The Perils of Compulsory Licenses in Copyright Law

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The attraction of compulsory licenses in copyright is obvious. They offer a way to persevere the incentive function of copyright rights but with a reduction in socially wasteful exclusion. Rights holders and those seeking to make use of copyrighted works are well aware that rights clearance and licensing can be expensive, time consuming and unproductive. This problem predates the Internet, but it has become even more apparent in a world of digital platforms and services that rely on access to millions and in some cases billions of works.

Compulsory licenses have been part of American copyright law for over a hundred years. Nonetheless, the increasing frequency with which academics and policy makers suggest that the answer to any given problem in copyright law is some form of compulsory license suggests a lack of familiarity with compulsory licenses in practice and a failure to consider all the implications such a regime. In theory, compulsory licenses can be socially beneficial, but they are unlikely to work in practice unless certain issues of institutional design are properly understood and addressed. This article provides a systemic framework for identifying the institutional design issues inherent to compulsory licenses in copyright and identifies a set of recurring problems. Among these problems are the following:

1) Arbitrary rate-setting: By definition, a compulsory license bypasses the information aggregation function of the market. Whether by legislative fait, administrative rule-making of quasi-judicial arbitration, the bodies responsible for determining prices under a compulsory license are typically starved of information and lack the expertise and ability to acquire it.

2) Monopoly pricing: Compulsory licenses administered through collecting organizations (also known as Collective Rights Organizations or CROs) tend to create extreme market power. Statutorily sanctioned CROs provide an excellent way for producer interests to implement a hub-and-spoke price fixing scheme, often with express antitrust law immunity.

3) Innovation: Because they are defined by statute, compulsory license regimes tend to ossify around existing patterns of use. Compulsory licenses are also apt to chill innovation or be deployed as regulatory impediments to discourage new entrants.

4) Overshadowing other policy imperatives: Discussion of compulsory licenses can overshadow the simple fact that certain limits to copyright rights don’t exist solely because no one has found a way to charge for them. In Compulsory licenses tend to eliminate free use (e.g., fair use, educational exemptions, disability exemptions) and discourage waiver, non-enforcement, or other manifestations of “tolerated use” that may be more socially productive.

5) Expansion: Compulsory licenses designed to address market failure in one context can become tools of copyright expansion by virtue of (i) unanticipated application in new contexts and (ii) over-reaching claims
(6) Moral hazard: The bodies that administer compulsory licenses are empowered by the state, but they pursue their own agenda. Real world experience suggests that CROs don’t simply favor the interests of rights holders over the public at large, they discourage free sharing of copyrighted content, sometimes ignore alternative permission structures adopted by rights holders, and generally follow their incentives which favor collection over distribution.