Appeals Court Holds that Music Downloads are Not Public Performances

When a musical recording is streamed over the Internet, it's a public performance. When it's downloaded onto a computer or portable device, it's not. That's according to a September 2010 Second Circuit decision in *United States v. American Society of Composers, Authors and Publishers* ("ASCAP").[1]

U.S. Copyright law confers upon copyright owners a number of different rights in their works (known in Property Law parlance as a "bundle of rights"). That bundle includes the right "to reproduce the copyrighted work in copies" and the right "to perform the copyrighted work publicly," as set forth in Section 106 of the Copyright Act.[2] ASCAP members – and other copyright holders – have long claimed their entitlement to receive a royalty fee under the first category whenever a copy of their work is downloaded from the Internet. For example, Yahoo! Inc. and RealNetworks, Inc. (who were also parties to the action) make songs available for download on a subscription basis, charging a monthly fee to customers to download a certain number of songs and then paying a portion of that fee to the copyright holders. By this proceeding, however, ASCAP sought to obtain an additional royalty fee for those same downloads under the second category, on the theory that music downloads are also "public performances." ASCAP licenses approximately 45% of the music available online, according to the opinion.

The court reached its decision through traditional statutory interpretation, focusing on the plain meaning of the statute's words. Noting that Section 101[3] of the Act defines "perform" as "to recite, render, play, dance, or act," the court observed that a "download plainly is neither a 'dance' nor an 'act.'" Then, relying on Webster's dictionary definitions, the court reasoned that the "ordinary sense of the words 'recite,' 'render,' and 'play' refer to actions that can be perceived contemporaneously." Indeed, the thrust of the court's decision is that a "public performance" entails "contemporaneous perceptibility." In other words, the audience must hear or see the performance while it is being transmitted.

A streamed transmission is a public performance because it "renders the musical work audible as it is received," according to the court. A download, on the other hand, does not "immediately produce sound." It is simply an electronic transmission of the work, and "[t]ransmittal without a performance does not constitute a 'public performance.'"

The Second Circuit distinguished its decision in *NFL v. PrimeTime 24 Joint Venture* holding that the defendant's process of uploading NFL games in the U.S. to a satellite (which

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[1] http://caselaw.findlaw.com/us-2nd-circuit/1539469.html
[2] http://www.law.cornell.edu/uscode/text/17/106
[3] http://www.law.cornell.edu/uscode/text/17/101

were then downloaded to Canadian audiences outside the defendant's license) constituted a "public performance," even though the satellite uplink did not involve a "contemporaneous" perception of the work.[4] The court explained that the uplink transmission was a public performance because "it was an integral part of the larger process by which the NFL's protected work was delivered to a public audience." A closer analogy to music downloads is renting videos for playback later, which has been held not to be a "public performance."[5]

In support of ASCAP's position, several *Amici* offered policy arguments in favor of treating downloads as public performances – namely to comply with international treaties and to harmonize U.S. law with copyright law in other countries. The court referred those arguments to Congress "which has the power to amend the Copyright Act."

Originally published on Frankfurt Kurnit's Entertainment Law Matters Blog, Oct. 6, 2010 (www.entertainmentlawmatters.com)

[4] http://openjurist.org/211/f3d/10/national-football-league-v-primetime-joint-venture
[5] http://openjurist.org/866/f2d/278/columbia-pictures-industries-inc