

1 UNITED STATES COURT OF APPEALS  
2 FOR THE SECOND CIRCUIT

3  
4 August Term 2009

5 (Argued: March 3, 2010 Decided: September 28, 2010)

6 Docket Nos. 09-0539-cv (L), 09-0542-cv (con), 09-0666-cv (xap),  
7 09-0692-cv (xap), 09-1572-cv (xap)

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9  
10 UNITED STATES of AMERICA,

11  
12 Plaintiff-Appellee,

13  
14 -- v. --

15  
16 AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND  
17 PUBLISHERS,

18  
19 Defendant-Appellant-Cross-Appellee,

20  
21 In the matter of Applications of  
22 REALNETWORKS, INC., YAHOO! INC.,

23  
24 Applicants-Appellees-Cross-Appellants.

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26  
27 -----x

28  
29 B e f o r e : JACOBS, Chief Judge, WALKER and LIVINGSTON,  
30 Circuit Judges.

31 American Society of Composers, Authors and Publishers  
32 ("ASCAP") appeals the district court's ruling that a download of  
33 a digital file containing a musical work does not constitute a  
34 public performance of that work. Yahoo! Inc. and RealNetworks,  
35 Inc. (collectively, the "Internet Companies") cross-appeal the  
36 district court's assessment of the fees for the blanket licenses

1 they seek to perform musical works in the ASCAP repertory.

2 We affirm the district court's ruling that a download of a  
3 musical work does not constitute a public performance of that  
4 work, but we vacate the district court's assessment of fees for  
5 the blanket ASCAP licenses sought by the Internet Companies and  
6 remand for further proceedings in light of this opinion.

7 AFFIRMED in part, VACATED in part, and REMANDED.

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11 JOHN M. WALKER, JR., Circuit Judge:  
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13 This case presents two distinct questions that arise from  
14 the transmittal of musical works over the Internet: First,  
15 whether a download of a digital file containing a musical work  
16 constitutes a public performance of that musical work; and,  
17 second, whether the district court, acting in its capacity as the  
18 rate court, was reasonable in its assessment of the blanket  
19 license fees of Yahoo! Inc. and RealNetworks, Inc. (collectively,  
20 "the Internet Companies") to publicly perform any of the millions  
21 of musical compositions in the American Society of Composers,  
22 Authors and Publishers ("ASCAP") repertory.

23 For the reasons set forth below, we affirm the district  
24 court's ruling that a download of a musical work does not  
25 constitute a public performance of that work, but we vacate the  
26 district court's assessment of fees for the blanket ASCAP  
27 licenses sought by the Internet Companies and remand for further  
28 proceedings.

29 **BACKGROUND**

30 **I. FACTS**

1           The Internet Companies seek separate blanket licenses to  
2 publicly perform the entirety of the ASCAP repertory for certain  
3 of their websites and services. A blanket license is a license  
4 that gives the licensee the right to perform all of the works in  
5 the repertory for a single stated fee that does not vary  
6 depending on how much music from the repertory the licensee  
7 actually uses. United States v. Am. Soc'y of Composers, Authors  
8 & Publishers, No. 41-1395 (WCC), 2001 WL 1589999, at \*1 (S.D.N.Y.  
9 June 11, 2001). ASCAP licenses the non-dramatic, public  
10 performance rights in copyrighted musical works. More than  
11 295,000 composers, songwriters, lyricists, and music publishers  
12 in the United States participate exclusively in licensing their  
13 music through ASCAP. ASCAP licenses approximately 45% of all of  
14 the musical works that are played on-line.

15           The Internet Companies perform music in myriad audio and  
16 audio-visual contexts. Yahoo! provides music content in various  
17 ways across its website. For example, a user can enjoy the  
18 specific song or music video he desires from an "on-demand"  
19 stream in Yahoo! Search, listen to a radio-style webcast in  
20 Yahoo! Music, view audio-visual clips from movies and television  
21 shows in Yahoo! Movies and Yahoo! TV, or upload and share his own  
22 videos using Yahoo! Video.<sup>1</sup> However, only a small portion of the

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<sup>1</sup> Yahoo! provides audio and audio-visual content in the following areas of its website and through the following services: the Yahoo! homepage, Yahoo! Music, My Yahoo!, Yahoo! Movies, Yahoo! Video, Bix, Yahoo! Kids, Yahoo! TV, Yahoo! Games,

1 activity on Yahoo!'s website involves performances of musical  
2 works, and not all of the areas on Yahoo!'s website offer audio  
3 or audio-visual content.

4 RealNetworks performs music in audio and audio-visual  
5 contexts through a number of websites and subscription services.<sup>2</sup>  
6 Like Yahoo!, these sites and services publicly perform musical  
7 works in numerous formats, including, inter alia, radio,  
8 television, movie, game, and music-video formats. Also like  
9 Yahoo!, only a portion of the content on RealNetworks' sites and  
10 services consist of performances of musical works.

11 In addition to performing music on websites and through  
12 services, the Internet Companies offer to users copies of  
13 recordings of musical works through download transmittals. A

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Yahoo! Tech, Yahoo! Autos, Yahoo! Finance, Broadway on Yahoo!,  
Yahoo! Food, Yahoo! Search, Yahoo! Toolbar, Yahoo! Messenger, and  
the Yahoo! music widget.

<sup>2</sup> At the time of oral argument in this case, the  
RealNetworks sites and services that publicly performed music  
included, inter alia: the following: RealNetworks.com, Real.com  
(including its sub-domains such as Real Guide, and affiliated  
sites such as Rollingstone.com and Film.com), Rhapsody,  
Rhapsody.com, Rhapsodydirect.com, SuperPass, and Listen.com.  
Public filings, of which we take judicial notice, see Kavowras v.  
New York Times Co., 328 F.3d 50, 57 (2d Cir. 2003), report that  
RealNetworks has since spun off Rhapsody as an independent  
venture. See RealNetworks, Inc., Current Report (Form 8-K)  
(March 31, 2010), available at  
<http://www.sec.gov/Archives/edgar/data/1046327/000095012310032214/v55452e8vk.htm>. Because this case  
involves the setting of license rates for the period of January  
1, 2004 to December 31, 2009, however, Rhapsody's spin-off is not  
relevant to our analysis.

1 download is a transmission of an electronic file containing a  
2 digital copy of a musical work that is sent from an on-line  
3 server to a local hard drive. See United States v. Am. Soc'y of  
4 Composers, Authors & Publishers (Application of Am. Online, Inc.,  
5 RealNetworks, Inc., and Yahoo! Inc.) ("RealNetworks and Yahoo!  
6 I"), 485 F. Supp. 2d 438, 441 (S.D.N.Y. 2007). With a download,  
7 the song is not audible to the user during the transfer. Id. at  
8 442, 446. Only after the file has been saved on the user's hard  
9 drive can he listen to the song by playing it using a software  
10 program on his local computer. Id.

11 The Internet Companies primarily generate revenue from  
12 performances of musical works in two ways. On their websites,  
13 they make available, at no cost to users, performances of music,  
14 music videos, television programming, and the like that generate  
15 revenue from advertisements on the web page or in the audio or  
16 audio-visual player.<sup>3</sup> The district court found that, in all of  
17 the forms of website advertising it considered, one principle is  
18 common: the larger the audience and the more times a site is

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<sup>3</sup> Advertising on websites can take numerous forms, including, inter alia, display advertising, rich-media advertising, and sponsorships. Display advertising may be displayed, inter alia, as an item on a web page, in a pop-up or pop-under window, on an interstitial page (an ad page that appears between two content pages), or in a floating window that moves across the user's screen. Rich-media advertising, consisting of streaming audio or video, is generally played in the audio and audio-visual players in which the musical works are performed, either before, during, or after the performances of the musical works.

1 visited, the greater the revenue generated. See United States v.  
2 Am. Soc'y of Composers, Authors & Publishers (Application of Am.  
3 Online, Inc., RealNetworks, Inc., and Yahoo!) ("RealNetworks and  
4 Yahoo! II"), 559 F. Supp. 2d 332, 338 (S.D.N.Y. 2008). For  
5 example, advertisers typically pay for display advertising based  
6 on the number of "impressions," or views, of the advertisement by  
7 users of the page on which an advertisement appears. The second  
8 primary way that the Internet Companies generate revenue from  
9 performing musical works is through subscription-based services.

## 10 **II. PROCEDURAL BACKGROUND**

11 Acting in its capacity as the rate court,<sup>4</sup> the district  
12 court issued rulings in April 2007, April 2008, and January 2009  
13 resolving the issues presented on appeal. In its 2007 decision,  
14 the district court held that a download of a digital file  
15 containing a musical work does not constitute a public

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<sup>4</sup> In 1941, the United States brought a civil action against ASCAP for alleged violations of the Sherman Antitrust Act based on the fact that ASCAP's members license their songs collectively, thereby enhancing their market power. The action was settled by the entry of a consent decree, see United States v. Am. Soc'y of Composers, Authors & Publishers, No. 13-95, 1941 U.S. Dist. LEXIS 3944 (S.D.N.Y. Mar. 4, 1941), which has subsequently been amended from time to time. The most recent version, entered on June 11, 2001, the Second Amended Final Judgment ("AFJ2"), currently regulates how ASCAP may participate in the music industry and gives the United States District Court for the Southern District of New York jurisdiction as the rate court to oversee the implementation of the AFJ2. United States v. Am. Soc'y of Composers, Authors & Publishers, No. 41-1395 (WCC), 2001 WL 1589999 (S.D.N.Y. June 11, 2001). In its capacity as the rate court, the district court determines a reasonable fee for an applicant's ASCAP license. Id. at \*6-\*8

1 performance of that work. In its 2008 decision, the district  
2 court determined a method for calculating the fees for the  
3 blanket licenses payable to ASCAP for the Internet Companies'  
4 performances of musical works in the ASCAP repertory. In two  
5 separate opinions issued in January 2009, the district court,  
6 applying the method it determined in 2008, issued Final Fee  
7 Determinations for Yahoo! and RealNetworks, respectively.

8 In its second opinion, issued in 2008, the district court  
9 arrived at a license fee formula that multiplied a royalty rate  
10 by the percentage of revenue attributable to the performance of  
11 music. The district court applied a uniform royalty rate to the  
12 Internet Companies' varying music uses that did not fluctuate  
13 over the different types of performances on the Internet  
14 Companies' sites and services. In ultimately determining a  
15 royalty rate of 2.5% for both of the Internet Companies, the  
16 district court relied upon several benchmark agreements,  
17 including ASCAP's agreements with Music Choice, terrestrial radio  
18 stations, the broadcast television networks, and the cable  
19 television networks.

20 For Yahoo!, because only a portion of the revenue generated  
21 from its website is attributable to performances of musical  
22 works, the district court decided to measure Yahoo!'s music-use  
23 revenue by multiplying the company's total revenue from its  
24 licensed services - defined as those business units that publicly

1 perform music - less certain customary costs (such as for  
2 advertising sales commissions and traffic acquisition expenses)  
3 by a music-use-adjustment factor ("MUAF"). The MUAF was a  
4 fraction that reflected the amount of time users spent streaming  
5 performances of musical works relative to their overall time on  
6 the website; its numerator was the number of hours of music  
7 streamed from the licensed sites and services, and its  
8 denominator was the number of hours that the company's licensed  
9 sites and services were utilized.

10 For RealNetworks, the district court at first accepted  
11 ASCAP's argument that it was unnecessary to apply a MUAF because,  
12 unlike Yahoo!, "the vast majority of RealNetworks's revenue  
13 subject to fee is generated from subscription music services and  
14 advertising-supported sites where music is the central theme."  
15 RealNetworks and Yahoo! II, 559 F. Supp. 2d at 399; see id. at  
16 411. The district court, however, did reduce RealNetworks'  
17 revenue figure by subtracting revenue attributable to  
18 RealNetworks' Technology Products and Solutions business unit,  
19 which develops and markets software products and services that  
20 enable wireless carriers, cable companies, and other media  
21 communication companies to distribute media content to PCs,  
22 mobile phones, and other non-PC devices. Id. at 359-60, 411-12.  
23 In its 2009 Final Fee Determination, the district court altered  
24 course and applied certain MUAFs to RealNetworks' various sites

1 and services, but without explaining how it arrived at these  
2 MUAFs. (RealNetworks Judgment Order 2-4)

### 3 DISCUSSION

#### 4 I. Public Performance Right as Applied to Downloads

5 The Copyright Act confers upon the owner of a copyright "a  
6 bundle of discrete exclusive rights," each of which may be  
7 transferred or retained separately by the copyright owner. N.Y.  
8 Times Co. v. Tasini, 533 U.S. 483, 495-96 (2001) (internal  
9 quotation marks omitted). Section 106 of the Copyright Act sets  
10 forth these various rights, including the right "to reproduce the  
11 copyrighted work in copies" and the right "to perform the  
12 copyrighted work publicly." 17 U.S.C. § 106(1), (4). In this  
13 case, the Internet Companies offer their customers the ability to  
14 download musical works over the Internet. It is undisputed that  
15 these downloads create copies of the musical works, for which the  
16 parties agree the copyright owners must be compensated. However,  
17 the parties dispute whether these downloads are also public  
18 performances of the musical works, for which the copyright owners  
19 must separately and additionally be compensated. The district  
20 court held that these downloads are not public performances, and  
21 we agree.<sup>5</sup>

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<sup>5</sup> We review a district court's grant of summary judgment based on its interpretation of the Copyright Act de novo. See Larry Spier, Inc. v. Bourne Co., 953 F.2d 774, 775 (2d Cir. 1992).

1           In answering the question of whether a download is a public  
2 performance, we turn to Section 101 of the Copyright Act, which  
3 states that “[t]o ‘perform’ a work means to recite, render, play,  
4 dance, or act it, either directly or by means of any device or  
5 process.”<sup>6</sup> 17 U.S.C. § 101. A download plainly is neither a  
6 “dance” nor an “act.” Thus, we must determine whether a download  
7 of a musical work falls within the meaning of the terms “recite,”  
8 “render,” or “play.”

9           “As in all statutory construction cases, we begin with the  
10 language of the statute. The first step is to determine whether  
11 the language at issue has a plain and unambiguous meaning with  
12 regard to the particular dispute in the case.” Barnhart v.  
13 Sigmon Coal Co., 534 U.S. 438, 450 (2002) (internal quotation  
14 marks omitted). “[U]nless otherwise defined, statutory words  
15 will be interpreted as taking their ordinary, contemporary,  
16 common meaning.” United States v. Piervinanzi, 23 F.3d 670, 677  
17 (2d Cir. 1994) (internal quotation marks and alterations  
18 omitted). “When the language of a statute is unambiguous,  
19 judicial inquiry is complete.”<sup>7</sup> Marvel Characters, Inc. v.

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<sup>6</sup> Section 101 of the Copyright Act, its definitional section, fully defines “[t]o ‘perform’ a work” as “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.” 17 U.S.C. § 101.

<sup>7</sup> Because we see no ambiguity in the language of the Copyright Act, we need not reach ASCAP’s arguments regarding (i)

1 Simon, 310 F.3d 280, 290 (2d Cir. 2002) (internal quotation marks  
2 omitted); accord Barnhart, 534 U.S. at 450.

3 The ordinary sense of the words "recite," "render," and  
4 "play" refer to actions that can be perceived contemporaneously.  
5 To "recite" is "to repeat from memory or read aloud esp[ecially]  
6 before an audience," Webster's Third New International Dictionary  
7 1895 (1981); to "render" is to "say over: recite, repeat,"<sup>8</sup> id.  
8 at 1922; and to "play" is to "perform on a musical instrument,"  
9 "sound in performance," "reproduce sound of recorded material" or  
10 to "act on a stage or in some other dramatic medium," id. at  
11 1737. All three actions entail contemporaneous perceptibility.

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parallel provisions, (ii) legislative history, or (iii) secondary  
authorities.

<sup>8</sup> The one definition that, if applicable, would support  
ASCAP's position is the definition of "to render" that is "to  
hand over to another (as the intended recipient): deliver,  
transmit." Id. We do not, however, find this definition to be  
applicable in the context of the Copyright Act's definition of  
"to perform." "To render" does not stand alone in the § 101  
definition of "to perform"; it is contained within a list of  
words that, by association, give content to the term within the  
context of the statute. See Jarecki v. G.D. Searle & Co., 367  
U.S. 303, 307 (1961) (noting that often "a word is known by the  
company it keeps"); see also City of New York v. Beretta U.S.A.  
Corp., 524 F.3d 384, 401 (2d Cir. 2008) (stating that "the  
meaning of one term may be determined by reference to the terms  
it is associated with" (internal quotation marks and alterations  
omitted)); Black's Law Dictionary 1160-61 (9th ed. 2009)  
(defining noscitur a sociis as "[a] canon construction holding  
that the meaning of an unclear word or phrase should be  
determined by the words immediately surrounding it"). In  
addition to the fact that "to recite" and "to play" require  
contemporaneous perceptibility, the remaining terms in the § 101  
definition of "to perform" - "to dance" and "to act" - are also  
actions that are necessarily perceptible by sight and sound.

1           These definitions comport with our common-sense  
2 understandings of these words. Itzakh Perlman gives a "recital"  
3 of Beethoven's Violin Concerto in D Major when he performs it  
4 aloud before an audience. Jimmy Hendrix memorably (or not,  
5 depending on one's sensibility) offered a "rendition" of the  
6 Star-Spangled Banner at Woodstock when he performed it aloud in  
7 1969. Yo-Yo Ma "plays" the Cello Suite No. 1 when he draws the  
8 bow across his cello strings to audibly reproduce the notes that  
9 Bach inscribed. Music is neither recited, rendered, nor played  
10 when a recording (electronic or otherwise) is simply delivered to  
11 a potential listener.

12           The final clause of the § 101 definition of "to perform"  
13 further confirms our interpretation. It states that a  
14 performance "in the case of a motion picture or other audiovisual  
15 work, [is] to show [the work's] images in any sequence or to make  
16 the sounds accompanying it audible." 17 U.S.C. § 101. The fact  
17 that the statute defines performance in the audio-visual context  
18 as "show[ing]" the work or making it "audible" reinforces the  
19 conclusion that "to perform" a musical work entails  
20 contemporaneous perceptibility. ASCAP has provided no reason,  
21 and we can surmise none, why the statute would require a  
22 contemporaneously perceptible event in the context of an audio-  
23 visual work, but not in the context of a musical work.

1           The downloads at issue in this appeal are not musical  
2 performances that are contemporaneously perceived by the  
3 listener. They are simply transfers of electronic files  
4 containing digital copies from an on-line server to a local hard  
5 drive. The downloaded songs are not performed in any perceptible  
6 manner during the transfers; the user must take some further  
7 action to play the songs after they are downloaded. Because the  
8 electronic download itself involves no recitation, rendering, or  
9 playing of the musical work encoded in the digital transmission,  
10 we hold that such a download is not a performance of that work,  
11 as defined by § 101.

12           ASCAP, pointing to the definition of "publicly" in § 101,  
13 argues that a download constitutes a public performance. Section  
14 101 defines "[t]o perform or display a work 'publicly'" as  
15 follows:

16           (1) to perform or display it at a place open to the  
17 public or at any place where a substantial number of  
18 persons outside of a normal circle of a family and its  
19 social acquaintances is gathered; or (2) to transmit or  
20 otherwise communicate a performance or display of the  
21 work to a place specified by clause (1) or to the  
22 public, by means of any device or process, whether the  
23 members of the public capable of receiving the  
24 performance or display receive it in the same place or  
25 in separate places and at the same time or at different  
26 times.

27           Id. § 101. ASCAP argues that downloads fall under clause  
28 (2) of this definition because downloads "transmit or

1 otherwise communicate a performance," id., namely the  
2 initial or underlying performance of the copyrighted work,  
3 to the public. We find this argument unavailing. The  
4 definition of "publicly" simply defines the circumstances  
5 under which a performance will be considered public; it does  
6 not define the meaning of "performance." Moreover,  
7 ASCAP's proposed interpretation misreads the definition of  
8 "publicly." As we concluded in Cartoon Network LP v. CSC  
9 Holdings, Inc., "when Congress speaks of transmitting a  
10 performance to the public, it refers to the performance  
11 created by the act of transmission," not simply to  
12 transmitting a recording of a performance. 536 F.3d 121,  
13 136 (2d Cir. 2008). ASCAP's alternative interpretation is  
14 flawed because, in disaggregating the "transmission" from  
15 the simultaneous "performance" and treating the transmission  
16 itself as a performance, ASCAP renders superfluous the  
17 subsequent "a performance . . . of the work" as the object  
18 of the transmittal. See Duncan v. Walker, 533 U.S. 167, 174  
19 (2001) ("It is our duty to give effect, if possible, to  
20 every clause and word of a statute." (internal quotation  
21 marks omitted)). In contrast, our interpretation in Cartoon  
22 Network recognizes that a "transmittal of a work" is  
23 distinct from a transmittal of "a performance" - the former  
24 being a transmittal of the underlying work and the latter

1 being a transmittal that is itself a performance of the  
2 underlying work. See 536 F.3d at 134 (“The fact that the  
3 statute says ‘capable of receiving the performance,’ instead  
4 of ‘capable of receiving the transmission,’ underscores the  
5 fact that a transmission of a performance is itself a  
6 performance.”).

7 The Internet Companies’ stream transmissions, which all  
8 parties agree constitute public performances, illustrate why  
9 a download is not a public performance. A stream is an  
10 electronic transmission that renders the musical work  
11 audible as it is received by the client-computer’s temporary  
12 memory. This transmission, like a television or radio  
13 broadcast, is a performance because there is a playing of  
14 the song that is perceived simultaneously with the  
15 transmission. See, e.g., Twentieth Century Music Corp. v.  
16 Aiken, 422 U.S. 151, 158 (1975). In contrast, downloads do  
17 not immediately produce sound; only after a file has been  
18 downloaded on a user’s hard drive can he perceive a  
19 performance by playing the downloaded song.<sup>9</sup> Unlike musical  
20 works played during radio broadcasts and stream  
21 transmissions, downloaded musical works are transmitted at

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<sup>9</sup> Our opinion does not foreclose the possibility, under certain circumstances not presented in this case, that a transmission could constitute both a stream and a download, each of which implicates a different right of the copyright holder.

1 one point in time and performed at another. Transmittal  
2 without a performance does not constitute a "public  
3 performance." Cf. Columbia Pictures Indus., Inc., v. Prof'l  
4 Real Estate Investors, Inc., 866 F.2d 278, 282 (9th Cir.  
5 1989) (holding that renting videodiscs to a hotel guest for  
6 playback in the guest's room does not constitute the  
7 "transmission" of a public performance).

8 ASCAP misreads our opinion in NFL v. PrimeTime 24 Joint  
9 Venture, 211 F.3d 10, 11-13 (2d Cir. 2000), to hold that the  
10 Copyright Act does not, in fact, require a contemporaneously  
11 perceptible performance to infringe on the public  
12 performance right. In NFL, defendant PrimeTime, a satellite  
13 television provider, captured protected content in the  
14 United States from the NFL, transmitted it from the United  
15 States to a satellite ("the uplink"), and then transmitted  
16 it from the satellite to subscribers in both the United  
17 States and Canada ("the downlink"). PrimeTime had a license  
18 to transmit NFL games to its subscribers in the United  
19 States but not to Canada. The NFL sought to enjoin the  
20 transmissions sent to Canada by arguing that the uplink in  
21 the United States constituted unauthorized public  
22 performances of the games in the United States. The  
23 relevant issue was whether the uplink transmission was a  
24 public performance even though the uplink was only to a

1 satellite and could not, itself, be perceived by viewers.  
2 Id. at 12. We determined that PrimeTime's uplink  
3 transmission of signals captured in the United States  
4 amounted to a public performance because it was an integral  
5 part of the larger process by which the NFL's protected work  
6 was delivered to a public audience. Id. at 13.

7 ASCAP seizes on the fact that the uplink to the  
8 satellite was not contemporaneously perceptible to argue  
9 against a contemporaneous perceptibility requirement in this  
10 case. ASCAP's argument, however, fails to accord  
11 controlling significance to the fact that the immediately  
12 sequential downlink from the satellite to Canadian PrimeTime  
13 subscribers was a public performance of the games. Id. at  
14 11-13; see also David v. Showtime/The Movie Channel, Inc.,  
15 697 F. Supp. 752, 758-60 (S.D.N.Y. 1988) (finding that  
16 because "Showtime and The Movie Channel both broadcast  
17 television programming . . . to cable system operators,"  
18 which, in turn, "pass[ed] the signal along to their  
19 individual customers," the initial transmissions constituted  
20 public performances because they were a "step in the process  
21 by which a protected work wends its way to its audience");  
22 Melville B. Nimmer & David Nimmer, 2 Nimmer on Copyright §  
23 8.14[C][2] at 190.6 & n.63 (2009) (explaining that when a  
24 transmission is made "to cable systems that will in turn

1 transmit directly to the public," the earlier transmission  
2 is a public performance despite the absence of any  
3 contemporaneous perceptibility). In holding the  
4 transmission in Cartoon Network not to be a public  
5 performance, we distinguished NFL on the basis that in that  
6 case the final act in the sequence of transmissions was a  
7 public performance. See 536 F.3d at 137. That same  
8 distinction applies here. Just as in Cartoon Network, the  
9 Internet Companies transmit a copy of the work to the user,  
10 who then plays his unique copy of the song whenever he wants  
11 to hear it; because the performance is made by a unique  
12 reproduction of the song that was sold to the user, the  
13 ultimate performance of the song is not "to the public."  
14 See id. at 137, 138; see also United States v. Am. Soc'y of  
15 Composers, Authors & Publishers (Application of Cellco  
16 P'ship), 663 F. Supp. 2d 363, 371-74 (S.D.N.Y. 2009).

17 Accordingly, we affirm the district court's grant of  
18 partial summary judgment on the basis that downloads do not  
19 constitute public performances of the downloaded musical  
20 works.<sup>10</sup>

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<sup>10</sup> Several amici suggest that our obligations under the 1997 World Intellectual Property Organization Copyright Treaty ("WIPO Copyright Treaty") require us to find that downloads of musical works constitute public performances. The WIPO Copyright Treaty provides authors with the following right:

1       **II. Fee Determination for Using the ASCAP Repertory**

2               We now turn to the district court's determination of  
3       the appropriate fees payable by the Internet Companies for  
4       blanket licenses to publicly perform any of the millions of  
5       musical compositions in the ASCAP repertory. The district  
6       court determined these blanket license fees by applying a  
7       uniform royalty rate of 2.5% to the Internet Companies'  
8       music-use revenue, which was calculated by multiplying the  
9       total revenue from licensed services by a MUAF (music-use-  
10      adjustment factor), a fraction that reflected the amount of  
11      time users spent streaming performances of musical works

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[T]he exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.

WIPO Copyright Treaty art. 8.

Congress has recognized that this treaty does not "require any change in the substance of copyright rights," see H.R. Rep. No. 105-551(I), at 9 (1998), in part because the Copyright Act already permits copyright holders to control the reproduction and distribution of their musical works over the Internet. To the extent that a download implicates these rights, the conclusion that a download does not also trigger the public performance right does not infringe on Article 8 of the WIPO Copyright Treaty. The other policy arguments raised by ASCAP and amici - regarding global harmony of doctrine, and adequate compensation - are better addressed to Congress, which has the power to amend the Copyright Act. See Eldred v. Ashcroft, 537 U.S. 186, 205-07 (2003).

1 relative to their overall time on the website. We conclude  
2 that the district court's analysis was flawed in two major  
3 respects.

4 First, the district court did not adequately support  
5 the reasonableness of its method for measuring the value of  
6 the Internet Companies' music use. Second, the district  
7 court did not adequately support the reasonableness of the  
8 2.5% royalty rate applied to the value of the Internet  
9 Companies' music use. Accordingly, we remand to the  
10 district court so that it may redetermine reasonable fees  
11 for the licenses in light of the following discussion.

#### 12 **A. Standards of Review**

13 "In order to find that the rate set by the District  
14 Court is reasonable, we must find both that the rate is  
15 substantively reasonable (that it is not based on any  
16 clearly erroneous findings of fact) and that it is  
17 procedurally reasonable (that the setting of the rate,  
18 including the choice and adjustment of a benchmark, is not  
19 based on legal errors)." United States v. Broad. Music Inc.  
20 (Application of Music Choice) ("Music Choice IV"), 426 F.3d  
21 91, 96 (2d Cir. 2005). Fundamental to the concept of  
22 "reasonableness" is a determination of what an applicant  
23 would pay in a competitive market, taking into account the

1 fact that ASCAP, as a monopolist, "exercise[s]  
2 disproportionate power over the market for music rights."  
3 Id.

4 "A rate court's determination of the fair market value  
5 of the music is often facilitated by the use of benchmarks -  
6 agreements reached after arms' length negotiation between  
7 other similar parties in the industry." Id. at 94.  
8 Determinations by the district court that particular  
9 benchmarks are comparable and particular factors are  
10 relevant are questions of law reviewed de novo. Am. Soc'y  
11 of Composers, Authors & Publishers v. Showtime/The Movie  
12 Channel, Inc. ("Showtime"), 912 F.2d 563, 569-71 (2d Cir.  
13 1990). However, factual findings as to each factor under  
14 consideration or those underlying a proposed benchmark  
15 agreement, as well as findings with respect to fair market  
16 value, are reviewed for clear error. Music Choice IV, 426  
17 F.3d at 96; Showtime, 912 F.3d at 569; United States v. Am.  
18 Soc'y of Composers, Authors & Publishers (Application of  
19 Capital Cities/ABC, Inc., CBS Inc., & Nat'l Broad. Co.), 157  
20 F.R.D. 173, 195-96 (S.D.N.Y. 1994).

21 **B. The District Court's Determination of the Music-**  
22 **Use-Adjustment Factor**

23 Fundamental to the reasonableness of a fee for music  
24 use under a license is the reasonableness of the

1 determination of the revenue attributable to the actual uses  
2 by the applicant of the music to which the rate percentage  
3 is to be applied. See United States v. Am. Soc'y of  
4 Composers, Authors and Publishers (Applications of Capital  
5 Cities/ABC, Inc. & CBS, Inc.) ("Capital Cities"), 831 F.  
6 Supp. 137, 156-57 (S.D.N.Y. 1993); United States v. Am.  
7 Soc'y of Composers, Authors and Publishers (Application of  
8 Nat'l Cable Television Ass'n.), No. 41-CV-1395 (WCC) (MHD),  
9 1999 WL 335376, at \*12 (S.D.N.Y. May 26, 1999). In this  
10 case, the value of the applicants' uses could not be  
11 premised on total revenue without an adjustment for the fact  
12 that some revenues were not at all attributable to any use  
13 of ASCAP music. The district court decided to make this  
14 adjustment by using a MUAF that discounted the total revenue  
15 to reflect only those revenues attributable to music use.  
16 We have no quarrel with the use of a MUAF here, but we find  
17 error in the district court's method of determining its  
18 components.

19 The district court began by calculating the total  
20 revenue of the licensed sites and services - defined as  
21 those business units that publicly perform music - less  
22 certain customary deductions, to arrive at the revenue base  
23 to which the MUAF was applied. The Internet Companies argue  
24 that total revenue, when used as the revenue base, bears no

1 relation to the value they derive performing musical works  
2 on the Internet. This argument is unavailing because it  
3 overlooks the function of the MUAF, which can be understood  
4 as accounting for the value of the Internet Companies' music  
5 use in relation to their overall revenue. We find nothing  
6 wrong in concept with using a formula that reduces the total  
7 revenue of the licensed sites and services by a factor that,  
8 with substantial accuracy, accounts for music-use revenue,

1 as the MUAF can be understood to do here.<sup>11</sup> With respect to

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<sup>11</sup> If designed and calibrated properly, a single formula incorporating a MUAF should produce a fee reasonably equivalent to the fee produced by a set of formulae that applies a different reasonable rate to the revenue derived from each of Yahoo!'s different music uses, as is attempted in Yahoo!'s agreement with BMI, infra. (Thus, the single formula will be sensitive to the different intensities of Yahoo!'s various music uses.) The MUAF (if suitably constructed) calculates and accounts for the contribution that music makes to the overall service that Yahoo! sells to its customers, and makes the rate formula sensitive to relative changes in that contribution over time.

At the same time, the MUAF, because it is a third factor in a rate-formula structure that usually includes only two factors (revenue base and rate), complicates any benchmark analysis. The MUAF must be grouped with another of the factors to render the three-factor formula comparable to the two-factor benchmark formulae:

[Grouping 1]	(revenue base	X	MUAF)	X	2.5%
[Grouping 2]	revenue base	X	(MUAF	X	2.5%)

In line with our discussion above, the district court at times grouped the MUAF with the revenue base factor; however, at other times, the district court grouped the MUAF with the 2.5% factor. There is no dollar difference in result, and which grouping is appropriate depends on what is being compared.

For instance, if one is benchmarking a formula that multiplies licensed-services revenue by a rate (as most two-factor formulae do), one might not group the MUAF with the revenue base factor (Grouping 1 above). The benchmark rate cannot be compared to the 2.5% factor alone if the factors not being compared are not equivalent:

[Benchmark]	licensed-services revenue	X	rate		
[Yahoo!]	(licensed-services revenue	X	MUAF)	X	2.5%

In such an instance, the problem disappears if the MUAF is grouped with the 2.5% factor (Grouping 2 above):

1 the components of the MUAF, however, we find error.

2 **1. Yahoo!**

3 The district court's MUAF accounts for the value of  
4 Yahoo!'s music use by using the amount of time that music is  
5 streamed. Streaming time, however, neither drives nor  
6 correlates with Yahoo!'s advertising revenue. The record  
7 evidence makes plain that Yahoo!'s advertising revenue model  
8 more accurately correlates with the number of times a  
9 particular page is accessed by users than to the duration of  
10 streaming time. To the extent that the district court's  
11 MUAF relied on an imprecise metric for determining  
12 advertising revenue attributable to music use when a  
13 superior metric was apparently available and practicable,<sup>12</sup>

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[Yahoo!] licensed-services revenue **X** (MUAF **X** 2.5%)

With this grouping, MUAF **X** 2.5% is the rate to which the benchmark rate is compared.

As mentioned, the alternative groupings are mathematically equal. The reasonableness of the Yahoo! formula can be established by comparing benchmarks to either grouping.

<sup>12</sup> One reason a district court may use a less precise metric is because it is impracticable to use a more precise one, for example if relevant statistics are unobtainable or unreliable. See Capital Cities, 831 F. Supp. at 156-57 (using the amount of music use in television programming as an "adequate proxy" for the value of the music to the network, "in the absence of any other yardstick"). However, the district court did not make a sufficient showing that this was the case.

1 the district court's method for calculating the MUAF was  
2 unreasonable.<sup>13</sup> E.g., Capital Cities, 831 F. Supp. at 156-  
3 57 (accepting amount of music used in television program as  
4 an adequate measure of the value of the music to the program  
5 because it was the only measure available).

6 Display advertising on the Internet is sold on a  
7 cost-per-thousand model that counts the total number of page  
8 impressions, i.e., how many times a particular page is  
9 accessed. Pages that are accessed a greater number of times  
10 occasion higher advertising rates because the advertisements  
11 on these pages are viewed with greater frequency. It is,  
12 thus, unreasonable to use streaming time, which has no  
13 necessary correlation with page views, as a proxy for the  
14 number of times a page is viewed; time spent on-line is not  
15 reflective of how a user interacts with a particular page.

16 A user may have a page open that he is not viewing at  
17 all, either because he has multiple pages open and is

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<sup>13</sup> The district court, recognizing the imprecision of its metric, offered, inter alia, the following rationale for using it: "Although the streaming time is increased by visitors who stream music as a 'background' while they are engaged in other activities on the website, such as searches or e-mailing, that effect is largely if not wholly offset by the myriad incidental performances of music in movies, advertisements, user-uploads and elsewhere, which are not counted as music streaming time (against Yahoo!)." RealNetworks & Yahoo! II, 559 F. Supp. 2d at 413. We find this sort of rough estimation, with no basis in the record, unreasonable because there appears to be a much more precise metric available to the district court.

1 interacting with another page, website, or computer program,  
2 or because he has walked away from the computer altogether  
3 but has left that page open. For example, user A, who is  
4 listening to a four-minute song, may view only the page on  
5 which the song is playing in that four minutes because his  
6 exclusive focus is on the song, while user B, who is  
7 listening to the same song on as background music, may be  
8 simultaneously clicking on links and reading articles  
9 throughout Yahoo!'s website, and thus may be seeing multiple  
10 advertisements on multiple pages during that same four-  
11 minute period. The streaming time for users A and B is the  
12 same, but the advertising exposure of each differs widely.

13 The advertising marketplace takes account of the  
14 foregoing consideration by applying different advertising  
15 rates to different areas of the website. For example,  
16 advertising for radio-style webcasts in Yahoo! Music is  
17 priced at a rate lower than similarly placed ads on Yahoo!'s  
18 homepage, because users normally have the Yahoo! Music  
19 window minimized (and thus not viewable) for much of the  
20 time the radio-style music is playing, in contrast to other  
21 areas on Yahoo!, like the homepage, that command greater  
22 viewer attention.<sup>14</sup> The district court erred by

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<sup>14</sup> We are not suggesting that the amount of time music is played has no correlation to the revenue attributable to music on Yahoo!'s licensed sites and services. Streaming time likely

1 constructing a MUAF that failed to take into account these  
2 various realities of Internet advertising.<sup>15</sup>

3 In sum, the district court erred by adopting an  
4 imprecise metric - music streaming time rather than page  
5 views - as the basis of its MUAF, without providing a  
6 sufficient rationale for that decision. We will not specify  
7 a particular method of developing a formula for determining  
8 music-use revenue on remand; we also leave it to the  
9 district court to determine whether it should proceed with a  
10 variant of its current formula (revenue multiplied by a

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bears some relation to the importance of music on Yahoo!. Furthermore, we recognize that music can enhance a user's experience on Yahoo! even when he navigates away from the streaming page to another Yahoo! webpage. For example, music may be driving advertising revenue on the non-music page to the extent that the music is making Yahoo! experience, as a whole, more appealing. The district court may take this into account in the formula it adopts on remand. We find the district court's reasoning unreasonable not because streaming time bears no relation to the value of music to the revenue of the licenses sites and services, but because there is a more accurate metric available - page impressions - that the district court chose not to use without providing a sufficient reason.

<sup>15</sup> We recognize that revenue is generated from music use by other methods as well, such as through site sponsorship or sponsored search results. However, the district court gave no rationale supporting the conclusion that streaming time is a better measure of the value created by these forms of advertising than it is for display advertising, nor did it indicate that these alternative forms of advertising were a significant part of its analysis. On remand, the district court may wish to address how its metric for calculating music-use revenue will interact with these alternative forms of advertising and whether they are significant in terms of its ultimate fee determination.

1 MUAF) or in some other way altogether, in light of the  
2 foregoing discussion.

3 Yahoo! has also faulted the district court for using  
4 statistics with differing methodologies in the MUAF's  
5 numerator and denominator. In calculating the numerator,  
6 the district court used Yahoo!'s statistics for the number  
7 of hours of music streamed, which give no effect to the  
8 specific window engaged by the user. In calculating the  
9 denominator, the district court used statistics based on a  
10 different methodology provided by comScore Media Metrix for  
11 the total hours of use of the licensed sites and services.<sup>16</sup>  
12 Unlike Yahoo!, comScore measures hours used only for the  
13 specific window that is engaged. The difference is that, in  
14 an instance in which a user has multiple windows open at one  
15 time, comScore will count the time for only the single  
16 window that is in active use, while Yahoo! will count the  
17 time for all the windows open. Yahoo!'s statistics thus  
18 reflect considerably greater use time than comScore's  
19 because, anytime a user has multiple windows open, Yahoo! is  
20 counting the time use for each of the Yahoo! windows open  
21 while comScore is counting the time use for only the single

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<sup>16</sup> ComScore is an Internet audience measurement firm that measures traffic to, and time spent on, Internet sites and services.

1 window engaged by the user. Without addressing whether one  
2 method is preferable to the other, we conclude that  
3 constructing a MUAF by using Yahoo!'s statistics for the  
4 numerator and comScore's statistics for the denominator is  
5 unreasonable because these statistics are not comparable,  
6 with the result that their comparison overstates music-  
7 streaming time.

8 The district court's opinion states that, as of the  
9 date of its issuance, Yahoo! had failed to supply any site-  
10 hours data comparable to that supplied by comScore that  
11 could have been used for the denominator, but that Yahoo!  
12 was free to do so before the district court ordered its  
13 Final Fee Determination. The parties disagree over whether  
14 Yahoo! ultimately furnished adequate total site-hours data.  
15 Because we remand for reconsideration of the MUAF, we refer  
16 this dispute to the district court. We do, however, note  
17 that in calculating any MUAF, the district court must strive  
18 to use measurements that are as consistent and as precise as  
19 practicable.

## 20 **2. RealNetworks**

21 Turning to RealNetworks, as noted previously the  
22 district court in 2009 determined and applied differing  
23 MUAFs to RealNetworks' various licensed sites and services

1 despite its decision not to apply MUAFs in 2008, without any  
2 explanation for the basis of these MUAFs. Accordingly, we  
3 remand for explanation (or reconsideration if the current  
4 MUAFs cannot be justified) because the district court's  
5 rationale was insufficient.

6 The district court applied the following MUAFs to  
7 RealNetworks. For its Rhapsody subscription service,<sup>17</sup> the  
8 district court defined the MUAF's numerator as total number  
9 of plays of audio-music and music-video streams, and the  
10 denominator as the total number of Rhapsody streams plus the  
11 number of deliveries of conditionally downloaded music files  
12 to subscribers. (RealNetworks Judgment Order 2-3) For its  
13 SuperPass subscription service,<sup>18</sup> the numerator was fixed as

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<sup>17</sup> The district court found that Rhapsody is an unlimited on-demand music subscription service that offers subscribers access to over four million songs. In addition to streaming music and selling permanent downloads of music, Rhapsody subscribers can also conditionally download music. A conditional download is a download that may be accessed by the user for a limited duration or number of uses.

For a monthly fee, a Rhapsody subscriber can play as much or as little music as he wants. Regardless of the actual amount of music played, however, the Rhapsody subscriber must still pay the full subscription fee. If the subscriber continues to pay the subscription fee, then neither the amount nor the type of music actually played by the subscriber affects the amount of revenue received by RealNetworks.

<sup>18</sup> The district court found that SuperPass is a subscription service that offers, for a monthly fee, access to news, sports, movies, games, music, and other entertainment content; short films, video clips, and music; music downloads (at \$0.99 per song) and streaming previews of music; access to the

1 the total number of hours of streams to users in each month  
2 by means of the music-radio portion of SuperPass, and the  
3 denominator as the total number of SuperPass music hours  
4 plus the total number of hours of all other streams to users  
5 by means of SuperPass. (RealNetworks Judgment Order 3) And  
6 for RealNetworks' Music, and Media Software and Services  
7 groups, the district court used as the numerator the total  
8 number of hours of streams that non-subscription, on-demand,  
9 and radio-music users receive from RealNetworks' licensed  
10 sites, and as the denominator the total number of hours  
11 users spend on RealNetworks' licensed sites. (RealNetworks  
12 Judgment Order 4)

13 Because the district court failed to explain the basis  
14 for these MUAFs, and in light of the issues we raised with  
15 respect to the MUAF applied to Yahoo!, we remand for the  
16 district court to explain or reconsider the MUAFs applied to  
17 RealNetworks. In addition to consideration of any issues  
18 that it deems appropriate, the district court should address  
19 the following: (1) whether its method for calculating the  
20 MUAF for the Rhapsody subscription service is more precise

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majority of RadioPass services; and CD burning and other features for the RealPlayer. As with Rhapsody, SuperPass subscribers pay the full monthly fee regardless of the amount of content they access, and the amount of subscription revenue that RealNetworks receives does not depend on the subscriber's behavior or actual usage of the subscription's offerings.

1 or practicable than the method used in the benchmark  
2 agreements in the record; (2) whether there is a more  
3 precise way, that is also practicable, to account for the  
4 value of the music use for the SuperPass subscription  
5 service in light of the fact that some components of the  
6 subscription do not involve the streaming of content to  
7 users; and (3) whether there is a more precise and still  
8 practicable way to measure RealNetworks' advertising  
9 revenue, in light of the issues we raised in our discussion  
10 of Yahoo!'s MUAF.

### 11 **C. The Royalty Rate Applied by the District Court**

#### 12 **1. Yahoo!**

13 The district court arrived at Yahoo!'s royalty rate by  
14 relying on benchmark agreements for blanket licenses that  
15 ASCAP entered into with Music Choice, terrestrial radio  
16 stations, the broadcast television networks, and cable  
17 television providers, as well as the rates that Yahoo!  
18 itself pays to the major record companies for music-video  
19 rights. The district court's factual findings that support  
20 selecting these benchmarks were not clearly erroneous.  
21 After reviewing the district court's analysis of these  
22 benchmarks in relation to this case, however, we hold that  
23 the district court unreasonably arrived at its decision to

1 apply a uniform 2.5% royalty rate and that, in setting the  
2 royalty rate, the district court must follow an approach  
3 more tailored to the varying nature and scope of Yahoo!'s  
4 music use.

5 Beginning with the Music Choice benchmark, the district  
6 court found that Music Choice provides channels of music to  
7 listeners on a subscription basis via cable and satellite  
8 television and the Internet. Music Choice's channels are  
9 organized around genres of music, and, on the Internet,  
10 listeners have the option to create up to ten personalized  
11 audio channels. ASCAP's current blanket license with Music  
12 Choice, for the period January 1, 2006 through December 31,  
13 2010, calls for payment of a royalty rate that is 2.5% of  
14 Music Choice's gross revenues, where gross revenue is  
15 defined as all revenues derived from the licensed services.

16 We conclude that the royalty rate agreed to by Music  
17 Choice provides strong support for applying a 2.5% royalty  
18 rate to those Yahoo! sites and services that provide access  
19 to music channels organized around music genre, similar to  
20 those on Music Choice. Additionally, it provides a basis  
21 for a 2.5% royalty rate, or higher, for Yahoo! sites and  
22 services that permit an interactive music experience, in  
23 which the user may control the selection of music he is

1 hearing, for example if a user tunes into a more customized  
2 station or uses Yahoo! Search to listen to songs on-demand.  
3 See RealNetworks and Yahoo! II, 559 F. Supp. 2d at 413.

4           However, the Music Choice benchmark does not justify  
5 applying a 2.5% royalty rate to all of Yahoo!'s music uses,  
6 because Yahoo! offers numerous sites and services that are  
7 less music intensive than Music Choice's offerings. The  
8 district court finessed the Music Choice benchmark's limited  
9 relevance by concluding that there are other benchmarks in  
10 the record that support applying a 2.5% royalty rate to all  
11 of Yahoo!'s performances of the ASCAP repertory. Because we  
12 conclude that these other benchmarks do not adequately  
13 support an across-the-board 2.5% royalty rate, we remand for  
14 reconsideration of a reasonable royalty rate.

15           Turning to the major broadcast television networks'  
16 agreements with ASCAP, the district court found that these  
17 agreements differed from Yahoo!'s because the major networks  
18 pay a flat rate for their ASCAP usage without regard to  
19 revenue (as specified in Yahoo!'s application) and that "[a  
20 similar] flat-fee structure is unsuitable for the online  
21 music industry," RealNetworks and Yahoo! II, 559 F. Supp. 2d  
22 at 401. The district court nevertheless concluded that, by  
23 comparing the percentages of broadcast revenue that the

1 television companies pay ASCAP under their flat royalty rate  
2 to the percentage of licensed services revenue that Yahoo!  
3 would pay if a 2.5% royalty rate (as well as a MUAF) were  
4 applied to its license, the networks' agreements could be  
5 "useful to gauge the reasonableness of the fee range ASCAP  
6 seeks from . . . Yahoo!, and [Yahoo!'s] ability to pay the  
7 blanket fees rather than resorting to less efficient  
8 licensing options or foregoing the use of ASCAP music  
9 altogether." Id.

10 The district court found that "[t]he three television  
11 networks, ABC, CBS, and NBC, have annual revenues in the  
12 range of \$3 to \$4 billion[,] comparable to current . . .  
13 Yahoo! revenues" and that the networks pay a percentage of  
14 broadcast revenue for their ASCAP license that is comparable  
15 to the amount Yahoo! would have paid if a 2.5% royalty rate  
16 (as well as a MUAF) was applied to the total domestic  
17 revenue from the licensed services for the same period.  
18 From this finding, the district concluded that, to the  
19 extent that music is not much less important to Yahoo! than  
20 it is to the television networks, a 2.5% royalty rate is  
21 reasonable.

22 The district court similarly looked to percentage of  
23 total revenue when assessing ASCAP's agreements with the

1 general-entertainment and music-intensive cable television  
2 networks. The district court found that the general-  
3 entertainment cable television networks pay 0.375% of total  
4 revenue derived from licensed services and that the music-  
5 intensive cable television networks pay 0.9% of licensed-  
6 services revenue derived from licensed services. As it did  
7 with the major broadcast television networks, the district  
8 court compared the percentage of total revenue that Yahoo!  
9 would pay under the court's formula to the 0.375% and 0.9%  
10 paid by the cable television networks to conclude that a  
11 flat 2.5% royalty rate, when multiplied by a MUAF, is  
12 reasonable for Yahoo!'s license.

13 We are unconvinced that percentage of revenue  
14 comparisons between broadcast and cable television networks,  
15 and Yahoo! are useful in determining a reasonable fee for  
16 Yahoo!'s public performances of the ASCAP repertory. Nearly  
17 every program on a television station somehow utilizes  
18 musical works. In contrast, only a fraction of the traffic  
19 on Yahoo!'s website uses music; much of Yahoo!'s website  
20 does not implicate any music use whatsoever. Given that  
21 Yahoo!'s revenue base relies far less on ASCAP content than  
22 the television networks' revenue base, we believe that

1 comparing percentages of overall revenue bases is of little  
2 probative value in this benchmark analysis.<sup>19</sup>

3 These comparisons, moreover, indicate a deeper flaw in  
4 the district court's analysis: its inclination to lump all  
5 of Yahoo!'s varying musical uses together, instead of  
6 looking to the nature and scope of Yahoo!'s different types  
7 of uses and applying a rate that reflects (or rates that  
8 reflect) the varying nature of Yahoo!'s music use. See  
9 United States v. Am. Soc'y of Composers, Authors &  
10 Publishers (Application of Nat'l Cable Television Ass'n.),  
11 No. 41-CV-1395 (WCC) (MHD), 1999 WL 335376, at \*12 (S.D.N.Y.  
12 May 26, 1999). The district court's finding that cable  
13 television networks pay 0.375% of their revenue for their  
14 ASCAP licences is a good example. The most direct  
15 conclusion to be drawn from this benchmark is that providers  
16 of cable-style television will pay 0.375% of their revenue,  
17 in a competitive market, to license ASCAP music.<sup>20</sup> However,  
18 the district court looked past this conclusion in setting  
19 the royalty rate and instead used this benchmark to justify

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<sup>19</sup> The district court's analysis of the terrestrial radio stations's licencing agreements with ASCAP suffers from the same flaw.

<sup>20</sup> This conclusion is supported by the fact that the major broadcast television networks, which perform a blend of cable-television style programming, as well as less music-intensive programming such as news and sports, pay between 0.24%-0.34% for their ASCAP licenses.

1 applying a 2.5% rate to all of Yahoo!'s music use based on  
2 an imprecise comparison of the percentages of overall  
3 revenue. We think a better approach would be to attempt, if  
4 practicable, to set a royalty rate that requires Yahoo! to  
5 pay a rate for its cable-style programming that is similar  
6 to that in the cable market.<sup>21</sup>

7 Our view that a reasonable royalty rate should reflect  
8 the varying values of Yahoo!'s differing music uses is  
9 supported by Yahoo!'s license with BMI.<sup>22</sup> As previously  
10 noted, BMI is ASCAP's principal competitor in licensing the  
11 performance rights for musical works. The two rights  
12 organizations control approximately 90% of all on-line music  
13 performances, with roughly equal shares of the market.  
14 Because these two companies operate in the market in such

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<sup>21</sup> The district court's analysis of Yahoo!'s agreement with the major record companies is erroneous for the same reason. The court did not use this benchmark to assess how much Yahoo! should pay for its right to perform ASCAP musical works in music videos. It instead used this benchmark to make a far more general conclusion concerning how much Yahoo! should pay for all of its various music uses.

<sup>22</sup> The district court concluded that the royalty rates used in the BMI-Yahoo! license are not probative of what the market would yield for Yahoo!'s license in this case because, it concluded, the BMI-Yahoo! license is a "per-segment" license that confers a different set of rights than the "blanket" license Yahoo! seeks from ASCAP. Yahoo! contests this finding. In light of our remand, it is not necessary to rule on this issue. We leave it open to the district court, however, to revisit this finding on remand.

1 similar manners, BMI's agreements are instructive. See  
2 e.g., United States v. Am. Soc'y of Composers, Authors &  
3 Publishers (Application of MobiTV, Inc.), Nos. 09-Civ-7071  
4 (DLC), 41-Civ-1395 (DLC), 2010 WL 1875706, at \*38 (S.D.N.Y.  
5 May 11, 2010).

6 In its negotiated agreement with BMI, Yahoo! agrees to  
7 pay the following license fees: (a) 1.75% of "Direct  
8 Revenue" from "Preprogrammed Radio"; (b) 2.5% of "Direct  
9 Revenue" from "On-Demand Streams"; (c) 2.15% of "Direct  
10 Revenue" from "User-Influenced Programming"; (d) 1.0% of  
11 "Direct Revenue" from "Audio-Visual Programming"; and (e)  
12 0.6875% of "Yahoo! Music Advertising Revenue and Yahoo!  
13 Music Run of Site Allocation." This agreement, providing  
14 for a so-called "bucket" for each different use, supports  
15 the conclusion that the other benchmarks also suggest: the  
16 market assigns different values to Yahoo!'s different music  
17 uses and is capable of yielding a royalty rate that reflects  
18 the varying intensity of Yahoo!'s music uses.<sup>23</sup>

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<sup>23</sup> ASCAP's licensing agreement with Turner Broadcasting further supports the conclusion that the market is capable of yielding a royalty rate that reflects the varying intensity of Yahoo!'s music uses. Turner owns numerous types of television stations that use music differently from one another - including, by way of example, general entertainment cable television stations such as TNT and TBS, and a cable news station, CNN - all of which are covered under a single license with ASCAP. Similar to Yahoo!'s agreement with BMI, Turner's license with ASCAP includes different rates on a per-network basis, thereby reflecting the economic reality that Turner's different channels

1           The district court found that effectuating the BMI  
2 structure is quite complex, because Yahoo! is required to  
3 subdivide its sites and services into 17 separate revenue  
4 categories that are apportioned into "5 buckets" and that,  
5 to report the revenue under these categories, Yahoo! is  
6 required to make dozens of calculations and collect numerous  
7 data points. "Because most of these data [points] are not  
8 ordinarily collected for other business purposes," the  
9 district court concluded that "their accuracy [i]s suspect  
10 and auditing [Yahoo!'s] reports [i]s difficult and  
11 expensive." The district court found that the BMI method is  
12 additionally complicated by how the parties decide what  
13 revenue is "directly attributable" to the streaming of  
14 music. RealNetworks and Yahoo! II, 559 F. Supp. 2d at 411.  
15 We neither endorse nor challenge these conclusions, and we  
16 leave it to the district court on remand to decide whether a  
17 bucket system is feasible with alterations, or whether  
18 another system is preferable in light of our guidance today.

19           We further acknowledge the requirement that fee  
20 structures and the proceedings used to arrive at them  
21 comport with the provisions of the Second Amended Final  
22 Judgment, see, e.g., United States v. BMI (Application of

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use ASCAP's repertory in manners that the market values differently.

1 Muzak LLC), 275 F.3d 168, 176-77 (2d Cir. 2001) (assessing  
2 whether a rate structure that included "carve outs" for  
3 songs licensed by the Applicant directly from the copyright  
4 holder was within the rate-setting court's blanket-license  
5 authority), and the district court's concern that the  
6 setting of different rates for the Internet Companies'  
7 various services would be in some tension with prior case  
8 law regarding blanket licenses, see RealNetworks & Yahoo!  
9 II, 559 F. Supp. 2d at 406-08. We note, however, that the  
10 district court's own proposed MUAF would have involved  
11 "reporting or . . . keeping track of . . . music use,"  
12 notwithstanding the court's observation that such tracking  
13 is generally not a feature of blanket licenses, see id. at  
14 407, and that a recent rate-setting opinion has made use of  
15 multiple rates as part of a blanket license, see MobiTV,  
16 2010 WL 1875706, at \*22, \*37-38, \*43. Moreover, our own  
17 precedent indicates that non-traditional fee structures can  
18 be compatible with blanket licenses. Muzak, 275 F.3d at  
19 177. It is for the district court to consider, in the first  
20 instance, what options are available to it in setting a  
21 reasonable rate or rates in this case.

22 For the foregoing reasons, we remand to the district  
23 court to redetermine the royalty rate (or rates) that Yahoo!  
24 must pay ASCAP for its license, in light of our holding that

1 the district court's valuation of Yahoo!'s use of the ASCAP  
2 repertory must reflect, as well as practicable, the varying  
3 nature and scope of Yahoo!'s music use. We do not, however,  
4 suggest that the specific royalty rates set forth in the  
5 BMI-Yahoo! agreement must be accepted by the district court  
6 on remand, nor do we suggest that a bucket system is the  
7 only method by which a reasonable fee could be calculated.  
8 Instead, we believe that there are other ways to proceed,  
9 including possibly using a "blended" uniform rate<sup>24</sup> (e.g.,  
10 taking a snapshot of Yahoo!'s current music use, valuing the  
11 different uses independently, averaging them into a blended,  
12 uniform royalty rate, and then revisiting that rate  
13 periodically), or perhaps using a modification of the BMI  
14 bucket system to avoid some of the reliability problems  
15 noted by the district court, or employing some third method  
16 not yet discussed. We leave it to the district court to  
17 determine the best way to proceed consistent with the  
18 concerns we have discussed.

## 19 **2. RealNetworks**

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<sup>24</sup> We also do not mandate that, if the district court were to use a blended uniform rate, the rate would have to be lower than 2.5%. We only hold that the district court's application of the benchmark agreements in its opinion does not support an across the board 2.5% rate.

1           The district court applied the Music Choice and radio  
2           station benchmarks to RealNetworks. The court found that  
3           Music Choice's 2.5% royalty rate supported applying a 2.5%  
4           royalty rate to RealNetworks because, inter alia, many of  
5           RealNetworks' music uses are equally or more music intensive  
6           than Music Choice's uses, specifically referring to  
7           RealNetworks' on-demand, music-video, and music-stream uses.  
8           The district court also found that the radio station  
9           benchmarks supported a 2.5% royalty rate for RealNetworks.

10           We do not take specific issue with the district court's  
11           analysis as it may pertain to uses by RealNetworks that are  
12           analogous to those of Music Choice and the radio stations.  
13           However, RealNetworks objects to the district court's  
14           analysis on the basis that RealNetworks' services include  
15           music uses that are less music-oriented than those of Music  
16           Choice or the radio stations, such as uses in video games,  
17           television shows, and ring tones. We find this objection  
18           persuasive to the extent that it tracks the flaws we have  
19           identified in the district court's analysis underlying  
20           Yahoo!'s royalty rate, and we remand so that the district  
21           court may conduct a more complete analysis of the various  
22           uses of ASCAP musical works by RealNetworks and may  
23           determine, in light thereof, the appropriate method for  
24           determining RealNetworks' royalty rate (or rates).

1           **D.     Download Revenues**

2           With respect to the district court's fee calculation,  
3           ASCAP cross-appeals one issue: whether download revenue  
4           should be included in the revenue base, even though  
5           downloads are not public performances, because public  
6           performances of music are used to generate the downloads of  
7           music. Although the district court recognized some  
8           relationship between the ability to stream music and  
9           download revenue, it made no formal factual findings about  
10          the extent and implications of that relationship. In an  
11          analogous context, the district court found that the ability  
12          to preview ringtones (via streaming) "undeniably  
13          increase[d]" the sale of ringtones (via download). In re  
14          United States v. Am. Soc'y of Composers, Authors &  
15          Publishers (Application of AT&T Wireless f/k/a Cingular  
16          Wireless), 607 F. Supp. 2d 562, 565 (S.D.N.Y. 2009). We  
17          leave it to the district court on remand to determine the  
18          extent of any such relationship in this case.

19          Finally, ASCAP cross-appeals the district court's  
20          admission of the Internet Companies' alleged late evidence.  
21          This issue is moot in light of our remand to the district  
22          court for further proceedings, at which additional evidence  
23          may be considered.

1 **CONCLUSION**

2 For the foregoing reasons, we AFFIRM the district  
3 court's ruling that downloads of musical works do not  
4 constitute public performances of those works, and we VACATE  
5 the district court's assessment of reasonable fees for the  
6 blanket ASCAP licenses sought by the Internet Companies and  
7 REMAND for further proceedings in light of this opinion.