Compulsory Licensing of Musical Compositions for Phonorecords under the Copyright Act of 1976

Paul S. Rosenlund
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By Paul S. Rosenlund*

In 1976, Congress revised the copyright law of the United States for the first time in sixty-seven years. As in 1909, when the previous copyright law was passed, one of the more controversial subjects of the 1976 Act was compulsory licensing of musical compositions for reproduction in sound recordings. Basically, compulsory licensing under both the 1909 and 1976 Acts requires a music publisher to license a record company to manufacture and distribute phonorecords of most copyrighted music. To obtain such a license, a record company need only follow certain notice procedures and pay the modest mechanical royalty specified in the compulsory licensing statute.

The procedures which governed the availability and operation of compulsory licenses under the 1909 Act were unnecessarily burdensome on both copyright proprietors and the recording industry. As a result, most licenses that were issued for recording music were not obtained through the statutory scheme but were privately negotiated between the parties. Negotiated licenses were similar in most respects to compulsory licenses except that the requirements of statutory licensing dealing with notice were deleted and accounting procedures for royalties were amended. The omission of the statutory requirements operated entirely to the benefit of the record companies and conferred no corresponding benefit upon the copyright proprietors. More impor-

* B.S., 1976, University of California, Davis. Member, Third Year Class. This Note will be entered in the Nathan Burkan Memorial Competition.


2. 17 U.S.C. app. § 115 (1976); 1909 Act §§ 1(e), 101(e). A license obtained through the statutory procedure is commonly called a compulsory or statutory license. The term “mechanical license” is more general, and refers to either a compulsory license or a similar license which is negotiated between a record company and a copyright proprietor. Royalties payable under any type of mechanical license are referred to as “mechanical” or “publishing” royalties.

3. See note 33 & accompanying text infra.

4. See notes 33-38 & accompanying text infra.

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stantly, the statutory licensing rate of two cents per song per record distributed acted in most instances as a ceiling on the rates paid under negotiated licenses. As a practical matter, a record company could obtain a negotiated license on demand but without the controls imposed by the compulsory licenses which were more beneficial to the copyright proprietors.5

The system that developed under the 1909 Act only accomplished half of the original goal of compulsory licensing. The goal was to make music readily available for the public's enjoyment while still adequately compensating composers for their work.6 Under the 1909 Act, music was freely available for recording, perhaps too freely, but because of the many changes in the structure of the recording industry that had taken place since 1909, composers were not receiving what they thought to be adequate compensation.7 Against this backdrop, Congress began the task of copyright revision. After years of hearings and debates, a new system of compulsory licensing was enacted in 1976 which paid a slightly higher royalty, but otherwise retained the past system, insofar as it delegated control over the licensing procedure to the recording industry.

This Note does not dispute the need for some sort of a mandatory licensing system, but takes the position that the 1976 amendments to the compulsory licensing scheme continue to place overly broad restrictions on composers' power to control the disposition of their music. More specifically, copyright proprietors should be allowed to command higher licensing rates potentially available in a more open market. The suggested solution is to increase dramatically the statutory licensing rate, in order to effectively eliminate the artificial ceiling on royalty rates. Copyright proprietors would continue to be required to license their music but would be given more freedom to negotiate the rate at which music is licensed. The royalty rate would soon reach a realistic market level. Such a system would place authors and composers8 on a

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5. See notes 39-41 & accompanying text infra.
6. See note 42 infra.
7. See notes 43-59 & accompanying text infra.
8. The terms "author," "composer," and "songwriter" are defined for the purposes of this Note as the creator of any music copyrightable under 17 U.S.C. app. § 102 (1976). Although the creator of a work is generally the initial copyright owner under 17 U.S.C. app. § 201(a) (1976), the copyright in a musical composition is usually assigned to a publisher, which, by agreement, issues licenses and collects royalties, sharing them with the composer. A music publisher will generally share mechanical royalties with the composer on an equal basis. See S. SHEMEL & W. KRASILOVSKY, THIS BUSINESS OF MUSIC 148-61, 205, 518-25 (rev. & enlarged new Copyright Act ed. 1977) [hereinafter cited as THIS BUSINESS OF MUSIC]. A composer may also "publish" his own music. This involves forming a publishing company, usually a sole proprietorship or partnership, and contracting with a royalty administration firm to issue licenses, collect royalties, and disburse them to the publishing company (i.e., the composer) after subtracting a small fee, usually 3 1/4 to 4 1/2%. Id. at
The Nature of Exclusive Rights in Copyrighted Works

Authors have no constitutional right to control the reproduction of their original works. The Constitution merely provides that "Congress shall have the power . . . [t]o promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Accordingly, the Supreme Court held in 1834 that copyrights in published works were purely statutory. Rights granted by Congress are, therefore, subject to any limitations or qualifications which Congress sees fit to impose in the public interest.

Prior to the 1909 Copyright Act, composers had no right to control mechanical reproduction of their music. The Supreme Court held in White-Smith Music Publishing Co. v. Apollo Co. that the making of a piano roll did not constitute copying, publication, or infringement of the copyright in a musical composition under the then current copy-

10. A work is considered to be "published" when it is distributed to the public in the form of copies or phonorecords by sale, lease, lending or otherwise. Thus, merely printing or recording a work in some fashion does not constitute publication unless it is distributed to the public. "A public performance or display of a work does not of itself constitute publication." 17 U.S.C. app. § 101 (1976).
12. Although the Constitution speaks only in terms of granting exclusive rights, the constitutionality of granting nonexclusive rights, i.e., compulsory licensing under § 1(e) of the 1909 Act, was never seriously challenged. This occurred possibly because composers and publishers feared that an unfavorable decision would divest composers of even the limited rights granted by § 1(e). M. Nimmer, 1 Nimmer On Copyright § 1.07 (1978) [hereinafter cited as Nimmer On Copyright].
13. The 1909 Act used the terms "mechanical reproduction" and "parts of instruments serving to reproduce mechanically the musical work" in the same sense that the 1976 Act uses the term "phonorecord." Compare 1909 Act § 1(e) with 17 U.S.C. app. § 101 (1976). See note 70 infra.
right statute.\textsuperscript{15} The Court reasoned that perforated paper piano rolls, wax cylinders, phonograph records, and other similar mechanical devices for reproducing music were not "copies" of copyrighted sheet music because one could not perceive the actual musical notation while looking at such a device.\textsuperscript{16} Consequently, the large piano-roll industry and the growing phonograph industry could record any copyrighted composition without paying royalties to the composer or publisher. The prominent composers of the day, of course, felt that they should own the exclusive rights to their compositions for mechanical reproduction, just as writers owned the exclusive rights to print their books.\textsuperscript{17} The injustice of this unequal treatment, coupled with the rapid growth of the piano roll and phonograph industries, led to a strong push for control over the mechanical reproduction of music.\textsuperscript{18}

\textbf{Compulsory Licensing Under the 1909 Act}

After several years of debate over the mechanical rights issue, Congress granted limited control of mechanical rights to copyright proprietors.\textsuperscript{19} The feelings in Congress at the time were that the American public should continue to have access to the popular music of the day, but that the growing economic importance of mechanically reproduced music made it necessary to guarantee composers adequate compensation for their work.\textsuperscript{20} Congress' concern for the rights of composers was tempered, however, by a fear that a "mechanical-music trust" would develop if exclusive mechanical rights were created.\textsuperscript{21} The political climate of the era, moreover, necessitated that Congress adhere to

\begin{itemize}
  \item \textsuperscript{15} Act of March 3, 1891, ch. 565, § 4952, 26 Stat. 1106 (repealed 1909).
  \item \textsuperscript{16} 209 U.S. at 17-18.
  \item \textsuperscript{17} E.g., John Philip Sousa said that "[y]ou can take any catalog of records of any talking machine company in this country and you will find from 20 to 100 of my compositions on it. I have yet to receive the first penny for the use of them. . . . They [the phonograph companies] pay Caruso $3,000 to make a record in their machine . . . ." \textit{Arguments Before the Comm. on Patents of the Senate and House of Representatives on S. 6330 and H.R. 19853}, 59th Cong., 1st Sess. 24-25 (1906) [hereinafter cited as June 1906 \textit{Hearings}].
  \item \textsuperscript{18} June 1906 \textit{Hearings}, supra note 17, at 24-25.
  \item \textsuperscript{20} H.R. REP. No. 2222, 60th Cong., 2d Sess. 7 (1909).
  \item \textsuperscript{21} It appeared that a large number of music publishers, in anticipation of a court ruling giving them exclusive rights to mechanical reproduction, had assigned their mechanical rights to the Aeolian Company, a prominent manufacturer of piano rolls. Testimony at hearings alleged that this arrangement was intended to create a mechanical-music monopoly in the Aeolian Company. Such a monopoly was already believed to exist in Italy. \textit{Id.} at 7-8; June 1906 \textit{Hearings}, supra note 17, at 165-70, 202-06 (statements of Albert H. Walker, Esq., and Nathan Burkan, Esq.). A copy of one of these Aeolian contracts is reproduced in \textit{Hearings Before Subcomm. No. 3 of the House Comm. on the Judiciary on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835}, 89th Cong., 1st Sess. 724-27 (1965) (statement of Record Industry Ass'n of America, Inc.) [hereinafter cited as 1965 \textit{House Hearings}].
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an attitude of "trust busting." Congress' fear was probably groundless, but was sufficient, nonetheless, to support limitations on the mechanical rights created by the 1909 Act.

The compulsory licensing provisions of the 1909 Copyright Act remained substantially the same until 1976 when the new copyright act was passed, despite numerous attempts to repeal them. Compulsory licensing has been much maligned, but is generally considered the most influential force in the development of the music publishing and recording industries.

Sections 1(e) and 101(e) of the 1909 Act fulfilled the basic goal of compensating composers for their efforts while preventing any one party from monopolizing or otherwise abusing mechanical rights in


24. This compulsory licensing solution to the problem was unique at the time, but many other countries have since enacted similar laws. HOUSE COMM. ON THE JUDICIARY, 87TH CONG., 1ST SESS., COPYRIGHT LAW REVISION, PART 6, SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL 53 (Comm. Print 1965) [hereinafter cited as SUPP. REP. REG.].


any particular composition. The provisions achieved this goal by setting forth very precise procedures to be followed by both the copyright proprietor and the compulsory licensee. The Act provided that: (1) the copyright proprietor was to file a “notice of use” of a copyrighted composition with the Copyright Office immediately after allowing the first phonorecord to be made or lose all rights to collect royalties for mechanical reproduction; (2) any person who wanted to use the composition in a phonorecord after the initial recording had to send a notice of such intention to the Copyright Office and to the copyright proprietor; (3) the manufacturer of the “parts” (records, tapes, piano rolls or any similar devices) had to pay to the copyright proprietor two cents per “part” manufactured, whether or not they were ever sold; and (4) royalties were to be paid monthly, with royalty statements verified by the record manufacturer under penalty of perjury.

Provisions (3) and (4), above, were considered unnecessarily burdensome by record manufacturers, which found that they could streamline licensing procedures by negotiating for licenses directly with the copyright proprietors rather than following the statutory procedures. As a result, virtually all mechanical licenses obtained while the 1909 Act was in effect were negotiated rather than obtained through the compulsory licensing procedure.


29. 1909 Act § 1(e); see note 82 & accompanying text infra.

30. 1909 Act § 1(e).

31. 1909 Act § 1(e). The 1909 Act was framed in terms of a royalty of 2¢ per record (called a “part” in the 1909 Act). This has been interpreted to mean 2¢ per song on today’s long playing records. ABC Music Corp. v. Janov, 186 F. Supp. 443, 445 (S.D. Cal. 1960); 2 Nimmer on Copyright, supra note 12, § 8.04[b][1].

32. 1909 Act § 1(e).

33. Julian T. Abeles, a representative of the Harry Fox Agency, which issues mechanical licenses for many music publishers, stated, “I find that not in one single instance over the years—not one, and I defy anybody to prove to the contrary—has a legitimate record company ever served notice under the compulsory license provision of the Act. In every instance they obtain an agreement from the publisher, because of certain benefits that are derived therefrom irrespective of the Act.” House Comm. on the Judiciary, 88th Cong., 1st Sess., Copyright Law Revision Part 3, Preliminary Draft for Revised U.S. Copyright Law and Discussions and Comments on the Draft 216 (Comm. Print 1964).

Another commentator stated that compulsory licenses have “not been used with respect to one millionth of one per cent of the phonograph records which have been manufactured in the United States.” Seton, Music—Domestic Phonograph Records, in The Business and Law of Music 21, 24-25 (J. Taubman ed. 1965). See generally B. Kaplan & R. Brown, Cases on Copyright, Unfair Competition, and Other Topics Bearing on the Protection of Literary, Musical, and Artistic Works 437-41 (3d ed. R. Brown 1978).
Negotiated licenses were generally framed in terms of the copyright act but relaxed the restrictions of the statutory license in several significant ways, all of which inured solely to the benefit of the recording industry. First, royalties were payable not for all parts manufactured, but only for parts actually distributed. Second, royalties were payable quarterly rather than monthly. Third, royalty statements did not have to be made under oath. Finally, the requirements that the notice of intent to use be filed by the licensee were waived. In addition, the royalty rate payable under such negotiated licenses was not always as high as the two cents per song statutory rate. Indeed, the statutory rate acted in most cases as a ceiling on the royalty rates paid under negotiated licenses. Undoubtedly, some very popular songwriters could demand higher royalties, but the legislative histories of the 1976 Act do not contain any reference to licenses having been issued for more than the statutory rate. It was difficult for a publisher to demand more than the statutory rate for negotiated licenses because a record company always had the option of invoking a compulsory license.

The recording industry readily concedes its control over the licens-

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34. Examples of negotiated licenses are located in Entertainment Law Institute, Record and Music Publishing Forms of Agreement in Current Use 443-44 (I. Spiegel & J. Cooper eds. 1971) [hereinafter cited as Entertainment Law Institute Forms]; This Business of Music, supra note 8, at 535.
35. This Business of Music, supra note 8, at 535.
36. Id.; Entertainment Law Institute Forms, supra note 34, at 443-44.
37. This Business of Music, supra note 8, at 535; Entertainment Law Institute Forms, supra note 34, at 443-44.
38. This Business of Music, supra note 8, at 535; Entertainment Law Institute Forms, supra note 34, at 443-44.
39. A great deal of conflicting evidence on this issue exists. A music publishers' survey reported that the average royalty rate paid is 1.62%. The record companies reported, however, that 81% of all licenses are issued at the two cent rate, and that the vast majority of the remaining licenses are issued at lower rates because they are for "budget," "club," or "premium" records which are sold at a lower retail price. S. Rep. No. 94-473, 94th Cong., 1st Sess. 93 (1975). [hereinafter cited as 1975 Senate Report]. Why copyright owners haven't simply "held out" for higher royalties under the threat of forcing record companies into using the cumbersome and expensive compulsory licensing procedure is unknown. A "take it or leave it" attitude of record companies or a fear of some sort of blacklisting may have contributed to this situation.

Some royalty rates for songs on long playing albums are actually higher than two cents. Popular albums released in the 1960's commonly had 12 songs, each licensed at two cents for a total of 24¢, per album. The 24¢ figure became a guide for all albums, regardless of the number of songs on the album. The result was that an album with only 8 songs was still licensed for a total of 24¢, meaning that the longer playing songs were licensed at more than two cents. On an album by album basis though, this practice had no net effect on royalty rates. See Supp. Rep. Reg., supra note 24, at 57.
ing process. A spokesman for the Record Industry Association of America stated that "everybody in the record industry knows that he is free to have his artists perform for recording purposes just about any musical composition they care to sing or play . . . . [T]he general practice of the industry is to make the recording first and arrange for copyright clearance later."\(^4\)

The industry's practice cannot be condemned per se. The free availability of music for public enjoyment certainly benefits us all. The crucial issue, however, is whether composers, the creators of this music, are being adequately compensated for the benefits they bestow upon society and whether there should be such an ironclad ceiling on the royalties payable.\(^4\)

Placing a limit on mechanical royalty rates created little controversy in 1909. At that time and for many years thereafter, the major source of income for composers was from the sale of copyrighted sheet music rather than phonorecords.\(^4\) Consequently, compulsory licensing did not constitute a major inroad upon the rights of composers, especially in light of the fact that composers had no mechanical rights whatsoever prior to the enactment of the 1909 Act.\(^4\)

The economic situation today, however, is quite different from that of 1909. Phonorecords are the most important medium for the distribution of popular compositions.\(^4\) Sales of sheet music and folios in the United States are less important for most songwriters than they were in 1909.\(^4\) Consequently, mechanical royalties are one of the most important sources of income for today's popular songwriters.\(^4\)

Recording artists who write the music which they record are also heavily dependent upon mechanical royalties. This dependency may be especially prevalent among new recording artists who have little lev-


42. The Register of Copyrights stated in 1965, "The basic legislative problem is to insure that the copyright law provides the necessary monetary incentive to write, produce, publish, and disseminate creative works, while at the same time guarding against the danger that these works will not be disseminated and used as fully as they should because of copyright restrictions." Supp. Rep. Reg., supra note 24, at 13.

In enacting the 1909 Act, Congress stated that copyright is not granted "primarily for the benefit of the author, but primarily for the benefit of the public." H.R. Rep. No. 2222, 60th Cong., 2d Sess. 7 (1909).

43. See Henn, supra note 25, at 44; This Business of Music, supra note 8, at 153.

44. See notes 13-18 & accompanying text supra.

45. This Business of Music, supra note 8, at xvii-xxiii.

46. Id. at 153.

47. Performing rights, which are exclusive, 17 U.S.C. app. § 102 (1976), generate the other major source of revenue for songwriters and publishers. Most performance royalties are derived from the licensing of radio and television broadcasts of copyrighted music. See note 23 supra; This Business of Music, supra note 8, at 162.
erage when bargaining with record companies. Recording contracts for most artists require that very large numbers of records must be sold before a record company must pay artists' royalties to the artist.

Recording contracts generally provide that artists are to be paid artists' royalties on the basis of a percentage of the price of every record sold. This percentage may vary from five to fifteen percent or more of the retail price of a record, depending on the prestige and popularity of the artist. Before any artists' royalties are payable, however, recording contracts usually provide that recording costs and a number of other expenses are to be recouped by the record company out of artists' royalties. With recording costs alone capable of exceeding $100,000, it is estimated that only one record in five has sufficient sales to actually recoup its costs out of artist royalties. The other four records do not, however, necessarily lose money for the record companies that released them. A record company may receive sufficient revenues through record sales to recover its own expenses, but unless the accumulated artists' royalties, which are but a fraction of the price of a record, exceed the costs that are recoupable under the recording contract, the artist will normally receive no artists' royalties. Furthermore, most contracts provide that recoupable costs and royalties are to be cross-collateralized among all records made by an artist with the company. Cross-collateralization offsets the royalties of a successful record against the losses of a poor selling record, again leaving the artist with no artists' royalties.

The economics of the record industry and the uncertainty sur-

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49. See This Business of Music, supra note 8, at 2-5. Artists' royalties are paid by record companies to compensate recording artists for their performances which are embodied in the recording. Only mechanical royalties pay for the use of a copyrighted musical composition. The payment of artists' royalties based upon a percentage of the price of records distributed is customary, but an artist and record company are free to negotiate any form of compensation, such as a flat fee per record recorded, depending on the relative bargaining power of the parties.

50. A standard form contract for new artists provides that the following expenses are to be recouped from artists' royalties: all studio costs, including salary for musicians, engineers, arrangers, sketchers, copyists, payments to unions, packaging, expenses for LPs and tapes, "reserves for returns, exchanges, credits, rebates and allowances of any kind," and consumer advertising. ENTERTAINMENT LAW INSTITUTE FORMS, supra note 34, at 2-4. An artist is not, however, liable to the record company for these expenses if they are not actually recouped. This risk falls upon the record company and is often cited as a justification for the general nature of the recording contracts discussed above. THIS BUSINESS OF MUSIC, supra note 8, at 8-9.

51. THIS BUSINESS OF MUSIC, supra note 8, at 9.

52. 1975 SENATE REPORT, supra note 39, at 92; see Bergman, supra note 48, at 7.


54. Id; THIS BUSINESS OF MUSIC, supra note 8, at 8.
rounding artists' royalties encourages musicians to record their own music. Rather than depend on artists' royalties, which are highly speculative and derived purely from contract, a musician is likely to seek mechanical royalties, which record companies are obligated to pay under the copyright law. Thus, even a record which generates artists' royalties insufficient to recoup costs will generate mechanical royalties that the record company must normally pay to the copyright owners of the music that is recorded. As a general practice, costs are not deducted from these mechanical royalties by record companies, thus assuring income for the artist-songwriter. Recording one's own music also ensures that the music will be circulated, allowing for the possibility that another recording artist will like the song and want to record it, thereby generating more mechanical royalties for the composer.

Composers must, however, guard their publishing rights carefully. Many record companies publish music through a subsidiary company and try to acquire an assignment of the publishing rights to their artists' music. When the record company pays mechanical royalties to its publishing subsidiary, the subsidiary keeps its publisher's share and distributes the remainder to the composer. Self-publishing would, of course, earn the artist-songwriter up to twice as much, depending on the nature of the publisher-songwriter royalty split.

Even the sophisticated composer must contend with the fact that

55. Although there is no bar to a recording contract providing that recording and related costs are recoupable out of mechanical royalties for compositions which are published by the artist (called controlled compositions), this practice is not common. See THIS BUSINESS OF MUSIC, supra note 8, at 544-46 (sample recording contract); see note 8 supra.

56. Many record companies will request an assignment of an artist's publishing rights when they sign the artist to a recording contract. This assignment involves entering into a publishing contract with the artist-songwriter. THIS BUSINESS OF MUSIC, supra note 8, at 8. Such contracts typically provide that the publisher issues licenses, collects mechanical royalties, and pays one half or more of the royalties to the songwriter. Id. at 154

57. An alternate method used by record companies to reduce mechanical royalty payments is to provide in recording contracts that a lower mechanical royalty, perhaps 75% of the statutory rate, will be paid for controlled compositions. THIS BUSINESS OF MUSIC, supra note 8, at 14. Compare the recommended contract for a new recording artist (all of artist's publishing rights assigned to record company) with that for an established recording artist (no restriction of artist's publishing rights). ENTERTAINMENT LAW INSTITUTE FORMS, supra note 34, at 1, 7-8, 13-27.

58. Although the preceding discussion portrays a rather bleak economic picture for the songwriter-recording artist, most of these people actually do earn money even if they do not sell enough records to recoup recording costs from their artists' royalties. Artists are often paid rather generous cash advances by their record companies (recoupable from artists' royalties), wages for their time while recording in the studio, and fees for personal performances. An artist who feels exploited and underpaid will, of course, be of little value to a record company. Record companies can justify their practices, to a certain degree, in that they undertake a great financial risk every time they sign an unknown artist and commit their financial resources toward that artist's future. See THIS BUSINESS OF MUSIC, supra note 8, at 1-15; Bergman, supra note 48, at 7.
inflation has greatly eroded the value of the two cent royalty. Although record sales have increased dramatically, giving songwriters a proportionate increase in royalty income, record company revenues have increased at a much more rapid rate. This growing economic disparity could not be eliminated by songwriters and music publishers alone. Legislative action was required. Many copyright law revisions were attempted between 1924 and 1940. Not until 1955, however, did serious discussion of copyright revision begin. The movement led to many studies and reports and to the introduction of a revision bill in 1964. The 1964 bill formed the basis of the Copyright Act of 1976.

Compulsory Licensing Under the 1976 Act

As was the case with the 1909 Act, mechanical licensing was a controversial subject of the recent copyright revision. The Register of Copyrights initiated the struggle when, after publishing two highly praised, scholarly studies of compulsory licensing, he recommended to Congress in 1961 that compulsory licensing be eliminated entirely, and that composers be granted exclusive control over mechanical rights in their works. The recommendation met with the approval of scholars and members of the copyright bar, authors, and composers. The favorable reactions were, however, drowned in a sea of protests from the recording industry. Elimination of the compulsory license would have greatly reduced the leverage which record companies have when "negotiating" mechanical licenses. Without the two cent compulsory license available, a record company would have to pay whatever licensing rate was demanded.

The Register of Copyrights retreated from his position in 1965 and by 1976, elimination of compulsory licensing was a dead issue.

60. See Henn, supra note 25, at 21-35.
61. 1976 House Report, supra note 40, at 47.
62. Id. at 47-50. The original 1964 revision bill was simultaneously introduced as H.R. 11947, 88th Cong., 2d Sess. (1964), and S. 3008, 88th Cong., 2d Sess. (1964). Id.
66. E.g., id. at 241 (statement of American Guild of Authors and Composers).
The remaining controversy centered on setting a proper royalty rate.69

Section 106 of the Copyright Act of 1976 grants five exclusive rights to the copyright proprietor of a musical composition: (1) "to reproduce the copyrighted work in copies or phonorecords;"70 (2) "to prepare derivative works based upon the copyrighted work;" (3) "to distribute copies or phonorecords of the copyrighted work to the public;" (4) "to perform the copyrighted work publicly;" and (5) "to display the copyrighted work publicly."71

Section 115 of the Copyright Act of 1976, like section 1(e) of the 1909 Act, greatly limits the exclusive rights granted by section 106 by providing for compulsory licensing of music for phonorecords. Copyright proprietors of literary works, dramatic works, pantomimes, choreographic works, pictorial, graphic, and sculptural works, or motion pictures and other audiovisual works are not subject to similar restrictions.72 Section 115 of the 1976 Act did, however, modify prior law in several important respects and clarify several issues which arose under the 1909 Act.

Availability and Scope of the Compulsory License

The 1976 amendments did not significantly change the existing policy concerning the availability and scope of compulsory licenses. The amendments reflect either earlier court interpretations of provisions which were ambiguous under the 1909 Act or changes that were felt necessary to clarify the scope of the compulsory license.73

A compulsory license may now be obtained for recording nondra-

70. Unlike the 1909 Act, the 1976 Act makes a clear distinction between "copies" and "phonorecords." The 1976 Act defines "copies" as "material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. app. § 101 (1976). The 1976 Act defines "phonorecords" as "material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." Id. (emphasis added).

A clear distinction must also be made between the copyright in a sound recording and the separate copyright in the underlying musical composition from which the recording is made. Both musical compositions and sound recordings are copyrightable under 17 U.S.C. app. § 102 (1976). An interest in the copyright in a sound recording does not, however, give one any rights in the musical composition which is embodied in the sound recording. See Meyers, Sound Recordings and the New Copyright Act, 22 N.Y.L.S. L. Rev. 573 (1977).

73. 1976 House Report, supra note 40, at 107-09.
matic musical works\textsuperscript{74} when phonorecords of the works have been previously made and distributed to the public with the permission of the copyright owner.\textsuperscript{75} The distribution requirement remedied a significant problem that had arisen under the 1909 Act. A compulsory license was apparently available whenever an authorized recording was made, even if it was never distributed to the public.\textsuperscript{76} In addition, the 1976 Act makes it clear that compulsory licensing is not available to record pirates, those who without authorization duplicate and sell legitimate sound recordings protected by federal copyright law or by state law.\textsuperscript{77} Recent case law which developed under the 1909 Act also denied compulsory licenses to record pirates.\textsuperscript{78}

The 1976 Act also denies compulsory licenses to manufacturers of phonorecords intended primarily for background music systems, jukeboxes, broadcasting, television synchronization or motion picture soundtracks.\textsuperscript{79}

A recording made under a compulsory license may not alter the fundamental musical character of the composition. A licensee may arrange the composition only to the extent necessary to make it conform to the style of the performance involved.\textsuperscript{80}

Compulsory Licensing Procedure

The 1976 Act substantially changed compulsory licensing procedure in an unsuccessful attempt to conform to industry licensing practices. The 1976 Act deleted the 1909 Act requirement that the copyright proprietor file a notice of use after licensing a recording for

\textsuperscript{74} The use of the term "nondramatic musical works" excludes motion picture soundtracks and show tunes from coverage under the compulsory licensing scheme.

\textsuperscript{75} 17 U.S.C. app. § 115(a)(1) (1976). Thus, a compulsory license cannot be obtained for a song which has never been recorded and released to the public.

\textsuperscript{76} 1909 Act § 1(e). No reported cases ever addressed this issue. 2 NIMMER ON COPYRIGHT, supra note 12, § 8.04[C].


\textsuperscript{78} The landmark case in this area is Duchess Music Corp. v. Stern, 458 F.2d 1305 (9th Cir.), cert. denied sub nom. Rosner v. Duchess Music Corp., 409 U.S. 847 (1972). The\textit{Duchess} case is criticized at 2 NIMMER ON COPYRIGHT, supra note 12, § 8.04[E][1].


\textsuperscript{80} 17 U.S.C. app. § 115(a)(2) (1976).
the first time.\textsuperscript{81} The notice of use provision served no useful purpose and often precluded the inattentive copyright proprietor from taking action against manufacturers of unauthorized recordings until a notice of use was filed.\textsuperscript{82}

A licensee must still, however, serve a “notice of intention to obtain a compulsory license” upon the copyright proprietor.\textsuperscript{83} This notice functions like the “notice of intention to use” which was required by section 101(e) of the 1909 Act. The 1909 Act, however, required service upon both the copyright proprietor and the Copyright Office.\textsuperscript{84} Notice under the 1976 Act need only be served upon the copyright proprietor. Filing in the Copyright Office is necessary only if the Copyright Office records do not reveal the address of the copyright proprietor.\textsuperscript{85} Notice must be given prior to the actual distribution of the phonorecords, but may be made as late as thirty days after the recording is made.\textsuperscript{86} The additional time factor simply recognizes the industry practice of obtaining the license after the recording is made.\textsuperscript{87}

Royalties

The 1976 Act made two major changes regarding the payment of royalties. First, royalties are payable only for phonorecords made and actually distributed,\textsuperscript{88} rather than for all phonorecords manufactured, as provided by the 1909 Act.\textsuperscript{89} Second, the royalty rate was increased. A copyright proprietor is now entitled to two and three-fourths cents per song or one-half cent per minute of playing time, whichever is greater.\textsuperscript{90}

The new “made and distributed”\textsuperscript{91} requirement will make opera-

\textsuperscript{81} See note 29 & accompanying text supra.
\textsuperscript{84} 2 NIMMER ON COPYRIGHT, supra note 12, § 8.04[G][1][b]; see note 30 & accompanying text supra.
\textsuperscript{86} A compulsory license may not be obtained later than 30 days after a recording is made. \textit{Id.}
\textsuperscript{87} See note 41 & accompanying text supra. If a record company does not obtain a license in 30 days, however, the compulsory license becomes unavailable and a publisher could demand a high royalty rate.
\textsuperscript{88} 17 U.S.C. app. § 115(c)(1) (1976).
\textsuperscript{89} 1909 Act § 1(e).
\textsuperscript{90} 17 U.S.C. app. § 115(c)(2) (1976).
\textsuperscript{91} For royalty purposes, “a phonorecord is considered ‘distributed’ if the person exercising the compulsory license has voluntarily and permanently parted with its possession.”
LICENSING OF MUSIC FOR RECORDING

Under a compulsory license, much less objectionable to record companies. For example, if a record company makes 100,000 records under a compulsory license and is only able to distribute 1,000 of those records, under the 1976 Act, it will only have to pay mechanical royalties for the 1,000 records actually distributed. If there are twelve copyrighted songs on each record, mechanical royalties will only be about $330. If on the other hand, this record company had made the 100,000 records subject to a compulsory license under the 1909 Act, it would have had to pay two cents per song for every record made. Even if no records were ever distributed, the company would have had to pay about $24,000 in mechanical royalties, further increasing losses on a losing record. Although the made and distributed requirement of the 1976 Act may not actually encourage use of the compulsory license, it is less objectionable to record companies and therefore a much less effective bargaining tool for publishers.

The 1976 increase in the royalty rate was the first since compulsory licensing was created in 1909. The recording industry waged an incessant battle of statistics against any increase. Most of these arguments were deflated, however, by the fact that the retail list price of the average popular record album has increased from $3.98 in 1964 to $7.98 and $8.98 in 1978. From 1964 to 1974, record company revenues increased at more than twice the rate of mechanical royalty.

This is consistent with industry practices of maintaining royalty reserves to offset returns of unsold records by retailers and wholesalers. 1976 HOUSE REPORT, supra note 40, at 110. Under new Copyright Office regulations, however, a record is deemed to be permanently distributed one year from the time that the licensee first parts with possession of the record or at any time when generally accepted accounting principles or the Internal Revenue Service would recognize a sale, whichever comes first. 43 Fed. Reg. 44,519 (1978) (interim regulations) (to be codified in 37 C.F.R. § 201.19(a)(4)). For records which are given away by the licensee or otherwise distributed in some manner other than by sale, the licensee is deemed to have “permanently parted with possession” at the time the distribution is made. Id; Sippel, Berman Ducks No Right Questions in L.A., BILLBOARD, March 25, 1978, at 24. Involuntary conversions of records such as fire or theft, and the destruction of unwanted phonorecords do not constitute distribution. 1976 HOUSE REPORT, supra note 40, at 110.

92. See notes 31 & 39 supra.
93. E.g., 1965 House Hearings, supra note 21, at 771-888 (statement of John Desmond Glover) (consolidated income statement of the recording industry purporting to demonstrate that a one cent increase in the compulsory license rate would drive most small record companies out of business, id. at 810-13); 1975 SENATE REPORT, supra note 39, at 91-93.
94. HOUSE COMM. ON THE JUDICIARY, 89TH CONG., 1ST SESS., COPYRIGHT LAW REVISION PART 5, 1964 REVISION BILL WITH DISCUSSIONS AND COMMENTS 133 (Comm. Print 1965) (statement of Clive Davis).
95. Goldberg, Record Prices Rising?, ROLLING STONE, September 21, 1978, at 18. A typical popular record album contains twelve songs. SUPP. REP. REG., supra note 24, at 57. If all 12 songs were licensed at the current statutory rate of 2 3/4¢ per song, the licensing cost to the record company would be approximately 33¢ per album.
revenues.96

It is noteworthy that many licenses negotiated prior to 1978 will
follow the new statutory pattern and pay the new rate, as many negoti-
ated licenses currently in use state only that "the royalty shall be the
statutory rate in effect at the time the phonorecords are made."97
Licenses may still, of course, be negotiated.

The rates set by section 115 are subject to review and modification
by the Copyright Royalty Tribunal98 in 1980,99 again in 1987, and
every ten years thereafter.100 The Copyright Royalty Tribunal is an
independent agency of the legislative branch101 composed of five com-
missioners appointed by the President for seven year terms.102 In de-
termining whether or not to adjust the statutory rate, the Tribunal must
consider four objectives defined in the Act.103

The modified accounting procedures for payment of royalties
under a compulsory license are more stringent than those under the
1909 Act.104 Royalty payments must be made "on or before the twenti-
eth day of each month and shall include all royalties for the month next
preceding. Each monthly payment shall be made under oath . . . "105
"[D]etailed cumulative annual statements of account, certified by a
certified public accountant"106 are required for every compulsory li-
cense. Monthly statements verified under oath were also required by

96. 1975 Senate Report, supra note 39, at 91-92; see note 59 & accompanying text
supra.
97. This Business of Music, supra note 8, at 535 (sample license form); Sippel,
98. The Copyright Royalty Tribunal is established and guided by 17 U.S.C. app. §
801-810 (1976).
103. 17 U.S.C. app. § 801(b)(1) (1976) states that when calculating royalty rates, the
Copyright Royalty Tribunal shall consider the following objectives: "(A) To maximize the
availability of creative works to the public; (B) To afford the copyright owner a fair return
for his creative work and the copyright user a fair income under existing economic condi-
tions; (C) To reflect the relative roles of the copyright owner and the copyright user in the
product made available to the public with respect to relative creative contribution, techno-
logical contribution, capital investment, cost, risk, and contribution to the opening of new
markets for creative expression and media for their communication; (D) To minimize any
disruptive impact on the structure of the industries involved and on generally prevailing
industry practices."

The Copyright Royalty Tribunal is unique to world copyright law. There is little legis-
lative history on the Tribunal and its exact functions are as yet unclear. See Brylawski, The
104. 1909 Act § 101(e).
106. Id.
section 1(e) of the 1909 Act, but no annual statement was necessary. The Register of Copyrights is required to prescribe regulations governing both the monthly and annual statements, setting forth the “form, content, and manner of certification” of such statements.\textsuperscript{107}

The record companies claim that the monthly statements required by both the 1976 and 1909 Acts are burdensome and unnecessary,\textsuperscript{108} so negotiated licenses will probably follow the same quarterly accounting as before.\textsuperscript{109} Nevertheless, the more stringent reporting requirements found in the Act and the regulations are expected to lead to higher accounting standards for negotiated licenses, especially for free or promotional records.\textsuperscript{110}

Remedies for Breach and Infringement

The 1976 Act has dramatically improved the remedies available in the event of a breach or infringement of mechanical rights. Under both prior\textsuperscript{111} and present\textsuperscript{112} law, one who violates exclusive recording rights\textsuperscript{113} is a copyright infringer and is liable for all infringement penalties.\textsuperscript{114} Exclusive recording rights exist, however, only when a copyrighted composition has never before been published as a phonorecord.\textsuperscript{115}

In addition to breach of exclusive rights, there are two other types of infringements upon mechanical rights. The first is failure to pay the royalties as they fall due under a license. The second is making and distributing phonorecords without a license when a license is available.

Under the 1909 Act, the nonpayment of royalties under a license did not constitute infringement. However, the copyright proprietor had a cause of action for all royalties due plus, in the court’s discretion, an additional amount of up to three times the royalties due as well as costs.
and attorneys' fees.\textsuperscript{116} Such sums were not often significant enough to warrant court action, and the remedy did little to prevent financially irresponsible parties from invoking the compulsory license without ever paying royalties.\textsuperscript{117} These remedies were, however, expanded by the Sound Recording Amendment of 1971 which made the unauthorized manufacture of copyrighted phonorecords an act of infringement.\textsuperscript{118}

Section 115(c)(4) of the 1976 Act addresses this problem by treating nonpayment of royalties under a compulsory license as a copyright infringement rather than a mere breach of contract. If the licensee does not pay the royalties due within thirty days after receiving notice of default from the copyright owner, the license is terminated and the former licensee becomes an infringer.\textsuperscript{119} In the event of infringement, the 1976 Act provides ample remedies to the copyright proprietor, such as injunction,\textsuperscript{120} impoundment and disposal of the infringing phonorecords and the equipment used to make them,\textsuperscript{121} liability for damages, including liquidated damages of up to $50,000 or all profits of the infringer attributed to the infringement,\textsuperscript{122} awards of costs and attorneys' fees,\textsuperscript{123} and, in cases of willful infringement, criminal liability.\textsuperscript{124}

The 1909 Act was unclear as to the liability created by recording music for which a compulsory license was available but never obtained because of a failure to file a notice of use under section 101(e). There was a question as to whether such use would create liability for infringement or merely for royalties due. Most authorities concluded that such a use was an infringement, subject to all of the remedies provided by section 101 of the 1909 Act rather than a contractual breach of the compulsory license under section 1(e).\textsuperscript{125}

The 1976 Act makes it clear that failure to serve the statutory notice of intent to obtain a compulsory license forecloses the possibility of obtaining a compulsory license. Unless a license is negotiated, making and distributing phonorecords constitutes infringement subject to the

\textsuperscript{116} Norbay Music, Inc. v. King Records, Inc., 290 F.2d 617, 620 (2d Cir. 1961); 1909 Act § 1(e); 2 NIMMER ON COPYRIGHT, supra note 12, § 8.04[G][3].

\textsuperscript{117} HENN, supra note 25, at 35.


\textsuperscript{120} 17 U.S.C. app. § 502 (1976).

\textsuperscript{121} 17 U.S.C. app. §§ 503, 509 (1976).

\textsuperscript{122} 17 U.S.C. app. § 504 (1976).

\textsuperscript{123} 17 U.S.C. app. § 505 (1976).

\textsuperscript{124} 17 U.S.C. app. § 506 (1976).

\textsuperscript{125} See, e.g., Duchess Music Corp. v. Stern, 331 F. Supp. 127 (D. Ariz. 1971), rev'd on other grounds, 458 F.2d 1305 (9th Cir.), cert. denied sub nom. Rosner v. Duchess Music Corp., 409 U.S. 847 (1972); 2 NIMMER ON COPYRIGHT, supra note 12, § 8.04[G][1][b].
wide range of penalties.\textsuperscript{126} The 1976 Act also makes any attempted use of compulsory licensing by record pirates an act of infringement.\textsuperscript{127}

**Conclusion: The Potential Impact of the Copyright Act on Mechanical Licensing**

Congress set out to achieve three major goals in revising the compulsory licensing laws. Only one of these goals was actually attained. First, Congress did not amend compulsory licensing procedure to conform completely to trade practices.\textsuperscript{128} Second, Congress failed to substantially raise royalty rates as was needed.\textsuperscript{129} Congress did, however, create strong remedies against violators of compulsory licensing requirements.\textsuperscript{130}

When amending the procedural provisions of compulsory licensing, Congress had two directions in which to go. First, the compulsory license could have been modeled upon the negotiated licenses in use at the time. To conform to trade practices Congress would have had to require quarterly accounting of royalties with no distribution, oath, or other complicating factors which were disfavored by the recording industry.\textsuperscript{131} Second, Congress could have kept the compulsory license in its existing unworkable form, thereby ensuring a continuance of the practice of using negotiated licenses only. Congress, seemingly ignoring the fact that the 1909 Act compulsory licenses were rarely used, took neither of those two paths. Instead, it created a new form of the compulsory license which will still probably never be used because of its many procedural complexities.

The new compulsory license is procedurally much less objectionable to the recording industry. Royalties must now be paid only for records made and actually distributed rather than for all records made.\textsuperscript{132} The distribution requirement conforms with current trade practices but the remainder of the new licensing procedures do not.\textsuperscript{133} With this major roadblock removed, however, operating under a compulsory license may be much less objectionable to a record company.

\textsuperscript{126} 17 U.S.C. app. § 115(b)(2) (1976); see notes 120-24 & accompanying text \textit{supra}.  
\textsuperscript{128} \textit{See Supp. Rep. Reg.}, \textit{supra} note 24, at 53; see notes 74-87 & accompanying text \textit{supra}.  
\textsuperscript{129} \textit{See Supp. Rep. Reg.}, \textit{supra} note 24, at 53; see notes 88-110 & accompanying text \textit{supra}.  
\textsuperscript{130} \textit{See Supp. Rep. Reg.}, \textit{supra} note 24, at 53; see notes 111-127 & accompanying text \textit{supra}.  
\textsuperscript{131} See notes 29-38 & accompanying text \textit{supra}.  
\textsuperscript{132} See notes 91-92 & accompanying text \textit{supra}.  
\textsuperscript{133} See notes 29-38 & accompanying text \textit{supra}.
Removal of the objectionable features of compulsory licensing makes the statutory rate an even more firm ceiling on negotiated license rates than it has been in the past. Because of the industry practice of recording first and getting a license later, it has always been possible for a publisher to demand a higher mechanical royalty rate in lieu of forcing a record company to rely upon the compulsory license provisions. While this approach never seems to have had much of a coercive effect, it will be even less coercive under the 1976 Act.

This argument may be countered by the fact that the basic royalty rate was increased from two cents per song to two and three-fourths cents per song, but considering that this was the first raise in almost seventy inflationary years, the increase is illusory, both in relative and absolute terms.

An alternative approach could have been taken by Congress to alleviate the problem of artificially low mechanical licensing rates which would still have functioned to keep music readily available to the public at a reasonable price. Congress could have raised the statutory rate above what they thought to be a fair rate. The effect of this increase would be to allow negotiated license rates to float to a realistic market price, presumably below the statutory rate. Publishers demanding overly high rates would price themselves out of the market or be limited by a record company's "offer" to invoke a compulsory license. Along with this rate increase, the compulsory license could be made procedurally more attractive to record companies in order to make it a viable alternative to a negotiated license with an inordinately high royalty rate. Negotiated royalty rates would probably rest at a level in between the present statutory rate and a new higher statutory rate that would be compatible with both the recording industry and with songwriters and publishers. A rate increase could also be accomplished by the Copyright Royalty Tribunal in 1980. The Tribunal, however, is restrained from making dramatic rate increases that could have a disruptive effect on prevailing industry practices.

134. See notes 39-41 & accompanying text supra.
135. Id.
136. Id.
137. The recording industry rejects the image of the monolithic record company dealing with the powerless and innocent songwriter because of the fact that music publishers rather than composers issue mechanical licenses. 1965 House Hearings, supra note 21, at 680 (statement of Record Industry Ass'n of Am., Inc.). Many songwriters, however, particularly those who record their own music, publish their own music also. This Business of Music, supra note 8, at 233-35; see notes 57 & 58 & accompanying text supra.
138. This assumes that the present rate of 2 3/4€ per song is lower than what a free-market rate would be. The author does not, however, purport to know what this free-market royalty rate would be or exactly how it could be determined.
139. See note 103 & accompanying text supra.
these alternatives, however, is preferable to the existing system which so greatly restricts the control that songwriters have over their music.