UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

MEMORANDUM OF LAW OF AMICUS CURIAE THE SOCIETY OF COMPOSERS, AUTHORS, AND MUSIC PUBLISHERS OF CANADA IN SUPPORT OF ASCAP'S OPPOSITION TO VERIZON'S MOTION FOR SUMMARY JUDGMENT CONCERNING RINGTONES

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STATEMENT OF INTEREST

The Society of Composers, Authors and Music Publishers of Canada ("SOCAN") respectfully submits this brief in support of the opposition of the American Society of Composers, Authors and Publishers ("ASCAP") to the motion of Cellco Partnership d/b/a Verizon Wireless ("Verizon") for summary judgment concerning whether ringtones implicate the public performance right. All parties have consented to the filing of this memorandum of law.

SOCAN is the performing rights society for Canadian member composers, lyricists, songwriters, and music publishers. SOCAN authorizes third parties to publicly perform its members' musical works in Canada for license fees, which SOCAN collects and distributes to its members.

SOCAN licenses public performances in Canada of musical works by foreign composers, lyricists, songwriters, and music publishers, including those in the United States, through reciprocal agreements with U.S. performing right societies – ASCAP, Broadcast Music, Inc. ("BMI"), and SESAC Inc. ("SESAC") – and societies in other countries. These agreements facilitate SOCAN's licensing public performances of Canadian members' musical works in the United States and elsewhere. SOCAN relies on U.S. collecting societies to enforce Canadian members' rights to control and obtain compensation for public performances of their works in the U.S.

SOCAN and its members, including, *e.g.*, popular artists Gordon Lightfoot, Nickelback, Michael Bublé, Avril Lavigne, Feist, and Nelly Furtado, have a direct interest in Verizon's application. Fees for public performance of SOCAN members' musical works in the U.S. depend upon proper application of the public performance right. Canada and the United States

are among each others' largest trading partners.[1] SOCAN paid U.S. affiliated societies ASCAP, BMI, and SESAC more royalties than any other national societies: 2008: $52,300,000; 2007: $45,670,000; 2006: $41,805,000; 2005: $49,732,000; 2004: $37,109,000. Similarly, U.S. performing rights societies paid SOCAN the highest amounts it received from any foreign source: 2008: $16,700,000; 2007: $14,035,000; 2006: $12,612,000; 2005: $15,235,000; 2004: $15,998,000.

ARGUMENT

RINGTONE TRANSMISSIONS ARE PUBLIC PERFORMANCES UNDER THE COPYRIGHT ACT

Verizon's erroneous analysis of Section 106(4) of the Copyright Act, 17 U.S.C. § 106(4), would deprive SOCAN's members of income to which they are entitled. As an initial matter, as this Court is aware, the consent decree that governs this proceeding was most recently amended on June 11, 2001. *See United States v. Am. Soc'y of Composers, Authors & Publishers*, No. 41-1395, 2001 WL 1589999 (S.D.N.Y. June 11, 2001) ("AFJ2"). When the amended consent judgment was presented to this Court in 2001, the U.S. Department of Justice agreed that the right of public performance was equivalent to foreign copyright laws in the definition of public performance. *Id.* at § II(Q) ("'Right of public performance' means, and 'perform' refers to, the right to perform a work publicly in a nondramatic manner, sometimes referred to as the 'small performing right,' *and any equivalent rights under foreign copyright law*, including, but not limited to, *rights known as the rights of transmission, retransmission, communication, diffusion and rediffusion.*") (emphasis added).

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[1] From 2006 to 2008, SOCAN received the second largest amount of royalties paid by ASCAP to its affiliated international societies. Furthermore, SOCAN ranked either 3rd or 4th among the societies in payments to ASCAP for performances of ASCAP members' works in other territories.

Public comment on the proposed amended consent judgment was sought, *see* 65 Fed. Reg. 57,828 (Sept. 26, 2000), but no one disputed that the performance rights were equivalent. Significantly, at the time, U.S. and foreign performing rights organizations were collecting royalties on ringtones, as foreign organizations continue to do now. The Department of Justice was fully aware of this equivalence, and it expressly adopted the statement that the rights are equivalent in AFJ2. By entering AFJ2 as its own judgment, this Court also recognized that equivalence. This definition of public performance in AFJ2 thus encompasses the meaning of the "transmit" clause in the U.S. Copyright Act and the "communication" of works to the public under the Canadian Copyright Act.

Sections 3(1) and 3(1)(f) of the Canadian Copyright Act provide the rights in Canada that are equivalent to the U.S. "public performance" right, 17 U.S.C. § 106(4).

> Canada's Copyright Act implements the public performance right as follows:
>
> For the purposes of this Act, "copyright", in relation to a work, means the sole right to produce or reproduce the work …, to perform the work or any substantial part thereof in public …, and includes the sole right
>
> * * *
>
> (f) in the case of any … musical … work, to communicate the work to the public by telecommunication ….

Canadian Copyright Act, R.S.C. 1985, C. C-42, § 3(1)(f).

The Canadian Copyright Act also established a Copyright Board, which performs a rate-making function similar to this Court. Canadian Copyright Act, R.S.C., ch. C-42, §§ 66(1) *et seq.* (1985).[2] Decisions of the Canadian Copyright Board are subject to judicial review by the

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[2] The Canadian Copyright Act recognizes collective societies, such as SOCAN, which license and collect royalties for public performance and communication to the public of their members' works. *Id.*, §§ 67, 70.1. The Copyright Board determines the types of performance activities covered by the Canadian Copyright Act, and reasonable royalty rates, based upon proposed tariffs submitted by collecting societies, following briefing and evidentiary hearings in which affected parties may participate. *Id.*, § 68.

Canadian Federal Court. Federal Court Act, R.S.C., ch. F-7, § 28 (1985). Consequently, important copyright decisions in Canada often are first made by the Copyright Board, which may then be reviewed by Canada's courts.

In Canada, ringtones have been held to be implicated by the equivalent of the U.S. public performance right under the Canadian Copyright Act. *See* Copyright Act of Canada, R.S.C., ch. C-42, §§ 3(1) and 3(1)(f) (1985). Specifically, in *Public Performance of Musical Works (Tariff 24, Ringtones) (Re)*, [2006] 52 C.P.R. 375 ("Tariff 24"), the Canadian Copyright Board held that transmissions of musical ringtone data files from computer servers to individual telephone devices were subject to public performance licenses from SOCAN under Section 3(1)(f) of the Canadian Copyright Act. The Federal Court of Appeal upheld the Board's decision on ringtones, stating:

> [43] [T]he conclusion of the Copyright Board that the transmissions in issue [transmission of ringtones] in this case are within the scope of paragraph 3(1)(f) of the Copyright Act is consistent with the language of that provision and its context.

Canadian Wireless Telecommunications Assn. v. Soc'y of Composers, Authors & Music Publishers of Canada, 2008 FCA 6, 64 C.P.R. (4th) 343, ¶ 43, *leave to appeal refused*, Sept. 18, 2008.

Canada's Copyright Board and courts also held that transmissions of digital files embodying performances of musical works, whether in ringtones or otherwise, constitute licensable public performances and communications to the public under Section 3(1)(f) of the Canadian Copyright Act, stating that "performance [of a work in a digital music file] occurs at the time of transmission …." *SOCAN Statement of Royalties to be Collected for the Performance or the Commc'n by Telecommunication, in Canada, of Musical or Dramatico-Musical Works 1996, 1997, 1998 (Tariff 22, Internet), (Re)*, [1999] 1 C.P.R. (4th) 417, ¶ 119

("Tariff 22 Phase I").[3] Communication to the public occurs regardless of "whether or not it is played or viewed upon receipt, *is stored for use at a later date or is never used at all* ...." *Id.*, ¶ 121 (emphasis added). "[T]o communicate [a musical] work to the public by telecommunication..." is a specific type of public performance under Section 3(1)(f). *Id.*, ¶¶ 119-121, *citing Canadian Ass'n of Broadcasters v. SOCAN*, [1994] 58 C.P.R. (3d) 190 (F.C.A.) and *Canadian Cable Television Ass'n v. Canada (Copyright Board)*, [1993] 2 F.C. 138, 46 C.P.R. (3d) 359. Indeed, in *Tariff 22 Phase I*, the Board held that a communication need not be instantaneous or simultaneous to be a communication to the public. *Tariff 22 Phase I*, at ¶ 121.[4] Any contrary conclusion here would thus violate the definition of public performance in § II(Q)

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[3] The Copyright Board's decision on these issues was upheld. *Soc'y of Composers, Authors & Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2002 FCA 166, 19 C.P.R. (4th) 289, ¶ 199 (one judge dissenting on other issue), *rev'd in part*, *Soc'y of Composers, Authors & Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2004] 2 S.C.R. 427, 2004 SCC 45.

[4] Specifically, the Board concluded:

> 119 First, ... the performance occurs at the time of transmission .... [A] communication to the public occurs each time that any member of the public uses a browser to access the work from the source computer.
>
> 120 Second, a work is communicated to the public even if it is transmitted only once, as long as it is made available on a site that is accessible to a segment of the public. As was stated earlier, a communication is to the public if its intended target is a public * * *.
>
> 121 Third, the communication occurs at the time the work is transmitted whether or not it is played or viewed upon receipt, is stored for use at a later date or is never used at all ....

Tariff 22 Phase I, at ¶¶ 119-121.

of the current ASCAP consent decree – AFJ2 – and deprive foreign authors of the intent of that provision.[5]

In addition, any contrary conclusion here would also violate Article 11 of the Berne Convention for the Protection of Literary and Artistic Works, as revised at Paris on July 21, 1971 (the "Berne Convention"), which Congress implemented. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853, § 2(3) ("BCIA"). It would also be inconsistent with subsequent legislation implementing the Berne Convention and other treaties and trade agreements. *See* Agreement on Trade Related Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1125, 1197-1225 ("TRIPs"); the Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809, 4974 (1994) ("URAA"); and North American Free Trade Agreement, U.S. – Can. – Mex., Art. 1705, Dec. 17, 1992, 32 I.L.M. 605, 671 (1993) ("NAFTA").[6]

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[5] In addition, in a later decision, the Board also rejected the contention that SOCAN members were "double dipping …," as Verizon argues here, explaining that "[t]he communication and reproduction rights are separate rights, often owned by separate persons, administered through separate channels and subject to separate regimes." *"Statement of Royalties to be Collected by SOCAN for the Communication to the Public by Telecommunication, in Canada, of Musical or Dramatico-Musical Works," Public Performance of Musical Works (Re) (Tariff No. 22.A) (Internet—Online Music Services) 1996-2006)* ("Tariff 22.A Phase II"), at ¶ 100, http://www.cb-cda.gc.ca/decisions/2007/20071018-m-e.pdf, *appeal pending*.

[6] After its adherence to the Berne Convention, the United States became a leading participant in international treaties and trade agreements designed to further expand international protection for intellectual property. These include the 1988 United States-Canada Free Trade Agreement, Dec. 22, 1987 – Jan. 2, 1988, U.S. – Can., 27 I.L.M. 281 (requiring Canada to change its law to provide non-discriminatory payment to U.S. rights owners for certain retransmissions and broadcasts); NAFTA, *supra*, (effective in 1994) (§ 1705(1) mandates parties to provide Berne Convention protection, including for "communication of a work to the public"); the agreements resulting from the Uruguay Round of the General Agreement on Tariffs and Trade ("GATT"), which included creation of the World Trade Organization and TRIPs, *supra*; the World Intellectual Property Organization ("WIPO") Copyright Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17, 36 I.L.M. 65 (1997) (effective 2002) (Copyright Treaty requires

One of the principal purposes of the Berne Convention is to ensure consistent treatment of copyrighted works among member nations. This Court should construe the Copyright Act to be consistent with Berne, as Congress intended. The Berne Convention is not self-executing, BCIA, § 2(1), but courts assume that Congress ordinarily seeks to follow principles of international law. *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains…."); *accord*, *Eldred v. Ashcroft*, 537 U.S. 186, 205-06 (2003) (recognizing Congressional consideration of Berne Convention and international law in enacting term extension); *F. Hoffmann-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004); *Guaylopo-Moya v. Gonzales*, 423 F.3d 121, 135 (2d Cir. 2005); *United States v. Yousef*, 327 F.3d 56, 92 (2d Cir. 2003).[7] Notably, in *Eldred*, the Supreme Court recognized that Congress considers foreign copyright law to insure that American authors' works are fully protected abroad, as well as in the United States. *Eldred*, 537 U.S. at 205-206.[8]

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compliance with Berne rights and provided basis for 1998 Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860); and the WIPO Performances and Phonograms Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17, 36 I.L.M. 76 (1997) (effective 2002) (requiring protection for sound recordings and performances in phonograms).

[7] Article 11 of the Berne Convention, *inter alia*, protects public performance of musical works:

> 1. Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing:
>
> (i) the public performance of their works, including such public performance by any means or process;
>
> (ii) any communication to the public of the performance of their works.

[8] Canada recognizes these same principles. *Théberge v. Galerie d'Art du Petit Champlain Inc.*, [2002] 2 S.C.R. 336, ¶ 5 ("[c]opyright in [Canada] is a creature of statute"); *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2004] 2 S.C.R. 427, 2004 SCC 45 ("Parliament is presumed not to legislate in breach of a treaty, the comity of nations and the principles of international law") (considering Berne Convention in analyzing Canadian Copyright Act) (Op. of LeBel, J.).

Congress expressly intended harmony between U.S. and foreign treatment of copyright among Berne signatories:

> The objective of the Berne Union is development of "effective and harmonious" copyright laws among all nations. Once the United States becomes a member of the union, other members will expect from us a due and careful regard for their values; and, by the same token, other countries will have to consider the deeply felt legal, economic and social values reflected in American copyright law and which we believe are important elements of a responsible international copyright system.

H.R. Rep. No, 100-609, 100th Cong., 2nd Sess. 20 (1988).

Further, the Uruguay Round Agreements established, for the first time, an international mechanism for adjudicating claimed violations of the rights protected by the Berne Convention by member states through the World Trade Organization ("WTO"), including the TRIPs Agreement. URAA, *supra*, §§ 2(8), 101. The TRIPs Agreement requires WTO members, including the United States, to "comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto …," and to afford "national treatment" and "most favored nation" treatment with regard to protection and enforcement of Berne rights. TRIPs, *supra*, Arts. 3 and 9.1. *See also* World Trade Organization, http://www.wto.org (last visited June 15, 2009) (official site of WTO, with official texts of relevant agreements).

Ringtone transmissions are public performances under 17 U.S.C. § 106(4) and the definition of public performance agreed to by the United States and adopted by this Court in the amended consent judgment in this case, AFJ2, § II(Q), which specifically refers to equivalent rights under foreign copyright law. Indeed, Congress has several times reaffirmed its intent that the U.S. implementation of the public performance right be in harmony with its implementation in other Berne countries and full compliance with the Berne Convention, Article 11.

Such harmonious implementation affords authors and owners of works the exclusive right to authorize and be compensated for all public performances "by any means or process" and "any communication to the public" of their performances, including transmissions of digital audio files embodying musical performances such as ringtones, as recognized by most of the rest of the world. Accordingly, the Court here should not erroneously deprive foreign composers, lyricists, and other owners of copyrighted musical works of compensation to which they are entitled and which they receive under the Canadian Copyright Act. Any other conclusion would place the U.S. afoul of its own obligations under international law.

CONCLUSION

For the foregoing reasons, the Court should deny Verizon's motion for summary judgment concerning ringtones.

Respectfully submitted,

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