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Section 118 of the new Copyright Act became effective on January 1, 1978.[1] Among other subjects within its purview,[2] the section mandates licensing for certain uses of published, nondramatic, musical works by noncommercial broadcasting.

The inclusion of such a provision in the general revision of the Copyright Law was, of course, done at the behest of the public broadcasting industry.[3] It was claimed at the time revision was be-

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1. Section 118 of the new Copyright Act (17 U.S.C. §§ 101-108 (Supp. III 1979)) was adopted from a bill introduced by Senator Charles Mathias as S.1361, Amendment No. 1815, 93d Cong., 2d Sess. Aug. 19, 1974 (90 Stat. 2541 (1976)). In its final form the amendment empowers the Copyright Royalty Tribunal to establish a schedule of rates and terms which is binding on all owners of copyright in certain specified works and other broadcasting entities. See note 7, *infra*.

2. Section 118 also grants public broadcasting a compulsory license for use of pictorial, graphic and sculptural works, subject to payment of royalty fees set by the Copyright Royalty Tribunal. 17 U.S.C. § 118.

Although § 118 refers to "public broadcasting entities," the section applies to "noncommercial educational broadcast stations" as defined in 47 U.S.C. § 397:

> [A] television or radio broadcast station, which (A) under the rules and regulations of the Federal Communications Commission in effect on November 7, 1967, is eligible to be licensed or is licensed by the Commission as a noncommercial educational radio or television broadcast station and which is owned and operated by a public agency or nonprofit private foundation, corporation, or association or (B) is owned and operated by a municipality and which transmits only noncommercial programs for educational purposes.

47 U.S.C. § 397(7) (1976). The term "public television" was coined by the Carnegie Commission because the name "educational television" "calls to mind the school room and the lecture hall. It frightens away from educational channels many of those who might enjoy them most." THE CARNEGIE COMMISSION ON EDUCATIONAL TELEVISION, PUBLIC TELEVISION: A PROGRAM FOR ACTION 14-15 (1967). "Public" in this sense is synonymous with "educational," i.e., "primarily designed for educational and cultural purposes." ROBERT J. BLAKELY, TO SERVE THE PUBLIC INTEREST: EDUCATIONAL BROADCASTING IN THE UNITED STATES 187 (1979). However "public broadcasting" should be distinguished from "instructional television," which for the purposes of the new copyright law is defined in 17 U.S.C. § 110(2).

3. S. REP. No. 473, 94th Cong., 1st Sess. 100 (1975).

ing considered that a special need for compulsory licensing existed. Characteristics peculiar to public broadcasting — including the "special nature of programming," the "repeated use of programs," the "varied types of producing organizations" and the "limited extent of financial resources" — were said to necessitate compulsory licensing.[4] Public broadcasters, in lobbying for licensing for musical works, also expressed a fear that in the absence of such compulsory licensing, small, noncommercial stations could be forced into costly and time consuming arbitration, or federal court proceedings.[5]

The House Committee on the Judiciary determined that the nature of public broadcasting did warrant special treatment in certain areas.[6] It approved the compulsory license. Later, the Copyright Royalty Tribunal,[7] in fulfilling its mandate to report and make recommendations to Congress, prepared its findings concerning section 118. Although the report was due before Congress on January 3, 1980, the Public Broadcasting Service (PBS) and National Public Radio (NPR) suggested that it was premature and

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4. *Hearings Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of House Comm. on the Judiciary, on H.R. 2223,* 94th Cong., 1st Sess. 865-66 (1975).

5. Oler, *Legislating Copyright Protection for Works Used in Public Broadcasting,* 25 COPYRIGHT BULL. 118, 130 (1977-1978).

6. H. R. REP. No. 1476, 94th Cong., 2d Sess. 117 (1976).

7. The Copyright Royalty Tribunal was created by sections 801-803 of the new Copyright Act (17 U.S.C. §§ 801-03). Its purposes are: (1) to make determinations concerning the adjustment of reasonable copyright royalty rates and reasonable terms and rates of royalty payments; and (2) to distribute royalty fees deposited with the Register of Copyrights and to determine, in cases of controversy, how such fees will be distributed. Additionally, the Tribunal is charged with protecting the respective interests of the copyright owner and user, safeguarding the industries involved from disruptive impacts and maximizing the availability of creative works to the public. *See generally,* Brylawski, *The Copyright Tribunal,* 35 U.C.L.A. L. REV. 1265 (1977).

Report of the Copyright Royalty Tribunal on "Use Of Certain Copyrighted Works In Connection With Noncommercial Broadcasting" As Required By 37 CFR 304.14 (Jan. 22, 1980) [hereafter cited as Tribunal Report] is reprinted below at pp. 41-51. Public broadcasters have objected to the manner in which the Tribunal reached the conclusions contained in its report. Indeed, PBS objected to the report being issued at all. The fact is, however, that the Tribunal had ample evidence before it when it reached its decision. The ASCAP license fee proceedings, for example, had been quite lengthy and elicited a large amount of evidence which had a bearing on the question of the continued need for a compulsory license. It is a legitimate and, indeed, a necessary function of the Tribunal to make recommendations to Congress in the areas of its statutory responsibility. The fact that one report or another may not have been *specifically* authorized is not particularly important. Indeed, if the Tribunal was to limit its reports to only those which are specifically provided for by the 1976 Copyright Act, very little would ever be heard from it again by the Congress.

asked that it be postponed.[8] The petition was denied and the report was issued on January 22, 1980.

In that report, the Tribunal concluded that the concerns of public broadcasting representatives and their insistence upon the necessity for a compulsory license were not well-founded. The Tribunal asserted that the programming needs of public broadcasting for performing rights in musical works could be fully met through blanket licensing arrangements with the performing rights societies.[9] The Tribunal recalled findings of its earlier public broadcasting proceeding that the "blanket license is the most suitable method for licensing public broadcasting to perform musical works."[10]

After considering public broadcasting's claim that its limited administrative and financial resources precluded it from relying on the customary functioning of the copyright system, the Tribunal found that there was no necessity for a compulsory license for the performance by public broadcasting of nondramatic musical works. To the contrary, it found that the statutory structure may have increased unduly the enforcement burden in this area.[11]

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8. Tribunal Report at 2. See p. 43 below.

9. Tribunal Report at 4. See p. 45 below. A blanket license enables music users to perform all the works in the catalog of a performing rights licensing organization for the payment of a single fee. It is a tremendous benefit for the music user for the following reasons:

(1) He is freed from the obligation of identifying and contacting the copyright owners of every copyrighted work he wishes to make use of. The practical difficulty in doing this can easily be imagined.

(2) Assuming contact has been made, he must then negotiate with the copyright owner to arrive at a license fee for his proposed use. This could involve literally hundreds of negotiations over the course of a year and would, ultimately, prove to be far more costly than a blanket license.

(3) With a blanket license the user pays a single fee and knows that he is fully protected from potential copyright violations. It saves him quite a bit of time and money. It also relieves the copyright owner from countless individual negotiations with thousands of music users from all over the country and, indeed, the world. The expense of his doing so would be so prohibitive that either the cost of his product, *i.e.*, music, would have to be greatly increased or the compensation paid to the creators of the music, the writers, would have to be greatly reduced.

The blanket license has proven to be the best vehicle for the licensing of music, for it delivers a product to the consumer at the lowest possible cost while providing fair compensation to the music writers. It is for these reasons that the Tribunal has concluded that the blanket license is the most suitable method for licensing public broadcasting to perform music works.

10. 43 Fed. Reg. 25,069 (June 8, 1978).

11. Tribunal Report at 5. See p. 46 below.

In the words of Copyright Royalty Commissioner Thomas C. Brennan, when the issue of compulsory licensing was discussed in Congress: those "who usually proclaim the virtues of

Public broadcasters suggest that, without the protection of a compulsory license, they will regularly be forced into arbitration or litigation. That rarely occurs in practice. Licensing agreements are, as a rule, quickly and amicably arrived at between music licensing organizations and broadcasters. The present statutory structure, however, includes a third entity — the Tribunal. By its own admission, the Tribunal concedes that its existence entails "expenses and other burdens that can be obviated by reliance on the customary functioning of the copyright system without interfering with the programming activities of public broadcasting stations." In other words, the Tribunal acknowledged that its involvement as a government entity entailed (impliedly unnecessary) reporting requirements, hearings, proceedings, rulings, counsel fees, etc.

The history of governmental participation in virtually every area of human endeavor bears out the truth of this notion and yet public broadcasters have criticized the Tribunal for not indulging in even more formal proceedings and more oral argument, and for not requiring the production of more documents prior to the issuance of its report.

The Tribunal determined that none of the other arguments presented in support of the compulsory license had any basis in fact.[12] It concluded that the compulsory license was not necessary for the efficient operation of public broadcasting and constituted an inappropriate interference with the traditional functioning of the copyright system and the artistic and economic freedom of those creators whose works are subject to its provisions.[13]

It is this very freedom that BMI is most concerned with. Since its founding, BMI's purpose has been to ensure that the creators of music receive fair compensation for the use of their property.[14]

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the market place were promoting government intervention, while well-known civil libertarians were insisting that an author must not be allowed to prevent the public performance of his work." Brennan, *Some Observations on the Revision of the Copyright Law from the Legislative Point of View*, 24 COPYRIGHT BULL. 151,152 (1976-1977).

12. Tribunal Report at 5. See p. 45 below. For example, the public broadcasters' claim that small, non-commercial stations could not clear recording rights through organizations in New York as quickly as a commercial producer cannot be substantiated.

13. *Id.* at 5. See p. 46 below.

14. Broadcast Music, Inc. (BMI) is the world's largest music licensing organization with nearly 60,000 writer and publisher affiliates. Founded in 1940, it offers music users a repertoire of over 1,000,000 compositions and has reciprocal agreements with 39 licensing societies world-wide. A nonprofit organization, BMI collects license fees for the public performance of music and distributes all of its income, less operating expenses and a reserve fund, to its writer and publisher affiliates on the basis of performances.

Does a compulsory license help achieve this? BMI believes that it clearly does not, believing as the Tribunal did that there is no basis for extending special consideration to public broadcasters in the area of music licensing. The creators of music should be able to enter into arms-length negotiations with public broadcasters in the same manner as they do with other music users: freely and without compulsion.

The idea of a compulsory license constitutes an incipient threat to holders of *all* copyrights, not merely to holders of music copyrights. If the government can compel music licensors to sell their product at a certain price, there is nothing, theoretically, to prevent it from extending the practice to other businesses. Indeed, once the idea becomes established as a legitimate exercise of governmental authority, its extension is almost inevitable.[15]

Prior to the passage of the 1976 Copyright Act, public broadcasting used music composers' works extensively and left them unrewarded. Their works were heard on college and university campuses, but there was no compensation. Jukebox owners exploited compositions free of any obligation to pay for them. The compulsory license perpetuates this unfair treatment because under its auspices, copyright holders do not have the right to decide who will use their creations and under what circumstances. Government bu-

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Do the creators of music have the same rights under a compulsory license as they do under one that is not compulsory? One of the definitions of the world "compel" is "to urge with force." Does that suggest an expansion or a diminution of rights? By definition, anything that is mandated under threat of force necessarily involves a limitation and a restriction of rights. To assert otherwise is spurious.

For the effects of compulsory licensing on investment in the production of musical compositions see Goldstein, *Preempted State Doctrines, Involuntary Transfers and Compulsory Licenses: Testing the Limits of Copyright*, 24 U.C.L.A. L. REV. 1107, 1136 n.118 (1977).

15. "It is clear that the dominant trend in the copyright legislation was the reliance by the Congress on the device of a compulsory license to facilitate access to copyrighted materials by users." Brennan, *supra*, note 11, at 152. *See generally* Ringer, *Copyright in the 1980's*, 23 COPYRIGHT BULL. 299 (1975-76).

The Communications Act of 1934 (codified at 47 U.S.C. §§ 301-609 (1976)) empowered the FCC to set aside certain noncommercial educational radio, and later, television stations to be used purely for educational and civic purposes. While these stations remained largely instructional, copyright owners had not pressed the issue of performance license when their works were broadcast. However, by the late 1960's, the structure of noncommercial instructional broadcasting changed. The Public Broadcasting Service, arising from Public Broadcasting Act of 1967 (47 U.S.C. §§ 390 *et seq.* (1967) has expanded the fare offered by these noncommercial stations so that the programming can scarcely be distinguished from that broadcast by commercial stations. It no longer seems reasonable to allow PBS to broadcast a copyrighted piece under different terms than a commercial station. *See* Korman, *Performance Rights in Music Under Sections 110 and 118 of the 1976 Copyright Act*, 22 N.Y. L. SCH. L. REV. 521, 537-39 (1977).

reaucrats decide that. In addition, it can well mean that they have little to say about how much they will be paid for the use of their work, since the going rates are decided by the government.

Fortunately, the revised Copyright statute provides that voluntary license agreements negotiated at any time between copyright owners and public broadcasting entities shall supersede the rates and terms established by the Tribunal.[16] Thus, in those cases, compulsory licenses could be rendered moot and, therefore, unnecessary.

Every effort should be made by public broadcasters and the music licensing organizations to arrive at such voluntary agreements. In the unlikely event that such agreements cannot be reached, arbitration would be the preferable way of resolving the question. This approach would be less costly to all parties concerned in terms of time, effort and money.[17]

When compulsory licensing was first proposed, the arguments urged in support of it may have seemed plausible. Congress had the right and the duty to consider these and other arguments before finding that a compulsory license was necessary. Now the Copyright Tribunal, after more than two years of study, has offered a fresh appraisal of the question. It has concluded that the concerns expressed by public broadcasters are not as compelling as initially thought. Reasonable exceptions to the exclusive rights of writers and copyright proprietors can be justified when necessary to promote public policy. However, the underwriting of public broadcasting at the expense of writers and publishers should never be considered as part of that policy.

The Tribunal, on the basis of its reconsideration of section 118's application and effects, believes that the public broadcasting com-

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16. 17 U.S.C. § 118(b)(2).

17. Arbitration would be less costly than a formal proceeding before the Tribunal for a number of reasons:

(1) Arbitration procedures are more informal;

(2) Protracted hearings are not necessary;

(3) Extensive briefs are not generally required, including post and pre-hearing briefs;

(4) Arbitration would be faster, both in terms of obtaining a hearing and in arriving at the result;

(5) Arbitration procedures are less complicated and "bureaucratic." It would take less time to present a case; and

(6) Less time and fewer complications mean smaller counsel fees. That can be a very important consideration in any controversy.

pulsory license fails to meet that criterion and, hence, is not justified.

The compulsory license is an idea whose time has come — and gone. BMI joins with the Tribunal in recommending that it be reconsidered by the Congress at the earliest appropriate time.