

Prefatory Comment from Professor Ohm: While reading this opinion, try to understand the unusual procedural/institutional posture in which this "controversy" arises. Also, pay close attention to who the parties are and the roles they are playing. The RIAA finds itself in an atypical situation in these proceedings.

Before the U.S. Copyright Office Library of Congress Washington, D.C. 20559

In the Matter of Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding

MEMORANDUM OPINION

I. Introduction

On September 14, 2006, the Copyright Royalty Board ("Board"), acting on a request by the Recording Industry Association of America, Inc. ("RIAA"), and pursuant to 17 U.S.C. § 802(f)(1)(B), referred two novel questions of law¹ to the Register of Copyrights ("Register").

1. Does a ringtone, made available for use on a cellular telephone or similar device, constitute delivery of a digital phonorecord that is subject to statutory licensing under 17 U.S.C. § 115, irrespective of whether the ringtone is monophonic (having only a single melodic line), polyphonic (having both melody and harmony), or a mastertone (a digital sound recording or excerpt thereof)?

2. If so, what are the legal conditions and/or limitations on such statutory licensing?² In sum, and as stated more fully below, we believe that ringtones (including monophonic and polyphonic ringtones, as well as mastertones) qualify as digital phonorecord deliveries ("DPDs") as defined in 17 U.S.C. § 115. Apart from meeting the formal requirements of Section 115 (*e.g.*, service of a notice of intention to obtain a compulsory license under Section 115(b)(1), submission of statements of account and royalty payments, etc.), whether a particular ringtone falls within the scope of the statutory license will depend primarily upon whether what is performed is simply the original musical work (or a portion thereof), or a derivative work (*i.e.*, a musical work based on the original musical work but which is recast, transformed, or adapted in such a way that it becomes an original work of authorship and would be entitled to copyright protection as a derivative work).

Procedural Background. On August 1, 2006, the RIAA requested that the Copyright Royalty Board refer a question to the Register of Copyrights regarding the eligibility of a mastertone, a short digital sound recording file distributed for use in a cellular telephone or similar device, for statutory licensing under 17 U.S.C. § 115.³ An opposition to the RIAA's referral motion was submitted, collectively, by the National Music Publishers Association, Inc. [and others]. After considering the arguments of the parties, the Board

agreed that the matters raised by the RIAA motion did present novel questions of law and agreed to submit the questions to the Register.

III. Ringtone Types

Before addressing the questions raised by the Copyright Royalty Judges, we must first determine the scope of the subject matter in this proceeding. According to RIAA, a ringtone is a digital file, generally no more than 30 seconds in length, played by a cellular phone or other mobile device to alert the user of an incoming call or message.¹⁵ RIAA states that, initially, mobile carriers and other ringtone vendors distributed synthesized ringtones that embodied versions of musical works, but not recorded performances by featured recording artists. It states that these earlier forms of ringtones are commonly known as “monophonic” ringtones (having only a single melodic line) and “polyphonic” ringtones (having both melody and harmony). RIAA explains that typical commercial monophonic and polyphonic ringtones consist of a segment of the musical work representing its “hook,” or most memorable portion of the melody, with little or no revision.¹⁶

RIAA states that . . . there is consumer demand for downloads of shorter (partial-copy) excerpts of sound recordings for use as ringtones. These ringtones are commonly referred to as “mastertones.”¹⁷ RIAA asserts that mastertones are displacing monophonic and polyphonic ringtones as the ringtone of choice amongst consumers.¹⁸ RIAA acknowledges that record companies and ringtone vendors must obtain licenses to reproduce and distribute the relevant musical works in ringtones and that Section 115 exists to enable use of musical works when licenses are not otherwise available.¹⁹

* * *

Copyright Owners [the National Music Publishers Association, Inc., the Songwriters Guild of America, and the Nashville Songwriters Association International] assert that the creation of ringtones, including mastertones, involves “substantial” creativity and “significant” changes to the underlying work.

* * *

IV. The Applicability of Section 115 to Ringtones

Statutory Language. Section 115 of the Copyright Act provides a “compulsory license to make and distribute phonorecords” of any musical work previously recorded once a phonorecord of a nondramatic musical work has been “distributed to the public in the United States under authority of the copyright owner.”²⁵ Such a license “includes the right of the compulsory licensee to distribute or authorize the distribution of a phonorecord of a nondramatic musical work by means of a digital transmission which constitutes a digital phonorecord delivery.²⁶ The term “digital phonorecord delivery” or “DPD” is defined, in part, as “each individual delivery of a phonorecord by digital

transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording.”²⁷

* * *

Congress added the DPD provisions to Section 115, as part of the DPRA of 1995, with support of the music publishers, noting: “The intention in extending the mechanical compulsory license to digital phonorecord deliveries is to maintain and reaffirm the mechanical rights of songwriters and music publishers as new technologies permit phonorecords to be delivered by wire or over the airwaves rather than by the traditional making and distribution of records, cassettes, and CDs.”³⁰ The question presented here is whether ringtones qualify as digital phonorecord deliveries within the scope of Section 115.³¹ * * *

Analysis. We find that ringtones meet the definition of DPDs. The issue presented is one of pure statutory construction and there is no actual dispute on this point.⁴¹ Based on the language of the statute, ringtones easily meet the requisite definitions under the Copyright Act to be included in the Section 115 licensing scheme.

* * *

We disagree with Copyright Owners that Congress did not intend for ringtones to be the kind of use of musical works contemplated for inclusion under the Section 115 license.⁴⁷ While we adhere to the general proposition that statutory licenses are to be construed narrowly,⁴⁸ we find that Section 115, as amended by the DPRA, purposefully broadened the scope of the statutory license to cover DPDs, and ringtones appear to fit comfortably within the definition of DPDs.

* * *

Whether our interpretation “opens the door” to licensing of snippets of musical works to be used in car alarms or doorbells is a question that is outside the scope of this proceeding.

* * *

V. Derivative Works

Section 115 and Derivative Works. * * * Congress used one defined term, “derivative work,” to specify both that derivative works are protectable under Section 103 of the Copyright Act and that the copyright owner has the exclusive right to prepare derivative works under Section 106(2) of the Copyright Act.⁷² According to the Act’s legislative history, Section 115 exists to permit artists and record companies to create sound recordings, which are a type of derivative work.⁷³

Copyright Owners generally assert that ringtones fall outside the ambit of the statutory license because they are derivative works. * * * They assert that Section 115 subjects

only the rights to reproduce and distribute phonorecords of works to the statutory license, leaving derivative works outside its scope. * * *

* * *

Analysis. As an initial matter, we agree with Copyright Owners' assertion that Section 115, by its terms, concerns only the rights to reproduce and distribute phonorecords of works, leaving derivative works outside its confines. * * *

To be considered a derivative work, a ringtone must exhibit a degree of originality sufficient enough to be copyrightable.⁸⁰ With regard to the appropriate legal test regarding copyrightability, we believe that *Feist* is controlling precedent here.⁸¹ In *Feist*, the Supreme Court observed that "as a constitutional matter, copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity," and that there can be no copyright in work in which "the creative spark is utterly lacking or so trivial as to be virtually nonexistent."⁸²

Court Precedent. Copyright Owners argue that caselaw compels a conclusion that ringtones are derivative works. They argue that ringtones satisfy any creativity requirement for the copyrightability of a derivative work.⁸³ They additionally argue that the selection process involved in the creation of ringtones meets the creativity standard for copyrightability under settled law.⁸⁴ Copyright Owners also assert that the courts have routinely held that shortened versions of a variety of different copyrighted works constitute derivative works under the Copyright Act. They note, for example, that courts have found that clips from full-length copyrighted works, such as movie trailers, constitute derivative works.⁸⁵

RIAA cites cases contrary to Copyright Owners' position. For example, it cites precedent holding that the use of copyrighted music excerpts in the background of a television show did not infringe the derivative work right because the inclusion of the music did not create a new derivative work that warrants copyright protection.⁸⁶ It also refers to another case where the district court denied a claim that adding local commercials to rental videos was an infringement of the derivative work right because there was no evidence that "the mere addition of a commercial to the front of a videocassette recasts, transforms, or adapts the motion picture in what could represent an original work of authorship."⁸⁷ * * *

RIAA argues that the cases involving the creation of unauthorized trailers through editing and condensing of motion pictures are inapt. According to RIAA, such cases involve claims of unauthorized reproduction, and that is a sufficient basis on which to decide them. Moreover, in the few instances where those cases address the derivative work right, they point in conflicting directions depending on whether or not the court follows Ninth Circuit precedent.⁸⁹ RIAA argues that the Register should decline to follow the Ninth Circuit's holding that the derivative work right may be infringed without a finding of originality. * * *⁹⁰ RIAA states that, in any event, the trailer cases are of marginal

relevance here because they involve a greater degree of editorial judgment than copying a single clip for distribution as a mastertone or other typical commercial ringtone.

90 RIAA cites *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*, 856 F.2d 1341 (9th Cir. 1988) where the Ninth Circuit affirmed a district court finding that mounting legally purchased copies of copyrighted artworks on ceramic tiles infringed the right to prepare derivative works. The court found that appellant “made another version” of the artwork that amounted to the preparation of a derivative work because it “recast or transformed the individual images by incorporating them into its tile-preparing process.” This decision has been followed in subsequent cases within the Ninth Circuit. *See, e.g., Micro Star v. Formgen, Inc.*, 154 F.3d 1107, 1112 (9th Cir. 1998); *Sobhani v. Radical Media, Inc.*, 257 F. Supp. 2d 1234 (C.D. Cal. 2003). *See id.* at 16-17.

Analysis. * * * [W]e agree with RIAA that the Ninth Circuit’s more lenient test for infringement of derivative works, which seemingly ignores the originality requirement, appears to be in error as it runs contrary to all other Circuit Court precedent.⁹³ [Also], we agree with RIAA that reliance on derivative works precedent involving movie trailers, such as *Video Pipeline, Inc.*, is inapt because the creating and editing process involved in making those trailers required much more originality than simply shortening an existing musical work to create a ringtone.⁹⁴ [Further], under *Woods [v. Bourne]*, an excerpt of a musical work made into a ringtone without original embellishments likely would not be considered a derivative work because nothing of substance has been added and the ringtone is merely a copy of a work (albeit a portion) already produced, without additions or variations. [Finally], as for those mastertones that contain new words in the lyrics not found in the underlying musical works, we draw no conclusions based on precedent because they involve factual issues and potentially close questions that need not be resolved here. A court of competent jurisdiction would be the appropriate forum to make the necessary determinations.

* * *

Examples in the Record * * *

Copyright Owners . . . [assert that] there is no such thing as a “typical commercial ringtone,” as RIAA seems to suggest. Rather, they vary in kind and length. They note the following examples: (1) the ringtone for Leonard Cohen’s “Everybody Knows” recording comprises nine seconds of the approximately five and a half minute full length work and the ringtone commences seven seconds into the song; (2) Britney Spears “ . . . Baby One More Time” ringtone consists of a fifteensecond snippet of the recording that begins two and half minutes into the three and a half minute song; and (3) the mastertone for Jay Z’s “Change Clothes,” consists of excerpts of two separate hooks repeated twice (even though these hooks are separated in the full-length song by other musical content), and then these two snippets are further repeated if the caller fails to answer the phone.

Copyright Owners also note that some songs result in multiple ringtones, each focusing on different elements of the same underlying composition. They state, for example, that the Bubba Sparxx/Ying Yang Twins hit, “Ms. New Booty,” has spawned two ringtones—one featuring the lyric “I found you” and the other emphasizing the lyric “get it right.”¹⁰¹

They also assert that other ringtones include new content not present in the underlying work. Copyright Owners note, for example, that the Pussycat Dolls' mastertone derived from the best-selling song "Don't Cha" features the lyrics, "Don't cha wish your girlfriend was hot like me. Don't cha wish your girlfriend was a freak like me," which are part of, but not all of the lyrics of the song. This ringtone, which is eleven seconds, as compared to the four and a half minute full length work, also includes new material different from those of the underlying work: "Come on boy, don't cha wanna pick up? We're ready for ya." These additional words are spoken, not sung, and are not accompanied by music. Likewise, Copyright Owners note that in Beyonce's mastertone "Let Me Cater 2 You," the ringtone contains a portion of the song, with an extra line added at the end: "What's up, this is Beyonce from Destiny's Child and this call is for you." Again, the additional words are spoken, unaccompanied by music.

Analysis. The ringtone samples provided by the parties are instructive. The record evidence demonstrates that not all ringtones are the same. While we need not decide whether all of the ringtones presented to us are within the scope of Section 115, we observe that some undoubtedly are not. For example, the 16 second mastertone, *Grind With Me*, by performing artist, Pretty Rickey, was created solely for ringtone use and the lyrics used therein are not found in the 4:02 minute full length version of the work. This ringtone is likely copyrightable as a derivative work because it is original and demonstrates a "creative spark." In any event, there are likely to be many ringtones, such as the mastertone that uses a portion of Otis Redding's classic "*Sittin' On the Dock of the Bay*," that simply copy a portion of the underlying musical work and cannot be considered derivative works because such excerpts do not contain any originality and are created with rote editing. There are also ringtones that contain a portion of the full length musical work and additional spoken material such as the Pussycat Dolls example, above. The determination of whether such a ringtone, or one that includes the addition of some new lyrics, results in a copyrightable derivative work is a mixed question of fact and law that is beyond the scope of this proceeding.

* * * At one end of the spectrum are those ringtones that are simple excerpts of larger musical works. This type of ringtone is not a derivative work. At the other end of the spectrum are ringtones that contain additional original authorship. These would be considered derivative works if there was a sufficient amount of creative authorship in the new material. In between are ringtones that may include some new material (spoken words or music) in addition to the excerpt. Those ringtones cannot be properly analyzed in a factual vacuum and their status as derivative works need not be determined in this proceeding, but are more appropriately determined on a case-by-case basis by the courts.

VI. The "Arrangement Privilege"

Section 115(a)(2) of the Copyright Act states that the "compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the *arrangement* shall not change the *basic melody* or *fundamental character of the work*, and shall not be subject to protection as a derivative work under this title, except with

express consent of the copyright owner.”¹⁰² (Emphasis added) According to the Act’s legislative history, the purpose of the limitations in Section 115(a)(2) was to prevent the musical composition from being “perverted, distorted, or travestied.”¹⁰³

Arrangements. * * *

Copyright Owners strongly assert . . . that it is well settled in the music industry that arrangements, intended to permit alterations solely in interpretation and style, are adaptations of entire works.¹⁰⁶ They note that an arrangement, as defined by the American Federation of Musicians, is “the art of preparing and adapting an already written composition for presentation in other than its original form. An arrangement may include reharmonization, paraphrasing, and/or development of a composition, so that it fully represents the melodic, harmonic, and rhythmic structure.”¹⁰⁷ They assert that, by definition, there cannot be a ten-second arrangement of a three minute composition and a ringtone is no more of an arrangement of a song than the selection of four notes out of all the others is an arrangement of a song.¹⁰⁸

RIAA asserts that the definitions of “arrangement” that Copyright Owners provide are unconvincing. . . . RIAA also argues that there is nothing in the Copyright Act, its legislative history, or the common usage of these terms to suggest that, by employing the phrase “musical arrangements” in either Section 101 or Section 115(a)(2), Congress was distinguishing between “musical arrangements” as a class and musical arrangements that happen to shorten versions of the underlying work. RIAA asserts that there are innumerable arrangements of a particular work and a shorter version of such a work is still referred to as an arrangement.¹¹⁰

Analysis. * * * While Copyright Owners’ definition is appropriate to use in this context, we believe that the definition found in the *New Encyclopedia of Music and Musicians* (“NEMM”) is as reliable, if not more comprehensive.¹¹¹ NEMM defines an arrangement as “The process or result of readjusting a work for performance by different artistic means from that originally intended. Also, a relatively close or literal rendering of the substance and form of a work with only those modifications demanded by the limitations or peculiarities of the medium in view.”¹¹²

We can make three general observations based on the definitions and the law. First, the user’s right to make a melodic arrangement should be limited so that the basic character of the musical work is preserved.¹¹³ Second, a mastertone that merely shortens the full length work to conform it to the physical limitations of the cellphone does not affect the musical work’s arrangement. Finally, a ringtone that makes minor changes to lyrics of the underlying musical work generally does not affect its arrangement.¹¹⁴ There may be other ringtones that are substantially different from the underlying musical work, but whether such changes impinge upon the arrangement of the work is a factual question, which goes beyond the scope of this proceeding.

* * *

Fundamental Character of the Work. Copyright Owners state that . . . Section 115 is [also] inapplicable because the basic melody and fundamental character of the underlying work has been changed. They assert that ringtones delete large portions of the underlying works including much of the melody, verses, bridges, codas, and instrumental interludes. They conclude that the reduction of a work to a short refrain excludes all of the other elements that make up the overall character of the work.¹¹⁷

* * *

RIAA asserts that typical commercial ringtones do not change the basic melody of a musical work; to the contrary, ringtones by their very nature seek to accurately reproduce the basic melody with little or no alteration. RIAA asserts that the limitations in Section 115(a)(2) to prevent changes to the “basic melody and fundamental character of the work” were added specifically to address the objections of the copyright owners that the arrangement privilege would otherwise allow “radical alterations” to the “material detriment of the work.”¹¹⁹ RIAA states that in the case of mastertones, the melody is exactly the same as in the commercial sound recording release and distributing a clip does not radically alter, pervert, distort, or travesty the musical work in contravention of Congressional intent. . . . RIAA concludes that creating a partial copy of the work does not constitute a radical alteration, and if it did, mastertones would not be commercially successful.

Analysis. * * * Mastertones are taken from commercially released sound recordings which may involve arrangements, but for purposes of this proceeding, we assume that the commercially released sound recording was licensed (either by means of a voluntary license or the statutory license), and that the arrangement in the sound recording was within the scope of the license. In such cases, which we will assume to be the norm, the use of the same arrangement in the mastertone would not be in contravention of the limitations of Section 115(a)(2). Given this conclusion, we need not specifically address whether mastertones change the fundamental character of the work, but a statutory analysis is still necessary to determine the legal status of monophonic and polyphonic ringtones under Section 115.

* * * Under the statute, it is reasonable to conclude that a portion of a pre-existing musical work truncated to ringtone length does not change the basic melody and fundamental character of the work. . . . As such, we cannot conclude that the musical work customized for ringtone purposes has been perverted, distorted, or travestied, as those terms are commonly defined, as no changes have been made to the melody of the original work.¹²⁴ In sum, we do not believe, as Copyright Owners argue, that the reduction of a work to a short excerpt fundamentally changes the overall character of the work or impugns the integrity of the work.

* * *

VII. Private Use

Section 115 states that “a person may obtain a compulsory license only if his or her primary purpose in making phonorecords is to distribute them to the public for private use including by means of a digital phonorecord delivery.”¹²⁷ According to the Act’s legislative history, the “private use” limitation was added to Section 115 to clarify that manufacturers of specialty recordings for use in jukeboxes and business music services could not rely on the mechanical license in their use of musical works.¹²⁸

Copyright Owners assert that ringtones fail to satisfy Section 115's requirement that the phonorecords be distributed for private use. They argue that the “private use” limitation contemplated by Congress includes only ordinary listening use for private enjoyment of music. To bolster their argument that a ringtone serves only public functions, Copyright Owners assert that a ringtone: (1) is no substitute for enjoyment of the full length musical work; (2) provides the notification functions of a phone ring; and (3) is marketed as a lifestyle accessory. They conclude that ringtones provide mobile phone users a means to publicly identify and express themselves to their friends, colleagues and the public at large.¹²⁹

* * *

Analysis. We believe that Copyright Owners’ arguments are inconsistent with the law and ignore common uses of music by individuals. The controlling language here is “for private use.” It is undisputed that the term is directed at individual consumers who use music for personal enjoyment. However, Copyright Owners seem to suggest that once an individual takes the music out of the home, the statutory provision becomes null and void.¹³¹ This cannot be what Congress intended. Here, we note that traditional phonorecords are used in public (*e.g.*, in boom boxes in public parks, in a car stereo while the automobile is driving down the street, etc.), but that does not disqualify them from the statutory license by violating their primary purpose of being for private use. While it may be true that some mobile phone users purchase ringtones to identify themselves in public, this use most likely would not be considered a public use as Congress intended that term to be understood in the Section 115 context, and in any event, there is no basis to conclude that the *primary purpose* of the ringtone distributor is to distribute the ringtone for “public”use.

* * *

While we cannot delineate a litmus test that will in every case determine specifically whether a particular ringtone is or is not within the scope of the statutory license, the guidance offered above is sufficient for purposes of this proceeding. In general, a ringtone will fall within the scope of the compulsory license unless it has so altered the musical composition as to constitute a derivative work. Simply excerpting a single portion of a licensed sound recording of a musical composition will not constitute the making of a derivative work. It is clear that many, but not all, ringtones will fall within the scope of the Section 115 license. Therefore, it is appropriate for the Copyright Royalty Judges to determine royalties to be payable for the making and distribution of ringtones under the compulsory license.

October 16, 2006