TIME TO SAY GOOD-BYE TO MADONNA'S *AMERICAN PIE*: WHY MECHANICAL COMPULSORY LICENSING SHOULD BE PUT TO REST

INTRODUCTION

A common misconception among listeners of American popular music is that when a new version of a previously recorded song is released, the "cover" artist or their record label obtained the permission of the original artist or composer before recording the song. Nothing could be further from the truth. United States copyright law imposes a compulsory license on sound recordings.[1] Under this licensing scheme, composers are not allowed to choose who subsequently records or "covers" their works once the works have been fixed as sound recordings.[2] Instead, anyone who desires can make an arrangement of an existing work, record the arrangement, and sell it. The author is completely powerless to stop such a recording, and the integrity of the work is left to the mercy of the cover artist. For example, the talented and popular female solo artist, Madonna, recently covered Don McLean's *American Pie.*[3] In her new version, Madonna transformed a folk-classic and definitive piece of American popular music into a commercial friendly, dance-pop shadow of the original work. While the pop diva is a respectable and talented artist, the public could have done without this emotionless, fast food cover of a generation's anthem.[4] "The unsettling question for Madonna fans should be why she did it. After seventeen years of pushing the boundaries of pop music and being a trend setter, why fall back on [*American Pie*] . . . [which] McLean recorded . . . as a tribute to the death of Buddy Holly

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[1] *See* 17 U.S.C. § 115 (2000).

[2] *See id.*

[3] MADONNA, *American Pie, on* THE NEXT BEST THING: MUSIC FROM THE MOTION PICTURE (WEA/Warner Brothers 2000), originally written by DON MCLEAN, *American Pie, on* AMERICAN PIE (Capitol Records 1971).

[4] Several music reviewers have expressed their distaste for Madonna's truncated version of the original. *See* Kevin O'Hare, *Recordings*, STAR TRIB. (Minneapolis), Feb. 27, 2000 at 10F, *available at* LEXIS, News Library, Music Reviews File (stating that Madonna's version of the song has a "mildly ingratiating dance groove"); *see also* Larry McShane, *Madonna Releases New 'American Pie,' at* http://dailynews.yahoo.com/htx/ap/20000202/en/american_pie_2.html (Feb. 2, 2000) (on file with author) ("That's blasphemy to a generation."); Associated Press, *Madonna Worried About Song Remake, at* http://dailynews.yahoo.com/htx/ap/20000227/en/madonna_american-_pie_1.html (Feb. 27, 2000) (on file with author) (quoting Madonna as saying, "I thought, who am I to do a cover of a pop classic . . . ?").

. . .?"[5] Yet, the compulsory license provision continues to allow such alterations to be made without any deference to the composer's wishes or constitutionally-protected intellectual property rights.

The mechanical compulsory license for non-dramatic musical works allows anyone to make a recording (or in colloquial terms "cover") of an original, non-dramatic musical work once a phonorecord of the work has been publicly distributed under the authority of the copyright owner.[6] Even more disturbing to copyright owners and aspiring authors is the second provision of § 115.[7]

A compulsory license includes the privilege of making an arrangement, but the arrangement is limited in scope.[8] A cover artist may alter the original only to the extent that the arrangement does not change the basic melody or fundamental characteristic of the work.[9]

What Congress failed to adequately address and what is equally frustrating to composers, is this: in doing what is permissible, that is, paying the compulsory license and altering a copyrighted work to conform to a style, a cover artist might change the fundamental character of the work. In other words, some musical genres and performance styles are so far removed from the style of

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[5] Michael D. Clark, *Recordings*, HOUS. CHRON., Feb. 20, 2000, at 6, *available at* LEXIS, News Library, Music Reviews File.

[6] *See* 17 U.S.C. § 115(a)(1), which reads in part:

> In the case of non-dramatic musical works, the exclusive rights provided by clauses (1) and (3) of section 106, to make and to distribute phonorecords of such works, are subject to compulsory licensing under the conditions specified by this section.
> (a) Availability and scope of compulsory license
> (1) When phonorecords of a non-dramatic musical work have been distributed to the public in the United States under the authority of the copyright owner, any other person, including those who make phonorecords or digital phonorecord deliveries, may, by complying with the provisions of this section, obtain a compulsory license to make and distribute phonorecords of the work.

Id.

It should be noted that throughout the 1976 Act and this Note, the term "phonorecord" refers not only to albums, but to any and all "material objects in which sounds. . .are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise conununicated . . . ." *Id.* § 101.

[7] *Id.* § 115(a)(2).

> A compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work, and shall not be subject to protection as a derivative work under this title, except with the express consent of the copyright owner.

Id.

[8] *See id.*

[9] *See id.*

the original work that any alterations made to conform to the new style will change the fundamental character of the original work.

This Note will explore the suspect, continued use of the mechanical compulsory license. Part I introduces the Constitutional backdrop of copyright protection and some limitations on that protection. Part II discusses the history of the mechanical compulsory license, including its creation and amendments. Part III begins by examining the legislative history behind the current provision, then moves through discussions on the problems of § 115(a)(2) as enacted, and the economic effects the compulsory license has on authors and the public. This Note concludes with some possible reforms and solutions.

I. A CONSTITUTIONAL INTRODUCTION

The foundation of federal copyright law has its roots in the United States Constitution.[10] In order to attract private investment in the production of individual expression, copyright law vests exclusive property rights in the author of an original work.[11] The goal of copyright protection—to promote the useful arts—is furthered by granting authors a "bundle" of exclusive rights.[12] Presumably, individual property rights of authors create an incentive for artists to produce works, and the market determines the value of these works.[13] However, certain limitations are imposed on an author's exclusive rights.[14] For example, the fair use doctrine allows what would otherwise be infringing uses to be excused from

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[10] *See* U.S. CONST. art. I, § 8, cl. 8. "Congress shall have the Power. . .To Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." *Id.*

[11] *See* Paul Goldstein, *Preempted State Doctrines, Involuntary Transfers and Compulsory Licenses: Testing the Limits of Copyright*, 24 UCLA L. REV. 1107 (1977).

[12] *See* 17 U.S.C. § 106.

> Subject to sections 107 through 12[2], the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
> (1) to reproduce the copyrighted work in copies or phonorecords;
> (2) to prepare derivative works based upon the copyrighted work;
> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly.
> (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
> (6) in the case of sound recordings, to perform the copyrighted work publicly by means of digital audio transmission.

Id.

[13] *See* Goldstein, *supra* note 11, at 1107.

[14] *See* 17 U.S.C. §§ 107-122.

copyright protection; a public interest outweighs the private right to monopoly.[15] One of the most controversial limitations is the compulsory license imposed on mechanical reproductions of non-dramatic musical works.[16]

II. Background

Compulsory licensing is an exception to the rule that authors own all the rights to their creations exclusively.[17] The compulsory license for mechanical reproduction functions by "plac[ing] three limitations on the contractual freedom of the owner of the copyright to a musical composition; it establishes limits on (1) the persons with whom he may refuse to contract; (2) the times at which he may contract; [and] (3) the price at which he may contract."[18] Since the use of compulsory licensing subverts the general principles of copyright law, it should be used "sparingly and only where necessary."[19] It has been noted by several scholars that the need for compulsory licenses arises in one of two situations. First, it is used to accommodate authors' rights when a new technology develops for which owners' exclusive rights have not yet been established.[20] Second, compulsory licensing is used as a political compromise to pass legislative revisions.[21]

A. *The 1909 Copyright Act*

The 1909 Act contained the first appearance of a compulsory

15 *Id.* Section 107 covers the fair use doctrine. Public interest is only one of the factors to be weighed in detailing whether or not a use falls under this exception. *See id.*

16 *See id.* § 115.

17 *See* Robert Cassler, *Copyright Compulsory Licenses-Are They Coming or Going*, 37 J. Copr. Soc'y. 231, 232 (1990). The author further points out that someone other than the owner who wishes to exercise the exclusive rights must obtain the owner's permission, which the owner "has an absolute right to refuse." *Id.* at 232.

18 William M. Blaisdell, *Study No. 6, The Economic Aspects of the Compulsory License*, S. Comm. on the Judiciary, Copyright Law Revision Studies Prepared for the Subcomm. on Patents, Trademarks, and Copyrights, 86th Cong., 1st Sess. 91 (Comm. Print 1960) [hereinafter Blaisdell Study], *reprinted in* 1 Omnibus Copyright Revision Legislative History (G. Grossman ed., 1960).

19 *Oversight of the Copyright Act of 1976: Hearings on Cable Television Before the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 6 (1981) (statement of David Ladd), *cited in* Cassler, *supra* note 17, at 259. The general principle of copyright law is to secure exclusive rights to authors in order to attract private investment and promote the progress of science and the useful arts. *See generally supra* notes 10, 11, and 12, and accompanying text.

20 *See* Robert Stephen Lee, *An Economic Analysis of Compulsory Licensing in Copyright Law*, 5 W. New Eng. L. Rev. 203, 209 (citing House Comm. On the Judiciary, Copyright Law Revisions, H.R. Rep. No. 94-1476, at 209 (1976), *reprinted in* 17 Omnibus Copyright Revision Legislative History (G. Grossman ed., 1976)).

21 *See id.*; *see also* Cassler, *supra* note 17, at 255 (holding that compulsory licenses ease the expansion of copyright protection by offering a political compromise to the competing interests of inadequately protected copyright owners and free-riding copyright users).

license in copyright law.[22] During the late nineteenth century, numerous machines were invented which allowed copyrighted work to be mechanically reproduced. Increased sales in these mechanical devices caused a decrease in sheet music sales and therefore, a decrease in publisher and composer royalties. Manufacturers of piano rolls and phonographs wanted to continue their free use of copyrighted material, while composers and publishers sought copyright protection.[23] The compulsory license represented an attempt by Congress to attach some protective rights to new technologies of player piano rolls and phonorecords.[24]

In the landmark case of *White-Smith Music Publishing Co. v. Apollo Co.*,[25] the Supreme Court was asked to decide whether or not the manufacturer's use of copyrighted songs constituted an infringement.[26] The true issue was whether or not an exclusive right

22 1909 Copyright Act, ch. 320, 35 Stat. 1075 (1909), *repealed by* 17 U.S.C. § 115 (2000) [hereinafter 1909 Act]. 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 provisions of this title shall have the exclusive right:
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> (e) To perform the copyright work publicly for profit if it be a musical composition . . . 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 . . . [A]nd 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 . . . .

Id.

23 *See* Harry Henn, *The Compulsory License Provision of the U.S. Copyright Law*, S. Comm. on the Judiciary, Copyright Law Revision Studies Prepared for the Subcomm. on Patents, Trademarks, and Copyrights, 86th Cong., 1st Sess., 3 (Comm. Print 1960) [hereinafter Henn Study], *reprinted in* 1 Omnibus Copyright Revision Legislative History (G. Grossman ed., 1960).

24 *See* Cassler, *supra* note 17, at 246 (developing industries argue they need the protection of a compulsory license to plan possible growth); Goldstein, *supra* note 11, at 1128 ("Congress sought compromise positions lying somewhere between exclusive rights and no rights at all."); Frederick F. Greenman Jr. & Alvin Deutsch, *The Copyright Royalty Tribunal and the Statutory Mechanical Royalty: History and Prospect*, 1 Cardozo Arts & Ent. L.J. 1, 4 (1982) ("The legislative history of the creation of the mechanical and cable licenses demonstrates that in the legislative struggles created by new technologies, the representatives of the new technologies have shown consistent tactical superiority over their more established opponents among the copyright owners."); Lee, *supra* note 20, at 209 ("[C]ompulsory licensing is offered when new technology has created new uses for which the author's exclusive rights have not been clearly established."). "Congress imposed compulsory licensing in response to technological changes in information transmission . . . ." Jason S. Rooks, *Constitutionality of Judicially-Imposed Compulsory Licenses in Copyright Infringement Cases*, 3 J. Intell. Prop. L. 255, 255 (1995).

25 209 U.S. 1 (1908).

26 *See id.*

to make mechanical reproductions existed.[27] While the decision was pending, several music publishers signed an exclusive deal with the largest manufacturer of player piano rolls, Aeolian Company, granting Aeolian long-term exclusive rights to their catalogs.[28] These contracts were conditioned upon judicial notice or congressional enactment of an exclusive mechanical reproduction right.[29] However, the Court held that player piano rolls were not "copies" of a musical work under the current statute.[30]

The Court, in dicta, suggested that it is Congress's role to rewrite the current statute to include mechanical reproductions either in the definition of "copy" or as an exclusive right.[31] Instead, Congress concentrated on the impending threat of a monopoly in mechanical reproduction of music.[32] In order to prevent the Aeolian company from securing a monopoly and vest some rights for authors, Congress created the compulsory license provision.[33]

The 1909 Act fixed the mechanical reproduction royalty rate at two cents per side, per album.[34] There was no provision to increase this rate for inflation over time, or to periodically update the rate's equitability. Furthermore, the statute allowed anyone to make a "similar use" of the copyrighted work once the copyright owner permitted or knowingly acquiesced in the mechanical use of the work.[35] This ambiguous language caused great confusion to industry professionals and copyright scholars alike. While no adaptation right was expressly given, it was judicially recognized and fell under the heading "similar use."[36] Employing a plain meaning analysis, the "similar use" language seemed to allow "bootlegging"

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27 *See* Henn Study, *supra* note 23, at 3.

28 *See id.*

29 *See id.*

30 *See White-Smith Music Publ'g*, 209 U.S. at 17-18. The 1909 Act did not define the term "copy." The Court concluded that under the statute one must be able to read and perceive the work from the form. Therefore, a piano roll (and likewise a phonograph) was not a notation from which an ordinary person or musician could read and perceive the copyrighted song. *See id.*

31 *See id.* at 18-20; *see also* Greenman & Deutsch *supra* note 24, at 6.

32 *See* Henn Study, *supra* note 23, at 12.

33 *See id.* at 2-14; *see also* 1909 Act § 1(e). For a reprinting of the text of the section, see *supra* note 22.

34 *See* 1909 Act § 1(e).

35 *See id.*

36 *See* Stratchborneo v. Arc Music Corp., 357 F. Supp. 1393 (S.D.N.Y. 1973) (holding that a compulsory licensee has the right to alter a copyrighted work to suit his own style and interpretation); *see also* Accord Manners v. Famous Players-Lasky Corp., 262 F. 811 (S.D.N.Y. 1919) (holding that where a provision of a contract granting an exclusive license to produce a play, stated that, "no alternations, eliminations, or additions" shall be made without the author's consent, alterations made necessary by the different method of production may be made without the author's consent, alterations that constitute a substantial deviation from the locus of the play, or the order and sequence of the development of the plot may not be made without consent).

(simply duplicating the exact recording), further complicating the issue.[37] The poor drafting of the 1909 provision led Congress to overhaul the compulsory license provision in the 1976 Act.[38]

B. *The 1976 Act Revisions*

Unlike the 1909 Act, the compulsory license of the 1976 Act functioned as a political compromise, not as compensation for new technology.[39] The 1976 Act deleted the ambiguous "similar use" language and explicitly banned bootlegging.[40] Additionally, the 1976 Act codified the judicial recognition of adaptation to conform to a performance style.[41] Despite persistent efforts by the recording industry to retain the two-cent royalty ceiling, the 1976 Act raised the statutory compensation rate to three cents.[42] However, the retention of this compulsory license, coupled with the poor craftsmanship of § 115(a)(2), created several debatable issues.

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37 The distinction between duplication and cover is troublesome. It is permissible to gather your own musicians, and record an exact copy of the music, but it is impermissible to copy the sound recording. *See* Duchess Music Corp. v. Stern, 458 F.2d 1305 (9th Cir. 1972) (stating that simply dubbing or copying a pre-existing sound recording was not a similar use); *accord* Jondora Music Publ'g Co. v. Melody Recordings, Inc., 506 F.2d 392 (3d Cir. 1974) (articulating this odd distinction which allows arrangement but not bootlegs). Professor Nimmer believed that "bootlegging," or making a copy of a sound recording, was permissible under the *Duchess* definition of similar use and the act as written. *See* MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.04[E] (1992). This confusing doctrinal inconsistency was resolved in the 1976 Act, which specifically bans bootlegging. *See infra* note 40.

38 *See* 17 U.S.C. § 115 (2000).

39 *See infra* Section III.

40 "A person may not obtain a compulsory license for the use of the work in the making of phonorecords duplicating a sound recording fixed by another. . . ." 17 U.S.C. § 115(a)(1).

41 *See id.* § 115(a)(2). For the full text of the section, see *supra* note 7. The limitation on arrangements of licensed works could be considered a codification of the adaptation right recognized in Stratchborneo v. Arc Music Corp., 357 F.Supp. 1393 (S.D.N.Y. 1973) (allowing some adaptations without the author's consent as long as they did not deviate from the focus of the play, or from the order and sequence of the development of the plot).

42 Members of the recording industry testified before the Senate Subcommittee on the Judiciary that two-cent royalty rate of the 1909 Act was adequate compensation in 1961 (and presumably forever) despite inflation and the economic principle of time value of money. *See* COPYRIGHT LAW REVISION PART 3, PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW AND DISCUSSIONS AND COMMENTS ON THE DRAFT 1 (Comm. Print 1964) [hereinafter Revision Part 3]. "Frankly the statutory rate is the rate [copyright owners] like." *Id.* at 218 (statement of William M. Kaplan); "I thought, in the absence of any proof to the contrary, that the two-cent rate was not out of date." *Id.* at 224 (statement of Earnest Meyers); "The two-cent rate, strange though it may sound, is still a fair rate today" *Id.* at 229 (statement Sidney Diamond); "It isn't a matter for snickering. The two-cent rate is still applicable because of the development of the LP." *Id.* at 230-31 (statement of Walter Yetnikoff).

III. Analysis

A. *Legislative History*

Prior to the formal copyright law revisions which began in 1951, several bills were presented to Congress concerning the compulsory license.[43] Beginning as early as 1925, numerous bills were proposed which would have eliminated the compulsory license for mechanical reproductions.[44] One proposed bill required that the copyright owner's consent must be obtained before a work created under the compulsory license scheme could be released.[45] Unfortunately, all of these proposed revisions died in Congress.[46]

1. 1961 Proposed Revisions

From 1956 through 1958, the Senate Subcommittee of the Judiciary conducted studies to determine the relevancy and economic impact of the compulsory license provision.[47] Based on these studies, the Register of Copyrights issued the opinion that the compulsory license provision be completely eliminated.[48] The practical effect of the compulsory licensing was to deprive the copyright owner of any artistic control over further recordings of her musical work.[49] The monopolistic concerns which dominated the formation of the 1909 provision no longer existed.[50] Therefore, there was no justification for discriminating against composers as artists by placing a statutory ceiling on the mechanical reproduction right.[51] The Register also addressed and refuted the recording industry's arguments for retaining the compulsory license provision.[52] In closing, however, the Register suggested that if Congress

43 The inadequacy of U.S. copyright law became clear when the demand for U.S. copyright works abroad skyrocketed after World War II. When the U.S. turned from copyright pirate to copyright crusader, Congress was called upon to reform the copyright act. Interview with William Patry, Professor of Law, Benjamin N. Cardozo School of Law, in New York, N.Y. (Feb. 8, 2000) (on file with author).

44 *See* Henn Study, *supra* note 23, at 21-35 (detailing the contents of over twenty-five proposed bills to reform or repeal the compulsory license).

45 *See* H.R. 1270, 80th Cong. (1st Sess. 1947); *see also* Henn Study, *supra* note 23, at 34.

46 *See generally supra* note 44 and accompanying text.

47 *See* Blaisdell Study, *supra* note 18; Henn Study, *supra* note 23.

48 *See* Register of Copyrights, 87th Cong. 1st Sess. Report on the General Revision of the U.S. Copyright Law 35. (Comm. Print 1961) [hereinafter Revision Part 1].

49 *See id.* at 33.

50 *See id.*

51 *See id.*

52 The recording industry posed three arguments against the elimination of the provision: (1) the public might be deprived of a large variety of musical recordings if copyright owners were given exclusive mechanical rights; (2) the compulsory license provision fosters competition between large and small record labels; and (3) copyright owners benefit from the exposure the compulsory license allows. *See id.* at 34. In response to these arguments the Register stated the following:

decided to retain the provision, substantial changes must be made to the existing provision.[53]

2. 1963 Hearings

During the meetings of 1961 and 1962 for copyright law revision, retention of the compulsory license was one of the most frequently debated issues.[54] On one side, the composers and music publishers represented the copyright owners' interests; the opposition was comprised solely of the recording industry, including present-day industry moguls Walter Yetnikoff and Clive Davis.[55]

a. Copyright Owners

Copyright owners had three basic arguments for eliminating the compulsory license. First, it was questionable whether the congressional price fixing and grant of limited right in mechanical reproduction was constitutional.[56] The copyright clause[57] clearly states that authors shall be granted "exclusive rights."[58] Since Congress can only grant rights pursuant to its enumerated powers, Congress must grant authors exclusive rights in their creative works and nothing less.[59] Although doubts concerning the constitutionality of compulsory licensing are raised from time to time, these

> (1) [U]nder a regime of exclusive license, each company would have to record different music; while the public would not get several recordings of the same music, it would probably get recordings of a greater number and variety of musical works. (2) [M]any hits are now originated by smaller companies; and their prospective hits are often smothered by records of the same music brought out by larger companies having better known performers and greater promotional facilities. Under a regime of exclusive licenses. . .there is little danger that the large companies would get all the hits: in the field of popular music the number of compositions available for recording is virtually inexhaustible, and which of them may become hits is unpredictable. (3) The authors and publishers would benefit from the removal of the compulsory license.

Id. at 34-35.

53 The Register suggested that changes be made to the royalty rate, the notice requirement, and the copyright owners' remedies against those who do not comply with the compulsory license. *Id.* at 35-36.

54 *See* Goldstein, *supra* note 11, at 1128.

55 *See generally* Register of Copyrights, 88th Cong. 1st Sess. Discussion and Comments on the Report on the General Revision of the U.S. Copyright Law (Comm. Print 1963) [hereinafter Revision Part 2]. Walter Yetnikoff is the former CEO of Sony CBS records. Clive Davis is the former CEO of Arista records.

56 "I can't conceive of anything else overriding the clear provision of the Constitution that the grant of rights under copyright must be exclusive." *Id.* at 62 (statement of Herman Finklestein, ASCAP); *see also* Bruce Schaffer, *Are the Compulsory License Provisions of the Copyright Law Unconstitutional?* 2 Comm. & L. 1, 24 (1980) ("[T]here seems to be no good constitutional reason at all to limit the exclusive rights of authors with compulsory licenses.").

57 U.S. Const. art. I, § 8, cl. 8.

58 *Id.*

59 *See* Schaffer, *supra* note 56, at 24.

doubts were never pressed in any reported litigation.[60] Second, if the provision is constitutional, the mere existence of the compulsory license undermines the entire reason for having a copyright law and directly conflicts with the intent of the Constitution and the goal of copyright law in general.[61] "Such indiscriminate reproduction of a copyright owner's work without his consent violates the basic concept of copyright protection."[62] There is no rational basis for singling out composers as a suspect class of authors and depriving them of basic copyright protection when they choose to fix their works in the form of a sound recording. The incentives to attract private investment and further the creative endeavors of composers are destroyed when anything less than an exclusive right is granted.[63] Finally, copyright is property.[64] The compulsory license represents a Congressional taking of private intellectual property. In order to compensate authors for this intrusion on their exclusive rights, Congress set a ceiling instead of a price floor or a market-based rate.[65] The compulsory license prohibits negotiating a price of the property above the two-cent statutory mandate; no sound reason exists for fixing the price of this particular commodity.[66] Furthermore, price-fixing and mandatory contracts are

60 *See* Henn Study, *supra* note 23, at 19.

61 *See generally* Revision Part 2, *supra* note 55. "This is perverting the whole purpose of copyright law, and I submit that there just isn't any sound reasoning for continuing this compulsory license. And I haven't seen any argument or fact that would lead to any other conclusion . . . ." *Id.* at 62 (statement of Herman Finkelstein, ASCAP); "The author should be granted the exclusive rights in his works, not some exclusive rights." *Id.* at 247 (letter submitted by The Authors League of America); *see also* Revision Part 3, *supra* note 42, at 201. "What could be more parasitic than a compulsory license? [A] recording is entitled to protection like any other fixation in a tangible form." *Id.* (statement of John Schulman, Chairman of the American Patent Law Association Committee on Copyright).

62 Letter by Curtis G. Benjamin & Horace S. Manges, Joint Copyright Committee of American Book Publisher's Council Inc., and American Textbook Publishers Insitute, Revision Part 2, *supra* note 55, at 228.

63 *See* Goldstein, *supra* note 11, at 1136-37.

64 *See* Revision Part 2, *supra* note 55, at 66. "Copyright is property and there is no reason for fixing prices on recordings by statute than for fixing prices on anything else . . . . I think that the author, the composer and the publisher ought to be free to do business in the American fashion, on the basis of fair competition, not upon the basis of statutory appropriation of property." *Id.* at 63-64 (statement of John Schulman).

65 *See supra* note 34 and accompanying text (commenting on how the 1909 Act fixed the royalty rate at a two-cent price ceiling).

66 *See* Revision Part 2, *supra* note 55, at 257. "[Compulsory Licensing] is absolutely unnecessary as a means of precluding restraints of trade. It is a serious detriment to the recording of classical music." *Id.* (letter submitted by the Authors League of America, Inc.); *see also* Revision Part 3, *supra* note 42, at 208.

> [I]f [a composer] takes less than the statutory fee (two-cents) and less than the statutory protection [a record label] will record [his] songs. Now, that to me has always been the vice of the compulsory license. It puts the composer in a position where he can never ask for more than two-cents, where he can never insist that his work be recorded, but where he's faced with the prospect that, if somebody is interested in recording, he will get less than the statutory fee.

completely unnecessary in an industry where non-exclusive licenses are dictated by self-interest.[67] "[T]he whole thing is a travesty . . . . But try to justify this reduction of the person's right to his own property, and justify it on the grounds that he's better off, makes the writer a ward of the state, and I don't think he should be."[68]

b. Copyright Users

The recording industry, represented by individuals and the Recording Industry Association of America ("RIAA") as a whole, made the arguments that the Register of Copyrights had anticipated.[69] First, the recording industry argued that the compulsory license furthered the goal of copyright protection by allowing the industry to fill the demand for popular music at a low cost and high speed, catering to the public interest.[70] If the compulsory license were repealed, authors and publishers would band together to extract exorbitant rates from record labels and drive up transaction costs.[71] Ultimately, the public would be deprived of different versions of their favorite songs because authors would make it impossible to get licenses.[72] Therefore, a repeal of this provision would be against the public interest.[73] However, the recording in-

Id. (statement of John Schulman).

67 *See* Lee, *supra* note 20, at 220 (demonstrating that removing the compulsory license would not necessarily result in composers granting exclusive licenses because authors and publishers gain economic benefit from multiple recordings; therefore, it would be in their best interest to grant non-exclusive licenses); Arpie Balekjian, *Navigating Public Access and Owner Control on the Rough Waters of Popular Music Copyright Law*, 8 LOY. ENT. L.J. 369, 381 (stating that it is in the composer's best interest, economically, to negotiate non-exclusive licenses and have multiple recordings distributed).

68 Revision Part 3, *supra* note 42, at 208 (statement of John Schulman).

69 *See* Revision Part 1, *supra* note 48 and accompanying text.

70 *See generally* COPYRIGHT LAW REVISION PART 4, 88TH CONG. 2D SESS. FURTHER DISCUSSIONS AND COMMENTS ON PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW 413-448 (Comm. Print 1964) [hereinafter Revision Part 4] (statement by the RIAA in opposition to the recommendation of the Register of Copyrights that the compulsory license for recording of music be eliminated from the Copyright Act).

71 *See id.* at 414-17. "The RIAA position . . . is that elimination of [the compulsory license would threaten the existence] of many manufacturers; and it would tend to encourage the growth of monopolistic practices which would . . . be contrary to the public interest." *Id.* at 414. *But see* Lee, *supra* note 20, at 219-20 (stating that supporters of compulsory licensing swear it lowers transaction costs and prevents monopolistic practices among authors and manufacturers, but it may in fact have a negative impact on competition).

72 *See* Revision Part 2, *supra* note 55, at 68.

> We have forgotten completely again about the public interest . . . if a recording company did have an exclusive license the music would be recorded in that one form. It would go to such extent that if a vocal record of a work were recorded, nobody else could make an instrumental record of that work, and the public would be deprived of that.

Id. (statement of Isahelle Marks, Decca Records, Inc.).

73 *See id.*

> [T]here is no God-given right to authors and composers to have the exclusive right to their recordings. This is a congressional grant governed by the public

dustry failed to explain why government regulation of popular music was a more pressing issue of public interest than for any other art form, such that it required a price ceiling.[74] "Moreover, everyone says [compulsory licensing is] in the public interest, but nobody can prove it or disprove it. When [the recording industry doesn't] like something, [it says], 'It's contrary to the public interest.' When [it likes] something [it says], 'Why, that's in the public interest.' But nobody has been able to prove it."[75]

The RIAA argued the compulsory license had to be retained because the threat of an industry-wide monopoly might resurface if authors were allowed to grant exclusive licenses,[76] and such a dramatic change would cripple the music industry.[77] The RIAA further argued that the recording industry had thrived for fifty years under the compulsory license system and no real evidence was produced by the Register to support such a drastic change in the way the music business is conducted.[78] "It seems to us that you should maintain the status quo under which the record industry has prospered, unless you can show reasons for changing it."[79]

> interest . . . and nothing is said in this piece of paper about the effect of the repeal of the compulsory licensing on the public interest."

Id. at 58 (statement of Ernest S. Meyers). "The compulsory license statute enables these various renditions, and different styles, to go before the public for the public to make a decision." *Id.* at 69-70 (statement of Clive Davis, General Counsel, Columbia Records).

[74] *See* Revision Part 3, *supra* note 42, at 225. "I haven't heard, in all this discussion here, why it is in the public interest to put a maximum price on this particular species of property as contracted to other forms of property—all of which are regulated under anti-trust laws . . . ." *Id.* (statement of Mr. Zissu).

[75] *Id.* at 228 (statement of John Schulman).

[76] *See* Revision Part 4, *supra* note 70, at 426. "[C]opyright proprietors . . . might hold out for an exorbitant royalty rate or perhaps refuse to issue a license under any terms." *Id.*; "The possibility of securing exclusive licenses [from composers] clearly has monopolistic tendencies." *Id.* at 437.

[77] *See id.* at 426. "If this procedure were to be changed, the record industry would be thrown into chaos." *Id.* *But see* Revision Part 3, *supra* note 42, at 235. "[I]n an area where thousands and thousands of musical compositions are available . . . the bargaining power of most authors to exact outrageous prices just doesn't exist . . . ." *Id.* (statement of Irwin Karp, Authors League of America).

[78] *See* Revision Part 3, *supra* note 42, at 230. *But see* Revision Part 2, *supra* note 55, at 66.

> And I fail to see why if [the recording industry has] made a lot of money from [compulsory licensing] and you've been able to do it for a long time, that justifies the position. I think if you've made a lot of money the answer might be you ought to be satisfied; you give the other fellow a chance.

Id. (statement of Irwin Karp, Authors League of America).

[79] Revision Part 3, *supra* note 42, at 230 (statement of Walter Yetnikoff, Columbia Records). The author of this Note finds this argument made by the record industry completely without merit. It is a well settled principle of law that, "[i]t is revolting to have no better reason for a rule of law than it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid have vanished long since, and the rule simply persists from imitation of the past." Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897). The economic analysis supplied by the Blaisdell Study and the recommendation of the Register in Revision Part 1 demonstrated that the monopoly fear which created the need for a compulsory license had long since vanished. Therefore,

3. The Compromise of 1964

Some compulsory licenses are developed as a political compromise between two lobbying groups. In 1963, three alternatives to the compulsory license provision were submitted to the Senate Subcommittee of the Judiciary.[80] Alternative A suggested a complete extinction of the compulsory license.[81] Alternative B retained the compulsory license, altered the royalty rate and, for the first time, codified the adaptation right.[82] Noticeably missing from this alternative, however, was the present limitation on adaptation, meaning that the adaptation may not change the melody or fundamental character.[83] Alternative C suggested a compromise between the two camps by granting authors an exclusive right to mechanical reproductions for the first five years of the copyright term, with the compulsory license available five years after the copyrighted work's distribution.[84]

Alternative B received the largest amount of support.[85] De-

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what reasons (besides the clearly self-serving ones) do the recording industry truly have? Indeed, the compulsory license provision of the 1909 Act was, "an anomaly caused by Congress responding to the antitrust fever of the day" and should never have survived the revisions of the 1976 Act. Schaffer, *supra* note 56, at 24.

[80] ALTERNATIVE A read in pertinent part:

> SOUND RECORDINGS OF CERTAIN NONDRAMATIC MUSICAL WORKS. The *exclusive* rights . . . to make a sound recording of the work, to duplicate . . . and to distribute . . . shall be subject to the transitional provisions . . . [the present law would continue in effect for five years, then the new act with exclusive rights in sound recordings would become effective].

ALTERNATIVE B read in pertinent part:

> SOUND RECORDINGS OF CERTAIN NONDRAMATIC MUSICAL WORKS. The privilege of making a sound recording under a compulsory license shall include the privilege of . . . making whatever arrangement or adaptation of the work may be . . . necessary to conform it to the style or manner of interpretation of the performance involved.

ALTERNATIVE C read in pertinent part:

> SOUND RECORDINGS OF CERTAIN NON-DRAMATIC MUSICAL WORKS. The exclusive rights to . . . make a sound recording . . . to duplicate . . . [and] to distribute . . . shall be *limited* as follows . . . When under the authority of the owner . . . records . . . have been distributed to the public by sale or other transfer, any person sball, *after five years* from the date the records were first distributed, be considered to have, under a compulsory license, license to make and duplicate, by any process, a sound recording of the work, and to distribute records of it to the public by sale or other transfer of ownership.

3 THE KAMINSTEIN LEGISLATIVE HISTORY PROJECT: A COMPENDIUM AND ANALYTICAL INDEX OF MATERIALS LEADING TO THE COPYRIGHT ACT OF 1976 §§ 115-18, 201-05, at 13-14 (Alan Latman & James F. Lightstone eds., 1983) (emphasis added).

[81] *See id.* at 13.

[82] *See id.* at 13-14.

[83] *See id.* at 14.

[84] *See id.*

[85] Policy makers tend to fall into three categories: those who believe the goal of copyright law is to balance the interest of the public against the copyright owner; those who believe exclusive ownership is fundamental to copyright law, hut also see the political compromise available in compulsory licensing; and those who believe intellectual property is no different than real property and should be guarded with the same exclusivity and vigor

spite the recommendation of the Register and artist advocacy groups, including ASCAP and The American Guild of Authors and Composers, the lobbying efforts of the recording industry to retain the compulsory license proved too great and a compromise had to be made.[86]

While Alternative B was the most appealing political solution, it was subject to attack from both copyright owners and users. The recording industry disapproved of the increase in the statutory royalty rate.[87] Artist advocates cautioned that the revision as written could give artists a copyright in a derivative work.[88] Furthermore, copyright owners criticized the unlimited adaptation right granted to a compulsory licensee.[89] In a letter dated April 15, 1963, Philip Wattenberg suggested the limitation on the adaptation right.[90] This suggested limitation, along with the explicit mandate that arrangements made under the compulsory license provision shall not be subject to protection as derivative works, was first introduced in the July 20, 1964 draft. The language of this draft and the present §115(a)(2) are identical.[91]

B. *Problems with the Statute as Enacted*

1. Constitutionality and Public Policy

In general, the retention of a compulsory license in the absence of any overriding economic factors subverts the principles of copyright law.[92] Indeed, it has been maintained by some scholars

(dead-set against compulsory licensing). The majority of policy makers fall into the middle category, "[t]hat is, although . . . generally . . . not inclined toward compulsory licenses, in special cases they will concede a need for one." Cassler, *supra* note 17, at 242-44. For these reasons, Alternative B received the most votes. *See id.*

86 "As the prime beneficiaries of compulsory licenses, the record industry producers . . . would not, and did not, allow Congress to alter the mechanical compulsory license . . . ." Rooks, *supra* note 24, at 269; *see also* Scott L. Bach, Note, *Music, Recording, Publishing, and Compulsory Licenses: Toward a Consistent Copyright Law*, 14 HOFSTRA L. REV. 379, 390 (stating that the Register's original recommendation was favored by artists, but "drowned in a sea of protests from the recording industry.").

87 *See* Revision Part 3, *supra* note 42 and accompanying text.

88 "It seems to me, that so long as [a work made under the compulsory license] is a derivative work, there should be no copyright of any kind in that work unless the work is derived with the express consent of the owner of the basic work." *Id.* at 207 (statement of Herman Finkelstein, ASCAP).

89 "Technically speaking the user's right to make a melodic arrangement should be limited so that the basic melody and fundamental character of the original work is preserved." Revision Part 3, *supra* note 42, at 444 (quoting from a letter submitted by Philip B. Wattenberg, a music magazine publisher).

90 *See id.* at 444-45.

91 *Compare id. with* 17 U.S.C. § 115(a)(2) (2000).

92 *See* Goldstein, *supra* note 11, at 1135-37 (arguing that by placing an artificial ceiling on mechanical reproductions, the investment incentive mechanism of copyright is undermined and the general purpose, to promote the progress of science and useful arts, is controverted).

that the non-exclusive right granted in §115 is unconstitutional.[93] Even if the constitutionality of compulsory licensing is accepted, the greater question of whether or not it serves the public interest and promotes the general goal of copyright protection remains unanswered. The recording industry claims to be the champion of the public interest by asserting that the compulsory license provision allows record labels to deliver the most popular songs performed by a variety of composers at competitive prices.[94] Several scholars argue, however, that compulsory licensing directly cuts against the public interest[95] by creating a false price ceiling,[96] undercutting the market,[97] reducing the investment in new and different work,[98] and ultimately depriving the consumer of the benefit of new music.[99]

Due to the lack of a clear, overriding public purpose, it is useful to examine what the provision does in practice. Compulsory licenses create a mandatory non-negotiable contract where the property owner is forced to give virtually unlimited use of his work in exchange for a rate he cannot determine because a ceiling is set by the legislature. According to the current statute,[100] no balancing test of the public interest and private property interest is employed in determining this royalty rate.[101] One would think such a

93 *See* Schaffer, *supra* note 56, at 24 (stating that the compulsory license is unconstitutional); Cassler, *supra* note 17, at 237 (making a strong and sound argument that the compulsory license is unconstitutional).

94 *See supra* notes 69-73 and accompanying text.

95 *See supra* note 75 and accompanying text.

96 *See* Rooks, *supra* note 24, at 272 (describing how artificial price ceilings undercut the investment mechanism by reducing the recoverable amount in the marketplace).

97 *See id.*; *see also* Balekjian, *supra* note 67, at 380 (stating that compulsory licensing limits composers opportunities and outputs).

98 *See supra* note 79 and accompanying text.

99 *See* Rooks, *supra* note 24, at 272 (explaining that one possible consequence of compulsory licensing is a reduced differentiation among works in the marketplace); Balekjian, *supra* note 67, at 380 (arguing that the public cannot enjoy the benefits of a free market).

100 Royalty rates are now fixed by the Copyright Arbitration Royalty Panel (CARP), 17 U.S.C.A. §§ 801-803 (2000). The CARP is given four objectives: to maximize availability of creative works to the public; afford the copyright owner a fair return for his work and the copyright user a fair income; reflect the role of the copyright owner and user in the public product with respect to their relative creative contributions; and minimize the disruptive effect prevailing industry practices. *Id.* § 801(b)(1)(A)-(D). In 1993, Congress decided the royalty rate should rise and fall according to the consumer price index, once and for all abandoning the completely antiquated system of flat fixed rates. *See* Todd D. Patterson, *The Uruguay Round's Anti-Bootlegging Provision: A Victory for Musical Artists and Record Companies*, 15 WIS. INT'L. L.J. 371, 382 (referring to the provision of the Code of Federal Regulations which created the sliding scale, 37 C.F.R. § 255.2 (1994)).

101 While the CARP is told to consider four factors, it is never required to weigh the public's interest against the composer's private property interest. The CARP is only told to consider the maximum public exposure to works weighed against the creative efforts of the composer. *See* Midge M. Hyman, *The Socialization of Copyright: The Increased Use of Compulsory Licenses*, 4 CARDOZO ARTS & ENT. L.J. 105, 107 (1985).

constitutionally questionable taking of private intellectual property with public policy purpose on its face must perform some public good in its practice. Unfortunately, it seems the only public good the compulsory license brought was a political compromise.[102] The continued use of a statutory scheme in direct conflict with the constitutional purpose of copyright[103] "requires a more compelling justification than political expediency."[104]

2. Relevancy of Continued Use and Economic Factors

It is debatable whether the compulsory license is economically efficient. In a voluntary transaction, efficiency may be presumed because an exchange would not occur unless both parties expected a gain.[105] Forced transactions, like those under the compulsory license, cannot be deemed efficient without further inquiry.[106] Compulsory licensing no doubt expedites transactions, but expediency should not be confused with efficiency.[107] To deprive the parties of the benefit of a market transaction, some other economic factor should be present.[108]

In 1909, the threat of a monopoly was a real and sufficient justification for imposing upon the rights of private contract.[109] The threat vanished soon after the 1909 Act was adopted, with the birth of the recording industry.[110] During the 1976 revisions, the recording industry could show virtually no support for its argument that such a monopolistic threat would resurface.[111] The argument proffered by proponents of compulsory licensing, that authors will engage in monopolistic practices harmful to the industry,[112] ignores the fact that composers benefit by entering non-exclusive contracts to actively promote their works.[113]

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102 *See* Cassler, *supra* note 17, at 255.

103 *See* Goldstein, *supra* note 11, at 1135.

104 Bach, *supra* note 86, at 393.

105 *See* Lee, *supra* note 20, at 211.

106 *See id.*

107 *See* Goldstein, *supra* note 11, at 1138.

108 *See id.*

109 *See supra* note 32 and accompanying text.

110 *See* Goldstein, *supra* note 11, at 1137.

111 The RIAA continually admonishes that a monopoly will suddenly spring up immediately after the compulsory license is removed. But, no reason or evidence is ever offered. The RIAA seems to rely on the notion that there was a threat of monopoly in 1909, the compulsory license has been staving off this continuing threat ever since. *See generally* Revision Part 4, *supra* note 70.

112 *See* Cassler, *supra* note 17, at 252; *see also supra* note 71 and accompanying text.

113 *See* Revision Part 1, *supra* note 48, at 34 (arguing that since authors and publishers benefit from multiple recordings, presumably they would seek to grant non-exclusive licenses); Goldstein, *supra* note 11, at 1138 (stating that high transaction costs and exclusive licenses are undesirable to both the licensor and the licensee); Lee, *supra* note 20, at 219

It is possible for monopolistic practices to plague the music industry in the near future due to large corporate mergers,[114] rather than the fall of compulsory licensing. If this threat becomes a reality, the proper remedy is a suit by the Justice Department under the Sherman Antitrust Act.[115] Similarly, if a repeal of compulsory licensing were to create a monopoly today, the antitrust laws could be used to combat the economic evil.[116]

A final argument offered in economic support of compulsory licensing is that it fosters competition. Section 115 afforded small record labels the opportunity to compete with the giant labels by releasing the same music.[117] This argument assumes that the public, not given a choice, wants to hear the same music performed by different artists. Furthermore, compulsory licensing "may tend to discourage competition, as a small record company cannot get the full benefit of a hit song because a large record company may follow immediately with a recording of the same song by a more outstanding artist."[118]

In practice, the mechanical compulsory license is economically inefficient. Consumers, and not the Copyright Arbitration Royalty Panel, are best equipped to determine what a product is worth.[119] The license is premised on the fatuous presumption that the public benefits by everyone behaving in a like manner.[120] No justifiable economic rationale currently exists to support the continued usurpation of composers' freedom of contract.

(repealing the compulsory license would allow composers to monopolize their works by denying public access, but such a practice is not in the composers best interest).

114 While the number of existing record labels seems high to a casual observer, the figure is misleading. Most well known labels are owned by a parent corporation. Throughout the late 1970s until the late 1990s "The Big Six" (Warner, EMI, RCA/BMG, Polygram, MCA/Universal and Sony) reaped virtually all the profits of the music industry, owned the major labels and held the most profitable artists. In December of 1998, Universal purchased Polygram, leaving the Big Five. *See Completion of Polygram/Universal Deal Nears*, BILLBOARD, Dec. 12, 1998, *available at* LEXIS, News Library, Billboard File. In February 2000, it seemed imminent that the Big Five would shrink to the Big Four, as Warner announced plans to acquire EMI. *See Feds to Scrutinize Warner/EMI—FTC or Justice Department Will Review Merger*, BILLBOARD, Feb. 12, 2000, *available at* LEXIS, News Library, Billboard File.

115 Sherman Antitrust Act, 15 U.S.C. § 1 (2000).

116 While the antitrust laws did exist when the 1909 Act was drafted, the infancy of their development caused Congress to discount their use as a possible solution. *See* Blaisdell Study, *supra* note 18, at 120.

117 *See* Lee, *supra* note 20, at 219; *see also supra* notes 70 and 72, and accompanying text.

118 Lee, *supra* note 20, at 220.

119 *See id.* at 218.

120 *See id.* at 221 (citing DANIEL ORR, PROPERTY, MARKETS AND GOVERNMENT INTERVENTION 256, 292-93 (1976)).

3. Statutory Language

a. Disparate Treatment of Different Artists

When a composer publishes his music, the composition and the composer are subject to the compulsory license, and the composer is left with no control over the genre or the quality of the music, or over who records it. This provision separates composers from all other "creative artists, such as writers, painters, and sculptors, who are given exclusive control over their creations for the full copyright duration."[121] Within the smaller realm of musical works, sound recordings are treated differently than compositions.[122] If a composer only issues the work in printed, sheet-music form, it is not subject to the compulsory license. But, if the composer wants to fix his work in the form of a sound recording, he loses all control over who may copy it.[123] Most frustrating is the disparate treatment of different composers under this provision. Purportedly, the compulsory license gives the composer a fair return on his creative role in the cover artist's recording.[124] In fact, different composers have varying levels of skill, accomplishment, stature, and public acceptance.[125] It is questionable policy to determine a single fair rate of return when the public places such varied and subjective values on different composers. "The compulsory license generalizes the value of every composer's work at a single rate, ignoring individual achievement and barring free negotiation."[126]

b. Inconsistent Language

The limitation on the adaptation right under § 115(a)(2) is logically inconsistent in today's world of popular music. Considering the plethora of musical genres, it is quite possible that in conforming to a style or manner of performance, the fundamental character of a work will be changed. For example, an up-beat, fast-tempo electronic dance arrangement of a soulful, profound ballad changes the meaning and impact that work has on the listener. Imagine a dance version, complete with electronic instruments and mixed beats of *God Bless America*.[127] Even if the melody is retained,

121 Bach, *supra* note 86, at 398.

122 *See* Balekjian, *supra* note 67, at 382 (holding that the current provision allows disparate treatment among of owners of musical compositions, which is unnecessary to promote the public access policy); *see* 17 U.S.C. § 602 (2000).

123 *See* Bach, *supra* note 86, at 398.

124 *See id.*

125 *See id.*

126 *Id.*

127 IRVING BERLIN, *God Bless America* (1918). It should be noted that Irving Berlin, along

one could easily argue the fundamental character of the patriotic ballad is altered. Yet, the only changes made in the work were those necessary to conform it to a performance style. Three examples of how this statutory inconsistency has affected composers and their compositions are expounded below.

Sartori and Quarantotto composed a song entitled *Con Te Partiro (I Will Go With You)*.[128] This work was made popular in the United States by Andrea Bocelli and Sarah Brightman singing *Time to Say Good-bye* as a tribute to Henri Maske.[129] This piece could be classified as a semi-serious work, not fitting squarely into the realm of popular music, given its instrumentation and "art song" quality. Under § 115(a)(2), a cover of this work was performed, recorded and distributed.[130] The performing artist, Donna Summer, transformed the semi-serious composition into a dance track complete with synthesizers, drum machine, and a voice effects processor.[131] The reflective, romantic nature of the original work was lost in a fury of electrified, un-original, pulsating beats.[132] Such uses of musical compositions are not only artistic travesties, but also insults to composers.

Another example of the tragedy and offense caused by compulsory licensing lies in the popular song *Torn*, written and originally recorded by the band Ednaswap.[133] Ednaswap recorded the slow moving, gritty and heart-wrenching ballad twice before it was scheduled for release on their album "Wacko Magneto."[134] Ednaswap's record label decided not to release *Torn* as a single, and the

with John Philip Sousa and Victor Herbert, were staunch critics of the lack of any mechanical reproduction rights prior to the 1909 Act. Sousa and Herbert "complained that manufacturers of music rolls and talking-machine records were reproducing part of their brain and genius without a cent for such use of their compositions." Henn Study, *supra* note 23, at 3. It is doubtful two-cents was enough compensation for the non-consensual reproduction of these artists' creative genius.

128 ANDREA BOCELLI, *Con Te Partiro*, *on* ROMANZA (S.R.L./Polydor B.V./Phillips/Insieme Srl 1996).

129 *Id.*

130 It should be noted that while there is a formal process in place to invoke § 115(a)(2), no one in the industry bothers to follow this complex and time consuming procedure. Instead, a privately owned intermediary, The Harry Fox Agency, will partner up cover artists with recorded songs and negotiates a fee for the use of the song. However, this is of little consequence. An author will never receive a negotiated fee higher than the statutory ceiling created by § 115. For a detailed discussion on how music licensing works in practice see Greenman, *supra* note 24, at 13 n.55.

131 DONNA SUMMER, *I Will Go With You* (*Con Te Partiro*) (remixes), *on* I WILL GO WITH YOU (Sony/Columbia 1999).

132 "This [version] totally kicked the true meaning out of *Con Te Partiro* . . . the beats are horrible," Anon. *Album Reviews*, *at* http://amazon.com/music/con_te_partiro_2.html (last visited Feb. 2, 2000) (on file with author).

133 EDNASWAP, *Torn*, *on* WACKO MAGNETO (Island Records 1997).

134 Interview with Joseph Riccitelli, Senior Vice President of Radio Promotion, Jive Records, in New York, N.Y. (Feb. 16, 2000) (on file with author).

band transferred their copyright to BMG Publishing.[135] Once subject to the compulsory license provision, another label signed an Australian actress named Natalie Imbruglia, arranged an up-tempo version of *Torn* for the waif-like model, and the song became a hit.[136] Ednaswap hated this cover; Anne Preven, the vocalist and joint author, writes very personal music and never intended this song to be performed in Imbruglia's manner.[137] But, under § 115(a)(2), Preven and artists like her have no say in the matter, and Preven's talents, along with her co-writers', go virtually unrecognized.[138]

Perhaps the most appalling attribute of § 115(a)(2) is exemplified in Madonna's cover of *American Pie*.[139] Written in 1971 by folk artist Don McLean,[140] *American Pie* became the anthem for a generation,[141] a work that would survive in the annals of popular music as one of the greatest songs ever written. In its original form, the song was eight minutes and thirty seconds long, representing an homage to Buddy Holly, Richie Valens and the Big Bopper, but also a lament on the current trends of popular music—a tribute and a social commentary all in one.[142] Madonna collabo-

135 *See id.*

136 NATALIE IMBRUGLIA, *Torn*, *on* LEFT OF THE MIDDLE (BMG/RCA 1998). Despite biting reviews calling the cover, "[a] bit of innocuous radio fodder . . . indicative of the disposable pop in Imbruglia's stateside debut," *Weekend at Home; The Latest in Music, Video and Books*, ATLANTA J. & CONST., Mar. 12, 1998, at 6E, *available at* LEXIS, News Library, Entertainment Archive News File, Imbruglia's version spent ten weeks at No. 1 on the Billboard charts. *See* *Hot 100* Airplay, BILLBOARD, July 25, 1998, *available at* LEXIS, News Library, Billboard File.

137 As a business partner and personal friend of the band, Mr. Riccitelli spoke on behalf of Ms. Preven and Ednaswap. *See* Interview with Joseph Riccitelli, *supra* note 132. The view expressed by Ms. Preven is not uncommon among composers. Many artists feel their works are imbued with a piece of their soul. European countries recognize this ethereal concept and protect certain aspects of works from alteration because an alteration would violate the author's "moral rights." The issue of moral rights is beyond the scope of this paper. However, moral rights should not be taken lightly. It was the U.S. compulsory license provision coupled with our failure to recognize moral rights, which prevented the United States from joining the Berne Convention for nearly a century. *See* Berne Convention Implementation Act of 1988, Pub. L. No. 199-568, 102 Stat. 2853 (1988). The Berne Convention for the Protection of Literacy and Artistic Works was concluded in 1886. The Convention seeks to protect the rights of authors in their artistic and literary works, including writings, musical arrangements, and scientific designs. The Convention has since been modernized through multiple revisions. The Berne Convention was adopted by the U.S. Congress in 1988. It was affected by an international committee of nations to protect the rights of authors in their literary and artistic works. *See also* Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised July 24, 1971, 828 U.N.T.S. 221.

138 "These gifted songwriters deserve all of the credit, in my opinion, for the success of *Torn*." Simon Glickman, L.A. TIMES, Feb. 22, 1998, at Calendar page 91, *available at* LEXIS News Library, Entertainment Archive News File.

139 MADONNA, *American Pie*, *on* THE NEXT BEST THING: MUSIC FROM THE MOTION PICTURE (WEA/Warner Brothers 2000).

140 DON MCLEAN, *American Pie*, *on* AMERICAN PIE (Capitol Records 1971).

141 *See* McShane, *supra* note 4.

142 *See* Ian Michaels, Clive King and Patrick Humphries, *Top 100 Cult Moments*, The

rated with producer William Orbit to create a shorter, more commercial-friendly version.[143] The arrangement shaves over three minutes off the original, and adds "an electronic dance beat and distant background vocals from actor Rupert Everett."[144] While Madonna is an extremely talented, successful and original artist, this arrangement is "blasphemy to a generation . . . straying far afield from McLean's simple arrangement."[145] The social commentary and nostalgic element of the original are lost in the transmogrification to a dance tune. The fundamental character is arguably lost, although the melody is retained.

The above examples are condoned and even encouraged by § 115(a)(2). During the copyright revision process, several critics of the proposed Alternative B[146] prophesized the inherent dangers of the adaptation right and its limitation.[147] Even the RIAA recognized that the adaptation right needed more clarification than the tentative draft offered.[148] Yet, no clarification was ever made and no standards were created.

The only guideline offered in all the legislative history, aside from the limitation itself, is that the arrangement should be reasonable and not distort, pervert or make a travesty of the work.[149] Based on these guidelines, parody is seemingly impermissible[150]

(London), Feb. 21, 1998, *available at* LEXIS, News Library, Entertainment Archive News File; *see also* McShane, *supra* note 4.

143 *See* MADONNA, *supra* note 139.

144 McShane, *supra* note 4.

145 *Id.* "For me, [American Pie] got me interested in the music business. I would place it in the top ten songs ever written. I feel the cover is unbelievably nonchalant, no passion, no emotion at all." Interview with Joseph Riccitelli, *supra* note 134.

146 *See supra* note 82 and accompanying text.

147 Dating as far back as the Henn Study, policy makers cautioned against the use of an overboard adaptation privilege. "Whether or not a compulsory license to record a composition implicitly includes the right to make necessary and proper arrangements and limitations on such a right of arrangement, require clarification." Henn Study, *supra* note 23, at 54. Once Alternative B was introduced, several artist advocates spoke out against the provision. "I respectfully submit that this is a dangerous provision because, under that provision, radical alterations can be made to the material detriment of the work." Revision Part 3, *supra* note 42, at 217 (statement of Julian Abels, MPPA). Questions were also raised as to how far the privilege extends and what uses a manufacturer was allowed to make of an arrangement. *See id.* at 232 (statement of Mr. Kellman).

148 *See* Revision Part 4, *supra* note 70, at 43.

149 *See* H.R. Rep. No. 94-1476, at 109 (1976). Mr. Wattenberg, who drafted the current limitation of "basic melody and fundamental character" warned that a compulsory license provision without any limitation would allow sacred and serious works to be desecrated, and that some arrangements would inevitably stay "beyond the limits of reason and good taste. . . making burlesque and. . .salacious versions." Revision Part 3, *supra* note 42, at 444. Even the RIAA recognized a compulsory licensee did not have the right to distort the copyrighted work. But no definition of "distort" was ever given. *See also* Revision Part 4, *supra* note 70, at 430.

150 Given the legislative history and current case law on parody and fair use, it seems a parody would always alter the fundamental character of a copyrighted work. Indeed, Professor Patry stated that Congress did not intend for the compulsory license to cover parody

under the compulsory license, but what else? The guidelines of distortion and perversion are not contained in the Copyright Act; they are undefined terms from the legislative history. Moreover, "fundamental character" is never defined in the Copyright Act. How can an author, performer or judge determine when the fundamental character has been altered if no one knows what fundamental character means? It has been the policy of the Supreme Court not to question what is art.[151] So long as the work meets the threshold of originality, the Court will not enter any subjective determinations as to the artistic merit or value of a work.[152] In the absence of any written standards or guidelines for judges, the inherent risk of arbitrary and capricious decisions based on an individual trial judge's personal, subjective tastes in art grows exponentially. Absent any legislative history or case law on what distortion and perversion are, an arbitrary standard such as "I know it when I see it"[153] could easily arise. Vesting unelected officials with unbridled discretion to determine what is distortion of art subverts general principles of judicial review. Moreover, such an undertaking is one the courts have already expressly refused to assume.[154] Does Madonna's cover of *American Pie* distort the original, or is it simply in poor taste?[155] More importantly, if the court does not question what is art, who decides these questions of distortion and perversion, and what should be the standard of adjudication?

4. Inadequate Remedy

Unfortunately, the above questions remain unanswered because it is futile for a copyright owner to raise them. The only remedy afforded a copyright owner in this situation is a suit for infringement.[156] Generally, in a suit for copyright infringement, the plaintiff bears the burden of proving that he owns the copyright, that the defendant had access to and copied the work, that the defendant's use was an improper appropriation, and that there is a substantial similarity between the original and the alleged infringement.[157] In potential abuses of the compulsory license, a plaintiff would have an extraordinarily difficult time proving the third prong of improper appropriation. The plaintiff would be required to prove the defendant's use violated the express adaptation limitation of § 115 (a)(2). However, composers would be at the mercy of a trial judge's subjective determination of whether the adaptation distorted, perverted, or parodied the original.[158] It is often thought that judges would use this broad discretion to constrict permissible adaptations under the compulsory license. But, since judges are not trained to adjudicate art, they have tended to lean far in the opposite direction of expanding what is permissible either in terms of originality or fair use.[159] The true fear is that judges would never find an adaptation made pursuant to the compulsory license to be an infringement, thus rendering § 115 moot.[160]

In the 1963 hearings, the RIAA recognized that the existence of infringement suits centered around a violation of the compulsory license provision.[161] "There have been occasional reports in the trade press of litigation based on the claim that an arrangement mutilating the original work constitutes an infringement, i.e. that it is outside the scope of the rights acquired under the statutory license—but no such case appears ever to have been brought

at all. Interview with William Patry, Professor of Law, Benjamin N. Cardozo School of Law, in New York, N.Y. (Feb. 8, 2000) (on file with author). However, some scholars believe there may be instances where satirical performance could be covered under the compulsory license. *See* Charles Sanders & Stephen Gordon, *Stranger in Parodies: Weird Al and the Law of Musical Satire*, 1 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 11, 32 (1990) (citing H.R. REP. No. 94-1476, at 109 (1976)).

151 "It would be a dangerous undertaking for persons trained only in the law to constitute themselves final judges of the worth of pictorial illustration." Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903). Since this seminal case, it has been the position of the Supreme Court not to make subjective value judgments as to what constitutes art.

152 *See* Atari Games Corp. v. Oman, 888 F.2d 878 (D.C. Cir. 1989) (holding the series of colored blocks in a Pong game copyrightable because the level of creativity necessary is minimal); *accord* Feist Publ'ns, Inc. v. Rural Telephone Serv. Co. Inc., 499 U.S. 340 (1991) (originality is the touch-stone of copyright; the level may be low, but it does exist).

153 Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). While Justice Stewart was attempting to set a "standard" for pornography, it is easy to see how the personal tastes of what an individual judge finds aesthetically pleasing, or morally reprehensible can figure into such a vague and subjective standard.

154 *See Bleistein*, 188 U.S. at 251.

155 *See* Interview with Joseph Riccitelli, *supra* note 134.

156 Theoretically, if a work made under the compulsory license did distort or pervert the original by changing the fundamental character, the copyright owner could bring suit because the use under § 115(a)(2) would be invalid and therefore an infringement of the copyright owner's exclusive rights under § 106. *See* 17 U.S.C. §§ 501-505 (2000).

157 *See* CRAIG JOYCE ET AL., COPYRIGHT LAW § 8.03, at 618-20 (4th ed. 1998).

158 With no statutory definitions or guidelines, a plaintiff would be forced to rely on the subjective judgments of the trial court.

159 To be copyrightable, a work need only contain a modicum of creativity. *See* Atari Games Corp. v. Oman, 888 F.2d 878, 883 (D.C. Cir. 1989). Considering cases of parody, judges have recently expanded the fair use doctrine to encompass more musical forms of parody, where they consider musical parody valid criticism deserving of protection. *See* Sanders & Gordon, *supra* note 150, at 12.

160 Wide latitude for compulsory adaptations has already been judicially recognized. *See* Comment, *Copyright and the Musical Arrangement*, 7 PEPP L. REV. 125, 139 (1979); *see also* Leo Feist Inc. v. Apollo Records, 300 F. Supp. 32 (S.D.N.Y. 1969), *aff'd*, 418 F.2d 1249 (2d Cir. 1969) (holding that Latin arrangements of the standards *Five Foot Two, Eyes of Blue, When Your Eyes Are Smiling*, and *Lazy River* were permissible under the compulsory license provision).

161 *See* Revision Part 4, *supra* note 70, at 431.

to trial."[162] Since that time, gross violence has been committed against countless compositions under the protective guise of the compulsory license, but no infringement action has ever proceeded to trial. One possible reason for the lack of infringement suits is the difficulty and cost in proving that an infringement has occurred, weighed against a lucrative settlement offer.

C. *Possible Reforms*

1. Removal of the Compulsory License

The notion that compulsory licenses are employed to protect artists' rights when a new technology emerges no longer supports the use of a mechanical compulsory license for sound recordings.[163] The phonograph (or any other form of sound recording) is no longer "new technology." Congress chose to protect sound recordings as works in the 1976 Act, thereby protecting authors' rights in that form of fixation.[164] The other justification for limiting the exclusive rights of sound recordings by retaining the compulsory license was that it offered a political compromise. However, political compromise at the expense of artists' property rights was unwarranted.[165] Artists' rights should be more equally balanced against the recording industry's interest and the public interest.[166]

Originally, the mechanical compulsory license was enacted to protect the recording industry from monopoly during the years of its infancy.[167] The record industry no longer needs the protection from monopoly[168] or the economic boost of a compulsory scheme. In fact, the recording industry saw its most profitable year ever in 1999.[169] It seems only equitable that such a thriving industry share

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162 *Id.*

163 *See* Lee, *supra* note 20, at 209 (explaining that compulsory licensing is used to accommodate author's rights when exclusive rights in a new technology have not been established).

164 All works of original authorship fixed in any tangible medium of expression now known or later developed that are protected under the general subject matter of copyright. *See* 17 U.S.C. § 102(a) (2000). The 1976 Act expressly enumerates sound recordings as a work of authorship. *See id.* § 102(a)(7). Therefore, the exclusive rights of 17 U.S.C. § 106 apply to sound recordings. For a list of the exclusive rights granted under § 106, see *supra* note 12.

165 *See supra* note 102 and accompanying text.

166 *See* Hyman, *supra* note 101, at 107 (stating that unlike the fair use doctrine, which balances the public interest against the private property interest of the author, compulsory licensing resembles an unwritten, forced contract).

167 *See* Lee, *supra* note 20, at 225 (noting that compulsory licensing was developed at a time when the recording industry and antitrust laws were in their infancy).

168 *See id.*; *see also supra* notes 115-116 and accompanying text.

169 In 1990, the market for recorded music peaked at $7.5 billion. Throughout the past decade, that market value has steadily risen to $14.6 billion in 1999, up 6.3% in one year

some of its profits with the creative minds behind the music by abolishing the compulsory license and allowing authors to negotiate freely.

a. The Harsh and Cold Reality

Unfortunately, the compulsory license will not be completely abandoned. The recording industry has relied on this crutch for over ninety years. While it is doubtful that the abolition would cause the RIAA's prophesized chaos,[170] a massive restructuring would be necessary because compulsory licensing is now ingrained as an industry custom. Although custom alone is not sufficient to support the continued use of the license,[171] the lobbying power of and the resistance to change by the recording industry is sufficient.[172] Authors and their advocates could never match the lobbying power of the recording industry;[173] therefore, authors' rights under the compulsory licensing scheme continue to suffer.

The only real chance authors had at removing the compulsory license arose when the United States joined the Berne Convention.[174] European countries viewed the U.S. mechanical compulsory license as a threat to an author's moral rights, because U.S. copyright law contains no offsetting provision to protect the integrity of an author's work.[175] In a stealthy move, U.S. negotiators "found" the protection of moral rights in § 115(a)(2), easing our adherence to the Berne convention.[176] The language, "but the ar-

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alone (between 1998 and 1999). *See* Don Waller, *U.S. Record Sales Reach New Record*, *at* http://dailynews.yahoo.com/h/nm/20000221/en/music-sales-1.html (Feb. 21, 2000) (on file with author).

170 *See supra* note 71 and accompanying text (detailing the RIAA's predictions of the effect removing the compulsory license would have on the indusry).

171 The grounds for enacting the compulsory license have vanished into thin air, yet the recording industry clings to it as custom. While custom may be persuasive evidence, or in some cases an affirmative defense at trial, it is not justification for a rule of law. *See* Holmes, *supra* note 79, at 469.

172 *See supra* note 86 and accompanying text.

173 *See id.*

174 The lack of a moral rights provision coupled with the broad license granted to cover artists proved to be a great obstacle in U.S. adherence to the Berne Convention. *See, e.g.*, Ralph Oman, *The United States and the Berne Union: An Extended Courtship*, 3 J.L. & TECH 71, 93 (1988) (noting that while many European states have incoporated moral rights into their copyright laws pursuant to Article 6bis of the Berne Convention, the United States does not have a corresponding right).

175 *See id.*

176 *See* 17 U.S.C. § 115 (a)(2) (2000). Really, U.S. copyright law does not protect moral rights of music composers in any way. The limitation on arrangement of § 115(a)(2) is ambiguous and easily circumvented. The European countries who sought U.S. recognition of moral rights allowed U.S. negotiators to "find" moral rights under § 115 as a political compromise after winning the argument to ban the jukebox provision of § 116. Therefore, moral rights were never truly "found" and Europe knows that the United States refuses to recognize them. For the full text of 17 U.S.C. § 115 (a)(2), see *supra* note 7.

rangement shall not change the basic melody of fundamental character of the work," equaled the U.S. payment of lip service to the moral rights doctrine. Considering the intense international pressure to repeal or amend the compulsory license and Congress's failure to succumb to it, it is unlikely any pressure from domestic supporters of authors' rights will ever be successful in repealing the compulsory license.

2. Reforming the Existing Provision

Since there is little hope of removing the scheme, Congress should consider reforming the existing license provision. First, in the definition section of the Act,[177] Congress could articulate a standard by which to judge "fundamental character."[178] But, as seen in digital sampling cases, such an undertaking may prove problematic.[179] A quantitative approach to defining fundamental character disregards the individual value of every composer's work.[180] For example, altering six measures in the verse of a piece may do less harm to the fundamental character of original work than altering two measures of the hook.[181]

A second option for reform would be to create guidelines defining distortion and perversion. Currently, there is no case law on distortion and perversion apart from the standards set in parody cases.[182] Congress or the courts should develop a standard of what distortion means under the compulsory license provision in order to avoid arbitrary and capricious artistic judgments by trial judges.

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177 *See id.* § 101.

178 *Id.* § 115(a)(2).

179 *See* Robert Szymanski, *Audio Pastiche: Digital Sampling, Intermediate Copying, Fair Use*, 3 UCLA Ent. L. Rev. 271, 295 (1996) (detailing that the effect of samples varies dramatically based on which portion of a song is sampled and the notoriety of the sampled work and artist, therefore, free negotiation rather than a compulsory licensing regime suits the needs of composers and users).

180 *See* Bach, *supra* note 86, at 398.

181 In digital sampling infringement suits, courts have adopted "value" approaches instead of quantitative approaches to determine liability. *See* Grand Upright Music Ltd. v. Warner Bros. Records Inc., 780 F. Supp. 182 (S.D.N.Y. 1991) (holding that the misappropriation of even a short sample can infringe the copyright of the original work). The assumption that any material taken which equaled less than six bars of the entire work would not be an infringement is erroneous. *See* Szymanski, *supra* note 179, at 300.

182 As no infringement actions under 17 U.S.C. § 115(a)(2) have ever progressed to trial, the only judicial standards on distortion come from cases where the parodied use of a copyrighted work is challenged under the fair use doctrine. *See* Campbell v. Acuff Rose, Inc., 510 U.S. 569 (1994). In *Campbell*, the Court stated that four factors would be weighed in determining "fair use" i.e. permissible, non-infringing use of the copyrighted work had been made: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount appropriated in relation to the copyrighted work as a whole; and (4) the effect upon the potential market or value of the copyrighted work. *Id.* at 577. While these standards for fair use do not solve the complexities of musical parody, they are standards nonetheless, and they provide a starting point for judicial examination and analysis.

Of course, to develop a body of case law, a suit under § 115(a)(2) would actually need to proceed to trial. Perhaps the most important reform would be to make litigating an infringement of the compulsory license cost-effective for an artist.

3. Other Compromise Options

For a moment, set aside the fact that tremendous lobbying power of the recording industry makes concession to authors' rights in this area nearly impossible. Now is an excellent time, given the recent economic prosperity of the recording industry,[183] to adopt John Schulman's Alternative C proposal and grant exclusive sound recording rights to composers for the first five years, after which a compulsory license is made available.[184] If such an idea, after implementation, proved economically efficient and beneficial to the author and the public, it could permanently replace the current mechanism. Finally, there are several ways in which Congress could draft a non-compulsory provision that encourages public access while allowing composers the benefit of the free market.[185] Private parties could use the well-established substantive laws of contract and property to negotiate the most economically efficient alternatives among themselves. Unfortunately, Congress and the recording industry have become too comfortable reaching for a quick and easy solution in compulsory licensing. "By reaching so quickly for the compulsory license solution, Congress effectively foreclosed experimentation with possibly more efficient private alternatives."[186]

Conclusion

The past justifications for implementing a mechanical compulsory license no longer support the gross usurpation of authors' intellectual property interests. Developed under a threat of monopolization when antitrust laws were in their infancy, the compulsory license scheme has been allowed to exist far past the time when these fears vanished. The continued reliance on compulsory licensing forces composers to be discriminated against as artists by depriving them of Constitutionally required exclusivity of copyright protection.

As it exists, § 115(a)(2) allows cover artists to take advantage

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183 *See supra* note 169 and accompanying text.

184 *See supra* note 80 and the accompanying text referring to Alternative C.

185 *See* Balekjian, *supra* note 67, at 390.

186 Rooks, *supra* note 24, at 270.

of a composer's work with virtually no recourse left to the original author. The alteration right granted to cover artists under the provision is logically inconsistent with the limitation that the arrangement may not change the fundamental character of the work, given the vast spectrum of musical genres in existence today. The antiquatedness and inadequacy of the provision is clearly illustrated by the current "hits" of Donna Summer, Natalie Imbruglia and Madonna.

The compulsory license provision should be repealed or rewritten to give composers the same treatment given to other authors by allowing them to negotiate freely the terms of the use of their works. Ultimately, the composers, the recording industry and the public will benefit economically and artistically under a free negotiation provision. Composers will no longer be the pariahs of the author community, cast out in a raging sea of unauthorized, non-consensual uses of their works. The recording industry will be forced to negotiate, but it is in the interest of all parties to keep these transaction costs low. In time, the public will receive a greater number of diversified and original works when the crutch of compulsory licensing is cast aside.

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