

Amicus Brief in AT&T/ASCAP ringtone licensing

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Supporting Documents

In an effort to squeeze additional royalty payments from the Carriers, ASCAP has invited this Court to endorse the remarkable proposition that millions of American consumers break the law every time their mobile phones ring in public. Having branded every public ring of a musical ringtone an "unlicensed ringtone performance," ASCAP then argues that the Carriers must either pay royalties or be held liable for these alleged consumer infringements.

Accepting ASCAP's arguments would jeopardize the interests of consumers in three distinct ways. Most directly, increased royalty obligations on the Carriers will mean increased prices for consumers who purchase musical ringtones, an outcome that contradicts Section 110(4) of the Copyright Act,' which makes it clear that entirely noncommercial public performances are noninfringing. Consumers ought not be indirectly taxed for precisely the activities that Congress left outside the reach of the public performance right.

ASCAP's arguments also pose two more fundamental threats to the interests of consumers. First, a finding that consumers infringe the public performance right each time their phones ring in public threatens to stigmatize millions of consumers as law- breakers. This will leave consumers vulnerable to infringement claims and royalty demands not just from ASCAP and its members, but also from other copyright owners in other contexts. Second, a ruling here that holds the Carriers liable, in the absence of primary infringement liability on the part of their customers, would upset the traditional balance between direct and secondary infringement, jeopardizing the "breathing room for innovation and a vigorous commerce"on which consumers depend. *Metro-Goldwyn- Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 933 (2005).

ASCAP has made public statements to the effect that it has no intention of seeking direct payment from consumers over "public ringing." These unenforceable public relations statements, however, do nothing to dispel the harms detailed above. Whether or not consumers are directly targeted by ASCAP members for royalties or litigation, they will face increased prices, the risk of suit in other contexts, and an artificially depleted set of innovative technologies and services if ASCAP's arguments are accepted here.

In order to avoid these harms to consumers, the Court should firmly reject ASCAP's erroneous views of copyright law. Section110(4) of the Copyright Act compels the conclusion that consumers are not infringing the public performance right when their phones ring in public. And where there is no direct infringement by consumers, there is also no secondary liability on the part of those who provide them with innovative tools and services. Moreover, Second Circuit authority bars ASCAP's effort to end-run the limitations of secondary liability by reframing its arguments as direct infringement claims.

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