IN THE
SUPREME COURT OF THE UNITED STATES

No. ___

ABKCO MUSIC, INC.; COLGEMS-EMI MUSIC INC.; SONY MUSIC PUBLISHING (US) LLC; EMI APRIL MUSIC INC.; EMI BLACKWOOD MUSIC INC.; EMI CONSORTIUM MUSIC PUBLISHING, INC. D/B/A EMI FULL KEEL MUSIC; EMI CONSORTIUM SONGS, INC. D/B/A EMI LONGITUDE MUSIC; EMI FEIST CATALOG INC.; EMI ROBBINS CATALOG INC.; EMI UNART CATALOG INC.; JOBETE MUSIC CO.; SCREEN-GEMS-EMI MUSIC INC.; STONE AGATE MUSIC; STONE DIAMOND MUSIC CORP.; RODGERS & HAMMERSTEIN HOLDINGS, LLC; PEER INTERNATIONAL CORPORATION; PSO LIMITED; PEERMUSIC LTD.; PEERMUSIC III, LTD.; SONGS OF PEER, LTD.; LYRIC COPYRIGHT SERVICES, L.P. O/B/O CRESCENDO ROYALTY FUNDING, L.P.; WARNER-TAMERLANE PUBLISHING CORP.; W CHAPPELL MUSIC CORP.,

Applicants,

v.

WILLIAM SAGAN; NORTON LLC; BILL GRAHAM ARCHIVES, LLC D/B/A WOLFGANG'S VAULT; BILL GRAHAM ARCHIVES, LLC D/B/A CONCERT VAULT; BILL GRAHAM ARCHIVES, LLC D/B/A MUSIC VAULT; BILL GRAHAM ARCHIVES, LLC D/B/A DAYTROTTER,

Respondents.

APPLICATION TO THE HON. SONIA SOTOMAYOR FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Pursuant to Supreme Court Rule 13(5), the above-captioned Applicants hereby move for an extension of time of 30 days, to and including March 28, 2023, for the filing of a petition for a writ of certiorari.[1] Unless an extension is granted, the deadline for filing the petition for certiorari will be February 26, 2023.

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[1] EMI Algee Music Corp. and WB Music Corp., who appear as plaintiffs in the caption of the decision below, are now known respectively as Sony Music Publishing (US) LLC and W Chappell Music

In support of this request, Applicants state as follows:

1. The U.S. Court of Appeals for the Second Circuit rendered its decision on October 6, 2022 (Exhibit 1), and denied a timely petition for rehearing on November 28, 2022 (Exhibit 2). This Court has jurisdiction under 28 U.S.C. §1254(1).

2. This case involves the scope of liability under the Copyright Act for selling massive numbers of bootleg concert recordings over the Internet. Respondent William Sagan purchased thousands of concert tapes that were allegedly made by various concert promoters and venue operators, all without the consent of either the performers who were being recorded or the owners of the copyrights in the musical works that were being performed. He then used his position as the sole owner, president, and CEO of two companies, Respondents Norton LLC and Bill Graham Archives, LLC, to commercially exploit those bootleg concert recordings online on a massive scale. Sagan hired his brother-in-law, Matthew Lundberg, to digitize the tapes and make them commercially available online, resulting in tens of thousands of concert recordings being put up for sale in audio and audiovisual formats—all while refusing to obtain licenses for the copyrights in the underlying musical works.

3. Applicants, a group of music publishers who own or control the copyrights in many of the musical works contained in the bootleg concert tapes at issue, filed suit against Respondents for copyright infringement as to nearly 200 musical works. The district court granted summary judgment for Applicants (as

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Corp. Spirit Catalog Holdings S.A.R.L. and Spirit Two Music, Inc., who appear as plaintiffs in the caption of the decision below, are now Lyric Copyright Services, L.P. o/b/o Crescendo Royalty Funding, L.P.

relevant here), holding Sagan liable for direct infringement for his role in acquiring the bootleg recordings, developing the plan to digitize them, and instructing Lundberg which concerts to make available for online download. The district court also held that Respondents were not eligible to obtain compulsory licenses under 17 U.S.C. §115 for the works at issue, because Respondents could not satisfy the statute's substantive requirements—not least because they could not show that the recordings at issue were "lawfully fixed" with the consent of the performers. *See* 17 U.S.C. §115(a)(1)(B).

4. The Second Circuit affirmed in part and reversed in part. It agreed that Respondents had infringed Applicants' copyrights in the 146 works that Respondents reproduced and distributed in audiovisual recordings. Ex.1 at 15-18. But the Second Circuit nevertheless concluded that Sagan could not be held liable for direct infringement, because (according to the Second Circuit) liability for direct infringement "attaches only to 'the person who actually presses the button.'" Ex.1 at 29-31. In the Second Circuit's view, because Sagan instructed his employee Lundberg to copy the works at issue rather than literally performing the copying himself, Sagan could not face direct infringement liability. The Second Circuit also held that Respondents could obtain compulsory licenses without complying with the substantive requirements of 17 U.S.C. §115, because Respondents claimed that they had acquired the recordings and their accompanying rights from the people who originally made them—which meant, according to the Second Circuit, that the

recordings were not "fixed by another" under §115(a) and so were not subject to the relevant statutory requirements. Ex.1 at 18-22.

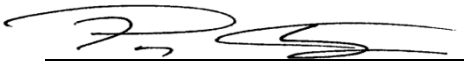
5. The Second Circuit's exceptionally narrow understanding of liability for direct infringement cannot be reconciled with the statutory text, this Court's precedent, or decisions from other federal courts of appeals, which have explicitly rejected the view that direct infringement requires showing that the defendant personally performed the physical act of unauthorized copying. *See, e.g.*, *Society of the Holy Transfiguration Monastery, Inc. v. Gregory*, 689 F.3d 29, 55-57 (1st Cir. 2012). That is hardly surprising, given that the Second Circuit's view would let individual corporate executives effectively immunize themselves from direct infringement liability just by ordering their employees to do the copying for them. The Second Circuit's strained interpretation of "fixed by another" in §115 likewise conflicts with the plain meaning of the statutory text, and gives a free pass to Respondents and others to exploit illegal bootleg concert recordings as long as they buy those recordings from their unauthorized creators. Neither holding should be permitted to stand.

6. Applicants' counsel, Paul D. Clement, was not involved in the proceedings below and requires additional time to familiarize himself with the record and research the legal issues presented in this case. Mr. Clement also has substantial argument and briefing obligations between now and the due date of the petition, including oral argument in *Hendrix v. J-M Manufacturing Co.*, No. 21-56276 (9th

Cir.) and oral argument in *Maine Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv.*, No. 22-5238 (D.C. Cir.).

WHEREFORE, for the foregoing reasons, Applicants request that an extension of time to and including March 28, 2023, be granted within which Applicants may file a petition for a writ of certiorari.

Respectfully submitted,



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February 10, 2023