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The story of Jonathan Coulton and song copying on Glee was one of the biggest copyright-related stories of 2012, with plenty of media coverage (and even a fictionalized TV adaptation). For the uninitiated: In 1992, Anthony Ray, a.k.a. Sir Mix-A-Lot, released the song “Baby Got Back.” The song, a “chart-topping multi-platinum Grammy-winning hip-hop celebration of female pulchritude,” is widely considered a modern classic. In October 2005, an artist named Jonathan Coulton released a humorous “cover” arrangement of “Baby Got Back” that retained Sir Mix-A-Lot’s lyrics, but also added new melodic and rhythmic material set against a smooth, folk-style acoustic guitar-led accompaniment. Coulton’s “joke” arrangement became an overnight viral hit due to the absurd juxtaposition of Sir Mix-A-Lot’s lyrics and Coulton’s crooning.

In January 2013, Fox’s hit TV show “Glee” featured a cast performance of “Baby Got Back,” using a musical arrangement indistinguishable from Coulton’s version. When Coulton contacted Fox’s lawyers looking for an explanation, they responded by saying that Fox was within its legal rights to reproduce Coulton’s musical arrangement at will, and that Coulton should simply be “happy for the exposure.” In the wake of this incident and the PR blowup that followed, it was soon discovered that Coulton was but one of a troublingly large number of independent arrangers whose work was featured in an episode of Glee without acknowledgement, consent or compensation.

The story of Jonathan Coulton and Glee is unusual and complicated, involving a relatively obscure provision within the Copyright Act’s compulsory licensing scheme, 17 U.S.C. § 115(a)(2). The provision states:

A 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 the express consent of the copyright owner.

Under the statute, arrangements of a musical work “shall not be protected as a derivative work under this title” absent the explicit consent of the copyright owner. This means that even if an arranger pays for a compulsory license to make a cover arrangement – as Jonathan Coulton did when making his arrangement of “Baby Got Back” – he nonetheless retains no

copyright in the original, creative features of his arrangement as a derivative work, unless he or she tracks down the original artist (in this case, Sir Mix-A-Lot) and gets his or her explicit consent. Absent the original artist's explicit consent, the arrangement essentially falls into the public domain, where anyone (including Fox) may profit from it without consulting, crediting, or compensating the arranger.

Even the staunchest supporters of an "open access" system of copyright believe that one should not be allowed to copy another's creative work verbatim for commercial gain, against the owner's consent, and without any attribution. Therefore, it seems odd that the Copyright Act would permit Fox's deliberate appropriation of Coulton's creative and original musical arrangement. In fact, Section 115(a)(2) as it stands now is broken, and in dire need of an update.

The legislative history of Section 115(a)(2) provides that the provision "is intended to recognize the practical need for a limited privilege to make arrangements of music being used under a compulsory license, but without allowing the music to be perverted, distorted, or travestied." This Congressional intent should immediately bring to mind "moral rights," a somewhat controversial idea that the law should give rights to artists to preserve their work's artistic integrity. The United States has thus far only embraced a limited version of moral rights through legislation such as the Visual Artists Rights Act of 1990 (VARA), which provides a limited right for artists "to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation." However, the language of Section 115(a)(2) is different from VARA in a few key ways.

Most importantly, Section 115(a)(2) creates an overly burdensome "opt in"-style regime, whereas VARA's regime is "opt out." Under section 115(a)(2), the power to provide consent for an arrangement to receive derivative work protection is held by whoever holds the copyright to the original song. In other words, the law presumes the copyright holder has withheld consent for any arrangements, at least until he or she expressly states otherwise. This creates a major burden on an arranger to locate and negotiate with the original copyright holder, often many years after the original song is first released. Even assuming the original copyright owner can be located, Section 115(a)(2) allows him or her to withhold consent for any reason. This regime is very different than that under VARA, which by default allows the distortion of works unless the original artist acts affirmatively to obtain an injunction preventing the distortion.

Apart from being overly burdensome and inefficient, Section 115(a)(2)'s default "no covers allowed" setting simply does not comport with modern songwriters' general attitudes towards derivative arrangements. Most songwriters understand that if their music is to the test of time, others will necessarily adapt and re-imagine their work; countless artists in a wide variety of genres have thus embraced and encouraged the production of transformative covers. While there are certainly some musicians who object to all

unauthorized covers as a matter of principle, this small minority ought not to be assumed to be the default position in the twenty-first century.

In order to better effectuate Congress's stated intent "to recognize the practical need for a limited privilege to make arrangements of music being used under a compulsory license, but without allowing the music to be perverted, distorted, or travestied," Section 115(a)(2) should therefore be re-written as follows:

A 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 the express consent of the copyright owner.~~ **However, the license may be revoked if the artist of the original work or his assignees can show that material prejudice to the artist or song's integrity or reputation will result from distribution of the new arrangement.**

This new language has a number of benefits. By removing the provision that eliminates "derivative work" protection for arrangements made without the original artist's consent, the proposed law would grant – by default – a "thin" copyright protection for the arrangement's original, creative features. This protection would limit the ability of third parties (such as Fox) to create identical copies of the new arrangement without permission. Although the proposed law would preserve the artist's ability to object to an offensive arrangement, the proposed law would require that the plaintiff show "material" prejudice to the artist or song's integrity or reputation. Requiring material prejudice would ensure that the artist's interest in integrity is respected, while preventing the plaintiff from haphazardly punishing an arrangement merely because he or she disapproves of it.

It is often difficult to balance the rights of an author to maintain his or her artistic integrity with the rights of the public to rearrange and adapt the artist's work. Music is not merely a commodity sold like a toaster; artists put a piece of themselves in their musical works, and therefore suffer legitimate harm when a cover artist perverts, distorts, or travesties their work. At the same time, protecting artistic integrity should not mean punishing innovative arrangers who advance art through new and creative arrangements. The proposed law effectively fixes the problems of the existing regime while striking an equitable balance of these interests. With the adoption of the proposed language, the copyright system will be better able to foster the creation of a diverse and vibrant library of music.

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