

Compulsory License for Making and Distributing Phonorecords

The Compulsory Licensing Provisions

Section 115 of the Copyright Act provides a compulsory license to make and distribute phonorecords once a phonorecord of a work has been distributed to the public in the United States under authority of the copyright owner, subject to certain terms and conditions of use. Such a license includes the right of the compulsory licensee to distribute or authorize the distribution of a phonorecord of a nondramatic musical work by means of a digital transmission, which constitutes a digital phonorecord delivery. The Copyright Office's regulations set out in detail the procedures that must be followed when seeking a compulsory license. See www.copyright.gov/title37/201/37cfr201-18.html and www.copyright.gov/title37/201/37cfr201-19.html.

History

Almost a century ago, Congress added to the Copyright Act the right for copyright owners to make and distribute, or authorize others to make and distribute, mechanical reproductions (known today as phonorecords) of their musical compositions. Because Congress was concerned about the potential for monopolistic behavior, it also created a statutory license, section 115 of the law, to allow anyone to make and distribute a mechanical reproduction of a musical composition without the consent of the copyright owner provided that the person adhered to the provisions of the license, most notably paying a statutorily established royalty to the copyright owner. Although originally enacted to address the reproduction of musical compositions on perforated player piano rolls, the statutory license has for most of the past century been used primarily for the making and distribution of phonorecords and, more recently, for the digital delivery of music online.

In 1995 Congress recognized that digital transmission of sound recordings was likely to become an important outlet for the performance of recorded music. Moreover, it realized that new technologies may lead to new systems for the electronic distribution of phonorecords with the authorization of the affected copyright owners. For these reasons, Congress made changes to section 115 to meet the challenges of providing music by means of a digital transmission when it enacted the Digital Performance Right in Sound Recordings Act of 1995, which also granted copyright owners of sound recordings an exclusive right to

perform their works publicly by means of a digital audio transmission subject to certain limitations. Specifically, Congress wanted to reaffirm the mechanical rights of songwriters and music publishers in the new world of digital technology.

What Is a Phonorecord?

The statute defines phonorecords as “material objects in which sounds, *other than those accompanying a motion picture or other audiovisual work*, are fixed.” (See www.copyright.gov/title17/92chap1.html#101.) Since the compulsory license applies only to the making and distributing of phonorecords, and soundtracks are not phonorecords, the compulsory license is not available to one wishing to record a soundtrack. The term *digital phonorecord delivery*, or DPD, is defined, in part, as each individual delivery of a phonorecord by digital transmission of a sound recording that results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording.

Does the Intended User Have to Use a Compulsory License?

No. The person wishing to make and distribute phonorecords of a nondramatic musical work can negotiate directly with the copyright owner or his or her agent. But if the copyright owner is unwilling to negotiate, or if the copyright owner cannot be contacted, the person intending to record the work can use the compulsory licensing provisions of the copyright law.

When Can a Compulsory License Be Obtained?

A compulsory license is available to anyone as soon as “phonorecords of a nondramatic musical work have been distributed to the public in the *United States and its territories* under the authority of the copyright owner.”

NOTE: For the purpose of computing royalties, a phonorecord is considered “voluntarily distributed” if the compulsory licensee has voluntarily and permanently parted with possession of the phonorecord. A digital phonorecord delivery will be treated as having been voluntarily distributed and relinquished from possession, and a compulsory licensee will be treated as having permanently parted with possession of a digital phonorecord delivery, on the date the phonorecord is digitally transmitted.

Does the Compulsory License also Cover the Making and Reproduction of a Sound Recording?

No. Section 115 does not cover sound recordings. Rather, it covers the reproduction and distribution of musical compositions. It is important to note that there are two separate components of a musical work: the composition and the sound recording. A musical composition consists of music, including any accompanying words. The author of a musical composition is generally the composer and the lyricist, if there are lyrics. A musical composition can be in the form of a notated copy (for example, sheet music); a phonorecord (for example, cassette tape, LP, or CD); or a DPD. A sound recording, on the other hand, results from the fixation of a series of musical, spoken, or other sounds. The author of a sound recording is the performer(s) whose performance is fixed, the record producer who processes the sounds and fixes them in the final recording, or both. Copyright in a sound recording is not the same as, or a substitute for, copyright in the underlying musical composition. A separate license must be obtained from the copyright owner of the sound recording before a musical work can be used.

Under What Conditions Can a Compulsory License Be Obtained?

A compulsory license can be obtained only if the primary purpose in making the phonorecords is to *distribute them to the public for private use*. It is not available for phonorecords intended for use in background music systems, jukeboxes, broadcasting, or any other public use.

Can a New Arrangement of the Copyrighted Musical Work Be Made for the Recording?

Yes. The compulsory license includes the privilege of making a musical arrangement of the work “to the extent necessary to conform it to the style or manner of interpretation of the performance involved.” However, section 115 also provides that the arrangement “shall not change the basic melody or fundamental character of the work, and shall not be subject to protection as a derivative work . . . except with the express consent of the copyright owner.”

How Does One Obtain a Compulsory License?

The first step is to identify the copyright owner of the non-dramatic musical work to be recorded. This may be done either by personally searching the records of the Copyright Office or by requesting that the Copyright Office conduct the search. Alternatively, if the copyright owner or authorized agent of the owner is known, see below. (For further information about searching Copyright Office files, see Circular 22, *How to Investigate the Copyright Status of a Work*, and Circular 75, *The Licensing Division of the Copyright Office*.)

NOTE: The circulars referenced in this document are available on the Office's website at www.copyright.gov. You can also request circulars 24 hours a day from the Forms and Publications Hotline at (202) 707-9100. Leave a recorded message.

If the Name and Address of the Copyright Owner Are Known

- 1 Before or within 30 days of making, and before distributing, any phonorecords of the work, serve a Notice of Intention to Obtain a Compulsory License on the copyright owner or authorized agent of the owner by certified or registered mail. An updated copyright owner's address other than the address listed in the Copyright Office records can be used. There is no need to file a copy of the notice in the Copyright Office.

NOTE: A Notice of Intention can designate any number of nondramatic musical works, provided that the copyright owner of each designated work is the same or, in the case of any work having more than one copyright owner, any one of the copyright owners is the same and provided that certain other information required in the notice does not vary. (See section 201.18 of title 37 of the *Code of Federal Regulations* at www.copyright.gov/title37/201/37cfr201-18.html for more information and regulations.)

- 2 Make royalty payments, accompanied by a monthly statement of account, to the copyright owner or authorized agent of the owner on or before the 20th day of each month for every phonorecord made and distributed in accordance with the license.
- 3 File with the copyright owner or authorized agent of the owner a detailed annual statement of account, certified by a certified public accountant.

If the Owner Is No Longer at the Address or Refuses to Accept Delivery

If the Notice of Intention to Obtain a Compulsory License is sent by mail or reputable courier service to the last address for the copyright owner shown by the records of the Copyright Office, or to an updated address otherwise identified, and the notice is returned to the sender because the copyright owner is no longer located at the address or has refused to accept delivery, file the original notice as sent in the Licensing Division of the Copyright Office (see address at the end of this circular). Include a brief statement specifying that the notice was sent to the last address identified for the copyright owner but was returned; appropriate evidence that it was mailed to that address may be submitted. No filing fee is required for notices filed under these circumstances. (See section 201.18 of title 37 of the *Code of Federal Regulations* at www.copyright.gov/title37/201/37cfr201-18.html for more information and regulations.)

An acknowledgment of receipt and filing will be provided to the sender.

If the Name and Address of the Copyright Owner Are Not Known

- 1 File a Notice of Intention to Obtain a Compulsory License in the Licensing Division of the Copyright Office (see the address at the end of this circular).
- 2 Submit the statutory filing fee for each title listed in the notice in a single payment. (See Circular SL 4L, *Copyright Office Licensing Division Service Fees*.) An acknowledgment of receipt and filing will be provided to the sender. However, if certification of a document is required, see Circular 6, *Obtaining Access to and Copies of Copyright Office Records and Deposits*, for information and associated fees.
- 3 Make checks payable to *Register of Copyrights* or authorize deduction from a deposit account for the filing fee. (See Circular 5, *How to Open and Maintain a Copyright Office Deposit Account*.)

IMPORTANT: The name and address of the copyright owner may be known or appear in the records of the Copyright Office at a later time. Since royalty payments must be made after the copyright owner is identified, the licensee should periodically search these records to ascertain if the copyright owner has been identified. *If* and *after* the copyright owner is identified, the licensee should make royalty payments for phonorecords made and distributed directly to the copyright owner or

authorized agent of the owner. Do not send royalty payments to the Copyright Office.

The Copyright Office does not provide forms for the Notice of Intention to Obtain a Compulsory License, the monthly statement of account, or the annual statement of account. For detailed instructions concerning the form and content of the Notice of Intention and statements of accounts, see sections 201.18 and 201.19 of title 37 of the *Code of Federal Regulations* at www.copyright.gov/title37/201/37cfr201-18.html and www.copyright.gov/title37/201/37cfr201-19.html, or contact the Licensing Division of the Copyright Office:

*Library of Congress
Copyright Office
Licensing Division
101 Independence Avenue SE
Washington, DC 20557-6400*

TEL: (202) 707-8150
FAX: (202) 707-0905
EMAIL: licensing@loc.gov
WEB: www.copyright.gov/licensing

What Are the Current Royalty Rates for Using the Compulsory License?

For current copyright royalty rates under the compulsory license for making and distributing phonorecords, see *Mechanical Copyright Royalty Rates* at www.copyright.gov/carp/m200a.html or contact the Licensing Division of the Copyright Office.

Copyright Royalty Board

The Copyright Royalty Board (CRB), created under the Copyright Royalty and Distribution Reform Act of 2004, is involved in the compulsory license for making and distributing phonorecords. Made up of three copyright royalty judges, the CRB determines the royalty fee that users must pay under a compulsory license. The judges, who are full-time employees of the Library of Congress, are appointed for six years with the opportunity for reappointment. However, the first three judges, appointed in 2006, are serving staggered terms of two, four, and six years, to establish a cycle that avoids having to replace all three judges at the same time. For information about rate setting and royalty distribution proceedings, write to the CRB at P.O. Box 70977, Washington, DC 20024-0977; call (202) 707-7658; or visit www.loc.gov/crb.