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Music Industry Changes Its Ringtone Suits

By Jean-Luc Renault
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LOS ANGELES — As the recording industry continues to flounder, music companies have established a two-front tactic to shore up revenue — sue those who distribute their songs without licenses and seek out new revenue streams once considered marginal.

Nowhere is that better illustrated than in a pending lawsuit several major record labels filed against Myxer, a website that allegedly distributes pirated songs as ringtones, allowing users to hear snippets of songs by their favorite musicians when they receive calls on their mobile phones.

Considering the declining profits wracking the music business, it's no surprise that the labels sought up to \$100 million in damages from an alleged copyright infringer. But most of the original plaintiffs — including Sony BMG Music Entertainment and Warner Bros. Records — dropped out of the suit after reaching deals with the ringtone dealer, suggesting that legal action could be a new tactic for music companies to reach friendly deals with businesses they once tried to shut down.

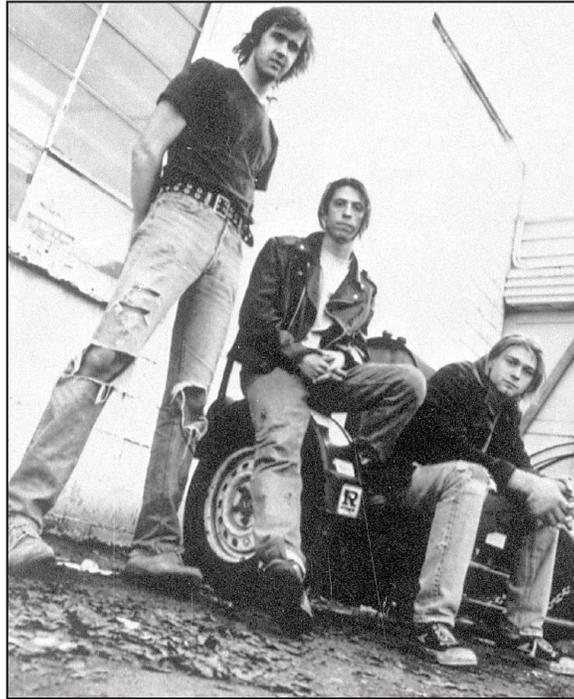
UMG Recordings has not reached such deals with the company and is proceeding with the lawsuit. UMG owns the rights to 245 songs named in the lawsuit, including works by Nirvana, Weezer, Snoop Dogg and Ludacris.

Copyright experts said the case highlights the growing importance of the mobile download market, which generated \$729 million in sales for the music industry last year.

"The music industry is looking for any source of new revenue in light of falling record sales," said Yakub Hazzard, a partner with Robins, Kaplan, Miller & Ciresi and co-chair of the firm's media and entertainment litigation practice.

"Now, rather than trying to eliminate infringers, the labels will sue to make a deal to take advantage of a business model the defendant created," he said.

A consortium of 14 record labels originally sued Myxer in 2008, accusing the Florida-based website, which supports itself through



Members of the band Nirvana in 1991.

Associated Press

advertising revenue, of allowing users to upload copyrighted songs that other users can download and use as ringtones on their mobile phones for free.

The plaintiffs' most recent amended complaint accused Myxer of direct, contributory and vicarious copyright infringement and sought either profits obtained from the infringements or damages of \$150,000 for each infringement.

The complaint did not set a specific number of alleged violations, but did include a list of 736 of the plaintiffs' copyrighted songs that appeared on Myxer, which would be liable for more than \$110.4 million in damages if each song were infringed upon once.

During a hearing on a motion for summary judgment in front of U.S. District Court Gary Feess last week, only one of the plaintiffs remained in the lawsuit, as the other 13 have reached distribution deals with Myxer.

Music publishing giant EMI, whose Christian music division was a plaintiff in the suit, dropped out of the case last October. Sony,

Warner Bros. and their subsidiaries did the same this May.

The deals give Myxer's 35 million users access to the labels' catalogs, from which users can download ringtones, full versions of songs and music videos.

In exchange, Myxer now charges a fee of about \$3 per download from those catalogs.

EMI, Sony and Warner Bros.' decisions to settle the case represent a tactic that other companies involved in disputes over mobile music downloads have used before.

Last December, Broadcast Music Inc., an organization that collects royalties on behalf of musicians, sued mobile phone company T-Mobile for selling music downloads without public-performance licenses, which generate royalty payments for songwriters.

Venues such as bars, movie theaters, concert halls and nightclubs are required to obtain public-performance licenses to play music, and record labels and collection societies have stepped up litigation

in recent years to crack down on businesses that don't have them.

But both sides began negotiations to end the dispute amicably, reaching an undisclosed settlement in June before dismissing the case.

Hazzard, who is not involved in the Myxer litigation, said music companies could be using lawsuits as a way to reach settlements that are "win-win situations" for both parties.

"Record labels probably realized they would have been better off making a deal with Napster rather than stamping it out of existence and leaving a void," he said.

Whether that will happen with UMG in the Myxer case remains to be seen.

Jeffrey Goldman, a partner with Jeffer, Mangels, Butler & Mitchell and the lawyer for UMG, declined to comment on the case, as did Myxer's lawyers from Winston & Strawn.

Feess indicated at the hearing last week that his tentative ruling was to deny the plaintiff's motion for summary judgment and allow the case to go to trial.

The judge said he would later provide a written order on the motion, but did not specify when he would issue his ruling.