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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

-v-

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS

Defendant,

In the matter of the Application for the
Determination of Reasonable License Fee by

AT&T WIRELESS

Civil Action No. 41-1395 (WCC)

**BRIEF OF *AMICI CURIAE*
ELECTRONIC FRONTIER
FOUNDATION, PUBLIC KNOWLEDGE,
AND CENTER FOR DEMOCRACY AND
TECHNOLOGY IN SUPPORT OF AT&T
MOBILITY'S MOTION FOR SUMMARY
JUDGMENT ON RINGTONES**

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STATEMENT OF INTEREST

In responding to motions for summary judgment by AT&T Mobility and Verizon Wireless (the “Carriers”), ASCAP has leveled copyright infringement claims against the millions of mobile phone customers who have legitimately purchased musical ringtones. *Amici* urge this Court to weigh the interests of those consumers carefully before deciding questions of copyright law that could affect the lives of millions of Americans. *See Newmark v. Turner Broadcasting Network*, 226 F. Supp. 2d 1215, 1220 (C.D. Cal. 2002) (resolution of secondary copyright liability claims “will necessarily require a determination that the activities of the owners constitute direct copyright infringement, thereby instilling in them a reasonable apprehension that they will be subject to liability.”); Julie Cohen, *The Place of the User in Copyright Law*, 74 *FORDHAM L. REV.* 347, 356-58 (2005) (noting that consumer perspectives are often overlooked in copyright cases pressing secondary liability theories).

The Electronic Frontier Foundation (“EFF”) is the nation’s leading nonprofit civil liberties organization working to protect consumer interests, innovation, and free expression in the digital world. EFF and its more than 13,000 dues-paying members have a strong interest in assisting the courts and policy-makers in striking the appropriate balance between copyright law and the public interest.

Public Knowledge (“PK”) is a Washington, D.C. based not-for-profit public interest advocacy and research organization. PK promotes balance in intellectual property law and technology policy to ensure that the public can benefit from access to knowledge and the ability to freely communicate and innovate in the digital age. PK has a strong interest in ensuring that copyright law is not misread and misused to chill innovation and transform millions of law-abiding consumers into copyright infringers.

The Center for Democracy & Technology (“CDT”) is a nonprofit public interest group that seeks to promote free expression, privacy, individual liberty, and technological innovation on the open, decentralized Internet. CDT advocates balanced copyright

policies that provide appropriate protections to creators without curtailing the openness and innovation that have been vital to realizing the democratizing potential of new digital media.

SUMMARY OF ARGUMENT

In an effort to squeeze additional royalty payments from the Carriers, ASCAP has invited this Court to endorse the remarkable proposition that millions of American consumers break the law every time their mobile phones ring in public. Having branded every public ring of a musical ringtone an “unlicensed ringtone performance,” ASCAP then argues that the Carriers must either pay royalties or be held liable for these alleged consumer infringements.

Accepting ASCAP’s arguments would jeopardize the interests of consumers in three distinct ways. Most directly, increased royalty obligations on the Carriers will mean increased prices for consumers who purchase musical ringtones, an outcome that contradicts Section 110(4) of the Copyright Act,¹ which makes it clear that entirely noncommercial public performances are noninfringing. Consumers ought not be indirectly taxed for precisely the activities that Congress left outside the reach of the public performance right.

ASCAP’s arguments also pose two more fundamental threats to the interests of consumers. First, a finding that consumers infringe the public performance right each time their phones ring in public threatens to stigmatize millions of consumers as law-breakers. This will leave consumers vulnerable to infringement claims and royalty demands not just from ASCAP and its members, but also from other copyright owners in other contexts. Second, a ruling here that holds the Carriers liable, in the absence of primary infringement liability on the part of their customers, would upset the traditional balance between direct and secondary infringement, jeopardizing the “breathing room for

¹ 17 U.S.C. § 110(4). Unless otherwise noted, all statutory references are to Title 17 of the U.S. Code.

innovation and a vigorous commerce” on which consumers depend. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 933 (2005).

ASCAP has made public statements to the effect that it has no intention of seeking direct payment from consumers over “public ringing.”² These unenforceable public relations statements, however, do nothing to dispel the harms detailed above. Whether or not consumers are *directly* targeted by ASCAP members for royalties or litigation, they will face increased prices, the risk of suit in other contexts, and an artificially depleted set of innovative technologies and services if ASCAP’s arguments are accepted here.

In order to avoid these harms to consumers, the Court should firmly reject ASCAP’s erroneous views of copyright law. Section 110(4) of the Copyright Act compels the conclusion that consumers are not infringing the public performance right when their phones ring in public. And where there is no direct infringement by consumers, there is also no secondary liability on the part of those who provide them with innovative tools and services. Moreover, Second Circuit authority bars ASCAP’s effort to end-run the limitations of secondary liability by reframing its arguments as direct infringement claims.

I. MOBILE PHONE USERS DO NOT INFRINGE COPYRIGHT WHEN THEIR PHONES RING IN PUBLIC.

ASCAP studiously avoids leveling explicit accusations of piracy against the millions of American mobile phone users who have legitimately purchased musical ringtones. Nevertheless, because secondary liability on the part of the Carriers necessarily presupposes that consumers are the primary infringers, when ASCAP argues that “AT&T is . . . liable for ringtone performances by virtue of its inducement of,

² See Antony Bruno, *ASCAP Brief Pushes Royalty for Ringtones*, BILLBOARD.BIZ, June 22, 2009 (can be located by searching for “ASCAP brief pushes”) (quoting ASCAP statement that “ASCAP’s approach has always been to license these [Carriers’] businesses – not to charge listeners/end-users.”).

contribution to, or vicarious responsibility for, the ringtones it sells,” ASCAP Opp. Br. at 23, the infringement accusation against consumers is plain. ASCAP itself admits as much in a footnote, equating its secondary liability theories against the Carriers to those pressed in cases like *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), and *Metro-Goldwyn-Mayer v. Grokster*, 545 U.S. 913 (2005), where liability was “premised on the idea that the defendant’s primary consumers were primary infringers.” ASCAP Opp. Br. at 23 n.49.

Fortunately, Section 110(4) of the Copyright Act makes it clear that consumers do not infringe the public performance rights of ASCAP’s members when playing ringtones in public:

Notwithstanding the provisions of section 106, the following are not infringements of copyright: ... (4) performance of a nondramatic literary or musical work otherwise than in a transmission to the public, without any purpose of direct or indirect commercial advantage and without payment of any fee or other compensation for the performance to any of its performers, promoters or organizers, if (A) there is no direct or indirect admission charge . . .

17 U.S.C. § 110(4).³ Where consumer playback of ringtones is concerned, every requirement of Section 110(4) is met—the performance involves no “transmission” by the consumer, is undertaken without any purpose of commercial advantage, and involves no payment or admission charge.

For consumers, Section 110(4) is a critically important limitation on the scope of the public performance right. It firmly places not only the playback of ringtones in public

³ *Amici* do not concede that these performances would be infringing but for Section 110(4). As an initial matter, *amici* are aware of no case where any court has ever held that a performance of a musical composition by an individual for personal purposes, which incidentally took place where others might overhear, constitutes a “public performance” within the meaning of Section 106(5). In addition, *amici* are confident that many ringtone performances, even if viewed as falling within the scope of Section 106(5), would qualify as fair uses under Section 107, in light of their noncommercial purpose, transformative nature, brief nature of the excerpt, and the absence of demonstrable harm to any market for the work. Because Section 110(4) applies squarely here, however, there is no need for this Court to reach these additional limitations on the exclusive rights of ASCAP’s members.

beyond the reach of a copyright owner's demands for payment, but also many other everyday activities that might otherwise infringe the public performance right (and thereby result in a demand for royalties on the part of ASCAP). For example, Section 110(4) makes it clear that the public performance right does not reach an individual who:

- Rolls down the window of her car while the stereo is playing;
- Sings "Happy Birthday" at a private gathering in a public park;
- Hums a tune while walking on a public sidewalk; or
- Listens to music on the radio while sitting on the beach.

These are just a few of the myriad everyday activities that Section 110(4) declares "are not infringements of copyright," 17 U.S.C. § 110(4), and thus expressly excludes from the public performance right.

As noted above, ASCAP has attempted to mollify consumers with press statements that its members would never pursue individuals for these everyday activities.⁴ But ASCAP's forbearance is hardly an adequate substitute for the absolute statutory privilege enjoyed by consumers pursuant to Section 110(4).

First, whether or not ASCAP or its members choose to dun individual consumers for "public ringing," consumers will be saddled with higher prices for a variety of goods and services should ASCAP prevail here. This undermines Congress' explicit statutory instruction in Section 110(4) that noncommercial performances in public places are not within the scope of the public performance right, and thus not something for which consumers should have to pay. In short, ASCAP's arguments here would force consumers to pay *indirectly* (in the form of higher prices for ringtones) for precisely the activities that Congress excluded from the public performance right.

Moreover, unless stopped here, there is nothing to prevent ASCAP and other copyright owners from pressing other technology providers for additional royalties (all of

⁴ See n.2 supra.

which will ultimately be paid by consumers). For example, under ASCAP's theory of individual consumers as "primary infringers," there would be nothing to stop it from demanding that auto makers pay royalties on each car that comes with a sound system, based on the inevitable infringements resulting from "listening to the stereo with the windows down." Unless the Court resolves the question of individual liability here, ASCAP and other copyright owners may be tempted to raise the issue anew in other contexts, imperiling the interests of consumers.

ASCAP's "forbearance" also does nothing to dispel the stigma of unlawful conduct that ASCAP's claims necessarily hang on individual mobile phone users. ASCAP, which represents only a minority of copyright owners of musical compositions, is not in a position to make a promise of forbearance on behalf of all copyright owners. As a result, acceptance of ASCAP's arguments here would set a precedent that leaves consumers vulnerable to infringement actions from a variety of rightsholders when they engage in noncommercial performances in public places. There is ample evidence demonstrating that rightsholders are willing to bring civil litigation against individual consumers. For example, in 2003, satellite television broadcaster DirecTV sent more than 100,000 demand letters to individuals offering to "settle" allegations of piracy for \$3,500 each.⁵ And since 2003, the recording industry has targeted more than 35,000 individual Americans for copyright infringement litigation for using peer-to-peer file sharing technologies.⁶ Whatever one's views on the merits of these enforcement efforts, they underscore the fact that consumers can face legal action should their everyday activities be treated as infringing. Moreover, the availability of statutory damages, as well as the strict liability nature of copyright infringement, makes infringement actions

⁵ See Lucas Graves, *DirecTV Takes No Prisoners*, WIRED, Nov. 2003 (<http://www.wired.com/wired/archive/11.11/view.html?pg=3>).

⁶ See Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. J., Dec. 19, 2008, at B1 (reporting that the music industry "opened legal proceedings against about 35,000 people since 2003").

attractive to rightsholders interested in launching opportunistic strike suits.⁷ Finally, even in the absence of widespread enforcement actions against consumers, the legitimacy of our copyright system overall suffers when it treats everyday, noncommercial activities as infringements.

In order to avoid these harms, and in light of the express statutory language of Section 110(4), this Court should explicitly reject ASCAP's contention that individual mobile phone users are infringing the public performance right when their phones ring in a public place.

II. CARRIERS HAVE NO LIABILITY FOR ASSISTING CONSUMERS IN ENGAGING IN NONINFRINGING ACTIVITIES.

It is axiomatic that there can be no secondary liability without direct infringement. *See Metro-Goldwyn-Mayer v. Grokster*, 545 U.S. at 940 (holding that “the inducement theory of course requires evidence of actual infringement by recipients of the device....”); *Faulkner v. National Geographic Enterp.*, 409 F.3d 26, 40 (2d Cir. 2005) (holding that “there can be no contributory infringement absent actual infringement.”); *Matthew Bender & Co. v. West Publ'g Co.*, 158 F.3d 693, 706 (2d Cir. 1998); 3 Melville B. Nimmer & David Nimmer, *NIMMER ON COPYRIGHT*, § 12.04[D][1] (2007). As a result, because mobile phone users do not infringe the public performance right when their phones ring in public, the Carriers cannot be held secondarily liable for these rings. Nor, in light of the Second Circuit's ruling in *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008), *cert. denied*, 2009 WL 1835220 (U.S. June 29, 2009), can ASCAP evade these well-settled principles by repleading its claims as direct infringement claims against the Carriers.

Consumers have an important interest in the proper application of secondary liability principles to technology innovators, as consumers increasingly rely on the goods

⁷ *See, e.g., Field v. Google Inc.*, 412 F. Supp. 2d 1106, 1123 (D. Nev. 2006) (copyright plaintiff took steps to get his works copied by Google, then sued for infringement).

and services that these innovators create in order to fully enjoy the rights and privileges bestowed by the Copyright Act. In the words of UCLA Law Prof. Neil Weinstock Netanel:

Copyright law strikes a precarious balance. To encourage authors to create and disseminate original expression, it accords them a bundle of proprietary rights in their works. But to promote public education and creative exchange, it invites audiences and subsequent authors to use existing works in every conceivable manner that falls outside the province of the copyright owner's exclusive rights.

Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L. J. 283, 285 (1996). In order make the most of this invitation to use copyrighted works in “every conceivable manner” that does not infringe copyright, consumers increasingly depend on technology innovators to provide them with the tools and services necessary to get the most from their copyright privileges. After all, when it comes to “performing” musical works within the meaning of the Copyright Act, consumers have long-since given up singing around a piano in favor of radios, CD players, and iPods. However, if ASCAP succeeds in its efforts to pin secondary liability on the Carriers here, that precedent could have a chilling effect on a broad array of technology innovators. Accordingly, consumers have a vested interest in seeing ASCAP's misguided interpretations of secondary liability jurisprudence rejected by this Court.

In the face of Section 110(4), ASCAP makes two unavailing arguments in an effort to shore up its secondary liability claims. First, ASCAP contends that the Carriers “must prove as a matter of law that each and every customer would be able to meet its burden of proof to show that his or her ‘performance’ of ringtones would satisfy the § 110(4) exemption.” ASCAP Opp. Br. at 28. ASCAP fails to explain how the Carriers or, indeed, any company, could ever meet the impossible burden of proving that no customer had ever committed copyright infringement using its product or service.

Fortunately for innovators and consumers alike, ASCAP has misstated the law. It is ASCAP, not the Carriers, that bears the burden of demonstrating the existence of direct

infringement. *See Metro-Goldwyn-Mayer v. Grokster*, 545 U.S. at 940; *Matthew Bender v. West*, 158 F.3d at 706. And other than citing the single outlandish example of the Chicago Sinfonietta's performance of "Concertino for Cell Phones and Orchestra" (where the performers in any event appear to have been licensed by ASCAP⁸), ASCAP has failed to identify any occasion in which a consumer ringtone performance might fall outside the bounds of Section 110(4).

Moreover, ASCAP's argument proves too much. No company that provides either musical content or related technologies could meet ASCAP's proposed test. On ASCAP's view of the law, the burden would be on Apple to prove that no iPod owner had ever used the device to play a song purchased from Apple's iTunes download store in a club where admission was charged (or else pay ASCAP a royalty for each iPod sold). This is not the law. *See Matthew Bender v. West*, 158 F.3d at 706-07 (no secondary liability for vendor of CD-ROMs even if a customer could theoretically use the CD-ROMs to infringe); *accord Sony v. Universal*, 464 U.S. at 442 (no secondary liability because the Betamax VTR was "merely capable" of substantial noninfringing uses).

Second, ASCAP argues that a technology innovator may not "stand in the shoes of its customers when determining whether any of the §§107-122 exceptions to the exclusive rights in the Copyright Act applies." ASCAP Opp. Br. at 28-29. ASCAP has again misstated the relevant law. The Supreme Court has made it clear that defendants accused of secondary liability *are* entitled to "stand in the shoes" of their customers for purposes of asserting the limitations and exceptions set forth in Sections 107-122. *See Sony v. Universal*, 464 U.S. at 455 (absolving Sony of contributory infringement based on the fair uses of its Betamax VTR customers); *accord* 3 NIMMER ON COPYRIGHT § 12.04[D][5] ("Turning to the key question of fair use, it would seem beyond peradventure that to the extent [the primary infringer] prevailed on that affirmative defense, the case

⁸ *See* Verizon Reply Br. at 13 & n.24.

would end against all [secondary liability] defendants.”). In contrast, the cases cited by ASCAP all involve *direct infringement* claims, and are thus inapposite where, as here, the Carriers stand on consumers’ Section 110(4) privilege in resisting ASCAP’s *secondary liability* claims. See *Princeton Univ. Press v. Michigan Document Services, Inc.*, 99 F.3d 1381, 1383 (6th Cir. 1996) (direct infringement claim against a “commercial copyshop that reproduced substantial segments of copyrighted works . . .”); *Playboy Enters., Inc. v. Frena*, 839 F. Supp. 1552, 1559 (M.D. Fla. 1993) (“There is irrefutable evidence of direct copyright infringement in this case.”); *Basic Books, Inc. v. Kino’s Graphics Corp.*, 758 F. Supp. 152 (S.D.N.Y. 1991) (direct infringement claim against commercial copyshop for reproduction of university course readers).

There are good reasons why secondary liability defendants are entitled to rely on the copyright privileges of their customers. Were ASCAP’s view of the law accepted, technology companies would face potentially ruinous liability by continuing to sell devices and services that consumers need in order to enjoy the copyright privileges established by Congress in Sections 107-122 of the Copyright Act. Such an outcome would imperil many everyday devices that consumers take for granted—such as VCRs, digital video recorders like TiVo, or MP3 players like the iPod—where the makers of these devices depend on the ability to “stand in the shoes” of their customers’ fair use defenses.⁹ Similarly, ASCAP’s misguided view of the law would jeopardize the existence of online auction services like eBay, as those services rely on the ability to “stand in the shoes” of their customers’ first sale defenses under Section 109. In short, ASCAP’s arguments, if accepted, would put a wide array of technology innovators in jeopardy, well beyond the Carriers here.

ASCAP’s own leading authority, *Princeton Univ. Press v. Michigan Document*

⁹ In fact, this is exactly the basis on which the Supreme Court *approved* Sony’s continued sale of the Betamax VCR. See *Sony v. Universal*, 464 U.S. at 455 (absolving Sony of secondary liability based on the fair use defense of its customers); accord 3 NIMMER ON COPYRIGHT § 12.04[D][5].

Services, 99 F.3d 1381 (6th Cir. 1996), brings this point home. In that case, the defendant was accused of direct infringement for making and selling “coursepacks” of reading material for university students. Although the court in that case rejected the defendant’s fair use defense, a very different result would have obtained had the copyright owners attempted to bring secondary liability claims against a copyshop for the infringing activities undertaken by its customers. In that situation (which mirrors the situation here), a complete defense on the part of the customers (such as fair use) would insulate the manufacturer from liability. See *Faulkner*, 409 F.3d at 40; cf. *Cartoon Networks v. CSC Holdings*, 536 F.3d at 132 (distinguishing *Michigan Document Services* from situations where “a store proprietor . . . charges customers to use a photocopier on his premises”). In fact, this example illustrates the absurdity of ASCAP’s position and its potential impact on consumers—ASCAP’s proposed rule barring technology vendors from relying on the copyright privileges of users would effectively make it impossible to sell photocopiers without first obtaining a reproduction license from all the world’s publishers. Such an outcome would “block the wheels of commerce” to the detriment of consumers and technology innovators alike, precisely the result that the Supreme Court cautioned against in *Sony v. Universal*, 464 U.S. at 441 (quoting *Henry v. A.B. Dick Co.*, 224 U.S. 1, 48 (1912)).

III. ASCAP’S DIRECT INFRINGEMENT CLAIMS AGAINST THE CARRIERS REPRESENT AN UNAVAILING EFFORT TO END-RUN ESTABLISHED SECONDARY LIABILITY PRINCIPLES.

ASCAP also argues that the Carriers themselves directly infringe the public performance right when musical ringtones are performed in public places. This argument threatens consumer interests in much the same way that ASCAP’s misguided secondary liability arguments do—by threatening to chill technology innovators that produce technologies and services that empower consumers to engage in noninfringing activities.

Copyright law imposes more stringent requirements on rightsholders seeking to prove secondary liability claims (e.g., necessity of proving primary infringement,

knowledge, material contribution, intent to induce, right and ability to control, and/or direct financial benefit, as well as overcoming the staple article of commerce defense set out in *Sony v. Universal*, 464 U.S. at 442) than on those who bring direct infringement claims. There is a good reason for this: without these requirements, copyright would effectively bestow on copyright owners a monopoly over general purpose technologies and services that can be used for noninfringing purposes. See *Sony v. Universal*, 464 U.S. at 441 n.21 (“It seems extraordinary to suggest that the Copyright Act confers . . . the exclusive right to distribute VTR’s simply because they may be used to infringe copyrights. That, however, is the logical implication of [Universal’s] claim.”).

In short, the stringent requirements imposed on a copyright owner pressing a secondary liability claim are meant to “leave[] breathing room for innovation and a vigorous commerce.” See *Metro-Goldwyn-Mayer v. Grokster*, 545 U.S. at 933 (explaining the purpose of the *Sony v. Universal* “staple article of commerce” doctrine). As discussed above, consumers depend on the availability of innovative technologies in order to enjoy copyrighted works in noninfringing ways (such as the noncommercial performances privileged by Section 110(4)). ASCAP’s effort to replead its secondary liability claims against the Carriers as direct infringement claims, if permitted, would upset this delicate balance, chilling innovators and reducing the availability of new technologies that interact with copyrighted works in noninfringing ways.

Fortunately, as ably set out by the Carriers in their briefs, ASCAP’s direct infringement arguments against the Carriers are foreclosed by this Court’s earlier ruling distinguishing downloads from performances, *United States v. Am. Soc’y of Composers, Authors & Publishers*, 485 F. Supp. 2d 438 (S.D.N.Y. 2007), and the Second Circuit’s precedent in *Cartoon Network v. CSC Holdings*, 536 F.2d 121 (2d Cir 2008). Simply put, direct infringement requires that the defendant “do” the act that infringes the copyright owner’s exclusive right. Here, it is indisputably the mobile phone consumers, not the Carriers, who engage in the volitional acts that perform the musical ringtones stored on

their phones. Accordingly, the Carriers cannot be liable as *direct* infringers for providing the phones, network, and ringtones in question to those who actually “do” the performing. Instead, these sorts of claims are quintessentially the stuff of *secondary* liability, and are foreclosed here by ASCAP’s failure to demonstrate that consumers are primary infringers.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to grant the Carriers’ motions for summary judgment.

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