PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

1285 AVENUE OF THE AMERICAS
NEW YORK, NEW YORK 10019-6064

TELEPHONE (212) 373-3000
FACSIMILE (212) 757-3990

LLOYD K. GARRISON (1946-1991)
RANDOLPH E. PAUL (1946-1956)
SIMON H. RIFKIND (1950-1995)
LOUIS S. WEISS (1927-1950)
JOHN F. WHARTON (1927-1977)

WRITER'S DIRECT DIAL NUMBER
(212) 373-3163

WRITER'S DIRECT FACSIMILE
(212) 492-0163

WRITER'S DIRECT E-MAIL ADDRESS
jaycohen@paulweiss.com

2001 K STREET, NW
WASHINGTON, DC 20006-1047
TELEPHONE (202) 223-7300
FACSIMILE (202) 223-7420

FUKOKU SEIMEI BUILDING
2-2 UCHISAIWAICHO 2-CHOME
CHIYODA-KU, TOKYO 100-0011, JAPAN
TELEPHONE (81-3) 3597-8101
FACSIMILE (81-3) 3597-8120

UNIT 3601, FORTUNE PLAZA OFFICE TOWER A
NO. 7 DONG SANHUAN ZHONGLU
CHAO YANG DISTRICT
BEIJING 100020
PEOPLE'S REPUBLIC OF CHINA
TELEPHONE (86-10) 5828-6300
FACSIMILE (86-10) 6530-9070/9080

12TH FLOOR, HONG KONG CLUB BUILDING
3A CHATER ROAD, CENTRAL
HONG KONG
TELEPHONE (852) 2536-9933
FACSIMILE (852) 2536-9622

ALDER CASTLE
10 NOBLE STREET
LONDON EC2V 7JU, U.K.
TELEPHONE (44 20) 7367 1600
FACSIMILE (44 20) 7367 1650

MATTHEW W. ABBOTT
MARK H. ALCOTT
ALLAN J. ARFFA
ROBERT A. ATKINS
JOHN F. BAUGHMAN
LYNN B. BAYARD
DANIEL J. BELLER
MITCHELL L. BERG
MARK S. BERGMAN
BRUCE BIRENBOIM
H. CHRISTOPHER BOEHNING
ANGELO BONVINO
HENK BRANDS
JAMES L. BROCHIN
RICHARD J. BRONSTEIN
DAVID W. BROWN
SUSANNA M. BUERGEL
PATRICK S. CAMPBELL*
JEANETTE K. CHAN
YVONNE Y. F. CHAN
LEWIS R. CLAYTON
JAY COHEN
KELLEY A. CORNISH
CHARLES E. DAVIDOW
DOUGLAS R. DAVIS
THOMAS V. DE LA BASTIDE III
ARIEL J. DECKELBAUM
JAMES M. DUBIN
ANDREW J. EHRLICH
LESLIE GORDON FAGEN
MARC FALCONE
PETER L. FELCHER
ROBERTO FINZI
PETER E. FISCH
ROBERT C. FLEDER
MARTIN FLUMENBAUM
ANDREW J. FOLEY
HARRIS B. FREIDUS
MANUEL S. FREY
KENNETH A. GALLO
MICHAEL E. GERTZMAN
PAUL D. GINSBERG
ERIC S. GOLDSTEIN
ERIC GOODISON
CHARLES H. GOOGE, JR.
ANDREW G. GORDON
BRUCE A. GUTENPLAN
GAINES GWATHMEY, III
ALAN S. HALPERIN
CLAUDIA HAMMERMAN
GERARD E. HARPER
BRIAN S. HERMANN
ROBERT M. HIRSH
MICHELE HIRSHMAN
JOYCE S. HUANG
MEREDITH J. KANE
ROBERTA A. KAPLAN
BRAD S. KARP
JOHN C. KENNEDY
ALAN W. KORNBERG
DANIEL J. KRAMER
DAVID K. LAKHDHIR
JOHN E. LANGE
DANIEL J. LEFFELL
XIAOYU GREG LIU
JEFFREY D. MARELL
JULIA TARVER MASON
MARCO V. MASOTTI
EDWIN S. MAYNARD
DAVID W. MAYO
TOBY S. MYERSON
JOHN E. NATHAN
CATHERINE NYARADY
ALEX YOUNG K. OH
JOHN J. O'NEIL
KELLEY D. PARKER
ROBERT P. PARKER*
MARC E. PERLMUTTER
MARK F. POMERANTZ
VALERIE E. RADWANER
CAREY R. RAMOS
CARL L. REISNER
WALTER G. RICCIARDI
WALTER RIEMAN
RICHARD A. ROSEN
ANDREW N. ROSENBERG
PETER J. ROTHENBERG
JACQUELINE P. RUBIN
RAPHAEL M. RUSSO
JEFFREY D. SAFERSTEIN
JEFFREY B. SAMUELS
DALE M. SARRO
TERRY E. SCHIMEK
KENNETH M. SCHNEIDER
ROBERT B. SCHUMER
JAMES H. SCHWAB
STEPHEN J. SHIMSHAK
DAVID R. SICULAR
MOSES SILVERMAN
STEVEN SIMKIN
JOSEPH J. SIMONS
MARILYN SOBEL
TARUN M. STEWART
ERIC ALAN STONE
AIDAN SYNNOTT
ROBYN F. TARNOFSKY
JUDITH R. THOYER
DANIEL J. TOAL
MARK A. UNDERBERG
LIZA M. VELAZQUEZ
MARIA T. VULLO
LAWRENCE G. WEE
THEODORE V. WELLS, JR.
BETH A. WILKINSON
STEVEN J. WILLIAMS
LAWRENCE I. WITDORCHIC
JORDAN E. YARETT
KAYE N. YOSHINO
TONG YU
TRACEY A. ZACCONE
T. ROBERT ZOCHOWSKI, JR.

*NOT ADMITTED TO THE NEW YORK BAR

June 17, 2009

BY HAND DELIVERY

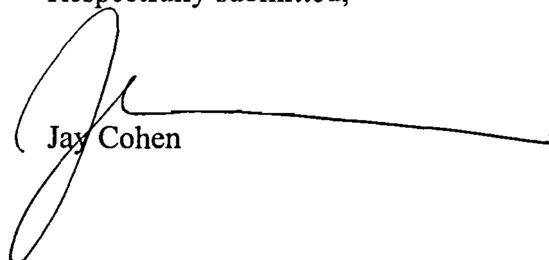
Clerk's Office
U.S. Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

United States of America v. *American Society of Composers, Authors and Publishers (In the Matter of the Application of RealNetworks, Inc., et al.)*, Nos. 09-0539-cv(L), 09-0542-cv(CON), 09-0666-cv(XAP), 09-0692-cv(XAP), 09-1527-cv(XAP)

To the Clerk of the Court:

On behalf of *Amici Curiae* Association of Independent Music Publishers, Church Music Publishers Association, Music Publishers' Association of the United States, National Music Publishers' Association, Inc. and Production Music Association, we enclose an *amicus* brief for filing in the above-captioned appeal. This brief is being submitted with the consent of all parties to the appeal. Please file and docket it accordingly.

Respectfully submitted,



Jay Cohen

Enclosure

09-0539-cv(L), 09-0542-cv(CON),

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

United States Court of Appeals

for the

Second Circuit

UNITED STATES OF AMERICA,

Plaintiff,

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,

Defendant-Appellant-Cross-Appellee,

– v. –

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

BRIEF FOR *AMICI CURIAE* ASSOCIATION OF INDEPENDENT MUSIC PUBLISHERS, CHURCH MUSIC PUBLISHERS ASSOCIATION, MUSIC PUBLISHERS' ASSOCIATION OF THE UNITED STATES, NATIONAL MUSIC PUBLISHERS' ASSOCIATION, INC. AND PRODUCTION MUSIC ASSOCIATION IN SUPPORT OF DEFENDANT-APPELLANT-CROSS-APPELLEE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

Of Counsel:

JAY ROSENTHAL
KATHRYN E. WAGNER
NATIONAL MUSIC PUBLISHERS' ASSOCIATION, INC.
601 West 26th Street, Fifth Floor
New York, New York 10001
(212) 834-0178

JAY COHEN
LYNN B. BAYARD
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000

Attorneys for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Amici Curiae are trade associations that represent the interests of music publishers and songwriters. None of the *Amici Curiae* has a parent corporation, and there is no publicly-held corporation that has a 10% or greater ownership interest in any of the *Amici Curiae*.

TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iii

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 5

ARGUMENT 8

I. CONGRESS INTENDED TO GRANT BROAD EXCLUSIVE RIGHTS IN MUSICAL WORKS AND TO PRESERVE SUCH RIGHTS IN NEW TECHNOLOGIES 8

A. The Exclusive Rights Of Musical Work Copyright Owners Are Broad 8

B. Congress Intended To Preserve The Musical Work Public Performance And Mechanical Rights In Digital Transmissions 10

II. IF NOT REVERSED, THE DISTRICT COURT DECISION WILL HAVE ADVERSE CONSEQUENCES FOR SONGWRITERS AND MUSIC PUBLISHERS AND THE CREATION OF MUSICAL WORKS 14

CONCLUSION 19

TABLE OF AUTHORITIES

Page(s)

CASES

Buffalo Broad. Co. v. *ASCAP*, 744 F.2d 917 (2d Cir. 1984)....................................9

Freeplay Music, Inc. v. *Cox Radio, Inc.*,
404 F. Supp. 2d 548 (S.D.N.Y. 2005)..9

Mechanical and Digital Phonorecord Delivery Rate Proceeding, 74 Fed.
Reg. 4510-01 (Jan. 26, 2009)..13, 15

Mechanical and Digital Phonorecord Delivery Rate Proceeding, 74 Fed.
Reg. 6832 (Feb. 11, 2009)..13

United States v. *ASCAP (In the Matter of the Application of RealNetworks, Inc., et al.)*, 485 F. Supp. 2d 438 (S.D.N.Y. 2007)............................5, 10, 12

STATUTES AND REGULATIONS

17 U.S.C. §§ 101 *et seq.*..11

17 U.S.C. § 106..8, 9, 18

17 U.S.C. § 106(1)..8

17 U.S.C. § 106(3)..8

17 U.S.C. § 106(4)..8

17 U.S.C. § 115..8, 11, 16

17 U.S.C. § 115(a)(1)..11

17 U.S.C. § 115(c)(3)(J)(i)..11

17 U.S.C. § 115(d)..11

17 U.S.C. § 201(a)..1

Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No.
104-39, 109 Stat. 336..11

37 C.F.R. §§ 385.10-17 13

LEGISLATIVE MATERIALS

H.R. Rep. No. 94-1476 (1976) 8

S. Rep. No. 104-128 (1995) 11, 12, 13

S. Rep. No. 94-473 (1975) 8

CONSTITUTIONAL PROVISIONS

U.S. CONST. art. I, § 8, cl. 8 .... 7, 18

OTHER AUTHORITIES

6 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHTS § 30.01 (2005) 1

Supplemental Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill, Copyright Law Revision Part 6, 89th Cong., 1st Sess. (Comm. Print 1965) 9

Deborah Tussey, TECHNOLOGY MATTERS: THE COURTS, MEDIA NEUTRALITY, AND NEW TECHNOLOGIES, 12 J. Intell. Prop. L. 427 (2005) 14

Amici Curiae Association of Independent Music Publishers, Church Music Publishers Association, Music Publishers' Association of the United States, National Music Publishers' Association, Inc. and Production Music Association, by their attorneys, Paul, Weiss, Rifkind, Wharton & Garrison LLP, submit this *amicus* brief in support of the appeal of Defendant-Appellant-Cross-Appellee the American Society of Composers, Authors and Publishers ("ASCAP").[1]

INTERESTS OF *AMICI CURIAE*

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

---

[1] All parties have consented to the filing of this brief.

[2] Two distinct copyrights exist in recorded music: the copyright in the underlying musical work – the interests of *amici* here – and the copyright in the sound recordings of the musical work, that is, recordings by performing artists of the underlying musical composition. *See* 6 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHTS § 30.01 (2005).

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

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

Association of Independent Music Publishers ("AIMP") is dedicated to serving the independent music publishing community by providing continuing professional education and analyses of trends and developments in creative, business, and legal areas relating to the exploitation of music copyrights. AIMP's primary focus is to

educate and inform music publishers about current industry trends and practices by hosting seminars on pertinent copyright and licensing issues and providing a forum for the discussion of various issues confronting the music publishing industry.

Church Music Publishers Association ("CMPA") is an organization of publishers of Christian music focused on areas of concern regarding copyright information, education, protection and administration. CMPA aims to facilitate public and industry awareness in these areas, as well as the continuing personal and professional relationships of its members. Founded in 1926, CMPA currently acts on behalf of 46 member publishers, including representatives from the publishing houses of almost every church denomination and affiliates from every major Christian record label.

Music Publishers' Association of the United States ("MPA"), founded in 1895, is the oldest music trade organization in the United States, fostering communication among music creators, publishers, dealers, music educators and all users of music. MPA focuses on issues relevant to composers and publishers of printed music for concert and educational purposes, and is actively involved in both supporting compliance with national and international copyright laws and advocating the protection of intellectual property rights in legal and legislative fora throughout the world.

National Music Publishers' Association, Inc. ("NMPA") is the principal trade association of music publishers in the United States. Founded in 1917, it has over 800 members, which collectively own or control the majority of musical compositions available for licensing in this country. NMPA represents the rights of music publishers and, through them, songwriters, in litigation, legislation, industry-wide negotiations and rate-setting proceedings. It is the most active proponent for the interests of music publishers in the United States. NMPA's licensing affiliate, The Harry Fox Agency, Inc., was established in 1927 and serves as a licensing and collecting agent on behalf of its over 37,000 publisher-principals in licensing their copyrighted musical compositions for reproduction and distribution.

Production Music Association ("PMA"), founded in 1996, is a non-profit organization currently comprising 23 members, including major music publishers and independent music publishers, which represent over 300 individual music libraries. PMA is dedicated to the promotion and protection of the interests and rights of the composers and publishers of production music, sometimes referred to as "library music." To that end, PMA works with performing rights organizations, legislators and copyright users in connection with the distribution of performance royalties. PMA also educates its members and the marketplace about music rights and other issues affecting the production music community.

SUMMARY OF ARGUMENT

If not reversed, the District Court decision – abolishing the public performance right in digital music downloads – will have far reaching and unintended detrimental effects on songwriters and music publishers and their continued creation of musical works.

The musical work is the foundation of the music industry and has long been the focus of copyright protection. To that end, the Copyright Act grants to the owners of musical work copyrights several broad exclusive rights, including among others the rights of reproduction and distribution (sometimes known as the "mechanical right") and the right of public performance. These rights are not mutually exclusive. Regarding digital technologies specifically, the Copyright Act expressly confirms that digital transmissions may implicate both the mechanical right and the public performance right.

The District Court nevertheless determined that recognition of a public performance right in digital downloads was too "sweeping" in part because the delivery of a music file as a digital download also involves "a mechanical reproduction of the copyrighted work in the form of a 'digital phonorecord delivery' . . . ." *United States* v. *ASCAP (In the Matter of the Application of RealNetworks, Inc., et al.)*, 485 F. Supp. 2d 438, 447 (S.D.N.Y. 2007). The District Court's conclusion cannot be reconciled with the plain language of the Copyright Act or

Congress' clear intent affirming that the two rights – mechanical and performance – can coexist. Indeed, Congress has repeatedly expressed its goal to preserve the exclusive rights granted to the musical work copyright owner in digital transmissions – whether "streams" or "downloads" or the next form of digital delivery – provided, as here, that the statutory criteria for public performances and reproductions and distributions are satisfied.[3]

Thus, in first addressing the impact of the digital revolution on the music industry in 1995, Congress confirmed – as reflected in the Copyright Act – that the fact that a digital transmission is a "digital phonorecord delivery" subject to a mechanical royalty has no bearing on the public performance right. As the legislative history reveals, Congress' aim was to maintain mechanical royalty income *and* performance rights income in digital transmissions for songwriters and music publishers. The District Court decision does just the opposite. It eviscerates the public performance right in digital music downloads (and, by possible extension, the public performance right in audiovisual downloads) and provides a road map to copyright users on how to evade public performance payments for the use of musical works.

---

[3] As noted below, ASCAP's brief exposes the fundamental flaws in the District Court's decision to read a simultaneous perceptibility requirement into the public performance clause in the Copyright Act, and *amici* will not repeat those arguments.

Beyond crafting a public performance loophole unintended by Congress, the District Court decision will have lasting and harmful consequences on musical work copyright owners. The full recognition and protection of their exclusive rights – including, in particular, as new technologies evolve – is essential to the livelihood of songwriters and music publishers. To deny creators an exclusive right granted by the Copyright Act, as the District Court did, will deprive them of revenue streams critical to their continued creation of musical works, thereby diminishing the pool of musical works available to the public. Most important, the failure to recognize the public performance right attendant to downloads sets a dangerous precedent that the protection of well-established rights that spring from the plain language of the Copyright Act could be eroded in the context of new and developing technologies. By contrast, reaffirmance of the performance right in downloads will advance the mandate of the Copyright Clause of the U.S. Constitution, U.S. CONST. art. I, § 8, cl. 8, by providing incentives to songwriters and music publishers to continue the creation of the musical works that are vital to American culture.

For these reasons, and those set forth below and in ASCAP's brief, *amici* respectfully submit that the District Court decision should be reversed.

ARGUMENT

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

A. The Exclusive Rights Of Musical Work Copyright Owners Are Broad

Section 106 of the Copyright Act grants to the owner of a copyright in a musical work several exclusive rights. 17 U.S.C. § 106. Relevant here, the Copyright Act grants to the musical work copyright owner the exclusive rights to reproduce and to distribute the work (including in the form of CDs, vinyl records, cassettes and through digital distribution). 17 U.S.C. §§ 106(1), (3). Section 115 of the Copyright Act grants users a compulsory license to reproduce and distribute musical works (the so-called "mechanical license") in exchange for a statutorily prescribed royalty (so-called "mechanical royalties"). 17 U.S.C. § 115. In addition, the Copyright Act grants to the musical work copyright owner the exclusive right to perform the work publicly. 17 U.S.C. § 106(4).

The exclusive rights granted by the Copyright Act are decidedly broad. As the drafters explained, they sought "to set forth the copyright owner's exclusive rights in broad terms." H.R. Rep. No. 94-1476, at 61 (1976); S. Rep. No. 94-473, at 57 (1975). Congress so intended in order to advance the Act's goal of promoting the progress of science and useful arts through the creation and dissemination of original works of authorship. H.R. Rep. No. 94-1476, at 47 (1976). Notably, in defining the exclusive

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

The broad mechanical and performance rights granted to the musical work copyright owner – although individually defined, licensed and compensated – have long been recognized to coexist in the same musical work, allowing the copyright owner to license and benefit from each individual right. As this Court has acknowledged, "[t]he Act specifically accords the copyright owner the right to authorize others to use the various rights recognized by the Act, including the performing right and the reproduction right, and to convey these rights separately." *Buffalo Broad. Co.* v. *ASCAP*, 744 F.2d 917, 920 (2d Cir. 1984) (internal citations omitted). *See also Freeplay Music, Inc.* v. *Cox Radio, Inc.*, 404 F. Supp. 2d 548, 552 (S.D.N.Y. 2005) (confirming that "[a]lthough the owner of a copyright in the musical

composition holds the exclusive right both to reproduce and to perform the composition, he or she may license, or decline to license, either right separately").

Moreover, as even the District Court conceded, the Copyright Act's "classifications" of exclusive rights are not mutually exclusive. 485 F. Supp. 2d at 447 ("the Act's classifications are non-exclusive"). Thus, the same use of a copyrighted musical work may implicate both the mechanical and performance rights. With respect to digital transmissions (whether downloads or streams), the protection of both the performance and mechanical right is not merely "theoretically possible," *id.*; it is precisely what Congress intended.

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

The District Court nevertheless deemed a public performance right in digital downloads to be too "sweeping" in part because "the delivery of a music file . . . via a download constitutes a mechanical reproduction of the copyrighted work in the form of a 'digital phonorecord delivery' . . . ." *Id.* The District Court's determination contravenes the express language of the Copyright Act and Congress' clear intent.

In 1995, Congress addressed technological change in the music industry by clarifying and extending the rights of performance, reproduction and distribution in

both musical works and sound recordings.[4] *See The Digital Performance Right in Sound Recordings Act of 1995*, Pub. L. No. 104-39, 109 Stat. 336, as codified in portions of 17 U.S.C. §§ 101 *et seq.* ("DPRA"). Regarding musical works specifically, Congress confirmed that the Section 115 compulsory mechanical license covered "digital phonorecord deliveries" (or "DPDs"). 17 U.S.C. § 115(a)(1); *see also* S. Rep. No. 104-128, at 7 (1995). In so doing, Congress affirmed its intent that musical work copyright owners receive the protection and benefit of all of their exclusive rights – reproduction, distribution and public performance alike. First, the definition of a DPD expressly contemplates that a digital transmission involves the performance right *and* the mechanical right. Specifically, a digital phonorecord delivery is defined as "each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording, *regardless of whether the digital transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein.*" 17 U.S.C. § 115(d) (emphasis added). Moreover, the statutory language of Section 115 expressly preserves the right of public performance in digital transmissions. 17 U.S.C. § 115(c)(3)(J)(i) ("Nothing in this section annuls or limits the exclusive right to

---

[4] ASCAP's brief discusses in detail how Congress' grant to sound recording owners of a public performance right further undermines the District Court's analysis. *See* Brief of Defendant-Appellant-Cross-Appellee ASCAP at 26-29.

publicly perform a sound recording or the musical work embodied therein, including by means of a digital transmission, under Section[] 106(4) . . . .").

The legislative history of the DPRA – far from showing that Congress "did not intend the two uses to overlap to the extent proposed by ASCAP," 485 F. Supp. 2d at 447 – leaves no doubt that Congress, in confirming a mechanical right in a DPD, intended to protect both rights and did not intend, as the District Court mistakenly concluded, for the mechanical right to substitute for the performance right and the performance royalty income stream so vital to musical work copyright owners. As Congress stated:

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

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

Congress did not limit its caution to a particular subset of digital transmissions. On the contrary, at the time, Congress recognized that the technologies then in existence would likely "lead to new systems for the electronic distribution of phonorecords" and that digital transmission of all types was "likely to become a very

important outlet for the performance of recorded music." S. Rep. No. 104-128, at 14 (1995). Thus, Congress made plain that where, as here, a transmission, such as a digital download, results in a DPD and constitutes a performance under the relevant statutory criteria, both rights should be fully recognized and protected to preserve the potential income stream to copyright owners and their incentives to create.[5]

In keeping with the statutory language and Congress' intent, a recent industry agreement regarding mechanical royalty rates for services offering interactive streams and limited downloads reached among *amicus* NMPA, the Recording Industry Association of America and the Digital Media Association, and adopted as law in relevant part by the Copyright Royalty Board, recognizes that *both* the mechanical right and the performance right may be implicated in *both* limited downloads and streams. *See Mechanical and Digital Phonorecord Delivery Rate Proceeding*, 74 Fed. Reg. 4510-01, 4514-15 (Jan. 26, 2009), *as modified by* 74 Fed. Reg. 6832 (Feb. 11, 2009) (describing and adopting industry agreement); 37 C.F.R. §§ 385.10-17 (codifying industry agreement).

In sum, the District Court decision stands at odds with the Copyright Act, Congress' intent and the understanding of music industry participants. If not reversed, the District Court decision will leave a legal loophole in copyright protection that may

---

5 ASCAP's brief sets forth in detail the legal and technological bases for concluding that the right of public performance exists in digital downloads. *Amici* will not repeat each of those arguments.

encourage copyright users to favor one technology – the one for which performance royalties would not be owed – over another. But decisions of market actors as to what technology to employ should not be driven by the law or the courts, but by market factors such as competition, efficacy and efficiency considerations. *See generally* Deborah Tussey, TECHNOLOGY MATTERS: THE COURTS, MEDIA NEUTRALITY, AND NEW TECHNOLOGIES, 12 J. Intell. Prop. L. 427, 474 (2005) ("Technology-centered judgments . . . generate incentives for developers to design around specific legal requirements, ultimately producing further litigation and steering innovation in directions which may prove inefficient or otherwise suboptimal . . . [and] may, ultimately, force the legislative intervention which media neutrality was meant to avoid."). And such a loophole – abolishing an exclusive right in musical works contrary to statutory language and congressional intent – will be to the detriment of the creators of musical works whose rights the Copyright Act is designed to protect.

II. IF NOT REVERSED, THE DISTRICT COURT DECISION WILL HAVE ADVERSE CONSEQUENCES FOR SONGWRITERS AND MUSIC PUBLISHERS AND THE CREATION OF MUSICAL WORKS

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

Songwriters and music publishers face grave financial struggles in pursuit of their creative endeavors. Songwriters, in particular, live a perilous existence pursuing

a financially trying profession. *See Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding*, 74 Fed. Reg. at 4523 ("the songwriting occupation is financially tenuous for many songwriters"). Many songwriters are forced to work odd jobs to make ends meet – thereby minimizing the time they have to devote to their craft – and others are forced to abandon their songwriting aspirations altogether. Songwriting offers no reliable income stream and relatively small rewards even for the most successful, "hit" songs. Although some songwriters enjoy financial success from songwriting, their stories are unusual and their success is often short-lived. The financial hurdles of the music industry are particularly acute today, as mechanical royalties – on which many songwriters and music publishers depend – have waned due to rampant piracy and reduced album sales in the digital marketplace.

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

Beyond depriving songwriters and music publishers of their rights and fair remuneration, the District Court's failure to recognize the performance right at stake

sent a signal to the entire creative community that certain enumerated copyright protections that are strictly enforced in more traditional media will not be fully enforced in the existing, or future, digital media. As the distribution of media shifts rapidly and decisively to digital outlets, the District Court decision could have significant adverse consequences for songwriters and music publishers upon whom the music industry relies for the creation of musical works.

The potential danger of the District Court's ruling is highlighted in the context of digitally-distributed audiovisual works. Music publishers and songwriters have long received performance royalties from the broadcast performances of their compositions incorporated in movies and television shows, among other audiovisual formats, but they do not receive Section 115 mechanical royalties from such uses.[6] The District Court's failure to recognize the performance right in the context of music downloads – a decision motivated by the District Court's view that musical work copyright owners are compensated for such uses by mechanical royalties – has led some to argue that the performance right in audiovisual downloads should be similarly abandoned. Tellingly, since the District Court decision, music publishers have

---

[6] Section 115 grants a mechanical license "to make and distribute phonorecords" of a musical work. 17 U.S.C. § 115(a)(1). The Copyright Act defines "phonorecords" as "material objects in which sounds, *other than those accompanying a motion picture or other audiovisual work*, are fixed." 17 U.S.C. § 101 (emphasis added). Thus, Section 115 mechanical royalties are not payable on reproductions and distributions of audiovisual works incorporating musical works.

received notices from several Internet companies stating their position that the decision implicates not only music downloads, but also television and movie downloads.

The consequences for songwriters and music publishers will be extreme. As the transmission of audiovisual works migrates increasingly to digital platforms using download technologies, the District Court decision – if extended to audiovisual downloads – would effectively eliminate the only ongoing royalty income that copyright owners currently enjoy for performances of their works in television shows and movies. If the District Court decision is permitted to stand, the inevitable result of such a precedent will be the chilling of creation by songwriters and music publishers, who have relied for decades on music copyright protection to safeguard their works and reward their creative pursuits.

By contrast, affirming the performance right in downloads will not preclude copyright users' operation of their businesses. Licenses for public performances of millions of copyrighted musical works are obtainable, as a matter of right, under the ASCAP and BMI consent decrees. Preserving the performance right in digital downloads will avoid the unpredictable consequences of eliminating an exclusive right, and reserve for the marketplace or the appropriate rate-setting bodies the task of properly determining the value of the performance right in the context of new and evolving technologies.

* * *

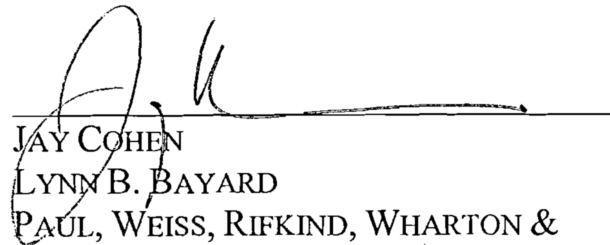
In sum, the exclusive rights enumerated in Section 106 of the Copyright Act were granted to advance the constitutional goal of "promot[ing] the Progress of Science and useful Arts," U.S. CONST. art. I, § 8, cl. 8. Full and continuing recognition of each of the exclusive rights and the assurance of fair compensation to the copyright owners for their efforts are crucial for the copyright system to succeed. Without the promise of future copyright protection and adequate compensation, there would be few musical works and even fewer songwriters. And without the underlying musical work, there would be no song for recording artists to perform and no song for record companies and digital music providers to sell.

CONCLUSION

For the reasons set forth above, and those set forth in ASCAP's brief, *amici* respectfully submit that the District Court decision should be reversed.

Dated: June 17, 2009

Respectfully submitted,



JAY COHEN
LYNN B. BAYARD
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000

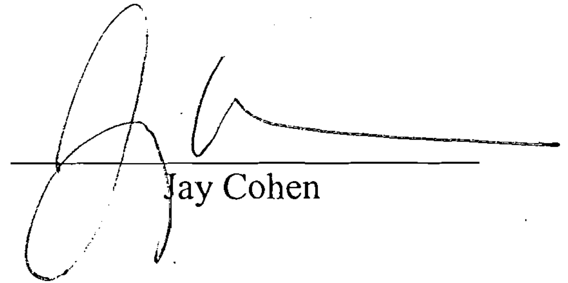
Counsel for Amici Curiae

Of Counsel:

JAY ROSENTHAL
KATHRYN E. WAGNER
NATIONAL MUSIC PUBLISHERS' ASSOCIATION, INC.
601 West 26th Street, Fifth Floor
New York, New York 10001
(212) 834-0178

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32(a), I hereby certify that the foregoing brief was produced using the Times New Roman 14- point typeface and contains 3,976 words.



Jay Cohen

ANTI-VIRUS CERTIFICATION FORM

See Second Circuit Interim Local Rule 25(a)6.

CASE NAME: United States of America v. American Society of Composers, Authors and Publishers (In the Matter of the Application of RealNetworks, Inc., Yahoo! Inc.)

DOCKET NUMBER: Nos. 09-0539-cv(L), 09-0542-cv(CON), 09-0666-cv(XAP), 09-0692-cv(XAP), 09-1527-cv(XAP)

I, (please print your name) Ankush Khardori, certify that

I have scanned for viruses the PDF version of the attached document that was submitted in this case as

an email attachment to

- [ ] <agencycases@ca2.uscourts.gov>.
- [ ] <criminalcases@ca2.uscourts.gov>.
- [x] <civilcases@ca2.uscourts.gov>.
- [ ] <newcases@ca2.uscourts.gov>.
- [ ] <prosecases@ca2.uscourts.gov>.

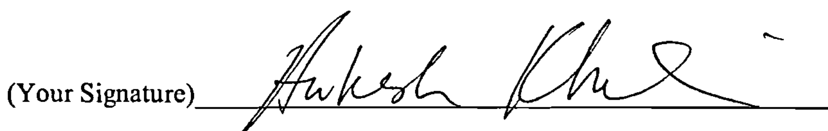
and that no viruses were detected.

Please print the **name** and the **version** of the anti-virus detector that you used

Symantec Antivirus version 10.1.6.6000

If you know, please print the version of revision and/or the anti-virus signature files

06/16/2009 rev. 4

(Your Signature) 

Date: 06/17/2009

AFFIDAVIT OF SERVICE BY FEDERAL EXPRESS

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Trevor J. Hill, being duly sworn, deposes and says:

1. I am not a party to this action, am over 18 years of age and am employed by Paul, Weiss, Rifkind, Wharton & Garrison LLP, 1285 Avenue of the Americas, New York, New York 10019.

2. On June 17, 2009, I personally served two true copies of the foregoing:

- BRIEF FOR AMICI CURIAE ASSOCIATION OF INDEPENDENT MUSIC PUBLISHERS, CHURCH MUSIC PUBLISHERS ASSOCIATION, MUSIC PUBLISHERS' ASSOCIATION, NATIONAL MUSIC PUBLISHERS' ASSOCIATION, INC. AND PRODUCTION MUSIC ASSOCIATION IN SUPPORT OF DEFENDANT-APPELLANT-CROSS-APPELLEE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS; and
- ANTI-VIRUS CERTIFICATION FORM on the following:

Thomas P. Lane
Winston & Strawn LLP
200 Park Avenue
New York, NY 10166

Kenneth Steinthal
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153

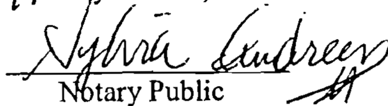
Catherine Stetson
Hogan & Hartson LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004

Christopher J. Glancy
White & Case LLP
1155 Avenue of the Americas
New York, NY 10039

3. I made such service by personally enclosing two true copies of the aforementioned documents in a properly addressed pre-paid wrapper and delivering it to a Federal Express office for Priority Overnight delivery prior to the latest time designated by Federal Express for Overnight delivery.

Trevor J. Hill

Sworn to before me this
17th day of June, 2009



Notary Public

SYLVIA ANDREEV
Notary Public, State of New York
No. 01AN6119735
Qualified in Queens County
Certificate Filed in New York County
Commission Expires December 6, 2012