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Paper Information

Title:	Reconceptualizing Compulsory Copyright Licensing
Abstract:	<p>United States copyright law generally assumes that by providing property entitlements in creative works, the free market will create balance between two competing priorities: incentivizing authors to produce new content and providing the public with access to creative works. Nonetheless, lengthy provisions of the Copyright Act outline compulsory licensing schemes that require music copyright owners to license their works to all comers at government-mandated prices. Consistent with broader scholarship on property rules and liability rules, scholars have tended to treat compulsory copyright licensing as a way of addressing the transaction costs that can prevent any market from operating efficiently. This Article questions that account, arguing that compulsory licensing plays an important and underexplored role in furthering copyright-specific policy objectives. A close analysis of the compulsory music licensing regulatory regime and its history shows that its original role was to recalibrate the balance between authors' financial incentives and public access to creative works. Unlike liability rules designed to address transaction costs, where regulators generally try to mimic market rates using market proxies, music rate setting has traditionally used a policy-oriented set of criteria explicitly designed to identify royalty rates most conducive to ensuring this balance is achieved. In more concrete terms, compulsory license rate-setting bodies have often chosen rates designed to ensure that access-fomenting technologies—from the player piano to digital radio—could flourish, while also ensuring that copyright owners' financial incentives were not compromised. In this respect, the compulsory music licensing regime has more in common with copyright-specific limitations like the fair use doctrine than it does with the liability rules frequently used in more conventional markets. In recent years, however, this access-fomenting role has begun to conflict with an approach that sees compulsory licensing as only justified in the face of transaction costs-based market failures and, accordingly, sees market mimicking as the best way to price a compulsory license. This tension can be seen in both legislative changes to the Copyright Act attempting to address new digital technologies of dissemination and in recent rate-setting decisions by the Copyright Royalty Board ("CRB"), the entity that administers the Copyright Act's compulsory music licenses. The recently passed Music Modernization Act ("MMA") brought this tension to a head by replacing the regime's policy-driven rate-setting criteria with a market-mimicking "willing buyer and willing seller" standard. The trend away from policy-driven rate-setting is problematic. Compulsory licensing still has an important role to play in ensuring an ideal balance between authors' incentives and public access, especially with respect to the burgeoning streaming industry. The history of compulsory music licensing, recent trends in fair use case law, and evidence that music copyright owners are able to extract unreasonably high licensing fees in open markets, all suggest that the relationship between streaming services and copyright owners should be regulated through a policy-driven compulsory licensing regime. The MMA complicates regulators' ability to address these issues within the existing compulsory music licensing landscape, but the malleability of the new rate-setting standard may provide ways for the CRB to further an access-fomenting approach in future rate-setting proceedings.</p>