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## CBS v. ASCAP: An Economic Analysis of a Political Problem

### Cover Page Footnote

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# CBS v. ASCAP: AN ECONOMIC ANALYSIS OF A POLITICAL PROBLEM

JOHN CIRACE\*

## INTRODUCTION

COLUMBIA Broadcasting System, Inc. (CBS) v. American Society of Composers (ASCAP)<sup>1</sup> is the culmination of a series of legal challenges to the marketing of performance rights to musical compositions. ASCAP and Broadcast Music, Inc. (BMI)<sup>2</sup> have been frequent targets of antitrust litigation<sup>3</sup> because they control the performance rights to virtually every domestic copyrighted composition.<sup>4</sup> The most recent lawsuit attacks the blanket system under which ASCAP and BMI license these rights to television networks.

It is clear that the fate of the blanket license cannot be determined by mere reference to legal precedent and economic theory. After nearly ten years of continual litigation, the issue of its legality remains unresolved. Analysis of the market structure involved in *CBS v. ASCAP* demonstrates why this is so. Neither elimination of the blanket license nor approval of its present use is appropriate, and the task of finding a solution between these two extremes that will yield a "fair" price for musical performance rights is a matter of equity, not of economics. In a competitive market, price will tend to a competitive level. In the noncompetitive market of musical performance rights for network television, however, a competitive price will never emerge, and there is no economically meaningful method of determining a competitive price. Thus, the market may be destined for some form of public regulation.

## I. A HISTORY OF THE CASE

The Copyright Act of 1897 granted composers of music exclusive rights in the public performance of their works,<sup>5</sup> but the task of

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1. 400 F. Supp. 737 (S.D.N.Y. 1975), *rev'd*, 562 F.2d 130 (2d Cir. 1977), *cert. granted*, 99 S.Ct. 77 (1978) (No. 77-1583).

2. Although this Article focuses on ASCAP, its economic analysis is also applicable to BMI. Emphasis on ASCAP is warranted because ASCAP controls the performance rights to approximately three-fourths of the domestic copyrighted musical compositions. *See id.* at 742.

3. *See id.* at 743-45; Garner, *United States v. ASCAP: The Licensing Provisions of the Amended Final Judgment of 1950*, 23 Bull. Copyright Soc'y 119 (1976), Timberg, *The Antitrust Aspects of Merchandising Modern Music: The ASCAP Consent Judgment of 1950*, 19 Law & Contemp. Prob. 294 (1954).

4. *CBS v. ASCAP*, 400 F. Supp. at 742.

5. Act of Jan. 6, 1897, ch. 4, § 4966, 29 Stat. 481 (current version at 17 U.S.C. § 106(4) (1976)).

enforcing these rights in theatres, cabarets, hotels, and restaurants across the country was beyond the capacity of individual composers and users.<sup>6</sup> ASCAP and BMI were organized as "clearinghouses" for the buying and selling of nondramatic performance rights in musical compositions.<sup>7</sup> ASCAP and BMI presently operate as follows: composers give the clearinghouse nonexclusive authority to license performance rights to users;<sup>8</sup> in turn, the clearinghouse issues to users a blanket or per program license that allows the use of any or all of the compositions in the clearinghouse's catalogue for a negotiated fee which does not vary according to the number of compositions used.<sup>9</sup> When a blanket license is issued, the user pays a fixed percentage of its total advertising revenues during the period of the license, generally one year.<sup>10</sup> When a per program license is issued, the user pays a fixed percentage of advertising revenues from those programs that actually use the licensor's music.<sup>11</sup> Technically, users may also obtain performance rights directly from composers or their publishers,<sup>12</sup> but this method is used infrequently, if at all, in the radio and television industries.<sup>13</sup>

Over the years, ASCAP and BMI have supplied musical performance rights to the radio, television, and motion picture industries. The blanket licensing system was held illegal with respect to motion pictures,<sup>14</sup> but it has remained the preferred means of obtaining performance rights for radio and television.<sup>15</sup> Because such a system lends itself to abuse, the Department of Justice has negotiated consent decrees with ASCAP and BMI in an attempt to curtail anticompetitive practices.<sup>16</sup>

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6. *CBS v. ASCAP*, 400 F. Supp. at 741; see Finkelstein, *ASCAP as an Example of the Clearing House System in Operation*, 14 Bull. Copyright Soc'y 2, 2 (1966).

7. Finkelstein, *supra* note 6, at 2.

8. *CBS v. ASCAP*, 400 F. Supp. at 741-42.

9. *Id.* at 742. Individual composers receive distributions from ASCAP's license revenues in amounts based primarily upon the extent to which their works are performed. *United States v. ASCAP*, [1960] Trade Cas. ¶ 69,612 (S.D.N.Y.); *Timberg*, *supra* note 3, at 318.

10. *CBS v. ASCAP*, 400 F. Supp. at 742.

11. *Id.*

12. See *id.* at 754.

13. See *id.* at 742.

14. See *Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888 (S.D.N.Y. 1948).

15. *CBS v. ASCAP*, 400 F. Supp. at 742.

16. The Government sued ASCAP and BMI for antitrust violations in 1941. *United States v. ASCAP*, [1940-1943] Trade Cas. ¶ 56,104 (S.D.N.Y. 1941). The complaint charged that the annual blanket license—the only license then offered—was in restraint of trade. *Id.* The Government claimed that the practice of obtaining exclusive licenses from members permitted the exaction of arbitrary prices from users. *Id.* The action resulted in a consent decree requiring ASCAP to offer broadcasters both per program and blanket licenses. *Id.* at 404. The decree also prohibited ASCAP from withholding parts of its inventory in order to exact higher prices from users. *Id.* at 405. Finally, ASCAP was enjoined from asserting the exclusive right to license performance rights and from interfering with individual licensing on the part of its members. *Id.* at 403. The effectiveness

CBS obtained blanket licenses from ASCAP and BMI for the use of music in its network programming until 1969, when it challenged the blanket licensing system.<sup>17</sup> CBS sued ASCAP, BMI, and their members and affiliates when it reached an impasse in license renewal negotiations with BMI.<sup>18</sup> CBS charged that the blanket license constituted an illegal tie-in and price fixing in violation of section 1 of the Sherman Act.<sup>19</sup> It sought an injunction requiring the establishment of a per use licensing arrangement<sup>20</sup> by which a single performance of each particular musical work would be assigned a reasonable price and made available to television networks on an individual basis.<sup>21</sup> In the alternative, CBS sought an injunction prohibiting blanket licenses for all television networks.<sup>22</sup>

The district court dismissed the complaint. The court found that CBS was not compelled to enter a blanket license agreement with either ASCAP or BMI because direct dealing with individual copyright owners was a viable alternative for the network and CBS failed to demonstrate any significant obstacles to direct dealing.<sup>23</sup> The court concluded that the absence of compulsion precluded a finding of a tie-in or price fixing.<sup>24</sup>

On appeal, the Second Circuit reversed. It determined that a blanket licensing system established by a group of copyright owners constitutes price fixing in violation of the Sherman Act,<sup>25</sup> and it found

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of the last provision as an incentive to composers to engage in direct licensing was undermined by other provisions in the decree, which permitted ASCAP to compel composers who licensed directly to pay the royalties derived therefrom into the ASCAP revenue pool. The proceeds were then distributed to composers at fixed rates. *CBS v. ASCAP*, 562 F.2d at 133 (citing *United States v. ASCAP*, [1940-1943] Trade Cas. at 403).

In 1950, the 1941 Decree was amended. *United States v. ASCAP*, [1950-1951] Trade Cas. ¶ 62,595 (S.D.N.Y. 1950). Under the terms of the amended decree, ASCAP was prohibited from compelling composers to pay the revenues they received from direct licensing into the ASCAP pool. *Id.* at 63,752. A provision required that per program licensing be made available to ensure that users actually had a choice between obtaining a blanket and a per program license. *Id.* at 63,753-54. Lastly, a judicial fee-setting procedure was created to be used when ASCAP and a licensee could not agree upon a negotiated fee. *Id.* at 63,754.

In 1966, BMI entered into a similar consent decree with the Government. Pursuant to the terms of the decree, BMI is required to offer a per program license in addition to a blanket license. Moreover, differences in the terms of these licenses must be justified by business reasons. *See CBS v. ASCAP*, 400 F. Supp. at 744.

17. *CBS v. ASCAP*, 400 F. Supp. at 753.

18. *Id.* at 754.

19. 15 U.S.C. § 1 (1976). CBS's complaint also charged a violation of § 2 of the Sherman Act. *Id.* § 2. This claim, however, was dismissed by the district court, 400 F. Supp. at 783, and is not pertinent to the analysis of this Article.

20. 400 F. Supp. at 741.

21. *Id.* at 747 n.7.

22. *Id.* at 741.

23. *Id.* at 757-79.

24. *Id.* at 780-83.

25. 562 F.2d at 140.

the availability of a viable alternative to blanket licensing, although dispositive of the tie-in issue, insufficient to overcome the network's charge of price fixing.<sup>26</sup> Despite its finding of price fixing, the court declined to adhere strictly to the *per se* rule against price fixing—a rule that technically would require an injunction against the blanket license.<sup>27</sup> Instead, in an effort to maintain the advantages of blanket licensing for the benefit of users of copyrighted musical compositions other than television networks, the court suggested that blanket licensing may be a market necessity.<sup>28</sup> The court, however, interpreted the district court's finding that CBS had the alternative of directly negotiating with composers as evidence that the blanket licensing system was not a market necessity in this case.<sup>29</sup>

In remanding the case to the district court, the Second Circuit stated that "if on remand a remedy can be fashioned which will ensure that the blanket license will not affect the price or negotiations for direct licenses, the blanket license need not be prohibited in all circumstances."<sup>30</sup> The court suggested that ASCAP and BMI might be permitted to continue to offer blanket licenses if the licenses were found to serve a market need for users *and* if ASCAP and BMI also provided an alternative type of license that would augment competition.<sup>31</sup>

## II. ECONOMIC ANALYSIS

The careful opinion of the Second Circuit reveals the perplexities inherent in *CBS v. ASCAP*. The court apparently recognized that it was confronted with an insuperable dilemma, and its intuitive hesitancy either to outlaw or uphold ASCAP's blanket license is creditable in light of economic analysis which reveals that either recourse would encourage anticompetitive activity.<sup>32</sup> Analysis further indicates, however, that no economic means of effecting competition in this particular market can be devised. Therefore, any remedy short of public regulation would be inadequate.

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26. *Id.* at 135, 138.

27. *Id.* at 140; *see* *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221, 223-24 (1940).

28. 562 F.2d at 136-38, 140 n.26.

29. *Id.* at 138.

30. *Id.* at 140.

31. *Id.*

32. The problem may actually be greater than the Second Circuit envisioned. In a footnote, the court acknowledged CBS's contention that if the blanket license "overhangs" the market, then the price of individual performance rights will necessarily be affected, but it stated that on the record it was not convinced that this is necessarily so. *Id.* at 140 n.27. The analysis in this Article, however, leaves no doubt that the existence of a blanket license significantly affects individually negotiated prices.

### A. ASCAP's Blanket License

In the current market of musical performance rights for network television, substantial concentration exists on the sides of both buyer and seller. In general, such a market structure creates a situation which could favor either the buyer or the seller, depending upon the bargaining methods employed. In this particular market, however, the seller will always have the upper hand; a bargaining rule that does not unduly favor ASCAP cannot be devised.

Until the present time, ASCAP's power to control the market has presumably been held in check by the fear of adverse judicial reaction to its practices. If its unrestricted blanket license should receive judicial sanction, then ASCAP would have free rein to engage in perfect price discrimination. ASCAP's propensity to do so is aptly illustrated by its past attempts to use the blanket license as a vehicle for price discrimination with respect to the radio and motion picture industries.

#### 1. Bilateral Monopoly

A bilateral monopoly exists when a single seller, or monopolist, confronts a single buyer, or monopsonist. The market structure in *CBS v. ASCAP* is actually that of a bilateral oligopoly—several sellers confront several buyers.<sup>33</sup> Nevertheless, analysis of this market in terms of a bilateral monopoly is valid because ASCAP has substantial monopoly power and CBS has substantial monopsony power.<sup>34</sup>

The relevant market may be analyzed by reference to Figure 1.<sup>35</sup>

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33. There are two major sellers, ASCAP and BMI, *see CBS v. ASCAP*, 400 F. Supp. at 742, and three major buyers, CBS, American Broadcasting Company, and the National Broadcasting Company. *See CBS v. ASCAP*, 562 F.2d at 132.

34. When there are only two major sellers in a market, those sellers have substantial monopoly power—the power to raise prices. Any seller whose demand curve is not perfectly elastic has some monopoly power. J. Robinson, *The Economics of Imperfect Competition* 4-5 (1934). When there are only three major buyers, those buyers have substantial monopsony power—the power to lower prices. Theoretically, buyers have monopsony power even if they can slightly influence price by changing the amount they purchase in a market. *See id.* at 216.

At the trial, economist Franklin Fisher, testifying on behalf of CBS, stressed the “cartel” nature of ASCAP, *see Record*, vol. 8, at 1653, whereas economist Peter O. Steiner, testifying on behalf of ASCAP, stressed the “monopsony” power of CBS. *See Record*, vol. 15, 4415. This testimony provides added support for analyzing the market structure in terms of bilateral monopoly. The added realism afforded by an analysis in terms of bilateral oligopoly would not justify the added complexity such an analysis would entail.

35. Figure 1 is adapted from M. Friedman, *Price Theory* 15, Fig. 2.2 (2d ed. 1976). The demand curve in Figure 1 may be used to analyze any one of the three media: radio, television, or motion pictures. Musical compositions are fungible in the medium of television. *See CBS v. ASCAP*, 400 F. Supp. at 783. They are, without doubt, at least substantially interchangeable in the radio and motion picture media. This weaker characterization is sufficient in order to construct an industry demand curve for the right to perform musical compositions. For example, economists do

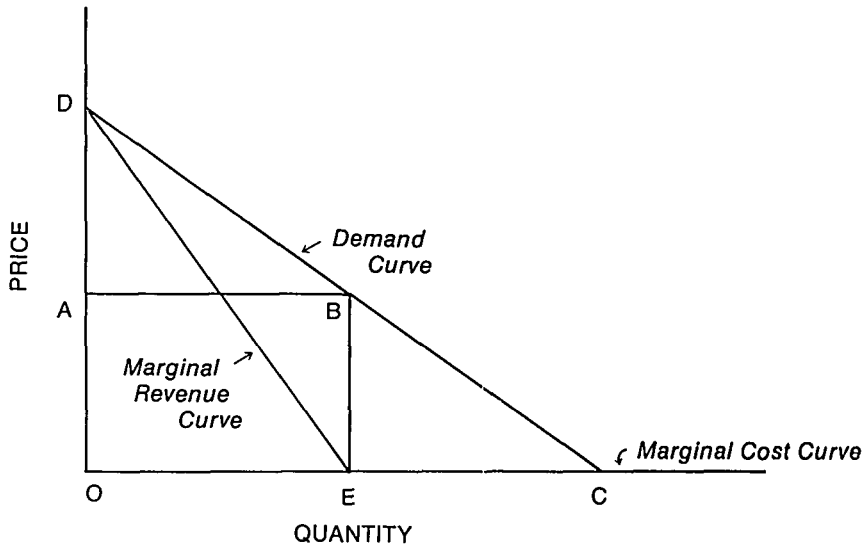


FIGURE 1

For purposes of simplification, the marginal cost to ASCAP of supplying additional users with performance rights to musical compositions is assumed to be zero at all relevant quantities. A few remarks will justify this assumption. First, no one person's hearing or viewing of a musical performance precludes another from enjoying the same performance. As such, musical performance rights exhibit the characteristic of a public good. In contrast to private goods, which may be consumed by only one person at a time,<sup>36</sup> public goods may be consumed by any number of persons simultaneously.<sup>37</sup> The marginal cost of additional consumption is zero. In addition, the same musical composition is often used in the production of sheet music and phonorecords, as well as in television, radio, and live performances. Thus, a huge stock of compositions have no economic cost for present use. The cost of creating them has been incurred in the past, owing to the demands of users other than network television. The marginal cost of licensing the performance rights of such compositions to television networks is zero.<sup>38</sup> It should be noted, however, that the conclusions

not hesitate to discuss the demand for automobiles, even though Volkswagens and Cadillacs are no more than substantially interchangeable.

36. The classic example of a private good is an apple. C. Ferguson & S. Maurice, *Economic Analysis* 399 (rev. ed. 1974).

37. See D. Dewey, *Microeconomics* 242 (1975); C. Ferguson & S. Maurice, *supra* note 36, at 399-400; Bator, *The Anatomy of a Market Failure*, 72 *Q.J. Econ.* 351 (1958); Head & Shoup, *Public Goods, Private Goods, and Ambiguous Goods*, 79 *Econ. J.* 567, 567 (1969). The paradigm of a public good is national defense.

38. Only those compositions specially created for television and for which other uses are not contemplated would have marginal costs of greater than zero. To the extent that musical compositions are fungible, however, these specially created compositions may be ignored. See note 35 *supra*.



of this analysis do not rest on the assumption that marginal cost equals zero. The assumption is made merely to simplify the analysis.<sup>39</sup>

One distinctive feature of a bilateral monopoly is that, within that market structure, price and output are indeterminate.<sup>40</sup> If only one side of a market is concentrated, price and output can be determined with reasonable certainty. For instance, a monopolist of performance rights would maximize his profits by selling at the price and corresponding quantity at which marginal cost equals marginal revenue.<sup>41</sup> Because marginal cost is zero at all quantities, marginal cost equals marginal revenue at point *E* in Figure 1. The monopolist would sell *OE* units of performance rights at a price of *OA*, and his total revenue would equal *OABE*. Similarly, the price paid and quantity purchased by a monopsonist can be ascertained. When sellers compete, the competition causes price to equal marginal cost, which occurs at point *C* in Figure 1. In general, a monopsonist has the power to reduce price below the competitive level.<sup>42</sup> Because marginal cost is zero in the market of musical

39. If the reader objects strongly to the assumption that the marginal cost of the right to perform compositions is zero, a more complicated analysis, which does not require such an assumption, may be made by superimposing the demand curve of Figure 1 over the supply curve of Figure A at note 42 *infra*. This analysis yields the same conclusions as the analysis in the text of this Article.

40. D. Dewey, *supra* note 37, at 111-13; W. Vickery, *Microstatics* 115-16 (1964).

41. C. Ferguson, *Microeconomic Theory* 265 (rev. ed. 1969).

42. This can be illustrated by reference to Figure A below. Assume that *DD* is the demand curve of a single buyer, or monopsonist, for labor and that *SS* is the competitive supply curve for labor. The competitive equilibrium is at *E* with a price of *W*<sub>1</sub> and an output of *Q*<sub>1</sub>. Optimally, the monopsonist would like to equate his marginal valuation of the product, given by the demand curve, with marginal cost, given by the *MC* curve. He would strive to attain point *L*, with a price of *W*<sub>2</sub> and an output of *Q*<sub>2</sub>. The monopsony price is below the competitive price and fewer workers are hired. D. Dewey, *supra* note 37, at 197-99; see C. Ferguson & S. Maurice, *supra* note 36, at 367-74.

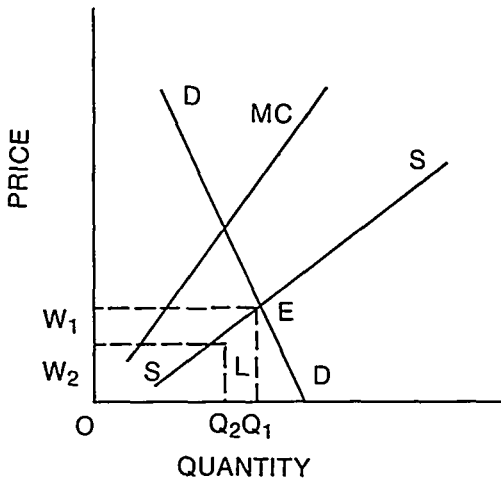


FIGURE A

performance rights for television, however, the competitive price theoretically would also be zero, and the monopsony price could probably not be lower.<sup>43</sup> Therefore, the monopsonist would buy approximately *OC* units at an approximate price of zero. In a bilateral monopoly, however, neither the monopolist nor the monopsonist can dominate the other and thereby control the market. The situation is necessarily indeterminate: the number of units sold will be between *OE* and *OC*, and the price will be between zero, and the monopoly price, *OA*.<sup>44</sup> The specific result will depend upon the bargaining rules and strategy employed.<sup>45</sup>

In the context of bilateral monopoly, it is extremely difficult to devise bargaining rules that do not unduly favor one side or the other.<sup>46</sup> The most commonly used collective bargaining rule in bilateral monopoly markets permits one side to choose price per unit and the other side to choose the number of units.<sup>47</sup> The rule generally produces equitable results, provided that demand is elastic. Labor negotiations in concentrated industries provide an example of the successful application of this rule. Labor has a veto power with respect to the level of wages. Management, on the other hand, usually controls the number of workers hired. If labor insists on raising the wage rate to a level which is imprudently high (significantly above the equilibrium level), management will be forced to reduce the work force, which usually accounts for a high proportion of total costs. Management can often substitute machines (capital) for labor, at least in the long run. In short, labor must consider the effect of its demands upon the number of workers hired. In terms of economic analysis, at a wage level significantly above the equilibrium level, the demand for labor becomes elastic, at least in the long run.<sup>48</sup>

This rule would fail in negotiations between ASCAP and CBS. The cost of musical performance rights constitutes less than one percent of the total cost of an hour-long prime time television show;<sup>49</sup> thus, CBS would probably not reduce the number of musical compositions it uses,

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43. Conceivably, the competitive price could be negative in that composers might be willing to pay to have their compositions performed on television.

44. In a bilateral monopoly, price and output are determinate only if collusion is possible. In that case, uncertainty surrounds only the division of profit between the monopolist and the monopsonist. D. Dewey, *supra* note 37, at 110-13.

45. C. Ferguson, *supra* note 36, at 281-82. The bilateral monopoly problem can also be analyzed by means of an Edgeworth box diagram. This approach reaches the same conclusions as supply and demand analysis, but it highlights the bilateral trading and the indeterminateness of the solution. *See id.* at 431-41; W. Vickery, *supra* note 40, at 115-16. An Edgeworth box diagram will not be used, however, because it is more cumbersome than supply and demand analysis.

46. W. Vickery, *supra* note 40, at 116.

47. *Id.*

48. A. Rees, *The Economics of Work and Pay* 57-66 (1973).

49. At the time of the trial, CBS paid about \$200,000 for an hour-long variety show or dramatic serial and as much as \$750,000 for a made-for-TV movie. Its payments to ASCAP or BMI averaged about \$1,000 per show. *CBS v. ASCAP*, 400 F. Supp. at 743.

even if ASCAP were to double its fees. In short, because the demand for the right to perform musical compositions is extremely inelastic within the relevant range of prices,<sup>50</sup> the labor-management bargaining procedure would unduly favor ASCAP.

The blanket licensing system also endows ASCAP with the superior bargaining position in the market of musical performance rights for network television. In effect, by furnishing a blanket license, ASCAP chooses both price and quantity. Moreover, it has the power to act as a discriminating monopolist.

## 2. Price Discrimination via the Blanket License

### a. The Discriminating Monopolist

Some discussion is required to explain the term discriminating monopolist and how the blanket license, in the form of an all-or-nothing bargain, can enable one to attain this position. In Figure 2, a monopolist would charge all buyers of performance rights the same price,  $OA$ , and would sell  $OE$  units; his revenue is indicated by  $OABE$ .<sup>51</sup> A monopolist can increase this standard revenue by charging different prices to different buyers. For instance, some buyers would be willing to pay a price higher than the monopoly price,  $OA$ , but lower than the maximum price at which a unit could be sold,  $OD$ ; this is indicated by the  $DB$  portion of the demand curve. If the monopoly price is charged, these buyers will be able to buy the product for less than they would be willing to pay. The

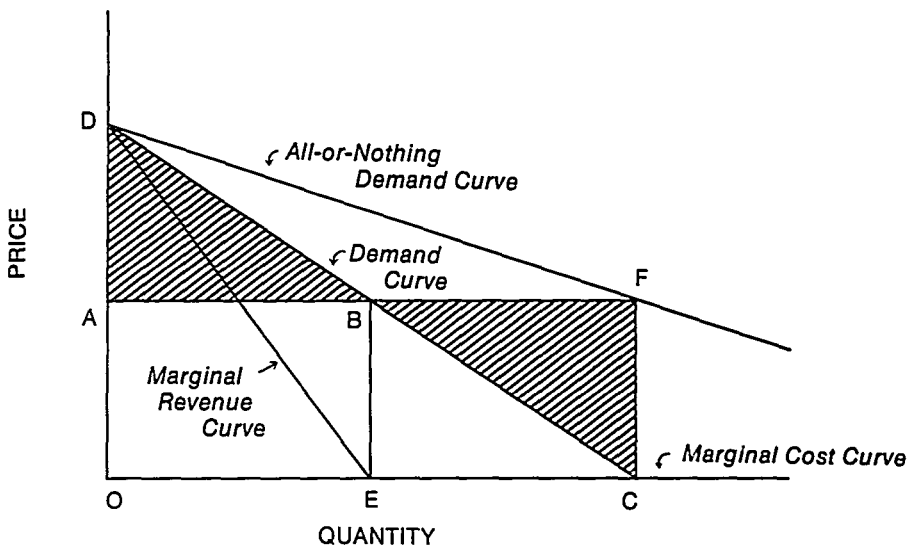


FIGURE 2

50. Demand for an input of a final product becomes more inelastic as the proportion of that input to the total cost of the product decreases. A. Marshall, *Principles of Economics* 381-93 (8th ed. 1920); G. Stigler, *The Theory of Price* 243-44 (3d ed. 1966).

51. See note 41 *supra* and accompanying text.

total amount of the benefit is measured by the shaded triangle *DAB* and is called consumer surplus.<sup>52</sup> The *BC* portion of the demand curve indicates that some buyers would be willing to purchase performance rights at a price less than the monopoly price. A monopolist who could charge prices lower than *OA* to these buyers would capture the revenue from triangle *CEB*.

Perfect price discrimination occurs when the monopolist charges each buyer the maximum amount that he is willing and able to pay.<sup>53</sup> By engaging in perfect price discrimination, the discriminating monopolist is able to appropriate all of the revenue within area *DOC*, which comprises the usual monopoly revenue, *OABE*, consumer surplus, *DAB*, and the fruits of a newly created demand, *CEB*. A monopolist who wishes to discriminate must be able to determine the demand elasticities of different buyers and to prevent those who will only pay a low price from buying its product and selling it to those who will pay a high price.<sup>54</sup> If, for example, ASCAP attempted to sell different bundles of performance rights to different buyers at different prices, it would confront the difficult problem of determining how much each buyer is willing to pay for each bundle of rights.

This problem can be avoided by using an all-or-nothing bargain, or blanket license, under which a buyer must purchase either a specified quantity or nothing at all.<sup>55</sup> Whereas competitive dealing presupposes that buyers are free to purchase either the maximum number of units available or a smaller quantity at a corresponding price, the all-or-nothing bargain forces a buyer to purchase more units than he wishes to purchase at a price that is higher than he wishes to pay. The all-or-nothing demand curve in Figure 2 demonstrates that the all-or-nothing bargain yields the same revenue as perfect price discrimination.<sup>56</sup> If buyers are collectively given a choice of buying either *OC* units at an average price of *OA* per unit or nothing, then the total revenue from such sale is *O AFC*. Because triangle *DAB* is equal to triangle *FCB*, the total revenue from the all-or-nothing bargain, *O AFC*, is equal to the total revenue of the discriminating monopolist, *DOC*.<sup>57</sup> Thus, the all-or-nothing bargain allows the monopolist to reap the benefits of perfect price discrimination without confronting the problems posed by dealing with different buyers on different terms.

#### b. ASCAP's Attempts at Price Discrimination

Since price discrimination would be most advantageous for ASCAP, it is likely that ASCAP would exploit its availability, given the oppor-

52. See C. Ferguson & S. Maurice, *supra* note 36, at 127-29.

53. J. Robinson, *supra* note 34, at 187 n.1; see W. Vickery, *supra* note 40, at 104-05.

54. W. Vickery, *supra* note 40, at 294-97.

55. It should be noted here that, in the context of the all-or-nothing blanket license, the marginal cost to the buyer, CBS, of the right to perform an additional composition is zero.

56. See M. Friedman, *supra* note 35, at 15 n.1.

57. See notes 53-54 *supra* and accompanying text.

tunity to do so. This presumption is supported by ASCAP's historical proclivity to use the all-or-nothing bargain as a vehicle for price discrimination. Moreover, the history of ASCAP's discriminatory activities reveals that ASCAP retains the potential to engage in such activities with respect to the network television industry.

i. *ASCAP and the Radio Industry*: In about 1920, ASCAP realized that the radio industry held commercial possibilities.<sup>58</sup> It began to issue blanket licenses free, or at nominal fees, to fledgling radio stations.<sup>59</sup> ASCAP steadily increased its fees and during the 1930's raised its prices 900%.<sup>60</sup> In 1932, ASCAP and the radio stations entered a contract by which each station was to be charged a flat fee plus 2% of its gross advertising revenue in 1933, 4% in 1934, and 5% in 1935. The contract in force in 1935 was extended for five years.<sup>61</sup> At this time, fees were charged only to individual stations and not to national broadcasting networks.<sup>62</sup>

58. See generally Caldwell, *The Copyright Problems of Broadcasters*, 2 J. Radio L. 287, 292 (1932).

59. Comment, *ASCAP and the Antitrust Laws: The Story of a Reasonable Compromise*, 1959 Duke L.J. 258, 262 [hereinafter cited as *Reasonable Compromise*].

60. Allen, *The Battle of Tin Pan Alley*, 181 Harpers 514, 519 (1940). ASCAP defended its constantly rising license fees by arguing that performances on radio drastically reduced the sales of sheet music; it reasoned that radio is a substitute product for sheet music and that the wide exposure and constant repetition of a melody shortened the life of a musical composition. Cohn, *Music, Radio Broadcasters and the Sherman Act*, 29 Geo. L.J. 407, 413 (1941).

61. Mills & Miller, *The ASCAP-NAB Controversy: The Issues*, 11 Air L. Rev. 394, 399 (1940).

62. *Id.* at 395. During this period of rising license fees, the radio industry, under the leadership of the National Association of Broadcasters, unsuccessfully challenged ASCAP in several ways. It sought repeal of the statutory minimum damage provision for infringement of a musical copyright, which provided for damages of \$250 for each and every infringement. Copyright Act, ch. 356, § 25(b), 37 Stat. 489 (1912) (current version at 17 U.S.C. § 101(b) (1976)). This provision was a powerful deterrent, given the great difficulty in proving actual damage from a broadcast copyright infringement. See Comment, *Revision of the Copyright Law*, 51 Harv. L. Rev. 906 (1938); Comment, *Copyright Reform and the Duffy Bill*, 47 Yale L.J. 433 (1938).

The radio industry also enlisted the aid of state legislation. As a result, many states passed legislation prohibiting the blanket license or placing a tax on ASCAP's compositions. *E.g.*, Act of Feb. 16, 1939, ch. 13, 1939 Alaska Sess. Laws 66 (current version at Alaska Stat. §§ 45.50.330-.460 (1962)); Act of June 12, 1939, ch. 19653, 1939-1 Fla. Laws 1575 (repealed 1977); Act of June 10, 1937, ch. 17807, 1937-1 Fla. Laws 204 (repealed 1977); Act of May 17, 1937, ch. 138, 1937 Neb. Laws 488 (current version at Neb. Rev. Stat. §§ 59-1401 to 1406 (1974)); Copyright Act, ch. 115, 1939 N.D. Sess. Laws 160 (current version at N.D. Cent. Code §§ 47-21-01 to 11 (1978)); Act of May 18, 1937, ch. 212, 1937 Tenn. Pub. Acts 828 (repealed 1943); Act of Apr. 13, 1939, No. 32, 1939 Vt. Acts 46 (current version at Vt. Stat. Ann. tit. 32, §§ 7901-7904 (1970)); Act of Mar. 8, 1937, ch. 218, 1937 Wash. Laws 1070 (current version at Wash. Rev. Code Ann. §§ 19.24.010-.900 (1978)); see Cohn, *supra* note 60, at 416-19; Note, *Anti-ASCAP Legislation and Its Judicial Interpretation*, 9 Geo. Wash. L. Rev. 713 (1941) [hereinafter cited as *Anti-ASCAP Legislation*]; note, *Musical Monopolies and Legislative Control*, 53 Harv. L. Rev. 458 (1940) [hereinafter cited as *Musical Monopolies*]. Several of these laws were held unconstitutional. See *Buck v. Harton*, 33 F. Supp. 1014 (M.D. Tenn. 1940); *Buck v. Swanson*, 33 F. Supp. 377 (D. Neb. 1939), *rev'd on other grounds sub nom.* *March v. Buck*, 313 U.S. 406 (1931); *cf.* *Buck v. Gallagher*, 307 U.S. 95 (1939) (ASCAP has standing to request injunction against enforcement of Washington anti-ASCAP statute); *Gibbs v. Buck*, 307 U.S. 66 (1939) (same with respect to Florida statute).

This history indicates that, from its inception, ASCAP exhibited a tendency to discriminate in price. A license fee based upon a percentage of gross revenue is discriminatory in that it grants the same number of rights to different licensees for different total dollar amounts, depending upon their ability to pay. The effectiveness of price discrimination is significantly enhanced by the all-or-nothing blanket license.<sup>63</sup>

By 1939, ASCAP derived two-thirds of its revenue from radio license fees.<sup>64</sup> In that year, it served notice that it intended to charge blanket license fees according to the source of the program. This change in licensing would have doubled the fees paid by radio from over four million dollars to eight or nine million dollars. For the first time, ASCAP also sought fees from the networks; it proposed to charge them 7.5% of their gross advertising revenue. Local stations were offered either a reduction or no change in fee, depending upon the size of the station.<sup>65</sup>

ASCAP's proposal was similar to one that would be made by a discriminating monopolist. It would have resulted in significantly different rates for different licensees. ASCAP proposed to charge one rate to small stations, a higher rate to medium size stations, a still higher rate to large stations, and the highest rate to networks.<sup>66</sup> Assuming that the revenue ASCAP received from the radio industry prior to its proposal approached the normal monopoly revenue, *OABE* in Figure 2, the proposed system would yield an amount approximating the discriminating monopolist's revenue, *DOC*.

The radio industry refused to accede to ASCAP's demands. The National Association of Broadcasters formed a rival performing rights society, BMI, and the nation's radio stations commenced a ten-month boycott of ASCAP's music.<sup>67</sup> In addition, the Government revived a dormant antitrust suit<sup>68</sup> and filed a criminal prosecution against ASCAP.<sup>69</sup> In 1941, as a result of these hostile reactions, ASCAP compromised. It contracted with the networks and individual stations

63. See notes 56-57 *supra* and accompanying text. In several suits during the 1930's, however, ASCAP's price discrimination was held not to violate the antitrust laws. *Buck v. Del Papa*, 17 F. Supp. 645 (D.R.I. 1937); *Buck v. Hillsgrove Country Club, Inc.*, 17 F. Supp. 643 (D.R.I. 1937).

64. Allen, *supra* note 60, at 515.

65. Mills & Miller, *supra* note 61, at 396-402. With respect to local stations, ASCAP proposed license fee reductions of 50% for the smallest and financially weakest stations, 33½% reductions for medium size stations, and neither reductions nor increases for large stations. *Id.*

66. See note 65 *supra* and accompanying text.

67. White, *Musical Copyrights v. the Anti-trust Laws*, 30 Neb. L. Rev. 50, 54 (1951); Comment, *Music Copyright Associations and the Antitrust Laws*, 25 Ind. L.J. 168, 172 (1950) [hereinafter cited as *Music Copyright Associations*].

68. In the early 1940's, commentators were divided on the question whether ASCAP was in violation of federal antitrust laws. See, e.g., Cohen, *State Regulation of Musical Copyright*, 18 Ore. L. Rev. 175 (1939) (pro-ASCAP); Cohn, *supra* note 60 (same); Note, *ASCAP and the Sherman Act*, 12 Air L. Rev. 173 (1941) (same); *Anti-ASCAP Legislation*, *supra* note 62 (suspicious of ASCAP); *Musical Monopolies*, *supra* note 62 (same).

69. ASCAP pleaded *nolo contendere* to the charges and was fined \$35,250. *Music Copyright Associations*, *supra* note 67, at 178-79.

for a fixed percentage of their gross advertising revenues,<sup>70</sup> and it entered into a consent decree with the Government.<sup>71</sup>

The consent decree, however, placed ineffectual restraints on ASCAP and had no significant impact on subsequent negotiations.<sup>72</sup> The first provision of the decree stated that ASCAP could not acquire exclusive performance rights from its members; yet, it authorized ASCAP to collect all proceeds that its members derived from individual contracts with users.<sup>73</sup> Therefore, because copyright owners had no incentive to deal as individuals, all prices were, in effect, the product of collective bargaining.

The second provision prohibited ASCAP from entering into "any performing license agreement which shall result in discriminating in price or terms between licensees similarly situated; provided, however, that differentials based upon applicable business factors which justify different prices or terms shall not be considered discrimination . . ." <sup>74</sup> This provision is vacuous because price discrimination is only profitable when the licensees are *not* similarly situated. If licensees are similarly situated, the price that will afford ASCAP the greatest profit from one is the same as that for the other. In terms of economic analysis, price discrimination is profitable only when different buyers have dissimilar elasticities of demand.<sup>75</sup>

The decree also required ASCAP to offer a per program license, in addition to an annual blanket license, and to set a per unit price for musical compositions. ASCAP was also prohibited from charging license fees for programs during which no music is played and from requiring additional licenses for stations that broadcast programs provided by the networks.<sup>76</sup> These provisions of the consent decree were also ineffectual. A license fee represents only a small fraction of the total cost of a program, and therefore it is unlikely that the fee, however computed, would have a substantial impact on the number of musical

70. The contracts ran through 1949 and were automatically renewable unless a party objected. *Id.* at 172.

71. *United States v. ASCAP*, [1940-1943] Trade Cas. ¶ 56,104 (S.D.N.Y. 1941). The terms of the consent decree are discussed at note 16 *supra*. The consent decree also provided for some reforms within the ASCAP organization which are not relevant to this discussion. *See* [1940-1943] Trade Cas. at 405.

72. This befits a consent decree signed within one week of the filing of the complaint. *See* Garner, *supra* note 3, at 124.

73. The decree stated: ASCAP "shall not . . . assert any exclusive performing right . . . on behalf of any copyright owner. . . . Nothing herein contained shall be construed as preventing [ASCAP] . . . from . . . requiring all moneys derived from the issuance of licenses by the respective members of [ASCAP] to be paid by the licensee to [ASCAP] and distributed in the same manner as other revenues." *United States v. ASCAP*, [1940-1943] Trade Cas. ¶ 56,104, at 403 (S.D.N.Y. 1941).

74. *Id.*

75. W. Vickery, *supra* note 40, at 294-97.

76. *United States v. ASCAP*, [1940-1943] Trade Cas. ¶ 56,104, at 404-05 (S.D.N.Y. 1941).

compositions broadcast.<sup>77</sup> Given several methods for determining prices, ASCAP could use the method most favorable to it and merely adjust the prices derived by any other method so as either to generate the same revenue or make such methods unattractive. For example, per program licensing can be structured to provide ASCAP with the same revenue as blanket licensing. Assuming that musical compositions are performed on one-half of a station's programs and the rate for a blanket license is two percent of gross advertising revenue,<sup>78</sup> a fee of four percent of advertising revenue from programs on which musical compositions are performed, which would approximate the blanket license fee, could be charged instead. The ineffectiveness of a per program alternative is borne out by the general lack of interest in per program licenses.<sup>79</sup> Similarly, the price of per piece licensing could be set to make that alternative unattractive. Because price discrimination in the context of the blanket license is most favorable to ASCAP, other bargaining methods, which would ordinarily be less favorable, are not economically relevant if price discrimination is not limited or prohibited.

ii. *ASCAP and the Motion Picture Industry*: In 1946, ASCAP wished to increase its revenue from the motion picture industry. The rates for that industry were set in fixed dollar terms that had not been changed since 1933.<sup>80</sup> Pursuant to a contract due to expire in 1947, each motion picture exhibitor paid an annual license fee that was computed according to the number of its theatre seats: ten cents per seat for theatres with less than 800 seats, fifteen cents per seat for theatres with 800 to 1599 seats, and twenty cents per seat for theatres with more than 1,600 seats.<sup>81</sup> ASCAP proposed to abandon this formula and to charge,

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77. Performance license fees were 5% or less of radio station's gross advertising revenue; thus, the demand for those rights was inelastic. *See* note 50 *supra*.

78. In 1947, the blanket annual rate for a radio station was 2.5% of advertising revenue and the per program rate was 8% of a program's revenue. *Variety*, Sept. 17, 1947, at 46, col. 4. The commercial blanket license in radio has since been reduced to 1.725% of a station's net receipts from sponsors. Garner, *supra* note 3, at 138-39. The current blanket license for local television stations consists of a threshold fee of 2% of net receipts for a given year, plus a decreasing percentage for receipts in excess of the threshold level. The per program license fee is 9% of net receipts for most programs; for motion pictures shown on television, however, the fee is 4%. *Record* vol. 20, at E300, *CBS v. ASCAP*, 400 F. Supp. 737 (S.D.N.Y. 1975); Garner, *supra* note 3, at 147.

79. "The per program license . . . has fallen into disuse. . . . The current disparity between the per program and blanket license has led some observers to conclude that licensees have been deprived of the 'economic choice' contemplated by the 1950 Judgment." Garner, *supra* note 3, at 138-39 (footnote omitted).

80. *Film Daily*, March 28, 1947, at 1, col. 3; *Motion Picture Daily*, March 24, 1947, at 1, col. 4.

81. *Variety*, Apr. 23, 1947, at 38, col. 1. "From 1918-19, when ASCAP first began to collect from the exhibitor, to 1925, there had been a theoretical fee of 5 cents per seat per annum, collected first only in New York City and then, gradually and bitterly fought, in the exchange centers. When the 1925 flat fee collapsed under the weight of exhibitors' protests, a sliding scale, based on the theatre's seating capacity, was instituted in 1935." *Motion Picture Herald*, Feb. 21, 1948, at 16. This formula contained a modest amount of price discrimination. Nevertheless, it was probably less discriminatory than a system whereby exhibitors pay a given percentage of their gross revenue.



instead, an annual fee in the dollar amount that the licensee would collect at top adult prices from a single performance at full capacity in his theatre.<sup>82</sup> The change would have resulted in a 200% increase in total fees<sup>83</sup>—an increase magnified by the 60% rise in the consumer price index during the 1933-1946 period.<sup>84</sup> The increase was not to be distributed uniformly among the exhibitors; approximately 9,000 of the 16,000 theatres would have paid only a slight increase in dollar or percentage terms, while the impact on the larger first-run theatres would have been much greater.<sup>85</sup>

ASCAP's proposed formula was similar to one in which each theatre would pay the same percentage of gross revenue.<sup>86</sup> This method of computing license fees involves some price discrimination but is not usually regarded as an unfair method of determining prices. In the context of the all-or-nothing bargain, however, the discriminatory impact is augmented.<sup>87</sup>

Motion picture exhibitors strenuously resisted the proposal,<sup>88</sup> and a majority of exhibitors organized the Theatre Owners of America to represent them in negotiations with ASCAP.<sup>89</sup> Confronted with such opposition, ASCAP capitulated and stipulated to a twenty-five percent increase in license fees for large theatres, a slight increase for medium size theatres, and no increase for small theatres.<sup>90</sup> Despite this agreement, some exhibitors continued to fight any "seat tax,"<sup>91</sup> and they

82. Film Daily, Aug. 22, 1947, at 1, col. 2; Hollywood Rep., Aug. 22, 1947, at 1, col. 4. There was to be a 15% discount for exhibitors who had 70 to 100 performances per month, and a 30% discount for those with less than 70 performances per month. Because the average number of performances was 80 per month, most theatres would qualify for the 15% discount. In addition, ticket taxes were to be excluded from the computation of the fee. Variety, Sept. 3, 1947, at 4, col. 4. See generally Motion Picture Daily, Sept. 8, 1947, at 2, col. 2.

83. License fees were expected to roughly triple from \$1.3 million to \$4.5 million. This would represent a 200% increase, but the trade papers referred to it as a 300% increase. Motion Picture Daily, Aug. 25, 1947, at 1, col. 4; Motion Picture Daily, Aug. 22, 1947, at 1, col. 3; Motion Picture Herald, Aug. 30, 1947, at 17; Variety, Aug. 27, 1947, at 5, col. 3.

84. U.S. Dept. of Commerce, Historical Statistics of the United States 210-11 (1975); Motion Picture Daily, Aug. 25, 1947, at 1, col. 4. Moreover, the proposed increase came at a time when exhibitors were experiencing a 15-20% attendance decline from the peak levels of 1946. Variety, Oct. 1, 1947, at 16, col. 4.

85. Motion Picture Herald, Aug. 30, 1947, at 17. For example, Radio City Music Hall, which paid \$1,240 under the old formula, would have paid \$7,279 under the proposal. Motion Picture Daily, Aug. 26, 1947, at 6, col. 4.

86. "We merely ascertain the potential income from a capacity sale of the theatre for a single performance, and use that as the amount of the annual license fee. Since there are usually well over 1,000 performances a year, it is simple mathematics to estimate that the society will receive about one-one-thousandth of each admission dollar." Hollywood Rep., Aug. 22, 1947, at 9, col. 2 (quoting Deems Taylor, President of ASCAP).

87. See notes 56-57 *supra* and accompanying text.

88. Timberg, *supra* note 3, at 299-305.

89. Motion Picture Herald, Sept. 27, 1947, at 1.

90. Motion Picture Daily, Feb. 9, 1948, at 1, col. 1; Motion Picture Herald, Feb. 14, 1948, at 2; Variety, Feb. 11, 1948, at 4, col. 5.

91. Film Daily, Feb. 18, 1948, at 1, col. 1.

brought private antitrust actions against ASCAP. In two of these cases, ASCAP was adjudged to have violated the antitrust laws.<sup>92</sup> One court stated that "[a]lmost every part of the Ascaph structure, almost all of Ascaph's activities in licensing motion picture theatres, involve a violation of the anti-trust laws"<sup>93</sup> and held that theatre owners were no longer required to pay license fees.<sup>94</sup>

In 1950, as a result of ASCAP's dealings with the motion picture industry, the consent decree was amended.<sup>95</sup> The amended judgment prohibited ASCAP from licensing performance rights to motion picture exhibitors.<sup>96</sup> It provided that licenses be issued on a "per film" basis and not on an "industry-wide" basis.<sup>97</sup> Consequently, a system that bypassed ASCAP evolved; individual motion picture producers began to bargain directly with individual copyright owners or their publishers.<sup>98</sup>

The 1950 amended judgment restructured the licensing system for the motion picture industry only. No restriction was placed on ASCAP's ability to use the blanket license with respect to radio and television, nor was any attempt made to formulate a rule for determining fees under a blanket license that would reduce ASCAP's power to engage in price discrimination.<sup>99</sup> Thus, ASCAP retains the power to discriminate in price with respect to the network television industry. Given ASCAP's historical proclivity to do so if afforded the opportunity, it seems likely that an unqualified judicial sanction of ASCAP's present blanket licensing system would spur such anticompetitive activity.

### B. *Prohibition of the Blanket License*

A prohibition of ASCAP's blanket license is as unacceptable as the preservation of the license in its present form. Although a number of commentators have opposed an injunction against the blanket license on

92. *M. Witmark & Sons v. Jensen*, 80 F. Supp. 843 (D. Minn. 1948), *appeal dismissed mem. sub nom. M. Witmark & Sons v. Berger Amusement Co.*, 177 F.2d 515 (8th Cir. 1949); *Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888 (S.D.N.Y. 1948).

93. *Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888, 893 (S.D.N.Y. 1948).

94. *Id.* at 900.

95. *See United States v. ASCAP*, [1950-1951] Trade Cas. ¶ 62,595 (S.D.N.Y. 1950). This judgment did little more than conform to the decision in *Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888 (S.D.N.Y. 1948).

96. *United States v. ASCAP*, [1950-1951] Trade Cas. ¶ 62,595, at 63,752 (S.D.N.Y. 1950).

97. *Id.* at 63,753.

98. Record, vol. 5, at 824-27, *CBS v. ASCAP*, 400 F. Supp. 737 (S.D.N.Y. 1975) (testimony of Albert Berman, Managing Director of the Harry Fox Agency).

99. Although the consent decrees prohibited ASCAP from acquiring exclusive licenses from its members, composers have little incentive to bargain individually. The bargaining power of even the most famous composer does not approach the collective bargaining power available to ASCAP through the all-or-nothing bargain. The all-or-nothing bargain also removes any incentive for users to deal with individual composers. Users would obtain blanket licenses, if available, and therefore would not pay twice for the use of the same compositions. *See CBS v. ASCAP*, 400 F. Supp. at 754.

the ground that the transaction costs of direct bargaining between CBS and individual composers or their publishers would be prohibitive,<sup>100</sup> this is not a valid criticism. Such costs do not present an insurmountable barrier to direct licensing. Nevertheless, direct licensing of musical performance rights in the context of network television would be economically unsound. The principal objection to direct licensing is that if copyright owners were forced to deal with CBS on an individual basis, then CBS could assert its monopsony power over those individuals.

### 1. Transaction Costs

If radio stations were to contract directly with individual copyright owners for musical performance rights, then the number of separate contracts between individual stations and individual copyright owners would be counted in the millions, each involving small dollar amounts.<sup>101</sup> Thus, the radio industry needs a blanket license to keep the number of individual contracts and their costs at manageable levels. In contrast, the motion picture industry has successfully dispensed with the blanket license; it has developed a market "machinery" by which motion picture producers bargain directly with individual composers for performance rights.<sup>102</sup> In *CBS v. ASCAP*, the district court found that the market machinery that exists in the motion picture industry could easily be expanded to accommodate the television industry.<sup>103</sup> In effect, the court found that the television networks' use of music was more like the motion picture industry's than the radio industry's<sup>104</sup> and that direct

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100. See 91 Harv. L. Rev. 488, 493-495 (1977) [hereinafter cited as *Middleman*]; Comment, *CBS v. ASCAP: Performing Rights Societies and the Per Se Rule*, 87 Yale L. J. 783, 786-787 (1978) [hereinafter cited as *Performing Rights Societies*].

In order to support this theory, the Harvard commentator analogizes ASCAP to a middleman. This analogy, however, is inappropriate. The best example of middlemen are wholesalers, who typically deal in competitive markets. *CBS v. ASCAP* involves bilateral monopoly power. See pt. II(A)(1) *supra*. A bilateral monopoly functions quite differently from a competitive market, and operations in one cannot necessarily be attributed to the other. Moreover, the middleman analogy does not comport with principles of agency law. The Harvard commentator confuses the definitions of broker and middleman. See *Middleman, supra*, at 492 n.27. In the law of agency, middlemen do not negotiate on behalf of either party; they are essentially finders who bring parties together and therefore can receive payments from both. Brokers, on the other hand, have a fiduciary duty to bargain on behalf of the party they represent, their principal, and can only accept payment from that party to the transaction. See F. Mechem, *Outlines of the Law of Agency* §§ 501, 503 (4th ed. P. Mechem 1952). See also *Spratlin, Harrington & Thomas, Inc. v. Hawn*, 116 Ga. App. 175, 156 S.E.2d 402 (1967). Thus, in terms of agency law, ASCAP more closely resembles a broker than a middleman.

101. See *Performing Rights Societies, supra* note 100, at 786.

102. *CBS v. ASCAP*, 400 F. Supp. at 759-60.

103. *Id.* at 757-65.

104. Television programs are mainly made-for-TV movies or video taped shows, each of which uses a limited number of musical compositions. *Id.* at 755-56.

licensing to network television program producers by copyright owners was feasible.<sup>105</sup>

The district court's reasoning is valid. The CBS network nationally telecasts approximately 7,500 programs annually.<sup>106</sup> Its music requirements consist chiefly of "inside" music, that is, theme and background music specifically composed for a particular program. "Outside" music, which consists primarily of feature music and some background music that has been composed previously, is used regularly on only a small number of programs<sup>107</sup> and accounts for only about ten to fifteen percent of CBS's present music needs.<sup>108</sup>

Producers hold the rights to inside music composed for their programs; they must obtain the rights to outside music from the composer or his representative. Most of the programs broadcasted over the CBS television network are produced by independent production companies referred to as "program packagers."<sup>109</sup> At present, the program packagers do not provide CBS with performance rights to music. They do, however, furnish many other rights that CBS needs in order to broadcast copyrighted music, such as the right to record a composition in synchronization with the film or video tape.<sup>110</sup> "Synch" rights are not provided by means of a blanket license, and the process by which these rights are licensed could also be used to license performance rights.

Program packagers obtain their synchronization rights in one of two ways, depending upon the type of music involved. With respect to inside music, many packagers own publishing subsidiaries that acquire the copyrights directly from the composers.<sup>111</sup> The district court observed that these publishers maintain catalogues of the compositions they control and found that CBS could feasibly negotiate with them for performance rights, as it does for synchronization rights.<sup>112</sup> With respect to outside music, synchronization rights for packagers are almost exclusively brokered through the Harry Fox Agency, Inc. (Fox Agency), which represents virtually every major music publisher. The Fox Agency issues several thousand television synchronization licenses annually.<sup>113</sup> In addition, the Fox Agency handles the motion picture

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105. *Id.* at 765.

106. *Id.* at 742.

107. Outside music is used on "variety shows and variety specials, sports shows (e.g., football halftime shows), late night talk shows, and the 'Captain Kangaroo Show.'" *Id.* at 756.

108. *Id.* at 757.

109. *Id.* at 755. Most of the prime time serials fall into this category. At the time of the trial, CBS itself produced only "Gunsmoke," two daytime serials, and some variety, news, public affairs, and sports programs. *Id.* at 742.

110. *Id.* at 759.

111. *Id.* at 756. With respect to performance rights, ASCAP distributes royalties to these subsidiaries for music performed on shows created by their parent companies. *Id.*

112. *Id.* at 760-61.

113. *Id.* at 759-60. "Because Fox has instructions regarding each publisher's fee structure, (or, more often, is familiar with it on the basis of past experience) it is usually able to quote prices over

industry's "movie rights" contracts, which provide for package coverage of both synchronization and performance rights for theatrical motion pictures.<sup>114</sup> The district court concluded that television producers could similarly license performance rights through the Fox Agency or a new agency modeled on it.<sup>115</sup>

Therefore, if the blanket license is eliminated, a workable system of licensing performance rights could nevertheless be developed.<sup>116</sup> *CBS v. ASCAP* presents the case for ASCAP's blanket license unclouded by the issue of transaction costs.

## 2. The Monopsony Power of Network Television

Although transaction costs would not preclude individual bargaining, a more significant economic consideration supports the maintenance of some form of blanket licensing. The substantial concentration on the buyers' side of the market indicates that the networks have monopsony power in the market for musical performance rights.<sup>117</sup> In addition, two factors indicate that substantial concentration may be inherent in the network television industry.<sup>118</sup> First, the cost of producing prime time

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the telephone for the compositions which interest the producer. The entire transaction, including actual issuance of the license, is completed within two to three days at most." *Id.* at 760.

114. *Id.* The combined synchronization-performance right package sells for between \$250 and \$20,000 per composition per motion picture, and the price is not often below \$750. Record, vol. 5, at 846. In contrast, synchronization rights for use in television sell at very low rates. The usual price range is \$50 to \$150 per composition; \$250 is considered a high price. *Id.* at 817-20. There was testimony that if it were not for "nuisance value," the price of synchronization rights for television would be zero in many instances. *Id.*, vol. 8, at 1677-79. One reason given for accepting a low price in television was that copyright owners want their compositions performed on television. *Id.*, vol. 5, at 814. Composers may believe that television performances of their music will increase their sales in other media. In addition, they may believe that ASCAP's collective power with respect to performance rights insures that their distributions from ASCAP exceed the amounts they would receive if they sold combined synchronization and performance rights as individuals. *See id.* at 927. The monopsony power of the network may contribute to the low price as well.

115. *Id.* at 762.

116. The district court's finding that direct licensing of performance rights is feasible was accepted by the Second Circuit. 562 F.2d at 134-40.

117. *See* notes 33-34 *supra* and accompanying text.

118. An argument against this contention can be advanced on the ground that removal of the restrictions on competition between pay television and "free," or advertiser-sponsored television, by charging a price to all television viewers would alter the pattern of substantial concentration in the industry. Free television plans its programming to attract the largest audience possible, but such programming fails to consider differences in preferences and intensity of demand. If a price were charged to television viewers, then diverse preferences would have to be taken into account. The current mass audience, a precondition for advertising revenue, would become fragmented, and fewer viewers would be needed to sponsor a particular program. Therefore, it would be possible for competitors to arise and enter the market. It is not possible to predict whether removing the restrictions against such competition would reduce the substantial concentration in the network television industry. Lower and middle income families, however, have a strong interest in the present system of free television. R. Noll, M. Peck & J. McGowan, *Economic Aspects of Television Regulation* at 32-33 (1973) [hereinafter cited as R. Noll]. Changes that significantly alter the existing market structure would probably not be politically acceptable.

network shows is extremely high,<sup>119</sup> and only a few networks are able to generate the capital needed to support such shows.<sup>120</sup> Second, network television exhibits some aspects of a natural monopoly.

The critical indicator of the existence of a natural monopoly is an inherent tendency to decreasing unit costs<sup>121</sup> as output increases.<sup>122</sup> From the perspective of the viewer, network television broadcasting exhibits this characteristic of a natural monopoly.<sup>123</sup> An additional viewer does not increase a network's total cost; marginal cost equals zero. Cost per viewer, therefore, declines indefinitely as more viewers watch the network. From the perspective of the network, however, unit costs do not necessarily decrease as output increases.<sup>124</sup> If a network can attract additional viewers only by spending more money on programs, then its marginal cost per added viewer is greater than zero. Broadcasters would spend to increase audience size only to the point at which advertising revenue from an additional viewer equals the cost of attracting the viewer. From this standpoint, network television broadcasting may not be a natural monopoly. Nevertheless, the fact that average cost decreases from one perspective and increases from another does not necessarily preclude the possibility that network television is a natural monopoly. In practice, natural monopolies are difficult to identify, and many industries that are widely recognized as natural monopolies exhibit the same ambiguous cost and output pattern as network television. For example, a local telephone company is generally considered a natural monopoly. If output is measured by the number of messages, unit costs decline as output increases because the cost of transmitting an additional message is minimal. On the other hand, if output is measured by the number of subscribers, unit costs increase because the number of connections in the central exchange increases more than proportionately

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119. See note 49 *supra* and accompanying text.

120. The three national networks provide most of the prime time programs shown on television and a majority of all programs broadcasted by affiliated stations. Most local television stations are affiliated with one of the three networks. R. Noll, *supra* note 118, at 15.

121. Several different meanings may be applied to the term "decreasing unit costs." (1) Short-run decreasing costs: When a firm has a given existing capacity, total unit cost of production declines as output increases, up to the physical limits of the capacity of the firm's operations. (2) Long-run decreasing unit costs: As a firm increases its capacity, unit costs decrease, provided that the additional capacity is fully utilized. This phenomenon is due to economies of scale internal to the firm. The natural monopoly concept is related to this definition. (3) Decreasing costs due to economies of scale external to the firm: As an entire industry grows it may acquire some of its inputs at decreasing average costs, because its growth enables the suppliers of those inputs to take advantage of potential economies of scale internal to their industry. (4) Decreasing costs over time as a result of technological progress. 1 A. Kahn, *The Economics of Regulation: Principles and Institutions* 124-30 (1970); C. Phillips, *The Economics of Regulation* 22 (1969).

122. 2 A. Kahn, *The Economics of Regulation: Principles and Institutions* 119 (1971).

123. G. Becker, *Economic Theory* 95 (1971); R. Noll, *supra* note 118, at 33.

124. See R. Noll, *supra* note 118, at 10-11.

as the number of subscribers increases.<sup>125</sup>

Even if network television is not a natural monopoly, however, the actual concentration in the industry would enable the networks to reduce the price of musical performance rights below the competitive level.<sup>126</sup> Competition among individual copyright owners to sell musical performance rights to networks would, in itself, cause the price of such rights to decline. The monopsony or buying power of the networks would place further downward pressure on the price. In short, if individual copyright owners were required to negotiate with the television networks or their program producers, bargaining power would be overwhelmingly with the networks.

No system short of blanket licensing will adequately offset the monopsony power of network television. For instance, a "per use" system, such as that suggested by CBS, would decidedly favor the buyer over the seller. Under such a system, CBS would bargain with individual copyright owners, and ASCAP would maintain a "per use reservoir" for use in the event that an individual composer could not be contacted.<sup>127</sup> The price of each performance right licensed from ASCAP would be determined after considering the nature of the use, duration of the use, and popularity of the composition.<sup>128</sup>

At the trial in *CBS v. ASCAP*, the level to which the price of compositions in the per use reservoir would tend was a source of disagreement. Peter O. Steiner, economist for ASCAP, claimed that the per use price would be a ceiling price because CBS could assert its monopsony power over many copyright owners and would use the per use reservoir only when it lacked such power.<sup>129</sup> Franklin Fisher, economist for CBS, claimed that the per use reservoir price would

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125. 1 A. Kahn, *supra* note 121, at 125.

126. See note 42 *supra* and accompanying text.

127. See *CBS v. ASCAP*, 400 F. Supp. at 747 n.7.

128. *Id.* Other telecasters have proposed systems similar to that suggested by CBS. In *United States v. ASCAP*, [1971] Trade Cas. ¶ 73,491 (S.D.N.Y.), the National Broadcasting Company (NBC) requested a license for 2,217 ASCAP compositions which were the most frequently featured performances on its variety shows. NBC intended to obtain the remainder of its music requirements through direct transactions. *Id.* at 90,008-09. In *United States v. ASCAP*, 208 F. Supp. 896 (S.D.N.Y. 1962), *appeal dismissed per curiam sub nom. Shenandoah Valley Broadcasting, Inc. v. ASCAP*, 371 U.S. 540, *appeal dismissed*, 317 F.2d 90 (2d Cir.), *rev'd*, 375 U.S. 39 (1963), *modified*, 375 U.S. 994, *aff'd*, 331 F.2d 117 (2d Cir.), *cert. denied*, 377 U.S. 997 (1964), over 300 local television stations that paid for music on all nonnetwork programs they broadcasted wanted a license that would exclude all independently produced prerecorded programs. Individual producers of television programs would have obtained licenses for rights to the music performed on the shows they produced. Therefore, the local stations would have paid only for performances on locally produced programs. The court denied the request and stated that the stations wanted a license that was neither a blanket license nor a per program license but "a composite sort of license, containing a little bit of both." *Id.* at 897.

129. Record, vol. 15, at 4415.

reflect supply and demand and therefore would be self-correcting. He claimed that if the price were too high, most transactions would take place outside the reservoir, and that if it were too low, most would take place within the reservoir.<sup>130</sup> When called to the witness stand a second time, however, Fisher correctly stated that a resolution of the dispute depended upon whether musical compositions are fungible.<sup>131</sup> If they are fungible, CBS would be able to coerce a composer to lower his individual price by threatening to use another composer's music instead.<sup>132</sup> Because CBS could usually obtain a lower price from the composer himself, it would rarely have to resort to the per use reservoir. Given the district court's conclusion that musical compositions are fungible in the medium of television, Steiner's claim that the per use reservoir would set a ceiling price that CBS would use only if it could not assert its monopsony power appears to be correct. Thus, a per use system would not mitigate the monopsony problem presented by direct licensing.

### C. Summary

Neither ASCAP's present blanket licensing system nor compulsory individual contracting between television networks and composers establishes economically acceptable bargaining rules in the market for musical performance rights. If ASCAP were to continue to bargain without restriction on behalf of copyright owners, then price would tend to the monopoly price, which is higher than a competitive price. If copyright owners were to deal directly with CBS, then price would tend to the monopsony price, which is lower than a competitive price.

An attempt to avoid the monopoly-monopsony problem by asking what the price of musical performing rights would be if the market structure were theoretically competitive would fail. According to the theory of perfect competition, a product's price is efficient if it equals the cost of producing an additional unit, that is, marginal cost.<sup>133</sup> In the context of this theory, it is difficult to determine a price for products such as musical compositions which, once created, are costless to use. Because an additional performance is costless to the composer, the efficient price of musical performance rights is zero.

Some economists believe that decisions concerning how many of these goods to produce and who should produce them are best left to the

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130. *Id.*, vol. 8, at 1660.

131. *Id.*, vol. 16, at 4769-70.

132. At the trial, witnesses often used "Happy Birthday" as an example of a song that is not fungible. A producer of television programs testified, however, that as a reasonable substitute one could sing "For He's a Jolly Good Fellow," have a cake with candles on stage, and have someone blow out the candles. *Id.*, vol. 4, at 603-04 (testimony of Edward Duke Vincent).

133. C. Ferguson & S. Maurice, *supra* note 36, at 393-94; Bator, *The Simple Analytics of Welfare Maximization*, 47 *Am. Econ. Rev.* 22 (1957).



political process. They suggest that such goods be provided to the public free of charge, that payment be made indirectly through a general increase in taxes, and that the producers of such public goods be subsidized by the government.<sup>134</sup> The results of such a solution, however, would reflect neither a perfectly competitive or efficient price nor a fair or just financial return for composers. Nevertheless, because there is no economically meaningful method of determining a price between the monopoly and monopsony prices, and because a collective bargaining rule that would be equitable to both CBS and ASCAP does not exist, some form of public regulation is necessary.

### III. LEGISLATING A PRICE

Although license fees should be regulated, the basic blanket licensing structure should be retained. That structure is necessary to offset the monopsony power of the television networks. Moreover, the blanket license has served the television industry satisfactorily for over thirty years.<sup>135</sup> Its value as a convenient means of licensing musical performance rights is undeniable, and although transaction costs would not preclude individual dealing,<sup>136</sup> the blanket license certainly reduces such costs.<sup>137</sup> The courts have recognized the virtues of the blanket license,<sup>138</sup> and in the past they have employed tortuous reasoning in order to avoid barring its use.<sup>139</sup> Public regulation of the blanket license, in the form of a court-imposed fee or a quasi-regulatory price, would eliminate the need to resort to such evasive devices, as well as prevent the television networks from asserting their monopsony power over individual composers.

Fashioning a rule for collective selling that will fairly adjust the relationship between CBS and ASCAP necessarily entails a policy decision, because no suitable price for performance rights can be determined economically.<sup>140</sup> This decision may, of course, be made by Congress.

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134. See, e.g., D. Dewey, *supra* note 37, at 216-19; C. Ferguson & S. Maurice, *supra* note 36, at 399-400; Hotelling, *The Relation of Prices to Marginal Costs in an Optimum System*, 7 *Econometrica* 151, 151-55, 158-60 (1939).

135. *CBS v. ASCAP*, 400 F. Supp. at 742.

136. See pt. II(B)(1) *supra*.

137. See *Performing Rights Societies*, *supra* note 100, at 786.

138. See, e.g., *CBS v. ASCAP*, 562 F.2d at 140; *CBS v. ASCAP*, 400 F. Supp. at 742.

139. Prior to *CBS v. ASCAP*, the courts uniformly rejected attacks on the blanket license. See, e.g., *Sam Fox Publishing Co. v. United States*, 366 U.S. 683 (1961) (third parties have no standing to modify a consent decree); *K-91, Inc. v. Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967) (ASCAP is insulated by the consent decree because the district court is the final arbiter of price under the decree), *cert. denied*, 389 U.S. 1045 (1968); *United States v. ASCAP*, 341 F.2d 1003 (2d Cir.) (same), *cert. denied*, 382 U.S. 877 (1965); *United States v. ASCAP*, [1971] Trade Cas. ¶ 73,491 (S.D.N.Y.) (twenty years of acquiescence in the interpretation of the 1950 amended judgment is conclusive).

140. See pt. II(C) *supra*.

Alternatively, in this case it may be made by the courts. The authority to make such a decision, however, does not aid in determining a particular method that will provide desirable results. Therefore, some suggestions are made as to viable means of regulating fees under a blanket license.

### A. *Congressional Regulation*

The very existence of composers' performance rights is the result of a political decision embodied in the Copyright Act of 1897.<sup>141</sup> In fact, the copyright laws contain many politically determined provisions that represent marked deviations from the market system. For instance, the pricing of the uses of musical compositions is controlled in various ways; markets are combined for the sale of sheet music,<sup>142</sup> and the right to make phonorecords is publicly regulated.<sup>143</sup> Thus, congressional regulation in the area of composers' rights is not unprecedented.

It is particularly noteworthy that, although it did not address musical performance rights with respect to commercial television, the Copyright Law of 1976<sup>144</sup> directed a method for pricing such rights in noncommercial television. This method provides for collective bargaining, with judicial determination of a price should the parties fail to agree.<sup>145</sup> Similar legislation could be directed to musical performances on commercial network television. Such a provision would probably be more reasonable than subsidizing composers, an action that would permit their compositions to be performed free of charge.<sup>146</sup>

### B. *Judicial Regulation*

The responsibility for formulating a method of determining an appropriate license fee need not be left to Congress. The courts may develop and impose such a rule by exercising their authority under the 1950 amended judgment or by finding that ASCAP's activities constitute a market failure and, as such, warrant exceptional remedial consideration.

#### 1. *Market Failure*

Occasionally, competitive markets will not efficiently allocate resources with respect to particular products. There are three possible

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141. See note 5 *supra* and accompanying text.

142. 17 U.S.C. app. § 106 (1976).

143. *Id.* §§ 115, 801.

144. 17 U.S.C. app. §§ 101-810 (1976).

145. *Id.* app. § 118 (1976).

146. Finkelstein, *The Composer and the Public Interest—Regulation of Performing Right Societies*, 19 *Law & Contemp. Prob.* 275, 292 (1954); *Reasonable Compromise*, *supra* note 59, at 277. Such legislative regulation would properly be conducted by the Copyright Royal Tribunal. See 17 U.S.C. app. § 801 (1976).

reasons for such a market failure: natural monopoly, public good, and ownership externality.<sup>147</sup> When market failures occur, nonmarket solutions may be necessary. This fact has been recognized by courts which, when confronted with certain market failures, have imposed regulatory measures for remedying anticompetitive effects.<sup>148</sup> To date, such cases have involved only the market failure of natural monopoly.

In *United States v. Terminal Railroad Association*,<sup>149</sup> several railroads that crossed the Mississippi River organized an association which acquired control of available bridges and terminal facilities. The facilities clearly exhibited the characteristic of a natural monopoly. As more people use bridge and terminal facilities, the costs per person decline.<sup>150</sup> An ordinary application of the antitrust laws in this case would have resulted in the dissolution of the association. The Supreme Court, however, fashioned a remedy to meet the particular circumstances. Instead of ordering dissolution, the Court required that all railroads be given the opportunity to use the facilities on equal terms.<sup>151</sup>

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147. See W. Nicholson, *Microeconomic Theory* 425-529 (1972).

148. See *Associated Press v. United States*, 326 U.S. 1 (1945); *Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918); *United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912), *modified*, 236 U.S. 194 (1915). It is noteworthy that both CBS and the Government recognized such an exception. See *CBS v. ASCAP*, 562 F.2d at 136-37. *Chicago Board of Trade* involved a true market functioning exception. The Chicago Board of Trade was a grain market whose members were brokers, commission merchants, millers, manufacturers of corn products, and grain elevator owners. The Board adopted a rule that required those buying and selling grain outside of trading hours to do so at the price at which the market closed. The rule was held not to violate the antitrust laws. 246 U.S. at 239-41.

Another often cited case in this area is *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933), which created an exception to the per se rule against price fixing. It is widely recognized, however, that this exception was developed under the severe conditions of the Great Depression and is without precedential value. In that case, 137 companies, producing 12% of the bituminous coal mined east of the Mississippi River and 74% of that mined in the Appalachian territory, had set up a joint agency to handle all their sales. The Supreme Court recognized that the arrangement established common prices for the firms involved, but then discussed the depressed state of the industry: "[The industry] suffered from over-expansion and from a serious relative decline through the growing use of substitute fuels. It was afflicted by injurious practices within itself,—practices which demanded correction. . . . When industry is grievously hurt, when producing concerns fail, when unemployment mounts and communities dependent upon profitable production are prostrated, the wells of commerce go dry." *Id.* at 372. The Court noted that the combination did not have a sufficient market share to be able to fix the market price. Moreover, any increase in the price of coal promised to reopen numerous mines previously shut down by low prices. The Court allowed the arrangement to stand but took the precaution of having the district court retain jurisdiction for further proceedings if future developments should justify that course. "*Appalachian Coals* is often regarded today as an aberration of the nineteen thirties, when competition was often deemphasized." P. Areeda, *Antitrust Analysis* 357 (2d ed. 1974).

149. 224 U.S. 383 (1912), *modified*, 236 U.S. 194 (1915).

150. Cf. 2 A. Kahn, *supra* note 122, at 125 (analysis of municipal water supply which may be analogized to bridge and terminal facilities). See generally *United States v. Terminal R.R. Ass'n*, 224 U.S. at 397-98.

151. 224 U.S. at 411-12.

Similarly, in *Associated Press v. United States*,<sup>152</sup> the Court framed an equitable remedy without imposing the full sanctions of the antitrust laws. The Associated Press distributed news gathered by its own employees, its member newspapers, and foreign news agencies to its members. The news gathering activity displayed the primary characteristic of natural monopoly: the collaborative activity caused unit costs to decrease as output increased.<sup>153</sup> The Court, however, did not enjoin this activity. Instead, it held that members of such combinations must afford competitors access to the news gathered by the combination on nondiscriminatory terms.<sup>154</sup>

ASCAP's activities also have a natural monopoly aspect. ASCAP was organized to finance a staff of "musical police" who, in order to detect copyright infringements, would investigate establishments in which music was played.<sup>155</sup> On a national scale, this activity is clearly beyond the capability of an individual or a small group.<sup>156</sup> The larger the group, the lower the cost of this policing activity will be per person. Thus, the infringement detection activity displays a tendency to decreasing unit costs as output increases. Although this activity is not directly in issue in *CBS v. ASCAP*, it can be used as a basis for applying the market failure exception to the antitrust laws, thereby enabling ASCAP to continue its activities as regulated by the courts.

In addition, ASCAP's infringement detection activity is related to the two other types of market failure. The activity is necessary because of the public good aspect of musical compositions. It is difficult to devise a market mechanism for excluding those who do not pay for a public good. If individuals cannot be excluded, they receive a "free ride" when the good is provided to others.<sup>157</sup> This excludability problem necessitates ASCAP's infringement detection activities.

The infringement detection activity is also related to an ownership externality. This type of market failure exists when the owner of a resource or product has no legally enforceable right to charge a price for its use or abuse. A determination as to who should bear the costs of such externalities often requires an adjustment of legal rights or governmen-

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152. 326 U.S. 1 (1945).

153. See generally *id.* at 13 n.10.

154. *Id.* at 21.

155. Allen, *supra* note 60, at 516, 521. The battle in the courts to stop the piracy of musical compositions was long and costly. See *Herbert v. Shanley Co.*, 242 U.S. 591 (1917); *Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co.*, 36 F.2d 354 (7th Cir. 1929); *Irving Berlin, Inc. v. Daigle*, 31 F.2d 832 (5th Cir. 1929); *Pastime Amusement Co. v. M. Witmark & Sons*, 2 F.2d 1020 (4th Cir. 1924); *M. Witmark & Sons v. Calloway*, 22 F.2d 412 (E.D. Tenn. 1927); *Harms v. Cohen*, 279 F. 276 (E.D. Pa. 1922); *Hubbell v. Royal Pastime Amusement Co.*, 242 F. 1002 (S.D.N.Y. 1917); 174th St. & Saint Nicholas Ave. Amusement Co. v. Maxwell, 169 N.Y.S. 895 (Sup. Ct. 1918).

156. Cohn, *supra* note 60, at 410.

157. C. Ferguson & S. Maurice, *supra* note 36, at 399-400.

tal intercession.<sup>158</sup> For example, a homeowner incurs the cost of more frequent house painting by virtue of his residing near a factory that emits smoke. If a law is passed that prohibits factory owners from polluting, or requires them to pay a tax related to the amount of damage done, then the cost of cleaning the air will be included in the price of the factory's product and will be paid for by consumers. In such a case, the market externality is internalized.<sup>159</sup>

Prior to the enactment of the Copyright Law of 1897, there was an ownership externality with respect to musical performance rights; musical compositions could legally be performed without compensating the composer.<sup>160</sup> The law, which granted musical performance rights, is an example of a legal adjustment which made possible the internalization of an externality. The externality was not removed for practical purposes, however, until ASCAP's formation. Ownership externalities involving large groups of individuals require at least quasi-governmental regulation such as ASCAP's infringement detection activity in addition to an alteration of legal rights.<sup>161</sup>

ASCAP's infringement activity, therefore, exhibits characteristics of all three types of market failure. The courts could rely on any one of these market failures to fashion a remedy that would eliminate anticompetitive effects while preserving ASCAP's valuable activities. Although there are no cases that explicitly recognize the public good or ownership externality failures as meriting such exceptional treatment, if any market failure exists, appropriate regulation should be available. Competition via markets can hardly be demanded when markets fail.

## 2. The 1950 Amended Final Judgment

The 1950 amended judgment to the 1941 consent decree contains a provision for judicial determination of a reasonable price for musical performance rights, should ASCAP and a customer fail to agree.<sup>162</sup> The court has never exercised its power under this provision but has preferred to act merely as a mediator.<sup>163</sup> The provision, however, assumes more significance than it has been accorded in light of an economic analysis of the market involved; it provides a means of setting a fair price in a situation that precludes the emergence of such a price from natural market forces.

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158. D. Dewey, *supra* note 37, at 224.

159. E.J. Mishan, *Cost-Benefit Analysis* 109-62 (2d ed. 1976).

160. The story of how Stephen Foster died nearly penniless in a New York hospital is a graphic, if extreme, illustration of the effects of an ownership externality. See *5,000,000 Songs*, 7 *Fortune* 27, 32 (1933).

161. In this respect, large group externalities are distinguishable from small group externalities. See generally Coase, *The Problem of Social Cost*, 3 *J.L. & Econ.* 1 (1960); Regan, *The Problem of Social Cost Revisited*, 15 *J.L. & Econ.* 427 (1972).

162. *United States v. ASCAP*, [1950-1951] *Trade Cas.* ¶ 62,595, at 63,754 (S.D.N.Y. 1950).

163. Garner, *supra* note 3, at 127-28.

Given the wide range of possible prices in bilateral monopoly bargaining, the court, if it did set a price, would probably choose the historical price with minor adjustments. Interim prices, which the court also has the power to set,<sup>164</sup> have been set in this manner.<sup>165</sup> In view of the higher than competitive rate of profit that the television networks have enjoyed,<sup>166</sup> a rule that each network should pay ASCAP the historical rate of 2% to 2.5% of its gross advertising revenue is not unreasonable.<sup>167</sup> This method of determining blanket license fees, which contains some price discrimination,<sup>168</sup> would permit ASCAP to share in the networks' higher than competitive profit. Recent contracts between CBS and ASCAP, however, have provided for a flat license fee.<sup>169</sup> That such a flat fee is more favorable to CBS than a fee based on a percentage of gross advertising revenue should be considered by a court that intends to use such an historical price in setting a fee for the blanket license.

### C. *Suggested Methods of Regulation*

The use of an historical rate to ascertain a suitable license fee is only one method that the courts and legislature could employ. Other viable options are suggested below. Before any additional suggestions are made, however, the lack of an indisputably correct solution should be reiterated. In addition, it is important that only one collective selling rule be adopted. If more than one rule is allowed, as in the consent decrees,<sup>170</sup> ASCAP could set the price according to the terms most favorable to it, and the prices under the other rules could be adjusted so as to make them unattractive.

One system of regulating ASCAP's blanket license fees could be to set one flat fee for all television networks. This system would prevent ASCAP from discriminating in price among the different networks. If it is considered desirable to restrict ASCAP's revenue, the fee could be based upon a percentage of the revenue of the financially weakest network. This procedure would reduce the total amount collected in

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164. *United States v. ASCAP*, [1950-1951] Trade Cas. ¶ 62,595, at 63,754 (S.D.N.Y. 1950).

165. *See* Garner, *supra* note 3, at 147.

166. *See* R. Noll, *supra* note 118, at 16-17.

167. During the 1958-1961 period, the network license fee was 2.5% of net receipts from sponsors, after deductions, plus \$12.50 per month per affiliated station. Record, vol. 23, at E1051-52, *CBS v. ASCAP*, 400 F. Supp. 737 (S.D.N.Y. 1975).

168. *See* note 63 *supra* and accompanying text.

169. For the period 1962-1963, the district court temporarily continued the agreement then in effect. Record, vol. 23, at E1133, *CBS v. ASCAP*, 400 F. Supp. 737 (S.D.N.Y. 1975). In 1964, the license fee was reduced 20% with respect to receipts in excess of 1963 receipts. *Id.* at E1133-34. The fee for 1965 was subject to agreement; \$4,505,000 was paid. *Id.*, vol. 20, at E5. The license fee has been a negotiated flat fee since 1966. *Id.* at E5; *id.*, vol. 23, at E1135.

170. *See* notes 76-79 *supra* and accompanying text.

license fees below what it would be if each network were charged a certain percentage of its own revenue.

Another possible option would be to prohibit the annual blanket license and to permit blanket licensing only on a per program basis. Different license fees could be charged for different types of programs, and the fees could reflect either an historical price or a percentage of the revenue of the least affluent network. Under this procedure, networks that use the most music would tend to pay the highest fees.

Because of the difficulty in assessing composers' investment and opportunity costs, a true regulatory price for musical compositions could probably not be determined. For most regulated industries, such as public utilities, price is set so that revenue will cover current costs, replace depreciated capital, and earn a fair return on invested capital.<sup>171</sup> An accurate estimate of the amount of money and time invested and an appraisal of a fair rate of return are crucial to this procedure. The investment in creating musical compositions, however, cannot be estimated accurately. There is no recognized skill or educational level that is required for or common to all composers. Moreover, the time that it takes to create a piece of music varies among composers and compositions; there are child prodigies like Mozart, composers who devote all of their time to their work, composers who also work as conductors or musicians, and so on. Even if the investment could be assessed, however, a fair rate of return, or opportunity cost, for composers could probably not be gauged because of the difference in quality and popularity of various musical compositions. All that can be said is that, if a regulatory price is set for musical compositions, whatever that price may be, it will probably not affect the overall rate of return for composers. If there is free entry into the market, a higher price will cause an increase in total investment and the number of compositions produced, but since demand is inelastic, the same number of compositions will be sold, and competition will force the rate of return on total investment to the equilibrium rate.<sup>172</sup>

Although a suitable price cannot be ascertained by application of standard regulatory procedures, a quasi-regulatory price can be determined by reference to prices for musical performance rights in the motion picture industry. The use of music on television is similar to that in motion pictures, with two provisos: the monopsony power of network television does not appear to be shared by motion picture producers, and although musical compositions are fungible in the television medium, they may or may not be fungible in the motion picture industry. Notwithstanding these provisos, the average price of musical perfor-

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171. See generally 1 A. Kahn, *supra* note 121, at 76-131; C. Phillips, *supra* note 121, at 260-302; C. Wilcox & W. Shepherd, *Public Policies Toward Business* 359-90 (5th ed. 1975).

172. See generally D. Dewey, *Modern Capital Theory* 79-92 (1965).

mance rights in the motion picture industry could be determined, and that price could be carried over to the television industry. Either a single average price for combined synchronization and performance rights or several average prices for various types or uses of music could be calculated.

This procedure should not be used prospectively because of the danger that future prices in the motion picture industry might be influenced by composers' knowledge that the same prices would be used in the television industry. Composers could demand higher prices in their dealings with motion picture producers and attempt to recoup any losses incurred by a decrease in sales through higher fees in the television industry. Nevertheless, the twenty-five years of past price experience in the motion picture industry could serve as the basis for determining fees for network television. The historical fees could then be adjusted to reflect intervening changes in the cost of living. Such a quasi-regulatory procedure would provide a feasible means of setting reasonable license fees for television networks.

#### CONCLUSION

Introducing public regulation into the musical performance rights market may arouse justifiable consternation. Governmental intervention in the economic realm has traditionally been regarded with suspicion and disfavor; the efficient prices of perfect competition are considered secondary to the operation of natural market forces.<sup>173</sup> The realities of the market structure involved in *CBS v. ASCAP*, however, preclude reliance on natural market forces to produce a price that even approaches a competitive level. To counteract ASCAP's current bargaining power with compulsory direct dealing between composers and networks would merely shift the balance of power from the monopolistic to the monopsonistic extreme. The impossibility of determining an economically meaningful price between these extremes compels recourse to regulatory measures. A price that will not unfairly exploit either side of the market must rest on equitable considerations.<sup>174</sup>

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173. See M. Friedman, *Capitalism and Freedom* 7-36 (1962).

174. Although the judiciary is empowered to set a price for musical performance rights, its determination of a fee would necessarily entail a political decision. This political decision is within the domain of the legislature and, therefore, will probably necessitate an amendment to the copyright laws.