86th Congress
1st Session } COMMITTEE PRINT

COPYRIGHT LAW REVISION

STUDIES

PREPARED FOR THE

SUBCOMMITTEE ON
PATENTS, TRADEMARKS, AND COPYRIGHTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
EIGHTY-SIXTH CONGRESS, FIRST SESSION

PURSUANT TO

S. Res. 53

STUDIES 5–6

5. The Compulsory License Provisions of the U.S. Copyright Law
6. The Economic Aspects of the Compulsory License

Printed for the use of the Committee on the Judiciary

UNITED STATES
GOVERNMENT PRINTING OFFICE
46476 WASHINGTON : 1960

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[1] The late Honorable William Langer, while a member of this committee, died on Nov. 8, 1959.

FOREWORD

This is the second of a series of committee prints to be published by the Committee on the Judiciary Subcommittee on Patents, Trademarks, and Copyrights presenting studies prepared under the supervision of the Copyright Office of the Library of Congress with a view to considering a general revision of the copyright law (title 17, United States Code).

The present copyright law is essentially the statute enacted in 1909, though that statute was codified in 1947 and has been amended in a number of relatively minor respects. In the half century since 1909 far-reaching changes have occurred in the techniques and methods of reproducing and disseminating the various categories of literary, musical, dramatic, artistic, and other works that are the subject matter of copyright; new uses of works and new industries for their dissemination have grown up; and the organization of the groups and industries that produce or utilize such works has undergone great changes. For some time there has been widespread sentiment that the present copyright law should be reexamined comprehensively with a view to its general revision in the light of present-day conditions.

Four studies of a general background nature appeared in the first committee print of this series. The present committee print contains two studies, Nos. 5 and 6, on the substantive problem of the compulsory license for the recording of music, as now provided in 17 U.S.C. § § 1(e) and 101(e). Study No. 5, "The Compulsory License Provisions of the U.S. Copyright Law," by Associate Professor Harry G. Henn, of the Cornell Law School, reviews the law and practice on this subject and presents the issues involved. Study No. 6, "The Economic Aspects of the Compulsory License," by William M. Blaisdell, economist of the Copyright Office, presents an analysis of the economic effect of the compulsory license in operation and the probable effect of its elimination.

The Copyright Office invited the members of an advisory panel and others to whom it circulated these studies to submit their views on the issues. The views, which are appended to the studies, are those of individuals affiliated with groups or industries whose private interests may be affected, as well as some independent scholars of copyright problems.

It should be clearly understood that in publishing these studies the subcommittee does not signify its acceptance or approval of any statements therein. The views expressed in the studies are entirely those of the authors.

JOSEPH C. O'MAHONEY,
Chairman, Subcommittee on Patents, Trademarks, and Copyrights, Committee on the Judiciary, U.S. Senate.

COPYRIGHT OFFICE NOTE

The studies presented herein are part of a series of studies prepared for the Copyright Office of the Library of Congress under a program for the comprehensive reexamination of the copyright law (title 17 of the U.S. Code) with a view to its general revision.

The Copyright Office has supervised the preparation of the studies in directing their general subject matter and scope, and has sought to assure their objectivity and general accuracy. However, any views expressed in the studies are those of the authors and not of the Copyright Office.

Each of the studies herein was first submitted in draft form to an advisory panel of specialists appointed by the Librarian of Congress, for their review and comment. The panel members, who are broadly representative of the various industry and scholarly groups concerned with copyright, were also asked to submit their views on the issues presented in the studies. Thereafter each study, as then revised in the light of the panel's comments, was made available to other interested persons who were invited to submit their views on the issues. The views submitted by the panel and others are appended to the studies. These are, of course, the views of the writers alone, some of whom are affiliated with groups or industries whose private interests may be affected, while others are independent scholars of copyright problems.

ABE A. GOLDMAN,
Chief of Research,
Copyright Office.

ARTHUR FISHER,
Register of Copyrights,
Library of Congress.

L. QUINCY MUMFORD,
Librarian of Congress.

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STUDY NO. 5

THE COMPULSORY LICENSE PROVISIONS OF THE U.S. COPYRIGHT LAW

By Prof. Harry G. Henn

July 1956

CONTENTS

THE COMPULSORY LICENSE PROVISIONS OF THE U.S. COPYRIGHT LAW

The U.S. Copyright Act of 1909[1] recognized for the first time recording and mechanical reproduction rights[2] as part of the bundle of exclusive rights secured by statutory[3] copyright in certain classes of works,[4] limiting such mechanical reproduction rights in musical compositions by compulsory license provisions.

Shortly before the passage of the 1909 act, the U.S. Supreme Court, in construing the then-existing copyright statute,[5] in the oft-cited case of *White-Smith Music Publishing Co.* v. *Apollo Co.*,[6] had held that the making and sale of a pianola roll[7] of a copyrighted musical composition did not constitute copying (or publication or, inferentially, vending), and hence was no infringement, of the copyright in such

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[1] Act of March 4, 1909 (35 Stat. 1075), effective July 1, 1909, 17 United States Code 1 et seq. (1952).

[2] Quaere, whether "recording rights" and "mechanical reproduction rights" are synonymous. If the former are broader than the latter, the compulsory license provision might apply only to the latter. The terminology of the Copyright Act is far from consistent. See pp. 13–14, 54, infra.

[3] Recording has been held violative of common-law rights. *George* v. *Victor Talking Machine Co.*, 38 U.S.P.Q. 222 (D.N.J. 1938), rev'd on other grounds, 105 F. 2d 697 (3d Cir. 1939), cert. denied, 308 U.S. 611, Sup. Ct. 176, 84 L. Ed. 511 (1939). This has long been the assumption of the music publishing and recording industry. See pp. 46–48, infra. Common-law rights are perpetual until publication (see note 71 infra), and are not subject to the compulsory license provision of the U.S. Copyright Act.

[4] Dramatic works (sec. 1(d)) and musical compositions (sec. 1(e)): Prior to the act of July 17, 1952 (66 Stat. 752), effective January 1, 1953, 17 U.S.C. 1(c) (Supp. 1955) no recording rights attached to nondramatic literary works. *Corcoran* v. *Montgomery Ward & Co.*, 121 F. 2d 576 (9th Cir. 1941), cert. denied, 314 U.S. 687, 62 Sup. Ct. 300, 86 L. Ed. 550 (1941) (setting to music and recording poem held not to infringe statutory copyright in poem). See H. Rept. No. 1160, 82d Cong., 2d sess. (1952); Cane, "Belated Justice for Authors," 36 Stat. Rev. 21 (Aug. 22, 1952); Schulman, "Recording Base Widens," 1 American Writer 13–15 (October 1952). Only mechanical reproduction rights in musical compositions are subject to compulsory licensing. (See p. 56, infra.)

[5] Act of Mar. 3, 1891 (26 Stat. 1106), Rev. Stat., sec. 4952 (based on act of July 8, 1870 (16 Stat. 212)), sec. 86, which provided that the author of a copyrighted musical composition should have "the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same." In 1870, although the mechanical piano (with interchangeable boards or perforated cards) had been previously invented, recording was mainly limited to the single-selection music box, barrel organ, bird organ, chiming clock, or snuff box. Sheet music was the medium through which new songs were enjoyed in the home. By 1900, pianolas, pianophones, aristons, aeolians, aerophones, polyphones, clarophones, phonographs, gramaphones, and graphophones were in widespread use, and a substantial industry had been built up around them and the interchangeable parts they played.

[6] 209 U.S. 1, 28 Sup. Ct. 319, 52 L. Ed. 655 (1908) (Holmes, J., concurring). Lower courts had previously ruled to the same effect. *Stern* v. *Rosey*, 17 App. D.C. 562 (1901); *Kennedy* v. *McTammany*, 33 Fed. 584 (C.C.D. Mass. 1888), appeal dismissed, 145 U.S. 643, 12 Sup. Ct. 983, 36 L. Ed. 853 (1892). Accord: *M. Witmark & Sons* v. *Standard Music Roll Co.*, 213 Fed. 532 (D.N.J. 1914), aff'd, 221 Fed. 376 (3d Cir. 1915) (pre-1909 work).

[7] And, by analogy, disks, bands, and cylinders, which, along with pianola rolls, comprised the interchangeable parts then used in mechanical music-producing machines. (See note 5 supra.) For the problems posed by motion picture sound tracks, long-playing records, wire and tape recordings, electronic devices, etc., see p. 54, infra.

musical composition.[8] The result of this case, but not the underlying rationale, was changed by two provisions of the 1909 act:

Section 1(e) [9] which, among other things,[10]

(1) Recognized recording and mechanical reproduction rights in musical compositions, except those by foreign authors unless their nations granted similar rights to U.S. citizens,[11] published and copyrighted [12] after July 1, 1909, the effective date of the act; and

(2) Subjected such mechanical reproduction rights to compulsory licensing,[13] and

Section 25(e)[14] specifying further remedies for infringement of mechanical reproduction rights.[15]

I. Analysis of Pertinent Provisions of Present Copyright Law

A. Legislative History of Present Compulsory License Provisions

As early as 1905,[16] work was commenced on a series of bills looking toward the codification of the Federal copyright laws.[17] The Librarian of Congress held three conferences with authors, publishers, and

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[8] The Court applied a visual test of copying by endorsing the definition of a copy of a musical composition, within the meaning of the Copyright Act, as "a written or printed record of it in intelligible notation" (209 U.S. at p. 17, 28 Sup. Ct. at p. 323, 52 L. Ed. at 662). A copy had to appeal to the eye, not the ear. Cf. 2 Bl. Comm. 405–406. The Court concluded, after suggesting possible legislative relief, that the copyright statute as it then stood did not include records such as pianola rolls as copies or publications of the copyrighted music. Holmes, J., concurred on the basis of the facts and opinions in the United States and abroad, saying:

"On principle anything that mechanically reproduces that collocation of sounds ought to be held a copy, or if the statute is too narrow ought to be made so by a further act, except so far as some extraneous consideration of policy may oppose."

209 U.S. at p. 20, 28 Sup. Ct. at p. 324, 52 L. Ed. at p. 663. See Universal Copyright Convention, art. VI, discussed in note 71 infra.

[9] See p. 12, infra.

[10] Sec. 1(e), besides recognizing recording and mechanical reproduction rights in musical compositions, provides for the right of public performance for profit of musical compositions and the right to make any arrangement thereof or the melody thereof in any system of notation. Public performance rights in musical compositions had been expressly recognized in the act of January 6, 1897 (29 Stat. 481), the limitation "for profit" being added by the 1909 act. Rights to arrange or adapt musical works are expressly conferred in sec. 1(b). Besides sec. 1(e) rights of public performance for profit, arrangement, and recording and mechanical reproduction, musical compositions are presently protected against printing, reprinting, publishing, copying, and vending (sec. 1(a)), and dramatizing, arranging, or adapting (sec. 1(b)).

[11] See note 55 infra.

[12] See note 57 infra.

[13] The compulsory license provision of sec. 1(e) was the first of two instances (for second, see note 66 infra) of a compulsory license in Federal copyright and patent enactments, but is not entirely without precedent. Congress, under the Articles of Confederation, having no power over copyright, recommended in 1783 that the several States enact copyright legislation. Of the 12 original States (Delaware being the exception) which did so between 1783 and 1786, four statutes (Connecticut, Georgia, New York, South Carolina) contained compulsory license with security provisions applicable when copies of a copyrighted book were not supplied in reasonable quantity and at reasonable price. "Copyright Enactments of the United States, 1783–1906," pp. 11–31 (2d ed. 1906); Fenning, "Copyright Before the Constitution," 17 J. Pat. Off. Society 379, 380, 383 (1935). Compulsory patent licensing is one of the most controversial subjects in the patent field. The Temporary National Economic Committee favored an amendment to the patent laws which would require licensing of patents at reasonable royalties. Subsequently as an adjunct of enforcement of the antitrust laws in the patent field, a number of antitrust civil decrees required defendants to license patents either at a reasonable royalty or royalty free. A congressional subcommittee reviewing the American patent system has undertaken a study of all antitrust decrees requiring compulsory licensing of patents to determine their effectiveness in promoting competition and the practical problems involved in the administration of compulsory licensing. S. Rept. No. 1464, 84th Cong., 2d sess., p. 11 (Jan. 16, 1956). Several foreign countries adopted compulsory license provisions patterned on sec. 1(e) of the U.S. Copyright Act. 1 Ladas, "The International Protection of Literary and Artistic Property," pp. 429–432 (1938). See pp. 36–41, infra.

[14] 17 U.S.C. sec. 101(e) (1952); see p. 13, infra.

[15] See pp. 13–21, infra.

[16] For a summary of developments, see 37 Music Trades 5–6 (Mar. 13, 1909).

[17] H. Rept. No. 3380, 58th Cong., 3d sess. (1905).

other interested groups in 1905–6 in New York City and Washington, D.C. At the last conference a draft bill, containing the following provision, was discussed: [18]

> That the copyright by this Act shall cover and protect the words and music of any song, opera, operetta, oratorio, mass, choral work and cantata, as well as each separate number or part thereof issued in separate form, together with all subsequent translation, arrangement or setting of the original work in any mode of notation, system of signs, figures or devices, or any form of reproduction whatsoever; and the music and words of a mixed composition may be jointly protected under one copyright or may be separately copyrighted.

A series of bills were introduced in Congress, during the 3 years from 1906 to 1909, to recognize recording and mechanical reproduction rights in musical compositions.

1. The 59th Congress

(a) S. 6330 and H.R. 19853

On May 31, 1906, identical bills were introduced by Senator Kittredge (S. 6330) and Representative Currier (H.R. 19853) providing that the copyright should include the sole and exclusive rights [19]—

> * * * (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.

The bills were referred to the Committees on Patents of both Houses which held joint hearings on June 6–9, 1906.

John J. O'Connell, as representative of several New York player-piano manufacturers, claimed at the hearings that the above-quoted paragraph (g) would give a monopoly of the music-roll business to one company.[20] He indicated, in response to questions, that the piano manufacturers were not opposed to giving the composer some return provided this was done in such a way that every manufacturer would have the right to use the music upon paying for it. John Philip Sousa and Victor Herbert complained that manufacturers of music rolls and talking-machine records were reproducing part of their brain and genius without paying a cent for such use of their compositions.[21]

No further action was taken at that session. New hearings were commenced at the next session in December 1906. Thereafter, the Senate Committee on Patents, by a divided vote (three members dissenting), reported the original bill, while the House committee, one

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[18] Sec. 42, Conference, Mar. 13–16, 1906.

[19] S. 6330, H.R. 19853, 59th Cong., 1st sess. (1906).

[20] The Aeolian Co. had received from numerous music publishers exclusive long-term license agreements to manufacture perforated music rolls in consideration for its carrying the *White-Smith Music Publishing Co.* case (see note 6, supra) to the U.S. Supreme Court in hope of a decision recognizing mechanical reproduction rights. There was considerable disagreement at the congressional hearings whether such license agreements would survive an adverse Supreme Court holding and apply if mechanical reproduction rights were recognized by legislation. Hearings on S. 6330 and H.R. 19853, 59th Cong., 1st sess., pp. 23–26, 94–97, 139–148, 166, 185–198, 202–206 (June 6–9, 1906). See note 44, infra.

[21] Id., at p. 84.

member dissenting, reported against extending copyright to include recording and mechanical reproduction rights.[22]

(*b*) *S. 1890 and H. R. 25133*

Senator Kittredge persisted at this session, introducing on January 29, 1907, a bill (S. 1890) defining the exclusive rights secured by the copyright of a musical composition as including the right [23]—

> * * * to make any rearrangement or resetting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced.

2. *The 60th Congress*

(*a*) *H.R. 243, S. 2499, S. 2900, and H.R. 11794*

At the next Congress, bills were introduced in December 1907, providing that perforated rolls, records, and matrices for the same, did not constitute arrangements or adaptations of a musical work.[24] Shortly thereafter, two bills were introduced providing that the exclusive rights in a musical composition included the right [25]—

> * * * to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced.

At this time, the *White-Smith Music Publishing Co.* case [26] was before the U.S. Supreme Court. The congressional committees decided to postpone action pending the decision of the Supreme Court. The case was argued on January 16 and 17, 1908, and decided on February 24, 1908.

Joint committee hearings were resumed on March 26, 27, and 28, 1908.[27]

(*b*) *H.R. 20388*

Antitrust considerations previously raised now began to appear in the drafted bills. On April 6, 1908, Representative Campbell introduced a bill which provided, among other things, that any copyright issued by the United States for a musical composition or a device for reproducing music or musical compositions owned by an individual or firm would cease and terminate upon such individual or firm violating any law of Congress or any State which prohibited, restrained, or regulated trusts and monopolies.[28]

Congressional committee sentiment was largely divided between those who favored recognition of recording and mechanical reproduction rights absolutely and those who wanted such recognition limited by compulsory license provisions. A very small minority opposed recognition of such rights either on constitutional grounds,

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[22] Hearings on S. 6330 and H.R. 19853, 59th Cong., 2d sess., pp. 156–161, 200–236, 247, 261, 268–298, 342–370 (Dec. 7, 8, 10, 11, 1906); S. Rept. No. 6187, 59th Cong., 2d sess., pp. 2–4, pt. 2 (1907); H. Rept. No. 7083, 59th Cong., 2d sess., pp. 9–11, pt. 2 (1907). The main objection was that any legislation involving mechanical reproduction rights be postponed pending the decision of the Supreme Court in the *White-Smith Music Publishing Co.* case.

[23] S. 1890, 59th Cong., 2d sess. (1907). A bill introduced by Representative Currier in the House on the same day (H.R. 25133) omitted this provision.

[24] H.R. 243, 60th Cong., 1st sess. (1907); S. 2499, 60th Cong., 1st sess. (1907).

[25] S. 2900, 60th Cong., 1st sess. (1907); H.R. 11794, 60th Cong., 1st sess. (1908).

[26] See note 6 supra.

[27] Hearings on H.R. 243, S. 2499, S. 2900, and H.R. 11794, 60th Cong., 1st sess., pp. 183–243, 255, 264–281, 293–356 (Mar. 26–28, 1908).

[28] H.R. 20388, 60th Cong., 1st sess. (1908). See note 44 infra.

largely dissipated by the Supreme Court opinions in the *White-Smith Music Publishing Co.* case, or in the feeling that there should be no further burden on the music-loving people of the country.

The issue, in effect, then, was between absolute and qualified recognition of recording and mechanical reproduction rights. Some question was raised as to the constitutionality of a compulsory license provision with an arbitrary royalty rate. Both Mr. O'Connell, counsel for the National Piano Manufacturers' Association, and Arthur Steuart, chairman of the Copyright Committee of the American Bar Association, expressed opinions that Congress in creating new rights had the power to annex conditions thereto since no abridgement of existing rights would be involved.

After the close of the hearings in March 1908, Senator Smoot, chairman of the Senate Committee on Patents, had suggested that the various interested groups attempt to agree on a bill. Accordingly, representatives of the song writers, talking-machine people, and piano manufacturers expressed agreement in favor of the universal royalty idea, and, except for the talking-machine people who thought the 2-cent rate was too high for cheap records, the 2-cent flat rate as proper and reasonable.[29]

(*c*) *H.R. 21592*

A compulsory licensing provision appears for the first time in a bill introduced on May 4, 1908. To a subsection conferring, among the several rights, the exclusive right to make any arrangement or setting of a musical composition or its melody in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced, was appended the following proviso: [30]

Provided, That the provisions of this Act so far as they secure copyright covering the parts of instruments serving to reproduce mechanically the musical work shall include any compositions published and copyrighted after the passage of this Act: *And provided further*, That whenever the owner of a musical copyright has used or permitted the use of the copyrighted work upon the 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 equal to the royalty agreed to be paid by the licensee paying the lowest rate of royalty for instruments of the same class, and if no license has been granted then per centum of the gross sum received by such person for the manufacture, use, or sale of such parts, and in all cases the highest price in a series of transactions shall be adopted.

A later section of the same bill provided in part:

Whenever the owner of a musical copyright has used or permitted the use of the copyrighted work upon the parts of musical instruments serving to reproduce mechanically the musical work, then in case of infringement of such copyright by the unauthorized manufacture, use, or sale of interchangeable parts, such as disks, rolls, bands, or cylinders for use in mechanical music-producing machines adapted to reproduce the copyright music, no criminal action shall be brought, and in a civil action no injunction shall be granted, but the plaintiff shall be entitled to recover in lieu of profits and damages a royalty as provided in section one, subsection (e) of this Act.

[29] 37 Music Trades 5 (Mar. 13, 1909).
[30] H.R. 21592, 60th Cong., 1st sess. (1908).

(*d*) *H.R. 21984*

On May 12, 1908, Representative Sulzer introduced a bill combining recognition of recording and mechanical reproduction rights in musical compositions [31] with a compulsory licensing provision, mentioning for the first time the two-cent royalty: [32]

That any person who willfully and for profit shall infringe any copyright secured by this Act, or who shall knowingly and willfully aid or abet such infringement, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment for not exceeding one year, or by a fine not less than one hundred dollars and not exceeding one thousand dollars, or both, in the discretion of the court: *Provided, however*, That no person shall be deemed to infringe the copyright in any musical composition who shall make, vend, sell, or offer for sale any device or contrivance containing any arrangement or setting of the same or of the melody thereof, in which the thought of an author may be recorded and from which it may be read or reproduced, and who shall pay to the copyright proprietor of the same before vending, selling, or offering any such device or contrivance for sale, the sum of two cents in each case where the device or contrivance is a talking-machine record, and a sum equal to one-tenth part of the marked retail price of any other such device or appliance, and shall affix to such devices or appliances before vending, selling, or offering them or any of them for sale a royalty stamp issued to him by the proprietor of the copyright denoting the payment of said sum: *And provided further*, That the proprietor of the copyright shall cause to be prepared, for the payment of the royalty thereof, and shall keep on hand at all times a sufficient supply of stamps, and shall sell the same to any person desiring to purchase the same, in default of which no action shall be maintained nor recovery be had for any infringement by any such device or contrivance. Every manufacturer of any such device or contrivance shall securely affix, by pasting on each such device or contrivance manufactured by him, a label on which shall be printed the name of the manufacturer, his place of residence, the title of the composition which it is adapted to reproduce, the name of the author of such composition, and the retail price of the same, in default of which he shall be liable under the provisions of this Act as an infringer of the copyright: *And provided further*, That the person using or affixing the stamp as herein provided for shall cancel the same by writing thereon the initials of his name and the date on which such stamp is attached or used, so that it may not again be used.

Any person who shall vend, sell, or offer for sale such contrivance or appliance with properly affixing thereon and canceling the stamp denoting the royalty on the same, or affixes a false, fraudulent, or counterfeit stamp, or any dealer who buys, receives, or has in his possession any such device or contrivance on which the royalty has not been paid, or any person who removes or causes to be removed from any such device or contrivance any stamp denoting the royalty on the same, with intent to again use such stamp, or who knowingly uses or permits any other person to use the stamp so removed, or who knowingly receives, buys, sells, gives away, or has in his possession any stamp so removed, or has in his possession any stamp so removed, or who makes any other fraudulent use of any such stamp shall be deemed guilty of a misdemeanor, and shall be fined not less than two hundred and fifty dollars nor more than one thousand dollars and imprisoned for not less than three months nor more than one year.

Nothing in this section declared to be illegal by any court of competent jurisdiction shall in anywise affect or impair any other section or subsection or part thereof in this Act contained, but the same shall remain in full force and effect in the same manner to the same extent as if this section were not embodied in this Act.

(*e*) *H.R. 22071*

On May 12 (calendar day May 21), 1908, Representative Sulzer introduced another bill which retained the recording and mechanical reproduction rights and royalty stamp provisions of his earlier bill

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[31] H.R. 21984, 60th Cong., 1st sess. (1908). Similar to provisions in bills cited in note 25 supra.

[32] H.R. 21592, 60th Cong., 1st sess. (1908).

but limited the compulsory license provision to situations where the proprietor had made or authorized a recording and made the royalty of one-tenth of the marked retail price applicable to all mechanical reproductions, thus supplanting the 2-cent provision for phonograph records.[33]

(f) H.R. 22183

On May 12, 1908, Representative Currier introduced a bill which provided a 2-cent royalty except in the case of disks not exceeding 8 inches in diameter or cylinders not exceeding 4 inches in length, in which case the royalty was to be 1 cent. The provisos read as follows:[34]

> * * * *Provided*, That the provisions of this Act, so far as they relate to instruments or machines or parts of instruments or machines which reproduce or serve to reproduce to the ear the musical work, shall include only compositions published and copyrighted after this Act takes effect, 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 or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States similar rights: *Provided further*, That any person may make use of the copyrighted work in the manufacture of records or controllers for mechanical music-producing machines, however operated, and may sell or use such records for profit upon payment of a royalty to the copyrighted proprietor by the manufacturer of such record or controller, as hereinafter provided: *And provided further*, That in no event shall the payment of more than one royalty be required on any such record or controller.
>
> In case of the use of such copyrighted composition on such interchangeable records or controllers of such mechanical musical-producing instruments no criminal action shall be brought, and in a civil action no injunction shall be granted, but the plaintiff shall be entitled to recover in lieu of profits and damages a royalty of two cents on each such record or controller, except in the case of disks for talking machines not exceeding eight inches in diameter or cylinders not exceeding four inches in length, in which case the royalty shall be one cent; but in the case of the refusal of such manufacturer to pay to the copyright proprietor within thirty days after demand in writing the full sum of royalties due at the said rate at the date of such demand the court may award taxable costs to the plaintiff and a reasonable counsel fee, and the court may enter judgment therein for any sum above the amount found by the verdict as the actual damages, according to the circumstances of the case, not exceeding three times the amount of such verdict.

Opposition developed on the part of some music publishers with the result that no bill was reported before the end of the session in June 1908.[35]

A special House committee was thereupon appointed to consider the various bills then pending, primarily: H.R. 22183, providing for a 2-cent flat royalty rate; H.R. 21592, permitting the composer to withhold his composition from mechanical reproduction, if he did not permit such use; if he did permit such use, anybody else could make similar use of the composition upon paying a percentage of royalty; and H.R. 21984, providing for a 2-cent royalty on talking-machine records and a 10-percent royalty on music rolls.[36] The special committee met on the reconvening of Congress in December 1908 with a view to framing, on the basis of the various bills, one that would be not only valid but just and reasonable to all interests.[37]

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[33] H.R. 22071, 60th Cong., 1st sess. (1908).
[34] H.R. 22183, 60th Cong., 1st sess. (1908).
[35] 37 Music Trades 5 (Mar. 13, 1909).
[36] Ibid. See notes 30, 31, 34, supra.
[37] Ibid.

(g) H.R. 24782

Meanwhile, on December 19, 1908, Representative Barchfeld introduced a bill which contained, besides provisions similar to some of the other bills, some new features. The most important of these was that the proprietor of a copyrighted musical work, when he mechanically reproduced it or permitted someone else to do so, should file a written declaration of intention so to use said work with the Register of Copyrights, giving also the nature and extent of such contemplated use; and if such use were permitted to others a duplicate original of the contract under which said use was permitted must also be filed. The Register of Copyrights was required to issue a weekly bulletin or list of the declarations of intention and contracts respecting the use of copyrighted works upon instruments mechanically reproducing the work. The full section read as follows: [38]

That whenever the proprietor of a copyrighted musical work shall use or permit the use of the same for profit upon any instrument serving to reproduce mechanically the musical work, he shall first file with the Register of Copyrights (a) if the use be only by the copyright proprietor, a written declaration of intention so to use said work and the nature and extent of such contemplated use; (b) if such use is permitted to others, a duplicate original of the contract under which said use is permitted, and thereupon any other person subject to the provisions hereof may make similar use of such copyrighted work and to the same extent upon paying to the copyright proprietor of the same before vending, selling, or offering any such instrument for sale, (c) if the said use is to be made by the copyright proprietor, a sum equal to ten per centum of the selling price of any such instrument, but in no event to be less than two cents; (d) or if the use is permitted to others the royalty provided in the contract permitting such use for instruments of the same class. Any person using a copyrighted work under the provision hereof shall affix to such instrument before vending, selling, or offering it for sale a royalty stamp issued to him by the proprietor of the copyright denoting the payment of said royalty, and shall cancel the stamp at the time of affixing the same by writing thereon the initials of his name and the date of cancellation so that it may not again be used.

The proprietor of the copyright shall cause to be prepared and keep on hand for sale proper stamps, bearing his imprint, for the payment of the said royalties, in such denomination as will coincide with the royalty hereinabove specified, in default of which no action shall be maintained nor recovery be had for any infringement by any such instrument.

Any person who shall vend, sell, or offer for sale any such instrument without properly affixing thereon and cancelling the stamp denoting the royalty on the same shall be liable as an infringer of the copyright. Any person who affixes a false or fraudulent stamp or who removes or causes to be removed from any such instrument any stamp denoting the royalty on the same, with intent to again use such stamp, or who knowingly uses or permits any other person to use the stamp so removed, or who knowingly receives, buys, sells, or gives away, or has in his possession any stamp so removed, or who makes any other fraudulent use of any such stamp, shall be deemed guilty of a misdemeanor, and shall be fined not less than two hundred and fifty dollars nor more than one thousand dollars, or imprisoned for not less than three months nor more than one year, or both.

No change shall be made in the contract which has been filed with the register of copyrights in compliance with the requirements of this section except after thirty days' written notice to the register of copyrights, which shall plainly state the change proposed to be made therein. Any copyright proprietor filing a false or fraudulent contract with the register of copyrights, or offering, granting, or giving, or any person soliciting, accepting, or receiving any rebate or refund of any portion of the royalty named in the contract filed by the copyright proprietor with the register of copyrights, shall forfeit to the United States a sum not less than five hundred dollars nor more than five thousand dollars.

[38] H.R. 24782, 60th Cong., 2d sess. (1908).

The register of copyrights shall issue a weekly bulletin or list of the declarations of intention and contracts respecting the use of copyrighted works upon instruments hereinbefore provided, specifying the copyrighted work to be used, the name and address of the proprietor, the character and extent of such use, and the terms of royalty and nature of permission, contained in each contract; and it shall be the duty of the register of copyrights to furnish such bulletins to all persons applying for the same at a sum not exceeding five dollars per annum.

Nothing in this section declared to be invalid by any court of competent jurisdiction shall in any wise affect or impair any other section or subsection or part thereof in this Act contained, but the same shall remain in full force and effect in the same manner and to the same extent as if this section were not embodied in this Act.

(*h*) *H.R. 25162*

On January 5, 1909, Representative Sulzer again introduced a bill which resembled two of his earlier bills but fixed the royalty at "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 * * *": [39]

That whenever the proprietor of a copyrighted musical work shall use or permit the use of the same for profit upon any instrument serving to reproduce mechanically the musical work, he shall first file with the register of copyrights (a) if the use be only by the copyright proprietor, a written declaration of intention so to use said work and the nature and extent of such contemplated use; (b) if such use is permitted to others a duplicate original of the contract under which said use is permitted; and thereupon any other person subject to the provisions hereof may make similar use of such copyrighted work, and to the same extent and upon a similar instrument and not otherwise, upon paying to the copyright proprietor of the same, before vending, selling, or offering any such instrument for sale; (c) if the said use is to be made by the copyright proprietor, a sum equal to ten per centum of the selling price of any such instrument, but in no event to be less than two cents; (d) or if the use is permitted to others, the royalty provided in the contract permitting such use for instruments of the same class. Any person using a copyright work under the provisions hereof shall affix to such instrument, before vending, selling, or offering it for sale, a royalty stamp, to be issued to him by the proprietor of the copyright denoting the payment of said royalty, and shall cancel the stamp at the time of affixing the same by writing thereon the initials of his name and the date of cancellation so that it may not again be used.

The proprietor of the copyright shall cause to be prepared and keep on hand for sale proper stamps, bearing his imprint, for the payment of said royalties, in such denomination as will coincide with the royalty hereinabove specified, in default of which no action shall be maintained nor recovery be had for any infringement by any such instrument.

Any person who shall vend, sell, or offer for sale any such instrument without properly affixing thereon and canceling the stamp denoting the payment of the royalty on the same shall be liable as an infringer of the copyright. Any person who makes, or is knowingly concerned in the making of a counterfeit of any such stamp, or who affixes a false or fraudulent stamp, or who removes or causes to be removed from any such instrument any stamp denoting the payment of the royalty on the same, with intent to again use such stamp, or who knowingly uses or permits any other person to use the stamp so removed, or who knowingly receives, buys, sells, or gives away or has in his posesssion any counterfeit stamp or stamps so removed, or who makes any other fraudulent use of any such stamp shall be deemed guilty of a misdemeanor, and shall be fined not less than two hundred and fifty dollars nor more than one thousand dollars, or imprisioned for not less than three months nor more than one year, or both.

No alteration or modification shall be made in the contract which has been filed with the register of copyrights, in compliance with the requirements of this section, except after thirty days' written notice to the register of copy-

[39] H.R. 25162, 60th Cong., 2d sess. (1909).

rights, which shall plainly state the change proposed to be made therein. Any copyright proprietor filing a false or fraudulent contract with the register of copyrights or offering, granting, or giving, or any person soliciting, accepting, or receiving, any rebate or refund of any portion of the royalty named in the contract, or any modification thereof filed by the copyright proprietor with the register of copyrights, shall forfeit to the United States a sum not less than five hundred dollars nor more than five thousand dollars.

The register of copyrights shall issue a weekly bulletin or list of the declarations of intention and contracts respecting the use of copyrighted works upon instruments hereinbefore provided, specifying the copyrighted work to be used, the name and address of the proprietor, the character and extent of such use, and the terms of royalty and nature of permission contained in each contract; and it shall be the duty of the register of copyrights to furnish such bulletins to all persons applying for the same at a sum not exceeding five dollars per annum.

Nothing in this section declared to be invalid by any court of competent jurisdiction shall in any wise affect or impair any other section or subsection or part thereof in this Act contained, but the same shall remain in full force and effect in the same manner and to the same extent as if this section were not embodied in this Act.

(*i*) *H.R. 27310*

On January 28, 1909, Representative Washburn introduced a bill, H.R. 27310, combining recognition of mechanical reproduction rights and compulsory licensing provisions, which became operative in the event of the exercise of such rights, and fixing the royalty at "five per centum of the sum derived bona fide by the manufacturer thereof, from the manufacture, use, sale, or lease of such parts." [40] Two safeguards for the composer were inserted: (1) the requirement that the mechanical reproducer give notice of intention to record under the compulsory license provision to the composer, and (2) the provision for treble royalties in the event of nonpayment of the statutory royalty.

(*j*) *H.R. 28192*

On February 15, 1908, Representative Currier introduced a bill similar to immediate forerunners with provisions for reciprocal treatment of the works of foreign authors and composers and for a "royalty of two cents on each such part manufactured." [41] The 2-cent flat royalty was considered the then equivalent of five percent on the manufacturer's price. The bill, H.R. 28192, was referred to the Committee on Patents which reported it out unanimously without amendment, on February 22, 1909.[42] The bill and report were referred to the Committee of the Whole House on the State of the Union which agreed on amendments on March 2. As amended the bill was passed by the House and rushed through a night session of

[40] H.R. 27310, 60th Cong., 2d sess. (1909).
[41] H.R. 28192, 60th Cong., 2d sess. (1909).
[42] H. Rept. No. 2222, 60th Cong., 2d sess. (1909); S. Rept. No. 1108, 60th Cong., 2d sess. (1909).

the Senate on March 3, 1909, and approved and signed by the President on March 4, 1909,[43] becoming effective on July 1, 1909.

The congressional reports accompanying the various preliminary bills deal with recording and mechanical reproduction rights of music, but shed little light on the compulsory license provision. The latter was a compromise to placate the expressed fears, particularly among phonograph record and pianola roll manufacturers, that the recognition of mechanical reproduction rights would result in monopolization of the industry by the Aeolian Co.[44]

The report of the House Committee on Patents accompanying the successful bill H.R. 28192 discloses that section 1(e)[45]—

*** * * has been the subject of more discussion and has taken more of the time of the committee than any other provision in the bill.**

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[43] See note 1 supra, pp. 12–13, infra. The bill which became law, unlike five earlier bills, did not treat each of the rights given the copyright owner as a "separate estate" subject to assignment, lease, license, gift, bequest, inheritance, descent, or devolution. Substantial royalties were expected to be paid composers by player-piano and talking-machine companies.

"In his 'Life of Edison,' Frank L. Dyer, president of the National Phonograph Co., said that in the last 20 years upward of 1,310,000 phonographs have been sold, for which there have been made or sold no less than 97,845,000 records of a musical or other character. Most of these have been musical records. At Orange, N.J., the National Phonograph Co. made 75,000 records a day. The Victor and Columbia companies make thousands of records a day.

"The talking-machine companies have been reticent about making public the figures for individual record sales. The composers, however, believe that as many as 100,000—some say 150,000—records have been sold of such popular songs as 'Love Me and the World Is Mine.' Records of the comic songs, such as 'Waiting at the Church,' have sold into the thousands. The child ballads of Chas. K. Harris have been among the favorites with talking-machine patrons. John Philip Sousa says he has heard records of his marches played by talking-machines in the most remote places.

"Figures of music rolls are also difficult to secure. The Universal music-roll catalogue alone contains 16,500 selections. The Chase & Baker Co., Buffalo; W. W. Kimball Co., Chicago; Connorized Music Co., New York; Autopiano Co., the Q. R. S. Co., and other concerns have very large catalogues. On April 25, 1908, the Aeolian Co. printed a list of the 50 best selling music rolls, no selection in the list being included which had not sold for more than 25,000 rolls. Among the popular numbers in this list were the following: 'Narcissus' 'The Rosary,' 'School Days,' and 'Honey Boy.'"
37 Music Trades 5 (Mar. 13, 1909).

[44] See note 21 supra. Quaere, whether this danger of monopoly was exaggerated.

"The danger of monopoly through the contract between the Aeolian Co. and leading music publishers was greatly exaggerated and distorted by the mechanical instrument people in their powerful opposition to our getting any protection whatever; and was made worse, in my opinion, because the Aeolian Co., in spite of earnest pleading on my part, failed to appear at the hearings before the congressional committee and reply to the absurd, ridiculous and unjust charges brought up against them, they maintaining throughout the controversy an honorable and dignified silence."
Statement by Walter M. Bacon, treasurer, White-Smith Music Publishing Co., 37 Music Trades 6 (Mar. 13, 1909). The congressional committee, however, feared the establishment of a mechanical music trust:

"It appeared that some years ago contracts were made by one of the leading mechanical reproducing establishments of the country with more than 80 of the leading music publishing houses in this country. Some of these contracts were filed with the committee and show that under them the reproducing company acquired the rights for mechanical reproduction in all the copyrighted music which the publishing house controlled or might acquire and that they covered a period of at least 35 years, with the possibility of almost indefinite extension. These contracts were made in anticipation of a decision by the courts that the existing law was broad enough to cover the mechanical reproduction, and one consideration on the part of the reproducing company was an agreement that that company would cause suit to be brought which would secure a decision of the Supreme Court of the United States.

"Later on another set of contracts were prepared, based upon the passage by Congress of a law which would give such rights."
H. Rept. No. 2222, 60th Cong., 2d sess., pp. 7–8 (1909). Provision in the copyright law to promote antitrust policy is not without parallel. The manufacturing clause is primarily grounded on protective tariff considerations. Ashford, "The Compulsory Manufacturing Clause—An Anachronism in the Copyright Act," 49 Mich. L. Rev. 417 (1951). Copyright practices are subject to the antitrust laws. McDonough and Winslow, "The Motion Picture Industry: United States Versus Oligopoly," 1 Stan. L. Rev. 385 (1949); White, L. C., "Musical Copyrights Versus the Antitrust Laws," 30 Nebr. L. Rev. 50 (1950). Comment: "ASCAP Monopoly Violates Sherman Act," 1 Stan. L. Rev. 638 (1949). Notes: 33 Minn. L. Rev. 517 (1949); 33 Minn. L. Rev. 545 (1949); 17 U. of Chi. L. Rev. 183 (1949); 3 Miami L. Rev. 59 (1948); 61 Harv. L. Rev. 539 (1948); 37 Geo. L.J. 542 (1942); 52 Harv. L. Rev. 846 (1939). See also *Watson* v. *Buck*, 313 U.S. 387, 61 Sup. Ct. 962, 85 L. Ed. 1416 (1941). See note 28 supra.

[45] H. Rept. No. 2222, 60th Cong., 2d sess., p. 4 (1909).

Some five and a half pages of the report deal with the recognition of recording and mechanical reproduction rights and the compulsory license provision, emphasizing that the latter was inserted in the public interest to prevent monopolizatiton of mechanical reproduction rights in copyrighted music.[46]

B. THE PRESENT COMPULSORY LICENSE PROVISIONS

Section 1(e) reads in pertinent part as follows:

SEC. 1. EXCLUSIVE RIGHTS AS TO COPYRIGHTED WORKS.—Any person entitled thereto, upon complying with the provisons of this title, shall have the exclusive right—

(e) To perform the copyrighted work publicly for profit if it be a musical composition; [47] and for the purpose of 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 of 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 or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States similar rights. And as a condition of extending the copyright 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 the 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 2 cents on each such part manufactured, to be paid by the manufacturer thereof; and the copyright proprietor may require, and if so the manufacturer shall furnish, a report under oath on the 20th day of each month on the number of parts of instruments manufactured during the previous month serving to reproduce mechanically said musical work, and royalties shall be due on the parts manufactured during any month upon the 20th of the next succeeding month. The payment of the royalty provided for by this section shall free the articles or devices for which such royalty has been paid from further contribution to the copyright except in case of public performance for profit. It shall be the duty of the copyright owner, if he uses the musical composition himself for the manufacture of parts of instruments serving to reproduce mechanically the musical work, or licenses others to do so, to file notice thereof, accompanied by a recording fee, in the copyright office, and any failure to file such notice shall be a complete defense to any suit, action, or proceeding for any infringement of such copyright.

In case of failure of such manufacturer to pay to the copyright proprietor within thirty days after demand in writing the full sum of royalties due at said rate at the date of such demand, the court may award taxable costs to the plaintiff and a reasonable counsel fee, and the court may, in its discretion, enter judgment therein for any sum in addition over the amount found to be due as royalty in accordance with the terms of this title, not exceeding three times such amount.

The reproduction or rendition of a musical composition by or upon coin-operated machines shall not be deemed a public performance for profit unless a fee is charged for admission to the place where such reproduction or rendition occurs.

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[46] Id., at pp. 4–9, 16.

[47] The act of 1909 contained no punctuation before the phrase "and for the purpose of public performance for profit" and a semicolon instead of a comma after such phrase. In an early case it was contended that a musical composition had to be written for the purpose of public performance for profit to enjoy such performance rights. The court rejected the contention, holding that a semicolon was intended before the above-quoted phrase. *Hubbell v. Royal Pastime Amusement Co.*, 242 Fed. 1002 (S.D.N.Y. 1917). The 1947 codification of the copyright law followed this construction by relocating the semicolon. Act of July 30, 1947 (61 Stat. 652). Quaere, why the recognition of recording and mechanical reproduction rights and rights of arrangement is introduced by the phrase: "and for the purpose of public performance for profit, and for the purpose set forth in subsection (a) hereof". See notes 51 and 59 infra.

Section 1(e) is supplemented by section 25(e) (presently sec. 101 (e)), as follows:

§ 101. INFRINGEMENT.—If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

* * * * * * *

(e) ROYALTIES FOR USE OF MECHANICAL REPRODUCTION OF MUSICAL WORKS.—Whenever the owner of a musical copyright has used or permitted the use of the copyrighted work upon the parts of musical instruments serving to reproduce mechanically the musical work, then in case of infringement of such copyright by the unauthorized manufacture, use, or sale of interchangeable parts, such as disks, rolls, bands, or cylinders for use in mechanical music-producing machines adapted to reproduce the copyrighted music, no criminal action shall be brought, but in a civil action an injunction may be granted upon such terms as the court may impose, and the plaintiff shall be entitled to recover in lieu of profits and damages a royalty as provided in section 1, subsection (e), of this title: *Provided also*, That whenever any person, in the absence of a license agreement, intends to use a copyrighted musical composition upon the parts of instruments serving to reproduce mechanically the musical work, relying upon the compulsory license provision of this title, he shall serve notice of such intention, by registered mail, upon the copyright proprietor at his last address disclosed by the records of the copyright office, sending to the copyright office a duplicate of such notice; and in case of his failure so to do the court may, in its discretion, in addition to sums hereinabove mentioned, award the complainant a further sum, not to exceed three times the amount provided by section 1, subsection (e), of this title, by way of damages, and not as a penalty, and also a temporary injunction until the full award is paid.

The terminology, as well as the substantive provisions, of sections 1(e) and 101(e) is somewhat inconsistent.

Section 1(e), so far as musical compositions protected thereunder are concerned, defines such protection against recording and mechanical reproduction as proscribing:

(1) The making of "any form of record in which the thought of an author may be recorded and from which it may be * * * reproduced";

(2) The making of "parts of instruments serving to reproduce mechanically the musical work";

(3) The making of "mechanical reproductions."

Such protection is qualified by the compulsory license provision stating that whenever the copyright owner has used or "permitted or knowingly acquiesced" in the use of the "parts of instruments serving to reproduce mechanically the musical work," any other person may make similar use thereof upon payment of 2 cents royalty per part manufactured. The owner is required to file a notice of use if he uses the work himself for the manufacture of parts, etc., or "licenses" others to do so. For the failure of the manufacturer to pay the royalty the court can award "any sum in addition over the amount found to be due as royalty * * *, not exceeding three times such amount."

Section 101(e) provides that whenever the owner has used or "permitted" the use of the work upon parts, etc., the specific remedies for infringement by the "unauthorized manufacture, use, or sale of interchangeable parts, such as disks, rolls, bands, or cylinders for use in mechanical music-producing machines" include "a royalty as provided in" section 1(e). In case of a person's failing to send the required notice of intention to use, the award may include, "in addition to sums

hereinabove mentioned * * * a further sum, not to exceed three times the amount provided by" section 1(e).

Questions naturally arise whether different meanings were intended by the use of different phraseology. For example, the scope of protection under section 1(e) is defined in three ways: "any form of record in which the thought of an author may be recorded and from which it may be * * * reproduced"; "parts of instruments serving to reproduce mechanically the musical work"; "mechanical reproduction." The last two, unlike the first, contain the qualifying adverb "mechanically" or adjective "mechanical." An additional definition of scope of protection is found in section 101(e): "interchangeable parts, such as disks, rolls, bands, or cylinders for use in mechanical music-producing machines." Here, again, is found the qualifying adjective "mechanical," and, in addition, some elaboration of the term "parts" ("disks, rolls, bands or cylinders") and the additional qualification that such parts be "interchangeable," a requirement lacking from section 1(e). The compulsory license provision uses only the phraseology of the second definition of scope of protection in section 1(e): "parts of instruments serving to reproduce mechanically the musical work." [48]

Different phraseology is used to indicate when the compulsory license, and implementing, provisions come into operation. Thus, under section 1(e), the compulsory license provision becomes operative when the owner has used or "permitted or knowingly acquiesced" in the use of the work upon parts, etc., while the owner must file a notice of use where he uses or "licenses" the manufacture of parts, etc. The specific remedies of section 101(e) are applicable whenever the owner has used or "permitted" the use of the work upon parts, etc.

While the language of section 1(e) seems to be directed against the making of records, the control of parts or reproductions, and the manufacturer of parts, section 101(e) provides specific remedies for the unauthorized "use, manufacture, or sale."

The statutory royalty rate is 2 cents per composition per "part," without any definition of "part." If the same composition is on two sides of a disk, the question naturally arises whether the disk or each side is a "part." In this connection, section 101(e) refers to "parts, such as disks."

Section 1(e) recognizes the right "to make any arrangement" of a musical composition "or of the melody of it in any system of notation" from which it may be read. Since section 1(b) has already recognized the right to arrange or adapt a musical work, it can be contended that the reiteration of the right of arrangement in section 1(e) was intended to permit the reasonable exercise of such right as incident to the making of parts under the compulsory license provision of that subsection.

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[48] See p. 54, infra. Neither the cases, the congressional report recommending passage of the 1909 act, nor subsequent amendments appear to distinguish between recording rights and mechanical reproduction rights. H. Rept. No. 2222, 60th Cong., 2d sess., pp. 4–9 (1909); 68 Stat. 1030, 17 U.S.C. 9(c)(1) (Supp. 1955).

Under section 1(e) nonpayment of the 2-cent royalty per part manufactured might result in an award for the amount of such royalty and in addition a sum not exceeding three times such amount. Whether this maximum award under section 1(e) is three or four times the amount of the statutory royalty is questionable, presumably the former judging by occasional references to treble recovery and 6 cents.[49] Section 101(e) permits a recovery of the statutory royalty and, where the person has failed to file the required notice of intention to use, in addition thereto, a further sum not to exceed three times the amount provided in section 1(e). Again, there is a problem of construction as to whether this further sum is limited to three times the statutory royalty, or three times the amount of maximum recovery under section 1(e). If the latter, and such maximum recovery under section 1(e) is either three or four times the amount of the statutory royalty, then the overall recovery, under both sections 1(e) and 101(e), could total 12 or 16 times the statutory royalty.

C. JUDICIAL AND ADMINISTRATIVE CONSTRUCTION OF PRESENT PROVISIONS

Except for the relocation of the semicolon in section 1(e) in 1947 [50] to separate the provision relating to public-performance-for-profit rights from the provisions relating to recording and mechanical reproduction rights and the change of numbering of section 25(e) to 101(e),[51] the foregoing statutes have remained the same since 1909.[52]

Section 1(e) is, of course, the fifth and final subsection of section 1 of the copyright law, which enumerates the exclusive rights as to copyrighted works. Section 1(e) consists of three paragraphs, all limited to musical compositions. The first clause confirms public-performance-for-profit rights, which are limited by the so-called "jukebox" exception of the third and final paragraph of section 1(e). The second clause, after a second reference to the right of arrangement,[53] and of the balance of the first and second paragraphs of section 1(e) relate to recording and mechanical reproduction rights.

Under the first paragraph of section 1(e) (subsequent to the first clause), the proprietor of the copyright of a musical composition,[54] written by an American author or a foreign author whose country grants similar rights to U.S. citizens as evidenced by a Presidential

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[49] See note 65, infra.
[50] See note 47, supra.
[51] Act of July 30, 1947 (61 Stat. 652).
[52] For clause-by-clause analysis of the compulsory license provisions, see Evans, "The Law of Copyright and the Right of Mechanical Reproduction of Musical Compositions" in Third Copyright Law Symposium 113, at pp. 118–131 (1940).
[53] The second clause can be said to embrace two distinct rights: (1) the right to make any arrangement or setting of the musical composition or the melody thereof in any system of notation from which it may be read, and (2) the right to make any form of record from which it may be reproduced. Sec. 1(b) previously recognizes the right to arrange or adapt a musical work. Howell, "Copyright Law," 148 (3d ed. 1952).
[54] The term "musical compositions" is defined by the Regulations of the Copyright Office (37 Code Fed. Regs., sec. 202.6 (1955)) as follows:
"§ 202.6 *Musical compositions (Class E).* This class includes all musical compositions (other than dramatico-musical compositions), with or without words, as well as new versions of musical compositions, such as adaptations, arrangements and editings, when such editing is the writing of an author."

proclamation,[55] originally [56] copyrighted, either as a published or unpublished work,[57] after July 1, 1909, enjoys, as part of the copyright, the exclusive right to record and make mechanical reproductions thereof.[58] The proprietor need not exercise nor authorize the exercise of such rights. However, if the proprietor does exercise or authorize the exercise of mechanical reproduction rights, any other person may,

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[55] "Proclamations, Conventions, and Treaties Establishing Copyright Relations Between the United States of America and Other Countries" (Copyright Office, May 1956); "International Copyright Relations of the United States of America" (Department of State, revised as of Jan. 20, 1955); 29 Ops. Att'y Gen. 64 (1911). The Universal Copyright Convention (see pp. 43–44, infra), and implementing legislation (act of Aug. 31, 1954, 68 Stat. 1030, effective Sept. 16, 1955); 17 U.S.C. 9(c) (Supp. 1955) eliminates the sec. 1(e) requirement of reciprocal treatment with respect to mechanical reproduction rights (since the Convention is based on national treatment) and of special proclamations so far as musical compositions which have qualified for protection under the Convention are concerned. Sec. 1(e), defining authors whose copyrighted musical compositions are entitled to recording and mechanical reproduction rights, is to be distinguished from the differently worded sec. 9, defining the authors whose works are eligible for statutory copyright. Compare *G. Ricordi & Co.* v. *Columbia Graphophone Co.*, 258 Fed. 72 (S.D.N.Y. 1919), overruling 256 Fed. 699 (S.D.N.Y. 1919), with *Leibowitz* v. *Columbia Graphophone Co.*, 298 Fed. 342 (S.D.N.Y. 1923). See also H. Rept. No. 2222, 60th Cong., 2d sess., p. 9 (1909).

[56] Sec. 1(e) became effective July 1, 1909, and was not retroactive. *M. Witmark & Sons* v. *Standard Music Roll Co.*, 213 Fed. 532 (D.N.J. 1914), aff'd, 221 Fed. 376 (3d Cir. 1915). The date of original copyrighting controls. Musical compositions originally copyrighted prior to July 1, 1909, are not protected against recording and mechanical reproduction as the result of renewal of copyright subsequent to that date. *E. B. Marks Music Corp.* v. *Continental Record Co.*, 120 F. Supp. 275, on rearg., 100 U.S.P.Q. 446 (S.D.N.Y. 1954), aff'd, 222 F. 2d 488 (2d Cir. 1955), cert. denied, 350 U.S. 861, 76 Sup. Ct. 101, 100 L. Ed. 69 (1955). Rejecting the contention that renewal, since a "new estate," was a "new copyright" for purposes of sec. 1(e), the court stated (222 F. 2d at 491):

"We think the words above quoted from the proviso to sec. 1(e) are clearly destructive of the plaintiff's contention that Congress intended that the mechanical reproduction of a song, which for years had been in the 'public domain,' may, by renewal, be fenced into a monopolistic field."

See also *Jerome* v. *Twentieth Century Fox-Film Corp.*, 67 F. Supp. 736, 741–742 (S.D.N.Y. 1946), aff'd on other grounds per curiam, 165 F. 2d 784 (2d Cir. 1948):

"Assuming that plaintiff's copyright does not include the mechanical reproduction rights because the original copyright was obtained in 1896, almost 13 years prior to July 1909, that does not support defendant's argument that the renewal of the copyright in 1923 did not carry with it the motion picture rights."

See also 58 F. Supp. 13, 15 (S.D.N.Y. 1944). Renewal results essentially in a new copyright, distinct from the original copyright. *G. Ricordi & Co.* v. *Paramount Pictures, Inc.*, 189 F. 2d 469 (2d Cir. 1951); cf. note 56 supra. The renewal copyright is "free and clear of any rights, interests, or licenses attached to the copyright for the initial term." *Fitch* v. *Schubert*, 20 F. Supp. 314, 315 (S.D.N.Y. 1937); *Silverman* v. *Sunrise Pictures Corp.*, 273 Fed. 909 (2d Cir. 1921), cert. denied, 262 U.S. 758, 43 Sup. Ct. 705, 67 L. Ed. 1219 (1923); *Southern Music Pub. Co.* v. *Bibo-Lang, Inc.*, 10 F. Supp. 972 (S.D.N.Y. 1935). Quaere, as to the effect of renewal on licenses, negotiated or compulsory, under the original copyright. See note 230 infra.

[57] Musical compositions (music or words and music, but not words alone) (see note 54 supra) may be copyrighted as published works or unpublished works (that is, works not reproduced for sale). See note 235 infra. The word "published," as used in sec. 1(e), has been construed as including unpublished as well as published works. *Shilkret* v. *Musicraft Records*, 131 F. 2d 929 (2d Cir. 1942). Cf. *Marx* v. *United States*, 96 F. 2d 204 (9th Cir. 1938). But see *Leibowitz* v. *Columbia Graphophone Co.*, 298 Fed. 342 (S.D.N.Y. 1923).

[58] This right obviously embraces recording and mechanical reproduction methods known in 1909, e.g., records, disks, and cylinders for phonographs; rolls for player-pianos. It has never been seriously urged that subsequently developed methods, such as long-playing records, electrical transcriptions, tape and wire recordings, were not covered. Some question, however, has been raised with respect to use in sound motion pictures, so-called "synchronization rights." Early sound films used a record on a turntable synchronized with the film ("Vitaphone"). Today the sound is reproduced by a sound track on the film itself ("Movietone"). See *Jerome* v. *Twentieth Century-Fox Film Corp.*, 67 F. Supp. 736, 741 (S.D.N.Y. 1946) (stating sound track on film is not type of "mechanical reproduction" to which sec. 1(e) applies), aff'd on other grounds per curiam, 165 F. 2d 784 (2d Cir. 1948), criticized in Dubin, "Copyright Aspects of Sound Recordings," 26 So. Calif. L. Rev. 139, at 147–149 (1953). Cf. *Foreign & Domestic Music Corp.* v. *Licht*, 196 F. 2d 627, 629 (2d Cir. 1952); *Encore Music Publications, Inc.* v. *London Film Productions, Inc.*, 89 U.S.P.Q. 501 (S.D.N.Y. 1951); *Foreign & Domestic Music Corp.* v. *Michael Wyngate, Inc.*, 66 F. Supp. 82 (S.D.N.Y. 1946); *Famous Music Corp.* v. *Melz*, 28 F. Supp. 767, 769 (W.D. La. 1939) (dictum). Cf. *L. C. Page & Co.* v. *Fox Film Corp.*, 83 F. 2d 196, 199 (2d Cir. 1936) (copyright of motion picture held to protect music on sound track). Quaere, as to kinescope recordings,. See pp. 13–14, supra, 51–52, infra.

under the compulsory license provision, make "similar use" [59] of the musical composition upon payment by the manufacturer to the proprietor of a royalty of 2 cents "on each such part manufactured," [60] and the proprietor is required to file a notice of use in the Copyright

[59] See 2 Ladas, "The International Protection of Literary and Artistic Property," pp. 790–791 (1938):
"Thus, not only the same, but a similar use may be made by other persons. This should mean that use by the owner on phonograph records would involve permission for use by others on rolls of piano players."
Textually, sec. 1(e) is capable of the construction that protection to the copyright owner thereunder renders unlawful the making of recordings, whether known in 1909 or subsequently developed, including mechanical reproductions known in 1909 (i.e., disks, rolls, bands, cylinders); that the compulsory license provision comes into operation only upon the owner's making or authorizing the making of mechanical reproductions known in 1909; and that the "similar use" permitted under compulsory license must, by way of further limitation, be the same type of such mechanical reproduction, thus excluding (by strict construction since the clause is in derogation of the composer's rights) such post-1909 uses as electrical transcriptions and tape and wire recordings for radio broadcasting, kinescope, and television tape recordings for telecasting, and synchronization of sound film by means of disks or sound tracks. Accordingly, even if use on motion picture sound tracks be proscribed by sec. 1(e), it does not necessarily follow that the compulsory license provision would ever apply to permit use on sound tracks, whether the copyright owner permitted use on disks, sound tracks, or otherwise. Cf. Dubin, "Copyright Aspects of Sound Recordings," 26 So. Calif. L. Rev. 139, 147–148 (1953). In connection with the enjoyment of a compulsory license, some latitude is allowed manufacturers to prepare individual instrumental or vocal arrangements of the composition. *Edward B. Marks Music Corp.* v. *Foullon*, 79 F. Supp. 664 (S.D.N.Y. 1948), aff'd, 171 F. 2d 905 (2d Cir. 1949). Furthermore, under a compulsory license, the words of the musical composition may not be used. *F. A. Mills, Inc.* v. *Standard Music Roll Co.*, 223 Fed. 849 (D.N.J. 1915), aff'd, 241 Fed. 360 (3d Cir. 1917). But see *M. Witmark & Sons* v. *Standard Music Roll Co.*, 213 Fed. 532 (D.N.J. 1914), aff'd, 221 Fed. 376 (3d Cir. 1915). Nor may the composition be publicly performed for profit by means of any record made under a compulsory license. *Irving Berlin, Inc.* v. *Daigle*, 31 F. 2d 832 (5th Cir. 1929); *Famous Music Corp.* v. *Melz*, 28 F. Supp. 767 (W.D. La. 1939); *Associated Music Publishers, Inc.* v. *Debs Memorial Radio Fund, Inc.*, 46 F. Supp. 829 (S.D.N.Y. 1942). Contrariwise, if an exhibitor has a public-performance-for-profit license covering the music composition, a motion picture with a sound track which infringes such composition may be exhibited without making the exhibitor an infringer. *Foreign & Domestic Music Corp.* v. *Licht*, 196 F. 2d 627 (2d Cir. 1952). Persons desirous of making recordings or other uses of the work may always attempt to negotiate a license with the copyright owner in cases where the availability of the compulsory license provision is doubtful. See pp. 51–52, infra.

[60] The term "part" refers to the statutory phrase, "parts of instruments serving to reproduce mechanically the musical work," which codified the ruling of the U.S. Supreme Court in *White-Smith Music Publishing Co.* v. *Apollo Co.*, 209 U.S. 1, 28 Sup. Ct. 319, 52 L. Ed. 655 (1908), that a pianola roll, since incapable of being read, was not a "copy" but a part of a mechanical music-producing machine. Verified reports and royalty payments may be required by the copyright proprietor on the 20th day of each month on the "number of parts" manufactured during the previous month. Two cents per part was thought in 1909 to be equivalent to 5 percent of the manufacturer's selling price, and a "reasonable royalty" and "adequate return" to the composer. H. Rept. No. 2222, 60th Cong., 2d sess., pp. 6, 7 (1909). Quaere, in the case of two or more compositions on the same "part," whether the royalty was intended to be 2 cents per composition, or, if two cents in toto, how it was intended to be allocated; in the case of disks or tapes, whether each side thereof or the whole is a "part." See p. 14, supra. It has been contended that the royalty should be based on parts sold, not on parts manufactured. 37 Music Trades 6 (Mar. 13, 1909). Although the royalty is at the same rate for all compositions, the statutory royalty provision calls for returns to composers based theoretically on manufacturer's estimates of prospective sales, and hence is automatically geared to public acceptance. Payment of the royalty cannot be avoided by going through the final manufacturing step outside the United States. *G. Ricordi & Co.* v. *Columbia Graphophone Co.*, 258 Fed. 72 (S.D.N.Y. 1919) (disk records made and sold in Canada held subject to statutory royalty as "manufactured" in United States since first eight of nine manufacturing steps occurred in United States. For the Canadian law since 1921, see p. 38, infra. Application of the statutory royalty rate for long-playing records, tape and wire recordings, motion picture sound tracks, etc., obviously creates difficulty, especially in the case of longer musical compositions. If, say, 500 positive prints of a sound motion picture were made to supply exhibition demands, the producer, at the statutory royalty rate, would pay only $10 per musical composition recorded on the sound track. See *Jerome* v. *Twentieth Century-Fox Film Corp.*, 67 F. Supp. 736, 741 (S.D.N.Y. 1946), aff'd on other grounds per curiam, 165 F. 2d 748 (2d Cir. 1948). The payment of the royalty does not compensate for public performance for profit of the recorded musical composition; permission for such performance must be obtained by actual license.

Office.[61] The proprietor's failure to file such notice of use constitutes a complete defense to any suit, action, or proceeding for an infringement of the recording or mechanical reproduction rights.[62]

Remedies for infringement of recording or mechanical reproduction rights in musical compositions are outlined in various sections of the copyright law. Where the copyright proprietor has not exercised or permitted the exercise of mechanical reproduction rights, and the compulsory license provision, therefore, does not come into operation, the general remedies of sections 101(a)–(d), 104, 106, 108–112, 115–116 of the copyright law, so far as relevant, apply. However, where the mechanical reproduction rights have been duly exercised, thereby activating the compulsory license provision, specific remedies are set forth in sections 1(e) and 101(e). These sections are not consistent in terminology or in substance, as pointed out above.[63]

The second paragraph of section 1(e) provides:

> In case of failure of such manufacturer to pay to the copyright proprietor within thirty days after demand in writing the full sum of royalties due at said rate at the date of such demand, the court may award taxable costs to the plaintiff and a reasonable counsel fee, and the court may, in its discretion, enter judgment therein for any sum in addition over the amount found to be due as royalty in accordance with the terms of this title, not exceeding three times such amount.

These provisions are somewhat restated in the first half of section 101(e):

> SEC. 101. * * * (e) ROYALTIES FOR USE OF MECHANICAL REPRODUCTION OF MUSICAL WORKS.—Whenever the owner of a musical copyright has used or permitted the use of the copyrighted work upon the parts of musical instruments serving to reproduce mechanically the musical work, then in case of infringement of such copyright by the unauthorized manufacture, use, or sale of interchangeable parts, such as disks, rolls, bands, or cylinders for use in mechanical music-producing machines adapted to reproduce the copyrighted music, no criminal action shall be brought, but in a civil action an injunction may be granted upon such terms as the court may impose, and the plaintiff shall be entitled to recover in lieu of profits and damages a royalty as provided in section 1, subsection (e), of this title: *Provided, also* * * *

Then follows the proviso which constitutes the second half of section 101(e) to the effect that whenever any person intends to rely upon the compulsory license provision, he must serve notice of such

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[61] The notice of use should be filed on Form U, either with or after the application for copyright registration of the composition, and should be accompanied by the $2 recordation fee for a notice containing five titles or less, plus 50 cents for each title over five. The copyright registration numbers, dates of publication or registration, and names of authors should be given as well as the correct titles of the compositions. Copyright Office Circular No. 5 (March 1954). In the fiscal year 1955, almost 8,000 notices of use were filed. Annual Report of the Register of Copyrights for the Fiscal Year Ending June 30, 1955, p. 11. Such notice-of-use requirement, since not a condition of the copyright but a procedural prerequisite to enforcement, is not affected by the Universal Copyright Convention. Cary, "The United States and Universal Copyright: An Analysis of Public Law 743" in "Universal Copyright Convention Analyzed," pp. 100–101 (1955); Sherman, "The Universal Copyright Convention: Its Effect on United States Law," 55 Colum. L. Rev. 1137, 1155 (1955).

[62] Although the statute provides that the proprietor's failure to file the notice of use shall be a complete defense to any suit, action, or proceeding for any infringement of such copyright, the courts have limited the defense to claims of infringement of mechanical reproduction rights, treating the latter as the antecedent of such copyright. *Lutz* v. *Buck*, 40 F. 2d 501 (5th Cir. 1930); *Irving Berlin, Inc.* v. *Daigle, Irving Berlin, Inc.* v. *Russo*, 31 F. 2d 832 (5th Cir. 1929), rev'g 26 F. 2d 149, 150 (E.D. La. 1928) (public performance for profit); *F. A. Mills, Inc.* v. *Standard Music Roll Co.*, 223 Fed. 849 (D.N.J. 1915), aff'd, 241 Fed. 360 (3d Cir. 1917) (copying of words). The statute failed to incorporate the provisions of some five earlier bills that each of the rights given the copyright proprietor be treated as a "separate estate." See note 43 supra; see also note 56 supra.

[63] See pp. 14–15, supra.

intention, by registered mail, upon the copyright proprietor at his last address disclosed by the records of the Copyright Office, sending to the Copyright Office a duplicate of such notice.[64] If this be not done, the proviso goes on to provide that—

> the court may, in its discretion, in addition to sums hereinabove mentioned, award the complainant a further sum, not to exceed three times the amount provided by section 1, subsection (e), of this title, by way of damages, and not as a penalty, and also a temporary injunction until the full award is paid.

These provisions have been rarely invoked, and there are few reported cases attempting to construe them.[65]

Although doubts concerning the constitutionality of the compulsory license provision have been raised from time to time, they apparently have never been seriously urged in any reported litigation.[66]

While the copyright law since 1909 has protected, to the extent indicated above, musical compositions against recording and mechanical reproduction, it has not changed the ruling in *White-Smith Music Publishing Co.* v. *Apollo Co.*[67] that recordings were not "copies" of the musical composition or "writings" of an author within the scope of the existing copyright statute. Accordingly, the copyright statute

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[64] 17 U.S.C. 101(e) (1952). No special form is required for such notice of intention to use. Copyright Office Circular No. 5 (March 1954).

[65] *Miller* v. *Goody*, 125 F. Supp. 348 (S.D.N.Y. 1954) (award of damages at three times statutory royalty and impounding matrices pending defendant's filing of notice of intention to use and payment of damages); *Edward B. Marks Corp.* v. *Foullon*, 77 U.S.P.Q. 502 (S.D.N.Y. 1948) (award of $333.30 as statutory royalties and damages on 5,555 records, per license agreement, together with costs and attorney's fees), aff'd, 171 F. 2d 905, 907 (2d Cir. 1949): "Moreover, sec. 1(e) allows the judge to triple the royalties against him if he defaults in his payments; and sec. 25(e) does the same if he does not serve upon the owner notice of his intention in advance." *Leo Feist, Inc.* v. *American Music Roll Co.*, 253 Fed. 860 (E.D. Pa. 1918) (award of $373.74—equivalent to statutory royalty and $150 counsel fee, and $100 punitive damages for defendant's subsequent failure to report and pay monthly on demand). The only remedies for infringement of recording and mechanical reproduction rights are against the manufacturer under secs. 1(e) and 101(e); distributors are accordingly not liable. *Miller* v. *Goody*, 139 F. Supp. 176 (S.D.N.Y. 1956). See also *Foreign & Domestic Music Corp.* v. *Licht*, 196 F. 2d 627 (2d Cir. 1952). (Nonimported motion picture containing sound track infringing musical composition held not subject to seizure in hands of exhibitor licensed to perform composition publicly for profit.)

[66] The constitutional reference to copyright as "the exclusive Right" casts some doubt on the constitutionality of provisions establishing rights lacking in exclusivity, such as compulsory license provisions. Fenning, "Copyright Before the Constitution," 17 J. Pat. Off. Soc'y 379, 385 (1935); Fenning, "The Origin of the Patent and Copyright Clause of the Constituiton," 17 Geo. L. J. 109, 116–117 (1929); Weil, "American Copyright Law," pp. 62–65 (1917); DeWolf, "An Outline of Copyright Law," p. 101 (1925). Of course, the recording and mechanical reproduction rights are exclusive, only becoming nonexclusive by the copyright owner's exercise of mechanical reproduction rights, thereby activating the compulsory license provision. The compulsory license was not introduced to impair existing rights but to define rights then being recognized for the first time in the copyright statute. H. Rept. No. 2222, 60th Cong., 2d sess., p. 9 (1909). But see Evans, "The Law of Copyright and the Right of Mechanical Reproduction of Musical Compositions" in Third Copyright Law Symposium 113, at pp. 148–150 (1940); Joiner, "Analysis, Criticism, Comparison and Suggested Corrections of the Copyright Law of the United States Relative to Mechanical Reproduction of Music" in Second Copyright Law Symposium 43, at pp. 66–67 (1940). For one explanation why the constitutionality of the compulsory license provision has not been litigated, at least by copyright owners, see p. 23, infra. Cf. attacks by Representative W. Sterling Cole on the constitutionality of the compulsory license provision of the Atomic Energy Act of 1954 (42 U.S.C., section 2183(e) (Supp. 1955)) on the basis of the constitutional reference to "the exclusive Right" of the inventor; 2 Hearings on S. 3690 and H.R. 9757, 83d Cong., 2d sess., p. 658 (1954); 2 U.S. Code Congressional and Administrative News 3487–3491 (1954); 100 Congressional Record A5356, A5358, July 23, 1954; 102 Congressional Record A1903 (daily ed. Feb. 29, 1956). See also Comment: "The Constitutionality of the Patent Provisions of the 1954 Atomic Energy Act," 22 U. of Chi. L. Rev. 920 (1955).

[67] See note 6 supra; see also *Miller* v. *Goody*, 139 F. Supp. 176 (S.D.N.Y. 1956).

provides no basis for protecting the recording itself [68] or the rendition recorded.[69]

Whether recordings are "writings" in the constitutional sense and hence constitutionally eligible subject matter for Federal statutory copyright protection, should Congress attempt to extend copyright protection to them; [70] whether the public distribution or sale of a recording constitutes publication of the work and/or rendition so as to terminate any common-law rights therein; [71] and whether a recording is a "copy" which can serve as the medium for securing [72] or perfecting [73] statutory copyright in the recorded work, or which, if published

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[68] 17 U.S.C. 5 (1952); H. Rept. No. 2222, 60th Cong., 2d sess., p. 9 (1909); Copyright Office Circular No. 5 (March 1954). But see *Aeolian Co.* v. *Royal Music Roll Co.*, 196 Fed. 926 (W.D.N.Y. 1912), criticized in DeWolf, "An Outline of Copyright Law," pp. 101–102 (1925); note, 5 Stan. L. Rev. 433 (1953). Protection may be available on grounds of unfair competition. *Fonotipia Ltd.* v. *Bradley*, 171 Fed. 951 (C.C.E.D.N.Y. 1909). But see *G. Ricordi & Co.* v. *Haendler*, 194 F. 2d 914, 916 (2d Cir. 1952); *Hebrew Publishing Co.* v. *Scharfstein*, 288 N.Y. 374, 43 N.E. 2d 449 (1942).

[69] Compare *Capitol Records, Inc.* v. *Mercury Records Corp.*, 221 F. 2d 657 (2d Cir. 1955) with *RCA Mfg. Co.* v. *Whiteman*, 114 F. 2d 86 (2d Cir. 1940), cert. denied, 311 U.S. 712, 61 Sup. Ct. 393, 85 L. Ed. 463 (1940) (sale of records of rendition held divestitive of common-law rights therein). Contra: *Waring* v. *WDAS Broadcasting Station, Inc.*, 327 Pa. 433, 194 Atl. 631 (1937); *Waring* v. *Dunlea*, 26 F. Supp. 338 (E.D.N.C. 1939); *National Ass'n of Performing Artists* v. *Wm. Penn Broadcasting Co.*, 38 F. Supp. 531 (E.D.Pa. 1941). But see N.C. Gen. Stat., sec. 66–28 (1950); S.C. Code, sec. 66–101 (1952); Fla. Stat. secs. 543. 02–03 (1953). For a complete discussion, see Kaplan "Performer's Rights and Copyright: The Capitol Records Case," 69 Harv. L. Rev. 409 (1956); Nimmer, "Copyright 1955," 43 Calif. L. Rev. 791, 801–806 (1955); note, 31 N.Y.U.L. Rev. 415 (1955).

[70] United States Constitution, art. I, sec. 8, clause 8. The *White-Smith Music Publishing Co.* case involved interpretation of the pre-1909 copyright act and not of the constitutional term "writings." A recent commentator has expressed opinion that constitutionally "writings" include records (and "authors" include performers). Kaplan, "Performer's Rights and Copyright: The Capitol Records Case," 69 Harv. L. Rev. 409, 413–414 (1956).

[71] Until recently it was generally assumed that the sale of records was not publication of the embodied composition. Burton, "Business Practices in the Copyright Field," Seven Copyright Problems Analyzed 80, 102–104 (1952). Recording was neither copying nor publishing. *White-Smith Music Publishing Co.* v. *Apollo Co.*, 209 U.S. 1, 28 Sup. Ct. 319, 52 L. Ed. 655 (1908). Records were likened to a captured performance which was not a publication. *Ferris* v. *Frohman*, 223 U.S. 424, 32 Sup. Ct. 263, 56 L. Ed. 492 (1912). Records have been frequently issued at the outset to test the public reaction, and sheet music might not be issued at all if the record failed to catch on. Sheet music has greatly declined in relative importance as a medium of exploiting popular music. The traditional view was that statutory copyright need not be resorted to unless sheet music be issued. Kaplan, "Publication in Copyright Law: The Question of Phonograph Records," 103 U. of Pa. L. Rev. 469, 472 n. 20 (1955). A growing number of recent cases has held or indicated that the sale of a recording constitutes publication of the recorded composition. *Biltmore Music Corp.* v. *Kittinger*, C.O. Bull. No. 29, p. 32 (S.D. Cal. 1954); *Mills Music Co.* v. *Cromwell Music, Inc.*, 126 F. Supp. 54 (S.D.N.Y. 1954); *Shapiro, Bernstein & Co.* v. *Miracle Record Co.*, 91 F. Supp. 473 (N.D. Ill. 1950); *Blanc* v. *Lantz*, 83 U.S.P.Q. 137 (Cal. Super. Ct. 1949) (intentionally making sound track of music public held divestitive of common-law rights in music under then State statute); cf. *Capitol Records, Inc.* v. *Mercury Records Corp.*, 221 F. 2d 657 (2d Cir. 1955); *Yacoubian* v. *Carroll*, 74 U.S.P.Q. 257 (S.D. Cal. 1947). See Nimmer, "Copyright Publication," 56 Colum. L. Rev. 185, 192–194 (1956). The traditional view was incorporated in the Universal Copyright Convention, art. VI, defining "publication" as meaning the "reproduction in tangible form and the general distribution to the public of copies of a work from which it can be read or otherwise visually perceived." But see *RCA Mfg. Co.* v. *Whiteman*, 114 F. 2d 86 (2d Cir. 1940), cert. denied, 211 U.S. 712, 61 Sup. Ct. 393, 85 L. Ed. 463 (1940).

[72] 17 U.S.C. 10, 12 (1952). "Very doubtful" under the present statute. Kaplan, "Publication in Copyright Law: The Question of Phonograph Records," 103 U. of Pa. L. Rev. 469, 482–484 (1955). Generally, statutory copyright is secured by publication with copyright notice or registration and deposit of a copy of an unpublished work. Logically what amounts to a divestitive publication of a musical composition ought to qualify as an investitive publication thereof, although the converse would not necessarily be so. The location of the copyright notice would present problems. See note 74 infra.

[73] 17 U.S.C. 12, 13 (1952). Phonograph records have not been accepted for registration and deposit by the Copyright Office in recent years, although works in Braille and motion pictures with sound tracks have been accepted. See Kaplan, "Publication in Copyright Law: The Question of Phonograph Records," 103 U. of Pa. L. Rev. 469, 483 n. 65 (1955). The Copyright Office has not refused to accept motion pictures because sound tracks were attached to them, but has made no ruling as to whether the registration does or does not include the sound track. If the sound track were submitted separately, registration would presumably be denied. See also *Yacoubian* v. *Carroll*, 74 U.S.P.Q. 257 (S.D. Cal. 1947) (issuance of records held not reproduction of copies for sale of musical composition previously copyrighted under sec. 12; hence deposit of two "copies" not required under secs. 12, 13).

or offered for sale in the United States by authority of the copyright proprietor, must bear the statutory copyright notice,[74] are intriguing questions which are beyond the scope of this study.

II. Legislative History of Compulsory Licensing Provisions In the United States Since 1909

A. PROPOSED BILLS

1. The 68th Congress

The compulsory licensing feature of section 1(e) did not come up for further legislative consideration for 16 years.

(a) H.R. 11258 and S. 4355

On January 2, 1925, Representative Perkins introduced a bill designed to revise the copyright law and permit the entry of the United States into the International (Berne) Copyright Union. H.R. 11258[75] and its Senate counterpart, S. 4355,[76] had been drafted by the Register of Copyrights, Thorvald Solberg, at the request of the Authors' League, and contained no provision for compulsory licensing of mechanical reproduction rights. Instead, section 12(d) simply granted to authors, their administrators, executors, or assigns the right—

> to make, copy, and vend any phonograph record, or any perforated roll or other contrivance by means of which, in whole or in part, the copyright work may be mechanically reproduced * * *.

Hearty support for the complete elimination of the licensing provision was given by Nathan Burkan, of ASCAP, who testified during hearings held from January 22 through February 24, 1925, that compulsory licensing was an arbitrary, discriminatory class legislation which forced authors to do business with persons not of their own choosing at terms contrary to those specified in section 1(e) and without any means of enforcing their claims against unknown record producers.[77] More specifically Mr. Burkan alleged the phonograph industry was reporting on sales of records, rather than the number of records produced; was furnishing uncertified statements of accounts on a quarterly, instead of a monthly, basis; and was charging the author 10 percent for "breakage" as well as costs for "arrangements" and advertising. Mr. Burkan further claimed manufacturers were refusing to pay royalties on records exported abroad or on records produced from matrices shipped abroad. In addition, many record companies produced records without any intention of paying the license fee or delayed payment, sometimes until they became bank-

[74] 17 U.S.C. 10 (1952). The statute is silent with respect to the location of copyright notice on records, tape and wire recordings, etc. 17 U.S.C. 19, 20 (1952). Cases in the past have held that a copyright notice was not required on a phonograph record or perforated roll. *Irving Berlin, Inc.* v. *Daigle; Irving Berlin, Inc.* v. *Russo*, 31 F. 2d 832 (5th Cir. 1929); *Buck* v. *Heretis*, 24 F. 2d 876 (E.D.S.C. 1928); *Buck* v. *Lester*, 24 F. 2d 877 (E.D.S.C. 1928). Quaere, whether a record manufactured under the compulsory license provision (assuming it to be a copy, and its public distribution or sale to be a publication, of the recorded musical composition) can be said to be published or offered for sale by authority of the copyright proprietor.

[75] H.R. 11258, 68th Cong., 2d sess. (1925).

[76] S. 4355, 68th Cong., 2d sess. (1925) (introduced by Senator Ernst, Feb. 17, 1925).

[77] Hearings on H.R. 11258, 68th Cong., 2d sess., pp. 148–168 (1925).

rupt. Thus an author, even after securing judgment, was frequently left without recourse against the manufacturer.[78]

Representatives of the Music Industries Chamber of Commerce and individual record manufacturers replied to these charges by reminding the committee that American business had been passing through an economic recession which had affected other industries as well as phonograph record manufacturers, and that failure to pay royalties had in several of the instant cases been due to the belief that the alien author had not been domiciled in the United States,[79] and therefore not entitled to such payment.

Claiming $2 million in royalties had been paid in 1924 on the basis of a $50 million business to approximately 300 to 400 copyright owners, and that elimination of the compulsory license provision was not necessary for the entry of the United States into the Berne Union, the record manufacturers pleaded for the retention of the compulsory license provision, but with modifications which would (1) change the "unfair method of basing royalty payments upon production"; (2) extend the license to include "word" music rolls;[80] and (3) protect publishers against financially or otherwise irresponsible manufacturers of mechanical devices.[81]

On the last day of the hearings a subcommittee was appointed to consider the bill during recess, and informal hearings were held April 22 and May 8, 1925.

2. The 69th Congress

(*a*) *H.R. 5841*

A bill identical to the two bills considered by the 68th Congress was reintroduced by Representative Perkins at the beginning of the 69th Congress, on December 17, 1925,[82] but no further action was taken. For the next 2 years, 1926–27, compulsory licensing continued a controversial subject.

(*b*) *S. 2328 and H.R. 10353*

With the rapid development of radio broadcasting in the early 1920's a dispute soon developed between ASCAP and the radio stations over the licensing of the performances of musical compositions. S. 2328[83] and H.R. 10353[84] were introduced on January 26 and March 15, 1926, by Senator Dill and Representative Vestal, respectively, as a possible solution to the controversy between the two interests. By adding a new subsection (f) to section 1, the bills proposed to extend compulsory licensing to musical compositions used for broadcast purposes, with a license fee based on the power of the transmitting station. This license was to be applicable only to sub-

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[78] Id., at pp. 157–160.
[79] See note 55, supra.
[80] Piano rolls on which the lyrics were printed. Use of the words had been held to infringe under sec. 1(a) of the act. *F. A. Mills, Inc.* v. *Standard Music Roll Co.*, 223 Fed. 849 (D.N.J. 1915), aff'd, 241 Fed. 360 (3d Cir. 1917). Rolls without words were becoming unsalable; 10 cents or more royalty per roll was usually asked. But see *M. Witmark & Sons* v. *Standard Music Roll Co.*, 213 Fed. 532 (D.N.J. 1914), aff'd, 221 Fed. 376 (3d Cir. 1915) (pre-1909 work).
[81] Hearings on H.R. 11258, 68th Cong., 2d sess., pp. 233–275 (1925).
[82] H.R. 5841, 69th Cong., 1st sess. (1925).
[83] S. 2328, 69th Cong., 1st sess. (1926).
[84] H.R. 10353, 69th Cong., 1st sess. (1926).

sequently copyrighted compositions so as not to impair existing contracts.[85]

Joint hearings were held April 5 to 22, 1926, at which a representative of the Music Industries Chamber of Commerce listed the bad features of the existing compulsory license provision as: (1) failure to include the so-called "word" roll; (2) pressure on the part of music publishers to make the record manufacturers take a certain number of compositions each month in order to get the few they actually wanted; and (3) lack of protection for the copyright owner against use of his music by financially irresponsible concerns.[86]

On the other hand, Nathan Burkan questioned the constitutionality of compulsory licensing and explained failure to make an attack in the courts as follows: [87]

> Unquestionably this act was so artfully drawn, that if an attack was made upon the compulsory provisions of the act and the court declared them unconstitutional, the whole act would have to fall. That would have left the authors in the same plight they were in from 1888 to July 1909 * * *
>
> Another reason for the failure to make any attack upon the constitutionality of this proposition was the power of boycott that these reproducers of mechanical instruments possessed.

Mr. Burkan also alleged:[88]

> The act of 1909, while it provided in case of any infringement of the copyrighted work that the infringer should be liable to very severe penalties, damages, costs, to injunction, seizure, and forfeiture of infringing material, and to criminal punishment, in the case of the illegal mechanical reproduction, the sole remedy * * * is limited to a recovery of three times the royalty fixed by the statute; * * * If the mechanical reproducer made no reports or kept false books as to the number of records or rolls he manufactured then the composers' plight is more desperate * * *

In discussing *Wheaton* v. *Peters*,[89] often cited as a basis for the compulsory licensing provision, Mr. Burkan stated:

> This case is no authority for the proposition that Congress can attach to a copyright grant a compulsory license feature.
>
> On the contrary, the holding of the case is that Congress in vesting the exclusive right may impose conditions. A compulsory license is the antithesis of the exclusive right.[90]

In short, Mr. Burkan characterized the two bills as being [91]—

> vicious and paternalistic price-fixing measures, lacking in merit and iniquitous because unconstitutional, because depriving a body of useful citizens of their property, without just compensations, for the private benefit of a powerful group * * *

(c) *H.R. 10434*

In the meantime Representative Vestal had also introduced a general revision bill, H.R. 10434,[92] which was designed to permit the entry of the United States into the Berne Union. Approximately two-thirds of H.R. 10434 contained text identical with the Perkins bill, the remainder constituted compromises worked out by conflict-

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[85] Hearings on S. 2328 and H.R. 10353, 69th Cong., 1st sess., pp. 31–32 (1926). See note 66 supra.
[86] Id., at p. 87.
[87] Id., at p. 314. See note 66 supra.
[88] Id., at p. 315.
[89] 8 Pet. 591 (U.S. 1834).
[90] Hearings on S. 2328 and H.R. 10353, 69th Cong., 1st sess., p. 329 (1926). See note 66 supra.
[91] Id., at p. 371.
[92] H.R. 10434, 69th Cong., 1st sess. (1926).

ing interests through a series of meetings held in New York throughout 1925.[93]

Section 1(h) of the bill gave an exclusive right—

> to make or to procure the making of any transcription, roll, or record thereof, in whole or in part, or any other contrivance by or from which it may in any manner or by any method or means be communicated, exhibited, performed, represented, produced, or reproduced; and to communicate, exhibit, perform, represent, produce, or reproduce it in any manner or by any means or method whatsoever, * * *

Again, in support of this endeavor to eliminate the compulsory license, ASCAP submitted a brief in which it argued the following points:[94]

> 1. All that Congress was empowered to grant to an author was the exclusive right as a monopoly for a limited period in the work made the subject of copyright. Congress can give neither more or less. Freeing the work for use by manufacturers of mechanical records upon the payment of an arbitrary price fixed by Congress is not securing to the author a "monopoly for a limited period" nor the exclusive right in his work.
> 2. A copyright being private property, Congress had no power to fix the price for which private third parties might use the work. Even if the Government could appropriate or use it itself, it would have to pay just compensation, and the ascertainment of such compensation was a judicial question and not a legislative one, and Congress could not fix the price.
> 3. Assuming, but not concluding, that Congress could fix the price, the rate fixed in the act was unjust, unreasonable, and confiscatory.

Somewhat similar in tone was the resolution of the American Bar Association:[95]

> There should be no compulsory license required of authors, who should be permitted to dispose of and deal in their rights in their absolute discretion. Specifically, we disapprove of the provisions of section 1(e), the act of 1909, for compulsory licenses mechanically to reproduce copyright music. We believe that a composer should have the right to dispose of his music, however it may be produced or reproduced, as he may see fit.

During Mr. Solberg's testimony, a letter from former Representative Washburn, dated April 2, 1926, was read into the record:[96]

> That royalty clause was a "makeshift" made necessary to get the bill through. Without it, there would have been no copyright legislation in 1909. The author should have "complete control" of his rights. The constitutional right expressed in the provision that Congress may secure for limited times to authors and inventors the exclusive right to their respective writings and discoveries should, if exercised, not be abridged by legislation—that I believe to be a sound principle.

In reiterating its request for retention, but modification, of the existing compulsory license provision, the phonograph record industry through its representatives claimed success was dependent upon access to all existing musical compositions and pointed out that since 1909 compulsory licensing had been adopted by England, Canada, Australia, New Zealand, India, Newfoundland, Italy, and Germany; and that the industry had flourished under the aegis of the license as compared to the countries having no provision.[97]

What effect these arguments pro and con had on the committee cannot be determined since no report was issued.

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[93] Hearings on H.R. 10434, 69th Cong., 1st sess., pp. 14–18, 227 (1926).
[94] Id., at p. 261.
[95] Id., at p. 224.
[96] Id., at p. 240.
[97] Id. at pp. 384–385.

(*d*) *H.R. 10987*

H.R. 10987,[98] as introduced by Representative Vestal on April 5, 1926, embodied still another attempt to amend section 1(e) by requiring each copyright owner who permitted the use of his work for mechanical reproduction or for radio broadcasting to—

> affix in some accessible place on such music and upon the phonograph disk, cylinder, roll, or other contrivance for the mechanical reproduction thereof, a notice of the amount of royalty prescribed for any use of such music for public performance for profit, and thereafter any other person may make similar use of the copyrighted work, and the sale or other distribution of any musical composition, or disk, cylinder, roll, or other contrivance for reproducing said composition which has the rate of royalty for use so affixed, *shall carry with it an implied license * * * to broadcast it, or to use it for the manufacture of mechanical instruments*, as the case may be, from and after payment of the prescribed royalty * * *. [Emphasis supplied.]

This bill, however, saw no legislative action.

(*e*) *H.R. 17276*

On February 21, 1927, Representative Vestal introduced still another bill, H.R. 17276,[99] which would have repealed section 25(e) and amended section 1(e) so as to require the recording in the Copyright Office by each copyright owner of his sale, assignment, or license of the right to the mechanical reproduction of his work, and also the recording by every manufacturer of his agreement, under seal, to use the work in full compliance with the terms and conditions of the original grant. Any violation of the license, as recorded, by the manufacturer would be deemed an infringement of copyright, with a possible penalty of his being "forever barred from the benefits and privileges of the compulsory license provisions of this act with respect to any musical work whatsoever, irrespective of the proprietorship thereof." The copyright owner was also to be given the right of discovery, inspection, or examination of books, records, and papers or any manufacturer relative to the production, sale or disposition of mechanical reproductions. No further action on this bill is recorded.

3. The 70th Congress

With the beginning of the new Congress, Representative Vestal renewed efforts to amend the compulsory license provisions.

(*a*) *H.R. 8912*

H.R. 8912, [100] introduced January 9, 1928, was a general copyright revision bill, similar in text to H.R. 10434 [101] of the previous Congress, but no hearings were held.

(*b*) *H.R. 10655 and S. 3160*

Two more bills [102] followed, each proposing amendments similar to H.R. 17276 [103] of the previous Congress, with the exception of the penalty. Instead of barring the infringing manufacturer from fur-

[98] H.R. 10987, 69th Cong., 1st sess. (1926).
[99] H.R. 17276, 69th Cong., 2d sess. (1927).
[100] H.R. 8912, 70th Cong., 1st sess. (1928).
[101] See note 92 supra.
[102] H.R. 10655, 70th Cong., 1st sess. (1928) (introduced by Representative Vestal, Feb. 7, 1928); S. 3160, 70th Cong., 1st sess. (1928) (introduced by Senator Moses, Feb. 13, 1928).
[103] See note 99 supra.

ther conduct of his business, the bills provided for a fine of not less than $500 nor more than $5,000 for the granting by any copyright owner or the acceptance by any manufacturer of refunds, rebates, discounts or setoffs.

In the hearings on H.R. 10655 are indications that compromise versions of the bills were apparently submitted to the committee both by ASCAP and the phonograph industry.[104] Discussions dealt with the need for accessible music on the part of the phonograph record industry; applicability of the license to foreign authors, and to compositions copyrighted prior to 1909; also an apparent attempt to limit the licensing provision to phonograph records and rolls, to the exclusion of other electronic devices, specifically Vitaphone and Movietone. The 12-cent royalty situation with regard to the "word" rolls was also presented at some length as was the requirement to file notices of use within 10 days by domiciled copyright owners and 20 days by foregin proprietors with failure to do so being a complete defense to any suit or proceeding thereon.[105]

Mr. Solberg appeared as one of the final witnesses and asked to correct the impression that Representative Washburn had been the author of the 2-cent royalty, outlining briefly the legislative history of the compulsory license clause from 1906 to 1909.[106] In conclusion he recommended a short bill be drafted which would merely permit copyright owners to make contracts wherever they desire, but require the contracts be available at some convenient place for examination. Again the committee failed to report the bill out.

(*c*) *H.R. 13452*

H.R. 13452,[107] introduced by Representative Vestal on May 1, 1928, had been drafted by a subcommittee of the Committee on Patents.[108] It included some of the language discussed at the hearings on the previous bill, namely, the license was limited to a grant "for the manufacture and sale of *ordinary commercial phonograph records or perforated music rolls*." [109] Such grant was to be in writing and not effective until recorded in the Copyright Office by the copyright proprietor. Royalties, the amount of which were to be determined by contract, were to be "payable at a specified rate per ordinary commercial phonograph record or perforated music roll * * *" The grants could be altered, modified, extended or canceled by subsequent agreements which would not be effective until 90 days after their recordation in the Copyright Office. Each manufacturer was to be required to file an acknowledged notice under seal of his intention to use. Payment of royalty would free the articles or devices from further contribution except in the case of public performance for profit. It would also be unlawful for any one to change, alter or deviate from the terms of a grant, as recorded, and to give or accept any discriminatory preference under penalty of a $500 to $5,000 fine.

The bill was reported [110] out of committee 4 days after it had been introduced and referred to the House Calendar. In recommending the

[104] Hearings on H.R. 10655, 70th Cong., 1st sess., pp. 42–50, 72–94 (1928).
[105] Id., at pp. 193–194.
[106] Id., at pp. 191–192.
[107] H.R. 13452, 70th Cong., 1st sess. (1928).
[108] Hearings on H.R. 13452, 70th Cong., 2d sess, p. 4 (1929).
[109] H.R. 13452, 70th Cong., 1st sess. (1928) (emphasis supplied).
[110] H. Rept. No. 1520, 70th Cong., 1st sess. (1928).

bill favorably, without amendment, Representative Vestal wrote:[111]

> Extended hearings were held, and much testimony was taken from representatives of both the copyright owners and manufacturers of devices which serve to mechanically reproduce copyrighted musical works. The matter has been studied for years by the committee, and all interests have generally agreed as to the justice of the principle of free bargaining governing the relationships between the copyright owners and the manufacturers of mechanical devices.
>
> It seemed apparent to your committee that obvious injustice was done to the composers and authors of musical works in depriving them of an opportunity to freely bargain in respect of the terms and conditions under which mechanical reproduction of their works could be licensed to others, and to subject them to a statutory form of compulsory licensing which afforded no adequate protection against dishonest and delinquent manufacturers.
>
> It seemed equally apparent that for the just protection of the manufacturers a musical composition, once released by its copyright owner to any manufacturer for mechanical reproduction, should be available to all manufacturers upon terms equal to those required to be met by the first licensee.

On February 4, 1929, the bill came up on the Consent Calendar of the House. Representative Vestal requested unanimous consent to have the bill passed over in order to iron out differences explaining that an amendment was being prepared by the manufacturers which would be ready later in the day. A comment was made that a number of wires were being received from retailers of phonograph records and piano rolls, and that since they represented the public, perhaps they should be heard. The result was that the bill was unanimously passed over without prejudice or objection.

Hearings were held on H.R. 13452 before the House Committee on Rules on February 13 and 16, 1929. There Representative Chindblom objected to the granting of a rule on the grounds that hearings had not been held before the bill was reported out of committee and he proposed an amendment which would prohibit copyright owners from combining to fix a price or royalty rate for the use of mechanical reproductions.[112] Representative Busby also registered opposition to the bill characterizing it as "half baked", "full of discrepancies", and leaving "the public absolutely at the mercy of a combine [ASCAP]".[113]

Representative Ackerman of New Jersey proposed a number of amendments which, to name a few, would make the license nonretroactive to July 1, 1909; eliminate any reference to the manufacture and sale of ordinary commercial phonograph records or perforated music rolls as being too restrictive; strike out all references to "promptly" as too indefinite and confusing; and eliminate, as being obnoxious, the provision necessitating payment of royalties for the public performance of compositions by mechanical instruments in addition to that paid by the manufacturer.[114]

Representative Wolverton, also from New Jersey, claimed the bill was not framed in the interest of the public and if enacted would do irreparable injury to an industry "that has been built up over a period of 20 years, and that was struggling against the inroads of radio."[115] No further action on the bill and amendments is recorded.

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[111] Id., at p. 2.
[112] Hearings on H.R. 13452, 70th Cong., 2d sess., p. 19 (1929).
[113] Id., at pp. 25–26.
[114] Id., at pp. 26–30.
[115] Id., at p. 41.

4. The 71st Congress

With the start of another Congress Representative Vestal reintroduced several bills.

(*a*) *H.R. 6989*

On December 9, 1929, H.R. 13452[116] was reintroduced as H.R. 6989,[117] but no action was taken.

(*b*) *H.R. 9639*

H.R. 9639[118] as introduced February 7, 1930, was a somewhat shortened and revised measure designed to repeal outright the compulsory license. At hearings held in March and April 1930, some changes in position were justified by the fact that a number of phonograph record companies had purchased or secured interests in sheet-music publishers, many of whom were copyright owners.[119] It was also pointed out that the only parts of instruments known in 1909 were player-piano rolls and talking-machine records, sold for use in the home; now the number and form of instruments had expanded and, with increasing industrial use, home use was almost insignificant.[120] Furthermore, sale of player-piano rolls was decreasing and since the so-called "word" rolls had not been included in the license, the 12-cent royalty payment on a roll selling for 32 cents was cutting deeply into the manufacturer's profits.[121] In opposition to the complete elimination of the compulsory license provision, the phonograph industry listed as specific objections the following:[122]

(*a*) The proposed bill constitutes a renunciation of the principle of full accessibility.

(*b*) If the proposed legislation is enacted into law, it would open wider the door to increased oppression by means of monopoly or combination of publishers, and/or copyright owners.

As a concluding witness, Karl Fenning[123] questioned the constitutionality of the doctrines of accessibility to music and compulsory licensing.[124]

(*c*) *H.R. 12549*

Still another revision bill, H.R. 12549,[125] was introduced by Representative Vestal on May 22, 1930, and reported out of the Patent Committee on May 28, with amendments.[126] Relative to compulsory licensing, Representative Vestal stated in his report:[127]

A fair compromise of the matter has been arrived at in drafting the new bill. By section 1, subsection (d), it is provided, in effect, that the 2-cent compulsory license shall continue until January 1, 1932, as to the mechanical-musical provisions of the act of 1909, and the repealer section (sec. 64) of the new bill makes adequate provision by excepting the operation of the repealer to accommodate this purpose. This length of time will give manufacturers time

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[116] See note 107 supra.
[117] H.R. 6989, 71st Cong., 1st sess. (1929).
[118] H.R. 9639, 71st Cong., 1st sess. (1929).
[119] Hearings on H.R. 9639, 71st Cong., 2d sess., pp. 8–14 (1930).
[120] Id., at p. 13.
[121] Id., at pp. 53–54.
[122] Id., at pp. 74–75.
[123] See Fenning, "Copyright Before the Constitution," 17 J. Pat. Off. Soc'y 379 (1935); "The Origin of the Patent and Copyright Clause of the Constitution," 17 Geo. L.J. 109 (1929).
[124] Hearings on H.R. 9639, 71st Cong., 2d sess., p. 86 (1930).
[125] H.R. 12549, 71st Cong., 1st sess. (1930).
[126] H. Rept. No. 1689, 71st Cong., 2d sess., pts. 1, 2 (1930).
[127] Id., at p. 9.

to adjust themselves, and the new provision still holds open to the compulsory license features of the old act, musical compositions from 1909 to 1932. This does not disturb existing conditions except as to new works after 1932.

It may be said in this connection that within the last few years and, in fact, within the last few months, a great revolution has taken place in the musical world. The advent of radio and of the talking motion picture has resulted in the absorption by radio and motion-picture concerns of most of the business of mechanical-musical reproduction. The provisions of the new bill have been inserted, not only because of the unfairness of the old regime as provided by the 1909 act but also because the practical business situation has undergone significant changes. Regardless of that, however, the compulsory price-fixing principle provided by the 1909 act is one that works obvious injustice, and its effect should be removed as to future works.

The bill was recommitted to the Patent Committee on June 12, 1930.[128] The following day Representative Vestal reported the bill out of the committee, the report being identical with House Report No. 1689, but including the text of the bill with the changes marked.[129] On June 20, the bill was presented for consideration by the whole House with a 2-hour limitation on debate. Once more the bill was recommitted to the Patent Committee and reported out for the third time on June 24,[130] when it was finally referred to the House Calendar. Following a debate on the floor of the House during which several amendments were proposed, the bill was finally passed on January 13, 1931 and sent to the Senate, where it was referred on January 21, 1931 to the Senate Committee on Patents. Although a number of amendments to the bill were presented in the Senate, none pertained to compulsory licensing. Hearings were held January 28 and 29, but the proposed elimination of the licensing feature was overshadowed by discussions concerning the divisibility of copyright, provisions affecting the radio industry and public performance for profit, particularly with relation to coin-operated machines. Senator Hébert filed the committee report on February 23, 1931, in which he refers to the compulsory license as follows: [131]

Under the existing copyright law (act of 1909) it is provided as a condition of extending the copyright control to mechanical reproduction of musical works, where the owner of a musical copyright permits the use of his work upon the parts of instruments serving to reproduce it mechanically, any other person may make similar use of such work upon the payment to the copyright proprietor of a royalty of 2 cents on each part manufactured. This provision applies to the reproduction upon phonograph records, talking machines, player pianos, etc. It is believed this provision for the fixing of a price to be paid to the owner of any property is unique in American legislation. There appears to be no valid reason for any distinction between the author or owner of a musical composition and the author or owner, or producer of any other kind of property or work. As a result of the enactment of the provision in the law of 1909, owners of musical works are at the mercy of those engaged in mechanical reproduction with whom they have no contractual relations and who may be wholly irresponsible. The author is forced to permit the use of his work whether or not he desires to do so and at a price which is fixed by law and over which he has no control.

The provision of the bill under consideration will eliminate the 2-cent compulsory license fee heretofore fixed by law, from and after January 1, 1932, so far as the mechanical reproduction of music is concerned. Thereafter authors and composers, like other American citizens, will be free to make their own contracts upon terms mutually agreed upon. This provision will not disturb existing conditions and will not affect works other than those created subsequent to July 1, 1909, and up to January 1, 1932.

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[128] 72 Congressional Record, 10594–10596 (June 12, 1930).
[129] H. Rept. No. 1898, 71st Cong., 2d sess. (1930).
[130] H. Rept. No. 2016, 71st Cong., 2d sess. (1930).
[131] S. Rept. No. 1732, 71st Cong., 3d sess., pp. 26–27 (1931).

The bill, however, failed to receive consideration on the floor of the Senate.

5. The 72d Congress

(*a*) *H.R. 139 and S. 176*

H.R. 12549 was reintroduced by Representative Vestal as H.R. 139 [132] on December 8, and by Senator Hébert as S. 176 [133] on December 9, 1931, but no action was taken on either bill.

Commencing February 1, 1932, a series of hearings were had on the general revision of the copyright law. The topic of public performance for profit as presented by the manufacturers of coin-operated phonographs and pianos reflected indirectly on the compulsory license question. The general feeling of members of that industry seemed to be that they did not mind a 2-cent royalty paid at the source, but that they would object, as a form of double taxation, to any provision that required payment of a royalty for each performance of the record on their machines.[134]

At the hearings a brief was submitted in behalf of the phonograph industry by Arthur Garmaize stating in part: [135]

> There exists no justification for the agitation to remove the statutory mechanical license now found in our existing copyright law in subdivisions (e) of sections 1 and 25 except the wish to create a mechanical-music monopoly. However, the wish to prevent the creation of a mechanical-musical monopoly is sufficient lawful justification to continue price fixing for the use of music for mechanical reproduction now existing for 23 years through subdivisions (e) of sections 1 and 25 of our copyright law and known as the statutory mechanical license.
>
> Passenger transportation, freight, telephone, telegraph, gas, electricity, streetcar transportation, and subway transportation rates are fixed because it is claimed the purveyors thereof are public utilities. Rents were fixed during the war because of an existing emergency. The price for the mechanical use of music was fixed in 1909 and should be fixed now because of the emergency that then existed and now exists in a threatened mechanical-music monopoly and because the right to control mechanical reproduction is not an inherent right of the common law or of copyright but was created by Congress in 1909 for the first time. This statutory monopoly right created for the first time in 1909 and surrounded by the Congress creating it with the safeguard of the statutory mechanical license should not by the present Congress be utilized as an instrument with which to create a business monopoly on top of the statutory monopoly by repealing subdivisions (e) of sections 1 and 25 of the existing law known as the statutory mechanical license.

Also during the course of the hearings a patent attorney gave still a different interpretation to the problem of compulsory licensing when he testified: [136]

> During the hearings the suggestion has been made that the copyright law should provide for compulsory licensing or working of a copyright. Some witnesses have stated that this is entirely unnecessary since the copyright proprietor will for business reasons keep his work in print if there is any demand whatever for it. This statement assumes that all copyright proprietors possess sound business judgment, which unfortunately is not always true * * *. Under the present law there is no way of compelling a temperamental copyright proprietor either to keep a work in print himself or to allow some one else to reprint on a reasonable royalty basis.

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[132] H.R. 139, 72d Cong., 1st sess. (1931).
[133] S. 176, 72d Cong., 1st sess. (1931).
[134] Hearings on General Revision of the Copyright Law, 72d Cong., 1st sess., pp. 208–217 (1932).
[135] Id., at p. 239.
[136] Id., at p. 480.

The series of Sirovich bills which resulted from these hearings made no provision for compulsory license and no extensive discussion of the subject is to be found in connection with these bills.

6. *The 74th Congress*

(*a*) *S. 2465 and S. 3047*

On March 13, 1935, Senator Duffy introduced the first of his general revision bills, S. 2465.[137] Two months later, on May 13, 1935, the second, S. 3047,[138] was introduced as a revised version, including a number of committee amendments. Senator McAdoo reported the bill out of committee on the same day it was introduced.[139] Amendments by Senators Vandenberg and Trammell were subsequently offered. The bill, together with the amendments, was debated July 31, 1935 and passed. During the second session the House Committee on Patents conducted hearings on S. 3047, H.R. 10632 and H.R. 11420, known as the Duffy, Daly, and Sirovich bills, respectively. With respect to compulsory license, the Duffy bill provided for its retention and in addition would also have given the manufacturer a copyright in his recording; the Daly bill would have eliminated the compulsory license clause.

A brief submitted by Gene Buck of ASCAP claimed that the original license violated the Constitution by denying authors the exclusive right to their writings:[140]

> The Duffy bill not only continues this compulsory license scheme, but provides in addition, that the manufacturer of the record, upon paying the sum of 2 cents, can secure a new copyright in the record or transcription, and can communicate the work to the public by radio facsimile, wired radio, telephone, and television * * *.
>
> There is no reason why a mechanical-instrument manufacturer who under a compulsory license pays the author only 2 cents per record should have a separate copyright. For the payment of 2 cents, such manufacturer would be able to license the performance of records in competition with performances by living musicians licensed by the authors. This would unjustly enrich such manufacturers at the expense of the authors, and would throw a great many musicians out of employment.

Radio and coin-operated machine interests joined in opposing these licensing-plus features, and protested the multiplicity of licensing agencies if the law were enacted.[141]

The president of the Boston Music Publishers' Association, William A. Fisher, testified:[142]

> Under our present law machine and electrical transcription companies manufacture disks and records at a fixed license of 2 cents per record. This provision not only deprives composers and authors of the right to bargain but at the same time grants the right of manufacture to anybody else at the same ridiculous figure. Not only does the Duffy bill continue this unjust compulsory license clause with its contemptible 2-cent fee, but, worse still, any purchaser of a record may publicly perform it provided no admission fee is charged. These disks are increasingly used in restaurants and over the radio, and the bill permits their free communication by wired radio, telephone, and television. The

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[137] S. 2465, 74th Cong., 1st sess. (1935).
[138] S. 3047, 74th Cong., 1st sess. (1935).
[139] S. Rept. No. 896, 74th Cong., 1st sess. (1935).
[140] "Hearings on Revision of Copyright Laws," 74th Cong., 2d sess., pp. 112–113 (1936).
[141] Id., at pp. 470, 800.
[142] Id., at p. 558.

old law differentiates between the license to manufacture and sell a record and the right to give such record public performance for profit. The bill in question blurs these rights * * *.

The phonograph industry maintained that if the provision by which all manufacturers were given equal rights were removed, they would be forced to resort to competitive bidding for the right to record, and a temporary, excessive profit would be realized by only a small number of composers. It was contended whereas royalties on records were only one source of revenue for the composer, if too large a percentage of production cost were paid in royalties, the manufacturer would soon go out of business.[143] Miss Isabelle Marks of Decca seconded this reasoning by stating that unless the compulsory license provision remained in the statute—

it would unquestionably create a monopoly in the hands of the one phonograph company in the industry that also happened to have the best financial background * * *.[144]

Upon the conclusion of these hearings, none of the bills was reported out by the House committee.

7. The 75th Congress

(*a*) *S. 7, H.R. 2695, and H.R. 3004*

S. 7,[145] introduced by Senator Duffy on January 6, 1937, H.R. 2695 [146] introduced by Representative Moser of Pennsylvania on January 12, and H.R. 3004,[147] introduced by Representative Sol Bloom on January 14, were all identical with S. 3047.[148] No action resulted.

(*b*) *H.R. 5275 and S. 2240*

Representative Daly presented H.R. 5275 [149] on March 3, 1937, and Senator Guffey introduced S. 2240 [150] on April 22, 1937, both modified versions of Representative Daly's earlier general revision bill providing for the elimination of the compulsory license and jukebox clauses. No action was taken on them.

(*c*) *H.R. 10633*

On May 16, 1938, Representative Moser of Pennsylvania introduced a bill, H.R. 10633,[151] which would have set up a compulsory license for the printing, reprinting, publishing, copying, performing, vending, or exercise of any protected right in respect to any work copyrighted where the person was unable to secure an agreement with the copyright owner, by filing a written application with the Federal Communications Commission for a permit to make the desired use at the rates of royalties or charges therefor as the Commission should determine. No hearings were held on the bill.

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[143] Id., at pp. 623–624.
[144] Id., at p. 631.
[145] S. 7, 75th Cong., 1st sess. (1937).
[146] H.R. 2695, 75th Cong., 1st sess. (1937).
[147] H.R. 3004, 75th Cong., 1st sess. (1937).
[148] See note 138 supra.
[149] H.R. 5275, 75th Cong., 1st sess. (1937).
[150] S. 2240, 75th Cong., 1st sess. (1937).
[151] H.R. 10633, 75th Cong., 3d sess. (1938).

8. The 76th Congress

(*a*) *H.R. 926, H.R. 4871, H.R. 6160, and H.R. 9703*

Representative Daly reintroduced his general revision bill, formerly H.R. 5275,[152] on January 3, 1939, as H.R. 926,[153] and again in still another revised form on March 8, 1939 as H.R. 4871.[154] The latter version was also introduced by Representative McGranery, as H.R. 6160 [155] and H.R. 9703 [156] in 1939 and 1940. No action, however, was taken on any of these bills.

(*b*) *H.R. 6243*

Representative Moser also reintroduced his compulsory license bill on May 9, 1939, as H.R. 6243.[157]

(*c*) *S. 3043*

In the meantime the Shotwell Committee was readying a general revision bill for consideration in this Congress. Apparently the feasibility of continuing the 2-cent compulsory license came up for consideration in March 1939, and several briefs were submitted. The recording interests claimed the compulsory licensing provision had worked well for the past 30 years; the right to use copyrighted music was available to all upon like terms and conditions, and substantial profits had been enjoyed by copyright proprietors. They alleged that no analogy existed to the book-publishing field since no one would claim it desirable for all publishers to issue the same book. In the music industry, however, many orchestras were competing for public favor and performed the same selections for different recording companies and even for the same company in different price classifications.[158]

The Songwriters' Protective Association argued the basic constitutional concept was that copyright protection was for authors and not for commercial exploiters of the authors' creations.[159] The motion picture interests maintained: [160]

> In justice to the owners of the paramount rights in musical copyrights it should be noted that, although the recording manufacturers seek to retain the present 2-cent compulsory license fee in respect of the right arbitrarily to manufacture any recorded rendition of a copyrighted musical composition, the record manufacturers are nevertheless not making any proposal to apply the same principle of an arbitrary statutory license, permitting other manufacturers to make physical duplicates of a specially copyrighted recorded rendition. In other words, if a record manufacturer made and copyrighted a Toscanini version of a Beethoven symphony, he would not wish arbitrary statutory licenses to permit other manufacturers to dupe at a 2-cent royalty rate the same Toscanini rendition, although he would say they should be free to make their own renditions of the same public domain symphony or use any copyrighted musical composition for 2 cents per recording.

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[152] See note 149 supra.
[153] H.R. 926, 75th Cong., 1st sess. (1939).
[154] H.R. 4871, 76th Cong., 1st sess. (1939).
[155] H.R. 6160, 76th Cong., 1st sess. (1939).
[156] H.R. 9703, 76th Cong., 2d sess. (1940).
[157] H.R. 6243, 76th Cong., 1st sess. (1939), formerly H.R. 10633, 75th Cong., 3d sess. 1938).
[158] Memorandum submitted in behalf of the recording interests to Committee for the Study of Copyright in response to memos urging elimination of the compulsory license * * * pp. 1–2 (1939).
[159] Song Writers' Protective Association memorandum in reply to the memorandum submitted in behalf of the recording interests re the compulsory license provision of sec. 1(e) * * *, 1–2 (1939).
[160] Comments of motion picture producers and distributors upon the memorandum submitted in opposition to copyrightability for acoustic recordations by broadcasting interests, the American Society of Composers, Authors and Publishers, and the Song Writers' Protective Association, pp. 5–6 (1939).

The final draft of the Shotwell bill, S. 3043,[161] as introduced by Senator Thomas on January 8, 1940, did not contain a licensing provision. The session ended, before any action was taken on the bill.

9. The 77th Congress

(*a*) *H.R. 3456*

On February 18, 1941, Representative Martin J. Kennedy introduced a bill, H.R. 3456,[162] which might be considered a variation of the earlier Moser bills.[163] It provided that whenever two or more copyright proprietors of a musical composition refused to enter into an agreement to permit the public use or performance of the composition (especially by radio) upon payment of a reasonable and fair compensation, the Federal Trade Commission could fix a rate of payment and order permission to make use of the composition. Refusal to comply with the Federal Trade Commission's order would result in seizure for confiscation of the copyright. This proposed legislation never reached the hearing stage.

(*b*) *H.R. 3997 and H.R. 7173*

A general revision bill, based on Representative Daly's earlier bill, but containing a number of changes relative to the rights of performing artists was introduced in this Congress by Representative Sacks as H.R. 3997 [164] but no action was reported.

During the second session, Representative Sacks on June 1, 1942, introduced H.R. 7173 [165] which, among other things, proposed that copyright in an acoustical recording for which the 2-cent royalty had been paid could not be secured without the consent of the paramount copyright owner.

10. The 78th and 79th Congresses

(*a*) *H.R. 1571, H.R. 3190, and S. 1206*

Three more acoustical recording bills,[166] each identical with H.R. 7173,[167] were introduced in these two Congresses, but without any action thereon.

11. The 80th Congress

(*a*) *H.R. 1270*

The requirement of securing the copyright owner's consent to the copyrighting of a record upon payment of the 2-cent royalty reappeared in a bill introduced in January 1947, H.R. 1270.[168]

Among the opponents to H.R. 1270 at hearings held between May 23 and June 23, 1947, Don Petty, of the National Association of Broadcasters, declared with respect to the compulsory license provision in section 1(e): [169]

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[161] S. 3043, 76th Cong., 2d sess. (1940).
[162] H.R. 3456, 77th Cong., 1st sess. (1941).
[163] See notes 151, 157, supra.
[164] H.R. 3997, 77th Cong., 1st sess. (1941).
[165] H.R. 7173, 77th Cong., 2d sess. (1942).
[166] H.R. 1571, 78th Cong., 1st sess. (1943); H.R. 3190, 79th Cong., 1st sess. (1945): S. 1206, 79th Cong., 1st sess. (1945).
[167] See note 165, supra.
[168] H.R. 1270, 80th Cong., 1st sess. (1947).
[169] Hearings on H.R. 1269, H.R. 1270, and H.R. 2570, 80th Cong., 1st sess., pp. 78–79 (1947).

This provision was designed to enforce the congressional policy against monopoly. While H.R. 1270 purports to leave this policy intact, it nevertheless makes possible the easy circumvention of it. This is so because the amendments proposed to sections 11 and 12 permit works to be copyrighted in the form of acoustic records. At the same time, section 1(f) gives the copyright owner of such works the exclusive right to make or authorize the making of records. This means that the policy of section 1(e) will be defeated if the creator of a musical composition chooses to copyright his work in the first instance as a record.

Miss Isabelle Marks testified as to recording industry practice concerning the royalty fee scale on phonograph records in effect since approximately 1932 as follows: [170]

It is a royalty of 1¼ cents for a 35-cent record, 1½ cents for a 50-cent record, 1¾ cents for a 60-cent record, and 2 cents for 75 cents or more, and that has been universal. Each record that is made is made with a royalty at that price through a definite licensing agreement with the publisher. We either get a license from that publisher to issue the record at that price or we fall back on section 1(e), where we pay 2 cents.

On July 19, 1947, the Subcommittee on Patents, Trademarks, and Copyrights recommended, during an executive session of the Judiciary Committee, that the bill be adversely reported, with the result that the bill was never reported out of the full committee.[171]

No further bills dealing with the compulsory license of copyrighted works have been introduced in the U.S. Congress.[172]

B. SUMMARY

A review of the testimony contained in the hearings and the reports reveals the fact that between the mid-1920's and the late 1930's a number of attempts were made to eliminate or extend the compulsory license provisions. Each attempt, however, provoked considerable controversy. The development of radio and other electronic devices for the recording and reproduction of sound provided the motivation behind many of the proposals, while economic conditions affecting the phonograph industry exerted a counterbalancing influence.

Conflicts arose between the creators and the users. The principle of compulsory license was attacked by the authors because it restricted their bargaining power; the benefits derived from the statutory royalties went to the music publishers as copyright owners, rather than to the authors; and the copyright owners frequently found their works being exploited by unscrupulous, financially irresponsible recording manufacturers. Consistently throughout the period, the manufacturers of piano rolls and phonograph records pleaded the economic necessity of having complete accessibility to all music and of restricting the payment of royalties to a relatively low percentage of the cost of production. When faced with the prospect of being required to pay fees for each performance of recorded music, the radio and jukebox industries threw their support to the recording manufacturers in opposing the introduction of a compulsory license for public performance rights of records and transcriptions.

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[170] Id., at p. 89.

[171] 93 Congressional Record D–406 (July 19, 1947).

[172] Bills to eliminate the so-called "jukebox exception," strictly speaking, relate to public performance for profit. Public Law 743 (68 Stat. 1030), effective Sept. 16, 1955, eliminated the sec. 1(e) requirement of reciprocal treatment with respect to mechanical reproduction rights for Universal Copyright Convention works but did not affect the compulsory license provision. See note 55 supra.

That the subject of compulsory license is a controversial one may be observed from the number of bills that were introduced in the 68th through the 80th Congresses and the comparatively small number ever reported out of committee or voted upon by either House.

III. Compulsory License Provisions in the Laws of Other Countries and in International Conventions

Various types of compulsory license provisions are found in the copyright laws of certain foreign countries and multilateral copyright conventions.[173]

A. NATIONAL LAWS

1. Great Britain

There are several types of compulsory licenses in the British copyright law.[174]

(*a*) The proviso of section 3 of the British Copyright Act contains a compulsory license to reproduce a published work after the expiration of 25 years from the death of the author. After that time the copyright is not deemed infringed by reproduction of the work for sale if the person reproducing the work proves that—

(i) he has given the prescribed notice in writing of his intention to reproduce the work; [175] and

(ii) the royalties have been paid.[176]

(*b*) Section 4 of the act contains a compulsory license for republication or performance of a work if after the death of the author of a literary, dramatic or musical work which has been published or publicly performed, a complaint is made to the Judicial Committee of the Privy Council that the owner of the copyright refuses to republish or allow republication or public performance of the work. In that situation the Judicial Committee may order the owner to grant a license for republication or public performance of the work.[177]

The 1952 Report of the Copyright Committee [178] recommended repeal of the proviso in section 3 and of section 4. The British copyright bill of 1955 would repeal the proviso in section 3, and section 4 of the British Copyright Act, 1911.[179]

(*c*) Section 19(2) of the act contains a compulsory license for mechanical reproduction of a musical work. Contrivances for mechanical performance of a musical work may be made upon proof that—

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[173] See "Compulsory License" in 2 Pinner, "World Copyright," pp. 124–142 (1954).

[174] Copyright Act, 1911, 1 and 2 Geo. 5, ch. 46. This act, with some slight modifications, has been adopted in Australia, Ceylon, New Zealand, and the Union of South Africa. Except for these self-governing dominions and Canada (see p. 38, infra), it applies throughout the British Commonwealth of Nations. Prior to the 1911 act, reproducing music on interchangeable parts of mechanical instruments was held to be not copying and therefore no infringement of a composition protected under the then-existing copyright statute. *Boosey* v. *Wright* (1899), 1 ch. 836 (1900), 1 ch. 122.

[175] See "Copyright Royalty System (General) Regulations," 1912; Copinger, "Law of Copyright," app. B (8th ed. 1948).

[176] See Copinger, op. cit., supra, note 175, at p. 88.

[177] Id., at p. 86. No such cases are reported.

[178] Report of the Copyright Committee (presented by the President of the Board of Trade to Parliament by Command of Her Majesty, October 1952), par. 23.

[179] Explanatory Memorandum to Copyright Bill, H.L. 1955, fifth schedule 9, and sixth schedule 3, to copyright bill, 1955.

(i) such contrivances have previously been made with the consent or acquiescence of the copyright owner; and

(ii) the prescribed notice of intention to make the contrivances has been given and the royalties paid.

The license includes words and music,[180] but alterations not previously made or necessary for the adaptation are prohibited.[181]

The royalties for records made and sold under the compulsory license were originally set, in the act of 1911, at 5 percent of the ordinary retail selling price of the contrivance, but not less than a halfpenny for each separate musical work reproduced therefor.[182] However, the act of 1911 provided that after a period of 7 years the royalty rate could be changed by an order of the Board of Trade confirmed by Parliament.[183] Accordingly, in 1928, the royalty rate was increased to 6¼ percent, with a minimum of 3 farthings (three-fourths of a penny) for each separate work.[184]

The Copyright Committee recommended that no change be made in regard to the compulsory license provisions of section 19.[185] Section 8 of the copyright bill of 1955 incorporates provisions similar to section 19(2) of the present act. Section 8 of the bill would permit any record manufacturer to make records of a musical work or of an adaptation thereof, under the following conditions:

(*a*) Records of the work, or, as the case may be, of a similar adaptation of the work, have previously been made for the purposes of retail sale, and were so made by, or with the license of, the owner of the copyright in the work;

(*b*) Before making the record, the manufacturer gave to the owner of the copyright the prescribed notice of his intention to make it;

(*c*) The manufacturer intends to sell the record by retail, or to supply it for the purpose of its being sold by retail by another person, or intends to use it for making other records which are to be sold or supplied; and

(*d*) In the case of a record which is sold by retail, the manufacturer pays to the owner of the copyright, in the prescribed manner and at the prescribed time, a royalty of an amount ascertained in accordance with the following provisions of this section.

The bill would fix the royalties at 6¼ percent of the ordinary retail selling price of the record.[186] If, after the end of the period of 1 year after the section becomes effective, the rate ceases to be equitable, the Board of Trade may make an order changing it.[187] In the case of a record which comprises two or more musical works, the minimum royalty is 3 farthings in respect to each work.[188] Under section 8(5) words are included in the compulsory license.

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[180] Copyright Act, 1911, 1 and 2 Geo. 5, ch. 46, sec. 19(2)(ii). The otherwise similar compulsory license provision in the United States Copyright Act of 1909 is limited to the music. See note 80 supra. The British act, unlike the American act (see note 56 supra), was retroactive. *Monckton* v. *Pathe Freres*, 30 T.L.R. 123 (C.A. 1913).

[181] Id., sec. 19(2)(i).

[182] Id., sec. 19(3)(b). In contrast, the American statutory royalty rate is 2 cents per "part" manufactured. In 1909, 2 cents was considered equivalent to 5 percent of the manufacturer's selling price. See notes 59 supra, 186–188 infra.

[183] Id., sec. 19(3)(b).

[184] Copyright Order Confirmation (mechanical instruments: royalties) Act, 1928, 18 and 19 Geo. 5, ch. 46, confirming an order by the Board of Trade.

[185] Report of the Copyright Committee (op. cit., supra, note 178), par. 81.

[186] Copyright bill, 1955, sec. 8(2).

[187] Id., sec. 8(3).

[188] Id., sec. 8(4)(a).

2. Canada

(*a*) Section 7 of the Canadian Copyright Act[189] contains substantially the same compulsory license as the proviso in section 3 of the British act.

(*b*) Section 13 of the act provides that, upon complaint to the Governor in Council, substantially the same compulsory license as in section 4 of the British act may be granted.

(*c*) Section 19 of the act contains substantially the same compulsory license as section 19(2) of the British act. This license applies to motion pictures which are considered "other contrivances, by means of which sounds may be reproduced, and by means of which the work may be mechanically reproduced" as provided in section 19.[190]

(*d*) Section 14 of the act provides that any person may apply to the Minister for a compulsory license for the printing and publishing in Canada of a copyrighted book if the owner of the copyright fails—

(i) To print the book in Canada; and

(ii) To supply sufficient copies of such printing to the Canadian market.

This license is granted by the Minister as an exclusive license not to exceed 5 years.[191]

(*e*) Section 15 of the act provides that a compulsory license may be granted for serial publication in Canada if publication of a book in serial form is begun outside the British Dominions or in a foreign country whose nationals are not entitled to the benefits of the Canadian act. This license is also granted by the Minister.

3. Germany

Section 22(1) of the German copyright law[192] provides that the author of a musical work, who has authorized another to make mechanical reproductions of the work, must permit any other person domiciled in Germany to make mechanical reproductions of the work. The author is entitled to an equitable remuneration. If the parties cannot agree on an "equitable" remuneration, the courts, with the assistance of experts, may decide.[193] This permission must be given, even if the first person had purportedly been given an exclusive license.

Under section 22(1) the applicant must sue if the license is not forthcoming. To facilitate obtaining a license the German draft law of 1953 proposes that the applicant must inform the copyright

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[189] Copyright Act, 1921, ch. 32, R.S.C. 1927, as amended by ch. 8, 1931; ch. 18, 1935; ch. 28, 1936; ch. 27, 1938.

[190] Fox, "Canadian Copyright Law," pp. 169, 174, 187 (1944); cf. note 213, infra, and note 59, supra. Under the Canadian act, the royalty is 2 cents for the playing surface of each record (apportioned among different owners of works involved) and 2 cents for each other contrivance. Mechanical reproduction rights apply to literary and dramatic as well as musical works.

[191] Copyright Act (supra, note 189), sec 14(7). No counterparts to this section and sec. 15 are found in the British act. Secs. 14 and 15 apply only if the author is a Canadian or non-Berne Union country national.

[192] Law Concerning Copyright in Works of Literature and Music, June 19, 1901, as amended.

[193] Voigtländer-Elster-Kleine, "Urheberrecht," p. 127 (1952). The mechanical reproduction right remains exclusive even though the author exercises it himself. Only when he licenses its exercise by others does the compulsory license provision become operative. The voluntary license may function as a standard to a court when fixing equitable remuneration.

owner by registered letter of his intention to record; and if 2 weeks have passed without reply the recording may be made.

Section 22(2) provides that this permission extends to the words of the musical work, provided the author of the words has previously permitted their mechanical reproduction. The author of the musical work has the right and the duty to permit mechanical reproduction of the words, and, in that case, must share the royalties with the author of the text.

It should be noted that the compulsory license is not directly given by the law but that the author is compelled by the law to give such license.

4. Italy

Articles 52 to 60 of the Italian copyright law [194] permit broadcasts of copyrighted works by the state broadcasting organizations without the author's consent, except where the work is new or where the broadcast performance is the first of that season.[195] Under article 56 of the law the author of the work broadcast is entitled to a remuneration, the amount of which, in the case of disagreement between the parties, is determined by the judicial authorities.

In view of the fact that broadcasting is a state monopoly in Italy, this limitation might be considered a withholding of an exclusive right rather than a compulsory license given to the state.

Italy has no provision for a compulsory license for recordings.

5. Switzerland

Articles 17 to 21 of the Swiss copyright law [196] provide for a compulsory license in regard to records of musical works. Under article 17, any person having an industrial establishment in Switzerland may require, against payment of an equitable fee, authorization to record a musical work, provided a recording of the work by another has been previously authorized and the records have been placed on the market or the work has been otherwise published. The first license need not have been express, but may have resulted from the circumstances such as complete transfer of the copyright.

Under article 18, the compulsory license extends to the text of a musical work.

Article 19 provides that, after the death of the author, the license must be given even where the author, during his life, would not have given it, even though there was no prior recording.[197]

Article 20 of the law provides that if the parties cannot agree about the authorization to record the work, the courts shall decide the question. Presumably, this includes questions on the amount of the remuneration.

Under article 21, records made under articles 17 to 20 may be publicly performed.

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[194] Copyright law of April 22, 1941, as amended.
[195] Id., art. 52(3).
[196] Copyright law of Dec. 7, 1922. Sound films are not within the compulsory license provision.
[197] Röthlisberger, "Schutz des Urheberrechtes," p. 238 (1931).

6. Austria

Article 58(1) of the Austrian Copyright Act [198] provides that any record manufacturer domiciled or with his principal place of business in Austria, or in a country which grants reciprocal protection to Austrians, may acquire a license to make and distribute recordings of any published musical work where the composer has permitted similar use. Appropriate royalty would be fixed by the court.

Under article 58(2) the license extends to the text of the musical work.

Article 58(4) provides that the compulsory license does not apply to recordings of both images and sounds. The reason given for thus excluding sound tracks of motion pictures is that a motion picture producer who has acquired the exclusive right to use a musical composition in a motion picture should not be forced to permit the use of the work by other producers.[199]

7. Argentina

Article 6 of the Argentine copyright law [200] provides that the heirs or successors in title of a deceased author may not oppose republication of the work if they have allowed more than 10 years to pass without themselves undertaking a republication. Further, a translation may be made by a third party under the same conditions. If there is no agreement on the conditions of printing or the fee, the question will be decided by arbitration.[201]

Argentina has no compulsory license for recordings.

8. Mexico

Article 30 of the Mexican copyright law [202] provides that publication of literary, scientific, educational, or artistic works useful or necessary to the development of national science, culture, or education shall be considered an act of public use. The Government may permit publication of such works by another than the copyright owner if—

(i) No copies are available in Mexico during the year following publication, or the supply is exhausted; or

(ii) Copies are priced so high as to impede their general use, to the detriment of culture.

The Secretary of Education determines an amount of 15 percent of the retail price of the copies as a deposit in favor of the copyright owner with the Bank of Mexico.[203]

Article 114 of the law provides that no penalties shall accrue under article 113 for unauthorized public performance or broadcast of musical, dramatic, dramatico-musical, choreographic, or pantomimic works, provided the royalties for such performance have been paid. Royalties are fixed by contract with users or groups of users,

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[198] Federal Act on Copyright in Works of Literature and Art and on Related Rights of Apr. 9, 1936, as amended to July 8, 1953.
[199] Lissbauer, "Urheberrechtsgesetze," p. 282 (1936).
[200] Law No. 11723 of Sept. 28, 1933.
[201] Id., art. 6(3).
[202] Federal copyright law of Jan. 14, 1948, as amended Dec. 31, 1948.
[203] Id., art. 31, V.

or failing this, by means of a royalty schedule issued by the Secretary of Education in accordance with precedents and equity.[204]

Mexico has no compulsory license for recordings.

9. Brazil

Article 660 of the Brazilian Civil Code[205] provides that, if the owner of a published work refuses to authorize the publication of a new edition of the work, the Federal Government or a State Government may expropriate the work on payment of indemnification provided the work is needed for reasons of the public interest.

Brazil has no compulsory license for recordings.

10. France, Belgium, the Netherlands

France has a compulsory license only in regard to toy music boxes, etc.[206] Belgium and the Netherlands have no compulsory license.

B. INTERNATIONAL CONVENTIONS

Broadly speaking, there are three sets of multilateral copyright conventions:

(1) The international copyright conventions (the Berne Convention of 1886 and its successive amendments[207] establishing the International Copyright (Berne) Union) which have been ratified by most of the countries in the Eastern Hemisphere and by Brazil and Canada, but not by the United States, in the Western Hemisphere;

(2) The pan-American copyright conventions,[208] notably the Buenos Aires Convention of 1910 which the United States and most of the Latin American countries, except Cuba, El Salvador,[209] Mexico,[210] and Venezuela have ratified; and

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[204] Id., art. 81.

[205] Civil Code: Law No. 3071 of Jan. 1, 1916.

[206] Law of Oct. 11, 1917.

[207] Berne Convention of 1886 and annexed acts (hereinafter sometimes called the Berne Convention); Additional Act and Declaration signed at Paris, May 4, 1896 (hereinafter sometimes called the Paris Convention); Revised Berne Convention for the Protection of Literary and Artistic Works, signed at Berlin, Nov. 13, 1908 (hereinafter sometimes called the Berlin Convention); Additional Protocol to the International Copyright Convention of Berlin, signed at Berne, Mar. 20, 1914; Revised Convention for the Protection of Literary and Artistic Works, signed at Rome, June 2, 1928 (hereinafter sometimes called the Rome Convention); and Berne Convention for the Protection of Literary and Artistic Works, as revised at Brussels, Belgium, in June 1948 (hereinafter sometimes called the Brussels Convention).

[208] Convention of Montevideo on Literary and Artistic Property, signed Jan. 11, 1889; Convention for the Protection of Literary and Artistic Property, signed at Mexico, Jan. 27, 1902 (hereinafter sometimes called the Mexico City Convention); Convention for the Protection of Patents of Invention, Drawings and Industrial Models, Trademarks and Literary and Artistic Property, signed at Rio de Janeiro, Aug. 23, 1906; Convention Concerning Literary and Artistic Copyright, signed at Buenos Aires, Aug. 11, 1910 (hereinafter sometimes called the Buenos Aires Convention); Revision of the Convention of Buenos Aires Regarding Literary and Artistic Copyright, signed at Havana, on Feb. 18, 1928; and Inter-American Convention on the Rights of the Author in Literary, Scientific, and Artistic Works, signed at Washington, June 22, 1946 (hereinafter sometimes called the Washington Convention). All are found in Canyes, Colborn, and Piazza, "Copyright Protection in the Americas" (Pan-American Union Law and Treaty Series No. 33) 187–213 (2d ed. 1950).

[209] El Salvador has ratified the Mexico City Convention, which governs its copyright relations with the United States and with the Dominican Republic.

[210] Mexico has ratified the Buenos Aires Convention, but its ratification has not been deposited and hence is not effective.

(3) The Universal Copyright Convention,[211] which became effective September 16, 1955 among certain countries.

1. International Copyright (Berne) Conventions

(*a*) *Brussels Convention, 1948*

This Convention, the most recent revision of the International Copyright (Berne) Conventions, itself contains no provision granting a compulsory license. However, there are several provisions permitting a compulsory license applicable to musical works in national laws of member countries. Paragraph (1) of article 11 *bis* of the Convention grants authors the exclusive right of authorizing—

> * * * the radio-diffusion of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds, or images; 2.° any communication to the public whether over wires or not, of the radio-diffusion of the work, when this communication is made by a body other than the original one; 3.° the communication to the public by loudspeaker or any other similar instrument transmitting, by signs, sounds, or images the radio-diffusion of the work.

Paragraph (2) of article 11 *bis* enables member countries to restrict this exclusive right:

> It shall be a matter for legislation in the Countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph may be exercised * * *

Paragraph (3) of article 11 *bis* provides, in part:

> It shall * * * be a matter for legislation in the Countries of the Union to determine the regulations for ephemeral recordings made by a broadcasting body by means of its own facilities and used for its own omissions.

As to recording rights, article 13 of the Convention provides:

> (1) Authors of musical works shall have the exclusive right of authorizing 1° the recording of such works by instruments capable of reproducing them mechanically; 2° the public performance of works thus recorded by means of instruments.

Paragraph (2) of article 13 enables member countries to restrict the exclusive right:

> Reservations and conditions relating to the application of the rights mentioned in the preceding paragraph may be determined by legislation in each country of the union * * *

However, these restrictions, which may take the form of a compulsory license provision, may not, under article 14(4), be applied to cinematographic adaptations of literary, scientific, or artistic works.[212]

(*b*) *Rome Convention, 1928*

Article 11 *bis* of the Rome Convention contained provisions relating to the communication of works "to the public by radio diffusion" which served as the pattern for the expanded, same-numbered article of the Brussels Convention. Article 13 was substantially the same in the Rome and Brussels Conventions, but article 14(4) was sub-

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[211] Ratified by Andorra, Cambodia, Pakistan, Laos, Haiti, Spain, United States, Costa Rica, Chile, Israel, German Federal Republic, Monaco (effective Sept. 16, 1955). Several additional foreign countries have since ratified or are in the process of ratifying the Convention.

[212] Brussels Convention, art. 14(4).

stantially revised at Brussels to preclude expressly the application of compulsory licensing under article 13(2), to motion pictures.[213]

(*c*) *Berlin Convention, 1908*

Article 13 of the Rome and Brussels Conventions found its origin in the same-numbered article of the Berlin Convention.[214]

(*d*) *Paris Convention, 1896*

The attempt to insert in the Paris Convention, 1896, a provision protecting musical works against use on disks, rolls, sheets, etc. (as distinguished from use in music boxes and the like) was unsuccessful.[215]

(*e*) *Berne Convention, 1886*

The Berne Convention of 1886, the first of the multilateral copyright conventions, contained in its final protocol a provision that the manufacture and sale of instruments for the mechanical reproduction of musical airs was no infringement.[216]

2. Pan-American Copyright Conventions

None of the several pan-American copyright conventions includes any compulsory license provision.[217]

3. Universal Copyright Convention

The Universal Copyright Convention does not specify the particular rights or works subject to protection. These matters, on the principle of national treatment, are left to the domestic law of each country. Recordings are not deemed "published" works for convention purposes.[218]

Article V(1) of the Universal Copyright Convention grants exclusive translation rights, but paragraph 2 of article V provides for restriction of this right by domestic legislation of the contracting countries, subject to the following conditions:

> If, after the expiration of a period of seven years from the date of the first publication of a writing, a translation of such writing has not been published in the national language or languages, as the case may be, of the Contracting State, by the owner of the right of translation or with his authorization, any national of such Contracting State may obtain a nonexclusive license from the competent authority thereof to translate the work and publish the work so translated in

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[213] 1 Ladas, "The International Protection of Literary and Artistic Property," pp. 435–438 (1938). Various proposals for amendment are outlined at 1 id., at pp. 438–440.

[214] 1 Ladas, op. cit. supra note 213, at p. 419 et seq. Art. 13 expressly had no retroactive effect. For a comparative law study of compulsory license systems, and their effects under the Berlin Convention, and subsequent revisions, see 1 id., at pp. 430–435. Foreign courts have refused to apply compulsory license provisions to motion picture sound tracks. 1 id., at pp. 465, 469. See also note 196 supra. But see note 190 supra.

[215] 1 Ladas, op. cit. supra note 213, at pp. 413–414.

[216] See final protocol 3: "It is understood that the manufacture and sale of instruments for the mechanical reproduction of musical airs which are copyrighted, shall not be considered as constituting an infringement of musical copyright." The delegates may have been thinking of music boxes rather than of more modern instruments but the language was broader. 1 Ladas, op. cit. supra note 213, at pp. 412–413, 416.

[217] Nor any express recognition of recording and mechanical reproduction rights, with the exception of the Washington Convention, 1946. *Todamerica Musica Ltda.* v. *Radio Corporation of America*, 171 F. 2d 369 (2d Cir. 1948); *Portuando* v. *Columbia Phonograph Co.*, 81 F. Supp. 355 (S.D.N.Y. 1937); Sherman, "The Universal Copyright Convention: Its Effect on United States Law," 55 Colum. L. Rev. 1137, at pp. 1152–1153 (1955). The Washington Convention included in its scope of protection the exclusive right to "adapt and authorize general or individual adaptations * * * mechanically or electrically * * *" Art. II(d).

[218] Arts. I, II, IV. See note 71 supra.

any of the national languages in which it has not been published; provided that such national, in accordance with the procedure of the State concerned, establishes either that he has requested, and been denied, authorization by the proprietor of the right to make and publish the translation, or that, after due diligence on his part, he was unable to find the owner of the right. A license may also be granted on the same conditions if all previous editions of a translation in such language are out of print.

Article V then prescribes the procedure for obtaining a license if the copyright owner cannot be found, provides for equitable remuneration under the national legislation, for accuracy of the translation, and the scope of the license.

IV. Present Music Publishing-Recording Industry Practices in the United States

Composers of musical compositions have been primarily interested in the exercise of their rights (1) of publication in the form of sheet music; (2) of public performance for profit; and (3) of use in recorded form.[219]

Publication in the form of sheet music was, prior to the advent of radio, undoubtedly the most important of the foregoing rights. Use in recorded form, once limited to 78 r.p.m. phonograph records and piano-player rolls, has now expanded to extended-play (45 r.p.m.) and long-playing (33⅓ r.p.m.) records, motion-picture sound tracks, tape and wire recordings, etc.,[220] and today far exceeds in importance sheet-music use. Piano-player rolls, once of substantial significance, have slight present-day importance.[221] Public-performance-for-profit rights, which are beyond the scope of this study, are now generally licensed through performance societies (ASCAP, BMI, SESAC), which police the exercise of such rights in nondramatic form.[222]

Composers may be individual composers or cocomposers (frequently one of the music and the other of the lyrics),[223] or employees of others. In the latter case, the employers would be deemed the statutory authors of the compositions.[224] Such employer-employee relations are most frequently encountered with respect to arrangements of existing compositions, whether copyrighted or not. To arrange a copyrighted composition requires the consent of the copyright proprietor of such composition, and any derivative copyright in the arrangement is subject to the basic copyrights in such composition.

The Songwriters' Protective Association, organized in 1931, has over 2,000 composer-members. Some 300 to 400 music publishers have signed the SPA basic agreement.

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[219] See note 5 supra.

[220] See notes 7, 58 supra, pp. 50–52, infra.

[221] Approximately 250,000 rolls were sold last year by the last of the piano-roll makers, Imperial Industries Co. (Max Kortlander), for player piano devotees across the Nation. In 1926, the company produced 10 million rolls. The Wall Street Journal 1 (May 7, 1956).

[222] Rothenberg, "Copyright and Public Performance of Music" (1954); Finkelstein, "Public Performance Rights in Music and Performance Right Societies" in "7 Copyright Problems Analyzed" 69–85 (1952).

[223] Rosengart, "Principles of Co-Authorship in American, Comparative, and International Copyright Law," 25 So. Calif. L. Rev. 247 (1952); Redleaf, "Co-ownership of Copyright," 119 N.Y.L.J. 760, 782, 802, 822 (Mar. 1–4, 1948); Kupferman, "Copyright—Co-owners," 19 St. John's L. Rev. 95 (1945).

[224] 17 U.S.C. 26 (1952).

There are hundreds of music publishers throughout the United States, the vast majority of which are engaged in relatively small-scale operations. A few are music holding companies for stage show or motion picture producers, or subsidiaries or other affiliates of recording companies. Many of the independent music publishers, especially the longer established concerns, are members of the Music Publishers Protective Association.

In 1954, approximately 200 million phonograph records, totaling $185 million, were sold in the United States. Of these roughly 2 percent were imported. The American phonograph record industry earned approximately $24 million (or some 12 percent of its gross receipts) from exports of records and matrices. Most of the $24 million was earned by exporting only the master on which the foreign presser paid royalties proportionate to the number of pressings manufactured.

There is a constantly changing roster of approximately 1,000 music recording companies, societies, and producers in the United States, ranging from large-scale, well-established leaders of the industry, like RCA Victor, Columbia, Capitol, Decca, MGM, Mercury, and London, to relatively insignificant producers. In 1954 these 7 large firms accounted for 85 percent of the dollar volume of business; 25 others for an additional 10 percent; 5 percent of the volume being distributed among the remaining producers. As indicated above, the larger of the recording concerns sometimes have their own publishing affiliates, but these comprise a comparatively minor aspect of their operations.

All the larger concerns are both producers and pressers, i.e., they make both the original recordings (masters or matrices) and the pressings (finished disks as sold to customers). In 1954 the industry produced about 22,000 masters. Some of the smaller companies produce original recordings but have their disks pressed either by their larger competitors or by the so-called contract pressers of which there are between 20 and 30.

The 7 largest firms and many of the medium-size firms are members of the Record Industry Association of America, a trade association of some 50 members.

Among the smaller record producers are record pirates or "disk-leggers" who rerecord or "dub" recordings made by legitimate companies and sell them competitively.[225] Some fly-by-night producers, either in making original recordings or rerecordings, do not bother to seek permission or file notices of intention to use or account for or pay royalties. Copyright proprietors are without apparent remedy against an insolvent manufacturer except, of course, by way of injunction.[226]

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[225] *Miller* v. *Goody*, 139 F. Supp. 176, at p. 180, note 4 (S.D.N.Y. 1956):
"In this manner, they avoid having to pay the performers for their time, and they have the benefit of the initial recording company's talents in getting the finest rendition possible. Ordinarily, they also omit payment of the copyright, although, as far as the copyright law is concerned, even a pirate has the right to record copyrighted musical compositions provided he files notice of intent and pays the royalties."

[226] Id., at p. 182.

The tape recording industry is in its infancy, there being between 20 or 30 producers of tape recorders, tape phonographs and/or recorded tapes. At first, wire and tape recorded music was developed and used primarily by professionals, such as disk recording studios for the purpose of producing masters, and radio and television stations. Soon it came into use in providing background music services. About the same time, it began to enter the home, where it was taken up by enthusiasts for high fidelity recording and reproduction of music. About a million homes are now supplied with tape phonographs or similar equipment for playing tape recordings. Several firms have issued catalogs of recorded tapes. Some producers of recorded tape make original recordings, and others arrange to have such recordings made for them by recording studios, but probably the bulk of the recorded tapes are made from the master tapes or other matrices of established disk producers. Some 30 members comprise the Magnetic Recording Industry Association.[227]

Musical compositions might be: (1) in the public domain; (2) protected by common-law copyright; or (3) protected by statutory copyright. In each situation, recording industry practices obviously vary.

A. PUBLIC DOMAIN

If in the public domain, the musical composition may be freely used by anyone in any form or medium. Works enter the public domain when they are published without securing statutory copyright; when the statutory copyright is not properly maintained; at the end of 28 years if the original statutory copyright is not duly renewed; or at the end of 56 years, the original and renewal term of statutory copyright. Conceivably the recording and mechanical reproduction rights might be in the public domain while the other rights of statutory copyright are not.[228]

B. COMMON-LAW COPYRIGHT

Common-law copyright, sometimes called the right of first publication, actually includes full control prior to first publication over all uses, including recording.[229] Such common-law recording rights are not only perpetual, short of publication, but are also unqualifiedly exclusive since not subject to the compulsory license provision applicable to statutory copyright.

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[227] A more recent development is stereophonic tape which has two channels to reproduce the sound through 2 sets of amplifiers and speakers. New York Herald-Tribune Book Review, sec. 11 (June 3, 1956).

[228] See notes 56, 62, supra.

[229] *Harper & Bros.* v. *M. A. Donohue & Co.*, 144 Fed. 491, 492 (N.D. Ill. 1905), aff'd per curiam, 146 Fed. 1023 (7th Cir. 1906); *George* v. *Victor Talking Machine Co.*, 38 U.S.P.Q. 222 (D. N.J. 1938), rev'd on other grounds, 105 F. 2d 697 (3d Cir. 1939), cert. denied, 308 U.S. 611, 60 Sup. Ct. 176, 84 L. Ed. 511 (1939); see also Pickard, "Common Law Rights Before Publication" in "Third Copyright Law Symposium," pp. 298–336 (1940).

Where the musical composition is protected by common-law copyright, the general practice is for the composer to assign his common-law copyright to a music publisher.[230]

Included in the assignment is the right of the music publisher to secure statutory copyright in his own name. Prior to 1932, assignments provided for scant minimum royalties to composers, say, one-half to 1 cent per copy of sheet music or record, without provision for sharing proceeds from synchronization or foreign use.

With the organization of the Songwriters' Protective Association, standard forms of contract containing provisions protective of composers, and limited to the original term of copyright, provided a pattern. Thus, the 1932 form of contract called for the composer to receive one-third of the publisher's receipts from mechanical and synchronization rights, for the composer to share in the exploitation

[230] Klein, "Protective Societies for Authors and Creators" in "1953 Copyright Problems Analyzed" 19 at pp. 32–41. At pp. 38–39 are tabulated the relative positions of composers before SPA and under the 1947 SPA contract. For the forms of the 1947 contract and 1950 renewal contract, see id., at pp. 80–93, 94–106.

Before SPA	Under the 1947 SPA contract
Recording, transcription, and motion picture synchronization royalties to the writer were as low as 10 percent and usually not higher than 25 to 33⅓ percent.	Recording, transcription, and motion picture synchronization royalties to the writer are now 50 percent minimum. Par. 4(g) of the 1947 revised contract.
Foreign royalties were often omitted from contracts and even when included seldom exceeded 25 percent of the publisher's income from foreign countries.	Foreign royalties are now a minimum of 50 percent of the publisher's foreign income. Par. 4(c) of the 1947 revised contract.
It was the general practice for publishers to make "bulk" foreign deals for their entire catalogs. This often made it difficult to properly evaluate the earnings of an individual song.	No "bulk" deals are permitted subject to certain limited exceptions. Par. 4(j) of the 1947 revised contract.
Sheet music royalties were as low as 1 cent per copy.	Sheet music royalties are now a minimum of 3 cents per copy, except that when the writer and publisher agree to use the "sliding scale" providing for royalties up to 5 cents per copy, the minimum for the first 100,000 copies is 2½ cents per copy. Par. 4(b) of the 1947 revised contract.
An advance paid by a publisher to a writer for 1 song was usually deductible from the earnings of all that writer's songs in the publisher's catalog.	An advance can be deducted only from the earnings of the song on which it was paid. Par. 4(a) of the 1947 revised contract.
Publishers often required the repayment of an advance as a condition for the return of a song.	The advance remains the property of the writer. Par. 4(a) of the 1947 revised contract.
The publisher was not obliged to print or exploit the song, nor to return the unpublished song to the writer under any circumstances.	The publisher agrees to fulfill the following 2 requirements within 1 year: (1) Publish and place on sale regular piano copies; and (2) publish and place on sale orchestrations or secure the release of a commercial recording or pay an advance of $250. The writer is entitled to the return of the song upon written demand if the publisher does not fulfill the above requirements within 1 year. Par. 6 (a) and (b) of the 1947 revised contract.
Royalty payment periods were not specified in contracts and payments were made at the convenience of the publisher.	Regular royalty payment periods are specified in the contract. Par. 10 of the 1947 revised contract.
Many sources of a publisher's income were not mentioned in old contracts. Therefore, the writer did not share in the income from these sources.	The writer shares to the extent of at least 50 percent in all sources of income not specified in the contract. Par. 4(g) and (n) of the 1947 revised contract.
There was no agreement permitting the writer or his agent to examine the publisher's books.	The writer or his agent may examine the publisher's books. Par. 11 (a), (b), and (c) and 12 (a) and (b) of the 1947 revised contract.
Disputes between writer and publisher could be settled only by expensive actions in courts of law.	The writer has recourse to the simpler, speedier and much less expensive process of "arbitration" under the New York State arbitration law Par. 17 of the 1947 revised contract.

of the composition by subsequently developed methods, for the composition to be published in salable form within a specified period, for periodic royalty statements and payments, etc. This form was revised in 1939 to increase the composer's share of mechanical royalties to 50 percent, to require that the publisher hold these in trust for the composer, and to ban "bulk deals" by publishers. In 1947 the form was substantially revised to limit the assignment of rights in the United States and abroad to the original term of American copyright or 28 years, whichever be shorter; to provide for minimum sheet music royalties either on a straight 3 cents per copy basis or on a sliding scale (2½ to 5 cents per copy); to require publication in sheet music form and the making of phonograph records or $250 payment; to limit reassignment; to require SPA countersignature; etc. Renewal rights[231] are not included in the SPA form of assignment. In 1950, an SPA form of renewal contract was promulgated.

Not all publishers use the SPA forms. One form commonly used by prominent publishers is very short, but includes assignment of the copyright not only for the original term but also for the renewal term, provision for sheet-music royalties of 4 cents per copy of piano or dance orchestration arrangements, of 10 percent of the publisher's proceeds from the sale of copies of other arrangements, and of 50 percent of the publisher's proceeds from recording rights. Absent is any express covenant on the part of the publisher to publish sheet music or make or authorize recordings.

The music publisher might (1) record,[232] license the recording of, or list for licensing, the composition, and/or (2) publish copies of it in the form of sheet music.

If the publisher records, licenses recording, or lists for licensing, without publishing copies, two alternative procedures are possible: (1) continued reliance on common-law copyright; or (2) securing of statutory copyright in the composition as an unpublished work.[233] Since the advantages of the former were once thought to outweigh those of the latter, some publishers preferred to rely, absent publication in sheet music form, on common-law copyright.

A growing number of recent cases, however, has held or intimated that the sale of a recording constitutes a divestitive publication of the recorded composition, resulting in the loss of all common-law rights therein.[234] Unless this present judicial trend be reversed, the more cautious alternative of securing statutory copyright in the composition before selling recordings thereof, should soon replace the older practice completely.

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[231] Bricker, "Renewal and Extension of Copyright," 29 So. Calif. L. Rev. 23 (1955); Kupferman, "Renewal of Copyright—Section 23 of the Copyright Act of 1909," 44 Colum. L. Rev. 712 (1944); Brown, "Renewal Rights in Copyright," 28 Cornell L.Q. 460 (1943). See note 57 supra.

[232] Through such publisher's recording division.

[233] See note 59, supra, pp. 49–52, infra. Notice of use would be filed. See note 61, supra.

[234] See note 71, supra.

C. STATUTORY COPYRIGHT

Statutory copyright might be secured in the musical composition as (1) an unpublished work, or (2) a published work.[235]

Statutory copyright might be secured in an unpublished work by registration and deposit of a copy.[236] If the work be thereafter published, a second registration and deposit of copies are required as conditions precedent to enforcing such copyright.[237]

Statutory copyright is secured in a published work by publication with proper statutory copyright notice.[238] Registration and deposit of copies are conditions precedent to enforcing such copyright.[239]

Otherwise, statutory copyright in an unpublished work and statutory copyright in a published work are identical. The duration is the same; [240] copies published or offered for sale in the United States by authority of the copyright proprietor must bear the statutory copyright notice; [241] recording and mechanical reproduction rights are protected,[242] subject to the compulsory license provision.

If mechanical reproduction rights are not exercised by the copyright proprietor, anyone interested in recording the work must obviously negotiate a license to make such use. No such negotiated license may, in view of the application of the compulsory license provision, be exclusive. Once mechanical reproduction rights are exercised, anyone, under the compulsory license provision, may make "similar use" of the work at the statutory royalty rate.[243] This consequence, of course, means that the statutory royalty rate operates as a ceiling for any negotiated royalty rate. The first company to record is sometimes charged a lower royalty as a concession for chancing an untested market. If a composition gains public acceptance, competing companies, within a matter of days, can issue their recordings of the composition under the compulsory license provision or under negotiated licenses.[244]

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[235] Copyright is secured in an unpublished musical composition by registration and deposit, that is, by the deposit in the Copyright Office of one complete copy, an application Form E (regular or "foreign," as the case may be), and the $4 registration fee. If the musical composition is later published, the published copies should contain the proper copyright notice, and the registration and deposit requirements with respect to published works would apply. Copyright is secured in a musical composition in which a claim to copyright was not registered prior to publication, by publication of the composition with proper notice of copyright. Promptly after publication with notice of copyright, two complete copies of the best edition should be deposited in the Copyright Office, along with an application on Form E and the $4 registration fee. If a new version of a musical composition is made, copyright may be secured in any new copyrightable matter contained in such new version, 17 U.S.C. 12, 10, 11, 18, 7 (1952); Copyright Office Circular No. 58 (September 1955). In the fiscal year 1955, 57,527 musical compositions were registered. "Annual Report of the Register of Copyrights for the Fiscal Year Ending June 30, 1955," p. 9. Statutory copyright endures for an original term of 28 years, 17 U.S.C. 24 (1952) ("28 years from the date of first publication"). In the case of works not produced for sale, the 28-year period runs from the date of registration and deposit. *Marx* v. *United States*, 96 F.2d 204 (9th Cir. 1938). Renewal for an additional term of 28 years may be had by timely application. See note 231 supra. Approximately one-third of the 1927 Class E registrations were renewed in 1954. "Annual Report of the Register of Copyrights for the Fiscal Year Ending June 30, 1955," p. 12.

[236] See notes 57, 73, 235, supra.

[237] Ibid.

[238] See notes 57, 72, 73, 74, 235, supra.

[239] See notes 57, 62, 73, 235, supra.

[240] See note 235, supra.

[241] See note 74, supra.

[242] See note 57, supra.

[243] See note 59, supra, pp. 49–52, infra. Notice of use would be filed. See note 61, supra.

[244] According to one observer, the existence of the compulsory license provision has a tendency to smother competition for new and fresh musical material, thus aborting incentive to author and composer and accounting, in part, for the monotony, repetition and impersonal music offered to the American public. Schulman, "Effect of the Copyright Act of 1909 on the Quality of American Music" (address before annual meeting of National Music Council, May 16, 1956).

Practices vary. Music publishers or their trustees [245] or affiliates [246] appointed to hold recording rights file notices of use and list their compositions available for recording. Recording companies, usually attempt to negotiate a license, relying on the compulsory license provision only as a last resort. In the latter event, the recording company would mail a notice of intention to use to the copyright owner and the Copyright Office, and monthly account for and pay to such owner the statutory royalty of 2 cents per composition per side, regardless of the selling price or size or speed of the recording. Where several compositions are to appear on the same side, such as in the case of a medley, the statutory royalty would be 2 cents per composition. For this reason, medleys of several copyrighted compositions are not frequently recorded in the absence of a negotiated license containing concessions by the copyright owner.

Various forms of license are used in licensing the mechanical reproduction of musical compositions.

The Music Publishers Protective Association has two basic forms: (1) a short-form license, where only a one-speed recording is to be released; and (2) a long-form license, where the recording is to be released at more than one speed. Under either form, an MPPA representative serves as publisher's agent-trustee.

The MPPA short-form license follows the compulsory license provisions by prescribing a royalty at the statutory rate on the basis of records manufactured and in other respects [247] except that (1) accounting and payment of royalty shall be quarterly rather than monthly, (2) failure to make such accounting and payment constitutes ground for revocation of the license, and (3) serving and filing of notice of intention to use under section 101(e) of the Copyright Act are waived.[248]

The MPPA long-form license is identical with the short-form license except that the royalty is (1) on the basis of records manufactured *and sold* and (2) at the following schedule of rates (based on manufacturer's suggested retail price):

78 revolutions per minute records:
- 35 cents or less_____ 1¼ cents per side.
- 36 to 50 cents_____ 1½ cents per side.
- 51 to 60 cents_____ 1¾ cents per side.
- More than 60 cents___ Statutory rate.

Extended-play 45 revolutions per minute records:
- $1.40 or less_____ 1½ cents per selection, per side.
- More than $1.40_____ Statutory rate per selection, per side.

Longplaying 33⅓ revolutions per minute records:
- $2.85 or less_____ 1½ cents per selection, per side.
- $2.86 to $3_____ 1¾ cents per selection, per side.
- More than $3_____ Statutory rate per selection, per side.

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[245] E.g., the Harry Fox Office (Music Publishers Protective Association), which represents a substantial number of music publishers in this respect.

[246] E.g., Music Publishers Holding Corp., a Warner Bros. subsidiary.

[247] Such a license agreement has been held a substitution for, rather than a recognition of, a compulsory license under sec. 1(e), with the statutory royalty rate, provision for triple royalty in event of default in payment, etc., incorporated by reference. *Edward B. Marks Music Corp.* v. *Foullon*, 171 F. 2d 905, 908 (2d Cir. 1949) ("So far as the parties chose to incorporate into this [Mechanical License Agreement] any of the terms of sec. 1(e), these of course became the measure of their relations like its other terms; but that was only by virtue of the incorporation. Ex proprio vigore the statute fixed nothing between them.")

[248] Such waiver would appear redundant, since sec. 101(e) requires notice of intention to use "in the absence of a license agreement" when reliance is "upon the compulsory license provision." See note 247, supra.

Other prevalent forms of mechanical reproduction license are strikingly similar to the MPPA long-form license, especially so far as the royalty schedule is concerned. Some forms, instead of merely referring to the "statutory rate" for certain types of records sold, specify 2 cents. Some forms set forth the royalty rate "for * * * records" of the licensed composition rather than "per selection, per side," but the former is given the same meaning as the latter. One form covers Canada as well as the United States, setting forth the same royalty schedule for records sold in either nation. Another form covers the United States and all countries of the Western Hemisphere where such rights are controlled by the licensor but provides that in Argentina, Brazil, Chile, Urguay, and Paraguay the licensee "shall pay the regular current royalty payable for such countries, computed and paid in U.S. currency at the rate of exchange prevailing at the time of payment." Following the usual royalty schedule, one form has added a provision for a royalty of one-fourth cent per minute of playing time (or fraction thereof) for all extended-play and longplaying records of compositions of an extended nature, with a minimum royalty of 2 cents. In cases of musical compositions from stage shows or motion pictures, a release date for recordings might be fixed.

Where forms of license are used, the license determines the rights of the parties, and problems of construing the statutory compulsory license provisions, except to the extent that they are incorporated into the license, are avoided. If the availability of the compulsory license provision is doubtful, the possibility of its being available undoubtedly encourages the negotiation of licenses at royalty rates comparable to the statutory royalty. Thus the question of the applicability of the compulsory license provision to extended-play and longplaying records, tape and wire recordings, and motion picture sound tracks [249] has apparently never been litigated in this country.[250]

In sound motion picture films, music might serve several functions: (1) as background or thematic music to create audience mood; (2) as song or dance numbers in a musical comedy or revue; (3) as a musical narrative, such as in an operetta; or (4) as a title song (with advantageous promotional tie-ins). Motion picture producers, when using copyrighted music in sound tracks, negotiate for synchronization rights and do not invoke the compulsory license provision.

Like motion picture producers, the broadcasting industry, in making records, electrical transcriptions,[251] magnetic tape,[252] sound motion

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[249] Even prior to *Jerome* v. *Twentieth Century-Fox Film Corp.*, 67 F. Supp. 736 (S.D.N.Y., 1946), reviewed on other grounds per curiam, 165 F. 2d 784 (2d Cir. 1948), when it was assumed, at least in certain circles, that a sound track was within sec. 1(e). no one ever attempted to invoke the compulsory license provision. Dubin, "Copyright Aspect of Sound Recordings," 26 So. Calif. L. Rev. 139, 147, note 50 (1953). See notes 58, 59 supra.

[250] The foreign cases generally have held that sound-track use was not within the respective foreign-law compulsory license provisions invoked. 1 Ladas, op. cit. supra note 213, at 465–469. But see note 190 supra; cf. note 213 supra.

[251] Electrical transcriptions, developed over the past 15 years, are essentially 16-inch. 33⅓ revolutions per minute disk recordings, each side of which can contain an entire 15-minute program. They may be "processed records" or "instantaneous recordings" (taken off the line or off the air and ready for immediate playback). McDonald, "The Law of Broadcasting" in 7 Copyright Problems Analyzed 31, at p. 36 (1952).

[252] Much of the recorded program material now heard is from tape or from recordings of tape after final editing. Tape may be reclaimed, is easily edited, and has relatively no surface noise. There is also a system of wire recording largely confined in broadcasting to portable equipment used in man-on-the-street interviews and the like. McDonald, op. cit. supra, note 251, at p. 37.

pictures,[253] or kinescope recordings [254] involving copyrighted music for radio and/or television use, negotiates for the necessary recording rights.[255] For example, it has been a longstanding custom to make special payment for recording a copyrighted composition by electrical transcription at the rate of 25 cents for each station expected to broadcast the composition. In the case of production numbers from shows or motion pictures, 50 cents per station has been paid; in the case of record libraries intended for repeated use, an annual fee is usually worked out.[256] Lump-sum payments (e.g., $10) are made for the license to record musical compositions in sound motion pictures or by kinescope or tape recordings for television purposes.

Motion picture films which are sold or leased usually bear the statutory copyright notice on the ground that the film is a copy of at least the visual elements involved and the sale or lease thereof constitutes publication.[257] Such copyright notice functions to secure copyright in all the copyrightable components of the film, and to maintain any subsisting copyrights in the copyrighted components thereof. In the past, copyright notices have generally not been affixed to records, tape, wire or other recordings.[258] In view of the recent trend of cases to the effect that the sale or lease of such recordings constitutes a publication of the recorded composition,[259] the cautious practice now would appear to be to secure statutory copyright in the composition. Whether or not the copyright notice needs to be affixed to all such recordings sold or leased in the United States by authority of the copyright proprietor [260] is a very debatable point. Apart from the legal question there is the serious practical problem of inserting proper copyright notices on already overcrowded labels of phonograph recordings, especially in the case of extended-play and long-playing records containing several compositions of different proprietorships and/or copyright dates. Copyright proprietors when authorizing recordings of musical compositions have rarely requested the insertion of copyright notices.

V. Problems in Evaluating Compulsory License Provisions of Present Copyright Law

The fundamental question in any evaluation of the compulsory license provisions is whether the compulsory license principle should be retained or eliminated.

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[253] Made with motion picture cameras for general use or primarily for exhibition to paying audience, for television, or for rental for home use, education, promotion material, etc. McDonald, op. cit. supra note 251, at p. 37.

[254] Kinescope recording equipment combines a tiny television receiver and electronically geared motion picture camera. From the negative kinescope recording made off the air or as a "dry run" (either in the "live manner" or by stop-and-start technique), positive prints are made for distribution to television stations for telecasting and file purposes. The use of kinescope recordings permits syndication of a program or transmission on a network basis without the expense involved in coaxial cables and radio circuits. McDonald op. cit. supra note 251, at p. 37. TV tape recordings of visual and audio elements are replacing kinescope recordings.

[255] McDonald, op. cit. supra note 251, at p. 49. Recording may be for purposes of original broadcast, delayed broadcast, rebroadcast and/or file uses.

[256] Ibid.

[257] *Blanc* v. *Lantz*, 83 U.S.P.Q. 137 (Cal. Super. Ct. 1949); *White* v. *Kimmell*, 94 F. Supp. 502 (S.D. Cal. 1950). Projection of a motion picture on a screen might constitute copying but not publication. *DeMille Co.* v. *Casey*, 121 Misc. 78, 201 N.Y. Supp. 20 (Sup. Ct. 1923); *Patterson* v. *Century Productions, Inc.*, 93 F. 2d 489 (2d Cir. 1937), cert. denied, 303 U.S. 655, 58 Sup. Ct. 759, 82 L. Ed. 1114 (1938).

[258] See note 74, supra.

[259] See note 71, supra.

[260] See note 74, supra.

A. COMPULSORY LICENSE PRINCIPLE

This principle was worked out in 1909 as a compromise between those interests which, fearing monopoly, favored continued nonrecognition of recording and mechanical reproduction rights, and those which, stressing the rights of composers and freedom of contract, urged absolute recognition. The resulting qualified recognition, based upon the compulsory license principle, emerged from some 3 years of pre-1909 controversy.[261] The 1909 compromise provided for (1) continued access to compositions by manufacturers of phonograph records and piano rolls, and (2) payment by such manufacturers to composers (or their assigns) of what was then considered a reasonable royalty.

Whether the 1909 compromise was sound in the light of the then-existing situation has been much debated.[262] Be that as it may, the situation today is substantially different.

In 1909, the rights under consideration had been held nonprotectable and hence were available to all. The Aeolian Co. and the then major music publishers had allegedly made exclusive contracts which would become effective upon the recognition of mechanical reproduction rights by court decision or congressional enactment.[263] This potential monopoly, whether real or imagined, was regarded as a serious threat at a time when effective antitrust regulation was still in its infancy.[264]

For almost 50 years now the recording industry has relied on the compulsory license principle. Forms of licensing arrangements, royalty rate schedules, and other industry practices have been predicated upon the compulsory license provision and have become practically standardized. The principal difference between a negotiated license and a compulsory license is that the former usually calls for quarterly rather than monthly royalty reports and payments, dispenses with the notice of intention to use, and prescribes a royalty scale below the statutory royalty of 2 cents per composition per side. Without the compulsory license provision, an exclusive license might be negotiated at substantially higher royalty rates,[265] or even nonexclusive licenses might be negotiated at higher royalty rates in the absence of a statutory ceiling.

Whether the royalty considered reasonable in 1909 is reasonable today is discussed below.[266]

Contentions that the compulsory license principle is unconstitutional obviously would, if sustainable, be sufficient reason for eliminating the principle. However, the principle was not incorporated in the statute to impair existing rights, but was inserted as part of the definition of rights then being recognized for the first time. Hence there would seem to be no deprivation of property without due

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[261] See pp. 2–12, supra.
[262] See pp. 21–36, supra.
[263] See note 44, supra.
[264] See note 6, supra.
[265] Whether this would result in more or less aggregate recording royalties to composers has yet to be tested. The present arrangements for the exclusive recording services of outstanding artists and performers, being somewhat analogous, might offer helpful information in this respect. Interestingly, the royalty scales have tended to be the same for all compositions whether protected by common law copyright (not subject to compulsory license provision) or by statutory copyright.
[266] See pp. 54–56, infra.

46476—60——5

process of law or taking of private property for private use without just compensation. Nor should the constitutional phrase, "the exclusive Right," preclude Congress from subjecting one aspect thereof to compulsory licensing, especially since such right is exclusive until exercised.[267]

To the extent that the present compulsory license provision is of doubtful application with respect to certain uses or operates unfairly under certain circumstances, improvement is possible, as discussed below, without necessarily abandoning the compulsory license principle.

If the compulsory license principle is to be retained, certain subsidiary considerations become relevant.

B. REPRODUCTION PERMITTED UNDER COMPULSORY LICENSE

The framers of the compulsory license provision in 1909 obviously had in mind old-speed phonograph records and player-piano rolls, bands, and cylinders.[268] These were the recording devices then known; they were the ones discussed at the hearings; they are the ones described or named in the statute; they are the ones to which the statutory royalty system was intended to apply. Whether the compulsory license principle applies to extended-play and long-playing records, tape and wire sound recordings, and other types of recordings, such as motion picture sound tracks, kinescope recordings, and television tape recordings, has not been resolved. Obviously the former are more closely analogous to old-speed phonograph records and piano player rolls and cylinders than are the latter. Any revision of section 1(e), then, should clearly differentiate between the various types of recordings, whether by means known in 1909, now or hereafter, and should specify which of such types of recordings, if less than all, are intended to be subject to compulsory licensing. Furthermore, the statutory royalty rates should be adjusted to reflect the different types of recording possible under compulsory licensing.

The "similar use" [269] permitted by compulsory license should also be more clearly defined. Competition in the recording industry, especially as among different types of recordings, would undoubtedly be promoted if the authorization of a recording of one type subject to compulsory licensing, as above discussed, gave rise to a compulsory license with respect not only to that particular type of recording but also to the remaining types subject to compulsory licensing.

Whether or not a compulsory license to record a composition impliedly includes the right to make necessary and proper arrangements of the same, and the limitations on such right of arrangement, require clarification.

C. STATUTORY ROYALTY RATE

Part of the 1909 compromise was the provision for the payment to composers (or their assigns) of what was then considered a reasonable royalty: 2 cents per part manufactured (e.g., per side of old-speed

[267] See note 66, supra; pp. 4–5, 19, supra.
[268] See notes 58, 59, supra.
[269] See note 59, supra.

record, piano roll), 2 cents being the then approximate equivalent of 5 percent of the manufacturer's selling price.[270]

Whether such royalty rate, assuming it was reasonable in 1909, remains reasonable today, would appear worthy of reexamination in view of the decreased purchasing power of money, the subsequently developed types of recordings (assuming the compulsory license provision be applicable to them), and the substantially increased manufacturer's selling prices.

Obviously a royalty fixed by statute may be stated in terms of amount (as in the present statute), or percentage (possible bases: manufacturer's price, retail price), or a combination thereof (e.g., higher or lower of the two), or the rate fixed in the original negotiated license which activates the compulsory license provision. The fixed amount royalty has the advantage of simplicity but obviously should not be the same for longer and shorter recordings. A single flat royalty might have been sufficient for old-speed records and piano rolls (somewhat mollified in the latter case by negotiating royalties for the use of the words of the musical composition).[271] A royalty schedule, with different amounts stated for different uses (per present practice), would appear desirable in the case of extended-play and long-playing records, tape and wire recordings, and other types of recording under compulsory license, or, in the alternative, a percentage-of-price royalty which would, in application, reflect the length of the recording since the length would be reflected presumably in the price. To base the royalty on that fixed in the original negotiated license might have to take into account such variables as the specific provisions of such original lisense and to provide an alternative basis where the proprietor makes his own recording.

The royalty can, of course, be based on records manufactured in the United States, the present statutory method, or on records sold here, the present negotiated method, or both. The sales basis involves such problems as complimentary distributions to disk jockeys and the like and recordings sold and returned, and omits royalties on recordings manufactured in the United States but sold abroad. For the royalty on manufacture, the manufacturer is liable. As between the small record company, society, or other producer, on the one hand, and the contract pressing plant, on the other, the latter is often better established and more financially responsible. While both presumably would be liable for royalties to the copyright proprietor on parts manufactured, the former, as between it and the latter, should be primarily liable. However, because of the secondary liability of the pressing plant, the problem of loss of royalties through insolvency is minimized.

Whether the royalty is per recording, or per side of recording, or allocable if more than one composition is involved, are matters requiring careful definition.[272]

If the royalty is not fixed by the statute, some machinery, either administrative or judicial, would have to be established (and sup-

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[270] See p. 10, supra.
[271] See note 80, supra.
[272] See note 60, supra.

ported) to fix the royalty either by general regulations or individual action.[273]

Periods and methods of accounting for, and payment of, the royalty should be set forth in the statute in such a way that the composer (or assigns) is assured honest, periodic accounting and prompt payment. Penalties for failure to so account and pay should also be prescribed.[274] Since the copyright owner does not select his licensees, he should have the right of reasonable inspection of the manufacturer's books and records in order to check on the accounting. For the same reason, royalty claims might be collected, in advance, in behalf of the copyright owner, by pressing plants from the licensee under a compulsory license. Perhaps such claims ought to enjoy some preferential status in the event of the insolvency or bankruptcy of a licensee under a compulsory license.

D. PROCEDURAL IMPLEMENTATION

The present section 1(e) requirement[275] that the copyright owner file a notice of use, when recording rights are to be exercised, may be desirable in order to enable interested recording companies to determine which compositions are available for recording under compulsory license. As a practical matter, of course, some recording companies actually commence recording before clearing the rights. Negotiated licenses are attempted before resort to the compulsory license provision. The Copyright Office would seem to be the logical place of filing. Changes in filing procedure would seem to be matters within the discretion of the officials of that office. The filing fee should probably be sufficient to cover the costs involved. The present penalty for failing to file is the barring of an action for infringement of recording rights. This would not appear to be overly burdensome.

The present section 101(e) requirement[276] that the prospective licensee under a compulsory license send to the copyright owner a notice of intention to record the composition would appear to be a slight burden under the circumstances, and should undoubtedly be continued as a means of letting the copyright owner learn of prospective recording of his composition. Appropriate penalties for failure to give such notice should be prescribed.[277] Negotiated licenses usually waive this requirement.

E. EXTENSION OF COMPULSORY LICENSE PRINCIPLE TO NONMUSICAL WORKS

The arguments relating to the retention of the compulsory license principle with respect to musical works do not necessarily apply in the case of nonmusical works. Dramatic works have been protected against recording since 1909, and nondramatic literary works since 1953.[278] When such recording rights were recognized, there was no agitation to subject them to compulsory licensing. There is not and never has been any threat of monopoly; the scale of operations is substantially smaller; there has been no industry reliance on lack of

[273] See pp. 34, 38, supra.
[274] See pp. 18–21, supra; note 65, supra.
[275] See note 61, supra.
[276] See notes 64, 65, supra.
[277] See pp. 18–21, supra; note 65, supra.
[278] See notes 4, 191, supra.

recognition of such rights or on any compulsory license provision relating to the same. On the other hand, the composer, so far as recording rights are concerned, has a status inferior to that of the creators of other copyrightable works.

F. STATUTORY LANGUAGE

Any revision of the present compulsory license provisions might well eliminate the awkward constructions and inconsistent phraseology of the present provisions.[279]

G. EFFECTIVE DATE OF AMENDMENTS

Any amendments which substantially affect rights in works in which statutory copyright is subsisting should, following the example of the act of 1909, probably not be retroactive. If the revision represents substantial changes, its effective date might well be delayed for a sufficient period to enable the various interests involved to make the necessary adjustments in their trade practices.[280]

VI. Recapitulation of Major Issues

A. Should the principle of the compulsory license for the mechanical recording of music be retained or eliminated?

B. If that principle is retained:

(1) What types of recording should be, and what types should not be subject to compulsory license?

(2) If more than one type of recording is subject to compulsory license and the copyright proprietor authorizes the making of one such type, should another person be allowed to make a different such type under compulsory license?

(3) What should be the limitations on the right of arrangement incidental to recording under compulsory license?

(4) Should the royalty rate be a flat sum per composition (or per unit of playing time), a percentage of the retail sales price (or of the manufacturer's price), or something else? What should the flat sum or percentage figure be? Should there be any provision for allocation? How should a composition which is recorded on two sides of a recording be treated?

(5) Should the royalty rate be applied to records manufactured in the United States, to records sold in the United States, or on some other basis? Should only the manufacturer be liable for the same?

(6) Should the present provisions requiring the copyright proprietor to file a notice of use, and making his failure to file such notice a defense to any suit for infringement of recording rights, be retained, modified, or eliminated?

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[279] See pp. 13–15, supra.

[280] See p. 26, supra. Such matters as the "jukebox exception," protection of musical compositions of foreign authors against mechanical reproduction, and the various matters discussed in notes 68–74, supra, are beyond the scope of this study.

(7) Are the present provisions requiring the manufacturer to give notice of intention to use and to account and pay royalties monthly, adequate to safeguard the copyright proprietor? If not, what other and different safeguards should be provided for?

(8) Should the present penalties for the manufacturer's failure to fulfill the conditions for exercising the compulsory license be retained, modified, or eliminated?

C. Should the compulsory license principle be extended to mechanical recording rights in other classes of works or to other rights in musical compositions and/or other classes of works? If so, what should be the detailed features thereof?

COMMENTS AND VIEWS SUBMITTED TO THE COPYRIGHT OFFICE

ON

THE COMPULSORY LICENSE PROVISIONS OF THE U.S. COPYRIGHT LAW

CONTENTS

COMMENTS AND VIEWS SUBMITTED TO THE COPYRIGHT OFFICE ON THE COMPULSORY LICENSE PROVISIONS OF THE U.S. COPYRIGHT LAW

By Herman Finkelstein

SEPTEMBER 25, 1956.

I have read rather carefully Harry Henn's paper on the compulsory license provisions and feel that he did a remarkable job of research and analysis. He is certainly to be congratulated on that phase of the report.

There is no need in commenting on those aspects of the report with which I agree. My comments at this time will be limited to Harry's observations with respect to the practical aspects of the problem.

At page 54 of his report, Harry says:

"Competition in the recording industry, especially as among different types of recordings, would undoubtedly be promoted if the authorization of a recording of one type subject to compulsory licensing, as above discussed, gave rise to a compulsory license with respect not only to that particular type of recording but also to the remaining types subject to compulsory licensing."

This statement assumes that the compulsory license provision promotes healthy competition in the recording industry. I think it does just the opposite. What do you suppose would happen with the American theater if all the Broadway houses could produce "My Fair Lady" on a compulsory license basis? Most of the theaters would be putting on productions of that show and thus limit the opportunity of other playrights to have their new plays presented to the public. That is just what is happening in the field of music. All the recording companies concentrate on the same numbers with the result that a song must be either a complete success or a total failure. There is nothing in between. Unless a song can be recorded today, there is no market for it. The compulsory license provision results in limiting the number of songs that can be projected at a given time. If the record manufacturers could get exclusive rights, they would be working on *different* compositions. This would further the purpose of the copyright law which is to encourage authorship.

Unlike the situation in 1909, it would also encourage competition legitimately among record companies. Today the small record company cannot get the full benefit of a hit which it may create because immediately one of the large record companies issues a covering record by a more outstanding artist who is under contract with them.

Does Mr. Henn know these facts, and, if so, does he think that, in spite of them, the compulsory license provision promotes competition and that, if anything, it should be extended rather than restricted?

It seems to me that this is one of the first things that the panel should discuss on a practical level.

This is the only criticism I wish to make of Harry's splendid job at this time, except to compliment him on the contribution to the copyright law represented by that part of his paper which deals with the historical and legal aspects, as distinguished from the economic aspects.

Sincerely,

HERMAN FINKELSTEIN.

By Joseph S. Dubin

SEPTEMBER 25, 1956.

I have delayed forwarding my comments on the Henn compulsory license study until this date in order to have an opportunity to completely go into the matter. The subject itself has always been of extreme interest to me, and I have been wrestling with various thoughts and did not resolve them until this late date.

(*a*) I believe the principle of the compulsory license, whether mechanical or music, must and should be retained. Its elimination, in my opinion, might give rise to the creation of a monopolistic monster, and I do not believe the fears that existed in 1909 should be brushed aside merely because of the passage of years. The monopoly that I speak of would affect both the creator and the manufacturer. The retention of the principle of compulsory license tends to promote free and open competition.

(*b*) Retaining the principle—

(1) Section 1(e) should be amended to delete the following language "upon the parts of instruments serving to reproduce mechanical, musical works" wherever such language is found, and substituting therefor the following language "or other contrivances, by means of which sounds may be reproduced, and by means of which the work may be mechanically performed."

The substituted language is similar to that found in section 19 of the British Copyright Act of 1911, and section 19 of the Canadian copyright law of 1921.

(2) The recording should be required to be made independently, and not by duplicating one made by another manufacturer, but, if there has been a reproduction by one contrivance, coming within the proposed amended definition, anyone else should be allowed to reproduce by means of another mechanical contrivance.

(3) There should be no limitation on the right of arranging incidental to recording under compulsory license.

(4) I believe that the royalty rate should continue to be a flat sum per composition, but as yet I have come to no conclusion regarding the details. There should be a provision for allocation, and an equitable arrangement for a composition recorded on two sides.

(5) The royalty rate should be applied not only to records manufactured in the United States, but to records sold in the United States as well. I see no reason why anyone other than the manufacturer should be liable.

(6) The present provisions regarding the filing of a notice of use, etc., should be retained.

(7) There should be a stricter supervision in connection with the requirements on the part of the manufacturer to account, etc. As yet I have not worked out these details.

(*c*) I do not believe that the compulsory licensing principles should be extended to mechanical recording rights in other classes of work, but should be restricted to music.

(*d*) I fear that if the compulsory licensing provision is eliminated, in connection with such elimination will arise the principle of statutory protection of a recording, and, a necessary step therefrom, protection under the copyright law of the performance of a performing artist. I have always maintained that the protection of the performing artist should be governed by contract only, and should not be granted by statute.

I have deliberately presented my views in sketchy form, and will be happy to support them as and when requested.

With kindest personal regards, I remain,

Sincerely yours,

JOSEPH S. DUBIN.

By Horace S. Manges

SEPTEMBER 27, 1956.

In reply to your letter of August 15, which arrived while I was on vacation, my view is that the principle of the compulsory license should be eliminated from the copyright law. I want to take this opportunity to pay tribute to the study prepared by Harry Henn, which you were kind enough to send me. This is certainly a scholarly work of first magnitude.

* * * * * * *

Sincerely yours,

HORACE S. MANGES.

By Edward A. Sargoy

SEPTEMBER 28, 1956.

I have read with great interest and care the illuminating study by Prof. Harry Henn on "The Compulsory License Provisions of the U.S. Copyright Law," and appreciate your invitation to comment.

I feel that Harry Henn is to be complimented on this very thorough presentation of the various facets of this very difficult question. With its complete tracing of the legislative history, prior to 1909, of the compulsory 2-cent royalty provision for musical recordings, with its history of the many proposed bills since 1909 to abolish, strengthen, modify, and expend its application to other fields, as the case may be, with its comparison of the laws of other countries and under international arrangements, and an indication of how it functions under present music publishing-recording industry practices, all so thoroughly documented with footnotes, I feel that an exceedingly useful background has been given from which to focus more clearly on the conflicting points of view involved. I would gather this is the major function of these preliminary studies, rather than to present a special view, and in this respect the study has admirably fulfilled such purpose.

It is on fundamental issues that this question will ultimately have to be resolved. The lack of clarity and loose language of the present law, particularly as to the types of recordings to which it is applicable, and the confusing measures of damages for users failing to abide by the provisions of section 1(e), as carefully related in the study, could easily be remedied if the principle of compulsory licensing were to continue to be accepted. The latter is, of course, our paramount problem.

In his recapitulation of the major issues (pp. 57–58), Harry Henn poses three major questions. These are substantially as follows: (1) shall the principle of compulsory licensing be retained or eliminated; (2) if retained as to musical recordings, how shall it be amended (outlining a variety of considerations); and (3) shall it be extended to other rights in musical works, indeed to other classes of works, and if so, to what extent.

As to questions 1 and 3 above, the study merely poses them, after a thorough historic background showing when, if at all, they have been presented in prior legislative attempts. Under question 2 the study goes into some detail as to a number of the points which will have to be resolved, were we to accept continuation of the present principle of compulsory licensing of musical recordings. Were we to do so, I don't think there would be too great a difficulty in equitably resolving the various questions put by Harry Henn, such as, for example, the types of musical recording to which the principle should be applicable, whether such types were to be restricted or interchangeable, the extent of rights of incidental arrangement, whether rates were to be flat or percentage, per composition, per unit of playing time, per side, based on the retail or the manufacturer's price, the number sold or the number manufactured, foreign sales or manufactures as well as domestic, and the appropriate administrative and damage provisions for effectively handling returns from compulsory licensees. I think there could also be considered in this regard the principle of full accessibility of the musical work to any record manufacturer, if the copyright owner does permit any recording at all, on the basis of such terms of payment and license as would be selected and set by the copyright owner with his first negotiated recording licensee, regardless of or without fixed statutory royalty rates of any kind, and to require the owner to deposit his first negotiated license with the Copyright Office for the guidance of other record manufacturers, as in certain of the Vestal bills (H.R. 17276, 69th Cong.; 13452, 70th Cong.). There might also be considered the possibility of exclusive licensing for a limited period of 6 months, a year, or two, or more, with full accessibility thereafter to other manufacturers. There might also be considered requirements for appropriate security for the payment of royalties by compulsory licensees, to counter the possibility of use of the work by irresponsible manufacturers.

I am not aware of any present pressures, under question 3, to extend compulsory licensing or full accessibility to other rights in music or to other kinds of works. The major problem to my mind, at this stage, is in obtaining an answer to question 1, whether we shall retain at all the present or any form of compulsory licensing or full accessibility, in a general revision of our laws.

I approach this question strictly as a member of the public, never having had a matter or a client concerned in one way or another with the problem. My personal predilection in a general way may be described as an inclination in prin-

ciple against any statutory compulsory licensing system whereby the personal property of authors, or any other kind of private property, could be used by individuals for personal profit for purposes not affected with the public interest, without negotiation with or permission of the owner, on the basis of full accessibility at royalties established by the statute or by the owner's first deal with a selected licensee.

There may, however, be strong economic or social arguments in favor of such full accessibility which I am sure will be presented by such interests as are concerned with preserving such principle in the music recording industry, and I am sure the other side will have powerful economic and social arguments to the contrary. I should like to hear and weigh them. I do not recall any serious contention, for example, that the right, during the term of copyright, to reprint a story, poem, play, photograph, music, or book, or to adapt, produce, or perform the same for the theater, radio, television, or in motion pictures, or to make duplicates of the motion picture film and to distribute the same for public and private exhibition, should be fully accessible to anyone, without negotiation or license from the copyright owner, at royalties established by the statute or by the owner's agreement with his first authorized licensee. I think the overriding principle of general exclusivity, with its right to select exclusive as well as nonexclusive licensees, on a time, territorial, use, or any other basis, is too well entrenched today to merit serious question.

Are there basically different economic and social considerations involved in musical recordings, after 47 years of compulsory licensing, which warrant a retention of the principle with appropriate clarifying and modernizing modifications, or should the principle of general exclusivity applicable to all other rights under copyright, and private property generally, be applicable? I am not thinking in terms of a possible combination or conspiracy of authors, publishers or record manufacturers, to which the antitrust laws would appropriately apply to protect the public. The problem of either full accessibility or exclusive licensing can arise in connection with a single hit song. The volume of distribution, in that a million records of a single composition could get into as many homes, would not offhand seem to me to be controlling. A successful book can likewise get into hundreds of thousands of homes, a motion picture into 15,000 theaters and many more nontheatrical establishments, a play or a musical composition performed on Broadway and in road companies before millions of people, and over the radio and television before tens of millions. Yet, there is no outcry for general accessibility on a compulsory basis. In fields other than musical recordings, exclusive and nonexclusive licensing at the option of the owner, is a way of life which is generally accepted, provided there are no such restraints of trade or competition as are prohibited by the antitrust laws.

It would seem that production and manufacturing costs of a musical recording being comparatively small, full accessibility, on the basis of the small statutory royalty rate, has resulted in the public getting the benefit of a variety of recordings by different artists and orchestras of the same musical composition. Indeed, as Harry Henn points out in his discussion of current pricing practices, contracts with record manufacturers are negotiated by the copyright owner for less than the statutory rate, in the economic effort to get as many recordings of the particular musical composition as possible on the market. This is done, of course, under the shadow of a 2-cent royalty ceiling and the compulsion of full accessibility, regardless of whether the copyright owner would like to have the particular artist or orchestra record the number. If we were to depart from full accessibility, and permit exclusive licensing arrangements, may the public be in the position of hearing the hit songs of a particular show as performed only by an Elvis Presley, if the record manufacturer with whom Presley is under contract happened to finance or control the particular show (or Presley so insisted at a time when he was at the height of his bargaining power)? Will the comparatively few record companies with strong financial backgrounds which today dominate the record business, be in a position to tie up the current and future output of various musical publishing houses, as was feared would be done by the Aeolian Co. in pre-1909? Or will the economics of the marketplace ultimately resolve situations that we can now conjure up, to the ultimate satisfaction of the public interest in securing a variety of recordings from which to make its choice, as similar situations have ultimately been resolved in the case of motion pictures, plays and other fields of copyright, where the full power of exclusivity and exclusive licensing still prevails?

Ordinarily, I would be inclined to trust the practical economics of the marketplace as the resolving factor which will avoid jeopardy to or deprivation of any important interest of the general public, and rely upon the antitrust laws to protect against such combinations, conspiracies, or other improper conduct as may restrain trade in this field.

The above are some questions which occur to me, as I am sure they have occurred to others, and I would look forward to seeing how they are answered pro and con by the interests economically concerned.

Although, as I have indicated, my inclination is against compulsory licensing, I am disposed, until persuaded by authority to the contrary, toward Harry Henn's view that, Congress having created the recording right on an exclusive basis, it can also eliminate total exclusivity by providing conditions for full accessibility on a royalty basis if the copyright owner chooses to utilize or to authorize another to record his composition rather than to withhold recording, and that such would not be unconstitutional so long as there is not a deprivation of any vested right. The crux of the problem, insofar as my personal view is concerned, is whether there is now any economic and social justification for continuing to follow the principle of full accessibility of a copyrighted musical composition to anyone for recording purposes. Harry Henn's study has not gone into this aspect, perhaps appropriately, other than merely to indicate the question, and considerations pro and con will no doubt be forthcoming from the economic interests directly affected. I will await such with interest.

Sincerely yours,

EDWARD A. SARGOY.

By George E. Frost

SEPTEMBER 20, 1956.

During the past few days I have had an opportunity to read through Professor Henn's memorandum on the compulsory licensing statute respecting records. I certainly think Professor Henn should be complimented for preparing a vast amount of material in workable form and particularly for including a discussion of actual practice as distinguished from mere dissertation on statutes.

I do have one thought that is perhaps worthy of additional consideration. What basis is there to link the compulsory licensing on records to the monopoly problem? I realize that this question may seem to have an obvious answer and also I realize that there are some passages in the analysis that in fact do come very close to a discussion of this question. Nevertheless I wonder if it might be wise to consider this matter as a separate subject. The thought running through my mind is that there is currently no more reason to connect compulsory licensing as to records with a possible monopoly of the record business than to insist that there should be compulsory licensing of motion pictures, for example, because of the antitrust difficulties that have attended the motion picture producing and distributing industry. We also have a considerable background of experience along this line in the patent law where the antitrust law itself has—either through decrees or by reason of precautionary steps taken by manufacturers—served to provide what amount to compulsory licensing in actual cases of antitrust consequence.

I hope I make myself clear on the above and certainly do not intend to make this suggestion too emphatically because it may be felt that the study is better left in substantially present form.

With respect to note 66 it might be wise by way of analogy to note the statutes respecting Government use of patented inventions, since these statutes provide one form of compulsory licensing.

I hope the above comments will be of some use to you and I am only sorry that other matters have precluded a more prompt comment on the paper. For what it is worth, I might add that the monograph I have prepared for the Senate committee on the patent system will include some discussion of compulsory licensing, although I doubt anything there said will add to what Professor Henn has already included in note 66.

Sincerely yours,

GEORGE E. FROST.

By George E. Frost

SEPTEMBER 29, 1956.

Thank you for your letter of September 24, 1956.

Upon reviewing my letter of September 20 in the light of your letter I see that I did not express my thought clearly. I think it would be a big mistake to undertake any kind of a separate study of the "monopoly situation"—and understand from your letter that you are in complete agreement on this point. What I had in mind was a separate section or subject in the Henn study (1) bringing out in some detail the fears that were expressed at the time of the 1909 act, (2) tracing the subsequent development of the record industry insofar as it bears on the copyright coverage of records is concerned, (3) perhaps discussing some of the analogous areas where copyright coverage has not been limited by compulsory license (and here I should certainly regard motion pictures as of interest, although book publishing and other industries also provide analogies), and (4) discussing the present structure of the record manufacturing industry to bring out the differences between the present structure and the conditions that were thought in 1909 to warrant the compulsory licensing provision. Finally, it might be well in such a section to bring out the impact of the antitrust laws in demanding a free reasonable royalty licensing policy in those situations where monopoly problems might otherwise exist (e.g., ASCAP, the various patent-antitrust decrees).

I am indeed sorry that my letter was confusing and hope that the above will adequately give you my thoughts. I realize that the suggestion is a rather big order—and may be unworkable. However, it does seem to me that since the alleged monopoly problem motivated the compulsory license provision in the beginning—and it is my personal feeling that it certainly does not apply today—the matter might bear consideration in more detail than is now included in the Henn memorandum.

One more thought on the alleged monopoly problem: For years the patent compulsory licensing controversy has centered about the argument that the small company loses all value from patents when the big fellows can obtain compulsory licenses. Every time there has been a compulsory licensing hearing in Congress many small manufacturers and inventors have come forward to testify that freedom from such licensing is essential to their continued existence and to the value of the patent right to them. The argument has unquestionably been most effective. Although the point has not been emphasized in any compulsory licensing hearings, the interesting fact is that the impact of the antitrust law enforcement in recent years has been to force the dominant firms to follow a policy of granting licenses on reasonable terms (at least with respect to important patents), so that at the present time we have a practical situation where compulsory licensing is in effect required as to the large company but not the small.

I wonder whether this line of reasoning has significance in connection with the record problem. Would it help the small record manufacturer to be able to get exclusive rights as to a particular musical composition? My immediate reaction is that it would, because a few good "hit" records could go far toward strengthening the position of such manufacturer. In short, one can at least argue that freedom from compulsory licensing as to records will in this respect encourage competitive effort rather than discourage such effort. While it may not be practical to dwell on this approach in the Henn paper, I do think it warrants mention in this letter.

I am no friend of compulsory licensing in any way, shape, or form. In my judgment, the only occasion for such procedure—either in patent law or copyright law—is in the case where use of the grant for exclusionary purposes either gives rise to monopoly power or an unreasonable restraint of trade in the Sherman Act sense or is an exercise of such monopoly power. But this situation is adequately handled by the Sherman Act and there is no occasion to lean on the patent or copyright law to provide the control. In the patent field there are also reasons to believe that the courts will not enforce patents under circumstances wherein compulsory licensing might be required, but here we may have a rather fundamental difference between the patent and copyright situation.

In short, it is my feeling that with respect to recordings, as well as other subjects, the public interest is better served by leaving the copyright owner free to make his own license arrangements. And I see no reason to believe that the considerations of economics, public relations, and the antitrust laws will fall short of protecting against any real monopoly problem.

However, I do not have a closed mind with respect to the statutes for compulsory licensing anyone wants to propose. It seems to me that the patent group as a whole has been too rigid in its thinking in this direction—not on the ground that compulsory licensing is desirable but rather because I don't think such statutes (if properly limited to protect the small manufacturer) would have the extreme effect attributed to them. As to the matter of recordings, for similar reasons I do not think that the *principle* of compulsory licensing is quite the life or death matter that some persons seem to think it is. This does not, of course, take care of the practical problem of what sort of a statute might be harmless in a practical way. It seems clear that the present flat 2-cent provision is anachronistic, discriminatory, and unfair. I do not have in mind any statute that would satisfy me and entertain some doubt that one can be devised.

In summary, it seems to me that compulsory licensing is wrong in principle and for that reason should not be in the law, but I would listen to anyone who came forth with a statute that was workable, fair, and would be harmless in the sense of not imposing on the copyright owner any substantially different limits on his action than are now associated with economic, public relations, and antitrust considerations.

Sincerely yours,

GEORGE FROST.

By Cedric W. Porter

OCTOBER 1, 1956.

Re the compulsory license provisions of the U.S. copyright law.

I acknowledge receipt of your letters of August 15 and September 14, 1956, requesting comments on Harry Henn's comprehensive study of the above subject for general revision of the copyright law.

I have read Mr. Henn's study very carefully and it is certainly a very comprehensive and able treatise. I can see nothing that I can add to it in any way because Mr. Henn has obviously covered the ground so thoroughly.

If it is in order at the present time, I would like to be recorded as favoring the elimination of the compulsory license provision for the mechanical recording of music in any general revision of the copyright law. I think the present provision is wholly contrary to the basic concepts of the copyright law in general, which is to give the author of any "writing," in the broad general sense of the copyright law, full protection in the exploitation of his work, by whose labor and genius the work has been created. Surely no one else has a right to participate in the proceeds of the exploitation of that work without the author's consent. It should never be forgotten that a copyright is not a monopoly, because it is basic in copyright law that anyone else is free to create another original writing in the same subject matter, so long as he does his own original creative work. Thus a man who writes a 'history of England' for instance, and secures copyright thereon, does not prevent anyone else from writing his own history of England as long as he does not copy the first man's original copyrighted work.

As applied to musical compositions, the very number of musical compositions extant and created yearly is sufficient proof that musical talent is not rare. Songs and musical compositions are created by the thousands every year and if a new dramatico-musical work or motion picture with musical accompaniment is sought to be produced, the producer merely engages a competent composer or team of songwriters to create the necessary songs or musical accompaniment.

If a particular recording company desires to produce a certain composer's work, it can negotiate for the recording rights, just the same as any motion picture producer does, for instance, who seeks to buy the motion picture rights to a popular dramatic work or novel. The author, of course, merely sells these dramatic rights to the highest bidder. If the composer prefers he can, of course, issue nonexclusive licenses to record his musical composition to as many recording companies as he wishes. To me the danger of any one music publisher or association securing a monopoly on recording rights is greatly exaggerated, just as it was greatly exaggerated in 1909 when the present compulsory license provisions were inserted in the Copyright Act of 1909.

By the same token I am opposed to the extension of compulsory licensing provisions to other rights of reproduction secured by copyright.

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If compulsory licensing of the recording rights is retained, a flat fee, such as 2 cents per record, should be abandoned as too inflexible to apply to changing conditions, such as new recording media and changes in price structure.

Sincerely yours,

CEDRIC W. PORTER.

By Sydney M. Kaye

OCTOBER 2, 1956.

I am sorry to answer so belatedly your request of August 15, for comments on Professor Henn's excellent study on the compulsory license provisions of the copyright law. Between vacation and pressure of work I have even now given inadequate attention to the report, and any views stated here are tentative rather than final. My present reaction to your questions is as follows:

A. *Should the principle of the compulsory license for the mechanical recording of music be retained or eliminated?* I believe that the compulsory licensing principle should be retained. It is strongly ingrained in the laws of many countries, some of them competitive to the United States in the manufacture of recordings, and I note that it is being retained in the proposed British revision of the copyright law. It might well be that abolition of compulsory licensing would redound to the economic advantage of a few of the larger record companies and to some of the leading composers. The amount of financial benefit to authorship is, however, doubtful. At the present time the recording industry operates on an extremely low per unit profit margin. At present the copyright proprietors get more money than the performing artists, and I am informed that the net profit of the record company is less than the gross amount paid to either. A certain result of the abolition of the compulsory license clause would, however, be the granting of exclusive licenses. The number of songs which it is sought to have recorded is so much greater than the recording market can support that almost all authors and publishers would grant exclusive rights to the first record company to consider a work. Such advantages as are inherent in having works recorded by a diversity of artists and companies would thus be lost. Smaller record companies would be unable to record leading works. On balance, therefore, I favor the retention of the compulsory licensing provision.

B. *If that principle is retained:*

(1) *What types of recording should be, and what types should not be subject to compulsory license?* In a rapidly shifting technology there is no point to tying a compulsory licensing provision to any physical type of recording. The present trade practice, however, is not to apply the compulsory license clause to music synchronized with films which are licensed for public exhibition nor to electrical transcriptions licensed solely for broadcasting use. It is arguable that the compulsory license clause should be applicable only to performances which are utilized on recordings offered for sale to the public.

(2) *If more than one type of recording is subject to compulsory license and the copyright proprietor authorizes the making of one such type, should another person be allowed to make a different such type under compulsory license?* I see no point in limiting the compulsory license clause to the same type of physical object first manufactured. Such a limitation tends to restrain scientific and technical progress.

(3) *What should be the limitations on the right of arrangement incidental to recording under compulsory license?* Ever since the birth of the recording industry works have been recorded in arrangements. The present act contains a provision that the manufacturer may make any arrangement or setting of the work or its melody, and it also has language relating to similar use. A compulsory license clause which did not include the right to arrange would be illusory. Such distortions and perversions of serious works as would tend to bring the composer into disrepute already can find remedy on the theory of defamation.

(4) *Should the royalty rate be a flat sum per composition (or per unit of playing time), a percentage of the retail sales price (or of the manufacturer's price), or something else? What should the flat sum or percentage figure be? Should there be any provision for allocation? How should a composition which is recorded on two sides of a recording be treated?* The present 2 cents per composition per part of instrument payment is outmoded for works of long duration. The trade practice is to pay for such works if included on longplaying records at the rate of 1 cent for each 4 minutes with one-quarter of a cent for

additional minutes or fractions thereof and a minimum royalty of 2 cents. Fixing the license fee as a percentage of the suggested retail list price has disadvantages both because the suggested price proves in practice to be largely fictitious and because a premium is placed by such a system on cheap production. I recognize that a flat sum does not adjust itself to economic change. If change is needed, however, I suggest that the practice arrived at by private treaty probably has much to recommend it. In practice the royalties on short works vary from 1¼ to 2 cents per selection, with most payments less than 2 cents. In the light of this invariable practice there would not seem to be justification for increasing the 2-cent payment.

(5) *Should the royalty rate be applied to records manufactured in the United States, to records sold in the United States, or on some other basis? Should only the manufacturer be liable for the same?* The present trade practice is to have quarterly accountings and to have payments based upon records manufactured and sold in the United States rather than on records manufactured. Indeed, it is the provisions of the present clause basing royalties on records manufactured and requiring monthly accountings which probably account for the complete disuse of the compulsory license clause in the trade. Applying royalties to records manufactured outside the United States and sold here would probably result in the payment of double royalties. I see no reason, however, why liability should not attach to vendors as well as manufacturers.

(6) *Should the present provisions requiring the copyright proprietor to file a notice of use, and making his failure to file such notice a defense to any suit for infringement of recording rights, be retained, modified, or eliminated?* I think the present provision with respect to the penalty for failure to file notice of use should be retained but it should be clarified to reflect the court decisions which hold that failure to file notice is a defense only to a suit for infringement of recording rights.

(7) *Are the present provisions requiring the manufacturer to give notice of intention to use and to account and pay royalties monthly, adequate to safeguard the copyright proprietor? If not, what other and different safeguards should be provided for?* It would be more realistic to have quarterly accountings in accordance with the present practice. On the other hand this would clearly increase the risks of the copyright proprietor, and I would not therefore urge a longer accounting period unless some additional protection were devised.

(8) *Should the present penalties for the manufacturer's failure to fulfill the conditions for exercising the compulsory license, be retained, modified, or eliminated?* Under our present economics the 8-cent ceiling would seem to be adequate to protect the rights of authors. In principle, however, I am in favor of leaving the fixation of damages to the courts.

There is raised as a separate question the following:

C. *Should the compulsory license principle be extended to mechanical recording rights in other classes of works, or to other rights in musical compositions and/or other classes of works? If so, what should be the detailed features thereof?* In logic the compulsory license clause should be extended to the other classes of works. This raises so many complexities that I have not thought through that I could not presently advocate such a course.

Cordially,

SYDNEY M. KAYE.

By Irwin Karp

OCTOBER 3, 1956.

Please accept my apologies for not having written sooner with respect to Professor Henn's thorough monograph on compulsory licensing.

I regret the delay, particularly since my comment on compulsory licensing is brief—I believe that it is inequitable and unjust and should be repealed; and that in any program for revision of the copyright law the emphasis should be on eliminatiton of the provision and not on ameliorating the inequities and hardships it inflicts.

I know that the arguments for and against the provision have been thoroughly aired (and reaired). I feel, though, that my comment without any indication of the reasons for it would be completely useless. Therefore, I impose on you:

Compulsory licensing, from its inception, has been conceded to be an encroachment on the author's right to dispose of his work as he sees fit, justified only on the ground that it was necessary to prevent a monopoly in the recording indus-

try (cf. Professor Henn's study, pp. 3, 24, 27–33). It has not served this purpose.

The antitrust argument is a sham. If any danger of monopoly or restraint of trade manifests itself in the recording industry, it should be met with the remedies provided by the antitrust laws. Actually, there is no danger that free licensing will lead to monopoly by some licensees. Free licensing by authors in every other area has never produced monopoly. On the contrary, the only monopolies which have come to judicial attention, as for example, in the motion picture industry, have resulted from activities of the users (or licensees) which were in no way related to the licensing of the underlying material.

Compulsory licensing at the extremely low and outdated rate of 2 cents has not prevented monopoly or concentration of power in the recording industry. As Professor Henn points out, 7 of 1,000 concerns in the industry control 85 percent of the business, 25 concerns control 10 percent, and the remaining 968 must divide 5 percent of the business. Judged by this result, compulsory licensing must be considered a failure.

It could be more persuasively argued that the provision has facilitated concentration of power in the hands of the seven major companies. If a small concern risks a recording of a new composition and public interest is aroused, any of the larger companies can immediately record the work. With prominent performers and musicians under contract, and resources for extensive advertising and exploitation, its recording can preempt the market. The independent is left with the honor of having discovered the song; and this is hardly the incentive which would induce smaller concerns to bring to the public untried works by new composers.

Moreover, there is no reason to assume that the free licensing of recording rights would be equivalent to exclusive licensing in this field. If, as may well be the case, popular compositions require several exposures, that is, several different recordings, that result can be worked out without the dubious benefit of statutory compulsion. In fact, in the music industry it has been developed voluntarily in the area of public performance, where a composition is nonexclusively licensed to many users, some of whom are in competition with each other.

Similarly, in other media, nonexclusive licensing, voluntarily established, is often customary where it suits the needs of both creators and users. For example, in the theater the nonexclusive licensing of stock and amateur rights has been a long-established custom. In the publishing industry, free licensing has not prevented, and in fact has encouraged, multiple exposure when it is practical and profitable. The same novel, within a short period of time, may be serialized in a magazine (prior to book publication), published as a book, published in condensed version at the same time (Omnibook or Reader's Digest) and circulated by one or more book clubs.

Despite my good intentions, I see that I have provided you with another restatement of the arguments for your files. However, I do believe that these are some of the major considerations which should lead all of us to work for repeal of the compulsory licensing provision. It does not serve the interests of authors, users, or the public.

Cordially yours,

IRWIN KARP.

By John Schulman

OCTOBER 3, 1956.

The studies made by Harry Henn on the compulsory license provisions of the copyright law are most interesting as an analysis of the history and development of section 1(e) of the copyright law. It seems to me that, aside from the fact that the compulsory license provision was written into the act in 1909, there is no justification for retaining it.

I argued the lack of justice in this compulsory license provision before the Judiciary Committee of Congress during the course of the hearings on the jukebox bill. Recently, I delivered an address before the annual meeting of the National Music Council wherein I gave my opinion of the deleterious effect of this provision on the quality of American music. The speech is reproduced in the Bulletin of the National Music Council, volume XVI, No. 3, May 1956. Harry refers to my address in footnote 244.

Obviously, when it comes to the recapitulation of the major issues, my answer is unequivocal. The principle of compulsory license for mechanical recordings of music should be eliminated.

You will remember that when in 1952 recording and performance rights were accorded to literary works, the question of attaching a compulsory license was raised. We all agreed that these new rights accorded to literary works should not be subjected to a compulsory license.

Even if the question of justice and equity to the authors and composers of music were to be disregarded, I think that the compulsory license has failed woefully to accomplish its purpose.

Harry Henn does not go into the practical effect and operation of the compulsory license to any great extent. However, the little information he provides should in itself be convincing proof that compulsory licensing has not broadened competition in the recording business.

For example, on page 45, the study discloses that in 1954 approximately 200 million records were sold at an aggregate price of $185 million. Of this dollar volume, however, 85 percent represented sales by the seven major companies, i.e., RCA Victor, Columbia, Capitol, Decca, MGM, Mercury, and London.

The Henn study then recites that of the remaining 15 percent of sales, 25 companies accounted for 10 percent. This means that 32 companies control 95 percent of the record output, and leaves only 5 percent total record sales to be divided among approximately 1,000 record labels, of whom 18 companies are large enough to belong to the Record Industry Association of America.

It is my opinion that the compulsory license has to a great extent contributed to this concentration of output. The compulsory license feature of the act has, in my opinion, subjected smaller record companies to the mercy of the larger organizations, and has discouraged the creation of successful new recording companies. The larger companies have not only the capital and distribution systems to produce and sell their records, but they employ many of the popular recording artists. If a small company were to record a song, and by the investment of money, time and effort that song becomes a hit, one or more of the larger companies may cover that record with a recording by a more popular artist and take away the first company's market. The smaller company would then be deprived of the possibility of profiting from its investment which it could have derived from the protection of an exclusive recording right.

At the present time competition in records can at most stem from versions of the same song performed by different artists. What we need is a stimulus for the recording of more songs, to give greater musical variety, and afford broader opportunity to more writers and composers.

In my opinion, the elimination of the compulsory license will stimulate healthy competition, would result in the recording of more songs, and would be generally a salutary factor in the cultural and economic phases of the music industry.

It may be well to have a detailed study made of these practical, economic, and cultural factors. Such a study might take into account the fact that the other rights accorded by the Copyright Act are exclusive and are not burdened with a compulsory license. It might also take into account that the statutory provision is discriminatory in that it applies only to the recordings of individual musical compositions. It does not, of course, apply to dramatico-musical works, to plays or to many other types of works utilized in the communications field and in the entertainment industry.

The fact that I emphasize this aspect should not be taken as a concession that there is any theoretical or philosophical justification for the continuance of the compulsory license or that it furthers the "public" interest in any fashion. It is about time that this discriminatory feature of the Copyright Statute be eliminated.

With best regards.

Sincerely yours,

JOHN SCHULMAN.

By Benjamin Kaplan

OCTOBER 30, 1956.

This is in reply to your letter of October 23 about Professor Henn's study of the compulsory license provision. I shall not deal in detail with Professor Henn's paper, but will rather state my reaction to the question of principle which you

put, namely, whether a compulsory license on the general lines of that contained in the present copyright law should be continued.

Professor Henn's treatment of the subject tells us a good deal about the origin of the compulsory license provision and its interpretation and use, and is bound to be valuable when the new law begins to be hammered out. But the study does not in itself provide sufficient basis for a judgment on how elimination or modification of the compulsory license would affect the various parts of the industry and, more important, the public. Professor Henn's study does briefly describe present practices in the music industry, but he does not get into the wide range of facts which would have to be gathered and assessed in order to reach a sound decision on whether the compulsory license should be continued, altogether eliminated, or changed in one respect or another. You will understand that I am not at all critical of Professor Henn's study for its omission to delve into these complicated facts, claims and forecasts. Obviously this was outside the scope of the inquiry which he undertook. Indeed it is not clear to me that any study paper could deal so fully with these matters as to lay a proper basis for policy determinations. There may be no escape from conducting investigations on the lines perhaps of the British Copyright Committee. Let me add here that with regard to other questions that will have to be settled in the course of writing a new law, it may be possible for study papers to approach the issues of policy more closely and more effectively. This will turn on the nature of the particular questions under consideration.

There may be some who will feel themselves quite prepared to make a recommendation about the compulsory license without getting deeply into the facts. If, for example, one holds that any compulsory license is unconstitutional as an infringement of the "exclusive Right" language of the copyright clause, or believes that there is something inherently vicious about imposing any severe limit on composers' rights to market their property, he may condemn the compulsory license out of hand without seeking to trace out the consequences. I have no such view of the constitutional provision, and would be disposed to measure composers' rights in the light of the public interest. Accordingly, I could form a judgment only upon an examination of the complex of relevant facts and claims. As many of these are not known to me, I can make no recommendation at the present time about what the new law should do with the compulsory license. I am well aware that even the most ample examination of industrial structure, methods of doing business, etc. would not lead automatically to the solution of the policy questions, but I am in hopes that further exploration would make it easier to deal with those questions and give us greater confidence in our judgment about them.

Like many other specialists, I have been troubled and uneasy about the compulsory license. It is an extraordinary regulation without exact counterpart in other branches of the present law. It is certainly curious to find "2 cents a side" enshrined for almost 50 years in what purports to be an organic law. But these oddities do not themselves mean that a compulsory license should find no place in a revised statute. That remains to be seen.

Of course it is perfectly clear that the present provisions are awkwardly drawn. This is well shown by Professor Henn. It follows that even if the principle of the compulsory license is retained, the statute should be redrafted.

Yours sincerely,

BENJAMIN KAPLAN.

By Ralph S. Brown, Jr.

OCTOBER 30, 1956.

I am embarrassed that you had to prod me for my comments on the compulsory licensing problem. I did my homework on the Henn memorandum in time to have met the suggested October 1 deadline. I have, however, been troubled by the great gulf between Professor Henn's competent and careful memorandum on the one hand, and the policy issues—largely economic in character—that are involved in this particular problem. I was not in a position to take the time to review such policy material as are available; and so far as I know, there isn't very much.

However, since you offer me the helpful escape of simply expressing my recommendation on the continuing of the compulsory licensing provision, I am willing to express a tentative opinion.

I think the compulsory licensing provision should be eliminated. In the phonograph business, the pattern of the industry has changed so much in the last few years that a fairly fluid and competitive pattern seems to prevail. Though there do exist groups of perhaps inordinate bargaining power, such as the record companies affiliated with the networks on the one hand, and the composer and publisher groups on the other, remedial action with respect to them is primarily an antitrust problem. I cannot myself envision any simple scheme of compulsory licensing that would meet modern needs; and I do not see present justification for a complex scheme that would require governmental administration. In short, I would like to see how the unrestrained market would work. If it works badly, later legislative intervention would always be possible.

* * * * * * *

Sincerely yours,

RALPH BROWN.

By Joseph A. McDonald

JANUARY 18, 1957.

A. The principle of compulsory license for the mechanical recording of music should not be eliminated from the U.S. copyright law.

B. (1) Musical compositions embodied in any type of recording which is distributed to the general public in substantially the manner in which phonograph records are distributed today should be subject to compulsory license.

(2) Yes, the compulsory license should be usable in connection with any of the various types of recordings subject to compulsory license, not merely in connection with the particular type used for the initial recording.

(3) There should be no statutory limitation with respect to the arrangement of musical compositions recorded under a compulsory license. The status of arrangements should be treated, if at all, as a separate matter. It would seem, in this connection, that any arrangement which would not constitute a violation of the rights of an owner of a musical composition when made for the purpose of giving a public performance for profit should be lawful when embodied in a recording under a compulsory license.

(4) A flat royalty per composition per record made seems more practical than a percentage formula with selling price as one of its terms. It is suggested that the element of total playing time of the recording might be introduced as a factor so that the fee might be, for example 2 cents for the first 5 minutes of playing time or any part thereof plus 2 cents for each 5 minutes of playing time or major portion thereof in excess of 5 minutes.

(5) It would seem that the royalty rate should be applicable to records manufactured in the United States and that the manufacturer only should be liable therefor.

(6) It would seem desirable to retain the present provisions with respect to the consequences of failure to file notice of use with the exception of a possible modification to make it clear that the defense applies only to claims based on unauthorized recording.

(7) The present provisions regarding accounting and payment of royalties seem adequate.

(8) The present penalty provisions should be retained.

C. It would seem unwise to extend compulsory license to works other than musical compositions or to rights other than mechanical recording rights but it would be desirable to consider a defintion of the terms "musical composition" and "musical work."

The foregoing represents my personal views as a member of the panel on general revision. It is not presented as a summary of the position of the company with which I am associated.

JOSEPH A. MCDONALD.

By George Link

JANUARY 22, 1957.

I believe the principle of the compulsory license of mechanical recording of music to be sound, not only in theory but in practice. This includes all types of recording.

My associates and I have been unable to agree as to what should be the limitations on the right of arrangement incidental to recording under compulsory license. If we can come to an agreement, I shall convey it to you.

We believe in a flat royalty rate per composition or per unit of playing time; one price for 3 or 5 minute recordings and then proportionate increases for each 3 or 5 minutes of playing time.

We believe the manufacturer alone should be liable for the royalty rate on records manufactured in the United States.

The present provisions requiring the copyright proprietor to file a notice of use, etc., are reasonably satisfactory.

The present provisions requiring the manufacturer to give notice of intention to use and to account and pay royalties monthly are adequate.

The present penalty provisions are sound.

Until we have made some further studies, we would prefer that the compulsory license principle apply to musical compositions only.

Cordially and sincerely,

GEORGE LINK.

By Sidney W. Wattenberg

MARCH 6, 1957.

You have asked me for comments on the paper written by Harry Henn on the compulsory license provision of the Copyright Act. I found Mr. Henn's treatment of the subject most interesting and illuminating.

I offer the following comments as a member of the Committee on Copyright Law Revision, not as a representative of the Music Publishers' Protective Association, Inc., or any other group; in other words, they are my own personal views.

I am wholeheartedly in favor of the deletion of the compulsory license provision from the law.

I can give you any number of reasons for this attitude but I think you are quite familiar with most of them. In the first place, the compulsory license provision originally was included in the act to prevent monopoly. However, because of the development and rigorous enforcement of the U.S. antitrust laws, there does not seem to be any reason for including an antitrust provision in the copyright statute.

As a matter of fact, I think that the very concept of compulsory licensing is inconsistent with the concept of copyright and the constitutional provision under which copyright legislation is based, namely, the granting to authors of "exclusive" rights.

Aside from this general opposition to the compulsory license provision, I might point out the following facts. The compulsory license provision was enacted in 1909 and at that time a royalty of 2 cents for each record manufactured was provided for. This 2 cents is a maximum, not a minimum. In other words, mechanical companies, because of the economic advantage they themselves possess, in many cases are able to get a reduction of the 2-cent royalty, but I do not recall ever having heard of a case where a copyright proprietor received more than the 2-cent royalty.

The 2-cent royalty has never been increased by Congress although copyright royalties represent perhaps the only item of manufacturing costs which has not risen sharply. Mechanical companies pay more for their shellac, labels, equipment, and other materials and certainly more for labor today than they did in 1909. They do not have to pay more to the copyright proprietor.

The 2-cent royalty provided for in the statute applies to all compositions, and today with the development of the long-playing record, it seems to me to be so unfair as to shock the conscience of a reasonable man that a mechanical company under the compulsory license provision can record a work such as George Gershwin's "Rhapsody In Blue" for the same 2-cent royalty as he is called upon to pay for let us say Elvis Presley's "Hound Dog."

The publishers also are concerned with the fact that they cannot themselves choose their licensees. They are required to deal with all mechanical companies large and small, bona fide and fly-by-night, and very often small mechanical companies acting under the compulsory license provision record a work and disappear before accounting for and paying royalties. The publishing industry is called upon to pay tens of thousands of dollars a year to locate and audit

mechanical companies who have manufactured and actually released records, but who have not accounted for or paid the royalties due.

The last thing I will mention, but I assure you it is not the least important, is of course the jukebox exemption, and I will do no more at this point than just to mention it.

I could go on and give you many additional reasons against the retention of the compulsory license provision, but I know you are sufficiently well versed in the field to have become familiar with all of them. I should like, therefore, merely to put myself personally on record with you that I am opposed to the compulsory license provision. If the provision were repealed and if any publisher, writer, or combination of publishers and writers were to vest in any one or more mechanical companies control of the industry, I am certain that the existing antitrust laws would be more than adequate to meet the situation.

With kindest regards,

Very sincerely yours,

SIDNEY W. WATTENBERG.

By Ernest S. Meyers

JUNE 14, 1957.

You have asked me for my views on the compulsory license provision discussed in the study by Prof. Harry Henn.

As usual, Professor Henn's presentation and excellent analysis of the history of the provision is a compliment to his thoroughness and ability. However, regardless of any consideration of the provision historically, there can be no doubt that it has benefited handsomely each group with whom Congress was concerned in the enactment and application thereafter of the statutory license. These beneficiaries are—

First, the public. The public is receiving records of all sizes and kinds and of every character, from classical to popular, at extraordinarily low prices.

Second, the record companies. The record business has grown and expanded until it is the most important part of the music industry.

Third and fourth, the publishers and composers (songwriters). I have grouped publishers and composers because the contract between them provides for payment to the publisher and makes provision for the division of the royalties received between them. Trade papers report that writer income is reaching "an alltime high." The number of songwriters has increased until now there are 2,000 composer members of the Songwriters Protective Association and some 300 to 400 music publishers.

Its origin

This provision took many years in its formulation. Its gestation involved the 59th, the 60th, the 61st, and 62d Congresses. It was finally born in 1909 and constitutes section 1(e) of the Copyright Act. In essence, this section provides that, once a musical composition has been licensed, any other record company can record that musical composition and release it on the payment of a royalty of 2 cents to the copyright proprietor.

Since *White-Smith Music Publishing Company* v. *Apollo Company*, 209 U.S. 1 (1908), held that recordings were not copies, the compulsory licensing provision actually created new rights under the Copyright Act, and therefore the conditions attached are not subject to attack on constitutional grounds. As Professor Henn points out, the state of the music business at that time was aired extensively in the many hearings. It became evident that one of the fears of Congress in the creation of these new rights was that certain companies then powerful and dominant could use the proposed exclusive rights as a means of securing a monopoly. In order to prevent this, Congress enacted the compulsory licensing provision.

Its results and benefits

(*a*) *The record companies.*—The compulsory license has effectively prevented any monopoly. The success of the record business has attracted new record companies to the industry until the three companies that existed in 1909 now exceeds several hundred active companies. Moreover, the volume of the business has consistently increased. For example, in 1956, 176,175,582 records were sold by members of the Record Industry Association of America, who do ap-

proximately 80 percent of the industry's business, having a retail value of $273,673,451. The larger of the record companies, such as Capitol, Columbia, Decca, Mercury, MGM, and Victor, now find, side by side with them, and competing successfully for a market that grows ever larger, such names as Dot, Disney, Vox, Cadence, Kapp, Atlantic, London, and many others. Another example of how the business has grown: Six years ago, Dot Records, Inc., was organized; today it holds 4 out of the top 25 hits of the industry and is grossing $8 million.

(*b*) *The public.*—It is undisputed that, by any standard, the public pays very low prices for the records it purchases, no matter which company issues them, and competition keeps these prices reasonable and low. In 1909, a buyer of records paid anywhere from $1.50 to $7 for 2 to 4 minutes of music. In 1956, a buyer paid 85 cents for 3 minutes and $3.98 (Federal excise tax and the cost of the album included) for 46 minutes of music. Again, in 1909, a buyer of music purchased only one tune for the price of the record. Today, a buyer may purchase a single record with two tunes at a cost to him of less than 45 cents per tune; an extended-playing record of four tunes at a cost of about 31 cents per tune; or a longplaying record of 12 tunes at a cost of about 29 cents per tune. If further comparisons are to be made, then, of course, considerable weight must be given to the qualitative and technological improvements of the current product.

(*c*) *Publishers and composers.*—Songwriters and the publishers receive a royalty for each record sold, and the returns to songwriters and the publishers have been lucrative. New investment in record companies, and new companies, each of which may issue different recordings of the same song, give to songwriters and the publishers ever increasing returns for the successful publication of a song, and many chances to reach and penetrate the market.

Record companies have ever been extremely active in stimulating and exploiting the playing of their records. These market activities and the tremendous sums expended for exploitation are reflected in increased royalty payments to the songwriters and music publishers. Likewise, their ASCAP ratings and returns are bettered by these activities, so that the return in royalty payments songwriters and publishers receive from ASCAP is directly attributable to record company activities, all of which are made possible by the compulsory licensing provision. For example, during the week of July 2, 1956, the 10 most popular songs, as reported by one trade paper, were available in the following variations for the public to express its preference:

Tune No. 1, 10 variations on 8 labels.
Tune No. 2, 9 variations on 5 labels.
Tune No. 3, 5 variations on 5 labels.
Tune No. 4, 12 variations on 11 labels.
Tune No. 5, 3 variations on 3 labels.
Tune No. 6, 4 variations on 3 labels.
Tune No. 7, 2 variations on 3 labels.
Tune No. 8, 9 variations on 8 labels.
Tune No. 9, 5 variations on 4 labels.
Tune No. 10, 3 variations on 3 labels.

Thus, viewed pragmatically, the effects of the compulsory licensing provision have been an unbelievable success in all directions. It would be most unwise to subject the provision to distortions that might result from pressure by self-interest groups who would be seeking its modification and change, not on the basis of any scientific analysis or because it has caused any appreciable inequity, but solely for the purpose of seeking for themselves more of the benefits than they receive under the present compulsory licensing provision.

No monopoly

Furthermore, no monopoly has resulted. Were a change to be enacted whereby the songwriter, the publisher, or the record company could determine the royalty rate and provisions under which records of the musical composition were to be marketed, it would create the same danger of monopoly which Congress feared in the first place. The dominant unit would be in a position to dictate terms to the smaller units and the public would ultimately be damaged thereby. Certainly, there is no justification to benefit a few at the expense of the many, or, because of a philosophic legal concept, to put one or two of the four beneficiaries, which the act was designed to benefit, into a position where it could dictate its terms and dominate the market. In any event, it is evident that with such a change in the legislation the principal beneficiary, which is the public, would

be the most likely to suffer. The healthy competition which exists under this compulsory licensing provision benefits the public, the songwriter, the publisher, and the record company alike. It cannot be doubted that the public interest is best protected from the evils of monopoly and price control by the maintenance of the type of competition which the statutory license has promoted.

The royalty

It has been assumed that the statutory rate is out of date or out of line with today's dollar. In making such an argument, it is popular to compare the 2-cent rate in 1909 with the 75-cent full-course dinner, or with 10-cent-per-pound butter. The argument is specious. The 2-cent rate is not out of line. The cost of music to the public has declined since 1909 when measured either against minutes of music which the consumer buys for his dollar or the number of songs. On the other hand, the composer's rate not only has not gone down but it has multiplied beyond all measure when it is compared to the "1909 multiplier"; i.e., units sold to the buying public. With multiple selections on longplaying records, the fees to the copyright proprietor may range from an average of 23 to 32 cents per longplaying record. At the dealer cost level, the mechanical license fees to the copyright proprietor will range from 6½ to 10 percent of the dollar cost, with more longplaying records falling in the 9 percent category. On a popular record which retails for 85 cents (exclusive of excise tax), a 4-cent royalty (2 cents each for two sides) represents a fee of about 10 percent of the manufacturer's price.

The statutory royalty has become ingrained in the music business. It is part of its economic structure. This economic structure has provided handsome returns for those whom Congress sought to benefit. Each of the four—the public, the record company, the songwriter, and the publisher—have reaped golden harvests from the application of its formula. Perhaps one or the other has a greater benefit than a precise scientific formula might decree he should receive but no gross inequities have resulted. No one of the four has been hurt to an extent that is apparent or obvious. Certainly, no inequity has resulted which is so apparent that would justify disturbing a statutory provision that has been of such mutual benefit to the four beneficiaries it was designed to benefit.

Statutory analysis

A statute must be tested as follows:

First. Examine the evil or wrong it was designed to cure. In this instance, it was designed to create recording rights in songwriters and publishers, and a format for the successful marketing thereof, and the prevention of any monopoly that might result therefrom.

Second. Examine the results of the application and operation of the provision to see if the intentions have been accomplished. It is abundantly evident that the intentions of the compulsory licensing provision have been accomplished.

Third. Examine the results to see if there is any "fallout" which had not been foreseen or contemplated at the time of the enactment of the statute. There is no such "fallout" as a result of this compulsory licensing provision.

The purposes of the Copyright Act have been accomplished

In accordance with the philosophic concepts of the enabling provision of the Constitution upon which the Copyright Act was based—

(1) The composition of music has been excitingly stimulated;

(2) The temporary monoply has given the songwriter artist a handsome return;

(3) Magnificent recordings have been available to the public at reasonable prices and will, at the termination of the temporary monopoly, contribute a vast new treasury of wealth to the arts and culture of this country.

It has proved adaptable to technological advance

The most amazing result of the compulsory licensing provision is its elasticity and the ability with which it has been able to comprehend and to apply to the technological advances in the industry. It has an adaptability comparable to that found to be desirable in constitutional provisions. Nor is any argument tenable that there is no similar provision in other parts of the copyright statute. That it might not work with other forms of literary composition, or in motion pictures, is no argument that it should not be part of the provision pertaining to music. Perhaps, if a compulsory licensing provision were made to apply to

other literary expressions protected by the act, it would have had the same success as it has had for music.

However, neither the failure of its being applicable in a like manner to other artistic expressions protected by the act nor any artificial hypothesis should determine its propriety. The measure of the success of the provision alone is the proper test. The overwhelming pragmatic conclusion must be that it is working ideally to the benefit of all four it was intended to benefit—the public, the songwriter, the music publisher, and the record company—and should not be disturbed.

Other considerations

Other objections presented as bases for changes are inconsequential.

The fact that some small record companies take advantage of the statutory license by going bankrupt is a matter for regulation; in any event, when viewed in contrast to the many rewards from the successful companies, it is statistically de minimis.

In viewing the legalistic philosophy which protects against a compulsory license, it should be recalled that while this is generally called a compulsory license provision, it is not actually compulsory because the songwriter and publisher have the right to dictate the terms of the contract for the launching of the first record. It is only after the first license has been issued that a compulsory license exists to other record companies. In viewing the propriety of the 2-cent royalty figure, it is interesting to note that the MPPA long-form license contained the following negotiated royalties based upon the manufacturer's suggested retail price:

78 revolutions per minute records:
- 35 cents or less_____ 1¼ cents per side.
- 36 to 50 cents_____ 1½ cents per side.
- 51 to 60 cents_____ 1¾ cents per side.
- More than 60 cents___ Statutory rate.

Extended-play 45 revolutions per minute records:
- $1.40 or less_____ 1½ cents per selection, per side.
- More than $1.40_____ Statutory rates per selection, per side.

Longplaying 33⅓ revolutions per minute records:
- $2.85 or less_____ 1½ cents per selection, per side.
- $2.86 to $3_____ 1¾ cents per selection, per side.
- More than $3_____ Statutory rate per selection, per side.

Moreover, on modern symphonies copyright proprietors and record companies have negotiated the royalties on the basis of 1 cent per 4 minutes of playing time or 10 cents for 40 minutes.

Further, as a comparison, ASCAP negotiates a general license with the broadcasting companies and others, with fixed royalties upon the payment of which any user can force a compulsory license on any songwriter or publisher who is a member of ASCAP.

Thus, copyright proprietors and the record companies have succeeded through negotiation in harmonizing the statutory royalty with the changing technology in the music industry.

Conclusion

Every composer, whether he is a professional writer, medical student, or business executive, strongly believes his composition will become a "hit." Before that dream can become a reality, however, an opportunity to record the composition must be afforded, and thereafter its success will depend on intangible standards, such as the composition, the performance, and the promotion. There is no doubt that in the absence of the statutory license, many compositions would remain unrecorded, and even if recorded by one company, not heard by the general public. It is the broad statutory license that has provided the opportunity to the composer to have the public fully judge his work. To illustrate, many compositions have been recorded on small or new labels by artists who have never before recorded, and thereafter the compositions have been given widespread exposure by other labels to the total benefit of the public, the songwriter, the publisher, and the record industry.

The compulsory-license provision is not to be scrapped because it was adopted in 1909. Over the years, the provision has demonstrated its soundness and workability. It is my considered opinion that any fundamental change in the statutory license would adversely affect the musical artistry and genius in this country.

Thank you for your courtesy in affording me an opportunity to express my views. Should you require any elaboration on these views, or any statistics, I would, of course, be happy to accommodate you.

Sincerely yours,

ERNEST S. MEYERS.

By Morris M. Schnitzer

JUNE 27, 1957.

I have followed, with interest, the published news reports of an investigation underway by your Department to determine whether the statutory 2 cents royalty rate for mechanical phonograph records is equitable.

I represent independent record manufacturers, have gained some experience in that way, and reflect their views in this letter.

Those features of the statutory license, which enable all record manufacturers to draw upon musical copyrights, has manifestly benefited all who are concerned with the record industry. Competition has been fostered in the public interest; the volume of record sales has thereby been enhanced, to the advantage of record producers and vendors; and the aggregate of royalties, earned by composers and publishers, has been augmented correspondingly. To the best of my knowledge, no one in the record industry advocates abandonment of this feature of the law.

That cannot be said for the inflexible, statutory rate of 2 cents. This amount was fixed at a time when phonograph records were confined to one or at best two musical selections; sold for several dollars; and the royalty rate was a very negligible fraction of the producer's selling price and an even smaller percentage of the retail price. Today phonograph records sell for as little as 25 cents each and may include four and more copyright items. The great volume of phonograph records sell for a price well below $1. So far from being a modest fraction of the record producer's cost, the statutory royalty is a principal and often decisive factor in determining whether the selection can be recorded at all. The best evidence of this development is that the great majority of phonograph records are made and sold pursuant to individual arrangements with copyright owners for reduced rates. In net effect, the statutory rate of 2 cents now serves to reestablish the monopoly, which the statutory license was intended to abolish. Record producers can't operate at all without the benefit of the customary reduced rates; and the ability of the copyright owner to extend this privilege to selected manufacturers and to withhold the same opportunities from others, has fostered discrimination and stifled competition.

The overriding congressional aim was to allow record manufacturers to have substantially equal access to copyright musical material. Under present market conditions, this can only be accomplished by substituting, for the inflexible 2-cent rate, an equitable uniform percentage based upon the retail selling price of the record. In that way equality of access to copyright material would be restored to record manufacturers on every price level of the industry. This change would withdraw from copyright owners their present opportunity to play favorites among record producers. What they would gain in turn is the larger aggregate revenues which the suppression of monopoly and the enhancement of competition usually achieves.

This proposal is neither novel nor untried. A uniform percentage of the sales price, rather than a fixed dollar amount, is the method which the Government fixes to tax record production and sale. And in European countries a percentage royalty, rather than an inflexible number of pennies, has been the established practice for some time and has worked well.

Very truly yours,

MORRIS M. SCHNITZER.

By Ralph S. Peer

AUGUST 13, 1957.

* * * The thesis of Prof. Harry Henn, "The Compulsory License Provisions of the U.S. Copyright Law," * * * is an admirable factual study of the problem, although it seems to me that if the Congress is to be fully informed there should be in addition an investigation along practical and sociological lines.

* * * * * * *

Going behind the factual report of Professor Henn, I have the feeling that we are dealing with a conception which is essentially un-American and not democratic. It was accepted in 1909 by a music publishing industry which was in the infant stage. They had neither the money nor the experience to fight the various large corporations which for years (thanks to defects in the Copyright Law of 1890) had been using music without compensating the copyright owners. Half a loaf was certainly better than nothing at all.

The Congress in 1909 certainly introduced a novel concept which if it had been carried out and applied to all phases of our life would have led to a social revolution. Music is simply one of the many commodities used by record and piano roll manufacturers. Doubtless the small piano roll manufacturers would like to have seen incorporated in our laws a provision that they never needed to pay more for paper rolls than the price paid by the largest manufacturer in that business. The record factories would have found it convenient to have similar ceilings placed upon payments to recording artists, prices of shellac, the cost of hydraulic presses, and so forth. Looking back at the situation as it existed in 1909, there was not then and there certainly is not now any justification for a limitation on the cost of a single commodity and especially such a universal and unlimited product as the musical composition. In effect users of music have been protected by a ceiling which for all practical purposes ignores the obvious point that no two such compositions have the same commercial value.

The enormity of the crime committed against one of our supposedly creative industries can be measured when one considers what would have happened to our steel industry if in 1909 the Congress had decided that the highest price would be $15 per ton from that date onward. Steel also is required by many industries which would like to buy it at the lowest possible price, which the Congress will authorize. For many years now music publishers, authors, and composers have been bilked out of huge sums of money by being forced to live in a competitive world under noncompetitive conditions so far as mechanical licenses are concerned.

It is abhorrent to the American way of life to interfere in this manner with normal competitive processes—and especially in a creative field. The only parallel I can think of is modern Russia, where authors and composers are paid a fixed weekly salary in accordance with the opinion of some official as to the value of his musical output. The resultant copyrights are then the property of the state and are made available to the state-owned record factory, the state-owned film company, and state-owned broadcasting industry, and so forth.

If the Congress is to have a ceiling on mechanical royalties, then let it likewise take over the control of the record industry and finally set ceilings on the prices which may be charged for records.

If there is to be this ceiling on mechanical royalties, why not a similar ceiling on amounts paid to recording artists? Why not restrict all creative effort in the same manner?

The outstanding fact to be considered is a very simple question—why in a competitive economy do we control rigidly this one comparatively unimportant item of manufacturing expense? The reasons advanced in 1909 we now know in retrospect to have been rather fanciful. In order to overcome the political influence of piano roll manufacturers, this monstrous scheme was accepted as a compromise. That it has been permitted to exist as a part of our Federal laws for almost 50 years, in the face of a growing tendency to create fair trade conditions, is a curious reversal of progress.

The Congress has indicated by its actions during the last 50 years that it abhors price fixing and all forms of combination in restraint of trade—and yet the Congress itself has been guilty in this one specific instance of the worst kind of price fixing—a ceiling was set in 1909 on a commodity and permitted to remain in effect without investigation, alteration, or real consideration during all of that period.

For purely political reasons it is useless to preach against the existence of a special right which has been maintained by the Congress for more than 50 years. Record manufacturers have received this protection for no logical reason applying to the present-day state of the industry. These manufacturers will no doubt exert all known forms of political pressure to see to it that they maintain their privileged position. The truth of the matter is that in the present-day market copyright owners spend thousands of dollars to induce record manufacturers and recording artists to use their material and seldom receive the full statutory royalty. Record manufacturers are in the "driver's seat" because recordings produce performing royalties and the propoganda essential to making a composition commercially valuable.

In 1909 the fear supposedly existed that the granting of an exclusive mechanical license might choke the small manufacturers of piano rolls. Let us look around in the world as it exists today to ascertain if this fear had any basis in fact. The answer is emphatically "no," because in practically the whole world, outside of the English-speaking nations, the possibility to grant exclusive mechanical licenses has always existed. Many years ago exclusive licenses were granted in Italy, Cuba, and a few other countries. Any form of restricted use, however, is contrary to the basic principles of music publishing, and this was quickly discovered. In the entire world there are now no instances of copyright owners granting exclusive licenses for commercial records. We can, therefore, drop the fear of "exclusivity," and no reason exists for the compulsory license except the desire of Congress to grant a privilged position and a ceiling on a minor item of cost to record manufacturers.

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In referring to the subject of exclusivity, it must be borne in mind that we have here a situation very closely akin to what happens in the world of patents. There are many instances of owners of patents being brought to account under our Federal laws for restraining trade by granting restrictive licenses. It would seem that our present laws are entirely adequate to stop any group of copyright owners from combining to enforce special conditions as to mechanical licenses.

Actually, we do not need to guess about what would happen if copyright owners were freed from all restrictions as to mechanical rights. That is the situation existing today on the European Continent. Furthermore, the copyright owners are not restrained by antitrust laws nor the limitations of fair trade acts. We find existing on the Continent the Bureau International de l'Edition Mecanique, which in effect has a monopoly in the field of mechanical rights. It can grant exclusive rights or charge any amount which it likes subject to certain limited restrictions, as in Germany. To serve as a bargaining agency the record manufacturers have created, with headquarters in London, the International Federation of the Phonographic Industry. These two entities sit down together, usually at the end of each 2-year period, and discuss their common problems. Please bear in mind that BIEM is able to stop the presses in all of the record factories of Europe—at least theoretically. Actually nothing like this has ever happened except in cases of illicit manufacture. A considerable amount of "hard bargaining" goes on, and finally both the copyright owners and the industry are satisfied. The present royalty rate is based almost entirely on the retail list price of the recordings, the average payment being 4 percent per side or a total of 8 percent on a double faced record. Under these conditions the record manufacturing industry in Europe has grown since the end of World War II by leaps and bounds.

There is one curious difference between the European and American scheme upon which Professor Henn has not commented. The compulsory mechanical license granted to the American manufacturer has a term corresponding to the duration of initial copyright, probably averaging 27 years. The license granted by BIEM normally has a term of 2 years. The Congress in effect grants a permanent license running for the full term of copyright—a right and privilege which in itself has great intangible value. No matter how conditions change with respect to the record manufacturing business, this license remains as an irrevocable right in the hands of the manufacturer.

The British Act of 1911, containing a compulsory mechanical licensing arrangement similar to ours, is a slight improvement on our own scheme—the royalty rate is based upon the list price of the record, and there is a provision for review of the royalty rate by the board of trade. Just as in this country, British copyright owners have never been able to muster sufficient political pressure to eliminate compulsory licensing. There appears, however, to be even less reason

within the British Commonwealth for the continuance of this principle than there is in this country.

In no country in the world where music publishing is of commercial importance has it been demonstrated that record manufacturers require the protection of compulsory mechanical licenses—quite the contrary. In countries where compulsory licensing exists, it exerts a deadening effect upon the publishing industry which, in turn, affects adversely authors, composers, and record manufacturers. If we believe in free competition and freedom of thought and action, let us get rid of this anomaly in this country. One would think that when once the Congress understands that the rate of 2¢ per record which it has imposed applies equally to cheaply made products selling for, say, 25¢ and to a stereophonic tape selling for $12 or $15, surely the absurdity of the situation will become apparent.

* * * * * * *

I fully believe that if a bright enough spotlight can be focused on the compulsory license provisions, the Congress will hasten to eliminate this monstrous and inequitable provision, which runs counter to the antitrust and fair trade ideas which have prevailed in most legislation during the last 50 years.

Sincerely yours,

RALPH S. PEER.

By Charles J. Moore

DECEMBER 31, 1957.

I recently wrote to the Honorable Sam Rayburn, Speaker of the House, concerning my opinions on proposed changes in the copyright law of 1909. Mr. Rayburn referred my letter to the Committee on the Judiciary and the chairman of that committee, Mr. Emanuel Celler, suggested that I also write you concerning this subject.

My recommendations, as I outlined them to Mr. Rayburn, are as follows:

1. That the minimum royalty on mechanical reproductions of copyrighted musical compositions be increased from the present 2¢ to about 10¢. Since this law is almost a half century old, and because of tremendous changes in the practice of musical recordings and in the actual value of the legal royalty, the minimum of 2¢ is no longer a fair royalty.

2. To enable the composer/writer of a song or musical composition, to prevent the recording of that composition by any group or artist if he (the composer) feels that that recording will reduce the future success of that composition, I believe that the composer of a song, as long as he holds exclusive title to the song, should have complete authority to license the performance of said song, or not to license it, as he wills.

* * * * * * *

Yours sincerely,

CHARLES J. MOORE.

By Bert Warner (Ethelbert Music Associates)

MARCH 3, 1958.

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I view the small publisher as a business agent for lyric and melody writers and recognize a moral obligation to operate my business in the interests of those who assign their copyrights to this firm. Efforts to reduce or limit the rights and benefits of copyright owners are discouraging to the sources of new music and therefore not in the public interest.

* * * * * * *

In 1909 a payment of 2 cents per side for recorded music was a fair compensation to the copyright owner and the compulsory licensing provisions were adequate for that day. Now the purchasing power of 2 cents is much less than in 1909. Therefore, I suggest that the payment for unlicensed recordings would be increased. A rate of 10 cents per side would not be excessive in my opinion. Of course, the rate for licensed recording would be by agreement with 2 to 5 cents per side being agreed in normal cases. But a higher rate for unlicensed recording would give the copyright owner a bargaining pressure he now lacks.

One more point, I feel that an unlicensed record released without the approval of the copyright owner, there should be a law enforced delay of 1 year or more. Thus if the copyright owner could grant a license exclusive for 6 months, or 10 months or more from the date of filing of Form U it would be easier to secure a first commercial record. At present a small label must take a great risk of a major absorbing the market by the release of a "cover" record.

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Sincerely,

BERT WARNER,
President, Ethelbert.

By Ellen Jane Lorenz (Lorenz Publishing Co.)

AUGUST 25, 1958.

At the June meeting of the Church and Sunday School Music Publishers Association I had the assignment of presenting a paper on "New Developments of the U.S. Copyright Law." Earlier in the spring I had written you, asking for any literature you could send me on your recent studies, and you sent a series of pamphlets which were of great help in preparing my talk.

It was agreed at the meeting that in view of your sympathetic reception of many people's points of view, we would try to formulate an expression of thought along the major lines of these pamphlets and send it to you in the hope that it would be of help in the formulating of your recommendations for the future law. Such a questionnaire has been completed, and the following are the results:

* * * * * * *

7. *Compulsory licensing*

Five voted to abolish, one voted to retain, one recommended that the royalties should be based on the sale price rather than a fixed amount as at present. Three opposed extending compulsory licensing to other rights in musical compositions besides recordings.

We hope that this little study, representing seven publishers of church and Sunday school music, will be of help to you.

Yours very truly,

ELLEN JANE LORENZ, *Editor.*

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