For nearly a century, the U.S. Copyright Law has provided that once a musical composition has been recorded with the consent of the copyright owner anyone else can make a new sound recording of the same composition by sending a notice to the Copyright Office and paying a royalty on each copy of the new recording sold (the amount of this royalty is adjusted from time to time by a Royalty Tribunal, it is currently 9.1 cents for each sale). Because the copyright owner cannot withhold its consent to the new recording, this is known as a “compulsory license.”

Originally conceived with player pianos in mind (hence the rather archaic use of the term “mechanicals” to refer to the royalties paid for such uses), many believe that this provision contributed heavily to the growth of the huge recording industry in the United States. Music publishers and songwriters have often been heard to complain of the compulsory license, however, since its effect has been that the statutory royalty rate is the maximum amount they can charge for licensing recording rights in a song and voluntary licenses issued by the publishers (or by the Harry Fox Agency, an entity controlled by the music publishing industry which handles most such licenses) are often given at less than the statutory rate.

In 1995 this section of the Copyright Law was amended to make clear that it applies, not only to physical CD sales, but also to the digital transmission of sound recordings. But one area that was not specifically addressed was the use of musical compositions as ringtones on cellular phones, which has now become quite a large business. The owner of a properly equipped cell phone can download (either directly or through a computer) an excerpt of a musical composition to announce an incoming call, and pays for this either as a one-time charge or on the basis of periodic service fees. Music publishers took the position that although this was a license of the right to make a sound recording it was not subject to the compulsory license, meaning that licenses had to be obtained directly from them (or from the Harry Fox Agency) on whatever terms they could negotiate with the phone companies or other ringtone providers.

In a ruling issued on October 16, 2006 (after oral testimony and extensive briefs from the record industry, on the one hand, and music publishing and songwriter groups, on the other), the Register of Copyrights determined that ringtones are indeed “digital phonorecord deliveries” (a technical term from the statute) and are subject to the compulsory license unless the musical work is so
fundamentally altered as to become a "derivative work" (in which event the consent of the copyright owner would still be required).

This ruling could have a profound effect on the marketplace because the statutory royalty may well be less than what the publishers are charging. On its website, the Harry Fox Agency expressed disappointment with the decision and indicated that it was considering its legal options.

The record industry will continue to profit, however, since owners of the copyright in the actual recordings which often are used for ringtones are not bound by the compulsory license and can negotiate rates freely for the use of their recordings.

Will this ruling, if unchanged, benefit consumers? That remains to be seen.

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