WHO IS ENTITLED TO OWN THE PAST?

ASHTON HAWKINS*
DAVID KORZENIK**
DAVID RUDENSTINE***

DAVID RUDENSTINE:

Good morning. I am a member of the Cardozo Law School faculty and, on behalf of my co-organizers, Ashton Hawkins and David Korzenik, and myself, I wish to welcome you all to this unusual event, which focuses on a number of cutting edge issues concerning who owns the past. A month ago, Cardozo sponsored a day-long conference entitled "Reports From the Front Lines of the Art and Cultural Property Wars."[1] Today's program is in the same vein, and brings together distinguished individuals from different disciplines to discuss difficult and important problems that concern disputes over cultural property and their consequences for museums, collectors and art source nations.

The topic today is important, and is bedeviled with disagreements and divisions that span a broad spectrum. At one end, there are those people who are strong proponents of a totally free market, a free art market, with no export restraint and no import restraint. At the other end of the spectrum are those people who support a very heavily regulated market, structured with strong export and national ownership laws enforced by criminal sanction. In between, there are numerous shades of other opinions.

One remarkable thing about this topic that strikes an outsider, and I consider myself a bit of an outsider in this field, is that the interested communities in this broad field have deep suspicions of each other and don't necessarily engage in collegial dialogue with one another to say the least. That condition allows universities to come forward and play one of the more constructive roles that universities can play in a society like ours. Universities can be kind of a neutral meeting ground where people with strongly opposed views can come together and exchange ideas. Cardozo hopes to be

* Executive Vice President, Metropolitan Museum of Art.
** Partner, Miller and Korzenik; Adjunct Professor, Benjamin N. Cardozo School of Law, Yeshiva University.
*** Fellow, Program in Law and Public Affairs, Woodrow Wilson School, Princeton University, 2000-2001; Dr. Herman George and Kate Kaiser Professor of Constitutional Law, Benjamin N. Cardozo School of Law, Yeshiva University.

[1] *See Reports From the Front Lines of the Art and Cultural Property Wars*, 19 CARDOZO ARTS & ENT. L.J. 1 (2001).

able, in the years ahead, to do more of that in this art rich city, which is not only a center of culture for the United States but, as many people think, for the world.

Today's panel would not have happened without Ashton Hawkins. He had the idea for the panel and he pulled together the panelists that are here before you. It's a remarkable group of individuals, and they are here because of the importance of this sensitive topic, and because Ashton is a co-moderator.

David Korzenik, who is a member of the panel, has also been very helpful in bringing this event about, and in constructing the hypotheticals that will be the basis of the conversation today. In addition to Ashton and David, Cynthia Church, in the Dean's Office, and Lynn Wishart, the director of the library, lent a considerable hand to make this event possible, as did the law students of the *Cardozo Arts & Entertainment Law Journal.*

The format today will be as follows: Mr. Hawkins and I are going to proceed to ask members of the panel to discuss a set of hypothetical facts with us. We're going to ask the panelists to give their reaction to the hypothetical facts—what would you do if confronted with this situation—and allow them to quiz one another as we proceed through different layers of complexity.

Let me just say a word about the panelists. Evan Barr is an Assistant U.S. Attorney. James Cuno is the director of the Harvard Museum. Richard Diehl is the director of the Alabama Museum of Natural History. Andre Emmerich is the Senior Advisor to Sotheby's. David Grace is an attorney from Washington, D.C. Marci Hamilton is a colleague of mine on the Cardozo faculty; she is the director of the Intellectual Property Program. David Korzenik is an attorney here in New York, and also an adjunct professor at Cardozo Law School. Arielle Kozloff is associated with the Edwin Merrin Gallery. Dr. Edmund Pillsbury is the former Director of the Kimbell Art Museum. Katherine Lee Reid is the current Director of the Cleveland Art Museum. Finally, Enid Schildkrout is the Chair of the Division of Anthropology and the curator of African Ethnology at the American Museum of Natural History.

With those brief introductions, let me turn things over to Mr. Hawkins for a moment. He's going to set the background for the first hypothetical and then we will proceed.

ASHTON HAWKINS:

I would like to begin by setting the stage. In 1970, 1972 and 1983, the groundwork was laid for this country's first major posi-

tion on the international movement of art.[2] Historically, the United States has been a completely free nation in terms of importing and exporting. It was in 1970 when the United Nations Educational Scientific and Cultural Organization ("UNESCO") Convention was initially promulgated to all the states.[3] States can receive a copy of it, weigh it, consider it, and if they like it, they can choose to adopt it. Many states do so with reservations, just as the United States did.

In 1972, the United States Senate adopted the Convention with certain reservations.[4] The primary reservation was that because of conflicts between the treaty and American law, they wanted to have implementing legislation passed by the Congress and the President to make the treaty come into effect.[5] Thereupon, an eleven-year discussion went forward. There were four separate markups in the Senate, and that's a lot of markups. Moreover, it was pressed continually by the State Department.

In the end, Senator Moynihan, and a few others, recognized this convention's importance and also the importance of the art trade and art collecting in America. Moynihan, helped by a certain number of other people—including Paul Bator from Harvard Law School and lawyers representing museums, art dealers and archeologists—fashioned a compromise whereby the treaty would be accepted by the United States, but the implementing legislation would set up a committee of experts from four different areas: the public area, archaeologists, dealers, and museum people.[6] These experts, chosen by the President, sit on a committee and review the applications from each country.[7] A country is entitled to apply, as Italy has done in October, for protection from pillaging of its sites.[8]

This evaluation is done by the committee, and within 180 days, they have to make a report to the President as to what they think of the application—how much of the application they would endorse, how much they would not endorse. Then it's accepted. Because it

---

2 *See* UNESCO Convention on the Means on Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter UNESCO Convention of 1970]; UNESCO Convention on World and Natural Heritage, Nov. 23, 1972, 27 U.S.T. 37, 1037 U.N.T.S. 151 [hereinafter UNESCO Convention of 1972]; Cultural Property Implementation Act of 1982, 19 U.S.C. § 2601-2613 (2000).

3 *See* UNESCO Convention of 1970, 823 U.N.T.S. 231.

4 *See* UNESCO Convention of 1972, 1037 U.N.T.S. 151.

5 *See id.*

6 *See* Convention on Cultural Property Implementation Act, Pub. L. No. 97-446, § 306(b)(1)(A)-(D), 96 Stat. 2356 (1983) (codified at 19 U.S.C. § 2602) [hereinafter CCPIA].

7 *See id.* § 306(g).

8 *See id.* § 303(a).

is done by executive agreement, it does not go back to the Senate.[9] The treaty between Italy, and let's say hypothetically, the United States, is entered into, and it sets up a list of national patrimony from Italy, which is hereafter embargoed from entry into the United States. It is a five-year term, renewable for another five years.[10] I don't think we know whether it can be renewed beyond that without having a further set of hearings. There is also another part of this, which is emergency action, whereby a nation can say: "We're having active pillaging right now and it's something that can't wait for deliberations of the committee. Would you entertain a notion of setting an embargo on these categories and things that are being pillaged from our sites right now?" That kind of embargo is a five-year term, renewable for three years. This sets the background of our discussion today. Let's begin with our first hypothetical.

HYPOTHETICAL #1: THE OMNIUM MUSEUM

Aldrich Generoso is a collector who lives in Maryland; he has a special enthusiasm for pre-Columbian art. Between 1962 and 1985, he acquired a very significant collection of pre-Columbian works from most of the countries in Central America as well as Ecuador and Peru, among others. He acquired most of them through a dealer in Washington D.C. by the name of Laslo Discreet. Laslo is known as a reputable dealer.

After years of collecting, Aldrich has come to know Laslo and to trust him. Aldrich knows little about the provenance of his pre-Columbian collection; but he was assured by Laslo that there were no difficulties with title or other such problems.

Between 1974 and 1995, Aldrich lent his collection to various museums in Europe and in the United States. Photographs of most of the works in the collection were reproduced and circulated widely in published books, museum catalogs and announcements. Some appeared in the press. The collection was well traveled. At no time were any challenges made to Aldrich's good title, nor did he receive any communications questioning that title.

Aldrich does not know the identity of the prior owners of the works in his pre-Columbian collection. He knows that the works came from various owners and collectors from different countries in Latin America. But he never asked Laslo about the prior owners and Laslo never disclosed them to him.

---

[9] *See id.* § 303(g)(1)(A)-(B).
[10] *See id.* § 303(b).

The Omnium Museum of Sundry Art in Washington D.C. has in its collection a few pieces of pre-Columbian art. But its collection in this area is seriously deficient. You are the Director of the Omnium Museum. Aldrich has recently approached you, seeking an exhibition for his pre-Columbian collection, which he would also make the subject of a "promised gift agreement" with the Museum. This is a common arrangement in which the donor commits to transferring title to the collection during his/her lifetime (or at death) with the timing of the gift (or fractional interest thereof) at the donor's discretion.

After his first meeting with you, Aldrich consulted his attorney, Arthur Tangle, Esq., who placed a call to Museum Counsel Leavett Alloning, Esq. Tangle explained to Alloning: "We don't have much in the way of documentation. Most of the works in the collection were acquired prior to 1972. We haven't investigated the provenance[11] of the works much; and when we have, we just hit an information wall and we just can't get past it." Apparently, according to Tangle, when he tried to contact the dealers from whom Aldrich had purchased, many were out of business and others had no helpful records. "We just can't do much for you on chain of title" he said. "But if this is going to be a problem, we should probably just save ourselves the time and end the discussion here. We would love to give you the collection, but you need to tell us what you want."

Tangle added that he was mindful of the policy of the Museum of the University of Pensacola not to make any purchase or accept any gift which lacks a clear provenance going back to the original excavation. He was concerned about this type of policy and wanted to know whether the Omnium and other museums subscribed to it.

PART A) As the Director of the Omnium Museum, how do you approach this offer and potential acquisition?

PART B) When you, as a curator at the Omnium, are consulted for guidance by the Director, what would you advise? What specific problems would concern you?

PART C) If Aldrich had proposed a gift–purchase arrangement, would that alter your view of the matter? Under a gift-purchase, a portion of the appraised value of the work is treated as a gift and the remainder is paid for by the museum to the donor.

---

[11] The words "provenance" and "provenience" are often used interchangeably. But in the context of museum and archeological studies, they have different meanings: "Provenance" refers to the "history of ownership of a work;" while "provenience" refers to the "geographical or geological origin or source of an artifact."

Here, Aldrich's collection is valued at $15 million; with $10 million to be treated as a gift and $5 million to be paid to Aldrich by the Omnium. The Omnium has the required funds.

PART D) If you do intend to make the acquisition, what kind of indemnification would you expect from Aldrich or from Laslo? Would you ask for indemnification on both the purchase and the gift?

ASHTON HAWKINS:

We have for example the first one, as director of the Omnium Museum, how do you approach this offer and potential acquisition? Ms. Reid, would you like to begin?

KATHERINE LEE REID:

The first thing you would have to determine is exactly what countries are involved, and which works in the collection were acquired at which dates. The collection started in 1965. I think we have to know what the different laws in the different countries are. Also, I think we have to know what our colleagues know of the museums, and what they've done in relation to these countries if we don't have the center of gravity ourselves. Hopefully we do.

DAVID RUDENSTINE:

The questions you raise are fair and reasonable, but suppose we don't know the answers. The question that really is put before you is: If you can't get answers to all those important questions, how do you proceed as a museum director?

KATHERINE LEE REID:

Well, in this one, I would look at it with such caution that I might take up Mr. Tangle on his offer. If you have serious questions about all this, we don't need to go further. I think that there's so little information about Aldrich, his attorney and their collection, that from the standpoint of the Omnium Museum, which collects in many different fields, there are many things that could be done. I think one serious option would be to preserve the institutional energies and to explore other options, because this one looks difficult.

DAVID RUDENSTINE:

And, you would do that even though it is an outright gift?

KATHERINE LEE REID:

I don't think that matters in terms of the future of the potential of something like this.

ASHTON HAWKINS:

Could I comment on that, Ms. Reid? From your general knowledge and also your lawyer's advice, do you think that objects acquired prior to 1983 would be questioned in any court of law or in any forum?

KATHERINE LEE REID:

When we establish a date before which we would accept works from the collection—whether it would be 1972 or 1983, our attorneys would guide us. We could be guided by law, and by a certain date where we understand what our national policy is, follow that and accept only those works that were acquired by the collector before that date.

ASHTON HAWKINS:

Mr. Pillsbury, would you be as cautious?

EDMUND PILLSBURY:

I don't think so. I think the works were bought in good faith. They have been exposed to the public. They have been well published. They have been shown at reputable museums, not as listed works of art, smuggled works of art, but as fine examples of their cultures.

I think you could accept it. My only concern would be, not that there be a letter of intent, but there be at least a fractional gift and a very, very strong commitment to the outright gift. I think complications can arise if the works go on public view. Then a question arises: Who owns the work of art?

Is it the museum's responsibility, or the owner's responsibility, or a joint responsibility? I think that this is a gift that you can consider. If this collection included architectural fragments and other such things that would clearly have to have been hacked from a wall, I think there are serious questions about something like that. The policy of the museum that I used to work for was that if you couldn't establish whether it was in this country before 1972, you wouldn't touch that kind of material, like architectural material

from Guatemala coming in from Mexico. I think that would be my personal position.

ASHTON HAWKINS:

Richard Diehl?

RICHARD DIEHL:

Well, although Aldrich and his dealer cannot seem to establish a chain of ownership back to the point of which the object came out of the ground, I assume they can competently state when Aldrich purchased the material. And if it has been in his hands, in his ownership since a given date—let's say 1983 or even 1972, I believe it would be legitimate to pursue acquisitions of this material.

Several years ago, I was involved in a somewhat similar situation. In helping to organize an exhibition for the National Gallery of Art in which the organizing committee is composed of both Mexican and U.S. dollars, we wrestled with the whole issue of whether we should exhibit material from private collections, and if so, under what circumstances?

The Mexican scholars on the committee agreed that if we could demonstrate that the committee had evidence that the objects were, in this case, in the United States by 1972, that they would be willing to allow them to be exhibited. In fact, one of the pieces of evidence that we used was a term paper written by a student from Yale University, in which she described the objects and illustrated them. The term paper was written in 1972. That was sufficient evidence for the director of Mexico's Natural Museum of Anthropology to agree to exhibit those pieces. Although that's a somewhat different case, I think that's the kind of thing we should be looking at here.

ASHTON HAWKINS:

Let's discuss archaeological material in general, not specific material from a building. That's obviously in a special category. What about distinguished objects that don't have necessarily a location assigned to them, or that you couldn't research. How would you feel about that?

RICHARD DIEHL:

I'd probably feel differently as an archaeologist than I do as a museum director. I would have to reconcile this conflict. In my

mind, as an archaeologist, once an object is removed from its context, it has lost the vast majority of its historical significance. It hasn't lost its aesthetic significance, and there is still information that can be gained from it. Once that object is moved however, then it is sort of in a different situation than it was prior to that. My emphasis as an archaeologist is to try to prevent the looting or the removal of the object from its context in the first place.

I also believe, as an archaeologist, that there are many activities that destroy the archaeological record, but looting is one of the least prejudicial. For example, in modern Mexico where I've worked for the last forty years, looting is not nearly as prejudicial to the archaeological record as mechanized agriculture, road building, and urbanization—a whole series of processes that destroy entire sites rather than remove specific objects. Archaeology is much more than specific objects. It is all of the context and associations that we have, and as an archaeologist that's what is critical to me. As a museum director, I would have to look at those objects in a rather narrow context. I don't know what I would do then.

DAVID RUDENSTINE:

The idea is to try to stay within the confines of the hypothetical, although I very much welcome your comment. Mr. Emmerich, if you were asked by a museum director for your advice on the possibility of acquiring this collection, given your experience and your status in the field, what advice would you offer?

ANDRE EMMERICH:

Well, I would urge the museum director to consider his audience, his constituents, and his museum—the Omnium Museum in Washington D.C. These objects come from Central America, Ecuador, and Peru. There is a rather large population of Mexican, Central American, Peruvian, and Ecuadorian ancestry in this country. Don't people of that descent have a right to a fair share of their national archaeology ipso facto? I think there's a case to made for American exceptionalism. We are a country of immigrants. Like well-to-do Chinese are now doing, we have bought our heritage as such pieces come on the market. We have not removed them by force. We have not stolen them. We have not conquered them with military actions. It seems to me that is a fact often forgotten. The obligation of the museum, especially one whose constituency is so broad as that of the Omnium Museum, is to show materials of significance to the descendants from all corners of the world.

DAVID RUDENSTINE:

So you would accept the gift and run the risk of either civil liability, or criminal liability and deal with it when it arose?

ANDRE EMMERICH:

Absolutely, yes.

DAVID RUDENSTINE:

David Grace, you're an attorney in this field. You've heard these reactions. Assume, for example, the museum director is your client and calls you up to relate this story. What do you advise?

DAVID GRACE:

Well, I think that one thing that comes through clear here is that a purely passive approach to the issue—relying on the statements by the donor—is not enough. The museum needs to come up with a set of internal reasonable care standards, which identify the steps they will take when donors come forward. I would suggest that they institute those standards in advance and that they apply to all donors coming forward. The standards need to be transparent so that there is no question five years later, as to whether or not the museum in fact took reasonable steps.

It seems to me that the museum should consider at least independent confirmation that the trail does end where the donor says it ends, rather than simply rely on the assertion by Arthur Tangle that he cannot find out beyond the first step. Here, we have a case where there has been publication already, for a number of years. But, that would be an element of reasonable care when we look at a review of published literature to see if there are reports of theft or other reports out there on some of the computerized systems. These are judgment calls in terms of how conservative the museum wants to be. Obviously though, there is that possibility of contacting a foreign government in advance.

DAVID RUDENSTINE:

Alright. Let us suppose though that Mr. Emmerich is the museum director, and he wants to embrace this. You are a cautious lawyer, obviously with a lot of concern of liability in the back of your mind. Mr. Emmerich says to you, "Come on David, tell me exactly what you're worried about? It's nice to have all these proce-

dures up front, but if I don't take the offer this week or next week, the collection may be offered to somebody else."

DAVID GRACE:

Well, let me begin by saying what I am not worried about. I am not worried about liability under the UNESCO Convention, or the Convention on Cultural Property Implementation Act ("CCPIA"), which has a 1983 effective date as passed in the Senate.[12] But, I am concerned, and we will discuss this issue in the next hypothetical, about whether these were stolen works and/or were smuggled into the country. I think there is potential liability on this point that needs to be examined.

Whether or not the advisory committee makes a finding of ongoing looting, a work that is stolen is subject to seizure or forfeiture under the CCPIA.[13] Furthermore, there are criminal laws in place dealing with stolen property.[14] Therefore, at a minimum, I believe you try to take reasonable steps to insure that you are not dealing in works actually stolen from a museum or other source in a foreign country.

DAVID RUDENSTINE:

Why? Are you telling Mr. Pillsbury and Mr. Emmerich that if they accept these works in their capacity as a museum director, they would run the risk of criminal liability? Is that what you just said?

DAVID GRACE:

I am not going say that they run the risk of criminal liability. But, they run the risk that there will be action to recover the goods.

DAVID RUDENSTINE:

Well, that is the basis of the hypothetical though. I mean as I understand the hypothetical, these items come free. Ms. Reid says she won't touch it without knowing a lot more. Mr. Pillsbury says he would take it. Mr. Emmerich says he would take it. Mr. Diehl says maybe he'll take it if he's wearing his museum hat, maybe he

12 *See* CCPIA, Pub. L. No. 97-446, § 315, 96 Stat. 2362 (1983) (codified at 19 U.S.C. § 2611).

13 *See id.* § 310.

14 *See generally* The National Stolen Property Act, 18 U.S.C § 2314 (2000) [hereinafter NSPA].

won't if he's wearing his anthropology hat, but then he'll think about it again tomorrow. That may not be quite fair, but . . . .

ANDRE EMMERICH:

That's close enough.

DAVID RUDENSTINE:

Alright.

DAVID GRACE:

I would guess and I'd be interested in the comments with the folks from museums that the public relations impact of this is as significant if not more significant than the strict legal liability or the risk of legal liability. And, I think that is certainly driving some of the questions I have in expressing the notion of a reasonable care checklist. The adverse fallout from having a foreign government coming forward and saying the museum has looted objects in its collection, even if they never get the objects back, is terribly significant.

ASHTON HAWKINS:

Could I interject something here? There is a very well-known museum on the West Coast, which has in recent years entered into a bargain sale agreement for the acquisition of a very fine collection of Greek vases and sculptures. I am told that a high percentage of those objects were obtained without permission. Almost all of them have been acquired in the last ten years. Yet, this museum went ahead with the acquisition. Does that change your thinking? I am also told that they probably have negotiated the return of certain items. Is this something that a museum director should be prepared to do? Can he take the risk that he'll accept the collection; there might be some problems down the line; and he'll negotiate with those problems as time comes up. How do people feel about that, Ms. Reid?

KATHERINE LEE REID:

I see it from the standpoint not only of serving a community. I think if you can, you obviously need to serve the community. But, I also think the climate of today gets you into a public relations problem that can drain the institution of energies unless you are prepared with the amount of legal advice and experience at your

disposal to be able to take on an issue like that. This well-known institution may well have those resources. You also have to consider whether you are totally independent—without members, without a constituency, or do you have the concern about the community, about your trustees, and the support of future donors?

I think that after getting into a public controversy it won't go away. It takes a year or two to resolve, and you end up having to suffer what happens in the press irrespective of what happens in the solution. You may end up with the collection, but you may have suffered. As an institution, I think you have to weigh whether it's worth it at the forefront.

ARIELLE KOZLOFF:

I just wanted to take up points from what David Grace was saying. First, the word "stolen" is a very broad term. Sometimes it means that the object was stolen from a museum or from an owner. Other times it simply means that, in the broadest sense, the object is thought to have come from a specific site and seems to have left the country of origin without permission.

I have found that what my colleagues in archaeological rich countries of origin do not want to have happen is this: they don't want to be embarrassed. I was a curator for twenty-eight years before I became a dealer, and I worked quite a bit, and still do work, with colleagues in archaeologically rich countries. They do not want to be embarrassed. They do not want to see something that is terribly important that could have come from nowhere else but their site, suddenly show up and meet with huge media attention and "Aha, we've acquired this, ten million, twenty million dollar object." These countries are then publicly humiliated. A good curator keeps this from happening.

On one hand, if the object truly is a treasure, if it is the most important thing that could have come from a particular site, then they should not buy it. If, on the other hand, it is an important object that could have come from a number of different sites, then the best thing a curator could do is get in touch with her foreign colleagues, as David Grace has suggested, in order to communicate with the foreign country.

These colleagues I refer to are people we meet frequently at international conferences. We talk to them on the phone. We write letters back and forth. We ask them for help with research. We bring them to the United States to give lectures. Because we are in constant communication with these colleagues, when one is

contemplating an important acquisition that could possibly raise sensitive issues, I suggest contacting your liaison immediately.

What do you tell them? Explain that you are aware of, and doing research on, a certain acquisition, and then proceed to ask them their opinion. This type of communication will allow you to test the waters. Eventually, if you acquire the piece, and your foreign colleague is contacted separately on the matter, he or she will already be informed and not surprised or embarrassed at the news.

ASHTON HAWKINS:

I think in the hypothetical we have postulated it is not typically the least significant treasure that would have come to the attention of the country of origin. The object being considered is a highly significant archaeological object that, in the prior thirty years, was publicly exhibited around the world. So, I think that issue is another kind of problem.

Mr. Cuno you have read the first hypothetical, and you have heard some of the discussion. Based on the offer of a gift coupled with an exhibition, how would you, as a museum director, respond to that offer?

JAMES CUNO:

I think the first thing to do is assess the measure of risk involved; that is, whether or not the museum is comfortable with assuming that risk. The risk level could be determined by a number of things, including public relations, as Ms. Reid suggested. Assuming that the risk is worth taking, I think the institution ought to go forward with the acquisition, ought to go forward with the exhibition, ought to go forward with subsequent publication and study, in order to steward that object or that collection through a public process by which people benefit for a variety of reasons from access to that work of art or collection.

DAVID RUDENSTINE:

Suppose that the terms were not an outright gift, but a gift purchase, as proposed in Part C of the first hypothetical. In that case, the museum is going to actually put up five million dollars. What impact does that, if any, have on your view Mr. Cuno?

JAMES CUNO:

That would be one of the factors one assesses before accepting the risk. However, this would not be, in and of itself, a discourag-

ing factor. Museums are in the business of taking risks with five million dollars from time to time. For instance, we might acquire a painting that for the same price turns out to be of less importance than we originally thought. It might not have been painted by the artist we originally thought painted it. Equally, one might hire a person who over the course of twenty-five years turns out to have been a bad hire; and over the years, it cost you five million dollars. There are all kinds of reasons for taking risks with the resources of the museum. One has to calculate the risk and decide whether it is worth taking. Five million dollars by itself should not discourage one from taking that risk.

DAVID RUDENSTINE:

You do not sound terribly worried about civil liability or having to give up the five million?

JAMES CUNO:

To clarify, that would not prevent me from going forward, if I thought there was a good reason by which we should acquire a given object, such as that it makes a real contribution to the quality of the program or collection of the museum. Moreover, there might be a very good chance that the museum will be able to retain rightful ownership of this object, and on the other hand a very good chance that one will have to return the object. A museum simply has to weigh the risks involved in spending money for an object's acquisition, money that is, after all, the public's money (whether or not it was given privately, the money was meant to be spent for the benefit of the public).

DAVID RUDENSTINE:

Ms. Schildkrout, if you were asked by a museum director, given the gift purchase arrangement, what would you suggest?

ENID SCHILDKROUT:

The institution I work for maintains data about the object that is probably as important as the object itself. We have a fairly set standard of procedures for curatorial vetting of these things. In my opinion, I would most likely be bound to apply the rule of 1970.[15] If the museum's policy is to follow the guideline set by the Convention, then curatorial discretion would be limited. If we had no data

[15] *See* UNESCO Convention of 1970, *supra* note 2.

before 1970, then I would probably recommend not taking this object. Beyond that, I think that it is important to look ahead. Since museums presumably collect or purchase for the long term, that lack of information could come back and haunt you and here, the impact of negative publicity really does come into play.

Looking back under the Native American Graves and Repatriation Act ("NAGPRA"),[16] many objects were collected in good faith according to the ethics, if not the laws, of the time. It is not that the laws have to be ex post facto, but the lack of data hinders us in responding to claims in the way we would prefer to respond, in many instances. The more data we have about the origin of objects, the more effective we are in dealing with claims to the benefit of the institution itself.

DAVID RUDENSTINE:

Evan Barr, given your position in the U.S. Attorney's office, suppose you were consulted by one of the museum directors, let's say over dinner as a friend (because they are not going to call you at the U.S. Attorney's office). They say, "Evan, we have this offer. I find it almost irresistible, but I'm worried. As a government lawyer, what's the risk as you see it?"

EVAN BARR:

First, I must give the standard disclaimer. I am speaking here in my personal capacity, and not on behalf of the Justice Department or the U.S. Attorney's Office. I would probably go by the axiom "if it's too good to be true, it must not be." Obviously what grabs my attention here is the museum's lack of documentation and the apparent lack of any effort to provide that documentation or dig any deeper. This is troubling. The attitude of Laslo as to the original source of the items is troubling. On the other hand, I think the bright line rule of 1972 is helpful here, and I would counsel to go ahead with any item that pre-dates 1972.[17] The museum seems to be inoculated in that case from any claim under the CCPIA.[18] There is also a pre-Columbian statute in the customs laws that specifically deals with monumental items or stone art.[19] The triggering date is also 1972.

---

16 *See generally* 25 U.S.C. § 3001 *et. seq* (2000).

17 *See* UNESCO Convention of 1972, *supra* note 2.

18 *See* CCPIA, Pub. L. No. 97-446, §§ 301-315, 96 Stat. 2350 (1983) (codified at 19 U.S.C. §§ 2601-13).

19 *See* Importation of Pre-Columbian Monumental or Architectural Sculpture or Murals, 19 U.S.C. §§ 2091-95 (2000).

The best advice is not to be too greedy. Settle for just that portion of the collection that pre-dates 1972, and then you can have a certain comfort level.

DAVID RUDENSTINE:

If I can turn to Part D, David Korzenik and Marci Hamilton, if you were in-house counsel to the museum directors and were approached regarding this gift purchase agreement and were asked about whether indemnification agreements would be possible, what would you advise?

DAVID KORZENIK:

Our first instinct is to conduct a due diligence procedure in order to figure out what the level of risk is. That is the natural and appropriate thing to do. Due diligence will occasionally permit us to avoid a potentially dangerous acquisition. But once the acquisition is made, interestingly the museum's potential liability is not ultimately influenced by the due diligence effort.

There are three sources of exposure, one is criminal. The second is a civil claim that may come from owners who later discover that the works are theirs, or from countries that later determine or believe that the works are theirs. Finally, there is the threat of forfeiture, criminal and civil. It is interesting that the due diligence effort does not really erase any of these liabilities except criminal.

The due diligence effort may affect the civil claims to some degree in some states. Of course, this depends upon whether the state has laws that will protect bona fide purchasers. Some states do not. Most of the civil suits ultimately result in the return of the property even if the claimant's lawsuit and cause of action is weak. James Cuno pointed out the real issue. You cannot generally anticipate the civil outcome.

Moreover, you certainly cannot anticipate the forfeiture outcome. The forfeiture outcome, if the recent case law is correct, has almost nothing to do with the innocence of the final owner. Though new legislation that affects forfeiture may have something more to say about this.

The reality is, even if you do the due diligence you may still lose that object. However, you are still in the business of presenting important cultural works to the public. The risks that you have to assess are the risks you turn to your curators to evaluate. You try to look at what the possible provenance and provenience of these works might be. Are they likely to have come out of a particular

area of the world from where claims are likely to follow? Those are the bets that you make. Ultimately, your due diligence will not reverse or change your forfeiture or civil exposure. At best, it will only erase the criminal exposure. It may protect you to a limited extent from some civil claims in some states. That is what I think is the irony.

As far as indemnification is concerned, your donor is not really going to want to indemnify, and it is going to be very hard to ask the donor to indemnify you for a work that might later blow up in your face. Perhaps you can look to the dealer. The dealer is somebody who wants the sale. He wants the transaction to occur. He did, likely, certify the work's authenticity and correctness to the collector. It may be that you can turn to the dealer, Laslo. If he is involved in the transaction, then ask him for some kind of indemnification for your costs; an indemnification for costs is not going to be that severe if you are getting it for free. Again, the risks are just there. I really agree with James Cuno—that is just the unavoidable reality of a museum's proper business. You make your best bets, whatever difficulties may be presented over the long term.

DAVID RUDENSTINE:

Marci Hamilton?

MARCI HAMILTON:

The risks are there, but they are there because of Congress. What worries me about the discussion is that it sounds like we are moving more and more towards lawyer-driven acquisition, with the increase in copyright protection and the increase in the possibility of data protection now pending in the Congress. It sounds to me like collections are going to be more and more driven by lawyerly concerns, and my concern is whether Congress has set the right balance.

It is unfortunate that the threshold acquisition question has to go to the lawyers in that Ms. Reid's primary answer would be: "Well, it looks too risky, so I'm not going to take it," or that the answer would be: "If it's post 1970, I'm just not even going to consider it." I think that is a disaster for the availability of art works and cultural properties to a public that needs them. My advice would be to forget about the risk. Go to Congress.

DAVID RUDENSTINE:

We are going to move on to Part II, the second hypothetical.

HYPOTHETICAL #2: THE ENVOY

The Museum has acquired the Aldrich Generoso collection of pre-Columbian art. After two years, you are inaugurating three new galleries for their permanent display–which galleries have been funded for $4 million by Aldrich. Two weeks before the opening, you receive a visit from an envoy of the Ministry of Culture of a Latin American nation. The envoy explains: "The Ministry obtained an advance copy of your book *The Omnium's Pre-Columbian Treasures.* We found it by visiting your online museum gift shop at 'Omnium.org.' You have no idea of the profound cultural importance that these works have for our nation and our people. With all due respect, we must insist that you return them to our country from whence they were stolen. We are convinced that we can establish that these artifacts came from sites within our country and that their export was illegal. You should know that we adopted a patrimony law in 1980, which gives our nation 'superior title' to all works of significant cultural value. Anyone who transports such works out of our territory or receives, acquires or owns them outside our territory is dealing in stolen property–property owned by our government."

PART A)

A1. How do you respond?

A2. Should one nation's definition of "cultural or national patrimony" be enforceable in another country with different laws?

A3. Leaving aside questions of present law, how, ideally, in the best of all possible worlds, are the competing national versus international interests to be reconciled?

A4. What kinds of "misappropriations" should be reversed? Are Napoleon's seizures of works of art (two thirds of which have been retained by France and still there) to be redressed or do they go too far back for a "return" to make sense? Would France be entitled to subject such property to its export control laws, given how it was acquired?

PART B) The envoy sends a formal letter to the U.S. State Department with a copy to U.S. Customs asserting that these objects were stolen from his country. Under present case law this presents a risk of seizure/forfeiture. How should the Omnium Museum address this ?

PART C) Is there a possibility of criminal liability ?

PART D)

D1. The envoy has also taken his charges against the Museum

to *60 Minutes*, among other news outlets. How would you explain your position to the Trustees?

D2. How should the Museum respond in the public forum? As you develop the Museum's public response to the envoy's challenge, what policy arguments do you offer for retaining the collection? [Is it not worth noting, for example, that the Metropolitan's recent opening of the Cypriot Gallery, with the President of Cyprus present and in the face of serious press criticism in Cyprus, has enhanced the importance and public appreciation of Cypriot national patrimony?]

DAVID RUDENSTINE:

Now, Edmund Pillsbury and Andre Emmerich, you were very embracing of the gift. Let's suppose that you are the chairman of the board of this museum. What do you tell the gentleman at the other end of the phone?

EDMUND PILLSBURY:

You invite him to come by and discuss the issues very carefully. I think you open communication. I do not think you can be rude about it. I can only speak from my own experience.

I began working for an institution that acquired a number of pre-Columbian objects before 1972. During my eighteen-year tenure, I think I received three serious letters from the Guatemalan embassy that were very firm in stating that they wanted those objects to be returned. My answer was that we would be happy to discuss this issue, but we first needed to establish from where these objects had come, since it wasn't clear they had come from Guatemala or some other country. If in fact they had come from Guatemala, it could not be established.

You have to talk through these issues. And, you have to certainly be on the side of protecting cultural patrimony. There is a trust and a bond with the public and you have to position the museum properly. James Cuno is correct; there are risks in everything. If you expend money it has to be of great cultural significance. It has to have great tradition, great rarity, and great importance. If it has all these things, then the right thing that you as a museum director are doing is trying to educate the public about the importance of other people's cultural property. I think you simply have to fend for the museum's right to use this material for educational purposes, while being sensitive of others who feel

they have a claim to the ownership. If the question is about title, then you have to look at it very carefully.

DAVID RUDENSTINE:

Andre Emmerich, you invite the Minister of Culture in, and you're having tea. What do you tell him?

ANDRE EMMERICH:

I would tell him exactly what Mr. Pillsbury tells him. I would also point out to him that these objects he's talking about, these rare treasures, are relatively frequently duplicated. His national museum in the capital has dozens of such objects sitting if not moldering in a warehouse. It will do his country a great deal of good in terms of cultural interest and tourism to have these things displayed in the United States. They are out of context already anyway. Therefore, the context issue falls by the wayside. I would point out that a great many tourists go to Guatemala and Mexico and Egypt, but nobody goes to Libya or Nicaragua.

DAVID RUDENSTINE:

Ms. Reid, you wouldn't have accepted this object as I understand it. If Mr. Pillsbury and Mr. Emmerich gave you a call, told you about their predicament, and asked you for your advice, would you say, "I told you so" and hang up the phone? If not, what would you say to them?

KATHERINE LEE REID:

Well, I feel that I have gotten in a tradition of expressing a "one-note" opinion here. I also think that James Cuno's approach is the correct one. I would not be in this same position because I really do feel that public opinion is a key factor in today's world. I think that it's too bad that the lawyers drive us. But, I think in a general art museum, a community art museum, the public opinion must be a considered.

That said, I think that we do need to work together as a profession with our guidelines, with the kinds of ethics codes that the American Association of Museums ("AAM") and Association of Art Museum Directors ("AAMD") provide.[20] If they were to poll me, I would certainly want to work with them, and as a profession, hold

[20] *See* ASSOC. OF ART MUSEUM DIRECTORS, PROFESSIONAL PRACTICES IN ART MUSEUMS (1992).

the line in the manner that Mr. Cuno and Mr. Emmerich were speaking about.

JAMES CUNO:

If I understand the hypothetical, I would want to uncouple the two issues that are presented by the Minister making the phone call. One is whether or not this object is of profound cultural importance to his nation and people. And the other issue is whether or not he believes that he has evidence to prove that it was stolen, and therefore, that it is legally his country's property.

I would have a different conversation regarding each of those points. In the first instance, while acknowledging the cultural importance of the object to the history of the Minister's country, I would argue that importance is not dependent on its residing in the Minister's country, but that it is independent of location; and that its original location (if even the latter can be determined beyond a shadow of doubt) is less important than how over the years it has been preserved, exhibited, and published where it is. As to the legal aspect of this, I would say that there is a process in my country by which we can determine who legally owns the object. I would say that we are perfectly willing to work with him in this process, during which we would be extending an opportunity to a great number of people to come to our museum, not only from this country but from other countries as well, to learn from and to examine this profoundly important cultural object. But, I would try to uncouple these two issues. They're not the same thing.

DAVID RUDENSTINE:

Marci Hamilton, you took a position in sharp contrast to David Grace's advice. I would say that Mr. Emmerich, Mr. Pillsbury, and maybe Mr. Cuno would have been delighted to have your legal advice. You would have said, "Go ahead, take it." Well, they took it, and the Minister of Culture now makes the call. They have handled it with as much grace as they possibly can. The Minister has left. They both have small migraines as a result, because they are afraid of what the newspaper is going to say about them the next day. You are a lawyer; they call you and say, "How can we put the best legal, ethical, and moral spin on this? You helped get us into this." What do you tell them?

MARCI HAMILTON:

There has been a thread running through the conversation by

the museum directors about the public's interest and serving the public, and what the role is for the public. I wonder what public you're serving? There's the public that is your constituent, the ones who pay to come through your doors. There's the public that lives in your area. And, there's the public that is the world public. I think public is undefined in this discussion. Once you define the public you want to serve, then you can take the high ground. The best public relations is always taking the high ground as fast as possible. While the high ground is always defined in terms of the public's interest, until the director has defined what public they are appropriately serving, I don't think the question can even be answered.

ANDRE EMMERICH:

In terms of public relations and image, the use of the term "stolen" is a very strange one. In many cases like *Peru*,[21] things are stolen "without permission" only if you are exporting from the country.[22] Within the country, trade is quite free. Should we in this country honor such expropriations? Why should we honor their expropriations? Very simply, we should not. The hero of my adolescence was the Scarlet Pimpernel; maybe we need him today to save not French aristocrats on their way to the guillotine but works of art from neglect. Lawyers can pursue this better than I can, but it's an important issue that what's stolen be properly defined. Stolen cannot mean just any violation of export control.

ASHTON HAWKINS:

I think it's important to expand a little bit on that point. For the most part, art source nations define "stolen" as objects that have been exported from their country without an export permit. Most of these countries have two kinds of cultural patrimony statutes. One kind vests the ownership in the state automatically. Whenever an object is found, it belongs to the state, even though in that country it can be bought and sold freely and collected freely and exhibited freely.[23] The other typical statute states that if some-

---

21 Peru v. Johnson, 740 F. Supp. 810 (C.D. Cal. 1989).

22 Some statutes, enacted by source nations, state that all objects of a certain class are property of "the State" or of "the People." Peru has such a statute. If read literally, the language of Peru's statute (and others like it) implies that an object removed from the country without government permission may be treated as "stolen." Accordingly, the source nation can recover the property in a civil action. By virtue of the language in the statute, the source nation becomes an owner seeking return of stolen property. *See* JOHN HENRY MERRYMAN & ALBERT E. ELSEN, LAW, ETHICS AND THE VISUAL ARTS 167 (3d ed. 1998).

23 These statutes are common in Spanish America. *See id.* at 166-67.

thing is found in the ground, the state has the right to exercise its dominion over it and to say that this is part of our cultural patrimony, as France, Germany, England, and others do.[24]

Laws in this country regard property in the common law sense of the word.[25] When you own something, it means you have title, possession, use, benefit, and control. How does this standard apply to ownership statutes, or patrimony statutes, from other nations? One of the questions in this hypothetical is how does one view those laws? How much respect do you give to them? Of course, the law in the United States is moving in the direction of treating those foreign statutes as deserving the same rights as United States property rights statutes.[26] A lot of people deplore this, but it is happening. It should also be said that the U.S. Customs Service has taken the view that if something is claimed as stolen by a foreign nation and it enters this country, the Customs Service feels that they have the right to seize it because of the *McClain* decision.[27] David Korzenik, you might explain how that works.

DAVID KORZENIK:

McClain is an important story. And, incidentally, if you are looking for a good screenplay, you should read that case because there is something very comedic about the criminality it describes. It's an interesting story. That aside, what I want to give you are the principles behind *McClain*, how it works, and why we reached this juncture where a criminal sword of Damocles, a forfeiture sword of Damocles appears now to hang over many museum acquisitions.

First, understand this basic rule of law, which is honored in most nations: it's not the practice of any nation that I know of to enforce the criminal laws of another nation. And, it's generally not the practice of any nation to enforce the export regulations or the export control laws of another nation. Those are the basic rules that have operated in this area until some of the treaties and the *McClain* case came into play.

What happened in *McClain* is this: we have in our laws something called the National Stolen Property Act.[28] The National Stolen Property Act makes it a crime for any person to transport in

---

[24] *See id.* at 70.

[25] *See generally* CCPIA, Pub. L. No. 97-446, §§ 301-315, 96 Stat. 2356 (1983).

[26] *See generally* NSPA, 18 U.S.C § 2314 (2000); United States v. An Antique Platter of Gold, 991 F. Supp. 222 (S.D.N.Y. 1997).

[27] United States v. McClain, 593 F.2d 658 (5th Cir. 1979) (challenging the second round of convictions for having received, concealed and/or sold stolen goods in interstate or foreign commerce and also for conspiracy to do the same).

[28] 18 U.S.C. § 2314 (2000).

interstate or foreign commerce goods known to have been "stolen."[29] It also requires, of course, that the party must know at the time they possess and receive this property that it is stolen.[30] Now we understand how this applies in the case of stolen cars, property stolen from someone's home, etc. That's the first law that you want to understand. The second law that's important to understand in the *McClain* context is the law of the art "exporting" nation such as Mexico. Mexico has a series of different laws. Under one of the laws enacted in 1972, the nation claims to own, or to have superior title to, works of cultural significance like pre-Colombian art.[31] There were some earlier statutes, but they seem to be more fuzzy and to make a less clear assertion of superior title. This is not a criminal law. If it were a criminal law that said, "It is illegal to export this object," then the United States would not enforce it. We might extradite someone who violated it and send them back to Mexico to be prosecuted, but we would not enforce it here in our courts. The Mexican law of 1972 is not an export law either, and indeed if it were, we would not enforce that either. But, what happened in *McClain* is that those two laws were put together in an unusual but important way that altered instantly how we understand art acquisitions.

In the *McClain* case, the export of the work of art into the United States and possession of a work that "belonged" to the state of, let's say Mexico, even if it was purchased from an owner in Mexico, was the acquisition and possession of "stolen property."[32] This confluence of laws, this expanded definition of "stolen property" then triggered the whole arsenal of law enforcement mechanisms in this country and, in essence, permits a foreign country to enact laws that would trigger and deploy our criminal statutes to protect their cultural property interests. *McClain* did another thing that was very significant, and that was not only to trigger criminal law, but also to trigger another important weapon in the prosecutorial arsenal, and that is the weapon of forfeiture.[33] Forfeiture is an unusual type of proceeding because it's not an action against a person for a criminal wrong, nor an action against a person for a civil wrong. It is an action against an object and an object's status.[34] It typically occurs as a separate proceeding adjunct criminal cases

---

29 *See id.*

30 *See id.* (listing unlawful or fraudulent intent as one of the requirements for criminal prosecution).

31 *See, e.g.*, MERRYMAN & ELSEN, *supra* note 22, at 166-67, 182-85.

32 *See* United States v. McClain, 593 F.2d 658, 664-65 (5th Cir. 1979).

33 *See id.* at 663-64 (citing the provision for forfeiture in 19 U.S.C. § 2093).

34 *See, e.g.*, Republic Nat'l Bank of Miami v. United States, 506 U.S. 80 (1992).

under the caption "The United States of America versus one Mercedes Benz" or "The United States of America versus a roll of $100 bills." It's a device that is very important and extremely valuable for law enforcement in drug crimes and so on. It's an extraordinarily useful weapon for prosecutors. It also has very ancient precedent that pre-dates the Constitution. The idea behind forfeiture is that the knife that kills the king "escheats" to state; any proceed of crime, or any implement of crime belongs to the state.[35] Therefore, the Constitutional problems have not been taken too seriously because the device pre-dates constitutional norms. Now you have this weapon by which the art object may be seized because it is "stolen" under the National Stolen Property Act.[36] The United States government institutes the action, and the owner now can appear as a "claimant." But, the burden of proof is not on the government to show beyond a reasonable doubt that a crime was committed. The burden of proof is not on a prior owner to prove, by preponderance of the evidence, that the thing is theirs and that they own it and that there are no statute of limitations problems. Rather, the burden is now on the "claimant," the current owner, to show that, in fact, the property was not stolen under this definition, to show that, perhaps depending upon how the law is applied, they were innocent of any knowledge of the wrongdoing.[37] Now, that defense may not even apply in that the new legislation may make it inapplicable.

One thing that's unfortunate about the *McClain* "switch," once it got turned on, and activated the whole panoply of prosecutorial devices, was that it also shaped the whole art-importing debate as a question about how the criminal law works, and how forfeiture law works. It thus took that debate far afield of cultural property policy. That's probably not where that debate should be taking place. Unfortunately that is where the debate is. That is *McClain*, and that is the machinery that we are worrying about. That is the sword that hangs over us.

DAVID RUDENSTINE:

Let's turn to the possibility of seizure. Suppose that you're general counsel to the Customs Service. Let's further suppose that

---

35 *See* MERRYMAN & ELSEN, *supra* note 22, at 170; *see also* United States v. Boznfield, 145 F.3d. 1123, 1133 (10th Cir. 1998).

36 *See* 18 U.S.C. § 2314 (2000).

37 The history of forfeiture laws do not provide for an innocent owner defense. *See* United States v. An Antique Platter of Gold, 991 F. Supp 222, 230 (S.D.N.Y. 1997). Showing lack of knowledge is not enough. *See id.*

the Minister of Culture sends a letter to the Department of State and to the Customs Service informing them of this collection, of their legal claims, and actually asking that the government seize the collection two weeks before this gala opening. The director of the government agency asks you as the government lawyer, "Is there a possibility of seizure under American law? If so, what is that possibility?" What would you advise?

EVAN BARR:

There are actually a number of different possible avenues here to address the Minister's concerns. It's worth pointing out that there's a lot of room for compromise at the beginning because his country's patrimony law only went into effect in 1980. We are only dealing with the items that were acquired between 1980 and 1985 presumably. Therefore, I think you can narrow it down.

In fact, the way these things usually play out, the foreign country approaches the State Department, the matter is referred to the Justice Department, or they approach Customs and the matter is referred to the Justice Department. A formal request, which is known as a letters rogatory is made for our assistance.[38] It would be my inclination to try to narrow this request. Apparently, the minister is asking for the whole collection to be surrendered. Before I step in and get involved on behalf of the United States government, I would want him to narrow his request to those items that fall into the relevant time period and also to those items for which he can produce solid proof that the items were looted from a particular site or were actually stolen from a museum or similar institution.

DAVID RUDENSTINE:

Suppose he did that, and we now have evidence with regard to some of the items that they were looted from sites between 1980 and 1985? Now, you have got let's say fifteen to twenty pieces identified for which there is at least some documentary evidence, and you're convinced it is a reasonable claim. The agency wants to know, "Should we go in and seize it while the cocktail party is going on?"

EVAN BARR:

Well, there are a few legal niceties that have to be attended to

38 *See id.* at 226.

first. We would have to obtain a warrant from a federal magistrate that would lay out a predicate offense justifying forfeiture. For example, before we jump in at that early stage, we would try to pull the Customs documents that were used to import the items and see if there's anything funny or strange about those documents. If there were the possibility that a false statement was made, or their documents simply weren't submitted, that would be a basis for possible seizure. We would not be in any hurry to act immediately, unless there was a risk that the items were not going to be in place, that they were going to be spirited away. Short of that kind of exigent circumstance, there'd be no particular rush.

I think a third-party custodial arrangement would also be productive, whereby the museum agrees that during the pendency of controversy it will surrender the items to a third party to be held while any litigation occurs. This option might give some comfort to the envoy from the other country.

Just looking at the facts here there is a number of possible statutes that could apply. The cultural property act that we've talked about might apply.[39] The *McClain* theory that David Korzenik laid out might apply as well.

I would also like to speak for a minute to the issue of whether we should be enforcing the laws of other countries, because I may be in the distinct minority on this matter. It is my feeling that embodied in the legal principle of comity between nations is a strong presumption in favor of applying other countries' laws as long as they are not morally repugnant or totally inconsistent with our laws. The laws that we're talking about are a specialized group of ownership laws. While they may seem alien to us, or unusual, the fact is that even in the United States we have laws that are similar. We have, for instance, the Archaeological Resources Protection Act,[40] which vests title in items found on federal land in the federal government. We have the Native American Graves Protection and Repatriation Act.[41] We have an act that grants title to the government in shipwrecks that are found off our coast.[42] Those are statutes and there are others out there that vest title in certain items in the government.

How would we feel if a copy of the Declaration of Independence ended up on display in Lima, Peru? If the government of Peru took actions to recover that item, would we find that surpris-

---

39 *See* NSPA, 18 U.S.C. § 2314 (2000).
40 16 U.S.C. §§ 470aa *et. seq.* (2000).
41 25 U.S.C. §§ 3001 *et. seq.* (2000).
42 *See* Abandoned Shipwreck Act of 1987, 43 U.S.C. §§ 2101 *et. seq.* (2000).

ing? I don't think so. I think that enforcing this species of law is not morally repugnant. We're not talking about statutes such as the ones passed in Nazi Germany, expropriating property of an entire ethnic group.[43] We're talking about the statutes that are reasonably tailored to protect certain national interests that those countries have identified.

ASHTON HAWKINS:

Forfeiture is now the subject of a bill sitting before the President, to curb to some degree, the procedures under which Customs operates when it seizes drug-related property and other such property.[44] There's been a general feeling in the Congress and in the nation that the U.S. government and Customs have gone too far in this area. Otherwise, the bill wouldn't have passed both houses of Congress in two months, and it wouldn't be before the President for signature.[45] That lays the groundwork for another idea, which is that seizure without trial really is an extreme denial of due process in the area of property.

Traditionally, forfeiture was always there, as David Korzenik has said, to assist the government in seizing contraband. Developments since the *McClain* case tend to treat art as contraband, the same way drugs or weapons might be treated, or something that is clearly antithetical to the public interest in the United States. By equating art with contraband, you "dehumanize" it, and you turn it into just another thing that one seizes to protect the foreign law. Quite apart from whether we agree or not about this being consistent or inconsistent with U.S. policy, I happen to disagree. I have never met a patrimony statute that I thought really related to any property law in any jurisdiction in the United States.

DAVID GRACE:

I wanted to pick up on that point. The one time the Congress clearly looked at this issue was in drafting the implementing legislation for the UNESCO Convention.[46] Congress came down to a very clear conclusion that we would not automatically enforce export control rules or other laws of foreign nations, that the cultural advisory committee and the State Department or the United States Information Agency were to exercise independent judgment about

---

[43] *See generally* LYNN H. NICHOLAS, THE RAPE OF EUROPA: THE FATE OF EUROPE'S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR (1994).

[44] Civil Asset Forfeiture Reform Act of 2000, 18 U.S.C. § 983 (2000).

[45] *See id.*

[46] *See* CCPIA, Pub. L. No. 97-446, §§ 301-315, 96 Stat. 2350 (1983).

whether they were going to impose import controls.[47] I agree there is this concept of comity. But, in this particular area, the one time that Congress has looked at it, it has drawn a line and said we will not automatically enforce the foreign law.[48]

JAMES CUNO:

It would be hard to imagine that the museum director would have arrived at this stage and be surprised by a phone call. I think that the director would have anticipated that this would be likely or not likely to happen. In the process of that anticipation, the museum director would have already determined the measure of risk. Part of that measure is to know with whom one is dealing and whether or not Mr. Generoso has the best interests of the museum in mind when offering his donation of objects as well as of money. A patient, confident institution and a patient, confident director should be able to determine whether Mr. Generoso has the best interest of the museum in mind, and whether a full level of trust has been achieved between museum and donor. If the museum is not impatient—has not rushed to judgment on this out of some desperate desire to acquire this collection—then I think the museum director would be in a very strong position to take the high road in answering the phone call from the Cultural Minister.

MARCI HAMILTON:

May I stress a point of information? Since 1983, have insurance policies developed that insure the museum against forfeiture or the loss?

ASHTON HAWKINS:

There have been attempts. There is a company in Washington that purports to do just that. However, it doesn't work very well because they send demanding letters to museums asking the museums to give information on which they will then base their insurance policy. As far as I know, there's been no satisfactory insurance. You can apply for federal immunity from seizure for international shows that are in the United States.[49] That is another matter we're not really discussing.

---

47 *See id.* §§ 306-308.

48 *See id.*

49 Immunity From Seizure Act, 22 U.S.C. § 2459 (1994).

KATHERINE LEE REID:

I just want to add one thing. I think the positions of various museums are guided by where we stand in terms of our source of funding. Before working in the Cleveland Museum of Art, I was at the Virginia Museum of Fine Art, where sixty percent of the budget comes from the citizens of the town. Taxpayers' money pays sixty percent of a $15 to $17 million budget. If the endowment is so huge that the institution really does not have to concern itself with funding, the position might be more edgy.

ARIELLE KOZLOFF:

On the Declaration of Independence in Lima example, I would love to see it. I would love to see it in Havana and Tehran. There are many places I'd really love to see copies of that document. But, other countries don't want it. This is one of the few countries in the world that is so omnivorous of the world's culture that it really wants to educate itself and its children and wants to have pieces of our heritage from wherever we are. Libya doesn't want American art. Peru doesn't want American art. We do want these things, and we want to share what we have with the other people.

On another point, I think what James Cuno was saying is that many museum directors would never get to the point of receiving this call from the minister of culture. I think about the opening of the Cypriot Galleries at the Metropolitan Museum, the lengths the museum went to for months, perhaps years, ahead of time: having press conferences in Athens, meeting with ministers of culture, and meeting with ambassadors. I like to think that most museum directors have enough of an international view that they would have already communicated with the other countries and show sensitivity as to how these countries feel.

ASHTON HAWKINS:

It might be worth commenting that the Cypriot Gallery at the Metropolitan Museum of Art put on display 1,600 works of art, many of which had not been on display since the First World War. Some had never been on display. There had traditionally been a small gathering of sculpture that was on display in the main museum building itself—the Great Hall.

When the decision was made to renovate spaces and put this collection on view in a first-class way, all these questions arose. The first one was: How did we acquire the collection? It was acquired

over a twenty-year period through the excavations of the museum's subsequent first director Luigi Palma di Cesnola, who was the American consul in Cyprus. He had permission to do this, theoretically, from the Ottoman Empire that was administering Cyprus at that time. These issues have not gone away. They are still raised in the press. But, it was the decision of Cyprus to not only endorse the galleries and endorse the publication of a very comprehensive catalogue for the first time, which was written by their former minister of antiquities, but also to come and be present at the opening of the galleries and in effect to proclaim that Cyprus's heritage was now established in one of the foremost museums in the world as an important heritage.

The hypothetical example here postulates that the Omnium Museum has very little pre-Colombian art, and postulates, by implication, that it should be acquiring pre-Colombian art in order to round out its collection. This "internationalist" consideration seems to be absent from the discussion so far. Yet, that is part of every museum director's basic role if he's in a museum that is collecting in various areas.

DAVID RUDENSTINE:

Before we move on to the last hypothetical, given the issues that have been put on the table, it might be worth just canvassing views here. What has been put forward is not only the risk of forfeiture and seizure, but also potential criminal liability under federal statutes.[50] As Marci Hamilton said, it is a national tragedy, to some extent, to have museum acquisitions driven by lawyers as opposed to curators and collectors. Yet, you cannot help but feel that to some extent, museum directors and their curators and advisors must wonder whether or not they are about to trespass into criminal liability. I would like an expression of views on this issue.

Is [the notion of criminal liability] part of your consciousness as you work, day in and day out, especially in the wake of the *McClain* case and other matters?

EDMUND PILLSBURY:

We do have to be worried because I think the rules are changing and evolving. Due diligence is something that is absolutely built into you as a museum director, and due diligence involves all the research to establish that a work of art is what it is supposed to

[50] Criminal liability can be imposed under the National Stolen Property Act. *See* 18 U.S.C. § 2314 (2000).

be and is of great cultural significance. The new element is the title issue and how much information must a museum obtain about the history of a piece it acquires to ensure that it acquires good title.

I know cases from my own experience where I did not look into certain questions because I did not want to be given information that would implicate our institution. I had suspicions about gaps in information regarding where an object might have been. In one case, it was a very important Italian painting, which had been lost from public view for nearly 100 years. I had my suspicions about where the object might have been for those 100 years. However, I was offered the piece in Switzerland and was acquiring it from a Swiss company. I did not quite know what to do about my suspicions. I certainly didn't want to be told by the seller that the piece did not come from this company, because that would implicate me. But, I did take the step of talking to authorities in that country to find out if they knew of the object and whether they considered it part of their cultural property. The answer was they did not know the piece, and they did not consider it part of their cultural property. I felt clear to go ahead. But, these are the kinds of issues involved. If I had gotten the seller to say, "Yes, we have had permission and this piece was in a private collection in this country," then immediately as the acquirer, I would have to have said, "Well why didn't you go further and establish clear export from that country?"

KATHERINE LEE REID:

We are aware of this possibility when we acquire works in a number of different fields. I feel that we need to work as a profession, through organizations such as the AAMD, and with our colleagues to explore policies, which will guide us in the future. At the present time, I think there is a situation that would make me very cautious.

JAMES CUNO:

Art museum directors are not the only institutional leaders that have to be conscious of liability. Any CEO of a complex organization faces similar questions of liability. And this is not the only place a museum is liable: there are questions of liability regarding financial commercial matters, human resource, and public relations issues. I would again like to distinguish between the director's job and the museum counsel's job.

I think that the director's job is always to take the high road in these kinds of things, while informed by counsel of matters of liability. Directors must distinguish the principle of ownership from the principle of stewardship. The high road is that museums never really own or possess these things. We always only take care of things; we steward things through time. It is the general counsel's office that is involved in the difficult task of determining matters of title and ownership. Museum directors ought not to be brought publicly into that discussion. Museum directors ought to distinguish issues of stewardship from ownership more than they do.

ENID SCHILDKROUT:

In an international arena, museums have no option but to obey the law—however they are advised to interpret it—and balance that obligation with public opinion. But I don't think that the legal aspects and the public relations aspects are easy to separate for curators and museum directors and I agree with Jim that we really need to rely on counsel to help sort that out. But both laws and public opinion are constantly changing, and a collection that seems "safe" today may not be tomorrow. At the same time it's very difficult, really impossible, to make decisions on the basis of foresight and foreboding. In the end, what we are really doing is balancing the present law with public opinion. But we have to recognize that both are volatile. I come back to NAGPRA—while I think that law has in many ways been of great benefit to museums and to Indians, it is difficult law to apply because it is so retrospective.[51] On the one hand we have found that even though the law facilitates repatriation of many classes of objects, regardless of how they were acquired, objects are not flying out of the doors of museums; in many instances no one knows where they should go. When museums and Indians are able to work together and engage in productive dialogue, it often happens that Indians decide to keep objects in museums even if they could pursue a successful claim. They too are balancing internal pressures, arguing, for example, about whether they want to destroy them, preserve them, use them, or what.

One thing we haven't yet discussed, I think, is the balance of local and national identities in the areas from which the objects come. We have asked about who the museum's constituency is, but in a world of global media, this too is not simple. I can think of instances where the interests of sub-national groups in certain

[51] *See* 25 U.S.C. §§ 3001 *et. seq.* (2000).

countries, as in the USA, do not always coincide with those of the national state. Then what you really have to take account of is the nature of the political debate about ownership within that context. If the Asante in Ghana or the King of Benin in Nigeria, or some Maori in New Zealand, make claims for objects that were taken at the turn of the last century, it is not always simple to deal with this by responding solely to the claims of their national government because these claims may not be presented as national claims. Yet they may have great weight in the court of public opinion. This is something we haven't considered yet in our discussion, because we have assumed we are looking at relatively strong nation states like Greece or Mexico.

ASHTON HAWKINS:

Why don't we go to the third hypothetical?

HYPOTHETICAL #3: A MODEST PROPOSAL

There is new legislation before Congress introduced by Sen. Jesse Sterns and Sen. Patrick Moynafoot designed to protect American cultural patrimony. Patrimony is to be defined as any work of anthropological, archaeological or cultural significance to the U.S. that either: a) originated in the U.S. or b) has been owned and held within U.S. territory for over twenty-five years. Such works may not be exported without an export license approved by the "Bureau of Culture" (to be established within the Department of State). A non-American work will not qualify as being of "cultural significance to the Nation" if it has not also been "published" in appropriate museum catalogs or other scholarly publications; or placed on exhibition with a bona fide cultural institution for five of the requisite twenty-five years.

PART A)

A1. You have been asked to testify before the Senate Committee on Foreign Relations that is considering this legislation. How do you testify?

A2. Would such legislation provide U.S. cultural institutions with the kind of protection available to foreign nations?

Why don't we start with James Cuno.

JAMES CUNO:

Well, I think one would have to testify against the proposed legislation for all the reasons that one is critical of similar legislation in other countries. I think the answer is simple. If one takes

an international perspective and criticizes other nations' laws of this kind, then we will have to be equally critical of our own country's attempts to establish laws of this kind.

ANDRE EMMERICH:

I am against it for reasons of American self-interest. The flow of art, into and out of collections and on the market, always seeks freedom of movement and cherishes the ability to take art freely from one place and country to another. Restrictive laws would have an enormous chilling effect on the flow of art into this country. As such, I do not think it would be helpful in protecting cultural patrimony. We want to protect our patrimony, and the best way to do so is to have the market wide open.

ARIELLE KOZLOFF:

I completely agree with Andre Emmerich and James Cuno. I think that the best thing for works of cultural patrimony is for it to be in the hands of the people who love it and want to care for it the most. In any given century, those people may be located on one continent or another. We have no idea which continent those people will be living on five hundred years from now. If some time in the future people are located in China, rather than allow great works of art to rot here, I think it would be better to sell them to wealthy Chinese who love them, want them, and want to care for them.

ASHTON HAWKINS:

Let me just add another factor. As far as I know, the United States is the only nation in the world without an export control law.[52] Notably, everyone else believes that these export control laws are a good idea. This raises an interesting question as to why they think this is a good idea. Given all these other considerations, are you still of the view that we should not be protecting our patrimony?

JAMES CUNO:

I think a workable compromise, if one finds it difficult to de-

[52] There are no restrictions on the export of works of art in Switzerland or the United States. *See* MERRYMAN & ELSEN, *supra* note 22, at 70. "There are, however, growing limits on the export of 1) archaeological objects, and 2) Native American cultural objects." *Id.* There is only one United States statute that does contain a form of export control. *See* NAGPRA, 25 U.S.C. §§ 3002-3007 (2000).

fend the principle of protecting one's cultural patrimony, is to use the British model.[53]

ASHTON HAWKINS:

That's a given. The British model is the best in providing a reasonable way of functioning within the statute.

ARIELLE KOZLOFF:

My answer to your question of "why" is that in the twentieth century we saw two hugely divergent political trends taking place: Marxism on the one side and capitalism on the other. The United States and a few countries in Western Europe are now the major capitalists buying these cultural objects.

The archaeologically-rich countries tend to have very strong elements on the two wings, the left wing and right wing. The right wing is fascist in that everything that comes from their nation should belong to them and not to foreigners; the left wing feels that cultural patrimony should belong to everybody and that there should be no money attached to it. These two wings converge on this issue. Notably, the archaeologically-rich countries are the ones making the biggest noise on this issue. They want the objects for either of their divergent interests; they want the objects to remain in their countries. Whereas, the capitalists feel they ought to be able to buy everything they want. So in response to your question "why," I think the answer is political and legal in nature.

EDMUND PILLSBURY:

There is no question that this would be inadvisable legislation. There are so many better ways for the government to support the arts and to provide incentives for art to remain here other than creating this artificial mechanism. Furthermore, we do not have, nor can we attain, either the intelligence or the resources to keep our own patrimony here.

ASHTON HAWKINS:

Yet, the English have set up and continue to administer a very fine export control system. This system allows a certain amount of exports, but also allows the nation to come in and preempt.[54]

---

53 *See* MERRYMAN & ELSEN, *supra* note 22, at 70 (noting that although needed in Great Britain, export permits are "routinely awarded without substantial expense, inconvenience, and delay.").

54 *See id.* at 69-73.

Would you call that system unwise for the United States?

EDMUND PILLSBURY:

I think we may evolve into something of that sort, because that system at least sets up a review process for works of great cultural importance. It remains unclear, however, whether our government has the ability to set up and operate a system comparable to the efficient English system. Additionally, the English system has been open to abuse in the past.[55] It has been influenced politically and in other ways. Even though it has worked pretty well, it has not provided a perfect solution.

KATHERINE LEE REID:

I believe legislators must have created most of the proposed law. In other words, input was not taken from the profession. I cannot believe that Senator Moynafoot was involved with this proposed legislation. I also think that if the proposed legislation were to be enacted it would provide an easy solution, which only looks good from the outside.

RICHARD DIEHL:

I see no positive results coming from this legislation. I believe American culture would benefit from mass exportation. The United States would continue to have access to these objects whether or not we retained physical ownership of the works. Given modern media, I believe it is to our advantage that these things move freely around the world.

ENID SCHILDKROUT:

I agree with that. But I wonder if we have to worry about this issue that much, as it seems like the proposed legislation would contradict so many other laws that are already on our books.

ASHTON HAWKINS:

Wouldn't the proposed legislation preempt existing laws, not contradict them? That's the difference with a federal statute. In other words, it would be common international policy.

---

55 *See id.*

ENID SCHILDKROUT:

How does a law like the Native American Repatriation and Graves Protection Act[56] which does prohibit museums in particular from de-accessioning certain objects outside of its parameters—e.g. selling them across state or national boundaries—relate to this?

ASHTON HAWKINS:

Well, I think NAGPRA is a separate issue. There is a form of this sort of federal policy in NAGRPA. The property cannot be exported legally if found on government land or located in a public collection. In contrast, private collectors can do what they want under the statute.[57]

ENID SCHILDKROUT:

But, once it is de-accessioned and goes back to the tribe, it becomes the tribe's property.[58]

ASHTON HAWKINS:

Yes, the tribe can send it abroad, but a museum cannot. I think we are just pointing out the fact that we already have cultural policy on our books. The legislation dealing with publicly owned Native American art is illustrative. These laws are extremely difficult to enforce. I believe the museums have had considerable problems with these laws. Private collectors are still free to buy and sell. However, they are not motivated to give it to a public institution, because to do so would subject the art to tribal claims.[59]

DAVID KORZENIK:

I think that is an interesting observation; NAGPRA is a species of clawback legislation.[60] I tend to doubt that this is a good idea. I think it just complicates things. It may not even be as effective as some of the other nations' patrimony laws. I am not sure that our proposed legislation, if we ever adopted it, would trigger an

---

56 25 U.S.C. § 3001 *et. seq.* (2000)

57 *See id.* §§ 3005-3007 (subjecting public institutions and museums, but not private parties, to forfeiture and civil penalties).

58 *See id.* § 3005.

59 *See id.* §§ 3005-3007.

60 *See* Marcia A. Howard, *A Corporate Welfare Reform Agenda, at* http://www.afscme.org/pol-leg/corpwel.htm (June 1994) (providing that the term "'clawback' refers to provisions that allow the state to rescind financial assistance if the economic development fails to achieve stated objectives . . . .").

equivalent of the National Stolen Property in other countries. As such, it might have far less utility to us than Mexico's or Peru's equivalent cultural patrimony laws have for them.

MARCI HAMILTON:

To be somewhat lawyerly about it, the legislation is massively overbroad, as it would apply to anything with cultural significance. For example, this would prohibit Disney from exporting its films. The proposed legislation is not salvageable the way it is currently drafted. It is contrary to the spirit of the First Amendment[61] and the Copyright Clause,[62] which are intended to create diversity, movement, quality, and quantity in the marketplace. Thus, it violates certain constitutional norms.

The proposed legislation is also silly. It flies in the face of the globalization of culture. I am surprised that the Internet and the world wide web have not come up once in our discussions about defending or keeping cultural property, and being able to disseminate it worldwide. In any event, there is no way to stop the globalization of culture.

DAVID GRACE:

I agree with the comments stated earlier. The one aspect of this legislation that I think is worth considering further is whether there should be some kind of safe harbor for objects that have come into the United States and have been published or made publicly available for some period of time. In other words, there should be instances whereby a safe harbor would insulate objects from forfeiture or other actions. This portion of the legislation is something that I believe is worth pursuing. If I were testifying, that is an area I would try to hit.

ASHTON HAWKINS:

I think it is fair to say that we all believe in the internationalization of culture. But is it really happening? It strikes me that the legal movement in this country is going in the other direction. I think our discussion this morning points this out. Museum directors currently have to look over their shoulder every time they buy something, or even when they accept something as a gift. So is that

---

61 *See* U.S. CONST. amend. I.
62 *See* U.S. CONST. art. I, § 8, cl. 8.

the internationalization you are thinking of, or is there something else you have in mind?

MARCI HAMILTON:

I have in mind the creation of the worldwide web by multinational corporations. Territories and national governments are no longer necessarily king. We are controlled, to a large extent, by the lobbyists of these multinational corporations, which are changing the laws in the European Union and the United States. So, that is why I started out by saying that the answer here is talking to Congress. This policy, if implemented, would be rolled over by the internationalization of culture. It is inevitable that we will all be part of one world. The reason I say this is because the G7[63] meets annually for that very purpose; it is the topic of discussions at G7, namely, how to share the world's resources with one another. Therefore, I think it is a political movement that cannot be forestalled.

DAVID RUDENSTINE:

So far, there is no defense of this proposed statute.

EVAN BARR:

I would love to rise to the challenge but I have to agree that the statute, as proposed, is deeply flawed. What is most troubling is the breadth of the clause about origination in the United States. I will say that there are more workable definitions out there. Specifically, Article One of the UNESCO Treaty, which has been adopted in our cultural property act, lists specific categories.[64]

DAVID RUDENSTINE:

Let us assume the statute has a similar list. Now what would you say?

EVAN BARR:

We are already signatories to such a treaty. If an article, such as a sculpture, is stolen in the classical sense, say from the National Garden Museum, and falls within one of those categories and ends up in a country that is a signatory, then the item would be returned

[63] The G7 are seven countries including the United States, Great Britain, France, Germany, Japan, Italy, and Canada.

[64] *See* UNESCO Convention of 1970, *supra* note 2, at art. 1.

through the mechanism that is already in place. I believe that result to be a good thing. We are already a party to an international framework that allows for this process to work both in having art returned to the United States and in the other direction. Notably, most of these cases involve the United States returning artwork. The statute still has problems. Obviously I am worried about a so-called "Bureau of Culture" determining important issues like this. Therefore, I would not be in favor of something this broad.

JAMES CUNO:

An alternative to this proposed legislation would address the fact that prior to the last fifty years, many of our most important and significant American works of art were made outside the United States. They were made in London, Rome, Paris, or Germany by American artists. Therefore, one would be misguided in proposing to recall works of art simply on the basis of where they were originally made. Cultural patrimony is not dependent on the object having been made in the country for which it is important; for example, take the case of the Statue of Liberty, it was made in France.

ASHTON HAWKINS:

The statute could have the option of either an American-made object, or an object that has been in America that has subsequently become part of the nation's patrimony.

JAMES CUNO:

I was being facetious when I mentioned the Statue of Liberty. But, there are those objects that lie elsewhere, that were not made here, but that were made by Americans elsewhere. It seems this statute is protecting the wrong objects in trying to protect cultural patrimony, because cultural patrimony actually lies elsewhere in many respects.

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

---

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

---

[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 communicated . . . ." *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

---

[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:
>
> (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"

---

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.

---

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 Institute, 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 Isabelle 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-

---

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 shall, *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, but 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]

---

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,* TIMES

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 rem-

---

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.

edy 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

---

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

---

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-

---

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 industry).

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.

---

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

---

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.

*Theresa M. Bevilacqua**

* Associate, Dorsey & Whitney LLP, Minneapolis, MN. J.D. 2001, Benjamin N. Cardozo School of Law. Ms. Bevilacqua wishes to thank Professor William Patry and Mr. Joseph Riccitelli for their contributions to this note.