THE COMPULSORY LICENSE REDUX: WILL IT SURVIVE IN A CHANGING MARKETPLACE?

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I. INTRODUCTION

Long ago, the Copyright Act could comfortably fit in one's pocket without disturbing one's profile.[1] This Act contained only one explicit limitation on a copyright owner's otherwise exclusive power to negotiate (or to decline) a license for all uses of a copyrighted work. The "mechanical compulsory license"[2] provided the owner of a copyright in a musical work who had authorized the creation and publication, of what the current law calls phonorecords, a right to statutorily determined compensation if others made different recordings of his music. As most copyright practitioners know, Congress enacted this restriction on authors' rights out of fear that the few existing manufacturers would monopolize the market for "mechanical rights" if it were left unregulated.[3]

This compulsory license and those that followed owed their creation to the *combination* of a desire to capture royalties from new technological uses of copyrighted works, and a fear that a purely private market for those uses would result in one or more aspects of a monopolized market. These aspects are artificially high prices, restricted output, or reduced public access to works of authorship. As technology has ratcheted forward, we have periodically discovered new ways in which to use copyrighted works, and, almost always, we have commercially exploited them. That exploitation has virtually always preceded a modification of the copyright law making clear that copyright would govern the

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[1] The Copyright Act of 1909, as revised through 1973, was 25 pages long. Ch. 320, 35 Stat. 1075 (1909) (repealed and superseded by the Copyright Act of 1976, 17 U.S.C. §§ 101-810 (1982, Supp. I 1983, & Supp. II 1984)). Copyright Office Circular 91. The 1976 Act is 68 pages long and gets longer with each amendment. U.S. Gov't Printing Office Doc. No. 0-39-006.

[2] 17 U.S.C. § 1(e) (1974) (superseded by 17 U.S.C. § 106 (1982)).

[3] *See* H.R. REP. No. 83, 90th Cong., 1st Sess., 66-67 (1967).

new use.[4]

If one examines the history of United States copyright law in this century, it becomes clear that however long it takes Congress to provide some measure of copyright relief for a new technological use,[5] that relief will likely appear in the form of a limited right to remuneration rather than a "classical" grant of complete copyright rights. Why this has happened, whether it shall remain so, and whether we should always complain about it, are subjects that others have addressed at greater lengths than I have. What I propose to examine is *how* the current law's licenses have functioned. This is more a sociological than a legal exposition. Today's question is not "should we have compulsory licenses at all?" or "could Congress draft these licenses more artfully?" but, much more simply, "how goes it?" After looking at our experiences with compulsory licensing, I will briefly discuss how Congress may solve tomorrow's problems.

II. BACKGROUND

Before turning to the first question, I will review the creation of the current law. I will not embark on a detailed review of the legislative history of the 1976 Act. Instead, I will just recall how the struggle which preoccupied many of us for years appeared to this congressional staffer who got in on the tail end. Commentators have often recounted that a variety of technology-related issues prevented Congress from quickly completing the process of modernizing the copyright law soon after publication of the Copyright Office's initial report recommending its possible revision.[6] The Office prepared that report[7] in 1961, fifteen years before the Congress enacted the current law. As time passed,

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[4] For example, motion pictures were invented in the 19th century but were not included in the copyright law until the 1912 revisions of the 1909 Act. 17 U.S.C. § 5(1)-(m) (1974) (subsequent history omitted). Sound recordings were commercially viable long before their inclusion in the law in 1971. 17 U.S.C. § 5(n) (1974) (subsequent history omitted).

[5] It bears noting that it took 67 years in the case of jukeboxes and 10 years in that of cable television. 17 U.S.C. § 1(e) (1974) (subsequent history omitted) (jukebox performances exempted outright). Since 1978, 17 U.S.C. § 116 has provided a basis for compensation for such performances under a compulsory license. *Cf.* Teleprompter Corp. v. CBS, Inc., 415 U.S. 394 (1974); Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968). Cable retransmissions were held exempt from copyright liability until 1978, when 17 U.S.C. § 111 provided the cable compulsory license.

[6] H.R. REP. No. 1476, 94th Cong., 2d Sess. 359 (1976); 122 CONG. RECORD 31,984 (1976) (remarks of Rep. Railsback); *see* National Cable Television Ass'n v. CRT, 689 F.2d 1077 (D.C. Cir. 1982); *see, e.g.*, Greene, *The Cable Television Provisions of the Revised Copyright Act*, 27 CATH. U.L. REV. 263, 279 (1978).

[7] REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW, 87th Cong., 1st Sess. (1961).

new technologies created new controversies, so that arguments about library photocopying,[8] cable television,[9] and computer uses[10] crowded the dockets. While the issues and the protagonists changed, the arguments had a strong family resemblance; a use of a copyrighted work to which the 1909 statute did not apply became a matter of commercial success, then of great dispute, and often of extended litigation.

To most Members of Congress, compromise solutions are almost always the most attractive. Thus, when copyright owners tried to reverse Congress' decades-old decision exempting jukeboxes from copyright liability, and to reverse legislatively the Supreme Court's more recent decisions that cable television systems were not publicly performing the works that they rebroadcast, the compulsory license mechanism, having "solved" the mechanical-monopoly problem, provided an obvious model for this latter-day compromise. Copyright owners believed with justification that a right to remuneration was a small fraction of a loaf as compared with a right to control all uses of their works. From the congressional perspective this was a practicable compromise. After all, Congress itself initially had determined that jukebox performances were exempt, and the Supreme Court simultaneously had held likewise for cable performances and had called on Congress to clarify the law.[11] Few Members of Congress felt that clarification necessarily meant full copyright liability, particularly where, as in the cable and jukebox industries, literally millions of transactions a year were to be brought within the ambit of copyright for the first time.

The idea that some restraints on the market for copyrighted works are appropriate is as old as statutory copyright itself. The first copyright law, the Statute of Anne,[12] contained a provision that if the Archbishop of Canterbury, the Lord Bishop of London, or certain other officials found a book's price "High and Unreasonable," they then had the power and authority to limit the price to one which, to them, seemed "Just and Reason-

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[8] Williams and Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975).

[9] *See, e.g.*, Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968).

[10] Questions concerning computer storage of "traditional" works, copyright for computer software, and works created with the assistance of a computer were assigned to the National Commission on New Technological Uses of Copyrighted Works by Pub. L. 93-573 (1974). Its recommendations were largely followed and are substantially contained in 17 U.S.C. § 117.

[11] *See, e.g.*, Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968).

[12] Statute of Anne, 8 Anne ch. 19 (1710) (subsequent history omitted), *reprinted in* A. LATMAN, R. GORMAN, & J. GINSBURG, COPYRIGHT FOR THE EIGHTIES 2 (1985).

able."[13] Recent debates about the ratemaking policies of the Copyright Royalty Tribunal (CRT) can trace their lineage back to eighteenth century England.

If one leaps from the Statute of Anne to the current law's four compulsory licenses,[14] one learns four slightly different lessons, a number of which are intimately related to the history of the CRT. The unexpected thread common to most is the extent to which the parties involved have negotiated solutions that modify or partially supplant the provisions of the compulsory licenses.

III. The Compulsory Licenses

A. *The Mechanical License*

The oldest example of a compulsory license is the mechanical license,[15] a lineal descendant of a compromise forged in 1909 between those who opposed any recognition of mechanical reproduction rights and those who favored full liability. Today the market for mechanical rights is one in which most transactions are, in a limited manner, consensual rather than regulated. Most of the contracts for the manufacture of phonograph records and tapes are made on terms set by the copyright owners in conjunction with record producers.[16] Given the regulated price for which a license may be had without negotiation, it is hardly surprising that the price terms of the negotiated licenses are always below the rates specified in 1978 by the statute, and now by the CRT.

The world in which prices could only be negotiated under a regulatory ceiling has recently become less harsh for copyright owners than it was from 1909 to 1978, when the rate stayed frozen at two cents per record.[17] Under the current law, we have made some progress on that front. The rate became two and three-fourths cents per record or one-half cent per minute, whichever was higher, in 1978.[18] The present rate is five cents per record or just under one cent per minute, whichever is

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[13] 8 Anne ch. 19.

[14] 17 U.S.C. § 111 (cable license secondary transmissions); *id.* § 115 (mechanical license for phonorecords); *id.* § 116 (jukebox license); *id.* § 118 (public broadcasting license).

[15] *Id.* § 115.

[16] S. Shemel & M. Krasilovsky, This Business of Music 147 (5th ed. 1977).

[17] 17 U.S.C. § 1(e) (1974) (superseded by 17 U.S.C. § 106 (1982)) (rate as it had been adopted in 1909).

[18] 17 U.S.C. § 115.

higher.[19] While there is still a "cap," it does increase, and thus offers fairer compensation, albeit not full rights, to composers and music publishers.

As the Copyright Office neither collects the royalties paid under this license, nor, except in rare circumstances, receives notice when the license is invoked,[20] we have no concrete evidence of the number of purely compulsory transactions as opposed to partly consensual ones. However, it seems likely that most transactions are based on agreements arrived at after non-price negotiations.

B. *The Jukebox License*

The 1976 Act gave us a more modern compromise between the advocates of no liability and those of full liability with respect to jukebox licenses.[21] For a flat fee, initially set out in the law[22] and thereafter adjusted by the CRT,[23] a jukebox operator is granted a license to publicly perform the musical compositions on its records. However, since copyright liability of *any* type was a new wrinkle for the jukebox industry, compliance has long been a primary concern with the operation of this license and remains a substantial problem to this day, particularly for the performing rights societies.

Surprisingly, in a society where we have a governmental or private statistic for almost everything, jukebox numbers, and their growth or diminution, are immune from exact quantification. Over time, there has been literally no agreement between jukebox operators and the representatives of the composers whose works are performed for the music-hungry public. During the early debate, prior to revision of the copyright law in 1976, the jukebox operators accepted the estimate that placed the number of boxes in use in this country at 500,000.[24] Later, as the likelihood of liability for jukebox performances loomed larger and larger, they revised that estimate downward to 250,000. Current industry estimates apparently range from 144,000-

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19 37 C.F.R. § 307.3(c) (1985).

20 17 U.S.C. § 115(b)(1).

21 *Id.* § 116.

22 *Id.* § 116(b)(1)(a).

23 *Id.* § 801(b)(1).

24 *See Hearings before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary United States Senate*, 90th Cong., 1st Sess. 259 (1967), *reprinted in* 9 G. GROSSMAN, OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY 259 (1976) (statement of Nicholas Allen, Counsel to the Music Operators of America).

250,000.[25] Whatever are the correct numbers, the Copyright Office records reflect a steady decline in jukebox registrations since 1978.[26] In recounting this history, I do not want to be unfair to the operators. They point out that the social habits of the country are changing, with more people staying home and spending less time feeding quarters into machines in the local gin mills. Moreover, with the increased rates, they have retired some marginally profitable boxes.

In 1978, the operators registered almost 140,000 boxes for an eight dollar fee for each one, generating a pot of roughly $1.1 million.[27] Through 1981, while the statutory fee of eight dollars was in force, there was a slight but consistent downward trend in the number of certificates issued annually, but the annual revenues, when rounded off, remained at $1.1 million.[28] When the fee was raised to twenty-five dollars in 1982, the number of registered jukeboxes declined more sharply than ever before. During the two years in which that fee was in effect, certificates declined by 15.7%.[29] In 1983, the year with the fewest registrations up to that time, due to the increase in the fee, the revenue was $2.8 million. Since the fee became fifty dollars in 1984, registrations have continued to decline, however, revenues substantially increased. In 1985, although only 97,000 jukeboxes were registered, the operators deposited $4.8 million with the Copyright Office.[30] This is more than four times the 1978 revenue, despite

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[25] Letter from Corinne Jones Gorzo, Senior Licensing Specialist, United States Copyright Office to Elana L. Gershen, Editor-in-Chief, *Cardozo Arts & Ent. L.J.* (Apr. 3, 1986):

JUKEBOXES CERTIFICATES ISSUED AS OF FEBRUARY 21, 1986

	FULL YEAR	HALF YEAR	TOTAL	ADDITIONAL NOTES
1978	139,569	3,827	143,396	4,287 operators
1979	135,763	2,395	138,158	3,959 operators
1980	135,046	2,121	137,167	4,058 operators
1981	133,702	1,637	135,339	3,922 operators
1982	125,218	1,182	126,400	4,007 operators
1983	112,700	1,641	114,341	4,068 operators
1984	102,468	1,845	104,313	4,317 operators
1985	97,424	1,942	99,366	4,164 operators
1986	24,124	0	24,124	1,056 operators

[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*

the fact that the number of licensed machines had declined by thirty percent.

While we have no clear data indicating the *extent* of operator noncompliance, the fact that some jukeboxes are unlicensed is clear to anyone who occasionally inspects a jukebox looking for the signature of the Register of Copyrights. (I wonder what my law school professors would have thought had they known that one day I would hold a position in which the broadest public dissemination of my name would be via tiny certificates intended for display in dimly lit corners of bars and diners throughout the land).

More scientifically, data from state and local governments reflect a higher number of jukeboxes than the number of certificates issued by the Copyright Office.

With the leadership and strong encouragement of Representative Robert Kastenmeier of Wisconsin, the problem of unlicensed machines has been dealt with in part by negotiations between the performing rights societies and the jukebox operator trade association. At present, the timely registration of a jukebox entitles its operator to a ten dollar rebate from the performing rights societies. Since the previous fee increases have all led to a reduction in registrations, it is plausible that the rebate method should do for the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC what it does for your friendly neighborhood car dealer. Whatever will happen, a pool of approximately five million dollars a year has been created now. Under the 1909 Copyright Act, there was nothing. While it is probably impossible to estimate what the pool would look like if there were full copyright liability for jukebox performances, it is clear that this compulsory license, notwithstanding all the arguments about the numbers of jukeboxes and fair prices, has served to provide a small but real contribution to the annual income of composers, lyricists, and music publishers.

C. *The Cable License*

The compulsory license for certain rebroadcasts by cable television systems provides a pie about twenty times larger than does the jukebox license. It comes as no great surprise, then, to see that this cable license[31] has been the subject of legislative initiatives, commercial debates, and protracted litigation to a

[31] 17 U.S.C. § 111.

greater extent than the jukebox license. In addition, the number of claimants who seek and receive their share of this pie is also substantially larger. In examining the history of copyright in the United States over the last twenty years, one might reasonably conclude that the largest *economic* shift in copyright policy occurred when Congress created this license.

To be sure, the 1976 Act arguably makes more fundamental *legal* changes in copyright policy: a unified federal system,[32] a display right,[33] a reduction in the importance of the copyright notice,[34] and a tortuous transition from a renewal-based duration scheme to the international norm of the life of the author plus fifty years.[35] But now that the passions of the revision wars have largely cooled, it safely can be said that it is hard to identify large sums of money either created anew or distributed differently because of the death of state common law copyright or a change in the rules for calculating when a copyright expires.

It is not hard to identify new sums with respect to the cable license. In 1984, $86.9 million was received by the Copyright Office. An additional $7.3 million was added, which reflected interest and appreciation in the value of the treasury instruments in which the funds were invested.[36] For 1985, incomplete returns show $98.7 million in receipts as of January 31, 1986.[37] As Everett Dirksen once said, "100 million here, 100 million there; sooner or later you're talking about real money." The substantial stakes can be attested to by examining the appellate litigation concerning cable ratemaking and distribution in which the CRT has been a party.[38]

Whenever the CRT has adjusted the rates, there has been litigation. Although the 1976 Act provides claimants with antitrust immunity as an incentive to work together to allocate shares among themselves and to present a plan to the CRT, every distribution has been the subject of a controversy involving the CRT and has gone to a court of appeals before final distribution could occur.[39] In these cases, television and radio broadcasters, together with a variety of copyright owners, have clamored for the

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[32] *Id.* § 301.
[33] *Id.* § 106(5).
[34] *Id.* §§ 405-406.
[35] *Id.* §§ 302-304.
[36] C. Gorzo, *supra* note 25.
[37] *Id.*
[38] *See, e.g.*, National Cable Television Ass'n v. CRT, 724 F.2d 176 (D.C. Cir. 1983); National Cable Television Ass'n v. CRT, 689 F.2d 1077 (D.C. Cir. 1982).
[39] *See, e.g.*, National Ass'n of Broadcasters v. CRT, 772 F.2d 922 (D.C. Cir. 1985) (subsequent history omitted).

recognition of their right to some compensation. If that claim was recognized, they then have clamored for a share of the pie larger than that decreed by the CRT.

For all the trouble that the CRT's practices and records have given the Court of Appeals for the District of Columbia Circuit, virtually all of the CRT's cable-related actions have been upheld, albeit somewhat grudgingly. The list of issues the court has had to deal with is instructive. These cases reflect, among other things, the creativity of the copyright and communications bars when $100 million is at issue. Without attempting to review every issue from every case, I would like to highlight a few of those issues which the CRT and the courts have considered. It is fair to say that hardly any of these were anticipated by Congress when it enacted the cable license.

One of the most long-standing and unsuccessful arguments made by the television broadcasters alleges that an individual station's broadcast day is itself somehow a copyrighted compilation of copyrighted programs. They argue that a separate copyright exists in the order in which various shows are presented. The court described the broadcast day argument as "quantitatively de minimis" in 1982[40] and twice rejected the notion that compensation was required.[41]

Commercial radio broadcasters suffered a similar result with respect to their claim that something other than the copyrighted music which they broadcast—and for which the performing rights societies receive royalties—was worthy of compensation.[42] One of the devotional television broadcasters argued, without success, that its share of the cable royalties was too small due to the CRT's "unconstitutional hostility toward broadcasting carried on as part of [our] Christian ministry."[43]

If one moves off the well-trodden path connecting the CRT and the Court of Appeals for the District of Columbia Circuit, other arguments concerning cable and copyright have been the subject of major battles. While I cannot speak for the whole 94th Congress, I am confident that neither Senator Scott nor Senator Mathias suspected that questions about the satellite delivery of baseball game broadcasts,[44] the "customizing" of a broadcast

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[40] National Ass'n of Broadcasters v. CRT, 675 F.2d 367, 379 (D.C. Cir. 1982).

[41] *Id.*; National Ass'n of Broadcasters v. CRT, 772 F.2d 922.

[42] National Ass'n of Broadcasters v. CRT, 675 F.2d at 379-80.

[43] National Ass'n of Broadcasters v. CRT, 772 F.2d at 939.

[44] Eastern Microwave, Inc. v. Doubleday Sports, Inc., 691 F.2d 125 (2d Cir.), *cert. denied*, 459 U.S. 1226 (1982).

signal for national distribution,[45] and the "stripping" and replacement of an invisible portion of a television signal by a satellite service[46] would concern both bench and bar to the extent that they have. Is it pure coincidence that these cases each involve one of the three "superstations" which have become staples of cable programming?

Finally, the question whether the definition of a "local service area" in the 1976 Act[47] included the then-unknown phenomenon of the low power broadcaster was hardly foreseeable. However, it is important to note that all of these controversies are rooted in the language of the copyright law which created the cable compulsory license.

In selecting the compulsory license compromise, Congress shaped the present market in ways that no one could have predicted in 1976. The advent of the superstation and the ratemaking practices of the CRT have directly affected the mix and quantity of distant signals available on cable systems. The idea that there would be near-universal interest in watching an out-of-town local station several thousand miles from its source might have seemed preposterous in 1976. Similarly, the notion that 3.75% of a cable system's gross receipts should be paid for retransmitting an additional distant station seemed ludicrous.

The effect of imposing such a rate has been twofold. First, it makes it prohibitively expensive for a cable system to import additional distant signals, because operators cannot pass along increased expenses to their customers if license fees increase every time revenues do. Second, this rate has made the creative accounting mechanism known as "tiering" even more attractive. By tiering, a cable system will offer a loss leader package of programs for a very low fee—that tier, of course, containing all distant signals for which the compulsory license fees must be paid—in the belief that 3.75% of a lesser amount of money is better. While the present rate was adopted on the theory that it reflected the free market price for distant signal equivalents,[48] it is nearly impossible to determine that price for any service if prices in its market are now strongly regulated. It is, however, a safe bet that a free market price would be expressed in dollars per subscriber rather than as a percentage off the top. In fact, if I can trust the

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[45] Hubbard Broadcasting, Inc. v. Southern Satellite Sys., 777 F.2d 393 (8th Cir. 1985).

[46] WGN v. United Video, Inc., 693 F.2d 622 (7th Cir. 1982).

[47] 17 U.S.C. § 111(f).

[48] 47 Fed. Reg. 52,159 (1982).

Washington rumor mill, this turns out to be the direction in which parties are tending to supplant, at least, the ratemaking functions of the CRT in their negotiations. If this comes to pass, then the cable license, which has been the source of tremendous controversy since its inception, will become, along with the mechanical and jukebox licenses, a statutory starting point for negotiations among the industries rather than a tariff demanding blind obedience.

D. *The Public Broadcasting License*

The final compulsory license in the current law concerns certain public broadcasting activities.[49] At first blush, it appears to be unlike the other "new" compulsory licenses. It is not immediately clear that it was enacted contemporaneously with the granting of new rights, but to a large degree it was. To be sure, the tradeoff between the creation of cable and jukebox rights, and their limitation via a compulsory license, is more obvious. But when Congress amended the law to provide a right of public display[50] and to remove the "for-profit" condition from the right of public performance,[51] public broadcasters felt threatened with dramatic and potentially expensive changes. The license, therefore, is a limited response to some of those changes.

It explicitly differs from the other licenses by stating Congress' desire that the parties make their own arrangements, by providing that voluntary license agreements supersede any CRT determinations,[52] and by granting copyright owners and public broadcasters antitrust exemptions so that they may negotiate collectively.[53] Thus, such negotiations and agreements have been the order of the day since 1978. Although the first round of negotiations took an immense amount of effort by both sides, from the government's perspective the benefits appear to have been worth it.

The Code of Federal Regulations contains an exhaustive schedule of rates with respect to the performance and display of various works by the Public Broadcasting System and local public radio and television broadcasters.[54] Yet, the overwhelming majority of copyright clearances for all types of public broadcasting

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49 17 U.S.C. § 118.
50 *Id.* § 106(5).
51 *Id.* § 106(4); *cf.* 17 U.S.C. § 1(c), (e) (1974) (subsequent history omitted).
52 17 U.S.C. § 118(b)(2).
53 *Id.* § 118(b).
54 *See* 37 C.F.R. § 304 (1985).

entities are accomplished by what the copyright law describes as "[l]icensed agreements voluntarily negotiated."[55]

IV. The Future of Compulsory Licenses

In the long run, there is no telling how these four licenses will fare. It is clear that in each instance, private arrangements can supplement or supersede the government's determinations. Large segments of the cable market, for example, are unaffected by the compulsory license. On an eighty-channel system it is not uncommon to find several local signals for which no copyright permission or payment is required, two or three distant signals imported and paid for via the license, with the balance of the programming consisting of cable-originated services for which private contracts are a necessity. Most public broadcasting transactions are paid for at rates to which the parties acquiesce, and the jukebox rebate system is in place, at least for the moment. Thus one sees the general preference of both copyright owners and their customers for making their own arrangements. This is clear even with the availability of a license which requires no communication between licensee and licensor.

Does this mean that these compulsory licenses have outlived their usefulness and that they will wither away? Will no others come to occupy a place in our copyright future? I know that that would be a popular message in some quarters, but it is not mine today. In large measure, the harsh reality of the existing compulsory licenses has motivated the negotiations that have occurred. To abolish compulsory licenses would dramatically alter the relationships between the parties and the circumstances under which the current system functions. Furthermore, Congress has not put the dramatic alteration of the copyright system high on its agenda. Members of Congress have introduced bills to abolish the CRT[56] and substantially curtail the cable license,[57] but none of these bills seems close to enactment.[58]

My task in this Article has been to report where we are and

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[55] 17 U.S.C. § 118(a)(2).

[56] H.R. 2752, 99th Cong., 1st Sess. (1985). Congress would transfer CRT's functions to the Copyright Office. H.R. 2784, 99th Cong., 1st Sess. (1985) would create a copyright royalty court to replace the CRT.

[57] H.R. 3339, 99th Cong., 1st Sess. (1985) would retain the cable license only for small systems while letting market forces determine the price for retransmission by large systems.

[58] On the "high-tech" front, the 98th Congress legislated a "pseudo-compulsory" license by according some retroactive protection to semi-conductor chips. 17 U.S.C. § 913(d).

to peer tentatively into the unknown. While the "ghost of copyright future" casts no shadow and speaks with less clarity than Congress, we can examine the shards in the dustbin of Capitol Hill.

I suspect we all remember the cartoons that filled the editorial pages after the Ninth Circuit's opinion in the *Betamax*[59] case; they portrayed copyright police forcibly removing a videocassette recorder (VCR) from Blackacre. Those cartoons were premature and slightly ridiculous. Premature, because the Supreme Court decreed the home-taping at issue non-infringing; and ridiculous, because Congress (not to mention the courts) would never have dreamed of permitting such intrusions into the sanctity of our homes.

Congressional response to the copyright issue is worth mentioning here. A number of bills were introduced during the pendency of the *Betamax* litigation and more have followed.[60] All would have made clear, as a matter of statutory law, the non-infringing nature of home taping. Some bills would have compensated copyright owners by providing a compulsory license with respect to equipment and recording media,[61] but no one gave any serious consideration to forbidding the importation, sale, or use of VCR's. Similar bills concerning compulsory licenses for audio-recording have also been introduced.[62]

As the United States considers whether to adhere to the Berne Convention,[63] it is worth noting that of our four current licenses, only the jukebox license looms as a serious impediment to our adherence to that strong pro-author treaty. Mechanical compulsory licenses are specifically authorized and are widely used among Berne member states.[64] The cable and public broadcasting licenses appear compatible under the rubric of "equitable remuneration for broadcasts and rebroadcasts."[65] In fact, some Berne members provide no compensation whatsoever for cable

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59 Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984).

60 *See, e.g.*, H.R. 4783, 97th Cong., 1st Sess. (1981); S.1758, 97th Cong., 1st Sess. (1981).

61 S.31, 98th Cong., 1st Sess. (1983); H.R. 1030, 98th Cong., 1st Sess. (1983).

62 S.1739, 99th Cong., 1st Sess. (1985); H.R. 2911, 99th Cong., 1st Sess. (1985).

63 *See* Duboff, Winter, Flacks & Keplinger, *Out of UNESCO and into Berne: Has United States Participation in the Berne Convention for International Copyright Protection Become Essential?*, 4 CARDOZO ARTS & ENT. L.J. 203 (1985).

64 Article 13(1), Berne Convention for the Protection of Literary and Artistic Works (Paris 1971), *reprinted in* 4 M. NIMMER, NIMMER ON COPYRIGHT, app. 27-5 to -6 (1985).

65 *Id.* at art. 11*bis*(2).

retransmissions.[66] Aside from the jukebox license, it appears that the licenses we have are not only the product of hard-fought domestic battles, but are also well within international standards.

None of this is to say that compulsory licenses are a panacea. If one were to set out today to design a copyright system *de novo*, one might be able to strike a balance between the rights of creators and the needs of users[67] without constraining markets for uses of copyrighted works. We do not have, and probably never will have, the luxury our founding fathers had back in 1790—starting from scratch. Instead, we find ourselves enmeshed in the present system, with an awkward mixture of pure copyright, random limitations such as fair use, and compulsory licensing.

Copyright progress in the recent past has been substantial; cable and jukebox performances are now part of the warp and woof of copyright life, generating more than $100 million annually for copyright owners. The search for relief on the home taping front continues. More likely than not, it will be governed by a compulsory license. As long as technology develops in ways that provide individuals with the capacity to do what publishers or recording studios used to do, then the right to remuneration is probably the maximum attainable goal. It may not have the appeal of a full-fledged exclusive right, however it is, I suspect, more attractive than no right at all.

V. Conclusion

The title of this Article asked whether compulsory licensing will survive in a changing market. Like a law professor, I have provided the question but not the answer. In thinking about that answer, it is important to remember that the licenses we now have, and those that are being proposed, are themselves the products of changed markets. If compulsory licensing disappears, it will do so because mechanisms will develop that make full liability transaction costs low enough to meet the demands of the user community. If the licenses survive, they will do so because the majority of those who rely on them view them, not as the best of all possible solutions, but as the least drastic alternative in a world where pure choices between clear options can rarely be made.

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[66] Canada, for example, is now considering whether to compensate copyright owners for broadcast retransmissions.

[67] 17 U.S.C. § 108(i).