Notre Dame Law Review

Volume 55 | Issue 5 Article 5

6-1-1980

# Blanket Licensing: The Clash between Copyright Protection and the Sherman Act

Glenn A. Clark

NOTES

# Blanket Licensing: The Clash Between Copyright Protection and the Sherman Act*

## I. Introduction

Music has a ubiquitous presence in the American culture. Radio, television, the piano player at the local cocktail lounge—all involve the public performance of musical compositions, often subject to copyright protection. Consequently, each rendition invokes a complex scheme of legal relationships. Composers and lyricists of copyrighted compositions possess statutory rights, including the exclusive right to public performance of their works.[1] Protecting these rights from infringement, however, has proved a difficult task.

Blanket licensing[2] has become the standard method by which writers and publishers of copyrighted works protect their exclusive public performance rights. Issued by performing rights societies,[3] blanket licenses authorize the use of any work in the repertory of the issuing society for the duration of the license. Although this system has proven an effective means by which isolated composers of musical works can enforce copyright protection, its legality under the antitrust laws has been suspect for some time.[4] Indeed, reconciling blanket licensing and the Sherman Act has consumed considerable judicial resources.[5] The heart of the issue involves a clash between the promotion of artistic efforts and the prohibition of unfair trade practices.

The purpose of this Note is to analyze blanket licensing in light of the an-

---

* This Note was entered in the Nathan Burkan Memorial Competition.

1 The exclusive right to public performance of copyrighted works is provided by 17 U.S.C. § 106(4) (1976). "Public performance" is defined at 17 U.S.C. § 101 (1976). It provides in pertinent part:

> To "perform" a work means to recite, render, play, dance, or act it, either directly or by means of any device or process . . . .
>
> To perform or display a work "publicly" means—
>
> (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
>
> (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

Exceptions to the definition are found at 17 U.S.C. §§ 110, 111(a) (1976).

The exclusive right to public performance is limited by 17 U.S.C. §§ 107-18 (1976). Of particular importance is 17 U.S.C. § 110(4) (1976) which makes noncommercial performance not infringement.

2 *See* text accompanying notes 21-25 *infra* for a discussion of blanket licenses.

3 The American Society of Composers, Authors, and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC are the most significant performing rights societies.

4 In 1941 the Justice Department challenge blanket licensing. United States v. ASCAP, Civ. No. 13-95, [1940-43] Trade Cas. (CCH) ¶ 56,104 (S.D.N.Y. 1941) (hereinafter cited as 1941 Decree), *amended,* [1950-51] Trade Cas. (CCH) ¶ 62,595 (S.D.N.Y. 1950) (hereinafter cited as 1950 Judgment); United States v. BMI [1966] Trade Cas. (CCH) ¶ 71,941 (S.D.N.Y. 1966) (hereinafter cited as 1966 Decree). The suits resulted in consent decrees that regulate ASCAP's and BMI's licensing arrangements with users of their works. *See* text accompanying notes 29-35 *infra* for a discussion of the consent decrees.

5 *See, e.g.,* Sam Fox Publishing Co. v. United States, 366 U.S. 683 (1961); K-91, Inc. v. Gershwin Publishing Co., 372 F.2d 1 (9th Cir. 1967), *cert. denied,* 389 U.S. 1045 (1968); United States v. ASCAP (Application of Shenandoah Valley Broadcasting, Inc.), 331 F.2d 117 (2d Cir.), *cert. denied,* 377 U.S. 997 (1964); Columbia Broadcasting Systems v. ASCAP, 400 F. Supp. 737 (S.D.N.Y. 1975), *rev'd,* 562 F.2d 130 (2d Cir. 1977), *rev'd & remanded sub nom.* BMI v. CBS, 441 U.S. 1, *motion for summary judgment denied,* 607 F.2d 543 (2d Cir. 1979) (hereinafter cited as *CBS*); Alden-Rochelle, Inc. v. ASCAP, 80 F. Supp. 888 (S.D.N.Y. 1948); 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).

titrust laws. In particular, it will discuss recent assaults on blanket licensing as price fixing *per se;* whether blanket licensing is so plainly anticompetitive as to warrant *per se* classification; and whether it can survive a reasonableness inquiry. Finally, a solution to this debacle will be tendered. However, before this endeavor can be pursued, it is necessary to explain the function and nature of performing rights societies and the various licensing arrangements they offer.

## II. Performing Rights Societies

The author of a musical composition is entitled to copyright protection once his creation is reduced to some "tangible medium of expression."[6] This protection includes the right "to perform the copyrighted work publicly."[7] Policing for infringement, however, is extremely difficult due to the ephemeral nature of a musical performance and the widespread, simultaneous use of musical works.[8] The author cannot detect a fleeting infringement unless he or an informant is present to observe the violation of his exclusive right. Furthermore, those wishing to perform a select work with the author's permission are confronted with the problem of locating the author and negotiating terms.[9] This increases the costs of utilizing copyrighted works and encourages an otherwise honest user to infringe.

Performing rights societies formed in response to these problems.[10] In 1914 ASCAP was established to serve as a "clearing house"[11] for copyright owners and users. Authors and composers united with publishers in the nonprofit joint venture, which is now the largest performing rights society in the United States.[12] The mechanics of the society's operations center around a

---

6 17 U.S.C. § 102 (a)(2) (1976).

7 *Id.* at § 106(4). This replaced similar protection provided by Act of Jan. 6, 1897, ch. 4, 29 Stat. 481 (replaced 1906).

8 *See generally* Finklestein, *ASCAP as an Example of the Clearing House System in Operation,* 14 BULL. COPYRIGHT SOC'Y 2 (1966); 2 NIMMER ON COPYRIGHT § 8.19 (1979).

9 Finklestein, *supra* note 8.

10 The Societe des Auteurs, Compositeurs et Editeurs de Musique (SACEM), established in France in 1929, was the first performing rights society. S. ROTHENBERG, COPYRIGHT AND PUBLIC PERFORMANCE OF MUSIC 27 (1954).

11 Finklestein, *supra* note 8. *See also* S. SHEMEL & W. KRASILOVSKY, THIS BUSINESS OF MUSIC 163-79 (P. Ackerman ed. 2d rev. ed. 1978) (hereinafter cited as SHEMEL & KRASILOVSKY).

12 ASCAP's membership is composed of over 17,800 authors (composers and lyricists) and 4,800 publishers. SHEMEL & KRASILOVSKY, *supra* note 11, at 163. The 1950 Judgment requires that membership be open to individuals meeting certain criteria. In the case of lyricists and composers, the copyrighted work must have been commercially recorded or regularly published. "Associate membership" is available to those authors who have had one work copyrighted, notwithstanding that it has not been recorded or published. For publishers, membership is contingent upon publishing activity, that is, one must have regularly engaged in the publication of musical compositions so as to have assumed the normal financial risks usually incurred in the publishing business. The ASCAP membership fee is $50 yearly for publishers and $10 for authors. *Id.* at 167.

Internally ASCAP is governed by a 24-member Board of Directors, composed of 12 writers and 12 publishers. Articles of Association of the American Society of Composers, Authors, and Publishers, Article IV § 1 (1979) (available from ASCAP). The management of the daily affairs of the society is the responsibility of the president. *Id.* at Article VII.

ASCAP's function is that of a clearinghouse or broker of performing rights. *See* Comment, *The Middleman as Price Fixer:* Columbia Broadcasting System, Inc. v. American Society of Composers, Authors and Publishers, 91 HARV. L. REV. 488 (1977). The society issues licenses for the use of copyrighted musical works. Licensees include radio and television stations, restaurants, bars, hotels, theaters and other businesses. *See* note 24 *infra.* Fees are collected from users and distributed to the ASCAP membership. Fees are determined as a percentage of gross receipts of the user or a flat amount, less adjustments such as agency commissions and wire chargers. The rate is slightly less than two percent of adjusted gross receipts in the licensing scheme. ASCAP members grant the society the nonexclusive[13] right to license nondramatic rights[14] in their musical compositions. ASCAP in turn licenses users to perform the works in its catalogue.

ASCAP prevailed as the sole performing rights society in the United States until 1939. In that year BMI[15] was founded by station owners in an at-

case of radio stations. SHEMEL & KRASILOVSKY, *supra* note 11, at 163.

After deductions for overhead costs, receipts are divided equally between writers as a group and publishers as a group. *Id.* Each group then distributes its share among its members according to its own formula. Pursuant to the consent decree, a composer may elect to receive remuneration based solely on the number of performances of his works, or he may choose the complex "spreading of funds" formula. Order Approving Consent Decree, Attachment A, United States v. ASCAP, Civ. No. 13-95 (S.D.N.Y. as amended July 30, 1976); SHEMEL & KRASILOVSKY, *supra* note 11, at 168-70. Key in the royalty distribution system are the number and kind of performance logged in ASCAP's survey. ASCAP: THE FACTS (1979) (unpublished pamphlet.) Performances are characterized as theme, background, cue or bridge, jingle and feature performances.

Points or "credits" are awarded based on the nature of each performance of an author's works. Feature performances receive a full credit, and theme, background, jingle and cue performances receive fractional credit values. Different credit values are awarded for repeat performances of the same work on a single program depending on the nature of the use. Similarly, additional credit value is awarded for works with an extensive performance history. With television, the time of day of the broadcast also is considered in determining credit values. SHEMEL & KRASILOVSKY, *supra* note 11, at 168-70; *How the ASCAP Survey Works—A Basic Primer,* ASCAP Today, Fall 1976, at 26. Revenues are distributed quarterly to writer and publisher groups. Credit values are then used to determine the percentage received by individual members of each group.

The survey utilized by ASCAP to determine fee payments involves extensive taping of a representative sample of actual broadcasts. The sample is then used to estimate total national performances of each author's works. Nonlicensed users are also surveyed to police for infringement.

Monitoring nonbroadcast performances is more difficult. To accomplish this feat, ASCAP screens the logs of wired music systems and checks programs of educational, symphony and concert performances. Feature performances on radio and television are used as "proxies" for hotel, nightclub and bar use. *How the ASCAP Survey Works—A Primer,* ASCAP Today, Fall 1976, at 28.

13 "Nonexclusive" means the author is free to license his works directly to users. This condition was imposed on ASCAP by the 1950 Judgment. Prior to the 1950 Judgment ASCAP received the exclusive right to license the works of its members. 1950 Judgment, *supra* note 4. Although BMI does receive exclusive licensing rights from its affiliates, the 1966 Decree prohibits it from denying its members direct licensing privileges upon request. 1966 Decree, *supra* note 4.

14 "Nondramatic" or "small" rights are distinguished from "dramatic" or "grand" rights. The distinction, however, is sometimes less than clear. Nondramatic rights have been referred to as "renditions of a song . . . without dialogue, scenery or costumes." Finklestein, *The Composer and the Public Interest—Regulation of Performing Rights Societies,* 19 L. & CONTEMP. PROB. 275, 283 n.32 (1954). The definition has been criticized as being both too broad and too narrow. *See* 3 NIMMER ON COPYRIGHT § 10.10 [E] (1979). Thus, it was held that the performance of 20 of 23 musical compositions from *Jesus Christ Superstar* in the same sequence (with one exception) as they occurred in the rock opera was a dramatic performance, the lack of scenery, costumes and dialogue notwithstanding. The Robert Stigwood Group, Ltd. v. Sperber, 457 F.2d 50 (2d Cir. 1972). In that case the court found the sequence to be sufficient to tell the story of the opera.

Conversely, the presence of scenery, costumes, and dialogue should not automatically render a performance dramatic. ASCAP has taken this position with respect to television performances, at least for the purpose of defining dramatic rights within the context of its agreements with authors. The agreement recites:

> For the purposes of this agreement, a dramatic performance shall mean a performance of a musical composition on a television program in which there is a definite plot depicted by action and where the performance of the musical composition is woven into and carries forward the plot and its accompanying action. The use of dialogue to establish a mere program format or the use of any nondramatic device merely to introduce a performance of a composition shall not be deemed to make such performance dramatic.

1976-1985 Agreement Between Authors and ASCAP, 1(d)(ii) (1980) (available from ASCAP, 1 Lincoln Plaza, New York, N.Y. 10023).

Perhaps a more workable standard is found in the following test: "Delete the proposed musical performance from the production (be it stage, motion picture or television); if after such deletion the continuity or story line of the production is in no way impeded or obscured, then the proposed performance is nondramatic—otherwise it is dramatic." 3 NIMMER ON COPYRIGHT § 10.10 [E] (1979) (citing R. Monta of Metro-Goldwyn-Mayer as the author of the test).

15 As of January 1976 BMI's membership included 29,000 writers and over 15,000 publishers. It remains, however, wholly owned by 480 broadcasters. BMI affiliates enter into two-year automatically renewable contracts with the society. Like ASCAP, BMI membership criteria are subject to judicial scrutiny. The 1966 Decree requires that an author have written a musical work which has either been commercially published or recorded or is "otherwise likely to be performed." 1966 Decree, *supra* note 4.

Unlike ASCAP, BMI members have no control over the management of the society. BMI stockholders elect the Board of Directors, none of whom is a writer or publisher.

tempt to increase the broadcasting industry's bargaining power with ASCAP.[16] Today ASCAP and BMI remain the two leading performing rights societies in the United States,[17] although several small privately owned organizations exist.[18]

The utility of a performing rights society is that it is a convenient medium for broadcasters and writers to become acquainted. Basically, a performing rights society performs five functions: 1) licensing the right to perform publicly copyrighted musical compositions in its repertory; 2) negotiating and collecting fees generated by the licenses it issues; 3) surveying the frequency and nature of licensee performances; 4) distributing fees collected from licensees to authors and publishers; and 5) policing for infringements and prosecuting when necessary in the name of members.[19] The primary vehicles employed by performing rights societies in exercising these functions are the "blanket" and the "per program" licenses. It is the use of these licensing schemes that has been the target of antitrust challenges. Accordingly, both marketing devices must be explored in detail.[20]

### A. *The Blanket License*

A blanket license entitles a broadcaster to use the entire repertory of the issuing society for the duration of the license.[21] The licenses are generally issued annually. Fees are usually based on a fixed percentage of total advertising revenues received during the period covered by the license.[22] The fee does not reflect actual usage of the copyrighted works. Furthermore, licenses for select compositions are not available from the society, but must be obtained directly from the writer.[23]

The major advantage of the blanket license is that it gives a user access to the entire catalogue of the performing rights society in a *single transaction*. Con-

---

BMI's fee schedule is similar to that of ASCAP. Broadcasters are charged at the rate of two percent of adjusted gross receipts. Its adjustment formula, however, is such that users of both ASCAP and BMI works generally pay one third less to BMI. SHEMEL & KRASILOVSKY, *supra* note 11, at 163.

A predetermined rate schedule is utilized by BMI in distributing royalties. Fixed monetary values are set for each type of performance (*e.g.*, 2½ cents for each AM radio feature performance for stations paying less than $1,000 in license fees; 4 cents if it pays more). Credit values are then assessed depending on the nature of the performance. "Multiple credits" are allotted for certain works including compositions originating in Broadway shows with an original cast album, and those compositions with over one million logged feature performances while in the BMI repertory. Contrary to ASCAP's system whereby all members are treated identically regardless of their commercial success, BMI members are afforded increased earnings once their cumulative performances reach a specified level. *Id.* at 171-73.

16 *Id.* at 163.

17 In 1975 ASCAP collected over $85 million in performance fees, while BMI's collections approximated $52½ million. *Id.* at 162. ASCAP claims that no fees were collected prior to its birth in 1914. *See* R. BROWN, KAPLAN & BROWN'S CASES ON COPYRIGHT 388 n.d (3rd ed. 1978).

18 3 NIMMER ON COPYRIGHT § 8.19 (1979). Of these SESAC, formerly known as the Society of European Stage Authors and Composers, is the most significant. In 1975 it collected approximately $2½ million in fees. SESAC differs from ASCAP and BMI in that 50 percent of its collections are paid to its writer and publisher members after deducting overhead costs, with SESAC retaining the remainder. SHEMEL & KRASILOVSKY, *supra* note 11, at 162-64.

19 Comment, CBS v. ASCAP: *Who Calls the Tune? Performing Rights Societies and the Rule Against Price Fixing*, 31 RUT. L. REV. 720, 725-26 (1978).

20 All future references to ASCAP will include BMI unless indicated otherwise.

21 *See generally* S. ROTHENBERG, *supra* note 10, at 30.

22 *See* note 12 *supra*.

23 400 F. Supp. at 759-60.

sequently, transactional costs are reduced.[24] From the writer's perspective, the benefits of the blanket license are twofold: 1) the costs of getting his compositions to users are reduced and 2) the problem of policing for infringement is reduced. The cost of disseminating information regarding a single composition to the multitude of potential users would be tremendous. The collection of fees from all users could prove costly as well. Additionally, efforts to curb infringement are enhanced since attention need only be focused on nonlicensees.[25]

### B. *The Per Program License*

Pursuant to the 1950 Judgment[26] ASCAP is compelled to offer a "per program" license to supplement the blanket license. In reality the per program license is a variation of the blanket license. The user still has access to the entire repertory of the issuing society. The critical difference between the two lies in the fee structure. The fee percentage for a per program license is higher than that paid for a blanket license.[27] The percentage, however, is applied to only total advertising revenues generated by programs using ASCAP music.[28]

It is these two licensing schemes that thrust performing rights societies into the judicial arena. Indeed, blanket licensing has been the focus of a continuing saga of litigation under the antitrust laws that has lasted for over forty years and still remains unsolved. The targets of this litigation, both governmental and private, have been ASCAP and BMI.

## III. ASCAP and BMI: No Strangers in Antitrust Litigation

### A. *The Consent Decrees*

In 1934 the Department of Justice filed a criminal complaint against ASCAP alleging antitrust violations.[29] The case never reached a verdict, however, because the government failed to prosecute the matter following a midtrial continuance. In 1941 the Department of Justice resumed its attack. In separate complaints the government charged that the blanket licenses offered

---

24 Transaction costs are reduced since users need only contact the society concerning prices and licensing terms. The enormity of the monetary and time savings is apparent given that a single radio station may broadcast in excess of 60,000 performances involving over 6,000 copyrighted musical works in a single year. Note, CBS v. ASCAP: *Performing Rights Societies and the Per Se Rule,* 87 YALE L.J. 783, 786 (1978). Contacting each writer and negotiating terms would be impossible. ASCAP estimates that there are hundreds of millions of performances of works in its repertory each year. *How the ASCAP Survey Works—A Basic Primer,* ASCAP Today, Fall 1976, at 26. Licensees include: 1) approximately 7,700 broadcasters; 2) wired music systems such as Muzak; 3) symphony, concert and/or educational operations; 4) hotels, nightclubs, bars; and over 5,000 other users including airlines and football stadia. *Id.*

25 ASCAP conducts a survey of licensee and nonlicensee radio and television broadcasts. The former is used for the purpose of calculating fees. The latter is used to police for pirating. If unlicensed uses are detected, ASCAP institutes infringement actions on behalf of its members. 400 F. Supp. at 742. *See generally* SHEMEL & KRASILOVSKY, *supra* note 11, at 165-66.

26 1950 Judgment, *supra* note 4.

27 S. ROTHENBERG, *supra* note 10, at 32.

28 *Id.* The 1950 Judgment requires that the terms and fees of the blanket and per program licenses offer a genuine economic choice. Moreover, ASCAP is prohibited from requiring or influencing prospective licensees to seek blanket licenses before per program licenses. 1950 Judgment, *supra* note 4.

The per program license is valuable to those broadcasters, particularly some radio stations, that use music only in a small portion of their shows. It has not been widely employed by the major television networks. 562 F.2d at 134 n.9.

29 Cohen, *Music, Radio Broadcasting and the Sherman Act,* 29 GEO. L. J. 407, 424 n.91 (1941).

by ASCAP and BMI were illegal restraints of trade and imposed arbitrary prices through unlawful copyright pools. The government requested the court to enjoin ASCAP's then exclusive[30] licensing arrangement with authors and composers, and require an alternative form of licensing from ASCAP and BMI. Neither case was prosecuted to a verdict since both the ASCAP and BMI cases culminated in antitrust consent decrees.[31]

The initial ASCAP decree was entered into in 1941, one week after the government filed the complaint. The decree was substantially amended in 1950, and has been subjected to minor amendment subsequently. The key provisions of the amended decree include: 1) automatic issuance of a license to a user upon request; 2) opportunity for users to initiate proceedings in the U.S. District Court for the Southern District of New York for the determination of a reasonable fee if a user objects to the one proposed by ASCAP, with ASCAP having the burden of proving reasonableness; 3) the availability of a per program license for broadcasters; 4) a prohibition against acquiring other than nonexclusive rights from its members; and 5) a prohibition against discrimination in licensing terms to users similarly situated.[32]

The BMI consent decree was also entered into in 1941. This decree was replaced by an amended decree in 1966.[33] The conditions it imposes are similar to those restricting ASCAP's operations. The two decrees do, however, vary in some respects. BMI is not restricted to obtaining nonexclusive rights from its affiliates.[34] Additionally, the 1966 Decree does not include a provision authorizing judicial fee setting.[35]

The provisions of the consent decrees and the conditions they impose on the operations of ASCAP and BMI have played significant roles in later assaults on blanket licensing. Indeed, these provisions have been the focal point of judicial scrutiny in subsequent litigation, often providing immunity from antitrust condemnation.

### B. K-91, Inc. v. Gershwin Publishing Corp.: *A Frontal Assault on Blanket Licensing*

In *K-91 Inc. V. Gershwin Publishing Corp.*[36] several ASCAP members sued a

---

30 441 U.S. at 10-11.

31 *Id.* at 12 n.20. *See* note 4 *supra.*

32 *See* 1941 Decree and 1950 Judgment, *supra* note 4. *See generally* Garner, United States v. ASCAP: *The Licensing Provisions of the Amended Final Judgment,* 23 BULL. COPYRIGHT SOC'Y 119, 120-27 (1976). The 1950 Judgment as amended does not require ASCAP to license the use of individual works in its repertory unless requested to do so by *both* the author and user. 1950 Judgment, *supra* note 4. When the National Broadcasting Company (NBC) sought a license for 2,217 compositions in the ASCAP repertory frequently used on NBC variety shows, the district court in New York ruled that it would not be appropriate to let a nonparty (NBC) obtain what in effect would be a modification of the ASCAP consent decree. Further, it interpreted section VI of the 1950 Judgment as not requiring ASCAP to function as an intermediary between users and individual ASCAP members. United States v. ASCAP (*In re* Application of National Broadcasting Co.) [1971] Trade Cas. (CCH) ¶ 73,491 (S.D.N.Y. 1971).

Significantly, the District Court for the Southern District of New York has never been called upon to establish a reasonable fee. It has, however, served as a mediator between ASCAP and users. Garner, *supra* note 32, at 127-28.

33 1966 Decree, *supra* note 4.

34 *Id.*

35 *Id.*

36 372 F.2d 1 (9th Cir. 1967), *cert. denied,* 389 U.S. 1045 (1968).

Seattle radio broadcaster for copyright infringement. The defendant admitted the infringement, but asserted as a defense that ASCAP was an unlawful combination for the purpose of price-fixing and block-booking its members' compositions in violation of sections 1 and 2 of the Sherman Act.[37] The Ninth Circuit responded by affirming the trial court's finding that ASCAP had not violated the antitrust laws since there was no assertion that ASCAP was not in compliance with the amended 1950 Judgment.[38] Further, the court averred that ASCAP could not be accused of price-fixing since every licensee had access to the district court to establish a reasonable fee whenever it felt ASCAP's terms unreasonable. The appellate court concluded that as long as ASCAP complied with the decree, it could not be price-fixing. The court labeled the decree as having "disinfected" ASCAP as a combination in restraint of trade.[39] Moreover, the court reasoned, the nonexclusive nature of ASCAP's licensing authority precluded ASCAP from falling within antitrust prohibition.[40]

Significantly, before denying certiorari[41] in *K-91* the Supreme Court invited the Solicitor General to file an amicus brief expressing the views of the government as to the legality of ASCAP's operations.[42] While the Solicitor General's sanction of the Ninth Circuit's [43] holding in *K-91* certainly weighed heavily in the Supreme Court's denial of certiorari, it proved to be extremely important in subsequent attacks on blanket licensing, particularly in the *CBS* litigation.

### C. CBS v. ASCAP[44]: *You've Lost That Lovin' Feelin'*[45]

#### 1. The District Court: We've Only Just Begun[46]

ASCAP and CBS have engaged in licensing agreements since 1929.[47] During this period, CBS had acquired only blanket licenses, never having

37 15 U.S.C. §§ 1 and 2 (1976). Section 1 provides in part that "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . . is declared illegal."

Section 2 provides, in pertinent part, that "[e]very 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 . . . shall be deemed guilty of a felony . . . ."

38 372 F.2d at 2-3.

39 *Id.* at 4. This conclusion is inconsistent with the court's earlier statement that "we do not reach the question of whether activities which would otherwise be a violation of the antitrust laws could be rendered immune because consistent with the terms of the consent decree." *Id.*

40 *Id.*

41 389 U.S. 1045 (1968).

42 389 U.S. 805 (1967).

43 *See generally* Memorandum for the United States as Amicus Curiae on Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, K-91, Inc. v. Gershwin Publishing Corp., No. 147, December, 1967 (hereinafter cited as Memorandum for the United States). The Solicitor General endorsed the Ninth Circuit's decision with the exception of the "disinfected" theory. The government disavowed any assertion that the 1950 Judgment would render lawful any conduct otherwise prohibited by the antitrust laws. *Id.* at 7. Earlier litigation had endorsed this position. *See* United States v. ASCAP (Application of Shenandoah Valley Broadcasting, Inc.), 331 F.2d 117 (2d Cir.), *cert. denied,* 377 U.S. 997 (1964).

44 400 F. Supp. 737 (1975). Earlier ASCAP's motion for summary judgment was denied. 337 F. Supp. 394 (1972).

45 Words and music by Phil Spector, Barry Mann and Cynthia Weil. Copyrighted 1964 by Screen Gems—Columbia Music, Inc.

46 Words by Paul Williams; music by Rodger Nichols. Copyrighted 1970 by Irving Music, Inc..

47 400 F. Supp. at 753.

elected to obtain a per program license. In April, 1969, CBS and ASCAP submitted for court approval agreements as to license fees for CBS's television network for 1969 and several prior years. Because the proposed fees would increase the disparity between CBS fees paid to ASCAP and BMI, BMI demanded an increase to maintain some semblance of parity. When negotiations for higher fees proved unproductive, BMI notified CBS that it would terminate CBS's license.[48]

CBS responded by requesting both BMI and ASCAP to submit licenses effective January 1, 1970, that would provide for payment on the basis of actual usage of each society's music. When neither ASCAP nor BMI accommodated CBS's request, CBS filed suit in the United States District Court for the Southern District of New York.[49]

CBS's complaint contained four allegations of antitrust violations and an allegation of copyright misuse. CBS averred that ASCAP and BMI were vehicles by which the members of both organizations engaged in price-fixing, unlawful tying arrangements, group boycotts, and monopolization, both attempted and achieved.[50] Also, CBS contended that the copyrights of the individual members of both organizations were the means by which the members restrained competition and, therefore, the activities of the defendants constituted copyright misuse. For relief, CBS sought an injunction under section 16 of the Clayton Act,[51] requiring both performing rights societies to offer licenses on terms that reflected the nature and amount of CBS's actual use of music.[52] Alternatively, CBS sought to enjoin both BMI and ASCAP from offering blanket licenses to any television network.[53]

The defendants responded by moving for summary judgment, contending that *K-91* was controlling.[54] Judge Lasker, in denying the motion, noted that *K-91* and *CBS* were not analogous. Initially he pointed out that ASCAP was not insulated from antitrust violations by the consent decree provision granting the district court authority to set a reasonable fee. The court acknowledged that a "reasonable price" does not necessarily equate with a "competitive price."[55]

---

48 *Id.*

49 Herman Finklestein, general counsel to ASCAP, replied that ASCAP would consider CBS's proposal at the next meeting of its board of directors on January 29, 1970. CBS's request was viewed as an application for a license pursuant to the consent decree. Further, CBS was instructed that a 60-day interim license would be issued with rates and terms to be negotiated and set by the court. *Id.*

BMI made a similar response, directing CBS to the provisions of its consent decree and the licensing alternatives provided therein. *Id.*

50 *Id.* at 745.

51 15 U.S.C. § 26 (1976).

52 As an alternative to the blanket license, CBS suggested a "per use" license. Under this system, ASCAP and BMI would continue in their clearinghouse roles. The payment of fees, however, would be contingent upon the performance of a composition in the "per use reservoir." The fee for each use would be set in a schedule. The actual amount would be a function of the nature of the use (theme, background or feature) and other factors including duration of use and the popularity of the particular composition. 400 F. Supp. at 747 n.7.

53 *Id.* at 741. CBS also sought a declaratory judgment of copyright misuse pursuant to 28 U.S.C. §§ 2201, 2202 (1976).

54 337 F. Supp. 394 (1972). In *K-91* the same antitrust violations asserted by CBS were rejected by the Ninth Circuit. *See* text accompanying notes 36-40 *supra.*

55 337 F. Supp. at 397-98 n.2. In United States v. Trenton Potteries Co., 273 U.S. 392 (1927) the Supreme Court held that the reasonableness of a fixed price would not validate the price-fixing practice. *Id.* at 397. In ASCAP's case, a price-fixing allegation following a court-established fee would present theoretical problems since ASCAP would no longer be the "price-fixing" entity. Consequently, a price-fixing challenge to ASCAP's operations under the 1950 Judgment would appear to attack the legality of the decree

Further, the court reasoned, in *K-91* no practical alternative to blanket licensing had been proposed as in *CBS.* Indeed, in *K-91* the parties had stipulated that no practical alternatives to blanket licensing were available.[56] Thus, *CBS* was readily distinguishable since CBS's position was to the contrary; it proposed a "per use" license as an alternative.[57]

Although Judge Lasker denied ASCAP's motion for summary judgment by distinguishing *K-91,* he did not give substantial weight to the government's position in that case. Rejecting a *per se* test and mandating a rule of reason standard, he endorsed the Solicitor General's position that market realities in the music publishing business were such that conduct that would otherwise be condemned would be tolerated to preserve an orderly market.[58] Such conduct, however, would be tolerated only to the "minimum extent" necessary to effect an orderly market.[59] Accordingly, the judge ruled that notwithstanding the 1950 Judgment, ASCAP's operations would fall under a rule of reason analysis if they transcended the minimum restraints necessary. He framed the issue in terms of whether the 1950 Judgment constituted "an implied partial repeal of the antitrust laws."[60] Presumably, if CBS could establish the viability of a "per use" license, the blanket license would fail under the "minimum extent" criterion.

The denial of ASCAP's motion for summary judgment was followed by an eight-week trial which culminated in the dismissal of CBS's complaint.[61] Despite Judge Lasker's earlier ruling that a rule of reason standard was to be applied to ASCAP and BMI, CBS persisted in its contention that both had engaged in *per se* violations of the Sherman Act.[62] CBS relied principally on

---

rather than ASCAP's operations. CBS appears to have been cognizant of this dilemma since it asserted that ASCAP's *operations under the 1950 Judgment* constituted the antitrust violation. 337 F. Supp. at 397.

56 *Id.* at 400.

57 *See* note 52 *supra.* The feasibility of the per use system raised a material question of fact, thus precluding summary judgment. 337 F. Supp. at 401.

58 *Id.* at 398, 400.

59 Judge Lasker relied on a Supreme Court decision dealing with the immunity of the New York Stock Exchange under the antitrust statutes. The Court held that the Exchange was immune only to "the minimum extent necessary" to make the Securities Exchange Act work. Silver v. New York Stock Exchange, 373 U.S. 341, 357 (1963). Judge Lasker analogized the Securities Exchange Act to the 1950 Judgment.

60 337 F. Supp. at 400. Judge Lasker's conclusion was an express rejection of the Ninth Circuit's view that the 1950 Judgment "disinfected" ASCAP's operations so as to provide complete antitrust immunity.

Whether the 1950 Judgment could create absolute immunity or even a partial repeal of the antitrust laws is dubious. *See, e.g.,* United States v. Columbia Artists Mgt., Inc., [1963] Trade Cas. (CCH) ¶ 70,955 (S.D.N.Y.), *aff'd per curiam,* 381 U.S. 348 (1965).

61 400 F. Supp. 737 (1975).

62 The per se violation referred principally to the allegation of price-fixing. Price-fixing was first condemned as a per se violation of the Sherman Act in United States v. Trenton Potteries Co., 273 U.S. 392 (1927). In that case the Court rejected a reasonableness standard for conduct categorized as price-fixing on four grounds: first, price-fixing inevitably results in the elimination of competition; second, the power to fix prices, whether reasonable or not, includes the power to control the market and ultimately, to fix unreasonable prices; third, a fixed price, even if presently reasonable, can become unreasonable with economic fluctuation; and fourth, courts do not have the facilities to undertake the task of determining reasonable prices for each and every industry in a changing economy. *Id.* at 397-98.

Thus, once conduct is characterized as price-fixing the judicial inquiry terminates. Economic justification for the practice is ignored. Modern courts have justified the per se approach for activities such as price-fixing under the rationale that the economic benefits of the practice are far outweighed by the judicial expediency gained by circumventing a rule of reason analysis. *See, e.g.,* United States v. Topco Assocs., Inc., 405 U.S. 596, 607-10 (1972); United States v. Container Corp. of America, 393 U.S. 333, 341 (1969) (Marshall, J., dissenting).

*United States v. Socony-Vacuum Oil Co., Inc.*[63] for support. In that case the Supreme Court held that any horizontal agreement among competitors that "tampers with price structures" is unlawful per se.[64]

The district court rejected this characterization of ASCAP's activities, noting that *Socony-Vacuum* was inappropriate since there was no assertion that individual members of ASCAP agreed among themselves as to license fees to be charged for compositions offered by *each* of them.[65] Further, the court ruled that the claim that a combination of individual sellers offering the *entire pool* of their works "through a common sales agent at a negotiated package price is per se illegal . . . fails as a matter of law."[66] To support its ruling the district court cited *Automatic Radio Co., Inc. v. Hazeltine Research, Inc.*,[67] which held that licenses for the use of any or all patents held by Hazeltine were not *per se* patent misuse. The court also relied on *Zenith Radio Corp. v. Hazeltine Research, Inc.*,[68] in which patent misuse was found under a licensing arrangement that compelled the licensee to choose between a license requiring the payment of royalties on products not using the patent or no license at all. In the latter case, the court noted, illegality was premised on the presence of coercion; the licensee either accepted the terms of the license or did without the underlying product.[69]

Coercion was conspicuously absent in *CBS*. As Judge Lasker indicated, the blanket license was only one of several options open to CBS. The per program license, which under the 1950 Judgment had to offer a genuine economic choice, provided for fees based only upon programs using the societies' music.[70] Also, the requirement that ASCAP acquire only nonexclusive rights preserved direct licensing as another option.[71]

Given these circumstances, Judge Lasker dismissed CBS's complaint.[72] Hardly terminating the issue, Judge Lasker's decision marked the beginning of a judicial nightmare that yet remains unresolved.

2. The Second Circuit Court of Appeals: *Bridge Over Troubled Water*[73]

The district court's conclusion that blanket licensing did not constitute an illegal tying arrangement was upheld on appeal.[74] The Second Circuit Court of Appeals, however, rejected the district court's finding that the activities of

63 310 U.S. 150 (1940).

64 *Id.* at 221. The Court stated that any combination "formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing . . . price . . . is illegal per se." *Id.* at 223.

65 400 F. Supp. at 748.

66 *Id.*

67 339 U.S. 827 (1950).

68 395 U.S. 100 (1969).

69 400 F. Supp. at 749.

70 *Id.* at 749. *See* text accompanying notes 26-28 *supra.*

71 400 F. Supp. at 749. Judge Lasker's emphasis of the need for coercion suggests that he was treating the case as essentially a tie-in or blocking claim. *See* 562 F.2d at 134. The district court also found that CBS could create the necessary machinery for direct licensing during a "reasonable planning period." 400 F. Supp. at 765, 781-83. Further, the court found that authors would not be "disinclined" to negotiate directly with CBS, but rather would line up at CBS's door. *Id.* at 765-67.

72 *Id.* at 783.

73 Words and music by Paul Simon. Copyright 1969 by Paul Simon.

74 562 F.2d at 135. The Second Circuit's finding was predicated on the district court's conclusion that a viable alternative to blanket licensing existed and thereby precluded coercion. *Id.* at 134-35.

ASCAP and BMI were not price-fixing. Judge Gurfein focused on CBS's contention that the pooling of copyrights for their collective sale by a single agency at a single price restrained competiton among authors.[75] Within this structure the court found price-fixing. The court stated that the "determination of how much each copyright owner gets from the common pot is an artificial fixing of the price to that member of the combination for his composition."[76] Indeed, the royalty paid to an individual was said to be the product of "at least the threshold elimination of price competition for the performing rights in his own particular composition."[77]

Recognizing that the characterization of blanket licensing as price-fixing would result in a *per se* condemnation of the practice, the court noted that price-fixing was sometimes tolerated under a "market-functioning exception."[78] This exception had received the endorsement of the Solicitor General in *K-91* as being applicable to the performing rights market.[79] Application of the doctrine in *CBS,* however, proved difficult in light of the haunting stipulation present in *K-91.*[80]

A dichotomy existed in *CBS* if the market-functioning exception was to be applied, given the district court's finding that direct licensing existed as a practical alternative to the blanket license.[81] If direct licensing was available as a practical alternative to blanket licensing so as to preclude coercion and, therefore, the presence of an illegal tie-in, blanket licensing could not be sustained under the market-functioning exception. That the market could function without blanket licensing, which is what the district court's ruling necessarily implied, refuted a market necessity assertion since direct licensing assured the existence of a market in the absence of blanket licensing. Consequently, that which disproved one antitrust violation, the tie-in charge, precluded the availability of a defense to the price-fixing allegation.[82]

Other defenses to the price-fixing characterization were also rejected by the court.[83] Accordingly, the Second Circuit reversed the dismissal of CBS's complaint.[84] However, rather than imposing an injunction as normally would

---

75 *Id.* at 136.

76 *Id.* The court found this conduct to be "tampering with price structures" within the meaning of *Socony-Vacuum. See* text accompanying notes 63-64 *supra.*

77 562 F.2d at 136.

78 *Id.* The court described the concept as holding that price-fixing is per se illegal unless it is absolutely necessary for the market to function at all. *Id.*

79 Memorandum for the United States, *supra* note 43, at 10-11.

80 *See* text accompanying note 56 *supra.*

81 *See* note 71 *supra.*

82 The court held that blanket licensing for *television networks* could not be saved by the "market necessity defense." 562 F.2d at 140. Consequently, the Ninth Circuit's holding in *K-91,* which upheld blanket licensing in the *radio broadcasting* industry was not, technically, in conflict with the court's ruling. The validity of the distinction in the two holdings was conditioned upon the presence of the *K-91* stipulation that no practical alternative to blanket licensing existed in the radio broadcasting industry. If a per use license could be designed for that market or the feasibility of direct licensing established, the issues raised in *CBS* would surface. *See* text accompanying notes 126-29 *infra.*

83 The court rejected the arguments that the consent decrees "disinfected" the activities of ASCAP and BMI, and that the blanket license was not a price-fixing mechanism. In addressing the latter, the court disavowed the assertion that the blanket license and licenses for individual compositions were so fundamentally different that a claim of price-fixing was impossible. The court reasoned that the mere existence of the blanket license enabled a copyright owner "to *choose* the blanket license as his medium of licensing . . . and therefore dulls his incentive to compete." 562 F.2d at 139.

84 CBS contended that the mere presence of the blanket license would taint prices for direct licensing arrangements. Citing the district court's finding to the contrary and CBS's substantial bargaining power in

be done after a finding of price-fixing, the court remanded the case to the district court to fashion a remedy which would insulate the effects of the blanket license on prices and negotiations for direct licenses.[85] Noting that blanket licenses are not "naked restraint[s][86] ineluctably doomed to extinction," but often serve valid market needs, the court proffered a possible remedy: a per use license that would ensure competition among individual members.[87]

3. Supreme Court: *Is That All There Is?*[88]

Having granted certiorari, the Supreme Court sought to untangle the copyright-antitrust snarl.[89] After rehashing the complex background data that are necessary to understand the milieu in which blanket licensing functions, the Court attacked the Second Circuit's condemnation of blanket licensing. At the outset the Court recognized that agreements among competitors to fix price have been traditionally placed in the *per se* category. But, as the Court stated, "easy labels do not always supply ready answers."[90]

Justice White, writing for the Court, questioned the Second Circuit's literal approach to the price-fixing issue, labeling it as "overly simplistic" and "overbroad."[91] Hence, the Court embarked on a critical analysis of blanket licensing.

The Court considered the extensive judicial and executive scrutiny to which blanket licensing had been subjected. Justice White noted that the Department of Justice had endorsed the Ninth Circuit's sanctioning of blanket licensing in *K-91*.[92] Additionally, the substantial restrictions imposed on ASCAP and BMI by the consent decrees provided further support that the blanket license was not a mere naked restraint.[93] Moreover, the Court pointed out that Congress had recognized the utility of blanket licenses in the Copyright Act of 1976 by adopting it as the means to license secondary transmissions by cable television[94] and the use of copyrighted compositions in jukeboxes.[95]

Next the Court focused on the unique market conditions in which the blanket license prevailed. Since Congress, by enacting copyright protection, created the line of commerce which blanket licensing allegedly restrained, the

---

the market, the court rejected CBS's claim. *Id.* at 140 n.27. This finding appears to be at odds with the Second Circuit's institutions to the district court: fashion a remedy "which will ensure that the blanket license will not affect the price or negotiations for direct licenses." *Id.* at 140.

85 *Id.* at 141.

86 *Id.* at 140.

87 The Second Circuit's decision stimulated substantial commentary. *See* Cirace, CBS v. ASCAP: *An Economic Analysis of a Political Problem*, 47 FORDHAM L. REV. 277 (1978); Note, *Copyright and Antitrust—A New Amended Judgment for ASCAP and BMI?* CBS v. ASCAP *Remanded*, 8 MEM. ST. L. REV. 821 (1978); Note, *Antitrust—Tie-ins—Price-fixing*, 1978 WIS. L. REV. 563; Note, *supra* note 24; Comment, CBS v. ASCAP, 6 HOFSTRA L. REV. 445 (1978); Comment, *supra* note 12; Comment, *supra* note 19.

88 Words by Jerry Leiber; music by Mike Stroller.

89 441 U.S. 1 (1979).

90 *Id.* at 8.

91 *Id.* at 9. The Court also rejected CBS's position that the payment of a flat fee regardless of the amount of actual usage of ASCAP music was sufficient to sustain an antitrust violation or copyright misuse. *Id.* at 8 n.13.

92 Id. at 15. *See* notes 36-43 and accompanying text *supra*.

93 441 U.S. at 11-13.

94 17 U.S.C. ¶ 111(d)(5)(A) (1976).

95 17 U.S.C. ¶ 116(c)(4) (1976).

Court reasoned that "any market arrangements reasonably necessary to effectuate"[96] those rights could hardly be deemed a *per se* violation. In a market composed of "thousands of users, thousands of copyright owners and millions of compositions,"[97] all demanding coordination and monitoring, the blanket license could not be characterized as a "naked restrain[t] of trade with no purpose except stifling . . . competition."[98]

Accordingly, the Supreme Court reversed the Second Circuit's *per se* finding[99] and remanded the case to the Second Circuit for a determination of whether CBS had preserved the assessment of blanket licensing under a rule of reason standard.[100] The Second Circuit subsequently upheld CBS's challenge under a rule of reasón test by denying BMI's motion for summary judgment on remanded.[101]

## IV. Blanket Licensing: Where Does It Stand?

The Supreme Court's decision supplies more questions than answers. The holding that blanket licensing to television networks was not a *per se* violation of the antitrust laws did not resolve the *per se* issue completely.[102] In fact, suits already have been filed challenging blanket licensing to local television stations under the *per se* rule.[103] Moreover, the legality of blanket licensing under a rule of reason test is in question.[104] Accordingly, it must be evaluated in light of both standards.

---

96 400 U.S. at 19.

97 *Id.* at 20. ASCAP has over 3 million songs in its repertory; BMI has over 1 million. 400 F. Supp. at 742.

98 441 U.S. at 20 (quoting White Motor Co. v. United States, 372 U.S. 253, 263 (1963)).

99 *Id.* at 24. The Second Circuit found copyright misuse on the basis of the antitrust violation. 562 F.2d at 141 n.29. Since the misuse was contingent upon the antitrust violation, that portion of the Second Circuit's judgment was also reversed. 441 U.S. at 24.

100 *Id.* at 25 n.44.

101 607 F.2d at 544. BMI maintained that CBS had not preserved the rule of reason issue and moved for summary judgment on remand. The Second Circuit gave four reasons for its ruling: 1) Justice White stated that the blanket license should be subjected to a "more discriminating examination under the rule of reason" (citing 441 U.S. at 24); 2) Justice Stevens in his dissent evaluated blanket licensing under the rule of reason and found it to be an unreasonable restraint (citing 441 U.S. at 26 (Stevens, J., dissenting)); 3) the Department of Justice in its amicus brief filed in the Supreme Court took no position on the status of blanket licensing under a rule of reason standard (citing 441 U.S. at 15); and 4) the Second Circuit had rejected the market necessity defense in dealing with television networks. *Id.*

102 See Hartnick, *From Black to White—A Comment on* Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 27 BULL. COPYRIGHT SOC'Y 1, 7 (1979).

103 *See, e.g.,* Buffalo Broadcasting Co. v. ASCAP, No. 78-5670 (S.D.N.Y., filed Nov. 27, 1978).

104 The rule of reason was initially established as the standard of evaluation under the Sherman Act in Standard Oil Co. v. United States, 221 U.S. 1 (1911). Seven years later Justice White clarified the standard in Chicago Board of Trade v. United States, 246 U.S. 231 (1918). There the Court stated that a restraint which "merely regulates and perhaps thereby promotes competition" as opposed to one which "may suppress or even destroy competition" can be tolerated under the reasonableness standard. *Id.* at 238. The Court also elaborated on what factors should be considered in a reasonableness inquiry:

> To determine that question [reasonableness] the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

*Id.* This remains the classic statement of the rule of reason test. Recently the Court rearticulated the relevant inquiry as one that "focuses directly on the challenged restraint's impact on competitive conditions." National Society of Professional Engineers v. United States, 435 U.S. 679, 688 (1978). The Court ultimately, however, restated the *Chicago Board of Trade* rule: "whether the challenged agreement is one that promotes competition or one that suppresses competition." *Id.* at 691.

### A. *Blanket Licensing and the Per Se Rule*

#### 1. Price-Fixing

The Second Circuit's conclusion that the blanket license involves price-fixing is vulnerable, as was pointed out by the Supreme Court. The weakness in the Second Circuit's finding is revealed by focusing on the activity that was branded price-fixing. The court stated:

> The charge that there is a restraint of trade by price-fixing is founded upon the conception that when any group of sellers or licensors continues to sell their products through a single agency with a single price, competition on price by the individual sellers has been restrained. . . . But even if the *single price* is reasonable, *the determination of how much each copyright owner gets from the common pot is an artificial fixing of the price to that member of the combination for his composition.* His distributive share of the common royalties may be greater than the royalty he would receive in a free market.[105]

CBS had charged that price-fixing occurred in the sale of a blanket license entitling the user to perform the entire repertory of the issuing society for a single fee. The beginning of the above passage acknowledges this fact. The court's finding of price-fixing, however, was not associated with that conduct, but rather with the ultimate distribution of the fees. Consequently, the "price" that the Second Circuit found to be "fixed" was not what the buyers paid, but what the sellers received. This finding strains common notions of price.[106]

The amount received by individual authors from the ASCAP royalty pool is not fixed. The amount is a function of the nature of the use (theme, background, cue, or feature), the quantity of use, the popularity of the work and the length of the author's membership in the society.[107] The only variable that is fixed is the credit formula which incorporates these factors in distributing the fees.

The Second Circuit's attenuated argument results from ASCAP's conduct not clearly equating with that found in prior price-fixing cases, upon which both CBS and the court relied.[108] The classic price-fixing cartel involves a

---

105 562 F.2d at 136 (emphasis added).

106 There is some support for this position in older case law. In Federal Trade Commission v. Cement Institute, 333 U.S. 683 (1948) the Court used the amount received by sellers as the relevant price for the purpose of sustaining a price discrimination charge under section 2(a) of the Clayton Act as amended by the Robinson-Patman Act. *Id.* at 721-26. Application of the concept to a price-fixing charge, however, is dubious since in the same case the Court used the amount buyers paid as the price to find an unfair method of competition under section 5 of the Federal Trade Commission Act. *Id.* Numerous price-fixing cases were cited in support of the Court's conclusion on the issue. *Id.* at 690-93. Further, the FTC abandoned this notion of price under the Robinson-Patman Act in the early 1950's. S. OPPENHEIM & G. WESTON, UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION: CASES AND COMMENTS 810-15 (3rd ed. 1974).

107 *See* note 12 *supra*.

108 *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); United States v. Trenton Potteries Co., 273 U.S. 392 (1927); United States v Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *aff'd,* 175 U.S. 211 (1899). All of these cases involved classic price-fixing cartels.

The Second Circuit also relied on two patent pooling cases, United States v. New Wrinkle, Inc., 342 U.S. 371 (1952) and United States v. Line Material Co., 33 U.S. 287 (1948). 562 F.2d at 136. These cases are not analogous for the same reason; ASCAP members do not agree to illegal activity and then implement it in their individual capacities.

group of competitors engaging in a conspiracy to *each* sell the *same product* at the *same price*. ASCAP and BMI do not reflect such a scheme. Members of performing rights societies do not agree on license fees for their *individual* works; rather, they authorize the society to negotiate fees for their *aggregate* works.[109]

The Supreme Court recognized this distinction, noting that the blanket license is a different product from that offered by individual copyright owners.[110] The blanket license possesses synergistic features for both users and copyright owners. The licensee receives immediate access to the entire repertory of the issuing society without the burden of individual negotiations. Further, the user receives flexibility in the choice of music with immunity from infringement suits. Conversely, composers receive policing services and access to users at minimal costs. These factors led the Court to conclude that "ASCAP is not really a joint sales agency offering individual goods of many sellers, but is a separate seller offering its blanket license of which the individual compositions are raw material."[111]

To support its price-fixing categorization the Second Circuit relied on broad language found in *Socony-Vacuum:* "a combination which tampers with price structures . . . engage[s] in an unlawful activity."[112] Again, the price structure to which the Second Circuit was referring was the payment received by individual members. The court apparently was suggesting that the ASCAP royalty distribution plan would influence direct licensing fees. This assertion, however, is in direct conflict with a later finding of the court that the existence of the blanket license would not taint direct licensing attempts.[113]

Ironically, CBS, the party seeking to condemn blanket licensing as price-fixing, proposed an alternative per use license that is more offensive to the antitrust laws than the current practice.[114] Under CBS's proposal ASCAP would license individual uses of its members' compositions. The fees, however, would be fixed in schedules reflecting the nature of the use to which the music was put—theme, background, or feature. The credit formulas currently used by ASCAP and BMI would be used in distributing royalties.[115]

Clearly this system approaches, if not reaches, the conduct of classic price-fixing cartels. CBS would pay the same price to writers and lyricists for the same product as the result of an agreement. Consequently, a group of com-

---

Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933) most closely resembles the conduct in *CBS.* In that case over 100 producers of coal established a joint selling agency to market their coal. The agency set selling prices for coal and then allocated contracts to the members. The Supreme Court upheld the practices of the agency in light of depressed market conditions due to overproduction, dumping and pyramiding sales contracts.

Although this conduct is similar to that found in *CBS,* it can be distinguished. ASCAP does not establish a license fee which individual members then adopt in licensing their compositions to users. Indeed, such a practice is precisely what CBS proposed under its per use license. Upholding such a license by relying on *Appalachian Coals* would be suspect, however, since *Socony-Vacuum* implicitly overruled the *Appalachian Coals* economic justification rule for price-fixing. 310 U.S. at 224 n.59.

109 The Supreme Court acknowledged this point. 441 U.S. at 24 n.42 (citing 400 F. Supp. at 48).
110 *Id.* at 21-22.
111 *Id.* at 22.
112 562 F.2d at 136 (quoting 310 U.S. at 222).
113 *See* note 84 *supra.*
114 *See* note 52 *supra.*
115 400 F. Supp. at 763. This is precisely what the Second Circuit condemned as price-fixing.

petitors would engage in a conspiracy to sell the same product at the same price.[116]

As stated above, the difficulty with attacking ASCAP as a price-fixing cartel is that it does not conveniently fit the conduct that has been traditionally categorized as such. ASCAP's licensing scheme was not "formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing . . . price."[117] The difficulty results, in part, from the nature of antitrust law. It is an evolutionary process. The *per se* rule itself is the outgrowth of repeated scrutiny of certain conduct to the point that its anticompetitive effect can be predicted as a certainty.[118] Had blanket licensing been brought within the penumbra of price-fixing in *CBS,* it would have marked one more step in the broadening of that aspect of the *per se* concept. Notwithstanding the Supreme Court's rejection of the price-fixing label, blanket licensing could still receive *per se* condemnation if the Court found it to be "plainly anticompetitive."

2. Blanket Licensing: Plainly Anticompetitive?

Price-fixing is not the only conduct vulnerable to *per se* categorization.[119] All practices and agreements void of economic virtue are "conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."[120] Said another way, practices that are so "plainly anticompetitive" are deemed "illegal *per se.*"[121]

Whether blanket licensing was sufficiently anticompetitive to warrant *per se* classification was addressed by the Supreme Court in *CBS.* The Court made clear, at least in the confines of television networks, that blanket licensing did not have such an impact.[122]

The difficulties of *per se* condemnation of blanket licensing are reflected in the Second Circuit's resolution of the issue. Despite the court's finding that blanket licensing violates *per se* standards, the court attempted to preserve blanket licensing in coexistence with some form of per use licensing.[123] The court recognized that blanket licenses served existing market needs for those who seek infringement immunity at modest cost. This result, however,

116 *See* text accompanying notes 108-109 *supra.* The Supreme Court raised this issue as well. 441 U.S. at 17 n.27.

117 The Court characterized this conduct as price-fixing in *Socony-Vacuum.* 310 U.S. at 223.

118 Price-fixing provides a good example of the evolutionary process. Judicial scrutiny of the practice began in 1897 in United States v. Trans-Missouri Freight Association, 166 U.S. 290 (1897) in which the Court first held the practice to be in violation of section 1 of the Sherman Act. In United States v. Addyston Pipe & Steel Co., 175 U.S. 211 (1899), *aff'g,* 85 F.2d 271 (6th Cir. 1898), the Court held that no inquiry into the reasonableness of a fixed price was necessary. After vacillating in several cases as to the proper standard to be applied to price-fixing, the Court enunciated the per se rule in United States v. Trenton Potteries, 273 U.S. 392 (1927). In United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) the Court reasserted the per se standard and attempted to establish the parameters of the conduct constituting price-fixing. *See* note 64 *supra.*

119 Other activities condemned under the per se rule include: horizontal customer, territorial and geographic restraints, United States v. Topco Associates, Inc., 405 U.S. 506 (1972); concerted refusals to deal, Klor's Inc. v. Broadway-Hale Stores, 359 U.S. 207 (1959); and tying arrangements, International Salt Co. v. United States, 332 U.S. 392 (1947).

120 Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958).

121 435 U.S. at 692.

122 441 U.S. at 24.

123 562 F.2d at 140.

frustrates the *per se* rule. As the Supreme Court noted, "the per se rule does not accommodate itself to such flexibility."[124] The Second Circuit's resolution of *CBS* was in reality a perversion of the rule of reason standard; it condemned blanket licensing after a superficial analysis of its impact on competition and failed to pinpoint the "plainly anticompetitive" effect,[125] but sought to preserve the practice within limitations.

Moreover, rendering blanket licensing illegitimate for television networks through the use of the *per se* rule raises serious questions as to its legality in other markets. It is difficult to conceive of a practice that could be so plainly anticompetitive when dealing with television networks and yet be maintained as reasonable when dealing with radio broadcasting.[126] Harnessing the breadth of *per se* illegality in this manner would violate existing notions of the rule.

Application of the *per se* rule would also create a licensing void. A per use license issued through a performing rights society that would survive under the antitrust statutes would be difficult to imagine in light of the *per se* illegality of blanket licensing.[127] The Supreme Court recognized that blanket condemnation of the practice would threaten the legality of any license issued through a performing rights society.[128] In light of the many benefits offered by performing rights societies, the Court found such a conclusion intolerable.[129]

The most significant shortcoming in applying the *per se* rule to blanket licensing in *CBS* was the absence of a plainly anticompetitive effect. The consent decrees safeguarded against ASCAP and BMI using their copyright pools to thwart competition.[130] While these hardly immunized ASCAP and BMI from antitrust violations,[131] they did suggest that the procompetitive and anticompetitive effects of blanket licensing have been somewhat balanced so as to maximize the former and minimize the latter.[132] Moreover, the district court's finding that there are no real impediments to direct licensing[133] suggests that any lack of competition was due, in part, to CBS's failure to exploit this alternative.[134]

A lack of competition, however, is not descriptive of the market found by the district court. Indeed, the district court characterized the market as one that creates "Darwinian imagery of cutthroat competition among hungry publishers and writers seeking network exposure."[135] Consequently, the

124 441 U.S. at 17.
125 *Id.* at n.27.
126 The reasonableness of blanket licensing for radio broadcasters received the endorsement of both the judiciary and Justice Department in *K-91*. 441 U.S. at 15. The Justice Department in its amicus brief in *CBS* denounced the Second Circuit's per se classification, but took no position on the legality of blanket licensing under a reasonableness standard. *Id.*
127 *See* text accompanying notes 114-16 *supra*.
128 441 U.S. at 17.
129 Significantly, Justice Stevens, the lone dissenter in the Court's decision, also rejected a per se conclusion. *Id.* at 25 (Stevens, J., dissenting).
130 *See* text accompanying notes 29-35 *supra*.
131 441 U.S. at 13.
132 *Id.* at n.24.
133 400 F. Supp. at 758; 441 U.S. at 24.
134 *Id.* at 783.
135 *Id.* at 767.

presence of blanket licensing can hardly be said to have a plainly anticompetitive effect.[136]

### B. *Blanket Licensing Under the Rule of Reason Standard*

#### 1. Justice Stevens' Dissent

The Supreme Court declined to evaluate blanket licensing under the rule of reason[137] and instead opted to let the Second Circuit first address the issue.[138] Justice Stevens, however, thought the issue properly before the Court and evaluated blanket licensing under the reasonableness criterion in his dissenting opinion.[139] Justice Stevens concluded that blanket licensing violates the rule of reason.[140] His conclusion relies on the patent pooling cases.[141] Justice Stevens noted that the difference in the Court's holdings in the *Hazeltine*[142] cases turned on whether the patent pools were offered on an all-or-nothing basis. Since ASCAP and BMI offered only blanket licenses, he found ASCAP and BMI's practice to "fall on the illegal side of the line."[143]

Additionally, Justice Stevens found blanket licensing to have a stifling effect on competition. This effect resulted from two factors: 1) blanket licensing restricts price competition among individual copyright owners[144] and 2) it forecloses opportunities for new songwriters to gain market entrance through price competition.[145]

Justice Stevens' dissent warrants further analysis for several reasons. First, it is a superficial application of the rule of reason standard which ignores many of the findings of the district court.[146] Second, Justice Stevens focused only on one side of the reasonableness inquiry by ignoring the procompetitive effects of blanket licensing. Finally, as did the Second Circuit, Justice Stevens condemned blanket licensing as a conspiratorial constraint on competition, but sought to preserve its existence and complement it with a more vile per use license.[147] Thus, an analysis of blanket licensing under the criteria of *Chicago Board of Trade*[148] is necessary.

#### 2. Rule of Reason Analysis

##### a. *The History and Nature of the Industry*

Prior to the development of performing rights societies the exclusive right

136 For a discussion of the competitive status of the performing rights market within the television industry see notes 157-163 and accompanying text *infra.*
137 *See* note 104 *supra* for a discussion of the rule of reason.
138 441 U.S. at 25 n.44.
139 *Id.* at 25 (Stevens, J., dissenting).
140 *Id.* at 26. Justice Stevens found the record to be adequate to conduct a rule of reason inquiry. *Id.*
141 *See* notes 67-69 and accompanying text *supra.*
142 339 U.S. 827 (1950); 395 U.S. 100 (1969).
143 441 U.S. at 29 (Stevens, J., dissenting).
144 *Id.* at 32. Justice Stevens argued that price competiton between individual members is precluded since it is no more expensive for a network to broadcast a hit tune on a prime time show than it is to use an unknown song as background music in a midday soap opera. Consequently, popular songs are overused and the rewards to established authors inflated. *Id.*
145 *Id.* at 32-33.
146 *See* text accompanying notes 149-162 *infra.*
147 Justice Stevens would affirm the Second Circuit's judgment. 441 U.S. at 26. *See also* 441 U.S. at 33.
148 *See* note 104 *supra.*

to public performance of copyrighted works was virtually unenforceable.[149] The right was almost valueless since owners did not have the facilities to negotiate with users and police infringements.[150] Users wishing to perform compositions without infringing were, as a practical matter, unable to secure licenses from owners.[151] Thus, prior to 1914 and the birth of ASCAP the performing rights market was nonexistent. Indeed, ASCAP literally made a market in which the needs of authors and users were satisfied.[152]

Since 1914 the performing rights market has changed radically. Radio and television broadcasters have become the primary users of copyrighted music.[153] Hence, millions of performances of music are broadcasted annually, often involving the simultaneous use of the same composition. To limit transaction costs the blanket license was devised.[154] Until the *CBS* litigation all three major television networks secured blanket licenses without complaint. CBS had retained a blanket license for over thirty-five years without ever exploring alternative licensing arrangements.[155]

### b. *The Nature of the Restraint*

The blanket license has not operated unrestrained within the performing rights market. It has remained under the constant scrutiny of the Justice Department and the judiciary through numerous restrictions imposed by the consent decrees, including the possibility of judicial fee-setting for ASCAP. The licenses acquired by ASCAP and BMI both permit direct licensing,[156] and this remains an alternative to blanket licensing.

The blanket license entitles the user to unlimited use of any composition in the repertory of the issuing society. Fees for the license are negotiated as a percentage of advertising revenues or as a flat amount. Licenses are normally issued on an annual basis. Once collected, fees are distributed to the members of each society. Authors only receive royalties if their compositions were actually performed.[157]

### c. *The Effect of the Restraint*

Blanket licenses issued through performing rights societies created order where chaos reigned. Consequently, artistic creations have become a profitable product. Authors are now able to successfully market their achievements and broadcasters have acquired the right to exploit musical works at modest costs.

Competition between authors has not starved in the process. Members of performing rights societies compete for royalties within the societies since they

149 400 F. Supp. at 741.
150 *Id.*
151 *Id.*
152 441 U.S. at 22-23.
153 400 F. Supp. at 741.
154 *See* note 24 *supra.*
155 400 F. Supp. at 752-54.
156 The 1950 Judgment prohibits ASCAP from acquiring exclusive licensing rights. Although the 1966 Decree does not prohibit BMI from acquiring exclusive licensing privileges, it does enjoin BMI from denying one of its affiliates permission to license directly. *See* note 13 *supra.*
157 *See* notes 12 and 15 *supra.*

only receive compensation if their works are performed. Accordingly, authors vie for network performances. CBS, the "No. 1 outlet in the history of entertainment and the giant of the world in the use of music rights"[158] is a prime target of their efforts. It dominates many aspects of the music industry.[159] Authors deluge the network with copies of their compositions in hope of obtaining feature performances.[160] Moreover, it is the possibility of a broadcast to millions of viewers, the ticket to record and sheet music sales, and use by other performers that primarily motivates authors to generate music, not potential royalty distributions from ASCAP and BMI.[161] The market is a caldron of competition; thousands of authors seeking the exposure of three television networks.[162]

d. *Conclusion: Is Blanket Licensing Unreasonable?*

The district court opinion presents a plethora of proof that blanket licensing has not suppressed or destroyed competition for performing rights. Competition is thriving. Any lack of competition, price or otherwise, is not the result of blanket licensing.

CBS's continuous use of blanket licenses since the late 1940's suggests that it too has benefitted from the use of the system.[163] Indeed, blanket licensing and performing rights societies such as ASCAP may well be necessary to offset the substantial leverage of CBS within the industry. Absent such a system the works of individual authors could be performed for next to nothing by exploiting their dreams of cashing in on the proverbial pot of gold that potentially follows national exposure. Such a result is intolerable in light of the Copyright Act of 1976 and its goal of encouraging artistic creations.

Complementing the blanket license with a per use license hardly renders the system less intolerable under the antitrust laws. Every condemnation of blanket licensing under the Sherman Act would be at least equally applicable to a per use license. Therefore, a search for a less restrictive alternative is necessary.

## V. Is There a Better Way?

The Supreme Court's failure to address blanket licensing under the rule of reason standard will only prolong the legal nightmare that presently confronts performing rights societies. The Second Circuit's original opinion suggests that it will not respond favorably to blanket licensing on remand. Further, the narrowness of the Supreme Court's decision indicates that blanket licensing will come under attack from other sectors of the performing rights market.

---

158 400 F. Supp. at 771.
159 CBS is the largest manufacturer and seller of records and tapes in the world. In addition to the CBS network, it owns numerous radio and television stations in major metropolitan areas throughout the United States. *Id.* One author contends that the present licensing structure is necessary to offset the monopoly power of the three television networks in the performing rights industry. *See* Crace, *supra* note 87, at 299.
160 400 F. Supp. at 771.
161 *Id.*
162 *Id.*
163 *Id.* at 742.

To circumvent potential complex litigation, the Supreme Court should address the legality of blanket licensing in all contexts. A piecemeal approach is costly, both monetarily and in terms of judicial resources. Given the Court's 8-1 decision in *CBS* and generally favorable attitude, hopefully blanket licensing will endure such an evaluation.[164]

Acceptance of blanket licensing in its present form does, however, have drawbacks. The spectre of judicial fee-setting definitely influences fee negotiations. Its use as a dispute resolving mechanism, however, is questionable. The District Court for the Southern District of New York hardly possesses expertise in copyright-licensing fees. Resort to the district court would in most cases be the equivalent of litigation.

The obstacles to judicial fee-setting probably explain, in part, why the procedure has never been utilized.[165] Notwithstanding these limitations, the concept of appeal to a fee-setting body *after* negotiations have failed has merit. Perhaps a better body to carry out this function, however, is the Copyright Royalty Tribunal.[166] This entity has experience in royalty rate setting and is familiar with the intricacies of copyrighted musical compositions.

The goal of this process is to let buyers and sellers first attempt to come to terms on license fees. There is no substitute for a negotiated price. Should these efforts fail, resort could be made to the Copyright Royalty Tribunal with the performing rights society having the burden of proving reasonableness. Judicial review of the Tribunal's fee could then be had in accordance with the Copyright Act.[167]

## VI. Conclusion

Blanket licensing has served the performing rights industry well. At present it should withstand antitrust challenges under both the *per se* rule and the rule of reason.[168] Judicial sanctioning by the Supreme Court, however, should come at the earliest opportunity and address blanket licensing in all contexts. Piecemeal resolution of the issue benefits no one.

The best thing that can be said for blanket licensing is that it works. Performing rights societies should not be forced to tamper with success. If alternatives to blanket licensing are demanded by certain sectors of performing

164 Other solutions have been tendered, including a legislative exemption from the antitrust laws for performing rights societies and an overseeing federal agency. *See* Note, *supra* note 24, at 801-803. Price regulation through judicial or legislative fee setting has been discussed also. *See* Cirace, *supra* note 87, at 300-306.

165 *See* note 32 *supra*.

166 *See generally* 17 U.S.C. §§ 801-810 (1976). The Copyright Royalty Tribunal is currently authorized to adjust copyright royalty rates for compulsory licenses for the use of copyrighted works: 1) to make and distribute phonorecords; 2) in jukeboxes; 3) for secondary transmission by cable systems; and 4) in noncommercial broadcasting. 17 U.S.C. § 801(b) (1976).

167 17 U.S.C. § 810 (1976).

168 CBS's other antitrust challenges, including illegal tying arrangement and monopolization charges, were rejected by both the district court and the Second Circuit. 400 F. Supp. at 781-83; 562 F.2d at 130, 132, 135, 141 n.29.

rights users, those avenues should be explored through their own initiative. The present structure provides ample opportunity for the inquisitive.[169]

*Glenn A. Clark*

169 After the completion of this article the Second Circuit upheld the legality of blanket licensing on remand. Columbia Broadcasting System, Inc. v. American Society of Composers, Authors and Publishers, No. 75-7600 (2d Cir. April 3, 1980). The court never reached a reasonableness inquiry, concluding that blanket licensing is not even a restraint of trade in light of market alternatives such as direct licensing. *Id.* at 2227.

Hopefully blanket licensing will withstand future assaults under the antitrust statutes. The Second Circuit's failure to address blanket licensing under the rule of reason suggests that the copyright-antitrust conflict is hardly over, but must await resolution of pending litigation. *See* note 103 *supra.* Indeed, *carte blanche* sanctioning of blanket licensing under the antitrust laws remains only a dream to performing rights societies.