# Biting the Hand That Feeds: Why the Attempt to Impose Additional Performance Fees on iTunes is a Search for Dollars Without Sense*

Jesse A. Bland†

## TABLE OF CONTENTS

**I. INTRODUCTION .................................................................. 158**
**II. BACKGROUND: THE MUSIC INDUSTRY, COPYRIGHT & DIGITAL TECHNOLOGY ........................................................ 161**
*A. The Music Industry's Fall (and iTunes' Rise) .................................. 161*
*B. Digital Technology: Key Terminology ............................................ 163*
*C. Copyright law ..................................................................... 164*
1. A Utilitarian Overview of Copyright Law ................................... 164
2. Two Key Distinctions ................................................................. 165
3. Musical Compositions: Overview of Ownership & Management 167
4. Sound Recordings: Overview of Ownership & Management ....... 170
5. The Public Performance Right ..................................................... 171
a. History for Musical Compositions: § 106(4) ........................... 171
b. History for Sound Recordings: § 106(6) ................................. 172
c. The Rationale for Public Performance Rights Reflects the Utilitarian View of Copyright ................................................... 173
**III. PURE DOWNLOADS DO NOT, AND SHOULD NOT, CONSTITUTE PUBLIC PERFORMANCES UNDER THE COPYRIGHT ACT ...................................................................... 176**
*A. As a Matter of Law, Pure Downloads Do Not Constitute Public Performances ........................................................................ 176*
1. Statutory Language ..................................................................... 176
2. Retailers Can Rely on Precedent: *In re RealNetworks I & II* ...... 177
3. Proper Statutory Interpretation Affirms the "Contemporaneous Perception" Requirement ........................................................... 180
*B. As a Matter of Policy, Downloads Should Not Constitute Public*

---

* First-Prize Winner, 2010 Local ASCAP Nathan Burkan Memorial Writing Competition. Currently under consideration as a national finalist.

† J.D. Candidate, Vanderbilt University Law School, 2011; B.B.A., Finance, University of Georgia, 2007. The author would like to thank his family for their love and support, the editors of the Journal, and Professor Daniel Gervais for his generous assistance in the development of this note.

*Performances* .......... *183*
1. Performance Licenses for Downloads Enables "Double Dipping" .......... 183
2. Any Performance That Occurs Has No Economic Value .......... 184
**IV. THIRTY-SECOND PREVIEWS LIKELY CONSTITUTE PUBLIC PERFORMANCES BUT SHOULD BE EXEMPT FROM LICENSING .......... 185**
*A. As Streaming Transmissions, iTunes' Song Previews Likely Implicate the Public Performance Right for Musical Compositions and Sound Recordings* .......... *185*
*B. Equitable Considerations and Proper Legal Analysis Demand that iTunes Should Be Given the Same Exemption Currently Available to Brick-and-Mortar Music Stores* .......... *186*
1. Equitable Considerations Favor an Exemption .......... 186
2. Section 110 Should Apply to iTunes .......... 187
*C. The Current Act Would Apply the Counter-Productive "Interactive Service" Provider Label to iTunes and Produce Inefficient Results* *189*
1. The Requirements of an "Interactive Service" Provider .......... 190
2. The Interactive/Non-Interactive Distinction Does not Make Sense Here .......... 191
**V. CONGRESS SHOULD AMEND THE COPYRIGHT ACT .......... 193**
*A. Pure Downloads: Congress Should Amend The Definition of "Perform"* .......... *193*
*B. Thirty-Second Samples: Congress Should Amend Section 114* .......... *195*
**VI. CONCLUSION .......... 197**

## I. INTRODUCTION

In 1958, Johnny Cash released a single entitled "Guess Things Happen That Way."[1] The single soared to the top of the Billboard country chart, spending eight weeks at number one.[2] Since then, though, the song had garnered little attention, standing in the shadows of classics like "Ring of Fire"[3] and "I Walk the Line."[4] That all changed in 2010 when a seventy-

---

[1] JOHNNY CASH, *Guess Things Happen That Way, on* SINGS THE SONGS THAT MADE HIM FAMOUS (Sun Records 1958).
[2] JOEL WHITBURN, THE BILLBOARD BOOK OF TOP 40 COUNTRY HITS: 1944-2006 74 (2004).
[3] JOHNNY CASH, *Ring of Fire*, *on* RING OF FIRE: THE BEST OF JOHNNY CASH (Columbia Records 1963).
[4] JOHNNY CASH, *I Walk the Line*, *on* JOHNNY CASH WITH HIS HOT AND BLUE GUITAR (Sun Records 1957).

one-year old grandfather from Woodstock, Georgia, purchased and downloaded the track from iTunes. Ironically, "Guess Things Happen That Way" turned out to be the ten-billionth song downloaded from iTunes since the retailer's inception and, as a result, Louie Sulcer unknowingly won Apple's contest promoting the historic download, not to mention a ten-thousand-dollar gift card.[5] Sulcer had logged-on to his iTunes account in search of songs to include in a mix he was putting together for his son when he stumbled upon the track.[6] Having never heard the song, though, Sulcer first listened to a thirty-second preview for free. According to Sulcer, it was this thirty-second preview that led him to purchase the song: "I really liked it. It had some really good pickin' in it. So that's how I got to that song."[7]

While many celebrated the historic download as a sign of Apple's success and promise for the future of digital music sales, a select group of the music industry likely grumbled. This group—made up largely of music publishers, composers, and performance rights organizations—is demanding the right to collect performance fees from iTunes and other online retailers for many of the steps involved in the typical download process.[8] As the law stands today, iTunes pays multiple licenses for the reproduction and distribution rights associated with each song downloaded, but it does not pay any additional performance right licenses for the downloads themselves or the thirty-second song previews. But now the American Society of Composers, Authors and Publishers ("ASCAP"), Broadcast Music Inc. ("BMI"), and other performing-rights groups want to collect performance fees from three additional sources: downloads of music; downloads of films and TV shows, and thirty-second song samples.[9] In fact, according to David Israelite, president and CEO of the National Music Publishers Association ("NMPA"), the group has begun lobbying Congress to pass legislation that would require anyone who sells a

---

[5] Daniel Kreps, *iTunes Prize Winner to Steve Jobs: "Yeah Right, Who Is This Really?"*, ROLLING STONE (Feb. 25, 2010), *available at* http://www.rollingstone.com/rockdaily/index.php/2010/02/25/itunes-prize-winner-to-steve-jobs-yeah-right-who-is-this-really/; *see also* Leah Greenblatt*, EW Talks to the Georgia Grandfather Who Bought the 10 Billionth Song on iTunes: "I've Never Won Anything!"* ENTERTAINMENT WEEKLY (Feb. 25, 2010), *available at* http://music-mix.ew.com/2010/02/25/itunes-10-billionth-download-johnny-cash/ (quoting Sulcer as saying, "I was just checking iTunes, listening to those little twenty or thirty second clips, and I found this one. It has some good pickin' in it!").

[6] *See* Kreps, *supra* note 5.

[7] *Id.*

[8] Greg Sandoval, *Music Publishers: iTunes Not Paying Fair Share,* CNET (Sep. 17, 2009), http://news.cnet.com/8301-1023_3-10355448-93.html.

[9] *Id.*

download to pay a performance fee.[10]

These groups are not simply asking for a bigger slice of the licensing "pie," so to speak. They are demanding a bigger pie. But such a result remains unlikely, as it rests on the erroneous assumption that iTunes, if forced to pay additional performance fees, would not reconsider its overall fee structure and adjust other cash flows accordingly. In other words, new payments may simply result in the realignment of total financial flows from iTunes, but not more total copyright money. The same can be said even if their erroneous assumption holds. In fact, the harsh results produced under this scenario would prove even more costly to the continuing vitality of the music industry. If online retailers' fees increase, the additional costs will ultimately shift to consumers like Louie Sulcer. Thus, while such a regime would ostensibly lead to more copyright royalties, it would actually shift consumers away from legally purchasing digital music and stifle the growth of an innovative, beneficial distribution model. Given the importance of digital sales for the future of music, this outcome is nonsensical. More importantly, the additional fees are completely unwarranted.

This development brings to the surface some of the blurrier issues surrounding the music industry's evolution into the digital medium. Further analysis of these issues reveals statutory provisions that conflict with practical realities and the underlying purpose of copyright law. And because this battle takes place in the context of the music industry, it implicates a complex web of competing interests. At its core, though, this demand reflects a battle for control by industry groups that refuse to acknowledge or leverage the potential of digital retailers like iTunes. As a result, the entire industry continues to marginalize itself—at its own expense, no less—from the good graces of public perception.

This paper will address two of the three sources from which this group is seeking to collect public performance fees: music downloads and the thirty-second song samples provided for free by online retailers. This paper will conduct a two-pronged analysis. First, it will discuss whether each source implicates the public performance right for musical compositions and sound recordings under current law. Second, it will approach the issues from a policy standpoint, discussing whether each respective source should implicate the public performance right and, thus, require additional licensing. This analysis will show that imposing additional fees for these alleged "performances" would undermine the utilitarian foundation upon which American copyright rests. Along the way, this paper will argue that, regardless of whether a download or a thirty-second sample technically constitutes a public performance of either a musical composition or sound

---

[10] *Id.*

recording under the current Copyright Act, imposing additional performance fees on iTunes for these transmissions would create an inefficient, nonsensical, and counter-productive result. Accordingly, iTunes and other online retailers should not be subject to these additional fees. Finally, to ensure this result, I propose several legislative amendments as a solution to a problem that requires a delicate balance between artistic protection and market realities.

## II. BACKGROUND: THE MUSIC INDUSTRY, COPYRIGHT & DIGITAL TECHNOLOGY

### *A. The Music Industry's Fall (and iTunes' Rise)*

Describing the music industry's rapid decline requires a look at the statistics. Revenues are down. Way down. To put things in perspective, in 1999 total revenue from U.S. music sales and licensing topped $14.6 billion. That figure plunged to $6.3 billion in 2009.[11] Physical and digital sales combined for 373.9 million albums sold in 2009, down 12.7% from the 428.4 million sold in 2008.[12] Comparing the 2009 numbers with those from 2000, a year in which U.S. consumers bought 785.1 million albums,[13] reveals the full extent of the industry's staggering fall: over the past decade, album sales and industry revenues have declined by more than fifty percent.

But that only tells part of the story. Also relevant is the current shift toward a digital distribution model. While the industry's traditional business model revolved around tangible record sales in so-called "brick and mortar" retail stores, with the digital age came a revolutionary idea: digital sales via the internet. In fact, the industry has already begun the historical and inevitable shift toward digital distribution. As of 2009—a year in which

---

[11] David Goldman, *Music's Lost Decade: Sales Cut in Half*, CNNMONEY.COM (Feb. 3, 2010), http://money.cnn.com/2010/02/02/news/companies/napster_music_industry/index.htm.

[12] Daniel Kreps, *2009 Wrap-Up: Music Purchases Up, Album Sales Down,* ROLLING STONE (Jan. 7, 2010), *available at* http://www.rollingstone.com/rockdaily/index.php/2010/01/07/2009-wrap-up-music-purchases-up-album-sales-down/; *see also* International Federation of the Phonographic Industry ("IFPI"), IFPI Digital Music Report 2010, at 10, *available at* http://www.ifpi.org/content/library/DMR2010.pdf (noting that "the increase in the music industry's digital sales is not offsetting the sharp decline in sales of physical formats. Overall, global music sales fell for the tenth year running in 2009. Full year figures were not available at the time of going to press, but digital and physical global sales in the first half of 2009 were down 12%, excluding performance rights income.").

[13] Brian Hiatt & Evan Serpick, *The Record Industry's Decline*, ROLLING STONE (June 28, 2007), *available at* http://msl1.mit.edu/furdlog/docs/2007-06-19_rollingstone_industry_decline.pdf.

global digital music trade revenues rose 12% to over $4.2 billion—almost thirty percent of all recorded music industry revenues worldwide are now coming from digital channels.[14] When compared to the rapid decline in physical record sales, this growth becomes even more pronounced. In 2008, total recorded music sales in the United States declined by more than 18% over 2007 numbers, due to a 31.2% drop-off in physical music sales.[15] Digital record sales, on the other hand, increased by 16.5% and reached almost $1.8 billion.[16] This trend led at least one industry analyst to predict, "digital music sales will nearly equal CD sales by the end of 2010."[17]

The explosive growth of digital music sales can be largely attributed to one computer application: iTunes, which allows users to purchase, download, store, and organize multiple forms of digital media on their computers.[18] Unveiled by Apple in 2001,[19] iTunes has quickly become the largest music retailer in the United States and now accounts for over 25% of all music sold.[20] Its dominance in the digital music arena is staggering: consumer downloads from iTunes comprised 69% of the digital music market in the first half of 2009.[21] In an industry plagued by revenue erosion at the hands of illegal file-sharing, iTunes stands as a beacon of hope, providing the means to capitalize on the digital age. In fact, Apple CEO Steve Jobs described the launch of iTunes as "the birth of legal downloading,"[22] and shed light on its role in the market by proclaiming, "[w]e're going to fight illegal downloading by competing with it. We're not

---

[14] *See* Press Release, IFPI, IFPI Publishes 2010 Digital Music Report 2010 (Jan. 21, 2010), *available at* http://www.ifpi.org/content/section_resources/dmr2010.html.

[15] IFPI 2008 Recorded Music Data, *available at* http://www.ifpi.org/content/library/Recorded-Music-Sales-2008.pdf.

[16] *Id.*

[17] Press Release, The NPD Group, Digital Music Increases Share of Overall Music Sales Volume in the U.S. (Aug. 18, 2009), *available at* http://www.npd.com/press/releases/press_090818.html.

[18] Technically, the iTunes bundle consists of a few separate applications and functions. iTunes is a proprietary digital media player application used for playing and organizing digital music and video files. The program is also an interface to manage the contents on Apple's popular iPod range of digital media players. There is also the iTunes Store, the online retail vehicle through which users purchase digital music. For the purposes of this paper, though, I use "iTunes" to refer to the combination of each ancillary application.

[19] Press Release, Apple, Apple Introduces iTunes—World's Best and Easiest to Use Jukebox Software (Jan. 9, 2001), *available at* http://www.apple.com/pr/library/2001/jan/09itunes.html.

[20] *See supra* note 17.

[21] *Id.*

[22] *See* John Paczkowski, *iTunes: 10 Billion Songs Sold in Less Than Seven Years,* DIGITAL DAILY (Feb. 24, 2010), http://digitaldaily.allthingsd.com/20100224/apples-itunes-thanks-10-billion/.

going to sue it. We're not going to ignore it. We're going to compete with it."[23]

To put these statistics in the proper perspective, one must appreciate the complexities of the music industry itself. Throughout this paper, I will use "the music industry" to refer to the overarching collection of entities that holds distinct—and often divergent—interests in the commercial market for music. A clear distinction should be made between the group of entities most often associated with the term "the music industry"—the record labels—and the group demanding additional performance licensing fees from iTunes—performance rights organizations ("PROs"). While often "what is good for the goose is good for the gander," such will not likely be the case in the issue at hand. That is, while the record labels will clearly benefit from iTunes' ascension, the PROs, relative to the labels, clearly will not. This is due to the way in which cash flows are determined and allocated among the complex web of competing rights in the music context.[24] But this is not necessarily an undesirable result as long as the industry as a whole benefits and copyright's goals are furthered. More importantly, the law should not seek to appease a group of the music industry at the expense of undermining the historical purpose of the public performance right and, more broadly, the utilitarian notions that remain so central to America's view of copyright.

### ***B.****Digital Technology: Key Terminology*

Before analyzing the legal implications of iTunes' digital media transfers, a distinction must be made between the two relevant digital transmissions:[25] "pure" downloads and streaming transmissions. Downloading "is the transmission of a digital file over the internet from a server computer, which hosts the file, to a client computer, which receives a copy of the file during the download . . . ." Once saved, the file can be audibly played by the client and copied to various portable devices.[26] The key is that the files are copied completely to the user's hard drive for later playback.[27] What makes the download "pure" is the fact that the file cannot be played until fully downloaded.[28]

---

[23] *Id.*

[24] *See infra* Part II(C).

[25] So-called "progressive" downloads, which allow users to watch or listen to media as it is being downloaded, fall outside the scope of this paper. In any event, iTunes does not currently enable such transmissions.

[26] U.S. v. ASCAP, 485 F. Supp. 2d 438, 440 (S.D.N.Y. 2007) (internal citations omitted).

[27] *See* Matt Jackson, *From Broadcast to Webcast: Copyright Law and Streaming Media,* 11 TEX. INTELL. PROP. L.J. 447, 450 (2003).

[28] *See id.*

Streaming is different in two respects. First, it "allows the real-time (or near real-time) playing of the song,"[29] and second, it "does not result in the creation of a permanent audio file on the client computer. Rather, a constant link is maintained between the server and the client until playing of the song is completed, at which time replay of the song is not possible without streaming it again."[30]

### *C. Copyright Law*

#### 1. A Utilitarian Overview of Copyright Law

In the United States, copyright law begins with the Constitution, which vests Congress with the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[31] As the constitutional grant makes clear, the United States takes a utilitarian view on copyright. That is, Congress is to promote a social benefit—here, "the progress of science and useful arts"—by drafting laws that incentivize creativity and innovation. To be sure, copyright does seek to protect "authors"[32] by granting them a set of exclusive rights in their works. But it only grants these temporary monopolies as a means to an end: the maximization of social welfare. Thus, "private reward is justified only if, on balance, that reward works a net benefit to society."[33] The Supreme Court has noted that the limited scope of copyright "reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts."[34]

As noted, federal copyright law does not provide authors with a single, inseparable right, but instead vests them with a bundle of distinct, exclusive rights.[35] This "bundle" includes the following exclusive rights:

---

[29] *ASCAP*, 485 F. Supp. 2d at 442.

[30] *Id.*

[31] U.S. CONST., art. I, § 8, cl. 8.

[32] *See* Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884) (defining "author" in the constitutional sense to be "he to whom anything owes its origin; originator; maker").

[33] Sara K. Stadler, *Performance Values*, 83 NOTRE DAME L. REV. 697, 728 (2008).

[34] Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).

[35] *See* 17 U.S.C. § 106 (2009); H.R. REP. NO. 94-1476, at 12 (1976) ("The five fundamental rights that the bill gives to copyright owners—the exclusive rights of reproduction, adaptation, publication, performance, and display—are stated generally in section 106. These exclusive rights, which comprise the so-called 'bundle of rights' that is a copyright, are cumulative and may overlap in some cases. Each of the five enumerated

reproduction,[36] adaptation,[37] publication,[38] performance,[39] and display.[40] Each of these exclusive rights serves its own unique purpose in furthering the constitutional mandate. But at times these rights overlap. Accordingly, "[a]s a general matter, the Copyright Act is clear that when use of a copyrighted work implicates more than one of that work's rights, the user must license each right individually."[41] This requirement flows from the utilitarian view of copyright and simply reflects the idea that users attribute independent value to each potential use of a work and, therefore, should compensate copyright holders accordingly if a particular use implicates distinct rights. However, while this requirement made sense in an analog era where the exclusive rights fell neatly into distinct categories, it has been criticized as disconnected from, and inapplicable to, the digital age.[42] As discussed below, digital transmissions—purely because of the technology involved—tend to converge and conflate mechanical and performance rights. This process, in turn, erodes the economic distinctions that justified requiring separate licenses for overlapping rights in the first place.

### 2.Two Key Distinctions

The Copyright Act does not grant all the enumerated exclusive rights found in section 106 to all copyrightable works found in section 102(a).[43]

---

rights may be subdivided indefinitely and . . . each subdivision of an exclusive right may be owned and enforced separately").

[36] 17 U.S.C. § 106(1) (2009).

[37] *Id.* § 106(2). This is also commonly referred to as the "derivative works" right.

[38] *Id.* § 106(3).

[39] *Id.* § 106(4).

[40] *Id.* § 106(5).

[41] W. Johnathan Cardi, *Über-Middleman: Reshaping the Broken Landscape of Music Copyright*, 92 IOWA L. REV., 835, 852 (2007) (noting that, "[f]or example, if a theater company wishes to perform the musical Rent and in conjunction with that performance also wishes to print the lyrics of the score in the playbill, then the company must obtain both a performance license and a reproduction license").

[42] *See, e.g.,* Jonah M. Knobler, *Performance Anxiety: The Internet and Copyright's Vanishing Performance/Distribution Distinction*, 25 CARDOZO ARTS & ENT. L.J. 531, 578 (2007) (arguing that "the traditionally intuitive and useful semantic distinction between 'performance' and 'distribution' does not translate readily, or particularly meaningfully, to the internet context at all"); *see also* 2-8 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.24 (Matthew Bender, Rev. Ed. 2009).

[43] 17 U.S.C. § 102(a) (2009). The following categories comprise the subject matter of copyright under the Copyright Act of 1976: "(1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works." *Id.*

Instead, each category carries its own unique set of exclusive rights. The situation is especially complex in the musical context, where the final product—the song—actually consists of two separate copyrightable works: "musical works" (or "musical compositions")[44] and "sound recordings."[45] And while the Act does not define the term "musical works,"[46] it defines "sound recordings" as "works that result from the fixation of a series of musical, spoken, or other sounds . . . regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied."[47] Thus, a sound recording represents the underlying musical composition transposed into aural form.[48] One may ask why such a distinction exists. In fact, the Supreme Court did not recognize the difference until the early twentieth century.[49]

Today, however, the distinction clearly does matter, as it is often the case that two separate individuals own the copyright in each constituent element.[50] In fact, as noted below, though the performing artist sometimes holds the copyright in the sound recording, the record company usually holds title to this right.[51] On the other hand, a songwriter or publishing

---

[44] *See id.* at § 102(a)(2).

[45] *See id.* at § 102(a)(7).

[46] *See* NIMMER & NIMMER, *supra* note 42, at § 2.05 (noting the term was left undefined because it was thought to have a "fairly settled" meaning).

[47] 17 U.S.C. § 101 (2009).

[48] *See* NIMMER & NIMMER, *supra* note 42, at § 2.10. Note that the underlying work can also be either a dramatic or literary work transposed into aural form. However, for the purposes of this paper, all underlying works will be assumed to be musical compositions. Further, a sound recording should not be confused with a "phonorecord," the material object in which the sound is embodied. *See* § 101 (defining "phonorecord" as "material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term 'phonorecords' includes the material object in which the sounds are first fixed.").

[49] *See* White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1, 18 (1908) (holding that the perforated rolls used to make the sounds of a musical work in a mechanical piano are separate from the underlying musical work); Tomomi Harkey, Bonneville International Corp. v. Peters: *Considering Copyright Rules to Facilitate Licensing for Webcasting*, 20 BERKELEY TECH. L.J. 625, 633 (2005).

[50] *See* NIMMER & NIMMER, *supra* note 42, at § 2.10 [A][3] (citing H.R. REP. NO. 92-487 (1971); SEN. REP. NO. 92-72 (1971)) ("On the question of ownership of sound recording copyrights, the Committee Reports relating to the original Sound Recording Amendment of 1971, state: 'As in the case of motion pictures, the bill does not fix the authorship, or the resulting ownership of sound recordings, but leaves these matters to the employment relationship and bargaining among the interests involved.'").

[51] Christopher D. Abramson, Note, *Digital Sampling and the Recording Musician: A Proposal for Legislative Protection,* 74 N.Y.U. L. REV. 1660, 1669–70 (1999).

company typically holds the copyright in the underlying musical composition.[52] The distinction is also relevant vis-à-vis the public performance right because unlike musical compositions, sound recordings only enjoy a limited public performance right.[53] The sections below detail the different rights associated with musical compositions and sound recordings, as well as how these respective rights are managed.

To understand the management systems in place, though, another distinction—that between mechanical and performance rights—should be addressed. Section 106(1) of the current Copyright Act gives the copyright holder the exclusive right of reproduction.[54] Section 106(3) affords the exclusive right of distribution.[55] Taken together, these two rights are commonly referred to as "mechanical rights," which give the copyright holder the right to make and distribute musical compositions on phonorecords (i.e., compact discs ("CDs"), records, tapes, and certain digital configurations).[56] Mechanical rights are distinct from performance rights, which must be obtained by a party seeking to broadcast or perform the song publicly. As explained below, music retailers such as iTunes who provide download services are required to obtain a mechanical license for the reproduction and distribution of both the musical composition and the sound recording.

### 3.Musical Compositions: Overview of Ownership & Management

As the original "authors" of musical compositions, songwriters initially own the copyright in these works, which carries with it the following exclusive rights: (1) to reproduce the work, (2) "to prepare derivative works" based upon it, (3) "to distribute copies or phonorecords" of the work, (4) to perform the work publicly, and (5) to display the work publicly.[57] The key word, though, is *initially*. Songwriters have traditionally relied on music publishers for a number of key commercial services.[58] In

---

[52] *Id.*
[53] *See infra* Part II(C)(5).
[54] 17 U.S.C. § 106(1) (2009).
[55] *Id.* § 106(1).
[56] *See* N. Jansen Calamita, Note, *Coming to Terms with the Celestial Jukebox: Keeping the Sound Recording Copyright Viable in the Digital Age,* 74 B.U. L. REV. 505, 526 n.115 (1994); *see also* Harry Fox Agency, *Frequently Asked Questions*, http://www.harryfox.com/public/FAQ.jsp.
[57] *See* 17 U.S.C. § 106(1)–(5) (2009).
[58] *See* Cardi, *supra* note 41, at 840 ("For many years, publishers played a major role in commercializing the musical works composed by their principals. Publishers located and engaged artists to perform a songwriter's composition. They secured recording deals with major record labels and sought diverse sources of royalty revenues, from nightclub

return, the artists would sign the standard publishing agreement, which "required the songwriter to assign ownership of the copyrights in his songs to the publisher, retaining only the right to fifty percent of all royalties generated."[59]

However, as individual music publishers have seen their commercial relevance diminish considerably over recent years,[60] most mechanical and performance rights have been assigned to or acquired by two sets of copyright-licensing collectives. Mechanical licensing is managed by agents like the Harry Fox Agency ("HFA"). Established in 1927 by the NMPA, HFA represents over 37,000 music publishing catalogs and 160,000 songwriters, issuing licenses and collecting and distributing the associated royalties.[61] In addition to being the foremost mechanical licensing agent in the U.S., HFA also provides collection and monitoring services to its publisher clients. In return for these services, HFA receives an 8.75% commission on all royalties distributed.[62] Under the current Act, mechanical rights are subject to compulsory licensing, which means that once a copyright owner authorizes the distribution of phonorecords of a musical work to the public, then any member of the public may reproduce and distribute that work without obtaining permission from the copyright owner so long as he pays the compulsory mechanical license.[63] Further, the applicable rate is statutorily determined.[64] The current rate is 9.1 cents per song, regardless of whether customers buy the song as a digital track online or as a tangible record in a retail store.[65] In practice, however, labels do not

---

performances to television commercials. Publishers also promoted the songs of their writers, serving as street barkers in the early days of New York's Tin Pan Alley, and in later years ensuring broad exposure by means of bribes known as "payola" to radio stations, record labels, and bands. Publishers also served as licensing agents, issuing licenses for various uses and collecting and distributing the resulting royalties.").

[59] *Id.*

[60] *See id.* at 841 ("Over the twentieth century, the role of music publishers changed significantly. With the rise of the singer-songwriter and the dwindling market for sheet music, the publisher's role as promoter and entrepreneur diminished. The publisher's function is now primarily that of royalty-collector and bookkeeper. Nevertheless, publishers still issue a not-insubstantial number of licenses (including some mechanical licenses), and they remain the primary issuer of 'synchronization licenses'—licenses for the use of a song in an audiovisual work such as a television show, movie, or commercial. Thus, music publishers remain significant industry players and necessary contacts for the licensing of musical works in modern media.").

[61] Harry Fox Agency, *About HFA*, http://www.harryfox.com/public/AboutHFA.jsp.

[62] Cardi, *supra* note 41, at 842.

[63] *See* 17 U.S.C. § 115(a)(1) (2009).

[64] *See* 17 U.S.C. § 115(c)(3) (2009).

[65] *See* U.S. Copyright Office, *Mechanical License Royalty Rates*, http://www.copyright.gov/carp/m200a.html.

necessarily pay this amount, as the rate negotiated by HFA can be lower than the statutory rate.[66]

The licensing of performance rights, on the other hand, is handled by three PROs: ASCAP, BMI, and the Society of European Stage Authors & Composers ("SESAC").[67] Through an agreement, the music publisher grants the PRO the right to license all of the songs controlled by the music publisher.[68] The PRO then adds these songs to its own "repertoire," which consists of all the songs from the myriad songwriters and music publishers that have previously entered into such agreements.[69] For a fee that typically ranges from 17–23%, these organizations grant blanket licenses to mass-performance licensees such as radio broadcasters (both streaming internet and traditional terrestrial), television and cable networks, restaurants, and bars.[70] For example, a radio station would go to ASCAP and pay an annual fee for a blanket license to publicly perform an unlimited number of songs from ASCAP's entire repertoire an unlimited number of times. ASCAP would subtract its fee, then distribute the remainder of the royalties to the respective music publishers and songwriters on a 50/50 basis, regardless of the agreement between the two.[71] In fact, the distribution of royalties serves as a major distinction between HFA and the PROs: HFA pays the publishers, while the PROs pay the songwriters directly, regardless of whether they previously assigned their interests to publishers.[72]

---

[66] *See* Harry Fox Agency, *Licensing General FAQ*, http://www.harryfox.com/public/Licensing-GeneralFAQ.jsp#29.

[67] *See* Cardi, *supra* note 41, 843–44. Respective market shares are: ASCAP, 54%; BMI, 43 %; SESAC, 3%.

[68] DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 225 (Free Press 6th ed. 2006) (1994).

[69] In accordance with a consent decree however, the assignment to the PRO is a nonexclusive license, which means the songwriters and music publishers may also negotiate nonexclusive licenses directly with users, though this is seldom done. *See* United States v. ASCAP, 1941 Trade Cas. (CCH) ¶ 56,104, at 405 (S.D.N.Y. 1941); *see also* Neil Conley, *The Future of Licensing Music Online: The Role of Collective Rights Organizations and the Effect of Territoriality*, 25 J. MARSHALL J. COMPUTER & INFO. L. 409, 412 (2008) (citing AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 1312 (3d ed. 2002)).

[70] *See* Cardi, *supra* note 41, at 844–46.

[71] *See* KOHN & KOHN, *supra* note 69, at 876. To determine how much each songwriter or publisher should receive for a given copyright, the PRO will divvy up the proceeds of its blanket licenses according to a very complicated process. *See id.* at 924.

[72] *See* ASCAP, *The ASCAP Payment System*, http://www.ascap.com/about/payment/pdf/paymentSystem/ASCAP_PaymentSystem.pdf ("As a condition of ASCAP membership, all writer and publisher members agree that, even in work-for-hire situations, the writer and not the employer will be paid the writer's share of ASCAP performing rights royalties. In addition, ASCAP's Articles of Association provide that, with only very limited exceptions unrelated to work-for-hire situations,

### 4.Sound Recordings: Overview of Ownership & Management

Though a performing artist is considered the "author" of a sound recording[73]—and thus, the initial owner of the relevant exclusive rights under the Act—copyrights to sound recordings are generally held by record labels. Most performing artists contract with record labels to produce their music.[74] As a result of the relatively disparate bargaining powers involved, "labels typically claim exclusive ownership in musical sound recordings through work-for-hire agreements and assignments of ownership from the performing artists, producers, and technicians whose creative input makes the sound recording copyrightable."[75]

Mechanical rights for sound recordings are managed much the same way as their underlying musical compositions. In 1995, the DPRA made the compulsory mechanical license regime applicable to "digital phonorecord deliveries," which essentially means music files that are permanently downloaded to the user's computer.[76] In fact, HFA now issues mechanical licenses for audio-only, permanent digital downloads.[77]

Performance rights in sound recordings are managed by SoundExchange, a non-profit PRO that collects statutory royalties from satellite radio, internet radio, cable TV music channels, and similar platforms for streaming sound recordings.[78] SoundExchange does not, however, provide licenses for so-called "interactive" performances of sound recordings (e.g. "on-demand" services that allow the listener to select the

---

writer's royalties 'shall not be sold or otherwise disposed of.' Hence, subject only to those very limited exceptions, ASCAP will not honor an irrevocable assignment of writer's royalties but will, notwithstanding such an assignment, pay writer's royalties only and directly to the writer member-in-interest.").

[73] Actual ownership is often more nuanced. For example, producers or sound engineers can be, and usually are, considered co-authors of the sound recording. In fact, Congress explicitly intended this result. *See* H.R. REP. NO. 94-1476, at 8 (1976) ("The copyrightable elements of a sound recording will usually, though not always, involve 'authorship' both on the part of the performers whose performance is captured and on the part of the record producer responsible for setting up the recording session, capturing and electronically processing the sounds, and compiling and editing them to make a final sound recording.").

[74] *See* Andrey Spektor, *How "Chorus" Can Turn Into a Cacophony: The Record Industry's Stranglehold on the Future of Music Business*, 16 RICH. J. L. & TECH. 3, 18 (2009).

[75] *See* Cardi, *supra* note 41, at 848.

[76] Technically, "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 . . . " 17 U.S.C. § 115(d) (2009).

[77] Harry Fox Agency, *Digital Licensing*, http://www.harryfox.com/public/DigitalLicensing.jsp#19.

[78] *See* SoundExchange, http://www.soundexchange.com/.

tracks they wish to listen to and/or the order in which they wish to hear them).[79] Instead, licenses for interactive performances of sound recordings must be obtained directly from the copyright holder.[80] The Copyright Royalty Board, which is appointed by The U.S. Library of Congress, has entrusted SoundExchange as the sole entity in the United States to collect and distribute these digital performance royalties on behalf of featured recording artists, master rights owners (like record labels), and independent artists who record and own their masters.[81]

5.The Public Performance Right

Section 106(4) grants copyright holders of the underlying musical composition the exclusive right to perform, or authorize to perform, a work publicly, whether for profit or not.[82] Two things must be proven in order to implicate this right: first, there obviously must be an unauthorized "performance" of that work by someone other than the copyright holder; and second, the performance must be made "publicly." In-depth statutory analysis of this right is provided in Part III below. Sound recordings receive their public performance right from Section 106(6), which grants the exclusive right "to perform the copyrighted work publicly by means of a digital audio transmission."[83] As discussed below, though, the clause "by means a digital audio transmission" greatly restricts the scope of this right. But before detailing the scope of each respective right, we should examine the history and purpose of the public performance right in American copyright law.

*a.History for Musical Compositions: § 106(4)*

Copyright holders did not enjoy a performance right until the mid-nineteenth century.[84] Up to that point, they only enjoyed publication rights—that is, the exclusive rights of "printing, reprinting, publishing, and vending" copies of their works.[85] But in 1856, when Congress granted statutory copyright protection to "dramatic compositions," it also created the performance right, granting owners of plays the exclusive right to "act,

---

[79] SoundExchange, *Frequently Asked Questions*, http://soundexchange.com/category/faq/#question-440; *see also* 17 U.S.C. § 114 (2009).
[80] 17 U.S.C. § 114(d)(3) (2009).
[81] *Id.*
[82] 17 U.S.C. § 106(4) (2009); *see also* H.R. REP. NO. 94-1476 (1976).
[83] *Id*. at § 106(6).
[84] *See generally* Stadler, *supra* note 33, at 704.
[85] *See* Copyright Act of 1790, ch. 15, § 1, 1 Stat. 124, 124; Act of Feb. 3, 1831, ch. 16, § 1, 4 Stat. 436, 436.

perform, or represent the same, or cause it to be acted, performed, or represented, on any stage or public place for the whole period for which the copyright is obtained."[86] However, Congress chose not to extend this right to musical compositions, which continued to hold only "the sole right of printing, copying, etc., and not of public representation."[87] Congress changed its position in 1897, when it finally granted the public performance right to musical compositions.[88] The 1909 Act limited copyright holders' ability to demand licenses for performances of their works only to those that were performed "publicly for profit."[89] The 1976 Act, however, dropped the "for profit" requirement and opted to grant a broad public performance right that would be limited by specific exclusions.[90]

*b.History for Sound Recordings: § 106(6)*

While the Supreme Court recognized sound recordings as distinct from their underlying musical compositions vis-à-vis copyright protection as early as 1908,[91] sound recordings did not receive federal copyright protection until over six decades later in the form of the Sound Recording Amendment of 1971.[92] Today, the Sound Recording Amendment lives on, as the 1976 Copyright Act included sound recordings among the enumerated copyrightable subject matters. However, while Congress granted some copyright protection to sound recordings, it did not grant these works a public performance right for almost two decades. In 1995, recognizing that "digital transmission of sound recordings is likely to become a very important outlet for the performance of recorded music in the near future,"[93] Congress finally granted sound recordings an exclusive (albeit limited) public performance right by enacting the Digital Performance Right in Sound Recordings Act ("DPRA").[94]

---

[86] Act of Aug. 18, 1856, ch. 169, 11 Stat. 138, 139.

[87] Carte v. Duff, 25 F. 183, 187 (C.C.S.D.N.Y. 1885).

[88] *See* Act of Jan. 6, 1897, ch. 4, 29 Stat. 481, 481–82 (extending protection to "dramatic or musical composition[s]").

[89] *See* Copyright Act of 1909, ch. 320, § 1(e), 35 Stat. 1075, 1075, *repealed by* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541.

[90] *See* H.R. REP. NO. 94-1476, at 14 (1976) ("The approach of the bill, as in many foreign laws, is first to state the public performance right in broad terms, and then to provide specific exemptions for educational and other nonprofit uses.").

[91] *See* White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1, 18 (1908) (holding that the perforated rolls used to make the sounds of a musical work in a mechanical piano are separate from the underlying musical work); *see also* Harkey, *supra* note 49, at 633.

[92] Pub. L. No. 92-140, 85 Stat. 391 (1971).

[93] H.R. REP. NO. 104-274, at 12 (1995).

[94] Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109

The DPRA created a public performance right for sound recordings that was limited by the contours of a three-tiered system. Broadly speaking, this system created three classifications of digital audio transmissions and then determined a given transmission's treatment under the DPRA accordingly. Under the DPRA, all "interactive" services were subject to voluntary licenses. The treatment of "non-interactive" services depended on whether the given service qualified as a "subscription" service. The DPRA made "subscription" services subject to statutory licensing and essentially provided a blanket exemption for non-subscription services. The contours of this system were changed by the Digital Millennium Copyright Act in 1998.[95] The DMCA amendment tightened the regulation of "digital audio transmissions" by restricting the activities that qualify for the exemption and broadening the activities that are subject to statutory licensing. Thus, as the law currently stands, interactive services remain subject to voluntary licenses.[96] Non-interactive subscription services remain subject to statutory licenses.[97] But non-interactive, non-subscription services are no longer protected by a blanket exemption.[98] Thus, except for traditional radio broadcasts, most non-interactive, non-subscription transmissions are subject to statutory licenses.

### *c.The Rationale for Public Performance Rights Reflects the Utilitarian View of Copyright*

All this history begs the question: Why create a public performance right in the first place? As it is in many a copyright question, the answer is economic. The public performance right helps preserve the underlying, utilitarian purpose of American copyright law by ensuring remuneration for use of the underlying copy.

The relationship between songwriters and performers initially shaped copyright holders' notions of the public performance right. When songwriters and composers first received the public performance right in 1897, most did not initially enforce this new right.[99] Not only did the songwriters view the performers as customers, they viewed the "public performance of their songs as the best method of advertisement for sheet music of their compositions, which, at the time, was their major source of

Stat. 336 (1995).

[95] Digital Millennium Copyright Act, 1998, Pub. L. No. 105-304, § 405(a), 112 Stat. 2860 (1998).

[96] 17 U.S.C. § 114(d)(3) (2009).

[97] *Id.* at § 114(d)(2).

[98] *Id.* at § 114(d)(1).

[99] *See* Conley, *supra* note 69, at 415.

income."[100] Sara Stadler describes the situation in her article *Performance Values*: "Playwrights sold copies of their plays to producers and directors who wished to stage performances. Songwriters sold copies of their songs (known as "sheet music"), not only to orchestras and singers, but also to millions of ordinary Americans."[101] As she explains, "[i]n this world, in which recording devices did not exist, there were only two ways to perform a copyrighted play or song without having a copy in hand: (1) to perform the work from memory; and (2) to record a performance by hand, that is, by taking notes."[102] As long as others were purchasing copies of their work, copyright holders were perfectly content. Thus the performance right was used, if at all, to provide copyright holders with a way to enforce their right to remuneration for the underlying copy, not to protect the performance itself. In other words, "notwithstanding the existence of the right, the possession of a copy was, and continues to be, critical to the enterprise of performance."[103]

Technology, however, would change the prevailing views on the purpose and scope of the public performance right. In 1897, player pianos hit the market. These devices were capable of performing the underlying musical composition by reading perforated rolls of paper. This technology thus presented two innovations: the ability to "record" the underlying sheet music and then to perform that work to a large number of the public. This would have posed no problem if the manufacturers reproducing the music onto piano rolls had purchased the right to do so. Since this was not a legal requirement at the time, though, they of course did not.[104] In fact, the Supreme Court reinforced this fact in *White-Case Music Publishing Co. v. Apollo Co.*, when it held that the piano rolls were not "copies" under the pre-1909 Act.[105] While the 1909 Act would change this result,[106] the public

---

[100] *Id.*

[101] *See* Stadler, *supra* note 33, at 706.

[102] *Id.*

[103] *Id.* at 707.

[104] CRAIG H. ROELL, THE PIANO IN AMERICA, 1890-1940 59 (1989) ("These manufacturers were not required by law to pay royalties to composers upon the sale of a recording.").

[105] 209 U.S. 1, 18 (1908). As to the performance right, the Court noted, "There is no complaint in this case of the public performance of copyrighted music; nor is the question involved whether the manufacturers of such perforated music rolls when sold for use in public performance might be held as contributing infringers." *Id.* at 16.

[106] *See* Stadler, *supra* note 33, at 709–10. (noting "[i]n section 1(d) of the Copyright Act of 1909, Congress gave owners of copyright in dramatic works the exclusive right not only to 'perform or represent the copyrighted work publicly,' but also to 'vend any manuscript or any record whatsoever thereof' and to make any such record 'from which . . . it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced'").

performance right was no longer the same for songwriters. No longer were the performers customers. No longer were they costless advertisers. Unless they had purchased authorized copies, they were infringers. These public performances were piracy.

Technology also shaped the notion of the public performance right in sound recordings. The pattern is familiar: emerging technology—digital copies and the compact discs that embodied them, as well as technologies capable of delivering digital transmissions—heightened the potential for widespread piracy, threatening copyright holders' ability to capitalize on their works economically. This technology especially threatened the owners of copyrights in sound recordings—record labels—because the benefit of free promotion via radio broadcast that traditionally compensated for the lack of a public performance right depended upon scarcity. That is, this relationship was beneficial to the recording industry only as long as radio broadcasting boosted record sales, which was only viable as long as consumers were limited to purchasing tangible copies of pre-recorded music. Of course, once digital technology emerged, which rivaled analog by providing unprecedented sound quality, the record industry knew that consumers would not be so limited.[107] Thus, the central concern of the recording industry was that, absent a public performance right for sound recordings, digital transmission technology would displace the long-standing linchpin in the industry's business model: recorded music sales in "brick and mortar" retail stores.

The 1998 DMCA amendments similarly arose in response to new technology. Shortly after the DPRA was enacted, the first technology for streaming audio—RealAudio—was developed and released by Progressive Networks.[108] Thus webcasting was born, meaning it was now possible to make digital audio transmissions over the internet. Not only did webcasting allow broadcasters to digitally transmit sound recordings via the internet, it also allowed users to freely copy and share transmitted sound recordings, "or to listen to [such] services in lieu of purchasing music."[109] Once again, a new technology struck fear into the heart of the record industry by challenging the fundamental underpinnings of the industry's business model. In other words, the record industry was losing money— a lot of money. According to the RIAA, by 1997, the record industry was losing $1

---

[107] H.R. REP. NO. 104-274, at 12 (1995) ("Consumers have embraced digital recordings because of their superior sound quality.").

[108] *See* Kenneth D. Susan, Comment, *Tapping to the Beat of a Digital Drummer: Fine Tuning U.S. Copyright Law for Music Distribution on the Internet,* 59 ALB. L. REV. 789, 799 (1995).

[109] Arista Records, LLC v. Launch Media, Inc., 578 F.3d 148, 155 (2d Cir. 2009).

million a day due to music piracy.[110]

Thus, two things stand out with regard to the purpose of the public performance right. First, the public performance right is not intended to protect the actual performance of a work, but instead to protect the copyright holder's ability to reap a monetary benefit from his work. Second, when technology emerges that allows for the performance itself to supplant demand for the copy, the performance right allows the copyright holder to compensate for the relative loss in value of his copy. In this sense, the right reflects the fundamental, utilitarian premise upon which American copyright law is based: Congress incentivizes innovation and creativity by granting limited monopolies to authors and, as a result, maximizes social and economic welfare.

## III. PURE DOWNLOADS DO NOT, AND SHOULD NOT, CONSTITUTE PUBLIC PERFORMANCES UNDER THE COPYRIGHT ACT

While the PROs claim that "pure" downloads of songs—i.e., transmissions solely of data containing the work in digital format—constitute "public performances" of the copyrighted works, this section will disprove that argument. Through an in-depth statutory analysis, it will show that Congress intended the definition of "perform" to require contemporaneous sensory perception by the downloader/user in order for such activity to constitute a "performance." And by applying common canons of statutory interpretation, it reveals that pure downloads, *per se*, do not constitute public performances. Further, it will argue that, as a matter of policy, pure downloads should not constitute public performances because such a classification would run counter to the economic foundation of the Copyright Act.

### *A. As a Matter of Law, Pure Downloads Do Not Constitute Public Performances*

#### 1. Statutory Language

Section 106(4) grants copyright owners of musical compositions the exclusive right "to perform the copyrighted work publicly."[111] Section 106(6) grants copyright owners of sound recordings the right to "perform

---

[110] *Id*. (citing Copyright Piracy in the Internet: Hearing on H.R. 2265 Before H. Comm on the Judiciary, Subcomm. on Courts & Intellectual Prop., 105th Cong. (1997) (statement of Cary Sherman, Senior Executive Vice President and General Council of the RIAA)).
[111] 17 U.S.C. § 106(4) (2009).

the copyrighted work publicly by means of a digital audio transmission."[112] This section will analyze whether "pure" downloads implicate these exclusive public performance rights. To do so, we must begin with the statute itself. To violate the copyright holder's public performance right, a given activity must first meet two criteria: first, it must be a performance; second, this performance must be made publicly.

As applied to songs, "[t]o 'perform' a work means to recite, render, play, dance, or act it, either directly or by means of any device or process . . . ." The terms "recite," "render," and "play" are left undefined by the Act. Further, "[t]o perform or display a work 'publicly'" means either:

> (1)to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
>
> (2)to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.[113]

I will refer to these clauses as the "public place clause" and the "transmit clause," respectively. For pure downloads, which occur between individual computer hard drives, the "transmit" clause is obviously the only potential candidate. Accordingly, this section will only analyze the issue under that clause. Under the Act, "[t]o 'transmit' a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent."

### 2. Retailers Can Rely on Precedent: *In re RealNetworks I & II*

When it comes to determining whether pure downloads constitute public performances under the Copyright Act, iTunes and other online retailers have the clear advantage of judicial precedent. To date, the only district court to squarely address the issue concluded downloads are not performances. In *RealNetworks I*,[114] the District Court for the Southern District of New York held that "in order for a song to be performed, it must be transmitted in a manner designed for contemporaneous perception." And even though it acknowledged that the term "perform" was to be construed

---

[112] *Id.* at § 106(6).
[113] *Id.* at § 101.
[114] U.S. v. Am. Soc'y of Composers, Authors & Publishers *In re* RealNetworks, 485 F. Supp. 2d 438, 443–44 (S.D.N.Y. 2007), *affirmed in part, vacated in part on other grounds*, 2010 U.S. App. LEXIS 19983, at *5 (2d Cir. Sep. 28, 2010) [hereinafter *RealNetworks II*].

broadly, it concluded that "we can conceive of no construction that extends it to the copying of a digital file from one computer to another in the absence of any perceptible rendition. Rather, the downloading of a music file is more accurately characterized as a method of reproducing that file."[115]

At the heart of the decision was the court's finding that a download is simply not a "performance" under the Act. Since the Act does not define the terms "recite," "render," or "play," the court applied the axiom that "[w]hen words in a statute are not otherwise defined, it is fundamental that they will be interpreted as taking their ordinary, contemporary, common meaning."[116] Accordingly, the court looked to the dictionary.[117] From these definitions, the court concluded that "[a]ll three terms require contemporaneous perceptibility."[118] In addition to citing other courts for the proposition that pure downloads do not constitute public performances,[119] the court relied on two "responsible authorities" that had similarly classified these transmissions as implicating only the reproduction right. In its 2001 report to Congress on developing technology's effect on copyright law, the United States Copyright Office stated:

> [W]e do not endorse the proposition that a digital download constitutes a public performance even when no contemporaneous performance takes place ... It is our view that no liability should result from a technical "performance" that takes place in the course of a download…[T]o the extent that such a download can be considered a public performance, the performance is merely a technical by-product of the transmission process that has no value separate from the value of the download. . . . [I]t is our view that no liability should result under U.S. law from a technical "performance" that takes place in the course of a download.[120]

---

[115] *Id.* at 444.

[116] Morse v. Rep. Party of Va., 517 U.S. 186, 254 (1996) (internal citations omitted).

[117] *RealNetworks I*, 485 F. Supp. 2d, at 443 (internal citations omitted) ("Merriam-Webster's Dictionary defines 'recite' as 'to repeat from memory or read aloud publicly.' Similarly, in the present context, the term 'render' is defined as 'to reproduce or represent by artistic or verbal means[,] depict . . . to give a performance of . . . to produce a copy or version of (the documents are rendered in the original French) . . . to execute the motions of (render a salute)' and 'play' is defined as 'to perform music (play on a violin) . . . to sound in performance (the organ is playing). . . to emit sounds (the radio is playing) . . . to reproduce recorded sounds (a record is playing) . . . to act in a dramatic production.'").

[118] *Id.*

[119] *See id.* at 444 (citing, among others, A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1014 (9th Cir. 2001)).

[120] *RealNetworks I*, 485 F. Supp. 2d 438, 444–45 (S.D.N.Y. 2007) (citing U.S. Copyright Office, Digital Millennium Copyright Act Section 104 Report to the United States Congress [hereinafter 2001 Copyright Office Report] (Marybeth Peters, Register of Copyrights), at xxvii–xxviii (Aug. 29, 2001), *available at*

Similarly, in a 1995 report, the United States Department of Commerce's Information Infrastructure Task Force stated:

> A distinction must be made between transmissions of copies of works and transmissions of performances or displays of works. When a copy of a work is transmitted over wires, fiber optics, satellite signals or other modes in digital form so that it may be captured in a user's computer without the capability of simultaneous "rendering" or "showing," it has rather clearly not been performed.[121]

The United States Court of Appeals for the Second Circuit affirmed the district court's conclusion, holding that a download of a musical work does not constitute a public performance of that work.[122] In *RealNetworks II*, the Second Circuit applied an analysis similar to that of the district court and, after noting that the "first step is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case,"[123] concluded that "the ordinary sense of the words 'recite,' 'render,' and 'play' refer to actions that can be perceived contemporaneously."[124] While it acknowledged that one definition of "to render," —namely, "to hand over to another (as the intended recipient): deliver transmit,"[125] would support ASCAP's position—the court applied *noscitur a sociis* and found that particular definition inapplicable in the context of the Act's definition of "to perform."[126]

To summarize, under *RealNetworks I* and *RealNetworks II*, in order for a song to be performed, it must "be transmitted in a manner designed for contemporaneous perception." Under this test, a pure download—which constitutes nothing more than data files being transferred from a server to a specific user's hard drive—does not implicate the public performance right. Instead, the reproduction right is implicated, as "the delivery of a music file to a purchaser via a download constitutes a mechanical reproduction of the copyrighted work in the form of a 'digital phonorecord delivery.'"[127] Thus, the case clearly favors iTunes. It remains to be seen whether such reasoning

http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf).

[121] *Id.* at 445 (citing Information Infrastructure Task Force, *The Report of the Working Group on Intellectual Property Rights* (Bruce A. Lehman), at 71 (Sept. 1995) (footnote omitted)).

[122] *RealNetworks II*, 2010 U.S. App. LEXIS 19983, at *14 (2d Cir. 2010).

[123] *Id.* at *15–16 (quoting Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450 (2002)).

[124] *Id.* at *16.

[125] *See id.* (citing Webster's Third New International Dictionary 1895 (1981)).

[126] *RealNetworks II*, 2010 U.S. App. LEXIS 19983, at *17–18.

[127] *RealNetworks I*, 485 F. Supp. 2d 438, 447 (S.D.N.Y. 2007).

will be adopted in other circuits, but given the Second Circuit's influence on copyright law, the case cannot be taken lightly.

#### 3. Proper Statutory Interpretation Affirms the "Contemporaneous Perception" Requirement

The PROs' central argument relies on the "transmit clause" in order to get around any "contemporaneous perception" requirement. According to these groups, "every transmission of a performance to members of the public constitutes a public performance, regardless of whether the performance can be heard during its transmission, and regardless of what happens to the transmission at the receiving end."[128] However, this argument breaks down upon closer analysis, as proper statutory interpretation affirms the "contemporaneous perception" requirement.

Legislative history clearly establishes a congressional intent to define "transmit" broadly.[129] From this, the PROs claim that the transmission of music files necessarily constitutes a public performance under the "transmit" clause. However, as the *RealNetworks I* court pointed out, "*the transmission of a performance,* rather than just the transmission of data constituting a media file, is required in order to implicate the public performance right in a copyrighted work."[130] In its brief, ASCAP claimed that a public performance is "simply an initial performance—a 'rendering' or 'playing' of a work—followed by transmission of that initial performance to members of the public."[131] And, this so-called "initial performance," it continued, "occurs when the performing artists and musicians play the song in the recording studio—'play' being among the non-exhaustive examples of 'perform' specifically enumerated in the statute—and that performance is recorded."[132] To be fair, there is some legislative history that, if glossed over quickly, can be read to support such

---

[128] ASCAP's Memorandum of Law in Support of Its Motion for Partial Summary Judgment [hereinafter ASCAP's Memo] at 2, *RealNetworks I*, 485 F. Supp. 2d 438 (S.D.N.Y. 2007) (2007 WL 7007120).

[129] H.R. REP. NO. 94-1476, at 15 (1976) ("The definition of 'publicly' in section 101 makes clear that the concepts of public performance and public display include not only performances and displays that occur initially in a public place, but also acts that transmit or otherwise communicate a performance or display of the work to the public by means of any device or process . . . Each and every method by which the images or sounds comprising a performance or display are picked up and conveyed is a 'transmission,' and if the transmission reaches the public in my form, the case comes within the scope of clauses (4) or (5) of section 106.").

[130] *RealNetworks I*, 485 F. Supp. 2d at 446.

[131] *See* ASCAP's Memo, *supra* note 128, at 2.

[132] *Id.*at 3.

an argument. The 1976 House Report states:

> [T]he concepts of public performance and public display cover not only the initial rendition or showing, but also any further act by which that rendition or showing is transmitted or communicated to the public. Thus, for example: a singer is performing when he or she sings a song; a broadcasting network is performing when it transmits his or her performance (whether simultaneously or from records).[133]

While, at first blush, this language appears to bolster the PROs' claim, a closer reading illuminates the shortcomings of the argument. Both the statute and the above-quoted legislative history explicitly require that, in order for a transmission to implicate the public performance right, it must "transmit or otherwise communicate a *performance*."[134] Simply transmitting or communicating the work in digital format does not implicate the public performance right unless a "performance" of the work itself is transmitted.

The Second Circuit agreed in *RealNetworks II*,[135] and its analysis of this issue compellingly reinforces this conclusion. On appeal, ASCAP once again argued that downloads implicate the transmit clause "because they 'transmit or otherwise communicate a performance,' namely the initial or underlying performance of the copyrighted work, to the public."[136] The court noted, however, that "when Congress speaks of transmitting a performance to the public, it refers to the performance created by the act of transmission, not simply to transmitting a recording of a performance."[137] It then proceeded to dismantle ASCAP's argument, describing the logic as "flawed because, in disaggregating the 'transmission' from the simultaneous 'performance' and treating the transmission itself as a performance, ASCAP renders superfluous the subsequent 'a performance … of the work' as the object of the transmittal."[138] Thus, the issue turns on what constitutes a "performance" under the Act. The *RealNetworks* courts concluded that a "performance" requires "contemporaneous perception", and proper statutory interpretation affirms this result.

Other commentators have likewise concluded that the Act requires real-time sensory perception.[139] While the court relied on the Merriam-Webster Dictionary to define "render," one author employed the Oxford

---

[133] *See* H.R. REP. NO. 94-1476, at 63 (1976).
[134] 17 U.S.C. § 101 (2009) (emphasis added).
[135] *RealNetworks II*, 2010 U.S. App. LEXIS 19983, at *20–21.
[136] *Id.* at *20.
[137] *Id.* (quoting Cartoon Network LP v. CSC Holdings, Inc., 533 F.3d 121, 136 (2d Cir. 2008)).
[138] *Id.* at *21.
[139] *See* Knobler, *supra* note 42, at 549–553.

English Dictionary ("OED"), which, in part, defines "render" as:

> 4. To reproduce or represent, esp. by artistic means, to depict.
>
> 4b. To play or perform (music).
>
> 7. To hand over, deliver, commend, or commit, to another; to give, in various senses, to grant, concede.[140]

According to the canon of statutory construction known as *noscitur a sociis*, "the meaning of an unclear word or phrase should be determined by the words immediately surrounding it."[141] The words immediately surrounding "render" are "recite, play, dance, [and] act," each of which involves contemporaneous sensory perception by the audience. Accordingly, we can conclude that Congress intended the word "render," as used in the definition of "perform," to similarly require simultaneous sensory perception. As noted above, the *RealNetworks II* court explicitly applied this logic in concluding that the each word in the list of terms used to define "to perform" in the Act requires contemporaneous perceptibility.[142]

This conclusion is further supported by the definition of "perform" as it relates to movies. The Act additionally defines "perform" to mean, "in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible." Because the work must be shown or made audible, this definition of "perform" clearly requires simultaneous sensory perception. Thus, ASCAP's argument leads to an absurd conclusion: downloading a motion picture would require contemporaneous sensory perception to constitute a "performance," but downloading a song would not. It is axiomatic that "[i]f a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity."[143] The Second Circuit applied this reasoning in *RealNetworks II*, noting that "[t]he fact that the statute defines performance in the audio-visual context as 'show[ing]' the work or making it 'audible' reinforces the conclusion that 'to perform' a musical work entails contemporaneous perceptibility."[144] Accordingly, because pure downloads lack any contemporaneous perception of the song by the user, they cannot qualify as performances of these works. Pure downloads simply do not implicate the public performance right. However, as I will argue in

[140] *Id.* at 550.
[141] BLACK'S LAW DICTIONARY (8th Ed. 2004).
[142] *RealNetworks II*, 2010 U.S. App. LEXIS 19983, at *16.
[143] Church of the Holy Trinity v. U.S., 143 U.S. 457, 460 (1892).
[144] *RealNetworks II*, 2010 U.S. App. LEXIS 19883, at *19.

Part V, Congress should amend the definition of "perform" to clearly require contemporaneous perception.

### *B. As a Matter of Policy, Downloads Should Not Constitute Public Performances*

Regardless of statutory interpretation, pure downloads should not implicate the public performance right as a matter of policy. Music publishers and PROs portray the issue as iTunes' not paying its fair share to struggling artists. However, analysis reveals that this demand for "just compensation" is really an attempt to extract duplicative royalties for the same transmission by claiming the right to be compensated for an additional technical component of the transmission that has no economic value.

#### 1.Performance Licenses for Downloads Enables "Double Dipping"

As noted, for each download, the publishers—usually through HFA—receive a "mechanical license" for the digital reproduction of a copy of the underlying work. But these publishers—and the PROs—are now demanding an additional license for the public performance that allegedly occurs with each download. As many commentators have argued, such a duplicative licensing regime amounts to "double dipping," or, in other words, charging for the same thing twice. The PROs claim that reproduction rights and performance rights are explicitly distinct rights that require explicitly distinct payments.[145] This statement is technically correct—until it is applied to pure downloads, the alleged "performance" is but a mere byproduct of the transmission whose existence is wholly incidental to the technology involved. Viewed in this light, the proposed licensing fee looks more like an attempt to exploit a technicality than a legitimate scheme of remuneration. Enacting such a regime would allow these groups to demand payment for transfers without any intrinsic value and, therefore, go above and beyond the economic system envisioned by the Constitution.

To be fair, there is one reason for channeling funds through PROs: ASCAP and BMI distribute directly to authors.[146] HFA does not. It pays publishers. Thus, one could argue that the additional royalties generated would really be going to the songwriters. But this argument is unconvincing for a number of reasons. First, as noted above,[147] it is based on the erroneous assumption that iTunes would not restructure its cash flows in

[145] *See* Sandoval, *supra* note 8 (noting that, in countering the "double dipping" argument, the president of NMPA argues "we're going to lose the income of the performance").
[146] *See supra* note 70.
[147] *See supra* Part I.

response to these additional costs. That is, financial outflows based on the mechanical rights would likely be tweaked downward. If this were not possible, then the fees would come at the expense of the sound recording copyright holders or consumers. Neither option seems palatable. Further, if the industry was truly concerned about realigning the current royalty distribution scheme, it could do so. iTunes should not be subject to additional fees simply because one collective rights society distributes royalties in a manner that seems more equitable than the next. Most importantly, though, this argument must fail because it would produce a result that runs counter to the underlying purposes of American copyright law. That is, it uses emotional appeal to mask the fact that it would result in charging consumers for an alleged performance that, if it occurs at all, has no economic value.

2.Any Performance That Occurs Has No Economic Value

In a broader sense, the issue of whether a download constitutes a public performance arises only because the technology involved, when combined with the literal statutory language, creates some blurry areas of potentially overlapping rights. However, copyright law should only compensate the artist—i.e., require the public to pay—where doing so is economically justifiable. This is not one of those cases.

In its 2001 report to Congress, the Copyright Office made two findings especially relevant here. First, it noted that, "to the extent that such a download can be considered a public performance, the performance is merely a technical by-product of the transmission process that has no value separate from the value of the download."[148] Thus, but for the technology employed, there would be no allegation of a public performance. The Copyright Office's second finding is even more telling:

> The buffer copies have no independent economic significance. They are made solely to enable the performance. The same copyright owners appear to be seeking a second compensation for the same activity merely because of the happenstance that the transmission technology implicates the reproduction right, and the reproduction right of songwriters and music publishers is administered by a different collective than the public performance right.[149]

Though it arose in the mirror-image context—there it was HFA arguing that streaming transmissions required a mechanical license—this line of

[148] *See* 2001 Copyright Office Report, *supra* note 120, at 142.
[149] *Id.* at 143.

reasoning applies to this situation because it touches upon the same core issue. In both cases, the copyright owners were seeking to extract a duplicative payment for a single transmission by claiming the right to be compensated for an ancillary, technological byproduct that potentially implicated another right yet had no independent economic value. As other commentators have argued, "such claims often tie the payment of royalties to the technological means by which value is delivered to the consumer, rather than to the value itself."[150] To require additional fees in such a situation would undermine the economic, utilitarian framework that underlies copyright law.

## IV. THIRTY-SECOND PREVIEWS LIKELY CONSTITUTE PUBLIC PERFORMANCES BUT SHOULD BE EXEMPT FROM LICENSING

While pure downloads are not public performances under the Copyright Act, streaming transmissions clearly are. In fact, such transmissions implicate the public performance right in both the musical composition and the sound recording. As a result, the thirty-second samples of songs found on iTunes are likely public performances. And with regards to the sound recording copyright, these transmissions will qualify as "interactive," thus requiring Apple and other online retailers to negotiate with each individual copyright holder. However, as I will argue in Part V, this inefficient and shortsighted result can be avoided if such transmissions receive protection from a statutory amendment.

### *A.As Streaming Transmissions, iTunes' Song Previews Likely Implicate the Public Performance Right for Musical Compositions and Sound Recordings*

There is little debate that streaming, which by definition allows a song to be "played" contemporaneously with the transmission, constitutes a performance under the Act.[151] And because this performance is made available to "the public" over the internet,[152] it clearly implicates the public

[150] *See* Cardi, *supra* note 41, at 865.
[151] *Id.* at 860 (noting that streaming technology "facilitates the performance of a song via transmission from the originating service, over the internet, into a user's computer RAM, and through the user's computer speakers").
[152] Courts have long held that broadcasts to geographically-dispersed listeners are still public performances, even if each member of "the public" actually receives the transmission in his home. *See*, *e.g.*, Jerome H. Remick & Co. v. Am. Auto. Accessories Co., 5 F.2d 411, 412 (6th Cir. 1925) ("A performance, in our judgment, is no less public because the listeners are unable to communicate with one another, or are not assembled

performance right in the musical composition. Further, streaming transmissions over the internet implicate the public performance right in sound recordings. This means that a typical streaming service must obtain a performance license for the musical composition from the relevant PRO and a performance license for the sound recording. iTunes' thirty-second song previews are typical streaming transmissions. As a result, without a viable defense, these song samples provided for free on iTunes likely constitute public performances of both the musical composition and the sound recording.

### *B.Equitable Considerations and Proper Legal Analysis Demand that iTunes Should Be Given the Same Exemption Currently Available to Brick-and-Mortar Music Stores*

#### 1.Equitable Considerations Favor an Exemption

The PROs' demands are unwarranted from an equitable standpoint. The sole purpose for providing these previews on iTunes is to encourage legally-purchased downloading, an activity that is licensed by the copyright owner and for which the copyright owner receives a royalty. iTunes provides this promotional device free-of-charge. To demand payment does not seem to benefit the copyright holders, much less provide an equitable basis for relief. Jonathan Potter, executive director of the Digital Media Association ("DiMA"), a trade group that represents internet music services and media companies, summarizes the issue: "They are picking on Apple because they say Apple is making a bundle of money. But these companies should be thrilled that Apple and the other services are selling music and generating millions, maybe tens of millions, in royalties."[153]

However, in a recent case—hereinafter referred to as the *Ringtone Case*[154]—the court denied a wireless company's motion for summary judgment and held that the thirty-second previews of songs provided on the company's website did not constitute "fair use," a defense to infringement that has grown from an equitable doctrine to a codified, "noninfringing use."[155] The case arose out of a dispute between ASCAP and AT&T over whether AT&T should be required to make royalty payments for the

within an enclosure, or gathered together in some open stadium or park or other public place. Nor can a performance, in our judgment, be deemed private because each listener may enjoy it alone in the privacy of his home.").

[153] *See* Sandoval, *supra* note 8.

[154] U.S. v. ASCAP, 599 F. Supp. 2d 415 (S.D.N.Y. 2009) [hereinafter *Ringtone Case*].

[155] *See* 17 U.S.C. § 107 (2009).

previews.[156] AT&T makes ringtones[157] and ringback tones[158] available for purchase and offers previews of each to its customers prior to purchase.[159] The ringtones and ringback tones can be purchased in one of two ways: either through its "MEdia Mall" website or through its MEdia Mall mobile application.[160] Before purchasing a particular ringtone, a customer may listen to a preview, which plays for ten to thirty seconds.[161] And the only way for a user to listen to a preview is to click on an icon symbolized by a speaker illustration that appears next to each song listed in the search results next to the word "BUY."[162]

While the facts of the *Ringtone Case* are distinguishable in many respects from those at play in the iTunes debate,[163] courts may be influenced by that court's decision and refuse to recognize iTunes' thirty-second samples as fair uses. However, regardless of fair use, one equitable consideration clearly cuts in favor of exempting iTunes from any additional licensing fees—namely, the treatment currently afforded traditional, brick-and-mortar music stores under Section 110 of the Act.

### 2.Section 110 Should Apply to iTunes

Copyright law protects traditional music stores—iTunes' brick-and-mortar analogs—from being charged performance fees for in-store sampling if certain requirements are met. The same should apply in the digital context. Section 110 of the Act, entitled "Exemptions of certain performances and displays," states that a "vending establishment" is exempt from liability

> where the sole purpose of the performance is to promote the retail sale

[156] *See Ringtone Case*, 599 F. Supp. 2d at 419–21.

[157] A ringtone is a tune that plays when an individual who has purchased a ringtone receives a telephone call.

[158] Ringback tones substitute a tune for the sound a caller normally hears while waiting for the person called to answer the phone.

[159] *Ringtone Case,* 599 F. Supp. 2d at 419.

[160] *Id.* at 420.

[161] *Id.*

[162] *Id.*

[163] For example, the court found the third factor to weigh heavily in favor of ASCAP "[b]ecause the expressive value of the music was copied and because that expressive value constitutes the previews *in their entirety*." 599 F. Supp. 2d at 431 (emphasis added). In fact, the "previews may be 'rather close approximations of the ringtones and [ringback tones] for purchase, and sometimes actually longer in length than the product they are promoting." *Id.* at 421. While both the iTunes and AT&T previews use verbatim copies of copyrighted works, iTunes uses thirty-second clips from songs of much longer, though varying, duration.

of copies or phonorecords of the work, or of the audiovisual or other devices utilized in such performance, and the performance is not transmitted beyond the place where the establishment is located and is within the immediate area where the sale is occurring.[164]

And in these cases, "[a copyright holder] has no right to demand royalty payments for the use of music that is exempt from copyright liability."[165] In fact, ASCAP has acknowledged the fairness of this result:

> When a performance is given at a record store, it cannot be used by the store or the customer for any other purpose. The customer cannot 'take' the performance away from the store, nor can the store profit from the performance in any way other than to demonstrate the sale of the record.[166]

Just like the song previews in physical stores, the previews available on iTunes are provided for the sole purpose of promoting the sale of the record being transmitted. While iTunes does not qualify for the statutory exemption, which by its terms is limited to in-store samples at physical locations, the purpose of the exemption supports a finding that iTunes' use of the copyrighted works is fair. However, there is an argument for excluding digital retailers from this exemption that should be considered, namely: previews at brick-and-mortar stores are different from previews over the internet with regards to satisfying the requirement that the preview "not [be] transmitted beyond the place where the establishment is located and [be] within the immediate area where the sale is occurring."[167] To use ASCAP's words:

> When a performance is given at a record store, it cannot be used by the store or the customer for any other purpose. The customer cannot "take" the performance away from the store, nor can the store profit from the performance in any way other than to demonstrate the sale of the record.
>
> But just the opposite is true for a transmission of music on the internet. Either by way of downloading or streaming the music, the "customer" can listen to the music at home, as a substitute for other means of performance, such as a broadcast radio station, an on-line audio Webcaster, or any other transmission entity which must pay performing rights fees to the creators

---

[164] 17 U.S.C. § 110(7) (2009).
[165] U.S. v. Am. Soc'y of Composers, Authors & Publishers, 157 F.R.D. 173, 207 (S.D.N.Y. 1994).
[166] *See* Reply Comments of ASCAP, at 6, In the Matter of Report to Congress Pursuant to Section 104 of the DMCA, (Sept. 5, 2000) (No. 000522150-0150-01), *available at* http://www.copyright.gov/reports/studies/dmca/reply/Reply011.pdf.
[167] *See id.* at 6–7.

and copyright owners of the music performed.[168]

ASCAP—and the court itself—relied heavily on this logic in the *Ringtone Case*.[169] To be sure, this requirement makes sense in certain circumstances, for if retailers could use free music as a "draw" to bring consumers into their stores to purchase other items, the retailers would benefit at the expense of copyright holders. But the argument falls short for a couple reasons in the iTunes context. First, this argument conflates the free transmission of the entire item to which a consumer attributes value—i.e., the full song, or, in the *Ringtone Case*, the full derivative work the consumer would otherwise have to purchase—with the use of a portion of that item as a means of encouraging sales in the full version of the copyrighted work. Further, the argument relies on the assumption that the "store" requirement is applicable to the internet context. But even if one accepts the claim that such a metaphysical "store" exists, it must be the "iTunes Store," which serves as the digital retailer's online sales platform.[170] Since users can only listen to the previews while "inside" the iTunes Store, the threats envisioned by Congress simply cannot materialize.

### *C.The Current Act Would Apply the Counter-Productive "Interactive Service" Provider Label to iTunes and Produce Inefficient Results*

Since fair use can only be established after the fact on a case-by-case basis—not to mention the *Ringtone Case*'s likely influence on any such cases—the effects of the PROs' demands on iTunes should be analyzed under current law as if fair use does not apply. Because iTunes' thirty-second song samples stream songs to users' computers over the internet, these transmissions implicate not only the general public performance right afforded musical compositions under section 106(4), but also the limited public performance right in sound recordings under section 106(6). Section 106(6) gives the sound recording copyright owner the exclusive right to perform the work publicly "by means of a digital audio transmission." As we saw above, these transmissions technically qualify as public performances. They also qualify as "digital audio transmissions" because they "embod[y] the transmission of a sound recording."[171] Therefore, their

---

[168] *Id.*

[169] *See Ringtone* Case, 599 F. Supp. 2d 415, 433–34 (S.D.N.Y. 2009).

[170] *See* Apple, iTunes: What is iTunes?, http://www.apple.com/itunes/what-is/store.html (last visited Apr. 19, 2010).

[171] "A 'digital audio transmission' is a 'digital transmission' as defined in section 101 that embodies the transmission of a sound recording. This term does not include the transmission of any audiovisual work." 17 U.S.C. § 114(j)(5) (2009). A "digital

treatment under the Act depends upon their classification within the three-tiered system created by the DPRA. And because iTunes falls under the "interactive service" classification, these transmissions are subject to voluntary licensing—meaning Apple must negotiate independently with each individual copyright holder (both musical composition and sound recording) in order to play the song over the internet.[172]

### 1.The Requirements of an "Interactive Service" Provider

The sound recording copyright owner "has a right to demand that those who perform— i.e., play or broadcast—its copyrighted sound recording pay an individual licensing fee to [the copyright holder] if the performance of the sound recording occurs through an "interactive service."[173] An "interactive service," according to the statute, "is one that enables a member of the public to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient."[174]

Because iTunes users can, "on request," enable the transmission of a particular sound recording (albeit thirty seconds of that sound recording) to be played over their computers, iTunes squarely qualifies as a provider of an "interactive service." This explains why music publishers and PROs like ASCAP are demanding payment while the PRO for sound recordings, SoundExchange, has remained silent: the law mandates that providers of "interactive services" deal directly with each sound recording copyright holder, or, in copyright jargon, enter into a "voluntary license." Further, if iTunes were required to negotiate voluntary licenses with each sound recording copyright holder, it would also be required to obtain a license for the underlying musical composition.[175] All this for streaming thirty-second

---

transmission" is simply "a transmission in whole or in part in a digital or other non-analog format." § 101. Recall that "to 'transmit' a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent." Additionally, legislative history makes clear that "transmit" is to be interpreted very broadly. *See* S. REP. NO. 94-473, at 61 (1975) ("The definition of 'transmit' . . . is broad enough to include all conceivable forms and combinations of wired or wireless communication media . . . .").

[172] *See* 17 U.S.C. § 114(d)(3) (2009); Bonneville v. Peters, 347 F.3d 485, 489 n.7 (3d Cir. 2003) ("Interactive, on-demand services are subject to an almost unconditional performance right in the copyright holder: the purveyors of such services are required to negotiate individual, discretionary licenses with individual copyright holders subject to certain time limitations for exclusive licenses.").

[173] *Arista Records*, 578 F.3d at 148.

[174] 17 U.S.C. § 114(j)(7) (2009).

[175] *See id.* at § 114(d)(3)(C) ("Notwithstanding the grant of an exclusive or nonexclusive

previews of songs that boost record sales. Not only is this result wildly inefficient, it threatens to hamper the industry's growth in the digital arena. This result highlights a legal distinction that—given the technological advances and market innovations since its enactment—now seems largely outdated and out of touch with the future of the music industry. To understand how imposing these additional costs on iTunes would be incongruous with congressional intent—not to mention common sense—one must look to the original purpose of the interactive/non-interactive distinction.

### 2.The Interactive/Non-Interactive Distinction Does not Make Sense Here

As enacted, the DPRA defined an "interactive service" as "one that enables a member of the public to receive, on request, a transmission of a particular sound recording chosen by or on behalf of the recipient."[176] The context in which this distinction was made must be appreciated. The DPRA was passed in 1995, when "the possible role of the still commercially-nascent internet in the transmission of music was not yet significant enough to be considered."[177] The eleventh-hour DMCA amendment came only three years later. At that time, the largest threat to the record industry posed by digital technology was its potential to displace record sales without providing any counterbalancing compensation. Essentially, "if an internet user could listen to music broadcast over, or downloaded from, the internet for free, the recording industry worried that the user would stop purchasing music."[178]

Congress recognized that interactive transmission services were most likely to erode record sales because these services "enable a member of the public to receive, on request, a digital transmission of the particular recording that person wants to hear."[179] The House also considered the fact

---

license of the right of public performance under section 106(6) [17 USCS § 106(6)], an interactive service may not publicly perform a sound recording unless a license has been granted for the public performance of any copyrighted musical work contained in the sound recording.").

[176] 17 U.S.C. § 114(j)(4) (1995).

[177] *Bonneville*, 347 F.3d at 488 n.4.

[178] *Arista Records*, 578 F.3d at 153.

[179] *See* S. REP. NO. 104-128, at 35 (1995) (referring to "so-called 'celestial jukebox' 'pay-per-listen' or 'audio-on-demand' services"); *see also* Jane C. Ginsburg, *Copyright Legislation for the "Digital Millennium,"* 23 COLUM.-VLA J.L. & ARTS 137, 167 (1999) ("the more advance information the user has about the digital transmission, the more the transmission facilitates a user's private copying … of the recorded performance, or, at least, enables the user to substitute listening to the targeted performance for purchasing a copy of it").

that "[s]ubscription and interactive audio services can provide multi-channel offerings of various music formats in CD-quality recordings, commercial free and 24 hours a day." In essence, then, the distinction between interactive and non-interactive transmission services was a distinction between services that promote the sales of pre-recorded music, such as traditional radio broadcasts, and those services that potentially displace record sales.

But technology—not to mention the internet's role in our society—has changed significantly since 1998. Now, iTunes provides interactive digital transmissions that actually promote record sales. In fact, the interactive nature of the iTunes platform provides the key to its success. These samples pose no threat to sales because a typical consumer does not satisfy his desire for a certain song by repeatedly listening to the same, short sample of that song. Instead, the samples promote record sales in a number of ways. For example, the samples could reaffirm a user's initial desire to own the song; or, they could introduce the user to new artists. In fact, allowing users to discover new music remains a major focal point for iTunes. It accomplishes this goal in two ways. First, "[b]ased on your previous purchases, iTunes will point you to other music you will enjoy."[180] It also provides recommendations through its innovative "Genius Sidebar" program, which works as follows:

> Once you opt in to the service, which sends your music library and usage data to Apple anonymously according to the company, iTunes can generate a list of music in your library that sounds similar to any song in it, from which you can make a playlist. The Genius sidebar performs essentially the same function, except that it draws recommendations from the iTunes music store. Those recommendations include similar songs, top albums by the artist, songs by the artist missing from your collection and iTunes Essentials collections that include the song.[181]

These capabilities sound remarkably similar to the potential benefits of digital technology that Congress recognized as early as 1995:

> These new digital transmission technologies may permit consumers to enjoy performances of a broader range of higher-quality recordings than has ever before been possible. These new technologies also may lead to new systems for the electronic distribution of phonorecords with the authorization of the affected copyright owners. Such systems could increase

---

[180] Apple, iTunes: Learn About the Features of iTunes 9, http://www.apple.com/itunes/features/#search (last visited Apr. 19, 2010).

[181] Eliot Van Buskirk, *ITunes Crashes Music Recommendation Party; Rivals Rejoice*, WIRED (Sep. 9, 2008), *available at* http://www.wired.com/listening_post/2008/09/steve-jobs-anno/.

the selection of recordings available to consumers, and make it more convenient for consumers to acquire authorized phonorecords.[182]

The interactive/non-interactive distinction made sense in the twentieth century. But by providing an "interactive service" that actually fuels record sales, iTunes calls into question the continuing viability of the interactive/non-interactive distinction vis-à-vis online retailers. Thus, subjecting iTunes and other online retailers to an additional public-performance-right licensing regime for the thirty-second song samples is nonsensical, inefficient, and plainly counter-productive. And as I will argue in Part V, this result should be changed via legislative action.

## V. CONGRESS SHOULD AMEND THE COPYRIGHT ACT

In determining which course of action to take in this situation, decision-makers should be guided by the fundamental, utilitarian view of that drives copyright law in America. They should seek to produce a result that makes sense and does not hamper the growth of an innovative retail model. Here, the best way to achieve this result is through legislative action. Therefore, Congress should amend the Copyright Act in several respects to ensure the continued growth in digital record sales.

### *A.Pure Downloads: Congress Should Amend The Definition of "Perform"*

Part III of this paper argued that proper statutory interpretation reveals a requirement that, to "perform" a work under the Act, the copyrighted work must be made contemporaneously perceptible to the user through the transmission. Because the transmission of data files containing the musical composition itself does not allow for the work to be made audible, it follows that, as a matter of law, pure downloads are not "performances" under the Act. As a result, these transmissions cannot implicate the public performance right. Analyzing the issue from a policy perspective also brings one to the same conclusion. If we assume the opposite—that a pure download is a public performance—iTunes would have to pay a mechanical license to the musical composition copyright owner for the reproduction and distribution of the copy and an additional license for the public performance of the work even though the work is completely inaudible to the user during the transmission. Since any performance that occurs in this case has no economic value,[183] such a rule would allow copyright holders to

---

[182] S. REP. NO. 104-128, at 10 (1995).
[183] *See supra* Part III(B)(2).

charge twice for the same utility-producing transmission. Such "double dipping" should not be allowed.

While one court in the Second Circuit has adopted a "contemporaneous perception" requirement, it remains to be seen if this reasoning will spread to other jurisdictions. Accordingly, Congress should amend the definition of "to perform" to explicitly require contemporaneous sensory perception. This could be accomplished by looking to the definition of "perform" as it relates to motion pictures.[184] With regards to musical works, the Act currently provides the following definition: "To 'perform' a work means to recite, render, play, dance, or act it, either directly or by means of any device or process."[185] To firmly establish the "contemporaneous perception" requirement, I propose adding a unique definition of "perform" for musical works that would read as follows: "To 'perform' a musical work means to recite, render, play, dance, or act it, either directly or by means of any device or process, *so as to make the sounds accompanying it audible*."[186]

Of course, no statutory language is impervious to litigation. One can imagine disputes over this definition, as well as over the limits of "contemporaneous." For example, suppose a user downloaded a song and then immediately played it on his computer. A PRO could argue that this two-step process should be collapsed and viewed as one. After all, the user downloaded and listened to the song within a matter of seconds. And since playing a song over a computer's speakers is certainly a "performance," the contemporaneous perception requirement is met. However, this logic erroneously conflates two legally distinct transactions and ignores clear statutory language. In analyzing whether the public performance right is implicated, the download itself must be viewed as a completely separate transaction from the user's private performance of the transferred file. This distinction was clearly envisioned by Congress: "Although any act by which the initial performance or display is transmitted, repeated, or made to recur would itself be a 'performance' or 'display' under the bill, it would not be actionable as an infringement unless it were done 'publicly,' as defined in section 101. Certain other performances and displays, *in addition*

---

[184] *See* 17 U.S.C. § 101 (2009) ("To 'perform' a work" means, "in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.").

[185] *Id.*

[186] *Id.* While "progressive" downloads fall outside the scope of this paper, the law should provide an exemption for these and other potential hybrid transmissions in cases where they follow a legal purchase of the work. Such transmissions can only occur after the user legally purchases the song and, therefore, cannot threaten to displace the sale of the work. However, I believe other statutory provisions, such as Fair Use under Section 107, can sufficiently protect these transmissions.

*to those that are 'private,'* are exempted or given qualified copyright control under sections 107 through 118."[187] Further, it is explicitly mandated by the Act, which requires the "performance" to take place *during* the transmission itself.[188]

To preempt these potential disputes, I also propose amending the Transmit Clause so that "[t]o perform or display a work 'publicly'" will mean: "to transmit or otherwise communicate a performance . . . of the work to a place specified by clause (1) or to the public, by means of any device or process . . . *but only if the performance transmitted or otherwise communicated produces the work's intended sensory perception at the time of transmission or communication*. This will ensure that the contemporaneous sensory perception requirement be applied only to the transmission of the work itself.

While establishing bright-line rules is often a risky proposition when dynamic technology is involved, in the case of legally purchased pure downloads, the copyright holders are already protected by sections 106(1) and 106(3) and, thus, already receive compensation for their creative efforts each time a song is downloaded. Allowing copyright holders to receive duplicative royalties for these transmissions drastically alters the long-standing purpose of the public performance right: to provide artists with a means to ensure economic remuneration for their works when technology allows certain performances to *displace* the market for copies of their works. Thus, this amendment would foster the growth of a revolutionary technology whose potential for the recording industry is unbounded while also reinforcing America's fundamental, utilitarian view of copyright.

### *B.Thirty-Second Samples: Congress Should Amend Section 114*

The PROs also argue that iTunes should have to pay for the right to stream thirty-second samples of songs. As the Act currently stands, there are legitimate arguments that these samples should be treated as streaming transmissions over the internet, which are definitively treated as public performances.[189] In addition, because iTunes classifies as an "interactive service" provider under section 114, it would have to engage in a terribly inefficient and counter-productive voluntary licensing regime.[190] However, because these short samples promote record sales, this logic runs counter to

---

[187] *See* H.R. REP. NO. 94-1476, at 63 (1976).
[188] *See* 17 U.S.C. § 101 (2009) ("[T]o perform a work 'publicly'" means "to transmit or otherwise communicate a *performance* or display of the work to a place specified by clause (1) or to the public.") (emphasis added).
[189] *See supra* Part IV(B).
[190] *See supra* Part IV(C).

the purpose of the public performance right and common sense. In order to avoid such a nonsensical result, Congress should amend the Act to provide iTunes and other online retailers immunity from the voluntary licensing regime under section 114.

With regards to the public performance of sound recordings "by means of a digital audio transmission," section 114 creates a three-tiered licensing regime.[191] As noted, "interactive service" providers must individually negotiate with each sound recording copyright holder and obtain a license in the underlying musical composition in order to publicly perform—i.e, stream—a song.[192] However, certain transmissions are completely exempt from having to license the rights to publicly perform songs. These services are known as non-interactive, "nonsubscription broadcast" transmissions. Essentially, they are terrestrial radio broadcasts. Traditional radio broadcasters pay no royalties to sound recording copyright owners—the recording industry—because traditionally, as one court explained, "[t]he recording industry and broadcasters existed in a sort of symbiotic relationship wherein the recording industry recognized that radio airplay was free advertising that lured consumers to retail stores where they would purchase recordings."[193] This exemption was founded in Congress' desire not to impose "new and unreasonable burdens on radio and television broadcasters, which often promote, and appear to pose no threat to, the distribution of sound recordings."[194] As discussed above, the same can now be said for iTunes' short song samples. Accordingly, iTunes and other online retailers should receive the same exemption traditionally afforded terrestrial radio broadcasters. Congress could accomplish this goal by amending section 114.

One way to do this would be to add an exception to the treatment of certain "interactive services" under section 114(d)(3) so that the iTunes and other online retailers are given the non-interactive "nonsubscription broadcast transmission" treatment afforded radio broadcasters under 114(d)(1). Another way would be to create a fourth tier, what I will call "interactive promotional transmission services." If a transmission qualified under this tier, it would receive immunity from the standard voluntary licensing regime that all "interactive services" are now subject to. It would also receive a blanket exemption from all licensing requirements, much like any non-interactive "nonsubscription broadcast transmission" does now. This would be the better option for a number of reasons. First, it would leave the current regime undisturbed with regards to those "interactive"

---

[191] *See id.*
[192] *See id.*
[193] *Bonneville*, 347 F.3d at 487.
[194] H.R. REP. NO. 104-274, at 14 (1995).

services that actually displace record sales. In this sense, it would reinforce the underlying purpose of the public performance right. Second, it would alleviate iTunes from the burdens of an absurd licensing requirement and avoid the inefficient, counter-productive results such a system would entail. Lastly, it would reflect the notion that the "interactive" label no longer carries with it a negative connotation in all circumstances.[195] If iTunes' practice of providing free, thirty-second song samples has shown us anything, it must be that an interactive service can actually boost record sales.

## VI. CONCLUSION

Until the turn of the twenty-first century, the music industry seemed unstoppable. Record sales were growing. Costs were falling. And, at its peak in 1999, the industry's annual revenues eclipsed fourteen billion dollars.[196] But since then, profits have declined at a rapid clip, due largely to file-sharing technology that has eroded sales and called into question the industry's long-standing business model.[197] This model revolved around one thing: physical record sales. In doing so, it employed on a distribution model dependent upon tangible sales in traditional, "brick and mortar" retail stores.

In contrast to the vanishing physical records sales market, the digital sales market has exploded in recent years. Not only has this market experienced exponential growth since its inception, it provides a glimpse of hope for an otherwise gloomy future for the music industry. In fact, some analysts predict digital sales to surpass physical sales by 2011.[198] This success is due in large part to one retailer, iTunes, which provides consumers the means to legally purchase and download digital music over the internet. It also provides thirty-second samples to consumers free-of-charge in an attempt to boost sales and introduce users to new artists. But instead of embracing iTunes and leveraging its potential, certain groups are demanding that iTunes pay additional licensing fees for the alleged "performance" that occurs with each download and thirty-second song preview.

However, analysis reveals that imposing such costs would lead to inefficient, nonsensical, and counter-intuitive results that would conflict

---

[195] *See supra* Part IV(C)(2).

[196] *See* John Borland, *Music Industry Blames Net for Some Revenue Woes,* CNET, Feb. 16, 2001, *available at* http://news.cnet.com/Music-industry-blames-Net-for-some-revenue-woes/2100-1023_3-252787.html.

[197] *See supra* Part II(A).

[198] *See id.*

with the underlying purpose of public performance rights and undermine the utilitarian foundation upon which American copyright law rests. Downloads do not constitute public performances under the Act, nor should they.[199] And while the thirty-second previews likely qualify as public performances under a technical application of the law, such a result should be avoided.[200] Accordingly, I propose a solution that includes a number of legislative amendments to ensure that no performance licenses will be required for these activities.

In a broader sense, this battle reflects industry groups that refuse to come embrace reality. With the industry's traditional business model all but buried, these groups are attempting to extract as much as they can from any source possible. In pursuing this shortsighted agenda, however, they neglect innovative retailers that provide a means to capitalize on the digital age and perpetuate the notion of greed so often associated with the record industry. One may ask why any group that stands to benefit from an innovative technology's success would threaten to stymie that technology's growth. This is not to say that the music industry should stop trying to find new ways to make money. Such a move would be to sound its own death knell. But it should not kill the goose that laid the golden eggs in the process.

---

[199] *See supra* Part III.
[200] *See supra* Part IV.