MUSIC RECORDING, PUBLISHING, AND COMPULSORY LICENSES: TOWARD A CONSISTENT COPYRIGHT LAW*

I. INTRODUCTION

Under the Copyright Act of 1976, when a music composer allows a composition to be recorded and distributed to the public, anyone else may record and distribute that composition, provided that a statutory royalty is paid and minimal notice requirements are satisfied. This is true even if the original composer does not want others

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1. 17 U.S.C. §§ 101-914 (1982 & Supp. II 1985). The Copyright Act of 1976 is a single statute which regulates and protects a wide variety of artistic forms of expression, including literary works, musical works, motion pictures, sound recordings, and dance works. Id. § 102(a)(1)-(7). The scope of this Note is limited to a comparative analysis of how the copyright law regulates and affects the areas of music recording and publishing.

2. 17 U.S.C. § 115(a)(1) (1982). Section 115(a)(1), in part, states: "When phonorecords . . . have been distributed to the public . . . under the authority of the copyright owner, any other person may, by complying with the provisions of this section, obtain a compulsory license to make and distribute phonorecords of the work." Id.

3. 17 U.S.C. § 115(c) (1982). Presently, the royalty rate is five cents per composition per recording, or .95 cent per minute of playing time, whichever is greater. 37 C.F.R. § 307.3(c) (1986). Although the Copyright Act of 1976 indicates that the royalty rate is "two and three-fourths cents, or one-half of one cent per minute of playing time or fraction thereof," 17 U.S.C. § 115(c)(2) (1982), this rate has been increased administratively several times under the authority of 17 U.S.C. § 804 (1982). See infra note 89. Starting in 1987, the rate may be increased administratively upon petition at 10-year intervals. 17 U.S.C. § 804(a)(2)(B) (1982).

The compulsory licensee is required to make royalty payments and statements of account to the copyright owner on a monthly basis. 17 U.S.C. § 115(c)(4)-(5) (1982). For definitions of "compulsory licensee" and "statements of account," see 37 C.F.R. §§ 201.19(a)(1), (4) (1986). The licensee is required to pay royalties only for phonorecords made and distributed. 17 U.S.C. § 115(c)(2) (1982). "[A] phonorecord is considered 'distributed' if the person exercising the compulsory license has voluntarily and permanently parted with its possession." Id. See also 2 M. Nimmer, Nimmer on Copyright § 8.04[H] (1986). Thus, no royalty is payable on unsold records returned to the compulsory licensee. For an explanation of "permanently parted with possession," see 37 C.F.R. § 201.19(a)(5) (1986).

4. 17 U.S.C. § 115(b) (1982). Notice of intention to obtain a compulsory license for making and distributing phonorecords of nondramatic musical works must be served on the copyright owner "before or within thirty days after making, and before distributing any phonorecords . . . ." Id. § 115(b)(1). Additional requirements which must be complied with in order to satisfy § 115(b) notice are set forth in 37 C.F.R. § 201.18 (1986).
to record his composition. The effect of this provision is to "compel" composers to license the recording of their compositions by others, and consequently the provision is known as a compulsory license.

In contrast, subsequent written arrangements of a music composer's original work, known as derivative works, may not be printed and sold as sheet music by others without an express license from the composer. The composer may charge an exorbitant fee for this license, or may refuse to grant a license altogether.

Copyright law thus treats recorded music in a different manner from published sheet music. The following hypothetical example illustrates the difference:

5. See, e.g., Heilman v. Bell, 583 F.2d 373, 376 (7th Cir. 1978), cert. denied, 440 U.S. 959 (1979), which states: "Once the copyright holder has benefited by making a recording of the composition, he must permit others who pay the statutory royalty to similarly use the composition, i.e., to 'make a recording.'" Duplication of a recording, however, is not a similar use. Id. See also infra note 36.


The Copyright Act of 1976 also provides compulsory licenses for jukeboxes (17 U.S.C. § 116 (1982)), cable transmissions (17 U.S.C. § 111 (1982)), and public broadcasting (17 U.S.C. § 118 (1982)). However, these are beyond the scope of this Note, which is limited to compulsory licensing of phonorecords (17 U.S.C. § 115 (1982)).

7. A derivative work is "a work based upon one or more preexisting works, such as a . . . musical arrangement . . ." 17 U.S.C. § 101 (1982). A musical arrangement is created when an "arranger takes a pre-existing musical composition and produces an extensive work that is based on this prior composition." Comment, Copyright and the Musical Arrangement: An Analysis of the Law and Problems Pertaining to This Specialized Form of Derivative Work, 7 PEPPERDINE L. REV. 125, 129 (1979). "To be considered a derivative work, the subsequent work must borrow substantially from [the] prior work," id., and must make a nonminimal original contribution to the prior work. See 1 M. NIMMER, supra note 2, § 3.03. Other examples of derivative works include motion pictures, translations, art reproductions and editorially modified works. 17 U.S.C. § 101 (1982) (defining derivative work).

8. E.g., Russell v. Price, 448 F. Supp. 303, 304 (C.D. Cal. 1977), aff'd, 612 F.2d 1123 (9th Cir. 1979), cert. denied, 446 U.S. 952 (1980) ("[I]f one intends to create and commercially exploit a work that is derivative of a copyrighted work, a license to do so must be obtained from the owner."). See 17 U.S.C. §§ 106(2), 201(a),(d).

9. E.g., Coca-Cola Co. v. State, 225 S.W. 791, 793 (Tex. Civ. App. 1920) ("The owner of a . . . copyright . . . may impose upon his assignee such restrictions as he may see proper, including the price at which [it] may be sold . . . "). See also Remick Music Corp. v. Interstate Hotel Co., 58 F. Supp. 523, 542 (D. Neb. 1944), aff'd, 157 F.2d 744 (8th Cir.), cert. denied, 329 U.S. 809 (1946) ("The owner of a copyright has the right to dispose of it on such terms as he may see fit, or he may decline to dispose of it on any terms."); Westway Theatre, Inc. v. Twentieth Century-Fox Film Corp., 30 F. Supp. 830, 835 (C.D. Md.), aff'd, 113 F.2d 932 (4th Cir. 1940) ("The legal effect of a copyright . . . is to create in the owner an exclusive property right, with the incidental power to lease or license the use thereof by others on stipulated terms.").

10. See supra note 9. See also Paine v. Electrical Research Products, Inc., 27 F. Supp. 780, 784 (S.D.N.Y. 1939) (copyright holders have the right to exclude others from the use of their property) (citing Fox Film Corp. v. Royal, 286 U.S. 123 (1931)).
lustrates the effects of this disparate treatment: Composer, an unknown song writer, makes and distributes a first recording of his work. Performer, a prominent recording artist who customarily publishes his own recorded arrangements in sheet music form, transcribes and arranges Composer’s work so it can be played on his own musical instrument. Performer then records the new arrangement, sells the recording, and pays Composer the required statutory royalties under the compulsory license provision of the Copyright Act. Performer’s recording receives such widespread acclaim that he wishes to publish and sell the sheet music of his own recorded arrangement of Composer’s work. Yet, Composer can prevent him from doing this, or charge an exorbitant fee for the license to publish the work. If Performer does publish his written arrangement without Composer’s express license, he is subject to suit for copyright infringement. This means that Performer is free to make and sell recordings of his arrangement of Composer’s work, even if Composer objects, but Performer is not similarly free to publish and sell sheet music of the same musical arrangement which he has already written and recorded, and from which he has profited.

This Note analyzes the disparate treatment of recorded music and published sheet music under the Copyright Act of 1976, examines whether compulsory licensing of recordings is justified, and concludes that the disparate treatment reflects clashing policy goals and is inconsistent and unjustified.

II. THE DOMINANT POLICY OF COPYRIGHT LAW: LIMITED MONOPOLY

In 1944, Judge Learned Hand articulated the established prin-

11. This practice is not uncommon for popular recording artists. For example, classical guitarist Andres Segovia published the arrangement of his famous recording of the Chaconne by J.S. Bach (“Andres Segovia Edition: Johann Sebastian Bach Chaconne for Guitar,” Belwin-Mills Publishing Corp. (1963)), in addition to many other compositions.

12. It is not unusual for certain instrumentalists to draw upon the repertoire of other instruments through arrangements and transcriptions of musical compositions. For example, the Bach Chaconne mentioned supra note 11 was originally written for solo violin, and was later transcribed for solo guitar by Segovia.

13. See supra notes 2-6 and accompanying text.

14. See supra notes 7-10 and accompanying text.

15. 17 U.S.C. § 501(a) (1982) (protecting the exclusive right of the copyright owner to prepare derivative works pursuant to § 106(2)). Anyone who violates the copyright owner’s exclusive right to prepare derivative works based on the underlying copyrighted work is an infringer of copyright. Id.

16. “The compulsory licensee does not . . . obtain the right to reproduce the work in sheet music . . . .” 2 M. NIMMER, supra note 2, § 8.04[B].
principle that "[c]opyright and literary property are monopolies; they entitle the owner to prohibit various kinds of reproduction, and to relieve individuals of these prohibitions by licenses."17 The copyright monopoly, however, is not without boundaries. Copyright law creates a limited monopoly which protects the owner only from unauthorized copying by others;18 it does not protect underlying ideas, concepts, or principles from use by others.19 Moreover, the limited copyright monopoly expires following a statutory time period, which is generally the life of the author plus fifty years.20 After this time period expires, copyrighted works fall into the public domain.21 Despite these limitations, the copyright monopoly provides rights so substantial that antitrust questions have been raised in connection with their exercise.22

17. Goldsmith v. Commissioner, 143 F.2d 466, 467 (2d Cir.) (concurring opinion) cert. denied, 323 U.S. 774 (1944). The principle has also been suggested in several other cases. See, e.g., cases cited supra notes 9-10.

18. Schnadig Corp. v. Gaines Mfg. Co., 620 F.2d 1166, 1168 n.3 (6th Cir. 1980) ("A copyright protects only from copying, it does not confer an absolute monopoly."). See also Time, Inc. v. Bernard Geis Assoc., 293 F. Supp. 130, 144 (S.D.N.Y. 1968) (contrasting patent law, which provides unlimited monopoly for a limited time period, with copyright law, which provides limited monopoly for a limited time period).

19. 17 U.S.C. § 102(b) (1982) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery . . . ."). There is a recognized distinction between the idea underlying a work, which does not receive copyright protection, and the expression of the idea, which does receive copyright protection. In Mazer v. Stein, 347 U.S. 201, 217 (1954), the Supreme Court stated: "[A] copyright gives no exclusive right to the art disclosed; protection is given only to the expression of the idea—not the idea itself." Id. (citing F.W. Woolworth Co. v. Contemporary Arts, Inc., 193 F.2d 162 (1st Cir. 1951), aff'd, 344 U.S. 228 (1952)). See also Ansehl v. Puritan Pharmaceutical Co., 61 F.2d 131 (8th Cir. 1932), cert. denied, 287 U.S. 666 (1932); Fulmer v. United States, 103 F. Supp. 1021 (Ct. Cl. 1952); 1 M. NIMMER, supra note 2, § 2.03[D].

20. 17 U.S.C. § 302(a) (1982). The several exceptions to this time period are found throughout 17 U.S.C. ch. 3 (Duration of Copyright). A clear and concise explanation of these exceptions can be found in W. STRONG, THE COPYRIGHT BOOK: A PRACTICAL GUIDE 38-40 (2d ed. 1981). A more detailed explanation can be found in 2 M. NIMMER, supra note 2, ch. 9.


22. See, e.g., White, Musical Copyrights v. the Anti-Trust Laws, 30 Neb. L. Rev. 50 (1951) (discussing the seeming incompatibility between copyright law and federal antitrust laws); Comment, Music Copyright Associations and the Antitrust Laws, 25 Ind. L.J. 168 (1950) (discussing the origin, structure, and function of the American Society of Composers, Authors, and Publishers [ASCAP] and whether it violates the Sherman Antitrust Act by combining individual monopolies).

The Register of Copyrights noted that "the copyright owner is given exclusive control over the market for his work and if his control were unlimited [in duration], it could become an undue restraint on the dissemination of the work." REGISTER OF COPYRIGHTS, 87TH CONG.
The limited monopoly policy of copyright law arises from article one, section eight, clause eight of the Constitution, which empowers Congress to establish copyrights of limited duration to "promote the Progress of Science and useful Arts." Underlying section eight is the principle that society will be harmed if artists are not given exclusive rights to exploit their works for a limited time, because the lack of such rights would discourage artistic creativity. Thus, granting a limited monopoly in copyright advances the public interest because it encourages artists to create through the prospect of financial gain. The eventual termination of the monopoly assures the public good, because it allows the assimilation of artistic works into society, which is the ultimate objective of copyright law.

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23. U.S. CONST. art. I, § 8, cl. 8 provides that 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 . . . ." This clause is commonly known as the copyright clause. See, e.g., Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 701 (1984); Goldstein v. California, 412 U.S. 546, 546 (1973).

24. Universal City Studios, Inc. v. Sony Corp. of Am., 659 F.2d 963 (9th Cir. 1981), rev'd on other grounds, 464 U.S. 417 (1984). The Court in Sony Corp. stated: [I]t is clear that the real purpose of the copyright scheme is to encourage works of the intellect, and that this purpose is to be achieved by reliance on the economic incentives granted to authors and inventors by the copyright scheme. This scheme relies on the author to promote the progress of science by permitting him to control the cost of and access to his novelty. See also supra note 22, at 5 ("As reflected in the Constitution, the ultimate purpose of copyright legislation is to foster the growth of learning and culture for the public welfare, and the grant of exclusive rights for a limited time is a means to that end."). See generally Note, Toward a Constitutional Theory of Expression: The Copyright Clause, the First Amendment, and Protection of Individual Creativity, 34 U. MIAMI L. REV. 1043 (1980) (discussing the value of various kinds of expression and those which have been determined to warrant encouragement).

25. Mazer v. Stein, 347 U.S. 201 (1954). In Mazer, the Court stated: The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Sciences and useful Arts.' Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered. Id. at 219. See Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U.S. 405, 429 (1908) ("[I]t has been the judgment of Congress from the beginning that the sciences and the useful arts could be best advanced by giving an exclusive right to an inventor."). See also supra note 24.

26. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (holding that limited monopoly in copyright is intended to motivate "the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the prod-
The dominant policy goal of copyright law, therefore, is the creation of limited monopolies.\textsuperscript{27} The exclusive privileges granted to copyright owners for a limited duration\textsuperscript{28} under the Copyright Act of 1976 reflect this policy; the copyright owner retains the rights to reproduce, distribute, perform, and prepare derivative works\textsuperscript{29} based on copyrighted creations.\textsuperscript{30} Applied to music publishing, this vests the copyright owner with exclusive rights to prepare, print, and sell sheet music based on his composition.

\`{T}he noblest of human productions — knowledge, truths ascertained, conceptions, and ideas — become, after voluntary communication to others, free as the air to common use. Upon these incorporeal productions the attribute of property is continued after such communication only in certain classes of cases where public policy has seemed to demand it. These exceptions are confined to productions which, in some degree, involve creation, invention, or discovery.

\textit{Id.} at 250 (Brandeis, J., dissenting).

27. \textit{Sony Corp. of Am. v. Universal City Studios, Inc.}, 464 U.S. 417 (1984). In \textit{Sony Corp.}, the Court stated:

While the law has never recognized an author’s right to absolute control of his work, the natural tendency of legal rights to express themselves in absolute terms to the exclusion of all else is particularly pronounced in the history of the constitutionally sanctioned monopolies of the copyright and the patent.

\textit{Id.} at 432 n.13.

28. \textit{See supra} note 20 and accompanying text.

29. \textit{See supra} note 7.

30. 17 U.S.C. \textsection 106 provides:

\textbf{Exclusive Rights in Copyrighted Works}

Subject to sections 107 through 118, 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; and
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.
III. IS COMPULSORY LICENSING JUSTIFIED?

A. Limited Monopoly v. Immediate Public Access to Creative Works

In music recording, the compulsory licensing system31 supplants the dominant copyright policy goal of creating limited monopolies with a competing and opposing policy goal: allowing immediate public access to creative works.32

In pursuit of this new goal, Congress created a Copyright Royalty Tribunal33 to set and adjust royalty rates payable under the compulsory license.34 Congress directed the Tribunal to calculate rates which “maximize the availability of creative works to the public.”35 Thus, a stated goal of compulsory licensing is to foster public access to creative works. The compulsory licensing system achieves this objective, because once a copyright owner records and distrib-

31. See supra text accompanying notes 1-6.
34. 17 U.S.C. § 801(b)(1)(A) (1982). Congress also directed the Tribunal to achieve three other objectives:
(B) To afford the copyright owner a fair return for his creative work and the copyright user a fair income under existing economic conditions;
(C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution . . . ;
(D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.
17 U.S.C. § 801(b)(1)(B)-(D) (1982). Objective D (minimal disruptive impact) is discussed infra at text accompanying note 91. The question of whether a statutory royalty rate actually achieves objectives B and C is considered in the Recommendations section of this Note. For a market analysis and criticism of the royalty rate, see Note, Compulsory Licensing of Musical Compositions for Phonorecords Under the Copyright Act of 1976, 30 HastingS LJ. 683 (1979).
utes a work to the public, anyone else may record and distribute the work, even over the copyright owner's objection.\textsuperscript{36} Thus, the effect of the compulsory license is to make copyrighted musical compositions immediately available to anyone who wishes to exploit them following the composer's first use. This loss of exclusive control after first use singles out composers from other creative artists, such as writers, painters, and sculptors, who are given exclusive control of their creations for the full copyright duration.\textsuperscript{37} Also, the person exercising the compulsory license is authorized by statute to prepare musical arrangements (i.e., derivative works\textsuperscript{38}) based on the original composer's work,\textsuperscript{39} and may even imitate the sounds fixed\textsuperscript{40} in the first recording.\textsuperscript{41}

\textsuperscript{36} 17 U.S.C. § 115(a)(1) (1982). See supra notes 1-6 and accompanying text. Subsequent recording and distribution of original works should not be confused with duplication of an existing recording, which is universally held to be a copyright infringement. See, e.g., United States v. Taxe, 540 F.2d 961, 965 (9th Cir. 1976) ("The copyright owner acquires the exclusive right to duplicate but this does not bar independent fixation by another of other sounds similar to those copyrighted."). The sound recording made pursuant to the compulsory license is independently copyrightable. See 1 M. Nimmer, supra note 2, § 2.10[A] ("Since the use of the preexisting music in a sound recording is made 'lawful' by the compulsory license, it follows by the negative implication of [17 U.S.C. § 103(a) (1982)] that copyright may be claimed in a sound recording.").

\textsuperscript{37} For example, the Copyright Act grants exclusive control for the full statutory period to authors of literary, dramatic, choreographic, pictorial, sculptural, and other works. See 17 U.S.C. § 102(a) (1982) as it relates to § 106. Allowing compulsory licensing of music is analogous to permitting anyone to create motion pictures based on a writer's novel after the writer permits a first movie to be made, or allowing anyone to create posters of a painter's artwork after the painter allows a first poster to be made, or permitting anyone to create miniatures of a sculptor's carving after the sculptor allows a first miniature to be made. Yet, the Copyright Act does not tolerate such uses of works created by writers, painters, sculptors, and other creative artists. See 17 U.S.C. § 501(a) (1982) as it relates to §§ 106 and 102.

\textsuperscript{38} See supra note 7.

\textsuperscript{39} 17 U.S.C. § 115(a)(2) (1982) provides:

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.

This privilege is also known as the "Adaptation Right of a Compulsory Licensee." See 2 M. Nimmer, supra note 2, § 8.04[F].

\textsuperscript{40} Fixation is a term of art first introduced in the Copyright Act of 1976, and is a critical prerequisite to federal copyright protection. A work is fixed "when its embodiment in a copy or phonorecord . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." 17 U.S.C. § 101 (1982). See 17 U.S.C. § 102(a) (1982) (to be afforded copyright protection, works of authorship must be original and fixed in any tangible medium of expression).

\textsuperscript{41} See, e.g., United States v. Taxe, 540 F.2d 961, 965 n.2 (1976) ("'[M]ere imitation'
The immediate-public-access-to-creative-works goal of compulsory licensing conflicts directly with the dominant policy goal of limited monopoly; if the limited monopoly policy applied to sound recordings, no one could record a composer's work without an express license. Conversely, if the immediate public access policy applied to published sheet music, anyone could make and sell printed arrangements of a composer's original work, provided that a statutory royalty was paid.

The hypothetical example from the introduction to this Note further illustrates this clash of policies. The prominent recording artist (Performer) is allowed to make a musical arrangement/derivative work of Composer's original composition. Performer is then allowed to record the arrangement and sell the recording, even over Composer's objection. Yet, Performer is proscribed from publishing and selling the sheet music of the same musical arrangement which he has lawfully written, recorded, and from which he has profited. Furthermore, Composer can prevent the publication and sale of Performer's musical arrangement for the Composer's lifetime plus fifty years.

Under the immediate public access policy, music copyright owners are compelled to license the use of their compositions by others at a statutory rate. Under the limited monopoly policy, music copyright owners are free to license, or decline to license, the use of their compositions by others, and they can freely negotiate a price which they consider to be fair.

The question thus arises whether a sensible rationale exists for treating recorded music in a different manner from published sheet music. An examination of the history of the compulsory licensing doctrine sheds light on the answer to this question.

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42. See supra note 39.
43. See supra notes 2-6 and accompanying text.
44. See supra notes 9-10 and accompanying text.
45. See supra note 20 and accompanying text.
46. See supra notes 2-6 and accompanying text.
47. See supra note 3.
48. See supra notes 9-10 and accompanying text.
49. Id.
B. The History of Compulsory Licensing

The first compulsory license statute was enacted when Congress passed the Copyright Act of 1909.50 Prior to that time, copyright law did not address a composer's right to make sound recordings, presumably because recording technology developed after the previous copyright law revision in 1870.51 As recording technology developed after the 1870 revision, lower courts struggled with the question of whether mechanically reproducing compositions in piano rolls and phonorecords without the composer's permission is an infringement of the composer's copyright.52 One year prior to the 1909 copyright law revision, the Supreme Court considered this question in White-Smith Music Publishing Co. v. Apollo Co.53 The Court held that mechanical reproduction of compositions is not copying within the meaning of the 1870 Copyright Act, and thus does not infringe the rights of copyright holders.54 This ruling prompted composers to


The first U.S. copyright statute was enacted in 1790, and went through two general revisions in 1831 and 1870 prior to the Copyright Act of 1909. 1961 REPORT OF THE REGISTER OF COPYRIGHTS, supra note 22, at Preface IX (1976). Although amended in some ways, the 1909 Act was essentially the law until passage of the 1976 Act. Id.

51. See 1961 REPORT OF THE REGISTER OF COPYRIGHTS, supra note 22, at 32. See also COPYRIGHT LAW REVISION: RIAA STATEMENT, supra note 50, at 674. The Copyright Act of 1909 primarily regulated piano rolls for use in player pianos, and secondarily regulated phonograph records. See id. at 675.


The Supreme Court recognizes that "the law of copyright has developed in response to significant changes in technology." Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 430 (1984) (footnote omitted).


54. 209 U.S. 1 (1908).

55. Id. at 18. The effect of the White-Smith decision was to deny composers any exclusive right to reproduce their compositions mechanically in phonorecords or piano rolls. See 1961 REPORT OF THE REGISTER OF COPYRIGHTS, supra note 22, at 32; COPYRIGHT LAW REVISION: RIAA STATEMENT, supra note 50, at 674.

The White-Smith doctrine was legislatively overruled by the Copyright Act of 1976, which grants copyright protection to works "fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise commu-
complain to Congress that their works were being wrongfully exploited by record and piano roll companies. Consequently, at the inception of the hearings that preceded the 1909 Act, congressional committees favored granting composers the right to exclusive control of sound recordings of their works, which was consistent with the exclusive rights enjoyed by all other copyright owners. Prior to the Act’s adoption, however, one dominant record company, anticipating the copyright owner’s exclusive recording right, contracted with the leading music publishers for exclusive rights to record all their music. Congress viewed this as a warning that a provision granting exclusive recording rights to composers would result in monopolization of the entire recording business by this single company. To prevent this company from gaining an industry-wide monopoly, Congress created the compulsory license and set the royalty rate at two cents per record.

As time passed, inflation lessened the value of the two cent royalty. Even the Register of Copyrights noted that “[t]he compul-

nicated, either directly or with the aid of a machine or device.” 17 U.S.C. 102(a) (1982). See M. Nimmer, supra note 2, § 2.03[B][1].


58. The Aeolian Company was the largest manufacturer of piano rolls in America at that time. Copyright Law Revision: RIAA Statement, supra note 50, at 657-76.


60. Copyright Law Revision: RIAA Statement, supra note 50, at 675 (“The key to understanding the statutory license system lies in the reasons that impelled Congress to impose this limitation on musical copyright in 1909. In a phrase, it was prevention of [industrial] monopoly.”); 1961 Report of the Register of Copyrights, supra note 22, at 33 (“To forestall the danger that [a single] company would acquire a monopoly in the making of records, the committees adopted the device of the compulsory license.”).

61. 1961 Report of the Register of Copyrights, supra note 22, at 33; Copyright Law Revision: RIAA Statement, supra note 50, at 675; Shapiro, Bernstein & Co. v. Remington Records, Inc., 265 F.2d 263, 269 (2d Cir. 1959) (“Congress was seeking to reach a balance between adequate protection for the proprietor of a musical work on the one hand and the avoiding of a ‘great music monopoly’ on the other.”).


63. Note, supra note 35, at 693. The U.S. Court of Appeals, D.C. Circuit, noted that “[t]he inadequacy of the two-cent rate after half a century of economic change [has] long
sory license provisions are rather severe in their effect upon the copy-
right owner." Consequently, Congress attempted several copyright
revisions from 1924 to 1940, but controversy among various private
interests stalled these attempts. Congress began serious discussions
concerning copyright revision in 1955, and in July of 1964 the bill
that eventually emerged as the Copyright Act of 1976 was intro-
duced into Congress.

During the early stages of the movement for copyright law revi-
sion, the basic question of whether to retain or eliminate compulsory
licensing was a major issue. The Register of Copyrights initiated
the debate in 1961 by recommending that Congress eliminate the
compulsory license provision altogether. Although this recommen-
dation generally met with favorable reaction from scholars, authors,
composers, and members of the copyright bar, these reactions were
"drowned in a sea of protests from the recording industry." In

been recognized." Recording Indus. Assoc. of Am. v. Copyright Royalty Tribunal, 662 F.2d 1, 4 (D.C. Cir. 1981).

64. The Register of Copyrights is the chief administrator of the Copyright Office, and is
was the Register of Copyrights from 1960 until 1971. 25 BULL. COPYRIGHT SOC'Y 110 (1977)
(remarks of Hon. Robert W. Kastenmeier, reprinted from the Congressional Record).


66. Id. at Preface X; Note, supra note 34, at 693.

67. 1961 REPORT OF THE REGISTER OF COPYRIGHTS, supra note 22, at Preface X.
These private interests included representatives of authors and composers, as well as music
publishers and record manufacturers. A. GOLDMAN, THE HISTORY OF U.S.A. COPYRIGHT LAW
REVISION FROM 1901 TO 1954, at 9-10 (General Revision of the Copyright Law, Study No. 1,
Senate Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judi-
ciciary) (Comm. Print 1955), reprinted in 1 G. GROSSMAN, OMNIBUS COPYRIGHT REVISION
LEGISLATIVE HISTORY (1976).

68. 1961 REPORT OF THE REGISTER OF COPYRIGHTS, supra note 22, at Preface IX-X;
Note, supra note 35, at 693. In 1955, Congress authorized the copyright office to undertake a
series of studies for general copyright law revision. 1961 REPORT OF THE REGISTER OF COPY-
RIGHTS, supra note 22, at Preface IX.

69. Note, supra note 35, at 693. A copy of this bill can be found in Register Of Copyrights, 89TH CONG., 1ST SESS., 1964 REVISION BILL WITH DISCUSSION AND COMMENTS 1-32
(Comm. Print 1965), reprinted in 4 G. GROSSMAN, OMNIBUS COPYRIGHT REVISION LEGISLA-
TIVE HISTORY (1976) (printed for the use of the House Committee on the Judiciary).


71. Note, supra note 35, at 693.


73. Note, supra note 35, at 693. See infra note 77.

74. Note, supra note 35, at 693. See infra notes 75, 87. That industry protest was sub-
stantial is also evident from the Register of Copyrights' 1961 report, which identifies and ana-
lyzes at length the specific arguments advanced by the record industry. See 1961 REPORT OF
THE REGISTER OF COPYRIGHTS, supra note 22, at 33-35.
1965, the Register of Copyrights reversed his position, and by 1976, the elimination of compulsory licensing was no longer an issue.

The Register of Copyrights based his 1961 recommendation to eliminate compulsory licensing on two "highly praised, scholarly studies" of compulsory licensing, and on his own systematic analysis and rebuttal of the arguments advanced by the record industry in favor of compulsory licensing. The two studies focused on legislative history, industry practice and organization, and the economic aspects of the compulsory license. The analysis and rebuttal of record industry arguments was included in the Register of Copyrights' 1961 recommendation. Therein, the Register set forth the record industry's argument for retaining the compulsory license. The record industry claimed that the compulsory license was beneficial because it fosters a variety of recordings of the same musical works, provides authors and publishers with greater public exposure from multiple recordings, and allows small record companies to compete with


There is no question that [compulsory licensing has] had a profound effect upon the development of the American record industry, and that many of the present practices in the industry are directly related to them. It is not surprising, therefore, that proposals to abandon or substantially change the present provisions were sharply contested, and that it became necessary to work toward a compromise of the issue.

Id. at 53.

76. Id. "At the hearings it was apparent that the argument on this point had shifted, and the real issue was not whether to retain the compulsory license but how much the royalty rate under it should be." 17 U.S.C.A. § 115 (1982) (Historical Note).

77. Note, supra note 35, at 693 (citing studies of H. Henn, supra note 56, at 1-85 and W. Blaisdell, The Economic Aspects of the Compulsory License 87-125 (General Revision of the Copyright Law, Study No. 6, Senate Subcomm. on the Judiciary) (Comm. Print 1958), reprinted in 1 G. Grossman, Omnibus Copyright Revision Legislative History (1976)). Both the Henn and Blaisdell studies were highly praised for their research, analysis, thoroughness, and scholarship. See Comments and Views Submitted to the Copyright Office on the Compulsory License Provisions of the U.S. Copyright Law, H. Henn, supra note 56, at 59-85, and W. Blaisdell, supra at 115-25. See also 1961 Report Of The Register Of Copyrights, supra note 22, at Foreword III, which states that the Register's report "is the culmination of a program of studies by the Copyright Office preparatory to a general revision of the Copyright Law ..." Thirty-five studies were conducted and written from 1955 to 1963, two of which focused on compulsory licensing.

78. See 1961 Report Of The Register Of Copyrights, supra note 22, at 33-35. The Register of Copyrights systematically identified, analyzed, and rebutted record industry arguments for three of his five page recommendation to eliminate compulsory licensing. Id.

79. See H. Henn, supra note 56, and W. Blaisdell, supra note 77.
larger ones by making recordings of the same music.80 The Register of Copyrights expressly rebutted the record industry's arguments by pointing out that removal of the compulsory license would not necessarily result in the granting of exclusive licenses by composers.81 The Register noted that "[i]f it is true that authors and publishers benefit from multiple recordings, they would presumably seek to give non-exclusive licenses to several companies."82 Alternatively, the Register of Copyrights observed that even if exclusive licenses result from the elimination of the compulsory license, several benefits would result which offset any loss. For example, record companies would make recordings of a greater number and variety of works, instead of multiple recordings of the same work;83 large record companies would be prevented from stealing away "hits" originated by smaller companies;84 and composers would be able to freely negotiate their own interests.85 The Register of Copyrights further concluded that the original justification for compulsory licensing — prevention of a single company's industry-wide monopoly in sound recordings — was no longer valid, since there were hundreds of competing record companies and an ever-increasing volume and variety of music.86

Despite this analysis and conclusion, the Register of Copyrights reversed his position four years later in deference to recording industry interests.87 In 1976, Congress passed the Copyright Act of

80. See 1961 REPORT OF THE REGISTER OF COPYRIGHTS, supra note 22, at 34.
81. Id.
82. Id.
83. Id.
84. Id.
85. Id.
86. Id. at 34-35.
87. See 1965 REPORT OF THE REGISTER OF COPYRIGHTS, supra note 75, at 53. "During the discussions following issuance of the [1961] Report, it became apparent that record producers . . . regard the compulsory license as too important to their industry to accept its outright elimination." Id. See also supra note 75 (discussing the proposal to eliminate the compulsory license). The Register of Copyrights also cited the "multiple recordings of a single work" and "small record company competition" arguments as additional justifications for reversal of his position. Id. at 54. Recall that the Register of Copyrights had systematically analyzed and rebutted these same arguments four years earlier in his 1961 report. See supra text accompanying notes 80-85.
1976,88 retaining compulsory licensing and raising the statutory royalty rate from two cents to two and three-fourths cents.89 The Copyright Royalty Tribunal subsequently criticized this rate for being "unreasonably low."90 The new Copyright Act also directed the Copyright Royalty Tribunal to "minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices."91 This language suggests that Congress may have acted in deference to the industries involved.

Thus, the history of compulsory licensing reveals that the doctrine was retained in the Copyright Act of 1976 in deference to recording industry interests,92 and against a recommendation based on two authoritative studies93 and the Register of Copyrights' own analysis of recording industry practices.94 The compulsory licensing doctrine, which embodies a policy in direct conflict with the dominant copyright policy,88 requires a more compelling justification than political expediency.

C. The "Dual Nature" Rationale for Compulsory Licensing

Although independently copyrightable,88 a sound recording is also a derivative work based on a preexisting work, i.e., a musical

89. See supra note 3. In 1981, the Copyright Royalty Tribunal increased the royalty rate to four cents, and provided for automatic rate increases to occur in 1983, 1984, and 1986. See 37 C.F.R. §§ 307.2, 307.3 (1981). The royalty rate became five cents, or .95 cent per minute of playing time, for records made on or after January 1, 1986. Id. § 307.3(e). Starting in 1987, the rate may be increased by the Tribunal upon petition at 10 year intervals. 17 U.S.C. § 804(a)(2)(B) (1982). Thus, if no challenges to the five cent rate are made in 1987, the rate will remain at five cents until 1997, when challenges may again be raised. If challenges are made in 1987, however, the Tribunal may again provide for automatic rate increases to occur on specified dates within the 10 year interval from 1987 to 1997. See Recording Industry Assoc. v. Copyright Royalty Tribunal, 662 F.2d 1, 17 (D.C. Cir. 1981) ("[W]e see nothing in the [copyright] statute precluding the Tribunal from adopting a reasonable mechanism for automatic rate changes in interim years.").
90. 46 Fed. Reg. 10,466, 10,486 (Feb. 3, 1981) (Final Rule Findings), reprinted in 1 COPYRIGHT L. REP. (CCH) ¶ 13,042 (1981). This criticism was expressed when the Copyright Royalty Tribunal voted to raise the royalty rate to four cents in 1981. See supra note 89.
92. See supra notes 87, 91 and accompanying text.
93. See supra note 77.
94. See supra notes 78-86 and accompanying text.
95. See supra notes 27-30 and accompanying text. "[T]he fundamental principle of copyright [is] that the author should have the exclusive right to exploit the market for his work . . . ." 1961 REPORT OF THE REGISTER OF COPYRIGHTS, supra note 22, at 35 (emphasis added).
Consequently, a sound recording "embodies two distinct bundles of legal rights: (1) rights in the [preexisting] musical composition itself, and (2) rights in the [sound] recording 'fixing' a performance of that musical composition." Thus, sound recordings possess an inherent "dual nature" because they incorporate two separate legal rights.

The language used in at least two cases\textsuperscript{100} and one federal statute\textsuperscript{101} suggests that there is a tacit justification for compulsory licensing based on the dual nature of sound recordings. This language appears to focus on the financial benefit that the copyright owner receives by permitting a first recording of his work,\textsuperscript{102} thereby implying that it is unfair for the enriched copyright owner to prevent others from recording the work and similarly benefiting. The apparent concern is that if composers are given absolute control of recording rights by reason of a copyright in a preexisting musical composition, the recording rights of others will be abridged.\textsuperscript{103} Under this

\begin{itemize}
    \item \textsuperscript{97} See 17 U.S.C. § 101 (1982), which includes a sound recording as one of several examples of a derivative work. "A sound recording is a derivative work in relation to the musical work recorded therein, just as a motion picture is a derivative work in relation to the novel or screenplay upon which it is based." 1 M. Nimmer, supra note 2, § 2.10[A] n.8.
    \item \textsuperscript{98} See supra note 40.
    \item \textsuperscript{99} A & M Records, Inc. v. Heilman, 75 Cal. App. 3d 554, 562-63, 142 Cal. Rptr. 390, 395 (1977), cert. denied, 436 U.S. 952 (1978) (citations omitted). The rights in the pre-existing musical composition and the sound recording may belong to different individuals, or to the same individual.
    \item \textsuperscript{101} Copyright Act of 1909, 17 U.S.C. § 1(e) (1909).
    \item \textsuperscript{102} Consider the following explications of compulsory licensing: "Once the copyright holder has benefited by making a recording of the composition, he must permit others . . . to similarly use the composition." Heilman v. Bell, 583 F.2d 373, 376 (7th Cir. 1978), cert. denied, 440 U.S. 959 (1979) (emphasis added); "Once the owner of a copyrighted musical composition permits one recording to be made . . . the right to record that composition becomes non-exclusive." A & M Records, Inc. v. Heilman, 75 Cal. App. 3d 554, 563, 142 Cal. Rptr. 390, 396 (1977), cert. denied, 436 U.S. 952 (1978) (emphasis added); "[W]henever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work . . . any other person may make similar use of the copyrighted work." Copyright Act of 1909, 17 U.S.C. § 1(e) (1909) (emphasis added).
    \item \textsuperscript{103} See, e.g., Standard Music Roll Co. v. F.A. Mills, Inc., 241 F. 360, 363 (3d Cir. 1917) ("The object of [the compulsory license] seems to be the prevention of monopoly or favoritism in granting the right to reproduce a musical work mechanically."); A & M Records, Inc. v. Heilman, 75 Cal. App. 3d 554, 563, 142 Cal. Rptr. 390, 396 (1977), cert. denied, 436 U.S. 952 (1978) ("Recorded performances . . . cannot exist without the right to reproduce mechanically the underlying musical compositions. . . . [I]f composers had an unlimited right to control the 'mechanical reproduction' of musical compositions there [is] a danger of 'establishing a great musical monopoly' in the mechanical reproduction of music.")
rationale, the compulsory license protects the recording rights of others by barring the copyright owner's exclusive control after first use.

The dual nature rationale, however, is not a valid justification for use of the compulsory license. Since sound recordings are derivative works,\textsuperscript{104} treating them on a "waiver after first use" basis logically necessitates treating all other varieties of derivative works similarly. If applied consistently, the dual nature rationale would encompass all derivative works, such as art reproductions, motion pictures, and translations,\textsuperscript{105} and invoke the waiver after first use principle. Authors would lose the exclusive right to make derivative works once they created a first derivative work. This result conflicts with copyright law, which generally grants copyright owners the exclusive right to make derivative works.\textsuperscript{106}

D. Conclusions

The Copyright Act of 1976 treats recorded music in a different manner from published sheet music.\textsuperscript{107} This dissimilar treatment results from the clashing of inconsistent policy goals which underlie the regulation of music recording and publishing.\textsuperscript{108} Compulsory licensing, which regulates music recording, is based on a policy of allowing immediate public access to creative works.\textsuperscript{109} This policy conflicts directly with the dominant copyright law policy of creating limited monopolies.\textsuperscript{110} The historical justification for first enacting compulsory licensing in 1909 — prevention of a single company's industry-wide monopoly\textsuperscript{111} — is no longer valid.\textsuperscript{112} The decision to include compulsory licensing in the 1976 copyright revision was made under pressure from the recording industry,\textsuperscript{113} and against the

\textsuperscript{104} See supra note 97.
\textsuperscript{106} 17 U.S.C. § 106(2) (1982) ("[T]he owner of copyright under this title has the exclusive rights to do and to authorize . . . derivative works based upon the copyrighted work."). The compulsory license to make sound recordings operates as an exception to this general rule, since the exclusive right to make recordings based on an underlying work is lost after first use by the copyright owner. See supra note 6.
\textsuperscript{107} See supra notes 1-10 and accompanying text.
\textsuperscript{108} See supra notes 31-49 and accompanying text.
\textsuperscript{109} See supra notes 31-37 and accompanying text.
\textsuperscript{110} See supra notes 17-30 and accompanying text.
\textsuperscript{111} See supra notes 57-62 and accompanying text.
\textsuperscript{112} See supra note 86 and accompanying text.
\textsuperscript{113} See supra note 92 and accompanying text.
conclusions of two copyright scholars\textsuperscript{114} as well as the analysis and recommendations of the Register of Copyrights.\textsuperscript{115} Additionally, the inherent dual nature of sound recordings provides insufficient justification for use of the compulsory license.\textsuperscript{116} Consequently, since there is no sensible rationale for the inconsistent treatment of recorded and published music under the Copyright Act of 1976, compulsory licensing is unjustified.

IV. RECOMMENDATIONS

To bring consistency to the copyright law’s disparate treatment of recorded and published music, both must be treated in the same fashion. Therefore, a careful study of the limited monopoly and immediate-public-access-to-creative-works policies is required, along with a judgment about which policy best serves the public good.\textsuperscript{117} The following analysis provides a step in this direction.

Underlying the copyright clause\textsuperscript{118} is the principle that the public good requires encouragement, not suppression, of creative expression.\textsuperscript{119} Presumably, society is educated and uplifted by creative art and invention;\textsuperscript{120} effectively encouraging creative expression thus advances the public good.\textsuperscript{121} The framers of the Constitution concluded that the most effective way to encourage creative expression is to give exclusive rights to authors for a period of limited duration.\textsuperscript{122}

\begin{itemize}
  \item \textsuperscript{114} See supra note 93 and accompanying text.
  \item \textsuperscript{115} See supra note 94 and accompanying text.
  \item \textsuperscript{116} See supra notes 96-106 and accompanying text.
  \item \textsuperscript{117} "In enacting a copyright law Congress must consider . . . two questions: First, how much will the legislation stimulate the producer and so benefit the public and, second, how much will the monopoly granted be detrimental to the public?" 1961 REPORT OF THE REGISTER OF COPYRIGHTS, supra note 22, at 5 (quoting H.R. Rep. No. 2222, 60th Cong., 2d Sess. (1909)).
  \item \textsuperscript{118} See supra note 23.
  \item \textsuperscript{119} See supra notes 24-25; Note, supra note 24, at 1043, 1045. Recall that the Constitution empowers Congress to establish copyrights to "promote the Progress of Science and useful Arts." U.S. CONST. art. I, § 8, cl. 8.
  \item \textsuperscript{120} "[T]he ultimate purpose of copyright legislation is to foster the growth of learning and culture for the public welfare . . . ." 1961 REPORT OF THE REGISTER OF COPYRIGHTS, supra note 22, at 5.
  \item \textsuperscript{121} See supra notes 24-25; 1961 REPORT OF THE REGISTER OF COPYRIGHTS, supra note 22, at 5 ("[T]he welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings.") (quoting H.R. Rep. No. 2222, 60th Cong., 2d Sess. (1909)).
  \item \textsuperscript{122} See J. Madison, The Federalist Papers, No. 43 at 272 (New American Lib. ed. 1961). "The public good fully coincides . . . with the [copyright] claims of individuals." \textit{Id.} Thus, the Supreme Court has called the copyright a "constitutionally sanctioned monopoly." See supra note 27.
\end{itemize}
Such rights, however, are not Constitutionally guaranteed, but are created in Congress's discretion.\textsuperscript{123} Congress exercised its discretion by enacting a copyright law that generally grants exclusive rights as the framers envisioned: through limited monopolies.\textsuperscript{124}

The limited monopoly policy encourages creative expression by granting certain exclusive rights to use creative works for a limited time period.\textsuperscript{125} Artists may exploit their works exclusively during this period, and they are thereby motivated to create abundant new works by the prospect of privileged financial gain.\textsuperscript{126} The public good is fostered by the creation of these works, which fall into the public domain upon expiration of the statutory time period and are assimilated into society.\textsuperscript{127} Others who wish to use an artist's work during the protected time period must first obtain an express license from the copyright owner at a negotiated price, if the owner decides to negotiate such a license at all.\textsuperscript{128}

The policy underlying compulsory licensing, however, unlike the limited monopoly policy, gives the public immediate access to someone else's copyrighted work following the owner's first use of the work.\textsuperscript{129} The Register of Copyrights noted that under the immediate

\begin{itemize}
\item \textsuperscript{123} 1961 REPORT OF THE REGISTER OF COPYRIGHTS, \textit{supra} note 22, at 5, which states:
\begin{quote}
The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings, for the Supreme Court has held that such rights as he has are purely statutory rights . . . . The Constitution does not establish copyrights, but provides that Congress shall have the power to grant such rights if it thinks best.
\end{quote}
\textit{Id.} (quoting H.R. Rep. No. 2222, 60th Cong., 2d Sess. (1909)).
\item \textsuperscript{124} \textit{See supra} notes 17-30 and accompanying text.
\item \textsuperscript{125} \textit{See supra} text accompanying notes 24-30. \textit{See also} 1961 REPORT OF THE REGISTER OF COPYRIGHTS, \textit{supra} note 22, at 5 (quoting H.R. Rep. No. 2222, 60th Cong., 2d Sess. (1909)), stating:
\begin{quote}
Not primarily for the benefit of the author, but primarily for the benefit of the public, such rights are given . . . . [T]he policy is believed to be for the benefit of the great body of people, in that it will stimulate writing and invention to give some bonus to authors and inventors.
\end{quote}
\textit{Id.} notes 24-25 and accompanying text. \textit{See also} 1961 REPORT OF THE REGISTER OF COPYRIGHTS, \textit{supra} note 22, at 6, stating: "Many authors could not devote themselves to creative work without the prospect of remuneration. By giving authors a means of securing the economic reward afforded by the market, copyright stimulates their creation and dissemination of intellectual works."
\item \textsuperscript{127} \textit{See supra} note 21.
\item \textsuperscript{128} \textit{See supra} notes 8-10 and accompanying text.
\item \textsuperscript{129} \textit{See supra} notes 31-47 and accompanying text. Contrast this with the limited monopoly principle, which "is intended . . . . to allow the public access to the products of [authors' and inventors'] genius after the limited period of exclusive control has expired." Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (emphasis added).
\end{itemize}
Once [the copyright owner] exploits his right to record his music, he is deprived of control over further recordings. He cannot control their quality nor can he select the persons who will make them. . . . In essence, the compulsory license permits anyone indiscriminately to make records of the copyright owner's music at the . . . rate fixed in the statute. \(^{130}\)

Under this policy, music composers are differentiated from other creative artists, such as writers, painters, and sculptors, who are given exclusive control of their creations for the full copyright duration. \(^{131}\) Although the copyright owner is compensated for the use of his work, he is compensated at a government-determined rate. \(^{132}\) This rate is supposed to provide the copyright owner with a "fair return" for his creative work, to give the copyright user a "fair income," \(^{133}\) and also "to reflect the relative [creative] roles of the copyright owner and the copyright user." \(^{134}\) It is questionable whether a generalized statutory rate is capable of achieving these goals, since individual composers have attained different levels of skill, accomplishment, prestige, and public acceptance. A fair return for one composer may be inherently unfair for another. Thus, individual composers are in the best bargaining position to negotiate licensing fees which \textit{truly} reflect their relative creative roles in society and give them an \textit{actually} fair return for their creative work. \(^{135}\) The compulsory license generalizes the value of every composer's work at a single rate, ignoring individual achievement and barring free negotiation. \(^{136}\) For example, a world-renowned composer at the pinnacle

\(^{130}\) 1961 \textit{REPORT OF THE REGISTER OF COPYRIGHTS}, supra note 22, at 33. The Register of Copyrights further noted that as a result of compulsory licensing, "many complaints of inferior recordings and of recordings by financially irresponsible persons" have been made. \textit{Id.}

\(^{131}\) See supra note 37.

\(^{132}\) See supra note 3.

\(^{133}\) See 17 U.S.C. § 801(b)(1)(B) (1982); supra note 35. The Register of Copyrights notes that an important purpose of copyright law is "[t]o give authors the reward due them for their contribution to society." 1961 \textit{REPORT OF THE REGISTER OF COPYRIGHTS}, supra note 22, at 5.

\(^{134}\) 17 U.S.C. § 801(b)(1)(C) (1982); supra note 35.

\(^{135}\) If allowed to negotiate freely, composers at different levels of public acceptance would command licensing fees actually commensurate with their relative creative roles, and thus would receive an actually fair return for their work.

\(^{136}\) See ABC Music Corp. v. Janov, 186 F. Supp. 443, 445 (C.D. Cal. 1960) ("[T]he practical effect of [the compulsory license] is to limit the bargaining rights of the copyright proprietor . . . as to the maximum royalty he may receive, irrespective of the commercial value of the particular musical composition."). Furthermore, the Register of Copyrights, in his 1961 report, states:
of a brilliant, celebrated career receives licensing royalties at the same rate as an unskilled, unknown composer. Although the celebrated composer may receive more aggregate royalties than the unskilled composer, the compulsory license nonetheless values their substantive work at the same rate per copy. Thus, it is impossible for a generalized royalty rate actually to reflect the relative creative roles of diversely accomplished individual composers, or to provide a truly fair return for their creative work. The most precise reflection of the Copyright Act's concern for "relative [creative] roles" and "fair return" is not a generalized royalty rate which Congress (or a Congressionally authorized tribunal) determines, but the price which individual copyright owners command in the free market through individual negotiation.

Even assuming that a generalized royalty rate, in theory, could accurately reflect a composer's relative creative role and bring him a fair return, there is still controversy over whether the actual rates established by the Copyright Royalty Tribunal are adequate to

While some limitations and conditions on copyright are essential in the public interest, they should not be so burdensome and strict as to deprive authors of their just reward. Authors wishing copyright protection should be able to secure it readily and simply. And their rights should be broad enough to give them a fair share of the revenue to be derived from the market for their work.


137. Works of the celebrated composer are more likely to be recorded and sold than those of the unknown, unskilled composer.

138. There may exist a middle ground between the "free negotiation" and "generalized royalty rate" approaches in a royalty rate tied to a percentage of the suggested list price of record albums. A percentage royalty rate would avoid valuing the works of different composers at the same rate, since recordings of works by celebrated composers probably command higher prices than recordings of works by unskilled, unknown composers. Thus, composers at differing levels of accomplishment would receive differing royalty amounts per recording. Moreover, a percentage royalty rate would self-adjust with inflation through market fluctuations in record prices. A percentage royalty rate would therefore be less objectionable than a "flat" generalized rate, since it may better reflect the copyright owner's relative role and fair return. A percentage royalty rate, however, fails to solve the problem of the copyright owner's loss of exclusive control. See infra text accompanying notes 140-145.

In 1980, the Recording Industry Association of America (RIAA) asked the Copyright Royalty Tribunal to issue an order declaring that the creation of percentage royalties is beyond the Tribunal's jurisdiction. 46 Fed. Reg. 10,466, 10,477 (Feb. 3, 1981) (Final Rule Findings), reprinted in 1 COPYRIGHT L. REP. (CCH) ¶ 13,042 (1981). Although this request was denied, the Tribunal did not adopt a percentage royalty rate at that time. Id. The Tribunal hinted, however, that it may consider adopting such rates in the future, stating, "The Tribunal has not in this proceeding adopted a royalty rate fixed as a percentage of the price of the phonorecord, therefore, it is unnecessary for the Tribunal now to further discuss this issue." Id. (emphasis added). Thus, the Tribunal has left the door open to consider implementing percentage royalties in the 1987 royalty revision.
achieve these goals.\textsuperscript{139} Although a dramatic change in the royalty rate might help settle that controversy, the compulsory license would nevertheless continue to deprive copyright owners of exclusive control of their works.\textsuperscript{140} This raises an unsettled issue concerning the constitutionality of the compulsory license.\textsuperscript{141} Since the Copyright Clause gives Congress discretion to secure authors and inventors "the exclusive Right to their respective Writings and Discoveries,"\textsuperscript{142} it appears that any copyright legislation enacted through exercise of this discretion must grant exclusive rights.\textsuperscript{143} Insofar as the compulsory license creates a nonexclusive recording right in copyright owners of musical compositions,\textsuperscript{144} it is arguably unconstitutional.\textsuperscript{145}

Under the policy of allowing immediate public access to creative works, composers lose exclusive control of copyrighted works through a generalized royalty rate which ignores individual achievement and prevents free negotiation.\textsuperscript{146} The result is a diminution of encouragement to composers to be creative, which ultimately harms the public good.\textsuperscript{147}

The limited monopoly policy poses none of the problems evident in the policy underlying compulsory licensing, and consequently better serves the public good. Sound recordings should therefore be governed by the limited monopoly policy, and music copyright owners

\textsuperscript{139} For example, in 1981, the Copyright Royalty Tribunal's decision to raise the royalty rate from two and three-quarters cents to four cents was challenged by parties on both the receiving and paying ends of royalties. Recording Indus. Assoc. of Am. v. Copyright Royalty Tribunal, 662 F.2d 1, 6 (D.C. Cir. 1981). Those paying royalties argued that the new rate was too high, while those receiving royalties argued that the new rate was too low. \textit{Id.} at 6-7. The rate increase was upheld. \textit{Id.} at 18.

\textsuperscript{140} \textit{See supra} text accompanying notes 130-31.

\textsuperscript{141} \textit{See} I M. Nimmer, \textit{supra} note 2, § 1.07.

\textsuperscript{142} \textit{Supra} note 23 (emphasis supplied).

\textsuperscript{143} \textit{Supra} note 141.

\textsuperscript{144} \textit{See supra} notes 1-6 and accompanying text. The right to record becomes nonexclusive after the copyright owner makes and distributes a first recording.

\textsuperscript{145} \textit{Supra} note 141. The opposing view is that the words "exclusive right" in the copyright clause are words of authorization, which implicitly give Congress discretion to grant copyright protection less than or equal to exclusivity. \textit{Id.} Although Nimmer observes that this is the stronger view, he also notes that the issue has never been authoritatively decided. \textit{Id.}

\textsuperscript{146} \textit{See supra} text accompanying notes 129-40.

\textsuperscript{147} If granting exclusive rights to exploit works encourages creative activity and advances the public good, \textit{see supra} notes 25, 121, 125, 126, and accompanying text, then it logically follows that removing exclusive rights to exploit works diminishes encouragement to creative activity and harms the public good.
should have exclusive control of recording rights for the same limited time period for which they are granted other exclusive copyright protections.

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