

NOTES

Copyright “Band-Aids” and the Future of Reform

Kurt E. Kruckeberg[†]

I. INTRODUCTION

A young couple shares a romantic dinner at a posh, softly lit restaurant. Having just finished dessert, the young man rises from the table, reaches into his pocket, and removes a small velvet-wrapped jewelry box as he drops to one knee. Opening the box and his mouth to issue a marriage proposal, he is interrupted by the vocal stylings of *Nazareth* issuing from a mobile telephone stashed in a purse under a nearby table:

*Love hurts, love scars
Love wounds, and mars
Ooh, ooh, love hurts.*¹

Has the young couple been victimized by fate or merely subjected to a public performance of *Nazareth*'s work? While the question of fate is beyond the scope of this Note, the question of what constitutes a public performance was recently addressed by the United States District Court for the Southern District of New York.²

In the case of *In re Cellco Partnership*, the “Ringtone Decision,” the court held that a ringtone does not constitute a public performance for

[†] J.D. Candidate, Seattle University School of Law; M.M., University of Colorado; B.A., Luther College. I am indebted to Professor Margaret Chon for her encouragement and for commenting on early drafts of this work. I am also grateful to Michael Costello, Jennifer Cox Shapiro, C.T. Kruckeberg, and Nathan Sherrard, who took the time to review and comment on prior drafts. I have benefited from the tireless support of the entire staff of the *Seattle University Law Review*; in particular, I thank Paige Spratt, Kyle Trethewey, Nina Scheel, Holly Mack-Kretzler, Rachel Schaefer, and Joan Miller for their investment of time and effort in this piece. Lastly, I am grateful to my parents, Johanna and Thomas Kruckeberg, and my husband, Dave Morgan; without their love and support, my law-school adventure would not have been possible.

1. BOUDLEAUX BRYANT & FELICE BRYANT, *Love Hurts*, on HAIR OF THE DOG (A&M Records 1975).

2. *In re Cellco P'ship*, 663 F. Supp. 2d 363, 366 (S.D.N.Y. 2009).

which a mobile carrier must acquire a license.³ But to reach its decision, the court had to grapple with precedent that is difficult to reconcile.⁴ The court interpreted “public performance” under the Copyright Act⁵ one way in one context, and a different way in another context.⁶ This malleable interpretation dependent on context is reminiscent of Professor Jessica Litman’s statement:

There are moves that copyright lawyers make when the law isn’t working well for them. They avoid inconvenient statutory language by persuading courts that the words of the statute mean one thing in one context and a different thing in another context. . . . Copyright lawyers sit down with other copyright lawyers and negotiate a series of band-aid solutions in which they agree to behave with one another as if the statute on the books said what they wished it said.⁷

The Ringtone Decision is one such “band-aid solution” and indicates that we are due for another “wholesale copyright revision.”⁸

But the Ringtone Decision reveals another flaw in our current copyright regime. The copyright system is flawed because songwriters are increasingly separated from their works, leaving copyright disputes to be litigated between copyright intermediaries.⁹ This separation is caused by the increasing vertical integration¹⁰ of the music industry: four multina-

3. *Id.*

4. See Stephen M. Kramarsky, *Defining Public Performance in Digital Transmission Age*, N.Y. L.J., Nov. 17, 2009, at 5 (stating that *Cartoon Network L.P. v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008), and *Nat’l Football League v. PrimeTime 24 Joint Venture*, 211 F.3d 10 (2d Cir. 2000), “are, in fact, difficult to reconcile entirely”).

5. 17 U.S.C. §§ 101, 106 (2006).

6. Compare *Nat’l Football League*, 211 F.3d at 13 (satellite transmissions are public performances), with *Cartoon Network*, 536 F.3d at 123 (transmissions to digital video recording devices are not).

7. Jessica Litman, *The Copyright Revision Act of 2026*, 13 MARQ. INTELL. PROP. L. REV. 249, 250 (2009) (citing William S. Strauss, *Study No. 29: Protection of Unpublished Works 8–15*, in 1 STUDIES ON COPYRIGHT 187, 198–205 (1963)).

8. *Id.*

9. See Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 18 (2010) (differentiating between copyright interests for “creators,” “readers,” and “intermediaries”).

10. See JOHN KENNETH GALBRAITH, *THE NEW INDUSTRIAL STATE* 33 (Princeton Univ. Press 2007) (1967) (“The market is superseded by vertical integration. The planning unit takes over the source of supply or the outlet; a transaction that is subject to bargaining over prices and amounts is thus replaced with a transfer within the planning unit.”). For an entertaining illustration of vertical integration, see *30 Rock: Let’s Stay Together* (NBC television broadcast Oct. 7, 2010). The episode contains the following dialogue:

Jack: The only thing I will be discussing with the House Subcommittee on Baseball, Quiz Shows, Terrorism, and Media is vertical integration.

Liz: What’s vertical integration?

Jack: Imagine that your favorite corn chip manufacturer also owned the number one diarrhea medication.

tional media corporations receive a majority of global music revenues from copyright. With the intended beneficiaries of copyright—artists and the public—arguably absent from the courtroom, the court could not reach a satisfactory result. If the court held for the cellular telephone companies, it would award them a windfall by allowing them to profit from the performance of works without paying royalties. But if the court held for the American Society of Composers, Authors, and Publishers (ASCAP), it would disgorge profits of cellular-telephone innovation and award much of the profits to corporate interests that, through the vertical integration of the music industry, have substantially divorced songwriters from equitable remuneration for their creative work. The court was doomed to fail in reconciling an aging Copyright Act with rapidly developing technology and a music industry colored by collective dominance.

As we enter a new period of wholesale copyright revision, this Note examines the interplay of copyright and technology through a brief exploration of the Ringtone Decision. Part II of the Note explores the history of copyright reform, the music industry, and performance-rights organizations. Part III explores the Ringtone Decision and reveals that the decision is symptomatic of both a Copyright Act and music industry in need of reform, and is at odds with the normative value of copyright as an incentive for creators. Part IV explores how we should restore this normative value by rebalancing the bargaining power of songwriters and the vertically integrated music industry. It further argues that the appropriate rebalancing can occur by amending the Copyright Act with two provisions inspired by German copyright law: First, our Copyright Act should have a contract-reformation provision for instances in which a copyright transferee benefits disproportionately from new technology. And second, our Copyright Act should offer a limited reversionary right to the creator when a copyright transferee opts not to exploit the work through new technology. Part V concludes the Note.

II. COPYRIGHT LEGISLATION AND THE VERTICALLY INTEGRATED MUSIC INDUSTRY

On October 19, 1976, the current Copyright Act was signed into law.¹¹ Ford was President,¹² “Disco Duck” topped the Billboard charts,¹³

Liz: That’d be great ’cause then they could put a little sample of the medicine in each bag.

Jack: Keep thinking.

Liz: Except then they might be tempted to make the corn chips *give* you . . .

Jack: Vertical integration.

Id.

11. 17 U.S.C. § 101 (1976).

and the cassette was on its way toward eclipsing the LP as the most popular medium for music delivery.¹⁴ Today, despite several amendments, the Copyright Act remains largely in its 1976 form. Far from the days of “Disco Duck” and the choice between cassette and LP, today’s consumer can purchase Beyoncé’s album, *I am . . . Sasha Fierce*, in one of more than 260 formats.¹⁵ As a result, courts are struggling to apply the Copyright Act to technologies unimaginable at the time of the Act’s drafting.

To understand where copyright reform for music is headed, we must understand its history. Section A of this Part explores the legislative process traditionally used to enact copyright reform generally and reviews the development of public performance rights throughout the history of the Copyright Act in particular. Section B explores the vertical integration of the music industry that has accompanied legislative reform. And section C analyzes the role of performance-rights organizations—particularly ASCAP—in the music industry.

A. The Legislative Process in Copyright Reform and the Development of the Public Performance Right

Prior to 1856, the Copyright Act provided protection only for reproduction and distribution rights.¹⁶ In 1856, the first federal public performance right was granted, and authors of “dramatic compositions” obtained “the sole right ‘to act, perform, or represent their work or cause it to be acted, performed, or represented.’”¹⁷ The public performance right was extended from dramatic compositions to musical compositions in 1897.¹⁸

Copyright law continued to develop in tandem with technological discoveries that expanded the economic potential of creative works. The popularity of the piano roll,¹⁹ for example, led to a larger market for musical works in the early twentieth century.²⁰ Manufacturing companies

12. Frank Lynn, *Carter’s Forces, in Effort to Recoup in New York, Stress City’s Problems*, N.Y. TIMES, Oct. 19, 1976, at 1.

13. *Hot 100 for the Week of October 16, 1976*, BILLBOARD.COM, <http://www.billboard.com/#/charts/hot-100?chartDate=1976-10-16> (last visited Mar. 31, 2011).

14. Rebecca MacQuarrie et al., *The History of Recorded Music: 1960s–1980s*, <http://www.soc.duke.edu/~s142tm01/history4.html> (last visited Mar. 31, 2011).

15. INT’L FED’N OF THE PHONOGRAPHIC INDUSTRY, DIGITAL MUSIC REPORT 2010, at 4 (2010) [hereinafter IFPI 2010], available at <http://www.ifpi.org/content/library/DMR2010.pdf>.

16. 4 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 14:3 (2011).

17. *Id.* (quoting Act of Aug. 18, 1856, ch. 169, 11 Stat. 138 (supplemental to Act to Amend the Several Acts Respecting Copyright)).

18. *Id.*

19. A piano roll is “a roll, usually of paper, on which music is preserved in the form of perforations; it is recorded and played back mechanically on a player piano or pianola.” THE NEW GROVE DICTIONARY OF JAZZ 985 (Barry Kernfeld ed., 2d ed. 1994).

20. See JESSICA LITMAN, DIGITAL COPYRIGHT 23 (2d ed. 2006).

began reproducing songs through the distribution of thousands of piano rolls without authorization from composers.²¹ Composers sought a judicial remedy to the exploitation of their work without proper compensation.²² But the Court held that songwriters were not entitled to revenue from the sale of piano rolls because piano rolls were not really “copies” of a musical work.²³

In response to the lobbying efforts of composers and others interested in a piece of the expanding copyright pie, Congress set about reforming American copyright law by tasking representatives of songwriters, publishers, and manufacturers with crafting legislation that would appeal to all represented interests.²⁴ The 1909 Copyright Act was the result; it established a compulsory mechanical license for reproductions of music.²⁵ The compulsory mechanical license allowed piano-roll manufacturers to use copyrighted works without permission of the rights holder, but the manufacturer was obligated to pay the rights holder a statutorily determined fee for the use.²⁶

In the 1909 Act, Congress extended copyright protection beyond dramatic and musical compositions to additional genres of work, and Congress limited protection of musical compositions to for-profit performances.²⁷ In interpreting the Act, the Court would later adopt a broad construction of the phrase “for profit,” acknowledging that copyright infringement is not limited to performances “where money is taken at the door.”²⁸ In the Court’s view, “performances [that] are not eleemosynary . . . are part of a total for which the public pays.”²⁹

The task of applying the 1909 Act to new innovations fell to the Judiciary because the Legislature could not anticipate not-yet-invented technologies. For example, the development of the “word roll,” a piano roll with lyrics printed next to the roll’s perforations, was unanticipated

21. Sara K. Stadler, *Performance Values*, 83 NOTRE DAME L. REV. 697, 708–09 (2008).

22. *White-Smith Music Publ’g Co. v. Apollo Co.*, 209 U.S. 1, 9–10 (1908).

23. *Id.* at 18.

24. LITMAN, *supra* note 20, at 38. Because of highly technical aspects of industries affected by the Copyright Act, Congress originally resolved that the Library of Congress would convene a conference of experts to offer advice regarding codification of copyright laws. The original conference of industry insiders excluded representatives of the piano-roll and “talking machine,” or phonograph, industries. Not surprisingly, early drafts of the legislation disfavored the unrepresented industries, making the unlicensed manufacture of piano rolls or phonographs illegal. The piano-roll and phonograph manufacturers bitterly opposed the draft legislation, and so, the legislation did not receive a vote in Congress. *Id.* at 38–39.

25. *Id.* at 40.

26. 1 HOWARD B. ABRAMS, *THE LAW OF COPYRIGHT* §§ 5.5, 5.16 (2010).

27. Stadler, *supra* note 21, at 705.

28. *Herbert v. Shanley Co.*, 242 U.S. 591, 594 (1917).

29. *Id.*

by negotiators of the 1909 Act.³⁰ Thus, the Judiciary had to determine whether the inclusion of lyrics on a piano roll constituted infringement of the lyricist's copyright under the language of the 1909 Act.³¹

In the decades that followed the 1909 Act, developments in technology widened the economic potential in copyright, which created a desire for reform among traditional members of and newcomers to the music industry. In response to industry lobbying and a proposal from Congress to revise the 1909 Act, the Register of Copyrights issued a report in 1961 voicing its concern about various proposed alterations to the structure of the 1909 Act.³² In particular, the Register's report addressed new modes of identifying public performance exemptions.³³ According to the report, an attempt to specify discrete categories of exempt performance—such as religious, educational, and charitable performances—would likely result in uncertainty regarding exempt performances and an overly broad or narrow interpretation of the exemption.³⁴ Despite the Register's advice, the first draft of the bill presented two alternatives to the definition of a public performance right: (1) a continuation of the 1909 Act conception of the public performance right extending only to for-profit performances,³⁵ and (2) a broad, general public performance right limited by specifically iterated categories of exemption.³⁶

In revising the bill, the Register made a number of recommendations to clarify the definition of "public performance."³⁷ In response to evolving technology, the Register expressed that acts transmitting or reproducing an initial performance constituted an additional performance.³⁸ The Register also stated that codifying the phrase "either directly or by means of any device or process" as part of the definition would encom-

30. LITMAN, *supra* note 20, at 47.

31. *Standard Music Roll Co. v. F.A. Mills, Inc.*, 241 F. 360, 363 (3d Cir. 1917). Apparently, it did. *Id.*

32. 4 PATRY, *supra* note 16, § 14:11.

33. *Id.*

34. *Id.* (quoting U.S. COPYRIGHT OFFICE, REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW (1961)).

35. Protected public performances would include those "given with the expectation of direct or indirect commercial advantage, or if any part of the proceeds, after deducting the reasonable costs of the performance, will be used for private financial gain." 4 PATRY, *supra* note 16, § 14:12 (quoting Copyright Law Revision Part 3, Preliminary Draft for Revised U.S. Copyright Law and Discussions and Comments on the Draft, § 5(c)(4), Alternative A at 5 (Sept. 1964)). Under the 1909 Act, the broad definition of for-profit performances included performances in a restaurant or hotel without charge, *Herbert v. Stanley Co.*, 242 U.S. 591, 593 (1917), and included piping music into hotel rooms from a master radio receiving set at no additional charge, *Buck v. Jewell-La Salle Realty Co.*, 283 U.S. 191, 202 (1931), but would exclude "the owner of a private radio receiving set who in his own home invites friends to hear a musical composition which is being broadcast," *id.*

36. 4 PATRY, *supra* note 16, § 14:12.

37. *Id.* § 14:14.

38. *Id.* (quoting S. 1006, H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835, 89th Cong. (1965)).

pass new means of reproducing or amplifying initial performances, including “a host of . . . techniques, undoubtedly . . . some not invented yet.”³⁹

After a twenty-year negotiating process, Congress passed the 1976 Copyright Act, which reflected an industry compromise similar to the 1909 Act.⁴⁰ As a result of complex negotiations, the 1976 Act is a lengthy, complex piece of legislation. Rather than enacting simple, broad, and flexible provisions that might stand the test of time, the legislation contains language narrowly tailored for the interests of the industry representatives who crafted the legislation.⁴¹

For instance, Congress adopted the second of the Register’s proposed public performance definitions, abandoning the for-profit definition of public performance protection and, instead, codifying extensive exceptions to the broad public performance right.⁴² Congress included the “device or process” language in its definition of “perform.”⁴³ Congress also codified a definition of performing “publicly.”⁴⁴ The second of Congress’s two-pronged definition of “public” centers on the transmitter rather than the recipient of a performance because the transmission constitutes a performance “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.”⁴⁵ The definition, therefore, includes within its “public” scope transmissions and retransmissions of performances to recipients in private places and does not require proof that a member of the public actually took in the performance at the time of transmission.⁴⁶

39. *Id.* (quoting U.S. COPYRIGHT OFFICE, SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 22 (1965)).

40. LITMAN, *supra* note 20, at 51.

41. *Id.* at 57.

42. 4 PATRY, *supra* note 16, §§ 14:20–:30.

43. 17 U.S.C. § 101 (2006) (“To ‘perform’ a work means to recite, render, play, dance, or act it, *either directly or by means of any device or process* or, 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.”) (emphasis added).

44. *Id.* (“To 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; 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.”).

45. *Id.*

46. 4 PATRY, *supra* note 16, § 14:28. For example, radio and television broadcasts constitute public performances even in the absence of proof that a radio or television was powered on and receiving the transmission. *Id.*

These public performance protections apply only to “literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works.”⁴⁷ It was not until the Digital Performance Act of 1995 (DPA) that sound recordings were extended some public performance protection.⁴⁸ Before the DPA, public performance rights were reserved only in the musical composition underlying the recording. For example, the publisher that owns the right of public performance in “Disco Duck” receives royalty payments when the sound recording is played in public, but the record company that produced the song had no potential royalty in the public performance until passage of the DPA. The DPA extended sole rights for public performance “by means of a digital audio transmission” to copyright holders of sound recordings.⁴⁹ Analog sound recording transmissions remain exempt, resulting in an “absence of liability for terrestrial radio.”⁵⁰ The result of this fractured performance right is that web-based radio services providing digital audio transmission must license use of a song from both the copyright holder of the sound recording *and* the copyright holder of the musical composition, while terrestrial radio broadcasters need only license use from the copyright holder of the musical composition.⁵¹

An exploration of the history of copyright reform generally, and the public performance right in particular, illustrates that the industry-compromise method of legislating leaves much to be wanted. Just as industry representatives negotiating the 1909 Act could not predict the development of the word roll, parties to the development of the 1976 Act undoubtedly never considered that members of the public would ultimately carry small telephones into busy restaurants that would signal an incoming call by broadcasting a digital audio recording of a copyrighted musical work. The industry-compromise method of copyright reform likely necessitates band-aid solutions like the Ringtone Decision.

If historical trends are any indication, we are due for another generation of the Copyright Act.⁵² Similar to the development of the phonograph and the player piano, the availability of digital media has transformed the way in which the public interacts with music. From 2003 to

47. 17 U.S.C. § 106(4) (2006).

48. The protection granted was very limited. 4 PATRY, *supra* note 16, § 14:29.

49. 17 U.S.C. § 106(6) (2006).

50. 4 PATRY, *supra* note 16, § 14:29. Terrestrial radio is radio broadcast from land-based towers. ANNABEL Z. DODD, *THE ESSENTIAL GUIDE TO TELECOMMUNICATIONS* 9 (3d ed. 2002).

51. Emily F. Evitt, *Money, That's What I Want: The Long & Winding Road to a Public Performance Right in Sound Recordings*, 8 INTELL. PROP. & TECH. L.J. 10, 11 (2009). Companion bills H.R. 848 and S. 379, the Performing Rights Act, were reintroduced in 2009 and would eliminate terrestrial radio's exemption from paying royalties to copyright holders of sound recordings. Owen J. Sloane & Rachel M. Stilwell, *The Case for the Performing Rights Act*, L.A. LAW., May 2009, at 52.

52. See Litman, *supra* note 7, at 257.

2007, consumption of music in the United States increased by one-third.⁵³ In 2008, there were 1.5 billion music purchases in the United States,⁵⁴ and the digital share of the music market jumped to thirty-nine percent.⁵⁵ As in the periods preceding the 1909 and 1976 Acts, the economic contours of copyright are changing. The question remains whether the industry-compromise method of legislating will continue to inform Congress's revisions of the Copyright Act.⁵⁶

But there is another culprit besides our current legislative regime that might be the cause of copyright not working for its intended beneficiaries. The next section explores that potential cause.

B. The Vertical Integration of the Music Industry

The vast majority of copyrights are held by a small number of corporate entities. Estimates show that global revenues for the music industry exceeded \$15.5 billion in 2009, with the digital share of market revenues estimated at \$4.2 billion.⁵⁷ Four companies hold copyrights for seventy to eighty percent of global music revenues: EMI Music Publishing, Warner/Chappell Music, Sony/ATV Music Publishing, and Universal Music Publishing Group.⁵⁸

One reason for the consolidation of global copyright revenues in a handful of multinational media corporations is the vertical integration of the music industry.⁵⁹ Vertical integration occurs when different parts of the industry's value chain have the same owner, such as when a record company purchases a publishing company.⁶⁰ Formerly, music publishers benefitted from copyrights in the musical composition, and record pro-

53. INT'L FED'N OF THE PHONOGRAPHIC INDUSTRY, DIGITAL MUSIC REPORT 2009, at 4 (2009), available at <http://www.ifpi.org/content/library/DMR2009-real.pdf>.

54. *Id.*

55. *Id.* at 7.

56. See Litman, *supra* note 7, at 249.

57. See IFPI 2010, *supra* note 15, at 4.

58. Ulrik Volgsten & Yngve Åkerberg, *Copyright, Music, and Morals: Artistic Expression and the Public Sphere*, in MUSIC AND MANIPULATION: ON THE SOCIAL USES AND SOCIAL CONTROL OF MUSIC 336, 355 (Steven Brown & Ulrik Volgsten eds., 2006). Volgsten & Åkerberg state that five multinational companies own copyrights for seventy to eighty percent of global music revenues, including Bertelsmann/BMG Music Publishing. *Id.* The number of companies is now reduced to four as Universal purchased BMG Publishing in 2006 and Sony purchased Bertelsmann's half of the Sony BMG joint venture in 2008. Ethan Smith, *Sony to Take Over Music Partnership: Firm Raises Its Bet on Ailing Industry; Bertelsmann Exits*, WALL ST. J., Aug. 6, 2008, <http://online.wsj.com/article/SB121793861556313223.html>; *Universal to Buy BMG Publishing*, BBC NEWS, Sept. 6, 2006, <http://news.bbc.co.uk/2/hi/business/5319050.stm>.

59. Roger Wallis, *The Changing Structure of the Music Industry: Threats to and Opportunities for Creativity*, in MUSIC AND MANIPULATION: ON THE SOCIAL USES AND SOCIAL CONTROL OF MUSIC, *supra* note 58, at 287–88.

60. *Id.* at 294.

ducer–distributors benefitted from mechanical reproduction copyrights in a sound recording. Now, each of the four major publishing companies is paired with one of the “Big 4” record companies (Universal, Sony, Warner, and EMI), so the parent corporations can benefit from the “bundle” of copyrights in a work.⁶¹

With consolidated control of the music industry comes increased control over songwriters. In the past, signing with a major record label represented guaranteed wealth, but today, the majority of singer–songwriters working under major record labels fail to receive an equitable share of the proceeds of their work.⁶² To garner a contract with a recording company, a singer–songwriter often has to transfer her copyrights to a publishing company within the same corporation.⁶³ The public performance right at issue in the Ringtone Decision is among the rights a singer–songwriter often transfers to a multinational media corporation.⁶⁴

C. Origins of ASCAP

Despite the consolidation of copyright holders in the music market, performance-rights organizations continue to act as the collectors of public performance royalties. Understanding the origin of performance-rights organizations helps us understand the Ringtone Decision specifically, and the need for copyright reform generally.

As discussed earlier,⁶⁵ player pianos began to saturate the market at the turn of the twentieth century,⁶⁶ with manufacturing companies reproducing songs through distribution of thousands of piano rolls without authorization from the composers.⁶⁷ The Supreme Court held that piano rolls were noninfringing.⁶⁸ The 1909 Act was, in part, a response to this ruling.⁶⁹ Composers began reaping the benefit of manufactured copies of their works through compulsory licensing developed in the 1909 Act, but

61. *Id.*

62. See JOANNA DEMERS, STEAL THIS MUSIC: HOW INTELLECTUAL PROPERTY LAW AFFECTS MUSICAL CREATIVITY 144 (2006) (“[T]he majority of artists who work under the majors today end up losing money”); WILLIAM W. FISHER III, PROMISES TO KEEP 35 (2004) (“I’ve created 25+ albums for major labels, and I’ve *never once* received a royalty check that didn’t show I owed *them* money.”) (quoting Janis Ian, *The Internet Debacle—An Alternative View*, JANISIAN.COM (2002), <http://www.janisian.com/reading/internet.php>); see also Litman, *supra* note 9, at 9–10; Courtney Love, *Courtney Love Does the Math*, SALON.COM, June 14, 2006, <http://www.salon.com/technology/feature/2000/06/14/love>; Lyle Lovett Sells Millions, Earns Nothing, REUTERS, July 10, 2008, available at <http://www.reuters.com/article/idUSN1030835920080710>.

63. Wallis, *supra* note 59, at 294.

64. See *id.* at 295.

65. See *supra* Part II.A.

66. Stadler, *supra* note 21, at 708.

67. *Id.* at 708–09.

68. *Id.* at 709.

69. *Id.*

no individual composer had the resources to determine when his work was being *performed* without authorization.⁷⁰ As a result, in 1914, a group of prominent composers founded ASCAP with the primary purpose of assuring creators of music fair compensation for the public performance of their works.⁷¹

ASCAP’s aggressive membership efforts⁷² brought about radio-broadcaster opposition to the cost of ASCAP licensing.⁷³ In 1941, ASCAP was the subject of an antitrust action.⁷⁴ To settle the suit, ASCAP agreed to operate under a consent decree requiring the organization to license performance rights to all who seek them.⁷⁵ The consent decree has been modified twice, but it remains in place.⁷⁶ In the event that ASCAP and the party seeking a license cannot agree on a licensing fee, the United States District Court for the Southern District of New York operates as a rate-setting court and resolves the dispute.⁷⁷

Today, ASCAP licenses performance rights to works in its catalog primarily through blanket licenses that allow licensees to perform any work in the ASCAP catalog as often as they please within the stated term.⁷⁸ The organization subsequently distributes royalties to its member copyright holders according to a fee schedule related to the number of times the work is performed.⁷⁹ Celebrating its ninety-fifth year in 2008, ASCAP distributed nearly \$819 million to its member copyright holders.⁸⁰ ASCAP and its fellow performance-rights organization, Broadcast Music, Inc., hold “[a]lmost every domestic copyrighted composition [in their repertoires].”⁸¹

70. *Id.* at 710.

71. *The Birth of ASCAP*, ASCAP.COM, <http://www.ascap.com/about/history> (last visited Mar. 31, 2011).

72. *The Age of Radio*, ASCAP.COM, <http://www.ascap.com/about/history/1920s.html> (last visited Mar. 31, 2011).

73. *The Big Band Era*, ASCAP.COM, <http://www.ascap.com/about/history/1940s.html> (last visited Mar. 31, 2011).

74. See *United States v. Am. Soc’y of Composers, Authors & Publishers*, Civ. No. 13-95, 1941 U.S. Dist. LEXIS 3944 (S.D.N.Y. Mar. 4, 1941).

75. Daniel A. Crane, *Bargaining in the Shadow of Rate-Setting Courts*, 76 ANTITRUST L.J. 307, 310 (2009).

76. *Id.*

77. *Id.*

78. *Major Bob Music v. Stubbs*, 851 F. Supp. 475, 477 n.1 (S.D. Ga. 1994).

79. *Id.*

80. See ASCAP, 2009 ANNUAL REPORT 4 (2009), available at http://www.ascap.com/about/annualReport/annual_2009.pdf.

81. *Major Bob Music*, 851 F. Supp. at 477 n.1.

III. THE RINGTONE DECISION AS BAND-AID

Recall that when the Copyright Act isn't working well for lawyers, they tend to persuade courts "that the words of the statute mean one thing in one context and a different thing in another context."⁸² For example, the Ringtone Decision bandaged together differing interpretations of public performance⁸³ in an effort to address copyright issues in new technology.

On October 14, 2009, the United States District Court for the Southern District of New York filed the Ringtone Decision.⁸⁴ Section A of this Part examines the precedent that helped inform the Ringtone Decision. Sections B and C compare claims presented by ASCAP and the Mobile Carriers.⁸⁵ Section D explores the court's resolution of the claims.

A. *The Road to the Ringtone Decision*

Three recent opinions help inform an analysis of the Ringtone Decision. First, in the "Register's Opinion," the Register of Copyrights issued an opinion that the primary purpose of a ringtone is its private use, implying that a public performance license is unnecessary.⁸⁶ Second, in the "Download Decision," the United States District Court for the Southern District of New York established that digital downloads, while almost immediately available for playback, do not necessitate a public performance license because the downloads are not "contemporaneously perceptible."⁸⁷ And third, in the "Preview Decision," the United States District Court for the Southern District of New York established that a blanket license is necessary for ringtone previews streamed via the Web or mobile-phone applications because of the commercial purpose of the use.⁸⁸

82. Litman, *supra* note 7, at 250.

83. 17 U.S.C. §§ 101, 106(4) (2006).

84. *In re Cellco P'ship*, 663 F. Supp. 2d 363 (S.D.N.Y. 2009).

85. I use the term "ASCAP" to refer to ASCAP and its amici. I use "Mobile Carriers" to refer to AT&T Mobility, Verizon Wireless, and their amici. The court filed a brief opinion granting summary judgment to AT&T Mobility for "substantially the same reasons" as Verizon in *In re AT&T Mobility L.L.C.*, No. 09 Civ. 7072, 2009 U.S. Dist. LEXIS 123018, at *7 (S.D.N.Y. Oct. 14, 2009).

86. Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, 71 Fed. Reg. 64,303, 64,316 (Copyright Office Nov. 1, 2006).

87. *United States v. Am. Soc'y of Composers, Authors & Publishers (ASCAP I)*, 485 F. Supp. 2d 438, 446 (S.D.N.Y. 2007).

88. *United States v. Am. Soc'y of Composers, Authors & Publishers (ASCAP II)*, 599 F. Supp. 2d 415, 429 (S.D.N.Y. 2009).

1. The Register’s Opinion

In 2006, the Recording Industry Association of America (RIAA) requested an opinion from the Copyright Royalty Board regarding the eligibility of ringtones for compulsory mechanical licensing under § 115 of the Copyright Act.⁸⁹ The question was posed as a dispute between music publishers and the Big 4 record labels that sell ringtones to mobile-phone companies.⁹⁰ If ringtones *did not* qualify for a § 115 mechanical license, then record labels would have to negotiate a license with music publishers before creating and distributing ringtones to mobile-phone companies.⁹¹ If ringtones *did* qualify for mechanical licensure, ringtone distributors could secure rights to create and distribute ringtones at a lower statutory rate.⁹² The Copyright Royalty Board referred the issue to the Register of Copyrights in the form of two questions:

- (1) Does a ringtone, made available for use on a cellular telephone or similar device, constitute delivery of a digital phonorecord that is subject to statutory licensing under 17 U.S.C. § 115, irrespective of whether the ringtone is monophonic (having only a single melodic line), polyphonic (having both melody and harmony), or a master-tone (a digital sound recording or excerpt thereof)?
- (2) If so, what are the legal conditions and/or limitations on such statutory licensing?⁹³

In its memorandum opinion, the Register of Copyrights answered the questions posed.⁹⁴ First, the Register stated that monophonic and polyphonic ringtones, as well as mastertones, constitute digital phonorecord deliveries and, therefore, qualify for compulsory mechanical licensing under § 115 of the Copyright Act.⁹⁵ Second, the legal conditions or limitations depend on the nature of the ringtone—namely, whether the ringtone is a portion of an original musical work or is a derivative work such that it has become an original work of authorship entitled to its own copyright protection.⁹⁶

89. Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, 71 Fed. Reg. at 64,303.

90. Daniel M. Simon, Note, *Cell Phone Ringtones: A Case Study Exemplifying the Complexities of the § 115 Mechanical License of the Copyright Act of 1976*, 57 DUKE L.J. 1865, 1874 (2008).

91. *Id.*

92. *Id.* at 1875.

93. Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, 71 Fed. Reg. at 16,303.

94. *Id.*

95. *Id.*

96. *Id.* The opinion, which is not immune from judicial review, has been both praised and criticized. See Simon, *supra* note 90, at 1881 (discussing how the “analysis did not bring clarity to this muddled area of law”). The RIAA praised the decision, stating:

An important part of the decision was the Register's analysis of the § 115 limitation of compulsory mechanical licenses to persons making phonorecords for distribution "to the public for private use."⁹⁷ Music publishers argued that ringtones were not for "private use" because the end use was often outside the home where members of the public could hear the work and served as "a means [for users] to publicly identify and express themselves to their friends, colleagues and the public at large."⁹⁸ The Register rejected this position:

This cannot be what Congress intended. Here, we note that traditional phonorecords are used in public (e.g., in boom boxes in public parks, in a car stereo while the automobile is driving down the street, etc.), but that does not disqualify them from the statutory license by violating their primary purpose of being for private use. While it may be true that some mobile phone users purchase ringtones to identify themselves in public, this use most likely would not be considered a public use as Congress intended that term to be understood in the Section 115 context, and in any event, there is no basis to conclude that the primary purpose of the ringtone distributor is to distribute the ringtone for "public" use.⁹⁹

As will become clear, this reasoning closely parallels that of the court's in the Ringtone Decision.

2. The Download Decision

In the Download Decision, the rate court that resolves royalty conflicts under the consent decree for ASCAP's Sherman Antitrust Act violations determined that a digital transmission must be contemporaneously perceptible for it to constitute a public performance.¹⁰⁰ ASCAP applied to the court because the organization was unable to agree on a

This decision injects clarity into the marketplace—clarity that will help satisfy fans' hunger for the latest hits from today's best artists by affording record companies and ringtone providers the ability to move new offerings quickly and easily to consumers. Ultimately, we're all seeking a vibrant mobile business. This decision helps us further that goal.

Press Release, Recording Industry Ass'n of Am., RIAA Statement on Copyright Office Ringtone Ruling (Oct. 17, 2006), available at http://www.riaa.com/newsitem.php?news_month_filter=10&news_year_filter=2006&resultpage=&id=FFDA71A6-BC65-F876-E846-114BD14EABE1.

Conversely, the decision has been criticized: "A compulsory license for ringtones unnecessarily risks the artistic integrity and reputation of artists and songwriters who have no meaningful way of opting out of the licensing scheme." Daniel H. Mark, *Wringing Songwriters Dry: Negative Consequences of Compulsory Licensing for Ringtones*, 10 VAND. J. ENT. & TECH. L. 533, 541 (2008).

97. 17 U.S.C. § 115(a)(1) (2006).

98. Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, 71 Fed. Reg. at 64,315.

99. *Id.* at 64,316.

100. *ASCAP I*, 485 F. Supp. 2d 438, 446 (S.D.N.Y. 2007).

reasonable licensing fee with AOL, LLC, RealNetworks, Inc., and Yahoo! Inc. for their use of music contained in the ASCAP catalog.¹⁰¹ ASCAP moved for partial summary judgment on the issue of whether music downloads consist of a public performance as defined by the Copyright Act.¹⁰² Relying on statutory construction, analogous case law, and secondary authorities, the court concluded that “in order for a song to be performed, it must be transmitted in a manner designed for contemporaneous perception.”¹⁰³ Online streaming of a musical work, for example, does constitute a public performance under this standard.¹⁰⁴ Similar to a musical “stream,” a song download consists of a digital transmission to an end user.¹⁰⁵ A performance can occur “publicly” through the transmission of “any device or process.”¹⁰⁶ While a song download enables prompt replay, that does not mean that the transmission is “simultaneously perceptible [rendering it] a performance under the Act.”¹⁰⁷ The court did not, however, foreclose the possibility that a digital transmission could, in certain circumstances, be *both* a reproduction and a public performance.¹⁰⁸ The court’s opinion—particularly its use of a contemporaneously perceptible standard of public performance—is the subject of appeal.¹⁰⁹

3. The Preview Decision

A similar rate dispute resulted in the rate court’s Preview Decision.¹¹⁰ ASCAP requested the court determine rates for “interim blanket license fees and reasonable final blanket license fees” for AT&T Mobility’s public performances of works from the ASCAP catalog through its website and wireless transmissions.¹¹¹ The Preview Decision resulted from AT&T Mobility’s motion for partial summary judgment on the issue of ringtone and ringback tone previews that it offered via its mobile-media website and application.¹¹² AT&T Mobility argued that the pre-

101. *Id.* at 441.

102. *Id.* at 442.

103. *Id.* at 443.

104. *Id.* at 442.

105. *Id.* at 446.

106. 17 U.S.C. § 101 (2006).

107. *ASCAP I*, 485 F. Supp. 2d at 446.

108. *Id.* at 447.

109. ASCAP’s Opposition to AT&T’s Motion for Summary Judgment Concerning Ringtones at 11–12, *United States v. Am. Soc’y of Composers, Authors & Publishers*, No. 41-1395 (S.D.N.Y. Oct. 14, 2009).

110. *ASCAP II*, 599 F. Supp. 2d 415, 419 (S.D.N.Y. 2009).

111. *Id.* at 419.

112. *Id.*

views constituted “fair use” as defined by § 107 of the Copyright Act.¹¹³ ASCAP argued that the previews constituted public performances and, thus, should be included in the court’s determination of a reasonable blanket license fee.¹¹⁴ In balancing the fair use factors codified in the Copyright Act, the court held that AT&T Mobility’s use of works from the ASCAP catalog for previews did not constitute fair use.¹¹⁵

The Register’s Opinion, the Download Decision, and the Preview Decision make clear that the Ringtone Decision court could have moved in either of two distinct directions—a ringtone is a public performance or it isn’t. The Register’s Opinion advised that the primary purpose of a ringtone is its private use, implying that a public performance license is unnecessary.¹¹⁶ And the Download Decision established that digital downloads, while almost immediately available for playback, do not necessitate a public performance license because the downloads are not contemporaneously perceptible.¹¹⁷ But the Preview Decision established the necessity of a blanket license for ringtone previews streamed via the Web or mobile-phone applications because of the commercial purpose of the use. Thus, the court’s Ringtone Decision could determine that a ring-

113. *Id.* The fair use section of the Copyright Act states:

In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107 (2006).

114. *ASCAP II*, 599 F. Supp. 2d at 423.

115. *Id.* at 434. In examining the purpose and character of the use, the court determined that AT&T Mobility’s previews were not transformative because, other than selecting only a portion of the musical work, the songs were unchanged. *Id.* at 428. In addition, the court determined that the use was commercial in nature, weighing heavily against AT&T Mobility. *Id.* at 429. While stating that the second factor is “rarely found to be determinative,” the court noted that the nature of the copyrighted work was undisputedly creative, weighing in favor of ASCAP. *Id.* at 429–30. The court held that the third factor—the amount and substantiality of the portion used—also weighed in favor of ASCAP. *Id.* at 431. That the previews were copied identically from the member works was evidence of the “qualitative value of the copied material.” *Id.* Thus, while the amount used was temporally limited, it was markedly substantial because the selection was often the essence of the work. *Id.* at 430–31. The court held that the fourth and final factor was neutral if not weighing in favor of ASCAP. *Id.* at 433. In examining the market effect, the court “recognize[d] the strong possibility that ASCAP and its members lose current and future revenue when consumers access free previews from a website or wireless application to listen to, and possibly copy, previews of ASCAP music in lieu of accessing music segments from sources that pay licensing fees to ASCAP.” *Id.* at 432–33. The court also held that ASCAP created a market for performances of short segments of its music by licensing such use to nineteen separate companies. *Id.* at 432. A finding of fair use would, therefore, encroach on “potential licensing revenues from these markets.” *Id.*

116. See Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, 71 Fed. Reg. 64,303, 64,316 (Copyright Office Nov. 1, 2006).

117. *ASCAP I*, 485 F. Supp. 2d 438, 446 (S.D.N.Y. 2007).

tone is simply a download: a digital phonorecord that is transmitted without contemporaneous perception for private use. Alternatively, the court could hold that a ringtone is no different than a preview: a mobile transmission to an end user that is commercial in nature and encroaches on ASCAP’s established ringtone-licensing market.

B. ASCAP’s Case: A Ringtone Is a Public Performance

Delivery of music to mobile devices is rapidly increasing.¹¹⁸ Not surprisingly, ASCAP is “leveraging its power for the benefit of [its] members”¹¹⁹ alongside other interest groups and manufacturers attempting to mark their territory in the expanding digital and mobile music markets.¹²⁰ The Ringtone Decision, similar to the Download Decision, is the result of ASCAP pursuing that end.

ASCAP requested that the rate court determine blanket license fee rates for the Mobile Carriers’ public performances of works from the ASCAP catalog.¹²¹ The parties failed to negotiate a blanket license, so the court was asked to establish the royalty rates that the Mobile Carriers must pay to acquire blanket licenses.¹²² The Mobile Carriers moved for summary judgment on the issue of whether ringtones constituted public performances necessitating performance license fees.¹²³ The Ringtone Decision was the ruling on that motion.¹²⁴

ASCAP asserted that the initial ringtone transmissions are public performances under the Download Decision because the transmissions are contemporaneously perceptible performances.¹²⁵ ASCAP asserted that the Mobile Carriers must purchase public performance licenses lest the Mobile Carriers directly infringe public performance rights by maintaining an infrastructure that triggers the audio transmission of copyrighted works.¹²⁶ The Mobile Carriers would be secondarily infringing ASCAP’s public performance rights by enabling and encouraging an infringing public performance to be carried out by the end user.¹²⁷ Finally,

118. *Gartner Says Consumer Spending on Mobile Music Will Surpass US\$32 Billion by 2010*, GARTNER, INC., <http://www.gartner.com/it/page.jsp?id=500295> (last visited Apr. 1, 2011).

119. *The ASCAP Millennium*, ASCAP.COM, <http://www.ascap.com/about/history/2000.html> (last visited Apr. 1, 2011).

120. See Carmen Kate Yuen, *Scuffling for a Slice of the Ringtone Pie: Evaluating Legal and Business Approaches to Copyright Clearance Issues*, 8 VAND. J. ENT. & TECH. L. 541, 542 (2006).

121. *In re Cellco P’Ship*, 663 F. Supp. 2d 363, 367–68 (S.D.N.Y. 2009).

122. *Id.*

123. *Id.* at 366.

124. *Id.*

125. ASCAP’s Opposition to AT&T’s Motion, *supra* note 109, at 12 (emphasis in original).

126. *Id.* at 17.

127. *Id.* at 18.

ASCAP argued that the *Sony* doctrine¹²⁸ offers the Mobile Carriers no defense to secondary liability because the ringtones are not capable of “substantial noninfringing uses.”¹²⁹

1. Direct Liability for the Public Performance of Ringtones

In its brief, ASCAP reiterated that it was appealing the court’s Download Decision, but it used the Download Decision’s reasoning in leveling its first argument.¹³⁰ ASCAP contended that a ringtone is not merely a download.¹³¹ Ringtones are “capable of and designed for contemporaneous perception.”¹³² Because ringtones are often played as they are downloaded or are automatically played on completion, ringtones are not downloads in the Download Decision sense but are more akin to “streaming,” which was identified as public performance in the Preview Decision.¹³³

ASCAP argued that it does not matter whether the initial download transmission is perceived “publicly” because ringtones are *ultimately* designed for public perception.¹³⁴ While a digital copy of the ringtone resides on the end user’s phone, the Mobile Carriers participate in the process of a performance of the work wending its way to the public.¹³⁵

Finally, ASCAP maintained that the Mobile Carrier triggers a public performance when it uses its infrastructure to transmit a signal to a user’s mobile phone, causing the phone to ring.¹³⁶ In sum, the Mobile

128. See *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 442 (1984) (“[T]he sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses.”).

129. ASCAP’s Opposition to AT&T’s Motion, *supra* note 109, at 26.

130. *Id.* at 12.

131. *Id.*

132. *Id.* (emphasis in original).

133. *Id.*

134. *Id.* at 14.

135. *Id.* In making this argument, ASCAP relied on *National Football League v. PrimeTime 24 Joint Venture*, 211 F.3d 10 (2d Cir. 2000). In *NFL*, the court held that PrimeTime’s uplink of copyrighted material in the United States required a public performance license even though the perception in question occurred in Canada—outside the jurisdiction of the Copyright Act. *Id.* at 13. The court stated that “a public performance or display includes each step in the process by which a protected work wends its way to its audience. . . . [I]t is clear that PrimeTime’s uplink transmission of signals captured in the United States is a step in the process by which NFL’s protected work wends its way to a public audience.” *Id.* (quoting *David v. Showtime/The Movie Channel, Inc.*, 697 F. Supp. 752, 759 (S.D.N.Y. 1988)) (internal quotation marks and citation omitted). Thus, the transmission of a ringtone to a mobile-phone user is a “step in that process” leading to a public performance. ASCAP’s Opposition to AT&T’s Motion, *supra* note 109, at 14.

136. ASCAP’s Opposition to AT&T’s Motion, *supra* note 109, at 17.

Carrier “commands, enables and controls the playing of ringtones on subscribers’ mobile phones.”¹³⁷

2. Secondary Liability for the Public Performance of Ringtones

ASCAP argued that, even if the Mobile Carriers were not directly liable for an infringing public performance, they were secondarily liable for ringtone infringement.¹³⁸ Secondary liability is used as a generic term to include both contributory infringement and vicarious liability.¹³⁹ Contributory infringement occurs “when ‘one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another.’”¹⁴⁰ Vicarious liability “attaches when one ‘has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities.’”¹⁴¹

Under theories of contributory infringement and vicarious liability, ASCAP maintained that the Mobile Carriers affirmatively encouraged and promoted infringing activity while maintaining their mobile-phone infrastructures and deriving financial benefit from ringtone sales.¹⁴² ASCAP pointed to particular marketing schemes that not only encouraged downloading, but also encouraged public performance.¹⁴³ One such scheme encouraged users to “give your phone a personality,” while another compared the use of ringtones with the selection of nail polish color, asking, “Which ringtone will you put on today?”¹⁴⁴ ASCAP also

137. *Id.*

138. *Id.* at 23. In *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, the Supreme Court outlined theories of secondary liability for copyright infringement:

One infringes contributorily by intentionally inducing or encouraging direct infringement, and infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it. Although the Copyright Act does not expressly render anyone liable for infringement committed by another, these doctrines of secondary liability emerged from common law principles and are well established in the law.

545 U.S. 913, 930–31 (2005) (citing *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 434 (1984); see also *Kalem Co. v. Harper Bros.*, 222 U.S. 55, 62–63 (1911); *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971); *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963); 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12.04[A] (2005)) (footnotes and internal quotation marks omitted). The Court found *Grokster* liable for copyright infringement, holding:

When a widely shared service or product is used to commit infringement, it may be impossible to enforce rights in the protected work effectively against all direct infringers, the only practical alternative being to go against the distributor of the copying device for secondary liability on a theory of contributory or vicarious infringement.

Grokster, 545 U.S. at 929–30.

139. RONALD S. ROSEN, MUSIC AND COPYRIGHT 550 (2008).

140. *Id.* (citing *Gershwin Publ’g Corp.*, 443 F.2d at 1162).

141. *Id.*

142. ASCAP’s Opposition to AT&T’s Motion, *supra* note 109, at 24.

143. *Id.* at 7.

144. *Id.*

claimed that the Mobile Carriers were contributorily liable for infringement by knowingly maintaining an infrastructure that allows the primary infringement to continue.¹⁴⁵ In addition, ASCAP claimed that the Mobile Carriers were vicariously liable in failing to prevent the public performances from occurring.¹⁴⁶

3. The *Sony* Doctrine

Finally, ASCAP argued that the *Sony* doctrine offered the Mobile Carriers no defense.¹⁴⁷ In *Sony*, the Court held that secondary liability could not be found if there were “substantial noninfringing uses” of the product in question.¹⁴⁸ ASCAP argued that a copy of a member work could not be fairly compared to the Betamax videocassette recorder at issue in *Sony*.¹⁴⁹ While in *Sony* the defendants sold a neutral product capable of substantial noninfringing uses, the Mobile Carriers distribute the *actual* musical work unlicensed for public performance to their subscribers.¹⁵⁰

Because primary liability must be present for secondary liability to occur, the arguments presented in this section rely on the notion that primary infringement occurs at the level of the mobile-phone user’s public performance of a ringtone. To be sure, a performance of a ringtone in a public place “transmit[s] or otherwise communicate[s] a performance” to the public “by means of [a] device or process.”¹⁵¹ To avoid exemption under 17 U.S.C. § 110(4), however, the end user must be profiting from the transmission.¹⁵² ASCAP argued that customers enjoyed a “profit” in

145. *Id.* at 25.

146. *Id.* at 27.

147. *Id.* at 26.

148. 464 U.S. 417, 456 (1984).

149. ASCAP’s Opposition to AT&T’s Motion, *supra* note 109, at 26.

150. *Id.*

151. 17 U.S.C. § 101 (2006).

152. Section 110(4) states:

[Infringement does not occur in a] 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, except where the copyright owner has served notice of objection to the performance under the following conditions: (i) the notice shall be in writing and signed by the copyright owner or such owner’s duly authorized agent; and (ii) the notice shall be served on the person responsible for the performance at least seven days before the date of the performance, and shall state the reasons for the objection; and (iii) the notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation.

17 U.S.C. § 110(4) (2006).

the nonfinancial benefits from ringtone performances that they received.¹⁵³ ASCAP argued that because a customer benefits by purchasing a product and service she desires, she profits, and her use is ineligible for the nonprofit safe harbor of § 110(4).¹⁵⁴

C. The Mobile Carriers’ Case: A Ringtone Is Not a Public Performance

In their motions for summary judgment on the issue of public performance of ringtones, the Mobile Carriers sought to “define” and “clarify” the scope of the right before proceeding to a rate-setting trial for the requested blanket license.¹⁵⁵ The Mobile Carriers asserted that initial ringtone transmissions are downloads governed by the Download Decision.¹⁵⁶ In addition, the Mobile Carriers asserted that no license is necessary for alleged performances of a ringtone after its initial download.¹⁵⁷ The Mobile Carriers did not infringe ASCAP’s public performance rights in signaling phones to ring, nor were the Mobile Carriers secondarily liable for an alleged public performance carried out by the end user.¹⁵⁸ Finally, vicarious liability could not be found because the ringtones have substantial noninfringing uses.¹⁵⁹

1. Ringtones as Downloads Not Publicly Performed
When Initially Transmitted

The Mobile Carriers quickly disposed of the initial-transmission-as-performance argument. They argued that ringtone downloads are essentially the same as full-track downloads; thus, the Mobile Carriers accused any consideration of this initial transmission as a public performance to be relitigation of an issue already decided under the Download Decision.¹⁶⁰ Like a full-track download, a ringtone download does not consist of a perceptible performance.¹⁶¹ Nor is a concurrent performance of the work possible because ringtone downloads take only a few seconds while the ringtone itself is usually approximately thirty seconds.¹⁶² The Mobile

153. *In re Cellco P’Ship*, 663 F. Supp. 2d 363, 375 (S.D.N.Y. 2009).

154. *Id.*

155. Memorandum of Law in Support of Verizon Wireless’ Motion for Summary Judgment on Ringtones at 2, *United States v. Am. Soc’y of Composers, Authors & Publishers*, No. 41-1395 (S.D.N.Y. Oct. 14, 2009).

156. *Id.* at 6.

157. *Id.* at 8.

158. *Id.* at 14–16.

159. Reply Memorandum in Support of Verizon Wireless’ Motion for Summary Judgment on Ringtones at 15, *United States v. Am. Soc’y of Composers, Authors & Publishers*, No. 41-1395 (S.D.N.Y. Oct. 14, 2009).

160. *Id.* at 2.

161. Memorandum of Law in Support of Verizon Wireless’ Motion, *supra* note 155, at 1.

162. *Id.* at 3.

Carriers flatly asserted, “There is no technological or legal distinction between the transmission of a download of a digital file embodying a complete song and the transmission of a download of a digital file embodying an excerpt of a song for use as a mobile phone ringtone.”¹⁶³ Because the Download Decision states that the download of a digital music file does not fit the statutory definition of “public performance,” no public performance occurs in the initial transmission of a ringtone to a mobile phone.¹⁶⁴

2. Necessity of a Public Performance License for a Ringing Phone

Having addressed the initial-transmission issue by stating that it was essentially identical to the question presented in the Download Decision, the Mobile Carriers turned to the argument that subsequent performances of the ringtone are infringing. The Mobile Carriers first rebutted the argument that they were directly liable for subsequent public performances. Relying heavily on *Cartoon Network L.P. v. CSC Holdings, Inc.*,¹⁶⁵ the Mobile Carriers maintained that the volitional act necessary to constitute direct liability for infringement is lacking in the instance of a mobile phone ringing.¹⁶⁶ In *Cartoon Network*, the court held that media providers are not liable for making infringing copies when end users—over whom media providers have no control—initiate the infringing duplication.¹⁶⁷ The Mobile Carriers relied on the language of *Cartoon Network*, although they acknowledged in a footnote that the analysis they cited applies to infringement of the copyright holder’s reproduction right rather than performance right.¹⁶⁸ The Mobile Carriers asserted that, similar to the media providers in *Cartoon Network*, they have no control over how or what ringtone the subscriber uses, how or when the ringtone is set

163. *Id.* at 7.

164. *Id.*

165. 536 F.3d 121 (2d Cir. 2008).

166. AT&T Mobility’s Memorandum in Support of its Motion for Summary Judgment on Ringtones at 8–10, *United States v. Am. Soc’y of Composers, Authors & Publishers*, No. 41-1395 (S.D.N.Y. Oct. 14, 2009). In *Cartoon Network*, the court considered a claim by a cable television network that a cable systems operator had infringed the network’s public performance right by providing its subscribers with Remote Storage Digital Video Recorder systems (RS-DVRs). 536 F.3d at 123. The cable operator provided the subscribers with the RS-DVRs, but the subscribers operated the systems via remote control to create and transmit the network’s programming. *Id.* at 124. The court articulated that the question to be answered was “*who* made this copy[?] If it is [the cable operator], plaintiffs’ theory of direct infringement succeeds; if it is the customer, plaintiffs’ theory fails.” *Id.* at 130 (emphasis in original).

167. *Cartoon Network*, 536 F.3d at 133.

168. Memorandum of Law in Support of Verizon Wireless’ Motion, *supra* note 155, at 10 n.4.

to ring, whether the phone is powered on, or whether the phone is taken to a public place.¹⁶⁹

3. Noninfringing Uses

In the absence of end-user liability for public performance infringement, the Mobile Carriers argued that they could not be secondarily liable.¹⁷⁰ The argument, therefore, hinged on the end user’s use being noninfringing. In arguing that a public phone ring is not a public performance, the Mobile Carriers relied on the statutory exemption in § 110(4) of the Copyright Act.¹⁷¹ The Mobile Carriers argued that ringtones are not “transmitted” as required by the Copyright Act’s definition of the word.¹⁷² Rather than being transmitted, the ringtone “simply emanate[s] . . . in the immediate vicinity of the phone.”¹⁷³ Further, mobile-phone owners receive no “direct or indirect commercial advantage,” as the owners do not charge admission to hear the ringtone or use the tone for some means of promotion or advertisement.¹⁷⁴ If the court were to adopt ASCAP’s suggested rule, “it would be infringement to play a CD in one’s car while driving with the windows down or on the beach, or singing in the shower in a public gymnasium locker room.”¹⁷⁵ Because a finding of direct liability in the mobile-phone user is contrary to statute, a finding of secondary liability cannot occur.¹⁷⁶

Even if a public ring constitutes infringement, the Mobile Carriers argued that the ringtones they market have substantial noninfringing uses.¹⁷⁷ Private performances of the ringtone would be exempt from infringement actions and, therefore, are noninfringing uses.¹⁷⁸ As such, vicarious liability cannot be found under the *Sony* doctrine, where the Court held that there is no secondary liability when substantial noninfringing uses are present.¹⁷⁹ The Mobile Carriers cited a Federal Communications Commission study that found that fourteen percent of adults in the United States have abandoned landlines in favor of mobile phones

169. *Id.* at 4, 12.

170. *Id.* at 16.

171. *Id.*

172. *Id.* at 15. “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.” 17 U.S.C. § 101 (2006).

173. Memorandum in Support of Verizon Wireless’ Motion, *supra* note 155, at 15.

174. *Id.*

175. *Id.* at 16.

176. *Id.*

177. *Id.* at 17.

178. *Id.* at 19.

179. *Id.*

as their primary phone line.¹⁸⁰ As such, the Mobile Carriers claimed, it is highly likely that ringtones often receive private performances, relieving the Mobile Carriers from liability under *Sony*.

D. The Court's Band-Aid Solution

The court had to grapple with conflicting interpretations of public performance in the Copyright Act. One interpretation comes from *National Football League v. PrimeTime 24 Joint Venture*,¹⁸¹ the other from *Cartoon Network L.P. v. CSC Holdings, Inc.*¹⁸²

In *NFL*, the court held that PrimeTime's uplink of copyrighted material in the United States required a public performance license even though the performance in question occurred in Canada.¹⁸³ Because the performance was outside the jurisdiction of the U.S. Copyright Act, the end use was, arguably, noninfringing.¹⁸⁴ But the court stated:

[A] public performance or display includes *each step in the process* by which a protected work wends its way to its audience. . . . [I]t is clear that PrimeTime's uplink transmission of signals captured in the United States is a step in the process by which NFL's protected work wends its way to a public audience.¹⁸⁵

Thus, PrimeTime was liable for a public performance even though the end use before the court occurred outside of the jurisdiction of U.S. law.

Unlike the court in *NFL*, the *Cartoon Network* court held that media providers were not liable for public performance where end users initiated the performance.¹⁸⁶ The *Cartoon Network* court considered a claim by a cable television network that a cable systems operator had infringed the network's public performance right by providing its subscribers with Remote Storage Digital Video Recorder systems (RS-DVRs).¹⁸⁷ The cable subscribers—not the operators—used the RS-DVRs to create unique copies of the network's programming for their enjoyment.¹⁸⁸ The court stated that an interpretation of the public performance right requires an examination of the potential audience of a work's end

180. *Id.* at 4 (citing FED. COMM'NS COMM'N, DA 09-54, THIRTEENTH ANNUAL REPORT & ANALYSIS OF COMPETITIVE MARKET CONDITIONS WITH RESPECT TO COMMERCIAL MOBILE SERVICES (2009)).

181. 211 F.3d 10 (2d Cir. 2000).

182. 536 F.3d 121 (2d Cir. 2008).

183. *NFL*, 211 F.3d at 13.

184. *Id.* at 12–13.

185. *Id.* at 13 (quoting *David v. Showtime/The Movie Channel, Inc.*, 697 F. Supp. 752, 759 (S.D.N.Y. 1988)) (emphasis added) (internal quotation marks and citation omitted).

186. *Cartoon Network*, 536 F.3d at 123.

187. *Id.*

188. *Id.* at 124.

use.¹⁸⁹ Because a unique copy of the cable programming was created by and transmitted to individual subscribers, the court held that the performances could not have been made "to the public."¹⁹⁰

In applying this precedent to the Ringtone Decision, the court had to choose one of two interpretations. The court could have held that, similar to *NFL*, when mobile carriers triggered a ringtone to sound, they transmitted a performance because they took *the first step* in a process leading to a copyrighted work sounding in public. Or the court could have held that ringtones were unique copies of works made for the enjoyment of a single subscriber and, therefore, could not be public performances.

In bandaging together its decision, the court, for the most part, ignored *NFL* by relegating the majority of its discussion of the case to an extended footnote.¹⁹¹ Instead, the court relied heavily on *Cartoon Network*.¹⁹² The court's choice of *Cartoon Network*'s "unique copy" analysis in the Ringtone Decision and disregard for the *NFL* analysis exhibits precisely the "band-aid" behavior to which Professor Litman refers.¹⁹³

In addition, the court could not craft a holding consistent with the normative underpinnings of U.S. copyright law because the creators of the works at issue were largely disassociated from the litigation. Because the vertical integration of the music industry has resulted in a handful of corporate interests owning both the mechanical reproduction and performance rights in a majority of revenue-earning works, a vertically integrated media corporation would have been unfairly advantaged by a holding for ASCAP. A favorable outcome for ASCAP would have presented a best-case scenario for such an integrated corporation: mechanical reproduction revenue for the sound recording; mechanical reproduction revenue for the musical composition; public performance revenue for the musical composition; and public performance revenue for the sound recording.

The court's holding in favor of the Mobile Carriers is no closer to aligning copyright law with its normative underpinnings. The holding for the Mobile Carriers grants the mobile-telephone industry a windfall by allowing them to profit from the performance of copyrighted work without performance royalty payments. It is true that Mobile Carriers already pay mechanical reproduction royalties for ringtones. But the current copyright regime awards separate exclusive rights for reproduction *and* per-

189. *Id.* at 139.

190. *Id.* at 138.

191. *In re Cellco P'ship*, 663 F. Supp. 2d 363, 373 n.12 (S.D.N.Y. 2009).

192. *Id.* at 372–73.

193. Litman, *supra* note 7, at 250.

formance. Payment for one does not include the other. If the purpose of bifurcation of exclusive copyrights is to allow creators to reap much of the benefit from the exploitation of their creative work, then the Mobile Carriers should disgorge more of their ringtone profits.

The Ringtone Decision acts as a harbinger of copyright reform for two reasons. First, the court adopts different interpretations of the Copyright Act in different contexts.¹⁹⁴ And second, the Ringtone Decision shows how contemporary copyright litigation often inures to the benefit of copyright intermediaries while ignoring the creators that copyright law is intended to encourage.¹⁹⁵

IV. COPYRIGHT ACT REFORM

The increasing vertical integration of the music industry has created a power imbalance between copyright creators and intermediaries. The Copyright Act is a relic of history created for the benefit of entrenched interests. Courts are increasingly challenged when called to apply the aging Copyright Act to new technologies unimaginable at the time of its drafting. The Copyright Act is ripe for reform.

A. *Imagining Reform*

Professor Jessica Litman asks us to imagine a Copyright Act unbounded from its prior realizations.¹⁹⁶ Other scholars have joined her call for reform.¹⁹⁷ The music industry is also calling for reform via the “carrot and stick” method of “graduated response legislation.”¹⁹⁸ These calls for

194. See *supra* Part I.

195. See Litman, *supra* note 9, at 18 (differentiating between copyright interests for “creators,” “readers,” and “intermediaries”).

196. Litman, *supra* note 7, at 260 (“[An ideal Copyright Act should] nurture the creation, dissemination, and enjoyment of works of authorship. When it works well, it should encourage creators to make new works, assist distributors in disseminating them widely, and support readers, listeners, and viewers in enjoying them.”). Professor Litman has mused that one alternative copyright regime might do away with the Copyright Act’s six different exclusive rights and replace them with “one big lumpy one.” Jessica Litman, 12th Annual Nies Lecture at the Marquette University Law School: Real Copyright Reform (Feb. 23, 2009), available at <http://law.marquette.edu/flash/nies-2009-0223.html>. Such a consolidation is desirable in a world in which technology easily allows members of the public to be publisher, distributor, and performer. LITMAN, *supra* note 20, at 19. The single-right conception would also refocus the Copyright Act toward its normative underpinnings. But even one big lumpy right is vulnerable to a vertically integrated music industry that often requires transfer of a composer’s copyrights in order to contract. Wallis, *supra* note 59, at 294.

197. See DEMERS, *supra* note 62; FISHER, *supra* note 62; LAWRENCE LESSIG, FREE CULTURE (2005); LAWRENCE LESSIG, THE FUTURE OF IDEAS (2002); KEMBREW MCLEOD, FREEDOM OF EXPRESSION® (2007); and SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS (2003).

198. IFPI 2010, *supra* note 15, at 24. The music industry has focused on graduated response legislation as a solution to its copyright woes. *Id.* Under a graduated response system, Internet service-providers (ISPs) cooperate with copyright holders to police infringement. *Id.* Copyright holders identify user accounts that are used for infringement and inform the ISP. *Id.* The ISP sends the in-

reform reflect the current dissonance between the Copyright Act and its normative purpose of creating incentives for authors to make artistic works.

Regardless of the shape copyright reform takes, reform must be certain to rebalance the bargaining positions of songwriters and the music industry. Stronger authors' rights that are tailored to the authors' contracting position will balance the authors' interests against the collective dominance of the music industry.

B. Rebalancing the Songwriter's Bargaining Power

The increasing integration of the music industry forces many singer-songwriters to transfer their copyrights to one of four multinational media corporations in order to garner a record contract.¹⁹⁹ We should be skeptical of arguments that stronger authors' rights always create incentives for songwriters to compose works. Because songwriters often transfer those rights to a corporate entity, long and strong copyright protection often benefits multinational corporations more than songwriters.²⁰⁰

One of the stated goals of the current Copyright Act and its term extensions is to keep the songwriter involved in her work and its performance throughout her lifetime.²⁰¹ A better statutory system would be one that keeps the creator of the work "in the loop" despite one-sided contracting practices that result from the collective dominance of the music industry.²⁰² An improved system would give the songwriter leverage that could yield an appropriate allocation of gain from new technologies, such as ringtones. More than any term extension, a copyright provision that increases the songwriter's contract-negotiating power furthers the normative value of copyright as creative incentive.

To strengthen the songwriter's contract-negotiating power and reorient U.S. copyright law toward its normative purpose, we should add

fringing account holder a notice that she has been identified as an infringer. *Id.* If the infringer does not cease her behavior, a series of notices is sent to the infringer ultimately resulting in Internet service suspension. *Id.* "The system would protect the anonymity of individuals and would essentially implement the standard terms of ISP subscriber agreements, while conditioning continued service upon compliance with the law, particularly copyright." *Id.*

199. Wallis, *supra* note 59, at 294.

200. See DEMERS, *supra* note 62, at 143–46.

201. S. REP. NO. 104-315, at 12 (1996) ("Congress has sought to ensure that creators are afforded ample opportunity to exploit their works throughout the course of the works' marketable lives, thus maximizing the return on creative investment and strengthening incentives to creativity.").

202. Rajan Desai, *Music Licensing, Performance Rights Societies, and Moral Rights for Music: A Need in the Current U.S. Music Licensing Scheme and a Way to Provide Moral Rights*, 10 U. BALT. INTELL. PROP. L.J. 1, 22 (2001).

two provisions to the Copyright Act. Both provisions are inspired by²⁰³ twenty-first century amendments to the German Copyright Act.²⁰⁴

First, the U.S. Copyright Act should have a contract-reformation provision for instances in which a copyright transferee is disproportionately benefited by new technology.²⁰⁵ New technology often offers new

203. I say “inspired by” the German Copyright Act realizing that parts of German copyright law are inconsistent with U.S. copyright law, making a wholesale adoption of Germany’s statutory language inadvisable. Still, the notion that a contract that transfers copyright in a work might later be reopened if the work’s creator was inequitably remunerated might well be adapted for U.S. copyright law and could become the international norm. *See* J.A.L. STERLING, *WORLD COPYRIGHT LAW* § 12.04(1) (3d ed. 2007) (“The history of international copyright protection shows that international standards ‘level up’ rather than ‘level down’: it remains to be seen whether the new standards adopted in Germany on the contractual position of authors and performers will, if generally accepted as fair and having been tested in practice, [] become the international norm in this area.”).

204. Gesetz über Urheberrecht und verwandte Schutzrechte [Urheberrechtsgesetz] [UrhG] [Copyright Act], Sept. 9, 1965, *BUNDESGESETZBLATT*, Teil I [BGBL. I] at 1273, as amended by Gesetz [G], Oct. 26, 2007, *BGBL. I* at 2513 (Ger.).

205. This provision would be similar to *Urheberrechtsgesetz* § 32c. *See* 2 ADOLF DIETZ, *GER INTERNATIONAL COPYRIGHT LAW AND PRACTICE* § 4[3][a][i] (2010). Professor Sterling summarizes 2002 amendments to the German Copyright Act that strengthen the contractual stance of authors and performers:

The new amendments clarify and strengthen the position of the author in respect of equitable remuneration for his work. The aim of the amendments is “to let authors and performers equitably share in the returns and advantages from the use of their works”; for that purpose the legislator has introduced clauses to correct a remuneration not equitable from the beginning or to compensate for a conspicuous disproportion resulting from later uses of the works.

Some of the main provisions of the 2002 amendments may be summarised as follows:

- (1) Article 32(1) provides that if the rate of remuneration is not settled in the contract granting exploitation rights, the remuneration shall be at an equitable level. If the agreed remuneration is not equitable, the author may require from his contracting partner assent to alter the contract, so that the author is assured of an equitable remuneration.
- (2) Article 32(2) provides that remuneration is equitable if it is determined by a “common remuneration standard”. Article 36(1) provides that associations of authors may establish common remuneration standards with associations of users of works, or individual users of works.
- (3) Article 36(3) provides for settling of common remuneration standards by a mediation panel, set up in accordance with the provisions of Article 36(a). Article 36(3) also outlines the conditions on which reference to a mediation panel becomes obligatory.
- (4) Article 32(2), second sentence, provides that, in effect, where there is no common remuneration standard, remuneration is equitable if it conforms at the time of contracting to what is regarded as customary and fair in business having regard to the type, scope, length, etc. of uses.
- (5) Article 32(3) is designed to prevent agreements to circumvent Article 32(1)(2).
- (6) Article 32a(1) (the so-called “best seller” clause) provides that where the agreed consideration is conspicuously disproportionate to the returns and advantages arising from use of the work, the other party is required, at the demand of the author, to assent to a change in the remuneration to ensure some

revenue pools for artistic works. Ringtones provide an excellent example of this development. Because current contracting practices often involve the transfer of all copyrights to music corporations, a songwriter may be unable to enjoy revenue from newfound exploitation of her work. The Copyright Act must provide a safeguard for songwriters in these circumstances. Borrowing language from the German Copyright Act, a songwriter should be able to petition for the reform of a contract if the revenue the transferee corporation earns from exploitation of the work through new technology is “conspicuous[ly] disproportion[ate]” to the amount the corporation paid for copyright in the work.²⁰⁶ The reformed contract would ensure “equitable remuneration” for the songwriter.²⁰⁷

Second, the U.S. Copyright Act should offer a limited reversionary right to the creator when a copyright transferee opts not to exploit the work through new technology.²⁰⁸ Corporations do not exploit every work in their catalogue with new technology because it may be cost-prohibitive.²⁰⁹ A songwriter may wish to exploit his own work using new technology, but he is prevented from doing so because he has transferred exclusive use of his work to a corporation. If a corporate transferee does not intend to use new technology to exploit a work, the limited right to exploit the work with that technology should revert to the creator.

While these ideas are mere seedlings, they do have the potential to keep the songwriter engaged in his work and encouraged to continue creating. The suggested amendments are closely aligned to the normative underpinning of U.S. copyright law to provide incentive to singer-songwriters. As we enter a new period of copyright reform, we should search for opportunities to strengthen a songwriter’s negotiating stance against a vertically integrated music industry.

V. CONCLUSION

A court cannot reach an equitable result when it must decide which copyright intermediary should reap the benefits of the creative work of songwriters absent from litigation. New technologies, such as ringtones, unimaginable at the time of enactment of our current Copyright Act cause the Judiciary to stretch the narrow and inflexible text of the statute to its breaking point. Unsatisfactory decisions similar to the Ringtone

further equitable participation. The situation where the exploitation right is granted by the other party to a third party is also covered by this provision.

The claim for the change cannot be waived in advance (article 32a(3)).

STERLING, *supra* note 203, § 12.04(1).

206. 2 DIETZ, *supra* note 205, § 4[3][a][ii].

207. *Id.* § 4[3][a][i].

208. This provision would be somewhat similar to Urheberrechtsgesetz §§ 31a & 32c. *See id.*

209. Litman, *supra* note 9, at 35.

Decision presaged the passage of the 1909 and 1976 Acts. Commentators predict that a similar wholesale copyright revision will occur in the near term. Statutory provisions strengthening the rights of songwriters should be included in the next Copyright Act. By implementing these provisions, we can renew the bargaining power of the musical creator in an increasingly vertically integrated music industry.