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,

– 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

BRIEF OF *AMICI CURIAE* THE SONGWRITERS GUILD OF AMERICA, THE SOCIETY OF COMPOSERS AND LYRICISTS, THE NATIONAL ACADEMY OF RECORDING ARTS & SCIENCES, AD HOC GROUP OF PRODUCTION MUSIC WRITERS AND THE GAME AUDIO NETWORK GUILD IN SUPPORT OF APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1, amicus **The Society of Composers and Lyricists** ("SCL") states that it is a private, non-profit organization. It has no parent company, and no publicly held company holds more than ten percent of its stock.

Pursuant to FRAP 26.1, amicus the **National Academy of Recording Arts and Sciences, INC** ("NARAS") states that it is a private, non-profit organization. It has no parent company, and no publicly held company holds more than ten percent of its stock.

Pursuant to FRAP 26.1, amicus the **Ad Hoc Coalition of Production Music Company Owners** who themselves are members of the Production Music Association states that it is a private, non-profit, volunteer organization. It has no parent company and no publicly held company holds most than ten percent of its stock.

Pursuant to FRAP 26.1, amicus **The Game Audio Network Guild** ("GANG") states that it is a private, non-profit organization. It has no parent company, and no publicly held company hold more than ten percent of its stock.

Pursuant to FRAP 26.1, amicus **Songwriters Guild of America** ("SGA") states that it is an unincorporated membership association. It has no parent company, and no publicly held company holds more than ten percent of its stock.

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INTEREST OF AMICI

1. THE SOCIETY OF COMPOSERS & LYRICISTS

The Society of Composers and Lyricists ("SCL") is a non-profit organization representing professional film, television and video game composers and lyricists, with a distinguished 60-year history in the fine art of creating music for motion pictures, television and video games. The predecessor organization, the Screen Composers Association, began in 1945 with such legendary icons as Max Steiner, Bernard Herrmann, Erich Wolfgang Korngold, Dimitri Tiomkin and David Raksin among others. Current SCL Members include the top creative professionals whose experience and expertise is focused on many of the creative, technological, legal, newsworthy and pressing issues of the film/television/game music industry today. Work for hire is the primary method by which music is acquired for motion picture and television productions.[1] As a result, SCL's

[1] A "work made for hire" is (1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work, as part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire." 17 U.S.C. § 101. As a practical example, a work for hire is a song composed specifically for a movie, at the request of the movie studio,

membership consists predominantly of composers who do not own or enjoy the right of copyright, and receive compensation by contract. Composers are often paid a nominal fee upfront by the production company for composing the music. Their main source of income is at the 'back-end' through the performance royalties distributed by the performing rights organizations when the composer's music is included in a production that is broadcast or transmitted on television or via the Internet. Consequently, these composers are among those most affected if the decision below is interpreted to include audiovisual[2] downloads, as it would effectively eliminate composers' main stream of income.

2. NATIONAL ACADEMY OF RECORDING ARTS & SCIENCES, INC.

Established in 1957, The Recording Academy is an organization of musicians, producers, engineers and recording professionals that is dedicated

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that has the same title as the movie itself; whereas a traditional copyrighted song is written by a songwriter for use by the artist himself, or by another performing artist, for release via CD, iTunes, and satellite and terrestrial radio.

[2] "Audiovisual works" are works that consist of a series of related images that are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied. 17 U.S.C. § 101.

to improving the cultural condition and quality of life for music and its makers. Internationally known for the GRAMMY Awards — the preeminent peer-recognized award for musical excellence and the most credible brand in music — The Recording Academy is responsible for groundbreaking professional development, cultural enrichment, advocacy, education and human services programs.

The Academy continues to focus on its mission of recognizing musical excellence, advocating for the well-being of music makers and ensuring music remains an indelible part of our culture.

A number of its Board of Trustees are accomplished songwriters and composers, including Lamont Dozier, Phil Galdston, and Jimmy Jam. As the District Court ruling could have a significant negative impact on an important economic outlet for the critical songwriting and composing arm of the recording industry, NARAS is an interested party in this litigation.

3. AD HOC GROUP OF MEMBERS OF THE PRODUCTION MUSIC ASSOCIATION

The Production Music Association ("PMA") brings together publishers and composers of production music to promote and protect the interests and rights of the production music community. The PMA is a non-profit, volunteer organization currently comprising over 335 member

companies, including major-music publishers and many independent small business owners. The PMA provides crucial leadership to protect the values of its work and create an even better future for the production music library community.

Production music libraries engage composers to create the music. A substantial portion of music created for music libraries is done on a "work for hire" basis. Production music writers compose their music for music libraries who will then license the music to television and film producers, as well as game audio producers, who determine which music to use based on a theme or genre, such as action, adventure, drama, or comedy. As in the case of the composers, production music songwriters and composers are paid a nominal fee upfront by the library for composing the music. Their main source of income is at the 'back-end' through the performance royalties distributed by the performing rights organizations when the composer's music is licensed to a production that is broadcast or transmitted in television or the Internet.

Unlike other PMA Members who have joined the music publishers' amicus brief, the independent production music publishers who have joined in support of this brief often started out as songwriters and composers,

achieved some success in their field, and then started their own production music libraries which subsequently engaged other composers. This economic path is an option for composers and songwriters who seek some level of economic security in the economically perilous profession they have chosen. The ad hoc PMA members joining this brief would be negatively affected by Judge Conner's decision if it were applied to downloads of audiovisual works because it could deprive them of an important outlet for commercial success in the composing profession. In addition, if read in this manner, Judge Conner's decision could decimate an essential source of income – and in many cases the only source of income – for tens of thousands of songwriters and composers. These composers provide the vast majority of music currently used in television productions.

4. THE GAME AUDIO NETWORK GUILD

The Game Audio Network Guild ("G.A.N.G.") is a non-profit organization established to educate the public regarding interactive audio by providing information, instruction, resources, guidance and enlightenment not only to its members, but to content providers and listeners throughout the world. Currently, most composers for video game audio are compensated in the form of one flat fee identical to the work for hire structure. Currently,

copyright is exclusively reserved by the IP holder and most video game audio composers do not have the leverage to negotiate performance royalties - even though their compositions are often popular and commercially successful in other platforms as well. Nonetheless, the industry is working to augment the quality of audio in such games and wishes to attract a wider range of composers who would have a vested interest in the financial success of the interactive audiovisual production. G.A.N.G. composers are actively seeking opportunities to obtain public performance royalties for their musical works, but the District Court's decision threatens to deprive them of the ability to improve their industry at a critical juncture in its economic evolution.

5. THE SONGWRITERS GUILD OF AMERICA

The Songwriters Guild of America ("SGA") is the nation's oldest and largest organization run exclusively by and for songwriters, with more than five thousand members nationwide and over seventy-five years of advocacy for songwriters' rights. It is a voluntary association comprised of songwriters, composers and the estates of deceased members. SGA provides a variety of services to its members, including contract advice, copyright renewal and termination filings, and royalty collection and auditing to ensure

that they receive proper compensation for their creative efforts. SGA's efforts on behalf of all U.S. songwriters include advocacy before regulatory agencies and the U.S. Congress, and participating as amicus curiae in litigation of significance to the creators of the American canon of popular music.

SGA members typically write copyrightable musical works outside of the work for hire contractual arrangement, but some members also have their pre-existing musical works used in audiovisual productions, and these members would suffer as well if performance right income from transmission of movies and television programs were reduced or eliminated. Other SGA members also supplement their income by composing music and lyrics for audiovisual works under work for hire arrangements. Both classes of SGA members, work for hire and those engaging in other contractual arrangements, would be adversely affected by the District Court decision. Given the perilous economic existence of the songwriting profession as a whole, the loss of even a supplemental income stream could mean the difference between SGA members remaining in the profession they love, or exiting it for economic reasons.

All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

Unless reversed, the decision below could have profound negative effects on composers and songwriters whose music and lyrics are used in audiovisual works. These composers and songwriters are compensated through a one-time, front-end fee paid by movie and television production companies, and then by a contractual right to collect the writer's share of any public performance royalties generated by the audiovisual work. This front-end fee is ever decreasing, however, and has made composers and songwriters increasingly reliant on back-end public performance royalties. In fact, for most composers and songwriters, the public performance revenues are their main source of income. Composers and songwriters have no meaningful economic leverage to change or influence these industry compensation practices. If the decision below were read to cover so-called "downloads" of audiovisual works, many composers and songwriters would lose the vast majority of their income in audiovisual works -- as the performance right is the predominant acknowledged right implicated in an audiovisual download transmission.

Today, films and television programming are expanding from their traditional forms of transmission (such as broadcast, cable and satellite

television) to online transmission of audiovisual works. The video game industry is already shifting to an online transmission model. Because of the errors in the District Court's decision, composers of music and lyrics will suffer serious economic harm. To preserve the critical contributions of composers and songwriters to audiovisual works such as movies, television shows and video games, it is imperative that the public performance right be recognized in all transmissions of audiovisual works.

ARGUMENT

I. AUDIOVISUAL WORKS PRESENT UNIQUE LEGAL RULES AND INDUSTRY PRACTICES FOR COMPOSERS AND LYRICISTS

The District Court (at the Applicants' behest) purported to focus solely on "pure" music downloads when it rendered its legal ruling that there is no public performance right in a music download. That ruling has had a severe negative impact on songwriters; they are denied compensation for a performance of their music. But the effect of the District Court's misguided legal analysis is not limited to audio-only works; subsequent license applicants are contending that the decision is equally applicable to downloads of audiovisual works containing music. And in the audiovisual world, performance royalties are particularly critical income streams. Composers of music and lyrics for audiovisual works thus stand to be substantially harmed by the errors in the District Court decision.

A. Composers for Films and Television Productions and Video Games

Composers of music and lyrics for audiovisual works typically have their works utilized by the motion picture, television, and video-game industries. Some composers are hired directly by the motion picture or television production company, or by the video game producer, to create

music and lyrics for a specific movie, television show or series, or video game or series. Other composers write music without reference to a specific project to elicit certain moods, emotions, feelings, eras, or other settings, for production music companies, and these companies store this wide variety of music in production music libraries. Producers of movies, television shows, or video games, then engage the production music company and choose the appropriate music in the libraries to obtain the artistic result they seek in their production.

Many of these composers of audiovisual works create the music and lyrics under "work for hire" contractual arrangements, such that the "author" and owner of the music in the audiovisual work is the movie, television or video game production company – **not** the composer.

B. The Distinction Between Composers of Music for Audiovisual Works and Writers of Musical Works Utilized in Sound Recordings

It is important to distinguish under copyright law between: (1) composers of music for "audiovisual" works, and (2) songwriters who create a "musical" work for sound recordings. As discussed, the majority of composers of music and lyrics for audiovisual works labor under work for hire contracts with producers. Songwriters, on the other hand, are the

"authors" and hence owners of the copyright in their musical works when they are embedded in one or more "sound recordings."[3] Songwriters are entitled to receive royalties for the "reproduction" of such work (17 U.S.C.§ 106(1)); for the "distribution" of such work (17 U.S.C. § 106(3)),[4] and for the "public performance" of such work (17 U.S.C. § 106(4)). Songwriters of musical works often assign their copyrights to music publishers, who then exploit the works through promotion and licensing efforts, and then collect and distribute the royalties received from such works either themselves or through collecting organizations such as ASCAP and BMI and SESAC (for the public performance right) and the Harry Fox Agency (for the reproduction and distribution rights).

Amici respectfully submit that the District Court focused solely on songwriters creating musical works for sound recordings when rendering its ruling. This narrow focus explains many of the fact-specific aspects of the

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[3] "Sound recordings" are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied. 17 U.S.C. § 101

[4] If the sound recording containing the writer's musical work is either a "phonorecord" or a "digital phonorecord delivery" then the reproduction and distribution rights are typically subject to compulsory licensing under the "mechanical license" at 17 U.S.C. § 115.

ruling below, but critically disregards a significant portion of the profession – composers of music and lyrics for audiovisual works. This segment of the profession is significantly and directly harmed by the errors in the District Court decision. If the District Court had not focused exclusively on the downloading of sound recordings, but had considered the downloading of audiovisual works as well, then amici respectfully suggest that it would not have limited the public performance right in the erroneous manner that it did.

C. Contractual Basis of Compensation for Composers

As authors of a "work for hire," composers of music and lyrics in audiovisual works receive whatever economic benefit they can obtain through the contractual process, where they must "negotiate" with far more powerful entities such as movie studios and television production companies to try to achieve reasonable levels of compensation. Their creations are often works of significant commercial success and public recognition, yet these composers do not receive the "mechanical royalty" stream of income to which they would be entitled if they had composed the song as a songwriter for use in a sound recording and were not under contract to a

production company.[5] This highlights the importance of the performance right royalty stream to composers of music in audiovisual works.

There is significant literature regarding the complexity of the licensing and rights-clearance process that producers of movie and television productions must tackle to distribute an audiovisual work that is free from the risk of copyright infringement claims (or at least insurable against such claims). *See, e.g.,* 5 *Nimmer on Copyright* § 23.02 *(Motion Pictures; Rights Acquisition).* It is axiomatic in the movie and television production business that there is no feasible alternative to the production company holding all copyright in their works, and this has always been the standard practice.

This long-settled industry practice explains why music and lyrics composed for movies and television productions have been obtained under "work for hire" contractual provisions since the inception of these industries.

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[5] These well known musical works include the theme songs to: The Addams Family; Green Acres; Murder, She Wrote; Growing Pains; Who' The Boss; Saved By the Bell; Mr. Ed; Bonanza; Cheers; M*A*S*H* Roseanne; Good Times; Gilligan' Island; Unsolved; Mysteries; X Files; Home Improvement; Full House; Fresh Prince of Bel Air; Beverly Hills, 90210; Baywatch; Everybody Loves Raymond; Survivor; Family Guy; American Idol; Two and a Half Men; JAG; Dragnet; Perry Mason; Sesame Street; Brady Bunch; Sanford and Son; Odd Couple; Patty Duke Show. Composers of these very popular and commercially successful songs receive only back-end income (in the form of performance royalties) after the initial, and usually small, up-front fee.

The practical effect of this industry precedent, however, is that composers have no copyright to use as leverage to obtain compensation that is different from - or in addition to - what film and television production companies have historically offered.

Importantly, however, composers are ***contractually*** allowed to receive the writer's share of public performance royalties, even though the producer, under the conditions of a work for hire arrangement, is the legal author of their music. This contractual condition is only meaningful, however, if public performance royalties are paid for the exhibition, broadcast, or transmission of the film or television programs. Public performance royalties are most typically generated by broadcast television, cable or satellite broadcasts, or other transmissions of audiovisual works. Richard Bellis, a well-known composer and music educator who scored *Stephen King's IT, Doublecrossed, One Special Night, and Malpractice* states the following in his book, *The Emerging Composer*:

> The source of my annual "nut" for a number of years has been the money I receive from my Performing Rights Organization (PRO). With "front-end" money at an all time low, more and more composers have become aware of the

> importance of the [performance] royalties paid through the PROs.[6]

As is clear from these examples, the contractual right to the writer's share of the public performance royalties for composers is critical to their economic existence.

D. Pre-Existing Works of Songwriters Utilized in Audiovisual Works

In addition to the work for hire arrangement of composers, some songwriters have their pre-existing musical works utilized by motion picture or television productions, and public performance royalties are critical to the compensation model for this segment of the songwriting profession as well. Indeed, some movies rely substantially on the use of well-known pre-existing musical works to achieve their intended artistic effect. For example, the movies "The Graduate," "The Big Chill," "American Graffiti," "Coming Home," "Good Morning, Vietnam" and "Saturday Night Fever" relied substantially on pre-existing musical works to set tone, mood, and time period – it is difficult in fact to imagine these movies without such music. More recently, the artistically acclaimed movie "Lost in Translation"

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[6] R. Bellis, The Emerging Film Composer: *An Introduction to the People, Problems and Psychology of the Film Music Business* (1st ed. 2006) at 39.

utilized music from the French art-rock band Phoenix to establish the unique feel of that motion picture.

The position of a songwriter whose pre-existing musical work is being acquired for a film or television production is similar to that of a composer under a work for hire contract. A large production company seeks to acquire all rights so that it may distribute the audiovisual work. The production company will seek to minimize upfront costs (as discussed further *infra*), so songwriters (or their publishers) will be pressured to waive or reduce compensation for their synchronization or "synch" right for the reproduction and distribution of their musical work.[7]

As a result, songwriters are in a slightly different legal position -- but a very similar economic situation -- as composers. A substantial component of the compensation they receive from the use of their musical work in the audiovisual work will come from public performance right royalties attributable to the various performances of the audiovisual work.[8]

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[7] When musical works are not reproduced and distributed in phonorecords or digital phonorecord deliveries, the Section 115 mechanical license does not apply, and the reproduction and distribution rights are acquired through "synchronization" licenses.

[8] It should be noted that songwriters principally receive U.S. public performance royalty income for their musical works that are included in audiovisual works through licenses negotiated by ASCAP and other

II. PERFORMANCE RIGHTS INCOME IS CRITICAL

A. Key To Commercial Success In Composing: Healthy Stream Of Performance Royalty Income

Composers of music and lyrics for audiovisual works, and songwriters whose pre-existing works are used in such productions, would not be able to survive economically without a healthy stream of performance royalty income. The importance of such revenues is confirmed by: (1) the existence of this income stream in standard industry contracts, and (2) literature describing this aspect of the profession as the most critical revenue stream. Two pertinent examples of the latter are as follows:

> Never ever, ever sign away your "writer's share" of these [performance] royalties. That single act could begin to erode this revenue stream for all film and television composers.[9]
>
> Performing rights are the backbone of a film and television composer's income. Therefore, any radical change to the current system needs to be carefully examined before being embarked upon.[10]

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performing rights organizations with broadcast television and cable program suppliers.

[9] Bellis at 39

[10] Schyman, Garry Vice President of The Society of Composers and Lyricists *Straight Payment from a Film and Television Composer's POV* May 22, 2001 http://www.filmmusicmag.com/?p=590 Accessed May 21, 2009

Furthermore, it stands to reason that a dramatic reduction or elimination of one stream of income to an economic entity that relies on two streams of income would do significant harm to that entity. Even if the two streams of income were roughly equivalent (which they are not here, as described *passim*), elimination of 50% of an individual's or a business entity's revenues would typically be sufficient to change that entity's status from "economically viable" to "economically not viable." The District Court decision places composers of music and lyrics for audiovisual works in precisely this precarious position -- at risk of losing one of their two streams of income, and therefore at risk of becoming economically not viable.

B. Performance Royalties Are Increasingly Important As Front-End Fees Are Decreasing

1. Decreasing front-end fees

The majority of composers receive a decreasing front-end fee to compose music for a film or television program. The work of composing can include writing all significant signature pieces for the film or program (i.e., "themes"), as well as all the background and transitional music. In the majority of cases, the front-end fee is contractually structured as a "package," which burdens the composer with the costs of the physical

production of the music, not just its creation. Whatever is left over after the music is composed, produced and delivered to the studio is the actual front-end fee to the composer for the act of composition. Included in the "package" that the composer must assemble are hiring of orchestras, musicians, sound engineers, and other necessary musicians and technicians.[11] The package system has turned composers from employees into de facto independent contractors, making any attempt at collective bargaining difficult.

Songwriters face a comparable situation when their pre-existing musical works are used in a film or television production. Film and television production companies are under pressure to reduce the costs of their productions. While the production company must negotiate with songwriters in order to obtain reduced compensation or a waiver of the songwriter's "synch right" in the musical work, they are often successful at doing so, thus placing great importance on public performance royalties for proper compensation to songwriters for the true value of these works.

Movie and television producers are under pressure themselves to cut production costs. As a result, in the past several years, they have turned to

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[11] Bellis at 24-35.

cutting composers' front-end fees.[12] This has been especially true in television and independent film. In other words, while composers must still typically be responsible for delivering the music in a "package", complete with all aspects of its production, movie and television productions are providing composers with less and less money upfront to deliver this critical "package." As a result, the upfront fee that is left over for a composer to retain as income is decreasing.

Moreover, over the past several years movie and television producers have been demanding more rights from composers and songwriters with little or no additional compensation. In this regard, it is important to note that due to a lack of bargaining power on the part of creators, film and television industry custom and practice now dictate that virtually all composers and songwriters are subject to buyouts by producers of the right to receive compensation for the sale of copies of audiovisual works. Thus, no matter how many copies of a particular audiovisual work may be sold to the public, the composer and songwriter will receive no additional compensation beyond the initial synch license fee.

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[12] Bellis at 39.

2. Performance royalties are more critical than ever

In light of the diminished amount of up-front compensation paid to composers, the back-end writers' share of public performance royalties for the audiovisual work in question -- from which songwriters benefit under their "synch" contracts and composers benefit under their work for hire contract -- takes on increasing importance. Indeed, current trends in reducing the budgets of film and television productions indicate that back-end public performance royalties are often the ***only*** meaningful opportunity for compensation available to songwriters and composers of music and lyrics for many audiovisual works. It is precisely this critical stream of revenue that is put in jeopardy by the District Court ruling. Failure to continue the availability of this critical lifeline to composers and songwriters is simply inequitable. Additionally, it is difficult to evaluate the worth of a musical work or the possible level of popularity of an audiovisual work. Back-end royalties can protect the writer when the synch licensing process has resulted in the undervaluation of his or her work.

3. The District Court decision threatens "zero dipping" result for composers

The charge has been made by some music users and service providers that paying public performance royalties for the so-called "download" of a

work containing music amounts to "double-dipping" by composers and writers (*i.e.,* being paid twice for the same use). In light of the facts just presented regarding the method by which songwriters and composers of music for audiovisual works are compensated, this charge is baseless. Composers and songwriters receive little or no compensation for their up-front efforts, and must rely extensively on back-end public-performance royalties to receive any meaningful compensation for their works. The work for hire status of composers and weak bargaining position of both composers and songwriters make other compensation options weak or non-existent.

Indeed, the statutory definition of "digital phonorecord delivery" demonstrates the error of the District Court's analysis. When songwriters create musical works for sound recordings, they are entitled to mechanical royalties through a compulsory licensing process if the musical work is transmitted by means a "digital phonorecord delivery." The statutory definition of this term explicitly states, however, that the mechanical royalty applicable to a digital phonorecord delivery applies "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). Congress instructed the courts by this statement not to confuse the

"existence of a right" with the "valuation of a right." In the sound recording transmission context, a digital phonorecord delivery invokes a pre-determined mechanical royalty but leaves the valuation of the public performance right applicable to such a transmission to a later determination based on the particular transmission's unique factual circumstances.

The District Court decision, however, makes precisely the error that Congress sought to avoid: it focused on a particular, narrow fact situation and opined about the lack of a public performance right in a download transmission, instead of recognizing the existence of the right and leaving for future resolution the value of such a right in that particular context. This right exists under the law—regardless of the attributed value. The District Court's mistaken analysis becomes obvious when its logic is applied to the download of an audiovisual work: the value of the public performance right in the download of an audiovisual right is significant, and indeed is critical to compensation for composers of music and lyrics in such works.

The District Court decision appears to have been influenced by a user-centric perspective, given its focus on the individual user's "downloading" of a "digital file." That perspective is certainly inaccurate with respect to audiovisual works. Copyright "is not designed to afford consumer protection

or convenience but rather, to protect the copyrightholders' property interest." *See UMG Recordings, Inc. v. MP3.com, Inc*., 92 F. Supp. 2d 349, 352 (S.D.N.Y. 2000). Rather than "double dipping," songwriters and composers of music for audiovisual works are at risk of being unjustly bound by the decision below to "zero dipping." Such a result is contrary to the intent and purpose of the copyright law.

C. The Commercial Impossibility of Altering Industry Contracts

As industry publications confirm, it is virtually impossible for individual composers to obtain significant changes to the standard form contracts for the industry[13]. This is largely explained by economics: the movie and television production companies are the more economically powerful party to studio-composer or songwriter "synch" contracts, they hold the copyright to the audiovisual work, and they would not see it in their interest to guarantee more money upfront, or at any other time, to composers or songwriters whose music is obtained by contract for a particular production. Particularly during the present time, when film and television production budgets are being financially squeezed, it would be next to impossible for a composer or songwriter to obtain significant changes to the

[13] Bellis at 27.

decades-long practice of: (1) minimizing songwriter synch rights, (2) providing a decreasing up-front fee to composers, and (3) relying largely on back-end public performance royalties (which the production companies do not have to pay) for the writer's share of the audiovisual work's copyright royalties to compensate the composer or songwriter.

Furthermore, it would be difficult for composers or songwriters to act collectively to obtain industry-wide changes to the current back-end loaded compensation scheme. Songwriters (acting as independent small business persons) have already written the musical work that the production company seeks to acquire, are not employees of the production company, and so cannot form a union to bargain collectively. There is no union of composers, because most composers are not employees of the production company either, but rather independent contractors (who are nonetheless required by industry standards to sign a work for hire agreement), As such, it is not a meaningful alternative for any party to suggest that songwriters or composers "simply amend their contracts" with the film and television production companies. Songwriters and composers do not have sufficient individual bargaining power to do so, and they cannot organize to bargain

collectively. Rather, composers and songwriters will be vulnerable to loss of the principal source of their income.

D. Back-End Market-Based Valuation a Rational and Common Economic Model

The current back-end focused economic model for providing compensation to songwriters and to composers of music and lyrics included in audiovisual works is logical and often utilized in the entertainment industry. Music publishers will advance money to songwriters to write musical works, and record companies will advance money to recording artists to record and produce sound recordings. If there are healthy sales of the resulting musical works or sound recordings, the record company or publisher recoups its investment, makes a profit, and returns a portion of the profit to the songwriter or the recording artist.[14] The songwriter will be paid mechanical royalties – which is an example of a back-end compensation system based on market sales of the work in which copyright is held. 17 U.S.C. § 115.

The public performance right, while not the only back-end revenue stream available for musical works and sound recordings, is nonetheless an

[14]M. Krasilovsky et al., *This Business of Music: the definitive guide to the music industry* (8th ed. 2000), Chap. 16 (Songwriter Contracts and Royalty Statements).

important component of compensation to copyright owners of musical works (under 17 USC § 106(4)) and to sound-recording copyright owners (under 17 U.S.C. § 106(6)).

The District Court focused on musical works embedded in sound recordings, and concluded that the so-called "downloads" of such works would result in compensation to songwriters because of the "mechanical" compulsory license royalty under 17 U.S.C. § 115, and in particular the "digital phonorecord delivery" mechanism for digital downloads of such works under 17 U.S.C. § 115(d). However, what the lower court failed to consider was: (1) that the Section 115(d) definition of "digital phonorecord delivery" explicitly reserved the possibility that the transmission of a musical work embedded in a sound recording could implicate ***both*** a public performance right ***and*** a "mechanical" right; and (2) how its decision could be (and is being) read by some to extend to music and lyrics contained in audiovisual works. As a result, the District Court decision put at risk the most common economic method for the market to value artistic works: "back-end" performing rights revenues based on a percentage of actual usage of the work. This result is economically irrational.

E. District Court's Decision Threatens Songwriters and Composers from Realizing Income from New Media Markets

In addition to income from royalties for the public performance of audiovisual works on broadcast, cable and satellite television, composers of music and lyrics for audiovisual works, and writers of pre-existing songs utilized in such works, are entitled to receive (and stand to lose) significant income from royalties for the public performance of their works through new, emerging Internet-based platforms. In an attempt to exploit the loophole created by the District Court's decision and avoid paying public performance royalties, service providers may attempt to argue that certain platforms do not invoke the public performance right, but rather, in the District Court's words, constitute a "download." If this occurs, composers and songwriters would be deprived of performance royalties for previously compensable uses of their works.

For example: Netflix, a popular DVD and Blu-ray Disc rental service, now offers online films and television shows to its subscribers. The "Watch Instantly" feature allows subscribers, at no additional cost, to receive via Internet transmission an unlimited amount of DVD quality movies and television shows. This consumer-friendly feature competes with the DVD-

model as well as the use of broadcast, cable or satellite television as a method to watch movies already released on DVD. While this form of transmission is presently labeled as a 'stream' by Netflix, the bandwidth necessary to transmit an audiovisual work clearly requires that copies be made in the course of the transmission from the transmitter to the user in order to facilitate the performance of the movie. The District Court decision could encourage companies such as Netflix to fashion a technological argument that the transmission in fact constitutes a "download" of the movie, to support a legal position that under the lower-court decision it owes no performance royalties for the transmission – even though there is no legally relevant distinction between the "downloaded" and "streamed" movie.

Indeed, the District Court decision effectively writes the public performance clause out of the Copyright Law because of its misunderstanding of the application of current digital technology to a complicated industry.

F. Risk of Future Losses is Significant: Gaming Audiovisual Works Transmitted Via the Internet

Not only would the District Court decision disrupt the well-established profession of composing for film and television productions, but

it could also harm one of the fastest-growing new areas of audiovisual innovation: the video game industry.

The video game industry produced sales of $21.33 billion in 2008 in the U.S. alone[15]. It is growing at a significant pace and is becoming increasingly influential in popular culture. In copyright terms, a video game is an audiovisual work. Music included in a video game is subject to the same legal and business rules as apply to music composed for film and television productions, except that composers for this medium are just now starting to realize the economic importance of performance royalties and are actively working as a community to obtain this contractual benefit as the industry evolves. Industry leaders see improving the quality of music in video games as integral to improving the quality of the works in their industry generally.[16] In order for this to happen, video game composers have to be compensated through public performance royalties.

The plight of composers in the video game industry is aggravated by the practice whereby their compositions are also used to advertise the sale of video games, used in subsequent versions and on different platforms, yet

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[15] NPD Group 2008 Video Game Sales Report

[16] G.A.N.G., *Our History,* www.audiogang.org (accessed on May 21, 2009)

most composers do not receive additional compensation for the ancillary use of their compositions. Ultimately, composers of video game audio are limited to a front-end fee with little opportunity to benefit from the potential commercial success of the video game.

This industry is a particularly relevant example of the risks posed by the District Court decision, because its distribution model is already transitioning toward online delivery, moving away from a business model wherein consumers buy or rent physical copies of video games Sixty-eight percent of American households play computer or video games.[17] The sheer amount of users and size of the industry is by no means negligible. Music is an essential part of each video game, and the music often becomes popular and commercially successful in platforms other than the game, which in turn popularizes the game itself.[18] Should composers of video game audio benefit from the success of an industry that they have helped to build? Amici respectfully suggest that the answer is "yes," and further note that the ambitions of composers in this industry should not be frustrated simply

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[17] The Entertainment Software Association; *Industry Facts*, http.//www.theesa.com/facts/index/asp (accessed June 11, 2009)

[18] World of Warcraft is a massively multiplayer online role-playing game. It has more than 11.5 million monthly subscribers who 'live' in the alternate reality of the video game. http://www.worldofwarcraft.com/index.xml (accessed June 16, 2009)

because the video game industry is adapting faster to an online transmission model than contemplated by the District Court.

CONCLUSION

The District Court made a number of serious legal and factual errors that threaten profoundly negative effects on composers who write music and lyrics for audiovisual works and on songwriters whose pre-existing musical works are used in film, television, or the interactive audio industry. This Court should clarify the existence of the public performance right in all transmissions, and reverse the harmful legal precedent that the District Court decision threatens. Failure to do so could result in these amici being consigned to a "zero dip" for their musical works that are so often critical to the success of an audiovisual work. As such, the District Court's decision should be reversed.

Respectfully submitted.

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