

# *Reconceptualizing Compulsory Copyright Licenses*

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U.S. copyright law generally assumes that by providing property entitlements in creative works, the free market will create balance between two competing priorities: incentivizing creators to produce works and providing the public with access to this content. But the Copyright Act also outlines several detailed compulsory licensing schemes requiring the owners of certain copyright interests, in particular those related to music, to license their works to anyone at government-set prices. Scholars tend to treat compulsory copyright licenses as liability rules used to address market failures caused by transaction costs. This Article questions that account, arguing that compulsory licensing also plays an important and underexplored role in furthering copyright's specific cultural and social policy objectives. A close analysis of the music regulatory regime and its history shows that its primary function has been to recalibrate the balance between creators' financial incentives and public access to expressive works. Unlike liability rules designed only to address transaction costs, where regulators generally try to mimic market rates using market proxies, music rate setting traditionally used policy-oriented criteria. In practice, rate-setting bodies often chose rates designed to ensure that access-expanding dissemination technologies—from the player piano to digital radio—could flourish, while still ensuring that copyright owners' financial incentives were protected.

In recent years, however, Congress and regulators have begun to lose sight of this access-encouraging role. A series of legislative changes, including the recent Music Modernization Act (“MMA”), have made the compulsory music licensing regime increasingly inconsistent and ill-equipped to handle new forms of music dissemination. Policymakers now seem to view compulsory licensing as only justified in the face of transaction costs-based market failures and, accordingly, have begun privileging market mimicking over copyright policy goals when choosing royalty rates.

The Article argues that this shift is problematic. Compulsory licensing still has an important role to play in ensuring balance between creators' incentives and public access, especially as new technologies of dissemination, like streaming, become more ubiquitous. The Article also suggests some ways that this balance could still be achieved by regulators under the new rate-setting standards recently put in place by the MMA.