

meiea[®]

MUSIC & ENTERTAINMENT INDUSTRY
EDUCATORS ASSOCIATION

Journal of the
Music & Entertainment Industry
Educators Association

Volume 11, Number 1
(2011)

Bruce Ronkin, Editor
Northeastern University

Published with Support
from



MIKE CURB COLLEGE of
ENTERTAINMENT and MUSIC BUSINESS

BELMONT
UNIVERSITY

The Origins of Mechanical Licensing of Musical Compositions

Serona Elton
University of Miami

This research was funded in part by a research grant from the Music & Entertainment Industry Educators Association.

Introduction

For well over one hundred years, we have enjoyed listening to music by the use of a mechanical device, beginning with music boxes and progressing through piano rolls, wax cylinders, shellac, vinyl, 8-track tape, cassette tape, compact discs and now, digital files. The use of these devices, and the reproduction of the musical compositions embodied within them, has been of paramount significance to the owners of music copyrights and the companies manufacturing the devices. Copyright law today generally requires the manufacturer of one of these devices to obtain authorization from the owner of the copyright in the musical composition embodied within in order to not commit copyright infringement. This type of authorization, referred to as a *mechanical license*, continues to be the subject of a great deal of attention. As recently as 2008, the Copyright Royalty Board in the United States heard over twenty-eight days of testimony, which filled over 8,000 pages of transcripts, on the subject of a proposed revision to the mechanical licensing law of the United States.¹ The origins of the rights of copyright owners of musical compositions to exercise control over the mechanical reproduction of their works is a topic that few working in the music industry today know much about in detail. Most music industry practitioners in the United States incorrectly assume that it simply began with an important 1908 Supreme Court decision. This paper will discuss the origins of the mechanical license, which entails an interesting hopscotch of legal developments in a number of countries.

Copyright Protection of Musical Compositions

In the United States, musical compositions have been recognized as a type of original work of authorship entitled to protection under federal

copyright law since February 3, 1831.² The 1831 law granted copyright owners the “sole right and liberty of printing, reprinting, publishing, and vending” with respect to their musical compositions.³ In the United Kingdom, protection of musical compositions was added to the copyright law in 1842, when the law was amended to expand the definition of a “book” to include a “sheet of music.”⁴ These changes to copyright law in the United States and the United Kingdom, as well as in other countries, enabled the music publishing industry to flourish by preventing the unauthorized printing of sheet music. It is worth noting that, despite the general term “copyright”, the laws at this time were written narrowly to prohibit specific types of unauthorized copying, as opposed to modern-day laws which broadly prohibit any type of unauthorized copying.

Developments in the Technical Reproduction of Music

During the nineteenth century, certain key inventions came into being which changed how music was enjoyed by listeners and gave rise to certain types of music licenses which continue to serve as the keystones of the music-related revenue streams today. The first was the music box, which is described as a “musical instrument in which tuned steel prongs (*lamellae*) are made to vibrate by contact with moving parts driven by a clockwork mechanism.”⁵ Music boxes were well established by 1825, and the vast majority was manufactured in Switzerland.⁶ Soon to follow the music box was the invention of the player piano (also called a *pianola*) and accompanying piano roll, around 1880.⁷ Simply put, a player piano *plays* music by utilizing an internal mechanism which translates perforated holes on a piano roll, representing musical notes to be performed, into corresponding piano keystrokes. Prior to these developments, the only way to reproduce a musical composition was as musical staff notation on paper.⁸ Around the same time, the prototype for another invention, the phonograph, as it was referred to in America, or the gramophone, as it was referred to in England, was being demonstrated by several leading inventors.⁹ This invention was capable of recording actual sounds by engraving sound waves captured during a live recitation or performance onto a medium (initially tinfoil sheet cylinders, then wax cylinders, then shellac, and much later, vinyl) which could then be read and played back to the listener by use of a needle.¹⁰ These inventions raised questions regarding copyright protection of the musical compositions which they embodied. The fundamental question was whether or not the manufacturer of such devices needed to obtain

permission in order to reproduce a musical composition in these ways.

Early Developments in European Law

Across Europe, individual countries debated whether or not the manufacture of these devices without authorization from the copyright owner of the musical composition they embodied constituted copyright infringement.

As early as 1866, a law had been passed in France, as a “condition of securing a commercial treaty with Switzerland” which found mechanical reproduction not to be infringements.¹¹ This position regarding mechanical reproductions was seen as very favorable for the music box manufacturers in Switzerland.

About a decade later, in 1878, an international group comprised of authors, and presided over by Victor Hugo, convened and adopted five resolutions which became the foundation for what would come to be called the Berne Convention.¹² In 1883, that group, called the “International Association,” called a meeting in Berne, Switzerland, of all parties interested in forming a Union for the protection of literary works. A treaty was drafted at the meeting in 1883, and was further revised at meetings held in 1884 and 1885. In 1886, the first version of the Berne Convention for the Protection of Literary and Artistic Works was signed by ten countries: Belgium, France, Germany, Great Britain, Haiti, Italy, Liberia, Spain, Switzerland, and Tunisia.¹³ The 1886 Berne Convention included language regarding the mechanical reproduction of musical compositions. The language, which was influenced by the earlier French law of 1866, stated that, “It is understood that the manufacture and sale of instruments for the mechanical reproduction of musical airs in which copyright subsists, shall not be considered as constituting an infringement of musical copyright.”¹⁴ Ten years later, at the 1896 Paris conference on revisions to the Berne Convention, there were strong, yet unsuccessful, efforts made by some of the participants to remove the language.¹⁵ The French delegation did however clarify that the exception was meant to apply only to devices which could play a limited number of songs, such as music boxes, rather than to devices which were capable of playing an infinite number of tunes, such as player pianos and piano rolls.¹⁶ Soon thereafter, a number of different statutory amendments and court opinions throughout Europe began addressing the subject.

In Austria, an 1895 law had been passed which said, “The manufac-

ture and public use of instruments for mechanical reproduction of music records shall be no infringement of copyrighted music.”¹⁷

In Germany, under the Copyright Act for the German Empire, enacted in 1870, the high court ruled in 1900 that use of a musical composition in a music box was an infringement if it was not authorized by the copyright owner.¹⁸ This decision was quickly overruled by legislation adopted in 1901, indicating that “the sale of disks, plates, cylinders, strips, and other parts of instruments which serve mechanically to reproduce musical compositions is permitted, except when the rendition in respect to dynamic power, duration of tone, and tempo is in a manner similar to a personal performance.”¹⁹ This legislation was enacted in order to adopt the Berne Convention language of 1886, despite the protests of musical authors and publishers.²⁰ A compromise was reached, however, such that authors were given the exclusive right to control reproductions of their personal performance. The law, which became known as the “unfortunate section 22” stated, “Reproduction is permitted when a musical composition is, after publication, transferred to such discs, plates, cylinders, bands and similar parts of instruments for the mechanical rendering of pieces of music. This provision is applicable also to interchangeable parts, provided that they are not applied to instruments by which the work can, as regards strength and duration of tone and tempo, be rendered in a manner resembling a personal performance.” According to Richard Rogers Bowker, author of the 1912 book *Copyright: Its History and Its Law*, this had the effect of “giving the author control over the finer reproductions of his works but denying to him any control over the cruder reproductions, as on hand-organs, orchestrations, etc.”²¹ This type of performance reproduction could be rendered by the use of a Metrostyle. A Metrostyle was a line which was printed on a piano roll which indicated appropriate musical timing. If a pianist followed the line, the performance was supposed to more accurately reflect how the performing artist wanted the music to sound.²²

In France, in addition to the 1866 law, and the later clarification at the 1896 Berne conference, it had been judicially decided that while mechanically reproducing a musical composition was permitted without authorization, it was not permissible to mechanically reproduce the words of a song.²³ The case was brought by a retired tax official named Vives, on behalf of a group of publishers. Vives had decided that the 1866 law should not apply to recordings because they reproduced not only music, but also lyrics. He shared his perspective with the music publisher, Celes-

tin Joubert, who further shared it with some of his music publisher colleagues. The group of music publishers decided to allow Vives, at his own risk, to sue the record companies on their behalf. If Vives won the lawsuit, the publishers agreed to allow him to administer their mechanical rights, in exchange for forty percent of whatever money was received. The first case was brought against Pathe-Marconi in 1903, and Vives lost the trial, but won the appeal in a landmark decision on February 1, 1905. Vives ended up entering into agreements with the record companies, and began collecting mechanical royalties on behalf of the music publishers he represented.²⁴

In Italy, several court decisions addressed the question of mechanical reproductions, and one in particular in 1906, *Societa Italiana d. Autori v. Gramophone Co. of London*, decided that the reproduction of music on a phonograph or similar machine without consent was prohibited. The decision held that Article 3 of the Berne Convention of 1886 could not modify the domestic law of 1882, which specifically covered reproduction by any means.²⁵

In Belgium, a lower court decided, in the 1904 case of *Massenet and Puccini v. Compagnie Generale des phonographs, et al.*, that discs and cylinders reproducing musical compositions were infringements; however, in 1905, the Court of Appeals overturned the decision.²⁶

The laws throughout the European countries were inconsistent in their treatment of mechanical reproductions of musical compositions, and lead to uncertainty within this area of international trade.²⁷ This inconsistency would continue until the adoption of the 1908 Berne Convention.

Early Developments in the Law of the United Kingdom of Great Britain

In 1887, Great Britain implemented the Berne Convention by passing the *International Copyrights Acts, 1844 to 1886*, although no language can be found in the Act referring specifically to the Berne language concerning the mechanical reproductions of music.²⁸ In 1899 (reported in 1900), the Court of Appeal in Great Britain affirmed a lower court ruling in *Boosey v. Whight*, finding that piano rolls sold for use in the Æolian mechanical organ were not copies of sheet music within the Copyright Act of 1842, and were therefore not an infringement. The court further indicated that the question had never before been raised in the country.²⁹ The first time that the statutory law of Great Britain addressed the issue was in the *Musi-*

cal Copyright Act of 1906, which dealt with the piracy issues of the day, making the possession of pirated copies of sheet music or the plates used to print and reproduce sheet music, a crime.³⁰ The law also specifically provided that, “The expression ‘plates’ includes any stereotype or other plates, stones, matrices, transfers, or negative used or intended to be used for printing or reproducing copies of any musical work: Provided that the expressions ‘pirated copies’ and ‘plates’ shall not, for the purposes of this Act, be deemed to include perforated music rolls used for playing mechanical instruments, or records used for the reproduction of sound waves, or the matrices or other appliances by which such rolls or records are respectively made.”³¹

The Berne Convention of 1908

By the 1908 Berlin conference on revisions to Berne, the piano roll business was booming and phonographs were gaining popularity. In 1902, in the United States alone, between one million and one million and a half piano rolls were manufactured.³² At the 1908 Berne convention, held in Berlin, Germany, the German delegation suggested that the 1886 Berne language regarding mechanical reproductions be reconsidered, given the growth in the mechanical musical instrument industry.³³ The German delegation proposed the following text revision, “The authors of musical works, or their successors in title, shall have the exclusive right in the countries of the Union in which their works are protected by the present Convention: (a) to transcribe these works on parts of musical instruments for the mechanical reproduction of musical works; (b) to authorize their public performance by means of such instruments.” This new language would grant authors the right to control mechanical reproductions of their musical works.³⁴ A subcommittee was convened to explore the German proposal. All of the member countries, with the exception of Switzerland, agreed that this new right should be established. In the report, the committee indicated that it saw no reason to make a distinction between reproductions of musical works by printing versus by mechanical instrument.³⁵

The committee did not stop with the creation of the additional right, however. The German delegation proposed additional language intended to safeguard the interests of small manufacturers from what could be excessive financial demands by copyright owners of musical compositions, and from the formation of monopolies by the larger manufacturers with greater capital available to them. The German proposal established the

creation of a compulsory license. Under this licensing scheme, an author could prohibit any and all mechanical reproductions of his musical work; but once he authorized any one manufacturer to make reproductions, any other manufacturer could also make reproductions if it paid the author *equitable compensation*. This proposal borrowed the concept of a compulsory license from German patent law. Countries with no such compulsory licenses strongly opposed the consideration of this additional language, and felt that the committee should have instead stopped with the creation of the right, giving authors of musical works the same rights that were given to authors of literary works, without further restriction. Authors of literary works were free to negotiate arrangements with publishers, for amounts of money determined by the marketplace.³⁶

There was not unanimous approval with respect to the addition of the compulsory license, and so the approach taken, which was suggested by the British delegation, was to allow this to be addressed differently in each member country of the convention. The 1908 Berlin revision to Berne, finalized on November 13, 1908, added the following relevant language, found in Article 13:

The authors of musical works shall have the exclusive right of authorizing: (1) the adaptation of those works to instruments which can reproduce them mechanically; (2) the public performance of the said works by means of these instruments.

Reservations and conditions relating to the application of this Article may be determined by the domestic legislation of each country in so far as it is concerned; but the effect of any such reservations and conditions will be strictly limited to the country which has put them in force.

The provisions of paragraph 1 shall not be retroactive, and consequently shall not be applicable in any country of the Union to works which have been lawfully adapted in that country to mechanical instruments before the coming into force of the present Convention

Adaptations made in virtue of paragraphs 2 and 3 of the present Article, and imported without the authority of the interested parties into a country where they would not be lawful, shall be liable to seizure in that country.³⁷

Developments in the Laws of the United States (Copyright Act of 1909)

The United States was not a member of the Berne Convention in 1908, although it too was grappling with the question of how to treat mechanical reproductions of musical compositions. A speech given by President Theodore Roosevelt in December of 1905 urged Congress to urgently revise the copyright laws, listing as one of several reasons that they “omit provisions for many articles which, under modern reproductive processes are entitled to protection.”³⁸ Several bills were introduced between 1906 and 1909 as part of the broad revision. In May of 1906, identical bills were introduced in Senate and the House of Representatives during the first session of the 59th Congress, S. 6330 and H.R. 19853, proposing that copyright should include the exclusive right, “to make, sell, distribute, or let for hire any device, contrivance, or appliance especially adapted in any manner whatsoever to reproduce to the ear the whole or any material part of any work published and copyrighted after this Act shall have gone into effect, or by means of any such device or appliance publicly to reproduce to the ear the whole or any part of such work.”³⁹ Hearings were held and testimony was given by a representative of several player piano manufacturers that the proposed language would give “a monopoly of the music-roll business to one company,” while composers John Philip Sousa and Victor Herbert testified that their “genius” was being reproduced without any remuneration to them.⁴⁰ Nothing further happened with the two bills until the second session of the 59th Congress in January of 1907 when two more bills, S. 1890 and H.R. 25133, were introduced. The proposed language of these new bills defined the exclusive rights of the owner of a musical composition as including the “right to make any rearrangement or resetting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced.”⁴¹ The bills did not move forward during the session. In December of 1907 another set of bills were introduced in Senate and the House of Representatives at the first session of

the 60th Congress, S. 2499, S. 2900, H.R. 243, and H.R. 11794. The bills represented opposing points of view. One Senate and House set of the bills provided that piano rolls and the like were not arrangements (and thus not infringements), while another set of the bills gave authors the exclusive right to authorize mechanical reproductions. At the time, an important case was before the Supreme Court, *White-Smith Music Publishing Company v. Apollo Company*,⁴² in which the court was asked to determine if piano rolls were *copies* as defined in the copyright law, and therefore prohibited without the authorization of the copyright owner in the musical composition. All four of the bills stalled during the session because of a prevailing desire to wait and see the results of the *White-Smith* case.⁴³

On February 24, 1908 the Supreme Court issued its ruling and concluded that piano rolls were not *copies*. In its opinion, the court highlighted the fact that Congress had chosen not to amend the copyright law in such a way as to broaden the protection to include these devices, despite other important music-related amendments since the time that these devices came into existence and gained popularity.⁴⁴ Soon after the decision, hearings resumed. According to the legislative history, a number of different bills were introduced during the period that followed:⁴⁵

- H.R. 20388 (April 6, 1908): Any copyright issued by the U.S. government would terminate if the owner violated anti-trust laws.
- H.R. 21952 (May 4, 1908): Introduction of a compulsory license provision, to become effective after the copyright owner has authorized the first reproduction, with a royalty obligation.
- H.R. 21984 (May 12, 1908): Combined mechanical reproduction rights with compulsory license language for all reproductions (not only those following an authorized use), and suggested a two-cent royalty for talking machine records, and ten percent of the retail price for any other device.
- H.R. 22017 (May 12, 1908, numbered but not officially introduced until May 21, 1908): similar to H.R. 21984, but changed the compulsory provision to apply only after an author authorized the first use, and set the rate for all reproductions at ten percent of the retail price.

- H.R. 22183 (May 12, 1908): Provided a two-cent royalty except for certain sized disks and cylinders, which would have a one-cent royalty rate.
- H.R. 24782 (December 19, 1908): Introduced the notion of filing a Notice of Intention with the Register of Copyrights.
- H.R. 25612 (January 5, 1909): Similar to H.R. 21984 and H.R. 22017, all of which were introduced by the same person, Representative Sulzar, fixed the royalty rate at ten percent of retail with a minimum of two-cents.
- H.R. 27310 (January 28, 1909): Fixed the royalty rate at five percent of the sum of money collected by the manufacturer, along with notice of intention language and treble damages for non-payment of royalties.

None of these bills were reported (i.e., sent to the House floor for debate) out of the House Committee on Patents, causing great frustration. A special House committee was created to review all of the proposed bills and create one which would be satisfactory to all interested parties. The committee discussed the changes to the Berne convention that provided protection against unauthorized mechanical reproductions. It was concerned in the same way as the participants at the 1908 Berlin conference were with the potential for this new form of protection to result in a monopoly.⁴⁶ The committee also discussed the various ways that different European countries were addressing the question. The committee was made aware of contracts made in 1902 between a top mechanical reproduction company, The Æolian Company, and more than eighty of the top U.S. music publishers, securing exclusive rights to mechanically reproduce their musical compositions for a period of thirty-five years, with the possibility of period extensions. The contracts were entered into with the expectation that the courts would find that copyright owners did in fact have the exclusive right to control the mechanical reproduction of their musical compositions. The Æolian Company even agreed to “cause suit to be brought which would secure a decision of the Supreme Court of the United States.”⁴⁷ That case ended up being the *White-Smith* case.⁴⁸ At a later point, another set of agreements was signed in anticipation of Congress amending the copyright law to grant such rights.⁴⁹ The committee also discussed

a similar situation taking place in Europe. A large Italian music company, Fonotipia, which had monopolistic control of the business of making music by mechanical means in Italy, obtained, via agreement, the exclusive right to mechanically reproduce the entire catalog of a leading publisher in Germany on a worldwide basis. Fonotipia was to bring suit in each of the countries of the Berne Union to establish its monopoly.⁵⁰

On February 15, 1909 H.R. 28192 was proposed with similar language to those before it with the addition of reciprocal treatment of works of foreign authors, and a fixed royalty rate of two cents, which at the time was five percent of the manufacturer's price. This was a winner, and it was referred by the special committee to the Committee on Patents which reported it onward with no changes to the language. In the committee report which accompanied the final bill, it was stated that the section dealing with the mechanical reproduction of music was "the subject of more discussion and has taken more of the time of the committee than any other provision in the bill."⁵¹ The House agreed on a few amendments on March 2, 1909 and it was passed and "rushed through a night session" of the Senate on March 3, 1909 and signed by President Roosevelt on March 4, 1909.⁵² The new law became effective on July 1, 1909. The resulting 1909 Copyright Act language regarding the mechanical reproduction right and compulsory license was as follows:

Section 1 - Exclusive rights as to copyrighted works: Any person entitled thereto, upon complying with the provisions of this Act, shall have the exclusive right:

(e) To perform the copyrighted work publicly for profit if it be a musical composition; and for the purpose of public performance for profit, and for the purposes set forth in subsection (a) hereof, to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced: Provided, That the provisions of this Act, so far as they secure copyright controlling the parts of instruments serving to reproduce mechanically the musical work, shall include only compositions published and copyrighted after July 1, 1909, and shall not include the works of a for-

eign author or composer unless the foreign state or nation of which such author or composer is a citizen or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States similar rights: And provided further, 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 two cents on each such part manufactured, to be paid by the manufacturer thereof; and the copyright proprietor may require, and if so the manufacturer shall furnish, a report under oath on the twentieth day of each month on the number of parts of instruments manufactured during the previous month serving to reproduce mechanically said musical work, and royalties shall be due on the parts manufactured during any month upon the twentieth of the next succeeding month. The payment of the royalty provided for by this section shall free the articles or devices for which such royalty has been paid from further contribution to the copyright except in case of public performance for profit: And provided further, That it shall be the duty of the copyright owner, if he uses the musical composition himself for the manufacture of parts of instruments serving to reproduce mechanically the musical work, or licenses others to do so, to file notice thereof, accompanied by a recording fee, in the copyright office, and any failure to file such notice shall be a complete defense to any suit action, or proceeding for any infringement of such copyright.

In case of the failure of such manufacturer to pay to the copyright proprietor within thirty days after demand in writing the full sum of royalties due at said rate at the date of such demand the court may award taxable costs

to the plaintiff and a reasonable counsel fee, and the court may, in its discretion, enter judgment therein for any sum in addition over the amount found to be due as royalty in accordance with the terms of this Act, not exceeding three times such amount.⁵³

The final language of the amendment adopted the same overall approach as the 1908 Berne Convention by granting the exclusive right to control all mechanical reproductions of a musical work to the copyright owner and at the same time limiting the right by establishing a compulsory license which would become available once the owner had exercised his or her right in the first instance.

Developments in the Laws of the United Kingdom of Great Britain (Copyright Act of 1911)

Soon after the 1908 Berne conference in Berlin ended, the British Board of Trade got to work on examining whether or not to ratify the 1908 changes. Such ratification would come by way of changes to the U.K. copyright law, effectively implementing the terms of the convention. A committee headed by Lord Gorrell was appointed to lead the charge. The committee heard from many interested parties and easily decided the question of whether or not to add the right for composers to control mechanical reproductions of their works. However, they struggled with the possibility of providing for a compulsory license. The committee ultimately rejected the notion of a compulsory license, finding that fears around the monopolies which were said to surely result without it were exaggerated, and issued its final report in 1909.⁵⁴ The British Board of Trade then prepared a draft copyright bill. The next step involved calling for an Imperial Copyright Conference, which brought together Britain's self-governing dominions, Canada, South Africa, Australia, and New Zealand, to discuss the Berne revisions and the Gorrell Committee report.⁵⁵ The Copyright Conference agreed to twelve resolutions. Resolution six dealt with mechanical reproductions, and recommended, "that subject to proper qualifications, copyright should include the sole right to produce or reproduce a work, or any substantial part of it, in any material form whatsoever...and to make records etc by means of which a work may be mechanically performed."⁵⁶

Shortly thereafter, a bill was introduced in the House of Commons, which embodied the recommendations of the Gorrell Committee and the

Copyright Conference.⁵⁷ The bill was considered by a cross-party “Grand Committee” over the course of thirteen sessions between the middle of April and the 13th of July, 1911.⁵⁸ The committee modified the proposed language quite extensively, and, despite the recommendation of the Gorrell Committee, added a provision for the compulsory licensing of recording. The key interested parties, musical composers and publishers on the one side, and gramophone manufacturers on the other, battled it out in front of the Grand Committee, and in the press. *The Times*, the leading British newspaper, published a number of articles on the subject, quoting leading proponents of each position.⁵⁹ Ultimately, the Grand Committee concluded that amending the copyright law with the right to control mechanical reproductions of a musical composition, combined with a compulsory license, was an equitable compromise.⁶⁰ Although the proposed bill prepared in 1910 included only language creating the sole right regarding mechanical reproductions, the final bill of 1911 emerged with far greater complexity, based on the text of the U.S. 1909 Copyright Act.⁶¹ The pertinent language which was adopted read as follows:

Section 1(2): For the purpose of this Act, “copyright” means the sole right to produce or reproduce the Copyright, work or any substantial part thereof in any material form whatsoever, to perform, or in the case of a lecture to deliver, the work or any substantial part thereof in public; if the work is unpublished, to publish the work or any substantial part thereof; and shall include the sole right to...

(d) in the case of a literary, dramatic, or musical work, to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered...

Section 19(2): It shall not be deemed to be an infringement of copyright in any musical work for any person to make within the parts of His Majesty’s dominions to which this Act extends records, perforated rolls, or other contrivances by means of which the work may be mechanically performed, if such person proves –

(a) that such contrivances have been previously made by, or with the consent or acquiescence of, the owner of the copyright in the work; and

(b) that he has given the prescribed notice of his intention to make the contrivances, and has paid in the prescribed manner to, or for the benefit of, the owner of the copyright in the work royalties in respect of all such contrivances sold by him, calculated at the rate herein-after mentioned:

Providing that –

(i) nothing in this provision shall authorize any alterations in, or omissions from, the work reproduced, unless contrivances reproducing the work subject to similar alterations and omissions have been previously made by, or with the consent or acquiescence of, the owner of the copyright, or unless such alterations or omissions are reasonably necessary for the adaptation of the work to the contrivances in question; and

(ii) for the purposes of this provision, a musical work shall be deemed to include any words so closely associated therewith as to form part of the same work, but shall not be deemed to include a contrivance by means of which sound may be mechanically reproduced.

(3) The rate at which such royalties as aforesaid are to be calculated shall –

(a) in the case of contrivances sold within two years after the commencement of this Act by the person making the same, be two and one-half per cent.; and

(b) in the case of contrivances sold as aforementioned after the expiration of that period, five per cent on the ordinarily retail selling price of the contrivance calculated

in the prescribed manner, so however that the royalty payable in respect of a contrivance shall, in no case, be less than a half-penny for each separate musical work in which copyright subsists reproduced thereon and, where the royalty calculated as aforesaid includes a fraction of a farthing, such fraction shall be reckoned as a farthing.

Provided that, if, at any time after the expiration of seven years from the commencement of this Act, it appears to the Board of Trade that such rate as aforesaid is no longer equitable, the Board of Trade may, after holding a public inquiry, make an order either decreasing or increasing that rate to such extent as under the circumstances may seem just, but any order so made shall be provisional only and shall not have any effect unless and until confirmed by Parliament; but, where an order revising the rate has been so made and confirmed, no further revision shall be made before the expiration of fourteen years from the date of the last revision.

(4) If any such contrivance is made reproducing two or more different works in which copyright subsists and the owners of the copyright therein are different persons, the sums payable by way of royalties under this section shall be apportioned amongst the several owners of the copyright in such proportions as, failing agreement, may be determined by arbitration.

(5) When any such contrivances by means of which a musical work may be mechanically performed have been made, then, for the purposes of this section, the owner of the copyright in the work shall, in relation to any person who makes the prescribed inquiries, be deemed to have given his consent to the making of such contrivances if he fails to reply to such inquiries within the prescribed time.

(6) For the purposes of this section, the Board of Trade may make regulations prescribing anything which under

this section is to be prescribed, and prescribing the mode in which notices are to be given and the particulars to be given in such notices, and the mode, time, and frequency of the payment of royalties, and any such regulations may, if the Board think fit, include regulations requiring payment in advance or otherwise securing the payment of royalties.⁶²

The United Kingdom approach was different from the United States approach in several ways: the U.K. law required that notice be given when someone intended to rely upon the compulsory license; it established a rate which was based on a percent of the selling price with a penny-based minimum, rather than a specific penny rate; and it set forth a time period of seven years, after which the royalty rate would be reevaluated by the Board of Trade to ensure that it remained equitable.

International Reaction to the 1908 Berne Convention, 1909 U.S. Copyright Act, and 1911 Great Britain Copyright Act

Many countries enacted revised copyright laws following the 1908 Berne Convention and copyright law changes in the United States and Great Britain, generally following in the footsteps of these two major countries. A law review article published in 1940, "Proposed Copyright Revision and Phonograph Records," by Milton Diamond and Jerome H. Adler, lists those laws as follows:⁶³

- Canada: Copyright Act 1921, Section 19, using the same penny rate as the U.S. of two cents per side
- Australia: Copyright Act 1912, incorporates portions of the Great Britain 1911 Act
- New Zealand: Copyright Act 1913, section 25(2)
- Ireland: Industrial and Commercial Property Protection Act, 1927, section 169(2)
- India: Indian Copyright Act, 1914, incorporates portions of the Great Britain 1911 Act
- South Africa: The Union of South Africa Act, 1916, incorporates portions of the Great Britain 1911 Act
- Austria: Austrian Copyright Law, 1913, Article 13
- Germany: Law of May 22, 1910, similar to Austrian

Law

- Bulgaria: Law of 1921, Article 42(2)
- Switzerland: Federal Act of December 7, 1922, Articles 17-21
- Lichtenstein: Law of May 13, 1924, Article 108, adopts the Swiss law
- Latvia, Estonia and Lithuania: Civil Law (Code of Laws, Vol. 4, part 1) - with latest promulgations according to the official edition of 1914. Article 695A2, Par. 2

Beginning in 1910, U.S. presidential proclamations were issued to secure the newly recognized right to secure copyright controlling the parts of instruments serving to reproduce mechanically a musical work in the United States for the citizens or subjects of Germany (December 8, 1910); Belgium, Luxemburg, and Norway (June 14, 1911); Cuba (November 27, 1911); Hungary (October 15, 1912); Great Britain (not including Canada, Australia, New Zealand, Newfoundland, or South Africa; January 1, 1915); Italy (May 1, 1915); and New Zealand (February 9, 1917).⁶⁴

Conclusion

The legal and business questions which arose from the development of devices capable of mechanically reproducing musical compositions faced a number of countries at the same time. Each country engaged in its own domestic discussion of the issues and kept a watchful eye on the actions taken by other countries. Although not identical, the legal approaches adopted in the 1908 Berne Convention, 1909 United States Copyright Act, and 1911 Great Britain Copyright Act all addressed the competing interests at the time in the same way, by granting to copyright owners the exclusive right to control mechanical reproductions of their musical works, and limiting the right by establishing a compulsory license. By the mid-1920s, most countries arrived at the same or similar decisions with respect to revisions of their copyright laws. The international uniformity of these revisions enabled the mechanical reproduction industry to grow and thrive, while ensuring that the owners of musical composition copyrights were compensated. This continued as the prevailing international approach until the late 1980s when some countries, including the United Kingdom, decided to abolish the compulsory license.

Endnotes

1. U.S. Copyright Royalty Judges, *Final Determination of Rates and Terms*, Docket No. 2006-3 CRB DPRA, Nov. 24, 2008, 6.
2. U.S. Copyright Office, *Circular 1a, A Brief Introduction and History*, <http://www.copyright.gov/circs/circ1a.html>.
3. Copyright Act of 1831, 4 Stat. 436, §1.
4. Copyright Law Amendment Act, 1842, 5 & 6 Vict., c.45, §2 (Eng.).
5. H.A.V. Bulleid. "Musical box." In *Grove Music Online. Oxford Music Online*, <http://www.oxfordmusiconline.com/subscriber/article/grove/music/19418>.
6. Ibid.
7. Ibid.; Arthur W.J.G. Ord-Hume. "Player piano." In *Grove Music Online. Oxford Music Online*, <http://www.oxfordmusiconline.com/subscriber/article/grove/music/21928>.
8. Stanley Boorman, et al. "Printing and publishing of music." In *Grove Music Online. Oxford Music Online*, <http://www.oxfordmusiconline.com/subscriber/article/grove/music/40101pg1>.
9. John Borwick and Lewis Foreman. "recording and reproduction." In *The Oxford Companion to Music*, edited by Alison Latham. *Oxford Music Online*, <http://www.oxfordmusiconline.com/subscriber/article/opr/t114/e5534>.
10. "Gramophone (Phonograph) Recordings." In *The Oxford Dictionary of Music*, 2nd ed. rev., edited by Michael Kennedy. *Oxford Music Online*, <http://www.oxfordmusiconline.com/subscriber/article/opr/t237/e4435>.
11. H.R. Rep. No. 59-7083, pt. 2, at 4 (1907).
12. Peter Burger, "The Berne Convention: Its History and Its Key Role in the Future," *Journal of Law and Technology* 3, (1987): 11.; Bluebook citation provided for additional reference: 3 J.L. & Tech. 1.
13. U.S. Copyright Office, *International Copyright Union: Berne Convention, 1886; Paris Convention, 1896; Berlin Convention 1908* (Washington, DC: GPO, 1908), 31.
14. Berne Convention for the Protection of Literary and Artistic

- Works, art. 3, Sept. 9, 1886, 1161 U.N.T.S. 3.
15. Richard Rogers Bowker, *Copyright: Its History and Its Law* (New York: Houghton Mifflin Company, 1912), 209. See also Sam Ricketson and Jane Ginsberg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, 2nd ed. (London: Oxford University Press, 2006), online appendix no. 26, “Records of the Conference Convened in Berlin October 14 to November 14, 1908, Report Presented to the Conference on Behalf of Its Committee,” 207. Available at <http://www.oup.com/uk/booksites/content/9780198259466/>.
 16. Michael Freegard, “The Berne Convention, Compulsory Licensing and Collecting Societies,” *Columbia-VLA Journal of Law & The Arts* 11, (1986-1987): 140.; Bluebook citation provided for additional reference: 11 Colum.-VLA J.L. & Arts 137. See also Ricketson, *International Copyright*, appendix 26, 207.
 17. H.R. Rep. No. 60-2222, at 5 (1909).
 18. S. Rep. No. 59-6187, pt. 2, at 3 (1907).
 19. H.R. Rep. No. 60-2222, at 5 (1909).
 20. Bowker, *Copyright*, 210.
 21. *Ibid.*, 211.
 22. Julian Dyer, *The Autograph Metrostyle*, <http://www.pianolasociety.com/automet.html>.
 23. H.R. Rep. No. 60-2222, at 5 (1909).
 24. Phillippe Crocq, “The SDRM Story,” *Billboard*, May 22, 1993, F13.
 25. Bowker, *Copyright*, 214.
 26. *Ibid.*, 213.
 27. Ricketson, *International Copyright*, appendix 26, 207.
 28. International Copyright Act, 1886, 49 & 50 Vict., c. 33 (Eng.). A very useful resource can be found in a website titled “Primary Sources on Copyright (1450-1900),” located at <http://www.copyrighthistory.org>. The site provides a digital archive of primary sources on copyright from the time of the invention of the printing press until around 1900, including translations

- of French, Italian, and German documents.
29. *Boosey v. Whight*, (1900) 1 Ch. 122; 81 L.T.R. 265), 125.
 30. Bowker, *Copyright*, 208.
 31. Musical Copyright Act, 1906, 6 Edw. 7, c.86, §3 (Eng.)
 32. *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1, 9 (1908).
 33. Ricketson, *International Copyright*, appendix 26, 207.
 34. *Ibid.*
 35. *Ibid.*, 208.
 36. *Ibid.*, 208-209.
 37. Berne Convention for the Protection of Literary and Artistic Works, art. 13, Nov. 13, 1908, 1161 U.N.T.S. 3.
 38. H.R. Rep. No. 60-2222, at 1 (1909).
 39. U.S. Senate Committee on the Judiciary, *Study 1: The History of U.S.A. Copyright Law Revision From 1901 to 1954* (Washington, DC: GPO, 1960), 3.
 40. *Ibid.*
 41. *Ibid.*, 4.
 42. *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1 (1908).
 43. *Ibid.*; Also discussed in H.R. Rep. No. 59-7083, pt. 2 (1907).
 44. *White-Smith Music Publishing Co.*, 209 U.S. at 17-18.
 45. U.S. Senate Committee on the Judiciary, *Study 5: The Compulsory License Provisions of the U.S. Copyright Law* (Washington, DC: GPO, 1960), 2-12.
 46. *Ibid.*, 6.
 47. *Ibid.*, 8; S. Rep. No. 59-6187, at 5 (1907).
 48. U.S. Senate Committee on the Judiciary, *Study 5*, 3; H.R. Rep. No. 60-2222, at 8 (1909).
 49. H.R. Rep. No. 60-2222, at 8 (1909).
 50. *Ibid.*
 51. H.R. Rep. No. 60-2222, at 4 (1909).
 52. U.S. Senate Committee on the Judiciary, *Study 5*, 10-11.
 53. Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075, § 1(e).

54. Benedict Atkinson, *The True History of Copyright: The Australian Experience 1905-2005* (Sydney: Sydney University Press, 2007), 49-59.
55. Ibid.
56. Ibid., 67.
57. Ibid., 70.
58. Ibid.
59. Ibid. 70-76. A lengthy discussion of the public debate can be found in this book including numerous excerpts from *The Times* newspaper.
60. Ibid., 76.
61. Bowker, *Copyright*, 208.
62. Copyright Act of 1911, 1 & 2 Geo. 5, c.46, §§1 and 19 (Eng.)
63. Milton Diamond and Jerome H. Adler, "Proposed Copyright Revision and Phonographs Records," *Air Law Review* 11 (1940): 36.; Bluebook citation provided for additional reference: 11 Air L. Rev. 29.
64. U.S. Library of Congress, *Report of the Register of Copyrights, for Fiscal year 1916-1917* (Washington, DC: GPO, 1917), 15.

References

- American Society of Composers, Authors and Publishers (ASCAP), ACE database entry for “Yesterday,” as composed by John Lennon and Paul McCartney, <http://www.ascap.com/ace/search.cfm?mode=search>.
- Atkinson, Benedict. *The True History of Copyright: The Australian Experience 1905-2005*. Sydney: Sydney University Press, 2007, 49-59, 67, 70-76.
- Berne Convention for the Protection of Literary and Artistic Works, art. 3, Sept. 9, 1886, 1161 U.N.T.S. 3.
- Berne Convention for the Protection of Literary and Artistic Works, art. 13, Nov. 13, 1908, 1161 U.N.T.S. 3.
- Boorman, Stanley. “Printing and publishing of music.” In Grove Music Online. Oxford Music Online, <http://www.oxfordmusiconline.com/subscriber/article/grove/music/40101pg1>.
- Boosey v. Whight*, (1900) 1 Ch. 122; 81 L.T.R. 265), 125.
- Borwick, John and Lewis Foreman. “recording and reproduction.” In *The Oxford Companion to Music*, edited by Alison Latham. Oxford Music Online, <http://www.oxfordmusiconline.com/subscriber/article/opr/t114/e5534>.
- Bowker, Richard Rogers. *Copyright: Its History and Its Law*. New York: Houghton Mifflin Company, 1912, 208, 209-211, 213, 214.
- Bulleid, H.A.V. “Musical box.” In *Grove Music Online. Oxford Music Online*, <http://www.oxfordmusiconline.com/subscriber/article/grove/music/19418>.
- Burger, Peter. “The Berne Convention: Its History and Its Key Role in the Future.” *Journal of Law and Technology* 3 (1987): 11.; Blue-book citation provided for additional reference: 3 J.L. & Tech. 1.
- Copyright Act of 1831, 4 Stat. 436, §1.
- Copyright Act of 1909, Pub. L. No. 60-349, § 1(e).
- Copyright Act of 1911, 1 & 2 Geo. 5, c.46, §§1 and 19 (Eng.)
- Copyright Law Amendment Act, 1842, 5 & 6 Vict., c.45, § 2 (Eng.)
- Crocq, Phillippe. “The SDRM Story.” *Billboard*, May 22, 1993, F13.
- Diamond, Milton and Jerome H. Adler, “Proposed Copyright Revision and Phonographs Records.” *Air Law Review* 11 (1940): 36.; Blue-book citation provided for additional reference: 11 Air L. Rev. 29.
- Dyer, Julian. *The Autograph Metrostyle*, <http://www.pianolasociety.com/>

automet.html.

Freegard, Michael. "The Berne Convention, Compulsory Licensing and Collecting Societies." *Columbia-VLA Journal of Law & The Arts* 11 (1986-1987): 140-141.; Bluebook citation provided for additional reference: 11 Colum.-VLA J.L. & Arts 137.

"Gramophone (Phonograph) Recordings." In *The Oxford Dictionary of Music*, 2nd ed. rev., edited by Michael Kennedy. Oxford Music Online, <http://www.oxfordmusiconline.com/subscriber/article/opr/t237/e4435>.

H.R. Rep. No. 59-7083, pt. 2, at 4 (1907).

H.R. Rep. No. 60-2222, 1-8 (1909).

International Copyright Act, 1886, 49 & 50 Vict., c. 33 (Eng.).

Musical Copyright Act, 1906, 6 Edw. 7, c.86, §3 (Eng.)

Ord-Hume, Arthur W.J.G. "Player piano." In *Grove Music Online*. Oxford Music Online, <http://www.oxfordmusiconline.com/subscriber/article/grove/music/21928>.

Ricketson, Sam and Jane Ginsberg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, 2nd ed. London: Oxford University Press, 2006. online appendix no. 26, "Records of the Conference Convened in Berlin October 14 to November 14, 1908, Report Presented to the Conference on Behalf of Its Committee", 207. Available at <http://www.oup.com/uk/booksites/content/9780198259466/>.

S. Rep. No. 59-6187, pt. 2, 3-5 (1907).

U.S. Library of Congress. *Report of the Register of Copyrights, for Fiscal year 1916-1917*. Washington, DC: GPO, 1917: 15.

U.S. Copyright Office. Copyright registration of "Yesterday," Registration Number EFO000108812, 1965-07-21, <http://cocatalog.loc.gov>.

U.S. Copyright Office. *Circular 1a, A Brief Introduction and History*, <http://www.copyright.gov/circs/circ1a.html>.

U.S. Copyright Office. *International Copyright Union: Berne Convention, 1886; Paris Convention, 1896; Berlin Convention 1908*. Washington, DC: GPO, 1908: 31.

U.S. Copyright Royalty Judges. *Final Determination of Rates and Terms*. Docket No. 2006-3 CRB DPRA (Nov. 24, 2008), 6.

U.S. Senate Committee on the Judiciary. *Study 1: The History of U.S.A. Copyright Law Revision From 1901 to 1954*. Washington, DC: GPO, 1960: 3-4.

U.S. Senate Committee on the Judiciary. *Study 5: The Compulsory License Provisions of the U.S. Copyright Law*. Washington, DC: GPO, 1960: 2-12.

White-Smith Music Publishing Co. v. Apollo Co., 209 U.S. 1, 9, 17-18 (1908).



SERONA ELTON is an Assistant Professor and Director of the Music Business and Entertainment Industries Program at the University of Miami. She is also the President of MEIEA, a member of the Board of Governors for The Recording Academy, Florida Chapter, and a member of the Florida Bar Entertainment, Arts and Sports Law Section Executive Council. She regularly consults for music industry companies such as Sony Music Entertainment and Universal Music Group, and she is a licensed attorney in Florida and New York. Previously, she worked

for EMI Recorded Music, North America, holding a number of positions including Vice President, Mechanical Licensing and Repertoire Data Services.