COMPULSORY LICENSING AND CELL PHONE RINGTONES: THE PHONE IS RINGING, A COURT NEEDS TO ANSWER

I. INTRODUCTION

On October 4, 2006, lawyers from some of the most powerful organizations in the music industry gathered at the U.S. Copyright Office in the Library of Congress for oral arguments before representatives of the Register of Copyrights.1 Attorneys representing the Recording Industry Association of America (“RIAA”),2 EMI Music Publishing,3 the National Music Publishers’ Association (“NMPA”),4 the Songwriters Guild of America (“SGA”),5 and the Nashville Songwriters Association International (“NSAI”)6 assembled to argue one of the most hotly debated copyright issues facing the music industry. The final outcome of this legal issue will determine the allocation of millions of dollars in a four billion dollar specialty music market.7 What, you might ask, could create such a legal fight that music industry players cannot agree and are forced to petition the Register of Copyrights for an answer? None other than cell phone ringtones. Yes, those loud, annoying snippets of music that everyone seems to use these days have music industry power players up in arms.

Before a ringtone can find its way onto someone’s cell phone, the ringtone provider must license the copyright-protected music featured in the ringtone from whomever owns that copyright.8 For years, ringtone licenses were freely

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2. The RIAA is a trade group that represents the U.S. recording industry. Members include recording companies and recording artists. Recording Industry Association of America, Who We Are, http://www.riaa.com/aboutus.php (last visited June 1, 2008).
7. See infra Part II.D.4 for the financial status of the ringtone market.
8. See infra Part II.A for an explanation of music copyrights and why ringtone providers need to license the material they use.
negotiated between copyright owners and ringtone providers. Recently, however, changes in ringtone technology and the ringtone market have put a crunch on the profit margins of ringtone providers, and, as a result, providers have begun to look for new ways to decrease costs and increase profits. The argument that copyright licensing for ringtones should not be freely negotiated but rather should be facilitated through the compulsory licensing statute in section 115 has emerged as one such cost-cutting strategy. Section 115 requires copyright owners to license musical compositions under certain limited circumstances at a set statutory rate, currently only $0.091, that is much lower than the freely negotiated rates. As could be expected, copyright owners strongly opposed this change, and the debate ultimately ended up in front of the Register of Copyrights.

After reviewing briefs submitted by lawyers on both sides of the dispute and listening to an oral argument that included the playing of music by Beyoncé, Gwen Stefani, and Pretty Ricky—not typical fare for the Library of Congress—the Register of Copyrights issued her decision on October 16, 2006, finding that the compulsory license provision of section 115 covers ringtones. Music publishers instantly disagreed with the ruling and refused to follow it. Additional litigation on the subject seems imminent because the Register’s decision is not binding on courts and music publishers have already claimed to be exploring their legal options.

This Comment explores the law behind the growing debate over whether cell phone ringtones are subject to compulsory licensing under section 115 of the Copyright Act and evaluates the Register’s decision. Part II presents an overview of the relevant copyright law, the structure of the music industry, the history of ringtones and the technology behind them, and the details of the Register’s October 16, 2006 decision. Part III applies the relevant copyright law to ringtones and concludes that, contrary to the Register’s decisions, they should not be subject to compulsory licensing. Part III also examines the likely negative effects of the Register’s decision on the music industry and proposes that when a

10. See infra Parts II.D.3-4 for a discussion of these market changes.
16. Id.
17. See infra Part II.E.3 for a discussion of the industry response to the Register’s decision.
judicial ruling on compulsory licensing of ringtones is sought, the best response will be a bright-line rule against the application of section 115 to ringtones. Part III then examines the benefits of such a bright-line rule and provides multiple potential legal bases on which such a rule could be based. Last, Part IV concludes that a judicial ruling creating a bright-line rule against the application of compulsory licensing to ringtones is necessary to bring efficiency to the ringtone licensing process.

II. OVERVIEW OF RELEVANT COPYRIGHT LAW AND EXPLANATION OF THE RINGTONE DEBATE

A. Copyright Protection of Musical Compositions

1. Origin of Copyright Protection

The protection offered to artists by federal copyright law has been an essential part of the United States' legal system since the birth of our nation. The Constitution granted Congress the power to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” Congress quickly passed the first Copyright Act in 1790, and since that time artists have been vested with exclusive property rights in their original works. The first copyright statute granted “the author and authors of any map, chart, book or books” the exclusive rights of “printing, reprinting, publishing and vending such map, chart, book or books” for a term of fourteen years. In 1831, amendments to the Copyright Act of 1790 extended copyright protection to musical compositions. Over time, amendments to the Copyright Act have further expanded the subject matter of copyright protection and granted broader property rights to copyright owners for longer time periods. Under the current version of the Copyright Act, the property rights granted to copyright owners, often described as the “bundle” of rights, include the exclusive rights to reproduce and distribute the

22. See 17 U.S.C. § 102 (2000) (granting copyright protection to “original works of authorship fixed in any tangible medium of expression,” including literary, musical, dramatic, choreographic, pictorial, graphic, sculptural, audiovisual, and architectural works as well as pantomimes, motion pictures, and sound recordings).
23. Act of May 31, 1790, ch. 15, § 1, 1 Stat. at 124.
25. See, e.g., Copyright Act of 1909, ch. 320, § 24, 35 Stat. 1075, 1080-81 (repealed 1978) (extending duration of copyright protection from fourteen years to twenty-eight years); Act of Mar. 3, 1865, ch. 126, § 1, 13 Stat. 540, 540 (repealed 1870) (granting copyright protection to photographs and photographic negatives); Act of Apr. 18, 1856, ch. 169, 11 Stat. 138, 138-39 (repealed 1870) (granting exclusive public performance rights to authors of dramatic works).
copyrighted work and to perform the work publicly. Each of these rights can be separately sold, licensed, or transferred. Copyright owners are granted these exclusive monopolies over their works for a term of the author’s life plus seventy years.

Copyright law embodies an essential tension between competing policy goals that Congress seeks to balance through its copyright legislation. In *Twentieth Century Music Corp. v. Aiken*, the Supreme Court recognized the conflicting public policies behind copyright protection of, on one hand, granting property rights to copyright owners in their works as an incentive for them to create more works of art for the public to experience and, on the other hand, limiting those rights to promote broad public access to artistic works for public enjoyment and use in new works. Therefore, the granting of the “bundle of rights” to an author is balanced by statutory restrictions on the author’s ability to limit public access. An example of such a limitation, which applies exclusively to musical works, is the compulsory license provision of section 115, which allows anyone to reproduce and distribute reproductions of a musical composition without permission of the copyright owner as long as the owner has already


1. to reproduce the copyrighted work in copies or phonorecords;
2. to prepare derivative works based upon the copyrighted work;
3. to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
4. in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
5. in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
6. in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

Id.

28. See 17 U.S.C. § 201(d) (2000) (“The ownership of a copyright may be transferred in whole or in part.”); Richard Schuilenberg, Legal Aspects of the Music Industry 445 (Robert Nirkind & Sylvia Warren eds., 1999) (explaining that rights granted by section 106 can be “divided up into as many parts as the copyright owner may desire” and that “[e]ach of the ‘parts’ may be owned and protected separately”).

29. 17 U.S.C. § 302(a). This duration applies only to those works created on or after January 1, 1978. Id. Works created before that date may be subject to different durations under the terms of prior copyright acts.

30. See *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (recognizing that limited scope of copyright holder’s right and limited duration of those rights represent intentional balancing).

31. 422 U.S. 151 (1975).


33. See, e.g., 17 U.S.C. § 107 (outlining fair use exception to copyright under which copyrighted work may be used without license from copyright owner in certain situations such as for scholarship, criticism, or news reporting).
published the work once and the licensee pays a statutory royalty. By carefully balancing the rights granted and denied to owners of copyrights in musical works, Congress created a copyright law that has allowed the development of a music industry that both enables artists to earn a living from their musical creations and allows the public access to a wide array of musical works.

2. Two Layers of Copyright in Musical Works

Within a recording of a song, the Copyright Act protects two separate and distinct copyrights. First, there is the copyright in the musical composition, which consists of the lyrics and music. This copyright originally subsists with the songwriter but usually is transferred, at least partially, to a music publishing company that will promote the song and calculate and collect royalties on the songwriter’s behalf. The publishing company earns its revenue by taking a commission on the royalties collected. The second copyright subsists in the actual sound recording of the song. This copyright subsists with the authors of the sounds in the sound recording, which usually includes musicians and producers. Pursuant to recording and producing contracts, the copyright in a sound recording usually is transferred to the record company that pays for the artist to record the song and distributes the recorded track. For example, consider the recently popular single, “Ain’t No Other Man,” by Christina Aguilera. According to the U.S. Copyright Office’s database, the musical composition copyright in the words and lyrics was originally granted to the authors, Aguilera, Kara DioGuardi, Chris E. Martin, and Charles Roane, and was transferred to and is currently owned by BMG Music Publishing Company. RCA Records, Aguilera’s record label, owns the copyright in the sound recording of the song as well as all of the other songs on the album Back to Basics.

35. See BRIAN WESLEY PETERS, MUSIC BUSINESS 101, at 108-09 (Gail M. Kearns ed., 2005) (explaining two copyrights in recorded track and using table to present who owns which copyright).
36. Id.
37. Id.
38. See id. (explaining how agency hired to collect royalties takes percentage of such royalties as commission).
39. Id.
40. PETERS, supra note 35, at 108-09.
41. Id. If the recording is considered a “work made for hire,” as many recordings are pursuant to recording contracts, the record company will be considered the author of the sound recording from the beginning and no transfer will be needed. See 17 U.S.C. § 201(b) (2000) (declaring that when work is “for hire,” “the employer or other person for whom work was prepared is considered the author for purposes of this title”).
42. CHRISTINA AGUILERA, Ain’t No Other Man, on BACK TO BASICS (RCA Records 2006).
43. U.S. Copyright Office, Search Copyright Records, http://www.copyright.gov/records/cohm.html (search online records catalog by title for “Ain’t No Other Man,” then select appropriate check box) (last visited June 1, 2008).
44. Id.
These separate copyrights do not grant the same rights to their respective owners. A copyright in a musical composition carries with it the exclusive rights enumerated in section 106(1)-(5). These include the rights to reproduce the work, distribute the work, publicly display the work, publicly perform the work, and create derivative works based on the work. The last exclusive right listed in section 106(6) is expressly limited to sound recordings and thus does not apply to any other type of copyrighted work. While the copyright in a sound recording receives the extra exclusive right under section 106(6) “to perform the copyrighted work publicly by means of a digital audio transmission,” the remaining rights in a sound recording are limited by the exclusions in section 114. Under section 114(a), the exclusive rights of public display or performance do not apply to sound recordings. Additionally, section 114(b) limits the extent to which the rights retained in the sound recording copyright can be infringed. Copyrights in sound recordings can only be infringed when reproduction, distribution, or derivative work production makes use of the “actual sounds fixed in the recording.” Sound-alike recordings, even if intentionally recorded to mimic the original, do not infringe as long as they do not use the original recording. This protection is comparatively weaker than the protection afforded to copyrights in musical compositions, which can be infringed by works that sound “substantially similar” to the composition even if not the same note-for-note or word-for-word.


46. Id.

47. See id. § 106(6) (“[I]n the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.”).

48. Id.


50. See 17 U.S.C.A. § 114(a) (declaring that sound recordings are only entitled to exclusive rights in clauses (1), (2), (3), and (6) of section 106; explicitly excluding public performance and display rights in clauses (4) and (5)). For example, playing a CD in public would infringe the public performance and display rights of the owner of the copyright in the underlying musical composition but would not infringe any exclusive rights of the owner of the copyright in the sound recording. Thus, the right to perform or display a song publicly must be licensed from the copyright owner of the musical compositions but not the owner of the copyright in the sound recording. It is next to impossible to track every public performance of a song, and, therefore, performance rights are granted to venues where public performances take place (like concert venues) under a blanket license. Under the blanket license scheme, a venue pays a flat, yearly fee to a Performing Rights Organization (“PRO”) that distributes the fees to its members based on the popularity of their songs during a given time period. SCHULENBERG, supra note 28, at 366. The three main PROs in the United States are the American Society of Composers, Authors and Publishers (“ASCAP”), Broadcast Music, Inc. (“BMI”), and SESAC. Id. Almost every musical composer is a member of one of the three organizations. Id.


52. Id.

53. SCHULENBERG, supra note 28, at 452.

54. See id. at 440-42 (discussing tendency of courts to find copyright infringement whenever enough similarities exist between two works).
For licensing purposes, if someone wants to use a sound recording of a track in a commercial, for example, he or she must obtain the copyright clearance of both the owner of the copyright in the musical composition (songwriter or publisher) and the owner of the copyright in the sound recording (record company), because both copyrighted works are being used.\(^55\) If someone wants to create a new version of the musical composition, however, the individual only needs the clearance of the owner of the copyright in the musical composition because no sound recording is being used (a new one is being created).\(^56\) In such a situation, the owner of a copyright in a sound recording has no control over subsequent recordings of the same song if the owners of the musical composition copyright authorize those recordings.\(^57\)

3. The Music Industry

Copyright law has played a vital role in the development of the music industry. Without the protections of copyright, artists and record labels would have no ability to collect revenues for their recordings and compositions. The recording industry today is a very concentrated market. Thanks to a flurry of recent mergers and buyouts, the market is now dominated by what are known as the “Big Four” record labels.\(^58\) These labels are Universal Music Group,\(^59\) Sony BMG Music Entertainment,\(^60\) EMI Group,\(^61\) and Warner Music Group.\(^62\) Together, these four labels control approximately eighty-five percent of the U.S. recording industry.\(^63\) With revenue streams from CD sales and digital music sales, the value of the recording industry exceeds $12 billion.\(^64\) In such a concentrated market the four major labels can wield substantial bargaining

\(^{55}\) Peters, supra note 35, at 108-09.

\(^{56}\) See id. (distinguishing song ownership from ownership of recorded performance).

\(^{57}\) Id. For example, in 1981 Joan Jett recorded a famous version of the song “I Love Rock ‘N Roll,” originally recorded by the Arrows in 1975. Cover vs. Original, I Love Rock n Roll: Joan Jett vs. The Arrows, http://www.cover-vs-original.com/song-25.html (last visited June 1, 2008). In 2001, Britney Spears released a recording of the same song. Britney Spears, I Love Rock ‘N’ Roll, on BRITNEY (Jive Records 2001). As long as Britney Spears properly licensed the rights to use the musical composition, Joan Jett (or her record label, which likely owns the copyright in the sound recording) could not prevent her from recording the song.

\(^{58}\) Bill Lamb, Top 4 Major Pop Record Labels, http://top40.about.com/od/popmusic101/tp/majorlabels.htm (last visited June 1, 2008).

\(^{59}\) Universal Music Group represented about 25.5% of the recording market in 2005, with artists such as Mariah Carey and Gwen Stefani on its roster. Id.

\(^{60}\) Sony BMG Music Entertainment represents about 21.5% of the recording market, with artists such as Kelly Clarkson and Britney Spears on its roster. Id.

\(^{61}\) EMI Group represents about 13.4% of the recording market, with artists such as the Rolling Stones and Coldplay on its roster. Id.

\(^{62}\) Warner Music Group represents about 11.3% of the recording market, with artists such as Green Day and Madonna on its roster. Id.

\(^{63}\) Lamb, supra note 58.

power against artists, consumers, and even Congress. The trade group RIAA represents these labels collectively.66


1. History

The compulsory licensing provision embodied in section 115 of the Copyright Act of 190967 has been one of the most important and instrumental copyright provisions in the history of the music industry and also represents one of the biggest exceptions to the exclusive rights of copyright holders in the entire Copyright Act.68 Prior to 1909, however, no compulsory license provision existed, and musical composition copyright owners enjoyed the same rights69 as other copyright holders in deciding if, when, for how much, and to whom they wanted to license their copyrighted work.70 Traditionally, the works were licensed to companies who published sheet music, and the negotiated royalties paid by these companies represented a lucrative source of income for copyright holders. These freedoms for music composers changed, however, in the early 1900s with the invention of a new device that made use of musical compositions in a way not contemplated by copyright law at the time. The new device was the piano roll, a perforated sheet that, when inserted in a player piano, allowed the piano to play a musical composition.71 Manufacturers of piano rolls did not secure licenses from the musical composition copyright holders and, consequently, were sued for copyright infringement.72 In the landmark decision White-Smith Music Publishing Co. v. Apollo Co.,73 the Supreme Court held that such mechanical reproductions of a musical composition did not constitute “copies” under the pre-1909 Copyright Act because, unlike sheet music, they

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66. See supra note 2 for background on the RIAA.


68. See SCHULENBERG, supra note 28, at 453 (calling compulsory licenses “granddaddy exception” to author’s control of his copyrighted work and noting its importance to music industry).

69. Prior to the Copyright Act of 1909, these rights included the rights of “printing, reprinting, publishing, completing, copying, executing, finishing and vending.” White-Smith Music Publ’g Co. v. Apollo Co., 209 U.S. 1, 9 (1908).

70. See Apollo Co., 209 U.S. at 15 (acknowledging that musical compositions have been subject to protections of copyright law since 1831).

71. See id. at 10 (describing piano rolls and their manufacture).

72. See, e.g., id. at 9 (describing copyright violation claim brought against manufacturer of player pianos).

73. 209 U.S. 1 (1908).
were not “written or printed record[s] of [the composition] in intelligible notation.” The Court found that the Copyright Act did not grant any right to control mechanical reproductions, and, therefore, the piano roll manufacturers could not be held liable for infringement. The Court acknowledged the potential unfairness of this ruling but declared in dicta that the authority to amend the copyright statute rested only with Congress.

Congress heard the Court’s call and acted quickly to extend the rights of musical composition copyright holders. The Copyright Act of 1909 granted copyright holders the exclusive right to control mechanical reproductions of their musical compositions. The right, although exclusive, was not unconditional. In drafting the new legislation, Congress considered the monopolistic conditions developing in the music industry at the time. While the Supreme Court deliberated Apollo, many music publishers assumed that the decision would favor an exclusive right to control mechanical reproductions and, thus, granted licenses, pending the positive outcome of the case, to the Aeolian Company, a manufacturer of piano rolls. Fearing a grant of monopoly power to the Aeolian Company, Congress made the mechanical license compulsory, requiring that “as a condition of extending the copyright control to such mechanical reproductions,” once a copyright owner uses, permits, or knowingly acquiesces in the use of the copyright for a mechanical reproduction “any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty of two cents on each such part manufactured.” Consequently, once the copyright holder allowed one mechanical reproduction of a musical composition, anyone else could use the composition upon payment of the statutory fee. The Copyright Act of 1909 did not include any provision for raising the royalty.

74. Apollo Co., 209 U.S. at 17 (quoting Copyright Act current at time).
75. Id. at 18.
76. See id. (acknowledging that ruling “enables the manufacturers thereof to enjoy the use of musical compositions for which they pay no value” and that “such considerations properly address themselves to the legislative, and not to the judicial, branch”).
77. See Copyright Act of 1909, ch. 320, § 1(e), 35 Stat. 1075, 1075, repealed by 17 U.S.C. § 115 (2000) (granting copyright holders right to “make any arrangement or setting of [the composition] or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced”).
79. See id. at 3 n.20 (noting that in exchange for pursuing litigation up to Supreme Court, numerous music publishers granted Aeolian Company “exclusive long-term license agreements to manufacture perforated music rolls”).
80. See Schuonberg, supra note 28, at 453 (explaining that Congress used section 115 to break potential monopoly on piano rolls and that this desire to eliminate monopolies was part of President Theodore Roosevelt’s “trust-busting” policy).
81. Copyright Act of 1909, ch. 320, § 1(e), 35 Stat. at 1076.
82. There have always been lingering questions about the constitutionality of the compulsory
2. Major Amendments

Congress did not make any amendments to the compulsory license provision of the Copyright Act of 1909, with all of its ambiguities and its two-cent royalty rate, until 1976. In the interim, numerous bills to amend the provision were introduced, but none successfully. Most of the bills called for repealing or limiting the compulsory license in favor of the composer’s right to control use of his musical composition. With the 1976 amendments, Congress undertook a major overhaul of the 1909 Copyright Act and specifically made significant changes to the compulsory license. In its consideration of the compulsory license provision, which began in 1961, Congress again looked to the market conditions in the music industry and noted that the industry was thriving and the monopolistic threat of 1909 was no longer present. Thus, debates ensued over whether the compulsory license provision should be repealed as no longer necessary. By that time, however, record companies dominated the music market and compulsory licensing kept the costs of record production low, an advantage they did not want to give up. Although the Register of Copyrights and numerous artist advocacy groups recommended repealing the compulsory license, the strong lobbying power of the recording industry, represented by the RIAA, shifted the focus of Congress’s inquiry from whether to keep compulsory licensing to how much the royalty rate should be.

license, Theresa M. Bevilacqua, Note, Time to Say Good-Bye to Madonna’s American Pie: Why Mechanical Compulsory Licensing Should Be Put to Rest, 19 CARDOZO ARTS & ENT. L.J. 285, 293 (2001). It has been argued, although never in court, that the compulsory license is unconstitutional because it is contrary to the constitutional grant to copyright owners of “exclusive rights” in their works. Id. at 293-94; see also U.S. CONST. art. I, § 8, cl. 8 (granting exclusive rights to authors and inventors in their writings and discoveries).

83. See Bevilacqua, supra note 82, at 291 (discussing 1976 revisions to 1909 Copyright Act). In addition to lacking a provision for increasing the royalty rate, the 1909 Copyright Act was considered poorly drafted and created judicial confusion. Notably, it seemed that under the 1909 Copyright Act “bootlegging,” or copying a sound recording, was allowed as a “similar use.” Id. at 290. Indeed, copyright scholar Professor David Nimmer believed that the Act permitted bootlegging. Id. at 291 n.37. The uncertainty as to bootlegging was resolved in Congress’s later amendments of the Act. See id. (stating that Copyright Act of 1976 resolved ambiguity of “similar use” language and specifically barred bootlegging).

84. Id. at 292.

85. Bevilacqua, supra note 82, at 292.

86. See infra notes 92-107 and accompanying text detailing the changes made to the compulsory licensing provision now codified as section 115.


88. Id. at 33-35.

89. See id. (describing recording industry’s opposition to change in compulsory licensing statute).

90. Bevilacqua, supra note 82, at 298.

91. See H.R. REP. NO. 94-1476, at 107 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5722 (concluding that compulsory licensing is still warranted but recognizing that system is unfair to copyright owners and statutory rate is too low).
The 1976 amendments to the Copyright Act clarified many of the ambiguities of the 1909 Act. First, they specified that a musical composition would not be subject to compulsory licensing until it was distributed to the public rather than when first used mechanically by the owner. Second, Congress added the requirement that the person seeking the compulsory license must have a primary purpose of distributing the phonorecords to the public for “private use.” Congress included this requirement to prevent use of the compulsory license for phonorecords intended for commercial use, such as for jukeboxes and background music services. Third, the amendments placed express limitations on the use of a compulsory license for “bootlegging,” or duplicating the sound recording made by another, permitting it only when the licensee also obtains a license from the owner of the copyright in the sound recording.

Next, Congress clarified what liberties a person with a compulsory license may take when reproducing the musical composition. Congress amended section 115 to provide that while the licensee is granted the privilege of making his or her own arrangement of the musical composition to conform it to his or her own style or interpretation, that arrangement cannot “change the basic melody or fundamental character or the work.” Congress added this limitation to prevent the composition from being “perverted, distorted, or travestied.” The administrative process of obtaining a compulsory license also changed, requiring that notice of “intention to obtain a compulsory license” be served on the copyright holder within thirty days of the making of any phonorecords and before the distribution of any phonorecords. Failure to comply with the notice requirement would result in the loss of the opportunity to obtain a compulsory license. Finally, the 1976 amendment raised the statutory royalty rate for a

92. See 17 U.S.C. § 115(a)(1) (2000) (making compulsory licensing available once “phonorecords of a nondramatic musical work have been distributed to the public in the United States under the authority of the copyright owner”).
93. See id. (specifying that person will only be granted compulsory license if “his or her primary purpose in making phonorecords is to distribute them to the public for private use”); see also H.R. Rep. No. 90-83, at 68 (1967) (explaining that Register’s suggestion of phrase “private home use” was rejected because Congress feared that it might block use of compulsory licenses for tapes made for private use in cars, for which it wanted compulsory licenses to be available); STAFF OF H. COMM. ON THE JUDICIARY, 89TH CONG., SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL 55 (Comm. Print 1965) [hereinafter REGISTER’S SUPPLEMENTAL REPORT] (explaining that compulsory license was meant only to apply to records distributed for use in private homes and recommending that statute be clarified by changing language to read “private home use”).
95. See 17 U.S.C. § 115(a)(1) (clarifying that compulsory license cannot be obtained for duplicating sound recording of another unless recording was made lawfully and license is procured from owner of copyright in sound recording).
96. Id. § 115(a)(2).
99. Id. § 115(b)(2). As a result, the licensee would have to negotiate a license with the copyright holder, which he or she was not required to grant at all, without the statutory royalty ceiling.
compulsory license from $0.02 to $0.0275.\textsuperscript{100} Congress did not leave this rate to stay, however, and created the Copyright Royalty Commission to periodically review and recalculate the statutory rate.\textsuperscript{101}

The next major amendment\textsuperscript{102} to section 115 came when Congress passed the Digital Performance Right in Sound Recording Act of 1995 ("DPRSA").\textsuperscript{103} The DPRSA amended section 115 to include digital phonorecord deliveries ("DPDs"), defined as an “individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction.”\textsuperscript{104} Again responding to changes in the music market, Congress added DPDs to the compulsory license scheme in response to the rise of digital musical sales. Like piano rolls in 1908, the 1976 Copyright Act was not tailored to cover this new technology. Congress intended to make it clear that these new digital formats were not outside the scope of the mechanical reproduction rights of copyright holders.\textsuperscript{105} Under section 115, as amended in 1995, digital downloads and performances of musical compositions were subject to compulsory licensing.\textsuperscript{106} Since 1995, only minor changes have been made to section 115, none substantially affecting the compulsory license.\textsuperscript{107}

C. Derivative Works

1. Definition and General Exclusion from Section 115

A compulsory license granted under section 115 does not grant the licensee all of the copyright holder’s exclusive rights under section 106.\textsuperscript{108} Section 115 expressly states that only “the exclusive rights provided by clauses (1) and (3) of section 106, to make and to distribute phonorecords of such works, are subject to

\begin{itemize}
  \item \textsuperscript{100} Id. § 115(c)(2).
  \item \textsuperscript{101} See 17 U.S.C. § 801 (1976) (creating and outlining rules for Copyright Royalty Tribunal).
  \item \textsuperscript{102} In 1984, section 115 was amended slightly to include in compulsory licensing the right to control rental, lease, and lending of musical compositions. Record Rental Amendment of 1984, Pub. L. No. 98-450, § 3, 98 Stat. 1727, 1727 (codified as amended at 17 U.S.C. § 115 (2000)).
  \item \textsuperscript{104} 17 U.S.C. § 115(d). An example of a DPD is a digital music file, such as an MP3, downloaded from the Internet to a computer. Music files purchased and downloaded on iTunes are considered DPDs under the 1976 Copyright Act. See 17 U.S.C. § 115(c)(3)(A) (including digital music under compulsory license provisions).
  \item \textsuperscript{105} See S. Rep. No. 104-128, at 37 (1995), \textit{reprinted in} 1995 U.S.C.C.A.N. 356, 384 ("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.").
  \item \textsuperscript{106} 17 U.S.C. § 115(c)(3)(A).
  \item \textsuperscript{107} Minor amendments were also made to section 115 in 1997 and 2004. See Copyright Royalty and Distribution Reform Act of 2004, Pub. L. No. 108-419, § 5, 118 Stat. 2341, 2364-65 (replacing copyright arbitration royalty panels with Copyright Royalty Judges and authorizing submission of novel questions of copyright law to Register of Copyrights by Copyright Royalty Judges); Pub. L. No. 105-80, § 4, 111 Stat. 1529, 1531 (1997) (making only technical changes to Act).
  \item \textsuperscript{108} 17 U.S.C. § 115.
compulsory licensing.”109 The other exclusive rights of the copyright holder110 remain under the owner’s control and can be licensed only at his discretion and subject to freely negotiated terms. One of those retained rights is the right to prepare derivative works, which is provided for in clause (2) of section 106.111 Thus, the statute expressly excludes derivative works112 and a person planning to create a derivative work generally cannot make use of the compulsory license and must negotiate a license with the copyright holder.113

The Copyright Act defines derivative works as being “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.”114 The definition of derivative works also adds that “[a] work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a ‘derivative work.’”115 To illustrate what normally constitutes a derivative work, consider a novel written in English. A translation of that novel into another language would be a derivative work based on that novel. A motion picture version of the novel would be a derivative work based on the novel. Section 103 of the Copyright Act provides that the author of a derivative work may also obtain a copyright in the derivative work, but the protection will only extend to the material added and will not grant him any right in the preexisting

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109. Id.
111. See 17 U.S.C. § 106(2) (granting copyright holder right “to prepare derivative works based upon the copyrighted work”).
112. Congress’s intent to exclude derivative works rights from section 115 seems even more apparent when section 115 is compared with section 114(a), which details the limitations of the exclusive rights of the owner of a copyright in a sound recording. Section 114(a) states that these rights “are limited to the rights specified by clauses (1), (2), (3) and (6) of section 106.” 17 U.S.C. § 114(a) (2000). The specific mention of the derivative work right in section 114(a) shows that if Congress had intended to include the right in section 115, Congress would have specifically provided for it and that the omission was intentional. See SCHULENBERG, supra note 28, at 454 (examining statutory language and concluding that “[s]ection 115 does not give a right to create derivative works of musical compositions”). Professor Schunenberg noted that in the case of Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994), the defendant, rap group 2 Live Crew, never attempted to obtain a compulsory license for its parody of Roy Orbison’s “Oh, Pretty Woman,” which was so different from the original song that it arguably constituted a derivative work. SCHULENBERG, supra note 28, at 454; see also Campbell, 510 U.S. at 571-72 (noting different names given to versions of Orbison and 2 Live Crew). The group attempted to obtain a regular license and was denied (and later sued for using the song anyway). SCHULENBERG, supra note 28, at 447. Professor Schunenberg sees this example as evidence that a compulsory license cannot be used for derivative works. Id. at 454.
113. There is an exception to the exclusion of derivative works from section 115 detailed in section 115(a)(2). See infra notes 117-27 and accompanying text for a discussion of the exception in section 115(a)(2).
115. Id.
material. Referring again to the novel example, the person who translated the novel into another language would be able to obtain a copyright in the translated version. That copyright, however, would only apply to the translated words and not the original story. Therefore, the author of the translation would have no control over future uses of the original story. Accordingly, if a work meets this definition of a derivative work, the compulsory license provision of section 115 cannot be utilized to license the material in the underlying work that is to be used.

The language in section 115(a)(2), which specifically mentions a form of derivative work, seems to contradict the express exclusion of derivative works in the introductory provision of section 115 and can be interpreted to create an exception to the general exclusion of derivative works from compulsory licensing. Under section 115(a)(2), a compulsory license grants the right to make a "musical arrangement of the work." A musical arrangement, however, is one of the enumerated examples of a derivative work given in the definition of derivative works in section 101. The fact that these arrangements would be derivative works seems to have been recognized by Congress, which included in section 115(a)(2) the restriction that these permitted arrangements "shall not be subject to protection as a derivative work under this title, except with the express consent of the copyright owner." It seems that section 115 excludes the right to make derivative works in one provision only to authorize their production in the next. The resolution of this apparent contradiction is the conclusion that derivative works in general are outside the scope of compulsory licensing with the exception of those that qualify as permissible arrangements under section 115(a)(2). This resolution can be referred to as the "arrangement exception."

This privilege granted in the arrangement exception in section 115(a)(2) is strictly limited and only allows arrangement "to the extent necessary to conform it to the style or manner of interpretation of the performance involved." The statute mandates that the arrangement may not "change the basic melody or fundamental character of the work." The typical example of such an arrangement is what is known as a cover record in which one artist

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117. See id. § 115(a)(2) (allowing compulsory licensor to make musical arrangement of work, but denying such arrangements protection as derivative works).
118. Id.
121. The term "arrangement" is not defined in the Copyright Act. The term is defined by The New Encyclopedia of Music and Musicians as "[t]he process or result of readjusting a work for performance by different artistic means from that originally intended." The NEW ENCYCLOPEDIA OF MUSIC AND MUSICIANS 11 (Waldo Selden Pratt ed., The Macmillan Company 1929) (1924). The encyclopedia further defines arrangements as "relatively close or literal renderings of the substance and form of a work with only those modifications demanded by the limitations or peculiarities of the medium in view." Id.
122. 17 U.S.C. § 115(a)(2)
123. Id.
records a song originally written or recorded by another artist. Some of the most notable examples of such cover songs are Sid Vicious’s 1979 rendition of Frank Sinatra’s 1969 classic “My Way,”124 Whitney Houston’s 1992 recording of Dolly Parton’s 1974 hit “I Will Always Love You,”125 and Lenny Kravitz’s 1998 cover of the Guess Who’s 1970 release “American Woman.”126 In each of these instances, the later recording artist could make changes to adapt the song to his or her musical genre but could not go so far as to change the “basic melody or fundamental character” of the original musical composition.127 Therefore, the liberty that a compulsory licensor has to make changes to the licensed musical composition can be viewed on a continuum. At one end are permissible changes to adapt the song to a new genre or medium under the arrangement exception. As the changes become more dramatic, the new work eventually crosses a threshold where the basic melody or fundamental character have been changed and the new work no longer qualifies as an arrangement and is thus a derivative work that is outside the scope of section 115.

2. Originality: Infringement Versus Protection

Derivative works are important in two contexts in the Copyright Act: infringement and protection. Under section 106(2), a copyright owner has the exclusive right to prepare derivative works based on her copyrighted work,128 and anyone else who does so without authorization is infringing that right.129 Additionally, under section 103(a), the author of a derivative work may obtain copyright protection in that work, provided that her use of the preexisting work was lawfully authorized by the owner of the copyright in that work.130 In the protection context, courts have required that derivative works exhibit a requisite level of originality before protection will be granted.131 This originality
requirement is applied to all works that are granted copyright protection, regardless of whether they are derivative works.132

The federal circuits diverge, however, on whether a derivative work must also meet this level of originality for infringement purposes.133 This split has developed as a result of conflicting interpretations of the definition of a derivative work in section 101 of the Copyright Act. In some circuits, the definition is read to include the constitutional requirement of originality,134 and therefore require that for any work to qualify as a derivative work for infringement purposes it must also be independently copyrightable.135 These courts read the originality requirement into section 101’s definition of derivative works by reading the two sentences of the definition together.136 The first sentence, which omits the word “original,” declares a derivative work to be one that is “based upon one or more preexisting works.”137 The second sentence, however, encompasses the concept of originality by declaring that a work consisting of revisions, annotations, or other changes, “which, as a whole, represent an original work of authorship, is a ‘derivative work.’”138 In other circuits, the second sentence is not read to impose an originality requirement on all works that are “based upon one or more preexisting works,”139 and in those circuits a work does not have to be independently copyrightable to meet the definition of a derivative work for infringement purposes.140

The Ninth Circuit Court of Appeals, in Mirage Editions, Inc. v. Albuquerque A.R.T. Co.,141 ignored the second sentence of the derivative works definition in affirming a district court decision holding that the mounting of
legally purchased artworks on ceramic tiles for retail sale infringed the artwork copyright holders’ right to prepare derivative works under section 106(2) of the Copyright Act. The court reasoned that the derivative work right was created to extend the copyright owners’ protections beyond mere reproduction to other alternatives that “recast, transformed or adapted” the work and that incorporating the artworks in the tiles “certainly recast or transformed the original images.” The court held that simply making another version of a work constitutes a derivative work and will be considered infringement if the content taken from the preexisting work was substantial enough to constitute infringement if used without permission of the copyright holder. Thus, Mirage created precedent in the Ninth Circuit that all that is required of a derivative work is for it to be another “version” of a preexisting work in which the portion used meets the general standards for copyright infringement. Under this standard, the work does not have to be independently copyrightable to qualify as a derivative work. This holding has been followed by subsequent Ninth Circuit cases.

Conversely, courts in the Second and Seventh Circuits have refused to follow the precedent set by Mirage. In Woods v. Bourne, Co., the Court of Appeals for the Second Circuit determined that for a work to qualify as a derivative work, it must contain a sufficient amount of originality to be “independently copyrightable.” The court affirmed a district court decision in which that court reasoned that the first sentence of the definition of derivative works must be read in conjunction with the second, and thus a derivative work must be an “original work of authorship.” The standard of originality of a derivative work, the Second Circuit held, is that “there must be at least some substantial variation [from the underlying work], not merely a trivial

142. Mirage, 856 F.2d at 1343-44.
143. Id. at 1344 (referring to 17 U.S.C. § 101 (1982)).
144. Id. at 1343.
145. For a work to be considered infringing, generally a plaintiff must show that the defendant copied the plaintiff’s work and that the copying constitutes improper appropriation. 2 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 9.1 (Supp. 2007).
146. There is further support for this standard in the accepted concept that a derivative work does not have to be fixed in a tangible form (a foremost requirement for copyright protection) in order to infringe. See H.R. REP. NO. 94-1476, at 62 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5675 (stating that preparation of derivative work can infringe even though it is not fixed in tangible form); Paul Goldstein, Derivative Rights and Derivative Works in Copyright, 30 J. COPYRIGHT SOC’Y 209, 231 n.75 (1983) (agreeing that work does not have to be fixed to be an infringing derivative work).
147. See, e.g., Micro Star v. Formgen, Inc., 154 F.3d 1107, 1112 (9th Cir. 1998) (following Mirage to reason that video game incorporating “levels” created within another video game infringed derivative work rights of copyright owners of preexisting video game); Sobhani v. @Radical.media, Inc. 257 F. Supp. 2d 1234, 1238 (C.D. Cal. 2003) (following Mirage to find that commercials incorporating clips from another copyrighted commercial constituted derivative works).
148. 60 F.3d 978 (2d Cir. 1995).
149. Woods, 60 F.3d at 990.
150. Id. at 989-91 (quoting Woods v. Bourne Co., 841 F. Supp. 118, 121 (S.D.N.Y. 1994)).
variation.'\textsuperscript{151} The Seventh Circuit, in \textit{Lee v. A.R.T. Co.},\textsuperscript{152} affirmed a district court decision which expressly rejected the Ninth Circuit precedent under \textit{Mirage} and, similar to the court in \textit{Woods}, held that there was an originality requirement implicit in the definition of derivative works under which the derivative works right could not be infringed unless the new work was original enough to be independently copyrightable.\textsuperscript{153} Under facts strikingly similar to \textit{Mirage}, the Court of Appeals for the Seventh Circuit found that mounting artworks onto ceramic tiles did not infringe the derivative work rights of the copyright holders.\textsuperscript{154} The court, however, declined to make a ruling on what, if any, level of originality is necessary for a derivative work and instead based its decision on the premise that the mounting of the artworks did not transform, recast, or adapt the works and therefore did not create derivative works.\textsuperscript{155} Despite its decision not to take a side on the issue, the court, in strong dicta, criticized the \textit{Mirage} precedent.\textsuperscript{156} Numerous cases\textsuperscript{157} have followed the positions of the Second and Seventh Circuits that for a work to be an infringing derivative work it must be sufficiently original to merit copyright protection.\textsuperscript{158}

\footnotetext[151]{\textit{Id.} at 990 (alternation in original) (quoting \textit{L. Batlin & Son, Inc. v. Snyder}, 536 F.2d 486, 491 (2d Cir. 1976) (en banc)).}

\footnotetext[152]{125 F.3d 580 (7th Cir. 1997), aff'g 925 F. Supp. 576 (N.D. Ill. 1996).}

\footnotetext[153]{\textit{Lee}, 125 F.3d at 582.}

\footnotetext[154]{\textit{Id.} at 582-83.}

\footnotetext[155]{\textit{Id.}}

\footnotetext[156]{\textit{Id.} The court stated: Indeed, if \textit{Lee} is right about the meaning of the definition's first sentence, then \textit{any} alteration of a work, however slight, requires the author's permission. We asked at oral argument what would happen if a purchaser jotted a note on one of the note cards, or used it as a coaster for a drink, or cut it in half, or if a collector applied his seal (as is common in Japan); \textit{Lee}'s counsel replied that such changes prepare derivative works, but that as a practical matter artists would not file suit. A definition of derivative work that makes criminals out of art collectors and tourists is jarring despite \textit{Lee}'s gracious offer not to commence civil litigation. If \textit{Lee} (and the \textit{N}inth \textit{C}ircuit) are right about what counts as a derivative work, then the United States has established through the back door an extraordinarily broad version of authors' moral rights, under which artists may block any modification of their works of which they disapprove.

\textit{Id.} at 582.}

\footnotetext[157]{\textit{See}, e.g., \textit{Peker v. Masters Collection}, 96 F. Supp. 2d 216, 221 (E.D.N.Y. 2000) (finding that work infringes derivative works right only when it possesses threshold degree of originality); \textit{Precious Moments, Inc. v. La Infantil, Inc.}, 971 F. Supp. 66, 69 (D.P.R. 1997) (holding that copyrighted fabric featuring \textit{Precious Moments} characters that was purchased and sewn into bedding did not constitute derivative work because it lacked requisite originality).}

\footnotetext[158]{The differing interpretations of the originality requirement for derivative works have presented an issue in the context of motion picture trailers, which consist solely of short clips of full-length movies. In \textit{Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc.}, 192 F. Supp. 2d 321 (D.N.J. 2002), \textit{aff'd on other grounds}, 342 F.3d 191 (3d Cir. 2003), the court held that two-minute movie trailers that included no original work beyond the shortening and rearrangement of the full-length movie likely constituted derivative works. 192 F. Supp. 2d at 331; \textit{see also} \textit{Lamb v. Starks}, 949 F. Supp. 753, 755-56 (N.D. Cal. 1996) (finding movie trailer to be derivative work of full-length movie).}
3. Originality: Substantial Versus Trivial Variations

Even within the circuits in which it is accepted that a certain level of originality must be present for classification as a derivative work, there is conflicting case law on the standard by which courts should determine if the work meets the requisite originality for independent copyright protection. The seminal authority on the originality standard is *Alfred Bell & Co. v. Catalda Fine Arts, Inc.* The Second Circuit, in *Alfred Bell*, declared that all that is needed to satisfy constitutional originality requirements is some distinguishable variation on the preexisting work that is more than "'merely trivial.'" The court embellished that the requirement was "'little more than a prohibition of actual copying'" and could be satisfied by as little as a deviation in a copy caused by the copier's bad eyesight or shock at a clap of thunder.

The Second Circuit revisited the originality requirement for derivative works in 1976 in *L. Batlin & Son, Inc. v. Snyder*, adopting a higher standard for originality. In *Batlin*, the Second Circuit denied copyright protection to a plastic version of a novelty "Uncle Sam" coin bank based on a metal Uncle Sam bank design that was in the public domain. The court held that the level of originality necessary to support copyright protection in a derivative work requires some "substantial variation" from the preexisting work, more than the "merely . . . trivial variation such as might occur in the translation to a different medium." Although recognizing that there were several distinguishable changes made by the author of the plastic version, the court dismissed these as insubstantial and unable to support copyright protection independently.

Comparatively, in *Clean Flicks of Colorado, LLC v. Soderbergh*, the court held that family-friendly edited versions of full-length motion pictures were not "transformative" enough to qualify as derivative works.

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161. *Alfred Bell*, 191 F.2d at 103 (quoting Hoag-Sprague Corp. v. Frank C. Meyer Co., 31 F.2d 583, 586 (E.D.N.Y. 1929)).

162. Id. at 105.

163. 536 F.2d 486 (2d Cir. 1976).

164. See *Batlin*, 536 F.2d at 491 (deciding that to be eligible for copyright protection, derivative work must show "substantial variation" from preexisting work).

165. Id. at 491-92. Items in the public domain are those items that are not protected by copyright, either because they were never eligible, because their copyright protection has expired, or because their authors have dedicated them to the public domain. A. Samuel Oddi, *The Tragicomedy of the Public Domain in Intellectual Property Law*, 25 HASTINGS COMM. & ENT. L.J. 1, 1-5 (2002).

166. Id. at 491.

167. Id. at 489. *Batlin*’s “substantial variation” standard was relied on heavily in the Second Circuit’s more recent decision on the originality requirement for derivative works. *Woods v. Bourne*
While the Supreme Court has not directly addressed the issue of originality in the context of derivative works, the Court has ruled on the originality requirement in general and its application to compilations, 168 which can be easily analogized to derivative works. 169 In Feist Publications, Inc. v. Rural Telephone Service Co., 170 the Supreme Court recognized that in order to be eligible for copyright protection, a work will have to demonstrate originality in “some minimal degree of creativity.” 171 The Court explained that the requisite level is “extremely low” and that “even a slight amount will suffice.” 172 A work will be found to meet the requisite originality as long as it contains “some creative spark,” regardless of how “crude, humble or obvious’ it might be.” 173 Feist considered the copyright in a white pages phone directory in which phone numbers were listed alphabetically. 174 The Court decided that this was one of the few works in which the selection and arrangement of preexisting material (phone numbers in alphabetical order by name) was so obvious that it lacked the required “modicum of creativity.” 175 The standard articulated in Feist is arguably lower than the one adopted by the Second Circuit in Batlin.

D. The Challenge Presented by Ringtones

1. Ringtone Technology

Cell phone ringtones have progressed over an exceptionally short period of time from a technologically basic novelty product to a highly advanced and extremely popular digital music format. 176 Cell phone manufacturers developed and distributed the first ringtones in the late 1990s by including simple preloaded melodies in their cellular handsets. 177 These simple ringtones, known as

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168. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 346, 350-51 (1991). A “compilation” is defined as “a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.” Id. at 356 (quoting 17 U.S.C. § 101 (1976) (emphasis omitted)).

169. The requirements for copyright protection for compilations and derivative works are the same, according to the standard articulated in 17 U.S.C. § 103(b) (2000).


171. Feist, 499 U.S. at 345.

172. Id.

173. Id. (quoting 1 MELVILLE NIMMER & D. NIMMER, COPYRIGHT § 1.08[C][1] (1990)).

174. Id. at 342.

175. Id. at 362.


177. Sumanth Gopinath, Ringtones, or the Auditory Logic of Globalization, FIRST MONDAY,
monophonic ringtones, were often renditions of songs in the public domain. Monophonic ringtones used single notes played one at a time to reproduce brassy versions of the underlying composition that would play to alert a phone owner of an incoming call. As early as 1998, third-party retailers, known as content aggregators, began to provide monophonic ringtones for download. By early 2000, manufacturers developed polyphonic ringtones, which allowed for multiple, sophisticated sounds to be played at the same time, producing a sound that was much closer to the actual song.

2. Early Licensing Deals

As ringtones became more popular, providers began to offer more current songs, not just songs from the public domain. Because they were dealing with copyright-protected material, ringtone providers now had to procure licenses for distribution. Monophonic and polyphonic ringtones are reproductions of a musical composition in Musical Instrument Digital Interface (“MIDI”) sound files, not replays of sound recordings, so ringtone providers only had to license the underlying musical compositions of the songs. While the ringtone market flourished overseas, it grew slowly in the United States, and music publishers were reluctant to grant licenses at first.

Eager to catch the market as it grew, ringtone providers began distributing the ringtones without waiting for licenses from the copyright holders. This practice was especially dangerous, because music publishers could sue the providers for copyright infringement. While the ringtone providers had...
originally argued that ringtones were subject to compulsory licensing under section 115, they relinquished the position when music publishers, who were in the position to sue them for infringement already, rejected the idea and demanded individually negotiated licenses for ringtones. Rather than face costly litigation, ringtone providers agreed to deals in which they paid royalties to publishers of approximately ten percent of the retail price of each ringtone. With ringtones selling at $1.99 to $2.99 each, this royalty was at least double the statutory royalty rate for compulsory licenses.

3. The Rise of the Mastertone

Ringtone technology advanced, and, in 2003, manufacturers developed cellular handsets that could play actual sound recordings as ringtones, now known as mastertones. Because mastertones play copyrighted sound recordings, at this point, ringtone providers needed to license both the underlying musical composition, owned by music publishers, and the actual sound recording, owned by record labels. While music publishers granted licenses for mastertones at the same royalty rate they did for monophonic and polyphonic ringtones, recording companies demanded a much higher rate. Record labels typically grant licensing rights at the rate of forty to fifty percent of the retail value of the recording, and they made no exception for ringtones. By taking such a large cut of ringtone revenues, record labels have greatly decreased the profits of ringtone providers, who are now often left with only a seven percent profit margin as compared to an almost fifty percent profit margin with monophonic and polyphonic ringtones.

190. See supra Part II.B for a discussion of section 115 and its statutory requirements.
191. Masur & Chitakar, supra note 176, at 151; see also Harry Fox Agency, Ringtones FAQ, http://www.harryfox.com/public/infoFAQRingtones.jsp (last visited June 1, 2008) (stating that “DPD licenses issued under Section 115 of the Copyright Act do not extend to the making or distribution of Phonic Ringtones or Pre-Recorded Ringtones” for which a licensee “need[s] to obtain a specialized ringtone license”).
193. As of January 1, 2006, the statutory compulsory mechanical rate is $0.091. U.S. COPYRIGHT OFFICE, supra note 13.
194. Gopinath, supra note 177.
195. “Master ringtones” are defined as “excerpts from the original sound recording (6, 18 or 30 seconds) played when the phone rings.” INT’L FED’N OF THE PHONOGRAPHIC INDUS., supra note 179, at 10. Mastertones are also known as true tones, real tones, or master recording ringtones. Id.
196. Gopinath, supra note 177. See supra Part II.A.2 for a discussion of the two copyrights present in a sound recording and why both must be licensed.
197. Gopinath, supra note 177.
198. Id.
199. See Masur & Chitakar, supra note 176, at 152 (breaking down distribution of mastertone profits). In general, the recording company takes 40% of the retail price, music publishers take 10%, performing rights organizations take 3-5%, wireless carriers take 30%, technology providers take 10%, and ringtone service providers are left with just 7% of the retail price. Id.
4. Price Pressure and the Money Grab

The rise in popularity of ringtones in general,\textsuperscript{200} especially mastertones, has put pricing pressure on providers who are looking for new ways to increase profit margins. Worldwide, ringtone sales have grown to a value of four billion dollars, accounting for about ten percent of the global music market.\textsuperscript{201} In the United States alone, fifty percent of cell phone users have downloaded at least one ringtone.\textsuperscript{202} In 2005, mastertones accounted for sixty percent of ringtone revenues, nearly double the revenues collected from sales of polyphonic ringtones.\textsuperscript{203} Because ringtones retail for two to three times the price of a digital download of a song,\textsuperscript{204} that market has been able to almost match the revenue of the music industry’s download business on half the volume.\textsuperscript{205} In recognition of the popularity of ringtones, Billboard Magazine began ranking ringtone downloads in a “Top 40” chart in 2004,\textsuperscript{206} and, in June 2006, the RIAA began awarding gold and platinum sales awards for the top-selling ringtones.\textsuperscript{207}

The massive size of the ringtone market translates into millions of dollars at stake for those who get a piece of the ringtone revenue stream. For providers, this means that even a slight decrease in costs, multiplied by the massive sales volume, will result in a multimillion dollar profit increase.\textsuperscript{208} As a result, ringtone providers have returned to their initial stance that the compulsory mechanical license guaranteed by section 115 of the Copyright Act covers licenses for ringtones.\textsuperscript{209} If ringtone providers could license musical compositions at the...
statutory rate set by section 115, currently $0.091 per reproduction,\textsuperscript{210} rather than the negotiated ten percent royalties they have been paying so far,\textsuperscript{211} they could secure a substantial profit increase.

The RIAA has joined ringtone providers in their arguments for compulsory licensing of musical compositions for ringtones.\textsuperscript{212} Even though most record labels are also affiliated with music publishing companies, the labels support compulsory licensing for two reasons. First, the labels would like to provide one-stop licensing to ringtone providers, granting them a license for ringtone use that encompasses both the sound recording and the musical composition.\textsuperscript{213} Second, the labels eventually want to provide their own ringtones to cell phone companies, cutting out ringtone providers and thus increasing their profit margin.\textsuperscript{214}

With the RIAA on their side, ringtone providers have a much stronger standing in their argument against music publishers, but publishers have held their ground so far. In June 2004, some record companies and ringtone providers decided to test the compulsory licensing waters by sending compulsory licensing notices and royalties at the statutory rate ($0.085 per reproduction at the time) to the Harry Fox Agency (“HFA”),\textsuperscript{215} the primary licensing and collection agency that represents music publishers.\textsuperscript{216} Jacqueline Charlesworth, senior vice president of HFA, returned the money and sent out a notice reiterating HFA’s position that the compulsory license does not cover ringtones\textsuperscript{217} and that those who continued to send compulsory payments would be doing so “at great risk.”\textsuperscript{218} While record companies and ringtone providers returned to paying the negotiated ringtone rates, they have not relinquished their efforts to invoke section 115.

\textsuperscript{210} U.S. COPYRIGHT OFFICE, supra note 13.
\textsuperscript{211} See supra Part II.D.2 for a discussion of the royalty arrangements originally negotiated between ringtone providers and music publishers.
\textsuperscript{212} Gonzalez, supra note 208, at 15.
\textsuperscript{213} Id.
\textsuperscript{214} Id.
\textsuperscript{215} The Harry Fox Agency is the “foremost mechanical licensing, collections, and distribution agency for U.S. music publishers.” Harry Fox Agency, About HFA, http://www.harryfox.com/public/HFAHome.jsp (last visited June 1, 2008). The HFA represents the majority of U.S. music publishers and licenses the largest percentage of mechanical and digital uses of music in the United States. Id.
\textsuperscript{217} Id.; Ringtones FAQ, supra note 191.
\textsuperscript{218} Gardner, supra note 216, at 3. For a full reprint of the letter, see Gonzalez, supra note 208, at 11-12.
E. The Decision of the U.S. Copyright Office

1. Questions and Arguments Presented

In an effort to clarify the issue, the RIAA began lobbying Congress to update section 115 to expressly include ringtones. For more immediate results, the RIAA also petitioned the Copyright Royalty Board for clarification on the issue. The Board, unable to reach a decision, ordered parties on both sides to submit briefs supporting their position and referred the question to the Register of Copyrights at the U.S. Copyright Office. The questions presented to the Register of Copyrights were:

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?

In support of its position, the RIAA argued that cell phone ringtones are DPDs under the Copyright Act and are subject to compulsory licensing under section 115 based on a plain-language reading of the statute. Specifically, the RIAA argued that ringtones lack the requisite originality to constitute derivative works, which are outside the scope of section 115, under authority from the Second and Seventh Circuits requiring that a work be independently copyrightable to qualify as a derivative work. Additionally, the RIAA countered that even if ringtones are considered to be derivative works, they are permissible arrangements under the arrangement exception in section 115(a)(2). On behalf of music publishers, the NMPA, the SGA, and the NSAI (collectively “copyright owners”) argued in their brief that ringtones are excluded from section 115. The copyright owners argued primarily that

221. Id. Pursuant to section 802(f)(1)(B) of the Copyright Act, the Copyright Royalty Judges may refer any novel question of law regarding interpretation of the Act to the Register of Copyrights to be resolved. 17 U.S.C. § 802(f)(1)(B) (Supp. IV 2004).
222. Memorandum Opinion, supra note 15, at 64,303.
223. Id. at 64,304.
224. Id. See supra Parts II.C.2-3 for a discussion of the Second and Seventh Circuit precedents on derivative works.
ringtones are not covered by section 115 because they are derivative works and thus are outside the express language of the statute.\textsuperscript{227} The copyright owners urged the Register to follow Ninth Circuit precedent holding that there is no requisite originality or creativity required to infringe the derivative works right\textsuperscript{228} but also argued that ringtone production encompasses enough creativity to meet the originality standard of any circuit.\textsuperscript{229} The copyright owners also argued that ringtones do not fall within the arrangement exception of section 115(a)(2) because they change the fundamental character or basic melody of the underlying musical composition.\textsuperscript{230} Last, the copyright owners contended that ringtones are also excluded from section 115 because they do not meet the private use requirement.\textsuperscript{231}

2. The Register Finds that Ringtones Are Covered by Section 115 and Subject to Compulsory Licensing

On October 16, 2006, after reviewing briefs submitted by the RIAA and the copyright owners and after oral argument on the issue, the U.S. Copyright Office released its decision.\textsuperscript{232} The Register held that cell phone ringtones are subject to the compulsory license provision of section 115.\textsuperscript{233} Specifically, the Register of Copyrights found that ringtones (monophonic, polyphonic, and mastertones) are DPDs as defined in section 115 and are distributed to the public for private use, even though they are sometimes used for personal identification in public.\textsuperscript{234} The application of section 115 to a ringtone, according to the Register, depends on whether the ringtone is simply an excerpt of the sound recording or if new material is added.\textsuperscript{235} The Register rejected the Ninth Circuit precedent on derivative works and found that ringtones that consist of only excerpts of a sound recording are not derivative works and, therefore, are within the scope of the compulsory license.\textsuperscript{236} Ringtones that add new material, however, may be classified as derivative works and fall outside the scope of section 115.\textsuperscript{237} Finally, the Register also decided that if a ringtone were deemed to be a derivative work, following its initial distribution with the permission of the copyright owner, it then would be subject to compulsory licensing, and anyone wishing to make and distribute that ringtone could obtain a compulsory license.\textsuperscript{238}
3. Industry Response

The parties instantly responded to the Copyright Office’s ruling. The RIAA quickly released a statement applauding the decision. Steven Marks, executive vice president and general counsel of the RIAA, claimed that the decision "injects clarity into the marketplace," which will help satisfy customer demand for ringtones by allowing them to be provided to consumers more quickly and easily. The organizations on the other side of the battle, representing music composition copyright owners, reacted strongly against the decision. A spokeswoman for the NMPA expressed the organization’s disappointment with the decision, which she called “an unprecedented broadening of the compulsory license.” HFA, which represents many NMPA members and other songwriters, quickly posted a statement on its Web site refusing to follow the decision. The statement declared that “HFA has not issued and is not issuing ringtone or mastertone licenses under the compulsory license provisions of Section 115.” On a final, foreboding note, the statement declared that HFA and NMPA were evaluating their legal options regarding the decision.

This butting of heads within the music industry over the ringtone issue will likely continue, despite the decision of the Copyright Office. The Office’s decision is only advisory and is not controlling over courts, which could reach a different decision if a ringtone licensing case is brought. Ultimately, even a

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240. Id.


242. See Harry Fox Agency, supra note 18 (stating that Register of Copyright’s administrative ruling does not affect HFA’s policies regarding DPD licenses).

243. Id.

244. Id. The reaction posted by HFA read, in relevant part:

Recently, the Register of Copyrights issued an administrative ruling in the context of the pending Section 115 rate proceeding before the Copyright Judges in Washington, DC concerning the availability of the statutory compulsory license as to ringtones and mastertones under certain circumstances. This decision has no effect on HFA’s existing policy that DPD licenses issued by HFA on behalf of publishers are limited to the making and distribution of full downloads comprising full-length musical works and do not cover the additional configurations of ringtones or mastertones. HFA has not issued and is not issuing ringtone or mastertone licenses under the compulsory license provisions of Section 115.

Publishers have successfully licensed ringtones and mastertones in the free market for years, including through HFA’s ringtones licensing program. HFA is therefore greatly disappointed by the Register’s decision in the ratesetting proceeding to subject certain ringtones and mastertones to the compulsory license, which will hurt publishers and songwriters. Acting in conjunction with the NMPA, HFA is currently evaluating legal options with respect to the Register’s decision.

Id.

court decision can be overcome by congressional amendment to section 115; the
RIAA continues to lobby for this result.246

III. DISCUSSION

Contrary to the conclusion of the Register of Copyrights, ringtones should
not be subject to the compulsory license under section 115247 for several
reasons.248 First, ringtones are derivative works under the definition in section
101 of the Copyright Act.249 As derivative works, they may not make use of the
compulsory license under section 115 unless they fall into the arrangement
exception of section 115(a)(2).250 Ringtones, however, do not fall into this
exception and, therefore, are outside the scope of the compulsory license.251
Additionally, ringtones do not satisfy the private use requirement of section
115.252 This construction of the Copyright Act is consistent with the
congressional intent behind the compulsory license provision, which calls for a
narrow interpretation.253 In addition to extending the scope of section 115 to an
unprecedented level, the Register’s decision adds confusion and uncertainty to
an already volatile legal fight because it provides no real solution and was not
the proper venue for consideration of the ringtone question.254

As indicated by the cryptic statements of HFA,255 music publishers and
their representatives likely will seek a judicial ruling on the applicability of
the section 115 compulsory license to ringtones. While Congress has been discussing

L.J. 561, 575 (2005) (explaining that Copyright Office “does not have the authority to create law by
which courts must abide”).
246. Congress has been holding hearings for the last few years to discuss possible amendments to
section 115, but no bill has moved beyond the committee stage. See generally Discussion Draft of the
Section 115 Reform Act (SIRA) of 2006: Hearing Before the H. Subcomm. on Courts, the Internet, &
(discussing possible solutions to reform music licensing laws suggested jointly by music publishers and
online music companies); Digital Music Licensing and Section 115 of the Copyright Act: Hearing
Before the H. Subcomm. on Courts, the Internet, & Intellectual Prop. of the H. Comm. on the Judiciary,
109th Cong. (2005) [hereinafter Licensing Hearing] (determining how to update and modernize music
licensing, with special attention on section 115).
license and its statutory requirements.
248. See infra Part III.A for several arguments supporting the premise that ringtones are not
subject to compulsory licensing under section 115.
249. Cf. 17 U.S.C. § 101 (defining “derivative work” and listing examples, including
“abridgment[s],” which arguably can be analogized to ringtones). See infra Part III.A.1 for a
discussion of why ringtones are derivative works.
251. See infra Part III.A.2 for a discussion of why ringtones do not fall into the arrangement
exception.
252. See infra Part III.A.3 for a discussion of why ringtones fail to meet the private use
requirement.
253. See infra Part III.A.4 for a discussion of why this interpretation serves the congressional
intent behind the section 115 compulsory license.
254. See infra Part III.B.1 for a discussion of the detrimental effects of the Register’s decision.
255. See supra notes 242-44 and accompanying text for a review of HFA’s threat of legal action.
amendments to section 115 to clarify which new technologies the compulsory license will cover, 256 no amendments have been officially proposed and there is no indication that Congress will pass an amendment in the near future. It is worth noting that it took Congress over ten years to discuss, draft, and pass the 1976 amendments to section 115. 257 With no clarification from Congress in sight, the parties involved in the ringtone dispute will likely seek a judicial decision on whether ringtones are covered by the current version of the compulsory licensing provision. In analyzing this dispute, the court petitioned, regardless of the circuit chosen, should find that ringtones are not covered by the compulsory license provision. Such a ruling will benefit the music industry by reducing confusion and bringing the clarity of a bright-line rule to the ringtone issue. 258

A. Ringtones Are Not Subject to Compulsory Licensing Under Section 115

1. Ringtones Are Derivative Works

Ringtones qualify as derivative works under the definition in section 101 of the Copyright Act, 259 because they are based on preexisting works (original sound recordings and musical compositions) and they consist of significant modifications to the works (shortening, looping, etc.). 260 Ringtones can be most closely analogized to “abridgment[s]” as the term is used in examples of derivative works given in the Copyright Act. 261 While that term usually refers to shortened versions of literary works, 262 courts have expanded its scope to other copyrighted works. 263 The Second Circuit has endorsed a dictionary definition of

256. See generally SIRA Hearing, supra note 246 (discussing continuing efforts to reform section 115 of the Copyright Act); Licensing Hearing, supra note 246 (debating methods of updating compulsory music licenses).

257. See REGISTER’S REPORT, supra note 87 (reporting on congressional debates in 1961 regarding amendments to Copyright Act that did not pass until 1976).

258. See infra Part III.B.4 for a discussion of the benefits that a bright-line rule against compulsory licensing for ringtones will bring to the music market.

259. Section 101 states:

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. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a “derivative work.”


260. See 17 U.S.C. § 101 (defining “derivative work” as work that has been created from preexisting work in which the original work has been “recast, transformed, or adapted”).

261. See id. (giving examples of derivative works, one of which is abridgment).

262. An abridgment is defined as a “condensation; contraction” or “[a]n epitome or compendium of another and larger work, wherein the principal ideas of the larger work are summarily contained.” Twin Peaks Prods., Inc. v. Publ’ns Int’l, Ltd., 996 F.2d 1366, 1375 (2d Cir. 1993) (citing 1 BOUVIER’S LAW DICTIONARY 91 (3d rev. 1914)).

263. See, e.g., Campbell v. Lavery, No. 95-15967, 1997 WL 21206, at *2 (9th Cir. Jan. 14, 1997)
an abridgment as a "‘condensation; contraction” or “[a]n epitome or compendium of another and larger work.” 264 Ringtones are usually short snippets of the most popular portions of a song, such as the hook. 265 It seems that a short snippet of the most important part of a song meets the definition of an abridgment.

The Register’s requirement that a ringtone exhibit a level of originality to be considered an infringing derivative work 266 is misplaced. The Register chose to apply the creativity requirements of Feist Publications, Inc. v. Rural Telephone Service Co. 267 and Woods v. Bourne Co. 268 in her analysis. 269 While Feist is controlling Supreme Court precedent on a mandated showing of originality in order for a derivative work to qualify for copyright protection, 270 it does not speak to whether this originality is required for a derivative work to constitute copyright infringement of the preexisting work. Because section 115 only applies to a copyright owner’s exclusive rights of distribution and reproduction, it cannot be used to grant rights to prepare derivative works. 271 Therefore, the only relevant inquiry in determining whether section 115 excludes ringtones because they are derivative works is whether ringtones infringe the copyright holder’s derivative work rights.

It is irrelevant whether ringtones could also be independently copyrighted as derivative works by the producer because, contrary to existing precedent in the Second 272 and Seventh 273 Circuits, a derivative work should not need to be independently copyrightable to infringe the derivative work right. Legislative history indicates that Congress did not intend the standards for infringement and protection of derivative works to be the same. In House Report Number 94-1476, on the passage of the Copyright Act of 1976, the Judiciary Committee explained that for infringement purposes, a derivative work need not be fixed in a tangible medium, which is a requirement for copyright protection under

(unpublished table opinion) (finding that derivative software work may be abridgment of another software program).

264. Twin Peaks Prods., 996 F.2d at 1375.

265. See Parks v. LaFace Records, 329 F.3d 437, 452 (6th Cir. 2003) (defining “hook” as chorus of song).

266. Memorandum Opinion, supra note 15, at 64,310.


268. 60 F.3d 978 (2d Cir. 1995). See supra notes 148-51 and accompanying text for a discussion of Woods.

269. Memorandum Opinion, supra note 15, at 64,310, 64,315.

270. Feist, 499 U.S. at 345-46 (declaring constitutional prerequisite for originality for copyright protection).

271. See 17 U.S.C. § 115 (2000 & Supp. IV 2004) (stating that, in nondramatic musical works, only exclusive rights granted by sections 106(1) and 106(3) are subject to compulsory licensing). See supra Part II.C.1 for a discussion of the exclusion of derivative works from compulsory licensing.

272. See Woods, 60 F.3d at 978, 990 (limiting derivative works to those that are independently copyrightable). See supra notes 148-51 and accompanying text for a discussion of Woods.

273. See Gracen v. Bradford Exch., 698 F.2d 300, 305 (7th Cir. 1983) (finding no infringement of derivative work right because derivative work was not independently copyrightable).
section 102 of the Copyright Act.\textsuperscript{274} The Committee cited examples of ballets and other performances that cannot be copyrighted but that can infringe the derivative work’s right.\textsuperscript{275} Thus, Congress did not intend for a derivative work to be independently copyrightable in order to infringe the derivative work’s right.

The Second Circuit’s and the Seventh Circuit’s readings of the definition of derivative works in the Copyright Act to impose a requisite level of creativity are inappropriate because the definition’s plain language does not dictate such a reading.\textsuperscript{276} The second sentence of the section 101 definition of derivative works can be read not to imply a standard of originality to derivative works but rather to give examples of derivative works, some of which are “original work[s] of authorship.”\textsuperscript{277} If derivative works were required to be independently copyrightable in all circumstances, there would be no need for Congress to pass section 103(a) explicitly clarifying that derivative works can be independently copyrightable.\textsuperscript{278}

The Register herself stated in her opinion that a ringtone is “by definition” a derivative work.\textsuperscript{279} Nevertheless, she countered that before a derivative work can infringe the derivative work right under section 106(2) it must be independently copyrightable.\textsuperscript{280} There is no language in section 106(2) that in any way indicates an altered definition of the derivative work right for infringement purposes.\textsuperscript{281} Therefore, the Register was mistaken in her construction of the Copyright Act.

Under the more appropriate standard, adopted by the Ninth Circuit in \textit{Mirage Editions, Inc. v. Albuquerque A.R.T. Co.},\textsuperscript{282} the originality requirement of \textit{Feist} does not come into play in analyzing the status of derivative works for infringement purposes, because all that is required is that a derivative work “‘recast, transformed or adapted’” the work.\textsuperscript{283} If this adaption, transformation, or recasting unlawfully uses a preexisting work, it is an infringing derivative work.\textsuperscript{284} Under the \textit{Mirage} standard, there is no question that ringtones would infringe the derivative work rights of musical composition copyright owners because they create new versions of the composition. It does not matter if these new versions are independently copyrightable or not.


\textsuperscript{275} H.R. REP. NO. 94-1476, at 62.

\textsuperscript{276} See 17 U.S.C. § 101 (noting that derivative work may be mere modification of original work).

\textsuperscript{277} Id.

\textsuperscript{278} See id. § 103(a) (explaining that subject matter of copyright under section 102 includes derivative works).

\textsuperscript{279} Memorandum Opinion, \textit{supra} note 15, at 64,310 n.80.

\textsuperscript{280} Id. at 64,310.

\textsuperscript{281} See 17 U.S.C. § 106(2) (authorizing copyright owner to prepare derivative works).

\textsuperscript{282} 856 F.2d 1341 (9th Cir. 1988).

\textsuperscript{283} \textit{Mirage}, 856 F.2d at 1344 (quoting 17 U.S.C. § 101 (1982)).

\textsuperscript{284} Id. at 1343.
Even under the Register’s adoption of the originality standard for infringing derivative works, ringtones would still meet the originality requirement because the creative judgment involved in the process of creating ringtones still meets the level of creativity required under *Feist*.\(^{285}\) The creation of a ringtone itself, involving the selection of a portion of the musical composition and the looping of portions of the composition,\(^{286}\) involves more than sufficient creativity to meet the constitutional requirement, which is “extremely low.”\(^{287}\) In *Feist*, the Supreme Court announced that “even a slight amount [of creativity] will suffice. . . ‘no matter how crude, humble or obvious.’”\(^{288}\) The Court reasoned that a factual compilation was protected by copyright, even though the facts themselves could not be copyrighted, because they had been organized in an original way.\(^{289}\) Similarly, the creation of a ringtone, which involves creative selection and organization of a musical composition, meets the originality requirement to be considered independently copyrightable.\(^{290}\) The Register held that excerpts of music recordings made into ringtones lack the “original embellishments” necessary to meet the originality standard of independent copyrightability recognized in *Woods*.\(^{291}\) What the Register failed to consider is that the standard articulated in *Woods* is inconsistent with the lower standard set by the Supreme Court in *Feist*.\(^{292}\)

Most similar to ringtones, theatrical trailers for motion pictures, consisting of short clips of the full-length film, have been found to be infringing derivative works under the Copyright Act.\(^{293}\) For example, in *Video Pipeline, Inc. v. Buena Vista Home Entertainment, Inc.*,\(^{294}\) a federal court held that a trailer composed exclusively of selected scenes from a preexisting copyrighted motion picture, with no new content, constituted a derivative work.\(^{295}\) Similarly, a ringtone that

\(^{285}\) See 499 U.S. 340, 363 (1991) (stating that “copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity”). See *supra* Part II.C.3 for a discussion of the conflicting originality standards articulated by the Supreme Court and the Second Circuit.

\(^{286}\) See Initial Brief, *supra* note 226, at 14-15 (discussing how ringtones are produced).

\(^{287}\) *Feist*, 499 U.S. at 345.

\(^{288}\) *Id.* (quoting NIMMER & NIMMER, *supra* note 173, § 1.08 [C][1]).

\(^{289}\) *Id.* at 349.

\(^{290}\) Although the derivative work would be independently copyrightable, the copyright protection would be extremely thin, as noted in *Feist*, because the copyright would only extend to the method of arrangement used, not to any portion of the underlying work. *Id.* at 349-50.

\(^{291}\) Memorandum Opinion, *supra* note 15, at 64,310, 64,315; *see also* Woods v. Bourne Co., 60 F.3d 978, 990 (2d Cir. 1995) (declaring that there must be at least some substantial variation to musical composition to constitute derivative work, not just trivial variations).

\(^{292}\) See Page, *supra* note 159, at 421-22, 424 (arguing that *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486 (2d Cir. 1976) (en banc), on which *Woods* relied, is inconsistent with *Alfred Bell* and imposes too high of originality standard).

\(^{293}\) *See*, e.g., *Video Pipeline, Inc. v. Buena Vista Home Entmt’*`, Inc., 192 F. Supp. 2d 321, 331 (D.N.J. 2002) (determining that two-minute clip previews of copyrighted movies were likely derivative works), *aff’d on other grounds*, 342 F.3d 191 (3d Cir. 2003); *Lamb v. Starks*, 949 F. Supp. 753, 755-56 (N.D. Cal. 1996) (finding movie trailer to be derivative work of full-length movie).


\(^{295}\) *Video Pipeline, Inc.*, 192 F. Supp. 2d at 330-31.
selects portions of a preexisting musical composition and, in the case of a mastertone, the accompanying sound recording, to be showcased in a shortened version constitutes a derivative work.

In her decision, the Register adopted the RIAA’s view that the movie trailer cases were “of marginal relevance” because the selection of scenes for a theatrical trailer involves “a greater degree of editorial judgment” than the selection of portions of a song to use in a ringtone. This conclusion is unfounded. As evidenced by the massive market for ringtones in which multiple tones of the same song may be available showcasing different portions of the song or different reorderings and lengths of snippets, creating ringtones involves editorial skill and judgment to select which portions of the song will appeal most to customers and sound best as a cell phone ring. The Register had no basis for declaring that this process involved less editorial judgment than the creation of movie trailers based solely on clips from a full-length motion picture.

2. Ringtones Are Not Permissible Arrangements Under Section 115(a)(2)

As derivative works, the only way ringtones could still qualify for compulsory licensing is under the arrangement exception of section 115(a)(2). Ringtones, however, do not qualify for this exception because they are not “musical arrangement[s],” and even if they were, they alter the fundamental character and basic melody of the underlying musical work, which is not permitted by the arrangement exception.

A musical arrangement, as defined by the Register in her decision, refers to the “‘process or result of readjusting a work for performance by different artistic means from that originally intended. . . . with only those modifications demanded by the limitations or peculiarities of the medium in view.’” In creating ringtones, providers make modifications well beyond those necessary to adapt to the new medium. The RIAA argued, and the Register agreed, that ringtones qualify as musical arrangements because they involve modifying the musical composition, by shortening its length, to adapt to the limited memory of cell phones. This reasoning is flawed because most phones are now capable of downloading and playing full-length songs, yet demand for ringtones has

297. Oral Argument, supra note 1, at 20 (noting that there are nine or ten ringtone versions for “My Humps” by the Black Eyed Peas available for purchase at various lengths and content).
298. See Initial Brief, supra note 226, at 14 (describing skill and creative judgment involved in crafting ringtones).
increased. This demand evidences that ringtones are not just arrangements necessary to allow songs to be played on cell phones but rather are distinct variations of musical compositions to serve a separate market demand for products different from traditional song downloads. As such, ringtones are not “arrangement[s]” under section 115(a)(2) but are derivative works outside the scope of the compulsory license.

Even if ringtones were “arrangement[s]” of the preexisting musical composition, they still would not fall within the limited class of arrangements permitted by section 115(a)(2). That exception only applies to arrangements that do not “change the basic melody or fundamental character of the [original] work.” By deleting substantial portions of the underlying musical composition and, in some cases, reordering portions of the song, ringtones not only change, but remove portions of, the melody of the underlying works. A ringtone composed of a five-, ten-, or twenty-second clip of a sound recording cannot be said to reflect the basic melody of the entire piece. For example, a ten-second ringtone of Queen’s “Bohemian Rhapsody” could not possibly capture the basic melody of the classic song. Many providers offer a ringtone of the well-known, fast-paced portion of the “Bohemian Rhapsody” that does not reflect the basic slow melody of the rest of the composition.

The Register, however, agreed with the RIAA that a ringtone does not alter the basic melody of a musical composition, even if it is only a small portion of the piece, because ultimately ringtones seek to emulate the original composition. While this interpretation does not comply with most definitions of a musical arrangement, it still does not entitle ringtones to compulsory licensing because the exception expressed in section 115(a)(2) places two limitations on the permissible arrangements—they cannot change the basic melody or the fundamental character of the underlying composition. Congress added this limitation to prevent a composition from being “perverted, distorted, or travestied” through use of the compulsory license. Congress failed to provide more insight into the standard for this limitation, and there is no case law on its

303. See id. at 64,305 (acknowledging that because of technological advances, most cell phones can now play full songs).
304. See supra Part III.A.1 for a discussion of why ringtones are derivative works.
306. Id.
309. Memorandum Opinion, supra note 15, at 64,314-15 (reasoning that ringtones are created with intent of bringing to mind original song rather than deviating from it).
310. See WEBSTER’S NEW WORLD DICTIONARY 32 (Neufeldt ed., 1995) (defining musical arrangement as “an arranging of a composition” and musical arranging as “adapt[ing] (a composition) to particular instruments or voices”).
interpretation. Despite this lack of guidance, common sense indicates that converting a musical composition into a brassy, looping telephone ring certainly changes the fundamental character of the composition.\textsuperscript{313} Composers write songs to be enjoyed by listeners in their full length and on real musical instruments, not for use in utilitarian consumer products.\textsuperscript{314} It is likely that no musician would agree that Beethoven’s symphonies (among the most popular ringtones) retain their fundamental character when reduced to short clips of beeps and looped to serve as a utilitarian phone ringer.\textsuperscript{315} Thus, ringtones should fail to fall within the arrangement exception and be found to be infringing derivative works for which a license is required.

3. Ringtones Do Not Meet the Private Use Requirement

Compulsory licensing is also unavailable to ringtones because they are inherently intended for public play and therefore fail to meet the private use requirement of section 115(a)(1).\textsuperscript{316} That section requires that the compulsory licensee’s “primary purpose in making phonorecords [be] to distribute them to the public for private use.”\textsuperscript{317} The Copyright Act does not provide a definition of “private use,” but legislative history indicates that it refers to private listening in homes or cars.\textsuperscript{318} When Congress was drafting the provisions of section 115 for the 1976 Copyright Act, the Register of Copyrights suggested that the license be available only to phonorecords distributed for “private home use.”\textsuperscript{319} The word “home” was ultimately omitted from the statute because Congress recognized that it was common for members of the public to purchase music for listening in their cars as well and did not want this practice to prevent distributors from using the compulsory license.\textsuperscript{320} Thus, Congress intended to limit compulsory licensing to distributions of a noncommercial nature that are primarily intended for private listening by the purchaser and others in his or her home or car.\textsuperscript{321} While there is always the potential that the purchaser of a phonorecord such as a CD or MP3 could play it in public, this practice cannot be controlled by the distributor and therefore the compulsory license focuses on the “primary purpose” of the

\begin{itemize}
\item \textsuperscript{313} See Initial Brief, \textit{supra} note 226, at 16-17 (explaining many ways in which ringtones alter character of composition).
\item \textsuperscript{314} \textit{Id.} at 16-17.
\item \textsuperscript{315} \textit{Id.} at 17.
\item \textsuperscript{316} 17 U.S.C. § 115(a)(1).
\item \textsuperscript{317} \textit{Id.}
\item \textsuperscript{318} See \textit{supra} note 93 and accompanying text for an explanation of why Congress chose the language “private use” rather than the more limiting “private home use” phrase suggested by the Register.
\item \textsuperscript{319} Register’s Supplemental Report, \textit{supra} note 93, at 55.
\item \textsuperscript{320} H.R. REP. NO. 90-83, at 68.
\item \textsuperscript{321} See H.R. REP. NO. 94-1476, at 108 (1976), \textit{reprinted in} 1976 U.S.C.C.A.N. 5659, 5723 (concluding that scope of compulsory license requirement does not reach manufacturers of phonorecords that are intended primarily for commercial use, including broadcasters, jukebox operators, and background music services).
\end{itemize}
compulsory licensee rather than the actions of the public.322

Cell phone ringtones, as opposed to CDs and MP3s, do not just have the possibility of being used in public but rather are inherently intended for public use. If the sole purpose behind a ringtone was to listen to the song being played, there would be no reason to purchase a ringtone instead of a CD or MP3, which can easily be played on a portable music player or even a cell phone.323 Ringtones are distributed with the primary functional purposes of signaling incoming phone calls to the cell phone owner324 and playing in public in order to convey a message about the phone owner’s personality and interests.325 For example, one might choose a ringtone of Beethoven’s “Fifth Symphony” to indicate that he likes classical music and is an intellectual, or one might choose a ringtone of Justin Timberlake’s “SexyBack” to show that she is trendy and aware of the latest popular music. When these cell phones ring in public, these are the impressions that the phone owners hope to create. The use of a ringtone as a fashion accessory and form of personal expression has been recognized as a growing phenomena, with scholars reasoning that “[a] personalized ring tone not only allows for the immediate identification of an incoming call . . . but also makes a personal statement of musical taste.”326 Another journalist remarked that ringtones are “another way to express one’s tastes and personality.”327 Even Forbes published an article entitled “What Does Your Ringtone Say About You?”328

Perhaps the strongest support for a finding that ringtones are not intended for private use is the fact that PROs,329 which collect public performance royalties for musical composition copyright owners, currently collect royalties from ringtone sales.330 PROs generally license the right to perform a copyrighted musical work publicly to organizations and venues where public performances take place, such as concert venues.331 PROs claim that the ringing of a cell phone ringtone is a public performance of the copyrighted musical composition and demand that royalties be paid to license the public performance right.332 If

322. See 17 U.S.C. § 115(a)(1) (requiring that compulsory licensee’s “primary purpose” be to distribute phonorecords for private use).
323. See supra note 303 and accompanying text for a discussion of cell phones’ ability to play full-length songs.
324. See Memorandum Opinion, supra note 15, at 64,305 (adopting RIAA’s definition of ringtones as “a digital file, generally no more that [sic] 30 seconds in length, played by a cellular phone or other mobile device to alert the user of an incoming call or message”).
325. See supra note 200 discussing the personal aspects of ringtones.
326. Rosini & Rudell, supra note 200.
327. Bitting, supra note 200.
328. Ewalt, supra note 200 (noting that “a person’s choice of ringtone might speak volumes about his or her personality”).
329. See supra note 50 for an explanation of PROs and what they do.
330. See Masur & Chitrakar, supra note 176, at 152 (explaining that PROs collect two to three percent royalty on each ringtone).
331. SCHULENBERG, supra note 28, at 366.
ringtones are public performances of musical compositions, a view that PROs assert and ringtone providers acquiesce to in paying the performing rights royalty, then it simply does not follow that they are intended for private use. In her decision, the Register dismissed the claims that ringtones are intended for public use by equating their public performances to the use of a loud boom box or car stereo to play a CD.\textsuperscript{333} This reasoning is flawed, however, because it fails to recognize that unlike a CD, which can be played in public but is still primarily distributed for private use, a ringtone is distributed with the primary intention that it be played in public as a personal statement.

4. Excluding Ringtones from Compulsory Licensing Is Consistent with Congressional Intent Behind Section 115

Had Congress envisioned a market for cell phone ringtones when drafting amendments to the compulsory license provision, it likely would not have considered such ringtones to be within the scope of section 115.\textsuperscript{334} Legislative history consistently refers only to full length-works when debating the compulsory license, never mentioning parts or portions of works.\textsuperscript{335} The compulsory license under section 115 acts as an exception to the general rights enjoyed by copyright owners.\textsuperscript{336} As such, courts have held that it should be narrowly construed “lest the exception destroy, rather than prove, the rule.”\textsuperscript{337} In 1976, when Congress debated repealing the compulsory license but ultimately decided to retain it, Congress was careful to limit the license’s scope to narrow circumstances. While the 1995 DPRSA amendments to section 115 did extend the compulsory license to cover DPDs, it kept in place all of the statutory requirements that must be met before a compulsory license will be granted.\textsuperscript{338} These infrequent, nonexpansive amendments reinforce the courts’ decisions to narrowly construe the Act. The above narrow construction of section 115 is consistent with this history.

\textsuperscript{333} Memorandum Opinion, supra note 15, at 64,316.

\textsuperscript{334} See S. REP. NO. 104-128, at 37 (1995), reprinted in 1995 U.S.C.C.A.N. 356, 384 (reviewing mechanical reproductions for which compulsory license can be utilized as compact discs, vinyl records, and cassette tapes and including DPDs in definition of mechanical reproductions).

\textsuperscript{335} See id. (discussing application of compulsory license provision to phonorecords without making referring to parts or portions of phonorecords).

\textsuperscript{336} Fame Publ’g Co. v. Ala. Custom Tape, Inc., 507 F.2d 667, 670 (5th Cir. 1975).

\textsuperscript{337} Id.; see also Fred Ahlert Music Corp. v. Warner/Chappell Music, Inc., 155 F.3d 17, 24 (2d Cir. 1998) (noting narrow scope of compulsory license at issue); Edward B. Marks Music Corp. v. Colo. Magnetics, Inc., 497 F.2d 285, 288 (10th Cir. 1974) (reasoning that compulsory license exception “should be strictly construed to the end that an exception does not devour the general policy which a law may embody” (citing Shilkret v. Musicraft Records, Inc., 131 F.2d 929 (2d Cir. 1943))).

\textsuperscript{338} See supra Part II.B.2 for a discussion of the limitations placed on the compulsory license by the 1976 amendments and the 1995 amendments to section 115.
Rather than construing section 115 narrowly, the Register’s decision expands the compulsory license well beyond its original intent. The original purpose behind the compulsory license was to grant copyright owners the right to make mechanical reproductions of their musical compositions, while limiting their ability to grant exclusive licenses of the right, in order to prevent a publishing monopoly. At the time, the mechanical reproductions in question were piano rolls, used for replaying full-length compositions on a piano. Over time, mechanical reproductions have evolved to include vinyl records, cassette tapes, compact discs, and digital downloads of music. Ringtones are fundamentally different than these reproductions contemplated by Congress in that they are not simply reproductions of the musical composition but are truncated, and sometimes reordered, versions of the work used for a functional purpose beyond basic listening. If the compulsory licensing provision can be used for ringtones, what is to stop it from being applied to other functional uses of musical compositions such as doorbells, toys, or more? The Register has now opened the door to this functional use of compositions, which is well beyond what Congress likely envisioned when granting the compulsory license in section 115.

B. A Judicial Ruling Denying Compulsory Licensing to Ringtones Is Necessary

1. The Problem: The Register’s Decision Fails to Provide a Solution

The Register’s decision fails to provide a real solution to the issue because it simply reiterates the concept that if a ringtone is a derivative work it cannot be licensed through section 115. By providing only minimal guidance as to what is necessary for a ringtone to qualify as a derivative work, the Register’s decision in fact adds more confusion and misunderstanding to the growing dispute. The decision draws a line between those ringtones that qualify for compulsory licensing as nonderivative works and those that do not qualify for compulsory licensing based only on a broad legal definition of derivative works. This line is arbitrary and will breed additional confusion in the market. The Register noted that “[a]t one end of the spectrum are those ringtones that are simple excerpts of larger musical works” and thus are not derivative works, while at the other end are “ringtones that contain additional original authorship” which may constitute derivative works. These phrases shed no real light on where many ringtones fall on this spectrum because it is unclear what exactly constitutes

339. See supra Part II.B.1 for a discussion of Congress’s original intent to avoid a monopoly in the music industry through the compulsory license.


343. Id. at 64,313.

344. Id.
“additional original authorship.” 345 Thus, disputes over ringtone licensing will continue, and probably intensify, as arguments turn to whether a ringtone consists of mere excerpts or original authorship.

The Register was at a disadvantage in making this ruling because she did not have the benefit of factual findings and expert witnesses and, therefore, could not be more specific. This lack of specificity is not surprising, considering that whether a work constitutes a derivative work and whether the requisite level of originality for copyright protection has been satisfied in a work are questions of fact, not questions of law. 346 Thus, the Copyright Office was not the proper venue for a determination of this issue. The Register could not address whether the excerpts of sound recordings that do not constitute derivative works must be from a particular part of the song, such as the hook, whether they must be contiguous, or whether they may be looped or reordered. These issues cannot be answered without factual findings, and the Register herself noted that where ringtones fall on the spectrum between derivative and nonderivative works cannot be decided in a “factual vacuum” and will have to be decided by courts on a case-by-case basis. 347 Therefore, this decision lacks any real utility for clarifying the complex ringtone licensing issue and only adds to the confusion and contention already rampant in the industry.

2. A Bright-Line Rule Will Provide Clarity and Efficiency

A judicial ruling on the application section 115’s compulsory licensing provision to ringtones seems imminent. 348 When a case is brought, the presiding court will have a unique opportunity to use copyright law to simplify, rather than complicate, matters for the music industry. By ruling that section 115 does not apply to cell phone ringtones for the above reasons, 349 the court can create a bright-line rule that will end litigation on this issue, rather than only attempting to fit cell phone ringtones into a statutory scheme that was not drafted with such technology in mind. Like the Supreme Court in White-Smith Music Publishing Co. v. Apollo Co., 350 which refused to fit piano rolls into the then-current Copyright Act and instead indicated that Congress would have to change the current Copyright Act to accommodate new technologies, 351 the court presented with the impending ringtone case should do the same. The provisions of the Copyright Act should not be bent and stretched to fit new technologies but rather should be amended by Congress to clarify its ambiguities with regard to

345. Id.
346. See Woods v. Bourne Co., 60 F.3d 978, 991 (2d Cir. 1995) (declaring that determining if work is derivative work involves finding of facts comparing two works); Reytblat, supra note 160, at 212 (concluding that originality in context of copyright protection is question of fact).
347. Memorandum Opinion, supra note 15, at 64,313.
348. See supra notes 239-44 and accompanying text for HFA’s cryptic statements implying that it will bring litigation challenging the Register’s decision.
349. See supra Part III.A for an explanation of why cell phone ringtones are not subject to compulsory licensing under the Copyright Act.
3. Potential Bases for a Bright-Line Rule

There are many legal bases on which a court can rely in denying compulsory licensing to ringtones. First, the court could find that all ringtones constitute derivative works under the Ninth Circuit *Mirage* precedent, which requires only that a work create a new version of the underlying copyrighted work to qualify as a derivative work. Alternatively, the court could accept the Seventh and Second Circuit precedents holding that derivative works must be independently copyrightable to infringe the derivative work right and find that all ringtones meet the requisite level of originality for copyrightability and therefore are derivative works. These options are the least attractive options for a bright-line rule, however, because they potentially leave the door open to the challenging argument that derivative work status and originality should be determined by fact findings on a case-by-case basis.

A better alternative basis for a bright-line rule excluding ringtones from compulsory licensing would be a finding that all ringtones either are not arrangements as intended under the arrangement exception in section 115(a)(2) or that they may be arrangements but still are excluded from the arrangement exception because converting a musical composition to a utilitarian, functional product used to signal incoming phone calls always changes the fundamental character of the underlying work. Using these bases for a bright-line rule would be preferable to delving into a derivative works analysis because these grounds are less open to the criticism that each individual ringtone should be analyzed to determine if it meets a particular standard. These bases, however, still do not represent the best justification for a bright-line rule because there is the potential for argument that some ringtones are permissible arrangements while others are not, depending on the amount of changes made to the musical composition. This argument presents the opportunity for additional litigation on the issue.

The best basis on which to create a bright-line rule denying compulsory licensing to ringtones is a determination that ringtones do not meet the private use requirement of section 115(a)(1). Because this argument applies to all

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352. Congress is aware of the problems presented by ringtones and other new technologies and has held hearings on possible amendments to section 115. See generally SIRA Hearing, supra note 246 (discussing continuing efforts to reform section 115 of the Copyright Act); Licensing Hearing, supra note 246 (debating methods of updating compulsory music licenses).

353. See supra Part III.A.1 discussing why ringtones are derivative works under this standard.


355. See supra Parts II.C.2-3 discussing the precedents on derivative works in the Seventh and Second Circuits.

356. See supra notes 299-304 and accompanying text for a discussion of why cell phone ringtones are not arrangements.

357. See supra notes 304-15 and accompanying text for a discussion of why ringtones change the basic melody and fundamental character of the underlying musical compositions.

ringtones, regardless of their composition, it closes the door to an argument that case-by-case consideration of each ringtone is needed. If the nature of ringtones as public personal statements takes them outside the scope of “private use,” which it arguably does, then all ringtones are excluded from compulsory licensing. This basis best serves the purpose of a bright-line rule because it creates a definite answer on the issue that is not open to individual reconsideration.

4. Benefits of a Bright-Line Rule

A bright-line rule against ringtones will benefit the music industry by bringing the clarity and efficiency that many hoped the Register’s decision would bring. Unlike the conditional rule articulated by the Register, an absolute rejection of section 115 will prevent endless litigation and negotiations over whether a particular ringtone can be classified as a derivative work. This will save resources for all parties involved, even the judiciary. By facilitating quicker negotiations and avoiding litigation, a bright-line rule against applying section 115 to ringtones will also bring ringtones to market faster to the benefit of publishers, the RIAA, and consumers.

IV. Conclusion

In conclusion, it is likely that music industry power players will once again gather with their attorneys to battle on the issue of ringtone licensing. This time, however, it is likely that they will be in a court of law. When faced with this copyright dilemma, the judge presiding over the debate should disregard the Register’s decision that ringtones are subject to compulsory licensing under section 115. The Register’s decision was incorrect and represents an overly broad reading of section 115 that is not supported by the statutory language or legislative history. Additionally, by holding that some ringtones are subject to compulsory licensing while others are not, depending on each ringtone’s status as a derivative work, the Register’s decision fails to provide a clear answer and opens the door to disagreement and litigation regarding whether each ringtone does qualify as a derivative work.

In the alternative, the court petitioned should find that ringtones are not subject to compulsory licensing under section 115. A close reading of section 115 and an examination of the legislative history lead to the conclusion that ringtones are never subject to compulsory licensing because they are derivative works rather than permissible arrangements under section 115(a)(2), and they do not meet the private use requirement of section 115(a)(1). Based on these conclusions, the best solution to the problem presented by compulsory licensing of ringtones, until Congress amends section 115, is a judicial declaration of a bright-line rule that ringtones are outside the scope of section 115 for all of these meet the private use requirement.

359. See supra notes 239-40 and accompanying text for a discussion of the RIAA’s statement that the decision would clarify the market.
reasons and therefore ringtone licenses must continue to be negotiated in the free market. Such a bright-line rule will bring clarity to the situation and benefit all parties involved by promoting efficiency and avoiding excessive litigation.

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