I. Introduction

On September 14, 2006, the Copyright Royalty Board (“Board”), acting on a request by the Recording Industry Association of America, Inc. (“RIAA”), and pursuant to 17 U.S.C. § 802(f)(1)(B), referred two novel questions of law1 to the Register of Copyrights (“Register”). Specifically, the Board requested a decision by the Register as to the following:

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?2

In sum, and as stated more fully below, we believe that ringtones (including monophonic and polyphonic ringtones, as well as mastertones) qualify as digital phonorecord deliveries (“DPDs”) as defined in 17 U.S.C. § 15. Apart from meeting the formal requirements of Section 115(e.g., service of a notice of intention to obtain a compulsory license under Section 115(b)(1), submission of statements of account and royalty payments, etc.), whether a particular ringtone falls within the scope of the statutory license will depend primarily upon whether what is performed is simply the original musical work (or a portion thereof), or a derivative work (i.e., a musical work based on the original musical work but which is recast, transformed, or adapted in such a way that it becomes an original work of authorship and would be entitled to copyright protection as a derivative work).

Procedural Background. On August 1, 2006, the RIAA requested that the Copyright Royalty Board refer a question to the Register of Copyrights regarding the eligibility of a mastertone, a short digital sound recording file distributed for use in a cellular telephone or similar device, for statutory licensing under 17 U.S.C. § 115.3 An opposition to the RIAA’s determinations, and rulings described in Section 803(a) of the Copyright Act. See 17 U.S.C. § 802(f)(1)(B)(i).


2 The Copyright Royalty Board is currently conducting a proceeding to determine the reasonable rates and terms for the making and distribution of phonorecords under the Section 115 license. See Adjustments or Determination of Compulsory License Rates for Making and Distributing Phonorecords. 71 Fed Reg 1454 (Jan. 9, 2006). The answers to the two questions referred to in paragraphs 1 and 2 will be considered when the Board determines the terms of the Section 115 license.

Continued
referral motion was submitted, collectively, by the National Music Publishers Association, Inc., the Songwriters Guild of America, and the Nashville Songwriters Association International (“Copyright Owners”). After considering the arguments of the parties, the Board agreed that the matters raised by the RIAA motion did present novel questions of law and agreed to submit the questions to the Register.

Accordingly, on September 14, 2006, the Board transmitted to the Register of Copyrights the following: (1) the Order, dated August 18, 2006, referring two novel questions of law; and (2) the Initial and Reply Briefs filed with the Board by RIAA and the Copyright Owners. The Board’s transmittal triggered the 30–day decision period prescribed in Section 802(f)(1)(B) of the Copyright Act. This statutory provision states that the Register of Copyrights “shall transmit his or her decision to the Copyright Royalty Judges within 30 days after the Register of Copyrights receives all of the briefs or comments of the participants.”4

In addition to reviewing the Initial Briefs and Reply Briefs filed in this proceeding, the Office concluded that it would be helpful to conduct oral argument relating to the novel questions of law.5 On October 4, 2006, the Copyright Office convened a hearing and questioned counsel on matters raised in the briefs filed by RIAA and Copyright Owners.6

Summary of Arguments. RIAA argues that ringtones are digital phonorecord deliveries as that term is defined in the Copyright Act and are subject to statutory licensing under the plain language of Section 115, without limitation. It argues that ringtones in general and mastertones,7 in particular, contain no new original material, are not protectable as derivative works, and therefore cannot infringe on the derivative work rights of the Copyright Owners. Moreover, even if they were derivative works, RIAA argues that Section 115(a)(2), the arrangement privilege, expressly authorizes their creation. In any event, RIAA argues that once the copyright owner of a musical work distributes a new ringtone to the public, anyone can obtain a statutory license to use the musical work in that ringtone. RIAA concludes that the Register should find that ringtones are subject to statutory licensing under Section 115 of the Copyright Act, and all of the conditions under the provision should apply.

Copyright Owners assert that all ringtones are excluded from the Section 115 statutory license. They argue that the statutory license for making and distributing phonorecords of musical works is narrow in scope and does not encompass ringtones. They argue that ringtones are not covered by Section 115 because they involve only a portion of the underlying composition, not the entire musical work. Copyright Owners argue that ringtones are derivative works and thus fall outside the express language of the statute. As for Section 115(a)(2), they argue that ringtones cannot be considered “arrangements” as that term is understood in the music industry, and in any event, ringtones change the basic melody and fundamental character of the musical work. Copyright Owners also argue that ringtones fail to satisfy Section 115’s requirement that the phonorecords be distributed for private use. Copyright Owners conclude that although variations exist among ringtones, none of them fit within the Section 115 licensing scheme.

Summary of Decision. We find that ringtones (including monophonic and polyphonic ringtones, as well as mastertones) are phonorecords and the delivery of such by wire or wireless technology meets the definition of DPD set forth in the Copyright Act. However, there 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. Ringtones that are merely excerpts of a preexisting sound recording fall squarely within the scope of the statutory license, whereas those that contain additional material may actually be considered original derivative works and therefore outside the scope of the Section 115 license.8

Moreover, we decide that a ringtone is made and distributed for private use even though some consumers may purchase them for the purpose of identifying themselves in public. We also conclude that if a newly created ringtone is considered a derivative work, and the work has been first distributed with the authorization of the copyright owner, then any person may use the statutory license to make and distribute the musical work in the ringtone. For those ringtones that are covered by Section 115 of the Copyright Act, all of the rights, conditions, and requirements in the Act would apply. For those ringtones that fail outside the scope of Section 115, the rights at issue must be acquired through voluntary licenses. While the Copyright Royalty Judges need not know which specific ringtones fall within/outside the scope of the license for the purpose of setting rates, and the parties have not asked the Register to undertake such a granular analysis here, we nevertheless offer some guidance on the legal matters raised in this proceeding.

II. Section 115 of the Copyright Act

Almost a century ago, Congress added to the Copyright Act the right for copyright owners to make and distribute, or authorize others to make and distribute, mechanical reproductions (known today as phonorecords) of their musical compositions. Due to its concern about potential monopolistic behavior, Congress also created a statutory license, Section 115 of the Act, to allow anyone to make and distribute a mechanical reproduction of a musical composition without the consent of the copyright owner provided that the person adhered to the provisions of the license, most notably paying a statutorily established royalty to the copyright owner. Although originally enacted to address the reproduction of musical compositions on perforated player piano rolls, the statutory license has for most of the past century been used primarily for the making and distribution of phonorecords and, more recently, for the digital delivery of music online.9

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In 1995, Congress recognized that “digital transmission of sound recordings [was] likely to become a very important outlet for the performance of recorded music.” Moreover, it realized that “[t]hese new technologies also may lead to new systems for the electronic distribution of phonorecords with the authorization of the affected copyright owners.” For these reasons, Congress made changes to Section 115 to meet the challenges of providing music in a digital format when it enacted the Digital Performance Right in Sound Recordings Act of 1995 (“DPRA”). which also granted copyright owners of sound recordings an exclusive right to perform their works publicly by means of a digital audio transmission subject to certain limitations. Specifically, Congress wanted to reaffirm the mechanical rights of songwriters and music publishers in the new world of digital technology. The changes to Section 115 were also designed to minimize the burden on transmission services by placing record companies in the position to license not only their own rights, but also, if they chose to do so, the rights of writers and music publishers to authorize digital phonorecord delivery. It is the DPRA amendments to Section 115 that are of particular interest here.

### III. Ringtone Types

Before addressing the questions raised by the Copyright Royalty Judges, we must first determine the scope of the subject matter in this proceeding. According to RIAA, a ringtone is a digital file, generally no more than 30 seconds in length, played by a cellular phone or other mobile device to alert the user of an incoming call or message. RIAA states that, initially, mobile carriers and other ringtone vendors distributed synthesized ringtones that embodied versions of musical works, but not recorded performances by featured recording artists. It states that these earlier forms of ringtones are commonly known as “monophonic” ringtones (having only a single melodic line) and “polyphonic” ringtones (having both melody and harmony). RIAA explains that typical commercial monophonic and polyphonic ringtones consist of a segment of the musical work representing its “hook,” or most memorable portion of the melody, with little or no revision.

RIAA states that advances in technology now allow mobile devices to play digital copies of commercial sound recordings. As a result, mobile phone manufacturers are incorporating the functionality of stand-alone portable digital music players, thus permitting consumers to download sound recordings via the Internet or a computer connected to the Internet. RIAA states that, in addition to full song downloads of commercial recordings to such phones, there is consumer demand for downloads of shorter (partial–copy) excerpts of sound recordings for use as ringtones. These ringtones are commonly referred to as “mastertones.” RIAA asserts that mastertones are displacing monophonic and polyphonic ringtones as the ringtone of choice amongst consumers. RIAA acknowledges that record companies and ringtone vendors must obtain licenses to reproduce and distribute the relevant musical works in ringtones and that Section 115 exists to enable use of musical works when licenses are not otherwise available.

Copyright Owners describe ringtones as ten–to thirty–second “snippets” of full–length musical works that are created to serve as ringtones on cell phones and other mobile devices. Copyright Owners alternatively describe a ringtone as a ten–to thirty–second derivation of a musical work, sometimes repeated in a “looping” sequence and sometimes not. Copyright Owners assert that the creation of ringtones, including mastertones, involves “substantial” creativity and “significant” changes to the underlying work. They state, for example, that making a ringtone requires creative determinations as to which portions of the work should be selected to best capture the “hook” of the full length recording and also to be most appealing as ringtones. They further state that many mastertones are designed to be looped, repeating the selected portions of the song multiple times until the phone or mobile device is answered. Some songs have multiple hooks, each of which can be made into a separate ringtone. Other ringtones, they assert, include new content not present in the underlying work.

Analysis. While RIAA and the Copyright Owners may disagree as to the amount of creativity it takes to create a ringtone, they do agree that, in general, ringtones are a unique category of sound recordings that are used to announce an incoming call. The most rudimentary ringtone, in musical terms, is the monophonic ringtone that only contains a musical work’s melody (or a portion of the melody). One level up the musical hierarchy is the polyphonic ringtone that contains a work’s melody and harmony (or a portion thereof). The most musically complex ringtones are mastertones. A mastertone is a portion of a pre–existing full length musical work that may play sequentially or is looped in a sequence. A mastertone could also contain a portion of a musical work combined with a message from the recording artist designed specifically for the ringtone user. It is important to note that there are also non–musical ringtones that are becoming increasingly popular with consumers. As discussed below, different types of ringtones may be treated differently for Section 115 purposes.

20 RIAA Initial Brief at 3–4; see also Neil J. Rosini and Michael I. Rudell, Ring Tone Revenues Foster Copyright Detente, 234 N.Y.L.J. 3, col. 1 (2005) (“Originally, musical ring tones were only available in ‘monophonic’ form: a simple series of tones—each single note—that might remind one of several bars from a favorite CD as performed by a very simple computer. Technology then advanced to the ‘polyphonic’ level, which are like monophonic ring tones with multiple notes played at the same time, creating harmonies. They sound closer to that favorite CD, but without original instrumentation or vocals.”) [Hereinafter “Rosini and Rudell”].

21 RIAA explains that record companies hire contractors to select hooks from popular sound recordings and then create ringtones including these hooks. Oral Argument Transcript at 10.

22 RIAA states that ringtone producers do not intentionally create looping sequences; instead, looping is the product of cellphones that do not have adequate storage capacity (memory). Oral Argument Transcript at 13-14.

23 Copyright Owners Reply Brief at 5, 7.

24 See Rosini and Rudell (“[C]onsumers aren’t settling merely for musical ringtones and ringbacks. Audio clips from films and television programs; comic routines from Comedy Central; pithy observations by Donald Trump; and announcement of baseball players are also available as ring tones.”); see also http://cyberextazy.wordpress.com/2006/09/01/ringtones-in-mtv’s-video-music-awards/, Ringtones in MTV’s Video Music Awards[Sept. 1, 2006] (stating that ringtones are evolving into watchtunes, which are ringtones combined with video clips).

25 Copyright Owners Objection at 5.


28 Copyright Owners Objection at 5.


30 Id.

31 Id.


33 Id.

34 Id.

35 Copyright Owners Objection at 5.

36 Copyright Owners Reply Brief at 5, 7.

37 20 U.S.C. §§ 301 et seq.


39 Id.


41 Id.
IV. The Applicability of Section 115 to Ringtones

Statutory Language. Section 115 of the Copyright Act provides a “compulsory license to make and distribute phonorecords” of any musical work previously recorded once a phonorecord of a nondramatic musical work has been “distributed to the public in the United States under authority of the copyright owner.” Such a license “includes the right of the compulsory licensee 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.” The term “digital phonorecord delivery” or “DPD” is defined, in part, as “each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording.”

Congress created the statutory mechanical license, as part of the Copyright Act of 1909, to prevent monopolistic control over musical works while ensuring that music publishers and songwriters receive an appropriate royalty. Congress revisited the issue of statutory licensing in 1976 and 1995 and has reaffirmed these same purposes. Congress added the DPD provisions to Section 115, as part of the DPRA of 1995, with support of the music publishers, noting: “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 rather than by the traditional making and distribution of records, cassettes, and CDs.” The question presented here is whether ringtones qualify as digital phonorecord deliveries within the scope of Section 115. RIAA argues that, under the plain language of the Copyright Act, a distribution of a ringtone is a DPD subject to statutory licensing under the Copyright Act. RIAA asserts that a ringtone results from the fixation of a series of musical, spoken, or other sounds and therefore meets the definition of a “sound recording” in Section 101 of the Copyright Act; its fixation in a material object is a “phonorecord.” According to RIAA, it is a phonorecord of the relevant musical work as well. In the case of a mastertone, the sound recording is a clip of the commercially distributed recording. In the case of monophonic and polyphonic ringtones, the fixed sounds are rendered by a synthesizer in the telephone and so do not represent ambient sound in a recording studio.

RIAA asserts that downloads of ringtones are DPDs because, when a ringtone is downloaded, there is a digital transmission of the sound recording that results in a specifically identifiable reproduction for the transmission recipient. RIAA argues that the statutory license under Section 115 includes the right of the licensee to distribute ringtones just as it includes the right of the licensee to make and authorize other kinds of downloads. RIAA asserts that statutory licensing of ringtones is consistent with Congressional intent, as they are just the type of new technology contemplated by Congress to be included within the scope of the DPRA.

Copyright Owners do not argue that ringtones are not DPDs, stating instead that since ringtones are not covered by Section 115, there is no need to address the question. Rather, Copyright Owners argue that the statutory license for making and distributing phonorecords or musical works is narrow in scope and does not encompass uses such as ringtones. They assert that the inclusion of ringtones within the statutory license would contravene Congress’ intent that Section 115 be a narrowly construed exception to certain exclusive rights of the musical work copyright owner. Copyright Owners state that, as a “limited exception” to certain exclusive rights granted to copyright owners, courts consistently have held that the statutory license “be construed narrowly, lest the exception destroy, rather than prove, the rule.”

With regard to the DPRA of 1995, Copyright Owners assert that Congress’ clarification that Section 115 covered not only “brick and mortar” sales did not extend the license to cover any and all digital uses. They state that the existing limitations on the scope of the license did not change and that use of a work prior to publication, the creation of derivative works, and the synchronization of a musical work, are uses that remain outside of the license, whether in digital or physical form.

Copyright Owners assert that RIAA’s interpretation of Section 115 would “potentially open the door” to licensing of snippets of musical works used to enhance all sorts of other consumer products and devices, such as musical car alarms or doorbells. They state that the licensing of musical works for functional uses in consumer products is not what Congress intended when it enacted Section 115.

RIAA, in its Reply, asserts that the statutory mechanical license has been a fixture of U.S. copyright law for nearly a century and argues that it should be construed in accordance with its terms. RIAA contests Copyright Owners’ view that Section 115 should be construed narrowly, noting that the legislative history accompanying the 1976 Copyright Act states: “The fundamental question of whether to retain the compulsory license or do away with it altogether was a major issue during earlier stages of the program for general revision of the copyright law. At the hearings it was apparent that the argument on this point had shifted, and the real issue was not whether to retain

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26 See id. at 6–7.

27 See id. at 8.

28 Oral Argument Transcript at 55.
the compulsory license but how much the royalty rate under it should be.

2 The Committee’s conclusion on this point remains the same as in 1967: “that a compulsory license system is still warranted as a condition for the rights of reproducing and distributing phonorecords ofcopyrighted music.” 46 RIAA adds that Congress did not narrow the license through adoption of the DPRA in 1995, but rather stated that it was “extending the mechanical compulsory license to digital phonorecord deliveries” and that its purpose was to “maintain and reaffirm” that the Section 115 license would apply to “new technologies.” 47 RIAA concludes that although some details of the Section 115 license have changed over the years, nothing in these enactments or the legislative history thereof suggests that Congress intended a narrow reading of the statute. 

Analysis. We find that ringtones meet the definition of DPDs. The issue presented is one of pure statutory construction and there is no actual dispute on this point. 48 Based on the language of the statute, ringtones easily meet the requisite definitions under the Copyright Act to be included in the Section 115 licensing scheme. First, we hold that a ringtone meets the definition of “sound recording” under Section 101 of the Act as a work that results from “the fixation of a series of musical, spoken, or other sounds,” 49 and that the sound recording is fixed in the form of a “phonorecord,” defined in the statute as a “material object in which sounds, other than those spoken, or other sounds, but not including the spoken word, are fixed by or for any purpose.” 50 The phonorecord here is the actual sound recording file stored as a “download” on either the cell phone’s hard drive or on a cell phone’s removable memory storage disk. 51 When downloaded through the Internet or by wireless transmission, a ringtone is part of a “digital phonorecord delivery” and a digital transmission of a sound recording which results in a “specifically identifiable reproduction” by or for any transmission recipient of a phonorecord of that sound recording. 52 We also believe that our statutory analysis comports with Congressional intent. Ringtones are delivered by means of the type of “new technologies” Congress intended to be included when it enacted the DPRA in 1995. 53

We disagree with Copyright Owners that Congress did not intend for ringtones to be the kind of use of musical works contemplated for inclusion under the Section 115 license. 54 While we adhere to the general proposition that statutory licenses are to be construed narrowly, 55 we find that Section 115, as amended by the DPRA, purposefully broadened the scope of the statutory license to cover DPDs, and ringtones appear to fit comfortably within the definition of DPDs. On this note, we recognize that Copyright Owners have cited Fame Publishing Co. v. Alabama Custom Tape, Inc., 507 F. 2d at 670, to support their narrow construction argument. However, we find this citation is inapt because the case arose out of a dispute concerning statutory language found in the 1909 Act that is not present in the current version of Section 115. In any event, the legislative history of the Copyright Act of 1909 states that from its inception, this compulsory license was intended to include all “mechanical reproductions” and that one of its purposes was “to secure to the composer an adequate return for all use made of his composition.” 56 (emphasis added). While the concept of the cellular phone ringtone undoubtedly would have astonished the members of the 1909 Congress, the license they devised was broad enough to include ringtones. Whether our interpretation opens the door” to licensing of snippets of musical works to be used in car alarms or doorbells is a question that is outside the scope of this proceeding. 

Works or Portions of Works. According to Copyright Owners, Section 115 is expressly limited to the making and distributing of phonorecords of “works,” not portions of works such as ringtones. Copyright Owners argue that because a ringtone is not a reproduction of the entire musical work, it is not subject to the statutory license. They argue that Section 115 throughout its revisions makes clear that a “work,” and not a “portion” of a work, is its subject. Copyright Owners state that this result was not an accident of drafting nor is it an unintended source of statutory ambiguity. They state that Congress had no difficulty using the term “portions” where in fact that concept was intended, such as in Sections 108(h)(1) and 110(2) of the Copyright Act. 57 Copyright Owners assert that this interpretation is confirmed by Section 115’s legislative history which mentions “cover records” as well as cassettes and CDs 58. Copyright Owners remark that it is obvious that the Section 115 license applies only to physical or digital phonorecords of complete works since industry practices have developed on the basis of this interpretation of Section 115. They state, for example, that partial uses of compositions, such as medleys and samples, are licensed in market transactions. They further state that legal commentators have recognized that the Section 115 license does not apply to digital sampling and that it would have to be modified in order to include sampling within its scope. 59

56 Section 108(h)(1) states in part “a library or archives. . . may reproduce, distribute, display, or perform in facsimile or digital form a copy of or phonorecord of such work, or portions thereof, for purposes of preservation, scholarship, or research.” Section 110(2) refers to “the performance of a nondramatic literary or musical work or reasonable limited portions of any other work, or display of a work in an amount comparable to that which is typically displayed in the course of a live classroom session, by or in the course of a transmission.” 60 Copyright Owners Initial Brief at 9–11, citing Supplementary Register’s Report on the General Revision of the U.S. Copyright Law: 1965 Revision Bill, House Comm. on the Judiciary, 89th Cong., Copyright Law Revision Part 6, at 54 (Comm. Print 1965) (discussing “cover” records); H.R. Rep. No. 90–83, at 67 (1967) (referring to “disks and audio tapes”); S. Rep. No. 104–128, at 37 (1995) (“extending the mechanical compulsory licenses. . .as new technologies permit phonorecord to be delivered by wire or over airwaves rather than by traditional making and distributing of record, cassette and CDs.”)


58 See Public Performance of Sound Recordings: Definition of a Service, docket No. RM 9900–B, 65 FR 77,730 (Dec. 11, 2000) (noting that the Copyright Office has historically construed limitations on copyright narrowly, especially those constrained by a compulsory license.).

RIAA asserts that Section 115 applies to whole musical works as well as portions of musical works, and that any other reading would be inconsistent with other provisions of the Copyright Act.\textsuperscript{53} RIAA states that if the Copyright Owners are correct that the Copyright Act distinguishes between “works” and “portions of works,” then reproduction and distribution of ringtones would be permissible without a license as the provisions under Section 106 granting the exclusive rights to reproduction and distribution only refer to “works,” not “portions of works.” RIAA remarks that the Copyright Owners do not intend that interpretation nor is it a correct one. RIAA adds that Copyright Owners’ approach to what constitutes a “work” would make other phrases in the statute superfluous. It notes, for example, that one of the factors used in determining whether a use of a work is a fair use under Section 107(3) is the “amount and substantiality of the portion used in relation to the copyrighted work as a whole.” The phrase “as a whole” would be superfluous if a “work” in the Act must always be the whole work and not a portion thereof.\textsuperscript{54} RIAA asserts that although un stated, Copyright Owners apparently are relying on the canon of statutory construction expressio unius est exclusio alterius, which provides a general inference that omissions in statutory text are intentional.\textsuperscript{55} RIAA notes, however, that this maxim “requires great caution in its application” and should be disregarded where “its application would thwart the legislative intent made apparent by the entire act.”\textsuperscript{56} It states that such caution should be exercised here because, unlike most of the relevant language in Section 115, the references to “portions” of works that Copyright Owners cite did not appear in the 1976 Act and were only added years later. RIAA asserts that there is no indication that either amendment was intended to affect the interpretation of the provisions of the Copyright Act enacted more that twenty years before. RIAA concludes that two isolated references in the Copyright Act to “portions of works” cannot imply that the hundreds of unadorned references to “works” apply only to works in their entirety.\textsuperscript{57} RIAA notes that Copyright Owners’ argument that ringtones are analogous to sampling is equally misplaced. It states that ringtones are excerpts that are taken from musical works and distributed as such; samples, however, are short excerpts that are blended into what are clearly new creative works. RIAA asserts that the fact that the latter are licensed apart from Section 115 does not imply that the former should be.\textsuperscript{58} Analysis. The Section 115 license is not limited to the reproduction and distribution of phonorecords of the entire musical work, and an excerpt may qualify for the statutory license if all other requirements are met. We believe that the Copyright Act’s language and purpose are broad and that “portions of works” should be treated the same as any other type of work under Section 115. This provision of the Act does not expressly exclude “portions of works” from its scope and we cannot assume that such treatment was intended in the absence of clear statutory language to that effect.\textsuperscript{59} Contrary to Copyright Owners’ assertion, we cannot find support for such a limited and narrow reading of the Act in the legislative history they cite.\textsuperscript{60} Moreover, we believe that Copyright Owners’ citations to Sections 108 and 110 are inapt as these provisions were not enacted contemporaneously with Section 115 and cannot be read to provide any guidance as to Congressional intent or the purpose of the statutory license. We note, in particular, that their interpretation of Section 110(2) defies legislative intent as well as common sense.\textsuperscript{61} Under Copyright Owners’ interpretation, educators using the distance education exemption could transmit limited portions of works other than nondramatic literary or musical works, but if they transmit a performance of a nondramatic literary or musical work, they would have to transmit the entire work as a transmission of a portion of the work would not be permitted. Congress certainly did not intend this result.

We also find that Copyright Owners’ reading of the Copyright Act, if adopted, would render certain provisions of the statute superfluous. For example, well-settled interpretation of and practice under Section 118 of the Act would be undermined if Copyright Owners’ interpretation were correct. Under this provision, licensing agreements and related fees negotiated between noncommercial broadcasting entities and copyright owners of published nondramatic musical works are subject to ratemaking by the Copyright Royalty Board.\textsuperscript{62} While Section 118 expressly refers to “works,” it has been understood to include portions of works as well. For example, under 37 CFR § 253.7(b)(3), which implements the rates set for the Section 118 statutory license, “a ‘Concert Feature’ shall be deemed to be the nondramatic presentation in a program of all or part of a symphony, concerto, or other serious work originally written for concert performance or the nondramatic presentation in a program of portions of a serious work written for opera performances.”\textsuperscript{63}emphasis added. If we were to accept Copyright Owners’ argument that the Act covers only full musical works, and not portions of musical works, then the Board could never set such rates pursuant to Section 253.7. This result, we believe, was not intended by Congress. We also believe that Copyright Owners analogy to sampling is inapt. Sampling generally refers to the appropriation of sounds from an existing sound recording for transformative use along with other sounds in a new work. A mastertext, in contrast, is taken from a single work in the form of an excerpt.

Marketplace Developments.

According to Copyright Owners, the statutory license was instituted to ensure a market where none existed, but there is an active market for freely negotiated licenses already in place. They assert that the Register of Copyrights has stated that ringtones are a subject more appropriately left to market forces than government regulation and that “there is no need for Government to legislate what the parties can negotiate themselves.”\textsuperscript{64} They state that Copyright Owners and record labels, recognizing that ringtones are not DPDs subject to the statutory license,
have entered into voluntary license agreements granting the labels the right to create ringtones at specified mutually-negotiated royalty rates. Copyright Owners assert that these voluntary licenses provide further support that ringtones are outside the narrow scope of Section 115. They conclude that there exists a vibrant and growing market for ringtones, which makes it unnecessary and inappropriate to include ringtones within Section 115.

According to RIAA, Copyright Owners mischaracterize current marketplace conditions and the Register's prior testimony, which, in any instance, are both irrelevant. RIAA asserts that the Register's testimony was in the context of an express legislative invitation to explore revision of the statute. The reform proposal presented by the Register, if adopted by Congress, would have repealed the statutory license and omitted from a successor statute. The reform proposal presented in the context of an express legislative

v. derivative works

Section 115 and Derivative Works. Section 101 of the Copyright Act defines a derivative work 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, abridgement, 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." Congress used one defined term, "derivative work," to specify both that the derivative work right to be infringed, and that the copyright owner has the exclusive right to do and authorize any of the following. . . (2) prepare derivative works based upon the copyrighted work. . . . 17 U.S.C. § 106(2).

Copyright Owners note that the Copyright Board of Communications Rights, Administration of Performing Rights and of Phonorecords has determined that ringtones fall outside the ambit of the statutory license because they are derivative works. They argue that ringtones exceed the scope of the Section 115 license by infringing the copyright owners' exclusive right to prepare derivative works. They assert that Section 115 subjects only the rights to reproduce and distribute phonorecords of works to the statutory license, leaving derivative works outside its scope. Copyright Owners argue that ringtones fit squarely within the derivative work definition because they are based on pre-existing works, and typically reduce a three-to-five minute work to an abridged ten-to-thirty second work. RIAA asserts that the legal tests for protection of derivative works and infringement of the derivative work right are identical and that the right does not require originality. It states 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." RIAA cites a string of precedent to support its position that derivative works must be original to be afforded copyright protection in the work, and does not imply any exclusive right in the preexisting material." 17 U.S.C. § 101(b). Section 106 states that "[subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and authorize any of the following. . . (2) prepare derivative works based upon the copyrighted work. . . ." 17 U.S.C. § 106(2).

Copyright Owners note that the Copyright Board of Canada recently observed in a proceeding to set the rates for ringtones that "mastertones are created by taking an actual segment of a sound recording after determining which number of seconds out of a work will be most appropriate for the market." Id., citing Copyright Board of Canada, Collective Administration of Performing Rights and of Communications Rights, Statement of Royalties to be Collected by SOCAN for the Communication to the Public by Telecommunication, in Canada, of Musical or Dramatico-Musical Works, Tariff No. 24–Ringtones (2003–2005) [Aug. 18, 2006] at 13. In response, RIAA notes that the statement of rates set by the Copyright Board confirms its supposition that the selection of a mastertone from the underlying musical work is a "trivial omission." RIAA Reply Brief at n. 10.

Copyright Owners Initial Brief at 12–13. Copyright Owners note that the Copyright Board of Canada recently observed in a proceeding to set the rates for ringtones that "mastertones are created by taking an actual segment of a sound recording after determining which number of seconds out of a work will be most appropriate for the market." Id., citing Copyright Board of Canada, Collective Administration of Performing Rights and of Communications Rights, Statement of Royalties to be Collected by SOCAN for the Communication to the Public by Telecommunication, in Canada, of Musical or Dramatico-Musical Works, Tariff No. 24–Ringtones (2003–2005) [Aug. 18, 2006] at 13. In response, RIAA notes that the statement of rates set by the Copyright Board confirms its supposition that the selection of a mastertone from the underlying musical work is a "trivial omission." RIAA Reply Brief at n. 10.

Copyright Owners Initial Brief at 11, citing Feist Publ., Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 346 (1991) ("Originality is a constitutional requirement.").
With regard to the appropriate legal test regarding copyrightability, we believe that Feist's controlling precedent here. In Feist, the Supreme Court observed that "as a constitutional matter, copyright protects only those constituent elements of a work that possess more than a de minimis quantum of creativity," and that there can be no copyright in work in which "the creative spark is utterly lacking or so trivial as to be virtually nonexistent." As illustrated below, there are ringtones that may be considered derivative works because they exhibit a degree of originality and creativity. However, there are many other ringtones that would not be considered derivative works because they exhibit only trivial changes from the underlying work. Those ringtones would not be considered derivative works and would be within the scope of the statutory license.

Court Precedent. Copyright Owners argue that caselaw compels a conclusion that ringtones are derivative works. They additionally argue that the statutory license bars from making trivial modifications to ringtones without permission. However, courts have found that clips from full-length copyrighted works, such as television trailers, constitute derivative works.

RIAA cites cases contrary to Copyright Owners' position. For example, it cites precedent holding that the use of copyrighted music excerpts in the background of a television show did not infringe the derivative work right because the inclusion of the music did not constitute a new derivative work that warrants copyright protection. It also refers to another case where the district court denied a claim that adding local commercials to rental videos was an infringement of the derivative work right because there was no evidence that "the mere addition of a commercial to the front of a videocassette recasts, transforms, or adapts the motion picture in what could represent an original work of authorship." Relying on the district court's determination in Agee that "in no sense of the word was infringing and not fair use.

RIAA argues that the cases involving the creation of unauthorized trailers through editing and condensing of motion pictures are inapt. According to RIAA, such cases involve claims of unauthorized reproduction, and that is a sufficient basis on which to decide of different copyrighted works constitute derivative works under the Copyright Act. They note, for example, that courts have found that clips from full-length copyrighted works, such as movie trailers, constitute derivative works.


RIAA states that for mastertones, the trivial action of copying a clip from an existing sound recording does not stand on its own as meriting copyright protection. RIAA also asserts that there is no precedent in copyright law for the proposition that every partial reproduction of a work constitutes a separate derivative work. RIAA concludes that ringtones are nothing more than partial copies that lack sufficient originality to be protected as derivative works or to infringe the derivative works right. RIAA contends that ringtones do not fit under the definition of derivative works in Section 101 of the Act, the making of a ringtone cannot be excluded under Section 115 on this basis.

Analysis. As an initial matter, we agree with Copyright Owners’ assertion that Section 115, by its terms, concerns only the rights to reproduce and distribute phonorecords of works, leaving derivative works outside its confines. Thus, consideration of the derivative work right is important only to the extent that ringtones which are adjudged to be a derivative work cannot be licensed under Section 115. To be considered a derivative work, a ringtone must exhibit a degree of originality sufficient enough to be copyrightable.

See id. at 12-14, 20, citing Woods v. Bourne Co., 60 F.3d 978, 989 (2d Cir. 1995)(holding that a musical work must have “substance added making the piece to some extent a new work” and that only the “addition of such new material would entitle the creator to a copyright on the new material.”); Lee v. Deck the Walls, Inc., 925 F. Supp. 576 (N.D. Ill. 1996), aff’d on other grounds sub nom., Lee v. A.R.T. Co., 125 F.3d 580 (7th Cir. 1997)(holding that notecard art image deposited on tile and covered with epoxy is not copyrightable because the work does not contain any original artistic expression); Pekar v. Masters Collection, 96 F. Supp. 2d 216 (E.D.N.Y. 2000) holding that an oil painting reproduction, made by transfer of a copy of a copyrighted painting from a poster to a canvas with the addition of resin to create a brushed-on look of the original was not a derivative work because there was no originality that would be considered copyrightable; Precious Moments, Inc. v. La Infantil, Inc., 971 F. Supp. 66, 67 (D. Puerto Rico, 1997) (stating that originality is required for a derivative work to be copyrightable).

77 See id. at 2.

78 Id. at 10, citing Nimmer on Copyright § 8.09[A](noting that no reported case finds the holder of a reproduction license barred from making trivial changes to a work even without a separate license to make derivative works).

79 We recognize that in one sense, every ringtone will be a derivative work, in that every sound recording of music is a derivative work; the underlying work is the musical composition itself. See H. R. Rep. No. 94–1476, at 108–109 [1976] The issue before a court is whether a ringtone is a derivative work; by definition it is. Rather, the question is whether a musical composition as recorded in a ringtone infringes the derivative work right in the underlying composition. When we refer to ringtones as “derivative works” in this Memorandum Opinion, we are referring not to the sound recording, but to the musical composition recorded in the ringtone. See id., n. 8, supra.

80 Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991). Original, as the term is used in copyright, means that: (1) the work was independently created by the author (as opposed to copied from other works); and (2) it possesses at least some minimal creativity. Id. at 345. When we refer to “originality” in this Memorandum Opinion, we are referring not to independent creation, but to creativity.


82 Id., citing U.S. Papyrus, Inc. v. Executives Unlimited of Durham, Inc., 18 U.S.P.Q.2d 2049, at *8 (4th Cir. 1991) (finding that a section of a reference work was not a protectable compilation because the author collapsed voluminous tariff information into an easily usable guidebook); Coffey v. Cook, 409 F. Supp. 2d 484, 497 (S.D.N.Y. 2006) (finding a protectable compilation in the selection and ordering, for a musical show, of thirty two songs from a universe of possible musical compositions based on the compiler’s sense of musicality).


84 Copyright Owners Initial Brief at 15, citing Agee v. Paramount Commc’ns, Inc., 853 F. Supp. 778 (S.D.N.Y. 1994), aff’d in part rev’d in part on other grounds, 59 F.3d 317 (2d Cir. 1995)(holding that “copying a sound recording for use in a broadcast television program does not create a derivative work which warrants protection under the Copyright Act of 1976”). The Second Circuit found it unnecessary to reach the derivative works question. See id. at 324 (stating that “Although the interspersing and abridgement of a sound recording may not, strictly speaking, involve sampling or amount to the traditional creation of a derivative work, such use of a recording appears to fall within the language of section 114(b), perhaps constituting a rearrangement or alteration in sequence. We need not determine the extent to which the recording was altered, however, because the finding that Paramount created a derivative work is unnecessary to a finding of infringement that light of Paramount’s reproduction of Agee’s recording.”).


86 See id. at 15.
them. Moreover, in the few instances where those cases address the derivative work right, they point in conflicting directions depending on whether or not the court follows Ninth Circuit precedent. RIAA argues that the Register should decline to follow the Ninth Circuit's holding that the derivative work right may be infringed without a finding of originality. RIAA explains that in the Ninth Circuit, all one must show to prove infringement of the derivative work right is substantial similarity between the derivative work and the underlying work and that, under this reasoning, there is no legal distinction between infringing the reproduction right and infringing the derivative work right. RIAA submits that such an interpretation is wrong because it is contrary to the plain language of the statute and contrary to the weight of authority. RIAA states that, in any event, the trailer cases are of marginal relevance here because they involve a greater degree of editorial judgment than copying a single clip for distribution as a mastertone or other typical commercial ringtone.

Copyright Owners assert that to the extent there is a dispute among the circuits as to whether creativity sufficient for copyright protection is required for a work to be a derivative work for purposes of infringement, that dispute is not appropriate for resolution by the Register and is, in any event, irrelevant to the Register's analysis here since ringtones satisfy the test for creativity in any circuit.

Analysis. Given the wide range of ringtones available in the marketplace, and understanding that a derivative work analysis is factually intensive, our task here is not to provide a comprehensive analysis of the caselaw. However, we do need to address whether a musical excerpt, in the form of a ringtone, is a derivative work because it is a central issue in this proceeding. First, consideration of the derivative work right issue is important to the extent that a ringtone which is adjudged to be a derivative work cannot be licensed under Section 115. Second, we agree with RIAA that the Ninth Circuit's more lenient test for infringement of derivative works, which seemingly ignores the originality requirement, appears to be in error as it runs contrary to all other Circuit Court precedent. Third, we agree with RIAA that reliance on derivative works precedent involving movie trailers, such as Video Pipeline, Inc., is inapt because the creating and editing process involved in making those trailers required much more originality than simply shortening an existing musical work to create a ringtone.

94 We note that there is widespread disapproval of the Ninth Circuit's approach to derivative works. See, e.g., Lee v. A.R.T., 125 F.3d 580, 582 (7th Cir. 1997) (noting that the Ninth Circuit is "right about what counts as a derivative work, then the United States has established through the back door an extraordinarily broad version of the authors' moral rights."); Precious Moments, Inc. v. La Infantil, Inc., 971 F. Supp. 66, 69 (D. Puerto Rico 1997) (agreeing with the Seventh Circuit that Mirage and its progeny read the originality requirement out of the definition of derivative works and "open[s] the door for the most trivial modifications to generate an infringing derivative work."); Goldstein v. Nimmer on Copyright § 4.03. Although Copyright Owners assert that "to the extent that there is a dispute among the circuits as to whether creativity sufficient for copyright protection is required for a work to be a derivative work for purposes of infringement, that dispute is not appropriate for resolution by the Register," the positions taken by the parties on this issue require the resolution of that issue. Having concluded that many ringtones do not exhibit sufficient creativity to qualify for copyright protection as derivative works, it is necessary to determine whether the derivative work right nevertheless could be infringed by making and distributing such ringtones.

95 There are marked differences between the making of ringtones and the making of movie trailers in the cited cases. For example, the trailers at issue in Video Pipeline were 120 seconds in length and included the display of the movie studio's trademark, title of the motion picture, and two or more scenes from the film. See 342 F.3d at 195. In any event, the Third Circuit found that the trailers at issue were essentially copies of the original work that lacked "any significant transformative quality" and any "creative ingenuity." Id. at 199–200. The trailer at issue in John Lath. another case cited by Copyright Owners, was 2 minutes and 40 seconds in length and included individual images and scenes, among other things. Further, the original trailer was transformed into a 3-D format for use with specially engineered eyeglasses. See 949 F. Supp. at 753.

96 Copyright Owners Reply Brief at n. 13.

97 Copyright Owners Reply Brief at n. 13.
to function as a ringer, with the result that a musical phrase is repeated in a sequence unintended by the author of the work. They add that other mastertones involve the addition of new lyrics, spoken–word interludes, and other material designed to enhance sales. Copyright Owners conclude that, for a derivative work to be copyrightable under the copyright laws, the “requisite level of creativity is extremely low” and the alterations of ringtones in the manner described meet this test.

RIAA disagrees and asserts that ringtones are nothing more than partial copies that lack sufficient originality to be protected as derivative works or to infringe the derivative works right. It states that copying a clip to distribute as a rington does not involve the addition of any new material. RIAA argues that because the definition of the term “derivative work” applies to both protection and infringement, and because the definition requires originality in both contexts, copying a single short clip from a sound recording and/or musical work to distribute as a mastertone or other rington does not meet the requirements for copyright protection as a derivative work or infringement as a derivative work.

RIAA has submitted, into the record, a CD with relevant examples of mastertones, that are simply partial copies of the underlying musical work. In their Reply Brief, Copyright Owners reiterate that the creation of ringtones involves substantial creativity and that ringtones do not only feature the hook of a particular musical work. Moreover, they assert, there is no such thing as a “typical commercial rington,” as RIAA seems to suggest. Rather, they vary in kind and length. They note the following examples: (1) the rington for Leonard Cohen’s “Everybody Knows” recording comprises nine seconds of the approximately five and a half minute full length work and the rington commences seven seconds into the song; (2) Britney Spears “ . . . Baby One More Time” rington consists of a fifteen–second snippet of the recording that begins two and half minutes into the three and a half minute song; and (3) the mastertone for Jay Z’s “Change Clothes,” consists of excerpts of two separate hooks repeated twice (even though these hooks are separated in the full–length song by other musical content), and then these two snippets are further repeated if the caller fails to answer the phone. Copyright Owners also note that some songs result in multiple ringtones, each focusing on different elements of the same underlying composition. They state, for example, that the Bubba Sparx/Ying Yang Twins hit, “Ms. New Booty,” has spawned two ringtones—one featuring the lyric “I found you” and the other emphasizing the lyric “get it right.”

They also assert that other ringtones include new content not present in the underlying work. Copyright Owners note, for example, that the Pussy Cat Dolls’ mastertone derived from the best–selling song “Don’t Cha” features the lyrics, “Don’t cha wish your girlfriend was hot like me. Don’t cha wish your girlfriend was a freak like me,” which are part of, but not all of the lyrics of the song. This rington, which is eleven seconds, as compared to the four and a half minute full length work, also includes new material different from those of the underlying work: “Come on boy, don’t cha wanna pick up? We’re ready for ya.” These additional words are spoken, not sung, and are not accompanied by music. Likewise, Copyright Owners note that in Beyonce’s mastertone “Let Me Cater 2 You,” the rington contains a portion of the song, with an extra line added at the end: “What’s up, this is Beyonce from Destiny’s Child and this call is for you.” Again, the additional words are spoken, unaccompanied by music. Copyright Owners have submitted a CD, included in the record, that contains many more examples of ringtones that they assert support their case.

Analysis. The rington samples provided by the parties are instructive. The record evidence demonstrates that not all ringtones are the same. While we need not decide whether all of the ringtones presented to us are within the scope of Section 115, we observe that some undoubtedly are not. For example, the 16 second mastertone, *Grind With Me*, by performing artist, Pretty Rickey, was created solely for rington use and the lyrics used therein are not found in the 4:02 minute full length version of the work. This rington is likely copyrightable as a derivative work because it is original and demonstrates a “creative spark.” In any event, there are likely to be many ringtones, such as the mastertone that uses a portion of Otis Redding’s classic “Sittin’ On the Dock of the Bay,” that simply copy a portion of the underlying musical work and cannot be considered derivative works because such excerpts do not contain any originality and are created with rote editing. There are also

99 Copyright Owners Initial Brief at 19-20.
101 Copyright Owners Reply Brief at 5–6.
ringtones that contain a portion of the full length musical work and additional spoken material such as the Pussycat Dolls example, above. The determination of whether such a ringtone, or one that includes the addition of some new lyrics, results in a copyrightable derivative work is a mixed question of fact and law that is beyond the scope of this proceeding. In sum, there is a broad spectrum of ringtones, and whether one would be considered a derivative work depends upon the nature of the ringtone. At one end of the spectrum are those ringtones that are simple excerpts of larger musical works. This type of ringtone is not a derivative work. At the other end of the spectrum are ringtones that contain additional original authorship. These would be considered derivative works if there was a sufficient amount of creative authorship in the new material. In between are ringtones that may include some new material (spoken words or music) in addition to the excerpt. Those ringtones cannot be properly analyzed in a factual vacuum and their status as derivative works need not be determined in this proceeding, but are more appropriately determined on a case-by-case basis by the courts.

VI. The “Arrangement Privilege”

Section 115(a)(2) of the Copyright Act states that the “compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform to it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work, and shall not be subject to protection as a derivative work under this title, except with express consent of the copyright owner.”102 (Emphasis added) According to the Act’s legislative history, the purpose of the limitations in Section 115(a)(2) was to prevent the musical composition from being “perverted, distorted, or travestied.”103 Arrangements. RIAA argues that ringtones are authorized by the arrangement privilege set forth in Section 115. RIAA argues that even if the Register were to determine that the creation of mastertones or other ringtones necessarily involves preparation of a derivative work, Congress specifically authorized the creation of certain derivative works under the express terms of the Copyright Act. RIAA asserts that creating arrangements by changing the length of musical works has been an accepted part of industry practice since before creation of the mechanical license. RIAA states that shortening a musical work is necessary to conform the song to the style or manner of the performance involved because ringtones necessitate brevity.104

Copyright Owners take issue with RIAA’s stance. They state that RIAA’s argument rests on a false premise—that changing the length of a musical work necessarily results in an arrangement. They assert that arrangements are adaptations of whole works and involve changes to the style and interpretation of the underlying work. They conclude that a portion of a musical work for inclusion in a ringtone is not an arrangement of the underlying work.105

Copyright Owners strongly assert that a ringtone is not a musical arrangement as that term is understood in the music business. They state that it is well settled in the music industry that arrangements, intended to permit alterations solely in interpretation and style, are adaptations of entire works.106 They note that an arrangement, as defined by the American Federation of Musicians, is “the art of preparing and adapting an already written composition for presentation in its original form. An arrangement may include reharmonization, paraphrasing, and/or development of a composition, so that it fully represents the melodic, harmonic, and rhythmic structure.”107 They assert that, by definition, there cannot be a ten-second arrangement of a three minute composition and a ringtone is no more of an arrangement of a song than the selection of four notes out of all the others is an arrangement of a song.108

RIAA asserts that the definitions of “arrangement” that Copyright Owners provide are unconvincing. It states that the only definition that even remotely suggests that an arrangement must always embody the full work and never a partial copy of that work is the definition from answers.com, but even that definition is not particularly instructive.109 RIAA also argues that there is nothing in the Copyright Act, its legislative history, or the common usage of these terms to suggest that, by employing the phrase “musical arrangements” in either Section 101 or Section 115(a)(2), Congress was distinguishing between “musical arrangements” as a class and musical arrangements that happen to shorten versions of the underlying work. RIAA asserts that there are innumerable arrangements of a particular work and a shorter version of such a work is still referred to as an arrangement.110

Analysis. For purposes of our discussion here, “arrangement” pertains to the musical aspect of the work, and not to changes in lyrics. Even so, defining the parameters of Section 115(a)(2) is difficult because there is no precedent and there is no common ground among the parties regarding the appropriate definition of “arrangement” for Section 115 purposes. Here, the parties have used various dictionaries and web sites to support their definitional argument, but there is no consensus on which sources are valid and reliable. While Copyright Owners’ definition is appropriate to use in this context, we believe that the definition found in the New Encyclopedia of Music and Musicians (“NEMM”) is as reliable, if not more comprehensive.111 NEMM

108 Id. at 15–16.
109 RIAA Reply Brief at 15 and n. 11, citing www.answers.com/topic/arrangement (stating that an arrangement “fully represents the melodic, harmonic, and rhythmic structure” of the work,” but also stating that an arrangement “may specify or vary some or all of the sequence, including the order and number of repetitions of sections such as verses and choruses. . . introduction, codas, modulations, and other variations.”)
110 Id. at 16.
111 We note that when examining musical works for the purpose of copyright registration, the Performing Arts Section of the Copyright Office defines “arrangement” as “harmony added to an existing melody, or a transcription, such as a band arrangement of a piano piece.” Copyright Office examiners also rely on the definition of “arrangement” in Section 408.01 of Compendium II of Copyright Office Practices which states that “A musical arrangement is a work that results from the addition of new harmony to a preexisting work. The standard of originality for arrangements takes into
defines an arrangement as “The process or result of readjusting a work for performance by different artistic means from that originally intended. Also, a relatively close or literal rendering of the substance and form of a work with only those modifications demanded by the limitations or peculiarities of the medium in view.” We can make three general observations based on the definitions and the law. 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. There may be other ringtones that are substantially different from the underlying musical work, but whether such changes impinge upon the arrangement of the work is a factual question, which goes beyond the scope of this proceeding.

Copyright Owners assert that ringtones are actually abridgements, not arrangements, of a musical work, and therefore they fall outside the Section 115 license. While Copyright Owners do not fully state what constitutes an abridgement for the purposes of Section 115(a)(2), RIAA takes issue with this conclusion and cites a litany of definitions, references, and examples to support its case. In this context, and without adequate explanation from the Copyright Owners, we surmise that the gist of their argument is that a ringtone abridges a full length musical work, and as such, should be considered a derivative work. If that is the case, we need not re-examine the matter as it is analyzed and discussed in detail in the derivative work section above. Our conclusion here is bolstered by the fact that the term abridgement does not appear in Section 115(a)(2), but it does appear in the definition of derivative works in Section 101 of the Copyright Act.

Fundamental Character of the Work. Copyright Owners state that even assuming, for argument’s sake, that ringtones qualify as musical arrangements, Section 115 is inapplicable because the basic melody and fundamental character of the underlying work has been changed. They assert that ringtones delete large portions of the underlying works including much of the melody, verses, bridges, codas, and instrumental interludes. They conclude that the reduction of a work to a short refrain excludes all of the other elements that make up the overall character of the work.

Copyright Owners assert that ringtones change the character of the underlying work in other ways as well. They assert that ringtones transform artistic works into utilitarian substitutes for the ring of the telephone; the character of a musical work fundamentally changes when the “original artistic vision expressed by the work in the form of a full–length song is superseded by a new purpose of serving as a thirty second mobile phone ringer.” Copyright Owners argue that the use of a musical work as a ringtone departs from the integrity of the original composition, “a result that Congress properly avoided” by excluding such uses from the Section 115 scheme. RIAA asserts that typical commercial ringtones do not change the basic melody of a musical work; to the contrary, ringtones by their very nature seek to accurately reproduce the basic melody with little or no alteration. RIAA asserts that the limitations in Section 115(a)(2) to prevent changes to the “basic melody and fundamental character of the work” were added specifically to address the objections of the copyright owners that the arrangement privilege would otherwise allow “radical alterations” to the “material detriment of the work.” RIAA states that in the case of mastertones, the melody is exactly the same as in the commercial sound recording release and distributing a clip does not radically alter, pervert, distort, or travesty the musical work in contravention of Congressional intent. RIAA asserts that since Copyright Owners frequently license large parts of their catalogs for use as ringtones, that use cannot be said to be to the material detriment of the work. RIAA concludes that creating a partial copy of the work does not constitute a radical alteration, and if it did, mastertones would not be commercially successful. Analysis. Before discussing the “fundamental character” issue, we must note that the arrangement privilege does not represent the outer limit of what other kinds of changes (apart from what is conventionally understood as an arrangement) may be made to a musical work within the scope of the Section 115 statutory license. In this sense, an analysis of the arrangement privilege as it applies to mastertones is irrelevant except to the extent that some of these types of ringtones may actually tinker with the style and interpretation of the underlying work. Mastertones are taken from commercially released sound recordings which may involve arrangements, but for purposes of this proceeding, we assume that the commercially released sound recording was licensed (either by means of a voluntary license or the statutory license), and that the arrangement in the sound recording was within the scope of the license. In such cases, which we will assume to be the norm, the use of the same arrangement in the mastertone would not be in contravention of the limitations of Section 115(a)(2). Given this conclusion, we need not specifically address whether mastertones change the fundamental character of the work, but a statutory analysis is still necessary to determine the legal status of monophonic and polyphonic ringtones under Section 115.

As stated above, Section 115(a)(2) of the Copyright Act permits statutory licensees to make 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.” The Act’s legislative history states that the provision was enacted to prevent the music from being “perverted, distorted, or travestied.”
The language of the statute was meant to avoid the desecration of the underlying musical work.123 Under the statute, it is reasonable to conclude that a portion of a pre–existing musical work truncated to ringtone length does not change the basic melody and fundamental character of the work. Certainly, this conclusion applies to mastertones, and it would almost always apply to monophonic or polyphonic ringtones that preserve the basic melody of the underlying musical work. As such, we cannot conclude that the musical work customized for ringtone purposes has been perverted, distorted, or travestied, as those terms are commonly defined, as no changes have been made to the melody of the original work.124 In sum, we do not believe, as Copyright Owners argue, that the reduction of a work to a short excerpt fundamentally changes the overall character of the work or impugns the integrity of the work.

In the absence of a case directly addressing the scope of Section 115(a)(2), it is useful to examine precedent involving the derivative work rights in a musical composition. For example, in Woods v. Bourne, the Second Circuit discussed the factors upon which a derivative musical work may be considered an original work for copyrightability purposes:

“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 the major artist may take liberties with the lyrics or the tempo, the listener 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.”125

Under Woods, a typical monophonic or a polyphonic ringtone would be considered a mere “stylized version” of the original musical work with no changes to the melody, but perhaps some changes to the tempo. In such cases, an electronic synthesizer may generate a new polyphonic adaptation of the underlying musical work for play on a cellphone, and the ringtone may have been conformed to fit within the parameters of its intended use. However, where the ringtone has added non–trivial “new material,” such that it would be considered a derivative work, the Section 115 license may not be available because the ringtone was not changed simply to conform it for use in a cellphone.126

VII. Private Use

Section 115 states that “a person may obtain a compulsory license only if his or her primary purpose in making phonorecords is to distribute them to the public for private use including by means of a digital phonorecord delivery.”127 According to the Act’s legislative history, the “private use” limitation was added to Section 115 to clarify that manufacturers of specialty recordings for use in jukeboxes and business music services could not rely on the mechanical license in their use of musical works.128

RIAA asserts that ringtones are distributed to individual consumers for private use. It states Copyright Owners’ arguments ignore common sense, the relevant statutory language, and the legislative history of the Copyright Act. RIAA states that although ringtones do provide users a means to identify and express themselves, that is true for any phonorecord. RIAA asserts that all kinds of phonorecords distributed and sold to private customers are sometimes used in public, yet no one argues that such uses make the Section 115 license inapplicable. It argues that uses of CDs in public places, for example, do not make the Section 115 license unavailable to distributors for the simple reason that it is the primary purpose of the distributor, not the use by the consumer, that is relevant. According to RIAA, the phrase “private use” is not the opposite of “public performance,” but means “personal” or “noncommercial use.” RIAA asserts that ringtones satisfy the private use requirement because the primary example, to reproduction in a motion picture sound track or recording primarily for use in broadcasts, wired music transmissions, or jukeboxes.”). See also H. R. Rep. No. 94–1476, at 108 (1976) (“The second sentence of clause (1), which has been the subject of some debate, provides that ‘a person may obtain a compulsory license only if his or her primary purpose in making phonorecords is to distribute them to the public for private use.’” The provision was criticized as being discriminatory against background music systems, since it would prevent a background music producer from making recordings within the expression of the copyright owner; it was argued that this could put the producer at a great competitive disadvantage with performing rights societies, allow discrimination, and destroy or prevent entry of businesses. The committee concluded, however, that the purpose of the compulsory license does not extend to manufacturers of phonorecords that are intended primarily for commercial use, including not only broadcasters and jukebox operators but also background music services.”).

Copyright Owners assert that ringtones fail to satisfy Section 115’s requirement that the phonorecords be distributed for private use. They argue that the “private use” limitation contemplated by Congress includes only ordinary listening use for private enjoyment of music. To bolster their argument that a ringtone serves only public functions, Copyright Owners assert that a ringtone: (1) is no substitute for enjoyment of the full length musical work; (2) provides the notification functions of a phone ring; and (3) is marketed as a lifestyle accessory. They conclude that ringtones provide mobile phone users a means to publicly identify and express themselves to their friends, colleagues and the public at large.129

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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, not to distribute them for commercial use such as public broadcasting, in motion pictures, business music services or jukeboxes.

Analysis. We believe that Copyright Owners’ arguments are inconsistent with the law and ignore common uses of music by individuals. The controlling language here is “for private use.” It is undisputed that the term is directed at individual consumers who use music for personal enjoyment. However, Copyright Owners seem to suggest that once an individual takes the music out of the home, the statutory provision becomes null and void. This cannot be what Congress intended. Here, we note that traditional phonorecords are used in public (e.g., in boom boxes in public parks, in a car stereo while the automobile is driving down the street, etc.), but that does not disqualify them from the statutory license by violating their primary purpose of being for private use. While it may be true that some mobile phone users purchase ringtones to identify themselves in public, this use most likely would not be considered a public use as Congress intended that term to be understood in its general requirements are impossible to delineate any informed conditions or limitations on the statutory licensing of ringtones. We believe that Section 115’s general requirements are applicable to all types of ringtones (monophonic, polyphonic, or mastertones). This applies to mastertones that are simple excerpts of the underlying musical work, ringtones (monophonic, polyphonic, and mastertones) that are not adjudged to be derivative works, and those ringtones that do not change the basic melody or fundamental character of the work. For newly created ringtones that have not been distributed to the public, and that

130 RIAA Reply Brief at 17.
131 See Copyright Owners Initial Brief at 19 (“In sum, far from being used for private musical entertainment in one’s home, ringtones provide mobile phone users a means to identify themselves to their friends, colleagues and the public at large.”).
132 See id., supra.
133 17 U.S.C. § 115(a)(1). Mirroring the statutory language, the provision’s legislative history states that the Section 115 license is “available to anyone as soon as ‘phonorecords of a nondramatic musical work have been distributed to the public in the United States under the authority of the copyright owner.’” See H. R. Rep. No. 94 § 1476 (1976).
134 RIAA Initial Brief at 26–27.
135 Copyright Owners Reply Brief at 17–18.

IX. Conditions and Limitations

As noted above, the Copyright Royalty Board asked the Register to address the legal conditions and/or limitations that would apply to ringtones if such works were found to DPDs under Section 115 of the Act.

RIAA asserts that the same conditions and limitations that apply to other phonorecords apply to ringtones. It posits that first use of the song under the authority of the copyright owner, notice, and payment of royalties, would be among the statutory conditions that would apply to the licensing of ringtones.

Copyright Owners assert that there is no need for any limitations or conditions on the licensing of ringtones under Section 115, as all ringtones are excluded from the reach of the statute as a matter of law. They note, however, that if the Register were to conclude that some ringtones are subject to statutory licensing, the appropriate scope of such licensing would involve factual issues. Copyright Owners state that in this case, the Copyright Royalty Boards’ August 18, 2006 Order prohibited the submission of factual material that is required to make a reasoned determination of conditions on the licensing of ringtones within Section 115. They assert that the Copyright Royalty Boards’ decision not to permit the submission of factual materials makes it “impossible to delineate” any informed conditions or limitations on the statutory licensing of ringtones.

Analysis. We believe that Section 115’s general requirements are applicable to all types of ringtones (monophonic, polyphonic, or mastertones). This applies to mastertones that are simple excerpts of the underlying musical work, ringtones (monophonic, polyphonic, and mastertones) that are not adjudged to be derivative works, and those ringtones that do not change the basic melody or fundamental character of the work. For newly created ringtones that have not been distributed to the public, and that
fall outside the scope of the statute because they are derivative works or for any other reason outlined above, the Section 115 provisions do not apply. A commercial license is required to make and distribute those types of ringtones. There will, of course, be some instances where the status of a ringtone (monophonic, polyphonic, and mastertones) for Section 115 purposes is unclear. A judicial determination would be required where such mixed question of fact and law are present.

While we cannot delineate a litmus test that will in every case determine specifically whether a particular ringtone is or is not within the scope of the statutory license, the guidance offered above is sufficient for purposes of this proceeding. In general, a ringtone will fall within the scope of the compulsory license unless it has so altered the musical composition as to constitute a derivative work. Simply excerpting a single portion of a licensed sound recording of a musical composition will not constitute the making of a derivative work. It is clear that many, but not all, ringtones will fall within the scope of the Section 115 license. Therefore, it is appropriate for the Copyright Royalty Judges to determine royalties to be payable for the making and distribution of ringtones under the compulsory license.

Dated: October 16, 2006
Marybeth Peters,
Register of Copyrights.

[FR Doc. E6–18426 Filed 10–31–06; 8:45 am]}
BILLING CODE 1410–30–S

LIBRARY OF CONGRESS

Copyright Office

[Docket No. 2006–6]

Notice of Intent to Audit

AGENCY: Copyright Office, Library of Congress.

ACTION: Public notice.

SUMMARY: The Copyright Office of the Library of Congress is announcing receipt of a notice of intent to audit 2005 statements of account concerning the eligible nonsubscription and subscription transmissions of sound recordings made by Live365, Inc. (“Live365”) under statutory licenses.

FOR FURTHER INFORMATION CONTACT: Tanya M. Sandros, Associate General Counsel, Copyright GC/I&R, P.O. Box 70400, Southwest Station, Washington, DC 20024–0977. Telephone: (202) 707–8380. Telefax: (202) 252–3423.

SUPPLEMENTARY INFORMATION: Section 106(6) of the Copyright Act, title 17 of the United States Code, gives the copyright owner of a sound recording the right to perform a sound recording publicly by means of a digital audio transmission, subject to certain limitations. Among these limitations are certain exemptions and a statutory license which allows for the public performance of sound recordings as part of “eligible nonsubscription transmissions” and digital transmissions made by “new subscription services.” 17 U.S.C. 114.

The Copyright Act, title 17 of the United States Code, defines these terms as follows:

An “eligible nonsubscription transmission” is a noninteractive digital audio transmission which, as the name implies, does not require a subscription for receiving the transmission. The transmission must also be made as a part of a service that provides audio programming consisting in whole or in part of performances of sound recordings the primary purpose of which is to provide audio or entertainment programming, but not to sell, advertise, or promote particular goods or services.


Moreover, these services may make any necessary ephemeral reproductions to facilitate the digital transmission of the sound recording under a second license set forth in section 112(e) of the Copyright Act. Use of these licenses requires that services make payments of royalty fees to and file reports of sound recording performances with SoundExchange. SoundExchange is a collecting rights entity that was designated by the Librarian of Congress to collect statements of account and royalty fee payments from services and distribute the royalty fees to copyright owners and performers entitled to receive such royalties under sections 112(e) and 114(g) following a proceeding before a Copyright Arbitration Royalty Panel (“CARP”)—the entity responsible for setting rates and terms for use of the section 112 and section 114 licenses prior to the passage of the Copyright Royalty and Distribution Reform Act of 2004 (“CRDRA”), Pub. L. No. 108–419, 118 Stat. 2341 (2004). See 69 FR 5695 (February 6, 2004).

This Act, which the President signed into law on November 30, 2004, and which became effective on May 31, 2005, amends the Copyright Act, title 17 of the United States Code, by phasing out the CARP system and replacing it with three permanent Copyright Royalty Judges (“CRJs”). Consequently, the CRJs will carry out the functions heretofore performed by the CARPs, including the adjustment of rates and terms for certain statutory licenses such as the section 114 and 112 licenses. However, section 6(b)(3) of the Act states in pertinent part:

[t]he rates and terms in effect under section 114(f)(2) or 112(e) . . . on December 30, 2004, for new subscription services [and] eligible nonsubscription services . . . shall remain in effect until the later of the first applicable effective date for successor terms and rates . . . or such later date as the parties may agree or the Copyright Royalty Judges may establish.

Successor rates and terms for these licenses have not yet been established. Accordingly, the terms of the section 114 and 112 licenses, as currently constituted, are still in effect.

One of the current terms, set forth in § 262.6 of title 37 of the Code of Federal Regulations, states that SoundExchange, as the Designated Agent, may conduct a single audit of a Licensee for the purpose of verifying their royalty payments. As a preliminary matter, the Designated Agent is required to submit a notice of its intent to audit a Licensee with the Copyright Office and serve this notice on the service to be audited. 37 CFR 262.6(c).

On December 23, 2005, SoundExchange filed with the Copyright Office a notice of intent to audit Live365 for the years 2002, 2003, and 2004. See 72 FR 624 (January 5, 2006). Subsequently, on October 5, 2006, SoundExchange filed a second notice of intent to audit Live365,1 pursuant to § 262.6(c), notifying the Copyright Office of its intent to expand its current audit to cover 2005. Section 262.6(c) requires the Copyright Office to publish a notice in the Federal Register within thirty days of receipt of the filing announcing the Designated Agent’s intent to conduct an audit.

In accordance with this regulation, the Office is publishing today’s notice to fulfill this requirement with respect to