

COPY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
UNITED STATES OF AMERICA, :

Plaintiff, :

- against - :

AMERICAN SOCIETY OF COMPOSERS, AUTHORS
AND PUBLISHERS, et al., :

Defendants. :

----- X
In the Matter of the Application of
AMERICA ONLINE, INC., :

Applicant, :

for the Determination of Reasonable
License Fees :

----- X
In the Matter of the Application of
REALNETWORKS, INC., :

Applicant, :

for the Determination of Reasonable
License Fees. :

----- X
In the Matter of the Application of
YAHOO! INC., :

Applicant, :

for the Determination of Reasonable
License Fees. :

----- X

A P P E A R A N C E S :

WHITE & CASE LLP
1155 Avenue of the Americas
New York, New York 10036

CAROL A. WITSCHER, ESQ.
I. FRED KOENIGSBERG, ESQ.
CHRISTOPHER J. GLANCY, ESQ.
MEGHAN MCCURDY, ESQ.
STEFAN MENTZER, ESQ.

- and -

COPIES MAILED TO COUNSEL OF RECORD 4/30/08

Civil Action
No. 41-1395 (WCC)

**OPINION
AND ORDER**

A P P E A R A N C E S : (continued)

Of Counsel

AMERICAN SOCIETY OF COMPOSERS, AUTHORS
AND PUBLISHERS
One Lincoln Plaza
New York, New York 10023

RICHARD H. REIMER, ESQ.
Of Counsel

**Attorneys for Defendant American
Society of Composers, Authors and
Publishers**

WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153

**Attorneys for Applicants AOL LLC (f/k/a
America Online, Inc.), RealNetworks,
Inc. and Yahoo! Inc.**

KENNETH L. STEINTHAL, ESQ.
SAMANTHA G. FISHERMAN, ESQ.
DANIEL B. HODES
Of Counsel

Conner, Sr. D.J.:

This decision is the culmination of a hearing conducted by this Court in its capacity as the “rate court” pursuant to Section IX of the Second Amended Final Judgment (“AFJ2”) entered June 11, 2001 in *United States v. American Society of Composers, Authors and Publishers* (“ASCAP”), Civ. Action 41-1395 (WCC), 2001 WL 1589999 (S.D.N.Y. Jun. 11, 2001), to determine reasonable fees for blanket licensees for the performance of ASCAP-repertory music by AOL LLC f/k/a America Online, Inc. (“AOL”), RealNetworks, Inc. (“RealNetworks”) and Yahoo! Inc. (“Yahoo”), three internet service providers who have applied to ASCAP for such licenses but have been unable to reach agreement on such fees.

The rate hearing was conducted for 13 days during the period from October 25, 2007 to November 15, 2007. Testimony was heard from 12 witnesses, and depositions of 12 additional witnesses were designated for inclusion in the record. The Court received in evidence 203 exhibits. The parties’ post-hearing proposed findings and briefs totaled over 600 pages, not counting the affidavits and supporting documents submitted with them. After due consideration of all the evidence and arguments and weighing the credibility of the witnesses, the Court makes the following Findings of Fact and Conclusions of Law, pursuant to FED. R. CIV. P. 52(a).

FINDINGS OF FACT¹

I. The Development of the Online Industry

¹ Citations to “SF” refer to the Amended Stipulation of Facts. Citations to “Tr.” refer to the trial transcript in these proceedings. Each citation to the transcript includes the last name of the testifying witness. Citations to “[name] Dep. Tr.” refer to the deposition transcripts of witnesses whose testimonies were designated for inclusion in the record of these proceedings.

A. Growth of the Internet and Broadband

1. The Internet is a worldwide, publicly accessible network of interconnected computer networks that transmit data. (SF ¶ 1.) In just over a decade, the Internet has grown from its relatively obscure roots to become a major information and entertainment medium that rivals television and radio. It has transformed our culture in innumerable ways, changing how we shop, how we watch television and movies, and how we listen to music.

2. Several technological developments facilitated the Internet's rapid and widespread adoption as a new medium. Personal computers have grown in popularity and are now in most homes. The percentage of households with a computer increased from 15.0% in 1989 to 51.0% a decade later. (SF ¶ 7.) By 2006, some 77% of homes had at least one personal computer, and 32% had more than one. (*Id.*) During this time, computers grew increasingly powerful, and their ability to receive, process, and store an ever-larger volume of information increased correspondingly. (SF ¶ 8.) In addition, the number of people with connections to the Internet has grown substantially, and today most homes have Internet access. (SF ¶¶ 5, 8, 9, 12.) By 1998, more than a quarter of households had an Internet connection, and by 2006, 81% of the population had some form of Internet access. (SF ¶¶ 12, 29.)

3. By the end of the 1990's, a new technology emerged that enabled the delivery of large files, especially music and audiovisual files, on a widespread basis for commercial gain to a large segment of the public — high-speed Internet access. (SF ¶¶ 27, 39, 41.) High-speed Internet connections, often referred to as “broadband” connections, are advanced communications systems capable of providing high-speed transmission of data, audio, and video, and other content over the Internet, often by means of digital subscriber line (“DSL”), fiber optic cable, coaxial cable, or

wireless technology. (SF ¶ 33.) Unlike traditional dial-up Internet access that was carried through telephone lines and modems, broadband connections allow the rapid transmission of large quantities of data, including audio and audiovisual files. (*Id.*)

4. Because music and audiovisual files are far larger than text files, the transmission of such files over dial-up lines or narrow-band was slow and resulted in poor sound quality. (Tr. 17:4-25 (Kohn).) The development and widespread adoption of Internet connections with greater bandwidth meant that large data files could be transmitted at much faster, and commercially practicable, speeds.

5. The number of broadband Internet connections has grown dramatically in the past eight years. (AsX.² 365 (Chart), 149 (at ASCAP 009883, 009893).)

6. There were 2.48 million high-speed Internet lines in the U.S. at the end of 1999, but by the middle of 2006, there were 64.61 million high-speed lines. (*Id.*) Only 13% of households with Internet access had high-speed broadband connections in January 2001, but by January 2006, some 58% had broadband access. (SF ¶ 34.) Of those with dial-up access in 2006 who did not yet have a broadband connection, some 25% said they planned to obtain high-speed Internet access in the next twelve months. (SF ¶ 35.) Today, virtually everyone with access to cable television in the home can subscribe to high-speed Internet access. (SF ¶ 36.)

7. In addition, wireless broadband connections, once rare, have become increasingly available. Wireless high-speed connections are now accessible in public locales such as Internet cafes and public parks, and an increasing number of municipalities are undertaking efforts to offer all their residents access to low-cost, or free, wireless broadband connections. (SF ¶ 38.) According

² “AsX” refers to the numbered ASCAP Exhibit; “ApX” refers to the numbered Applicants’ Exhibit.

