US v. ASCAP, ___ F.3d ___, No. 09-539 (2d Cir. 2010): Second Circuit Holds that Digital Song Downloads are not Performances under the Copyright Act (2010)

On September 28th of this year, the Second Circuit affirmed a district court holding that the digital download of musical works by Yahoo and RealNetworks over the Internet does not constitute a public performance of the music, entitling ASACAP to collect fees. Performing rights societies, such as ASCAP, license the public performance of nondramatic musical works on behalf of the copyright owners of such works.

A "performance," as defined by the Copyright Act, means "to recite, render, [or] play … it, either directly or by means of any device or process…" 17 USC 101.

Using dictionary definitions of the verbs "recite," render," and "play," the Second Circuit noted that all the terms require contemporaneous perceptibility. Thus, there is no performance with the transmission alone, since the music is not recited, rendered or played through the act of delivery to the end user, the listener. Undoubtedly, the listener is performing the work, but probably not publicly.

Technically, according to the appellate court, downloads are electronic file transfers from on-line servers to the end user's hard drive. There is no performance during the transfer and the user must take further action to perform the songs after a download. Because the download itself involves neither the recitation, rendering, or playing of the musical work embodied in the digital transmission, the download is not a performance of the work.