

United States v. American Society of Composers, Authors and Publishers: 599 F. Supp. 2D 415 (S.D. N.Y. 2009)

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UNITED STATES V. AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

599 F. SUPP. 2D 415 (S.D. N.Y. 2009)

I. INTRODUCTION

In *United States v. American Society of Composers, Authors and Publishers*, the United States District Court for the Southern District of New York considered whether the use of copyrighted musical works as previews for ringtones and ringback tones was a public performance of the music, necessitating a blanket license from the American Society of Composers, Authors and Publishers (“ASCAP”), or a fair use not requiring any sort of license.¹ Plaintiff AT&T Mobility LLC (“AT&T”) made a request to ASCAP for a blanket license for public performance of ASCAP-licensed music via wireless and internet transmission.² The negotiations between the two parties failed, and AT&T initiated the suit in question.³ AT&T initially sought a determination from the court as to what would be a fair blanket license rate, but later moved for summary judgment on the issue of fair use.⁴ ASCAP filed a cross motion for discovery under the Federal Rules of Civil Procedure.⁵ The court denied AT&T’s motion and declined to

1. *United States v. Am. Soc’y of Composers, Authors and Publishers*, 599 F. Supp. 2d 415, 421 (S.D. N.Y. 2009). A ringtone is a song that plays in lieu of a wireless telephone’s default ringer. *Id.* at 420. A ringback tone is a song that plays instead of the sound a caller normally hears while waiting for his call to be answered. *Id.*

2. *Id.* at 419.

3. *Id.*

4. *Id.*

5. *Id.* at 419 (citing Fed. R. Civ. P. 56(f), which reads “If a party opposing the motion shows . . . [that] it cannot present facts essential to justify its opposition, the court may (1) deny the motion; (2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be

decide the motion for discovery.⁶

II. BACKGROUND

A. Parties to the Lawsuit

The American Society of Composers, Authors and Publishers (“ASCAP”) is a membership association for songwriters, composers, lyricists, music publishers, and some foreign copyright holders.⁷ ASCAP licensed to third parties the nondramatic public performances of its members’ copyrighted works.⁸ A 1941 consent decree dictated the manner in which ASCAP could charge these consumers for its members’ copyrighted material.⁹ The consent decree required that all actions arising from the implementation of the decree would take place in the District Court for the Southern District of New York.¹⁰

AT&T Mobility LLC (“AT&T”) was a United States wireless company that provided voice and data services to over seventy million subscribers.¹¹ AT&T also sold ringtones and ringback tones, which replace some of the customers’ default sounds on their cellular phones and offered previews prior to sale.¹² AT&T’s customers could purchase ringtones and ringback tones through either a website or an application on their phones.¹³ It was also possible for AT&T users to play ringtones through other methods, and ASCAP directed the court to several websites which showed the users how to convert music files to ringtones without purchasing the ringtones first from AT&T.¹⁴

Occasionally, there were multiple versions of a song available for download as a ringtone or ringback tone, and the only way to

undertaken; or (3) issue any other just order”).

6. *Id.*

7. *ASCAP*, 599 F. Supp. 2d at 419.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 420.

13. *ASCAP*, 599 F. Supp. 2d at 420.

14. *Id.*

determine which version a consumer desired was by listening to a sample.¹⁵ AT&T allowed its customers to listen to a ten to thirty-second long sample of the file.¹⁶ The consumer listened to the sample by clicking on a speaker icon next to the word “buy,” which allowed the consumer to listen to a brief streaming sample of the song that was not stored on the consumer’s computer or phone.¹⁷ ASCAP contended that it was also possible to preview the ringtones and ringback tones through other methods, again directing the court to various website that provided detailing instructions on such methods.¹⁸

B. *The Goal of the Samples*

AT&T stated that the goal of the samples was to allow the consumer to listen to a brief segment of a song so that they would purchase ringtones and ringback tones.¹⁹ AT&T claimed that customers were not charged and that AT&T did not make any revenue from the samples, because all profits came from eventual sales of the tones to the consumer.²⁰ Additionally, AT&T claimed that the ringtones and ringback tones could not be downloaded or distributed.²¹

ASCAP disagreed with AT&T’s asserted goals.²² According to ASCAP, the ringtones and ringback tones were not always brief; at times, they were close approximations to, or even longer than, the original works.²³ In addition to this, ASCAP stated that it required more discovery to determine the accuracy of the statement that AT&T made no revenue from the samples, because AT&T received advertising revenue from traffic to their website.²⁴ AT&T rebutted this, stating that there were no third-party advertisements

15. *Id.*

16. *Id.* at 421. ASCAP claimed that it required additional discovery in order to determine the actual length of AT&T’s samples. *Id.*

17. *Id.* at 420.

18. *ASCAP*, 599 F. Supp. 2d at 421.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *ASCAP*, 599 F. Supp. 2d at 421.

on their website, but ASCAP referenced banners on the site that, while not directly advertising a product, sent consumers to other sites or promoted services offered by third parties such as the Weather Channel.²⁵ Finally, to rebut the statement that the samples could not be downloaded or distributed, ASCAP again pointed to various websites that detailed procedures on how to copy a streaming preview to a computer and then transfer that file to a cellular phone.²⁶

AT&T moved for summary judgment under the theory that the samples constituted a fair use and were thus protected.²⁷ Under this theory, AT&T claimed that ASCAP had “no right to demand royalty payments for the use of material that was exempt from copyright liability.”²⁸ ASCAP countered that the samples were not a fair use, and it was entitled to royalty payments under the blanket license that AT&T sought to obtain.²⁹ Additionally, ASCAP cross-motivated for further discovery under Rule 56(f) of the Federal Rules of Civil Procedure.³⁰

III. ANALYSIS

The court analyzed AT&T’s claim under the fair use test found in the Copyright Act.³¹ The fair use test consists of four factors: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount of the original work used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for the copyrighted work.³² The

25. *Id.*

26. *Id.*

27. *Id.* at 423.

28. *Id.*

29. *Id.*

30. *ASCAP*, 599 F. Supp. 2d at 419.

31. *Id.* at 423 (citing 17 U.S.C. § 107 (2006)).

32. 17 U.S.C. § 107. The court here pointed out that the Supreme Court held that this list was not meant to be all-inclusive, and no factor is outcome-determinative of whether or not a use will be a “fair use”. *ASCAP*, 599 F. Supp. 2d at 423 (citing *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561 (1985)). The court additionally stated that the fair use doctrine was an affirmative defense, and thus the burden of proof rested upon AT&T, as the proponent of the use, to show that the use was fair. *Id.* at 424 (citing *Infinity*

court looked at each of the elements of the fair use test and decided that AT&T's use of the sampled music was not a fair use.³³ The court also found that there were no other exceptions in the Copyright Act that allowed AT&T's behavior.³⁴ Additionally, the court declined to decide on ASCAP's motion for further discovery, because there was already sufficient evidence to deny AT&T's motion.³⁵

A. Fair Use Analysis

The court noted that the purpose of the fair use doctrine was to prevent copyright infringement suits against people who were using the material for purposes that advanced the progress of science or the arts, such as educating, criticizing, news reporting, and researching.³⁶ The court additionally pointed out that other courts have evaluated fair use cases on an individual basis, weighing each of the factors in turn, with the ultimate test for fair use being whether the use would best serve the progress of arts and science.³⁷

1. The Purpose and Character of the Use

The court observed that the Supreme Court had held that the central purpose of this factor was to determine whether the new use was transformative.³⁸ The court also pointed out that the Copyright Act notes the importance of a commercial or non-profit use when analyzing this factor.³⁹

Broad Corp. v. Kirkwood, 150 F.3d 104, 107 (2d Cir. 1998)).

33. *ASCAP*, 599 F. Supp. 2d at 434.

34. *Id.* at 433 (citing 17 U.S.C. § 110(7)). "The statutory language unequivocally indicates that the exemption was intended only for previews of music in physical record stores." *Id.*

35. *ASCAP*, 599 F. Supp. 2d at 419.

36. *Id.* at 423.

37. *Id.* at 424 (citing *Blanch v. Koons*, 467 F.3d 244, 251 (2d Cir. 2006)).

38. *Id.* (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)). For a work to be transformative, it must add something new with a further purpose to the original work, rather than merely superseding it. *Id.*

39. 17 U.S.C. § 107. This is not to discover whether the new use is solely for monetary gain, but rather to establish whether or not the creator of the new work

The court held that AT&T's use of the samples was not transformative because the samples used by AT&T were exact replicas of music in ASCAP's library.⁴⁰ AT&T argued that some courts had found that a work that was an exact copy was still transformative because the new work had a different meaning than the original.⁴¹ AT&T further argued that the new use here was to inform customers, which was different from the original purpose of entertaining the musician's audience.⁴² AT&T relied on *Bill Graham Archives v. Dorling Kindersley Ltd.*⁴³ and *Kelly v. Arriba Soft Corp.*⁴⁴ for this proposition, and the court distinguished them both from the present case.⁴⁵

AT&T argued that their informational use of samples of songs was similar to the defendant's informational use of posters in *Bill Graham Archives*.⁴⁶ In *Bill Graham Archives*, the Second Circuit held that the reproduction of scaled-down concert posters in a biography of a music group was a fair use of the copyrighted work.⁴⁷ However, in *Bill Graham Archives*, the posters were used as historical artifacts to illustrate a biographical work, a use that falls within the scope of the preamble paragraph to section 107 of the Copyright Act.⁴⁸ In contrast, the New York District Court here held that AT&T's use of the samples to allow consumers to preview a song before purchasing it did not fall under any of the protected categories listed in the Copyright Act.⁴⁹ Additionally,

will profit off the original work without paying the customary fees. *ASCAP*, 599 F. Supp. 2d at 424 (citing *Harper & Row*, 471 U.S. at 562).

40. *ASCAP*, 599 F. Supp. 2d at 424.

41. *Id.*

42. *Id.*

43. *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006).

44. *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003).

45. *ASCAP*, 599 F. Supp. 2d at 424.

46. *Id.*

47. *Id.* (citing *Bill Graham*, 448 F.3d at 606-07).

48. *Id.* at 425. The preamble paragraph to § 107 reads in part "the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright." 17 U.S.C. § 107.

49. *ASCAP*, 599 F. Supp. 2d at 425.

the court in *Bill Graham Archives* found that the defendant's minimal use of the posters and lack of exploitation for commercial gain weighed in favor of fair use.⁵⁰ The court here held that AT&T's use of the samples only served the function of facilitating the ease with which AT&T could sell ringtones and ringback tones for commercial gain.⁵¹ The court additionally noted that ASCAP music did not make up a small portion of the samples, but rather each sample consisted entirely of ASCAP music.⁵² Because of these distinctions, *Bill Graham Archives* did not govern the outcome of the court's analysis of the nature and purpose of the use.⁵³

The court also distinguished the *Kelly* case.⁵⁴ In *Kelly*, the Ninth Circuit held that the use of thumbnail images for a search engine constituted a fair use.⁵⁵ The defendant's search engine found images online, indexed them, and created thumbnails of the images that were then searchable.⁵⁶ The plaintiff found a thumbnail of his copyrighted image in the results of a search on the defendant's search engine and sued for copyright infringement.⁵⁷ The court in *Kelly* found that the defendant's use of the images was a fair use and transformative, because the purpose of the use was to make it easier to find the images and served no real aesthetic purpose.⁵⁸ AT&T argued that its use of the music samples allowed for the consumer to find and purchase music, which served a different purpose from the purpose of the original music.⁵⁹ However, the court here held that the defendant in the *Kelly* case merely used the thumbnails in an effort to aid the user in finding the art, unlike AT&T, which used the samples to sell a product.⁶⁰ The court reasoned that the thumbnails in *Kelly* served the purpose of enhancing information seeking on the Internet, whereas the music

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *ASCAP*, 599 F. Supp. 2d at 425 (citing *Kelly*, 336 F.3d at 815, 818).

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 426.

60. *Id.*

samples served no public benefit, and functioned as a method to sell AT&T's product.⁶¹ Therefore, the court did not use the *Kelly* holding in determining this factor of the fair use test.⁶²

The court in this case found the ruling in *Infinity Broadcast Corp. v. Kirkwood*⁶³ to be most on point as to the transformative nature of a work.⁶⁴ In that case, the plaintiff radio broadcast company brought suit against a company that re-transmitted its broadcasts over the telephone.⁶⁵ The defendant made no alterations to the broadcasts, and marketed them as a tool with which advertisers and talent scouts could audition talent and check to make sure that commercials were airing correctly.⁶⁶ The court in *Infinity Broadcasting Corp.* held that the work was not transformative in this instance, even though the defendant argued that its use was for informative rather than entertainment purposes and that difference in purpose alone did not constitute a transformation.⁶⁷ The court in this case held that AT&T's samples merely served a different purpose and applied the reasoning of the *Infinity Broadcasting Corp.* court to hold that AT&T's different purpose is not transformative.⁶⁸

Additionally, the court in *Infinity Broadcasting Corp.* focused on the defendant's acts, not those of the consumer, and found that the defendant merely sold access to another company's original works.⁶⁹ The court there noted that while it was possible that talent scouts and advertisers would listen to the broadcasts for the stated purposes, they would still be deriving some entertainment value from the broadcasts.⁷⁰ Similarly, the New York District Court here held that AT&T allowed full access to protected ASCAP music and provided no evidence that its customers would use these samples solely for information, and not for entertainment

61. *ASCAP*, 599 F. Supp. 2d at 426.

62. *Id.*

63. *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104 (2d Cir. 1998).

64. *ASCAP*, 599 F. Supp. 2d at 426.

65. *Id.* (citing *Infinity*, 150 F.3d at 106).

66. *Id.*

67. *Id.* at 427.

68. *Id.*

69. *Id.*

70. *ASCAP*, 599 F. Supp. 2d at 427 (citing *Infinity*, 150 F.3d at 108).

purposes.⁷¹

The court here also looked to the Third Circuit's holding in *Video Pipeline*⁷² for guidance on the purpose and character element of the fair use test.⁷³ In *Video Pipeline*, the plaintiff made "clip previews," which were two-minute segments of a movie created without authorization by the copyright holder and sold as trailers to companies that sold home video.⁷⁴ The home video companies would then stream those previews as samples on its website when a customer wanted to see a trailer before buying a movie.⁷⁵ The plaintiff in that case made a similar argument as the one in the present case, claiming that the use was transformative, because it served a different purpose than the original.⁷⁶ The court in *Video Pipeline* rejected this argument and stated that the use was a "part of," and "not information about," the original work.⁷⁷ Furthermore, it did not agree that using a portion of a copyrighted work as an advertisement without any change to the original would qualify as a fair use under the Copyright Act.⁷⁸ Following this reasoning, the court in the present case found that AT&T's samples were not transformative.⁷⁹

The court here observed that whether or not a work was commercial plays a role in the purpose and character element of the fair use test, noting that works of a commercial nature have limited protection under the fair use test.⁸⁰ The court followed the Second Circuit's test for commerciality, which stated that a "genuine creative rationale" by the secondary user was much more likely to be a fair use than one who uses the original work simply because the secondary user does not wish to put in the creative work involved in making a new work.⁸¹ The test further provided

71. *Id.*

72. *Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc.*, 342 F.3d 191 (3d Cir. 2003).

73. *ASCAP*, 599 F. Supp. 2d at 427.

74. *Id.* (citing *Video Pipeline*, 342 F.3d at 194).

75. *Id.*

76. *Id.*

77. *Id.* (quoting *Video Pipeline*, 342 F.3d at 199).

78. *Id.* at 428.

79. *ASCAP*, 599 F. Supp. 2d at 428.

80. *Id.*

81. *Id.* (quoting *Blanch*, 467 F.3d at 255).

that if a secondary work were an advertisement, it would be less likely to be a fair use.⁸²

AT&T conceded the fact that its use of the samples was not strictly non-commercial but argued that if the new work was more transformative, the commercial uses factor became less important.⁸³ However, the court had already established that AT&T's samples were not a transformative work, and therefore claimed that the commercial nature of the work takes on even greater significance.⁸⁴ Because the samples essentially functioned as advertisements for AT&T's ringtones and ringback tones, the use of the samples was commercial.⁸⁵ Additionally, the court found that AT&T was likely compensated for the re-directing of business to third party websites from their music sample website, further cutting against the idea that the samples were a non-commercial use.⁸⁶

Due to all of the above, the court held that AT&T's use of the samples was not transformative.⁸⁷ Because the works were not transformative, the first element of this test weighed against a finding that AT&T's samples constituted a fair use.⁸⁸

2. *The Nature of the Copyrighted Work*

The court stated that the purpose of this element was to recognize that some works were intended to receive greater copyright protection than others, and thus fair use was harder to establish when these works were copied.⁸⁹ The court noted that there were two factors that other courts considered when deciding this element: (1) whether the original work was expressive or factual; and (2) whether the original work was published or unpublished.⁹⁰ Because most of ASCAP's music was published, this factor went in AT&T's favor, but the court found it more

82. *Id.* (citing *On Davis v. The Gap, Inc.*, 246 F.3d 152, 175 (2d Cir. 2001)).

83. *Id.* at 428-29.

84. *Id.* (citing *On Davis*, 246 F.3d at 175).

85. *ASCAP*, 599 F. Supp. 2d at 429.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* (citing *Campbell*, 510 U.S. at 586).

90. *Id.* (citing *Blanch*, 467 F.3d at 256).

important that ASCAP's music was undoubtedly creative.⁹¹ Because of the creativity involved in ASCAP's music and because AT&T's use of the work was not transformative, the court found that this element of the fair use test favored ASCAP.⁹²

3. *The Amount and Substantiality of the Portion Used*

The court observed that this element recognized the concept that the more substantial the taking of the original work, the less likely the secondary work was a fair use.⁹³ Additionally, the court noted that even a smaller taking of the songs might be unfair if it captured the "essence" of the original work.⁹⁴ AT&T claimed that it used ten to thirty-seconds of the songs for its samples, but ASCAP contended that there was insufficient discovery to know this for certain.⁹⁵ AT&T conceded that some samples might be the same length as the associated ringtone or ringback tone.⁹⁶ The court gave AT&T the benefit of the doubt about the length of the samples, but held that AT&T still had not provided any proof that the samples did not copy the "essence" of the original songs.⁹⁷ AT&T admitted that it sampled repetitive portions of the song, which were often the most significant part.⁹⁸

Though the samples were short, they incorporated a significant portion of the songs; therefore, the court here held that the third factor weighed against AT&T.⁹⁹

4. *The Market Effect of the Secondary Work*

The court found that the purpose of the market effect factor was

91. *ASCAP*, 599 F. Supp. 2d at 430.

92. *Id.*

93. *Id.*

94. *Id.* (quoting *Infinity*, 150 F.3d at 109). In addition, the Court noted the Supreme court holding in *Harper & Row* that the fact that a substantial portion of a work is copied verbatim is evidence of the importance of that part of the work. *Id.* at 431 (citing *Harper & Row*, 471 U.S. at 565).

95. *Id.* at 430.

96. *Id.*

97. *ASCAP*, 599 F. Supp. 2d at 430.

98. *Id.*

99. *Id.* at 431.

to protect copyright holders from secondary users who had siphoned off the demand for the original work.¹⁰⁰ The court indicated that fair use would not protect a secondary user who was creating a work to serve as a market substitute for the original work.¹⁰¹ The court recognized that a copyright holder must only show that the secondary work negatively impacted the reasonable or likely market share of the original, or would do so if the infringing use became widespread.¹⁰²

As it did earlier, the court found that AT&T's samples were not transformative.¹⁰³ By using ASCAP's music without paying a licensing fee, AT&T deprived ASCAP of the price it was entitled to for each song.¹⁰⁴ Additionally, ASCAP proved that other companies were paying a licensing fee for song samples, which established a market for these short-form licenses that would be negatively impacted by AT&T's free use of the samples.¹⁰⁵ The party arguing in favor of fair use had the burden of establishing that their actions would not harm ASCAP's market share, but the court found that AT&T had failed to provide any relevant evidence.¹⁰⁶ Because of the detrimental market effect of AT&T's samples upon ASCAP's licensing abilities, the court held that this factor weighed against fair use.¹⁰⁷

B. The Section 110(7) Exemption

Three of the four statutory elements weighed against fair use, but AT&T raised one final issue.¹⁰⁸ AT&T raised the point that § 110(7) of the Copyright Act allowed a very limited exception from copyright liability for music sampling in a record store, so long as the sample was not transmitted outside of the place where the

100. *Id.*

101. The court reiterated that this element must be examined in light of whether the new work was transformative or not. *Id.*

102. *Id.* (citing *Harper & Rowe*, 471 U.S. at 568).

103. *ASCAP*, 599 F. Supp. 2d at 432.

104. *Id.*

105. *Id.*

106. *Id.* at 433 (citing *Infinity*, 150 F.3d at 107).

107. *Id.*

108. *Id.*

purchase occurred.¹⁰⁹ AT&T argued that, although it did not fall within this exemption, the fact that Congress found sampling fair in this context meant that AT&T's use of samples was fair as well.¹¹⁰ However, ASCAP contended, and the court agreed, that if Congress wanted to exempt website sampling of music, it would have put language to this effect in the statute.¹¹¹ The court saw no reason to override Congress's deliberately specific wording in the Copyright Act.¹¹² In addition, the court found that while record store samples could only be enjoyed within the store, website samples could be enjoyed throughout the world, bringing this issue back to the siphoning of market share discussed in the fourth element of the fair use test.¹¹³ The court held that the easier it was for a user to access the infringing work, the greater the damage was to ASCAP's potential licensing market.¹¹⁴ Because of this, the court found that the exemption in section 110(7) of the Copyright Act did not apply to AT&T's situation.¹¹⁵

C. ASCAP's Motion to Compel Discovery

Upon AT&T's motion for summary judgment, ASCAP filed a cross-motion to compel further discovery.¹¹⁶ In support of this Rule 56(f) motion for additional discovery, ASCAP contended that

109. *ASCAP*, 599 F. Supp. 2d at 433 (citing 17 U.S.C. §110(7)). This section of the Act allows for:

performance of a nondramatic musical work by a vending establishment open to the public at large without any direct or indirect admission charge, where the sole purpose of the performance is to promote the retail sale of copies or phonorecords of the work, or of the audiovisual or other devices utilized in such performance, and the performance is not transmitted beyond the place where the establishment is located and is within the immediate area where the sale is occurring.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 434.

114. *Id.* (citing *Religious tech Ctr. V. Netcom On-Line Commc'n Servs., Inc.*, 907 F. Supp. 1361, 1380 (N.D. Cal. 1995)).

115. *ASCAP*, 599 F. Supp. 2d at 434.

116. *Id.* at 419.

there were a number of genuine issues of material fact that existed and should be tried.¹¹⁷ AT&T claimed that it did not have sufficient knowledge to comment on these facts, which were irrelevant to the determination of the issues in its motion.¹¹⁸ These issues included examples of other companies, such as production music library companies, major music publishers, and writers, who offered streaming samples of music over the Internet and with the purpose of encouraging more business.¹¹⁹ ASCAP also described the demand for “short forms of music,” where a licensee specifically sought to license a small portion of a larger musical work.¹²⁰ In these situations, the court noted that it was an industry standard to allow sample versions of the longer works for promotional purposes.¹²¹ ASCAP discussed the standard in video games, where a license to use a smaller portion was granted for promotional uses on the game’s website.¹²²

Finally, ASCAP provided information on other license agreements between ASCAP and third parties for short-form music, fifty-four of which were with other wireless providers and related to ringtones and ringback tones.¹²³ In many of these agreements, the companies expressly requested the ability to use samples of the music for the purposes of selling ringtones and ringback tones.¹²⁴ Under these agreements, ASCAP received a set portion of the revenue rates for the tones.¹²⁵ The court pointed out that one company was even specifically licensed to perform music samples in relation to the sale of ring tones, and in that agreement, ASCAP made a portion of the company’s revenue.¹²⁶

Based on all of the above, ASCAP filed a cross-motion for additional discovery, stating that it was impossible to get the whole picture on the length of the samples from the existing information

117. *Id.* at 421.

118. *Id.* at 421-22.

119. *Id.* at 422.

120. *ASCAP*, 599 F. Supp. 2d at 422.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *ASCAP*, 599 F. Supp. 2d at 422.

provided by AT&T.¹²⁷ The court never ruled on this motion, because the denial AT&T's motion for summary judgment meant that discovery would proceed as the trial went forward.¹²⁸

IV. CONCLUSION

Because all four factors weighed in favor of infringement instead of fair use, and there were no other factors that could be used to assert fair use, the U.S. District Court for the Southern District of New York denied AT&T's motion for summary judgment.¹²⁹ The court also found that it was not necessary to decide on ASCAP's motion to compel discovery, as discovery would now occur as the case moved forward.¹³⁰

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127. *Id.*

128. *Id.* at 434.

129. *Id.*

130. *Id.*

