COMMENTS

MARKETING OF MUSICAL PERFORMANCE RIGHTS AND ANTITRUST: THE CLASH CONTINUES

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INTRODUCTION

Over the years there has been a continuing confrontation between the marketing technique used to license musical compositions which are protected under the copyright laws[1] and the antitrust laws, principally the Sherman Act.[2] Historically, musical performance rights have been marketed through performing rights societies, the most important of which are the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI).[3] These societies use a blanket license system which has been the source of much litiga-

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[1] 17 U.S.C. §§ 101-810 (1976). *See, e.g.*, Columbia Broadcasting Sys. 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 (1978); K-91, Inc. v. Gershwin Publ. Corp., 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); Sam Fox Publ. Co. v. United States, 366 U.S. 683 (1961).

[2] Section 1 of the Sherman Act, 15 U.S.C. § 1 (1976), provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony. . . .

Section 2 of the Sherman Act, 15 U.S.C. § 2 (1976), provides in relevant part:

> 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. . . .

[3] SESAC is the most important of a number of other privately owned performing rights societies and was founded in 1931. It operates in a manner that is similar to ASCAP and BMI. D. WEISSMAN, THE MUSIC BUSINESS 83 (1979).

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tion over the years. The protection afforded to composers under the copyright laws is, of course, what makes it necessary in the first place to obtain a license to perform musical works. On the other hand, antitrust laws are designed to foster competition and reduce monopolistic characteristics of the marketplace. They condemn certain actions outright, such as price fixing. Thus it is probably inevitable that there should be some degree of conflict between the policies which are behind the passage of the antitrust laws and the copyright laws.[4]

In the late 1970s a significant amount of litigation took place between the Columbia Broadcasting System and the licensing societies regarding the system of blanket licensing.[5] Although the litigation reached the United States Supreme Court, the Court did not answer many of the questions concerning the system of blanket licensing. The purpose of this article is to trace the development of antitrust law regarding blanket licensing of musical performance rights, to examine the most recent judicial pronouncement on the matter in a case involving local television stations, and then to predict further developments. However, it is first desirable to take a brief look at the nature of the industry which markets musical performance rights.

The Marketing of Musical Performance Rights

The music business is characterized by many composers who copyright their works and then license them to others. One of the primary problems faced by the composer is protection against infringement of the copyrighted work by radio stations, television stations, performers, theaters, and nightclubs. Obviously, it is impossible for one person to monitor the performance of his work so as to identify even a fraction of the infringers. On the other hand, the problem for an organization which desires to use the music, such as a radio station, is the expense that would be involved in attempting to locate copyright owners and negotiate a licensing agreement with each composer whose music the station desires to play. Transaction costs would be enormous.

As a result of finding it physically and financially impossible to enforce his copyrights through an infringement suit, Victor Herbert and several other composers, authors, and publishers joined together to form ASCAP in 1914. The purpose of the nonprofit organization was to

[4] The Sherman Act and other antitrust laws favor the elimination of monopolistic practices and encourage competitive markets. The copyright laws grant limited monopolies and certain exclusive rights to copyright owners. *See*, Note, *CBS v. ASCAP: Blanket licensing and the Unresolved Conflict Between Copyright and Antitrust Law*, 13 Conn. L. Rev. 465, 465 (1981).

[5] CBS v. ASCAP, 400 F. Supp. 737 (S.D.N.Y. 1975), *rev'd*, 562 F.2d 130 (2d Cir. 1977), *rev'd*, 441 U.S. 1 (1979), *on remand*, 620 F.2d 930 (2d Cir. 1980).

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license works of their members, to police locations and facilities where their works might be played, and to take action against violations of their copyrights.[6] The organization now has grown to a membership of more than 17,800 writers and 4,800 publishers.[7]

BMI was started in 1939 as a nonprofit organization by members of the broadcasting industry. It is operationally similar to ASCAP and represents over 29,000 writers and 15,000 publishers.[8] Most domestic compositions are in the repertory of either ASCAP or BMI.[9]

Both organizations operate under a system of blanket licenses which give licensees the right to perform the entire repertory of the society as frequently as desired for a stated period of time. In 1941 the Department of Justice reactivated an earlier antitrust suit filed against ASCAP in response to complaints by the National Association of Broadcasters.[10] A consent decree was entered, and later substantially modified in 1950.[11] The amended consent decree provides the ASCAP may obtain only non-exclusive rights from its members. A member is free to make his or her own arrangement with a broadcaster and to enter into a separate license agreement. The decree also requires ASCAP to offer either a blanket license or a per program license to a broadcaster.[12] The per program license and the blanket license allow the broadcaster to use any material in the repertory. BMI is governed by similar provisions.[13]

The licensing activity of ASCAP and BMI is very big business. In 1975 ASCAP collected about $85 million in performance fees from broadcasters and other sources while BMI collected about $52.5 million. The amounts have more than doubled since 1963.[14] ASCAP derived about 54 percent of this revenue from television and 31 percent from radio. The figures are similar for BMI.[15] The revenue is distributed among the composers and publishers according to a complex formula based on the sampling of broadcasts. ASCAP actually tapes selected broadcasts while BMI requires each radio station to supply a

[6] Schull, *Collecting Collectively: ASCAP's Perennial Dilemma*, 7 ASCAP Copyright L. Symp. 35 (1956). For a full discussion of the role of copyright societies *see*, Weissman, *supra* note 3, at 82-87.

[7] S. Shemel & M. Krasilovsky, This Business of Music 163 (3d ed.1977).

[8] *Id.*

[9] Broadcast Music, Inc. v. CBS, 441 U.S. 1, 7 (1979).

[10] *See* Note, *supra* note 4, at 475.

[11] United States v. ASCAP, 1940-43 Trade Cas. (CCH) ¶ 56,104 (S.D.N.Y. 1941); United States v. ASCAP, 1950-51 Trade Cas. (CCH) ¶ 62,595 (S.D.N.Y. 1950).

[12] Columbia Broadcasting Sys. v. ASCAP, 620 F.2d 930, 933 (2d Cir. 1980).

[13] *Id.*

[14] Shemel & Krasilovsky, *supra* note 7, at 162.

[15] *Id.*

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log of music used for a selected week once every twelve to fourteen months.[16]

This system of licensing and distribution of fees has been in operation for many years.[17] Recently, the Columbia Broadcasting System (CBS) challenged the licensing system as it applies to the television *networks*, claiming that it violates the antitrust laws. The case was appealed to the Supreme Court, which held that the system of blanket licenses did not constitute a *per se* violation of the Sherman Act.[18] It remanded the case to the Court of Appeals for the Second Circuit to determine whether the blanket system, as applied to the networks, violated the Sherman Act based upon a rule of reason standard. The court of appeals held that it did not.[19] Left unanswered was the legal effect of the blanket license when applied to local or non-network stations. Recently, a federal district court held that the system of blanket licenses did violate section 1 of the Sherman Act. If upheld on appeal,[20] the decision may have far-reaching effects on the marketing and licensing of musical compositions for use in the local television market. In order to appreciate the issues presented in this case, it is first necessary to examine the *CBS* case.

CBS v. ASCAP

Overview

In 1969, after negotiations over a new blanket license schedule failed, CBS filed suit against ASCAP alleging a number of antitrust violations. It alleged that the blanket licenses constituted both price fixing and a tying arrangement since CBS had to purchase music that it did not use in order to obtain music that it desired. The complaint also alleged that the pooling arrangement resulted in a group boycott and a monopoly of performing rights. One count also alleged copyright misuse.[21] After an eight week bench trial, the district court dismissed the complaint, holding that the blanket license did not amount to a per se violation of the Sherman Act. It also found that since direct negotiation with individual copyright owners by CBS was permitted and feasible, there was no unreasonable restrain of trade, illegal tying, monopolization, or misuse of copyright.[22]

[16] *Id.* at 165.

[17] BMI v. CBS, 441 U.S. 1, 5 (1979).

[18] *Id.* at 24.

[19] CBS v. ASCAP, 620 F.2d 930, 939 (2d Cir. 1980).

[20] Although no appeal had been filed at the time of this writing, it is anticipated that one will be filed and a decision handed down sometime in 1984.

[21] CBS v. ASCAP, 400 F. Supp. 737, 745 (S.D.N.Y. 1975).

[22] *Id.* at 781-83.

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CBS appealed to the Court of Appeals for the Second Circuit. That court upheld the facts found by the trial court, as well as its legal conclusions, on all issues except one. The court held that the blanket license system constituted per se illegal price fixing.[23] The Supreme Court granted certiorari, held that the blanket licensing scheme did not constitute a per se violation of the Sherman Act, and remanded the case to the court of appeals to determine whether blanket licensing violated the rule of reason.[24]

The final round resulted in a victory for ASCAP and BMI, as the court of appeals decided that the blanket licensing arrangement did not violate the Sherman Act under the rule of reason.[25] This was not the result predicted by at least one commentator since the same court had earlier frowned on blanket licensing by holding that the per se doctrine applied.[26] However, the case was heard on remand by a panel that included only one of the original panel of judges.[27] A number of commentators have examined the *CBS* decision during its journey through the court system.[28] A brief look at the arguments presented in the various stages of the litigation is appropriate here as it may help to highlight the differences between this case and the *Buffalo Broadcasting* case which will be discussed later.

Basis of the Decision

The essential argument that CBS raised in the district court was based upon two rather old but classic cases, *United States v. Socony-Vacuum Oil Co.*[29] and *United States v. Trenton Potteries Co.*[30] Based on these cases CBS argued that agreements to fix prices constituted per se violations of the Sherman Act. The district court rejected the argu-

[23] CBS v. ASCAP, 562 F.2d 130 (2d Cir. 1977).
[24] BMI v. CBS, 441 U.S. 1, 24 (1979).
[25] CBS v. ASCAP, 620 F.2d 930, 939 (2d Cir. 1980).
[26] Note, *Blanket Licensing: The Clash Between Copyright Protection and the Sherman Act*, 55 NOTRE DAME LAW. 729, 748 (1980).
[27] CBS v. ASCAP, 620 F.2d 930, 932 (2d Cir. 1980).
[28] *See, e.g.* Note, *CBS v. ASCAP: Blanket Licensing and the Unresolved Conflict Between Copyright and Antitrust Law*, 13 CONN. L. REV. 465 (1981); Note, *Price Fixing and Per Se Redefined—BMI v. CBS*, 5 DEL. J. CORP. L. 73 (1980); Note, *Blanket Licensing: The Clash Between Copyright Protection and the Sherman Act*, 55 NOTRE DAME LAW. 729 (1980); Note, *Who Calls the Tune? Performing Rights Societies and the Rule Against Price Fixing*, 31 RUTGERS L. REV. 721 (1978); Note, *Antitrust Law—Tie Ins, Price Fixing and CBS*, 1978 WIS. L. REV. 563 (1978); Note, *CBS v. ASCAP: Performing Rights Societies and the Per Se Rule*, 87 YALE L.J. 783 (1978).
[29] 310 U.S. 150 (1940).
[30] 273 U.S. 392 (1927).
[31] Automatic Radio Mfg. v. Hazeltine Research Inc., 339 U.S. 827 (1950); Zenith Radio Co. v. Hazeltine Research Inc., 395 U.S. 100 (1969).

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ment, however, and instead relied on two patent licensing cases,[31] noting that "the critical difference between an illegal licensing arrangement and a legal one is the fact of coercion or compulsion by the licensor."[32] This raised a point that seemed to plague CBS throughout its litigation against ASCAP. The blanket licensing system was not the exclusive method for dealing with composers. CBS was free to negotiate its own deal with composers, but it had chosen not to do so.[33] According to the district court, had CBS chosen direct negotiation, the evidence indicated that "copyright owners would line up at CBS's door if direct dealing were the only avenue to fame and fortune."[34] Note that the district court was discussing the exposure opportunities that would be made available to a composer by a major network. The exposure opportunities offered by a local television station would, of course, be much more limited.

The court of appeals disagreed with the district court and held that where competing sellers offer a product through a single agency at a single price, the arrangement is illegal per se, regardless of the buyer's freedom to deal directly with the sellers (here the composers).[35] The effect of the scheme, according to the court, was to compensate those whose works were not used. The court did note the existence of what it characterized as a "market function exception"[36] for those instances where the arrangement is the only practical method for marketing the product. It concluded that the exception did not apply since the district court had found that the alternative for dealing directly with the composers was available to CBS.

Rather than issuing an injunction prohibiting the practice as would normally occur in such a situation, the court of appeals remanded the case to the district court to fashion a remedy and indicated that the blanket license might be acceptable under certain circumstances.[37] This approach by the appellate court was unusual, to say the least, and was duly noted by the Supreme Court in reversing the decision.[38] The *raison d'etre* for the per se doctrine is to eliminate the necessity of a

[32] CBS v. ASCAP, 400 F. Supp. 737, 749 (E.D.N.Y. 1975).
[33] CBS v. ASCAP, 620 F.2d 930, 937 (2d Cir. 1980).
[34] CBS v. ASCAP, 400 F. Supp. 737, 768 (E.D.N.Y. 1975).
[35] 562 F.2d 130 (2d Cir. 1977).
[36] *Id.* at 136-37.
[37] *Id.* at 140. The court opined that a possible remedy might include a system where ASCAP would be "required to provide some form of per use licensing which would ensure competition among the individual members with respect to those networks which wish to engage in per use licensing." For a strong and perceptive criticism of the appellate court's decision *see*, Note, *CBS v. ASCAP, Who Calls the Tune? Performing Rights Societies and the Rule Against Price Fixing*, 31 RUTGERS L. REV. 721 (1978).
[38] 441 U.S. 1, 17 (1979).

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case-by-case analysis,[39] the very thing that the court of appeals was asking the lower court to do on remand.

When the case reached the Supreme Court, it noted the recognition by the court of appeals of the need for flexibility in fashioning a remedy to deal with the blanket license system. Speaking for the court, Justice White said that "the *per se* rule does not accommodate itself to such flexibility and . . . the observations of the court of appeals with respect to remedy tend to impeach the *per se* basis for the holding of liability."[40] He then noted that the per se rule should apply if the practice "appears to be one that would always or almost always tend to restrict competition and decrease output,"[41] rather than one that would increase economic efficiency.

The per se rule has been recognized by the courts for decades.[42] Agreements or practices which are plainly anticompetitive[43] and lacking in any redeeming virtue[44] have been declared illegal per se. The advantage of the per se doctrine is that it eliminates the exhaustive market analysis often required in a case where the act must be shown to be unreasonable in order to constitute a violation of the Sherman Act.[45] Under the per se doctrine, the agreements or practices that come within its purview are presumed conclusively to be illegal without the need for further examination.[46]

In concluding that the blanket license system was not violative of the Sherman Act based upon the per se doctrine, the Court noted that Congress intended copyright owners to benefit from their monopolies by controlling performances of their works.[47] The Court found that some type of overall license was necessary given the large number of users, licensors, and compositions.[48] Finally, it noted that the system had operated under a series of consent decrees in the past, thus indicating that it must have certain competitive values.[49] The majority held

[39] Northern Pac. R.R. v. United States, 356 U.S. 1, 5 (1958).

[40] Broadcast Music, Inc. v. CBS, 441 U.S. 1, 17 (1979).

[41] *Id.* at 19-20.

[42] United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

[43] Nat'l Soc'y Prof. Eng'rs v. United States, 435 U.S. 679, 692 (1978).

[44] Northern Pac. R.R. v. United States, 356 U.S. 1, 5 (1958).

[45] *Id.* The Court stated: "This principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken." *Id.*

[46] ASCAP v. CBS, 441 U.S. 1, 8 (1979).

[47] Broadcast Music, Inc. v. CBS, 441 U.S. 1, 19 (1979).

[48] *Id.* at 21.

[49] *Id.* at 14. The Court also noted that the Justice Department in an amicus curiae brief

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that the system should be examined under the rule of reason and remanded the case for that purpose. Justice Stevens, in his dissent, agreed that the system did not warrant application of the per se doctrine but also felt that there was sufficient evidence for the court to rule that the system of blanket licensing was an unreasonable restraint of trade.[50]

ANALYSIS: COURTS LEAVE ROOM FOR FURTHER LITIGATION

The courts seem to have trouble with the blanket license arrangement because of the uniqueness of the arrangement and of the market itself. The typical price fixing arrangement involves an agreement among sellers of the same or very similar products to manipulate the pricing mechanism. In the case of the ASCAP blanket license, however, the individual works (songs) are each markedly different and have different potential in the marketplace. The ASCAP blanket license agreement is designed to set fees for all the works of ASCAP members. The Supreme Court realized that the blanket license is a different product from the works of individual copyright owners. The court concluded therefore 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."[51] Thus the Court was not willing to extend the per se doctrine to encompass this type of arrangement. Indeed the court noted that Congress had approved such an approach in the Copyright Act of 1976 by adopting the blanket license as a means to license secondary transmissions by cable television[52] and for the use of copyrighted compositions in jukeboxes.[53]

Given the unusual application of the per se doctrine by the court of appeals, the decision of the Supreme Court was predictable. It was also consistent with the recent tendency of the Court to reject application of the per se doctrine in many situations and to use a rule of reason standard.[54]

submitted in the case of K-91, Inc. v. Gershwin Publ. Corp. 372 F.2d 1 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045 (1968), had taken the position that the system of blanket licensing was not illegal per se nor violative of the Sherman Act under a rule of reason standard.

[50] 441 U.S. at 25.

[51] *Id.* at 22.

[52] *Id.* at 15 (citing 17 U.S.C.S. § 111(d)(5)(A) (Law. Co-op. 1976)).

[53] *Id.* (citing 17 U.S.C.S. § 116(c)(4) (Law. Co-op. 1976)).

[54] *See* Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. CHI. L. REV. 1, 12-13 (1977). *See also*, Nat'l Soc'y Prof. Eng'rs v. United States, 435 U.S. 679 (1978); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

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As previously mentioned, the court of appeals on remand found that the blanket license system was reasonable. Recall that only one judge from the panel that originally heard the case participated in the decision, thus partially explaining an opinion that upheld the blanket license arrangement from the same court that had previously determined the arrangement to be illegal per se.[55] On remand the court found that alternatives to the blanket licensing system were feasbile.[56] and that CBS had never attempted to deal directly with licensors.

In focusing very narrowly on the issue of availability of alternative systems, the court found that there was not a restraint of trade[57] and never really examined the blanket license system itself in order to determine its reasonableness. A similar criticism may be leveled at the Supreme Court decision. It focused on the application of the per se doctrine. Despite the fact that the decision was 8-1 and the fact that it generally seems to favor the blanket system, the Court failed to address the issue on a broader basis.[58] This leaves open the question of the reasonableness of the system with regard to its application in other circumstances, giving rise to a new round of litigation with regard to *non-network* broadcasters in the case of *Buffalo Broadcasting Co. v. ASCAP*.[59]

BUFFALO BROADCASTING CO. V. ASCAP

Background

Five named plaintiffs, including Metromedia, Inc., and the Storer Broadcasting Company, brought this class action suit against ASCAP and BMI in federal district court challenging the system of blanket licensing of music performance rights to non-network or local televi-

[55] One might question how the court of appeals could find the practice to constitute a per se violation in its first decision and then find no objection to the practice on remand under a rule of reason standard. The difference in the decisions is easier to rationalize when one remembers that the nature of the industry is not a factor when the per se doctrine is applied but is part of the analysis when the rule of reason standard is used. *See supra* note 45 and accompanying text.

[56] 620 F.2d 930 (2d. Cir. 1980).

[57] *Id.* at 938.

[58] 441 U.S. at 16-17. Justice White expressed the opinion that application of the per se rule in this situation might be difficult to contain, perhaps resulting in the necessity of finding other situations illegal per se. Among the examples given was a situation where ASCAP would "negotiate and issue blanket licenses to individual radio or television stations. . . ." That, of course, is the situation met by the district court in *Buffalo Broadcasting, Inc. v. ASCAP*, discussed *infra* at notes 59-88 and accompanying text.

[59] 43 ANTITRUST & TRADE REG. REP. (BNA) 414 (S.D.N.Y. 1982). *See*, Note, *supra* note 4, at 511, for a prediction of additional litigation and a more detailed analysis of the various opinions in *CBS v. ASCAP*.

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sion stations. There are approximately 750 local television stations in the United States. Of these, 600 are network affiliated and the rest are independent.[60]

Classified by source, there are three types of programming for television stations: network-supplied, syndicated, and locally produced. This suit focused primarily on syndicated programming, which consists of theatrical motion pictures, pre-recorded television programs, and the like, which are offered by producers and distributors for sale or license to local stations. Such programs as made-for-television movies, cartoons, documentaries, news, sports, and religious programs are syndicated and typically make up 65-75 percent of the total non-network programming of the local television station.[61]

Local television stations fill their need for syndicated programs from programs offered by television producers and distributors who are the syndicators. The district court concluded that although there are many syndicators who offer thousands of programs, only a few are "hot" properties because of their recognized potential and are subject to intense competition among television stations in a given market. Therefore, a single local television station has little leverage when negotiating with the syndicator of a desirable program.[62] In addition, eight leading companies distribute 52 percent of the syndicated programs and 82 percent of the off-network syndicated programs,[63] thus putting the distributor in a powerful bargaining position concerning the right to broadcast off-network programs.

Against this background is the problem of obtaining rights to broadcast music that may be used in connection with these programs. There are essentially three types of music that may be used: feature music, theme music and background music.[64] The predominant portion of music contained in non-network programming of local television stations is found in syndicated programming whose acquisition is controlled by producers without any input by local stations. Most of this music is licensed by ASCAP and BMI. All of the named plaintiffs and almost all of the other commercial television stations have entered into blanket license agreements with ASCAP and BMI.[65] Fees for the license are computed as a percentage of the station's revenues less certain deductions.

As previously mentioned,[66] stations may purchase per program

[60] 43 ANTITRUST & TRADE REG. REP. (BNA) at 416.
[61] *Id.*
[62] *Id.* at 417.
[63] *Id.*
[64] *Id.*
[65] *Id.* at 418.
[66] *See supra* note 12 and accompanying text.

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licenses. Under this system they do not pay fees for music cleared "at the source."[67] Of 750 stations, only two hold BMI per program licenses. The Court found two reasons for this: (1) the base percentage under the program license is several times higher than the blanket license; and (2) reporting provisions of the per program license are burdensome, requiring stations to report music use in all non-network programming without regard to whether music used is BMI or ASCAP.[68]

According to the district court, syndicated program producers play a critical role in this scheme. They determine the musical needs of each program and thus are in a position to negotiate the price of the music prior to its selection. Music is obtained frequently by hiring a composer to write original music. If existing music is used in the program, the producer will obtain a license from the publisher or its agent. The ASCAP or BMI member hired to compose the music negotiates with the producer over the license of all rights to the music *except the television performing rights*.

The performing rights ultimately pass to the composer's publisher and either ASCAP or BMI, not to the producer. The court noted that the effect of this arrangement was to "split" television performing rights from all other rights in performance of the music.[69] Also noteworthy was the fact that the producer does usually designate the publishing house that is to get the publisher's share of royalties distributed by ASCAP. The publisher usually is an affiliated member of the performing rights society and usually is a company affiliated with (or a subsidiary of) the producer. The result is that there is very little motivation on the part of producers to deviate from the system. Thus, as the court noted, while all other rights than television performance rights are negotiated between the composer and producer and then are passed by the producer to the user of the music, the television stations must obtain the rights separately through their licenses with ASCAP and BMI. When producers sell programs to television stations, performance rights to the music do not come with the package. It is this "splitting" of rights which the court perceived as the heart of the plaintiff's case.[70]

Analysis

Faced with the decision of the Supreme Court in *CBS v. ASCAP*, the district court did not apply the per se rule.[71] There would seem to be no

[67] 43 ANTITRUST & TRADE REG. REP. (BNA) at 418.
[68] *Id.*
[69] *Id.*
[70] *Id.* at 424.
[71] *Id.* at 420.

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justification for the per se approach in the instant case given the clear position taken by the Supreme Court in the *CBS* case. Even the dissent by Justice Stevens was predicated upon an application of the rule of reason rather than the per se rule.[72]

The district court determined that a rule of reason analysis under *CBS v. ASCAP* required the resolution of two issues. The first was whether a realistically available alternative to blanket licensing of music performing rights to local television stations existed. If the answer was no, then the next hurdle for the plaintiffs was to show that on balance the blanket licensing system's anticompetitive effects outweighed its pro-competitive effects.[73]

Alternatives to Blanket Licenses. In the *CBS* case the first issue was resolved in favor of ASCAP so the court never had to reach the second issue.[74] In the *Buffalo* case the defendants contended that a number of alternatives to the blanket license were available to local stations. Among these were a per program license, direct licensing, and source licensing.[75]

As the court pointed out, the per program license was available under the terms of the consent decrees entered into between the government and ASCAP and BMI in 1941.[76] While this alleviates the problem of a buyer paying for material for programs where it is not required, it does not eliminate the source of grievance in this case, that the scheme eliminates competition among composers. The per program license has basically the same characteristics as the blanket license, but it is limited to a program. The evidence also indicated that fees charged on a per program license were much higher than on the blanket license. This, together with the onerous reporting requirements of the per program license, led the court to conclude that the per programs license was not a viable alternative to the blanket license.[77] Indeed, 99.7 percent of the stations did not use the per program license.

[72] 441 U.S. 1, 20 (1979) (Stevens, J., dissenting).

[73] 43 ANTITRUST & TRADE REG. REP. (BNA) at 420.

[74] 620 F.2d at 938.

[75] 43 ANTITRUST & TRADE REG. REP. (BNA) at 422. *Per program license* refers to the practice of negotiating a license for each individual program with ASCAP or BMI. The license would then apply to all compositions in their repertory but only for the individual program. *Direct licensing* refers to the practice of obtaining a license from each individual owner of a copyright for a particular work. *Source licensing* refers to the practice by which the producers themselves obtain the performing rights to the music contained in their programs and then pass along these rights, together with the program packages, to television stations.

[76] United States v. ASCAP, 1940-43 Trade Cas. (CCH) ¶ 56,104 (S.D.N.Y. 1941); United States v. BMI, 1940-43 Trade Cas. (CCH) ¶ 56,096 (E.D. Wis. 1941).

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The court placed great emphasis on this point. However, it would seem that since price competition between composers would not be restored by use of a per program license, this alternative still would not avoid the evils of the practice sought to be struck down by the plaintiffs. The emphasis placed by the court on the fact that the per program fees are higher does not seem to take into account the fact that according to the terms of the consent decrees under which BMI and ASCAP operate, fees must be such that there is a genuine economic choice between the per program and the blanket license,[78] and if the parties cannot agree on a fee, then one will be set by the district court.[79] In fact there has never been an appeal of a fee to the district court under the decree.[80] Thus the court is on sounder ground when it argues that the system does not treat the problem of lack of competition between composers.

Another alternative to the blanket license is for local stations to obtain performance licenses directly from composers. This alternative is unrealistic, however, because of the transaction costs involved in dealing with individual composers.[81] The question faced by the court was whether market machinery would evolve in order to reduce these costs if local stations pursued direct licensing. Recall that in the *CBS* case the court of appeals found that CBS had the market power to make direct licensing realistic.[82] Since it was this issue that was one of the primary reasons for the court's determination that no antitrust violation was present in the *CBS* case, it was critical for the plaintiffs in *Buffalo Broadcasting v. ASCAP* to differentiate themselves from *CBS* if they were to prevail. In *Buffalo Broadcasting*, the court was dealing with many individual stations, rather than one of the major networks. It had little difficulty finding that local stations did not have the market power of the networks.[83] With this finding the conclusion that direct licensing was not a realistic alternative became inescapable. There would be no motivation for publishers or composers to respond to any change in the system at the request of a local station, whereas this might not be the case in negotiations with a major national network.[84]

[77] 43 ANTITRUST & TRADE REG. REP. (BNA) at 421.

[78] CBS v. ASCAP, 441 U.S. 1, 11 (1979).

[79] *Id.*

[80] Note, *supra* note 26, at 734 n.32. This is at least partially accounted for by the fact that the court has no expertise in this area. The court has acted as a mediator in some instances.

[81] 43 ANTITRUST & TRADE REG. REP. (BNA) at 422.

[82] CBS v. ASCAP, 620 F.2d 930, 938 (2d Cir. 1980).

[83] 43 ANTITRUST & TRADE REG. REP. (BNA) at 422.

[84] *Id.* The court noted that this "underscores the crucial factual differences between

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The court assumed that if blanket licensing was prohibited, an alternative system of licensing would arise because individual transactions with individual composers are not realistic.[85] The primary means envisioned by the court for accomplishing this end would be the creation of an agency to license television performing rights on behalf of composers and publishers. One might speculate whether such a system would be of any significant benefit to local stations in terms of reduced costs. Remember that part of the plaintiffs' argument was based upon their conceded lack of individual bargaining power. However, that such a system might not eventually prove to be viable in the long run is no defense against an attack on an existing system that prevents alternative market structures from arising. Therefore, assuming that the court is correct in its conclusion regarding lack of market power of individual stations, it is difficult to argue with its holding that direct licensing is not a feasible alternative under the current blanket licensing system.

Regarding the alternative of source licensing, the court came to a conclusion similar to that on direct licensing.[86] It considered that local stations have little or no market power, whereas those on the other side of the market have no incentive to change the system.

The court seems to be on firm ground with regard to its conclusions in dealing with the first half of the problem—feasibility of alternatives. There is a significant number of stations, and there is no organization that would represent all of them in dealing with composers and publishers. There was evidence accepted by the court which indicated that stations were the supplicants in trying to "land" the more important programs and that in some situations the market might be bypassed entirely if an arrangement suitable to the sellers could not be made.[87] In other words, the local stations have very little real bargaining power.

Competitive Advantages and Disadvantages of the Blanket License. Once the court determined that realistic alternatives to blanket licensing were not available, it then had to determine whether the blanket licensing system was anticompetitive to such an extent that its advantages outweighed its disadvantages. The primary "evil" of the existing

these two lawsuits [*Buffalo* and *CBS*]. In the instant case [*Buffalo*], the trial testimony made clear that local television stations acting individually and severally would possess no such awesome power over copyright owners." *Id.*

[85] *Id.* at 423.

[86] *Id.*

[87] *Id.* at 417. The threat of bypassing a market is particularly significant in smaller markets where distributors receive little revenue. The court opined that there is little likelihood of a leading market being bypassed. *Id.*

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system as perceived by the court was that the licensing of music was accomplished at the producer level where there would be competition, but as to television performing rights, they alone were "split" from other rights and shifted to the local station level where there would be no competition because of the blanket license. The court concluded that the virtues of the blanket license, such as saving transaction costs, did not offset the anticompetitive consequences of the absence of price competition.[88]

There would seem to be no good reason why television performing rights cannot be the subject of negotiation at the producer level, i.e., why source licensing cannot work. Such licensing would promote some competition among holders of the copyright "bundle" of rights. Licensing fees would include costs of music performance rights, as well as other rights.

At present there is no real negotiation over the price paid for music to be used in local programming. Producers do not negotiate with copyright holders over performing rights, and the blanket license system is applicable to all music used by local stations. One should remember that a large amount of the music used by local stations is background music and theme music. In a sense it is largely fungible, at least to the extent that if costs of obtaining rights to the music from one composer are too great, then the person seeking it can go to another composer to obtain a lower price. The music is not "unique" in the sense that it is a top hit that is much in demand. With the elimination of blanket licensing, it is possible that "source licensing" would emerge. Producers would negotiate for the cheapest price for all rights, including television performing rights to music, which they then would license in a total "package" to local stations. Since producers already negotiate for rights to music, it would seem that there would be only a small disruption in the market place if television performance rights were also negotiated at the same time. Resulting competition might result in a reduced price, which is a primary goal of the antitrust laws.

The distinction between local and network programming would seem to justify the *Buffalo* court's decision in holding against ASCAP. The decision may have application in another developing communications area, cable television. This part of the communications industry is growing rapidly. The question is open whether a blanket license arrangement would be subject to successful antitrust challenge. An

[88] The cost saving factors examined by the court were: savings in transaction costs; elimination of monitoring costs; reduction of up-front costs for producers by relieving them of the need to purchase television performing rights at the same time that they obtain all other music rights; and maximum user flexibility by licensing the entire repertory of BMI or ASCAP. *Id.* at 425.

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analysis of antitrust problems in cable television is beyond the scope of this paper. However, under the rule of reason analysis of *CBS*, solutions to these problems will only be found after lengthy litigation and analysis of the cable television market. At this time the problems are unresolved. To pose them, however, is to indicate that the blanket licensing system used by ASCAP, BMI, and others for decades is subject to continued challenge. In the event anticipated challenges to the system are successful, methods by which royalties are determined for musical performance rights may change significantly.

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