UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, v. AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, Defendant.	Civil Action No. 41-1395 (WCC)
In the matter of the Application of CELLCO PARTNERSHIP d/b/a VERIZON WIRELESS, Applicant, for the Determination of Reasonable License Fees	

MEMORANDUM OF *AMICI CURIAE* BROADCAST MUSIC, INC. AND SESAC, INC. IN OPPOSITION TO VERIZON WIRELESS' MOTION FOR SUMMARY JUDGMENT CONCERNING RINGTONES

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Broadcast Music, Inc. ("BMI") and SESAC, Inc. ("SESAC") submit this *amici curiae* memorandum on the question of whether Cellco Partnership d/b/a Verizon Wireless ("Verizon") requires a public performance license for its provision of ringtones. BMI and SESAC oppose Verizon's motion for summary judgment that ringtones are exempt from the public performing right.

INTEREST OF AMICI CURIAE

Broadcast Music, Inc.

As the Court is aware, BMI is a music performing rights organization ("PRO") of comparable size to ASCAP. BMI was founded in 1939 to provide competition to ASCAP in the licensing of performing rights. Today, BMI continues to compete with ASCAP and SESAC to represent the public performing right of songwriters, composers, and music publishers ("affiliates") in their musical works.

Like ASCAP does on behalf of its members, BMI issues blanket licenses to music users for the public performance of BMI's affiliates' works, and collects license fees on behalf of those affiliates. BMI distributes those fees as royalties for the BMI works that have been performed on licensed media such as television, radio, and more than 6,500 digital media properties including thousands of Internet sites and mobile entertainment services, as well as in concert halls and other venues where music is enjoyed by the public. In all, BMI has approximately 375,000 affiliates, and licenses the public performing right in over 6.5 million musical works.

SESAC, Inc.

Founded in 1930, SESAC is the second oldest United States PRO. It represents thousands of American songwriters, composers, lyricists, and music publishers, and more than a quarter million musical works. SESAC licenses the nondramatic public performance of such

musical works in its repertory within the United States, and distributes to its affiliates royalties from the license fees paid by music users, including online and mobile music services.

The repertoires of BMI and SESAC also include many thousands of foreign works as a result of reciprocal agreements with over 80 foreign PROs around the world. BMI's and SESAC's affiliates depend on the royalties they receive from their PROs. Indeed, for many of BMI's and SESAC's working composers and songwriters, performing rights royalties – not royalties from the sale of recordings – are their largest source of income from their works.

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Cell phones and other mobile digital devices have become an increasingly popular way that the public listens to music. The enormous success of the Apple iPhone in just the last two years, as well as other "smartphones," has transformed the cell phone from a utilitarian tool into an entertainment center that has made music an even greater part of the fabric of American culture. Eighty-four percent of Americans now have a cell phone,[1] and for millions of them, ringtones are as basic to the cell phone as a car's automatic transmission.

While music itself is as central a part of American life as ever, the music industry continues to see a decline in sales of physical copies of sound recordings (and thus a corresponding decline in the mechanical royalties payable to songwriters and publishers). With the rise of digital technology, the music industry has necessarily looked for new ways to monetize the public's enjoyment of its artists' creative work. Despite rampant copyright piracy that has severely handicapped the industry's efforts, digital music revenues have been steadily growing. Mobile music services are a significant part of this digital business, through carriers

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1. Jennifer Harper, *Ties to cell phones run deep as ringtones don't miss a beat*, WASH. TIMES, Feb. 17, 2009, at A03.

including AT&T and Verizon. Mobile music revenue was $2.5 billion worldwide in 2008, and is projected to reach $5.5 billion by 2013.[2] Companies selling stand-alone portable music players, such as the iPod, face increasing competition from multimedia phones.[3] Ringtones themselves have become a multi-billion dollar business in only a few years.[4] Industry experts estimate that 8.5% of U.S. mobile subscribers purchased a ringtone in November 2008.[5] Verizon itself asserted recently that it has "long led in mobile music,"[6] and "periodically trumpet[s] statistics that illustrate the growing popularity" of services including ringtones and music."[7]

Although the technological means of music consumption continue to change, the Copyright Act was drafted to ensure that the public performing right for songwriters, composers, and music publishers would endure such changes. BMI's and SESAC's affiliates are entitled to receive compensation for the public performance of their copyrighted works as expressly provided for in the Act.

The ruling sought by Verizon in this Court, if granted, would immediately impair BMI's and SESAC's ability to license not only Verizon's ringtones, and could impact other uses of music that other music services will seek to analogize to ringtones. A ruling that Verizon need

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2. *Rising mobile dollars,* BILLBOARD, June 13, 2009, at 10.

3. Anne Morris, *Media & Entertainment: Music services and models: Blood on the tracks*, TOTAL TELECOM, Feb. 3, 2009.

4. Jay Yarow, *Nokia Tries Apple's Tune,* BUS. WK. ONLINE, July 1, 2008, http://www.businessweek.com/technology/content/jul2008/tc2008071_969873.htm

5. Press Release, comScore, Smartphones Provide Extra Mana for Mobile Games Industry as Audience for Downloaded Games Grows 17 Percent (Jan. 30, 2009), http://www.mmetrics.com/Press_Events/Press_Releases/2009/1/Mobile_Gaming_Grows/(language)/eng-US

6. Marin Perez, *Verizon Unveils Music, App Stores,* INFORMATIONWEEK, Apr. 3, 2009, http://www.informationweek.com/story/showArticle.jhtml?articleID=216402772

7. Olga Kharif, *Mobile TV's Weak U.S. Signal,* BUS. WK. ONLINE, Mar. 3, 2008, http://www.businessweek.com/technology/content/mar2008/tc2008033_721418.htm

not purchase a public performance license for these uses will harm songwriters, composers, and publishers, who depend on performing rights royalties for their livelihood.

SUMMARY OF ARGUMENT

Part I discusses why, before the Court should even entertain Verizon's argument that its transmissions of ringtones to its customers are not public performances, further factual development is needed with respect to Verizon's system design and engineering choices to determine how ringtones reach customers and are made audible. Under this Court's ruling in the *America Online* case, such technological design distinctions may be crucial in determining whether the transmission of ringtones by Verizon are themselves public performances requiring a license. Thus, Verizon's summary judgment motion should be denied based on an inadequate factual record.

Parts II-IV discuss why Verizon is secondarily liable for the performances of ringtones when they play in public in any event.

Part II discusses why Verizon's pervasive involvement in and profit from the process by which ringtones play in public, including its use of ringtones to increase revenue from other services, demonstrates its secondary liability for the public sounding of ringtones on its customers' phones under the *Grokster* case and well-settled principles of secondary liability.

As discussed in Part III, the performance of ringtones obtained from Verizon cannot meet the standard to qualify for a nonprofit exemption under section 110(4), both because it is not the type of non-commercial activity the statute was intended to exempt, and because it specifically violates the condition that there be no payment of any fee or compensation to the promoters or organizers of the performance.

Part IV discusses why the Register of Copyrights' opinion with respect to ringtones under section 115 has no bearing here.

Finally, as discussed in Part V, BMI's and SESAC's affiliates have received substantial royalties for the public performance of their copyrighted works via ringtones. Any ruling that ringtones do not require public performance licenses would permanently destroy this revenue stream. Moreover, if members of foreign PROs do not receive royalties for the use of their music in the United States, those foreign rights organizations may refuse to pay United States affiliates reciprocal royalties for ringtone uses of their works abroad, depriving BMI's and SESAC's affiliates of a foreign revenue source as well.

ARGUMENT

I. NUMEROUS FACTUAL QUESTIONS ABOUT VERIZON'S SYSTEM DESIGN AND ENGINEERING CHOICES MAKE SUMMARY JUDGMENT INAPPROPRIATE AT THIS TIME.

This Court ruled in *America Online* that downloaded transmissions of music files over the Internet, when they are not capable of or designed for contemporaneous audible perception during the transmissions, do not constitute public performances of the downloaded songs. *United States v. Am. Soc'y of Composers, Authors and Publishers (In re America Online, Inc.)*, 485 F. Supp. 2d 438 (S.D.N.Y. 2007), *appeal docketed*, No. 09-0539 (2d Cir. Feb. 10, 2009). In contrast, the Court recognized that streaming of musical works does constitute public performances. *Id.* at 442. The Court also specifically noted in footnote 5 that "[w]e do not mean to foreclose the possibility, however, that a transmission might, under certain circumstances, constitute both a stream *and* a download, each of which implicates a different right of the copyright holder." *Id.* at 446 n.5 (emphasis in original).

Amici curiae respectfully disagree with this decision's holding that transmissions must be capable of or designed for contemporaneous perceptibility to constitute public performances, and note that it is currently on appeal to the Second Circuit. However, even under the rationale of that decision, the Court's footnote acknowledging that certain transmissions can constitute both a

stream and a download means that the technical details of the ringtone transmission process apparently are critical to the Court's analysis. As we read the Court's decision, it is precisely such details which may determine whether the transmission of a ringtone from Verizon to a mobile phone in and of itself constitutes a public performance. This includes such questions as how the music is initially transmitted across the Verizon network to the mobile phone, how Verizon's network activates the ringtones of its customer when a third party dials the customer's telephone number, how Verizon is able to deactivate the ringtones of its customer when the customer drops his or her Verizon cell phone service, and how Verizon prevents its customer who has supposedly purchased a copy of the ringtone from porting that music onto any other device or listening to it except as a continuing customer of the Verizon mobile telephone service. Under the *America Online* decision – with its emphasis on how the transmission is "designed" and what it is "capable" of – all the system design and engineering details become critical to the transmission analysis. Almost of equal significance is whether alternative design and engineering choices could have yielded the same functionality as ringtones while yielding different results in terms of also being "designed" for or "capable" of contemporaneous or near-contemporaneous audibility.

As ASCAP explains in its opposition to Verizon's motion, ringtones can be sent to mobile phones as streams, pseudo-streams (progressive downloads), or downloads. (ASCAP'S Opp'n to Verizon's Mot. Summ. J. Concerning Ringtones ("ASCAP Br.") 6.) However, the specific factual details of how and why Verizon decides to transmit its ringtones are unknown. Indeed, ASCAP notes that Verizon produced additional technical documents as recently as June 10, and advised ASCAP of the availability of a new witness who may address technical issues on June 12. (*Id.* 6 n.17.) To BMI's and SESAC's knowledge, there has been no expert testimony

from Verizon on ringtone transmission, despite the importance under the *America Online* decision of how such transmissions are structured.

Verizon's system design and engineering choices with respect to ringtones therefore need more factual development in order for the Court to be in a position to determine whether they are, as Verizon claims, downloads within the meaning of the *America Online* holding, or whether they are both streams and downloads within the meaning of the Court's footnote 5 in that case – or whether they are something else entirely. Summary judgment in favor of Verizon on this question is premature and inappropriate. There should be a full airing of all the facts – including expert testimony from both sides – before the Court decides whether and how it should apply its *America Online* decision to Verizon's ringtone transmissions.

II. VERIZON'S PERVASIVE INVOLVEMENT IN AND PROFIT FROM ITS CUSTOMERS' PLAYING OF RINGTONES IN PUBLIC DEMONSTRATES ITS SECONDARY LIABILITY.

Ringtones play in public millions of times a day across the United States. Under the Act, "[t]o perform or display a work 'publicly' means . . . (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 . . . ." 17 U.S.C. § 101. Under this definition, when a ringtone plays on a train, at a public park, in a restaurant, or in a supermarket, it is being publicly performed, members of the public are momentarily entertained, and the songwriter is entitled to be compensated for that performance of his or her work. Indeed, informed observers assert that people buy ringtones precisely so they can make public statements about themselves, when "their" ringtone sounds in public.[8] Just as background music services that play in

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8. "Consumers purchase these two music products [full track songs and ringtones] to fulfill different needs, which means the value they receive for each kind of purchase is different. Consumers purchase and listen to music almost exclusively for their own personal pleasure. Similar to other forms of entertainment, such as going to

restaurants or stores must be licensed and paid for, the public sounding of ringtones must be licensed and paid for by Verizon.

And Verizon markets and sells its ringtones in connection with other services and fees in order to increase its overall revenue. Verizon touts its "online media store [that] gives our customers a one-stop shopping experience for all kinds of music – ring tones and ringback tones and now MP3s . . . ."[9] Moreover, Verizon "is the only operator that links its ringtone and over-the-air download store to its music ID service."[10] Generally, to purchase and use a Verizon ringtone, the buyer must either be a subscriber or prepaid Verizon customer. (ASCAP Br. 3.) If a user fails to make payments to Verizon, Verizon can deny him the ability to use his purchased ringtone. (*Id.* 5-6.)

The doctrine of secondary liability exists in copyright law – as it does elsewhere in the law under labels such as respondeat superior and principal-agent liability – to ensure than one who organizes, assists, contributes to, profits from, controls, or induces infringement cannot hide behind someone who is harder to locate, is more expensive to transact with, is less sophisticated, or has shallower pockets. In this case, the doctrine acts to ensure that Verizon cannot shirk its responsibility to pay for these uses and instead try to hide behind its customers, who are tethered to Verizon by the continued payments and continued use of its network that Verizon requires for access to the ringtones they have purchased.

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the movies, the value is in enjoying the experience. On the other hand, ringtones fulfill consumers' need for personal expression. They are an outward statement to those around us about who we are: quirky, retro, hip, or funny. Ringtones are more like a personalized license plate. In a subtle way, ringtones enable consumers to tell the people around them something about themselves." Drew Hull, *Ringtones & Full Track Download Pricing: No Conflict Here!*, http://wireless.npd.com/bulletinRingtonePricing.html (last visited June 30, 2009).

9. Perez, *supra* note 6.

10. Antony Bruno, *2008 top mobile executives,* BILLBOARD, Sept. 13, 2008, at 27.

In its landmark *Grokster* decision, the Supreme Court confirmed and clarified the application of secondary liability principles to copyright. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005). It held that:

> One infringes contributorily by intentionally inducing or encouraging direct infringement, see *Gershwin Pub. Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (C.A.2 1971), and infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it, *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 307 (C.A.2 1963).

Id. at 930. And, as a subspecies of contributory infringement, "one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement," is liable for inducement. *Id.* at 936-37.

Therefore, even if the initial transmission of a ringtone across Verizon's network to its customer were itself not a public performance, Verizon's pervasive involvement in, and profit from, the process by which a ringtone is made to sound in public plainly evidences its secondary liability for inducement. Verizon sells the mobile phone to its customer, and often supplies the phone number. When that number is called, Verizon controls the ringtone operation during incoming calls, to activate the ringtone and make it sound aloud. (ASCAP Br. 7.)

Indeed, Verizon's involvement in the public performances by its customers is substantially more hands-on than the defendants' role in the illegal copying at issue in *Grokster*. *Grokster* involved peer-to-peer file sharing computer networking software distributed by Grokster, Ltd. and StreamCast Networks, Inc. Members of the public downloaded the software onto their own computers, which permitted them to share unauthorized copyrighted music and video files with each other, but the illegal copies were never on servers owned or operated by the defendants. 545 U.S. at 919-22. Here, in contrast, the use of the Verizon network to make the ringtones sound in public is fundamental.

The Supreme Court reversed a grant of summary judgment to Grokster and StreamCast on secondary liability. *Id.* at 919. The Court rejected defendants' argument that, because the software at issue was capable of significant noninfringing uses, they were not legally responsible for the widespread copying of copyrighted material by the recipients of its software. *Id.* at 933-34. The far greater involvement of Verizon in the public performances of its paying customers means that it too is subject to secondary liability.

Even aside from the far greater degree of physical involvement by Verizon in the sounding of ringtones than was true of the copying in *Grokster*, the continuing commercial involvement of Verizon in its customers' use of ringtones places it squarely within the holding in *Grokster*. The *Grokster* Court relied in part on the defendants' efforts to profit from the copying to find that it could be liable for inducement. A piece of evidence of Grokster's and StreamCast's unlawful objective that was "particularly notable" was the fact that these distributors made money by selling advertising space by directing ads to the screens of their software users. *Id.* at 939. The more people who used their software, the more ads were sent, and the more advertising revenue was earned. *Id.* at 938-40. Thus:

> Since the extent of the software's use determines the gain to the distributors, the commercial sense of their enterprise turns on high-volume use, which the record shows is infringing. This evidence alone would not justify an inference of unlawful intent, but viewed in the context of the entire record its import is clear.

Id. at 940.

Similarly, Verizon's business model for ringtones is structured so that ringtones drive sales of other products, and a user must stay current in his continuing payments to Verizon in order to be able to continue to use his purchased ringtones. Just as in *Grokster,* the high-volume use of ringtones means greater gain for Verizon. Moreover, Verizon is liable under *Gershwin* for contributory infringement, as it materially contributes to the infringement carried out by its

customers by controlling the ringtone operation during incoming calls by activating the ringtone and making it sound aloud, and for vicarious liability under *Shapiro, Bernstein* because it profits from the infringement and declines to exercise its right to stop or limit it. *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159 (2d Cir. 1971); *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304 (2d Cir. 1963).

As in *Grokster*, summary judgment for Verizon here on the issue of secondary liability would be improper and unsupported by the evidence.

III. VERIZON IS NOT EXEMPT UNDER SECTION 110(4).

Accepting for the purpose of argument that its customers do indeed make public performances when their handsets play music ringtones that are audible to the public, outside their circle of family and friends, Verizon argues – without any support in the case law – that the customers (and Verizon standing behind them) qualify for the exemption from liability provided by 17 U.S.C. § 110(4). (Mem. Law Supp. Verizon Wireless' Mot. Summ. J. on Ringtones ("Verizon Br.") 14-16; Reply Mem. Supp. Verizon Wireless' Mot. Summ. J. on Ringtones 12-15.) There is simply no basis, either in the text or history of 110(4), to apply this exemption to the commercial provision of ringtones through the Verizon network.

Section 110(4) provides a narrow exemption for copyright infringement when all of the following conditions are met:

> performance of a nondramatic literary or musical work otherwise than in a transmission to the public, without any purpose of direct or indirect commercial advantage and without payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers, if (A) there is no direct or indirect admission charge; or (B) the proceeds, after deducting the reasonable costs of producing the performance, are used exclusively for educational, religious, or charitable purposes and not for private financial gain . . .

17 U.S.C. § 110(4).

Verizon's attempt to avail itself of this exemption is unsupported by the statute and the case law interpreting it. Verizon specifically fails to meet one of the required conditions to obtain this exemption: the performance must be "without payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers." 17 U.S.C. § 110(4). "Thus, a performance will not fall within the Section 110(4) exemption if it is for the purpose of commercial advantage to any of the performers, promoters or organizers . . . ." Melville B. Nimmer & David Nimmer, 2 NIMMER ON COPYRIGHT, § 8.15[E][4] at 8-195 (Matthew Bender, Rev. Ed.). When Verizon's customers purchase a ringtone, they are paying for the ability to perform that ringtone. As the promoter and organizer who is selling that functionality to the customers (and sending the signal through its network to sound the ringtone), Verizon is being paid a fee and is deriving commercial advantage from the sale. It receives further revenue because its customers must continue to be up to date in their payments to Verizon in order to use their purchased ringtones. Verizon therefore cannot meet this prong of the 110(4) exemption, and these performances are not exempt.

The narrowness of the 110(4) exemption is illustrated by that the fact that BMI and SESAC have located no court decision in which any defendant ever successfully availed itself of it. Instead, courts have invariably rejected defendants' attempts to exempt their infringing performances of copyrighted music. For example, a court held that a performance at a charity benefit at a bar was not exempt because the bar collected proceeds from alcohol sales during the benefit. *Morganactive Songs, Inc. v. Padgett,* No. 5:04-CV-145 (CAR), 2006 WL 2882521, at *1-3 (M.D. Ga. Aug. 3, 2006). Given that a local bar holding a charity event could not meet the standard necessary for this exemption, the idea that a company like Verizon should be able to hide behind this non-profit exemption contradicts the meaning and application of the statute.

Data services, which include ringtones, make up 25% of all Verizon revenues, which were almost $25 billion in the third quarter of 2008.[11]

IV. THE REGISTER OF COPYRIGHTS' STATEMENTS REGARDING 17 U.S.C. § 115 HAVE NO BEARING HERE.

In 2006, the Register of Copyrights was asked to decide whether ringtones could claim the benefit of the reproduction and distribution (mechanical) rights compulsory license under section 115. The Register ruled that "there is no basis to conclude that the *primary purpose* of the ringtone distributor is to distribute the ringtone" to members of the public for "public use," as opposed to "private use." (*DPRA,* Dkt. No. RF 2006-1 (C.R.B. Oct. 16, 2006) at 33, attached as Exhibit X to Decl. Hillel I. Parness in Supp. of Opp'n of ASCAP to Mot. of AT&T for Summ. J. on Ringtones, dated June 12, 2009 ("Parness Decl.") (emphasis in original).)

Verizon weakly attempts to argue that the Register of Copyrights' statements in the context of making and distributing ringtones as digital phonorecord deliveries have some relevance to the present motion. (Verizon Br. 13-14.) However, the public performing right under § 106 at issue here is entirely separate from and has a different purpose than § 115, and thus these statements have no bearing on whether a public performance license is required for ringtones under § 106.

The public/private issue arises under § 115 because, with respect to reproduction and distribution (mechanical) rights, "[a] person may obtain a compulsory license only if his or her primary purpose in making phonorecords is to distribute them to the public for private use, including by means of a digital phonorecord delivery." 17 U.S.C. § 115(a)(1). In contrast, the issue arises under § 106 in connection with the performance right, because the copyright owner has the exclusive right to "perform the copyrighted work publicly." 17 U.S.C. § 106(4).

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11. Steve Tarter, *Texting growth is phenomenal,* JOURNAL STAR, Nov. 2, 2008.

Thus, these two statutes have different meanings and contexts, and the Register's finding is unrelated to this case. In the proceeding before the Register, even the Recording Industry Association of America, arguing that ringtones were for private use under §115, conceded that "the phrase 'private use' is not the opposite of 'public performance,' but means 'personal' or 'noncommercial use.'" (Parness Decl. Ex. X at 31.) Verizon's customers who purchase ringtones do not make commercial uses of the ringtones such as selling or renting them – but they do publicly perform them when their phones ring outside their circle of friends and family, whether or not their primary purpose in buying the ringtone is noncommercial in nature. 17 U.S.C. § 101 (definition of "publicly" perform). The Register's determination is irrelevant to whether a public performance license is required for ringtones under § 106.

V. BMI AND SESAC AFFILIATES RELY ON REVENUE FROM PUBLIC PERFORMANCES SUCH AS RINGTONES, AND WOULD BE ADVERSELY AFFECTED BY A RULING THAT VERIZON REQUIRES NO SUCH LICENSE.

BMI and SESAC began licensing the mobile entertainment market as early as 2001. From then until 2006, there was a vibrant market for the performance right in ringtones. Hundreds of entities, including virtually every major ringtone provider, entered into BMI and SESAC licenses providing for payment for their public performance of ringtones. During this time, BMI and SESAC licensed hundreds of millions of ringtone performances, and distributed millions of dollars to their affiliates.

In 2006, some of these licensees began refusing to pay BMI and SESAC for ringtone licenses, claiming that ringtones required no such license. This dispute reached critical mass by the end of that year, with most of the licensees refusing to pay. These refusals to pay solidified in the aftermath of this Court's ruling in the *America Online* case that the downloads at issue there did not constitute public performances. 485 F. Supp. 2d 438. In fact, that holding did not

address ringtones or any other transmissions of music using telephony. It only addressed downloaded music files that were assumed to be not designed for or capable of "contemporaneous" perception, transmitted over the Internet. Yet customers seized upon that holding as a justification for their refusal to pay for their use of ringtones. Between 2006 and 2008, BMI and SESAC songwriters, composers, and publishers lost millions in expected ringtone income.

Most of the previously licensed ringtone services either made rate court applications or signed interim agreements, giving BMI and SESAC the right to collect payment retroactively upon resolution of the ringtone dispute. It is clear that the impact of a ruling by this Court that Verizon's use of ringtones does not require a public performance license would be sweeping. It is virtually certain that the customers refusing to pay BMI and SESAC would continue to do so, even though the decision is not formally binding on BMI or SESAC.

Moreover, a ruling in favor of Verizon here would also likely be interpreted by digital music transmitters as a broad expansion of the Court's *America Online* decision, and therefore as giving all sorts of music transmitters *carte blanche* to operate without public performance licenses despite making music transmissions quite different from those at issue in *America Online*.

A holding that ringtones do not require a public performance license would also place at risk substantial royalties received annually from foreign PROs and distributed to music creators for ringtones licensed throughout the world. BMI and SESAC have reciprocal agreements with more than 80 foreign PROs. Under these agreements, foreign PROs license the performing right in performances of U.S. writers' works occurring in their countries and forward the money collected on to BMI and SESAC. BMI and SESAC, in turn, do the same with respect to U.S.

performances of works by foreign writers and composers. Throughout Europe and in other countries, the creator of the musical work is paid a royalty for the performance of his or her musical work via a ringtone, and BMI's and SESAC's affiliates are therefore entitled to payments for ringtones in these countries. *See, e.g., Canadian Wireless Telecomms. Ass'n v. Soc'y of Composers, Authors & Music Publishers of Can.*, [2008] 3 F.C. 539 (songwriters are separately compensated for the communication to the public right in ringtones in Canada). These foreign royalties are not insignificant. For example, the German PRO, GEMA, listed ringtones as the source for € 850,000 in combined mechanical and performance income in 2007.[12] A holding that ringtones do not require payment of public performance fees may very well cause these foreign PROs to withhold substantial royalties from U.S. creators whose musical works are being exploited throughout the world.

12. GEMA, 2007 ANNUAL REPORT 27.

CONCLUSION

This Court should rule that the use of ringtones requires a public performance license, or at a minimum that genuine issues of material fact exist, and Verizon's motion for summary judgment should thus be denied.

Dated: New York, New York
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Respectfully submitted,

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