

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

UNITED STATES OF AMERICA,

Plaintiff,

- against -

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

**REPLY MEMORANDUM IN SUPPORT OF
VERIZON WIRELESS' MOTION FOR SUMMARY JUDGMENT ON RINGTONES**

WILEY REIN LLP

Bruce G. Joseph (BJ 8345)
Andrew G. McBride (AM 1966)
Michael L. Sturm (MS 3939)
1776 K Street NW
Washington, DC 20006
Tel: (202) 719-7000
Fax: (202) 719-7207
bjoseph@wileyrein.com
amcbride@wileyrein.com
msturm@wileyrein.com

Attorneys for Cellco Partnership d/b/a
Verizon Wireless

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INTRODUCTION AND SUMMARY

ASCAP's Opposition seeks to relitigate this Court's April 2007 decision that downloads do not implicate the public performance right. *United States v. ASCAP (Application of AOL, Inc.)*, 485 F. Supp. 2d 438, 446 (S.D.N.Y. 2007) (the "*Download Decision*"). ASCAP first displays remarkable amnesia: it presented extensive evidence about ringtones in the cross-motions leading to the *Download Decision* (the "Download Motions"), including video demonstrations and sworn testimony that ringtones are "purchase[d] for download," but ASCAP now argues (at 11) that "ringtones are decidedly different from the 'downloads' at issue" in the *Download Decision*. The Court's core holding in the *Download Decision* is that it is "the simultaneously perceptible nature of a transmission that renders it a performance under the Act." 485 F. Supp. 2d at 446. That holding controls here, for the download of a ringtone (which makes no perceptible sound and takes a fraction of the time necessary to perform the work) cannot be a "performance" under that reasoning.

ASCAP also reprises numerous arguments previously made and rejected by this Court in the *Download Decision*. They are no more valid here. Moreover, ASCAP's recycled argument that the download is an "intermediate transmission" leading to a performance has been foreclosed by *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 137 (2d Cir. 2008).

ASCAP next throws out a host of infringement theories in a manner that bespeaks legal desperation. ASCAP attempts to fuse the download transmission to the network signal that alerts a phone to an incoming call, arguing that this combination subjects Verizon Wireless to direct liability for any ringing that occurs in public and that the signal "otherwise communicates" a performance. But the network signal is wholly unrelated to whether the subscriber has purchased and chosen to use a ringtone, so it cannot be the kind of volitional act that *Cartoon Network* teaches is required for direct liability. Nor does the incoming call signal carry any music capable of performance. ASCAP's tortured construction of "otherwise communicate" cannot be reconciled with the *Download Decision* or the Copyright Act. Further, ASCAP's continued reliance on the download, either alone or combined with other alleged elements, reflects yet another attempt to obtain additional compensation for a transaction for which its members are already fully and fairly compensated.

ASCAP's secondary liability arguments fail for numerous reasons, including, most notably, ASCAP's failure to identify any direct infringement, its misconstruction of section 110(4) and the relevant burden of proof, and its misapplication of the *Sony* "capable of substantial non-infringing use" doctrine. As in the *Download Decision*, the issue here is one of law involving an undisputed nucleus of fact, so "the issue before the Court is thus purely one of statutory construction," and summary judgment is appropriate. See 485 F. Supp. 2d at 442.

ARGUMENT

I. ASCAP'S MAIN ARGUMENTS SEEK TO RELITIGATE THIS COURT'S *DOWNLOAD DECISION* AND SHOULD BE REJECTED.

A. Ringtone Downloads Were Considered in the *AOL* Case and Were Within the Scope of the *Download Decision*.

ASCAP argues at length (Opp. at 1, 10) that ringtone transmissions are not downloads and were not at issue in the Download Motions, even though ASCAP itself put them at issue there. ASCAP then repeats numerous arguments that the Court rejected in its *Download Decision*. The Court should reject ASCAP's attempt to relitigate that decision.

ASCAP asserts (at 11) that "[r]ingtones are decidedly different from the 'downloads' at issue in this Court's 2007 decision" and that "[r]ingtones, quite obviously, are not the 'downloads' that the Court considered." But ASCAP itself presented ringtone transmissions to the Court as "downloads" in its Download Motion. In a declaration supporting ASCAP's Download Motion, ASCAP's Vice President, New Media and Technology, Matthew DeFilippis, included a section about ringtones, in which he swore that ringtone purchases were downloads:

Typically, users can access a company's ringtone offerings through an Internet site. Using the site, a user can browse for and locate songs, which he or she can then stream as previews and purchase for download as ringtones. My video demonstration gives examples of how to preview and purchase for download as ringtones.

Reply Decl. of Matthew J. Astle ("Astle Reply Decl.") Ex. A ¶ 29 (DeFilippis Decl. in Supp. of ASCAP's Download Mot. (Feb. 27, 2007) ("DeFilippis Download Decl.)) (emphasis added). He described a ringtone as "a digital file played by a mobile phone or other mobile device to alert the user to an incoming call or message" and further swore that "[t]ypically, a wireless service transmits a ringtone directly to the user's wireless device, where it resides and is then played to signal an incoming

call or message.” *Id.* ¶ 28 (emphasis added). He also presented ten video demonstrations, four of which focused on ringtone downloads, with three of those specifically describing them, in ASCAP’s words, as “downloads.” Astle Reply Decl. Ex. B (exhibit to DeFilippis Download Decl.).

ASCAP was not alone in presenting ringtones to the Court as downloads. The Applicants quoted at length from an article discussing ringtones as downloads.¹ Two of the applicants sold ringtone downloads and thus had an immediate interest in their “public performance” status.² Similarly, the Recording Industry Association of America, Inc. (“RIAA”), whose brief the Court cited (*Download Decision*, 485 F. Supp. at 446-47), specifically defined downloads to include ringtones;³ CTIA-The Wireless Association submitted an entire brief arguing that ringtone download transmissions were not public performances.⁴ In short, contrary to ASCAP’s assertions here, ringtones were squarely presented to the Court as downloads covered by the Download Motions.⁵

B. ASCAP’s Arguments that Ringtones Are “Capable Of” or “Designed For” Contemporaneous Perception Are Meritless and Are Precluded By the *Download Decision*.

ASCAP’s argument that ringtones are “capable” of contemporaneous perception was made and rejected in the Download Motions. ASCAP argues (Opp. at 12) that ringtones are performances because they may be heard “immediately upon transfer,” but that statement stretches the undisputed evidence and, in any event, was rejected in the *Download Decision*.⁶

¹ Astle Reply Decl. Ex. C at 14-15 (Applicants’ Download Mem.) (quoting Steven Masur & Ursa Chitrakar, *The History and Recurring Issues of Ringtones: Lessons for the Future of Mobile Content*, 5 VA. SPORTS & ENT. L.J. 149, 157 (2006)) (“It is hard to imagine any specific performing act that would actually happen during purchasing a ringtone (or other download), because the musical composition downloaded as a ringtone is merely information or bytes, and not an experiential performance of the composition (as it is in the case of streaming).”).

² Astle Reply Decl. Ex. A ¶ 28 (DeFilippis Download Decl.) (describing ringtone services offered by AOL); *id.* Ex. D at ASCAP-VZW022899 (Expert Report of William H. Greene (discussing Yahoo!’s ringtone services)).

³ See Astle Reply Decl. Ex. E at 1 n.1 (Br. of *Amicus Curiae* RIAA) (“Throughout this brief, we use the term download to refer to the kinds of downloads that are made by the parties to this proceeding and other, similar downloads typical today, including ... downloads of audio and audio visual ringtones.” (emphasis added)).

⁴ See *id.* Ex. F at 4-5 (Br. of *Amicus Curiae* CTIA).

⁵ ASCAP is similarly wrong to say (Opp. at 1, 11, 14) that the *Download Decision* was limited to so-called “pure downloads,” which ASCAP previously defined as the purchase of “a permanent copy without any conditions on its use.” Astle Reply Decl. Ex. A ¶ 5 (DeFilippis Download Decl.). The Court recognized that downloads may be “conditional,” or subject to limitations, and still not be public performances. *Download Decision*, 485 F. Supp. 2d at 441-42 (“Providers sometimes attach conditions to the download and playback of a song, such as the maintenance of a current subscription to the provider or a limitation on the number of times the audio file may be reproduced.”). Thus, ringtones are downloads whether conditional or unrestricted.

⁶ ASCAP there argued that “[t]racks downloaded from the Realplayer Music Store play automatically after the download transmission is complete.” Astle Reply Decl. Ex. G at 7 (ASCAP Download Mem.).

[W]e are not persuaded by ASCAP's argument that downloaded music files are indistinguishable from streamed performances because, after a certain amount of digital data has been transmitted to the client computer, the purchaser can begin listening to the transmitted portion of the music file. However, the mere fact that a customer's online purchase is conveyed to him in a piecemeal manner, each segment of which is capable of playback as soon as the transmission is completed, does not change the fact that the transmission is a data transmission rather than a musical broadcast.

Download Decision, 485 F. Supp. 2d at 446. After analogizing such immediate playback to a retail purchaser playing a musical recording "as soon as he receives it," the Court concluded that "it is not the availability of prompt replay but the simultaneously perceptible nature of a transmission that renders it a performance under the Act." *Id.* (emphasis added).

In reaching this conclusion, the Court quoted with approval the similar statements of two governmental authorities. The Copyright Office has stated that "we do not endorse the proposition that a digital download constitutes a public performance even when no contemporaneous performance takes place."⁷ The Department of Commerce's expert Task Force on the National Information Infrastructure concluded: "When a copy of a work is transmitted . . . 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."⁸

Here, the evidence is undisputed that ringtone transmissions are not simultaneously perceptible and require some action by the recipient. *See Verizon Wireless' Mem.* ("VZW Mem.") at 2-3; *Astle Decl. Ex. 1 ¶¶ 5-6* (Ruth Decl.) (May 22, 2009). The declaration of ASCAP's technology consultant confirms that ringtone playback may only occur after the ringtone download is completed. *See Decl. of Jerry A. Kaufman ¶ 37* (June 12, 2009) ("Kaufman Decl.") ("Immediately after the ringtone transmission is completed, Verizon allows the subscriber to play the ringtone. As a result, the ringtone can be played virtually immediately after it has been transmitted to the subscriber's mobile phone." (emphasis added)). ASCAP's Opposition similarly admits that ringtones cannot be played until after the transmission is complete and argues that Verizon Wireless specifically designs its ringtone downloads not to be contemporaneously perceptible. *See, e.g., Opp.* at 4 ("[U]pon completion of the

⁷ 485 F. Supp. 2d at 444 (quoting U.S. Copyright Office, *Digital Millennium Copyright Act Section 104 Report to the United States Congress*, at xxvii-xxviii (Aug. 29, 2001)) (emphasis added).

⁸ *Id.* at 445 (quoting National Information Infrastructure Task Force, *The Report on the Working Group on Intellectual Property Rights* 71 (Sept. 1995)) (emphasis added).

transfer, [the phone] presents the user with a graphical ‘play’ button.”);⁹ *id.* at 12 (“[T]he only reason why the transmission does not ordinarily actually play before the transmission is concluded, is because Verizon has itself instructed that the file be encoded that way”); *id.* (“Verizon itself causes a limit on [contemporaneous playback] functionality when originally transmitting the ringtones to users.” (footnote omitted)). Thus, ringtone transmissions are downloads and not public performances.¹⁰

Indeed, despite ASCAP’s rhetoric, all of ASCAP’s descriptions of Verizon Wireless’ ringtone downloads confirm that, like the full-track downloads demonstrated in the DeFilippis video exhibit included in the Download Motions, a Verizon Wireless ringtone does not play until the download transmission is complete and the purchaser takes a further step.¹¹ *See* Opp. at 3 (describing receipt of message containing ringtone purchased on website and need to click the message); *id.* at 4 (describing “VZW Tones” purchase as allowing user to “click play button” “upon completion of the transfer”); *id.* at 4-5 (describing “Get it Now” purchase in same way as “VZW Tones” purchase); *id.* at 5 (describing text message purchase as involving receipt of a message containing the ringtone and the need to click on the message).

Faced with these facts, ASCAP falls back on the absurd argument (at 11-12) that Verizon Wireless must be charged with making a public performance because, although it uses technology that does not make public performances, it could change that technology to permit public performances. But ASCAP also made this argument in the Download Motions, asserting that “streaming and downloading ... both can audibly play a musical composition during transmission.” *Astle Reply Decl.*

⁹ ASCAP’s discussion here (at 4-5) lapses into nonsense when it repeatedly asserts, with underscored emphasis, that, following the transfer, “upon clicking the play button, the ringtone automatically begins playing immediately through the phone – the user is not given the option to hear it.” Except, of course, by not clicking the play button. Or by clicking the graphical stop button, which ASCAP fails to mention (but which is apparent in Mr. Petrovsky’s screen shots). *See* Petrovsky Ex. D at 10-12, 15; *id.* Ex. E at 20.

¹⁰ ASCAP’s additional argument that an alleged “constant link” is maintained between Verizon Wireless and the customer’s phone (Opp. at 11, 12) is neither supported by facts nor relevant. The full passage discussing a constant link made clear that the Court was discussing the streamed transmission of the perceptible performance: “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.” *Download Decision*, 485 F. Supp. 2d at 482. That is not the case with a ringtone. Once the ringtone file is on the phone, there is no longer any interaction between that file and the network. *Astle Reply Decl. Ex. H* (Hillier 30(b)(6) Dep. 58:16-25 (June 5, 2009)).

¹¹ *See* Decl. of Cliff Petrovsky ¶ 13 (June 22, 2009) (“Petrovsky Decl.”) (“I received a picture message [and] I opened the electronic message...” (emphasis added)); *id.* ¶ 30 (“After the transmission, I again received another New Pic/Video Message . . .” (emphasis added)). In fact, the demonstration shows that downloads from Real did not even require the added step after the transmission was complete. The song played automatically. *See* *Astle Reply Decl. Ex. B* at Pt03-RealPlayer_v01.wma (DeFilippis demonstration of Real).

Ex. G at 5 (ASCAP Download Mem.). It was rejected there; it should be rejected here. ASCAP is not entitled to actual royalties for entirely theoretical public performances.¹²

C. ASCAP’s Claim that Ringtone Downloads Are “Intermediate Transmissions” Is Precluded by the *Download Decision* and Wrong in Any Event.

ASCAP attempts (at 13-14) to shoehorn ringtone downloads into the public performance right by claiming that they are “Intermediate Transmission[s]” that are the first step in a “two-step intermediary performance.” This repeats another failed argument made in the Download Motions, where ASCAP claimed that “intermediate, non-audible transmissions are themselves public performances.” Astle Reply Decl. Ex. G at 22 (ASCAP Download Mem.). ASCAP even relies on the same cases on which it there relied. *Compare id.* at 16-18 & n. 5 (ASCAP Download Mem.) (relying on *NFL v. Primetime 24 Joint Venture*, 211 F.3d 10 (2d Cir. 2000), *David v. Showtime/The Movie Channel, Inc.*, 697 F. Supp. 752 (S.D.N.Y. 1988), *WGN Continental Broadcasting Co. v. United Video, Inc.*, 693 F.2d 622 (7th Cir. 1982), and *Hubbard Broadcasting, Inc. v. Southern Satellite Systems, Inc.*, 593 F. Supp. 808 (D. Minn. 1984)) with Opp. at 13-14 (relying on same cases). At issue in each of those cases was a series of television transmissions that culminated in a transmitted public performance to subscribers. But with ringtones, as with other downloads, there is no public performance by transmission at the end of the chain – a prerequisite to the “intermediate transmission doctrine.” Thus, the argument fails again.¹³

The Second Circuit recently confirmed this commonsense construction of section 101’s Transmit Clause in the *Cartoon Network* case. The Court rejected plaintiffs’ reliance on *NFL* for the proposition that prior transmitted performances to the public turned private performances of recorded content into public performances, reasoning that:

Because *NFL* only supports [plaintiff’s] conclusion if we determine that the final transmission in the chain (*i.e.*, the RS-DVR playback transmission) is “to the public,” plaintiffs’ reliance on *NFL* is misplaced. *NFL* dealt with a chain of transmissions whose

¹² *In re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003), cited by ASCAP (Opp. at 12 n.34), did not hold that a technology company must design its systems to make use of every possible copyright right. It merely held that an accused infringer may not avoid contributory liability by designing a system to foster copyright infringement and engaging in “willful blindness” as to what works were being copied on the system. *Id.* at 650.

¹³ If ASCAP’s construction were correct and a download transmission were the first step of a two-step intermediary performance, that conclusion would apply equally to full-track audio downloads. Like ringtone downloads, those files are transmitted to a purchaser and, at least sometimes, subsequently caused to play in public by the purchaser.

final link was undisputedly a public performance. It therefore does not guide our current inquiry.

Cartoon Network, 536 F.3d at 137 (emphasis added). Here, by contrast, there is no such chain of transmissions but a single download of the ringtone to an individual's cell phone. Even under ASCAP's theory, the alleged "final link" by which the ringtone is heard is not a public performance by transmission, but sounds heard directly from the cell phone when the phone receives a call if the user sets that song as a ringtone.

II. VERIZON WIRELESS DOES NOT PUBLICLY PERFORM RINGTONES WHEN A CALLER CALLS A CELL PHONE.

With the initial transmission clearly a non-performance download, ASCAP stretches to find a basis for finding Verizon Wireless responsible for the ringing of a user's ringtone, invoking first the first clause of the definition of "perform publicly" (the "Public Place Clause") and then the second (the "Transmit Clause"). Both arguments are without merit. The first fails to apply the rule that a direct infringer must engage in volitional conduct and seeks to double-count the download transaction, for which ASCAP's members are fully paid. The second stretches the words "otherwise communicate" beyond the breaking point.¹⁴

A. Verizon Wireless Does Not "Publicly Perform" Ringtones Under the Public Place Clause of the Definition of that Term when a Cell Phone Rings.

ASCAP's one-paragraph argument (at 14) that Verizon Wireless is directly responsible when a ringtone rings in a public place under the Public Place Clause relies on the combination of the initial download transaction, plus the ordinary operation of Verizon Wireless' wireless telephone communication network, which permits calls to be made (without regard to whether a ringtone is in use). But ASCAP's members are already fully paid for the download transaction under the mechanical license, with a fee set by the Copyright Royalty Board, *inter alia*, "to afford the copyright owner a fair return for his or her creative work." 17 U.S.C. §§ 115, 801(b)(1)(B).¹⁵ ASCAP's reliance on Verizon

¹⁴ ASCAP's final direct liability argument, that Verizon Wireless is "jointly and severally liable" (Opp. at 17), is another red herring. "Joint and several" does not create liability – it allocates responsibility among liable parties. A party cannot be jointly and severally liable unless it is first liable under ordinary doctrines of liability. *See, e.g., Singer v. Citibank N.A.*, No. 91 Civ. 4453 (JFK), 1993 WL 177801, at *4-*5 (S.D.N.Y. May 21, 1993) (distinguishing *Syigma Photo*, 778 F.2d 89 (2d Cir. 1985), on which ASCAP relied, where no dummy or shell company was involved and rejecting plaintiff's theory of joint and several liability because the case must "be judged under the standards for third-party liability rather than direct liability").

¹⁵ The recent section 115 decision awarding publishers and writers 24 cents for each ringtone download, compared to 9.1 cents for each full track download, makes clear that the Judges took into account the retail price charged for ringtone downloads. *See Mechanical and Digital Phonorecord Delivery Rate Determination*

Wireless' contribution to that download thus improperly seeks to extract double compensation based on that transaction. Moreover, ASCAP's argument erroneously (i) glosses over the undisputed fact that the phone's owner actually exercises the relevant control over whether a ringtone rings and (ii) ignores the requirement of volitional conduct as a prerequisite for direct copyright liability.

Verizon Wireless' moving papers demonstrated that the phone's owner controls whether a ringtone is set to play at all, the identity of the callers for which the ringtone is set to play, whether the audible signal is enabled or disabled, the volume with which the ringtone is set to play, and where the phone will be at any moment. *See* Verizon Wireless Rule 56.1 Stmt. ¶ 7 (May 22, 2009) ("VZW Rule 56.1 Stmt."). ASCAP offers no contrary evidence, limiting its response to characterization and argument. *See* ASCAP Rule 56.1 Stmt. ¶ 7 (June 12, 2009).¹⁶

Moreover, the conduct on which ASCAP relies to argue that Verizon Wireless is responsible for the ringing of a ringtone is not conduct that gives rise to responsibility for direct infringement. Most of the alleged facts on which ASCAP relies are equally applicable to downloads, offer no basis for distinguishing Verizon Wireless ringtones, and are fully accounted for in the compensation ASCAP's members receive for the download. Thus, services offering downloads:

- "supply and support" those downloads, *Download Decision*, 485 F. Supp. 2d at 441 ("Applicants engage in the distribution of music over the internet through . . . downloading.");
- offer a wide variety of downloads, Astle Reply Decl. Ex. A ¶¶ 10, 15 (DeFilippis Download Decl.) (discussing number of works available from two download providers);
- make substantial money selling them, *id.* Ex. A ¶¶ 6, 7 (DeFilippis Download Decl.) (discussing how download providers generate revenue);
- transmit them to the buyer, *Download Decision*, 485 F. Supp. 2d at 441; and

Proceeding: Final Rule, 74 Fed. Reg. 4510, 4510 (Jan. 26, 2009); *id.* at 4517-18, 4524 (noting "marketplace evidence" of royalties based on "greater of" formula including percentage of retail price, and concluding that the "marketplace evidence" provided a rate yielding a "fair return for the artists' creative works").

¹⁶ ASCAP challenges Mr. Ruth's competence to testify about how Verizon Wireless' ringtones are used, but as the individual responsible for running Verizon Wireless' ringtone business, he is clearly knowledgeable on the subject. *See* Astle Decl. Ex. 1 ¶ 1 (Ruth Decl.) (May 22, 2009); Astle Reply Decl. Ex. I (Ruth Dep. 55:9-18, 192:6-11 (Apr. 20, 2009)). Rather than rebut these undisputed facts, ASCAP argues that they are not relevant because a transmission of a performance "need not be received by the public every time." Opp. at 15. But ASCAP's argument, and the legislative history on which it relies, is wholly directed to the Transmit Clause. Not even ASCAP argues that it has relevance to the Public Place Clause. ASCAP's further assertion that "Verizon facilitates and controls . . . whether [ringtone] performances are heard by anyone, or even whether a device receiving a performance is turned on or the volume up," is made without citation and is wholly unsupported by any evidence. ASCAP Rule 56.1 Stmt. ¶ 7.

- frequently apply DRM technology that controls copying, limits the downloads to particular devices, and controls duration of play, *id.*, 485 F. Supp. 2d at 441-42 (“Providers sometimes attach conditions to the download and playback of a song, such as the maintenance of a current subscription to the provider or a limitation of the number of times the audio file may be reproduced.”).

If these alleged characteristics do not make full-track downloads public performances, they do not make ringtones public performances.¹⁷

ASCAP’s argument devolves into reliance on the incoming call signal sent by the wireless network. Opp. at 17.¹⁸ But, as Verizon Wireless’ moving papers demonstrated, and ASCAP has not rebutted, that signal is tied to the telephone function of the network (its purpose is to indicate an incoming call to the receiving device) and is unrelated to whether a ringtone is in use on that receiving device. VZW Rule 56.1 Stmt. ¶¶ 9-10.¹⁹ *Cartoon Network* is again instructive. The Second Circuit absolved Cablevision of direct liability despite finding that Cablevision was involved in “designing, housing, and maintaining a system that exists only to produce a copy.” 536 F.3d at 131 (emphasis added). Here, the incoming call signal on which ASCAP seeks to base liability exists as an integral part of a system designed to complete telephone calls, and it would be precisely the same with or without ringtones. VZW Rule 56.1 Stmt. ¶¶ 9-10; Astle Reply Decl. Ex. H (Hillier 30(b)(6) Dep. 21:18-22:9 (June 5, 2009)). The incoming call signal is what makes the phone work; it cannot properly be the basis for imposing direct responsibility on Verizon Wireless for a ringtone performance.

As demonstrated in Verizon Wireless’ Memorandum, at 9-12, direct infringement liability also turns on actually “doing” the infringing act – here, actually making the public performance. *Cartoon Network*, 536 F.3d at 131 (direct liability turns on “determining who actually ‘makes’ a copy”); *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 551 (4th Cir. 2004) (“[A] person [must] engage in volitional conduct – specifically the act constituting infringement – to become a direct infringer.”).²⁰

¹⁷ ASCAP cites no evidence to support the proposition that Verizon Wireless “determines when and whether a subscriber’s ringtone may be played,” *see* Opp. at 16-17, and there is none.

¹⁸ There is no citation and no record evidence supporting ASCAP’s overstated assertion that Verizon Wireless “commands, enables and controls,” ringtone ringing, Opp. at 16-17, other than “by triggering the tones when calls are received,” *id.* at 17 (citing Kaufman Decl. ¶ 40, which refers only to the “trigger command”).

¹⁹ Again, ASCAP does not contest the truth of the statements with competent evidence, responding only with characterization and argument. ASCAP Rule 56.1 Stmt. ¶¶ 9-10. Moreover, this fact was confirmed by Mr. Hillier. Astle Reply Decl. Ex. H (Hillier 30(b)(6) Dep. 20:7-22:9 (June 5, 2009)). The signal has nothing to do with what tone plays. Rather, the customer chooses to set a ringtone to ring by issuing a command that stays on the local phone.

²⁰ It is ASCAP, not Verizon Wireless, whose view of the relationship between volition and strict liability “is based on fundamental confusion.” Opp. at 20. Strict liability means that one does not need to intend or know that one’s actions infringe copyright. Volition, on the other hand, means that one must actually consciously do

Direct liability does not turn on “control,” which is an element of secondary, vicarious liability. *Cartoon Network*, 536 F.3d at 133 (imposition of liability on party “in a position to control” is “as a contributory, not direct, infringer”).

ASCAP attempts to distinguish *Cartoon Network* (at 18) on the ground that the Court of Appeals did not address whether the same volition requirement applies to direct infringement of the public performance right. But the Court did not determine that volition is not required; it simply ruled on another ground that no public performances occurred. 536 F.3d at 134.²¹ Further, the Court’s rationale on the reproduction issue does not leave room for the conclusion that direct liability for public performance does not require volition. The Court described the volition requirement to be “a particularly rational interpretation of § 106.” *Id.* at 131. Section 106, of course, embraces both the reproduction and public performance rights. 17 U.S.C. §§ 106(1), 106(4). Further, the Court’s reasoning that “[t]he Supreme Court’s desire to maintain a meaningful distinction between direct and contributory copyright infringement is consistent with congressional intent,” 536 F.3d at 133, is equally true for public performances.²² Doing the proscribed act is the *sine qua non* of direct liability.²³

the act that constitutes infringement. *See CoStar*, 373 F.3d at 549 (“While the Copyright Act does not require that the infringer know that he is infringing or that his conduct amount to a willful violation of the copyright owner’s rights, it nonetheless requires conduct by a person who causes in some meaningful way an infringement.”). In *Coleman v. ESPN, Inc.*, 764 F. Supp. 290 (S.D.N.Y. 1991), cited by ASCAP, it did not matter that ESPN did not intend to infringe copyright when its coverage of sporting events incidentally picked up and transmitted performances of songs. But it did matter that ESPN engaged in the volitional act of transmitting audiovisual footage of the events to its subscribers. Absent that volitional act, ESPN could not be directly liable for infringement. Moreover, *Coleman* preceded *Cartoon Network* and *CoStar*.

²¹ ASCAP’s assertion (at 18) that “the Second Circuit did not disturb” the district court’s holding that Cablevision directly infringed the public performance right is wishful thinking. The Second Circuit reversed every holding of the district court. *See Cartoon Network*, 536 F.3d at 123. Its reliance on a different ground on the public performance issue hardly suggests any endorsement of the district court’s reasoning or conclusions, particularly in light of its reasoning in connection with the reproduction right.

²² Further, “to perform” is defined in the Copyright Act by active verbs that each involve volitional conduct: “To ‘perform’ a work means to recite, render, play, dance or act it, either directly or by means of any device or process.” 17 U.S.C. § 101. The recognition that a device may be employed by the actor highlights the fact that the device is not doing the infringing act.

²³ The ISP safe harbors of 17 U.S.C. § 512 and *Napster*, *Aimster*, and *Grokster*, all relied on by ASCAP (at 19), are red herrings. The ISP safe harbors are independent of the issue of underlying liability. *See* 17 U.S.C. § 512(l) (providing that other defenses are not affected by the ISP safe harbors in § 512); *CoStar*, 373 F.3d at 552 (“Given that the [DMCA Section 512] statute declares its intent not to ‘bear adversely upon’ any of the ISP’s defenses under law, including the defense that the plaintiff has not made out a prima facie case for infringement, it is difficult to argue, as *CoStar* does, that the statute in fact precludes ISPs from relying on an entire strain of case law holding that direct infringement must involve conduct having a volitional or causal aspect.”). *Aimster*, *Napster* and *Grokster* were all found liable under theories of secondary liability. Verizon Wireless does not contend that operation of an automated system “absolves the proprietor of the system of any responsibility.” That responsibility, however, must be judged under principles of secondary liability.

B. Verizon Wireless Does Not “Publicly Perform” Ringtones Under the Transmit Clause of the Definition of that Term when a Cell Phone Rings.

With the *Download Decision* precluding ASCAP’s reliance on the Transmit Clause with respect to ringtone downloads, ASCAP invokes the network incoming call signal to argue (Opp. at 14-16) that Verizon Wireless is responsible under the Transmit Clause for any public performance that may occur when the ringtone rings. But this argument runs headlong into the fact that the signal is not the “transmission of a performance” that this Court found was “required in order to implicate the public performance right in a copyrighted work.” *Download Decision*, 485 F. Supp. 2d at 446. No “images or sounds are received beyond the place from which they are sent.” *Id.* The signal is not “a musical broadcast.” *Id.*

Confronted with these facts, ASCAP argues that the incoming call signal falls within the meaning of “otherwise communicate” in the Transmit Clause. ASCAP cites no authority for its sweeping construction of the words “otherwise communicate.” That is because the law is to the contrary. In *Columbia Pictures Indus., Inc. v. Professional Real Estate Investors, Inc.*, 866 F.2d 278 (9th Cir. 1989), the Ninth Circuit construed this phrase and found that it referred only “to a ‘process whereby images or sounds are received beyond the place from which they are sent.’” *Id.* at 282 (emphasis added). The Court reasoned that the purpose of the Transmit Clause “is to prohibit transmissions and other forms of broadcasting from one place to another without the copyright owner’s permission,” consistent with the definition of “transmit,” and that “[a]ccording to the rule of ejusdem generis, the term ‘otherwise communicate’ should be construed consistently with the term ‘transmit.’” *Id.* No sounds are sent and no sounds are received when the network signals an incoming call.

ASCAP provides no principle for limiting “otherwise communicate.” As RIAA argued in its download amicus brief, “[b]y the most broad literal reading of that language, the sale or rental of a CD or DVD could be said to communicate a musical work embodied in a sound recording or audiovisual work on the disc.” Astle Reply Decl. Ex. E at 11 (Br. of *Amicus Curiae* RIAA). This construction also arguably would hold CD and MP3 player manufacturers liable for “communicating” public performances every time the purchaser of a player uses a remote control to hit “play” by virtue of designing the players to play the music when the play button is hit. As RIAA observed, “[s]uch a result is, of course, ‘absurd.’” *Id.*

Moreover, the call signal is sent to a single subscriber. It is thus not “to the public.” As the legislative history relied on by ASCAP (at 15) teaches, to be public performances, the transmissions (or communications) must be made, or at least offered, “to the public at large.” H.R. REP. No. 90-83, at 29 (1967); H.R. REP. NO. 94-1476, at 64-65 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5678.

III. ASCAP CANNOT ESTABLISH SECONDARY LIABILITY.

ASCAP provides no basis to conclude that Verizon Wireless requires an ASCAP license based on secondary liability for infringing public performances made by others. ASCAP does not even attempt to dispute the well-settled principle that no secondary liability can attach absent direct infringement by another person. *See Faulkner v. Nat’l Geographic Enters. Inc.*, 409 F.3d 26, 40 (2d Cir. 2005) (dismissing secondary copyright infringement claim because alleged direct infringement was precluded); VZW Mem. at 16. ASCAP’s failure to identify any direct infringement by others should end the inquiry. But even if ASCAP could point to isolated instances of direct infringement, it has failed to show how Verizon Wireless could be held secondarily liable for any such activity.

A. ASCAP Has Failed To Show that Even a Single Cell Phone User Is Liable for Direct Infringement.

1. ASCAP Has Not Pointed to any Specific Instances of Alleged Direct Infringement by Verizon Wireless’ Users.

ASCAP fails to establish – or even allege – that Verizon Wireless’ subscribers are direct infringers. Instead, ASCAP argues that Verizon Wireless is secondarily liable on an unstated assumption that there is direct infringement by someone. At most, ASCAP asserts (at 22, 23, 24, 25, 27) that there are “unlicensed” performances. But “unlicensed” does not mean “infringing.” ASCAP’s failure to show direct infringement precludes secondary liability.

2. ASCAP’s Discussion of Section 110(4) Does Not Refute Verizon Wireless’ Showing that the Section Protects Cell Phone Users from Infringement Liability.

Verizon Wireless demonstrated that the phone’s owner is not a direct infringer when his or her phone rings because (i) the ringing occurs without any purpose of commercial advantage, (ii) no payment is made to any performers or organizers, and (iii) no admission charge is exacted. *See* VZW Mem. at 14-16; 17 U.S.C. § 110(4). ASCAP does not dispute that admission is not charged and performers are not paid when cell phones ring in public, nor does it allege that such users have “any

purpose of direct or indirect commercial advantage,” asserting only that “the customer benefits by purchasing a product and service it desires.” Opp. at 28. That is not commercial advantage.

ASCAP’s failure to find evidence that cell phone users benefit commercially from public cell phone ringing was not for want of trying. ASCAP went so far as to hire a private investigator, Mr. Petrovsky, to identify any public performances of ringtones for profit. Mr. Petrovsky, however, apparently was able to come up with only one (almost laughable) example that ASCAP cites in its brief – the Chicago Sinfonietta’s performance of a work entitled “Concertino for Cell Phones and Orchestra.” Opp. at 8 n.28. But this one atypical example from almost three years ago cannot trigger secondary liability for every Verizon Wireless ringtone, and it certainly does not entitle ASCAP to license and collect tens of millions of dollars from the entire wireless industry. Nor can ASCAP seriously contend that wireless carriers are responsible for such performances; ASCAP separately licenses orchestras for the performance of “music in the ASCAP repertory at concerts presented by the orchestra,” and ASCAP conspicuously fails to disclose to the Court that the Chicago Sinfonietta is, and in 2006 was, licensed by ASCAP. *See Astle Reply Decl. Exs. J, K.*²⁴

Lacking any evidence that the typical use of a ringtone by a user is for commercial benefit, ASCAP attempts to shift the goalposts, arguing that Verizon Wireless must “establish as a matter of law that each and every customer would be able to meet its burden of proof to show that he or she would” qualify for the section 110(4) exemption. Opp. at 28. The single district court case cited by ASCAP for this proposition is a pleading case, not a burden of proof case, and provides no support whatsoever for ASCAP’s asserted “each and every customer” rule. Moreover, this is a rate-setting proceeding under an antitrust decree, not an infringement action. Verizon Wireless is a legitimate business seeking the Court’s protection from ASCAP’s monopoly power derived from its aggregation of copyrights. ASCAP, in turn, seeks to license a broad range of activity (all ringtone sales), not isolated instances of infringement. Unidentified and unproven isolated acts of infringement – even if they might exist – do

²⁴ Mr. Petrovsky also presents a list of websites that allegedly detail other “ringtone concerts or performances.” *See Petrovsky Decl.* at 11-12. But it is no wonder neither he nor ASCAP mentions these other “performances” further – none of them implicates ASCAP’s members’ section 106 public performance rights. Most involve activities outside the United States and only two, in Germany and Switzerland, even said that they involved the playing of musical ringtones, in both cases compositions specifically written for the performances. *See* <http://www.flong.com/projects/telesymphony/>; www.escout.com/blog/2006/08/18/trend-mobile-phone-performances.html.

not entitle ASCAP to tens of millions of dollars based on all of Verizon Wireless' ringtone business. The *Download Decision* recognized this. This Court did not even deem it significant to discuss the possibility that isolated individuals or entities might use downloads to infringe, focusing instead on the overall character of the activity. See *Download Decision*, 485 F. Supp. 2d at 441-42 (describing the nature of downloads).

ASCAP next improperly focuses its section 110(4) discussion on Verizon Wireless, arguing that Verizon Wireless "benefits financially" from selling ringtones and that "any lack of financial gain by Verizon's customers does not bear upon the § 110(4) defense." Opp. at 28.²⁵ But it is performances by the phones' owners that must be infringing for secondary liability to attach, so it is their financial benefit that is relevant under section 110(4).²⁶

Finally, the argument ASCAP declares to be its "most important[]" regarding section 110(4) – *i.e.*, that a commercial entity cannot stand in the shoes of its customers (*id.* at 28) – is flatly wrong and has nothing to do with secondary liability. The cases cited by ASCAP all addressed whether a commercial entity can escape direct infringement liability based on fair use defenses that its customers could have asserted if they were the direct infringers.²⁷ None addresses the very different question of whether a commercial entity may avoid secondary liability in the absence of any direct infringement by its customers. On that, the law is well settled, and ASCAP is standing on the wrong side of an

²⁵ ASCAP also argues that there is no exemption at all for noncommercial public performances. See Opp. at 28 (quoting legislative history out of context). But the House Report ASCAP quotes was explaining the difference between the 1909 Copyright Act, which generally limited the public performance right to for-profit performances, and the new 1976 Act, which removed the general limitation but included a somewhat modified nonprofit exemption in section 110(4). See H.R. REP. NO. 94-1476, at 62 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5674 ("The approach of the bill . . . is first to state the public performance right in broad terms, and then to provide specific exemptions for educational and other nonprofit uses. This approach is more reasonable than the outright exemption of the 1909 statute."). In short, the 1976 Act does exempt from liability certain nonprofit performances through section 110(4).

²⁶ Even were it relevant, the out-of-context legislative history quoted by ASCAP (at 28) does not have the broad meaning ASCAP ascribes. The full passage incorporates and references "court decisions construing the 'for profit' limitation," and none of those decisions endorsed such an expansive conception of financial benefit. Stretching the "given or sponsored" language to cover Verizon Wireless' operation of a telephone network would gut section 110(4), as nearly every non-profit performance involves some commercial enterprise in some way – the operation of a radio station or the purchase of a CD, for example. In any event, Verizon Wireless earns no more revenue when a ringtone rings in public than when it rings elsewhere.

²⁷ See *Princeton Univ. Press v. Michigan Doc. Servs., Inc.*, 99 F.3d 1381, 1383, 1389 (6th Cir. 1996) (holding copy shop directly liable for copying educational materials despite possible fair use protection for customers); *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1531, 1547 (S.D.N.Y. 1991) (same); *L.A. News Serv. v. Reuters Television Int'l, Ltd.*, 149 F.3d 987, 994, 997 (9th Cir. 1998) (holding news organization directly liable for copying video news footage despite possible fair use protection for broadcasters); *Playboy Enters. v. Frena*, 839 F. Supp. 1552, 1558, 1559 (M.D. Fla. 1993) (holding bulletin board service operator directly liable for displaying and distributing photographs despite possible fair use protection for recipients).

impressive string of precedents. *See, e.g., Matthew Bender & Co., Inc. v. West Publ'g Co.*, 158 F.3d 693, 706 (2d Cir. 1998).

B. ASCAP's Circular Construction of the *Grokster* Intentional Inducement Standard Is Wrong.

ASCAP's argument (at 23-24) that Verizon Wireless intentionally induces infringement invokes circular reasoning: Verizon Wireless needs a license because its subscribers are infringers because Verizon Wireless does not have a license. ASCAP equates unlicensed with infringing, which is wrong, particularly given (i) the ringing of phones in places not open to the public and (ii) section 110(4). Unlicensed sounding of a ringtone to announce a call is not *per se* infringing, and that is all that matters here.

ASCAP cannot deny that intentional inducement under *Grokster* “premises liability on purposeful, culpable expression and conduct.” *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 937 (2005). *Grokster* does not premise liability on “selling an item with substantial lawful as well as unlawful uses” or “mere knowledge of infringing potential or actual infringing uses.” *Id.* at 932-33, 937. ASCAP points to nothing to show that Verizon Wireless intentionally promotes the infringing use of ringtones. Nor does ASCAP demonstrate that Verizon Wireless' revenues are tied to infringing conduct.²⁸ Nor does ASCAP demonstrate the kind of culpable intent present in *Grokster*.

C. ASCAP Does Not Rebut Verizon Wireless' Showing that Ringtones Are Capable of Substantial Non-Infringing Use.

ASCAP does not deny that, in the context of the *Sony* doctrine, which applies equally to both contributory and vicarious liability, ringtones are capable of substantial non-infringing use.²⁹ *See Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984). Instead, ASCAP argues that the

²⁸ *See Grokster*, 545 U.S. at 939-40 (*Grokster*'s revenue directly tied to infringement). Even if the ringing of the phone in public were infringing, Verizon Wireless does not reap any economic benefit from the phone's ringing in public. *Grokster* relied on infringing music sharing to generate direct advertising revenues. The difference precludes application of *Grokster* here.

²⁹ ASCAP's Rule 56.1 statement does not deny the truth of Verizon Wireless' factual showing that ringtones often play in private places, and that a substantial proportion of Americans rely exclusively on a mobile phone rather than a traditional land-line phone. *See* ASCAP Rule 56.1 Stmt. at 10-11. Rather, ASCAP denies that there is “evidence to support” these facts, despite the submission by Verizon Wireless of documents to support them. ASCAP even misses the import of the FCC Report submitted by Verizon Wireless (Astle Decl. Ex. 4), claiming that it is irrelevant because it does not prove that all ringtone performances take place in private places (Opp. at 15 n.37). *Sony*, of course, only requires that substantial – not all – uses be noninfringing, which clearly is true here. *See Sony*, 464 U.S. at 442. ASCAP also argues that Verizon Wireless is directly liable for causing the ringing of all ringtones, regardless of location, which is addressed in Part II, *supra*. In any event, that argument is not relevant to the *Sony* doctrine, which relates to secondary liability based on alleged direct infringement by the phones' owners.

doctrine applies only to claims of contributory liability “based solely on the provision of neutral devices that might be used for infringing activity.” Opp. at 26 (emphasis added). But ASCAP’s argument is belied by the examples provided in Verizon Wireless’ Memorandum, including cases where *Sony* was applied to defendants charged with distributing copies of the plaintiff’s works. See, e.g., *Matthew Bender*, 158 F.3d at 706-07 (applying *Sony* doctrine to CD-ROMs containing copies of the copyrighted work and holding they had substantial noninfringing uses);³⁰ *Mathieson v. Assoc. Press*, No. 90-6945, 1992 WL 164447, at *3 (S.D.N.Y. June 25, 1992) (applying *Sony* to sale of photographs incorporating the original copyrighted work that could have been used in infringing ways by the buyers).³¹ In any event, Verizon Wireless is licensed by ASCAP’s members to engage in the sale and distribution of ringtones embodying copyrighted music, so it is the sale of neutral devices – wireless telephones – and the operation of a neutral system – its wireless telephone communication network – on which ASCAP’s claim of secondary liability for performance must depend. There is no argument not to apply the *Sony* doctrine in such circumstances.

D. ASCAP Has Not Shown That Verizon Wireless Is a Contributory Infringer When its Users’ Phones Ring in Public.

Verizon Wireless also cannot be held liable for contributory infringement, for it lacks the requisite knowledge of infringement. ASCAP ignores the fundamental requirement that Verizon Wireless must have knowledge of activities that are infringing. See *Matthew Bender*, 158 F.3d at 706 (requiring that contributory infringers have “knowledge of the infringing activity”). ASCAP merely asserts that Verizon Wireless is aware that “ringtones it sells and delivers are being played” and that it knows that it has placed “ASCAP works into the marketplace for simultaneous or triggered public performance as ringtones.” Opp. at 25. But unless Verizon Wireless knows that the cell phone ringing

³⁰ Although the copyright at issue in *Matthew Bender* was “thin,” as ASCAP argues (at 26 n.50), it did exist, and the Court found that it could be infringed by CD-ROM users. 158 F.3d at 706. The court did not hold that the secondary liability standard is somehow different for “thin” copyrights. Moreover, ASCAP’s implication (at 27 n.50) that *Matthew Bender*’s holding was limited to uses that were “‘incidental’ to some other primary purpose” is unsupported. Even if *Matthew Bender* had imposed such a limitation, the ringing of a ringtone in public is certainly incidental to the primary purpose of the operation of a functional telephone network to place and receive calls.

³¹ ASCAP does not dispute that *Mathieson* involved distribution of the copyrighted work itself but instead attempts to distinguish it on the basis that it did not involve unauthorized “trafficking in copies of plaintiff’s” copyrighted work. But neither does this case – Verizon Wireless is fully licensed under 17 U.S.C. § 115 to sell ringtone downloads.

that occurs is infringing, it cannot be held contributorily liable.³² As discussed above, Verizon Wireless' users do not infringe copyright when someone calls their phone, as that ringing (i) often is not "public" and (ii) in any event, is not infringement under section 110(4). Indeed, ASCAP fails to identify even a single instance of a ringtone ringing that is direct infringement. *See supra* Part III.A.1. If ASCAP cannot point to directly infringing cell phone ringing, despite its investigation, Verizon Wireless should not be held to have knowledge of any such infringing activity.

Verizon Wireless does not – and cannot – know where, whether, and when a particular musical work will be performed as a ringtone because so much of what goes into making a ringtone ring is not subject to Verizon Wireless' knowledge or control.³³ Because generalized knowledge that ringtones are ringing in public somewhere is not sufficient to meet the knowledge standard for contributory infringement, Verizon Wireless cannot be held liable.

E. ASCAP Has Not Shown That Verizon Wireless Should Be Vicariously Liable When its Users' Phones Ring in Public.

ASCAP barely responds to Verizon Wireless' showing (VZW Mem. at 20-23) that it cannot be vicariously liable for any infringing performances by its users because it lacks any right or ability to police those performances and the requisite "obvious and direct" financial benefit from the infringement. *Softel, Inc. v. Dragon Med. & Scientific Commc'ns, Inc.*, 118 F.3d 955, 971 (2d Cir. 1997). ASCAP instead cites two district court flea-market cases from outside this Circuit (Opp. at 27) in support of a broader financial benefit standard than this Circuit recognizes and even fails to present evidence to support the application of that standard. Further, the only financial benefit and control that ASCAP asserts (*id.*) relate to the sale of the ringtones, lawful transactions for which ASCAP's members

³² Even the two cases cited by ASCAP make clear that the relevant "knowledge" must be of activity that is infringing. *Arista Records v. MP3Board, Inc.*, Civ. No. 00-4660, 2002 WL 1997918 at *5-*6 (S.D.N.Y. Aug. 29, 2002) (discussing activities by which MP3Board could have gained knowledge that it was providing access to infringing music files); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1172 (9th Cir. 2007) (holding that contributory infringement may be found where online defendant "has actual knowledge that specific infringing material is available using its system" (internal quotation marks omitted)).

³³ ASCAP asserts without support that Verizon Wireless can know where all of its customers' phones are located, but ignores that federal law prohibits Verizon Wireless' use of or access to any such information. 47 U.S.C. § 222(f). Moreover, even if Verizon could determine the location of operating phones on its network, it still could not know whether a ringtone is set, whether the phone is set to ring or vibrate, whether the phone is in a place open to the public, or whether the ringtone is being played for commercial advantage, which are the relevant inquiries for determining whether Verizon Wireless has knowledge of infringing performances of ringtones by its users.

are paid. ASCAP's Opposition says nothing about Verizon Wireless' benefit from or control over the ringing of the phone.

IV. GRANTING THIS MOTION WILL SUBSTANTIALLY STREAMLINE THIS CASE.

ASCAP's assertion (at 29-30) that granting this motion will not simplify the trial or conserve judicial resources defies credulity. Under Rule 56, there is no independent "simplification" analysis; summary judgment should be granted if the requisite showing is made. Fed. R. Civ. P. 56(c). Moreover, granting the motion will eliminate the need for the parties to present evidence concerning, or for the Court to set, a royalty rate for ringtones. It will therefore "parse out those issues that need not go to trial thereby conserving judicial resources" and also "focus the litigants and the Court on the central issues in a lawsuit." *In re United Brands Co. Securities Litig.*, No. 85 CIV. 5445 (JFK), 1988 WL 67413, at *2 (S.D.N.Y. June 20, 1988). This is true regardless of the arguments ASCAP may or may not assert about previews. Thus, granting the motion will streamline the trial of this action.

CONCLUSION

For the foregoing reasons and for the reasons stated in Verizon Wireless' Memorandum, Verizon Wireless respectfully requests that the Court rule as a matter of law that neither the download nor the playing of a ringtone implicates the public performance right under the Copyright Act in a manner that requires a wireless carrier to obtain an ASCAP license.

Respectfully submitted,

WILEY REIN LLP



Bruce G. Joseph (BJ 8345)
Andrew G. McBride (AM 1966)
Michael L. Sturm (MS 3939)
1776 K Street NW
Washington, DC 20006
Tel: (202) 719-7000
Fax: (202) 719-7207
bjoseph@wileyrein.com
amcbride@wileyrein.com
msturm@wileyrein.com

*Attorneys for Cellco Partnership d/b/a
Verizon Wireless*

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