CELL PHONE RINGTONES: A CASE STUDY EXEMPLIFYING THE COMPLEXITIES OF THE § 115 MECHANICAL LICENSE OF THE COPYRIGHT ACT OF 1976

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ABSTRACT

Most Americans carry their cell phones everywhere. Cell phone users can purchase ringtones to replace the traditional telephone ring. But often the ringtones are excerpts from copyrighted works, including popular music. This technology has grown enormously in a short time span, forcing lawmakers to consider its applicability to copyright laws that predate ringtones' existence by nearly fifty years. This Note examines the mechanical license provision of the Copyright Act of 1976, including its overlooked legislative history, to determine whether the mechanical license applies to ringtones. It concludes that the statute's requirements exclude most types of ringtones from the scope of the mechanical license provision.

INTRODUCTION

Although some consider cell phone ringtones to be intolerably irritating and others find them to be a welcome respite from the more banal phone ring of the past, most people would probably agree that ringtones are ubiquitous. For those who download ringtones, the selected sound recording may denote one's musical tastes and may even influence others who hear the ringtone to inquire further into a

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given artist or song. Music played on cell phones is a rapidly growing market for recording artists and music publishers alike.[1] This emerging market, although providing great potential to a struggling music industry,[2] poses intricate legal questions whose answers could either spur growth in the market or destroy it.

Each time a user downloads and plays a song through a cell phone, the copyrights involved in that particular song must be cleared.[3] In broad terms, a cell phone ringtone, like any other musical recording, consists of both the sound recording and the underlying musical work,[4] of which both must be licensed to avoid an infringement action.[5] Record labels, which own the copyrights in the sound recordings,[6] generally sell ringtones to phone companies. Although the record labels own the copyrights in the sound recordings, music publishers own the copyrights for the underlying musical works.[7] Yet to sell ringtones to the phone companies (and ultimately to the consumer), the record labels must also receive a license from the music publisher.

Section 115 of the Copyright Act of 1976 (Copyright Act)[8] provides a mechanical license which allows compulsory licensing of the underlying musical work at a royalty rate set by statute, thus obviating the need for costly negotiations.[9] The Copyright Act, however, only allows the mechanical license to operate under certain circumstances, and it is unclear whether the license applies to cell

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1. Indeed, a contributing factor is the marked increase in cell phone usage since 2000. *See* Dibya Sarkar, *Cell Phone Spending Surpasses Land Lines*, ABC NEWS, Dec. 18, 2007, http://i.abcnews.com/Technology/wireStory?id=4017522 (describing how cell phone spending has surpassed landline spending).

2. Paul B. Brown, *Ring Tones to the Rescue*, N.Y. TIMES, Dec. 3, 2005, at C5.

3. *See* 17 U.S.C. § 501(a) (2000) ("Anyone who violates any of the exclusive rights of the copyright owner . . . is an infringer of the copyright . . . .").

4. For a discussion of the characteristics of these two separate copyrights and the distinctions between them, see *infra* Part I.A.

5. *See infra* Part I.A.

6. *See* ASCAP Licensing, Common Licensing Terms http://www.ascap.com/licensing/termsdefined.html (last visited Apr. 31, 2008) (highlighting the fact that recording copyrights are owned by record labels).

7. It is important to distinguish between music publishers and record labels. Music publishers operate for the benefit of composers and songwriters, and they work with record labels to provide exposure and ultimately revenue to the songwriters. *Id.* Record labels play a similar role, albeit working with recording artists, by purchasing songs from the music publishers and increasing exposure to the recording artists. *Id.*

8. The Copyright Act of 1976, 17 U.S.C. §§ 101–810 (2000).

9. *Id.* § 115.

phone ringtones. One administrative agency, the Copyright Royalty Board,[10] has already weighed in on the decisive issue, ruling that some ringtones may qualify under the mechanical license.[11] The courts have not yet taken up the issue.

This Note addresses some of the legal questions concerning cell phone ringtone copyrights. Part I introduces the interplay between law and cell phone ringtones with a general discussion of the law of copyright in music followed by a discussion of how § 115 of the Copyright Act relates to ringtones. Part II.A gives special attention to distinguishing between different varieties of ringtones. This discussion provides necessary background for comprehending the Register of Copyrights' Mechanical and Digital Rate Adjustment Proceeding (Copyright Proceeding)[12] found in Part II.B. Taking one portion of the Copyright Proceeding—namely, the adaptation privilege—Part III analyzes the proper statutory interpretation of § 115's adaptation privilege. This Part, in analyzing the adaptation privilege, determines that the proper statutory interpretation of § 115 pushes most ringtones outside its ambit. This conclusion has extraordinary implications for the ringtone industry and may translate to a startling increase in costs to license underlying musical works from the music publishers.

I. WHY CELL PHONE RINGTONES IMPLICATE COPYRIGHT'S MECHANICAL LICENSE

A. General Discussion of the Law of Copyright in Music

As compared with other forms of expression, musical works receive unusual treatment in the Copyright Act. First, musical works and sound recordings are separate and distinct categories of copyrightable works.[13] In fact, although musical works—that is, the underlying composition and lyrics—have received federal copyright

10. The Copyright Royalty Board, an arm of the Copyright Register, consists of three judges who are appointed by the Librarian of Congress and whose primary responsibility is setting rates under the statute. Copyright Royalty Board, Background, http://www.loc.gov/crb/background (last visited Mar. 17, 2008).

11. *See infra* Part II.B.

12. Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, 71 Fed. Reg. 64,303 (Copyright Office Nov. 1, 2006) (final order).

13. *See* 17 U.S.C. § 102(a) (defining musical works and sound recordings as distinct categories of works of authorship).

protection since the Copyright Act of 1909 (1909 Act),[14] federal copyright law did not protect sound recordings[15] until the Sound Recording Act of 1971.[16] Prior to that, sound recordings were seen as unprotectable subject matter[17] because Congress, in the 1909 Act, expressed the view that the composers were the creative authors, whereas the sound recording represented merely the mechanical reproduction of that creative work.[18] This harsh regime changed in the early 1970s, when Congress formally brought sound recordings within the subject matter of copyright protection alongside all other forms of protectable expression in § 102 of the Copyright Act of 1976.[19]

Despite granting federal protection to sound recordings, the 1976 Act provides thinner protection to sound recordings than other works, including the underlying musical work, in three primary ways. First, a sound recording is not accorded protection under § 106(4),[20] and thus, until 1995,[21] there was no exclusive right of a sound recording artist to publicly perform the sound recording. As a result, anyone who publicly performed a copyrighted work could do so without permission from or payment to the sound recording copyright holder, provided that the performer obtained permission from and paid the musical work copyright holder.[22] To remedy this, Congress

14. Copyright Act of 1909, Pub. L. No. 60-349, § 4952, 35 Stat. 1075, 1075 (superseded by Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2554).

15. The Copyright Act of 1976 defines sound recordings as "works that result from the fixation of a series of musical, spoken, or other sounds." 17 U.S.C. § 101.

16. Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391. The relevant sections were then relocated and rewritten by the Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. 101-810 (2000)).

17. Sound recordings were still subject to state and common law copyright protection, but this protection was uneven at best. MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.10[B] (2007).

18. *See* H.R. REP. NO. 60-2222, at 9 (1909) ("It is not the intention of the committee to extend the right of copyright to mechanical reproductions themselves, but only to give the composer or copyright proprietor the control, in accordance with the provisions of the bill, of the manufacture and use of such devices.").

19. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2554 (codifying sound recordings with the other permissible subject matters for copyrights at 17 U.S.C. § 102 (2000)).

20. *See* 17 U.S.C. § 106(4) (2000) (granting copyright protection to "literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works").

21. *See infra* note 23 and accompanying text.

22. NIMMER & NIMMER, *supra* note 17, § 8.14[A]. For a general overview of the policy reasons behind not extending any sort of performance right to sound recordings, see Robert L. Bard & Lewis S. Kurlantzick, *A Public Performance Right in Recordings: How to Alter the Copyright System Without Improving It*, 43 GEO. WASH. L. REV. 152 (1974).

enacted the Digital Performance Right in Sound Recordings Act of 1995,[23] which allows the copyright holder the exclusive right to authorize others "to perform the [sound recording] publicly by means of a digital audio transmission."[24] Despite passage of the DPRSRA, protection to the copyright owner remains limited because it still allows any second comer to publicly perform the sound recording (so long as it is not a digital audio transmission)[25] without compensating the recording artist.[26]

The second primary vehicle for limiting the copyright protection accorded to music is § 114's limitations on the § 106(6) copyright protection for sound recordings.[27] Section 114 limits the sound recording copyright owner's reproduction right and distribution right to the "actual sounds fixed in the recording."[28] In practical terms, this means that a sound recording copyright holder cannot claim infringement when another recording artist creates a cover of the song, even though the artist reproduces the sounds of the original.[29] Where digital reproduction of a sound recording occurs, the "actual

23. Digital Performance Right in Sound Recordings Act (DPRSRA) of 1995, Pub. L. No. 104-39, 109 Stat. 336 (codified as amended at 17 U.S.C. §§ 106, 114–15 (2000)).

24. 17 U.S.C. § 106(6).

25. A "digital transmission" is defined in § 101 as "a transmission in whole or in part in a digital or other nonanalog format." *Id.* § 101. The DPRSA is more complex as some digital performances are exempt altogether, and although noninteractive services are covered by the statutory license, interactive services are fully subject to the exclusive rights of the sound recording copyright owner. *See generally* NIMMER & NIMMER, *supra* note 17, § 8.21–24 (detailing the various complexities of the DPRSA). Because this is beyond the scope of this Note, it is not necessary to further develop the details of DPRSA.

26. *See supra* note 20 and accompanying text. Note, however, that the performer would compensate the composer, lyricist, or music publisher. *See infra* note 32 and accompanying text. This compensation would be subject to the limitations on the public performance. 17 U.S.C. § 110.

27. The Copyright Act does not provide blanket and exclusive protection on use; instead, § 106 grants that a given copyright owner may hold only the right to reproduce (that is, the right to make copies), the right to prepare derivative works, the right to distribute copies to the public, the right to public performance, and the right to public display. 17 U.S.C. § 106.

28. *Id.* § 114(b) ("The exclusive rights of the owner of copyright in a sound recording under [the reproduction and adaptation rights] do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.").

29. There may be an extremely rare case in which protection is accorded through publicity or misappropriation rights when a second comer is passing off the song for commercial advantage without attributing. *See* Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988) ("We hold only that when a distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs and have committed a tort in California.").

sounds fixed in the recording" are directly copied to a new medium.[30] This is a major limitation on the protection afforded sound recording artists, but its purpose is to promote the proliferation of creative works by allowing future artists to build on prior works.[31]

Third, and perhaps most relevant for purposes of this examination of cell phone ringtones, is the § 115's mechanical license, which limits a musical work's copyright holder's reproduction and distribution rights by requiring the rights holder to license the musical work in certain circumstances. Section 115 applies to copyright holders of nondramatic musical works, including music publishers, lyricists, and composers.[32] It allows anyone wishing to reproduce the work to obtain a statutory mechanical license, but it does not apply to the sound recording copyright.[33] Section 115 provides a statutory mechanical license by which anyone can either reproduce or distribute a phonorecord[34] of the musical work so long as it has previously been distributed in phonorecords in the United States with authorization of the copyright owner and provided that compensation, as set forth by the Copyright Royalty Board,[35] is paid to the copyright owner.[36] The license is a "mechanical license" because the parties need not negotiate over terms; instead, everyone holds a license to either reproduce or distribute a musical work—regardless of permission—so long as there is proper payment. The practical effect of the mechanical license is to turn this strand of

30. Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 799–800 (6th Cir. 2005) ("This means that the world at large is free to imitate or simulate the creative work fixed in the recording so long as an actual copy of the sound recording itself is not made.").

31. *See* H.R. REP. No. 60-2222, at 9 (1909) ("It is not the intention of the committee to extend the right of copyright to the mechanical reproductions themselves, but only to give the composer or copyright proprietor the control, in accordance with the provisions of the bill, of the manufacture and use of such devices.").

32. 17 U.S.C. § 115.

33. Palladium Music, Inc. v. EatSleepMusic, Inc., 398 F.3d 1193, 1200 (10th Cir. 2005).

34. Although much of the Copyright Act refers to "copies," it defines "phonorecords" as those "material objects in which sounds . . . are fixed by any method now known or later developed." 17 U.S.C. § 101.

35. *Id.* § 801(b)(1). It should be noted that rates may also be set based on agreement of the parties. *See* NIMMER & NIMMER, *supra* note 17, § 8.04[I] ("A copyright owner and a licensee phonorecord maker and/or distributor may elect to waive the compulsory license, and enter into a consensual agreement."). The Copyright Royalty Board was formed in 2005 and consists of three judges whose primary role is to determine the rates and terms of the Copyright Act's statutory licenses. Copyright Royalty Board, *supra* note 10. The judges are appointed by the Librarian of Congress. *Id.*

36. 17 U.S.C. § 115(a)(1)–(c)(1).

property rights into a liability rule,[37] allowing anyone to use the owner's property provided that such use is in accordance with the rules set forth in the statute.

Congress passed Section 115 following *White-Smith Music Publishing Co. v. Apollo Co.*,[38] in which a plaintiff-composer brought suit to enjoin Apollo's alleged infringement.[39] Apollo was in the business of manufacturing player pianos which used perforated rolls to mechanically produce songs on the pianos.[40] The Supreme Court ruled for the defendant, holding that the perforated music roll did not constitute a "copy" of the underlying musical work.[41] In enacting the mechanical license in the 1909 Act, Congress intended to specifically overrule the holding in *White-Smith* to provide some means of compensation to the copyright owner for mechanical reproductions of their works.[42] Congress attempted to address that concern by balancing the public's interest in gaining access to the creative works with the overarching goal of compensating music composers adequately.[43] Striking this balance would fulfill the constitutional prerogative "[t]o promote the Progress of Science."[44]

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37. *See* Robert P. Merges, *Of Property Rules, Coase, and Intellectual Property*, 94 COLUM. L. REV. 2655, 2661 (1994) (equating compulsory licenses with liability rules).

38. White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1 (1908).

39. *Id.* at 8.

40. *Id.* at 8–9.

41. *Id.* at 18 ("These perforated rolls are parts of a machine which, when duly applied and properly operated in connection with the mechanism to which they are adapted, produce musical tones in harmonious combination. But we cannot think that they are copies within the meaning of the copyright act.").

42. H.R. REP. 94-1476, at 52 (1976) ("This broad language is intended to avoid the artificial and largely unjustifiable distinctions, derived from cases such as *White-Smith* . . . ."); *see also* Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, 71 Fed. Reg. 64,303, 64,304 (Copyright Office Nov. 1, 2006) (final order) ("[The mechanical license was] originally enacted to address the reproduction of musical compositions on perforated player piano rolls . . . .").

43. *See* Paul S. Rosenlund, *Compulsory Licensing of Musical Compositions for Phonorecords Under the Copyright Act of 1976*, 30 HASTINGS L.J. 683, 686 (1979) ("The feelings in Congress at the time were that the American public should continue to have access to the popular music of the day, but that the growing economic importance of mechanically reproduced music made it necessary to guarantee composers adequate compensation for their work." (citing H.R. REP. No. 60-2222, at 7 (1909))).

44. U.S. CONST. art. I, § 8, cl. 8.

B. Section 115 and Cell Phone Ringtones

The interpretation of § 115 is the primary source of controversy with respect to cell phone ringtones. This Section demonstrates that § 115 is the primary source of concern in this debate because that provision determines whether recording labels, in preparing and vending ringtones to the phone companies, can purchase the rights to the underlying composition at the statutory rate, or whether they must conduct arms-length negotiations for these rights.

The preamble to § 115 states that it affects only the copyright owner's exclusive reproduction and distribution rights under §§ 106(1) and 106(3) of the Copyright Act.[45] Thus, if ringtones are considered derivative works[46] of copyrighted works, and thus subject to copyright protection under another provision, §106(2), they cannot be made or distributed using a § 115 mechanical license. On the other hand, if they do not qualify as derivative works, then § 115 may apply, and so ringtones must meet the conditions set forth in § 115(a). Thus, asking whether a given work could qualify as a derivative work is an important threshold question.

Under the Copyright Act, a derivative work must "represent an original work of authorship,"[47] meaning it requires a constitutionally minimum level of creativity.[48] One district court judge elaborated on what would qualify as a derivative work in a musical composition:

> [T]here must be present more than mere cocktail pianist variations of the piece that are standard fare in the music trade by any competent musician. There must be such things as unusual vocal treatment, additional lyrics of consequence, unusual altered harmonies, novel sequential uses of themes—something of substance added making the piece to some extent a new work with the old song embedded in it but from which the new has developed. It is not merely a stylized version of the original song where a major artist may take liberties with the lyrics or the tempo, the listener

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45. *See* 17 U.S.C. § 115 (2000) ("In the case of nondramatic musical works, the exclusive rights provided by clauses (1) [to reproduce] and (3) [to distribute] of section 106 . . . are subject to compulsory licensing . . . .").

46. A derivative work is defined in the Copyright Act as "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." *Id.* § 101 (2000).

47. *Id.*

48. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991). The Court noted that "the requisite level of creativity is extremely low; even a slight amount will suffice." *Id.*

> hearing basically the original tune. It is, in short, the addition of such new material as would entitle the creator to a copyright on the new material.[49]

This passage sets forth an originality requirement for derivative works in musical compositions. In fact, the originality requirement for derivative works[50] is the same as for original works.[51] Yet because § 115 expressly does not affect the copyright owner's exclusive right to create derivative works,[52] a derivative work with the requisite originality likely would not fall within the bounds of the license. The Register of Copyrights acknowledged that if a particular work exhibited the constitutionally mandated "originality," then it would fall outside the scope of § 115.[53] This proposition is correct. The plain statutory language of § 115(a)(2) excludes those works that are changed to such a degree that they constitute derivative works,[54] and this exclusion places a ceiling on the adaptation privilege[55] that the

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49. Woods v. Bourne Co., 841 F. Supp. 118, 121 (S.D.N.Y. 1994) (footnotes omitted), *rev'd on other grounds*, 60 F.3d 978 (2d Cir. 1995).

50. A derivative work is defined in the Copyright Act as "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." 17 U.S.C. § 101.

51. *See id.* § 103 ("The subject matter of copyright as specified by section 102 includes . . . derivative works . . . ."); *see also* WILLIAM PATRY, PATRY ON COPYRIGHT § 3:50 (2007) ("Moreover, the standard of originality for derivative works is no different than for nonderivative works.").

52. Because the preamble to § 115 acknowledges only the right to copy and the right to distribute, *see supra* note 45 and accompanying text, it does not affect the right to create derivative works under § 106(2).

53. The Register of Copyrights explained:

> We note that Section 115 permits the creation of derivative works, but this privilege under the statutory license is limited to making musical arrangements necessary to conform it to the style or manner of interpretation of the performance involved. For purposes of our discussion in this proceeding, when we refer to derivative works not covered by Section 115, we mean those types of works that exhibit a degree of 'originality' as that term is defined in court precedent. The addition of original material would not only take a ringtone outside the scope of the privilege of making arrangements, it would also take the ringtone outside the Section 115 license altogether.

Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, 71 Fed. Reg. 64,303, 64,305 n.8 (Copyright Office Nov. 1, 2006) (final order) (citation omitted).

54. 17 U.S.C. § 115 (a)(2); *see also supra* note 45 and accompanying text (explaining that § 115 covers only the right to copy and the right to distribute, not the right to create derivative works).

55. 17 U.S.C. § 115 (a)(2); *see also infra* Part III.

mechanical license grants.[56] In other words, if a given arrangement has enough added creativity that it qualifies as a derivative work, it does not fall under the mechanical license. Yet, if the given arrangement has less originality—thus it does not qualify as a derivative work—it may fall under § 115, provided that it meets the other requirements of § 115(a)(2).

The relevant uncertainty, however, is whether these rights include the rights necessary to create a ringtone of the same composition. It is the recording labels, known as the "Big Four"—Universal Music Group, Sony BMG Music Entertainment, EMI Group, and Warner Brothers Music[57]—that sell ringtones to the phone companies. Thus, the record companies must have the necessary rights to the musical works from the music publishers to manufacture, distribute, or otherwise license these ringtones.[58] This is the heart of the issue: must a record company secure such rights directly from the music publisher, or can it rely on the mechanical license and the corresponding statutory rate for copies?

Record labels normally enter into arms-length negotiations with the music publishers to obtain the rights to the musical works to create, distribute, promote, and sell ringtones to phone companies like Verizon and AT&T.[59] The rates that these license negotiations establish are considerably higher than the mechanical license rates set forth in § 115.[60] Music publishers license works to record labels for as

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56. *See* 17 U.S.C. § 115(a)(2) ("A compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not . . . be subject to protection as a derivative work under this title . . . .").

57. Brett J. Miller, Comment, *The War Against Free Music: How the RIAA Should Stop Worrying and Learn to Love the MP3*, 82 U. DET. MERCY L. REV. 303, 319 n.115 (2005).

58. In some instances, ownership of the sound recording copyright may be a contested issue. Although the recording artist first performs the work, industry-standard contracts regularly treat sound recordings as works made for hire. *See* NIMMER & NIMMER, *supra* note 17, § 30.03[A] (setting forth an industry-standard contract). Even when the recording artist is a copyright owner, the artist may not be the only copyright owner. There may be producers, sound mixers, background musicians, and others who may contribute original expression sufficient to merit protection as a copyright owner. Consequently, who owns the copyright is a complicated issue, but for purposes of this Note, it is safe to assume that the recording studio owns the sound recording copyright, whether by operation of law or through contract.

59. *See* Neil J. Rosini & Michael I. Rudell, *Ring Tone Revenues Foster Copyright Détente*, N.Y.L.J., Dec. 23, 2005, at 3 (analogizing the ringtone market to the CD industry, in which record labels obtain licenses from publishers and then produce and sell the CDs themselves).

60. Carmen Kate Yuen, *Scuffling for a Slice of the Ringtone Pie: Evaluating Legal and Business Approaches to Copyright Clearance Issues*, 8 VAND. J. ENT. & TECH. L. 541, 544 (2006).

much as twenty-five cents per song, compared with the mechanical license's rate of slightly over nine cents per song.[61] Music publishers, therefore, would much prefer to leave the system as is, so that they could negotiate these licenses directly with the Big Four, thus garnering this higher rate. In contrast, the record labels argue that ringtones are subject to § 115 to obtain the statutory rate provided by the statute.[62] But copyright owners generally complain that statutory rates are below market value, so record labels (probably fairly) expect to achieve a better deal through the § 115 license than they otherwise would in the marketplace.[63] In a growing industry, the stakes are huge; given the huge volume of ringtones purchased each year,[64] even a small change in royalties can pay huge dividends to the winner of this battle. In short, how copyright law determines this question can translate into tens of millions of dollars of lost yearly income for either music publishers or record labels.

II. CELL PHONE RINGTONES

A. *Distinguishing between Different Varieties of Ringtones*

To appreciate the subtleties of the applicable copyright laws, it is desirable—and perhaps necessary—to apply the law to varying *types* of ringtones. Like ice cream, ringtones come in many different flavors, each of which may have a differing treatment under copyright.[65] For instance, a derivative work may result by reducing the melody to a simple monophonic tone—thus rendering it ineligible for the § 115 mechanical license—whereas an entirely different treatment may result from a ringtone that is a short snippet of the identical sound recording. Although it is not necessary to exhaust these

61. *Id.* (asserting that the traditional royalty sought by music publishers is approximately three times that set forth by the statute).

62. Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, 71 Fed. Reg. 64,303, 64,305 (Copyright Office Nov. 1, 2006) (final order).

63. Yuen, *supra* note 60, at 544 ("Publishers are accustomed to receiving ten percent of the retail price of ringtones, and since a master ringtone retails for $2.49 to $2.99, a publisher would be entitled to 24.9 to 29.9 cents per sale.").

64. BMI, BMI Forecasts U.S. Ringtone Sales to Hit $600 Million in 2006, Apr. 2, 2006, http://www.bmi.com/news/entry/334746. BMI sold over 360 million ringtones from 2001 to 2005. *Id.* Ringtone sales reached $500 million in 2005 alone. *Id.*

65. *See* Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, 71 Fed. Reg. at 64,304 ("[T]here are a variety of different types of ringtones ranging from those that are simple excerpts taken from a larger musical work to ones that include additional material and may be considered original musical works in and of themselves.").

possibilities, this Section chooses four ringtones—each with differing characteristics—to better understand the law's treatment of these types of works.

The varying types of ringtones can best be described based on their degree of similarity to the original sound recording. That is, this scale is based on the amount of additional creativity needed to produce the ringtone.[66] The first type of ringtone, beginning on the spectrum from the least amount of creativity required to produce a ringtone from the original, is a "true tone" or a "real tone." A "true tone" is an exact duplication of a sound recording, albeit in a shortened form.[67] For instance, Justin Timberlake's "Rock Your Body"[68] is a four-minute and twenty-seven-second song that was released in full form and played over the radio throughout the world. The "Rock Your Body" ringtone is a shortened version, playing approximately thirty seconds of the original song.[69] Nothing about the song was changed; rather, the only "creativity" in compiling the ringtone was selecting which portion of the song to include. In this example—as in most true tones—the ringtone captures the "hook," or the most popular refrain of a sound recording.[70] By 2006, with the increasing popularity of cell phones with MP3 capability, this type of ringtone accounted for 60 percent of all ringtone revenues.[71]

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66. The reasons for this scale are twofold. First, it provides a helpful guide for determining how far a ringtone strays from the original sound recording. This shift away from the original can greatly alter the copyright treatment of the ringtone, perhaps more than for any other variable. Second, courts have used this variable in determining the "transformative" nature of a work as a springboard for analyzing whether that work qualifies as a derivative work. *See supra* notes 47–54 and accompanying text.

67. *See* Steven Masur & Ursa Chitrakar, Essay, *The History and Recurring Issues of Ringtones: Lessons for the Future of Mobile Content*, 5 VA. SPORTS & ENT. L.J. 149, 152 (2006) ("Master Ringtones (also called 'truetones' or 'mastertones') are excerpts from the actual sound recordings of popular songs."); Marcy Rauer Wagman & Rachel Ellen Kopp, *The Digital Revolution Is Being Downloaded: Why and How the Copyright Act Must Change to Accommodate an Ever-Evolving Music Industry*, 13 VILL. SPORTS & ENT. L.J. 271, 288 n.63 (2006) ("A 'true tone' or 'trutone' is a ringtone that is a short (approximately thirty-second) music clip edited directly from an original sound recording and made available to consumers for downloading onto their cell phones to represent their own, recognizable cell phone ring.").

68. JUSTIN TIMBERLAKE, *Rock Your Body*, *on* JUSTIFIED (Jive Records 2002).

69. An example of a website from which to download the Justin Timberlake "Rock Your Body" ringtone is Thumbplay, Rock Your Body Ringtone, http://www.thumbplay.com/join/Justin+Timberlake-artist-Rock+Your+Body-genre-ringtones-bonus (last visited Mar 17, 2008).

70. Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, 71 Fed. Reg. 64,303, 64,305 (Copyright Office Nov. 1, 2006) (final order).

71. Narasu Rebbapragada, *The Playlist: Ring Tones Are Music Too*, PCWORLD.COM, Mar. 22, 2006, http://www.pcworld.com/article/id,125125-page,1/article.html.

The second type of ringtone that illustrates the differing treatment of ringtones under the Copyright Act is similar to a true tone, except that it adds new material not otherwise found in the original sound recording. Perhaps the best example is Beyoncé's "Let Me Cater 2 You" ringtone, which consists of a smaller portion of the actual song followed by Beyoncé's voice proclaiming, "What's up, this is Beyoncé from Destiny's Child and this call is for you."[72] The status of these types—which can be called "true tones plus"—may vary considerably from actual true tones because of the additional commentary. Those ringtones that incorporate this additional commentary in lyrical and musical form are also included in this "true tones plus" category.

The third and fourth categories of ringtones, which depart most from the original sound recording, are monophonic and polyphonic ringtones, respectively. Monophonic ringtones, which polyphonic ringtones largely have supplanted, introduced the ringtone to cell phone users. These ringtones play single notes in succession to create the impression that the actual sound recording is being played.[73] Oftentimes, it is difficult for the listener to even identify the song, because the simplicity of the one-note tune makes it difficult to transcribe complex sound recording arrangements.

More easily identifiable as the original song, yet the ringtone which departs most from the original sound recording, are polyphonic ringtones. As cell phone speaker technology progressed, these ringtones became the standard, until cell phones with MP3 technology began to play true tones.[74] Polyphonic ringtones, as the name implies, play multiple lines simultaneously. Because multiple sounds emanate from a band—such as the voice, drums, and guitar sounds—these polyphonic ringtones more closely approach the rhythm and melody of the original sound recording.[75]

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72. Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, 71 Fed. Reg. at 64,312; *see also* Scott Hervey, *Copyright Office Clears the Way for More Ringtones*, THEIPLAWBLOG.COM, Oct. 24, 2006, http://www.theiplawblog.com/archives/copyright-law-copyright-office-clears-the-way-for-more-ringtones.html (suggesting that the Beyoncé ringtone could qualify as a derivative work).

73. Masur & Chitrakar, *supra* note 67, at 151 ("[Monophonic ringtones] means that single note sounds were played in succession when the phone rang.").

74. *See* Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, 71 Fed. Reg. at 64,304.

75. *Id.* at 64,305 n.16 ("In 2001, polyphonic ringtones were developed, allowing multiple notes to be played at the same time, creating a fuller-sounding ringtone.").

Monophonic and polyphonic ringtones lie on the very end of the spectrum because they probably require a professional with a keen ear to manually transcribe the original sound recording.[76] The final result is a ringtone which incorporates only the melody[77] and rhythm[78] of a piece (and, in the case of a polyphonic ringtone, also the harmony[79]). Because it is not only possible but probable that two different transcribers can produce either a monophonic or polyphonic ringtone that is vastly different from one another, it is likely that there is a significant degree of creativity in these ringtones.[80]

B. The Register of Copyrights's Copyright Proceeding Decision

On October 16, 2007, the Copyright Office, acting on a request on behalf of the Recording Industry Association of America, Inc. (RIAA) to clarify the treatment of cell phone ringtones under existing copyright laws, handed down a final order in the Copyright Proceeding that concluded that ringtones could be subject to the mechanical licensing scheme.[81] The National Music Publishers Association, Inc., the Songwriters Guild of America, and the Nashville Songwriters Association International (collectively, Music Publishers) filed a motion in opposition of the RIAA position. Although concluding that certain ringtones could be subject to mechanical licensing, the Register did also note that certain types of

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76. M. D. Plumbley et al., *Automatic Music Transcription and Audio Source Separation*, 33 CYBERNETICS & SYSTEMS 603, 608 (2002) ("Transcription of polyphonic music introduces a number of new complexities that are not present in the monophonic version of this problem. Because we have more than one possible note at once, we can no longer be sure that there will be a single delay at which the whole waveform will repeat . . . ."). This indicates that, even where transcription is done by computer, its translation to polyphonic forms involves an increased level of difficulty.

77. Melody is defined as "a rhythmic succession of single tones organized as an aesthetic whole." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 722 (10th ed. 2001).

78. Rhythm is "the aspect of music comprising all the elements (as accent, meter, and tempo) that relate to forward movement." *Id.* at 1002.

79. Harmony is "the combination of simultaneous musical notes in a chord." *Id.* at 530.

80. There are cases that say that exact replicas in different media, even if they require great skill, do not demonstrate sufficient originality to merit protection. *E.g.*, Gracen v. Bradford Exch., 698 F.2d 300, 305 (7th Cir. 1983) (denying protection to a painting of Dorothy from *The Wizard of Oz*); Durham Indus., Inc. v. Tomy Corp., 630 F.2d 905, 911 (2d Cir. 1980) (denying protection to three-dimensional reproductions of Disney characters); L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 488 (2d Cir. 1976) (denying protection to Uncle Sam banks); Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 105 (2d Cir. 1951) (denying protection to a reproduced mezzotint engraving).

81. Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, 71 Fed. Reg. 64,303, 64,303 (Copyright Office Nov. 1, 2006) (final order).

ringtones, depending on their individual characteristics, could fall outside the scope of the statute.[82] In examination of these issues, the Register identified a number of ambiguities with respect to the relationship between ringtones and § 115.[83] This Section summarizes the issues raised in the Copyright Proceeding to provide some perspective as to how copyright laws treat ringtones generally.

The first issue presented by the parties was whether ringtones meet the definition of "digital phonorecord deliveries." The Digital Performance Right in Sound Recordings Act of 1995[84] allows the licensee of a § 115 mechanical license to "distribute or authorize the distribution of a phonorecord of a nondramatic musical work by means of a digital transmission which constitutes a digital phonorecord delivery."[85] This amendment was a response to the newly developed use of transmitting songs digitally.[86] The Register found that ringtones fit within the definition of digital phonorecord deliveries without much dispute from either party.[87]

Next, the Register addressed the parties' arguments concerning whether § 115 could license only portions of works, as compared with the entire work.[88] Because ringtones necessarily use small portions of the longer sound recording, the RIAA argued that it could use the mechanical license even when only portions of the musical work were being used. The Register agreed with this point and, using traditional methods of statutory interpretation, concluded that "an excerpt may qualify for the statutory license if all other requirements are met."[89]

The Register adopted the RIAA's argument that "[f]or the derivative work right to be infringed, the defendant must have created a derivative work, and for the derivative work to have been created, the Act requires the contribution of expressive content capable of standing on its own as a copyrightable work."[90] Thus, a cell

82. *See id.* 64,305 ("[D]ifferent types of ringtones may be treated differently for [statutory] purposes.").

83. *Id.*

84. 17 U.S.C. §§ 114–15 (2000).

85. *Id.* § 115(c)(3)(A).

86. NIMMER & NIMMER, *supra* note 17, § 8.24[A].

87. Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, 71 Fed. Reg. at 64,307.

88. *Id.* at 64,313–16.

89. *Id.* at 64,308.

90. *Id.* at 64,309 (quoting RIAA Initial Brief at 11, Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, 71 Fed. Reg. 64,303 (No. RF 2006-1)).

phone ringtone, which is merely a shortened version of a sound recording, is not sufficiently original to be considered a derivative work. Although the Register did acknowledge that certain ringtones may be considered derivative works because they do exhibit a minimal degree of originality,[91] it also concluded many ringtones would not fall under this category.[92] In the end, the Register agreed with the RIAA's argument that those ringtones which are merely shortened versions of the sound recording are not derivative works.[93] The Register refused to decide the issue of other ringtones, including those which contain new lyrics, stating that "they involve factual issues and potentially close questions that need not be resolved here."[94]

Following the discussion of derivative works, the Register then investigated what is at the crux of Part III: the arrangement privilege under § 115(a)(2).[95] Suffice it to say that this portion of the opinion is subject to considerable criticism, and Part III.B discusses it in detail along with a fresh reading of the legislative history. Lastly, the Register's office considered the private use exception,[96] which states that, for § 115 to be applicable, the "primary purpose in making phonorecords [must be] to distribute them to the public for private use."[97] In addressing this potential complication, the Register distinguished between the intentions of the individual cell phone ringtone consumer and the distributor of the ringtone. So long as the distributor's primary purpose was to distribute the digital phonorecord delivery for private use, the Register reasoned, then the individual ringtone consumer's purpose is irrelevant.[98] Thus, the Register concluded that the private use exception was a bar to the application of § 115.

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91. A true tones plus may have been what the Register had in mind, as the additional lyrics or commentary could provide sufficient originality to constitute a derivative work.

92. *Id.* at 64,310.

93. *Id.*

94. *Id.* at 64,311.

95. *Id.* at 64,313–15.

96. *Id.* at 64,315.

97. 17 U.S.C. § 115(a)(1) (2000).

98. *See* Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, 71 Fed. Reg. at 64,314–15 ("[R]ingtones satisfy the private use requirement because the primary purpose of the distributor is to distribute them to individual consumers for their own personal use and enjoyment, on those consumers' cell phones, in whatever manner the consumer sees fit . . . .").

In a monumental loss to music publishers, the Register concluded that the RIAA could rely on § 115 to license most ringtones.[99] For cell phone ringtones to fall within the mechanical license of § 115, the ringtones' attributes must fall within the requirements set forth in the statute; yet, the Register's Copyright Proceeding failed to fully dissect these requirements. Because the Register's Copyright Proceeding does not bar judicial review,[100] the Copyright Proceeding is not the definitive ruling on this issue. Indeed, its analysis did not bring clarity to this muddled area of law. Unfortunately, the Register bypassed the opportunity to set forth clear guidelines for the ringtone industry, and in doing so, opened the door to further challenges of these provisions.

III. THE ADAPTATION PRIVILEGE: HOW LIMITED?

This Part examines one of the four requirements of § 115(a)(2)—the arrangement privilege—and dissects it in a way that the courts may find helpful in the future. The arrangement privilege may be the *most* important issue for determining the status of ringtones under the Act for two reasons. First, neither courts nor commentators have expounded the impact of the adaptation privilege on the scope of the mechanical license. Indeed, the legislative history shows that Congress had intended the adaptation to be rather limited.[101] Second, the Register's analysis of the adaptation privilege is the most incomplete because it does not draw the line between ringtones that are covered by the privilege and those that are not. The Register and most scholars have analyzed § 115(a)(2) as a whole, losing sight of the four individual requirements explicitly set forth by Congress that a work must meet to qualify for the adaptation safe harbor. This Part explains each of these four requirements in detail, but it must be remembered that ringtones are only subject to the mechanical license if all four of the requirements are met.[102]

99. *Id.* at 64,304.

100. 17 U.S.C. § 803(d)(1).

101. *See infra* Part III.B (discussing the legislative history behind § 115's adaptation privilege).

102. Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, 71 Fed. Reg. at 64,303.

The § 115 mechanical license allows limited,[103] adaptation of the work without separately securing the authorization of the copyright owner. Specifically, § 115(a)(2) states:

> A compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work, and shall not be subject to protection as a derivative work under this title, except with the express consent of the copyright owner.[104]

This subsection allows the licensee at least some room to maneuver in making the new musical arrangement. Some have argued that it was necessary to draft some leeway into § 115 to further the goals of the mechanical license.[105] In the end, the Register agreed with the RIAA's argument that "shortening a musical work is necessary to conform the song to the style or manner of the performance involved because ringtones necessitate brevity."[106]

Because there is no case law interpreting § 115(a)(2),[107] it is difficult to determine how a court dealing with the issue would respond. It is not a fruitless adventure, however; traditional notions of statutory interpretation provide useful guidance. The subsection seems to create a safe harbor to the compulsory licensee who alters the original so long as the alteration falls within the bounds of § 115(a)(2). To obtain a mechanical license to create and distribute a ringtone that makes an alteration to the original musical work, the licensee must meet four requirements under § 115(a)(2). The subsection states, in full:

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103. *See* NIMMER & NIMMER, *supra* note 17, § 8.04[F] ("[T]he compulsory licensee's right to make new arrangements is limited.").

104. 17 U.S.C. § 115(a)(2).

105. *Id.* ("A limited adaptation right is clearly necessary if the compulsory license provision is to be implemented, inasmuch as different performers require some variation in musical arrangements."); H.R. REP. NO. 94-1476, at 109 (1976) ("The second clause of subsection (a) [of § 115] is intended to recognize the *practical need* for a limited privilege to make arrangements of music being used under a compulsory license, but without allowing the music to be perverted, distorted, or travestied." (emphasis added)).

106. Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, 71 Fed. Reg. at 64,304.

107. *See id.* ("[D]efining the parameters of Section 115(a)(2) is difficult because there is no precedent . . . .").

> A compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work, and shall not be subject to protection as a derivative work under this title, except with the express consent of the copyright owner.[108]

First, the alteration must be a change in the "arrangement" of the original.[109] Second, the arrangement only must change "to the extent necessary to conform it to the style or manner of interpretation of the performance involved."[110] Third, the arrangement may not "change the basic melody" of the original.[111] Lastly, the arrangement may not change "the fundamental character of the work."[112] These requirements are explicit in the statute, and any court that fails to find all four requirements as a precondition for § 115 is misapplying the statute. This Part analyzes all four of these conditions precedent in turn, providing an interpretation of § 115(a)(2) that may prove useful in the absence of meaningful guidance from either the Copyright Office or the courts.

In the Copyright Proceeding, the Register merged the four requirements explicitly set forth by § 115(a)(2) in a way that loses sight of the distinct statutory components. Regarding the general arrangement requirement of the § 115(a)(2) safe harbor, the Register made three general observations:

> First, the user's right to make a melodic arrangement should be limited so that the basic character of the musical work is preserved. Second, a mastertone that merely shortens the full length work to conform it to the physical limitations of the cellphone does not affect the musical work's arrangement. Finally, a ringtone that makes minor changes to lyrics of the underlying musical work generally does not affect its arrangement.[113]

The first observation simply restated the fourth requirement of § 115(a)(2) that the arrangement may not change "the fundamental

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108. 17 U.S.C. § 115(a)(2) (2000).

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, 71 Fed. Reg. at 64,314 (footnotes omitted).

character of the work." It provided absolutely no insight into what an "arrangement" is. The second observation—that a mastertone which shortens the work does not affect the "arrangement"[114]—was similarly incomplete. Lastly, the Register stated that "minor changes" to the lyrics in a ringtone do not affect the "arrangement."[115] This observation is conclusory, and depend on what the "minor changes" are. Ultimately, the Register largely ignored the mandates of § 115 by failing to adequately address each of the four elements of the adaptation privilege. Separate consideration of each element leads to the conclusion that most ringtones are not necessarily covered by the mechanical license.

A. "Arrangement"

The first requirement—namely, that the given work is an "arrangement"—probably would not exclude a significant number of ringtones from the mechanical license. Determining whether a given alteration to a musical work changes the "arrangement" first requires a precise definition of "arrangement." In the Copyright Proceeding, the meaning of the word was disputed, and each party provided definitions to best support its platform.[116] Ultimately, the Register defined "arrangement" as "[t]he process or result of readjusting a work for performance by different artistic means[117] from that originally intended."[118]

In short, the breadth of this definition—as interpreted through the Register's definition—means that an "arrangement" may include

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114. *See infra* Part III.A.

115. *Id.*

116. *See id.* at 64,313 ("[T]he parties have used various dictionaries and web sites to support their definitional argument, but there is no consensus on what sources are valid and reliable.").

117. The Register did not address whether performance in the form of a ringtone on a cell phone rather than as a complete song in another medium is a performance "by different artistic means." The Register seems to have concluded that it is by largely ignoring that portion of the definition. *See id.* at 64,314 (rejecting the music publishers' claim that the ringtone is an abridgement rather than an arrangement, but not considering *why* the shortening of the original song was necessary). But is the conclusion supported? Is modifying a song to accommodate technical limitations of the media the same thing as "conform[ing] it to the style or manner of" the performer under § 115(a)(2) Beyoncé's style is Beyoncé's style. The monophonic ringtone of her song is not changed to conform to her style; it is changed to conform to the technical limitations of the technology on which it is played. The conclusion that these are necessarily "arrangements" may have been hastily arrived at.

118. Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, 71 Fed. Reg. at 64,314 (quoting WALDO SELDEN PRATT, THE NEW ENCYCLOPEDIA OF MUSIC AND MUSICIANS (1929)).

all four representative types of ringtones. The true tone may be an arrangement because it shortens the work and repeats only a selected portion of the work. This is probably a "readjustment" of the work, even though the Register concluded that shortening a song does not affect its arrangement,[119] because the selection of the part of the song that the ringtone plays may differ from what the artist originally intended.[120] This definition also probably applies to both monophonic and polyphonic ringtones despite the technical requirements of producing these ringtone types,[121] as the process of incorporating different instruments—in the case of ringtones, a synthesizer—changes the composition by adding or removing harmonic elements of the work. The only type of ringtone that may not be within this category is the true tones plus ringtone, such as the one featuring Beyoncé,[122] that adds additional spoken words. Because the spoken words are additional creative lines, they may be outside the scope of an arrangement and qualify as an entirely new derivative work.[123] With the derivative works issue aside, however, it is likely that even these true tones plus would fall within the definition of "arrangement." After all, a musical notation of the ringtone can include the additional words of Beyoncé, and this difference readjusts the work from its original form.[124] Thus, all four types of ringtones might qualify as arrangements but may still be subject to scrutiny under some of the other requirements before passing the § 115(a)(2) test.

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119. *Id.*

120. After all, a given song could have various ringtones—all of which are unique—with each encompassing a different selection of the sound recording.

121. *See supra* note 76 and accompanying text.

122. *See supra* note 72 and accompanying text.

123. *See supra* note 91 and accompanying text.

124. A district court articulated the differences required to consider a work a derivative work:

> In order . . . to qualify as a musically 'derivative work,' . . . [t]here must be such things as unusual vocal treatment, *additional lyrics of consequence*, unusual altered harmonies, novel sequential uses of themes—something of substance added making the piece to some extent a new work with the old song embedded in it but from which the new has developed.

Woods v. Bourne Co., 841 F. Supp. 118, 121 (S.D.N.Y. 1994) (emphasis added), *rev'd on other grounds*, 60 F.3d 978 (2d Cir. 1995).

B. "To the extent necessary . . ."[125]

The second explicit limitation on the safe harbor provision for the adaptation right is a significant one; the arrangement may only be prepared "to the extent *necessary* to conform it to the style or manner of interpretation of the performance involved."[126] This restriction is perhaps the most constraining on the scope of the mechanical license, and yet commentators have misinterpreted it.[127]

The legislative history behind this restriction merely echoes the statutory language and adds no insight into the meaning behind the clause.[128] This legislative history does, however, acknowledge the purpose behind the broader subsection of § 115(a)(2), stating that the clause "is intended to recognize the practical need for a limited privilege to make arrangements of music being used under a compulsory license, but without allowing the music to be *perverted, distorted, or travestied*."[129] It must be stressed that this bit of legislative history illuminates the purpose behind *all* of § 115(a)(2). Commentators[130]—including Professor Nimmer—have failed to recognize this broader purpose and instead use the phrase "perverted, distorted, or travestied" to give meaning to the positive limitation that the arrangement be only "to the extent necessary."[131]

These commentators instead have read the clause to mean that when the "basic melody or fundamental character of the work" is left undisturbed, then the arrangement does not exceed the bounds of the "extent necessary to conform" requirement. Professor Nimmer, on the other hand, does acknowledge this clause, albeit in a backhand way. He states that

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125. *See infra* note 128.

126. 17 U.S.C. § 115(a)(2) (2000) (emphasis added).

127. *See infra* notes 128–30 and accompanying text.

128. *See* H.R. REP. NO. 94-1476, at 109 (1976) ("Clause (2) [of § 115(a)] permits arrangements of a work 'to the extent necessary to conform it to the style or manner of interpretation of the performance involved,' so long as it does not 'change the basic melody or fundamental character of the work.'" (quoting 17 U.S.C. § 115(a)(2))).

129. *Id.* (emphasis added).

130. *See, e.g.*, Mario F. Gonzalez, *Are Musical Compositions Subject to Compulsory Licensing for Ringtones?*, 12 UCLA ENT. L. REV. 11, 24 (2006) (failing to find the word "necessary" to be of any significance); Robert J. Morrison, *Deriver's Licenses: An Argument for Establishing a Statutory License for Derivative Works*, 6 CHI.-KENT J. INTELL. PROP. 87, 97 (2006) (same).

131. *See* NIMMER & NIMMER, *supra* note 17, § 8.04[F] ("Still, the variation may not be so great as to allow the music to be 'perverted, distorted or travestied.'").

> if there is to be a right at all to record anew under the compulsory license, it must envisage some minimal change and new arrangement, if only to conform to the range and style of the licensee's performers. Still, beyond such *necessary* changes, the compulsory licensee's right to make new arrangements is *limited*.[132]

Aside from this brief tribute of the "to the extent necessary" clause, however, Nimmer does little to advance any notion of what it does or should mean. Perhaps this is because no court has analyzed the scope of § 115(a)(2)[133] or perhaps it is because Nimmer does not recognize the "necessary to conform" clause to be a separate and independent requirement.

Congress does not often use the word "necessary" in the Copyright Act, and so it is unwise—perhaps irresponsible—to read such a robust adjective out of the statute. In fact, aside from the provisions describing the responsibilities of the Copyright Tribunal Board,[134] the word "necessary" only appears three times throughout the entire Copyright Act as originally enacted.[135] Furthermore, the legislative history supports this view. The legislative history demonstrates that the phrase "to the extent necessary" has real bite that cannot be ignored. Yet no case, treatise or law review article[136] even has analyzed this history.

In 1964, more than a decade before the final enactment of the Copyright Act of 1976, the House Committee on the Judiciary held a hearing to analyze various sections of the Act to determine their

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132. NIMMER & NIMMER, *supra* note 17, § 8.04[F] (emphasis added) (footnote omitted).

133. *See supra* note 107 and accompanying text.

134. *See* Copyright Act of 1976, Pub. L. No. 94-553, §§ 116(c)(5), 805(a), 806(a), 90 Stat. 2541, 2564, 2598 (codified as amended at 17 U.S.C. §§ 116, 805–06 (2000)) (using the word "necessary").

135. *See* 17 U.S.C. §§ 111(a)(4), 115(a)(2), 708(c) (2000) (using the word "necessary"). The word "necessary" does appear more regularly in later amendments to the Copyright Act, including the Digital Millennium Copyright Act. *See* Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (codified as amended in scattered sections of 17 U.S.C.) (using the word "necessary" thirteen times).

136. The legislative history behind § 115(a)(2) has been acknowledged. *See* Theresa M. Bevilacqua, Note, *Time to Say Goodbye to Madonna's* American Pie: *Why Mechanical Compulsory Licensing Should Be Put to Rest*, 19 CARDOZO ARTS & ENT. L.J. 285, 297–98 (2001) (discussing the "compromise of 1964"). Bevilacqua's discussion, however, focuses more on the phrase "fundamental character of the work" rather than the instant discussion of the "extent necessary to" clause. *See id.* (discussing the debate over whether to limit an artist's adaptation right).

feasibility.[137] In the context of the § 115 license,[138] then-current Register of Copyrights, Abraham Kaminstein, presented three different versions of the compulsory license. The first, labeled Alternative A, simply eliminated the compulsory license.[139] Alternative B, which garnered the most support and eventually was incorporated into § 115 of the 1976 Act,[140] included a similar provision to § 115(a)(2).[141] Lastly, Alternative C attempted to find middle ground between the first two alternatives by creating a compulsory license only after a five-year period following the initial distribution, during which the copyright owner would have exclusive rights to mechanical reproductions.[142]

Alternative B contained a phrase very similar to § 115(a)(2)'s arrangement provision, which allowed for the "privilege of making whatever arrangement or adaptation of the work may be *reasonably necessary* to conform it to the style or manner of interpretation of the performance involved."[143] In contrast, § 115(a)(2) allows the licensee to arrange the work only "to the extent necessary" within the style or manner of interpretation of the performance involved.[144] The hearings on this "reasonably necessary" adaptation right included two exchanges in which representatives of music authors and publishers argued that the language was too generous to the licensee. It is likely that such dialogues contributed, at least in part, to the subsequent deletion of the word "reasonably" in the resulting legislation.

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137. STAFF OF H. COMM. ON THE JUDICIARY, 88TH CONG., COPYRIGHT LAW REVISION, PART 3: PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW AND DISCUSSIONS AND COMMENTS ON THE DRAFT 1 (Comm. Print 1964).

138. This license is § 115 in the Copyright Act of 1976; in these hearings, the license was referred to as § 11.

139. *See* STAFF OF H. COMM. ON THE JUDICIARY, *supra* note 137, at 8 (providing the text of Alternative A); 3 THE KAMINSTEIN LEGISLATIVE HISTORY PROJECT: A COMPENDIUM AND ANALYTICAL INDEX OF MATERIALS LEADING TO THE COPYRIGHT ACT OF 1976, at 13–14 (Alan Latman & James F. Lightstone eds., 1983).

140. Bevilacqua, *supra* note 136, at 297–98.

141. *See* STAFF OF H. COMM. ON THE JUDICIARY, *supra* note 137, at 8–11 ("The privilege of making a sound recording under a compulsory license . . . shall also include the privilege of making whatever arrangement or adaptation of the work may be reasonably necessary to conform it to the style or manner of interpretation of the performance involved."); 3 THE KAMINSTEIN LEGISLATIVE HISTORY PROJECT, *supra* note 139, at 14–16 (same).

142. *See* STAFF OF H. COMM. ON THE JUDICIARY, *supra* note 137, at 11–13 (providing the text of Alternative C); 3 THE KAMINSTEIN LEGISLATIVE HISTORY PROJECT, *supra* note 139, at 16–18 (same).

143. STAFF OF H. COMM. ON THE JUDICIARY, *supra* note 137, at 9 (emphasis added).

144. 17 U.S.C. § 115(a)(2) (2000) (using the word "necessary").

First, Julian Abeles, a member of the Music Publishers' Protective Association, representing the Harry Fox Agency[145] at the hearing, commented on the adaptation phrase.[146] After analyzing the language, Abeles came to the conclusion that this did not sufficiently protect the copyright owner. Specifically, Abeles testified "that this is a dangerous provision because, under that provision, radical alterations can be made to the material detriment of the work."[147] He viewed the provision as allowing too expansive of a right to the licensee.

Second, Leon Kellman, representing the American Guild of Authors and Composers, testified on the same provision of Alternative B.[148] His words are worth repeating:

> Now, this arrangement provision causes a great fear in my mind in another respect. We think of arrangements in terms of pop songs. What about serious music—the man who writes a symphony, a sonata, something where the orchestration and the arrangement are an integral part of the composition? Will this provision give anyone the right to make a crazy arrangement—to jazz it up, to make his own arrangement? This provision is, as someone here said, "rough on serious music." It is horrible for serious music, and I think you are going to have to make a distinction in preserving the integrity of that type of music, which must not be rearranged.[149]

Kellman and Julian Abeles both felt the need to constrain the proposed arrangement privilege.

A later bill introduced in Congress, H.R. 4347,[150] amended the proposed language to accord with the language in § 115(a)(2): "A compulsory license includes the privilege of making a musical arrangement of the work *to the extent necessary* to conform it to the style or manner of interpretation of the performance involved . . . ."[151] The modifier "reasonably" was dropped. Although the legislative

145. The Harry Fox Agency, Inc. is the primary organization facilitating the mechanical compulsory license by collecting and distributing the fees on behalf of music publishers. *See* Harry Fox Agency, About HFA, http://www.harryfox.com/public/HFAHome.jsp (last visited Apr. 31, 2008).

146. STAFF OF H. COMM. ON THE JUDICIARY, *supra* note 137, at 216–17.

147. *Id.* at 217.

148. *Id.* at 231–32.

149. *Id.* at 232.

150. *See* 111 CONG. REC. 2076 (1965) (recording the introduction of H.R. 4347 on February 4, 1965).

151. H.R. 4347, 89th Cong. (1965).

history does not explain this change, Kellman's and Abeles's comments reflected a desire to constrict the previously flexible language of "reasonably necessary." The change directly followed the testimony, and because there were no other indications of alternative grounds for the change, their testimony likely prompted the more restrictive language found in § 115(a)(2).

The music industry must take this change in the legislative history seriously. Although reliance on the compulsory license may be minimal[152] because most licenses are operated consensually at a price lower than the statutory minimum,[153] the § 115 compulsory licenses play an important practical role. Because parties always may invoke the compulsory license if negotiations fail, all voluntary negotiations are conducted in the shadow of the mechanical license. Thus, a change in the interpretation or application of § 115(a)(2) would have a significant impact on the ringtone industry, notwithstanding the fact that the trade may not rely on the license for royalties.

So where does all of this lead? The provision, as supplemented by the legislative history of the term "necessary," sets an outer limit to the amount of alteration to the original that may be incurred. The licensee is entitled to make an "arrangement" of the work but only "to the extent necessary to conform it to the style or manner of interpretation of the performance involved."[154] Perhaps the best way to see what this mandate entails is to see what works change their status under § 115(a)(2) with this legislative gloss.[155]

Applying this legislative gloss to the four types of ringtones, only some meet the requirements for a mechanical license under § 115(a)(2). When adapting a sound recording to become a ringtone, it is necessary to conform the original musical work to the inherently short nature of a ringer on a cell phone (that is, twenty to thirty seconds). Although shortening the ringtone would be permissible under § 115(a)(2), what about other changes? Monophonic and polyphonic ringtones[156] too would fall within what is necessary to

152. NIMMER & NIMMER, *supra* note 17, § 8.04[I] ("In actual practice, the statutory mechanism is rarely invoked in the industry.").

153. *Id.* ("Given that a record manufacturer can always threaten to invoke the compulsory license without the copyright owners' consent, the statutory scheme functions as a 'ceiling' on the price that those owners may charge, absent an agreement among the parties.").

154. 17 U.S.C. § 115(a)(2) (2000).

155. *See supra* Part II.A.

156. *See supra* notes 73–80 and accompanying text.

conform to the medium of a cell phone ringtone. After all, monophonic and polyphonic ringtones are precisely the sort of reproduction that is embodied in the statute, because it is necessary to use a synthesizer to reach the desired interpretation.

But what if the polyphonic ringtone also included Beyoncé's speaking voice? Assuming that the other criteria of § 115(a)(2) are met,[157] it is likely that this change on the phonorecord would extend beyond that which is necessary to conform the original musical work to the ringtone medium. It would suffice for the ringtone to have merely the song without more. Adding Beyoncé's speaking voice even without changing the melody or the fundamental character of the work goes beyond what is "necessary." Ultimately, whether these ringtones may included within § 115 will relate to whether that portion of the ringtone is part and parcel of the arrangement or merely constitutes additional material which falls outside the scope of the ringtone's arrangement of the original work. Courts should interpret the text and legislative history of the statute to reflect the congressional intent.

C. Change "the Basic Melody"

The third requirement expressed in § 115(a)(2) is that a given ringtone "shall not change the basic melody" of the original.[158] This barrier to the mechanical license, like "to the extent necessary" clause, may pose a significant hurdle to the record labels' claim to the mechanical license. To illustrate, consider the analogy between a true tone in which a small portion of the overarching song is lifted and looped to form the ringtone and a writer lifting a small quotation out of a book. In both cases, the portion lifted has creative components; even a few sentences of a book or a few seconds from a song meet the originality requirement set forth by the Supreme Court in *Feist Publications, Inc. v. Rural Telephone Service Co.*[159] As the amount

157. This ringtone would be an arrangement because its polyphonic nature would require rearranging the work to a synthesizer. If the speaking voice came at the end of the song, then it would not alter the melody of the work. Yet if Beyoncé is not the author of the musical composition, this change might "alter the fundamental character of the work." 17 U.S.C. § 115(a)(2); *see also* Bevilacqua, *supra* note 136, at 309–10 (advocating an increased recognition for an author's moral rights through § 115(a)(2)).

158. 17 U.S.C. § 115(a)(2).

159. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991) ("Original . . . means only that the work was independently created by the author . . . and that it possesses at least some minimal degree of creativity."); *see supra* note 48 and accompanying text.

lifted becomes smaller, it may approach unprotectability. For instance, any two words from a book, no matter how creative the entire book is, will not be accorded protection because copyright law will not remove a two-word combination of expressing ideas from the public domain.[160] Likewise, any two chords lifted from an original song will not be protected.[161]

There is a line between what is protectable and unprotectable, but the real question becomes whether lifting a ten or fifteen second portion of the song is a change in the basic melody such that it violates § 115(a)(2). The answer depends on the characterization of the melody. If the melody is that of the entire work, then cutting out a portion of the work changes the melody. In contrast, if the melody is seen as small segments of melody which, when combined in a sequential matter, comprise the song, then lifting one full segment does not change the melody. Luckily, it is not necessary to choose sides; Congress has done so already. Section 115(a)(2) requires that "the arrangement shall not change the basic melody . . . *of the work*."[162] The "work" is the entire musical work, and the melody of the work therefore must be the entire melodic sequence of the song.[163] Thus, under a strict interpretation of the text, it is possible that a court using this reasoning would infer that any shortening of the work alters the basic melody.

160. Ideas are not protected under the Copyright Act, only expression. *See* 17 U.S.C. § 102(b) ("In no case does copyright protection for an original work of authorship extend to any idea . . . .").

161. *But see* Bridgeport Music, Inc. v. Dimension Films, 401 F.3d 647, 656–61 (6th Cir. 2004) (holding that digital sampling, even involving only three notes at a time, constituted copyright infringement), *amended on reh'g by* 410 F.3d 792 (6th Cir. 2005).

162. 17 U.S.C. § 115(a)(2) (emphasis added).

163. Although the Copyright Register did address the copyright owners' contention that Congress' use of "works" rather than "portions of works" signifies that the work as a whole is to be considered, this was in the context of the broader outline of § 115. *See* Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, 71 Fed. Reg. 64,303, 64,307–09 (Copyright Office Nov. 1, 2006) (final order) ("Copyright Owners argue that because a ringtone is not a reproduction of the entire musical work it is not subject to the [§ 115] statutory license."). These arguments cannot refute § 115(a)(2)'s explicit reference to the "melody of the work" because lifting only a portion of the work necessarily impairs the melody of the entire work. To read the statute otherwise would render the word "melody" superfluous if the underlying "work" could be shortened so that the melody shrinks into oblivion.

D. *"Fundamental Character"*

The fourth and final requirement found in § 115(a)(2) is that "the arrangement shall not change the . . . fundamental character of the work."[164] This factor, however, is unlikely to affect whether a given ringtone is included in the mechanical license, because any ringtone that already passes through the other three hurdles is unlikely to affect the "fundamental character" of the original.

The "fundamental character" element represents the outer bound of the safe harbor, although the phrase is not defined in the Act. It does, however, connote a broader meaning than merely changing the basic melody. In fact, it envisions a limited regime of moral rights, in which the integrity of the author and her work are protected, to the owner of the musical work copyright, often not found in the American system of copyright law.[165] How far these moral rights travel in protecting the composer is a matter of much more uncertainty. There is one principle with which few courts or commentators would disagree: if a musical work consists of both instrumental music and corresponding lyrics, it does not violate the "fundamental character" of the work to invoke the mechanical license in a purely instrumental version with no lyrics.[166]

With this notion in mind, it may be difficult to argue that any of the representative types of ringtones which have already passed the previous three filters of § 115(a)(2)—the "arrangement requirement," the all-important "extent necessary to" obstacle, and the "basic melody" hurdle—actually does change the "fundamental character" of the work. After all, monophonic and polyphonic ringtones are also instrumental representations of the sound recording. Of course, true tones stay even closer to the original by merely shortening the work.

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164. 17 U.S.C. § 115(a)(2).

165. *See* NIMMER & NIMMER, *supra* note 17, § 8.04[F] ("Such respect for the integrity of a musical composition evinces Congressional regard for the moral rights of composers, the sole explicit recognition of moral rights in the entire Copyright Act until passage of the Visual Artists Rights Act of 1990." (footnotes omitted)).

166. *See id.* (noting that courts have recognized a licensee's right to "produce a purely instrumental version" of "an authorized recording contain[ing] both music and lyrics"). One commentator has observed:

> [I]t is difficult to see how an instrumental version of a song could be said to "distort, pervert or make a travesty" of a composition. It is even more difficult to see how such a transformative and original musical arrangement would not contain the requisite originality to be considered a composition deserving full copyright protection in its own right.

Note, *Jazz Has Got Copyright Law and That Ain't Good*, 118 HARV. L. REV. 1940, 1955 (2005).

The additional lyrics added in a true tones plus ringtone may, depending on its substance, cross the line, but presumably such a ringtone would already be eliminated from the mechanical statutory license because it constitutes a derivative work.[167]

The idea that this fourth and final requirement actually lacks substantive teeth may be ironically fitting. In a legal system largely devoid of protecting the moral rights of copyright owners, it should come as no surprise that the mechanical license is no different. In practical effect, the "fundamental character" requirement, like the three other hurdles of § 115(a)(2), lends itself toward restricting the licensee's ability to pervert or travesty the original musical work while still providing for a limited adaptation right for the proliferation of musical works to be enjoyed by the public at large.

CONCLUSION

Cell phone ringtones have grown enormously in popularity,[168] and with this surge comes a significant increase in revenue for the industry. Indeed, monetary rewards are precisely the type of compensation that the Framers thought best to encourage the proliferation of creative works.[169] As such, they developed a system of copyright to ensure that monetary rewards, when paid to the copyright owners, would then encourage the artist to create more works. A shift in these expectations could fundamentally alter the rewards-based system, with the result that artists actually become discouraged from creating new works. As a result, it is essential that these rewards are paid to the correct party, and to that end, this Note proposes a new approach for interpreting § 115.

The statutory language of § 115(a) and its corresponding safe harbor subsection of § 115(a)(2) can be read either as a whole or in part. The former approach, which most commentators appear to have taken, allows any adaptation so long as it does not "pervert[], distort[], or travest[y]"[170] the original work. This interpretation seems

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167. *See supra* Part I.B.

168. Victoria Shannon, *Global Market for Cellphone Ring Tones Is Shrinking*, N.Y. TIMES, Dec. 31, 2007, at C2.

169. *See* U.S. CONST. art. I, § 8, cl. 8; NIMMER & NIMMER, *supra* note 17, § 1.03[A] n.2 ("[T]he real purpose of the copyright scheme is to encourage works of the intellect, and . . . this purpose is to be achieved by the reliance on the economic incentives granted to authors and inventors by the copyright scheme.").

170. H.R. REP. NO. 94-1476, at 109 (1976).

to be in contradiction to the "limited" adaptation privilege that was envisioned by the enacting Congress.[171] The latter interpretation—reading the statutory language literally and carefully—results in an approach that is much more faithful to the legislative history and traditional methods of statutory interpretation. This Note endorses that latter approach. Either way, much of what this Note explores will be resolved not in the Register's office, but in the courts. The financial stakes of the model of statutory interpretation that the courts ultimately choose are high. In the case of ringtones, it determines how much record companies will have to pay to music publishers and ultimately how much consumers will have to pay for their ringtones. The courts' final say on the matter will have a dramatic impact on the burgeoning market for ringtones.

171. *See* NIMMER & NIMMER, *supra* note 17, § 8.04[F] ("[T]he compulsory licensee's right to make new arrangements is limited.").