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NEWSLETTER

ASCAP Asks Supreme Court to Review Music Download Case

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In October 2010, the Court of Appeals for the Second Circuit confirmed in *United States v. ASCAP* (Application of Yahoo! & Real Networks) that websites that offer music downloads do not need licenses for the copyright public performance right, but need only secure licenses for reproduction and distribution rights. Our prior article concerning the case can be accessed here.

We had expressed hope that the Second Circuit's opinion—which was among a string of recent decisions rejecting unreasonably aggressive licensing positions taken by the performance rights organizations—might help temper the approach of those organizations. But the American Society of Composers, Authors and Publishers (ASCAP) has apparently decided to take (at least) one more bite at the apple, and has asked the Supreme Court to review the appellate court's ruling. In its petition for writ of certiorari, ASCAP claims that the Second Circuit's decision is inconsistent with the Copyright Act, violates international intellectual property obligations and will have dire economic consequences for copyright owners. Undoubtedly, Yahoo! and RealNetworks, along with the United States—which supported them below—will disagree. Supreme Court review is, of course, discretionary, and there are good reasons for the Court to reject this petition. Among them are the following:

First, ASCAP's statutory construction arguments were correctly rejected by the lower courts and do not merit Supreme Court review. ASCAP relies heavily on only one of several related definitions, contending that the relevant definition is the definition of to "perform a work . . . publicly" and that this definition does not require a rendition of a song that can be perceived contemporaneously at the time of the download in order for there to be a public performance. That

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definition, however, incorporates the defined term "perform," which explicitly does require such a simultaneous rendition, and is contingent on the existence of a "performance." ASCAP ignores this critical underlying definition, as well as the definition of "to transmit a performance." ASCAP also relies on section 115(d) of the Copyright Act, which clarifies that digital downloads may occur "regardless of whether the digital transmission is also a public performance," to argue that the statute shows that a download "can constitute a public performance under the Copyright Act." But this provision actually confirms that downloads are not necessarily public performances, and thus directly contradicts ASCAP's position that they are. Moreover, ASCAP's position is inconsistent with the Copyright Act in other ways. Among other things, it would eviscerate the statutory license that Congress created for digital downloads pursuant to Section 115 of the Copyright Act and would create an inexplicable disparity in treatment between musical works, on the one hand, and sound recordings that embody musical works, on the other.

Second, ASCAP is wrong that the Second Circuit's decision construed the Copyright Act to violate international treaty obligations. ASCAP argues that U.S. law must recognize a separate right of communication to the public for downloads in addition to the reproduction and distribution rights, but nothing in any treaty mandates how a signatory nation may protect any given activity, and the U.S. fully protects downloads through the reproduction and distribution rights. Further, as ASCAP itself acknowledges, none of the conventions or agreements are self-executing, so they are not positive law in the United States and provide no basis for finding the Second Circuit's construction of the Copyright Act to conflict with them. Moreover, ASCAP did not seriously argue this point before the Second Circuit. It appeared in one footnote in ASCAP's opening brief, and thus was arguably waived.

Third, in its effort to paint a picture of an industry likely to suffer adverse financial effects from the Second Circuit's decision, ASCAP ignores that copyright owners are fully and fairly compensated for the full economic value of music downloads through the reproduction and distribution rights. In essence, then, what ASCAP terms as a "dramatic reduction" in royalties amounts to the (proper) deprivation of the right to receive double compensation under the separate public performance rubric.

Wiley Rein filed an *amicus* brief in the Second Circuit supporting Yahoo! and Real Networks on behalf of CTIA-The Wireless Association ® , which further discusses many of the points addressed above and can be read here. We will continue to keep you advised of developments in this case, as well as others that could impact the royalties that broadcasters and other website operators must pay to copyright owners. In the meantime, for more information please contact one of the attorneys listed below.