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Copyright and Antitrust: The Effects of the Digital Performance Rights in Sound Recordings Act of 1995 in Foreign Markets

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Recommended Citation

Davis, Connie C. (2000) "Copyright and Antitrust: The Effects of the Digital Performance Rights in Sound Recordings Act of 1995 in Foreign Markets," *Federal Communications Law Journal*: Vol. 52: Iss. 2, Article 6.
Available at: <http://www.repository.law.indiana.edu/fclj/vol52/iss2/6>

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NOTE

Copyright and Antitrust: The Effects of the Digital Performance Rights in Sound Recordings Act of 1995 in Foreign Markets

Connie C. Davis*

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I. INTRODUCTION

The language of the Copyright Clause of the U.S. Constitution¹ and antitrust laws that prohibit monopolies and restraints of trade² may seem contradictory. While the Copyright Clause empowers Congress to grant monopolies to authors as an incentive to create, the antitrust laws reflect a policy against monopolies. However, despite their apparent differences, the two bodies of law work together to encourage innovation, industry, and competition.³

Competition and copyrights have long been recognized as a potential source of antitrust violations. Antitrust problems can arise in the case of copyright acquisition, licensing, and enforcement. The Supreme Court has stated that "the copyright laws confer no rights on copyright owners to fix prices among themselves or otherwise to violate antitrust laws."⁴ In *Data General Corp. v. Grumman Systems Support Corp.*,⁵ the First Circuit Court stated that "[a]lthough creation and protection of original works of authorship may be a national pastime, the [Sherman Antitrust Act (Sherman Act)] does not explicitly exempt such activity from antitrust scrutiny and courts should be wary of creating implied exemptions."⁶ The Supreme Court has also stated that the "neither the Sherman Act nor the Copyright Act works as a partial repeal of the other."⁷ Thus, the two laws must be harmonized.

Attempts at harmonizing the two laws have been concentrated in the areas of refusal to license copyrighted material and blanket licensing of copyrighted music. The greatest area of concern is blanket licensing of copyrighted nondramatic music. Blanket licenses give licensees the right to perform any and all of the compositions owned by a particular performance rights society (PRS). The practice of issuing blanket licenses for a fee has come under fire as price fixing, which is a per se violation of the Sherman Act.⁸

In 1995, Congress passed the Digital Performance Rights in Sound

1. U.S. CONST. art. I, § 8, cl. 8 (Copyright Clause).

2. See 15 U.S.C.A. § 1 (West 1998). "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several [s]tates, or with foreign nations, is declared to be illegal." *Id.*

3. See *Atari Games Corp. v. Nintendo of Am., Inc.*, 897 F.2d 1572, 1576 (Fed. Cir. 1990).

4. *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 19 (1979).

5. 36 F.3d 1147, 1185 (1st Cir. 1994).

6. *Id.*

7. *Watt v. Alaska*, 451 U.S. 259, 267 (1981).

8. See generally *Broadcast Music, Inc.*, 441 U.S. 1 (addressing whether blanket license issued to television networks is a form of price fixing).

Recordings Act (DPRSRA)⁹ in an effort to deal with the licensing problems associated with nondramatic musical works. The DPRSRA created a right in sound recordings to perform the copyrighted work publicly by means of a digital audio transmission, as well as established a compulsory licensing scheme.¹⁰ However, the DPRSRA fails to address the problem of licensing of nondramatic works in foreign markets.

Currently, in many foreign markets, regulation permit the network to broadcast nondramatic musical works, such as music videos, only if the network has a license for the right to perform the video—the public performance right.¹¹ Typically, the music company or the various PRSs hold this right.¹² In many cases, the music companies control the various PRSs. In order to broadcast in many foreign countries, U.S. music programming services must pay a blanket-licensing fee to the PRS of the country in which they wish to broadcast. Because of the control by music companies, the practice in foreign countries has been subject to accusations of price fixing and restraint of trade.¹³ In the United States, DPRSRA exempts noninteractive, nonsubscription services (networks supported by advertisement),¹⁴ which eliminates the potential for alleging Sherman Act violations.

This Note advocates extending the DPRSRA to foreign markets. Part II of this Note gives an overview of the development of sound recordings protection by the Copyright Act of 1976 (1976 Act)¹⁵ and the DPRSRA. It further discusses the nature of antitrust and its application to the blanket licensing of sound recordings. Part III reports the status of PRSs in foreign countries and the possible violations of antitrust law. Part IV summarizes how courts have interpreted and applied antitrust law to copyright. Part V poses challenges and discusses the concerns that have arisen in light of the new legislation.

9. See 17 U.S.C. § 115 (Supp. III 1997).

10. See 17 U.S.C.A. § 106(6) (West 1999). The DPRSRA added to the Copyright Act the exclusive right of digital performance and a variety of exemptions.

11. See *United States v. Time Warner, Inc.*, No. MISC.A.94-338(HHG), 1997 WL 118413, *1 (D.D.C. Jan. 22, 1997).

12. See *id.*

13. See *id.* at *1, *4.

14. See 17 U.S.C.A. § 114(d)(1) (West 1998).

15. Pub. L. No. 94-553, 90 Stat. 2541-2598 (1976).

II. BACKGROUND

A. *Traditional Copyright Protection of Sound Recordings*

Congress passed the first federal copyright act in 1790.¹⁶ This statute provided a foundation for the current act, granting to authors and their assigns the rights to maps, charts, and books for two fourteen-year terms.¹⁷ This statute essentially defined what Congress deemed to fall within the constitutional meaning of a "writing." As technology advanced, the list of what constituted a "writing" for purposes of copyright expanded. In 1802, Congress amended the Act in order to grant protection to any person "[w]ho shall invent and design, engrave, etch or work . . . any historical or other print or prints . . ."¹⁸ Congress further expanded the statute in 1831 to include musical compositions,¹⁹ and in 1865, Congress added photographs and photographic negatives to the list of protected works.²⁰ Congress again, in 1870, updated the copyright statute to include paintings, drawings, statuettes, statuary, and models or designs of fine art.²¹ The authors obtained statutory rights to control distribution, display, and reproduction of these "writings."²²

The statutory right of exclusive public performance did not exist until 1897.²³ Congress designed this exclusive performance right specifically for dramatic and musical compositions, which were considered "writings" and therefore protected by the copyright statute. Initially, Congress extended the performance right only to the current subject matter covered in the copyright statute.²⁴

It was not until 1973 that sound recordings became the subject matter of copyright and were considered "writings" under the Copyright Act.²⁵ In 1973, the Supreme Court recognized the federal government's constitutional authority to regulate sound recordings, stating that it is within Congress's power to decide whether a "particular category of 'writing[s]'" is worthy of national protection.²⁶ The Court in *Goldstein v.*

16. See Copyright Act of May 31, 1790, ch. 15, 1 Stat. 124 (repealed 1802).

17. See *id.*

18. Copyright Act of Apr. 29, 1802, ch. 36, 2 Stat. 171 (repealed 1831).

19. See Copyright Act of Feb. 3, 1831, ch. 16, 4 Stat. 436.

20. See Copyright Act of Mar. 3, 1865, ch. 126, 13 Stat. 540.

21. See Copyright Act of July 8, 1870, ch. 230, 16 Stat. 198.

22. See *id.*

23. See Copyright Act of Jan. 6, 1897, ch. 4, 29 Stat. 481.

24. See *id.*

25. See *Goldstein v. California*, 412 U.S. 546, 576 (1973).

26. *Id.* at 559.

*California*²⁷ did not address the specific rights that Congress endowed on the authors of sound recordings, and the performance right in sound recordings did not enter the debate.²⁸ The seeming denial of the performance right by Congress created disarray in state courts as well as in the circuits.²⁹ In an effort to respond to these problems, Congress amended the Copyright Act to create a limited copyright in sound recordings.³⁰ However, Congress limited the amendment to prevent duplication of sound recordings but did not include the performance right.

The right of public performance for musical works, particularly sound recordings, continued to be a pressing issue in the 1976 Act.³¹ The 1976 Act changed the copyright protection of sound recordings, granting the sound recordings' copyright holder limited rights. This included the right to prevent unauthorized duplication, distribution, and creation of derivative works, while explicitly denying a grant of a performance right in section 114(a).³² However, through section 114(d), Congress acknowledged the *potential* for a right of performance in sound recordings.³³ Section 114(d) required the Register of Copyrights to submit a report to Congress evaluating the adoption of a performance right in sound recordings.³⁴ The Register submitted a report in 1978, recommending that "section 114 be amended to provide performance rights, subject to compulsory licensing, in copyrighted sound recordings, and that the benefits of this right be extended both to performers (including employers for hire) and to record producers as joint authors of sound recordings."³⁵

B. The Digital Performance Rights in Sound Recordings Act of 1995

In 1995, Congress enacted the recommendation submitted by the Registrar as the DPRSRA. The 1976 Act, as amended by DPRSRA, provides the creator of an original work, including owners of copyrights in

27. 412 U.S. 546.

28. See *Goldstein*, 412 U.S. at 546.

29. For a clear understanding of the progression of state law protecting sound recordings performance rights, see Jonathon Franklin, *Pay to Play: Enacting a Performance Right in Sound Recording in the Age of Digital Audio Broadcasting*, 10 U. MIAMI ENT. & SPORTS L. REV. 83, 89 (1993).

30. Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391 (amended by Pub. L. No. 93-573, 88 Stat. 1873 (1974) (codified as amended 17 U.S.C. § 102 (1994)).

31. See 17 U.S.C.A. § 101 (West 1998).

32. See *id.* §§ 106(4), 114(a) (West 1999). See Franklin, *supra* note 29, at 83.

33. See *id.* § 114(d).

34. See *id.*

35. Performance Rights in Sound Recordings, 43 Fed. Reg. 12,763, 12,766 (1978).

sound recordings, with exclusive rights. Under the 1976 Act, authors may stop others from copying, distributing, publicly displaying, or making derivative works based on an author's protected work.³⁶ In addition, the DPRSRA added a new subsection 6 to section 106 of the Copyright Act that created a new exclusive right—the digital performance right. Section 106(6) clearly states that the owner of the copyright under this title has the exclusive right in the sound recordings, which allows the owner to perform the copyrighted work publicly by means of a digital audio transmission.³⁷ Basically, DPRSRA prohibits the unlicensed digital transmissions of sound recordings.

The DPRSRA subjected the limited right to performance to certain exclusions contained in section 114(d).³⁸ Section 114(d)(1) establishes a primary exemption for noninteractive, nonsubscription services.³⁹ This exemption allows broadcasters of free⁴⁰ (network) radio and television programming to continue to perform sound recordings without a license. In addition, various secondary transmissions of primary transmissions are exempt under this section.⁴¹

Section 114(d)(2)(e) addresses licensing to digital transmission service providers who offer noninteractive programming on a subscription basis.⁴² This section creates a compulsory licensing scheme and a voluntary negotiation scheme of licensing between representatives of various PRSs and transmitting entities.⁴³ As per sections 114(d)(2)(e) and (f), PRSs and transmitting entities must determine reasonable royalty rates for the licensing of the performance rights of sound recordings.

The DPRSRA adds another facet to copyright antitrust. The statute creates compulsory licensing and requires arbitration to settle disputes over licensing. In conjunction with the common law, the DPRSRA creates a domestic system that eliminates some of the problems that existed when the PRSs operated strictly under consent decrees. First, the DPRSRA authorizes the use of per program licensing. Second, the DPRSRA eliminates complete control of licensing by requiring arbitration. Third, DPRSRA protection under the Copyright Act only secures rights for those

36. See 17 U.S.C.A. § 106.

37. See *id.* §106(6).

38. See *id.* § 114(d).

39. See *id.* § 114(d)(1).

40. "Free" in section 114 means broadcasters who support their network through advertisements. See *id.* § 114(d).

41. See *id.* § 114(d).

42. See *id.* § 114(d)(2)(e).

43. See *United States v. Time Warner, Inc.*, No. MISC.A.94-338(HHG), 1997 WL 118413, *6 (D.D.C. Jan. 22, 1997).

societies that do not hold exclusive rights. In *United States v. Time Warner, Inc.*,⁴⁴ the court authorized investigations of possible violations of antitrust laws by PRSs in foreign markets and premised its decision on the facet added to copyright antitrust by the DPRSRA.⁴⁵

C. *Performance Rights Societies*

For the majority of copyrighted musical works in the United States, the American Society of Composers, Authors, and Publishers (ASCAP) and Broadcast Music, Inc. (BMI) license the public performing rights.⁴⁶ Copyright owners assign the PRSs, typically ASCAP or BMI, the right to license nondramatic public performances of their musical compositions. The PRSs then issue blanket licenses granting the right to perform any and all works in the societies' repertoires. The fees for blanket licenses are ordinarily a percentage of the total of revenues or a flat dollar amount and are not directly dependent on the amount or type of music used.⁴⁷

The effect of copyright owners' conveyance of their rights to ASCAP and BMI is the creation of a virtual monopoly over the licensing of musical performance rights in this country. The monopoly power can be found in the infringement action. The PRSs may institute suit against those who infringe and enjoin them from interfering with the owner's exclusive rights.⁴⁸ Under the 1976 Act, those who publicly perform copyrighted music have the burden of obtaining prior consent—a license.⁴⁹

ASCAP and BMI operations and licensing practices frequently have been challenged under U.S. antitrust laws.⁵⁰ Specifically, PRSs' practice of issuing blanket licenses has been subject to charges that such practices

44. No. MISC.A.94-338(HHG), 1997 WL 118413 (D.D.C. Jan. 22, 1997).

45. *See id.*

46. The exclusive right to public performance is granted by the Copyright Act. *See* 17 U.S.C.A. § 106 (West 1999). ASCAP and BMI together handle the bulk of nondramatic licensing transactions in this country. ASCAP, the larger of the two organizations, is an unincorporated membership association consisting of approximately eight thousand music publishing companies and 21,000 writers, composers and lyricists; it boasts a repertoire of over three million compositions. BMI is a nonprofit corporation affiliated with approximately 22,000 publishers and 38,000 writers, with about one million compositions in its repertoire. *See Buffalo Brdcast. Co. v. American Soc'y of Composers, Authors & Publishers*, 546 F. Supp. 274, 277 (S.D.N.Y. 1982), *rev'd*, 744 F.2d 917 (2nd Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985).

47. *See Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 5 (1979).

48. *See* 17 U.S.C.A. § 501 (West 1999).

49. *See* 17 U.S.C. § 506 (Supp. III 1997).

50. *See, e.g., United States v. American Soc'y of Composers, Authors & Publishers*, 981 F. Supp. 199 (S.D.N.Y. 1997); *United States v. American Soc'y of Composers, Authors & Publishers*, 914 F. Supp. 52 (S.D.N.Y. 1996); *Alden-Rochelle v. American Soc'y of Composers, Authors & Publishers*, 80 F. Supp. 900 (S.D.N.Y. 1948).

eliminate price competition between individual composers. These arguments are based on the fact that licensees are entitled to perform any work in the societies' repertoires for a fee not based on actual use. Numerous governmental and private antitrust actions have been brought against ASCAP and BMI.

Since 1941, consent decrees entered in litigation initiated by the Department of Justice under the Sherman Act govern ASCAP and BMI.⁵¹ The decrees resulted from an effort to reconcile the conflict between copyright and antitrust law. The conflict stems from the U.S. Constitution, which under the Copyright Clause permits Congress "[t]o promote the [p]rogress of [s]cience and useful [a]rts, by securing for limited [t]imes to [a]uthors and [i]nventors the exclusive [r]ight to their respective [w]ritings and [d]iscoveries."⁵² The right conferred by the Constitution is a limited monopoly. This is clearly in opposition to section 1 of the Sherman Act⁵³ that seeks to prevent monopoly powers.⁵⁴ Prior to the decrees, ASCAP and BMI held exclusive performance rights to the compositions in their repertory. Potential music users operating under the pre-1941 consent decree system could not obtain a direct license from the original copyright owner. This system forced users to obtain a blanket license on the PRSs' terms. The nonexclusive licensing practice established by the consent decree gives a licensee the opportunity to obtain the right from the PRSs or from the original composer. The decree requires that ASCAP and BMI offer a per-program licensing alternative to blanket licensing.⁵⁵ As a result, both organizations are subject to substantial regulation that prohibits issuing blanket licenses to certain groups of users, as well as providing individuals the right to negotiate on a per-use basis.⁵⁶ For example, in *Buffalo*

51. See *United States v. American Soc'y of Composers, Authors & Publishers*, 1950-51 Trade Cas. (CCH) ¶ 62,595 (S.D.N.Y. Mar. 14, 1950); *United States v. American Soc'y of Composers, Authors & Publishers*, 1940-43 Trade Cas. (CCH) ¶ 56,104 (S.D.N.Y. Mar. 4, 1941). BMI is governed similarly by consent decrees. See *United States v. Broadcast Music, Inc.*, 1966 Trade Cas. (CCH) ¶ 71,941 (S.D.N.Y. Dec. 29, 1966); *United States v. Broadcast Music, Inc.*, 1940-43 Trade Cas. (CCH) ¶ 56,096 (E.D. Wis. Feb. 3, 1941) (modified May 14, 1941).

52. U.S. CONST. art. I, § 8, cl. 8.

53. See 15 U.S.C.A. § 1 (West 1998).

54. See W. Michael Garner, *United States v. American Soc'y Composers, Authors & Publishers: The Licensing Provisions of the Amended Final Judgement of 1950*, 23 BULL. COPYRIGHT SOC'Y 119, 120-21 (1975-76).

55. See *United States v. American Soc'y of Authors, Composers & Publishers*, 1950-51 Trade Cas. (CCH) ¶ 62,595, at 63,753 (S.D.N.Y. Mar. 14 1959).

56. See The U.S. Department of Justice (DOJ) filed suit in 1941 against ASCAP for alleged antitrust violations. The parties settled and entered a consent decree that imposed limitations on ASCAP's operation. See *United States v. American Soc'y of Composers, Authors & Publishers*, 1940-43 Trade Cas. (CCH) 56,104 (S.D.N.Y. Mar. 4, 1941).

Broadcasting Co. v. American Society of Composers, Authors and Publishers,⁵⁷ both organizations were enjoined from issuing blanket performance licenses to local television broadcasters.

Internationally, the performance rights of U.S. music and music videos (digital performances) are controlled by national PRSs, such as Video Performance, Ltd. (VPL) in Britain, and umbrella international copyright societies, such as the International Federation of the Phonographic Industry (IFPI).⁵⁸ VPL and IFPI's practices are identical to those of ASCAP and BMI and have been subjected to similar scrutiny. For instance, in *United States v. Time Warner, Inc.*, the court issued civil investigative demands under the Antitrust Civil Process Act (ACPA).⁵⁹ VPL and IFPI, controlled by Time Warner, were targeted for investigation because of alleged "[r]estrains or monopolization of domestic and international markets for cable, wire[,] and satellite-delivered music programming."⁶⁰

VPL and IFPI have engaged in licensing that requires U.S. distributors of digital music and music videos to purchase blanket licenses in order to transmit on network stations in foreign countries.⁶¹ VPL and several other PRSs in Europe have exclusive rights to their members' music and music videos. This allows them to control and blanket licenses without allowing individual negotiations between foreign record companies and music programmers.⁶² This very practice is the source of antitrust litigation.

D. Antitrust as Traditionally Applied to Copyright Licensing

Antitrust laws are intended to protect the competitive process through economic efficiency and competition.⁶³ Antitrust laws are also geared toward enhancing competition, rather than protecting competitors.⁶⁴ The doctrine of antitrust law rests on the principle that certain practices and agreements in the marketplace are so plainly anticompetitive that those practices are conclusively presumed illegal.⁶⁵ Two sections of the Sherman

57. 546 F. Supp. 274 (S.D.N.Y. 1982).

58. See *United States v. Time Warner, Inc.*, No. MISC.A.94-338(HHG), 1997 WL 118413 (D.D.C. Jan. 22, 1997).

59. See *id.*; 15 U.S.C. §1312 (1994).

60. *Time Warner, Inc.*, 1997 WL 118413, at *1. Unlike ASCAP and BMI, VPL and IFPI are not bound by the consent decrees.

61. See *id.*

62. See *id.*

63. See Allen Kezsbam & Alan V. Goldman, *No Shortcut to Antitrust Analysis: The Twisted Journey of the "Essential Facilities" Doctrine*, 1996 COLUM. BUS. L. REV. 1, 2 (1996).

64. See *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962).

65. See 15 U.S.C.S. § 1 (West 1998).

Act proscribe this anticompetitive conduct. Section 1 of the Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several [s]tates, or with foreign nations, is declared to be illegal."⁶⁶

Congress directed this section at restraints of trade that arise out of contracts or other such combinations.⁶⁷ In order to fall within section 1 of the Sherman Act, there must be an agreement between two or more persons.⁶⁸ Section 2 of the Sherman Act establishes liability for anticompetitive practices.⁶⁹ Section 2 holds individuals liable for monopolizing or attempting to monopolize trade or commerce.⁷⁰

The issuing of blanket licenses to copyrighted musical compositions by PRSs has been the target of antitrust litigation. Specifically, the antitrust litigation has targeted the following practices of the PRSs: assigning licensees the rights, for a stated term, to perform any and all compositions owned by the agencies' members or affiliates; charging fees, ordinarily amounting to a percentage of total revenues or a flat dollar amount; and failing to establish fees that are directly dependent on the amount or type of music used.⁷¹ The litigation surrounding these issues raises the question of whether these practices rise to the level of price fixing, which is per se unlawful under the antitrust laws.⁷²

The antitrust issue with regard to sound recordings and blanket licensing arises in the context of broadcast in foreign markets. In order to broadcast any music videos outside of the United States, music programming services must pay a blanket licensing fee to the national PRS of the country in which the network wishes to broadcast the music videos.⁷³ These PRSs are alleged to impede U.S. exporters of music videos and

66. *Id.*

67. *See id.* ("Every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce among the several States or with foreign nations, is hereby declared to be illegal.").

68. *See id.*

69. *See* 15 U.S.C. § 2 (1994). The full text of section 2 provides:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$10,000,000 if a corporation, or, if any other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

70. *See id.*

71. *See* United States v. Time Warner, Inc., No. MISC.A.94-338(HHG), 1997 WL 118413, *1 (D.D.C. Jan. 22, 1997).

72. *See* Broadcast Music, Inc. v. CBS, 441 U.S. 1 (1979).

73. *See* Time Warner, Inc., 1997 WL 118413, at *1.

original nonmusic programming from entering foreign markets.⁷⁴

Under the Foreign Trade Antitrust Improvement Act (FTAIA),⁷⁵ conduct is exempt from the Sherman Act if it does not have a “direct, substantial, and reasonably foreseeable effect” on U.S. commerce.⁷⁶ It is plausible that even if the PRSs operate as price-fixing cartels, the antitrust laws cannot be extended to include the actions of foreign entities. The Department of Justice (DOJ) does not have jurisdiction to investigate this conduct because VPI and IFPI’s conduct abroad produces merely “ordinary” export effects. This argument is grounded in a reference in the House Report on the FTAIA: “a price-fixing conspiracy directed solely to exported products or services, absent a spillover effect on the domestic marketplace . . . would normally not have the requisite effects on domestic or import commerce.”⁷⁷ In this context, “normally” refers to the “ordinary” effects of price-fixing, and, accordingly, the FTAIA confers jurisdiction over foreign price-fixing only in the exceptional case when there is a “spillover effect” in domestic markets.⁷⁸

III. *UNITED STATES V. TIME WARNER, INC.*

The exclusivity of the rights held by PRSs engaging in the blanket licensing of music and music videos in foreign markets must undergo restructuring in order to escape antitrust actions and possible violations.⁷⁹ The practice of holding exclusive rights in performance rights has been a major ordeal for VPL and IFPI in antitrust investigations. Currently, VPL and IFPI hold the exclusive rights of member composers of music and music videos. In holding these rights, VPL and IFPI are able to force those

74. *See id.* at *2.

75. *See* 15 U.S.C. § 6(a) (1994). The provisions of FTAIA read as follows:
Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—

- (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
 - (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
 - (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
- (2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

Id.

76. *Id.*

77. H.R. REP. NO. 97-686, at 10 (1982).

78. *See id.*

79. *See id.*

companies engaging in the broadcast of music and music videos to purchase the performance rights on their terms and are able to exclude any individual from negotiating with the actual composer for use of the protected work.

The practices of VPL and IFPI are identical to ASCAP and BMI prior to the 1941 consent decrees.⁸⁰ As a result of their practices, VPL and IFPI's operation have come under scrutiny because of the exclusivity of the rights held. In *United States v. Time Warner, Inc.*,⁸¹ the DOJ sought to investigate whether the practice of VPL and IFPI violates the Sherman Act.

The PRSs claim that VPL and the other European PRSs in have been restructured.⁸² Time Warner⁸³ stated in its claim that VPL has been restructured "so that they no longer hold the exclusive rights to their member's music and music videos," and that record companies in the foreign market may negotiate individually with music programmers.⁸⁴ The DOJ's major concern is the permanence of the restructuring of VPL and IFPI. The foreign PRSs are not bound by the consent decrees entered into by domestic PRSs. Further, Congress's enactment of the DPRSRA only created compulsory digital radio licensing system pursuant to which, in the absence of an agreement between a licensor and licensee, licenses are set by arbitration in domestic licensing.⁸⁵

Effectively, VPL and IFPI licensing practices are not subjected to regulations under the current copyright law. Additionally, whether or not the practice of holding exclusive rights to performance and blanket licensing of these rights is a violation of the Sherman Act has never been articulated by the courts.⁸⁶ Time Warner contends that the antitrust laws are not applicable to VPL and IFPI.⁸⁷

The court in *Time Warner, Inc.* concluded that neither the plain language of the FTAIA, which does not identify particular categories of exempted conduct, nor its legislative history, considered in full, supports Time Warner's argument about the restrictive scope of the FTAIA on the

80. See *supra* Part II.C.

81. No. MISC.A.94-338(HHG), 1997 WL 118413 (D.D.C. Jan. 22, 1997).

82. See *id.* at *2.

83. Time Warner is one of the major controllers of the international performance rights societies VPL and IFPI.

84. *Time Warner, Inc.*, 1997 WL 118413, at *2.

85. See 17 U.S.C. § 115 (Supp. III 1997).

86. Before actually deciding whether the exclusive licensing practice was a violation of the antitrust laws, ASCAP and the DOJ reached a settlement which included the 1941 consent decrees. The question of whether the exclusive licensing practice is a violation of the antitrust law has not been litigated.

87. See *Time Warner, Inc.*, 1997 WL 118413, at *3.

practices of VPL and IFPI. The purportedly dispositive sentence about "spillover" effects appears in a section of the legislative history referring to the standing of injured foreign buyers, not injured U.S. exporters.⁸⁸

If such solely export-oriented conduct affects export commerce of another person doing business in the United States . . . [jurisdiction is preserved] insofar as there is injury to that person. . . . Thus a domestic exporter . . . is assured a remedy under our antitrust laws for injury caused by a competing United States exporter. But a foreign firm whose non-domestic [sic] operations were [thus injured] . . . would have no remedy under our antitrust laws.⁸⁹

The court in *Time Warner, Inc.*, concluded that the DOJ has jurisdiction over possible violations of the Sherman Act and that VPL and IFPI are subject to those laws contained within the Act.⁹⁰

The current organizational structure of VPL and IFPI are subject to penalties for violation of the Sherman Act. Because there is no jurisprudence on antitrust violations and PRSs that hold exclusive rights to performance of the works in their repertory, it is unlikely that Time Warner will continue to operate under the current structure. Since the court's decision in *Time Warner* to enforce civil investigative demands against Time Warner,⁹¹ it is evident that the status of VPL and IFPI, as well as other foreign PRSs, will be evolving. The ultimate issue is permanency. Without a consent decree, any changes in the current system of operation are not binding for continuance of operations.

IV. CASE LAW ON ANTITRUST AND COPYRIGHT INVOLVING U.S. PERFORMANCE RIGHTS SOCIETIES

Between 1934 and 1966, the government began efforts to restore competition in copyright licensing. The grant of a monopoly by the U.S. Constitution and the Copyright Act, which imposes penalties for infringement of the protected rights, gave PRSs virtual control over the market of performance of musical compositions.⁹² The DOJ initiated its efforts to eliminate the market monopoly in *United States v. American Society of Composers, Authors and Producers*.⁹³

The DOJ filed suit against ASCAP alleging that its practices of

88. See *id.* at *4.

89. PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW 337 (Supp. 1996) (quoting H.R. REP. NO. 97-686, at 10-11 (1982)).

90. See *Time Warner, Inc.*, 1997 WL 118413, at *5.

91. *Id.* at *6.

92. See Noel L. Hillman, *Intractable Consent: A Legislative Solution to the Problem of the Aging Consent Decrees in United States v. ASCAP and United States v. BMI*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 733, 745 (1998).

93. 1940-43 Trade Cas. (CCH) ¶ 56,104 (S.D.N.Y. Mar. 4, 1941).

obtaining exclusive copyrights monopolized the performance rights market for songs played on the radio.⁹⁴ The DOJ also claimed that the blanket license was an unlawful combination in restraint of trade.⁹⁵ The resulting decree changed the way ASCAP licensed its repertory.⁹⁶

The first challenge to the market structure created by the PRSs was in *CBS v. American Society of Composers, Authors and Producers*.⁹⁷ This suit attacked the flat fee imposed by the blanket licensing system as a violation of both sections 1 and 2 of the Sherman Act.⁹⁸ The district court rejected CBS's claims, held that the claims were not substantiated, and denied all relief sought.⁹⁹ Subsequently, the appellate court reversed the district court's decision and held that the blanket license has a direct effect on the price.¹⁰⁰ The appellate court concluded that "[b]lanket license[s] . . . reduce price competition among the members [to the agreement] and provide[] a disinclination to compete."¹⁰¹

The Supreme Court reversed the court of appeals, holding that blanket licensing constituted a violation of section 1 of the Sherman Act and remanded the case to be considered in light of the perimeters set forth in the opinion.¹⁰² On remand, the appellate court upheld the blanket license under the rule of reason.¹⁰³

Another case that challenged the blanket licensing practice of the domestic PRSs was *Buffalo Broadcasting Co. v. American Society of Composers, Authors and Publishers*.¹⁰⁴ Since this case followed the court of appeals' decision in *CBS* holding that blanket licensing was a restraint

94. *See id.*

95. *See id.*

96. *See supra* Part II.C.

97. 400 F. Supp. 737 (S.D.N.Y. 1975), *rev'd*, 562 F.2d 130 (2nd Cir. 1977), *rev'd*, *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979).

98. *See* 15 U.S.C.A. §§ 1, 2 (West 1998). For more detailed analysis of *CBS v. American Soc'y of Composers, Authors & Publishers*, see Hillman, *supra* note 92, at 747.

99. *See CBS*, 400 F. Supp. 737, *rev'd*, 562 F.2d 130 (2nd Cir. 1977), *rev'd*, *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979). The district court held that CBS failed to prove an illegal combination designed to fix prices and failed to offer any evidence that the individual composers acted in concert to restrain competition. The court continued its analysis by defining the market that was alleged to have been restrained. *See id.*

100. *See CBS*, 562 F.2d 130, 140, *rev'd*, *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979).

101. *Id.*

102. *See Broadcast Music, Inc.*, 441 U.S. 1. A careful fact-sensitive balancing approach of the rule of reason analysis should be used on remand. *See id.* at 24-25.

103. *See CBS v. American Soc'y of Composers, Authors & Producers*, 620 F.2d 930, 934 (2nd Cir. 1980), *cert. denied*, 450 U.S. 970, *reh'g denied*, 450 U.S. 1050 (1981).

104. 546 F. Supp. 274 (S.D.N.Y. 1982), *rev'd*, 744 F.3d 917 (2nd Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985).

on trade, Buffalo Broadcasting argued that the use of blanket licensing had restrained trade in the local television market.¹⁰⁵ Once this case made it to trial, the Supreme Court had reversed the court of appeals' decision in *CBS*. The court in *Buffalo Broadcasting Co.* applied the rule of reason and, like the appellate court in *CBS* on remand, held that there was no violation of section 1 of the Sherman Act.¹⁰⁶

The copyright/antitrust case law dealing with U.S. PRSs suggests that in the presence of a consent decree, the practice of blanket licensing does not violate section 1 of the Sherman Act. It is clear from both *CBS* and *Buffalo Broadcasting Co.* that as long as the domestic PRSs are operating in accordance with the consent decree, no violation will be found. The courts in the aforementioned case have defined the potential market that PRS's control very broadly. By applying the "rule of reason," the courts have decided that there is no "realistically available" alternative and that, on balance, the beneficial effects outweigh the anticompetitive effects.

V. CONCERNS AND CHALLENGES

The anticompetitive effects that have arisen in the realm of the control of performance rights by foreign PRSs have caused great concerns for U.S. companies that are in the business of broadcasting music and videos in foreign markets. The major concern is that the PRSs are using the international copyright laws of each individual country to strong-arm the purchase of a blanket license. The international laws, particularly the Rome Convention,¹⁰⁷ include the protection of performance rights in sound recordings. The Berne Convention for the Protection of Literary and Artistic Works¹⁰⁸ only protected literary and artistic works. These works did not include sound recordings. The Rome Convention allowed

105. *See id.* at 276.

106. *See Buffalo Brdcast. Co. v. American Soc'y of Composers, Authors & Publishers*, 744 F.2d 917, 925-26 (2nd Cir. 1984). The court used the two prong test that was devised in *CBS v. American Soc'y of Composers, Authors & Publishers*. The prongs of the test were: (1) whether the blanket license restrained competition because there was no realistic alternative available and (2) if there was no alternative, balance whether the anticompetitive effects of the blanket license system outweighed the beneficial or procompetitive effects. *See id.* at 926.

107. *See World Intellectual Property Organization Performances and Phonograms Treaty*, Dec. 20, 1996, 36 I.L.M. 76 (1997).

108. The Berne Convention for the Protection of Literary and Artistic Works, July 24, 1971, art. 5, para. 1, reprinted in MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* app. 27 [hereinafter *Berne Convention*]; *see also* Georges Koumantos, *The Future of the Berne Convention*, 11 COLUM.-VLA J.L. & ARTS 225, 229 (1986). The Berne Convention forms the basis of copyright protection in countries such as England, France, and Germany. All technologically advanced countries have adopted the Berne Convention, except the Soviet Union and China. *See id.*

protection for "other works," which included sound recordings. Because of the protection allowed, it is requisite that broadcasters of sound recordings receive licensing to broadcast the recordings.¹⁰⁹

The PRSs in each of the prospective countries use their intellectual property laws to require the purchase. U.S. companies have no alternative. They must purchase blanket licenses from the PRSs. These societies, as currently structured, hold the exclusive rights to performance and negotiations with individual composers and record companies, where foreign companies are prohibited.¹¹⁰

The challenge now faced by foreign PRSs is compliance with U.S. antitrust laws and avoiding both the penalties under the Sherman Act and possible injunctions that would be initiated under the Clayton Act.¹¹¹ To face the challenge, VPL and IFPI models of assigning licenses should mirror that of the domestic PRSs, as well as following the guidelines specified in the newly enacted DPRSRA. The courts have established that in the absence of exclusive rights, PRSs are the most efficient means to monitor and police composers' rights under the Copyright Act. Further, the courts have held that the scheme of blanket licensing when viewed in conjunction with the consent decrees is not a per se restraint of trade. Similarly, the Copyright Act now protects the endeavors of the PRSs, as well as providing means to ensure competition within the limited monopoly.

VI. CONCLUSION

The history of the protection of sound recordings both on a national and international level proved to be a compromise. Sound recordings were not protected in the original Copyright Act nor were they protected by the Berne Convention. After many compromises, a revised Copyright Act, and another international convention, sound recordings are protected. Similarly, the protection of performance rights in sound recordings was long and finally forthcoming in the DPRSRA. The protection of performance rights and the policing efforts have been undertaken by PRSs who initially controlled the market. Domestically, the fear of violating the antitrust laws and the severe punishment that accompanies such violations persuaded PRSs to consent to only possessing nonexclusive rights.

109. See *supra* Part II.A. (discussing the evolution of protection of sound recordings in the United States).

110. Because the performance rights societies have been assigned the exclusive rights, negotiations with the composers or record companies would be an infringement on the performance rights and subjected to penalties under the laws of each country.

111. See 15 U.S.C. § 12 (1994).

On the international level, there are no consent decrees and the possibilities of antitrust violations are inherent. After the decision in *Time Warner*, the controllers of PRSs must restructure or face the consequences. The best solution to the problem is to extend the guidelines found in the DPRSRA to the operations of foreign PRSs. This approach would eliminate the market monopoly and bring the PRSs in accord with antitrust laws.

