SUMMER 2006

A Publication of the Entertainment & Sports Law Section of the State Bar of Georgia

copywrite

Art Consultant
Nita Gray
678-418-9591

The Entertainment & Sports
Law Section of the State Bar of
Georgia publishes
Copywrite quarterly.
State Bar of Georgia
Suite 100,
104 Marietta Street, NW,
Atlanta, Georgia 30303

Copywrite highlights
developments in entertainment
and sports law, section news,
and other resources of interest
to section members.

OPENING OFFER

THE END OF SUMMER
BY LISA MOORE

This issue of Copywrite closes out the summer season, and as the leaves change and winter sets itself to roll in, the industry is as busy as ever. This time of year remains the busiest in the entertainment and tech industries—labels release sets before year's end and tech companies drive for upturns in fourth quarter numbers.

Atlanta is not immune to these economic and business realities, and yet some of us were wise enough to travel to Cancun and St. Kitts this past month for the SELAW and BESLA conferences. For those of you who did, we heard it was, as always, a great time. And as we transition into the New Year, we, the Executive Board, plan to keep the ball rolling with informative luncheons, timely panels and lively social events. Speaking of socials, thanks to all of you who sponsored or attended the 31st Anniversary Georgia Lawyers for the Arts Gala held last Friday at the beautiful Lowe Gallery in Buckhead. It was a terrific night, primarily because of all the volunteer attorneys in our Section and beyond who do so much to serve Georgia's arts community.

More substantively—for those of you who love IP—we hope you joined us at Taurus restaurant where Charlie Henn, a partner at Kilpatrick Stockton, took on "Protect the Mark: Anti-dilution, Branding and Other IP Topics."

Wishing you a safe and happy holiday season, and a very happy and successful New Year.

OF MASTERTONES AND MECHANICAL ROYALTIES

THE U.S. COPYRIGHT OFFICE'S PLACEMENT OF MASTERTONES WITHIN THE COMPULSORY LICENSING SCHEME

BY STANLEY A. SEYMOUR

I. Mastering the Mastertone

The first "musical" ringtone I ever had for my first cell phone back in the late 1990s was a monophonic version of Beethoven's "Fur Elise." This was because I grew tired of the standard electronic pulse that had previously sounded whenever someone called me and "Fur Elise" was the only other option I had at the time. Times have certainly changed. While I have converted back to my first love for the traditional, businesslike "ring" for my cell phone (seriously, who really wants to hear Yung Joc's "It's Goin' Down" during a deposition?), most cell phone users today can purchase polyphonic ringtones that don't just sound like their favorite songs—they are their favorite songs.

Musical ringtones are the most popular digital music format in the world, with mobile music revenues reaching $400 million last year in the United States alone.[1] And as most know, ringtones have evolved into what are now often referred to as master ringtones, or "mastertones." Mastertones are all or part

of an actual digital sound recording. Most ringtone purchasers still buy their ringtones from aggregators (such as Jamster or Wicked Betty) that enter into licensing agreements with the musical composition copyright owner, which is typically the composer and/or a music publisher.[2] Recently, record labels have also begun selling ringtones directly to purchasers.

II. The Great Paper Chase

An essential term of such licensing agreements—and a major point of contention between ringtone sellers and copyright owners—is, of course, the negotiation of the amount of royalties to be paid to the copyright owners. Simply, ringtone sellers want to pay the minimum royalties for ringtone content, whereas copyright owners vie for the largest percentages possible.[3]

For some time, this conflict has played out against the backdrop of the Copyright Act.[4] The record industry has long argued that ringtones are subject to the statutory licensing scheme of section 115 of the DPRA and, thus, are subject to the mechanical royalty set forth in the Act. Copyright owners argue that ringtones—particularly mastertones—do not fit within the scheme of section 115 and are, therefore, not subject to the mechanical royalty.

The conflict came to a head this year in a case before the U.S. Copyright Office's Copyright Royalty Board ("CRB") between the Recording Industry Association of America, Inc. ("RIAA") and copyright owners (namely, the National Music Publishers Association, Inc., the Songwriters Guild of America, and the Nashville Songwriters Association International, or collectively, the "Copyright Owners"). On September 14, 2006, the CRB referred the following questions to the U.S. Copyright Office's Register of Copyrights:

(1) Does a ringtone including mastertones constitute "delivery of a digital phonorecord" that is subject to statutory licensing under 17 U.S.C. § 115?

(2) If so, what are the legal conditions or limitations on such statutory licensing?[5]

Until now, copyright law has provided very little clarification on these issues, primarily because neither the Copyright Act nor the DPRA mentions ringtones.

Well, the U.S. Copyright Office has now spoken, and the winner is . . . the recording industry—sort of.

III. The Great Debate

On October 16, 2006, the Register of Copyrights issued an opinion holding that ringtones (specifically including mastertones) are subject to section 115 of the Copyright Act. Whether a particular mastertone falls within the scope of the statutory license will depend mainly upon whether the mastertone 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)."

While this decision is not exactly state-of-the-art (i.e., this is essentially a recording industry-heavy synthesis between RIAA's long-standing position and that of copyright owners everywhere), it does provide a clear line of where the U.S. Copyright Office stands on the mastertone licensing issue. More importantly, it means that for a large majority of mastertones currently in the marketplace, ringtone sellers will enjoy a compulsory license and copyright owners will "enjoy" a mechanical royalty—less than the higher royalties they previously could negotiate with ringtone sellers in licensing agreements.

A. Section 115 of the Copyright Act and the DPRA

Section 115 of the Copyright Act provides a "compulsory license" to make and distribute a mechanical reproduction 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," as long as the provisions of the license are met—notably, the paying of a statutorily established royalty to the copyright owner.[6]

In 1995, Congress enacted the Digital Performance Right in Sound Recordings Act of 1995 ("DPRA") in an attempt to amend section 115 to anticipate developing technologies. The DPRA grants copyright owners an exclusive right to "perform their works publicly by means of a digital audio transmission subject to certain limitations."[7] Specifically, the DPRA amended section 115 to "include[e] the right of the compulsory licensee to distribute or authorize the distribution of a phonorecord of a nondramatic musical work by means of digital transmission which constitutes a digital phonorecord delivery."[8] A "digital phonorecord delivery" ("DPD") means "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."[9]

B. RIAA's Position

RIAA asserts two essential arguments in this case. First, RIAA asserts that the download of ringtones constitutes a DPD because a download involves a "digital transmission of the sound recording that results in a specifically identifiable reproduction for the transmission recipient."[10] To this end, RIAA further claims that the "statutory license under [s]ection 115 includes the right of the licensee to distribute ringtones just as it includes the right of the licensee to make and authorize other kinds of downloads."[11]

Second, RIAA argues that ringtones are not derivative works, and thus, do not fall outside of the scope of section 115.[12] A derivative work is "a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed or adapted."[13] Accordingly, a derivative work is not a "reproduction" for the purposes of section 115.

RIAA also claims that even if ringtones were derivative works, they would fall within the "arrangement" privilege under section 115. Section 115(a)(2) of the Copyright Act provides 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."[14]

C. The Copyright Owners' Position

The Copyright Owners assert several arguments. First, the Copyright Owners argue that ringtones are not DPDs because they are not mentioned in, and therefore are not covered by, section 115. Specifically, they argue that interpreting section 115 otherwise could "open the door to licensing of snippets of musical works used to enhance all sorts of other consumer products and devices, such as musical car alarms or doorbells."[15]

Next, the Copyright Owners argue that section 115 does not apply to ringtones because the section is limited to reproduction of entire musical "works," not portions of works such as ringtones.[16] Similarly, they further argue that section 115 only applies to complete physical or digital phonorecords because "industry practices have developed on the basis of this interpretation."[17] The Copyright Owners also contend that ringtones are not "musical arrangements" because arrangements are considered within the music industry to be alterations and adaptations (i.e., reharmonization or paraphrasing) of entire works.[18]

The Copyright Owners also argue that ringtones are better left to the active market for freely negotiated licenses already in place. They claim that the statutory license was instituted "to ensure a market where none existed, but there is an active market for freely negotiated

licenses already in place."[19] This is a necessary argument, as the Copyright Owners stand to get the short end of the stick of a compulsory license. The problem with this argument (which both the RIAA and the Register of Copyrights hone in upon) is that it overlooks the well-established intent of section 115: to protect the market from a monopoly.[20]

Fundamentally, the Copyright Owners argue that ringtones are not reproductions subject to section 115 because (1) ringtones delete large

MUSICAL RINGTONES ARE THE MOST POPULAR DIGITAL MUSIC FORMAT IN THE WORLD, WITH MOBILE MUSIC REVENUES REACHING $400 MILLION LAST YEAR IN THE UNITED STATES ALONE.

portions of their underlying works "including much of the melody, verses, bridges, codas, and instrumental interludes" and, thus, change the overall character of the underlying work.[21]

D. The Register of Copyrights' Decision

The Register of Copyrights decides the conflict by adopting a rather broad reading of section 115 (and thus, the RIAA's arguments).

First, the Register of Copyrights holds that ringtones meet the definition of DPDs, finding that ringtones constitute "phonorecords" for the purposes of section 115 and are delivered by means of the "new technologies" that Congress intended to be included when it enacted the DPRA in 1995.[22]

Next, the Register of Copyrights quickly dismisses the notion that section 115 was intended only to apply to entire works, noting that section 115 does not expressly exclude "portions of works" from its scope.[23]

Refusing to even rely on an evaluation of the success of the marketplace, the Register of Copyrights moves on to the more important issue of derivative works. The crucial point is that the Register of Copyrights does not simply surmise that ringtones are not derivative works. The register of Copyrights notes that some mastertones can have original content beyond a mere "de minimis quantum of creativity" and, thus, are derivative works. Unfortunately, the Register of Copyrights does not offer a bright line distinction, but later notes that such determinations will be made on a case-by-case basis.[24] The Register of Copyrights is careful to add, however, that "there are many other ringtones that would not be considered derivative works because they exhibit only trivial changes from the underlying work."[25] Moreover, the Register of Copyrights states that "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."[26] This also means

THERE CAN BE LITTLE QUESTION THAT THE REGISTER OF COPYRIGHTS' OPINION CLARIFIES THE LONG-STANDING ISSUE OVER WHETHER MASTERTONES CAN BE SUBJECT TO THE COMPULSORY LICENSE.

that minor deletions or slight variations (such as sequencing or looping a chorus, verse, or other artifact in a recording) would not convert a ringtone into a derivative work.[27]

Towards this end, a "mastertone that merely shortens the full length work to conform it to the physical limitations of the cell phone does not affect the musical work's arrangement (and thus, does not affect the underlying work's arrangement).[28]

IV. The Great Beyond

There can be little question that the Register of Copyrights' opinion clarifies the long-standing issue over whether mastertones can be subject to the compulsory license; what is uncertain is how long this moment of clarity will last. Everyday, more and more original ringtones and other digital music content are created for cell phone and mobile device users (after all, it is a 400 million dollar business). Given the U.S. Copyright Office's reading of the Copyright Act and the DPRA, there is no way such content would not constitute a derivative work under the Act. Thus, to the extent this recent opinion strikes a blow against the Copyright Owners, the greater likelihood is that they will, as they always have, adapt to the market.

Still, the Register of Copyrights' current position is interesting. The author of the opinion (and the sole individual that actually holds the office of "Register"), Marybeth Peters, made recommendations to the U.S. Congress just two years ago, at a 2004 congressional hearing on the status of section 115, that the U.S. Congress eliminate the statutory license and leave the licensing of rights to the marketplace.[29] Of course, the U.S. Copyright Office must walk the path Congress tells it to, but it is notable that the U.S. Copyright Office may be more pro-marketplace than its most recent opinion reveals.

Endnotes

[1] International Federation of Phonographic Industry, Digital Music Report (Jan. 2006), http://www.ifpi.org/site-content/library/digital-music-report-2006.pdf; *See also* Steven Asur and Ursa Chitrakar, *The History and Recurring Issues of Ringtones: Lessons for the Future of Mobile Content,* 5 Va. Sports and Ent. L. J. 149, 150 (2006).

[2] Since ringtones are digital recreations of a song, aggregators only need to obtain a license from the musical composition copyright owner; the rights of a sound recording copyright owner, such as the record label that owns the masters of a recording, are not involved. *See* Carmen Kate Yuen, *Scuffling For a Slice of the Ringtone Pie: Evaluating Legal and Business Approaches to Copyright Clearance Issues,* 8 Vand. J. Ent. &

TECH. L. 541, 543 (2006) (citation omitted).

[3] *Id.* at 544.

[4] *See, e.g.*, 17 U.S.C. § 115.

[5] *In re Matter of Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding*, Mem. Op., Docket No. RF 2006-1 (Oct. 16, 2006) ("Opinion"); *see also* Order Granting in Part the Request for Referral of a Novel Question of Law, Docket No. 2006-3 CRB DPRA (Aug. 18, 2006).

[6] *See* 17 U.S.C. §§ 115(a), (c); Opinion, pp. 4, 7 (citing section 115(c)).

[7] *See* 17 U.S.C. § 114.

[8] 17 U.S.C. § 115(c)(3)(A).

[9] 17 U.S.C. § 115(d).

[10] Opinion, p. 8.

[11] *Id.*

[12] *Id.* at 17.

[13] 17 U.S.C. § 101.

[14] Opinion at 25 (citing 17 U.S.C. § 115(a)(2)).

[15] *Id.* at 9.

[16] *Id.* at 11.

[17] *Id.* at 12.

[18] *Id.* at 25.

[19] *Id.* at 14.

[20] *Id.* at 4.

[21] *Id.* at 28.

[22] *Id.* at 10.

[23] *Id.* at 13.

[24] *Id.* at 18 (citing *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991)); *see also id.* at 25.

[25] *Id.*

[26] *Id.* at 21 (*citing Woods v. Bourne Co*, 60 F.3d 978, 989 (2d Cir. 1995)).

[27] *Id.* at 22, 24.

[28] *Id.* at 27.

[29] *See* n. 3 at 549.

THE GEORGIA LAWYERS FOR THE ARTS

ATTORNEYS HELPING EMERGING ARTISTS

The Georgia Lawyers for the Arts is a nonprofit organization dedicated to providing legal assistance and educational programming to artists and arts organizations in Georgia. Last year, GLA conducted more than 65 educational programs and provided more than $1,000,000 in free legal services to low-income artists and nonprofit arts organizations across the state.

GLA also has an extensive resource library that contains sample contracts, copyright information and more than 250 volumes that artists, arts agencies, museums, galleries, attorneys and other members of the public can use.

For those of you new to the practice (or not so new) that want to get involved and help emerging artists that cannot otherwise afford assistance, consider becoming a volunteer attorney for GLA. This year GLA will handle approximately 5,000 cases and provide more than a million dollars of pro bono services. Please consider sharing your expertise.

For more information, call GLA at 404-873-3911.

MONETIZING THE PEER-TO-PEER SPACE

DETERMINING THE BEST MODEL FOR COMPENSATING ARTISTS

BY AYODELE VASSALL-GORE

Hollywood movie studios are facing increasing pressure to sell movies online because users of peer-to-peer networks are sharing movies across the networks. The peer-to-peer networks Bittorrent.com, Snocap.com and PeerImpact.com have all recently closed deals with movie studios and record labels to legally distribute content.[1] Yet according to BigChampagne LLC, the company that provides file-sharing and online music statistics to Billboard magazine, approximately nine million people on the Internet are still using illegitimate peer-to-peer networks at any given time in a month.[2] The appeal of operating a peer-to-peer service is that the cost of holding inventory, like CDs and DVDs, is essentially eliminated.[3] But little progress has been made towards compensating the artists.

This article looks at four compensation models that are beginning to emerge: (1) the advertising model, (2) the performance rights organization model, (3) the levy model, and (4) the compulsory license model.

Background

People around the world are using peer-to-peer networks to transfer movies, music, videos, real-time data and other digital media. Peer-to-peer networks rely on the participants rather than a collection of servers to operate.[4] The networks may be classified according to their degree of centralization—there are pure networks and hybrid networks.[5]

In a pure network, the peers act as both the client and the server because the network is not connected to a central server or router.[6] Grokster and Gnutella are examples of pure peer-to-peer networks. In a hybrid network, there *is* a central server that keeps information about peers and responds to requests for that information.[7] Napster is an example of a hybrid peer-to-peer network.

The Advertising Model

SpiralFrog.com is an example of an advertising-based model. SpiralFrog will debut in December 2006 and will offer licensed audio and video content from the catalogs of major and independent record labels for free because the company plans to recoup the costs through advertising. Users will have to sit through a 90 second advertisement before downloading their files. The problem, of course, is that the average user may be unwilling to sit through the commercials, thereby limiting the appeal of the service. But the positive side of the model is that individuals can continue to use peer-to-peer networks without being charged.

The Performance Rights Organization Model

In February 2006 The American Society of Composers, Authors and Publishers ("ASCAP") entered into a licensing agreement with LTDnetwork/Qtrax to license content on the Qtrax peer-to-peer network.[8] Qtrax is an ad-supported peer-to-peer service that allows only licensed material over the network.[9] Qtrax is also supported by a content filtering technology.[10]

While the agreement is a step in the right direction, most peer-to-peer networks do not use filtering technology, and the licensing agreement

only works because the filtering technology tracks the transfer of files. If the industry were to wait for the remaining existing peer-to-peer services to implement this technology—before implementing an alternative compensation scheme—the choice could prove detrimental because consumer trends show that individuals continue to seek the latest, and often illegal, peer-to-peer networks.

The Levy Model

Canada has a unique levy system that attempts to account for the illegally shared music: MP3 players with less than 10 gigabytes of memory have a surcharge of $15 and larger players have a surcharge of $25.[11] The money goes into a fund to pay musicians and songwriters.[12]

The concept of levies is not new to United States—the Audio Home Recording Act of 1992 ("AHRA") provides that a levy must be charged on all blank media and digital recorders.[13] But the AHRA did not produce the kind of revenue that was anticipated because digital audio media and digital recorder systems never caught on with consumers.[14] One problem with levies is that everyone has to pay them—those who download legally and those who download illegally. But research suggests that a small levy of two percent on certain goods and services would bring in over $1 billion for artists to share.[15] As a result, peer-to-peer networks could create another avenue for tracking popularity of artists and compensating artists according to the number of downloads.[16]

THE APPEAL OF OPERATING A PEER-TO-PEER SERVICE IS THAT THE COST OF HOLDING INVENTORY, LIKE CDS AND DVDS, IS ESSENTIALLY ELIMINATED. BUT LITTLE PROGRESS HAS BEEN MADE TOWARDS COMPENSATING THE ARTISTS.

The Compulsory License Model

Compulsory licenses are already issued for the digital performance of phonorecords, such as in the case of digital radio and webcasting.[17] Granting compulsory licenses for legal peer-to-peer networks that have been unable to negotiate with the major labels and movie studios could be a natural progression.[18]

While compulsory licenses are typically used for temporary transfers of copyright-protected material, such as with radio, using a similar license here would permit artist to receive compensation in an area where the larger copyright holders have chosen not to license content.[19] Arguably, that choice has been to the detriment of artists who have assigned their rights, since they could benefit from the exposure and income that peer-to-peer networks might provide. Customers who decide to purchase permanent copies of copyright protected material could be tracked with a system similar to the one used by Billboard to track downloads.[20] And most importantly, compulsory licenses are simply a useful scheme for allowing artists and copyright holders to capitalize on newer technologies, as trends in

the consumption of digital media change.[21]

The Future Model

Compulsory licenses and levies are the probably best models because they are flexible enough to continually generate income, as trends progress. These models are the quickest way to compensate copyright holders and artists without overburdening the consumer.

Certainly, there may be some peer-to-peer networks that are not controlled by legitimate companies or are located outside the jurisdiction of the United States; these concerns are merited, and it is not clear how a compulsory license or levy system would handle them. But it is not feasible to track down every individual who uses peer-to-peer networks. And the educational campaigns focusing on the rights of artists and downloading have not significantly dissuaded the masses from illegal file trading.[22]

The Wharton Business School recently published an article describing music downloading as a social phenomenon because even with the right technology "Napster would [not] have existed without millions of individuals who were willing to open their computer to the world."[23] So only time will determine the best solution and whether a levy or compulsory license model can produce a stream of revenue for the industry.

Endnotes

[1] Sarah McBride, *After Settling, Kazaa Promises a Legal Format*, Wall St. J., July 28, 2006, at A9.
[2] *Id.*
[3] *Id.*
[4] Wikipedia.com, Peer-to-Peer, http://en.wikipedia.org/wiki/Peer-to-peer, Peer-to-peer (last visited November 10, 2006).
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] ASCAP and P2P Service QTRAX Reach Music Licensing and Distribution Deal, http://www.ascap.com/press/2006/020706_qtrax.html (last visited November 10, 2006).
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] Mark A. Lemley & R. Anthony Reese, Reducing Digital Copyright Infringement Without Restricting Innovation, 56 Stan. L. Rev. 1345, 1406 (2004).
[14] *Id.*
[15] *Id.*
[16] Raymond S. Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. Chi. L. Rev, .263, 314 (2002).
[17] Neil W. Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-peer File Sharing*, 17 Harv. J. L. & Tech. 1, 20 (2003).
[18] *Id.*
[19] *Id.* at 10.
[20] Raymond S. Ray Ku, *The Creative Destruction of Copyright* at 314.
[21] *Id.*; *see also* Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright* at 1407.
[22] Ben Depoorter, Sven Vanneste, and Alain V. Heil, Gentle Nudges v. Hard Shoves in Copyright Law: An Empirical Study on the Conflict between Norms and Enforcement (Fall 2005), http://www.law.ugent.be/grond/casle
[23] *Id.*

IN REDLINE: MUSIC PRODUCER AGREEMENT

A PRODUCER'S REDLINE OF MAIN POINTS

BY JOHN INGRAM

This Agreement ("Agreement") sets forth the basic terms for Joe Smith professionally known as "Jo Smith" (hereinafter referred to as "Producer") to produce for Company A Inc. ("us" or "we") master recording(s) (the "Master(s)") embodying the performances of the recording artist, Jane Smith, professionally known as "Ja Smith" (hereinafter referred to as "Artist") which Master(s) may be embodied on Artist's forthcoming album (the "Album") to be delivered to Misc Entertainment, Inc. (hereinafter referred to as "ME") in accordance with the agreement (the "Recording Agreement") dated as of May 1, 2004, by and between Great Music Group ("Record Company") and ME or the services Artist, as amended. The relevant portions of the Recording Agreement are attached hereto as Exhibit "A." You are sometimes hereinafter referred to as "Producer" and all references in this Agreement to "you and Producer," "your and Producer's," and the like shall be understood to refer to you alone.

1. Terms/Services

(a) The term of this Agreement (the "Term") shall commence as of the date hereof and shall continue until such time as the Producer's Services (as defined below) have been fully completed hereunder and until such time as your obligations have been fully performed hereunder (excluding those material obligations that are intended to survive the expiration of the Term). You and Producer shall at all times diligently, competently, and to the best of your and Producer's ability perform the services required to be performed hereunder. Producer shall provide customary producer services ("Producer Services") on a non-exclusive, ~~first priority~~ basis. Subject to your continuing representations and warranties hereunder, we acknowledge satisfactory delivery and acceptance of the Master(s) hereunder and completion of the required services in connection with the Master(s). WITHIN APPROVED BUDGET. SPECIFY, REMIXES TO BE NEGOTIATED IN GOOD FAITH. FIRST RIGHT TO REMIX.

(b) You shall maintain and submit job sheets and deliver to us and Record Company within forty-eight (48) hours after each recording session hereunder, properly completed session reports, and all other documents, information and other materials, if any, (including, without limitation) Forms B and W-4 and similar withholding forms) required by Record Company in order for it to make payment, and to make such payment when due, of union scale compensation, or in order to effect timely compliance with any other obligations under any applicable agreement with any union or labor organization in connection with the Master(s). You shall pay or reimburse us, ME or Record Company, upon demand, for any penalties, fines, late charges or other costs incurred by reason of your failure to properly and timely comply with the foregoing, and any such sums paid by us, ME or Record Company and not promptly reimbursed by you may, at our option and without limiting any of our, ME's or Record Company's rights, be applied by us, ME or Record Company in reduction of any royalties or other sums, if any, payable to you and/or Producer under this Agreement.

2. Producer Advance/Recording Budget

(a) The producer advance ("Producer Advance") shall be Ten Thousand Dollars ($10,000.00) per Master (exclusive of recording costs), payable one-half (1/2) promptly following the commencement of recording of the Master and the balance upon ALREADY ACCEPTED ~~the later of (i) Record Company's and ME's acceptance of the Master as technically and commercially satisfactory, or (ii)~~ the complete execution of this Agreement. You hereby acknowledge receipt of Five Thousand Dollars ($5,000.00) of the Producer Advance.

(b) If and to the extent that recording costs in connection with the Master(s) produced hereunder exceed the approved recording budget (the "Recording Budget"), solely due to your or Producer's acts of omissions or the acts or omissions of any person or entity engaged by you or Producer, you and Producer shall be solely responsible for the payment of such excess costs ("Excess Costs"). In the event we, ME or Record Company, in our, ME and Record

Company's sole discretion, pay any such excess costs, yon shall promptly reimburse us, ME and Record Company as applicable, therefore upon demand. ~~Any sums paid by us, ME or Record Company and not promptly reimbursed by you as provided in this paragraph may, at our, ME's or Record Company's sole election and without limiting our, ME's and Record Company's rights, by applied by us, ME or Record Company in reduction of any sums payable to you and/or Producer under this Agreement including, without limitation, the Producer Advance.~~ ACKNOWLEDGE NO EXCESS COSTS

3. Royalties

½ POINT BUMPS AT GOLD AND PLATINUM LEVELS

(a) Conditioned upon your and Producer's full and faithful performance of all the material terms and provisions hereof, Artist shall instruct Record Company to pay you a royalty (i) with respect to full-price Net Sales of Phonographic Records embodying the Master(s) through Normal Retail Distribution Channels in the United States ("USNRC Net Sales"), at the rate of three percent (3%) of the suggested retail list price ("SRLP") of records computed, adjusted and paid in the same manner and on the same bases as Artist's royalties are computed, adjusted and paid pursuant to the Recording Agreement (the "Basic Royalty Rate"). With respect to sales of phonograph records other than full-price USNRC Net Sales of phonograph records, the above referenced Basic Royalty Rate will be reduced in the same proportion and subject to the same terms and conditions MUST INCLUDE SALES BASED CONFIGURATION ESCALATIONS (excluding royalty escalations) as apply to the royalty rate that is payable to Artist pursuant to the Recording Agreement (e .g., with respect to singles, foreign sales, etc.). PLEASE PROVIDE PROVISIONS

(b) No royalty, excluding mechanicals, will be payable to your or Producer until Record Company has recouped all Recording Costs incurred in connection with the album containing the Master(s). Such Recording Costs shall be recouped pursuant to the Recording Agreement the so-called "net artist royalty rate" (i.e., the royalty rate payable to Artist in respect of such Master(s) less the royalty rate payable to all producers, including, without limitation, you and Producer, and all other royalty participants in connection with the album). After such recoupment, royalties will be computed retroactively and paid to you on all Records sold, at the next regular accounting period, from the first such Record sold.

NO REDUCTION FOLLOWING ACCEPTANCE

~~(c) As to jointly produced Master(s), your royalty rate shall be the royalty rate provided for herein divided by the total number of parties with respect to whom we or Record Company are obligated to pay a royalty in connection with the Master concerned. In the event that any third party performs additional services with respect to the Master(s), including but not limited to mixing and/or remixing services, the royalty payable to you in connection therewith shall be reduced by the amount of the royalty payable to such third party. Notwithstanding the foregoing, if any third party, other than Producer,, produces any Master after satisfactory delivery and acceptance of that Master by Company,~~

~~your royalty rate will not be reduced as provided herein and provided further that in no event will a reduction in the Basic Royalty Rate in connection with the engagement of a third party remixer exceed one percent (1%).~~

4. Mechanical Royalties

PLEASE ACKNOWLEDGE NO SAMPLES AND PRODUCER'S 50% OWNERSHIP In the event that any composition wholly or partly written, owned or controlled by you and/or Producer or any entity in which you and/or Producer have an interest ("Controlled Composition") is embodied in any Master, you and/or Producer, as applicable, shall cause such Controlled Composition to be licensed to us and our designees (including, without limitation, Record Company) for mechanical reproduction on phonorecords at the following rates and on the following terms and conditions: (i) on phonorecords sold in the United States, the rate (the "United States Mechanical Rate") for each Controlled Compositions shall be equal to FULL RATE ~~seventy five percent (75%) of the minimum~~ statutory rate (without regard to playing time) provided for in the United States Copyright Act, which rate is applicable to the reproduction of musical compositions as of the earlier of the date of the Delivery of the Master(s) embodying such Controlled Compositions, or the date the Master(s) embodying such Controlled Compositions is required to be delivered to Record Company pursuant to Recording Agreement; and (ii) in all other respects, including but not limited to accountings and the applicable mechanical rates on sales in territories outside the United States, such Controlled Compositions shall be licensed to us and our designees (including, without limitation, Record Company) upon the same terms and conditions as are applicable pursuant to the Recording Agreement for compositions similarly controlled by us ("Artist Controlled Compositions") including, but not limited to, reserves and uses. Mechanical royalties with respect to such Controlled Compositions shall be calculated and paid in the same manner as mechanical royalties are calculated and paid (excluding escalations) with respect to Artist Controlled Compositions pursuant to the Recording Agreement.

PLEASE SUPPLY PROVISIONS.

NO CAPS; NO EXCESS

5. Representation and Warranties

(a) You and Producer agree to and do hereby indemnify, save and hold us, Artist, ME, Record Company, and our Artist's, ME's and Record Company's designees and licensees (collectively, the "Indemnitee") harmless of and from any and all liability, loss, damage, cost or expense (including, but not limited to, legal expenses and reasonable outside attorney's fees) arising from your or connected with any breach or alleged breach of this Agreement or any third party claim which is inconsistent with any of the warranties or representations made by you and/or Producer in this Agreement, provided that said claim has been settled with your and Producer's consent, not to be unreasonable withheld, or has resulted in a final judgment by a court of competent jurisdiction against any Indemnitee, and you agree to reimburse said Indenmitee on demand for any payment made or incurred by Indemnitee with respect to any liability or claim to which the foregoing indemnity applies. Notwithstanding

anything to the contrary contained herein, we, Artist, ME and/or Record Company shall have the right to settle without your or Producer's consent any claim involving sums of 15K ~~Ten Thousand Dollars ($10,000)~~ or less, and this indenmity shall apply in full to any claim so settled; if you or Producer do not consent to any settlement proposed by us, ME and/or Record Company for an amount in excess of 15K ~~Ten Thousand Dollars ($10,000.00)~~, we, ME and/or Record Company shall have the right to settle such claim without your or Producer's consent, and this indemnity shall apply in full to any claim so settled, unless your or Producer obtain a surety bond from a surety acceptable to us and Record Company in our sole discretion, with each Indemnitee as a beneficiary, assuring us, ME and Record Company of prompt payment of all expenses, losses and damages (including legal expenses and attorney's fees) which each Indemnitee may incur as a result of said claim. However, if no claim, demand or action is commenced within six (6) months ~~one (1) year~~ following the date the claim, demand or action was first received by us, ME and/or Record Company in writing and if no active settlement discussions are taking place, then we, ME and Record Company will release sums so withheld, unless we, ME or Record Company, in our and their sole business judgment, believe an action will be filed. Notwithstanding the foregoing, if after such release by us, ME or Record Company of sums withheld hereunder, a claim is reasserted, then our, ME and Record Company's rights under this paragraph will apply ab initio in full force and effect. We agree to promptly notify you and Producer of any action commenced on any such claim. You and Producer shall have the right to defend any such claim, at your or Producer's sole cost and expense, with counsel of your or Producer's own choosing; provided that we, ME and/or Record Company shall have the right at all times, in our sole discretion, to retain or resume control of the defense of such claim.

(b) During the Term and for two (2) ~~three (3)~~ years after the Delivery of each Master hereunder, neither you nor Producer shall authorize the production of or produce for any person, firm or corporation a master recording embodying any selection recorded on such Master.

(c) MAKE MUTUAL You and Producer have the right and power to enter into this Agreement, to grant the fights granted by you and Producer to us hereunder, and to perform all of the terms hereof. Without limiting the generality of the foregoing, no musical composition or nay other material recorded in the Master(s) shall be subject to any re-producing or other restrictions which would interfere with any of our rights hereunder or would infringe upon or otherwise violate the rights of any third party.

(d) During the Term, you and Producer shall be and remain a member good standing of any labor union or guilds with which we, ME or Record Company may at any time have an agreement lawfully requiring your membership.

(e) All recording sessions for the Master(s) shall be conducted in all respects in accordance with the terms of the AF of M Phonograph Record Labor Agreement, of the AFTRA Code of Fair

Practice for the Phonograph Industry, and of the agreements with all other labor unions and guilds having jurisdiction over the recording of the Master(s).

(f) Neither you nor Producer shall at any time, directly or indirectly, give or offer to give any consideration of any kind to any radio or television station or network, to any employee thereof, or to any person, firm or corporation controlling or influencing that station or network's programming for the purpose of securing the broadcast or promotion of any phonograph records hereunder.

6. Credits

(a) We shall instruct Record Company to accord credit to Producer as a producer of the Master(s) as follows: (i) a production credit in the liner notes elsewhere on the packaging of phonorecords (in all configurations) embodying the Master(s) hereunder, and (ii) in all quarter (1/4) page or larger advertisements placed by Record Company or under its control in the United States in so-called "nation-wide" trade and consumer publications and Billboard "strip ads" which pertain to records solely embodying the Master(s). Such credits shall be in substantially the following form:

"Produced by Jo Smith"

(b) No inadvertent non-recurring failure on our, Record Company's, or our respective designees' and licensees' part to provide the credits set forth in paragraph 6(a) above shall be deemed to be in breach of this Agreement, provided that we shall use best ~~reasonable~~ efforts to instruct Record Company to prospectively cure such failure after our receipt of your notice of such failure.

(c) Notwithstanding anything to the contrary contained in this Agreement, in the event that such Master(s) are produced by Producer jointly with a third party or in the event that any such third party shall perform additional services with respect to Master(s) produced by Producer hereunder ACKNOWLEDGE NO OTHERS, we shall have the right to accord such third party an appropriate credit in connection therewith.

PODCASTS AND THE LAW

PODCASTS ON ENTERTAINMENT AND SPORTS LAW, BUSINESS AND NEWS

Standford University
Technology Ventures Program
http://itunes.stanford.edu/
Weekly

Content includes lectures from the Technology Ventures Program, video features from the Stanford News Service, conversations from The Aurora Forum public conversation series, programs from Reunion Homecoming, and various interviews and speeches.

The Business
by KCRW
http://www.kcrw.com/etc/programs/tb
Weekly

A half-hour podcast on the film and television industries, hosted by Claude Brodesser-Akner.

The Negotiating Tip of the Week
by Josh Weiss
http://www.negotiationtip.com/blog
Weekly

Podcast created by Josh Weiss, Associate Director of the Harvard Program on Negotiation. Five minute program explores negotiation principles, with occasional guest interviews.

The Hollywood Reporter's
Money and Media Podcast
http://www.streetiq.com/dir/HOLLYWOOD.shtml
Weekly

Hosted by The Hollywood Reporter's Georg Szalai and StreetIQ.com's Stephen Malaster. Content includes entertainment industry news and analysis with a financial focus.

AudioBerkman
by The Berkman Center for Internet & Society
http://blogs.law.harvard.edu/mediaberkman/
Semiweekly

Podcast by The Berkman Center for Internet & Society at Harvard Law School. Includes lectures from the law school's CyberOne course on media technology and the law.

BMI Podcast: See it Here First
by BMI
http://music.bmi.com/podcast/200610/
Monthly

Podcast features songwriters from the BMI camp.

Sports Business Radio
http://www.sportsbusinessradio.com/?q=node/66
Weekly

Podcast on the business of sports, with guests including college athletics administrators, professional sports league executives, and atheletes.

Earshot Atlanta
by Creative Loafing
feed://feeds.feedburner.com/EarshotAtlanta
Periodically

Discusses Atlanta music news and upcoming events, with guest interviews.

AP Top 25 College Poll Podcast
feed://podcast.ap.org/podcasts/AP_Top_25_College_Poll.xml?iTunes=true
Weekly

Hosted by Associated Press sports reporters Dave Lubeski andd Ralph Russo. Content includes news on teams in the AP Top 25 college polls.

ABA Section of Litigation Podcast
feed://www.abanet.org/litigation/podcast/podcast.xml
Semimonthly

Provides trial tactics and tips. The ABA also provides CLE course podcasts at http://www.abanet.org/cle/podcast/

Lisa Moore ("Opening Offer: The End of Summer," p. 3) is an entertainment attorney and the principal of The Moore Firm LLC. Ms. Moore is the chair of the Entertainment & Sports Law Section of the State Bar of Georgia and the executive director of the Georgia Lawyers for the Arts. She is also an adjunct professor at the University of Georgia School of Law. Her e-mail address is lisa@glarts.org.

Stanley A. Seymour ("Of Mastertones and Mechanical Royalties: The U.S. Copyright Office's Placement of Mastertones Within the Compulsory Licensing Scheme," p. 4) is a labor and employment attorney with Freeman Mathis & Gary, in Atlanta. He has worked for 5 years on various entertainment matters and is a member of the Entertainment and Sports Law Section. His e-mail address is sseymour@fmglaw.com.

Ayodele Vassall-Gore ("Monetizing the Peer-to-Peer Space: Determining the Best Model for Compensating Artists," p. 12) is a third-year law student at the University of Miami School of Law and is a visiting student at the Emory University School of Law. Her e-mail address is ayodele1110@yahoo.com.

John Ingram ("In Redline: Music Producer Agreement—A Producer's Redline of The Main Points," p. 16) is a graduate of the University of Southern California Law Center and is an entertainment attorney with Baldonado & Associates, P.C., in New York. His e-mail address is john@hblaw1.com.

copywrite

Entertainment & Sports Law Section
State Bar of Georgia
104 Marietta Street, NW
Suite 100
Atlanta, GA 30303

State Bar of Georgia