

COPYRIGHT LAW REVISION

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STUDIES

PREPARED FOR THE

SUBCOMMITTEE ON

PATENTS, TRADEMARKS, AND COPYRIGHTS

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

EIGHTY-SIXTH CONGRESS, FIRST SESSION

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STUDIES 5-6

6. The Economic Aspects of the Compulsory License



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<sup>1</sup> The late Honorable William Langer, while a member of this committee, died on Nov. 8, 1959.

## FOREWORD

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This is the second of a series of committee prints to be published by the Committee on the Judiciary Subcommittee on Patents, Trademarks, and Copyrights presenting studies prepared under the supervision of the Copyright Office of the Library of Congress with a view to considering a general revision of the copyright law (title 17, United States Code).

The present copyright law is essentially the statute enacted in 1909, though that statute was codified in 1947 and has been amended in a number of relatively minor respects. In the half century since 1909 far-reaching changes have occurred in the techniques and methods of reproducing and disseminating the various categories of literary, musical, dramatic, artistic, and other works that are the subject matter of copyright; new uses of works and new industries for their dissemination have grown up; and the organization of the groups and industries that produce or utilize such works has undergone great changes. For some time there has been widespread sentiment that the present copyright law should be reexamined comprehensively with a view to its general revision in the light of present-day conditions.

Four studies of a general background nature appeared in the first committee print of this series. The present committee print contains two studies, Nos. 5 and 6, on the substantive problem of the compulsory license for the recording of music, as now provided in 17 U.S.C. §§ 1(e) and 101(e). Study No. 5, "The Compulsory License Provisions of the U.S. Copyright Law," by Associate Professor Harry G. Henn, of the Cornell Law School, reviews the law and practice on this subject and presents the issues involved. Study No. 6, "The Economic Aspects of the Compulsory License," by William M. Blaisdell, economist of the Copyright Office, presents an analysis of the economic effect of the compulsory license in operation and the probable effect of its elimination.

The Copyright Office invited the members of an advisory panel and others to whom it circulated these studies to submit their views on the issues. The views, which are appended to the studies, are those of individuals affiliated with groups or industries whose private interests may be affected, as well as some independent scholars of copyright problems.

It should be clearly understood that in publishing these studies the subcommittee does not signify its acceptance or approval of any statements therein. The views expressed in the studies are entirely those of the authors.

JOSEPH C. O'MAHONEY,  
*Chairman, Subcommittee on Patents, Trademarks, and  
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## COPYRIGHT OFFICE NOTE

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The studies presented herein are part of a series of studies prepared for the Copyright Office of the Library of Congress under a program for the comprehensive reexamination of the copyright law (title 17 of the U.S. Code) with a view to its general revision.

The Copyright Office has supervised the preparation of the studies in directing their general subject matter and scope, and has sought to assure their objectivity and general accuracy. However, any views expressed in the studies are those of the authors and not of the Copyright Office.

Each of the studies herein was first submitted in draft form to an advisory panel of specialists appointed by the Librarian of Congress, for their review and comment. The panel members, who are broadly representative of the various industry and scholarly groups concerned with copyright, were also asked to submit their views on the issues presented in the studies. Thereafter each study, as then revised in the light of the panel's comments, was made available to other interested persons who were invited to submit their views on the issues. The views submitted by the panel and others are appended to the studies. These are, of course, the views of the writers alone, some of whom are affiliated with groups or industries whose private interests may be affected, while others are independent scholars of copyright problems.

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STUDY NO. 6  
THE ECONOMIC ASPECTS OF THE COMPULSORY  
LICENSE

BY WILLIAM M. BLAISDELL

October 1958

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## THE ECONOMIC ASPECTS OF THE COMPULSORY LICENSE

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### I. THE ECONOMIC NATURE OF COMPULSORY LICENSE

Section 1(e) of the Copyright Act of 1909 provides that, once a recording of a musical composition has been agreed to by the owner of the copyright of that composition, then anyone may make a recording of the composition upon the payment of a statutory fee to the copyright holder. This type of provision, known as the compulsory license, is relatively infrequent in American law, except in connection with industries affected by a public interest, and in such cases usually only as a limitation on price; there is no such limitation in other areas of copyright. This specific provision places 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; (3) the price at which he may contract. Moreover, the copyright owner may not place any time limitation on the period during which the copyrighted property may be used, provided only that the statutory price is paid. Just as soon as one recording has been agreed to, anyone is free to record the same composition without time limit so long as he makes the required payments, known as "mechanical royalties."

There are several possible variations on each of these three major aspects of the compulsory license provision. For example, the freedom to record might become effective only after a certain time period, or the statutory fee might be varied as a percentage of a price or it might be related to the fee paid by the first recorder. In addition, the compulsory concept itself might be limited to a fixed period after a specified event such as the signature to the first negotiated contract for recording. Also, a tribunal might be established to determine a "fair and equitable fee" to be paid by those taking advantage of the provision. Still other variations might be applied, such as a sliding scale of fees increasing as the number of sales of the record increased.

In the present organization of the music business, recordings of various kinds are of increasing significance, and the compulsory license is important, particularly to the producers of popular records, where the large volume of sales creates the chance of large profits. Once a composition has reached the public domain, compulsory license is no longer applicable, of course. However, it is applicable to the copyrighted "standards," i.e., compositions which have been accepted more or less permanently into the musical culture, and to copyrighted classical selections, but since these latter make up a relatively small portion of the total record production, in this study emphasis will be placed on the music business as it treats popular recordings.



## II. THE FUNCTIONAL ORGANIZATION OF THE MUSIC-RECORDING BUSINESS

### A. COMPOSERS AND LYRICISTS

The music industry starts with the composition of a tune; it may be designed for a particular purpose such as popular use, television use, or moving picture use. It is hoped, of course, that a specially designed tune will end up in all these uses and perhaps others.

A large number of the composers and lyricists who produce the tunes are organized professionally into the Songwriters Protective Association<sup>1</sup> (SPA). This organization, now some 25 years old, functions primarily to protect the professional status of songwriters through the maintenance of a standard form of contract for use between individual songwriters and the publishers of musical compositions. In its most recent negotiations in 1947-48, it also established a "basic agreement" between the SPA and the Music Publishers Protective Association, which a music publisher must sign before he may purchase the compositions of SPA members under the 1947 Revised Uniform Popular Songwriters Contract. About 2,700 songwriters now belong to the organization and over 900 music publishers have signed the basic agreement. Although the SPA has used the group principle in dealing with music publishers, the standard SPA contract is applied individually by each songwriter to the sale of an individual composition to a publisher.

There is no clear information available as to the extent of the influence of SPA. It seems to be generally agreed that it is composed primarily of writers who are also members of ASCAP. One industry source states that—

The majority of the (popular) hit songs are presently written by nonmembers of SPA and published by firms not having a contract with that organization.

It may be inferred, an inference which is supported by some who are familiar with the industry, that most writers affiliated with BMI are not members of SPA, though some are. Also, there is a belief that regardless of the extent of the use of the SPA contracts (which are copyrighted), the standards established by those contracts are generally effective as a "floor" in the relationships between all songwriters and music publishers.

In contrast to the free-lance concept which dominates the SPA operation, the Composers and Lyricists Guild of America (CLGA) includes in its membership primarily those who write songs for the motion picture producers. The CLGA has about 500 members and there is a large overlap between its membership, on one hand, and that of SPA, the American Federation of Musicians (AFM) and the Writers Guild of America (WGA), on the other. There has been considerable talk about the possible merger of SPA and CLGA,<sup>2</sup> but no merger has taken place. The CLGA has sought to become the bargaining agent for its members in negotiations with the motion picture producers, but the National Labor Relations Board has decided that, for

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<sup>1</sup>The name of this organization was recently changed to the American Guild of Authors and Composers. For convenience we shall refer to it herein under its former designation.

<sup>2</sup>See, e.g., *Billboard*, June 23, 1956, and July 7, 1956; also *Variety*, Feb. 6, 1957.

purposes of the National Labor Relations Act, the members of CLGA are "not employees, but are independent contractors."<sup>3</sup>

Composers and lyricists also appear in other economic guises. As individuals, they may own or participate in music publishing firms, or recording firms, or they may also be recording artists. It is not unusual for a single individual to participate in several aspects of the music business.

The songwriter as such does not ordinarily deal directly with the licensing of his music for recording or for other uses. In practice he assigns his property to a music publisher under an SPA contract. The compulsory license provision affects the songwriter, however, inasmuch as it affects his revenues from the property which he has assigned to the music publisher.

#### B. MUSIC PUBLISHERS

The major effect of the 1947 Revised Uniform Popular Songwriters Contract (SPA) is to transfer to a music publisher all the rights in a musical composition, including the right to copyright it, under detailed and specific limitations which protect the position of the songwriter. No such contract between a songwriter and a music publisher is valid without the countersignature of the SPA; when a songwriter joins the SPA he transfers to it the recording rights to all his compositions, and it is only through countersignature on his contracts that the SPA releases these rights to a music publisher. In the present state of the music business, no music publisher would purchase a musical composition without obtaining the right to record it.

To the extent that individual songwriters do not belong to SPA, they presumably must protect their rights with respect to recording of their compositions. Within SPA, it may be inferred, the use of the organization countersignature to release recording rights is a method of tightening the organization. Individual songwriters would presumably insert special provisions in their contracts with music publishers in order to cover the potentially very valuable recording right.

Many of the major music publishers are organized into the Music Publishers Protective Association (MPPA). However, some of the very large publishers, notably those controlled by the Warner Bros. motion picture interests, do not belong. Organized in 1918, the MPPA has a membership of about 50 firms.

Although the negotiations with respect to the Minimum Basic Agreement (MBA) and the Uniform Popular Songwriters Contract are carried out by representatives of the MPPA for its members, the MBA itself is a contract between SPA and each individual publisher, and the songwriters contract is between the individual composer and an individual publisher.

The music publishers arrange for the dissemination of musical compositions through various media. With the development of motion pictures, electronic recording, and radio and television broadcasting, the functions of the music publishers have expanded greatly from their earlier activities in the publication and sale of sheet music. These newer developments have shifted the major sources of publishers' and songwriters' income from sales of sheet music and minor amounts of recording and performance royalties, to greatly expanded recording

<sup>3</sup> 117 N.L.R.B. No. 4, Jan. 4, 1957.

and performance royalties combined with a relatively small revenue from the sales of sheet music. Between 1951 and 1955, while sheet music royalty payments fell by 44 percent in volume, the volume of mechanical royalty payments by record producers to music publishers increased by 60 percent, the synchronization payments by motion picture producers to music publishers rose by 63 percent, and the performing rights payments by users of copyrighted musical compositions to performing rights organizations increased by 96 percent.<sup>4</sup>

Closely affiliated with the MPPA is the office of Harry Fox, trustee. It is understood that Mr. Fox is the general manager of the MPPA, and also that his office acts independently in a trustee capacity for others than members of the MPPA. The Fox office issues recording licenses and collects recording fees ("mechanicals") for those music publishers he represents as trustee in this connection. The collection function fulfilled by the Fox office is understood to be conducted on a nonprofit basis for the members of the MPPA, and against a percentage fee for other publishers. In these functions of licensing and collecting, the Fox office acts not only for domestic publishers, both members and nonmembers of MPPA, but also for foreign music publishers through contracts with foreign mechanical rights organizations, notably the Bureau International de l'Edition Mechanique (BIEM), the major mechanical rights organization in Europe. In connection with its function as collection agency for the mechanicals due to publishers from recording companies, the Fox office also verifies the accuracy of such payments by examining the books of account of record producers.

In addition to the MPPA, the so-called "standard" music publishers are organized into the Music Publishers Association of the United States, which is the trade association for this group. However, there is no clear line of demarcation between "standard" and "popular" compositions. Some members of MPPA have large catalogs of standard works in addition to their popular catalogs.

The music publishing industry is made up of about a dozen outstanding large firms and several thousand smaller firms, many of which are inactive in that they may merely hold copyrights and collect royalties on them rather than actively engaging in promotional and distributive operations. In 1958 ASCAP had 1,081 publisher members.<sup>5</sup>

Several of the largest music publishers are controlled by motion picture interests: MGM and 20th Century Fox, Paramount Pictures, Warner Bros., and Columbia Pictures.<sup>6</sup> Successful composers and recording artists frequently have their own music publishing firms, and both NBC and CBS own at least one such publisher affiliated with ASCAP and one each affiliated with BMI.<sup>7</sup>

It is primarily upon the music publisher that the direct impact of the compulsory license falls. In practice he is the holder of the copyright to musical compositions, and after his first agreement with a

<sup>4</sup> Cf. memorandum prepared by MPPA to the Department of the Treasury dated Feb. 19, 1957, re H.R. 5478, a bill to amend the personal holding company provisions of the Internal Revenue Code.

<sup>5</sup> The Billboard, Mar. 3, 1958.

<sup>6</sup> Cf. hearings, Senate Committee on the Judiciary, 83d Cong., 1st sess., on S. 1106 (jukebox exemption), p. 103.

<sup>7</sup> Cf. House Judiciary Committee hearings, 1956, serial 22, pt. 2, vol. 2, "Television," pp. 4208 and 4205.

record producer for the recording of a tune anyone may record the tune upon payment of the statutory royalty. In the absence of the compulsory license, the music publisher, as owner of the copyright, would be free to negotiate for the recording of the copyrighted material. He could negotiate with whom he chose, offer an exclusive contract if he wished, ask any price he desired, and suggest such time period as he cared to; in general, he could negotiate within the framework usually applicable to business operations having to do with the assignment or licensing of property rights.

In the absence of compulsory license, it may be assumed that the music publisher would recognize his own interest to be in licensing as many recordings and at such royalty rates as would produce the largest net amount of royalties from record sales and public performances—the latter particularly on radio and television—rather than being faced with the necessity of licensing all comers to record a composition at not more than the statutory royalty.

### C. RECORD PRODUCERS

When a music publisher has accepted a composition from a songwriter, one of his first moves, frequently even before sheet music publication, is to attempt to have it recorded by a record producer. In recorded form a composition is immediately available for broadcast which is considered to be the major form of "exposure" to the buying public.

Record producers will consider perhaps 50 compositions before they agree to the recording of one. Having accepted a composition, a recording contract is made with the music publisher. The payment to be made for the recording privilege (mechanical royalty) is negotiated on the basis of the statutory provision in section 1(e) of the Copyright Act, that is, the compulsory license provision. In practice the "2-cent per part" limitation in the statute is a ceiling on the payment. When the 78 r.p.m. record was standard in the industry, its playing time was a definition of "part." The industry is now dominated by the EP and LP speeds, and it has developed a new rule of thumb for EP and LP records to the effect that the recording royalty shall be  $\frac{1}{4}$  cent per minute of playing time or fraction thereof, but not less than 2 cents per side.<sup>8</sup>

However, in negotiating a recording contract, the bargaining strength of the two parties is important and in general the royalties agreed to in recording contracts are something less than the statutory rate; in fact, it is reported that, on rare occasions, a music publisher has been willing to waive any mechanical royalty in order to get a new composition recorded by an outstanding artist.<sup>9</sup> The license for use of the tune is usually issued by the Fox office and the mechanical royalty is paid to the Fox office on a quarterly basis.

<sup>8</sup> Cf. Henn, Harry G., "The Compulsory License Provisions of the U.S. Copyright Law," p. 50 (study No. 5 in the present committee print); and letter from Sydney Kaye, Esq., dated Oct. 2, 1956, in the comments and views appended thereto. A schedule of royalty rates based on the manufacturer's suggested retail price, and included in the MPPA "long form" license is published in Henn, Harry G., *op. cit.*, p. 50; and in a letter from Ernest S. Meyers, Esq., dated June 14, 1957, in the comments and views appended thereto. However, it seems that the dominance of the EP and LP speeds is such that the royalty based on the length of play of the record is generally used.

<sup>9</sup> Information from trade sources.

Although there are probably more than 1,000 record producers in existence at any one time,<sup>10</sup> a limited number of them are active at any one time. The record industry trade association, the Record Industry Association of America (RIAA), formed in 1952, reported 53 members as of December 31, 1956.<sup>11</sup> The functions of the RIAA are largely technical research, taxation and legislative activity, and statistical compilation.

Four or five of these producers are usually recognized as "major producers," although there is no recognized definition of a "major". Only four producers have annual gross sales of more than \$10 millions,<sup>12</sup> and several others are "semimajors" reaching for an annual gross sales figure of \$10 millions.

The relationships between record producers and other parts of the music industry are highly complex and widespread. Both RCA Victor Division and the Columbia Record Co. are closely affiliated, respectively, with the NBC and CBS broadcasting interests, which in turn own music publishers. This gives these two "majors" a distinctive position in the industry in that they can offer special inducements to recording artists in the form of radio and television appearances which are considered to be of major importance both in the sale of records and in the professional advancement of recording artists in the amusement industry.

#### D. MOTION PICTURE PRODUCERS

Since the advent of sound motion pictures in 1929 the motion picture industry has been a large user of music. The motion picture producer negotiates with the music publisher just as a record producer negotiates, but the use of a copyrighted musical composition in a motion picture is not considered to be subject to the compulsory license provision. Although the law applicable to this situation is not clear,<sup>13</sup> in practice the fees for such use of copyrighted music on a motion picture soundtrack are negotiated freely between the copyright owner (or his agent, the Harry Fox office) and the motion picture producer; and a single payment is usually made for both the right to use the music on the soundtrack (synchronization right) and the right to perform the music in exhibiting the motion pictures (performing right). The increasing use of theatrical motion pictures on television, and particularly the production of motion pictures specially for television use, have greatly enlarged the market for synchronization rights.

Prices paid for synchronization rights (together with the performing rights as to theatrical exhibition) vary widely. In a theatrical motion picture, some of the factors affecting the negotiation are: the total budget of the picture, the importance of the star actors, and the place which any given musical composition will have in the film.

<sup>10</sup> "Music Performance Trust Funds, 15th Combined Reports and Statements," p. 5, reports 1,167 phonograph record producers signatory to the 1954 Phonograph Records Trust Agreement as of June 30, 1956. Of the 1,018 signatories at Dec. 31, 1955, 951 reported no sales in the last half of 1955.

<sup>11</sup> Annual Report of the RIAA, Jan. 1, 1956-Dec. 31, 1956, p. 5.

<sup>12</sup> *Ibid.*, p. 5, and bylaws of the RIAA, sec. 2.

<sup>13</sup> See Kupferman, T.R., "Rights in New Media," in *Law and Contemporary Problems*, vol. 19, No. 2 (1954), pp. 173-174; and Dublin, Joseph S., "Copyright Aspects of Sound Recording," in *Southern California Law Review*, vol. 26, No. 2 (1953), pp. 139 ff.

Fees may run from as little as \$500 to as much as \$20,000. In TV films, the fee for a single use of a song in a syndicated film usually runs from \$250 to \$500, which includes unlimited runs for several years on a worldwide basis.<sup>14</sup>

Conversely, the motion picture industry is becoming an increasingly important source of musical material for phonograph records. A good deal of original music is now composed for motion pictures, and this material, first recorded on the soundtrack of a picture, is used for further recording on disks or tapes. In practice, if original copyrighted musical material is first used on the soundtrack of a motion picture, it is not thereby considered available for recording under the compulsory license provision; the right to first production of such original musical material in the form of recordings is subject to price negotiation, and only after such right has been given to one record producer is it possible for other record producers to invoke the compulsory license provision.

Due to their interest in music the relationships of the motion picture producers ramify throughout the music business: they are major owners of music publishing houses, and are thus influential in MPPA and ASCAP; they own recording companies, and they can direct their original motion picture musical compositions, through their own music publishers, to their own recording companies, if they so desire.<sup>15</sup>

In connection with compulsory license, the motion picture companies are affected as a source of compositions for recording, and hence as composers or copyright owners. This does not minimize their influence in the music business in other capacities not directly a part of their motion picture activities.

#### E. RECORDING ARTISTS

A major factor in the salability of a recorded tune is the recording artist or artists. Artists who perform for recording companies include both the solo artists and "name" groups, and the instrumental accompanists. Each phonograph record producer has his "stable" of solo artists, usually under exclusive contract; the contracts with these artists are probably his most valuable asset. In some cases a very well-known artist can maintain a nonexclusive position vis-a-vis phonograph recording but this is unusual.<sup>16</sup>

The contracts between solo artists and phonograph record producers are made under the provisions of a code of fair practice negotiated between the record producers and the American Federation of Television and Radio Artists (AFTRA). This code is a minimum agreement and individual artists are free to negotiate higher wages and better conditions of employment if they are able to do so. Well-

<sup>14</sup> Information re "sunk rights" taken from the *Billboard*, Feb. 22, 1957.

<sup>15</sup> Such action is not always considered desirable. In 1957, RKO-Teledisk Pictures owned both RKO Music (a publisher), and RKO-Unique (a record producer), but the picture producer transferred the album recording rights to a specific soundtrack to the subsidiary music publisher (RKO Music) with instructions to negotiate their sale in the open market. "The (RKO film) soundtrack album rights will be put on the open market by the publishing subsidiary," with the purpose of giving "the RKO publishing subsidiary a better bargaining position with the other disk companies." *Variety*, Feb. 20, 1957.

<sup>16</sup> "Bing Crosby is staying with Decca for another 3 years. However, the new pact gives the crooner the green light to do occasional groovings under other disk banners." *Variety*, June 6, 1956.

known artists are apparently given annual minimum guarantees with additions dependent upon the success of their records.<sup>17</sup>

Well-known solo recording artists are frequently "names" in the music business for reasons other than their recorded performances. They may own publishing houses and thus be influential in MPPA, ASCAP, or BMI, or they may also be composers or lyricists belonging to SPA. A very well-known performer may have a publishing house which is a member of ASCAP and another affiliated with BMI.

The instrumental musicians who perform for phonograph records, either directly under contract with a phonograph record producer, or indirectly as on a soundtrack under the control of a motion picture producer, are all members of the American Federation of Musicians (AFM), or the Musicians Guild of America (MGA), and are covered by the applicable minimum basic contracts of those unions. Some instrumental groups, such as well-established dance bands or symphony orchestras, are under exclusive recording contract to a particular record producer, but the accompanists for recording artists are frequently freelance musicians employed for the specific recording session.

With the rapid technological developments in recording and the cumulative popularity of recorded music, together with the "exposure" of recorded music by broadcasters, the need for performing instrumentalists has been drastically reduced. This is, of course, the major complaint of AFM. Most of the recording instrumentalists are concentrated in Hollywood and New York where they work on an individual freelance basis for the recording companies. In the calendar year 1955 the total wages received by members of the AFM for recording sessions was \$4,171,000.<sup>18</sup>

Neither group of performing artists is directly affected by the compulsory license provision. They are either under contract to a recording company or hired on a freelance basis by those companies. They are not involved directly in the negotiations leading to the recording of a copyrighted musical composition. Only if their contracts contain provisions for compensation related to the number of records sold would they participate directly in the returns from a hit tune. Of course, if a recording artist does have a hit tune his recording company presumably would recognize this attainment in connection with later recordings.

As indicated, a record producer's most valuable asset may well be his "stable" of recording artists. Exclusivity of contract, for recording purposes, between artist and producer is the usual rule. But these contracts are usually for a limited time period, and after a year or two a successful artist will find himself free to renew, or to shift to another producer. The moment an artist shows any promise of popularity, he is signed by some record producer. If he really becomes popular, then the advantages to him of a contract with a producer affiliated with radio or television become apparent; appearances on the air are the best possible exposure for obtaining lucrative personal appearance contracts, which every performer wants.

<sup>17</sup> E.g., Jo Stafford's new 5-year contract with Columbia Records "is described as 'one of the costliest' in the business with guarantees well into six figures." *Variety*, May 5, 1956.

<sup>18</sup> Official Proceedings, 59th Annual Convention, AFM, 1956, p. 131.

## F. PERFORMING RIGHTS ORGANIZATIONS

In contrast with, and completely separate from, the so-called "mechanical" royalty, i.e., royalties paid under the compulsory license provision of the Copyright Act, are the royalties paid for the right to perform musical compositions in public. Each public performance for profit of a copyrighted musical composition is subject to a performing license from the copyright proprietor. The several forms and the large number and wide distribution of public performances for profit now existing, as well as the great number of compositions performed, make the issuance of licenses by individual copyright owners a practical impossibility. Therefore, organizations have been formed to license the performing rights in a large catalog of copyrighted musical compositions. These organizations issue blanket licenses to those who wish to perform publicly for profit the compositions controlled by them. The licensing contract provides for payment of performing royalties to the organization which in turn makes payments to composers and publishers in accordance with arrangements established by the organization.

Performing royalties are a legal liability of the organization under whose control the performance is given; e.g., a radio or TV broadcasting station, a restaurant, or a hotel.<sup>19</sup> Payments of such royalties are made directly to the performing rights organization (ASCAP, BMI, or SESAC) under the provisions of a contract which usually licenses the contracting organization to arrange for unlimited performances of copyrighted musical material in the catalogs controlled by the particular performing rights organization.

Performing royalties are to be distinguished from mechanical (recording) royalties, the latter being a legal liability of the record producers who pay the royalties to the music publishers holding the copyright.

Performing rights organizations are not directly affected by the compulsory license provision. However, they are closely allied to both the composers and the music publishers, who receive mechanical royalties from the record producers. Moreover, the use of records in broadcasts is a major source of performing royalties; and the popularity of a recording, particularly as used in broadcasts, will affect the amount of the performing royalties received by the composer and publisher.

## G. SUMMARY

*How a musical composition becomes a record*

Within the framework of the music business, the typical course which a musical composition takes from the composer to the final user can now be followed, particularly in those areas where compulsory license applies; i.e., the recording of a copyrighted musical composition and the distribution of records. The composer of a musical composition (together with one or more colleagues collaborating as composers or lyricists) transfers all his rights in the composition

<sup>19</sup> Under the *Alden-Rochelle* decision (56 U.S.P.Q. 28 (S.D.N.Y. 1942); 80 F. Supp. 888 (S.D.N.Y. 1948); 80 F. Supp. 900 (S.D.N.Y. 1948)) motion picture theaters do not pay performing royalties on performances of copyrighted music in the films they exhibit; the payment is made "at the source"; i.e., by the film producer to the copyright owner. However, if a motion picture theater presents live performers who perform copyrighted musical works, the theater is liable for the payment of the performing royalty.



to a music publisher through the negotiation of a contract, frequently on the SPA standard songwriter's form. Presumably the composer is also a member of ASCAP or has contractual arrangements with a music publisher affiliated with BMI or SESAC. Except for the receipt of royalties for the performance, recording, or other use of the composition, all of which are covered in the SPA contract, and presumably in any other similar songwriter-publisher contract, the composer has now lost direct control of his created property.

The music publisher, having secured copyright in the composition, now attempts to license it for recording purposes. When the publisher succeeds in licensing the recording right, he files with the Copyright Office a Notice of Use or loses his defense against any suit for infringement of the recording right. The license for recording of the copyrighted composition is usually issued to the phonograph record producer by the Harry Fox office which sets up an account for the receipt of mechanical royalties from the record producer.<sup>20</sup> The license for such use having been issued, any other person, under the compulsory license provision, may then arrange to have the copyrighted composition recorded upon notifying the copyright owner and agreeing to pay mechanical royalties to him or his agent, the Fox office, and sending a duplicate of the notification to the Copyright Office.<sup>21</sup>

In practice the music publisher (copyright proprietor) is usually prepared to agree to additional recordings of his copyrighted musical compositions at the standard royalty rates without special negotiation; and recording companies generally obtain licenses at those rates. A very popular composition may be issued in as many as 15 or 20 different recordings by different record producers under the compulsory license system, but without ever specifically activating the statutory compulsory licensing provisions as such. Under these conditions payments of mechanical royalties by 15 or 20 producers will be made for the account of the music publisher who is the proprietor of the copyright. On rare occasions a music publisher may not wish a particular record producer to record his composition; under these conditions the record producer may nevertheless proceed, under the compulsory license provisions, to notify the publisher and the Copyright Office, record the composition, and arrange to make payments in accordance with the statute.

The Fox office, after deducting expenses,<sup>22</sup> pays the remainder to the publisher, who, in turn, pays the songwriter(s). The mechanical royalty for the songwriter(s), according to the provisions of the Uniform Popular Songwriters Contract (SPA), is not less than 50 percent of the publisher's receipts on that account.

Recording artists and instrumental musicians are employed by the record producer and are paid by him under provisions of the applicable AFTRA, AFM, and MGA contracts.

<sup>20</sup> Standard royalty rates have been established by trade practice, and are generally less than the maximum fixed by the statute.

<sup>21</sup> Sec. 101(e), Copyright Act.

<sup>22</sup> The maximum deduction for expenses is 3½ percent, an increase from a maximum of 2½ percent effective until about 1955. However, since the 1947 Revised Uniform Popular Songwriters Contract provides that no more than 2½ percent may be so used, the additional 1 percent must be borne by the publishers to the extent it is required (sec. 4(h), Songwriters Contract). Cf. Variety, Oct. 31, 1956; increasing volume of sales in the phonograph record business has made it unnecessary for the Fox office to use the entire 1 percent additional fee.

## H. THE DISTRIBUTION OF RECORDS

The general pattern of record distribution is for a distributor to cover a certain geographic area for a producer, and for the retail outlets in that area to purchase their supplies from the distributor. Currently the distribution of phonograph records is undergoing rapid metamorphosis. Formerly sold largely through music stores and record shops, phonograph records are now available at retail in drug-stores, grocery stores, department stores, bookstores, and in general wherever a rack may be set up, and are distributed through record "clubs." Also records are getting into consumers' hands more and more frequently through advertising "deals." For example, with the purchase of a specific merchandise item a coupon is received by the purchaser which permits him to purchase a record at a reduced price. Also, discounts on records at retail are perhaps the rule rather than the exception, although the volume of retail discount sales is not known.

## III. SUPPLY, DEMAND, AND THE COMPULSORY LICENSE

## A. THE SUPPLY AND DEMAND PATTERN

The usual industry practice seems to be for a songwriter to contract with a music publisher for the exploitation of a composition, and thus the ownership of most musical copyrights is in the hands of those publishers. Also, both industry information and logic would lead to the conclusion that the Uniform Popular Songwriters Contract of SPA establishes the "floor" for negotiation of such a contract. It would probably not be overstating the case to say that the framework of the music industry places in the hands of music publishers the control over the supply of copyrighted popular musical materials, and that the rights of songwriters are largely protected by the minimums established by SPA.

In negotiating recording licenses, the music publisher is limited under the compulsory license provision by the facts that, (1) he cannot give an exclusive recording license, (2) he cannot limit the time period for the use of the license except as it is limited by the life of the copyright,<sup>23</sup> and (3) he cannot exact a mechanical royalty of more than "2 cents on each such part manufactured."

In this framework, the music publisher has not been able to exact from record producers the full statutory fee for most types of recording, and at times he has been willing to forego the fee entirely in order to get the public "exposure" which a recording by a "big name artist" will give. The most he can hope for is that the composition will prove to be popular, and that a number of recording companies will produce recordings which will result in ample mechanical performing royalties.

A large part of the demand for copyrighted musical material comes from the recording companies. They decide the particular compositions to be recorded. It is the "A. & R. man"—the head of the artists

<sup>23</sup> A maximum of 28 years, because, under sec. 1 of the 1947 Revised Uniform Popular Songwriters Contract, the copyright reverts to the composer at the end of the original term.

and repertoire department—who usually makes this decision, and it is his responsibility to match up artists, tunes, accompanists, and musical arrangements to catch the fancy of a very unpredictable public taste. Not only must he make these decisions for compositions for which his company is the first licensee, but also he must be on the lookout for all compositions which other companies have recorded and which may offer an opportunity to catch the public fancy with a new arrangement, new artists, and new accompanists. In negotiating for a license (whether the first or a subsequent license) the recording company knows that it will get the license for the life of the copyright, and that, in all probability, it will need to pay something less than the statutory royalty rate; it also knows that, if the composition promises any public acceptance, the recording will be immediately faced with competition from several (perhaps up to a score) of competing recordings of the composition. Even a single producer may release several different recordings of the same musical material. As a result of his negotiating strength, the record producer may also require that the music publisher agree to contribute a specified amount to the promotional effort to publicize the composition.

The revenue received by the creators and owners of recorded copyrighted musical material is not the retail price of records, but rather the mechanical and performing royalties which are paid for the use of the material. In the present buoyant state of the music business, with worldwide distribution of records, and a seemingly insatiable public appetite for new tunes,<sup>24</sup> there is still such a flood of available compositions<sup>25</sup> that the mechanical royalty feed does not even attain the statutory maximum. It is clear that the competitive possibilities under the compulsory license are so great that no record producer finds it necessary, for most types of recording, to agree to pay even the statutory level of mechanical royalties on a new composition. Although performing and synchronization royalties are increasing at a faster rate than mechanical royalties,<sup>26</sup> and form the bulk of the gross income of the composers, mechanical royalties still loom large in the gross amounts paid to composers and lyricists.<sup>27</sup>

It should be recognized that “music publishers” and “record producers” are not necessarily clear-cut divisions of the industry, but rather functional concepts. In practice, as has been pointed out, music publishers may be owned by artists, composers, motion picture companies, broadcasting companies, performing rights organizations, and even recording companies; the motivation of “music publishers” is not necessarily unitary and unified. Similarly, “record producers” are affected by their relationships with broadcasting companies, performing rights organizations, music publishers, and motion picture companies. One clear fact is that the composers, and lyricists, in this conglomerate of motivation, have not been able to obtain the maximum statutory fee under the compulsory license provision, even though

<sup>24</sup> “\* \* \* about 150 new disks, or 300 tunes, have been hitting the market each week.” It is not clear whether these figures include “cover” records, i.e., varying recorded arrangements of the same composition. *Variety*, Apr. 3, 1957.

<sup>25</sup> In the fiscal year ended June 30, 1958, published and unpublished musical works were registered in the Copyright Office to the number of 58,330.

<sup>26</sup> Cf. pp. 93-94, *supra*.

<sup>27</sup> Cf. p. 104, *infra*. Composers and lyricists got an estimated \$4.75 million from mechanical royalties and an estimated \$12.2 million from performing royalties in 1956.

organization into the SPA and the widespread use of a standard contract has improved their position remarkably in the last 25 years.

It is also clear that this diversification of function in the music business is growing rather than diminishing. In a recent trade magazine article, it is stated, in part: <sup>28</sup>

Diversification is the key word of today's music business, with more and more firms branching out in all directions. Independent radio broadcasters and their staffers are going into record manufacturing, song publishing, TV film syndication, and the talent management game. Publishers are cutting records for their own labels and managing disk talent. TV producers and performers are setting up their own publishing firms, record labels and talent management divisions.

A certain amount of this activity has always existed, but heretofore it has usually been conducted on a relatively minor scale—and in many cases—on [*sic*] a decidedly hush-hush atmosphere. Today, however, diversification has become an accepted way of doing business not only around the Brill Building, but in all segments of the music business and related industries.

However, in all the confusion and melange of motivation and function, it stands out boldly that three items are required to make records: compositions, artists, and recording equipment and skills. Currently, compositions are controlled by the music publishers; artists, as well as the recording equipment and skills, are controlled by the recording companies.

#### B. WHO GETS WHAT IN THE MUSIC RECORDING BUSINESS?

In the present organization of the music recording business, the major direct beneficiaries of phonograph record production are the songwriters (composers and lyricists), the music publishers, the recording artists and the record producers. How much does each of these groups receive annually from music recordings?

1. *The songwriters.*—After assigning a composition to a music publisher, the songwriter receives royalties, assuming there are any, from his publisher (mechanical royalties) and from a performing rights organization (performing royalties).

Mechanical recording royalties are received either directly by publishers or from the Fox office, collecting agency for such royalties; at least one-half of all mechanical royalties are probably passed on to the songwriters. Record companies pay an average of 6.5 percent of their revenues to songwriters and publishers.<sup>29</sup> In 1956, the recording industry sold recordings with an approximate retail value of \$325 million of which about \$150 million went to the record producers.<sup>30</sup> Six and one-half percent of \$150 million gives \$9.75 million paid for mechanical royalties; of this about one-half,<sup>31</sup> or \$4.88 million, was allocated to songwriters. A 2½ percent deduction for collection expenses leaves a total of about \$4.75 million paid to songwriters.

2. *Music publishers.*—In the estimate made for the revenues of songwriters, the music publishers received an equal amount. There-

<sup>28</sup> The Billboard, July 7, 1956.

<sup>29</sup> Information from trade sources.

<sup>30</sup> Variety, Mar. 13, 1957. In this article, total sales during 1956, computed at retail prices, are estimated by the executive secretary of RIAA at \$325 million. This figure is divided by 2.1 to obtain the revenues of the record producers.

<sup>31</sup> 1947 Revised Uniform Popular Songwriters Contract, pars. 4(g) and 4(h). This provides that the songwriter, including both composer(s) and lyricist(s), shall receive not less than 50 percent of all mechanical royalties collected by the publisher, after a maximum deduction of 2½ percent for collection expenses. Most popular songs are probably sold at or above the "floor" established by provisions of this contract.

fore, the estimate of gross revenues for music publishers is the same as that for songwriters, or about \$4.75 million.

However, in both cases, the estimate of revenues is gross; i.e., both publishers and songwriters have business expenses to pay before they arrive at a "net income" figure. The gross revenue of an individual received for creative effort is somewhat different from gross revenue received by a business organization in the course of exploiting creative works, and no typical expense pattern is available as a basis for reducing the gross estimates to net figures.

3. *Recording artists.*—According to information from the trade, phonograph record production involves an average cost of 13 percent of gross revenue for the services of recording artists. In 1956, record producers received gross revenues of \$150 million;<sup>32</sup> 13 percent of this is \$19.5 million.

This includes both instrumental artists and others. AFM reports annually on the revenues of its members from recording and transcription activities; in 1955, they received a total of \$4.2 million.<sup>33</sup> This figure seems to be consistent with the estimated total of \$19.5 million.

4. *Record producers.*—Of the \$150 million gross received by record producers,<sup>34</sup> trade sources indicate that the average net profits are 4 percent of the gross. Thus, in 1956, record producers received an estimated \$6 million net.

5. *Summary.*—The estimates of revenue for the four groups follow:

[Millions]		
	Gross	Net
Songwriters.....	\$4.75	(?)
Music publishers.....	4.75	(?)
Recording artists.....	19.5	(?)
Record producers.....	150	\$6

It must be recognized that the gross revenues of the songwriters, the music publishers, and the recording artists are derived from the \$150 million gross of the record producers.

The following table shows the relationships among the various flows of revenue described in the preceding paragraphs.

*Estimated gross revenues of phonograph record producers, songwriters, music publishers, and recording artists from the music recording business<sup>1</sup> (1956)*

	<i>Millions</i>
Gross revenues from sales of phonograph records at wholesale.....	\$150.00
(a) Paid to recording artists as salaries and wages.....	19.5
(b) Paid as mechanical royalties (Copyright Act, sec. 1e).....	9.75
1. Paid as operating expenses (Fox office).....	\$0.25
2. Paid to music publishers.....	9.50
(a) Paid to composers and lyricists.....	4.75
(b) Retained by publishers.....	4.75
(c) Paid out as other business expenses.....	114.75
(d) Phonograph record producers' profit.....	6.0

<sup>1</sup> See accompanying text for explanation of the estimates.

<sup>32</sup> Cf. p. 103, supra.

<sup>33</sup> AFM, Official Proceedings, 1956, p. 131.

<sup>34</sup> Cf. p. 103, supra.

ADDENDUM

REVENUES FROM PERFORMING ROYALTIES

In addition to revenues from mechanical royalties, songwriters and music publishers receive performing royalties from performing rights organizations, primarily ASCAP and BMI; little is publicly known about SESAC, but its gross revenues are presumed to be relatively small. Performing royalties are derived predominantly from the performances of recorded musical works; i.e., radio and television performances of disks or tapes or films.<sup>35</sup> Hence, these performing royalties are closely related to the recording industry, in that they stem from the use of recording techniques.

In 1956 ASCAP received a total revenue of \$24.9 million, of which \$4.5 million was used for administrative expenses.<sup>36</sup> After reserves of \$1.8 million for foreign societies, \$9.3 million was paid by ASCAP to songwriters and \$9.3 million to music publishers. Also, the songwriters received some part of the ASCAP royalties paid to music publishers through their ownership of ASCAP-member publishing companies, but it is impossible to estimate the amount involved.

BMI collects performing royalties from those who perform its catalog and, after deducting expenses, pays the remainder to its publisher-affiliates who, under the provisions of the standard SPA Songwriters Contract, pay at least one-half of that amount to songwriters. For the fiscal year ended July 31, 1956, BMI received a gross of \$9.7 million and paid out as expenses \$3.9 million, leaving \$5.8 million for payments to publisher-owners and songwriters. A total of \$5.7 million was paid, of which the publishers presumably retained about \$2.85 million and paid about \$2.85 million to composers and lyricists; about \$150,000 was retained by BMI as addition to its corporate surplus.<sup>36</sup>

Thus, in summary, the songwriters received estimated mechanical and performing royalties in 1956 as follows: <sup>37</sup>

	<i>Millions</i>
From mechanical royalties.....	\$4.75
From performing royalties:	
From ASCAP.....	9.30
From BMI.....	2.85
Total.....	16.90

A like amount, similarly derived, is estimated to have been received by the music publishers.

Hence, it is estimated that the songwriters as a group, and the music publishers as a group, each received about \$17 million from mechanical and performing royalties in 1956. However, of the total of nearly \$34 million, a sum of \$9.5 million was received from mechanical royalties, and a sum of \$24.3 million was from performing royalties, indicating the dominance of performing royalties in the revenues of these two groups from the recording industry, directly or indirectly.

<sup>35</sup> In 1957, 88.41 percent of ASCAP's gross receipts from licensees was from radio and television local stations and networks. Hearings before Subcommittee No. 5, House Select Committee on Small Business, 85th Cong., 2d sess., pursuant to H.R. 56, "Policies of ASCAP," p. 542.

<sup>36</sup> Broadcasting, "Telecasting," Sept. 9, 1957, p. 62. Because ASCAP is a membership organization and BMI is a corporation designed not to make profit, it is difficult to cast their financial statements into a uniform mold. However, it is believed that the figures as given are basically comparable as between the two organizations.

<sup>37</sup> Supra p. 104.

The table on the following page shows the relationships among the various flows of revenue described in this addendum. In combination with the table, supra p. 104, the revenue flows from both mechanical and performing royalties may be traced.

*Estimated performing royalties received by songwriters and music publishers through ASCAP and BMI (1956)<sup>1</sup>*

	<i>Millions</i>
Revenues from performing royalties.....	\$34.6
(a) Received by ASCAP.....	24.9
1. Paid as expenses.....	\$4.5
2. Paid to music publishers.....	9.3
3. Paid to composers and lyricists.....	9.3
4. Reserved for payments to foreign organizations.....	1.8
(b) Received by BMI.....	9.7
1. Paid as expenses.....	\$3.9
2. Paid to music publisher affiliates.....	5.7
(a) Retained by publishers.....	\$2.85
(b) Paid to composers and lyricists.....	2.85
3. Retained by BMI as general surplus.....	.15

<sup>1</sup> See accompanying text for explanation of estimates.

#### IV. THE MUSIC RECORDING BUSINESS IN THE ABSENCE OF COMPULSORY LICENSE

##### A. WHAT IS MEANT BY "THE ABSENCE OF COMPULSORY LICENSE"

If the compulsory license were abolished the owner of copyrighted musical material, i.e., usually the music publisher, would be freed from three limitations under which he now labors in negotiating for the licensing of such material.

- (1) He could limit the licensing to those individuals he desired to deal with.
- (2) He could limit the time period for licensing the material.
- (3) He could negotiate freely as to the price to be paid for the use of the material.

On the other hand the recorder of copyrighted musical material would be in a position to negotiate for an exclusive license and if successful in this he would be freed from the competition of multiple versions of the same material which are issued as a result of the compulsory license provision. Thus a new pattern of negotiating strength would be established between the two parts of the music business which control the essentials to that business, namely, copyrighted musical materials on the one hand and recording artists and recording equipment and skills on the other.

It might be possible, of course, to remove only part of the limitations now inherent in the compulsory license, e.g., the limitation on the rate of mechanical royalties. Or the time period alone might be adjusted, i.e., the copyright owner might be completely free for 1 year after the date of copyright registration, at which point compulsory license would become effective.

##### B. A NEW PATTERN OF NEGOTIATION

Under a "no compulsory license regime", the owner of copyrighted musical material would be in a much stronger negotiating position

than he is at present, since he could then grant exclusive or nonexclusive licenses for limited periods of time at royalty rates which he believed to be to his advantage.

It has been suggested that, in the absence of compulsory license, the large and financially powerful recording companies which largely control the leading recording artists would purchase recording options to entire catalogs or entire repertoires of musical publishing firms, with the result that they would assume a strategic control of the entire record business, to the detriment of smaller and less powerful record producers. In the confused organization of the music business it cannot be categorically denied that this possibility might eventuate. However in a consumer market in which a new tune may appear on records and even though successful may disappear within a few weeks or months because it has been exhausted, and in view of the constant stream of new musical compositions that are not recorded, it is at least doubtful whether the owners of new copyrighted musical material would so easily give up the values which they control. Moreover the Uniform Popular Songwriters Contract, which seems to be the "floor" for negotiation between composers and music publishers,<sup>38</sup> prohibits music publishers from including compositions purchased by them under that contract—

In any bulk or block license heretofore or hereafter granted and \* \* \* (the music publisher) will not grant any bulk or block license to include the same, without the written consent of Songwriters Protective Association on behalf of the writer in each instance \* \* \*.<sup>39</sup>

Two exceptions to this general prohibition are (1) for purposes of including a composition in a block license for electrical transcription and (2) for general distribution outside of the United States and Canada.<sup>40</sup> Nevertheless, under this provision, the SPA, or the agents of individual composers, would have to be convinced that the sale of recording options for entire catalogs of repertoires would be to the advantage of the composers before they would permit such block sales of recording options to recording companies.<sup>41</sup>

In the present climate of thinking with respect to licensing intellectual property rights such agreement on the part of the composers or publishers would be quite surprising. In every field, copyrighted material is being licensed for use on an increasingly restricted basis, i.e., proprietors are giving up—

only those rights which are necessary for the purposes to which the use is intended and then only so long as those rights are used and paid for.<sup>42</sup>

The numerous current uses to which copyrighted properties can be put have made the owners more and more aware of the potential values which must be protected in any assignment which is made. A careful proprietor of a copyrighted item will assign its use only after assuring himself that all other possible uses are excluded from the assignment and remain in his hands.

<sup>38</sup> Cf. *supra*, p. 92.

<sup>39</sup> Paragraph 4(j).

<sup>40</sup> *Ibid.*

<sup>41</sup> The use of the 1947 Revised Uniform Popular Songwriters Contract form was due to expire on Dec. 31, 1956. However, both the SPA and many of the music publishers agreed to two 1-year extensions and presumably the negotiations for continuation or revision of the contract will be concluded not later than Dec. 31, 1958.

<sup>42</sup> "1953 Copyright Problems Analyzed," p. 60. "Protective Societies for Authors and Creators," by William Klein II.



Once in a position to limit the utilization of the property, in the absence of compulsory license, it seems more probable that the composers and music publishers would use their position to maximize profits with respect to the recording of each composition rather than optioning the use of large blocks of properties at a bulk price. However, it is conceivable that this situation would turn entirely on the price and other provisions of such an option. Were the price sufficiently high and were the music publishers still free to negotiate a specific price for the actual use of each individual optioned property, i.e., if the original option were only for the right to negotiate for the recording of the compositions in the catalog, the songwriters and publishers might be willing to enter such a contract. However, if a record manufacturer were to purchase an option under such conditions, there is some question as to its profitability for him, and he would undoubtedly not exercise his option on many of the compositions in a particular publisher's catalog. He might try to take what he thinks is the "cream", but the popularity of a particular composition is highly unpredictable. Perhaps the most that can be said is that songwriters and music publishers would not give up their new negotiating strength without getting a quid pro quo which the record producers might not be willing to give.

It is also possible that the reverse result might develop; namely, music publishers might begin to produce records. This would depend of course on the availability of talent but in the rather confused organization of the music business, particularly with music publishers taking on functions of talent agents, it is not improbable that talent "stables" could be slowly built up. The techniques of recordmaking would probably not present a barrier. Thus, within the past few months, announcement has been made of a new record pressing machine priced at only \$7,500 which is capable of turning out high-quality disks at a rate of nearly one per second; it is described as being simple to operate and the costs are said to be competitive.<sup>43</sup>

Are the sizes of the firms and the concentration of productive capacity in the phonograph record industry such that it would be easy for the music-publishing industry to control it in the absence of compulsory license? Conversely, are the sizes of firms and the concentration of capacity in the music-publishing business such that it would be easy for the phonograph record industry to control it in the absence of compulsory license? Available figures on these aspects of the industries indicate that the answer to both these questions is in the negative.

The RIAA, with 52 members in 1957, represents a large part of the total record production—perhaps as much as 90 percent. It has four class A members—those with a gross annual sales volume of more than \$10 million each; this number has remained unchanged since the founding of the association in 1952. Currently it also has four members in class B—those with a gross annual sales volume of more than \$2½ million but less than \$10 million each; there were only three such members from 1952 to 1956, the fourth having been added in 1957.<sup>44</sup>

<sup>43</sup> *Variety*, Jan. 23, 1957.

<sup>44</sup> Annual Report of the RIAA, 1955, p. 5, and bylaws of the RIAA, art. 2, sec. 2.

It is generally assumed that the four major record producers are Capitol, Columbia, Decca (New York), and RCA-Victor.<sup>45</sup> Two of these regularly publish their volume of sales: Capitol and Decca; in 1957 Capitol had gross sales of \$43.7 million and Decca had gross sales of \$31.8 million,<sup>46</sup> a total of \$75.5 million for the two. It is probable that the other two major producers are somewhat larger, perhaps accounting for a total gross sales figure of close to \$100 million. Total record production for 1957 is estimated at \$190 to \$200 million, at the producer level,<sup>47</sup> so the four major producers may account for about 80 to 85 percent of the total industry production.

Such a concentration of production may mean a strong monopolistic tendency in the industry.<sup>48</sup> Regardless of monopoly or competition, the structure of the industry does not lend itself to easy acquisition by the music publishers.

As to the structure of the music-publishing industry, not too much is known. However, there are several thousand music publishers in various stages of publishing activity, some of which are large. ASCAP, the major performing rights organization, had three music publisher board members with incomes from performing royalties of \$1.8 million, \$1.4 million, and \$1.3 million, respectively.<sup>49</sup> This does not include music publishers' income from other sources. Most of the 1,000 music publisher members of ASCAP are obviously small, but there are large ones among them. In addition in 1956 about 2,590 music publishers were affiliated with BMI, but the size of these firms is not known, except to the extent that some of them are large.<sup>50</sup> Considering the size and number of music publishers, it is difficult to imagine that there is danger of the recording companies taking control of the music publishers in order that they might control the use of tunes for recording, absent compulsory license.

This indicates clearly that the contending parties in the record production industry currently subject to compulsory license are not of unequal stature. In the absence of a compulsory license, the relatively equal strength of the two groups would tend to assure a fair basis for bargaining while the number of strong companies on each side would tend to maintain competitive conditions within each group.

It is perhaps significant that in the past the record industry has been unable to make up its mind whether, in the absence of compulsory license, the music publishers would take on the aspects of a monopoly. For example in 1929 and 1930 the record industry appears to have feared a combination of publishers and/or copyright

<sup>45</sup> Columbia and RCA-Victor are closely associated, respectively, with CBS and NBC; Decca (New York) owns the largest part of the voting stock of Universal Pictures Co., Inc., a major motion picture producer; and Capitol is owned almost entirely by Electrical and Musical Industries of London (EMI), the major British record and electronics producer.

<sup>46</sup> Billboard, Aug. 18, 1958, and Variety, Mar. 12, 1958.

<sup>47</sup> Billboard, Apr. 14, 1958. The gross retail sales are estimated to have been \$400 million to \$420 million. This has been divided by 2.1 to get the estimated producers' sales.

<sup>48</sup> In the latter part of 1956 and the early part of 1957 the trade press reported an investigation of the record producing industry by the Department of Justice re possible monopoly in the pricing of LP records. However, there has been no prosecution alleging such monopoly practices.

<sup>49</sup> Hearings before Subcommittee No. 5, House Select Committee on Small Business, 85th Cong., 2d sess., pursuant to H. R. 56, "Policies of ASCAP," p. 531.

<sup>50</sup> Hearings before the Antitrust Subcommittee (Subcommittee No. 5) of the Committee on the Judiciary, House of Representatives, 84th Cong., 2d sess., "Monopoly Problems in Regulated Industries" (1956), p. 4942. Mr. Carl Haverlin, president of BMI, testified that BMI had contracts with "about 2,590 publishers," of which "approximately 2,230" are inactive.

owners.<sup>51</sup> On the other hand in 1939 the record manufacturers did not refer to this danger but concentrated their arguments on other aspects.<sup>52</sup>

#### C. THE EFFECTS ON RETAIL PRICES AND VOLUME

On the average, record producers pay 6.5 percent of their gross revenues in the form of mechanical royalties. If this percentage were doubled in the absence of compulsory license the average wholesale price of records might justifiably increase from about 48 cents to about 52 cents. It has been indicated that the retail price of records is quite unpredictable ranging all the way from a few cents above wholesale to the suggested retail price which is approximately twice the wholesale price. It is possible that a doubling of the mechanical royalties would increase the lower ranges of the retail prices by a few cents but it is doubtful whether an increase of such a magnitude would seriously affect the volume of retail purchases, particularly in the buoyant current situation of the music market.

One result of the compulsory license provision has been that the public may be offered a variety of recorded versions of a particular composition. As already pointed out, under the compulsory license, when one record company issues a recording of a composition that promises to catch the public fancy, other companies are quick to issue recordings by other performers of the same composition. This might or might not be true if the compulsory license were eliminated, depending upon whether the authors and music publishers found it to their advantage to give exclusive licenses. If exclusive licenses were granted, the result might well be that instead of several recorded versions of the composition, a larger number compositions would be offered to the public on records issued by the various companies.

### V. THE CHANCE OF MONOPOLY

#### A. THE 1909 COMMITTEE REPORT

The right of the copyright owner to control the mechanical reproduction (recording) of music was first provided for in the Copyright Act of 1909, and this new right was made subject to the compulsory license. From the 1909 House committee report it is clear that the committee, in its recommendation to include the compulsory license provision, was chiefly concerned with the possibility that one recording company might obtain a monopoly of the recording rights in popular music. In part the committee said:

This danger (the establishment of a mechanical-music trust) lies in the possibility that some one (recording) company might secure, by purchase or otherwise, a large number of copyrights of the most popular music, and by controlling these copyrights monopolize the business of manufacturing, otherwise free to the world \* \* \*. The main object \* \* \* has been \* \* \* to so frame an act that it would accomplish the double purpose of securing to the composer an adequate return for all use made of his composition and at the same time prevent the formation of oppressive monopolies, which might be founded on the very rights granted to the composer for the purpose of protecting his interests.

<sup>51</sup> Henn, Harry G. "The Compulsory License Provisions of the United States Copyright Law," pp. 27 and 28, Study No. 5 in the present committee print.

<sup>52</sup> *Ibid.*, p. 33.

The report cites the fact that—

contracts were made by one of the leading mechanical reproducing establishments of the country with more than 80 of the leading music publishing houses in this country ;

these contracts provided that—

the reproducing company acquired the rights for mechanical reproduction in all the copyrighted music which the publishing house controlled or might acquire and that they covered a period of at least 35 years, with the possibility of almost indefinite extension.

These contracts never came into effect because they were contingent upon a favorable decision in pending court cases seeking to sustain the right of copyright owners to control the mechanical reproduction of music under the law prior to 1909, and the U.S. Supreme Court ruled adversely in *White-Smith Music Publishing Co. v. Apollo Co.* (209 U.S. 1 (1908)). However, to the committee the fact that such contracts had been made meant the strong probability of a monopoly in the music recording business if the mechanical recording right was provided for without some restriction such as the compulsory license.

Since that time, the author and music publisher groups have sought to eliminate the compulsory license provision, while the recording companies have exerted every effort to maintain it.<sup>53</sup>

#### B. THE PRESENT SITUATION

The retention of the compulsory license provision since 1909 against all adverse attacks has been accompanied by a number of major changes in the music business. The motion pictures have grown to a major industry using music on sound tracks since 1929 as a basic ingredient of their product, and more recently becoming a source of new musical material. They have also adjusted to new competition, as well as a new potential market for motion pictures, in the form of television. The compulsory license has not been applicable to the recording of music in theatrical or television motion pictures, and there has been no sign of a monopoly developing in the use of music in these areas.

It may also be noted that the recording of entire dramatico-musical works (musical plays) is not subject to the compulsory license, and even though the supply is limited there is no indication that any one recording company could acquire a monopoly of such works.

Recording of music for home use has been moved from the era of primitive cylinders, disks, and paper rolls to the era of high fidelity records and tapes at a retail price level which has made the home use of phonographs a commonplace and the distribution of records a \$400 million annual retail business. Radio broadcasting has opened up a new market for recorded music and has been a factor in the development of high fidelity recording in that the 3,500 radio stations have demanded more and better records for program purposes. Radio has multiplied the demand for recorded music and the high quality performance of music far beyond anything that was imagined in 1909.

The advent of television has multiplied each of these aspects of the music business still further. Over 400 operating television stations,

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<sup>53</sup> Cf. Henn, *op. cit.*, ch. II, *passim*.

and their joint programing through three major networks, have again acted to multiply the demand for recorded music, not only on recordings of sound alone but also through the use of music in both theatrical and television motion pictures used for broadcasts.

The number of recording companies has grown greatly since 1909 with the great increase in the market for records, and there are now some 10 or more companies strongly entrenched in a competitive position.

On the other hand, the creators and publishers of musical materials have organized themselves in order to protect their interests. It has been stated that the MPPA includes the leading music publishers who control approximately 80 percent of the copyrighted popular music in the United States.<sup>54</sup> Trade sources dispute this figure, pointing out that a large part of the currently popular songs are published by firms which do not belong to MPPA, nor do they subscribe to the SPA Minimum Basic Agreement. However, regardless of the extent to which the MPPA publishers own the copyrights of currently produced musical materials, it is unquestioned that the existence of MPPA and SPA has done much to regularize the relationships between music publishers and songwriters.

In 1931 the songwriters also organized and through their uniform contract for the sale of musical properties they have obtained a position vis-a-vis the music publishers far different from that of 1909. They now get not less than 50 percent of all royalties collected by the music publishers who own the copyrights on their musical properties and are in a position to prevent a monopoly in the use of their music if it should be detrimental to their interests.

Some analogy may be drawn between the use of music and the use of "talent" (performing artists) in the production of records. The leading performers are generally signed up to make records exclusively for some one company, but there has been no indication that any one company might develop a monopoly of "talent." By the same token, the supply of new popular music is so great, and the popularity of any particular composition is so uncertain, that it is difficult to see how any one record company could, in the absence of the compulsory license, secure a monopoly of popular music.

#### C. THE BALANCE OF FORCES

Although not much is known concerning the details of the organization of the music-recording business in the pre-1909 era, the changes which have taken place since then are clear. On the demand side, certain large record producers are now closely allied with broadcasting interests which are in turn large users of recorded music. These producers, through their control of artists by exclusive contract, are much stronger than their counterparts in the earlier era because they can now offer radio and television appearances on which the artists depend largely for public "exposure" as a foundation for their lucrative personal appearances in hotels, nightclubs, theaters, auditoriums, etc.

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<sup>54</sup> Warner, Harry B., "Radio and Television Rights," p. 436 (1953).

On the supply side the industry is also much more highly organized for the licensing of music for recording and the collection of mechanical royalties. However, the motivating power on the supply side is somewhat attenuated by the invasion of those who use music. The motion picture industry control of some major music publishers has been cited and also the establishment of music publishing companies by the recording interests which are in turn closely allied to broadcasting interests.

It is not implied that there was no organization within the music industry prior to the formation of the groups which have been mentioned. However, there is no question that the present music industry is much more highly organized than it was 50 years ago. The present state of the industry indicates that there is a fairly even balance between the two sides in their ability to protect their interests. Currently there is no single producer of recorded music, as there appeared to be in 1909, in a position to monopolize the supply of published music as it emerges from the music publishing houses. On the contrary, there are a number of large and powerful recording companies competing with one another, plus some hundreds of smaller companies.

The record producers must have a continuous flow of new tunes to prosper. The music publishers must license a continuous flow of new tunes for recording to reap the benefit of their copyrights. The two are so interdependent both in relation to their antecedents (e.g., the music publishers' relationship with the songwriters or the relationship between record producers and the broadcasters) and in relation to each other, that powerful as they both are there seems to be little chance that either would be in a position to dominate the other if compulsory license for recorded music were abandoned.

Moreover, the probability of a high degree of centralized control by any one company does not appear to exist either in the ranks of the music publishers or in the ranks of the record producers.

Finally, any monopoly aspects that might develop on either side would be subject to the same limitations as the monopoly aspects of any other business, i.e., the Sherman and Clayton Antitrust Acts.

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COMMENTS AND VIEWS SUBMITTED TO THE  
COPYRIGHT OFFICE

ON

THE ECONOMIC ASPECTS OF THE COMPULSORY  
LICENSE IN THE COPYRIGHT LAW

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COMMENTS AND VIEWS SUBMITTED TO THE COPY-  
RIGHT OFFICE ON THE ECONOMIC ASPECTS OF THE  
COMPULSORY LICENSE IN THE COPYRIGHT LAW

*By Ralph S. Peer*

OCTOBER 16, 1957.

[Referring to Mr. Blaisdell's study on "Economic Aspects of the Compulsory License in the Copyright Law":]

\* \* \* \* \*  
It must always be remembered that the "standard popular" repertoire in any country and the "current hits" are the product of what must be called a "national urge." It is the population itself which created this form of "property"—the intangible values are extremely high and practically never capitalized. According to available information, the Congress in 1909 was not aware of these intangible values, nor did it realize that it was interfering with the economic aspects of national forces which through the years have created vast property rights. The real point at issue was whether or not mechanical rights should, in the public interest, be granted on an exclusive basis. Actually it seems that "public interest" was not considered—the general idea was to protect piano roll and phonograph record manufacturers from the evils of a possible monopoly. This point could quite easily have been covered by a provision that mechanical rights could not be licensed or assigned exclusively. There is no easy explanation for going beyond this and fastening an arbitrary compulsory rate on the then very insignificant music publishing industry. The usual explanation is that a "lobby" put over this proposition because the Congress was not fully and completely informed, but this hardly accounts for the fact that no really great effort has been made during the intervening years to do away with this great injustice and this extraordinary interference with free competition.

If the price of butter had been established at a maximum of 15 cents per pound in 1909, one can well imagine the hue and cry which would have been set up in intervening years. It is only because music is intangible, and the income from mechanical royalties of secondary importance, that the situation has remained stagnant.

It is not generally realized that both the quantity and quality of popular music offered to the public is dependent upon the income derived by authors, composers, and publishers. The compulsory license interfered with normal income under competitive conditions and therefore tends to affect the available supply of popular music.

\* \* \* \* \*  
If one takes a broad view of the subject, it will be observed that the large commercial users of music—film producers, record manufacturers, and the operators of jukeboxes—have been able to impose huge restrictions on the income of authors, composers, and publishers. In spite of all of the efforts of the Congress during the last 50 years to eliminate restraint of trade, I offer the estimate that the components of the music publishing industry collectively are able to obtain only from one-third to one-half of the income available in an "open" market. Necessarily this limitation on income is against public interest—music has always brought joy and pleasure to the human race, both before and after the development of our great civilization. The number of persons engaged in producing and distributing commercial music is in direct relation to the total available compensation for this work—a fact easily demonstrated by the great increase in the activity of the commercial music industry which occurred after the formation of BMI, and which in turn is probably responsible

for the tremendous broadening of the phonograph record industry occurring about the same time. I would think that a careful investigation should be made of the methods by which income is presently limited, because the Congress would obviously prefer to create a free and open competitive market for this small but important industry. I rather imagine that Congress would be horrified to know that this group of creative artists and its associated publishers have been singled out in our supposedly free economy for restrictive treatment. Quite obviously against public interest. If these restrictions could be removed, the creation and use of music would, in my opinion, increase tremendously, and the mental health of our country would be greatly bettered by the resultant entertainment value.

\* \* \* \* \*

You are already familiar with my views about compulsory mechanical license. Recently, I had luncheon in Paris with the head of BIEM. It is his business to collect maximum possible amounts for mechanical use of music in all continental countries. None of the difficulties envisioned by the framers of our 1909 act have risen to the surface in Europe. Every 2 years there are meetings between BIEM and the international organization representing the recording industry. A mutually satisfactory contract has been in existence for a number of years, and there are no insurmountable difficulties on the horizon.

\* \* \* \* \*

Sincerely yours,

RALPH S. PEEB.

By *George E. Frost*

SEPTEMBER 20, 1957.

Mr. Blaisdell is to be complimented on a fine job of collecting the most interesting economic data relevant to the compulsory licensing problems. I am impressed with the case he makes for the proposition that the recording monopoly phobia that vexed the framers of the 1909 act no longer has an economic basis.

Without dwelling on the matter, I would like to emphasize that we have also had far-reaching developments in the antitrust law since 1909. These developments make it clear—it seems to me—that the antitrust law is fully capable of handling any monopoly problem that may develop in the future. I merely pause to mention *U.S. v. Aluminum Company of America* (148 F. 2d) 416 (2d Cir. 1945), with its broadened definition of exclusionary tactics under section 2 of the Sherman Act; *U.S. v. Paramount Pictures* (334 U.S. 131 (1948)), with its strictures on coercive package licensing practices; *Kobe v. Dempsey Pump Co.* (198 F. 2d) 416 (10th Cir. 1948), with its very clear condemnation of attempted acquisition of monopoly power by purchase of patents (and, by analogy, purchase of copyrights). There are many other cases that could be cited.

With an economic situation showing little evidence of possible monopoly power, coupled with almost 50 years of antitrust law development, it strikes me that proponents of a compulsory licensing provision along the lines of that now in effect must point to some decided different reason than that expressed by the framers of the 1909 act.

Sincerely yours,

GEORGE E. FROST.

By *Ralph S. Brown, Jr.*

OCTOBER 17, 1957.

Mr. Blaisdell's memorandum is exactly what is needed to advance our knowledge of the operation of the compulsory licensing provisions and of the probable economic effects of altering it. It strengthens my belief that the present scheme of compulsory licenses in section 1(e) should be altogether discarded, and that any inequalities of bargaining power, or undue concentration of economic power, should be dealt with under the antitrust laws.

RALPH S. BROWN.

By Ernest S. Meyers

JUNE 4, 1958.

You have asked for my appraisal of the probable economic effects of eliminating the compulsory license provision in connection with Mr. Blaisdell's preliminary study. I am opposed to the abolition of the compulsory license provisions of the present copyright law for the reasons hereinafter set forth. The phonograph record industry, though a small one by comparison to other industries in the United States, has grown during the past 50 years from 3 companies to an industry of 2,191 companies in good standing with the Music Performance Trust Fund under the present compulsory license law.

It is my view that: Composers, music publishers, musicians and the public at large have all benefited under the present law which has stood the test of time and usage, and which is still fair. The abolition of compulsory licensing would bring chaos to the record industry; and seriously injure the entire music industry with consequent damage to the consuming public.

The compulsory licensing feature of the law has played an important part in the growth, development, and diversification of the record industry. If some recording companies had been able to obtain exclusive mechanical rights in many of the new important musical compositions by outbidding their competitors, many small recording companies never would have started, or if they did get started, would not have survived. This would have led to a drastic reduction in the number of recording musicians employed and would have reduced or eliminated the choice of different recorded versions of the same musical work which the record-buying public now enjoys.

A new record company would be forced to bank its future on original and public domain material exclusively. The percentage of original hits out of original "at bats" would hardly provide the kind of financial security in the infancy of a company which is necessary for a future of growth and ultimate success. And as for public domain, recording access to the entire Stephen Foster repertory would not be likely to add materially to the new company's chances for survival, let alone, success.

The new company can parlay a few appealing artists and a repertory made available via compulsory licensing into a handsome business in a relatively short time. It then is in a position to provide increased revenues to every other phase of the music business. More records sold mean more "mechanicals" (royalties) to the holder of copyrights. More artists are employed. The public's musical appetite has greater variety to choose from and may even be enlarged. Finally, the hopeful young composer and his publisher have one more door on which to knock while trying to sell their latest composition. It just may be the door to success.

The one constant and indispensable element in the pattern of the industry's growth is the principle of compulsory licensing of records to be found in the Copyright Act. Remove it, and you knock out from under the new company its ability to compete in the market. In a sense, you would freeze the industry in its present configuration and quite possibly shrink it.

The argument is often made that if the composer (or his publisher acting for him) has freedom to license a record company of his choice—that is, if compulsory licenses are abolished—he will not make exclusive licenses, but will license a number of record companies. That argument is unrealistic: it ignores the selling power of the recording artists who work exclusively for record companies and whose performance of his music the composer enthusiastically seeks. The argument also ignores the powerful effect which a cash advance against *potential* royalties can have on a composer. It ignores, too, the powerful effect of a promise to give the composer's song special exploitation. Such a promise is eloquently persuasive when there are so many songs vying for public favor. In these circumstances, composers are bound to flock to the company with the big names in its roster of recording stars, and to the company that promises the big advance and song promotion. Furthermore, even if the better known composers do resist giving exclusive licenses they may grant licenses only on such high rates that the smaller record companies will be excluded by monetary considerations. Thus, monopoly can grow even if the licensor chooses to give nonexclusive licenses.

The following injurious consequences would result should compulsory licensing fall:

(a) *Phonograph records will cost more.*—It is simple economics to reason that the abandonment of the compulsory licensing principle will result in higher prices to the consuming public. At present the statute insures the public against wholesale record price increases. By fixing a 2 cent ceiling on royalties it forces the industry to maximize its income through volume of records sold rather than by resorting to price increases.

That this policy has benefited the public can be seen in the fantastic rise in the number of record companies and in the ever-widening market for popular records. For example in 1954, 145,345,871 records were sold with a value of \$163,098,925 by members of the RIAA who do approximately 80 percent of the industry's business. In 1956 the comparable figures were: 176,175,582 records sold having a value of \$273,673,451. The 1956 dollar figure is the more indicative figure since it reflects the sale of increased numbers of extended play and long-playing records which, of course, sell at higher prices than the usual single-play record. If the number of records sold reflected the number of selections included on long-playing and extended-play records, the ever-widening market for popular records would be even more strikingly illustrated.

By keeping the price of records stationary in an inflationary economy, the compulsory licensing provision has enabled the public to continue—even expand—its enjoyment of one of life's more modest luxuries. As Billboard points out, there are 9 million teenage consumers in the market for popular records. Raise the price of records and they can no longer consume, as their funds are, understandably enough, limited.

The popular record industry is a luxury industry of mass appeal. For its very existence it must sell its product to as large a public and at as low a cost as possible. Popular records are not a staple commodity like milk, nor are they an item of select appeal where price is of little consequence as, for example, Venetian glass. As most popular record consumers are people of limited means (even as most of our population are people of limited means) a rise in the retail price of records brought about by the removal of the compulsory license clause would seriously diminish public consumption.

Under the present system, for example, a record manufacturer can plan its album releases with full knowledge that any song which may be needed can be obtained. And the price for it is readily ascertained. Suppose a record manufacturer plans to do an album on the "Songs of Jerome Kern." If one or more of these songs, which are essential for a balanced album, are published by a music publisher that will not grant a license except at an especially high rate or as part of a tie-in sale deal, the record manufacturer will not be able to plan the contents of the album as he does now.

Even if it is assumed that the record manufacturer will consult the copyright proprietor in advance and thus work out the cost of each license, the fact of wide variations in license fees will cause the record companies to record less material. If album A has a high cost because the license fees are well above the average, the record company will have to look to album B to help level costs. This, of course, penalizes the public who can now neither afford album A nor album B, and the royalties of the composers and artists who made album B possible, will be correspondingly diminished.

(b) *Circumscribed tastes mean fewer records sold.*—A phonograph recording is a work of collaboration—the composer, the arranger of the music (for recording purposes), the orchestra and the performing artist join their talents to make a combination of words, sounds, and music they hope will have wide appeal. Different artists and different arrangements account for the variations. The public has a wide choice, thanks to the present democratically competitive compulsory licensing law. It can express its preferences. If exclusive licensing takes the place of the present system there will be no variations for the public to choose from especially in the popular single record field. And while there are many more versions in the field of popular music than in the classics, serious music that is in copyright would also be limited to one version under a system of exclusive licenses. Bing Crosby's record of "White Christmas", it is alleged, sold 20 million copies. If that song had first been recorded by an unknown artist under an exclusive contract and the public has not liked the particular rendition, the song might have died. And it has come to my attention that 23 record companies have each issued their individual version of the current "Gigi" score, an unprecedented industry-wide bonanza, impossible but for compulsory licensing.

Not infrequently a subsequent rendition of one song will boost substantially the sale of its first recording. This type of sale stimulant would also be lost if compulsory licenses are eliminated.

(c) *New writers may never get a chance to have their songs recorded.*—The business of writing and recording music is a vital and dynamic business. Yesterday's tyro can be tomorrow's top name. Under the competitive system that exists in the United States by virtue of our present compulsory license law, a medical student and a bookkeeping executive who have never written a song can produce a national best seller. It is significant to note that the song, "Cindy, Oh Cindy", was recorded on a small label by an artist who had never before recorded.

There is no dearth of musical writing talent in the United States. Recently, according to Billboard, one song publisher invited songwriters to submit songs and hundreds of tunesmiths heeded the call. The first song selected was recorded on 5 different records, one of which was popular enough to sell 700,000 records. Another song so selected was recorded in 5 versions and produced sales of 350,000 on 1 version. It was estimated that the recorded songs thus obtained from new writers were performed between 2 million and 3 million times on radio in less than a year.

It is interesting to note that since 1953 songwriter membership in ASCAP has jumped 33 percent. There is a striking parallel between this figure and the rise in the number of record companies activated in the past few years, from which one may conclude that the fortunes of both groups are linked together. The elimination of compulsory licensing will stifle the growth of the record industry, and consequently new songwriters will not be able to find the young, small, or adventuresome record companies that today are ready, willing, and in a position to gamble on their compositions in the competitive race for new hits. With only a few companies in the field these budding composers are apt to find the bargaining unequal and remain latent and unrealized.

(d) *Small music publishers will not be able to survive.*—The large music publishers will become larger and the small companies will be driven out of business. Today, there are large, well financed, and well established music publishers. But there are also numerous small music publishers and they perform an important economic function for the composer. In fact, from 1953 to the present, music publisher membership in ASCAP has risen 42 percent. These publishing companies make demonstration records of new music which they are constantly exposing to recording companies, large and small, as well as to recording artists. Because they do not have large libraries, or backlogs of standard songs, these smaller music publishing companies are always on the search for new material and new composing talent. These smaller music publishers can exist and thrive under the present system in the following manner: If the songs which they find are recorded by any one company there is a reasonable probability that they may be recorded by other companies. The system of compulsory licenses multiplies the publishers' rewards. Without such a system, the small publishers will be financially too weak to exist.

Even the ASCAP benefits to its members have been enhanced immeasurably by payments measured by performances which have been multiplied many times by the use of the phenomenal number of additional records that are made available to disk jockeys because of the growth of the recording business. In fact, some quarters believe that emphasis on the performance of records by disk jockeys is becoming essential to the proper marketing of any musical composition.

\* \* \* \* \*

I cannot too strongly restate my firm conclusion that abolition of the present system of compulsory licenses would have unfortunate economic consequences for the public and each of the segments in the music business.

Congress did not see fit to weave a system of exclusive licenses into the fabric of the recorded music business and there is no gross inequity or injustice which calls out for the abolition of compulsory licenses. Rather, it has been the case that the present compulsory licensing principle has incalculably benefited the entire music industry by encouraging the formation of new record companies, by increasing composer, artist and publisher royalties, by diversification of performance and by keeping retail prices within easy reach of the public. The phenomenal growth of the popular music industry in recent times is persuasive proof of the efficacy of the compulsory license clause in the Copyright Act.

\* \* \* \* \*

Those urging the repeal or revision of the so-called "compulsory licensing provision" keep reiterating the philosophical contention that the compulsory license is inimicable to the general principles of jurisprudence in that it (to quote Mr. Blaisdell) "establishes limits on (1) the person with whom he, the owner, may refuse to contract; (2) the times at which he may contract; and (3) the price at which he may contract."

These limitations were created and arrived at by Congress after a careful study and analysis of the prospective market. The principal beneficiaries whom Congress primarily wished to benefit by the Copyright Act were (a) the public, and (b) the authors and composers.

In considering this particular revision, Congress desired to protect the public from monopoly and the author or composer from being imposed upon by powerful publishers, or others more skilled in business than he. The purpose of Congress was similar to that which impelled it to create the second period of copyright, known as the renewal period. That purpose is well defined by Judge Frank in the dissenting opinion in the famous *Witmark* case (125 Fed. 2d 949):

"We need only take judicial notice of that which every schoolboy knows—that, usually, with a few notable exceptions (such as W. Shakespeare and G. B. Shaw), authors are hopelessly inept in business transactions and that lyricists, like the defendant Graff, often sell their songs 'for a song.'"

"Here, then, is a case where (a) defendant was an author, one of a class of persons notoriously inexperienced in business, and the particular author was actually, at the time, in desperate financial straits, while the plaintiff was a successful and experienced publisher; and (b) the property contracted for was of such a character that, when the contract was made, 'neither party could know even approximately the value' so that 'it was a bargain made in the dark'; and (c) the consideration was a very small sum."

As an example of how an author or composer may be imposed upon is the following quotation from the record in the case of *Jerry Vogel Music Co., Inc. v. Miller Music Co., Inc.*:

"On January 19, 1944, Fox, acting for appellant, quoted Universal a price of \$1,000 (exhibit 8 for identification).

"On May 3, 1944, almost 5 months after appellant had quoted a price, it learned from Fox that in spite of the fact that such licenses are customarily cleared through the Music Publishers Association by its members (f. 129), respondent had dealt directly with Universal and had licensed the use of the song in a motion picture (exhibit 9 for identification). It was learned at the trial that this license was granted for only \$200 (exhibit H)."

The appellant publisher, for reasons that best suited its purposes, being a tenant in common in the renewal copyright with the appellee publisher, granted the license for \$200 for a use for which license appellee was asking \$1,000.

To repeat, Congress wished to be sure that no monopoly would result and that the author or composer was protected against his commercial limitations, and that he received fair and reasonable royalties for the use of his composition.

Comprehension of the true formula set by Congress has been perhaps beclouded by the unintentional characterization of section 1(e) as a "compulsory license. This is not a proper or true definition, nor is it correct to say that Congress created a property and then limited the right of the property owner to use it. On the contrary, the Congress defined the extent of the property right after it had examined the economic market in which the property right would be used. Upon such an examination, it found (1) that an immediate monopoly in the Aeolian Co. would result unless Congress prevented it, and (2) that the likelihood that the ineptness of the author or composer to protect his commercial position against more skillful and more powerful publishers, etc., would again exist unless the authors and composers were protected.

It was for these reasons that Congress created the property right that had not previously existed, but in order that all that were to benefit from it might do so fairly and equally, it created the formula which while creating the property right would primarily protect the public against monopoly and the author and composer against unfair economic treatment.

It did not create a property right and then limit the rights of the property owner to use it. It created a property right conditioned upon certain restrictions as to its extent.

Such action on the part of Congress or the Government is not unusual as has been urged. On the contrary, wherever Federal franchises or licenses or property rights are created by Federal action, such have often been granted or created

with restrictions. When the Federal Communications Commission grants franchises in radio and television, the license and property rights which it creates are limited in extent by various restrictions imposed upon the use, or upon which the use is conditioned. To like effect are the licenses and property rights granted by the Civil Aeronautics Board and the Interstate Commerce Commission. In the Robinson-Patman Act, the activities of the seller in the second sale are limited by statute and the extent to which the seller can grant advertising, discounts and other benefits to the first customer are required by that legislation to be granted to every other customer.

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In sum, the public and the author and composer have been benefited handsomely under section 1(e); the publishers, broadcasters, and others subordinately interested have likewise benefited handsomely. Section 1(e) has created a very successful new business, the record business, which is contributing handsomely to this Nation's economy. All of this structure would be seriously damaged if this section were repealed. Those urging its repeal or revision are prompted solely by the selfish motive of grabbing for themselves a larger portion of the proceeds from this great business than that originally accorded to them by the congressional formula, which created this business. The primary beneficiaries of this original congressional formula, namely the public and the author and composer, would be seriously penalized. Monopoly would again rear its ugly head, the price of records would lose the protection of a competitive market and the public would suffer thereby. The author and composer would be at the mercy of the powerful commercial units with which they would have to negotiate and would be penalized by their individual ineptitude. The very things which Congress sought to prevent (and did prevent by its wisdom in creating the formula under which this business has grown so prodigiously) would again be created and the economic consequences would be ominous, including the destruction of a good part of the record business.

Sincerely yours,

ERNEST S. MEYERS.

