.

## CONCLUSION

For the foregoing reasons, the district court's ruling that downloads of copyrighted musical works do not constitute public performances within the meaning of the Copyright Act should be affirmed.

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## CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of August, 2009, I caused the foregoing brief to be filed with the Court as an e-mail attachment submitted to civilcases@ca2.uscourts.gov, along with ten paper copies sent via express mail. I have also caused copies to the counsel listed below by express mail.

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Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that the foregoing brief complies with the type-volume limitation because it contains 6,874 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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AUGUST 2009

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In connection with *United States* v. *ASCAP*, 09-0539-cv(CON), 09-0542-cv(CON), 09-0666-cv(XAP), 09-0692-cv(XAP), 09-1527-cv(XAP), I certify that I have scanned for viruses the PDF copy of the brief submitted in this case as an email attachment to civilcases@ca2.uscourts.gov, and that no viruses were detected. The virus check was made using Trend Micro Office Scan For Windows, Version 6.5.

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