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Michael Botein
New York Law School

Edward Samuels

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Compulsory Licensing vs. Private Negotiations in Peer-to-Peer File Sharing

By Michael Botein and Edward Samuels

Peer-to-peer sharing of creative works over the Internet poses a particularly thorny issue for copyright law. On the one hand, full copyright liability may seem inappropriate in such an environment, since it might inhibit the broad dissemination of creative works promised by the new technology. On the other hand, carte blanche immunity from copyright liability might erode the commercial value of creative works.[1]

In an effort to chart a course between the two unsatisfactory extremes, some commentators have recently proposed a compulsory license to authorize and regulate the peer-to-peer distribution of copyrighted works, primarily over the Internet.[2] We are sympathetic with the goals of such a compromise and believe that the issues need to be fully aired. Nevertheless, we remain skeptical about the feasibility of implementing such a system. To this end, we think it worthwhile to take a brief look at the history of compulsory copyright licenses in a number of different settings. As will be seen, compulsory licenses have been less than successful in implementing public policy goals.

Moreover, the general legal backdrop of the peer-to-peer issue has changed dramatically in the last few years. In June 2005, the US Supreme Court's decision in MGM *v. Grokster*[3] made clear that peer-to-peer transfer of copyrighted material violated the Copyright Act in the absence of a copyright license.[4] The case thus increased the importance of negotiations between intellectual property owners and potential distributors, thus arguably reducing the potential role of compulsory copyright and other forms of government intervention. Even without *Grokster's* tilting of the scales toward private negotiations, compulsory copyrights generally have not functioned very effectively.

To begin with, compulsory licenses are not new to intellectual property. They have been invoked to resolve several troublesome technological issues, primarily in the past quarter century. Some compulsory licenses have been moderately successful, but their general track record has been disappointing. At best, these licenses

Continued on page 16

Michael Botein is Professor of Law and Director, Media Center, New York Law School. He earned a BA, 1966, Wesleyan University; JD, 1969, Cornell University; LLM, 1972, Columbia University; JSD, 1979, Columbia University. Edward Samuels is an intellectual property consultant in New York City, www.edwardsamuels.com. He earned a BA, 1971, Yale University; JD, 1974, Columbia University. A prior version of this article appeared in 30 Southern Illinois University Law Journal *69 (2005).*

IN THIS ISSUE

COMPULSORY LICENSING VS. PRIVATE NEGOTIATIONS IN PEER-TO-PEER FILE SHARING 1
By Michael Botein and Edward Samuels

THE FCC & VOIP: A TENUOUS REGULATORY RELATIONSHIP 3
By Linda A. Rushnak

PRIVACY AND ONLINE BEHAVIORAL ADVERTISING 24
By Bennet Kelley

INTERNET LAW IN THE COURTS 27
By Evan Brown

RECENT EVENTS IN EU INTERNET LAW 29
By Patrick Van Eecke and Maarten Truyens

Wolters Kluwer Law & Business

Compulsory Licensing vs. Private Negotiations
Continued from page 1

should be viewed as interim accommodations to preserve a balance between the extremes of full and no liability during periods of technological or other change.[5] But such arrangements are not as successful as, and should yield as soon as possible to, private systems of compensation.

In traditional economic terms, privately negotiated contracts simply may be more efficient than governmental intervention. At least in theory, private arrangements should reflect better the changing realities of the marketplace. Even after 210 years of copyright law in this country and in the face of new technologies, the marketplace still best serves the public interest in encouraging both the creation and dissemination of new works.

As a backdrop for considering a new license in the peer-to-peer environment, this article reviews existing compulsory licenses. We first discuss the audio compulsory licenses:

1. The original compulsory license for mechanical reproduction of phonorecords, established in the Copyright Act of 1909 and preserved in § 115 of the current Act;[6]
2. The jukebox compulsory license, enacted as § 116 of the 1976 Copyright Act, and repealed in 1993;[7]
3. The digital audio home recording royalty, established in 1992 in chapter 10 of the Copyright Act;[8] and
4. The digital performance right in sound recordings license, established in 1995, set out in § 114 of the current Copyright Act.[9]

Because the technology and the economics of the video market are different from those of the audio market, we will review separately the television compulsory licenses, primarily focusing upon the cable compulsory license, adopted as § 111 of the 1976 Copyright Act.[10] We also will consider briefly: the public broadcasting license established in § 118;[11] the satellite retransmission license enacted in 1988, as set forth in § 119;[12] and the local-to-local retransmission license enacted in 1999 as § 122 of the current Copyright Act.[13]

We will conclude by considering other aspects of the copyright system that should be borne in mind as we contemplate the adoption of yet another compulsory licensing system.

AUDIO COMPULSORY LICENSES

THE COMPULSORY LICENSE FOR MAKING AND DISTRIBUTING PHONORECORDS

The most enduring compulsory license is the original one, adopted in the Copyright Act of 1909. The elaborate scheme was Congress's response to the Supreme Court's decision in *White-Smith v. Apollo*[14] holding that piano rolls and, by extension, phonorecords were not "copies" of the musical works that they recorded. That holding meant that the creators of phonorecords or other mechanical reproductions of musical works did not have to pay the owners of copyrights in the songs that they reproduced.

In 1909, Congress legislatively overruled the *White-Smith* case by providing that the making of phonorecords or other mechanical versions of songs was subject to copyright protection. Congress created the phonorecord compulsory license to protect against the monopolization of music by the sound recording industry and to assure that performers would have access to any songs that they wanted to "cover" by making their own recordings at a reasonable price.[15] The provision has stood the test of time, increasing from 2 cents per song in 1909 to 9.1 cents per song (or 1.75 cents per minute of playing time) in 2006.[16]

The success of this original compulsory license may have inspired Congress to adopt other compulsory licenses in the 1976 Copyright Act. But the phonorecord license arose in a context significantly different from any of the other compulsory licenses, and particularly the peer-to-peer environment. The phonorecord compulsory license does not involve the pooling of funds, but rather the direct payment by a user/performer (or the performer's recording company) to the owner of copyright in the underlying musical work (or payments made through the Harry Fox Agency as a designated intermediary).

The phonorecord license thus is simpler to administer than the later, more complicated compulsory licensing schemes. It also tracks more closely the private contract negotiation that would have occurred in the absence of the compulsory license.[17]

At least part of the justification for interfering with the normal market in musical works was the fact that the users—the performers and record companies involved in making new versions of older works—also contributed creatively to the pool of available versions of songs. This is not the case in the typical peer-to-peer transaction, which usually involves the simple multiplication (and potential displacement) of copies of works that are already available through commercial channels. A different situation might pertain if file sharing produced a large number of derivative works through sophisticated digital editing and manipulation, but this has not been the case to date.[18]

The story of the first compulsory license, however, is not finished. As electronic dissemination of musical works displaces the traditional sale of phonorecords and CDs, any compulsory license pegged only to the old technology soon would be doomed to failure. In 1995, Congress updated § 115 to compensate music copyright owners for the digital delivery of works authorized under the compulsory license, as well as the sale of old-fashioned phonorecords (defined broadly enough to include CDs).[19]

THE JUKEBOX COMPULSORY LICENSE

Under the 1909 Act, copyright did not extend to playing music on jukeboxes because Congress adopted a specific exception in favor of the jukebox industry.[20] Although the exception was potentially justified by the assumption that jukebox play of music promoted record sales, this unusual free ride by an industry that made a lot of money from copyrighted works seemed inconsistent with the general principles of copyright.

To some extent, the reasoning behind the jukebox free ride is analogous to the reasoning of some creators today who choose to make their works available for download without a license or fee; for a new entrant, it may very well be an excellent form of marketing, ultimately creating a demand for paid performances, such as bookings and recordings. In a market-based system, creators are of course free to make whatever arrangements they want for the cheap or free distribution of some of their works. We believe, however, that such a choice should be up to the individual copyright owners, not imposed across the board by a compulsory licensing system.

In 1976, Congress responded to this free ride problem by adopting a compromise: a compulsory license for the playing of music "by means of coin-operated phonorecord players."[21] The initial fee was set at $8 per jukebox. Through periodic adjustments, the fees climbed to almost eight times that amount within a decade.[22] In a two-step set of amendments in 1988 and 1993, Congress replaced the fees with "negotiated licenses" agreed to by the affected industries.[23] The current fees have been negotiated at $275 for the first jukebox by any particular operator, $55 for the second through 10th jukeboxes, and $48 for each additional jukebox.[24]

It would be tempting to suggest that Congress viewed the compulsory license as a temporary fix and that the shift to a marketplace alternative was a natural and anticipated evolution in the treatment of the jukebox industry, from exception to compulsory license to (relatively) free market. Congress's action was prompted primarily by concerns that the jukebox compulsory licensing system violated US obligations under the Berne Convention, particularly Article 11(1); this assures copyright owners the exclusive right in the public performance of their works.[25] Perhaps the more important lesson of this history is to underscore the international context of the copyright system, which we will consider later.

THE DIGITAL AUDIO HOME RECORDING ROYALTY

Prior to 1992, it was unclear whether the home tape recording of music was a copyright violation. On the one hand, manufacturers argued that they were not liable under the principles applied to video recorders in the *Betamax* case;[26] and rights against home users were, as a practical matter, unenforceable. On the other hand, some arguably distinguishing features made the audio market different from the video market of 1984. Of particular importance was the emergence of digital audio tape (DAT) as a near-perfect method of making copies.

In 1992, in response to the issues raised by the new digital technologies, Congress passed the Audio Home Recording Act.[27] Among other things, the Audio Home Recording Act provided for a statutory fee to be charged on the sale of digital audio recorders (generally 2 percent of the manufacturer's or importer's price, with a minimum of $1 and a maximum of $8) and digital audio media (generally 3 percent). The proceeds were to be distributed to the owners of copyright in music and sound recordings based upon estimated shares of the market.

The DAT experience might seem to be a good precedent for a peer-to-peer compulsory licensing system, with fees under the new system based upon the price of MP3 recorders and memory devices. The problem is that the DAT technology was a non-starter, and today the industry effectively is dead. The fees never amounted to much more than $4 million per year, and the aggravation in collecting and disseminating the funds was disproportionately large.[28] Perhaps more than any other, this license has resulted in "spending dollars to chase dimes." It is hardly a model for future legislation.

THE DIGITAL PERFORMANCE RIGHT IN SOUND RECORDINGS LICENSE

Prior to 1995, though there was an exclusive performance right in the underlying music, there was no exclusive performance right in sound recordings as such. In 1995, however, Congress created such a right. It was limited to the digital performance or transmission of such works, with lots of exceptions that nullified much of the potential impact of the new right.[29] As part of the package, Congress created a compulsory license that applied to some non-interactive digital transmission services. Such a compulsory license might seem relatively easy to set up, since it involves a relatively finite number of webcasters who do or could operate their Web sites for profit and who presumably are in a position to absorb reasonable performance fees.

After Congress adopted the complicated new right and incorporated the compulsory license into § 114 of the Copyright Act, observers waited to see how the compulsory license would work out. Even before any fees had been collected under the license, however, it became obvious that the statutory language was unclear. Did it apply to "streaming audio"? No one knew. By 1998, as part of the Digital Millennium Copyright Act, Congress revised the language to clear up some of the ambiguities.[30] A Copyright Arbitration Royalty Panel was established to recommend the initial rates for the compulsory license;[31] it came up with a proposed rate of 0.14 cents for each song streamed on an Internet-only webcast, and 0.07 cents for each song included as part of an AM or FM radio retransmission. After much public discussion and complaint, the Librarian of Congress adopted a compromise rate of 0.07 cents for each song delivered, whether by AM, FM, or Internet-only transmission.

Many people thought that the rates were outrageous and that smaller operators could not afford them. Congress intervened by passing the Small Webcaster Settlement Act of 2002.[32] Currently, the webcasting royalty rates are divided into nine categories of digital audio services, depending upon such factors as whether the service is commercial or noncommercial. Fees range from as low as $200 for noncommercial webcasters devoted primarily to news, talk, and sports to 10 percent of gross proceeds for such commercial services as XM Satellite Radio and SIRIUS Satellite Radio.

Since its rocky start, the compulsory license has begun generating at least a moderate flow of revenue, reaching as high as $35 million in 2005.[33] While the fees might seem to bode well as a model for a peer-to-peer compulsory license, the comparison is misleading. Much of the revenues generated by the new digital performance right are attributable to commercial satellite radio services such as XM and SIRIUS. Given the recent merger efforts of these leading companies, it looks like one or two entities will survive such that a traditional copyright license on a national level is practicable. By contrast, most peer-to-peer exchanges on the Internet will presumably be in a non-commercial setting where revenues are not likely to be generated, and funds will not likely be available for distribution.

VIDEO COMPULSORY LICENSES

THE CABLE COMPULSORY LICENSE

For almost two decades, the broadcast and cable industries fought over whether and how much cable systems should pay rights holders for cable systems' retransmission of programs broadcast by television stations. As a first step to establish a bargaining advantage, television broadcast networks and producers sued to establish that cable use of copyrighted broadcast programming was a copyright infringement. Partly out of fear of strangling the then-emerging cable industry, the Supreme Court twice flatly held that this type of use was "passive" in nature and thus created no liability.[34]

After the *Teleprompter* decision, the broadcast and production interests got the message that no judicial relief was in sight and turned their attention to the decades-old congressional fight over cable fees. The result was a compulsory license in § 111 of the 1976 Copyright Revision Act, which went into effect in 1978. This hideously complicated provision provided that cable operators could carry both local and distant broadcast television signals for a fee mandated by the Act, subject to periodic adjustments by the Copyright Royalty Tribunal. (Later, upon the abolition of the Tribunal, Copyright Arbitration Royalty Panels were appointed by the Librarian of Congress. Most recently, in November 2004, the panels were themselves replaced by a new system of Copyright Royalty Judges, to be phased in gradually.) The fee was based upon the number of distant signal equivalents (DSEs) that a cable system imported, counting a distant independent station as one and a network-affiliated station or educational station as ¼. The number of DSEs was multiplied by a figure initially set by Congress and later adjusted by the Tribunal to establish the percentage of their gross revenues charged for importing distant television signals.[35] The revenues collected by the licensing system then were divided among the copyright owners, after elaborate hearings that typically held up distributions for many years. The big winners in this process generally were broadcast programming and sports rightsholders.[36]

The percentage of gross revenues charged for each DSE has increased over the years.[37] Similarly, the total gross revenues of cable systems have increased steadily every year. For example, there was an increase in more than $20 billion in revenues from the time when the Copyright Act was first passed to almost $30 billion in 2002. But the total payment under the cable compulsory license actually has decreased in the past decade. After peaking near $200 million in 1989, it has gone down to only about $120 million in the past few years. (In part, this is offset by an increase in the compulsory licensing fees for satellite distribution systems under § 119, described later, which in 2002 amounted to almost $69 million.[38])

Why have the royalties under the compulsory license decreased? Quite simply, cable systems do not import as many distant signals as in the early days. Today, viewers are interested not in distant signals but rather in satellite networks—free, per-channel, or pay-per-view—for which cable operators negotiate fees in a free marketplace. Indeed, cable subscribers today get more than half of their programming from non-broadcast sources, and the percentage seems to be increasing steadily.

Even in its infancy, the cable compulsory license system was implemented against the backdrop of Federal Communications Commission (FCC) regulations that severely limited the number of DSEs that a cable system could import.[39] While the FCC long ago repealed the limitation, the § 111 fees effectively continue the cap on distant signals by pricing the importation of a DSE that would have been barred by the earlier FCC rules at 3.75 percent of gross revenue.[40] Cable operators thus do not view distant signal importation as a useful market strategy.

Broadcasters and cable operators also have fought over the rebroadcast of local over-the-air channels on cable systems within the same viewing area. Under the FCC's rules in the 1970s, cable systems were required to carry local programming under must-carry rules.[41] Presumably, the local station operators did not lose money by this arrangement: Broadcasters kept their local viewers—by being carried on cable systems—and were able to charge advertisers for them. Indeed, broadcasters actually may gain viewers in their local areas, since their signals often do not reach areas which they theoretically cover because of terrain or other problems; this is particularly true in urban areas like New York, where tall buildings block reception by a large part of the potential audience.

The cable compulsory license did not compensate significantly for the retransmission of local stations, since the cable operators were required to carry these signals in any event, and the local broadcasters wanted it that way. The DSE figure was based totally upon the importation of signals from outside the viewing area, however, and not upon retransmission of local television signals.

Most cable subscribers today watch satellite-delivered non-broadcast programming, for which the copyright model is not a compulsory license but rather a negotiated contract. The broadcasters quickly began to figure out that the real money was in non-broadcast satellite networks.

With the decrease in carriage of distant signals, payments under § 111 naturally went down. The statute explicitly requires payments only for signals carried beyond their normal licensed area, that is, distant signals.[42] Congress's theory quite reasonably seems to have been that broadcasters benefited from cable carriage of their signals; if the cable operators had any incentive not to carry local signals, broadcasters naturally would lose viewers, and hence advertising revenues, in their home markets. There was and is no need to impose a compulsory copyright scheme on local signals. Indeed, in many cases broadcasters assist local systems in receiving high-quality signals by building direct fiberoptic or microwave connections to cable operators.

After the widespread development of satellite cable channels in the late 1980s, cable operators had a declining need to import distant signals.[43] Since systems do not pay for local signals, it was inevitable that copyright payments would fall.

Although beyond the scope of this article, the change in compulsory copyright's significance is a good illustration of government's inability to predict rapid changes in market forces. In the decade after § 111's enactment, market changes reduced its importance significantly. Although satellite transmission existed at the time of the 1976 Copyright Revision Act, congressional drafters simply did not foresee its effect upon the relevance of signal importation and hence of a compulsory copyright scheme oriented around distant signals.

At the same time that § 111 was becoming less relevant, broadcasters and cable operators were moving to a system of private negotiations. To accommodate the shift, Congress, in the Cable Television Consumer Protection and Copyright Act of 1992, provided for "retransmission consent" (RTC) as an alternative to must-carry and effectively a supplement to § 111 royalties.[44] (Section 111 applies to owners of copyright in the individual programs; RTC extends rights to the broadcasters themselves based upon their broadcast signal and without regard to the ownership of any copyrights.)

Effective in 1993, § 325(b)(3) of the Communications Act allowed broadcasters and rights holders to negotiate for permission to carry their signals. This approach carries with it a risk under § 325(b)(4); if a broadcaster is unable to reach a retransmission consent (RTC) agreement with a cable operator, it gives up its right to cable carriage locally under the current version of the must-carry rules. But broadcasters appear to have sought such arrangements quite eagerly.

Instead of competing for relatively small slices of the compulsory copyright pie, after 1993 broadcasters seem to have preferred using the RTC option to negotiate for compensation. This apparently has not resulted in any purely financial windfalls. Instead, to the extent that the results of these negotiations are visible, they seem to reflect an increased reliance upon a form of barter.

Because the RTC deals are proprietary in nature, their details are never disclosed. Aside from the contracts' private nature, cable operators naturally fear that, if they make a highly favorable deal with one popular local broadcaster, others will demand the same terms. Nevertheless, discussions with cable industry executives indicate some broad outlines of RTC agreements.

According to an industry trade association representative,[45] RTC deals never include outright monetary compensation. In the early days of RTC, a few broadcasters demanded cash and met instant rejection.[46] Instead, these arrangements generally involve reciprocal dealings. For example, it was not an accident that, shortly after the major broadcast networks shifted to retransmission consent negotiations, most of them struck industry-wide cable agreements to create new cable networks with a network brand, for example, CNBC, MSNBC, FNC. The broadcasters were eager to expand into new video media, which resulted in new network-run cable channels. In some cases, cable operators received favorable terms under these agreements, for example, carriage rights to both a broadcast and a cable network for less than the cost of the former alone. Although cable operators thus were not responsible for copyright payments to local stations, in effect there was a negotiated agreement between the industries to transfer value. As discussed below, this probably was much more effective than the type of governmentally mandated payment scheme for distant signals.

The key to these transactions was that the cable industry could give the networks something more valuable than small cash payments, that is, national coverage. (In some cases, these arrangements also exist between cable operators and strong non-network group-owned stations.) Cable operators claim that they do not agree to or continue to carry cable networks with little audience interest. And some networks have had little success in launching new cable networks, even with the help of RTC agreements.

The general counsel at a major cable company indicated that other types of deals also are customary.[47] Since systems generally have excess advertising time on cable satellite channels, they often give or sell it at nominal rates to local network affiliates for running promotional material for upcoming network programs. Alternatively, an RTC agreement may commit cable operators to buy promotional time from local stations, at relatively low rates. Or broadcasters and cable operators may agree to share unused production time in their studios for nominal payments.

This combination of carrying broadcasters' cable networks, giving excess advertising time to broadcasters, and sharing production capacity may or may not have real economic value. As the cable general counsel noted, "It's the principle rather than the economic value. No one wants to admit paying cash. There would be network carriage and advertising agreements in any event, but the existence of RTC encourages and increases it."

While the compulsory licensing system may have represented an unhappy truce in the 1970s, it has been replaced to a large extent by negotiated agreements between the broadcasters and owners of programming and the cable as well as satellite operators who control access to most viewers. Like the jukebox compulsory license that eventually yielded to industry negotiations, perhaps the best compulsory licenses are the ones that fade away, which § 111 basically began to do after its first decade.

THE OTHER TELEVISION COMPULSORY LICENSES

The Satellite Home Viewer Act of 1994 created a compulsory license to do for direct broadcast satellite (DBS) operators the same thing as § 111 did for cable systems. Although the systems vary in significant ways (for example, § 119 bases the fees upon a certain price per subscriber, instead of a percentage of gross revenues), the lesson for other compulsory licenses is the same. A compulsory license can work, but it is not simple and may require an administratively burdensome set of regulations.

The treatment of other evolving retransmission systems, such as systems delivered over fiber-optic phone cables, is under review. A 1997 Copyright Office Report favored extending a compulsory license to cover telephone companies that retransmit broadcast signals.[48] This may yet become a real issue in the future, if the major local telephone companies are able to implement fiber-to-the-premises broadband service, such as Verizon's FIOS and AT&T's Lightspeed.

The public broadcasting or noncommercial broadcasting license fees set up pursuant to § 118 of the Copyright Act[49] should be considered sui generis. Under that section, fees have been set for the performance of musical compositions (providing lump-sum payments of several million dollars to ASCAP and BMI by PBS and NPR, and a few hundred dollars by college or university public broadcasting entities) and for pictorial, graphic, and sculptural works (generally in the tens of dollars per use).

In 1999, Congress added § 122 to the Copyright Act.[50] It granted satellite carriers the right to retransmit broadcast signals within the intended local market of a television broadcast station, ostensibly putting them more on a par with cable operators. The license is royalty-free, on the assumption that the original broadcaster benefits by reaching viewers in its service area. As such, the provision is more an exemption from copyright liability than a traditional compulsory licensing system. The primary feature is that the satellite carrier must provide a list identifying all subscribers to whom the satellite carrier retransmits.

Even as it has held open the possibility of extending compulsory licenses in the context of cable and telephone communications, the Copyright Office has voiced skepticism about compulsory licensing systems on the Internet. As concluded by the Copyright Office:

> [I]t would be inappropriate for Congress to grant Internet retransmitters the benefits of compulsory licensing. The primary argument against an Internet compulsory license is the vast technological and regulatory differences between Internet retransmitters and the cable systems and satellite carriers that now enjoy compulsory licensing. The instantaneous worldwide dissemination of broadcast signals via the Internet poses major issues regarding the national and international licensing of the signals that have not been fully addressed by federal and international policymakers, and it would be premature for Congress to legislate a copyright compulsory license to benefit Internet retransmitters.[51]

OTHER CONSIDERATIONS

In considering the treatment of new technologies within the overall framework of copyright, it is important to remember that copyright is not necessarily, or even principally, a barrier to the dissemination of creative works. As stated by the Supreme Court in *Harper & Row Publishers, Inc. v. Nation Enterprises*:[52] "it should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas . . ."

For example, ASCAP, perhaps the best existing model for a collective rights organization, was not created by a compulsory license set by Congress, but resulted from collective bargaining among the various parties, with periodic oversight by the courts through the lens of antitrust law,[53] and periodic adjustments of rights by Congress (as in the so-called Fairness in Music Licensing Act of 1998[54]).

An initial determination that a use is covered by copyright gives a copyright owner considerable leverage in setting the fees for distribution or performance of such works, of course, but the copyright owner makes no money if there are no distributions. An initial determination that copyright does not extend to a particular use, such as in the case of jukeboxes, cable, or the Betamax, will shift the bargaining power in favor of the users in any later consideration of a compulsory license.

On the other hand, a compulsory license is not the only means of placing limitations upon the rights of copyright owners. There are dozens of specific exceptions and limitations to the rights of copyright, including several in § 110[55] (covering certain nonprofit uses), and limitations resulting from basic principles of copyright, such as fair use, the idea-expression distinction, and the limitations upon copyright in works of utility. Many socially beneficial uses of copyrighted works on the Internet, even by people not owning the copyright, will be protected by these doctrines.

Although much maligned in the Internet community, the Digital Millennium Copyright Act (DMCA)[56] gives owners of works the right to control their works through copy-protection systems and the use of copy management information systems. Anyone seriously considering a compulsory license will have to work through the interplay between such a license and the workings of the DMCA.

For example, would the existence of a compulsory license to disseminate works on the Internet trump the DMCA? Presumably not, unless we essentially want to dismantle the DMCA and require that copyright owners unlock their copyright protection systems. If the existence of a compulsory license lessened the economic value of copyrighted works, particularly those initially supplied in digital form, the net effect of a compulsory license might be to convince many copyright owners to adopt more technically intrusive copy protection systems, a result that would presumably undermine the whole purpose behind such a compulsory license.

One also must keep in mind the increasing international role in deciding copyright policy. Take, for example, the proposed Public Domain Enhancement Act,[57] introduced in Congress in 2003, which would impose a maintenance fee for continuing copyright beyond 50 years from first publication. Whatever the merits of such a requirement, it seems to fly directly in the face of the Berne Convention,[58] which prohibits such formalities as a limitation on copyright. It was only in 1988 that the United States finally did away with the requirement of copyright notice and registration, as a condition to joining Berne in the first place.[59]

Another recent international development of considerable relevance is the updating of the General Agreement on Tariffs and Trade to include intellectual property rights, under the new structure of the World Trade Organization (WTO). In a recent decision,[60] a WTO panel held the US exemption of certain restaurants and business establishments for retransmission of musical works received over the airwaves (§ 110(5)) to be in violation of Berne obligations. The panel disapproved of national exceptions or limitations that "conflict with a normal exploitation of the work." It is quite possible that too broad a compulsory license also would be in violation of Berne obligations, triggering possible retaliatory sanctions in the WTO.

CONCLUSION

This discussion is not intended to preempt or forestall consideration of a new compulsory licensing system to balance competing interests in the emerging peer-to-peer environment. But the track record of prior compulsory licenses, the differences between those licenses and a peer-to-peer license, and other copyright as well as international considerations suggest that caution is in order before jumping headlong into any quick fix.

NOTES

1. Immunity could undermine the primary purpose of copyright law, which is to foster the creation of new works by granting authors exclusive rights in their works.
2. Neil Weinstock Netanel, "Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing," 17 *Harv. J. L. & Tech.* 1 (2003).
3. MGM v. Grokster, 545 U.S. 125, S. Ct. 2764 (2005).
4. The Court refused to apply the reasoning of the *Betamax* case, which had held that the private use of video recorders to time shift the viewing of works distributed for free over the public airwaves was a fair use under copyright law. *See* discussion in text at n.26, *infra*.
5. As discussed later, for example, the cable television compulsory copyright license filled a gap by resolving disputes between copyright owners and cable operators for a little more than a decade while the multichannel industry was developing. As soon as relations between broadcasters and cable operators stabilized, however, the industries migrated to a private law system of negotiated settlements under retransmission consent statutory provisions. As discussed later, although the old compulsory licensing provisions remain in effect, the industry players largely have migrated to negotiated arrangements. *See* discussion in text at n.34, *infra*.
6. 17 U.S.C. § 1(e) (1909); 17 U.S.C. § 115 (2000).
7. 17 U.S.C. § 116 (2000) (former 17 U.S.C. § 116 repealed and replaced by this new § 116, December 17, 1993, 107 Stat. 2309).
8. 17 U.S.C. §§ 1003-1007 (2000).
9. 17 U.S.C. § 114(d)-(h) (2000).
10. *See infra*.
11. 17 U.S.C. § 118 (2000).
12. 17 U.S.C. § 119 (2000).
13. 17 U.S.C. § 122 (2000).
14. White-Smith v. Apollo, 209 U.S. 1 (1908).
15. *See* generally H.R. 2222, 60th Cong. (2d Sess. 1909).
16. *See* 17 U.S.C. § 1(e) (1909); 37 C.F.R. § 255.3(m) (1998).
17. To this extent, it thus resembles the system of retransmission consent in the cable industry. *See* discussion infra beginning at text at n.44.
18. If the proposed compulsory license were limited to the making of derivative works, then the value added by the user would indeed be a relevant factor. But the currently proposed compulsory license is to reproduce or display or perform a work generally, whether or not value is added in the form of the creation of a new work.
19. 17 U.S.C. § 101 (2000); 17 U.S.C. § 115(d) (2000).
20. 17 U.S.C. § 1(e), ¶ 3 (1909) (now superseded).
21. 17 U.S.C. § 116 (1976) (now superseded).
22. 37 C.F.R. § 254.3 (2003).
23. 17 U.S.C. § 116A (1988); 17 U.S.C. § 116 (1993).
24. Robert A. Gorman & Jane C. Ginsberg, Copyright; Cases and Materials 608 (6th ed. 2002).
25. The Berne Convention for the Protection of Literary and Artistic Works, art. 11(1), Paris revision, July 24, 1971.
26. Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984).
27. 17 U.S.C. §§ 1001-1010 (2000).
28. US Copyright Office, The Annual Report of the Register of Copyrights, available at *www.copyright.gov/reports/index.html*. The Annual Reports of the Register of Copyrights for 2001, 2002, and 2003 state that AHRA fees were $3.32 million in 2000, $4.124 million in 2001, and $3.448 million in 2002.
29. 17 U.S.C. § 114(d) (2000).
30. Digital Millennium Copyright Act, Pub. L. No. 105-304, § 405(a)(1)-(4), 112 Stat. 2890 (1998).
31. 17 U.S.C. § 114(f)(1) (2000).
32. Small Webcaster Settlement Act of 2002, Pub. L. No. 107–321, 116 Stat. 2780 (2002). The text describes the situation as of 2005. In that year, however, the United States Copyright Royalty Judges announced a "Final Determination of Rates and Terms" that would substantially increase the royalty rates by as much as 1200 percent. *See http://www.loc.gov/crb/proceedings/2005-1/final-rates-terms2005-1.pdf*. The response of the Internet "radio stations" was not surprising: cries of outrage and a national campaign to "save Internet radio." *See http://www.savenetradio.org*. By 2007, 144 members of Congress and five senators had co-sponsored the Internet Radio Equality Act, to again legislatively overrule a substantial increase in the fees. *See* H.R. 2060: Internet Radio Equality Act, *http://www.govtrack.us/congress/bill.xpd?bill=h110-2060*. As Congress held hearings, and senators and representatives announced support for what they assumed was a popular measure, SoundExchange announced that it would delay implementation of the new rates pending attempts to renegotiate them without the need for legislative action.

    So, as of this writing, the rates are again up in the air. Given such difficulty in determining a reasonable fee for "radio stations" that make music available on the Internet, it is even less likely that a peer-to-peer negotiated fee could sufficiently mollify all of the parties concerned.
33. *See* Ben Sisario, "Old Songs Generate New Cash for Artists," *N.Y. Times*, Dec. 28, 2004. § E, at 1. For current information, see the Web site run by SoundExchange, the organization assigned the task of collecting and distributing the compulsory fees, at *www.soundexchange.com*.
34. Fortnightly Corp. v. United Artists, Inc., 392 U.S. 390 (1968), and Teleprompter Corp. v. Columbia Broadcasting Sys., Inc., 415 U.S. 394 (1974).
35. The relevant gross revenues for the computation do not include payments from on-demand channels, but rather only on basic tiers with broadcast signals. Cablevision Systems Dev. Co. v. Motion Picture Ass'n of Am. Inc., 836 F. 2d 599 (D.C. Cir.), *cert. denied*, 487 U.S. 1235 (1988). This creates a bit of a problem when a cable system includes distant signals in a higher or enhanced tier, which is uncommon. Since attempting to apportion a system's revenues between broadcast and non-broadcast revenues would produce major transactional costs, however, first the Copyright Royalty Tribunal and now the Copyright Office have chosen simply to ignore these rare cases.
36. Daniel L. Brenner, Monroe E. Price & Michael Meyerson, Cable Television and Other Nonbroadcast Video: Law and Policy § 9.19 (Clark Boardman Callaghan) (1986).
37. In the 1976 Copyright Act, the fees ranged from 0.2 to 0.675 of 1 per cent of gross receipts for each DSE. 17 U.S.C. §111(d)(1)(B). As of 1985, the fees were raised to a range of .265 to .893 of 1 per cent of gross receipts for each DSE. In 1990, an additional .089 to .599 of 1 per cent of gross receipts was added for each DSE, depending upon the number of DSEs, for cable systems in the top 50 or second 50 television markets. 37 C.F.R. § 256.2(a) and (c).
38. *See infra*.
39. Brenner, Price & Meyerson, *supra* n.36, at § 9.19.
40. 37 C.F.R. § 256.2(c).
41. The FCC's must-carry rules were codified by Congress in the 1992 Cable Television Consumer Protection and Competition Act, 47 U.S.C. §§ 534-535. The statute and its implementation were upheld by the Supreme Court in Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622 (1994), and Turner Broadcasting Sys., Inc. v. FCC, 520 U.S. 180 (1997).
42. 17 U.S.C. § 111(d)(1)(B)(1) (2000). *See, e.g.*, Brenner, Price & Meyerson, supra n.36, at § 9:15; Ferris & Lloyd, Telecommunications Regulation: Cable, Broadcasting, Satellite, and the Internet, § 7.12(1) (LexisNexis 2004).
43. Distant signals still are important in some circumstances, where a station in one market is particularly attractive in another because of program content, language, or the like. For example, cable systems in Puerto Rico

carry several New York City signals; because many Puerto Rican residents have friends or relatives in New York City, developments there naturally are of interest.

44. 47 U.S.C. § 325(b) (2000).
45. Confidential interview with senior management, cable trade association, Dec. 14, 2004.
46. Confidential interview with chief executive officer, cable multiple systems operator, Nov. 18, 2004. In recent years, there has been an increasing but small number of situations in which broadcasters have publicly demanded payments for carriage of their signals. The outcome of these isolated incidents is difficult to estimate, since these negotiations too are treated by the broadcast and cable industries as proprietary. There are no reports as to actual financial agreements.
47. Confidential interview with general counsel of cable multiple systems operator, Dec. 17, 2004.
48. Leslie Ellis, "Verizon Designs Data 'Gusher,'" *Multichannel News*, Nov. 28, 2005, at 31.
49. 17 U.S.C. § 118 (2000).
50. 17 U.S.C. § 122 (2000).
51 *See* A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals (Aug. 1997), *www.copyright.gov/reports/study.pdf*, Executive Summary, *www.copyright.gov/reports/exsum.pdf*, at 13.
52. Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 558 (1985).
53. *E.g.*, Broadcast Music, Inc. v. Columbia Broadcasting Sys. Inc., 441 U.S. 1 (1979).
54. Codified, in part, as 17 U.S.C. § 110(5)(B) (2000).
55. 17 U.S.C. § 110.
56. 17 U.S.C. §§ 1201-1205 (2000).
57. Introduced as H.R. 2601, 108th Cong. (2003).
58. Berne Convention, *supra* n.25, art. 5(2).
59. 17 U.S.C. § 411 (2000).
60. Panel Report, "United States-Section 110(5) of the U.S. Copyright Act," WT/DS160/R (June 15, 2000).