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Copyright and Anti-Trust Law : Public Performance Rights Licensing of Musical Works into Audiovisual Media

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Copyright and Anti-Trust Law: Public Performance Rights Licensing of Musical Works into Audiovisual Media

Submitted by
Dr. jur. Christian Seyfert

A Thesis presented to

The Faculty of the School of Law

Golden Gate University

in partial fulfillment
of the requirements for the degree

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Copyright 2005

*Dedicated
to the
German-American Friendship*

*and to
all lawyers,
filmmakers, composers, musicians, and other artists,
that want to fulfill their dreams
and contribute to the fascinating world of audiovisual arts*

*with
special thanks
to my*

*Teacher
Prof. Christine C. Pagano*

Table of Contents

Table of Contents.....	III
Table of Cases.....	V
I. Introduction.....	1
II. Historical Development and Necessity of Performing Rights Societies (PRSs).....	5
A. ASCAP.....	5
B. BMI.....	7
C. SESAC.....	8
III. Types of Public Performance Rights Licenses.....	10
A. Types of Public Performance Rights Licenses granted by the PRSs.....	10
1. Blanket license.....	10
2. Per-program license.....	13
3. Through-to-the-viewer license.....	14
4. Per-use license.....	15
5. Summary.....	16
B. Source and Direct Licensing.....	17
IV. Historical Attempts to Enforce Anti-Trust Law against the Blanket Licensing System.....	20
A. Governmental Anti-Trust Court Actions.....	20
1. History of the Consent Decrees.....	20
2. Main Content of the current Consent Decrees.....	23
B. Private Anti-Trust Court Actions.....	25
1. Motion Picture Theaters: Alden-Rochelle, Inc. v. ASCAP, 80 F. Supp. 888 (S.D.N.Y. 1948).....	25
2. Television Networks.....	32
a. District Court: CBS v. ASCAP, 400 F. Supp. 737 (S.D.N.Y. 1975).....	32
b. Court of Appeals: CBS v. ASCAP, 562 F.2d 130 (2 nd Cir. 1977).....	36
c. U.S. Supreme Court: BMI v. CBS, 441 U.S. 1 (1979).....	38
3. Local Television.....	42
a. District Court: Buffalo Broadcasting v. ASCAP, 546 F. Supp. 274 (S.D.N.Y. 1982).....	43
b. Court of Appeals: Buffalo Broadcasting v. ASCAP, 744 F.2d 917 (2 nd Cir. 1984).....	48
4. Cable Television: National Cable Television Association, Inc. v. BMI, 772 F. Supp. 614 (D.C. 1991).....	49

V. Summary and Conclusion.....	53
Glossary.....	57
Bibliography.....	61

Table of Cases

Alden-Rochelle, Inc., et al. v. ASCAP, 80 F. Supp. 888 (S.D.N.Y. 1948).

American Ad Management v. GTE Corp., 92 F.3d 781 (9th Cir. 1996).

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United States v. BMI, 1996-1 Trade Cas. (CCH) P71,378 (S.D.N.Y. 1994).
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I. Introduction

There is a natural conflict between copyright law and anti-trust law, in that the former tries to provide and promote the exclusive right to a limited monopoly the latter tries to prevent. According to the Copyright Clause (Art I, § 8(8)) of the U.S. Constitution "The Congress shall have Power ... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."¹ This exclusive right grants to authors a limited monopoly over their works of authorship for a limited amount of time that may be exploited according to the authors' discretion pursuant of the provisions of the U.S. Copyright Act (17 U.S.C.). It works to encourage creativity, and also, to induce competition among authors for "the most original" expression in arts and science.

Anti-trust law, on the other hand, reflects an express policy against monopolies. Section 1 of the Sherman Antitrust Act (hereinafter, the "Sherman Act") provides that "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 hereby declared to be illegal."² And Section 2 of the Sherman Act states even more clearly that "Every person who shall monopolize, or attempt to monopolize, or combine or conspire

¹ For the Copyright Clause of the U.S. Constitution in general, see Joseph C. Merschman, *Anchoring Copyright Laws in the Copyright Clause: Halting the Commerce Clause End Run around Limits on Congress's Copyright Power*, 34 CONN. L. REV. 661 (2002); Kevin D. Galbraith, *Forever on the Installment Plan? An Examination of the Constitutional History of the Copyright Clause and Whether the Copyright Term Extension Act of 1998 Squares with the Founders' Intent*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1119 (2002); Andrew M. Hetherington, *Constitutional Purpose and Inter-Clause Conflict: The Constraints Imposed on Congress by the Copyright Clause*, 9 MICH. TELECOMM. TECH. L. REV. 457 (2003); also Noel L. Hillman, *Intractable Consent: A Legislative Solution to the Problem of the Aging Consent Decrees in United States v. ASCAP and United States v. BMI*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 733, 735 (1998).

² For Section 1 of the Sherman Act, see, e.g., *United States v. Wise*, 370 U.S. 405 (1962); *Eastern Coal Corp. v. Disabled Miners Association*, 449 F.2d 616 (6th Cir. 1971); *Boddicker v. Arizona State Dental Association*, 549 F.2d 626 (9th Cir. 1977).

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 Anti-trust law’s main purpose is to protect the competitive process through economic efficiency and competition in a free market system in order to encourage product development and lower product prices.⁴ The framers of the Constitution abhorred monopolies as well, but felt that granting a limited monopoly to authors and inventors for their respective writings and discoveries was a fair trade for disclosure and publication.

The conflict between copyright law and anti-trust law intensifies in the area of public performance rights and in particular, the licensing of musical works. Copyright owners of musical works generally pool (“monopolize”) their public performance rights over their creative expressions in performing rights societies (PRSs) in order to strengthen the enforcement of these rights. These societies are designed to act as agents on their members’ behalf. They enforce their members’ exclusive public performance rights, collect public performance royalties from music users like TV or radio stations, monitor and control these entities’ performance activities, and distribute the collected performance monies to their members according to a pre-determined scheme. These activities, which are consistent with the U.S. Copyright Act would seem to violate Sections 1 and 2 of the Sherman Act in that they form a “contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce” (Section 1)

³ For Section 2 of the Sherman Act, see in particular Gordon B. Spivack, *Antitrust Developments: Monopolization under Sherman Act, Section 2*, 50 ANTITRUST L.J. 285 (1981); Andrew I. Gavil, *Antitrust at the Millenium (Part I): Copperweld 2000: The Vanishing Gap between Sections 1 and 2 of the Sherman Act*, 68 ANTITRUST L.J. 87 (2000).

⁴ See in particular PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION - PART ONE - CHAPTER 1 - THE OBJECTIVES OF ANTITRUST LAW (2001).

and/or “monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce” (Section 2).

The two legal areas must be harmonized in order to avoid the situation that would arise if the U.S. Constitution tried to promote and secure something unlawful. Attempts at harmonizing the two legal areas must start with the U.S. Supreme Court’s restriction of the broad language of the Sherman Act by integrating the rule of reason⁵ into the legal discussion: the Sherman Act shall be applied only to such business conduct that constitutes an “undue” or “unreasonable” restraint of trade.⁶ Reasonable market behavior that on balance⁷ does not hamper economic efficiency and competition in the free market must on the other hand be tolerated, even encouraged. Under this premise, anti-trust law would not contradict the Copyright Clause; instead, it would only set limits on unreasonable market behavior by copyright owners.

Some categories of business practices, however, are deemed by the courts to be illegal *per se*. As such, a balancing test containing an elaborate comparison of all circumstances and factors relating to the individual case is unnecessary because the anti-competitive business practices in the particular case “lack ... any redeeming virtue.”⁸

⁵ See *Standard Oil Co. v. United States*, 221 U.S. 1, 59-62 (1911); also *California Dental Association v. Federal Trade Commission*, 526 U.S. 756 (1999); *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978); *In re Detroit Auto Dealers Association*, 955 F.2d 457, 469-72 (6th Cir. 1992); also Andrew I. Gavil, *The Future Course of the Rule of Reason*, 68 ANTITRUST L.J. 331 (2000).

⁶ *Id.*

⁷ *In re Detroit Auto Dealers Association*, 955 F.2d 457, 469 (6th Cir. 1992) mentions the following factors to be included in a balancing test: 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. See also *American Ad Management v. GTE Corp.*, 92 F.3d 781, 791 (9th Cir. 1996); also Andrew I. Gavil, *supra* note 5.

⁸ See *Northern Pacific Railway Co. v. United States*, 356 U.S. 1 (1958): “There are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming 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.” Cited from *id.* at 5. See also HERBERT HOVENKAMP, ANTITRUST 90 (3rd ed. 1999).

The *per se* rule⁹ developed out of a judicial need for time-saving mechanisms in “plainly anti-competitive”¹⁰ cases. In cases in which the court has repeatedly dealt with certain business practices that it views as plainly or manifestly anti-competitive, the court need not duplicate previous in-depth economic investigations of the business practice’s economic effects and the history of the relevant market to determine illegality.¹¹ Such business practices include, for example, price fixing,¹² resale price maintenance,¹³ and tying agreements.¹⁴

This article will explore the question how anti-trust law affects the PRSs’ practice of licensing public performance rights of musical works into audiovisual media. It will, first, set forth the historical development and necessity of PRSs (under II); secondly, define and explain the different types and forms of licensing public performance rights (under III); and, thirdly, analyze in detail the historical attempts by the government and by private parties to enforce anti-trust law, in particular Sections 1 and 2 of the Sherman Act, against the PRSs’ system of blanket licensing musical works into audiovisual media (under IV).

⁹ See Mary Katherine Kennedy, *Blanket Licensing of Music Performing Rights: Possible Solutions to the Copyright-Antitrust Conflict*, 37 VAND. L. REV. 183, 187 (1984); also HOVENKAMP, *supra* note 8, at 90.

¹⁰ Cited from *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978). See also *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977): “Per se rules of illegality are appropriate...when they relate to conduct that is manifestly anticompetitive.” *Id.* at 49-50.

¹¹ See Kennedy, *supra* note 9, at 187.

¹² See, e.g., *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939); also Jonathan B. Baker, *Identifying Horizontal Price Fixing in the Electronic Marketplace*, 65 ANTITRUST L.J. 41 (1996); Phillip Areeda, *Antitrust in Transition: Crossing the Threshold of Change: The Changing Contours of the Per Se Rule*, 54 ANTITRUST L.J. 27 (1985); HOVENKAMP, *supra* note 8, at 91.

¹³ See, e.g., *United States v. Parke Davis & Co.*, 362 U.S. 29 (1960).

¹⁴ See, e.g., *International Salt Co., Inc. v. United States*, 332 U.S. 392 (1947). Tying agreements refer to cases, in which the seller of product A conditions the sale of product A to a buyer on the buyer’s purchase of product B, i.e., the buyer must purchase the perhaps unwanted product B in order to acquire the desired product A. See in general HOVENKAMP, *supra* note 8, at 148-51.

II. Historical Development and Necessity of Performing Rights

Societies (PRSs)

A. ASCAP

The exclusive right to publicly perform a copyrighted musical work was granted to a copyright owner by the Copyright Act on January 6, 1897.¹⁵ The right covered at the beginning only public “live” performances, mainly in clubs, dance halls, cabarets, gatherings, or theaters.¹⁶ In 1914, it became evident that an individual copyright owner could not reasonably negotiate public performance licenses with all possible users of music on an individual basis throughout the country.¹⁷ Moreover, all those who wished to publicly perform musical compositions, planned or spontaneously, without infringing

¹⁵ Act of Jan. 6, 1897, chapter 4, 29 Stat. 481 (1897). It said (excerpt): “Any person publicly performing or representing any dramatic or musical composition for which a copyright has been obtained, without the consent of the proprietor of said dramatic or musical composition, or his heirs or assigns, shall be liable for damages therefore, such damages in all cases to be assessed at such sum, as to the court shall appear to be just. If the unlawful performance and representation be willful and for profit, such person or persons shall be guilty of a misdemeanor.” Since 1897, the Copyright Act has been amended several times. Today, the public performance right is contained in Section 106 of the Copyright Act. For a current definition of the term “public performance” as provided in Section 101 of the Copyright Act, see the glossary. A copyright owner has several other exclusive rights pursuant to Section 106 of the Copyright Act, such as the right to reproduce the copyrighted work in copies or phonorecords, to prepare derivative works based upon the copyrighted work, and to distribute copies or phonorecords of the copyrighted work to the public. The right to publicly perform a copyrighted work is the focus of this paper.

¹⁶ See, e.g., M. WILLIAM KRASILOVSKY & SYDNEY SHEMEL, *THIS BUSINESS OF MUSIC: THE DEFINITIVE GUIDE TO THE MUSIC INDUSTRY* 133 (9th ed. 2003); also *Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888, 891-92 (S.D.N.Y. 1948).

¹⁷ For the necessity of PRSs in general, see KRASILOVSKY & SHEMEL, *supra* note 16: “There would be endless searches and bargaining for performing rights involving the owners of both established and obscure songs.” Cited from *id.* at 134-35. See also *BMI v. CBS*, 441 U.S. 1, 4-5, 10, 14-15, 20-21 (1979) (“thousands of individual negotiations, a virtual impossibility;” cited from *id.* at 20); *Buffalo Broadcasting Co., Inc. v. ASCAP*, 546 F. Supp. 274 (S.D.N.Y. 1982) (“impossible for individual composers and publishers to negotiate licenses with each user and to detect unauthorized uses;” cited from *id.* at 277); *National Cable Television Association, Inc. v. BMI*, 772 F. Supp. 614, 617 (D.C. 1991). See also Hillman, *supra* note 1, at 740-41; Joseph P. Escalante, *ASCAP, BMI, and the Sherman Act: Are Today’s Top-Stars in Bed with the Blanket License?*, 22 W. ST. U.L. REV. 75, 79 (1994); Nora Miles, *Pop Goes Commercial: The Evolution of the Relationship between Popular Music and Television Commercials*, 5 VAND. J. ENT. L. & PRAC. 121, 124 (2003); Rajan Desai, *Music Licensing, Performance Rights Societies, and Moral Rights for Music: A Need in the Current U.S. Music Licensing Scheme and a Way to Provide Moral Rights*, 10 U. BALT. INTELL. PROP. L.J. 1, 7 (2001).

the various copyright owners' copyrights could not, as a practical matter, obtain licenses in advance for all the musical works from each and every copyright owner.¹⁸ To fill this void, Victor Herbert¹⁹ and other famous music composers and music publishers formed the American Society of Composers, Authors, and Publishers (ASCAP) in order to pool their musical compositions for bundled sales to music users. This meant that ASCAP offered a blanket license to music users in exchange for a one time, flat fee that allowed licensees to publicly perform any and all musical works contained in the ASCAP repertory at any time during the license term upon their choosing. At that time, ASCAP membership agreements required that copyright owners grant exclusive licenses of their public performance rights to ASCAP, which meant that music users had to acquire a blanket license from ASCAP if they wanted to publicly perform musical works contained in the ASCAP catalogue. This was the genesis of ASCAP's anti-competitive behavior. ASCAP's exclusive licensing requirement excluded any form of competition with musical works of its own members. Governmental anti-trust court actions stemming from the 1930s later led to consent decrees that required ASCAP to change its membership agreements in this respect. From that moment on, ASCAP was allowed to obtain public performance licenses from its members only on a non-exclusive basis. We will discuss these developments in further detail in chapter IV.A.

Today, ASCAP represents over 200,000 U.S. music composers, songwriters, lyricists, and music publishers of every kind of music.²⁰ Through agreements with affiliated foreign PRSs, ASCAP also represents hundreds of thousands of music

¹⁸ *Id.*

¹⁹ See for further details <http://www.pdmusic.org/herbert.html> (last visited May 29, 2005).

²⁰ See <http://www.ascap.com/about/history/> (last visited May 29, 2005); also KRASILOVSKY & SHEMEL, *supra* note 16, at 136.

composers and publishers worldwide.²¹ As of this writing, its catalogue consists of more than 8 million musical works.

B. BMI

In ASCAP's early days, music composers had to qualify for membership in ASCAP by having at least five hit songs published. On a case by case basis, in its discretion, ASCAP itself decided in which cases this requirement was fulfilled. This requirement excluded most new artists from ASCAP's services and favored only a relatively small body of already established writers.²² Likewise, the ASCAP membership policies favored only music publishers who had already established themselves on the market.²³ Since ASCAP was the only PRS at the time, its member publishers and composers had significant influence over who could profit by writing music for public performances. At the same time, ASCAP exercised, due to its exclusive licensing power over its members' public performance rights, tremendous leverage in setting conditions for licensing all forms of music users.²⁴

In 1939, a number of radio broadcasters felt frustrated by the ASCAP conditions and decided that ASCAP's latest demands for a 100% increase in license fees over the previous year²⁵ and its continuing limitations on membership enrollment could not longer be tolerated.²⁶ As a result, the radio broadcasters formed their own PRS, Broadcast

²¹ See <http://www.ascap.com/about/history/> (last visited May 29, 2005).

²² See Television Music License Committee, *The History of Television Music Performance Rights* (last visited May 29, 2005) <<http://www.televisionmusic.com/historyprint.html>>; BMI, *A Creative Alternative* (last visited May 29, 2005) <<http://www.bmi.com/library/brochures/historybook/creative.asp>>.

²³ *Id.*

²⁴ *Id.*

²⁵ See BMI, *supra* note 22.

²⁶ See Jay M. Fujitani, *Controlling the Market Power of Performing Rights Societies: an Administrative Substitute for Antitrust Regulation*, 72 CAL. L. REV. 103, 105 (1984); Television Music License

Music Inc. (BMI), which offered music composers and music publishers open enrollment independent of their success and status.²⁷ BMI's formation had two purposes: first, to provide radio broadcasters and other music users with an alternative source from which to obtain a license for public performance rights; and second, to provide an opportunity for those songwriters and music publishers who were either unable to gain entry into ASCAP or unhappy with ASCAP terms, to share in performing rights income for their publicly performed musical works.²⁸ Over the years, BMI has built up its own alternative catalogue of musical works, today representing more than 300,000 songwriters, composers and music publishers in all genres of music.²⁹ Today, its repertoire consists of more than 6.5 million compositions. Like ASCAP, it is affiliated with all major foreign PRSs, representing hundreds of thousands of their members on the U.S. market.³⁰

C. SESAC

SESAC, another PRS, was formed in 1930 under the name Society of European Stage, Authors and Composers. Its repertory was at the beginning limited to European music,³¹ but today because of its openness to all kinds and genres of national and international music it prefers to call itself only SESAC.³² Currently, SESAC represents

Committee, *supra* note 22; also Gerald F. Phillips, *Five Cases that Shook Hollywood*, 25 LOS ANGELES LAWYER 35, 40 (2002); Kennedy, *supra* note 9, at 184.

²⁷ See Television Music License Committee, *supra* note 22.

²⁸ See the references in note 25; also KRASILOVSKY & SHEMEL, *supra* note 16, at 137.

²⁹ See KRASILOVSKY & SHEMEL, *supra* note 16, at 137; BMI, *The BMI Backgrounder* (last visited May 29, 2005) <<http://www.bmi.com/about/backgrounder.asp>>.

³⁰ See KRASILOVSKY & SHEMEL, *supra* note 16, at 149-51; also Buffalo Broadcasting Co., Inc. v. ASCAP, 546 F. Supp. 274, 277 (S.D.N.Y. 1982); National Cable Television Association, Inc. v. BMI, 772 F. Supp. 614, 617 n.3 (D.C. 1991).

³¹ See <http://www.sesac.com/aboutsesac/about.html> (last visited May 29, 2005); also Phillips, *supra* note 26, at 40; SCHULENBERG, *supra* note 34, at 8, 369.

³² Their original full name is nowhere mentioned on SESAC's official Web Site (www.sesac.com). See also DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 219 (2003).

about 8,000 songwriters and music publishers, about 2% of all public performance rights on the market.³³

Today, ASCAP and BMI are the two leading PRSs in the United States. Both represent their members on a break-even basis, distributing all collected performance monies to their members after deducting only administrative costs.³⁴ SESAC, instead, represents its members on a for-profit basis.³⁵ SESAC employs a selective enrollment policy by which it seeks to affiliate only financially promising new songwriters and music publishers.³⁶ In exchange, SESAC offers a more personal relationship between its creative staff and its members so as to better develop their members' talents and abilities.³⁷ SESAC substantially increased its status when Bob Dylan³⁸ and Neil Diamond³⁹ switched their writer and publisher catalogues in 1994 (Dylan) and 1995 (Diamond) from ASCAP to SESAC.⁴⁰

³³ See KRASILOVSKY & SHEMEL, *supra* note 16, at 133, 137; PASSMAN, *supra* note 39, at 219.

³⁴ See only KRASILOVSKY & SHEMEL, *supra* note 16, at 136-37.

³⁵ See KRASILOVSKY & SHEMEL, *supra* note 16, at 137-38.

³⁶ See <http://www.sesac.com/aboutsesac/about.html> (last visited May 29, 2005); also KRASILOVSKY & SHEMEL, *supra* note 16, at 137-38.

³⁷ See <http://www.sesac.com/aboutsesac/about.html> (last visited May 29, 2005). SESAC also employs a different license fee and distribution system. See also RICHARD SCHULENBERG, LEGAL ASPECTS OF THE MUSIC INDUSTRY: AN INSIDER'S VIEW OF THE LEGAL AND PRACTICAL ASPECTS OF THE MUSIC BUSINESS 369 (1999).

³⁸ URL: www.bobdylan.com.

³⁹ URL: www.neildiamond.com.

⁴⁰ See KRASILOVSKY & SHEMEL, *supra* note 16, at 138.

III. Types of Public Performance Rights Licenses

A. Types of Public Performance Rights Licenses granted by the PRSs

1. Blanket license

A blanket license typically grants the licensee, for example a TV station or the operator of an Internet website, the non-exclusive right to publicly perform any or all of the nondramatic musical works contained in the entire repertory of a PRS, in all or parts of its programs, and as often as the licensee wants.⁴¹ In other words, a blanket license gives the licensee permission to use the entire catalogue of musical works that have been licensed to the PRS.⁴² The repertory⁴³ of ASCAP consists, for example, of all copyrighted musical works written and published by ASCAP members or by the members of ASCAP affiliated foreign PRSs.

The PRSs offer the blanket license to reduce transaction costs, prevent unwanted and unforeseen copyright infringements by their licensees, and provide broadcasters with

⁴¹ See, e.g., the "Grant of License" clause in the ASCAP EXPERIMENTAL LICENSE AGREEMENT FOR INTERACTIVE SITES & SERVICES – RELEASE 2.0 (last visited May 29, 2005) <<http://www.ascap.com/weblicense/release2.0.pdf>>, or the ASCAP EXPERIMENTAL LICENSE AGREEMENT FOR INTERNET SITES & SERVICES – RELEASE 5.0 (last visited May 29, 2005) <<http://www.ascap.com/weblicense/release5.0.pdf>>. See also the "GRANT OF RIGHTS" clause in the BMI Local Television Station Music Performance Blanket License Agreement (last visited May 29, 2005) <http://www.bmi.com/licensing/forms/local_tv_blanket.pdf>. See also KRASILOVSKY & SHEMEL, *supra* note 16, at 136-38; Connie C. Davis, *Copyright and Antitrust: The Effects of the Digital Performance Rights in Sound Recordings Act of 1995 in Foreign Markets*, 52 FED. COMM. L.J. 411, 417 (2000); Escalante, *supra* note 17, at 79-80; Miles, *supra* note 17, at 124-25; Kennedy, *supra* note 9, at 184-85; Hillman, *supra* note 1, at 741-42; also CBS v. ASCAP, 337 F. Supp. 394, 396 (S.D.N.Y. 1972); BMI v. CBS, 441 U.S. 1, 5-6 (1979); Buffalo Broadcasting Co., Inc. v. ASCAP, 546 F. Supp. 274, 276 (S.D.N.Y. 1982); National Cable Television Association, Inc. v. BMI, 772 F. Supp. 614, 617 (D.C. 1991). A comprehensive analysis of the necessity and advantages of blanket licensing from a macro-economic perspective is set forth by Fujitani, *supra* note 26, at 107-13.

⁴² See PASSMAN, *supra* note 39, at 220.

⁴³ See, e.g., the definition of this term in Section 3.(d) of the ASCAP EXPERIMENTAL LICENSE AGREEMENT FOR INTERNET SITES & SERVICES – RELEASE 5.0, *supra* note 41, or in Section 3.(d) of the ASCAP EXPERIMENTAL LICENSE AGREEMENT FOR INTERACTIVE SITES & SERVICES – RELEASE 2.0, *supra* note 41.

a large number of musical options for all or parts of their programs.⁴⁴ ASCAP grants its blanket license until December 31 of the year in which the license was executed, and continues after that on a year-to-year basis unless the blanket license agreement is terminated at least thirty days prior to the end of a calendar year,⁴⁵ by one of the parties.⁴⁶ According to the wholesale character of the blanket license, the PRSs do not base their license fees on the extent of music/repertory use by the licensee during the term of its blanket license agreement, but on the licensee's gross receipts⁴⁷ or other market factors,⁴⁸ minus certain adjustments, such as agency commissions and wire charges.⁴⁹

Blanket license agreements for local broadcast TV stations have become extensively standardized over the years. This standardization is the result of years of negotiations between the Television Music Licensing Committee (TMLC) on one side, and ASCAP, BMI and SESAC on the other side. The TMLC represents local TV stations in music licensing matters and negotiates licenses on behalf of the local TV industry with the PRSs. In addition, the National Cable Television Association (NCTA)⁵⁰ has negotiated separately with ASCAP, BMI, and SESAC to obtain standard blanket license

⁴⁴ For the necessity and advantages of blanket licensing, see in particular Fujitani, *supra* note 26, at 107-13 (using a macro-economic perspective).

⁴⁵ See the "Term of License" clause in Section 5 of the ASCAP EXPERIMENTAL LICENSE AGREEMENT FOR INTERNET SITES & SERVICES – RELEASE 5.0, *supra* note 41.

⁴⁶ *Id.*; also Section 5 of the ASCAP EXPERIMENTAL LICENSE AGREEMENT FOR INTERACTIVE SITES & SERVICES – RELEASE 2.0, *supra* note 41.

⁴⁷ This is the current practice of ASCAP and BMI. See under <http://www.ascap.com/licensing/tvfaq.html>; <http://www.bmi.com/licensing/broadcaster/tv/tvfaq.asp> (both last visited May 29, 2005). See also KRASILOVSKY & SHEMEL, *supra* note 16, at 136-37; CBS v. ASCAP, 337 F. Supp. 394, 396 (S.D.N.Y. 1972); BMI v. CBS, 441 U.S. 1, 5 (1979); Buffalo Broadcasting Co., Inc. v. ASCAP, 546 F. Supp. 274, 282 (S.D.N.Y. 1982); National Cable Television Association, Inc. v. BMI, 772 F. Supp. 614, 617 (D.C. 1991).

⁴⁸ Unlike ASCAP and BMI, SESAC bases its determination of each licensee's license fee rate not on each licensee's gross receipts, but on other market factors, such as market population served by each licensee and each licensee's standard advertising rates. See under http://www.sesac.com/licensing/broadcast_licensing_faq.html#sesacL (last visited May 29, 2005). See also KRASILOVSKY & SHEMEL, *supra* note 16, at 137-38; SCHULENBERG, *supra* note 34, at 369.

⁴⁹ See in general Michael A. Einhorn, *Intellectual Property and Antitrust: Music Performing Rights in Broadcasting*, 24 COLUM.-VLA J.L. & Arts 349, 353 (2001); Davis, *supra* note 41, at 417.

⁵⁰ URL: www.ncta.com (current name: National Cable & Telecommunications Association).

agreements for local cable TV system operators who use the PRSs' music repertory in locally originated programming and advertising.⁵¹ The three major TV networks ABC, CBS and NBC as well as the PBS network have all negotiated blanket license agreements with ASCAP, BMI, and SESAC for their network programming. In contrast, the Fox, WB, UPN or PAX TV networks have never elected to acquire network licenses for their affiliates with ASCAP, BMI or SESAC. Instead, affiliates of these networks, in particular affiliated local broadcast TV stations, remain individually responsible for obtaining public performance licenses from PRSs to use the music in all of their programming, including their network programming.⁵² In addition to the "old media" licenses, downloadable standard "new media" blanket license agreements have recently been added by ASCAP and BMI to their online catalogues.⁵³ ASCAP currently offers experimental blanket License Agreements for Internet and Interactive Sites & Services;⁵⁴ BMI offers a Web Site Music Performance Agreement.⁵⁵ License fees are based on the website operator's gross revenues, further specified in included rate calculation schemes.⁵⁶

⁵¹ For details, see under <http://www.bmi.com/licensing/broadcaster/cable/cableqa4.pdf>; <http://www.ascap.com/licensing/tvcablesatellite/index.html>; http://www.sesac.com/licensing/broadcast_licensing_faq.html#sesac1 (all last visited May 29, 2005).

⁵² See Television Music License Committee, *supra* note 22; also *United States v. ASCAP*, 870 F. Supp. 1211, 1216 (S.D.N.Y. 1995).

⁵³ See <http://www.ascap.com/weblicense/> and <http://www.bmi.com/licensing/webcaster/> (both last visited May 29, 2005).

⁵⁴ See the ASCAP EXPERIMENTAL LICENSE AGREEMENT FOR INTERNET SITES & SERVICES – RELEASE 5.0, *supra* note 41, and the ASCAP EXPERIMENTAL LICENSE AGREEMENT FOR INTERACTIVE SITES & SERVICES – RELEASE 2.0, *supra* note 41. See also the ASCAP EXPERIMENTAL LICENSE AGREEMENT FOR WIRELESS MUSIC SERVICES - Release 3.0 (last visited May 29, 2005) <<http://www.ascap.com/weblicense/release3.0.pdf>> that provides a license to services that offer "ringtones," "ringbacks" and other music related products and services to consumers and other wireless music distributors.

⁵⁵ See the BMI WEBSITE MUSIC PERFORMANCE AGREEMENT (last visited May 29, 2005) <<http://www.bmi.com/licensing/forms/Internet0105A.pdf>>.

⁵⁶ See, e.g., *id.* Sections 4 and 5, or Section 7 of the ASCAP EXPERIMENTAL LICENSE AGREEMENT FOR INTERACTIVE SITES & SERVICES – RELEASE 2.0, *supra* note 41.

2. Per-program license

A per-program license grants the licensee the non-exclusive right to publicly perform any or all of the nondramatic musical works contained in the entire repertory of a PRS in certain programs as often as the licensee wants.⁵⁷ It is similar to a blanket license in that it authorizes the licensee to use all of the musical works in the entire repertory of a PRS. It differs, however, from the blanket license in that the music repertory of the PRS may be used only in certain programs that are identified in the language of the per-program license. The per-program license fee is determined in part by the nature and frequency of the music used in those programs and the amount of gross revenue generated by those programs, in particular advertising revenue for the licensee.⁵⁸ This leads generally to lower licensing cost for licensees who use music only in a limited number of their programs. However, a per-program license entails an obligation for each licensee to keep track of all musical works used in broadcast programs covered by the per-program license and to report the music content and gross revenues associated therewith electronically⁵⁹ to the relevant PRS on a monthly basis.⁶⁰ This monthly

⁵⁷ Section II(J) of the Second Amended Final Judgment (AFJ2) (last visited May 29, 2005) <www.ascap.com/reference/ascapafj2.pdf or www.usdoj.gov/atr/cases/f6300/6396.htm> defines a per-program license as "a non-exclusive license that authorizes a broadcaster to perform ASCAP music in all of the broadcaster's programs, the fee for which varies depending upon which programs contain ASCAP music not otherwise licensed for public performance." For per-program licensing, see also Einhorn, *supra* note 50, at 354, 355, 358-59; Hillman, *supra* note 1, at 742; also CBS v. ASCAP, 337 F. Supp. 394, 396 (S.D.N.Y. 1972); CBS v. ASCAP, 562 F.2d 130, 133-34 (2nd Cir. 1977); Buffalo Broadcasting Co., Inc. v. ASCAP, 546 F. Supp. 274, 282, 288-89 (S.D.N.Y. 1982); National Cable Television Association, Inc. v. BMI, 772 F. Supp. 614, 634-35 (D.C. 1991).

⁵⁸ See, e.g., Sections 2.(m) and 5.(a) of the BMI Local Television Station Music Performance Per Program License agreement (last visited May 29, 2005) <http://www.bmi.com/licensing/forms/local_tv_per_program.pdf>. See also Fujitani, *supra* note 26, at 105, 114; CBS v. ASCAP, 562 F.2d 130, 133-34 (2nd Cir. 1977).

⁵⁹ Both ASCAP and BMI accept no paper reports. See <http://www.ascap.com/licensing/tvfaq.html> and <http://www.bmi.com/licensing/broadcaster/tv/tvans2.asp#13> (both last visited May 29, 2005).

⁶⁰ See, e.g., Buffalo Broadcasting Co., Inc. v. ASCAP, 546 F. Supp. 274, 288-89 (S.D.N.Y. 1982). Special service firms have evolved that help local TV stations to administer the ASCAP and BMI reporting

reporting obligation may be the main reason why currently still 70%⁶¹ of all local TV stations prefer blanket licenses as opposed to per-program licenses.⁶²

3. Through-to-the-viewer license

A through-to-the-viewer license covers two or more public performances by two or more different entities. The license is granted to a programming service, for example a TV network, that transmits its programming or services to a local TV station (the first public performance) which then retransmits the programming or services to the viewers (the second public performance).⁶³ “Through-to-the-viewer” blanket licenses have been common for network programming on local broadcast TV since 1950⁶⁴ and on local cable TV since 1992.⁶⁵ They are intended to avoid the double or multiple charging of music users that would occur if both the service provider and the retransmitting stations were each forced to obtain separate blanket licenses for the same programming or services. In this respect, “through-to-the-viewer” licenses make per-program licenses for local TV stations an attractive, cost saving alternative to the blanket license. Instead of having to acquire blanket licenses for their entire programming, including such network programs that are already covered by the “through-to-the-viewer” license of their affiliated

requirements of per-program licenses. The two most prominent of these firms are Music Reports, Inc. (MRI) <www.musicreports.com> and W.G. Slantz <www.wgslantz.com>.

⁶¹ See, e.g., <http://www.ascap.com/licensing/tvfaq.html> (*id.* under 9.) (last visited May 29, 2005).

⁶² Critical of the current concept of per-program licensing Hillman, *supra* note 1, at 742-43, 745, 757-58. See also Buffalo Broadcasting Co., Inc. v. ASCAP, 546 F. Supp. 274, 289 (S.D.N.Y. 1982).

⁶³ The AFJ2, *supra* note 57, defines a through-to-the-audience license in Section II(S) as “a license that authorizes the simultaneous or so-called “delayed” performances of ASCAP music that are contained in content transmitted or delivered by a music user to another music user with whom the licensee has an economic relationship relating to the content.” See also National Cable Television Association, Inc. v. BMI, 772 F. Supp. 614, 622-24 (D.C. 1991); United States v. ASCAP, 870 F. Supp. 1211, 1213-14 (S.D.N.Y. 1995).

⁶⁴ See, e.g., Section V(A) in the Amended Final Judgment (AFJ) (United States v. ASCAP, 1950-1951 Trade Cas. (CCH) P 62,595 (S.D.N.Y. 1950)).

⁶⁵ See Peter B. Orlik, *Music Licensing* (last visited May 29, 2005) <<http://www.museum.tv/archives/etv/M/htmlM/musiclicensi/musiclicensi.htm>>.

networks, local TV stations can reduce their licensing costs significantly by spending their licensing money only for targeted acquisitions of per-program licenses for their uncovered syndicated and locally-produced programming. In accordance with the current consent decrees,⁶⁶ ASCAP and BMI grant through-to-the-viewer licenses in all of the above described situations.

4. Per-use license

The per-use license is another form of blanket license that avoids the current wholesale gross-revenue oriented character of a blanket license by using a license fee that is based on: (1) the nature of the copyrighted work and (2) the number of times it is actually publicly performed.⁶⁷ Such a scheme is able to connect the copyright owner's compensation needs with the actual use of his musical work by a PRS licensee and thus allows for a more accurate, and therefore fairer determination of performance royalty payments to composers and music publishers. However, current technology is not yet able to detect, recognize, categorize, name, and link every music piece publicly performed by a music user on TV or on other media to a specific source. The human investigation and reporting efforts of data collection that are required make the per-use license system as it is presently offered by ASCAP and BMI⁶⁸ impracticable and costly.⁶⁹

⁶⁶ See Sections II(S) and V of the AFJ2, *supra* note 57, and Articles IX(A) and (B) of the BMI Consent Decree, 1966 Trade Cas. (CCH) P 71,941 (S.D.N.Y. 1966), *as modified in* 1996-1 Trade Cas. (CCH) P 71,378 (S.D.N.Y. 1994)).

⁶⁷ See in general Einhorn, *supra* note 49, at 354; CBS v. ASCAP, 562 F.2d 130, 134 n.9 (2nd Cir. 1977); CBS v. ASCAP, 320 F. Supp. 389, 390 (S.D.N.Y. 1970). See also CBS v. ASCAP, 337 F. Supp. 394, 397 n.1 (S.D.N.Y. 1972), according to which CBS proposed a different ("library card") per-use license fee system.

⁶⁸ See Section VI (second sentence) of the AFJ2, *supra* note 57, and Article IX(A-C) of the BMI Consent Decree, *supra* note 66.

⁶⁹ Critical Escalante, *supra* note 17, at 90-91. See also Alden-Rochelle, Inc. v. ASCAP, 80 F. Supp. 888 (S.D.N.Y. 1948): "commercially impracticable." Cited from *id.* at 893.

5. Summary

A blanket license typically grants the licensee the non-exclusive right to publicly perform any or all of the nondramatic musical works of the entire repertory of a PRS in all or parts of its programs as often as the licensee wants. The blanket license fee is based on the licensee's gross receipts or other market factors, such as market population served by each licensee or each licensee's standard advertising rates, minus certain adjustments, such as agency commissions and wire charges.

A per-program license is another form of blanket license that refers the non-exclusive right to publicly perform any or all of the nondramatic musical works of the entire repertory of a PRS only to certain programs specifically articulated in the language of the per-program license. The per-program license fee is determined: (1) by the nature and frequency of the music used in those programs and (2) the amount of gross revenue generated by those programs. This calculation scheme typically leads to lower licensing costs for such licensees that are using music only in a limited number of their programs. However, the way in which per-program license fees are determined entails administrative burdens for the licensee. Blanket licensing is therefore still the prevalent form of licensing public performance rights in musical works.

A "through-to-the-viewer" license covers two or more public performances of two or more different entities. A "through-to-the-viewer" license is typically granted to a programming service, for example a TV network, that transmits its programming or services to a local TV station (the first public performance) that then retransmits the programming or services to the final viewers (the second public performance). Local TV stations benefit from a network "through-to-the-viewer" license in that it already covers

the broadcasting of their network programs (the second public performance). Instead of acquiring blanket licenses for their entire programming, local TV stations may choose to acquire per-program licenses only for their non-network programs, despite the general administrative burdens connected with per-program licenses.

A per-use license is another form of blanket license. The music user is allowed to use the entire repertory of a PRS, but the PRS charges the music user only for the public performance of such copyrighted works that were actually publicly performed by the music user. The license fee of the per-use license is based on: (1) the nature of the copyrighted work and (2) the number of times the copyrighted work is actually publicly performed. The per-use license is the ideal form of licensing public performance rights to music users because it can connect the license fee with the actual music use. However, limitations of technology make its current implementation impracticable.

B. Source and Direct Licensing

Public performance licenses can also be obtained from sources other than the PRSs. Consent decrees stemming from litigation and rulemaking in the 1940s require that the license grant of the copyright holder of the public performance rights to his PRS must be on a non-exclusive basis.⁷⁰ This means that potential music users can also negotiate for a license agreement directly with the copyright holder. In this respect, direct and source licensing can be distinguished.

Direct licensing entails a license agreement directly established between a music user, a local TV station, a theater owner, or an Internet service provider and the copyright

⁷⁰ See, e.g., Sections IV(A-B) and VI of the AFJ2, *supra* note 57.

holder.⁷¹ The licensor is typically compensated with a one time, flat license fee, thereby saving the licensee from future obligations to pay performance royalties on a continuous basis. Direct licensing is rarely done in today's far-flung global media broadcasting society. It is impractical for public performers like theater owners, local TV stations, Web broadcasters, etc. to track down every individual songwriter or music publisher whose musical works are contained in the to-be-exhibited or to-be-broadcast film or program and negotiate a public performance license individually with each of them.⁷² Direct licensing provides music users with no realistic alternative to the current range of public performance licenses offered by the PRSs.⁷³

A more practical, but also rarely chosen, way to avoid obtaining and having to pay for PRS licenses is called "source" licensing or licensing "at the source." In this scenario, public performers do not directly deal with copyright owners about licensing their public performance rights. Instead, the negotiations are conducted between the music users on one side, and film producers, film studios, or other media content providers on the other side. These content providers first obtain public performance licenses from the individual copyright owners together with a bundle of other rights, synchronization rights, master use rights, etc., and then pass along these rights to the

⁷¹ See, e.g., Einhorn, *supra* note 49, at 353; Buffalo Broadcasting Co., Inc. v. ASCAP, 546 F. Supp. 274, 289 (S.D.N.Y. 1982).

⁷² See the discussions in National Cable Television Association, Inc. v. BMI, 772 F. Supp. 614, 632-34, 635 (D.C. 1991) (cable television) ("difficult and costly;" cited from *id.* at 632); Buffalo Broadcasting Co., Inc. v. ASCAP, 546 F. Supp. 274, 289-91 (S.D.N.Y. 1982) (local television) ("unreasonably impractical and expensive;" cited from *id.* at 290). See also Fujitani, *supra* note 26, at 107-13 (to the necessity and advantages of blanket licensing from a macro-economic perspective).

⁷³ See also the opposing view by Escalante, *supra* note 17, at 88, who, however, fails to recognize that the difficult, costly, and impractical direct licensing must be a real choice for potential licensees(!), not only for licensing artists.

music users.⁷⁴ As in the direct licensing scenario, the copyright owners are usually compensated with a one time, flat license fee.⁷⁵ Source licensing is typically only practiced in situations, in which the PRSs cannot or are not allowed to⁷⁶ provide public performers with the necessary public performance license. In the U.S. this is only the case in situations where a motion picture theater owner wants to exhibit a motion picture in his theater.⁷⁷ This situation will be discussed in further detail under IV.B.1. In all other situations, filmmakers and other media producers regularly refuse to purchase and pay for public performance licenses “at the source” that they, as non-performers, do not need.⁷⁸ Bruce Owen, BMI’s former economist, testified in *Buffalo Broadcasting* that this kind of an arrangement would just drive up production costs at the source.⁷⁹ In contrast, public performers such as TV stations are forced to seek a license directly from the copyright owner of the public performance right or to acquire the appropriate licenses from the PRSs.

⁷⁴ About “source” licensing in general, see *Buffalo Broadcasting Co., Inc. v. ASCAP*, 546 F. Supp. 274, 282 n.18 (S.D.N.Y. 1982) (local television); *National Cable Television Association, Inc. v. BMI*, 772 F. Supp. 614, 628-32 (D.C. 1991) (cable television); also Einhorn, *supra* note 49, at 353-54; Fujitani, *supra* note 26, at 119 n.89.

⁷⁵ Critical Escalante, *supra* note 17: “This would convert the “continuing” performance license into a “one time only” fee....[This would] force...copyright holders...to give up the possibility of continuing royalties for a one-time charge.” Cited from *id.* at 89.

⁷⁶ See *Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888 (S.D.N.Y. 1948) (concerning motion picture theater exhibitions).

⁷⁷ *Id.* See also *M. Witmark & Sons v. Jenson*, 80 F.Supp. 843 (D.Minn. 1948), *appeal dismissed sub nom. M. Witmark & Sons v. Berger Amusement Co.*, 177 F.2d 515 (8th Cir. 1949).

⁷⁸ See *Buffalo Broadcasting Co., Inc., v. ASCAP*, 546 F. Supp 274, 293 n.42 (S.D.N.Y. 1982)). See also Escalante, *supra* note 17, at 89.

⁷⁹ *Id.*

IV. Historical Attempts to Enforce Anti-Trust Law against the Blanket Licensing System

A. Governmental Anti-Trust Court Actions

For decades, the greatest area of concern for the Antitrust Division of the Department of Justice (DOJ) has been the practice of the PRSs of issuing blanket licenses for a pre-determined non-negotiable fee to music users. This practice has been challenged by the DOJ as price fixing,⁸⁰ containing illegal tying arrangements⁸¹ intended to bundle and sell out the entire repertory of a PRS. Both price fixing and tying agreements can be regarded as a per se violation of the Sherman Act. The following pages offer a closer look to the DOJ's historical challenges of the blanket licensing system and the resulting consent decrees with the PRSs.

1. History of the Consent Decrees

The DOJ first investigated allegations of anticompetitive conduct by ASCAP over 80 years ago, some 10 years after ASCAP was formed.⁸² The first complaint was filed in 1934, but the government was granted a mid-trial continuance and never returned to the courtroom.⁸³ In 1941, the United States charged that the blanket license, which was then the only license offered by ASCAP and BMI and granted only on an exclusive basis forbidding direct licensing from the music composers and publishers, was an unlawful

⁸⁰ See Davis, *supra* note 41, at 417-18. See also the references accompanying note 12.

⁸¹ See the references accompanying note 14.

⁸² See Marcus Cohn, *Music, Radio Broadcasters and the Sherman Act*, 29 GEO. L.J. 407, 427 n.91 (1941); also BMI v. CBS, 441 U.S. 1, 10 (1979).

⁸³ See *United States v. ASCAP*, Equity No. 78-388 (S.D.N.Y., filed August 30, 1934). For this complaint, see also Hillman, *supra* note 1, at 743; BMI v. CBS, 441 U.S. 1, 10 (1979); Buffalo Broadcasting Co., Inc. v. ASCAP, 546 F. Supp. 274, 278 (S.D.N.Y. 1982); National Cable Television Association, Inc. v. BMI, 772 F. Supp. 614, 617 (D.C. 1991).

combination in restraint of trade under Section 1 of the Sherman Act and that arbitrary prices were being charged as the result of an illegal copyright pool.⁸⁴ The government enjoined ASCAP from requiring exclusive licensing powers from the copyright owners of the musical works and it also required ASCAP to offer an alternative licensing mechanism.⁸⁵ The case was finally settled by a consent decree, the Final Judgment (FJ) of 1941.⁸⁶

Following complaints relating to the television industry, successful private anti-trust court actions against ASCAP by movie theaters,⁸⁷ and a government challenge to ASCAP's arrangements with similar foreign PRSs,⁸⁸ the FJ was re-debated and extensively amended in 1950 in the Amended Final Judgment (AFJ) of 1950.⁸⁹ Under the AFJ, copyright owners of musical works may grant ASCAP only non-exclusive rights to license their musical works for public performances, thereby allowing music users an alternative way to obtain a public performance license.⁹⁰ In addition, the AFJ orders and directs ASCAP to issue to any music user making written application, a non-exclusive

⁸⁴ See *United States v. ASCAP*, 1940-1943 Trade Cas. (CCH) P 56,104 (S.D.N.Y. 1941). For the Final Judgment of 1941, see also annotations in *BMI v. CBS*, 441 U.S. 1, 10-11 (1979); *National Cable Television Association, Inc. v. BMI*, 772 F. Supp. 614, 617 (D.C. 1991). See also Davis, *supra* note 41, at 418, 423-24; Einhorn, *supra* note 50, at 349; Fujitani, *supra* note 26, at 113-14; Kennedy, *supra* note 9, at 189; Hillman, *supra* note 1, at 743; Television Music License Committee, *supra* note 22. See also the historical descriptions in Section II(B) of the Memorandum of the United States in Support of the Joint Motion to enter Second Amended Final Judgment (last visited May 29, 2005) <www.usdoj.gov/atr/cases/f6300/6395.htm> (hereinafter, "Memorandum in Support of the AFJ2").

⁸⁵ *Id.*

⁸⁶ See FJ of 1941, *supra* note 84.

⁸⁷ See *Alden-Rochelle, Inc. v. ASCAP*, 80 F.Supp. 888 (S.D.N.Y. 1948); *M. Witmark & Sons v. Jenson*, 80 F.Supp. 843 (D.Minn. 1948), *appeal dismissed sub nom. M. Witmark & Sons v. Berger Amusement Co.*, 177 F.2d 515 (8th Cir. 1949).

⁸⁸ See the description in Section I of the Memorandum in Support of the AFJ2, *supra* note 86.

⁸⁹ *Supra* note 64. See also the commentaries by W. Michael Garner, *United States v. ASCAP: The Licensing Provisions of the Amended Final Judgment of 1950*, 23 BULL. COPYRIGHT SOCIETY 119, 122-23 (1976); John Cirace, *CBS v. ASCAP: An Economic Analysis of a Political Problem*, 47 FORDHAM L. REV. 277 (1978); Hillman, *supra* note 1, at 744-46.

⁹⁰ See Sections IV(A), IV(B) and VI of the AFJ, *supra* note 64. See also the commentary by Hillman, *supra* note 1, at 744-45. See also *National Cable Television Association, Inc. v. BMI*, 772 F. Supp. 614, 617-18 (D.C. 1991).

license to publicly perform all ASCAP compositions on a per-program basis.⁹¹ ASCAP may not insist on the usual blanket license and the per-program license must offer the applicant a genuine economic choice between the per-program license and the usual blanket license.⁹² If ASCAP and a putative licensee are unable to agree on a blanket or per-program license fee within sixty days, the putative licensee may apply to the United States District Court for the Southern District of New York (USDCSDNY) for a determination of a reasonable fee (hereinafter, "rate court proceedings"), with ASCAP having the burden of proving reasonableness.⁹³

The DOJ forced BMI to enter into similar consent decrees. The original consent decree against BMI had been entered in 1941.⁹⁴ It was superseded by a new consent decree entered in 1966 following a monopolization complaint filed in 1964.⁹⁵ This new BMI Consent Decree was last modified in a court order by the USDCSDNY in 1994.⁹⁶ The ASCAP and BMI Consent Decrees vary in some respects. The most notable difference is that the BMI Consent Decree does not contain provisions on the question whether BMI may only obtain non-exclusive rights from its members, allowing music users to license public performance rights directly from the music composers and

⁹¹ See Sections VII(B) and VII(C) of the AFJ, *supra* note 64. See also the commentaries by Hillman, *supra* note 1, at 745; Davis, *supra* note 41, at 418; Einhorn, *supra* note 49, at 351; Fujitani, *supra* note 26, at 114, 123; Kennedy, *supra* note 9, at 189. See also *Buffalo Broadcasting Co., Inc. v. ASCAP*, 546 F. Supp. 274, 278 (S.D.N.Y. 1982); *National Cable Television Association, Inc. v. BMI*, 772 F. Supp. 614, 617-18 (D.C. 1991).

⁹² See Section VII(B) of the AFJ, *supra* note 66.

⁹³ *Id.* Section IX. The USDCSDNY has so far never exercised its power to set reasonable fees. Instead, it has assumed the role of mediator. See Garner, *supra* note 89, at 127-28; Cirace, *supra* note 89, at 303. See also Fujitani, *supra* note 26, at 115, 122-23; Hillman, *supra* note 1, at 745-46; Television Music License Committee, *supra* note 22; also *Buffalo Broadcasting Co., Inc., v. ASCAP*, 546 F. Supp. 274, 278 (S.D.N.Y. 1982).

⁹⁴ See *United States v. BMI*, 1940-1943 Trade Cas. (CCH) P 56,096 (E.D.Wis. 1941).

⁹⁵ See *United States v. BMI*, 1966 Trade Cas. (CCH) P 71,941 (S.D.N.Y. 1966).

⁹⁶ See *United States v. BMI*, 1996-1 Trade Cas. (CCH) P 71,378 (S.D.N.Y. 1994). For the 1994 modifications, see also Television Music License Committee, *supra* note 22.

publishers.⁹⁷ However, it has become clear over the years that music users “could secure direct licenses from BMI affiliates with the same ease or difficulty, as the case may be, as from ASCAP members.”⁹⁸

2. Main Content of the current Consent Decrees

In their most recent movement, the United States, represented by the DOJ, and ASCAP jointly moved the USDCSDNY to amend the AFJ once again in 2001 to its current version, the Second Amended Final Judgment (AFJ2) of 2001.⁹⁹ A number of provisions of the AFJ had become outdated and overcome by changes in technology, particularly the Internet, while others had proven to be ambiguous or ineffective in practice.¹⁰⁰

Today, the AFJ2 governs and regulates almost every aspect of ASCAP’s licensing and various other concerns, such as tracking and controlling music uses, informing music users or prospective music users upon request whether any musical work identified by title and writer is in the ASCAP repertory, and questions concerning membership enrollment.¹⁰¹ The most significant modifications to the AFJ include: first, the AFJ2 expands and clarifies ASCAP’s obligation to offer certain types of music users, including Internet companies, genuine economic alternatives, namely per-program licenses to the usual blanket license.¹⁰² Second, by explicitly prohibiting ASCAP from limiting its members’ rights to license their compositions directly or in a bundled form through an

⁹⁷ See Fujitani, *supra* note 26, at 115-16.

⁹⁸ Cited from *CBS v. ASCAP*, 400 F. Supp. 737, 745 (S.D.N.Y. 1975).

⁹⁹ *Supra* note 57.

¹⁰⁰ See Section III of the Memorandum in Support of the AFJ2, *supra* note 84. See also Television Music License Committee, *supra* note 22.

¹⁰¹ See also KRASILOVSKY & SHEMEL, *supra* note 16, at 142.

¹⁰² See Section VIII of the AFJ2, *supra* note 57; also Section III of the Memorandum in Support of the AFJ2, *supra* note 84. See also Einhorn, *supra* note 49, at 351, 361, 368.

agent or a music library, a practice called collective licensing, the AFJ2 encourages direct competition between ASCAP and its members.¹⁰³ Third, the AFJ2 simplifies the rate court proceeding of the AFJ to facilitate expedited and less costly resolution of fee disputes between ASCAP and its music users.¹⁰⁴ Fourth, the AFJ2 clarifies that provisions regulating per-program and through-to-the-viewer licenses apply also to online transmitters and online users, as well as to any other unanticipated industry that transmits and retransmits programs in a manner similar to syndicated TV programs.¹⁰⁵

The BMI Consent Decree is not as readable and well-structured as the AFJ2, but contains in essence, the same provisions securing for music users genuine economic alternatives¹⁰⁶ to the blanket license,¹⁰⁷ avoiding double licensing of transmitters and retransmitters in through-to-the-viewer situations,¹⁰⁸ and requiring that rate disputes be submitted to the rate court before the USDCSDNY.¹⁰⁹

Due to its lack of monopoly power with a current market share of only about 2% of all public performance rights in the U.S., SESAC has so far not been subject to any anti-trust litigation. It has, however, voluntarily entered into an agreement with the TMLC,¹¹⁰ a non-government organization covering pre-negotiated blanket license fees and per-program licenses for the local television industry.¹¹¹

¹⁰³ See Section IV(B) of the AFJ2, *supra* note 57; also Section III of the Memorandum in Support of the AFJ2, *supra* note 84. See also Einhorn, *supra* note 49, at 366.

¹⁰⁴ See Section IX of the AFJ2, *supra* note 57; also Section III of the Memorandum in Support of the AFJ2, *supra* note 84. See also Einhorn, *supra* note 49, at 351, 362-63.

¹⁰⁵ See Sections V and VII of the AFJ2, *supra* note 57; also Section III of the Memorandum in Support of the AFJ2, *supra* note 86. See also Einhorn, *supra* note 49, at 361, 366-67.

¹⁰⁶ See in Article VIII(B) of the BMI Consent Decree, *supra* note 66.

¹⁰⁷ *Id.* Articles VIII and IX.

¹⁰⁸ *Id.* Article IX(A).

¹⁰⁹ These BMI rate court proceedings are exercised by a judge other than one to whom any action in an ASCAP rate court proceeding has been assigned. *Id.* Articles XIII and XIV.

¹¹⁰ URL: www.televisionmusic.com.

¹¹¹ See Television Music License Committee, *supra* note 22. See also the information contained under http://www.sesac.com/licensing/broadcast_licensing_faq.html#sesacO (last visited May 29, 2005).

B. Private Anti-Trust Court Actions

The consent decrees do not, of course, immunize ASCAP and BMI from private anti-trust court actions brought by persons or entities not parties to the proceedings that resulted in the consent decrees. Just as the government is not bound by private anti-trust litigation to which it is a stranger, so private parties, similarly situated, are not bound by any form of government litigation.¹¹² Despite the guarantees, regulations, and proceedings provided by the consent decrees, several groups of licensees remained dissatisfied with ASCAP's and BMI's licensing practices and filed anti-trust actions. The actions were based principally on the same anti-trust concerns (price fixing, tying arrangements, and bundling) that triggered the government actions.

1. Motion Picture Theaters: Alden-Rochelle, Inc. v. ASCAP, 80 F. Supp. 888 (S.D.N.Y. 1948)

In the early years of filmmaking, during the "silent movie" era in the 1920s, the only music publicly performed in a motion picture theater was played live, usually by a piano or organ player accompanying the exhibition of the silent picture.¹¹³ Synchronization licenses were unheard of, since they were not needed for the production of the silent pictures. Theater owners originally refused to pay any royalties to ASCAP for the right to publicly perform the musical compositions during the exhibition. In 1923,

¹¹² See *M. Witmark & Sons v. Jensen*, 80 F. Supp. 843, 849 (D.Minn. 1948); *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 690 (1961) (referring to Section 5 of the Clayton Act as a definitive legislative pronouncement that a government suit cannot be preclusive of private litigation, even though relating to the same subject matter); also *United States v. General Electric Co.*, 95 F. Supp. 165 (N.J. 1950); *United States v. Columbia Gas & Electric Corp.*, 27 F. Supp. 116 (Del. 1939); *United States v. Radio Corporation*, 3 F. Supp. 23 (Del. 1933); also *BMI v. CBS*, 441 U.S. 1, 13 (1979).

¹¹³ See *Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888, 891-92 (S.D.N.Y. 1948); also Phillips, *supra* note 26, at 40; Television Music License Committee, *supra* note 22.

however, after ASCAP brought a series of infringement actions against several theater owners, theater owners began to obtain ASCAP licenses and pay for something that was, unquestionably, a live public performance of copyrighted musical works.¹¹⁴ After 1928 when the "talkies" found their way into the theaters, ASCAP continued to license theater owners for the public performances of the musical works now contained and pre-recorded in the soundtrack of the exhibited films.¹¹⁵ When a motion picture theater exhibitor received a talking motion picture from a distributor, synchronization and master use rights needed to be and had already been cleared by the film producer prior to distribution for exhibition. However, the theater owner still needed a public performance license from ASCAP for the exhibition of pictures that contained musical works.

After the legal struggles that followed in the early 1920s, ASCAP followed a rigorous licensing policy to ensure that every theater owner in the country was licensed by ASCAP and had to pay the blanket license fee imposed by ASCAP. In addition, music composers and publishers, by virtue of their membership agreements with ASCAP, were forbidden to license public performance rights directly to film producers.¹¹⁶ Moreover, they were required to condition the grant of synchronization licenses to film producers upon the public performance of the musical works in theaters having valid licenses from ASCAP or other PRSs.¹¹⁷ An example of such a provision is published in *Boosey & Hawkes Music Publishers, Ltd. v. The Walt Disney Company and Buena Vista*

¹¹⁴ For the historic developments, see in particular Phillips, *supra* note 26, at 40; also Alden-Rochelle, Inc. v. ASCAP, 80 F. Supp. 888, 891-92 (S.D.N.Y. 1948).

¹¹⁵ See in particular Television Music License Committee, *supra* note 22; Einhorn, *supra* note 49, at 355.

¹¹⁶ See Alden-Rochelle, Inc. v. ASCAP, 80 F. Supp. 888, 893 (S.D.N.Y. 1948); M. Witmark & Sons v. Jensen, 80 F. Supp. 843, 845-46 (D.Minn. 1948); CBS v. ASCAP, 562 F.2d 130, 133 (2nd Cir. 1977); also Fujitani, *supra* note 26, at 116; Escalante, *supra* note 17, at 77. See also Section II(B) of the Memorandum in Support of the AFJ2, *supra* note 84.

¹¹⁷ See, e.g., Alden-Rochelle, Inc. v. ASCAP, 80 F. Supp. 888, 894 (S.D.N.Y. 1948); M. Witmark & Sons v. Jensen, 80 F. Supp. 843, 844-45, 847 (D.Minn. 1948); CBS v. ASCAP, 562 F.2d 130, 133 (2nd Cir. 1977); also Einhorn, *supra* note 49, at 355; Phillips, *supra* note 26, at 40.

Home Video,¹¹⁸ whereby Disney signed a 1939 license agreement with Stravinsky in order to obtain the composer's authorization to use his composition, "*The Rite of Spring*," in a motion picture. The provision was worded as follows: The license to the work "is limited to the use of the musical composition in synchronism or timed-relation with the motion picture....The right to record the musical composition as covered by this agreement is conditioned upon the performance of the musical work in theatres having valid licenses from the American Society of Composers, Authors and Publishers, or any other performing rights society having jurisdiction in the territory in which the said musical composition is performed."¹¹⁹ Theater owners that were not licensed by ASCAP for their public performances and that refused to acquire such license in the future were, therefore, unable to enter into any form of exhibition agreement with film producers or distributors.

This licensing scenario constituted violations of Sections 1 and 2 of the Sherman Act for two reasons: First, ASCAP's membership agreements provided ASCAP with exclusive licensing power with respect to its members' public performance rights. Absent any licensing alternatives available on the market, ASCAP could use its bargaining power to fix and increase public performance license fees upon its discretion without having to look at alternative pricing and business policies of market competitors. Second, ASCAP extended its exclusive licensing power into third party negotiations in that it required its members to condition synchronization licenses to film producers and

¹¹⁸ 145 F.3d 481 (2nd Cir. 1998).

¹¹⁹ *Id.* at 484. See also the comment to this decision by Susan S. Blaha, *Case Summary: Boosey & Hawkes Music Publishing, Ltd. v. The Walt Disney Co.* 145 F.3d 481 (2^d Cir. 1998), 9 DEPAUL-LCA J. ART & ENT. L. 449 (1999). A similar provision is published in *M. Witmark & Sons v. Jensen*, 80 F. Supp. 843 (D.Minn. 1948): "The right to perform said musical composition as covered by this agreement is conditioned upon the performance of said musical composition in theatres having valid licenses from the American Society of Composers, Authors and Publishers, or any other performing rights society having jurisdiction in the territory in which said musical composition is performed." Cited from *id.* at 844-45.

distributors upon the public performance of the respective musical work in theaters having valid licenses from ASCAP or other PRSs. Theater owners were, therefore, not only confronted with ASCAP's exclusive licensing power when they were dealing with ASCAP about public performance rights, but also when they were negotiating exhibition agreements with film producers and distributors.

In 1942, a group of 164 theater owners brought suit against ASCAP claiming anti-trust law violations of Sections 1 and 2 of the Sherman Act.¹²⁰ The case was finally tried in 1948 against the backdrop of ASCAP's August 1947 attempt to increase the license fees for theater owners as much as 200% to 1500%.¹²¹ This blatant abuse of ASCAP's exclusive price fixing power in the middle of ongoing anti-trust proceedings against it may have been the decisive mistake that is hurting ASCAP and the other PRSs up to this day. The USDCSDNY held that almost every part of the ASCAP structure and almost all of ASCAP's activities in licensing motion picture theaters involved *per se* violations of the provisions of the Sherman Act.¹²² The bundling of ASCAP's members' nondramatic public performance rights was held to constitute both an unlawful combination in restraint of trade and commerce in violation of Section 1 of the Sherman Act¹²³ and an abuse of ASCAP's monopoly power in violation of Section 2 of the Sherman Act.¹²⁴ The USDCSDNY enjoined ASCAP from licensing and obtaining the public performance rights of any musical composition synchronized with motion picture films when such musical composition is publicly performed through the exhibition of such motion picture

¹²⁰ See *Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888, 890 (S.D.N.Y. 1948). See also the similarly situated case *M. Witmark & Sons v. Jenson*, 80 F. Supp. 843 (D. Minn. 1948), *appeal dismissed sub nom. M. Witmark & Sons v. Berger Amusement Co.*, 177 F.2d 515 (8th Cir. 1949).

¹²¹ See *Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888, 895, 898 (S.D.N.Y. 1948).

¹²² *Id.* at 893, 895.

¹²³ *Id.* at 894-95.

¹²⁴ *Id.* at 893-94.

films in a theater.¹²⁵ Further, the USDCSDNY enjoined ASCAP's members (1) from refusing to grant to film producers the right to publicly perform through the exhibition of motion picture film in theaters, all musical compositions which they allow film producers to synchronize with motion picture film, and (2) from licensing, except to film producers, the right of public performance through the exhibition of motion picture films in theaters, of musical compositions synchronized with motion picture films.¹²⁶ The USDCSDNY pointed out that although each member of ASCAP is granted by copyright law a monopoly in the copyrighted work, it is unlawful for the owners of a number of copyrighted works to combine their copyrights by any agreement or arrangement in violation of the anti-trust laws, even if it better preserves their property rights.¹²⁷

The USDCSDNY's ruling effectively meant that theater owners would not need an ASCAP license for their movie exhibitions. It was up to the film producers to acquire public performance licenses at the source simultaneously with the synchronization rights to the music. The license fees for the public performance licenses were included in the film budget and treated as part of the production costs of the film company and were, consequently, not passed along to the theater owners together with the acquired synchronization and public performance rights. This practice has not changed up to this day. It leads to a situation that allows theater owners to publicly perform musical works

¹²⁵ *Id.* at 900 n.2. Section IV(E) of the AFJ2, *supra* note 57, is based on this part of the holding. No such provision is contained in the current BMI Consent Decree, *supra* note 66. See also Phillips, *supra* note 26, at 40; Television Music License Committee, *supra* note 22.

¹²⁶ *Id.* at 900 n.2. See also Phillips, *supra* note 26, at 40; Television Music License Committee, *supra* note 22.

¹²⁷ *Id.* at 893.

contained in motion pictures without having to pay for it. This situation, therefore, is widely criticized by many scholars and music experts.¹²⁸

ASCAP, BMI, and SESAC have never challenged the reasoning of the *Alden-Rochelle* decision,¹²⁹ despite the fact that the music licensing industry has changed significantly over the last six decades. The arrangements of the 1930s and 1940s as contained, for example, in the Stravinsky case on pp. 26-27 have vanished from today's music licensing world. They also find no resemblance in any of the other present licensing arrangements with other audiovisual or non-audiovisual music users. Even more importantly, the current consent decrees enjoin and restrain ASCAP and BMI from exercising exclusive licensing powers over the copyright owners' public performance rights, thereby securing competition regarding these rights with other non-exclusive market alternatives.¹³⁰ Copyright owners may, for example, use the services of licensing agents to effectively license their public performance rights to others.¹³¹

Foreign legal systems, without exception, have never had anti-trust concerns in allowing their PRSs to charge theater owners for public performances of musical works contained in the motion pictures they exhibit.¹³² The fact that motion picture theaters in the U.S. do not pay PRSs for the right to publicly perform synchronized film music may even present negotiating problems for the U.S. PRSs when dealing with their foreign

¹²⁸ See, e.g., PASSMAN, *supra* note 39: "no logical reason for this;" "nonsense." Cited from *id.* at 222. See also JEFFREY BRABEC & TODD BRABEC, *MUSIC, MONEY, AND SUCCESS: THE INSIDER'S GUIDE TO MAKING MONEY IN THE MUSIC INDUSTRY* 219-20 (2004); Phillips, *supra* note 26, at 40.

¹²⁹ See, e.g., BRABEC & BRABEC, *supra* note 128, at 219; KRASILOVSKY & SHEMEL, *supra* note 16, at 228; also National Cable Television Association, Inc. v. BMI, 772 F. Supp. 614, 620 n.12 (D.C. 1991).

¹³⁰ See, e.g., Sections IV(A) and IV(B) of the AFJ2, *supra* note 57, and Article IV(A) of the BMI Consent Decree, *supra* note 66.

¹³¹ See, e.g., Section IV(B) of the AFJ2, *supra* note 57.

¹³² See, e.g., PASSMAN, *supra* note 39, at 222; KRASILOVSKY & SHEMEL, *supra* note 16, at 228-29, 233-34. Foreign PRSs usually collect theatrical public performance fees as a percentage of each theater's net box office receipts or as a per seat charge for the number of seats in each theater the motion picture is exhibited. See BRABEC & BRABEC, *supra* note 128, at 177-78, 204-05, 218-220; KRASILOVSKY & SHEMEL, *supra* note 16, at 233-34.

counterparts.¹³³ Since the foreign PRSs collect foreign theatrical performance royalties on behalf of their U.S. counterparts pursuant to their bi-lateral agreements with ASCAP, BMI, and SESAC, *et non vice versa*, foreign PRSs may have a good argument in seeking some form of compensation in future re-negotiations of these bi-lateral agreements when negotiating about the allocation of collection cost of performance royalties in other respects, such as for public performances on the Internet or other new media.

The *Alden-Rochelle* decision was at the time when it was pronounced (1948) necessary to strip ASCAP of its exclusive licensing power that it had exercised over the public performance rights of its members in the area of theatrical motion picture exhibitions. It gave the DOJ a good reason to amend the FJ of 1941 and to include provisions in the AFJ of 1950, and later in the BMI Consent Decree of 1966, to enjoin ASCAP and BMI from holding, acquiring, licensing, enforcing, or negotiating public performance rights of musical works on any other than a non-exclusive basis.¹³⁴ The *Alden-Rochelle* decision was, however, too restrictive in that it enjoined ASCAP in every respect from licensing theatrical public performance rights of musical works. To restrain ASCAP from licensing public performance rights on a non-exclusive basis went too far. It led to inconsistencies with the theatrical licensing situation in foreign territories. And even more importantly, it remained domestically unclear as to whether the U.S. courts were going to extend *Alden-Rochelle* to other areas of public performance licensing of musical works into audiovisual media. As of today, the U.S. courts have decided this question with respect to television networks (2.), local television stations (3.), and cable television (4.).

¹³³ See Phillips, *supra* note 26, at 40.

¹³⁴ See, e.g., Sections IV(A) and IV(B) of the AFJ2, *supra* note 57, and Article IV(A) of the BMI Consent Decree, *supra* note 66.

2. Television Networks

It took a fairly long time until the blanket licensing system was challenged by one of the TV networks. Nineteen years after the AFJ and three years after the BMI Consent Decree, CBS, then the "giant of the world in the use of music rights,"¹³⁵ decided to file in a lawsuit on December 31, 1969, the last day CBS was covered by a valid BMI license,¹³⁶ against both ASCAP and BMI, as well as their affiliated members.¹³⁷ The case ended almost twelve years later, after the final rehearing was denied by the U.S. Supreme Court.¹³⁸

a. District Court: CBS v. ASCAP, 400 F. Supp. 737 (S.D.N.Y. 1975)

CBS claimed before the USDCSDNY that the blanket license format unreasonably restrained interstate trade and commerce in violation of Sections 1 and 2 of the Sherman Act through price fixing, tying, and bundling of music compositions, a concerted refusal to deal, and monopolization.¹³⁹ Under Section 16 of the Clayton Act (15 U.S.C. § 26), CBS sought to enjoin the two PRSs from issuing blanket and per-program licenses, and in the alternative, asked the court to require the PRSs to offer a licensing format on terms proportionate to CBS's actual, rather than potential, use of music.¹⁴⁰

¹³⁵ Cited from CBS v. ASCAP, 400 F. Supp. 737, 771 (S.D.N.Y. 1975).

¹³⁶ See CBS v. ASCAP, 320 F. Supp. 389, 391 (S.D.N.Y. 1970).

¹³⁷ *Id.* The CBS case is annotated by Hillman, *supra* note 1, at 746-52; Einhorn, *supra* note 49, at 357-58; Fujitani, *supra* note 26, at 117-19; Kennedy, *supra* note 9, at 190-96; Television Music License Committee, *supra* note 22. See also the annotations in Buffalo Broadcasting Co., Inc. v. ASCAP, 546 F. Supp. 274, 285-86 (S.D.N.Y. 1982).

¹³⁸ See CBS v. ASCAP, 450 U.S. 1050 (1981).

¹³⁹ See CBS v. ASCAP, 400 F. Supp. 737, 741 (S.D.N.Y. 1975).

¹⁴⁰ *Id.*

CBS claimed that the blanket and per-program licenses offered by ASCAP and BMI constitute a *per se* violation of the anti-trust laws.¹⁴¹ On the issue of price fixing, CBS argued that ASCAP's and BMI's members avoided price competition among themselves and that the pooling of compositions in ASCAP's and BMI's repertory enabled the PRSs to fix the price that CBS and other music users must pay in order to obtain public performance rights.¹⁴² CBS also asserted that the blanket license format constitute a *per se* illegal tying and bundling of wanted and unwanted musical compositions because it had to acquire, along with some desired compositions, works that it did not need and would not use for its programming.¹⁴³ In addition, CBS argued that the purpose of blanket licensing to pool all compositions of ASCAP's or BMI's repertory into one license amounted to a concerted refusal by the members of ASCAP and BMI to deal directly with CBS with respect to their individual musical compositions.¹⁴⁴

After almost six years of litigation and an eight-week trial on the merits, the USDCSDNY resolved all issues favorably to ASCAP and BMI. The USDCSDNY disagreed with CBS that the blanket licensing system constituted a *per se* violation of the Sherman Act. It reasoned that ASCAP and BMI are both regulated by consent decrees. CBS had made no claim that either ASCAP or BMI had violated any provision of the consent decrees. Their terms did not in any way suggest that CBS was compelled to take a blanket license. On the contrary, ASCAP and BMI were required to offer per-program licenses under which a fee is charged only with respect to programs in which a composition within the repertory has been performed; and to structure the fees for blanket

¹⁴¹ *Id.* at 746.

¹⁴² *Id.* at 745-48.

¹⁴³ *Id.* at 745.

¹⁴⁴ *Id.*

and per-program licenses so that the user has a genuine choice between them.¹⁴⁵ Apart from the licenses available from ASCAP and BMI, the consent decrees leave a music user free to obtain licenses directly from copyright owners.¹⁴⁶

The USDCSDNY, therefore, applied a rule of reason test to analyze ASCAP's and BMI's blanket and per-program licensing system. The USDCSDNY held, first, that CBS had failed to prove an illegal combination designed to fix prices in violation of Section 1 of the Sherman Act.¹⁴⁷ Because the AFJ and the BMI Consent Decree guaranteed to music users the option of direct licensing and CBS had failed to disprove the viability of such an approach, CBS had only alleged and failed to prove that ASCAP's and BMI's members would not compete against each other if approached directly by CBS.¹⁴⁸ The USDCSDNY found that in view of CBS's enormous own market power, if CBS had requested music licenses directly from the copyright owners, "copyright owners would line up at CBS' door."¹⁴⁹ Second, the USDCSDNY rejected CBS's tying and bundling claim on the same basis as the first one. CBS was not forced to purchase an unwanted package of partially useless compositions, because it failed to prove that it could not purchase the individual compositions contained in the package directly from ASCAP's and BMI's members.¹⁵⁰ Third, the USDCSDNY found that CBS had failed to offer any evidence that the individual composers had acted in a concerted effort to refuse to deal with CBS by prohibiting competition among themselves through the blanket licensing format.¹⁵¹ And lastly, the USDCSDNY rejected CBS's claim that

¹⁴⁵ *Id.* at 749.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 746.

¹⁴⁸ *Id.* at 767-70.

¹⁴⁹ *Id.* at 768.

¹⁵⁰ *Id.* at 742, 748-49, 781.

¹⁵¹ *Id.* at 752, 782.

ASCAP and BMI had attempted and achieved a monopoly in the relevant market.¹⁵² The court defined the relevant product market more broadly than CBS. The court defined the market as “performance rights to compositions suitable for television network use” whereas CBS defined it as “the market for BMI and ASCAP blanket licenses.”¹⁵³ The court could therefore include in its market analysis licenses that could be directly acquired from the individual copyright holders. Because the PRSs could not control price or eliminate competition in such a broadly defined market, they could not be regarded as having monopolized or attempted to monopolize any part of the trade or commerce in violation of Section 2 of the Sherman Act.¹⁵⁴

The USDCSDNY was right to apply the rule of reason standard. A *per-se* price fixing, and a *per-se* tying and bundling of wanted and unwanted musical compositions did not occur because CBS had viable alternatives to acquire public performance licenses from other sources at a different price. CBS could have avoided the acquisition of blanket licenses, if it had, for example, acquired direct licenses for certain of its programs and per-program licenses for its other programs. CBS, however, preferred to acquire blanket licenses because they could offer CBS a convenient way of covering all of its programs with one single license. The blanket license did not do more than offer CBS a market alternative, a bundled product, offered at a certain price.

Notably, the USDCSDNY did not mention in the CBS case its *per-se* ruling of *Alden-Rochelle* with a single word. It missed a great chance to distinguish the situation present in *Alden-Rochelle* from the CBS case. The times had changed significantly. In 1948, ASCAP had still exerted exclusive licensing power over its members’ public

¹⁵² *Id.* at 782-83.

¹⁵³ Citations from *id.* at 782.

¹⁵⁴ *Id.* at 782-83.

performance rights. This excluded direct licensing from the copyright owners of the musical works. Until 1950, per-program licenses were not offered to music users at all. Both the AFJ of 1950 and the BMI Consent Decree of 1966 had done a great job in providing music users genuine market alternatives for their licensing needs. As long as ASCAP and BMI followed these decrees, they could not be reasonably held liable by the courts for a *per-se* violation of the Sherman Act. However, CBS appealed.

b. Court of Appeals: *CBS v. ASCAP*, 562 F.2d 130 (2nd Cir. 1977)

After almost two years, the United States Court of Appeals for the Second Circuit reversed, holding that ASCAP's and BMI's blanket license was a *per se* violation of Section 1 of the Sherman Act.¹⁵⁵ In an opinion "elegant in its simplicity,"¹⁵⁶ the appellate court based its reversal solely on CBS's price fixing claim. When sellers agree to sell collectively at a set price, they implicitly agree with each other not to compete on price.¹⁵⁷ When the price for the collective product or service includes compensation for someone whose products or services are not consumed, the consumer has most likely paid too much.¹⁵⁸ The pooling arrangement of the blanket licensing scheme therefore "fixes" some fee for each pool member, regardless of whether his compositions are used by each individual licensee.¹⁵⁹ To the appellate court, such a market structure was an intolerable affront to the free market.¹⁶⁰

¹⁵⁵ See *CBS v. ASCAP*, 562 F.2d 130, 140 (2nd Cir. 1977).

¹⁵⁶ Cited from Hillman, *supra* note 1, at 749.

¹⁵⁷ See *CBS v. ASCAP*, 562 F.2d 130, 135-39 (2nd Cir. 1977).

¹⁵⁸ *Id.* at 135-36. See also Hillman, *supra* note 1, at 750.

¹⁵⁹ *Id.* at 135-36.

¹⁶⁰ *Id.* at 136. See also Hillman, *supra* note 1, at 750.

The appellate court rejected ASCAP's argument that because the blanket license offered only a new product, unlimited access to ASCAP's repertory of music, in addition to direct licensing from each copyright owner, the price setting associated with the blanket licensing format was not a restraint of interstate trade and commerce.¹⁶¹ In the view of the court, the blanket licensing format was in compliance with Section 1 of the Sherman Act only if the free market failed to provide a mechanism to set a fair price on its own.¹⁶² But, paradoxically, since direct licensing was still an alternative for CBS, it could be relied upon to set a fair market price.¹⁶³

The *per-se* ruling of the appellate court avoided any clear analysis of the issues present in this case. The court did not explain how ASCAP and BMI could have *per se* violated Section 1 of the Sherman Act, when they were at the same time in compliance with the consent decrees. As mentioned earlier, ASCAP and BMI had lost their price fixing power because the consent decrees provided that direct licenses and per-program licenses could be obtained by music users at different prices. The court was mistaken in ruling that only if all other market alternatives had failed to provide a mechanism to set a fair price on its own, it would have avoided a violation of Section 1 of the Sherman Act. Quite to the contrary, a *per se* price fixing of ASCAP and BMI in violation of Section 1 of the Sherman Act could reasonably not occur as long as other market alternatives were able to provide such a fair price setting mechanism. The DOJ therefore disagreed with the decision of the court of appeals.

¹⁶¹ *Id.* at 139-40.

¹⁶² *Id.* at 136, 140. See also Hillman, *supra* note 1, at 750.

¹⁶³ *Id.*

c. U.S. Supreme Court: BMI v. CBS, 441 U.S. 1 (1979)

Supported by an *amicus* brief from the DOJ urging the reversal of the appellate court's decision,¹⁶⁴ ASCAP and BMI appealed the decision to the Supreme Court of the United States in 1979.¹⁶⁵ The DOJ referred in its *amicus* brief in the present case to an *amicus* brief, which it had submitted to the Supreme Court in an earlier case¹⁶⁶ concerning the ASCAP blanket licensing of radio stations, in which it said: "The Sherman Act has always been discriminatingly applied in the light of economic realities. There are situations in which competitors have been permitted to form joint selling agencies or other pooled activities, subject to strict limitations under the antitrust laws to guarantee against abuse of the collective power thus created... This case appears to us to involve such a situation. The extraordinary number of users spread across the land, the ease with which a performance may be broadcast, the sheer volume of copyrighted compositions, the enormous quantity of separate performances each year, the impracticability of negotiating individual licenses for each composition, and the ephemeral nature of each performance all combine to create unique market conditions for performance rights to recorded music."¹⁶⁷ The *amicus* brief submitted by the DOJ in the CBS case remained of that view.¹⁶⁸ Furthermore, it disagreed with the appellate court in that it urged the Supreme Court that blanket licenses, which the AFJ authorized ASCAP to issue to television networks, were not *per se* violations of the Sherman Act.¹⁶⁹ The

¹⁶⁴ See BMI v. CBS, 441 U.S. 1, 7, 14-15 (1979).

¹⁶⁵ *Id.*

¹⁶⁶ K-91, Inc. v. Gershwin Publishing Corp., 372 F.2d 1 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045 (1968).

¹⁶⁷ *Id.* at 10.

¹⁶⁸ See BMI v. CBS, 441 U.S. 1, 15 (1979).

¹⁶⁹ *Id.*

DOJ took no position, however, on whether the practice is an unreasonable restraint of trade in the context of the network television industry.¹⁷⁰

Following the DOJ's submission, the Supreme Court reversed the appellate court's decision.¹⁷¹ It remanded the case to the same appellate court for an application of the rule of reason, a determination of whether blanket licensing represented an unreasonable restraint of interstate trade and commerce under the Sherman Act, holding that blanket licensing was not a *per se* violation of the Sherman Act.¹⁷²

The Supreme Court rejected in particular the simplicity of the appellate court's decision. The complexity and uniqueness of the market, coupled with the passage of time, compelled the conclusion that only the use of the fact-sensitive, careful, balancing approach of rule of reason analysis would insure the proper result.¹⁷³ The *per-se* approach that developed mainly out of a judicial need for time-saving mechanisms in plainly anti-competitive cases provided the wrong recipe in cases where the Court lacked the experience with the ever-changing music licensing industry necessary to brand the PRSs' activity a *per se* violation of the antitrust laws.¹⁷⁴ Determining "price-fixing" is not a literal exercise but a conclusion reached "only after considerable experience with certain business relationships."¹⁷⁵ The Supreme Court quoted from the appellate court's decision in which the appellate court had stated that "[in] dealing with performing rights in the music industry we confront conditions both in copyright law and in antitrust law which are *sui generis*."¹⁷⁶ The proper inquiry under the rule of reason analysis must

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 25.

¹⁷² *Id.* at 7, 24-25.

¹⁷³ *Id.* at 24.

¹⁷⁴ *Id.* at 8-10.

¹⁷⁵ *Id.* at 9 (citing from *United States v. Topco Associates, Inc.*, 405 U.S. 596, 607-608 (1972)).

¹⁷⁶ *Id.* at 10 (citing from *CBS v. ASCAP*, 562 F.2d 130, 132 (2nd Cir. 1977)).

focus on whether the effect of blanket licensing is designed to “increase economic efficiency and render markets more, rather than less, competitive.”¹⁷⁷ In this context, the blanket license is not a “naked [restraint] of trade with no purpose except stifling of competition.”¹⁷⁸

The Supreme Court also rejected the appellate court’s view that a blanket license does not amount to a new different product for music users in addition to licenses directly acquirable from the copyright owners.¹⁷⁹ The Supreme Court stated that “[h]ere, the whole is truly more than the sum of its parts; it is, to some extent, a different product.”¹⁸⁰ The Supreme Court viewed ASCAP not as “a joint sales agency offering the individual goods of many sellers” but rather as a “separate seller” offering the blanket and per-program license as a new product whose “raw material” is the copyrighted compositions of ASCAP’s members.¹⁸¹ Since the blanket license is a product separate from the individual compositions, offered by different persons and entities on a different market level, it cannot adversely affect competition among individual copyright owners of the musical compositions.¹⁸²

The Supreme Court also recognized that ASCAP and BMI were each operating under consent decrees and constantly monitored and regulated by the DOJ.¹⁸³ Thus,

¹⁷⁷ *Id.* at 20 (citing from *United States v. United States Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978)).

¹⁷⁸ *Id.* (citing from *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963)) (brackets in original).

¹⁷⁹ *Id.* at 22.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* at 14-15, 24.

under the AFJ,¹⁸⁴ CBS had the option, which it failed to exercise, of asking the USDCSDNY to determine a reasonable fee for CBS's blanket license.¹⁸⁵

On remand,¹⁸⁶ the United States Court of Appeals for the Second Circuit upheld ASCAP's and BMI's use of their respective blanket license systems under the rule of reason analysis.¹⁸⁷ With clear direction from the Supreme Court, the detailed decision of the USDCSDNY, and CBS's failure on appeal to challenge anything other than the district court's *per se* rulings, the appellate court could basically do nothing else than affirm the district court decision that it formerly had reversed. So, after more than a decade of litigation, ASCAP's and BMI's practice of issuing blanket and per-program licenses to TV networks was deemed legal under the Sherman Act by the courts. The decision is good law today.

The Supreme Court decision in the CBS case became the point of reference for all future courts that had to judge ASCAP's and BMI's practice of licensing musical works into audiovisual media. The *Alden-Rochelle* decision by the USDCSDNY that the Supreme Court mentioned only one time in a footnote referring to the government's need in the late 1940s to reform the FJ of 1941,¹⁸⁸ had lost its persuasive power once the AFJ of 1950 was decreed. From that moment on, *Alden-Rochelle* ran into conflict with the new licensing reality that emerged from the AFJ requirements. The AFJ, and later the BMI Consent Decree stripped ASCAP and BMI of their exclusive licensing powers. In addition to the now available direct and source licensing options, the decrees provided

¹⁸⁴ See Section IX of the AFJ, *supra* note 64, and the references to this Section accompanying note 93. The BMI Consent Decree, *supra* note 66, contained at the time no similar provision for judicial determination of a reasonable fee. Such a provision was, however, added in 1994. See *id.* Article XIV.

¹⁸⁵ See *BMI v. CBS*, 441 U.S. 1, 23-24 (1979).

¹⁸⁶ See *CBS v. ASCAP*, 620 F.2d 930 (2nd Cir. 1980), *cert. denied*, 450 U.S. 970 (1981).

¹⁸⁷ *Id.* at 939.

¹⁸⁸ *Id.* n. 18.

music users with other genuine market alternatives, such as per-program licenses and “through-to-the-viewer” licenses that could be acquired instead of the regular blanket license. The Supreme Court decision in the CBS case made, therefore, clear that as long as ASCAP and BMI kept their licensing practice in compliance with the consent decrees, they could not be held liable by future courts for a *per-se* violation of the Sherman Act. In this way, oversimplified *per se* rulings such as the one by the appellate court in CBS v. ASCAP, 562 F.2d 130 (1977) could be avoided. Instead, future courts were mandated to apply the rule of reason test in all cases assuring a full-scale discussion about all pro-competitive and anti-competitive aspects relevant to the parties.

3. Local Television

The first ASCAP licenses for local TV stations were granted in 1941.¹⁸⁹ ASCAP initially offered free licenses for these stations.¹⁹⁰ But in late 1948, due to the growing importance of television as a medium of mass communication and the rising revenue stream from an increasing number of new local TV stations, ASCAP notified the broadcasters that it was terminating the free licenses and demanded negotiations for a new fee-based blanket license based on each local TV station’s annual net revenues.¹⁹¹ An agreement with the local TV stations was reached in 1949 setting the first blanket license fee rate at 12.25% of such revenues.¹⁹² This was the beginning of a long, litigious

¹⁸⁹ See Television Music License Committee, *supra* note 22; also United States v. ASCAP, 1993 U.S. Dist. LEXIS 2566, 1, 27.

¹⁹⁰ *Id.*

¹⁹¹ See Television Music License Committee, *supra* note 22; also United States v. ASCAP, 1993 U.S. Dist. LEXIS 2566, 1, 28; United States v. ASCAP, 870 F. Supp. 1211, 1214 (S.D.N.Y. 1995); United States v. ASCAP, 157 F.R.D. 173, 179 (S.D.N.Y. 1994).

¹⁹² So-called “radio + 10”-rate. Radio broadcasters had negotiated a blanket license fee rate of 2.25% of each station’s net revenue. The rate for the blanket TV license was supposed to become 10% higher. See Television Music License Committee, *supra* note 22; also United States v. ASCAP, 1993 U.S. Dist. LEXIS

relationship between the local TV stations and the PRSs.¹⁹³ In November 1978, five owners and operators of local TV stations initiated a class action against ASCAP, BMI and others. They represented the entire class of at the time about 450 owners and operators of about 750 local TV stations in the United States.¹⁹⁴

a. District Court: *Buffalo Broadcasting v. ASCAP*, 546 F. Supp. 274 (S.D.N.Y. 1982)

When the plaintiffs filed their claims, the U.S. Supreme Court had not yet reversed the Second Circuit ruling that ASCAP's and BMI's blanket license granted to the CBS network was a *per se* violation of Section 1 of the Sherman Act. The claims brought forward in this class action, thus, mirror to some extent the claims of the CBS network in its action. The plaintiffs claimed that ASCAP and BMI had restrained, through the blanket licensing system, interstate trade and commerce of local TV stations in violation of Section 1 of the Sherman Act.¹⁹⁵ The class action was limited to syndicated programming, excluding all network and locally-produced programming.¹⁹⁶ The plaintiffs argued that the blanket licensing system in this area was "needless, anomalous, inefficient and coercive."¹⁹⁷ To plaintiffs, the salient feature of ASCAP's and BMI's blanket licensing system was the splitting of the licensing of television public performance rights from the licensing of all other music rights at the source and the

2566, 1, 28; *United States v. ASCAP*, 157 F.R.D. 173, 179 (S.D.N.Y. 1994). The blanket license rates for local TV stations were significantly reduced in the upcoming years. See in particular Television Music License Committee, *supra* note 22; also *United States v. ASCAP*, 1993 U.S. Dist. LEXIS 2566, 1, 28-43.

¹⁹³ For a summary of the court history between local TV stations and the PRSs to a variety of issues (per-program licenses, through-to-the-viewer licenses, rate disputes, etc.), see *United States v. ASCAP*, 1993 U.S. Dist. LEXIS 2566, 1, 28-43; also Television Music License Committee, *supra* note 22.

¹⁹⁴ See *Buffalo Broadcasting v. ASCAP*, 546 F. Supp. 274, 276-77 (S.D.N.Y. 1982). See the annotations by Kennedy, *supra* note 9, at 201-10; Hillman, *supra* note 1, at 752-56; Fujitani, *supra* note 26, at 119-20; Einhorn, *supra* note 49, at 358; Television Music License Committee, *supra* note 22.

¹⁹⁵ *Id.* at 285.

¹⁹⁶ *Id.* at 279-81.

¹⁹⁷ *Id.* at 285.

consequent absence of price competition between and among musical compositions.¹⁹⁸ The plaintiffs believed that the very existence of blanket licensing prohibited local TV stations from seeking reasonable alternatives to the existing blanket licensing scheme and that an injunction against blanket licensing would likely result in a form of source licensing directly from the producers of syndicated programming, who already would have obtained public performance rights licenses from the copyright owners.¹⁹⁹

By the time, the case was finally decided by the USDCSDNY, the U.S. Supreme Court had already reversed the Second Circuit ruling in the CBS case, mandating the rule of reason test for further legal applications.²⁰⁰ Accordingly, the district court in this case felt bound by the U.S. Supreme Court ruling, applying the rule of reason test, however, in the following two-pronged manner: First, the USDCSDNY considered whether realistically available alternatives to the blanket licensing format existed for local TV stations.²⁰¹ Second, if it turned out that no realistically available alternatives to blanket licensing existed, the USDCSDNY analyzed according to the usual rule of reason test whether the anti-competitive effects of the blanket licensing format outweighed its pro-competitive effects.²⁰² Answering the first prong in the negative,²⁰³ the USDCSDNY went on to hold, under the second prong, that the blanket licensing format constituted an unreasonable restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act.²⁰⁴

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 285-86.

²⁰¹ *Id.* at 286.

²⁰² *Id.*

²⁰³ *Id.* at 292-93.

²⁰⁴ *Id.* at 296.

The USDCSDNY first discussed and discounted three existing alternatives to the blanket licensing system: per-program licenses, direct licensing, and source licensing. The USDCSDNY reasoned that per-program licenses entailed too onerous reporting obligations, and its rates then were about seven times higher than the rates charged for blanket licenses. The USDCSDNY, thus, concluded that per-program licenses were neither time- nor cost-efficient and therefore not a realistic alternative to blanket licenses.²⁰⁵ The USDCSDNY came to the same conclusion with regard to direct licensing. Having to seek public performance rights licenses directly from thousands of individual copyright owners would be exorbitantly expensive and out of practical reasons virtually impossible to implement for local TV stations. Thus, it could not be regarded as a realistic alternative to the blanket licensing format.²⁰⁶ Referring to the CBS case, the USDCSDNY pointed out that direct licensing may be a viable alternative for a powerful network like CBS but not for plaintiffs' local TV stations.²⁰⁷ The USDCSDNY also dismissed the notion that local TV stations would have the muscle to force producers of syndicated programming into source licensing arrangements.²⁰⁸ The USDCSDNY recognized that the producers of syndicated programming would not change to source licensing willingly without an injunction against blanket licensing.²⁰⁹ The USDCSDNY, consequently, concluded that none of the three alternatives to the blanket licensing scheme were realistically available to the local TV stations.²¹⁰

²⁰⁵ *Id.* at 288-89.

²⁰⁶ *Id.* at 289-91.

²⁰⁷ *Id.* at 290-91.

²⁰⁸ *Id.* at 291-93.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 293.

With no realistic alternatives available to the local TV stations, the issue of the case turned, under the second prong, to the question of determining reasonableness. The USDCSDNY acknowledged that for small businesses that cannot anticipate their music needs, a market of blanket licenses was necessary, efficient, flexible, could allow unlimited use of an entire repertory for one fee, did not restrict output, reduced transaction costs, and could eliminate monitoring costs that would result under other licensing systems.²¹¹ Nevertheless, the USDCSDNY finally concluded these effects were not able to outweigh the anti-competitive effects of the blanket licensing scheme. In the USDCSDNY's view, the pooling of all compositions in one repertory prevents local TV stations from competing freely on the price for the public performances of each individual composition they want.²¹² Compositions administered by ASCAP or BMI do not compete within each society with one another. Local TV stations have no incentive to use new or little-known musical works because they can broadcast an established, famous song at the same cost.²¹³ The USDCSDNY considered these concerns as too fundamental not to regard the blanket licensing system as unreasonable under Section 1 of the Sherman Act. The USDCSDNY therefore enjoined ASCAP's and BMI's blanket licensing practice with respect to syndicated programming for local TV stations in order to clear the way for the evolution of source licensing in this area.²¹⁴

The USDCSDNY's rule of reason analysis in this case is not convincing. It misses the Supreme Court's main point that the blanket license offers music users just a different product in addition to other market alternatives, such as per-program licenses,

²¹¹ *Id.* at 294-96.

²¹² *Id.* at 293.

²¹³ *Id.* at 293-94.

²¹⁴ *Id.* at 296.

direct and source licensing. The USDCSDNY itself acknowledged that for small businesses like local TV stations that cannot anticipate their music needs, the blanket license alternative was a necessary, efficient, and flexible means to reduce transaction costs, to eliminate monitoring costs that would result under other licensing systems, and to promote the use of music in general. Under the blanket license, every local TV station could pick and choose musical works upon their own discretion, famous songs as well as new or so far little-known works that still needed to be discovered. As the Supreme Court correctly stated, the blanket license is a product separate from the individual musical works, offered by a different competitor on a different market level.²¹⁵ Thus, it cannot adversely affect competition among individual copyright owners of musical works.

The USDCSDNY was already unconvincing in concluding that, under the first prong, direct and source licensing provided no realistic market alternatives to the blanket license for less powerful music users like local TV stations. Local TV stations could have used their existing market power to offer individual copyright owners or TV production companies a reasonable amount of money in order to obtain direct or source licenses. Since local TV stations covered with their syndicated and locally-produced programming only a smaller territory than the networks with their programming, the price for such licenses would have been significantly lower than the price for network direct and source licenses. And per-program licenses could have provided at least such TV stations an affordable alternative to the blanket license that needed music only for a limited number of their syndicated and locally-produced programming. ASCAP and BMI therefore appealed.

²¹⁵ See *BMI v. CBS*, 441 U.S. 1, 22 (1979).

b. Court of Appeals: Buffalo Broadcasting v. ASCAP, 744 F.2d 917 (2nd Cir. 1984)

The United States Court of Appeals for the Second Circuit reversed, holding that the blanket licensing system does not restrain interstate trade and commerce in violation of Section 1 of the Sherman Act because alternatives to the blanket licensing system in the form of per-program licenses, direct, and source licensing are realistically available.²¹⁶ Since these alternatives precluded, as a matter of law, the conclusion that the blanket license was a restraint of interstate trade and commerce,²¹⁷ no rule of reason analysis would be required.

As to per-program licenses, the appellate court found that the transaction costs and the burdens involved in monitoring have not been shown to be excessive. The sevenfold price increase of per-program licenses was held not to be disproportionate because the respective per-program and blanket rates were based on different revenue bases.²¹⁸ As to direct licensing, the appellate court found that the plaintiffs had failed to prove that they lacked sufficient leverage to have the realistic chance to acquire licenses from the individual copyright owners, in particular because no evidence was offered that the local TV stations had attempted to obtain such licenses in the past and because they had been able to obtain such licenses for their own locally-produced programming.²¹⁹ Finally, as to source licensing, the appellate court found that the plaintiffs had failed to prove that source licenses from producers of syndicated programming could not have been realistically acquired "by offering reasonable amounts of money"²²⁰ to the producers. The appellate court therefore concluded that the plaintiffs had not presented

²¹⁶ See Buffalo Broadcasting v. ASCAP, 744 F.2d 917 (2nd Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985).

²¹⁷ *Id.* at 933.

²¹⁸ *Id.* at 926.

²¹⁹ *Id.* at 929.

²²⁰ *Id.*

“evidence that the blanket license is functioning to restrain willing buyers and sellers from negotiating for the licensing of performing rights to individual compositions at reasonable prices.”²²¹

Although this appellate court’s decision did not quite have the power and thoroughness of the CBS Supreme Court ruling, it made clear that ASCAP and BMI may continue in the future to issue blanket licenses not only to the TV networks, but also to local TV stations. Despite the regular rate disputes before the USDCSDNY, this is the situation today.

4. Cable Television: National Cable Television Association, Inc. v. BMI, 772 F. Supp. 614 (D.C. 1991)

The blanket licensing system was also challenged by two cable TV networks and two trade associations representing cable TV networks and local cable TV system operators.²²² After the U.S. Supreme Court ruling in the CBS case and the Second Circuit’s ruling in *Buffalo Broadcasting*, it was no surprise when the United States District Court for the District of Columbia found BMI’s blanket licensing system with respect to both cable TV networks and local cable TV stations in accordance with the anti-trust laws.²²³ As in *Buffalo Broadcasting*, the case was limited to questions concerning blanket licenses for syndicated programming.²²⁴ Following the reasoning in the Second Circuit decision in *Buffalo Broadcasting*, the district court found that realistic

²²¹ *Id.* at 932.

²²² See National Cable Television Association, Inc. v. BMI, 772 F. Supp. 614, 616-17 (D.C. 1991).

²²³ *Id.* at 616.

²²⁴ *Id.* at 620.

alternatives are available both for cable TV networks and for local cable TV stations.²²⁵ Still, in view of a possible appeal by the parties, the district court wanted to decide the question of reasonableness at least on a hypothetical level.²²⁶ Its decision was never appealed by either party and remains unchallenged up to this day by the cable TV industry.

The district court concluded that the plaintiffs had failed to prove that there are no realistic alternatives to BMI's blanket licensing system available. As to source licensing, very few cable TV networks had ever attempted to obtain source licensing for syndicated programming.²²⁷ Those that did had not offered any additional money to obtain a public performance rights license.²²⁸ Nevertheless, source licensing had been obtained by HBO, and the Family Channel.²²⁹ The plaintiffs therefore could not show a restraint created by the blanket licensing system impeding the alternative of source licensing music in syndicated programming.²³⁰ As to direct licensing, the court reached the same result with respect to cable TV networks.²³¹ The plaintiffs failed to prove that direct licensing had been no viable alternative. HBO had not begun its direct licensing campaign until after BMI had filed the infringement suit against it.²³² In addition, music publishers like EMI had testified that they would grant direct licenses, for the right price.²³³ In contrast, local cable TV system operators were contractually bound to transmit the cable network's syndicated programming simultaneously on receipt from the satellite, and without

²²⁵ *Id.* at 628.

²²⁶ *Id.* at 641-46.

²²⁷ *Id.* at 632.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.* at 632-33.

²³² *Id.* at 633.

²³³ *Id.*

interruption or editing.²³⁴ Moreover, they had little advance notice of the programming content, much less the music contained therein.²³⁵ The court, therefore, found that “these circumstances rendered direct licensing of cable operators cumbersome and... unrealistic.”²³⁶ As to per-program licenses, such licenses had been offered by BMI to every cable TV network that had asked for one.²³⁷ The plaintiffs failed to show that they had made any serious efforts to obtain per-program licenses in the past.²³⁸ Moreover, there was an absence of evidence that cable TV networks to whom BMI had offered per-program licenses had ever seriously considered that option.²³⁹ In sum, the court concluded, there were realistic alternatives to the BMI blanket license available. For the cable TV networks per-program licenses, direct, and source licensing, and for the local cable TV stations at least source licensing. The BMI blanket license did, therefore, not constitute a restraint of interstate trade and commerce within the meaning of Section 1 of the Sherman Act.²⁴⁰

The court turned then hypothetically to the question of reasonableness.²⁴¹ As to the anti-competitive effect of price fixing, the court found that the plaintiffs had not offered any concrete evidence as to how the price of public performance rights was inflated beyond what it would have been without the blanket licensing system.²⁴² The plaintiffs had not shown that the price of music public performance rights in syndicated programming would have been lower, or more competitive, if the blanket license had not

²³⁴ *Id.* at 635.

²³⁵ *Id.*

²³⁶ Cited from *id.*

²³⁷ *Id.* at 634.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.* at 634-35.

²⁴¹ *Id.* at 641-46.

²⁴² *Id.* at 641-42.

existed.²⁴³ To the contrary, the court found ample evidence that the blanket license increased output and encouraged the use of music by eliminating marginal costs once the music is purchased.²⁴⁴ As another pro-competitive effect, the court highlighted the tremendous efficiency of the blanket license, which, ultimately, had been able to reduce costs to buyers, and eliminate potentially thousands of transactions that would otherwise have had to occur in negotiating licenses, monitoring of use, sales, and enforcement of copyrights, auditing, and bookkeeping.²⁴⁵ Moreover, blanket licensing was able to promote the goals of the copyright laws by protecting copyright owners from infringements by unauthorized users and by providing them compensation in exchange for the authorized use of their public performance rights.²⁴⁶

Up to the present, the blanket licensing system has, therefore, survived all challenges through private anti-trust court actions with the single exception of the one challenge brought by motion picture theater owners in 1948. In view of the reasons that have been given by the courts in the meantime in favor of the blanket licensing system, it seems likely that the *Alden-Rochelle* decision as the current alien in the national and international legal arena will sooner or later be overruled by the U.S. Supreme Court. Due to the successful DOJ anti-trust court actions against ASCAP and resulting consent decrees, the distinguishing reason, in particular ASCAP's initial exclusive licensing power and its abusive licensing arrangements in the 1930s and 1940s, has disappeared. Since the AFJ of 1950, *Alden-Rochelle*, the only successful private anti-trust court action

²⁴³ *Id.*

²⁴⁴ *Id.* at 644.

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 646.

against the blanket licensing system, has become vulnerable. Paradoxically, by securing genuine alternatives to the PRSs' blanket licensing scheme, such as per-program licenses, "through-to-the-viewer" licenses, direct and source licensing, the consent decrees have significantly contributed to its vulnerability.

V. Summary and Conclusion

1. There is a natural conflict between copyright law and anti-trust law. The Copyright Clause (Art I, § 8(8)) of the U.S. Constitution provides that "The Congress shall have Power ... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." This exclusive right grants to authors a limited monopoly over their works of authorship for a limited amount of time that may be exploited according to the authors' discretion pursuant of the provisions of the U.S. Copyright Act. Anti-trust law, on the other hand, reflects an express policy against monopolies. Section 1 of the Sherman Act provides that "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 hereby declared to be illegal." And Section 2 of the Sherman Act provides that "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 ..." The conflict between copyright law and anti-trust law intensifies in the area of licensing public performance rights of musical works. Copyright owners of musical

works generally pool these rights in PRSs which are designed to act as agents on their members' behalf. The issue is whether the PRSs' licensing system violates Sections 1 and 2 of the Sherman Act. Generally, the U.S. Supreme Court applies these two sections of the Sherman Act under a rule of reason standard. Under this standard, reasonable market behavior that on balance of all pro-competitive and anti-competitive aspects relevant to a case does not hamper economic efficiency and competition in the free market does not constitute a violation of the Sherman Act. However, the courts deem some plainly anti-competitive categories of business practices, such as price fixing, and tying and bundling agreements, as *per se* violations of the Sherman Act because they lack any redeeming virtue.

2. Initially, ASCAP's membership agreement provided that ASCAP shall have the exclusive power to license its members' public performance rights to music users. This provision excluded direct and source licensing of public performance rights from individual copyright owners. ASCAP offered at the time only blanket licenses. ASCAP's exclusive licensing practice was successfully challenged by U.S. motion picture theater owners in *Alden-Rochelle*. The USDCSDNY judged ASCAP's blanket licensing system as a *per se* violation of Sections 1 and 2 of the Sherman Act. In its decision (1948), the USDCSDNY enjoined ASCAP from exclusively or non-exclusively licensing and obtaining the public performance rights of any musical composition synchronized with motion picture films when such musical composition is publicly performed through the exhibition of such motion picture films in a theater. ASCAP, BMI, and SESAC honor the ruling of the USDCSDNY up to this day.

3. The *Alden-Rochelle* decision practically invalidated the FJ of 1941 that still allowed ASCAP to exclusively license its members' public performance rights to music users. The AFJ of 1950, and later the BMI Consent Decree of 1966, stripped the PRSs of their exclusive licensing powers. In addition, the decrees required that ASCAP and BMI offer per-program licenses as a genuine alternative to the blanket license. Other types of licenses, such as "through-to-the-viewer" licenses also had to be offered by the PRSs.

4. In the following years, the PRSs' blanket licensing system was challenged in other private anti-trust court actions. In 1969, CBS filed a lawsuit against ASCAP and BMI claiming *per se* violations of Sections 1 and 2 of the Sherman Act. In 1980, the U.S. Supreme Court decided in this case that blanket licensing was not a *per se* violation of the Sherman Act and, instead, mandated a rule of reason analysis. In practice, the Supreme Court decision meant that the PRSs could not be regarded by future courts as *per se* violators of the Sherman Act as long as the PRSs were in compliance with the provisions of the consent decrees. In *Buffalo Broadcasting v. ASCAP*, 744 F.2d 917 (1984), a case concerning local TV stations, the Second Circuit followed the CBS Supreme Court ruling, holding that the blanket licensing system was not in violation of the Sherman Act because alternatives to the blanket licensing system in the form of per-program licenses, direct, and source licensing were realistically available. In 1991, the same result was reached in a district court ruling concerning challenges by cable TV networks and cable TV stations.

5. The *Alden-Rochelle per se* ruling against ASCAP by the USDCSDNY was at the time necessary in that it divested ASCAP of its exclusive licensing power. In that sense, it was a ruling against the exclusive price fixing power that ASCAP had abusively

exerted in the 1930s and 1940s. *Alden-Rochelle* was too restrictive, however, in that it entirely precluded ASCAP from licensing motion picture theater owners. It had lost its persuasiveness, once the AFJ of 1950 provided music users with viable market alternatives to the blanket license. In addition, *Alden-Rochelle* is today in open conflict with the CBS Supreme Court ruling of 1980. We want to predict *Alden-Rochelle's* likely fall upon its first challenge before the Supreme Court. Vladimir and Estragon will again have to wait a little while for Godot, but this time surely not in vain.

- *Finis Operis* -

Glossary

Audiovisual works:

“Audiovisual works” are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines, or devices such as projectors, viewers, or electronic equipment, *together with accompanying sounds, if any*, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied. *See* Section 101 of the Copyright Act.

Blanket license:

The “blanket license” grants the licensee, for example a TV station or the operator of an Internet website, the right to → **publicly perform** any or all of the nondramatic musical works of the entire repertory of a → **performing rights society (PRS)** in all or parts of its programs as often as the licensee wants. It blankets the entire catalogue of musical works that can be licensed by the → **PRS**.

Copies:

“Copies” are material objects, *other than* → **phonorecords**, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term “copies” includes the material object, *other than a* → **phonorecord**, in which the work is first fixed. *See* Section 101 of the Copyright Act.

Derivative works:

A “derivative work” is a work based upon one or more preexisting works, such as a translation, *musical arrangement*, dramatization, fictionalization, → **motion picture version**, → **sound recording**, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a “derivative work.” *See* Section 101 of the Copyright Act.

Direct licensing:

“Direct licensing” refers to a license agreement directly established between a music user, a local TV station, a theater owner, or an Internet service provider and the current copyright holder of the → **public performance** rights of an individual musical work

Display:

To “display” a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, *in the case of a* → **motion picture** or *other* → **audiovisual work**, *to show individual images nonsequentially*. *See* Section 101 of the Copyright Act.

Master use right:

The “master use right” is the right to reproduce (Section 106(1) of the Copyright Act) a copyrighted musical work as it is contained in a particular → **sound recording** or master

tape in timed relation with the visual or other aural aspects of any → **motion picture**, television program or other → **audiovisual work**.

Motion pictures:

“Motion pictures” are → **audiovisual works** consisting of a series of related images which, when shown in succession, impart an impression of motion, *together with accompanying sounds, if any*. See Section 101 of the Copyright Act.

Performance:

To “perform” a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, *in the case of a* → **motion picture or other** → **audiovisual work**, *to show its images in any sequence or to make the sounds accompanying it audible*. See Section 101 of the Copyright Act.

Performing rights societies (PRSs):

A “performing rights society” is an association, corporation, or other entity that licenses the → **public performance** of nondramatic musical works on behalf of copyright owners of such works, such as the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC, Inc. See Section 101 of the Copyright Act.

Per-program license:

The “per-program license” grants the licensee the right to → **publicly perform** any or all of the nondramatic musical works of the entire repertory of a → **performing rights society (PRS)** in certain programs as often as the licensee wants. It is similar to a → **blanket license** in that it authorizes the licensee to use all of the musical works in the entire repertory of a → **PRS**. It differs, however, from the → **blanket license** in that the music repertory of the → **PRS** may be used only in certain programs of the licensee that are covered by the per-program license.

Per-use license:

The “per-use license” is another form of → **blanket license** that avoids the current wholesale gross-revenue oriented character of a → **blanket license** and to install instead a license fee system that is based on the actual nature and amount of each individual musical work → **publicly performed**.

Phonorecords:

“Phonorecords” are material objects in which sounds, *other than those accompanying a* → **motion picture or other** → **audiovisual work**, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term “phonorecords” includes the material object in which the sounds are first fixed. See Section 101 of the Copyright Act.

Public Performance:

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.

See Section 101 of the Copyright Act.

Sound recordings:

“Sound recordings” are works that result from the fixation of a series of musical, spoken, or other sounds, but *not including the sounds accompanying a → motion picture or other → audiovisual work*, regardless of the nature of the material objects, such as disks, tapes, or other → **phonorecords**, in which they are embodied. See Section 101 of the Copyright Act.

Source licensing:

Unlike in the → **direct licensing** scenario, “source licensing” refers to a practice in which the deal-making process is entirely controlled and finalized by non-performing film producers, film studios, or other media content providers. These entities acquire the → **public performance** rights to a musical work together with an entire bundle of other rights, → **synchronization rights**, → **master use rights**, etc. “at the source” and pass along these rights to the → **publicly performing** TV stations, theater owners, or other public media performers.

Synchronization right:

The “synchronization right” is the right to reproduce (Section 106(1) of the Copyright Act) a copyrighted musical work in timed relation or synchronization with the visual or other aural aspects of any → **motion picture**, television program or other → **audiovisual work**.

Through-to-the-viewer license:

The “through-to-the-viewer license” covers two or more → **public performances** of two or more different entities. The license is granted to a programming service, for example a TV network, that → **transmits** its programming or services to a local TV station (= first public performance) that then retransmits the programming or services to the final viewers (= second public performance).

Transmission:

To “transmit” a → **performance** or → **display** is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent. *See* Section 101 of the Copyright Act.

Work made for hire:

A “work made for hire” is –

- (1) a work prepared by an employee within the scope of his or her employment; or
- (2) a work specially ordered or commissioned for use as a contribution to a collective work, *as a part of a* → **motion picture** *or other* → **audiovisual work**, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

See Section 101 of the Copyright Act.

In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, *unless the parties have expressly agreed otherwise* in a written instrument signed by them, owns all of the rights comprised in the copyright. *See* Section 201(b) of the Copyright Act.

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