Copyright's First Compulsory License

Howard B. Abrams

Follow this and additional works at: http://digitalcommons.law.scu.edu/chtlj

Part of the Law Commons

Recommended Citation
Howard B. Abrams, Copyright's First Compulsory License, 26 SANTA CLARA HIGH TECH. L.J. 215 (2009).
Available at: http://digitalcommons.law.scu.edu/chtlj/vol26/iss2/2

This Article is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara High Technology Law Journal by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.
COPYRIGHT'S FIRST COMPULSORY LICENSE

Howard B. Abrams†

Abstract
This article discusses the development of the compulsory license for making phonorecords of nondramatic musical works in the Copyright Act of 1909 and the continued existence of this compulsory license in subsequent iterations of copyright law. Drawing on this background, the paper then argues that, however useful the compulsory license may have been in the past, it is no longer a useful means to promote the creation of intellectual works and should be repealed.

In particular, the paper highlights several factors that compel the conclusion that compulsory licenses are an outdated concept and should be repealed. In particular, the article focuses on how compulsory licenses deviate from the traditional bargain struck by copyright law, the lack of moral rights under the present system, the debatability of the assertion that repeal of the compulsory license will result in a sufficient quantity of exclusive licenses that will not only be exclusive but will harm the public interest, the lack of anti-monopoly concerns in the modern marketplace, and a belief that private negotiation will result in fairer treatment of the authors of nondramatic musical compositions.

Both the first recognition of a recording right for music and the first compulsory license provision in American copyright law were given birth in section 1(e) of the 1909 Copyright Revision Act.¹

† Howard B. Abrams is Professor of Law, University of Detroit Mercy School of Law. Thanks are due to Nina Dodge Abrams, Helene Blue, David Carson, Mike DiNapoli and Laurie Jakobsen for variously inspiring, helping with and commenting upon this article. Thanks are also due to the Santa Clara University School of Law for sponsoring a Conference on the 100th Anniversary of the 1909 Copyright Act at which an early draft of this paper was presented, to Tyler T. Ochoa and Pamela Samuelson for planning the Conference, and to Johnathan R. Elton and Aileen Kim of the Santa Clara Computer and High Technology Law Journal for their help editing this article.

¹. An Act to Amend and Consolidate the Acts Respecting Copyright, ch. 320, § 1(e), 35 Stat. 1075 (March 4, 1909, effective July 1, 1909) [hereinafter 1909 Copyright Act]. These types of licenses are also commonly called “statutory licenses,” which is arguably the
Rephrasing section 1(e)\(^2\) in the terminology of the current Copyright Act,\(^3\) once phonorecords\(^4\) of a nondramatic musical work\(^5\) have been


The United States first included musical compositions as copyrightable subject matter in 1831. An Act to amend the several acts relating to copyrights, Act of Feb. 3, 1831, ch. 16, § 1, 4 Stat. 436 (Peters ed. 1846). A right of performance for music was first included in the United States copyright laws in 1897. An Act to amend title sixty, chapter three of the Revised Statutes relating to copyrights, ch. 4, § 1, 29 Stat. 481-82 (1897).

2. In relevant part, section 1(e) of the 1909 Copyright Act provided:

That any person entitled thereto, upon complying with the conditions of this Act, shall have the exclusive right:

\[\ldots\]

(e) To perform the copyrighted work publicly for profit if it be a musical composition; and for the purpose of public performance public performance for profit; and for the purposes set forth in subsection (a) hereof, to make any arrangement or setting of it or of the melody of it in any system of notation or any form or record in which the thought of an author may be recorded and from which it may be read or reproduced: Provided, That the provisions of this title, so far as they secure copyright controlling the parts of instruments serving to reproduce mechanically the musical work, shall include only compositions published and copyrighted after July 1, 1909, and shall not include the works of a foreign author or composer unless the foreign state or nation of which such author or composer is a citizen of subject grants, either by treaty, convention, agreement, or law, to the citizens of the United States similar rights. And provided further, and as a condition of extending the copyrighted control to such mechanical reproductions, That whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon parts of instruments serving to reproduce mechanically the musical work, any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty of two cents on each such part manufactured, to be paid by the manufacturer thereof; \ldots

1909 Copyright Act, supra note 1, § 1(e) (emphasis added).


4. “Phonorecords” are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of machine or device. The term “phonorecords” includes the material object in which the sounds are first fixed.” 17 U.S.C. § 101 (2006).

5. The term “musical work” is not defined in the current Copyright Act although it is one of the categories used to classify copyrightable works. 17 U.S.C. § 102(a)(2) (2006). Nor is the term “nondramatic musical work” defined although this is the category of works to which the compulsory license provision applies. See 17 U.S.C. § 115 (2006). Although neither term is defined, the current Copyright Act draws a distinction between “musical works, including any accompanying words,” 17 U.S.C. § 102(a)(2) (2006), and
distributed to the public in the United States under the authority of the copyright owner, any other person can make an independent sound recording of that musical composition and then manufacture and distribute phonorecords of that sound recording provided they comply with the statutory requirements. In its essential form—payment of a royalty to permit the making of a sound recording of a nondramatic musical composition without the consent of the music's copyright owner—this compulsory license persists to this day.

I. ORIGENS

Why and how did this provision find its way into the 1909 Copyright Act? Turning back the clock to the incubation of the 1909 Copyright Act, this was a period of significant growth of both player pianos and the earlier forms of recorded music. Any hope by the

---


6. " 'Sound Recordings' are works that result from the fixation of a series of musical, spoken or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied." 17 U.S.C. § 101 (2006).

7. 1909 Copyright Act, supra note 1, § 1(e). The current version of this compulsory license is found at 17 U.S.C. § 115 (2006).


There was considerable interest in revising the copyright laws from many sources other than the music industry. President Theodore Roosevelt in a message to Congress in December 2005, stated:

Our copyright laws urgently need revision. They are imperfect in definition, confused and inconsistent in expression; they omit provision for many articles which, under modern reproductive processes, are entitled to protection, they impose hardships upon the copyright proprietor which are not essential to the fair protection of the public; they are difficult for the courts to interpret and impossible for the Copyright Office to administer with satisfaction to the public.

Goldman, Copyright Law Revision 1901-1954. Sound familiar?

10. II RUSSELL SANJEK, AMERICAN POPULAR MUSIC AND ITS BUSINESS—THE FIRST
music publishers of the day that their copyrights would prevent unauthorized embodiment of a performance of a musical composition in player piano rolls or other mechanical devices, which reproduced a performance of the music, was finally laid to rest by the Supreme Court in *White-Smith Music Publishing Co. v. Apollo Co.* White-Smith held that the unauthorized embodiment of a song in a player piano roll did not infringe the copyright in the song. The essential rationale of the Supreme Court's decision was that a player piano roll was not a "copy" within the meaning of the then current Copyright Act because it could not be understood by the naked human eye.

FOUR HUNDRED YEARS—FROM 1790 TO 1909 380-83 (1988) [hereinafter II SANJEK]. According to Sanjek, player pianos constituted "one out of every eight of the 354,545 pianos manufactured in 1909 to a peak, in 1921, of 208,541 of the 341,652 made and sold that year." *Id.* at 383.

Russell Sanjek's three volume set is both invaluable and frustrating. It is really the only work that brings together a detailed history of the business side of American popular music from its beginnings in the colonial era through 1984. An examination of the extensive bibliographies shows how exhaustive an effort went into researching the material for these volumes. I RUSSELL SANJEK, AMERICAN POPULAR MUSIC AND ITS BUSINESS—THE FIRST FOUR HUNDRED YEARS—FROM THE BEGINNING TO 1790, 423-39 (1988); II SANJEK, AMERICAN POPULAR MUSIC AND ITS BUSINESS—THE FIRST FOUR HUNDRED YEARS—FROM 1790 TO 1909, 421-46 (1988); III RUSSELL SANJEK, AMERICAN POPULAR MUSIC AND ITS BUSINESS—THE FIRST FOUR HUNDRED YEARS—FROM 1900 TO 1984, 655-93 (1988) [hereinafter III SANJEK]. At the same time, the absence of footnotes or endnotes leaves the reader maddeningly frustrated at trying to connect Sanjek's statements with the underlying source material supporting that statement.

11. For a description of the invention and evolution of recorded music from its inception through 1909, see II SANJEK, supra note 10, 363-68, 383-91. See also http://www.recording-history.org/HTML/phono_technology1.php. The rise of commercial distribution of the early Twentieth Century counterparts of today's phonorecords in the 1900's is testified to by the fact that the first sound recording to sell 1,000,000 copies worldwide was Enrico Caruso's 1907 recording of *Recita!* . . . *Vesti La Giubba* from Ruggero Leoncavallo's opera *PAGLIACCI*, which pre-dated the 1909 Copyright Act. See also http://www.sonybmgmasterworks.com/artists/enricocaruso/.

12. In essence, these are the owners of copyrights in musical compositions. They are called music publishers because prior to sound recordings and rights in public performances, their source of income was the sale of sheet music which they published. Today, sales of printed music are no longer the major source of income for music publishers, having been surpassed by compulsory licenses from phonorecords and performance royalties. As a result, most music publishers, even the major ones, do not print music but license the print rights to a relatively small number of music print houses.


14. *Id.* at 18.


16. *White-Smith*, 209 U.S. at 17. In his concurrence, Justice Holmes argued that this view was mistaken but went along with the majority because both domestic and foreign precedents
Because it was not a copy, it did not violate the copyright owner's exclusive right to make copies of the work. 17

It cannot be said this decision was unexpected as prior lower court decisions on the issue had also held against the music publishers on similar grounds.18 Even before the Supreme Court's decision, the music publishers, much as today's intellectual property owners do when there is a setback, appealed to Congress for a legislative fix.19 Starting with the first bills introduced in the efforts culminating in the 1909 Copyright Act, there were provisions granting copyright owners exclusive rights to record audio versions of their works.20

Hovering over this effort was the specter, perhaps more imagined than real, of a cartel of music publishers exercising monopoly power over the recording of music. Eighty-seven members of the Music Publishers Association controlling 381,598 compositions had agreed to give the Aeolian Company exclusive rights to

---

17. Id. at 18.


19. See generally II SANJEK supra note 10 at 397-401; Henn, The Compulsory License, supra note 9 at 2-12.

20. S. 6330, 59th Cong. § 1(g) (1906); H.R. 19853, 59th Cong. § 1(g) (1906) ("That the copyright secured by this Act shall include the sole and exclusive right . . . (g) To make, sell, distribute, or let for hire any device, contrivance, or appliance especially adapted in any manner whatsoever to reproduce to the ear the whole or any material part of any work published and copyrighted after this Act shall have gone into effect, or by means of any such device or appliance publicly to reproduce to the ear the whole or any material part of such work."). A similar provision was contained in § 1(e) in the Senate Bill introduced in the next session of Congress. S. 8190, 59th Cong. § 1(e) (1907). The companion bill in the House of Representatives; H.R. 25133, 59th Cong. (1907), originally contained the same section 1(g) as 1906 bills. The House Committee, however, struck this to wait upon the result in the White-Smith case, White-Smith, 209 U.S. 1, then pending before the Supreme Court. H.R. REP. NO. 59-7083, at 9 (1907). The Committee Report stated: "Should the court sustain the contention of the plaintiff in that case, the musical composers and publishers will probably secure all they sought to obtain by enactment of the provision mentioned, and should the court hold the other way, Congress can then take up the question of giving further protection to musical authors, if it deem it wise to do so, in a separate bill. Id.

In the Sixtieth Congress, after the Supreme Court had handed down the White-Smith decision, section 1(e) of the respective House and Senate bills assumed it final form. Compare 1909 Copyright Act, supra note 1, § 1(e), with H.R. 28192, 60th Cong. § 1(e) (1909) and S. 9440, 60th Cong. 1(e) (1909). See also H.R. REP. NO. 60-2222 at, 4-9 (1909), and S. REP. NO. 60-1108, at 4-9 (1909).

There were other bills regarding copyright and the proposed recording right during the run up to the 1909 Copyright Act, see Henn, supra note 9, at 3-12, but these are the principal ones leading up to the 1909 Copyright Act.
manufacture piano rolls of their copyrighted compositions in return for a royalty of ten per cent of the retail selling price of the piano rolls.\textsuperscript{21} The other 117 music publishing firms, controlling 503,597 compositions, were not parties to the deal.\textsuperscript{22} The Aeolian Company was the dominant manufacturer of player pianos.\textsuperscript{23} As part of the deal, the Aeolian Company had apparently financed the prosecution of the \textit{White-Smith} case.\textsuperscript{24}

This led to an outcry against this potential monopoly.\textsuperscript{25} Congress concluded that "[n]ot only would there be a possibility of a great music trust in this country and abroad, but arrangements are actively being made to bring it about."\textsuperscript{26} To prevent the emergence of this "great music trust" while still rewarding composers and lyricists a reward from the sales of phonorecords, Congress provided that after the copyright owner had made or authorized or acquiesced in the making of "parts of instruments serving to reproduce mechanically the musical work," any other person could do the same upon payment of a royalty to the copyright owner.\textsuperscript{27}

How was that royalty to be determined? Given its fears of a monopoly, Congress chose to set the rate legislatively rather than permit the possibility of monopoly pricing.\textsuperscript{28} Various formulas for determining the compulsory license royalty rates appeared in the different bills introduced in Congress.\textsuperscript{29} Congress ultimately chose the

\textbf{21.} III \textsc{Sanjek} \textit{supra} note 10, at 22-23.
\textbf{22.} III \textsc{Sanjek} \textit{supra} note 10, at 22-23.
\textbf{23.} III \textsc{Sanjek} \textit{supra} note 10, at 23. The Aeolian Company's player piano, The Pianola, was patented and thus only Aeolian player pianos could play Aeolian piano rolls.
\textbf{27.} 1909 Copyright Act, \textit{supra} note 1, § 1(e). To this day, the music industry refers to these licenses as "mechanical licenses" and the royalties as "mechanical royalties" or "mechanicals."
\textbf{28.} \textit{Id.}
\textbf{29.} \textit{See supra} notes 25-28 and accompanying text.
\textbf{30.} H.R. 21592, 60th Cong., 1st Sess. (1908) ("a royalty equal to the royalty agreed to be paid by the licensee paying the lowest rates of royalty for instruments of the same class"); H.R. 21984, 60th Cong., 1st Sess. (1908) (two cent royalty for a "talking machine record," one-tenth of the "marked retail price" otherwise); H.R. 22071, 60th Cong., 1st Sess. (1908) (10 % of retail price); H.R. 22183, 60th Cong., 1st Sess. (1908) (two cent royalty, but if it was "disks for
flat rate of two cents per copy royalty on these "parts of instruments."\textsuperscript{31}

Thus, section 1(e) of the 1909 Copyright Revision Act, copyright's first compulsory license, provided copyright owners with compensation for, if not insulation from, the otherwise unauthorized "use[s] of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work."\textsuperscript{32}

II. REPEAL OR RETENTION

Should the compulsory license for phonorecords be continued or should it be scrapped?

This issue was seriously raised during the revision process leading to the 1976 Copyright Revision Act.\textsuperscript{33} Because the arguments

\begin{itemize}
  \item Talking machines not exceeding eight inches in diameter or cylinders not exceeding four inches in length," the one cent); H.R. 24782, 60th Cong, 2d Sess. (1908) (same rate as licensed to others by copyright owner; if used only by the copyright owner, then 10% of the selling price but not less than two cents); H.R. 25162, 60th Cong., 2d Sess. (1909) ("ten per centum of the selling price of any such instrument, but in no event to be less than two cents . . . or if the use is permitted to others, the royalty provided in the contract"); H.R. 27310, 60th Cong., 2d Sess. (1909) ("five per centum of the sum derived bona fide by the manufacturer thereof, from the manufacture, use, sale, or lease of such parts"); H.R. 28192, 60th Cong., 2d Sess. § 1(e) (1909) and S. 9440, 60th Cong., 2d Sess. § 1(e) (1909) (two cent flat rate). H.R. 28192 and S. 9440 are essentially identical. H.R. 28192 was enacted as the 1909 Copyright Act.

1909 Copyright Act, supra note 1, § 1(e).

32. 1909 Copyright Act, supra note 1, § 1(e). The copyright owner was placed under an affirmative obligation to file notice of its use of the composition on "parts of instruments" as a precondition for receiving these royalties. Provided this was done, the copyright owner was entitled to be paid monthly on the twentieth day of the succeeding month and could require the payment be accompanied by a report by the manufacturer under oath of the number of parts manufactured. Id.


The legislative origins of the 1976 Copyright Revision Act can be traced back to 1955 when Congress appropriated funds for the Copyright Office to prepare studies of the problems in the then existing Copyright Act. Legislative Appropriations Act of 1955, ch. 568, 69 Stat. 499 (1955). This resulted in 35 studies of problems which were published over the period from 1960 through 1963. A two volume collection of these studies was published by the Copyright Society of the U.S.A. STUDIES IN COPYRIGHT—ARTHUR FISHER MEMORIAL EDITION (Copyright Society of the U.S.A. ed. 1963). After most of these studies had been completed, the Register of Copyrights submitted a Report to Congress which began the process of proposals, conferences and bills which culminated in the 1976 Copyright Revision Act. REGISTER OF COPYRIGHTS, COPYRIGHT LAW REVISION—REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISIONS OF U.S. COPYRIGHT LAW, 87th Cong., 1st Sess. (H. Comm. on the Judiciary Print July 7, 1961) [hereinafter 1961 REGISTER'S REPORT]. The subsequent history of this legislative effort and its documents is thoroughly and analytically indexed in THE KAMINSTEIN LEGISLATIVE HISTORY PROJECT: A COMPENDIUM AND ANALYTICAL INDEX OF MATERIALS LEADING TO THE COPYRIGHT ACT OF 1976 (Alan Latman & James F. Lightstone ed. 1981-1985)
and counter-arguments presented then are the same ones that persist to this day, it is an appropriate starting point for an analysis of the question.

In the 1961 Report of the Register of Copyrights, the Register of Copyrights proposed that the statutory mechanical license be abandoned.4 The Register noted the arguments for removing the statutory mechanical license. First, there was the deleterious effect of the two cent royalty rate under the compulsory license that had not kept pace with inflation.35 Second, the Register then noted that "[t]he danger of a monopoly in the situation existing in 1909 was apparently the sole reason for the compulsory license."36 To the Register, this reason was no longer valid.37 Third, the Register noted the argument that "the fundamental principle of copyright—that the author is to have the exclusive right to control the commercial exploitation of his work—should apply to the recording of music, as it is applied to all other kinds of works and to other means of exploiting music."38

The Register then turned to the counter-arguments which centered on the fear that the absence of the statutory mechanical license would lead to exclusive licenses thus preventing or lessening the number of cover recordings39 of a musical composition. The benefits of the non-exclusive compulsory license were seen to be:

1) It provides the public with a variety of recordings of any particular musical work, which might not be true if the copyright owner could give an exclusive license to one record company.

2) It enables smaller record companies to compete with the larger

(6 volumes).

34. 1961 REGISTER'S REPORT, supra note 33, at 36. To allow the music industry time to adjust to the absence of the mechanical compulsory license, the Register also proposed a one year period before the repeal went into effect. Id.

35. Id. at 33.

36. Id. at 33.

37. Id. at 33.

The Register argued:

There are now hundreds of recording companies competing with one another, and the music available for recording is widely scattered among hundreds of competitive publishers. The market for recordings and the number and variety of compositions recorded have increased tremendously. The volume of music available for recording is immense and constantly growing. Much of the new music remains unrecorded, and no one can foretell whether a recording of a particular composition will strike the public fancy.

Id.

38. Id. at 33.

39. In the terminology of the music industry, a "cover recording" is a later recording of a song that was previously recorded by another recording artist or group.
ones by offering other recordings of the same music.

(3) It benefits authors and publishers by giving their works public exposure through several different recordings, thereby increasing their revenue from royalties. 40

The Register rebutted these assertions by pointing out that “the removal of the compulsory license, however, would not necessarily result in exclusive licenses being given.” 41 After all, if it really were to the benefit of the songwriters and music publishers to have multiple recordings, they would seek to issue non-exclusive licenses to multiple companies. 42 The Register also stated that it was understood “that in those foreign countries having no compulsory license, the recording of musical works is usually licensed nonexclusively to any reputable company.” 43 The Register continued:

It seems likely that in the absence of the compulsory license, multiple recordings would still be licensed nonexclusively. If so, the three benefits attributed to the compulsory license by the record industry would still exist, but with these differences: the author or publisher could refuse a license to a recorder whom he considered irresponsible or for a recording he considered undesirable, and the royalty rate would be fixed by free negotiation. 44

Even under the assumption that the removal of the compulsory license would result in the granting of exclusive licenses, the Register “believe[d] that any loss of the three benefits flowing from multiple recordings would be offset by other considerations.” 45 First, the public’s potential loss of multiple recordings of the same musical composition would be offset because “[the public] would get recordings of a greater number and variety of musical works.” 46 As to the ability of a small record company to make competing records of a big record company’s hits, the Register commented that “this also works the other way” in that “[m]any hits are now originated by small companies; and their prospective hits are often smothered by records of the same music brought out by larger companies having better known performers and greater promotional facilities.” 47 The Register

40. 1961 REGISTER’S REPORT, supra note 33, at 34.
41. Id. at 34.
42. Id. at 34.
43. Id. at 34. Cf. infra note 160.
44. Id. at 34.
45. Id. at 34.
46. Id. at 34.
47. Id. at 34.
continued: "There is little danger that the large companies would get all the hits: in the popular field the number of compositions available for recording is virtually inexhaustible, and which of them become hits is unpredictable." 48 Further, the abolition of the statutory mechanical license would allow the publishers and songwriters to choose between exclusive and non-exclusive licensing arrangements as dictated by their own self-interest and the market. 49 The Register argued this could very well benefit the new and unknown author because granting an exclusive license might give them more initial opportunity to have their works recorded while the new works of successful authors might be more profitably licensed on a non-exclusive basis. 50

Further, the Register enunciated two policy reasons strongly favoring the repeal of the compulsory license. The first was that the "[r]emoval of the compulsory license would be likely to result in a royalty rate, fixed by free negotiation." 51 Of equal, if not greater, importance to the Register was the belief that in music as elsewhere in copyright, the author should control the commercialization of the author's work:

We have previously mentioned the fundamental principle of copyright that the author should have the exclusive right to exploit the market for his work, except where this would conflict with the public interest. In the situation prevailing in 1909, the public interest was thought to require the compulsory license to forestall the danger of a monopoly of musical recordings. The compulsory license is no longer needed for that purpose, and we see no other public interest that now requires its retention. 52

The Register's proposal to repeal the statutory mechanical license was met with opposition from enough of the music industry—primarily the record companies—to forestall it. The Register issued a Supplementary Report 53 after a series of meetings with representatives of various interested parties which summed up the discussions:

48. Id. at 34.
49. Id. at 35.
50. Id. at 34-35.
51. Id. at 35. This article will forbear from examining the economic pros and cons of free markets versus regulated markets.
52. Id. at 35.
During the discussions following the issuance of the [1961] Report, it became apparent that record producers, small and large alike, regard the compulsory license as too important to their industry to accept its outright elimination. Moreover, while still opposing the provision in principle, some copyright owners implied that ultimately there might be advantages in ameliorating the harsh and burdensome effects of the compulsory license rather than doing away with it altogether; .... Finally, and perhaps most important, there seemed to be a feeling that people in the industry generally would rather bear those ills they have than fly to others that they know not of.54

As the revision process moved into the stage of bills and committee hearings, the record companies continued to raise the objection of a potential music monopoly. In addition, some music publishers, or at least enough of them to satisfy Congress, indicated they could accept a continuation of the statutory mechanical license if the royalty rate structure could be made more equitable.55 The conclusion articulated by Congress in the committee reports accompanying the 1976 Copyright Revision Act, was:

The fundamental question of whether to retain the compulsory license or to 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 the compulsory license but how much the royalty under it should be.56

Thus, Congress enacted section 115 of the 1976 Copyright Revision Act,57 which preserved the compulsory license for making phonorecords of nondramatic musical compositions first found in section 1(e) of the 1909 Copyright Act58 with the Copyright Royalty Tribunal, now replaced by the Copyright Royalty Judges, to fix the royalty rates.59

54. Id. at 53-54.
58. 1909 Copyright Act, supra note 1, § 1(e).
III. Consequences

A. Proliferation of the Compulsory License Mechanism

Perhaps the most obvious consequence of the 1909 Copyright Act's compulsory license is that it created a precedent for Congress to use still other compulsory or statutory licenses to resolve other problems, perceived or real, between owners and users of copyrighted works. Indeed, the mechanism has proved popular. This was first evident in section 115 of the 1976 Copyright Revision Act, which carried forward the compulsory license for phonorecords with an updated and revised version of section 1(e) of the 1909 Copyright Act. Congress subsequently expanded this particular compulsory licensing mechanism to include the delivery of the recording of a non-dramatic musical composition by digital audio transmission. Three additional compulsory licenses were added by the 1976 Copyright Revision Act for (1) the secondary transmission of certain primary transmissions (essentially designed to permit cable television to carry over-the-air broadcast signals), (2) jukebox performances of copyrighted music, and (3) the broadcast of published nondramatic musical works and published pictorial, graphic and sculptural works by a public broadcasting entity. Three more compulsory licenses have since been adopted for (1) secondary transmissions by satellite carriers, (2) certain digital transmissions and delivery of sound
recordings 68 and (3) the manufacture and importation of digital recording devices. 69 A bill that would create yet another compulsory license to benefit performances embodied in sound recordings—as opposed to composers, writers and music publishers—is currently pending in Congress. 70 Clearly, Congress has become fond of the compulsory license as a mechanism to resolve problems involving conflicts between copyright owners and those who wish to use copyrighted works. 71

B. Creation of a Derivative Work Without Authorization from the Copyright Owner of the Underlying Work

Although not nearly as obvious, the most salient fundamental aspect of the compulsory license for the making of phonorecords of a non-dramatic musical composition is that it sanctions the creation and exploitation of a derivative work without the authorization of the copyright owner of the derivative work. 72 None of the other compulsory licenses do so. 73

The effect of section 115's compulsory license is to separate control over the creation of further sound recording and the subsequent manufacture and distribution of phonorecords embodying the sound recording from the copyright owner of the underlying musical composition once that composition had been recorded and

71. Clearly the question of whether using compulsory licenses in lieu of allowing free markets to develop and negotiate their own licensing schemes, if any, is a serious issue. This article will address it only in the context of the compulsory license for making sound recordings and phonorecords of non-dramatic musical compositions. See infra text accompanying notes 154-163.
72. A sound recording falls squarely within the definition of a “derivative work” in the current Copyright Act, which 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, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.” 17 U.S.C. § 101 (2006) (definition of “derivative work”) (emphasis added).
The production of a sound recording of a previously composed musical composition may and often does involve great talent and aesthetic judgment; nonetheless it is dependent upon the pre-existence of the musical composition. The one possible exception is spontaneous improvisation which is simultaneously recorded, but here the author, and thus the initial copyright owner, of both the musical composition and the sound recording is arguably the same person.
73. Compare supra notes 60-70 and accompanying text.
The other mechanism by which copyright law permits the preparation and dissemination of a derivative work is through the doctrine of fair use. See 17 U.S.C. § 107 and the plethora of cases and oceans of commentator’s ink that has been spilled on the subject of fair use.
distributed by or under the authority of the copyright owner. Thus, this allows the creation of a derivative work (the sound recording) without the consent of the owner of the copyright in the underlying work (the musical composition). This is a major exception from the basic rule of contemporary American copyright law that only the copyright owner can create or authorize the creation of a derivative work. The consequences of this statutory empowerment to create derivative works without the consent of the copyright owner of the underlying work deserve careful consideration.

The point cannot be emphasized too strongly. The otherwise unauthorized creation of a derivative work (the sound recording and the phonorecords manufactured that embody the sound recording) by invocation of the compulsory license leaves at large the issue of how problems of overlap with the copyright in the underlying work are to be resolved in the absence of either negotiated terms or statutory resolutions. One problem is determining the respective rights of the copyright owners of the underlying work and the derivative work where both overlap in the absence of statutory provision. Congress defined the conditions permitting the creation of an otherwise unauthorized derivative work—complying with the conditions required for the compulsory license—but obviously Congress did not fully consider the subsequent issues that might arise. If some third party made copies of the phonorecord, could the copyright owner of the underlying musical work sue for infringement? Could the creator or owner of the rights in the sound recording sue for infringement? What would be the basis of the action? What about performances of the work by means of the phonorecords? On a more modern note, what about the moral rights, if any, of the author of the underlying work? The answers to these questions came over time from a combination of judicial precedents and state and federal legislation.

1. The Right of Performance in a Sound Recording

The issue of whether the creator of the derivative sound
recording could control the performance of the sound recording by radio broadcast was litigated in the late 1930s. The earliest courts held that the performer making the derivative sound recording could prevent its radio broadcast on theories of common law unfair competition protecting non-statutory intellectual property from unauthorized exploitation by third parties. These decisions were effectively overruled by Learned Hand in *RCA Manufacturing Co. v. Whiteman*, holding "that the 'common-law property' in these performances ended with the sale of the records and that the restriction [written on the label or packaging] did not save it; and that if it did, the records themselves could not be clogged with a servitude." The practical effect was that broadcasters could not be prevented from broadcasting phonorecords regardless of any restrictive statements on the labels or the records. The broadcasters had to pay the music publishers for broadcasting recordings of their copyrighted musical compositions but not the performers whose performances were embodied in the records.

2. The Right to Make Phonorecords and Copies of a Sound Recording

As record piracy began to flourish in the 1950s and 1960s, the record companies who financed and thus claimed to own the rights in the sound recordings were without recourse under the Copyright Act of the day. Several other avenues of recourse were pursued by the record companies. The first legal attempts by the record companies to prevent record piracy were civil lawsuits in state courts invoking the misappropriation doctrine enunciated in *International News*

---

76. The right of the copyright owner of the underlying musical composition "[t]o perform the copyrighted work publicly for profit if it be a musical composition" was embodied in section 1(e) of the 1909 Copyright Act. Rights in the public performance of music were first recognized in the United States in 1897. *Supra* note 1.


79. *Id.* at 88.

80. A bill pending in the current Congress would require all broadcasters to pay the performers for the use of their recorded performances. H.R. 848, 111th Cong. § 6, 1st Sess. (2009).

81. *See infra* text accompanying notes 82-91.
Service v. Associated Press. In these cases, the record companies consistently prevailed.

Another strategy pursued by the record companies was to seek enactment of state criminal statutes outlawing unauthorized copying of sound recording. The constitutional validity of such statutes, at least as applied to pre-February 15, 1972 sound recordings, was upheld by the Supreme Court in Goldstein v. California. On first glance this effort was remarkably successful at one level, as almost every state in the Union has enacted such a statute. These statutes, however, are preempted by the Copyright Act with respect to all sound recordings first fixed on or after February 15, 1972. Primarily for this reason, the extent to which these statutes have resulted in any recent convictions is apparently minimal to non-existent.

84. See, e.g., 720 ILL. COMP. STAT. 5/16-7 (2008); MICH. COMP. LAWS § 752.782 (2004); N.Y. PENAL LAW § 275.05 (McKinney 2008); VA. CODE ANN. § 59.1-41.2 (West 2009); CAL. PENAL CODE § 653b (West 1999).
86. The record companies pursued the enactment of these state statutes even after Congress included sound recordings in the subject matter of the Copyright Act through the 1971 Sound Recording Amendment. Pub. L. 92-140, 85 Stat. 391(1971) (effective Feb. 15, 1972), codified at 17 U.S.C. §§ 1(f), 5(n), 19, 20, 26 & 101(e) (1976) (repealed 1976; repeal effective Jan. 1, 1978). Equivalent provisions are incorporated in the current Copyright Act. 17 U.S.C. §§ 102(a)(7), 106, 114 & 115 (2006)). Because the protections added to the Copyright Act by the 1971 Sound Recording Amendment were limited to sound recordings fixed on or after February 15, 1971, the record companies continued to pursue the adoption of these criminal statutes in those states which had not enacted them prior to that date.
88. The author is unaware of any recent convictions arising under such state statutes. The author's perception is that record pirates and counterfeiters concentrate almost exclusively on current hit records which would be in demand because (1) the risks of unsold inventory would
Still, another possible source of protection of sound recordings from unauthorized duplication was civil actions by the music publisher against the unauthorized duplicators. In *Duchess Music Corp. v. Stern*, the Ninth Circuit held that the compulsory license provision did not sanction the duplication of a sound recording without consent of the owner of the sound recording even if the compulsory license provisions were satisfied and the proper royalty payments were made to the owners of the copyright in the underlying musical composition. Subsequent federal cases in the Third, Fifth, and Tenth Circuits reiterated this conclusion.

These possible protections against unauthorized duplication, however, were too episodic, diffuse and uncertain to satisfy the record companies who lobbied Congress for federal legislation granting copyright protection to the recorded sounds as distinct from the underlying musical compositions being recorded. The result was the 1971 Sound Recording Amendment to the Copyright Act, granting federal copyright protection to sound recordings fixed on or after February 15, 1972.

It is worth noting that the possibility of copyright protection of sound recordings had been discussed by the 1909 Congress but was ultimately rejected. The relevant 1909 House Report stated: "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." Given the

---

89. Id.
92. See *H.R. REP. NO. 60-2222*, at 9 (1909) and *S. REP. NO. 60-1108*, at 9 (1909).
rise of record piracy and counterfeiting, as well as the perceived need for federal protection, the 1971 Sound Recording Amendment is understandable. The act, however, fails to clarify the problems created by the overlap of copyrights in the underlying work and the derivative works, evidencing Congress' failure to consider these issues.

C. Dominance of Record Companies and the Star System

There is no question that today the record companies and their star artists dominate the music industry rather than the music publishers and their composers and lyricists. One hundred years ago, the opposite was true. Today, as a result of mergers and buyouts, there are four major multi-national music conglomerates in the world: Warner Music Group, EMI, the Sony Music-BMG joint venture and Universal Music Group. Each of these conglomerates contains both record companies and music publishing companies. Within these companies and within the music industry in general, it is the record companies who are dominant. For example, it is the record companies

---

94. Many major recording artists do not author the material they record or author very little of it. Obvious examples would include such mega-stars as Elvis Presley and Barbra Streisand. There are also examples of songs finding far greater popularity and record sales in the recordings of well known star performers even when the songwriters are recording artists in their own right. For just one obvious example, many of the songs of Kris Kristofferson, a successful recording artist in his own right as well as a prolific songwriter, are far more popular in the versions recorded by others, e.g., Me and Bobby McGee recorded by Janis Joplin, Roger Miller, Gordon Lightfoot, The Grateful Dead, Jerry Lee Lewis, LeAnn Rimes and many, many others, and Sunday Morning Coming Down recorded by Johnny Cash, Willie Nelson, Hank Ballard and others. Kristofferson's recordings of Me and Bobby McGee and Sunday Morning Coming Down both appear on his debut album, KRISTOFFERSON (1970). Interestingly, today some genres of popular music (rock, hip hop) strongly tend to require the performers write all or almost all of their music in the interests of "street credibility," while in other genres (soul, country) this is of little or no importance.

95. This article does not consider the issue of whether or not the record companies over-exploit recording artists.


Each of these conglomerates contains many record labels. For example, the Warner Music Group includes such labels as Warner, Elektra, Atlantic and Rhino; Sony Music-BMG includes such labels as Sony, Columbia, Epic, Arista and RCA, the Universal Music Group includes such labels as Universal, Island, Def Jam and Interscope; and EMI includes such labels as Capitol, Angel, Virgin and Blue Note. Of course, each of these conglomerates includes many other labels.

96. For example, the Warner Music Group includes Warner-Tamerlane Publishing Corp., the Universal Music Group includes Universal Music Publishing Group, EMI includes EMI Music Publishing, and Sony Music includes Sony/ATV Music Publishing which is co-owned by the Michael Jackson Family Trust. All of these are among the world's major music publishers.
who determine which artists are recorded, not the music publishers. It is the record companies, not the music publishers, who decide which songs are recorded, which are released, and which are promoted.

Is the compulsory license responsible for the current structure of the music industry? It would have happened with or without the compulsory license, however, the compulsory license contributed to the speed and depth of this transformation by fixing the record companies' cost of obtaining material to be recorded below a free market price. This can be true even if the songwriter is also a recording artist.97 This factor is independent of the existence of the compulsory license, and almost certainly would have led to the record companies' domination of the music publishing industry, although probably not to the same extent.

If there had been a recording right without the compulsory license in the 1909 Copyright Act, it seems fair, although speculative, to say that the music publishers would have had more financial remuneration from their copyrighted works and thus more leverage in the music industry, even to the point where they might have created their own record companies.

D. The Impact of the Royalty Rate

1. Inflation

Easily obvious in hindsight, the flat rate fee of two cents per copy manufactured set by section 1(e) would not keep up with inflation. Thus, a one song “single” costing the consumer $1.00 in 1977 would yield the songwriter and music publisher the same $0.02 that they received from a one song phonorecord selling for $0.25 in 1909. Similarly, a twelve song LP in 1978, selling at retail from somewhere between $10 to $15 in 1978 would yield a maximum of $0.24 in the “mechanical” royalties flowing from the compulsory license. Had the royalty rate for the compulsory license been pegged at the ten percent of retail price that was in the proto-monopoly agreement between some of the music publishers and the Aeolian Company, those payments would have been from four to six times as much.98 Thus, as these mechanical royalties grew into the major source of income for songwriters and music publishers, there is a valid argument that they were grievously shortchanged.

97. See supra note 94.
98. See supra text at note 23.
This also contributed to the music publisher’s loss of dominance in the music industry. Had the royalty rate been pegged at ten percent of the retail price as the Aeolian contracts originally provided, it is clear the music publishers and songwriters would have received more compensation for their contributions to recorded music.

The impact of inflation was addressed in the 1976 Copyright Revision Act. Section 115 of the 1976 Act retained the compulsory license and initially increased the compulsory license’s royalty rate to 2½ cents per song or ½ cent per minute of playing time, whichever was greater. Section 801(a) created an independent Copyright Royalty Tribunal, and section 801(b) charged the Tribunal to make periodic adjustments to the statutory royalty rate. The Copyright Royalty Tribunal has since been replaced by a panel of three Copyright Royalty Judges, and the current rates are 9.1 cents per song or 1.75 cents per minute of playing time, whichever is greater.

The primary practical effect of the statutory rate throughout its history has been to establish an upper limit on what is charged for a license to record a nondramatic musical composition. Discounts are often made while premiums are so rare, if not unheard of, as to be immaterial on any quantitative basis. The other, perhaps less obvious, effect is that the statutory rate establishes the familiar parameters within which the music industry operates. It is a trivial exercise for a record company to obtain a negotiated mechanical license at the statutory rate. Bargaining for a discount takes

---

99. Subsequently the inadequacy of the statutory license rate was addressed by the adjustable royalties for the compulsory license provided by the 1976 Copyright Revision Act. 1976 Copyright Revision Act, supra note 33, §§ 801-810, codified as amended at 17 U.S.C. §§ 801-805 (2006). But it can be argued that the compulsory mechanical rates still functions far more as a ceiling than as a floor.
100. See supra text at note 23.
101. 1976 Copyright Revision Act, supra note 33.
102. Id. § 115 (codified as amended at 17 U.S.C. § 115 (2006)).
Previously, the composer of an hour long symphony received only the same two cents as the composer of a three minute popular song. This made the compulsory license an even greater inequity to the composers of longer works.
106. 37 C.F.R. § 255.3(m).
107. The author has heard rumors of songs commanding a premium over the compulsory license, but has never seen such a license.
108. For most songs, particularly the ones whose copyright is owned by a major music publisher, this entails nothing more than a telephone call to the Harry Fox Agency. See infra text.
somewhat more effort—typically a telephone call or series of calls—and the request typically is resolved expeditiously one way or the other as both parties will understand the parameters and jargon created by the compulsory license provision.\textsuperscript{109}

2. Ceilings and Floors

Another effect of the statutory royalty rate must be taken into account. The statutory royalty rate has become a ceiling rather than a floor for the earnings of music publishers and their composers and lyricists from recordings.\textsuperscript{110} Thus, even the most popular or potentially most popular songs normally cannot obtain more than statutory rate for their mechanical licenses in the current context of the music industry except in the rarest of circumstances, if at all.\textsuperscript{111}

Often the income to the songwriter and music publisher may be less. A typical scenario occurs when a star recording artist recording for a major label with significant promotional and distributional resources decides to record an unknown or relatively unknown song by a songwriter who does not have much leverage in the industry.\textsuperscript{112} The record company will request the music publisher (which may be the songwriter) to issue a mechanical license that discounts the royalty rate from that provided under the statute.\textsuperscript{113} The record company will argue that the major artist will sell many records of the song simply because of the star’s fan base, thus resulting in greater overall income to the music publisher and the songwriter than if the

\textsuperscript{109} Because the language of section 1(e) the 1909 Copyright Act spoke of “parts of instruments serving to reproduce mechanically the musical work” and “mechanical reproductions,” these compulsory licenses are called “mechanical licenses” and the resulting royalties from such licenses are called “mechanical royalties” or simply “mechanicals” to this day.

\textsuperscript{110} Peer Intern. Corp. v. Pausa Records, Inc., 909 F.2d 1332, 1337 (9th Cir. 1990).

\textsuperscript{111} See, e.g., Papa’s-June Music, Inc. v. McLean, 921 F.Supp. 1154 (S.D.N.Y. 1996) (Harry Connick, Jr. held subject to a contract clause entitling him to only seventy-five percent of the statutory rate applicable to compulsory licenses under the Copyright Act).


\textsuperscript{113} Ian Brereton, The Beginning of a New Age?: The Unconscionability of the “360-Degree” Deal, 27 CARDOZO 167, 185 (2009).
song was not recorded by the star. The threat is that if the discount is not granted, the song will not be recorded by the star. The requested discount is typically twenty-five percent.

Even more disadvantageous for the music publisher and songwriter is when the star insists that the star’s music publishing company be given a half interest in the copyright as a condition of recording the song. In this case, twenty-five percent of the compulsory license royalty will be diverted to the star. What makes this worse for the original music publisher and songwriter is that this also diverts twenty-five per cent of the song’s other earnings to the star.

At the extreme, where the star has sufficient magnitude, it is not altogether unknown for a star negotiating with a relatively unknown songwriter to insist on ownership of all of the copyright and with it all of the music publishing. Alternatively, an unscrupulous star might insist on both being a co-publisher and being credited as a co-writer of the song without making any contribution other than performing

114. Id. at 190 (2009).
115. Id.
116. In the prototypical contract between a songwriter without significant leverage and a music publisher, the songwriter transfers the copyright in the song to the music publisher in return for an advance against future earnings and a promise to pay the songwriter 50% of the earnings that the publisher generates from the song. The amounts of the advance and the percentage payable to the songwriters are, of course, negotiable, but this 50%-50% division is quite frequent. Because this is the frequent practice, the customary jargon of the music industry is to speak of a “publisher’s share” and a “writer’s share” of a song’s earnings with the understanding that each of these is 50% unless stated otherwise. Thus where the ownership of the copyright is split evenly between the star’s publishing company and another publishing company, the star’s company will receive half of the publisher’s 50% of the earnings, which is 25% of the song’s total earnings.

Where two music publishing companies both own a half interest in the copyright of a musical composition, the arrangement is call co-publishing.

117. Thus the music publishing company owned by the star will receive 25% of the total receipts (50% of the 50% that is the “publisher’s share”). See supra note 116.

118. What makes this different to the songwriter, is that now the star, through his or her music publishing company, will now receive 25% of the other income generated by the song from sources other than the sale of recordings such as public performances (broadcasts including webcasts), use of the song in film soundtracks (called synchronization rights or “sync” rights), use of the song in ringtones, etc. See generally AL KOHN AND BOB KOHN, KOHN ON MUSIC LICENSING, (3d ed. 2002) [hereinafter KOHN ON MUSIC LICENSING], and JEFFREY BRABEC & TODD BRABEC, MUSIC MONEY AND SUCCESS—THE INSIDER’S GUIDE TO MAKING MONEY IN THE MUSIC INDUSTRY (6th ed. 2008) [hereinafter MUSIC MONEY AND SUCCESS].

119. Suppose the star is almost certain to sell a million albums and maybe many more in the United States alone. A mechanical license at the statutory rate for a million selling album will generate $91,000 which leaves $45,500 for the songwriter’s share plus half of whatever other income the song may generate, which can be substantial. Id.
it. \textsuperscript{120} In this case the star also effectively gets fifty per cent of all of the earnings of the song\textsuperscript{121} but also obtains an undeserved creative credit. \textsuperscript{122}

The income of songwriter-performers is typically further reduced by the record company's insistence on "controlled composition" clauses in their recording contracts which usually tend reduce the mechanical royalty payable to three-quarters of the statutory rate and limit the number of songs on an album for which a mechanical royalty is payable to ten. \textsuperscript{123} Thus, a fifteen song CD album which would pay $1.365 under the current rate\textsuperscript{124} will yield the music publisher only $0.6825 or exactly half of what the statutory royalty rate contemplates. \textsuperscript{125} Only those performer-songwriters who are established with proven phonorecord sales can negotiate out of this kind of provision in contracts with major record labels.

IV. INDUSTRY PRACTICE

It is well worth asking the question of how frequently the compulsory mechanical license of section 115 is invoked in actual practice. The experience of the Copyright Office is that it was and is rarely used except for a brief period in the 1960s. \textsuperscript{126} From the

\textsuperscript{120} \textit{Id.}

\textsuperscript{121} As a co-publisher, the star gets half of the publisher's share and as a co-writer, the star gets half of the writer's share. \textit{Id.}

\textsuperscript{122} The ethical implications are obvious, particularly in an industry where creative credit enhances reputations and thus earning power. Authors of musical compositions, like the authors of many other kinds of works, are not included in the Copyright Act's provisions for moral rights. 17 U.S.C. § 106A (2006).


\textsuperscript{124} 1909 Copyright Act, \textit{supra} note 1.

\textsuperscript{125} The performer-songwriter's receipts will be reduced by whatever is the music publisher's share of such income unless the performer-songwriter has retained complete ownership of their copyrights.

\textsuperscript{126} Music Licensing Reform Before the Subcomm. on Intellectual Property of the S. Comm. on the Judiciary, 109th Cong., 1st Sess. (2005) (statement of Marybeth Peters, Register of Copyrights), available at http://www.copyright.gov/docs/regstat071205.html. Also symptomatic of the infrequency of actual use of the compulsory license is that none of the Annual Reports of the Register of Copyright for the years 2001 through 2007 consider this
Register of Copyrights, Marybeth Peters, in a prepared statement submitted to the Senate Committee on the Judiciary in 2005, described the historical pattern of use of the statutory mechanical license as follows:

[T]he “mechanical” license as structured under the 1909 Copyright Act was infrequently used until the era of tape piracy in the late 1960s. During this period, the “pirates” inundated the Copyright Office with notices of intention to utilize the compulsory license, many of which contained hundreds of song titles. The music publishers refused to accept such notices and any proffered royalty payments since they did not believe that reproduction and duplication of an existing sound recording fell within the scope of the compulsory license. After this flood of filings passed, the use of the license appears to have again become [sic] almost non-existent; up to this day, the Copyright Office receives very few notices of intention.127

In 2008 the Copyright Office received 274 Notices of Intent to invoke the compulsory license.128 In 2007, 382 Notices of Intent were received.129 There are no figures available as to how many of these Notices of Intent were filed either because negotiated licenses were refused or because the songs at issue were “orphan works” where the copyright owner could not be contacted.130

By comparison to the number of mechanical licenses issued by the Harry Fox Agency,131 this is miniscule. In 2008, the Harry Fox

statistic worth reporting. These reports can be found at http://www.copyright.gov/reports/annual/2006/index.html.

127. Id.

128. Telephone Interview with Mark DiNapoli, Assistant Chief, Examining Div., United States Copyright Office (July 13, 2009).

129. Id.

130. The term “orphan work” is used in copyright jargon to describe copyrighted works whose copyright owner cannot be located. This becomes a problem when someone wants to use a copyrighted work legitimately, is willing to negotiate a license that would compensate the copyright owner, but cannot locate the copyright owner through reasonable efforts. This problem is not limited to music but covers many other kinds of works as well.


131. The Harry Fox Agency is a wholly owned subsidiary of the National Music Publishers Association, the principal trade association of music publishers, and issues mechanical licenses on behalf of its publisher members. The Harry Fox Agency is by far the largest issuer of mechanical licenses in the United States today. Although no precise percentage can be determined, it is fair to say that the Harry Fox Agency probably issues well over half of all the mechanical licenses issued in the United States today.
Agency issued over 2.44 million mechanical licenses on behalf of its members of which 530,000 were for permanent digital downloads. In 2007, the Harry Fox Agency issued over 1.51 million mechanical licenses. Thus, in 2008, the number of Notices of Intent filed in the Copyright Office amounted to 0.0143% of the number of mechanical license issued by the Harry Fox Agency even after subtracting out the permanent digital download licenses from the Harry Fox total.

Given that the usage of the statutory compulsory license is minimal, the next question is why? First of all, the requirements placed upon the maker of the licensed sound recording under a compulsory mechanical license are onerous in comparison to standard industry practice. The points of comparisons used are the Harry Fox Agency mechanical license and the three sample mechanical licenses that are set forth in Kohn on Music Licensing. Royalty payments under a purely compulsory license are made monthly and are due on the twentieth day of the following month. The typical industry practice is that royalty payments are made quarterly and are due on the forty-fifth day or the fifteenth day of the second month.

---


133. Press Release, Harry Fox Agency, HFA Collects almost $394 Millions in Royalties for its nearly 35,000 Affiliated Publishers in 2007 (Mar. 17, 2008), available at http://harryfox.com/docs/2007HFARecapPR31708.pdf. Also, even though it is not directly on point to the topic of this paper, note the decline in revenues from 2007 to 2008, which arguably reflects the impact of unauthorized peer-to-peer file sharing over the internet.

134. Although accurate figures are not available, it is fair to say the Harry Fox Agency issues well over half of the mechanical licenses in the United States. The author's guess would be that it is in the 60% to 70% range of all mechanical licenses issued.


136. A blank copy of the basic Harry Fox Agency mechanical license is reproduced as Appendix A to this article with the permission of the Harry Fox Agency.

137. KOHN ON MUSIC LICENSING, supra note 118 app. to ch. 12, at 709-717. These are sufficiently typical of the mechanical licenses used in the music industry that further examples would be redundant. See, e.g., MUSIC MONEY AND SUCCESS, supra note 118, at 479-80.

following the accounting period. Monthly payments under a compulsory license must be made under oath and must comply with requirements set forth by the Register of Copyrights. The compulsory statement also requires an annual statement that is certified by a certified public accountant. In contrast, the typical industry license does not call for the monthly statements to be made under oath nor does it require a certified annual statement. Finally, if the copyright owner does not receive the monthly or annual statements under a compulsory license when due, they can give written notice of the default to the licensee that “unless the default is remedied within thirty days from the date of the notice, the compulsory license will be automatically terminated [and] [s]uch termination renders either the making or the distribution of phonorecords, or both, of all phonorecords for which the royalty has not been paid, actionable as acts of infringement.”

These requirements are sufficiently different from the normal business practices of the major record companies that they will not avail themselves of a compulsory license unless absolutely necessary, even to the extent of dropping songs off of albums. In particular, the record companies claim that their accounting departments are geared for quarterly payments and it is too big a dislocation to provide monthly statements in only twenty days. Nor are they at all happy with the idea of paying for certified public accountants to provide yearly statements.

On the flip side, this can work to the advantage of the songwriter or music publisher that does not wish to license their music for other recordings. Consider the following fact situation. A publicly unknown recording artist or group that writes its own material has just released a record with a song on it that is in a slow process of becoming a hit. A famous major artist on a major label wants to record that song and is capable of flooding the market, airwaves and webcasts with its version of song in very short order. If this happens, the unknown artist may be preempted from its chance at building a career. Provided the

139. Kohn on Music Licensing, supra note 118 app. to ch. 12, at 709-717. See, e.g., Music Money and Success, supra note 118, at 479.
140. Id. These requirements are set out at 37 C.F.R. § 201.19.
141. Id. These too are subject to the requirements promulgated by the Register of Copyrights. 37 C.F.R. § 201.19.
142. See supra note 53-57.
143. 17 U.S.C. § 115(c)(6). This last provision is found in two of the three contracts given in Kohn on Music Licensing, supra note 118, and in the Harry Fox Agency Mechanical License reproduced in Appendix A.
unknown artist controls the copyrights in its musical compositions, the artist can refuse to issue a mechanical license to the famous artist. It is quite probable that this will prevent the cover recording,\footnote{In the terminology of the music industry, a "cover recording" is a later recording of a song that was previously recorded by another recording artist or group.} which would kill the original. Therefore, to the extent that complying with the requirements for a compulsory license will prevent potential cover recordings, the composers and lyricists who control the copyrights in their musical compositions are effectively in the position of having the same power as if there were no compulsory license provision.

V. AND THE FUTURE

But is it sound to retain the compulsory license, notwithstanding its Congressional blessing? This central question can be broken down into a series of related subordinate questions. If nothing more than inertia keeps this system in place, should it be allowed to continue to displace free negotiations between the parties? Who is benefitted and who is harmed? To what extent does the change in the landscape of the music industry to its current domination by four major multinational record conglomerates\footnote{See text accompanying note 94.} alter the analysis? What does the infrequency of use of the actual compulsory license tell us?

A. The Statutory Guidelines

These questions go to the utility and efficacy of the royalty rate proceedings in front of the Copyright Royalty Judges as compared to a free or at least freer market. Thus, before attempting to answer the question of whether the compulsory mechanical license should be removed or retained, we need to consider the current parameters determining the compulsory license royalty rate.

Section 801(b)(1) of the Copyright Act mandates the guidelines the Copyright Royalty Judges are to follow in making their rate determinations for statutory mechanical licenses:

(A) To maximize the availability of creative works to the public.

(B) To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions.

(C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to the relative creative contribution, technological
contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication.

(D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.\(^{146}\)

It can readily be argued that these guidelines accomplish little that a free market would not accomplish, and, in part, even contribute to the maintenance of an artificial status quo. Do the rates that would be charged in a free market minimize or somehow constrict the availability of creative works to the public? In such other copyright based industries as motion pictures or books and magazines, where the prices for use of the underlying creative work are determined by private negotiations, there is no lack of works vying for the public’s choice. Why should music be any different? Here we run into the argument that the public would have fewer choices of different artists recording the musical composition if there were no compulsory license. This seems doubtful for at least two reasons. First, it may be in the interest of the music publisher to have as many artists as possible record their song, so this would be a strong incentive for the music publishers to negotiate non-exclusive licenses.\(^{147}\) Second, rival record companies can and do compete with each other by offering different music and different artists as well as by having different recordings of the same song.\(^{148}\) Thus, record companies that could not get mechanical licenses on previously recorded songs would need other avenues to reach the market and, in doing so, would bring new music and new artists to the public’s attention. Therefore, the Register of Copyrights’ initial contention that the public “would get recordings of a greater number and variety of musical works”\(^{149}\) in the absence of a compulsory license seems correct.\(^{150}\)

Also, there is no reason to assume that arm’s length negotiations between the music publishers and the record companies will not produce price points that make creative works abundantly available to the public. After all, both the potentially willing buyer (the record company) and the potentially willing seller (the music publisher) will not earn anything from the work unless it reaches the public.

\(^{147}\) 1961 REGISTER’S REPORT, supra note 33, at 34.
\(^{148}\) See id. at 34.
\(^{149}\) Id.
\(^{150}\) Id.
Lumping together the "fair return"-"fair income" requirement with the requirement of considering "the relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication" in determining a royalty rate, we see that it begs the question of whether this is best determined by a panel of Copyright Royalty Judges or by the parties to an arm's length negotiation. By negotiating individually, the parties could take into account the particular facts and circumstances surrounding each individual song, recording artist and record company. This will lead to price differentiation but that is not inherently wrong.

Finally, the command that the royalty rate shall be designed to "minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices" is, on its face, a command to maintain the status quo. To some extent this must prevent or hinder the music industry from adopting new methods of doing business that may be needed to adapt to changing economic and popular factors. It also may chill the music industry from seeking better functioning alternatives to present mechanical licensing methods.

After examining the statutory guidelines for determining the compulsory royalty rate, it is fair to say that they seem to have been written to preserve the current structure, institutions and relationships of the recorded music industry. In short, they reinforce the status quo. But this does not make the status quo either right or optimal.

B. An Alternative Reality

Let us now imagine a music industry without the compulsory license. As there has never been a free market for mechanical licenses unless you count the pre-1909 Copyright Act era, there is obviously no data from which to draw empirical conclusions.

154. As there has never been a free market for mechanical licenses unless you count the pre-1909 Copyright Act era, there is obviously no data from which to draw empirical conclusions.
on rereleases of old records would, in most cases, probably be
discounted substantially.

In some cases, this would require both the music publishers and
the record companies to estimate market potential and take the
attendant risks of miscalculation, but should they be artificially
insulated from the risks? After all, when the music publishers
negotiate with their other licensees (motion picture producers,
television producers, advertisers, video game manufacturers, etc.),
both sides are required to make these judgments. Neither record
companies nor music publishers are incapable of intelligent
negotiations.

Another result is that there would be some exclusive licenses.
Before asking if this is good or bad, the necessary prior question is
why this would occur. The answer lies in the shift of dominance in the
music industry from the music publishers to the record companies and
their stars.\textsuperscript{155} The record companies or recording artists would often
be in a position to insist on an exclusive license and would do so to
prevent other record companies or recording artists from competing
for the audience for the song. This would prevent competing record
companies from offering alternative versions of the same musical
compositions. They would still be able to compete, however, by
offering recordings of other artists and other musical compositions.
The Register of Copyrights has contended that this would increase the
number of musical compositions available to the public.\textsuperscript{156} This may
well be the case, but whether the increase in the recording of other
music would be infinitesimal or significant is not clear as record
companies today do in fact compete with each other primarily on this
basis.\textsuperscript{157}

The impact on the music publishers, and thus on the songwriters,
is harder to estimate. On the one hand, it can be argued that an
exclusive license would justify a higher royalty rate, which would
offset at least some of the loss of income from cover records that
could not then be licensed. But this is true only if the music publisher
has sufficient negotiating power to insist on a high enough premium

\textsuperscript{155} See supra text accompanying notes 70-71.

\textsuperscript{156} 1961 REGISTER'S REPORT, supra note 33, at 34.

\textsuperscript{157} In some areas, such as classical recordings, where there may be many recordings of
the same piece, particularly public domain works, the consumer choice of which version to buy
may be heavily influenced by the recording artist. For example, which recording of Beethoven's
Fifth Symphony do you prefer, the Chicago Symphony's conducted by George Solti or the
Berlin Philharmonic's, conducted by Herbert von Karajan, or one of myriad others? There are
differences.
to offset the loss of income from cover records. If they do not have sufficient negotiating power, then the abolition of the compulsory license would mean an overall loss to the songwriter and music publisher.

There are other possibilities, such as a mechanical license that is exclusive for a limited period of time so as to prevent a newly released record from being swamped by cover recordings made by established famous recording artists. Or the exclusivity can be tied to the amount of the income stream generated by the recordings over time. Again, these are contrary to current practice—which has its own momentum—and would require the music publisher or songwriter to have sufficient bargaining leverage to insist on such clauses. Given the present power balance in the record industry, the extent to which these or other variations on terminable exclusivity would occur is problematic.

Some music publishers believe that on an overall basis they are better off financially than they would be if the compulsory mechanical license were repealed. But is this fear realistic? Perhaps. Perhaps not. On one hand, there is a certain respect that must be accorded the judgment of the majority of the music publishing industry. On the other hand, as the Register of Copyrights has pointed out, there is evidence that in those countries whose copyright regimes do not have a compulsory mechanical license, there are significant numbers of non-exclusive licenses:

Our compulsory license in the United States is also an anomaly. Virtually all other countries that at one time provided for this compulsory license have eliminated it in favor of private negotiations and collective licensing administration. Many countries permit these organizations to license both the public performance right and the reproduction and distribution rights for a musical composition, thereby creating “one-stop shopping” for music licensees and streamlined royalty processing for copyright owners.

158. In licensing music for advertising purposes, time limited exclusive rights are quite common. Typically, there is a set period with options for the advertiser to extend the exclusivity if it is decided the campaign is to be continued. Licenses for music in advertising may also use such criteria as product classification or geographic area as a basis for exclusivity. The more exclusivity, the more the advertiser pays the music publisher.
159. See supra text at notes 53-56.
The approach suggested by the Register of Copyrights would roll a number of currently separate intermediaries into one and replace rates determined under the statute with industry wide bargaining. Obviously, this approach threatens the existence and business models of the existing intermediaries, who thus favor the continuation of the present system.

Also, if there were industry wide negotiations, who would represent the music publishers? In fact, many of the world’s largest music publishers are also parts of the same music conglomerates as the major record companies, which would create an inherent conflict of interest. Because the record companies usually have more clout than the music publishers within their specific corporate structures, the record companies would probably benefit from this conflict of interest at the expense of the music publishers and songwriters. If this practical problem can be solved, the case for industry-wide private negotiations and a single collective licensing administration becomes stronger.

C. Fundamental Principles and Moral Rights

1. Principles

Finally, it is worthwhile to consider the basic issue of whether the copyright owner should be able to control the making of derivative works. For all forms of copyrighted works other than non-dramatic musical compositions, this is the case. Moreover, the Register of Copyrights has identified this as “the fundamental principle of copyright—that the author is to have the exclusive right to control the commercial exploitation of his work—should apply to the recording of music, as it is applied to all other kinds of works and to other means of exploiting music.”


162. See supra note 96.

163. The author is unshakably convinced that this proposition is accurate, but could not find a reputable published written statement that so states. There also are none that refute it.


165. Supra text accompanying note 39.
The argument that it is essential that there be multiple versions of a song available to the public has some traction, only because it is so frequently repeated by the proponents of maintaining the compulsory license. Yet, it is subject to serious challenge. First, there is the counter-argument that the repeal of the compulsory license will be the death knell of non-exclusive licenses is questionable. Also, if there are exclusive licenses, they may yield the compensating benefit of a greater variety of musical compositions being recorded. It seems obvious that a recording artist who has been denied a license to record a given nondramatic musical composition will simply find a different one to record.

Perhaps more importantly, the absence of compulsory licenses for the preparation of otherwise unauthorized derivative works does not seem to have led to any particular deprivation for the public in any of copyright's other areas. Has it hurt Spiderman fans that this creation is available only through Marvel Comics or their licensees? The evidence from this instance is that a copyright owner will flood the market with derivative works. This indicates that if a record company had an exclusive right to record a certain musical composition and there was a perceived demand for alternate versions, the record company would in fact record an alternate version with other recording artists. Has it been harmful that only Warner Bros. can make movies of Harry Potter? Here we have a situation where the consumer will not be confronted with multiple versions and reiterations. It is submitted that Harry Potter fans do not feel deprived by J.K. Rowling's monopoly control over Harry Potter derivatives and her reported intent that there will be no more Harry Potter stories. Indeed, these and other copyright owners will argue that

167. Supra text accompanying notes 39 - 43.
169. In addition to the Spiderman movies, toys, T-shirts, and other embodiments, there are the multiple Spiderman comic series, e.g. THE AMAZING SPIDERMAN, THE SPECTACULAR SPIDERMAN, THE WEB OF SPIDERMAN, etc. Similar observations can be made about Superman, Batman, The X-Men and others.
170. Although Rowlings has indicated that she may write future works set in the fantasy universe inhabited by Harry Potter, she has said that the Harry Potter saga is now complete and at an end. Nancy Gibbs, Person of the Year 2007: J.K. Rowling, Time (2007), http://www.time.com/time/specials/2007/personoftheyear/article/0,28804,1690753_1695388_1695436,00.html
their financial returns, and thus their incentives to create, are maximized by exclusivity.

It must also be mentioned that the musical works contained in dramatic works, such as operas and musical plays, are not subject to a compulsory license.\textsuperscript{171} It is worth noting that frequently there are multiple recorded versions of the more popular songs from these operas and musicals even though they could be subject to exclusive licenses.\textsuperscript{172}

Is music any different? The argument will be that music is different because it does not reach its audience without performers who add their creative input. But is not the same true of motion picture scripts? Here the argument is truly joined. The point is the motion picture industry is dominated by the major motion picture studios which employ or acquire whatever rights they need from the authors, actors, directors, cinematographers and others. There is also no question that the studios rather than the creative contributors reap the greatest financial rewards from the motion pictures they produce, although some but not all of the creative contributors may be handsomely compensated.

If the contemporary fears of the loss of the compulsory mechanical license are correct, the same pattern could occur in the music industry with the record companies in the role of the motion picture studios. Assume this would hurt the music publishers—and thus the songwriters, composers and lyricists—financially. If sympathies are with the composers and lyricists who create the underlying works, this argues for retaining the compulsory license. But would this necessarily be the case? However, there also would be cases where the authors of musical works and their music publishers would acquire greater rather than less control over their musical compositions and thus increase their returns rather than continually bumping into the ceiling of the statutory rate. The truth is we do not know which result would predominate.

2. Moral Rights

One element certainly unforeseen by the 1909 Congress is the issue of the moral rights of a composer of music. The point cannot be

\textsuperscript{171} The compulsory license of section 115 is limited to “nondramatic musical works.” 17 U.S.C. § 115 (2006).

\textsuperscript{172} \textit{E.g.} \textsc{Andrew Lloyd Webber, All I Ask of You} (Polydor 1987), also recorded by \textsc{Sarah Brightman and Cliff Richard} (Polydor 1986); \textsc{Vicki Shepard} (Redzone Records 1999); \textsc{Barbara Streisand} (Sony 1989).
emphasized too strongly. If there were no statutory license, the copyright owner has the choice of granting or not granting the requested permission, with or without conditions or restrictions, based on whatever factors seem relevant to the copyright owner. These may or may not be purely financial.\textsuperscript{173} Certainly, there is room for the exercise of aesthetic judgment as well as other personal concerns. This is not so in the case of a sound recording of a non-dramatic musical composition.\textsuperscript{174} In addition to the obvious financial dimension of the making of an unsanctioned derivative work, there is a moral rights dimension. What if a composer objects to the rendition of the composer’s works by a certain performer because of revulsion over that performer’s style? Should any songwriter have the right to object if some other performer does a version of their compositions that they regard as a perversion? Or should the songwriter be able to prevent the performer from recording it in the first place?\textsuperscript{175}

The counter-argument is that the composers and songwriters, or at least those who control the copyrights of the works they created, could just bitch all the way to the bank with the proceeds of the statutory license. But shouldn’t they have the choice? Not every author is motivated solely by money, and artistic integrity, although hard to quantify, is nonetheless a concern of many authors in many fields.\textsuperscript{176} The statutory license precludes this and effectively bars the exercise of moral rights in the context of versions of non-dramatic musical compositions. The point here is not to examine the failures of the United States to genuinely implement the moral rights to which it pays lip service,\textsuperscript{177} but rather to point out that even if the United

\textsuperscript{173} Even if the author or copyright owner is motivated purely by financial concerns, there can be instances where turning down a request for a mechanical license may be advantageous in the long run. A simple illustration would be when a recording by an artist with modest sales projections would prevent a recording by an artist with significantly higher sales projections.


\textsuperscript{175} The defense of fair use under 17 U.S.C. § 107 (2006), would be available to anyone accused of infringement if they could show the factors governing such determinations weighed in their favor. The case of Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994), posed the issue of whether 2 Live Crew’s derivative rap version of Roy Orbison’s well-known recording of Pretty Woman infringed the copyright in the song in the absence of a license. In its opinion, the Court set forth the criteria it thought should be applied in future parody fair use cases.


States did have adequate protections for moral rights, they are effectively nullified by the statutory license of section 115.178

VI. Conclusion

Should the compulsory mechanical license be removed or retained?

As a practical matter this is not likely to happen any time soon. In the long term, it is harder to say whether it should be kept or discarded.

The conclusion of this article, with some hesitation, is that the mechanical license should be repealed.

Reverting to the most fundamental principle of all, the United States Constitution provides: “The Congress Shall Have Power... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”179 The underlying purpose of copyright is to encourage the creation of intellectual works.180 The mechanism to encourage this creation is the granting of exclusive rights to the authors of the works.181 It is submitted that the Constitution envisions a system where the making of any derivative work is dependent on the consent of the author or the author’s successor in interest. This is perhaps the largest factor.

The four other factors that have influenced this conclusion are (1) the total lack of moral rights in any form under the present system,182 (2) the debatability of the assertion that repeal of the compulsory license will result in sufficient quantity of exclusive licenses that will not only be exclusive but will harm the public interest,183 (3) the disappearance of the original anti-monopoly justification for the compulsory license,184 and (4) a belief that private

180. 1 HOWARD B. ABRAMS, THE LAW OF COPYRIGHT § 1:3, at 1-10 (18th ed. 2008).
181. Id.
182. In this scenario, the author will be able to exercise his moral rights effectively only if the author retains control of the copyright, but this occurs in a reasonable number of cases.
183. There are actually two separate components to this argument for retention of the compulsory license: first, that abolition of the compulsory license will result in exclusive licenses, and, second, that this will be harmful to the public interest. Both of these assertions have no proof.
184. Any danger of a powerful monopoly or oligopoly dominating the recorded music industry today comes from the major record companies, not the music publishers.
negotiation, whether on the basis of industry wide negotiations or one-on-one negotiations will result in fairer treatment of the authors of non-dramatic musical compositions.\footnote{185}

What do you think?

---

\footnote{185. It is clear that even today the compulsory license royalty rates are a ceiling, not a floor. Negotiations about rates, if any, are always about the amount of the discount, even in the case of previously unrecorded musical work to which the compulsory license is inapplicable.}
APPENDIX A

THE HARRY FOX AGENCY, INC. 601 WEST 26TH STREET, 5th FLOOR, NEW YORK, NEW YORK 10001
A SUBSIDIARY OF NATIONAL MUSIC PUBLISHERS' ASSOCIATION, INC

LICENSE NO. 109-040-9798
MARCH 16, 2009
TX. NO. 18278414

Refer to provisions hereof reproduced on reverse side varying terms of compulsory license provision of Copyright Act. The following is supplementary thereto:

1. SONG CODE: TO550V
2. TITLE: TEST
3. WRITERS: TEST
4. AKA: TEST

5. INCOME PARTICIPANT(S):
   TEST 01 PUBLISHER 100%

6. RECORD NO.: (CD) TEST
7. ARTIST: TEST
8. ROYALTY RATE: STATUTORY
   PLAYING TIME 5 MINUTES OR LESS

ADDITIONAL PROVISIONS:

THE AUTHORITY HEREUNDER IS LIMITED TO THE MANUFACTURE AND DISTRIBUTION OF PHONORECORDS SOLELY IN THE UNITED STATES, ITS TERRITORIES AND POSSESSIONS AND NOT ELSEWHERE.

YOU SHALL INCLUDE IN THE LABEL COPY OF ALL SUCH PHONORECORDS, OR ON THE PERMANENT CONTAINERS OF ALL SUCH PHONORECORDS, THE FOLLOWING PUBLISHER CREDITS IN THE FORM OF THE NAMES OF THE WRITER(S) AND THE PUBLISHER(S) OF THE COPYRIGHTED WORK.

ALBUM: TEST
DATE OF RELEASE: JANUARY 2009
RECORD LABEL: TEST
CONFIGURATION CODE: CD - COMPACT DISC (ALBUM)

Very truly yours,
THE HARRY FOX AGENCY, INC.

We acknowledge receipt of a copy hereof:

TEST LICENSEE:

[Signature]

Licensee Copy:
You have advised us, in our capacity as Agent for the Publisher(s) referred to in (A) supra, that you wish to obtain a compulsory license to make and to distribute phonorecords of the copyrighted work referred to in (A) supra, under the compulsory license provision of Section 115 of the Copyright Act.

Upon your doing so, you shall have all the rights which are granted to, and all the obligations which are imposed upon, users of said copyrighted work under the compulsory license provision of the Copyright Act, after phonorecords of the copyrighted work have been distributed to the public in the United States under the authority of the copyright owner by another person, except that with respect to phonorecords thereof made and distributed hereunder:

1. You shall pay royalties and account to us, as Agent for and on behalf of said Publisher(s), quarterly, within forty-five days after the end of each calendar quarter, on the basis of phonorecords made and distributed:

2. For such phonorecords made and distributed, the royalty shall be the statutory rate in effect at the time the phonorecord is made, except as otherwise stated in (C) supra:

3. This compulsory license covers and is limited to one particular recording of said copyrighted work as performed by the artist and on the phonorecord number identified in (C) supra; and this compulsory license does not supersede nor in any way affect any prior agreements now in effect respecting phonorecords of said copyrighted work:

4. In the event you fail to account to us and pay royalties as herein provided for, said Publisher(s) or his Agent may give written notice to you that, unless the default is remedied within 30 days from the date of the notice, this compulsory license will be automatically terminated. Such termination shall render either the making or the distribution, or both, of all phonorecords for which royalties have not been paid, actionable as acts of infringement under, and fully subject to the remedies provided by, the Copyright Act:

5. You need not serve us with the notice of intention to obtain a compulsory license required by the Copyright Act.

6. Additional provisions are reproduced under (D) supra.