Compulsory Licenses and United States Industrial and Artistic Property Law*

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Generally speaking, in both the patent and copyright fields, the industrial and artistic property law of the United States is hostile to compulsory licenses, whether by administrative or judicial imposition pursuant to a legal mandate or automatic, i.e., by operation of law.¹ Apart from a section in the United States Code which, in effect, establishes a general automatic compulsory license to use patented inventions for purposes of the federal government,² there exist only very few federal³ statutory provisions pertaining to compulsory licensing; the principal body of the actual United States law is decisional, developed to provide sanctions for violations of the antitrust laws. It even has been questioned whether Congress actually could enact broad and extensive compulsory licensing schemes such as are found in some other legal systems. The Constitution vests the Congress with the power:

To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.⁴

On the occasion of the revision of the Atomic Energy Act in 1954, when compulsory licensing of atomic energy patents was under consideration, Congressman Cole, now the Director General of the International Atomic Energy Agency, made an impassioned plea to the effect that the proposed compulsory licensing clauses were not only un-American but also uncon-

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¹The term compulsory license as used in this paper denotes the privilege of a user to utilize the intellectual property of another, without actual consent of the owner, in a fashion which ordinarily would constitute infringement and be subject to being restrained by court order. Such a privilege might be accorded by law only after proceedings terminating in a decision conferring it, or it might be accorded directly without the need for previous action.


³While in the United States the rights of patent and copyright owners are primarily a matter of federal law, the individual states may control the exercise of these rights to a limited degree under their general police power. Whether this power could ever justify the valid imposition of compulsory licenses is subject to uncertainty. The Supreme Court of the United States refused to pass on this question in the famous ASCAP cases, involving statutes of Florida (now Fla. Stats. §§ 543.01–543.35) and Nebraska (repealed in 1945) regulating combinations for the control of performance rights. Watson v. Buck, 313 U.S. 387 (1941); Marsh v. Buck, 313 U.S. 406 (1941). See DeMarines, State Regulation of Musical Copyright, Copyright Law Symposium Number Six 118 (1955).

⁴U.S. Const. art. I, § 8, cl. 8.
stitutional for the reason that the Constitution permitted only the grant of exclusive rights and the provisions for compulsory licenses made atomic energy patents non-exclusive.\(^5\) While it can well be doubted whether this contention would find favor with the Supreme Court in case the issue ever came before it,\(^6\) it is symptomatic of the American individualistic trends in the protection of the owner of intellectual or industrial property rights, which have made the long history of repeated efforts to induce Congress to minimize this protection one of failure and rejection.\(^7\)

Since patent and copyrights in the United States, as elsewhere, constitute quite different types of franchises, the compulsory licenses to which either of them might be subjected will be discussed separately.

I. PATENTS

General Patent Law

(a) The general patent law of the United States as embodied in the Patent Law Codification of 1952\(^8\) does not include any provisions for compulsory licenses. In sharp contrast to many modern foreign legal systems, United States patent law contains no statutory mandate aimed at enforcing the exploitation of protected inventions. As a result it is recognized that a patentee may elect not to utilize a patented invention himself or to permit others to do so for the duration of the patent, and that ordinarily, at least, he may obtain the aid of the courts for the purpose of preventing infringement, notwithstanding his failure to exploit the invention.\(^9\) There is some authority for the proposition that courts will deny injunctions against infringement where the patentee wishes to suppress totally the exploitation of

\(^5\) 100 Cong. Rec. 11658, 11721 and Appendix 5356 (1954).


\(^7\) See the statement to this effect and the lists, reaching back to 1877, of abortive bills aiming at a reversal of this policy in Hartford-Empire Co. v. United States, 323 U.S. 386, 417, 433 (1945); see also Compulsory Licensing of Patents—A Legislative History, Study of the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary, Study No. 12, 85th Cong., 2d Sess. (1958). It should be mentioned that the recommendations of the famous Temporary National Economic Committee in 1941 included suggestions for broad and general compulsory licensing legislation. Temporary National Economic Committee, *Investigation of Concentration of Economic Power, Final Report and Recommendations*, S. Doc. No. 35, 77th Cong., 1st Sess., 36 (1941).


the invention and such conduct may seriously endanger public health or the general welfare. But Congress has persistently refused positively to prescribe such action. Even the modest recommendations by the National Patent Planning Commission (under the chairmanship of the famous Charles Kettering), which advocated legislative sanction for compulsory licenses whenever a particular use was necessary to the national defense or required by the public health and safety, found the framers of the new code unresponsive. By the same token the patentee may prevent the unlicensed exploitation of a patent held by a third person, if the latter patent is subservient and its use would infringe the dominant patent. American law does not recognize a general right of the owner of the dependent patent to a license from the owner of the dominant patent such as is expressly given in some other English-speaking and continental countries.

(b) The only statutory exception from this rule pertains to the exploitation of a privately owned patent by or for the benefit of the federal government itself. The United States Code provides:

> Whenever an invention described in and covered by a patent of the United States is used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same, the owner's remedy shall be by action against the United States in the Court of Claims for the recovery of his reasonable and entire compensation for such use and manufacture.

> For the purposes of this section, the use or manufacture of an invention described in and covered by a patent of the United States by a contractor, subcontractor, or any person, firm, or corporation for the Government and with the authorization or consent of the Government, shall be construed as use or manufacture for the United States.

10 City of Milwaukee v. Activated Sludge, 69 F.2d 577 (7th Cir. 1934); Vitamin Technologists v. Wisconsin Alumni Research Foundation, 146 F.2d 941, 944 (9th Cir. 1944), cited with approval in the Report of the Attorney General's National Committee to Study the Antitrust Laws, 229, 230 (1955). See also Powell, The Exclusive Right of the Patentee—Should the Right or Power to Exclude Others be Dependent on Sale or Licensing by the Patentee?, 58 Harv. L. Rev. 726 (1945); Stemple, Non-User or Paper Patents, 34 J. Pat. Off. Soc'y 23 (1952); Freedman, Certain Aspects of the Non-Use of Patented Inventions, 2 Patent, Trademark & Copyright J. of Res. & Education 159 (1958). For the principal reasons for non-use see the report by Sanders, Rossman and Harris, The Non-Use of Patented Inventions, 2 id. at 1.


14 For a detailed discussion of the applicable rules see also TeSelle, Authorization or Consent to Infringe Patents in Production for the Government, 26 Geo. Wash. L. Rev. 583 (1958).

This statute, which amounts in effect to a compulsory automatic license on a reasonable royalty basis in favor of the federal government and its contractors who utilize the patented invention pursuant to official authorization, is the result of an interesting development.

Originally a United States patent was held to confer exclusionary rights also against the government itself, and resort to the powers of eminent domain was required if a government department wished to utilize a patented invention without consent by the patentee. However, because of the governmental immunity against actions sounding in tort, a patent owner could not entertain an action for infringement against the United States, but was confined to his relief against the responsible officer. Suit against the United States based on use of a patent was possible, under the Court of Claims Acts and subsequent legislation, only if an implied contract between the parties could be established in the light of the surrounding circumstances.

In 1910 Congress enacted a statute which specifically permitted a patentee to recover reasonable compensation from the United States whenever a patented invention was "used by the United States without license" of the patent owner. The Supreme Court, in construing the import of this act, held that it merely enlarged the protection of the patentee vis-a-vis the Government, but did not operate to confer on the United States and contractors acting under its authority a universal license on all patents issued subsequently thereto and, accordingly, did not shield government contractors from liability for direct infringement. In response to remonstrations by the Acting Secretary of the Navy, Congress in 1918 amended the act of 1910 so as to make the United States liable for the reasonable and entire compensation of a patentee whenever a patented invention was used or manufactured by or for the United States without a license of the patent owner. The Supreme Court passed on this new statute in *Richmond Screw Anchor Co. v. United States* and held that it curtailed the theretofore existing scope

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16 Since the statute confines the relief against the United States to reasonable compensation and excludes injunctive relief or damages exceeding that measure, the Government's position is equivalent to that of a licensee on a reasonable royalty basis.


18 10 Stat. 612 (1855); 12 Stat. 765 (1863) as amended 14 Stat. 9 (1886); 24 Stat. 505 (1887).


20 36 Stat. 851 (1910) (act to provide additional protection for owners of patents of the United States, and for other purposes).


22 40 Stat. 705 (1918).
of the patentee's protection and deprived him of his right to recover damages for acts which but for the statute would have constituted infringement.\footnote{23} In other words, the new legislation in effect created a compulsory license. In 1942 the statute was clarified to provide that the use or manufacture of a patented invention by a contractor, subcontractor, or any person, firm or corporation for the Government and with the authorization or consent of the Government should be construed as use or manufacture for the United States.\footnote{24} Although this entire legislation originated as a war measure, it was of a permanent character and ultimately incorporated in the Judicial Code.\footnote{25}

(c) Perhaps the most important compulsory licenses in the general patent law of the United States do not stem from any specific statutory provision but are entirely due to judge-made law, developed to create effective sanctions for violations of the antitrust laws.\footnote{26} It was settled early in the history of the enforcement of the antitrust legislation that a patent did not confer a carte blanche to flout the prohibitions of the Sherman Act—its sanctions would become operative when the patentee's conduct "transcended what was necessary to protect the use of the patent or the monopoly which the law conferred upon it."\footnote{27} It was also established since those days that the remedy to be administered should be such as would "neutralize the extension and continually operating force which the possession of power unlawfully obtained has brought and will continue to bring about."\footnote{28} In application of these two controlling principles the Supreme Court concluded in the famous case of \textit{Hartford-Empire Co. v. United States}\footnote{29} that an antitrust decree may prescribe the compulsory licensing of existing and future patents where the patentee had employed his patents as a vehicle for the unlawful monopolization of the industry. However, the court in that case qualified the imposition of such licenses in two important respects, namely, by restricting them to patents pertaining to the same technological category as those utilized in the monopolization and by permitting the patentee to re-

\footnote{23} 275 U.S. 331 (1928).
\footnote{28} Standard Oil Co. v. United States, 221 U.S. 1, 78 (1911).
\footnote{29} 323 U.S. 386 (1945), \textit{amplified and clarified}, 324 U.S. 570 (1945).
serve uniform reasonable royalties. The Court subsequently re-affirmed the propriety of the imposition of such compulsory licenses on several occasions and buttressed them by requiring the patentee to furnish the compulsory licensee with necessary technical information.

The contours of this power to impose compulsory licenses as a sanction for violation of the antitrust laws still lack desirable sharpness and have been the subject of controversy. In United States v. United Shoe Machinery Corp. Judge Wyzanski imposed compulsory patent licenses, despite the fact that defendant, although guilty of monopolization, had not engaged in abusive practices respecting patents. The decision was based on the view that such licenses were "required to reduce the monopoly power" defendant had, not as the result of patents, but as the result of business practices. The licenses, however, were on a uniform reasonable royalty basis and were confined to existing patents in the technological field of shoe machinery and shoe accessories. The Supreme Court affirmed this disposition. In the mammoth case of United States v. General Electric Co. the court found that General Electric had "sought to stretch the monopoly acquired by patents"—relating to improvements of lamps, lamp parts and lamp machinery—"far beyond the intendment of those grants." In the decree establishing the form of relief the court ordered dedication to the public of all existing patents on lamps and lamp parts and, in addition, the grant of non-exclusive licenses on a reasonable royalty basis on all lamp machinery patents then owned or acquired within five years from the decree, conceding, however, the right to defendant to insist on reciprocal licensing of patents owned by an applicant for a compulsory license on future patents. After a careful survey of the existing authorities the court concluded that the Supreme Court had not closed the door to compulsory royalty-free licenses or dedication of patents employed for the monopolistic practices.

30 323 U.S. at 417; 324 U.S. at 574.
35 Id. at 351.
36 Id. at 354.
39 The court pointed out that the basic lamp patents of G.E. had expired between 1929 and 1933, 82. F. Supp. at 815.
40 Id. at 905.
42 Id. at 843.
Perhaps the most difficult problems relate to the question as to what practices exceed the orbit of action permitted by the patent grant. In 1941 one of the most astute and observant students of the field wrote: "As yet the line between the patent privilege and the general law is not clearly defined." Unfortunately the situation has not changed, despite an impressive array of intervening adjudications and a vast amount of learning recently bestowed on the subject. While mere patent pooling or accumulation of a patent portfolio for defensive purposes does not seem to fall within the ambit of conduct proscribed by the Sherman and Clayton Acts, additional steps such as restrictive licensing practices, apparently including refusal to grant other than block licenses, seem to lead into the forbidden territory.

(d) In addition, it is possible to see compulsory licenses in certain other limited situations where under United States patent law one person has the right to utilize, without being guilty of infringement, an invention which is covered by a patent held by another. In this category, for example, belong the "shop rights" which an employer may possess in inventions of an employee, made with the employer's facilities during employment hours, where the employee was not hired to make such inventions, or the right to continue an innocent use initiated prior to the reissue of a patent or in analogous cases.

Atomic Energy Patents and Other Special Cases

(a) The most elaborate set of statutory provisions regulating the imposition of compulsory licenses under United States law is contained in the Atomic Energy Act of 1954, sections 153 and 157. The purpose of these

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43 HAMPTON, PATENTS AND FREE ENTERPRISE 147 (TNEC Monograph No. 31, 1941).
47 American Securit Co. v. Shatterproof Glass Corp., 154 F. Supp. 890 (D. Del. 1957), distinguishing Automatic Radio Co. v. Hazeltine, 339 U.S. 827 (1950), on the ground that there such refusal was not properly pleaded. See also the connected case of American Securit Company v. Hamilton Glass Co., 254 F.2d 889 (7th Cir. 1958), where the court reversed a decree of the lower court based on misuse through insistence on block licensing because of lack of proof of a request for separate licenses.
50 For the history and operation of the patent sections in the U. S. Atomic Energy Acts of
compulsory licensing provisions was to forestall the acquisition of a monop-
olic position in the atomic energy industry by a few large contractors who
had worked under government contracts during the pre-1954 period when
atomic energy development was a tight government monopoly. Their adop-
tion, though recommended by President Eisenhower, was the subject of a
prolonged and almost ludicrous struggle in Congress, but finally won the
endorsement of the requisite majority of both Houses.51

The act provides for two types of procedures to impose compulsory
licenses; one requires initiation by the Atomic Energy Commission with
a declaration that the patents in question are affected with the public in-
terest,52 while the other is open directly to any applicant for or holder of a
license, permit, lease or authorization under the act.53 The patents subject
to such licenses are only those covering an invention or discovery of "pri-
mary" importance in the production or utilization of special nuclear ma-
terial54 or atomic energy.55 In addition, compulsory licenses are accorded
solely if such licensing is of primary importance both to the furtherance or
effectuation of the policies and purposes of the act and to the conduct of
activities of the applicant.56 The patent owner is entitled to reasonable
royalty fees as determined by a special Patent Compensation Board.57

So far no actual use has been made of these provisions. The Atomic
Energy Commission considers the statutory authorization merely as a
"reserve power"58 and it is doubtful whether members of the industry will
ever be inclined to resort to these proceedings.

At any rate only patents for which applications are filed prior to Septem-
ber 1, 1959, are subject to such licensing.59

(b) For the sake of completeness it may be mentioned that the Ten-

1946 and 1954, see Riesenfeld, Patent Protection and Atomic Energy Legislation, 46 CALIF. L.
51 For a detailed account of the legislative history see id. at 45–50.
52 68 Stat. 945 (1954), 42 U.S.C. § 2183(a) and (b) (1954).
54 Special nuclear material denotes plutonium, uranium enriched in the isotopes 233 or 235
and any other material declared to be special nuclear material by the Atomic Energy Commiss-
58 Hearings on Development, Growth and State of the Atomic Energy Industry, Before the
Joint Committee on Atomic Energy, 84th Cong., 1st Sess. 194 (1955). During the 1958 hearings
before the Joint Committee on Atomic Energy under § 202 of the Atomic Energy Act of 1954,
the Atomic Energy Commission reiterated this position and pointed out that exercise of this
power was not needed for the Commission's own utilization of privately owned patents in view
the Atomic Energy Industry, Before the Joint Committee on Atomic Energy, 85th Cong., 2d
nessee Valley Authority Act also may be thought of as imposing special automatic compulsory licenses on patents pertaining to certain technologies. Section 19 of the act empowers the Tennessee Valley Authority to utilize patented inventions covering processes for the production of fixed nitrogen or any essential ingredient of fertilizer, or any method of improving and cheapening the production of hydroelectric power, confining the rights of the patentee to reasonable compensation.

II. COPYRIGHTS

The copyright law of the United States, like that of some other countries, subjects the mechanical reproduction rights in a musical composition to compulsory licensing on a statutory royalty basis when the copyright owner either has himself used the copyrighted work in a mechanical reproduction or has consented to such use by someone else, if certain other conditions are met. The enactment of the pertinent section in the Copyright Act of 1909 constituted the fruition of a long series of bills in Congress and represented a compromise between conflicting policies.

Prior to the Copyright Act of 1909 American law, in harmony with numerous foreign laws, did not consider mechanical reproduction of a copyrighted musical work as infringement. The Supreme Court had held in *White-Smith Music Co. v. Apollo Co.* that the manufacture of perforated rolls of music usable in mechanical pianos was not an infringement.

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62 Compulsory licensing provisions similar to those of the United States exist, e.g. in the United Kingdom, Copyright Act, 1956, 4 and 5 Eliz. II c. 74 sec. 8; see Rubinstein, *The British Copyright Act 1956*, 18 REVUE INTERNATIONALE DU DROIT D'AUTEUR 5, 25 (1958); in Germany, Lit. Urb. G. § 22, see ULMEN, UHRHEBER UND VERLAGSRECHT 183 (1951); Tournier, *L'artiste-adaptateur selon le droit allemand*, 18 REVUE INTERNATIONALE DU DROIT D'AUTEUR 155, 161 (1958); and in India, Copyright Act, 1957, § 52; see Desbois, *La loi indienne du 4 juin 1957*, 71 LE DROIT D'AUTEUR 126, 141 (1958). See also the comparative survey in Henn, *The Compulsory License Provisions of the United States Copyright Law, General Revision of the Copyright Law* 45-54 (U. S. Copyright Office, Study No. 1, 1957).
64 See Id. at 2–15.
65 For an excellent step-by-step discussion of the vacillating development of the German law relative to mechanical reproduction of musical works by means of exchangeable parts see the decision of the Supreme Court in Genossenschaft Deutscher Tonsetzer w. Anstalt fuer mecha.-musikal. Rechte, 134 RGZ 198 (1931).
66 Musical works have been open to copyright protection in the United States since the Copyright Act of 1831, 4 Stat. 436.
67 209 U.S. 1 (1908).
of musical compositions published in the form of sheet music. In keeping with the contemporary international efforts of composers and music publishers to obtain extension of the copyright protection of musical compositions to mechanical reproductions, revision of the American law in this respect was demanded. While the claims of composers for increased copyrights found a friendly ear in Congress, that body was impressed with the fear voiced by the members of the reproduction industry that recognition of such rights would result in the monopoly of one particular company. The compulsory licensing scheme was adopted to dissipate these apprehensions.

Section 1(e) provides, inter alia:

And as a condition of extending the copyright control to such mechanical reproductions, that whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work, any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty of 2 cents on each such part manufactured, to be paid by the manufacturer thereof. . . .

In addition, if the copyright owner makes a mechanical reproduction of his composition or licenses others to do so, the section requires him to file notice thereof in the copyright office. In case of non-compliance he is deprived of his right to sue for infringement of such copyright. Conversely, the reproducer, desiring to rely on the compulsory licensing provisions, must notify the copyright proprietor by registered mail of his intention and supply the copyright office with a duplicate of the notice.

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68 The court left the question open whether such manufacture would constitute contributory infringement of the performing rights. Id. at 16.

69 For the history of these endeavors culminating in the Berlin revision of 1908 of the Berne Convention for the Protection of Literary and Artistic Works see I Ladas, THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY 410-438 (1938).

70 The statute, as passed, differentiated between domestic and foreign composers. The latter are entitled to mechanical reproduction rights only if their own country accords similar rights, as determined by a presidential proclamation to that effect. Todamerica Musica v. Radio Corporation of America, 171 F.2d 369 (2d Cir. 1948). For a list of the proclamations relating to mechanical reproduction rights in musical works of nationals of foreign countries see table following 17 U.S.C. § 9 (1955). Under the regime of the Universal Copyright Convention of 1952 and the act of August 31, 1954, 68 Stat. 1030, which was passed to bring the copyright law into line with the principles established by the convention, composers who either are citizens or subjects of a state which has ratified or acceded to the convention or whose work was first published in such state are entitled to mechanical reproduction rights without special proclamation. 17 U.S.C. § 9(c) (1958 Supp.). See Cary, The United States and Universal Copyright: An Analysis of Public Law 743, UNIVERSAL COPYRIGHT CONVENTION ANALYZED 83, 88 (Kupferman & Foner ed. 1955). At present thirty nations have ratified or acceded to the Convention. Copyright Office Release 37, Annex A (1959).


72 17 U.S.C. § 1(e) (1952). (Emphasis added.)

It is patent that a compulsory license attaches solely if and when there has been a reproduction of the musical composition by means of mechanical parts, by or with the consent of the copyright owner. Until then his reproduction rights are absolute. But beyond this clear rule, there lies a zone of conflicting opinion and speculation. There is controversy as to whether the compulsory licensing provisions apply to reproduction techniques not known in 1909, especially sound tracks for films. There is likewise doubt as to what is to be deemed "similar use." If the owner of a copyright for a musical composition has authorized merely the mechanical reproduction of both melody and lyrics? Does reproduction by means of one contrivance entail a compulsory license to reproduce by means


75 In Jerome v. Twentieth Century-Fox Film Corp., 67 F. Supp. 736 (S.D.N.Y. 1946), aff'd per curiam, 165 F.2d 784 (2d Cir. 1948), Judge Leibell announced, by way of dictum, that the compulsory license proviso of § 1(e) did not apply to the use of a composition upon sound tracks for the two reasons that this reproduction technique was not known in 1909 and that a contrary conclusion would result in an unreasonably low royalty (2 cents for each print). This view has been criticized extensively by Dubin, Copyright Aspects of Sound Recordings, 26 So. Cal. L. Rev. 139 (1953), although without special attention to the economic argument. Judge Leibell, however, failed to consider that the reproduction right under the compulsory license does not carry with it the right to public performance for profit, see text at note 78 infra. At any rate, the mere fact that certain modern reproduction techniques were not envisaged in 1909 does not necessarily preclude the conclusion that the copyright of the composer under § 1(e) extends thereto, even if it were true that employment thereof by, or with the permission of, the copyright owner does not entail a compulsory license for others. Foreign & Domestic Music Corp. v. Licht, 196 F.2d 627 (2d Cir. 1952). For similar views on the possible differentiation between the scope of the reproduction rights under § 1(e), first clause, and the domain of the compulsory license proviso, see also Kupferman, Rights in New Media, 19 Law & Contemp. Prob. 172, 173–74 (1954); Henn, The Compulsory License Provisions of the United States Copyright Law, General Revision of the Copyright Law xi n. 59 (U. S. Copyright Office, Study No. 1, 1957).

76 In Standard Music Roll Co. v. Mills, Inc., 241 Fed. 360, 363 (3d Cir. 1917) the court stated: "Just how the reproduction is to be made, and whether it is confined to the music or shall extend to the words also, is in the first instance left for the owner to determine. But after he has determined it, and has granted a license to one person, he thereby opens the field to all others to do the same, or a similar, thing." But actually the court was confronted with the question whether the compulsory license for mechanical reproduction covered separate printing of the words and, correctly, held that it did not. Cf. Stasny Music Corp. v. Santly-Joy, Inc., 156 F. Supp. 795 (S.D.N.Y. 1957). Conversely it has been held that a notice of intent to rely on a compulsory license with respect to violin renditions covers voice renditions. Ricordi & Co. v. Columbia Graphophone Co., 263 Fed. 354 (2d Cir. 1920).
of any other? Does mechanical reproduction of a composition open the door to mechanical reproduction of "adaptations"?\footnote{77}{Cf. Edward B. Marks Music Corp. v. Foullon, 171 F.2d 905 (2d Cir. 1949) (leaving the question unanswered).}

The compulsory license accorded by section 1(e) upon payment of the statutory royalty covers the making of the reproduction and its use but does not include public performing rights. Accordingly, it has been held that failure of the copyright owner to file the statutory notice relative to his mechanical reproduction bars him merely from asserting infringement of his reproduction rights but not from claiming damages for infringement of his performing rights even if perpetrated by means of a mechanical reproduction.\footnote{78}{Irving Berlin, Inc. v. Daiqle, 31 F.2d 832 (5th Cir. 1929). \textit{Accord}, Associated Music Publishers v. Debs Mem. Radio Fund, 46 F. Supp. 829 (S.D.N.Y. 1942); Lutz v. Buck, 40 F.2d 501 (5th Cir. 1930). See also in this connection the recent case of Harms, Inc. v. Samson House Enterprises, Inc., 162 F. Supp. 129 (E.D. Pa. 1958) (involving copyright infringement through the playing of "transcribed" music and piping it into restaurants and taverns).}

The compulsory license scheme is implemented by a puzzling system of sanctions in case the manufacturer of the reproduction fails to comply with his statutory duties.\footnote{79}{Of course, parties may substitute consensual licenses for the compulsory license of \S\ 1(e) or vary some of the statutory terms thereof. Edward B. Marks Music Corp. v. Foullon, 171 F.2d 905 (2d Cir. 1949); Joy Music, Inc. v. Secco, 166 F. Supp. 549 (S.D.N.Y. 1958).}

The compulsory license provisions apply only to reproduction rights in musical compositions copyrighted for the first time after July 1, 1909.\footnote{80}{248 F.2d 260 (2d Cir. 1957), noted, 46 CALIF. L. REV. 621 (1958).}

They affect nationals of foreign states who are entitled to mechanical reproduction rights either by virtue of reciprocity or because of the national treatment principle established by the Universal Copyright Convention.\footnote{81}{See note 70 supra. \textit{Accord}, Heun, The Compulsory License Provisions of the United States Copyright Law, General Revision of the Copyright Law in n. 55 (U.S. Copyright Office, Study No. 1, 1957).}

The applicable rules were the subject of the recent case of \textit{Shapiro, Bernstein & Co. v. Goody},\footnote{82}{Post-1909 renewals of pre-1909 copyrights in musical compositions do not carry with them mechanical reproduction rights, despite the rule that renewals in general are deemed to constitute a new grant. Edward B. Marks Music Corp. v. Continental Record Co., 222 F.2d 488 (2d Cir. 1955); see also Jerome v. Twentieth Century-Fox Fihn Corp., 67 F. Supp. 736, 741 (S.D.N.Y. 1946).}

which apparently attracted international attention.\footnote{83}{248 F.2d 260 (2d Cir. 1957), noted, 46 CALIF. L. REV. 621 (1958).}
They do not cover the reproduction rights in dramatic or non-dramatic literary works.\(^8\)

Needless to say, the constitutionality, the fairness and the effectiveness of the existing compulsory licensing scheme are much debated issues.\(^8\) The attacks center on the purported inequity of singling out the reproduction rights in musical compositions among other reproduction rights, on the apparent arbitrariness of a flat per part royalty rate without regard to quality or technological character, on the alleged failure to reduce monopolistic trends and on the supposed lack of constitutional authority for other than absolutely exclusive rights.\(^8\)

Whether in a forthcoming revision of the United States copyright law the system of compulsory licenses will be expanded, retained in their present scope, or abolished is difficult to presage. At any rate the United States has not enacted provisions for the compulsory licensing of translation rights in writings such as are authorized by the Universal Copyright Convention of 1952.\(^8\)

### CONCLUSION

Compulsory licenses for the benefit of private competitors are not favored by the traditions of American statute law, except as sanctions for actual violations of the antitrust laws. Dr. Vannevar Bush, a scientific leader, recently has suggested the introduction of statutory compulsory licensing of patents in a limited number of particularly aggravated cases, such as oppressive patent pools and the suppression of patents for improved products or processes by a dominant manufacturer.\(^8\) Whether Congress will ever reverse its negative position is doubtful, to say the least. The main hope for relief against abuses of the patent or copyright systems rests, as usual, with the courts.

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\(^8\) 17 U.S.C. § 1(c) and (d) (1952).


\(^8\) Universal Copyright Convention, Sept. 6, 1952 art. V. (2) 6 U.S.T. & O.I.A. 2738–39. For a discussion of this article see Finkelstein, *Right of Translation: Article V of the Universal Copyright Convention*, Universal Copyright Convention Analyzed 51, 55 (Kupferman & Foner ed. 1955). It may be mentioned that Argentina recently passed a decree enacting compulsory license provisions with respect to copyrightend writing not in Spanish in accord with the authorization of Art. V, 71 Le Droit D'Auteure 73 (1958).