

INTELLECTUAL PROPERTY AND ANTITRUST: MUSIC PERFORMING RIGHTS IN BROADCASTING

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INTRODUCTION

Since 1934, the Antitrust Division of the U.S. Department of Justice (DOJ) has concerned itself with competitive issues in the licensing of music performance rights by the nation's two major performing rights organizations (PROs), the American Society of Composers, Authors, and Publishers (ASCAP) and Broadcast Music Inc. (BMI). DOJ concerns about ASCAP and BMI led to two Consent Decrees in 1941,¹ two more in 1950² and 1966,³ and key modifications in 1960⁴ and 1994.⁵ In September 2000, the DOJ and ASCAP again filed a Joint Motion to enter a Second Amended Final Judgment (AFJ2) that will, once enacted, make further headway into resolving some competitive concerns.⁶ This paper reviews the improvements and possible difficulties of the new Consent Decree and its underlying rationale, as described by an accompanying memorandum released by the Department.⁷

ASCAP and BMI license the rights to publicly perform musical compositions in non-dramatic settings in the United States. Licensees together now pay nearly one billion dollars to the two organizations for the right to use their cataloged material, which together include roughly 97 percent of all American compositions. Television and radio broadcasters, which are the major revenue contributors and prime focus of this paper, respectively, account for approximately 45 and 36 percent of total license revenues at ASCAP.⁸ Broadcast licensees include the three full-time television networks, the Public Broadcasting System, Univision, affiliated and independent local television stations, cable operators, cable

1. United States v. ASCAP, 1941-1943 Trade Cas. (CCH) ¶ 56, 104 (S.D.N.Y. 1941); United States v. BMI, 1940-1943 Trade Cas. (CCH) ¶ 56, 096 (E.D. Wisc. 1941).

2. United States v. ASCAP, 1950-1951 Trade Cas. (CCH) ¶ 62, 595 (S.D.N.Y. 1950).

3. United States v. BMI, 1966 Trade Cas. (CCH) ¶ 71, 941 (S.D.N.Y. 1966).

4. United States v. ASCAP, 1960 Trade Cas. (CCH) ¶ 69, 612 (S.D.N.Y. 1960).

5. United States v. BMI, 1996-1 Trade Cas. (CCH) ¶ 71, 378 (S.D.N.Y. 1994).

6. Second Amended Final Judgment, United States v. ASCAP, No. 41-1395 (S.D.N.Y. 2000), <http://www.usdoj.gov/atr/cases/f6300/6396.pdf> (last visited Feb. 19, 2001) [hereinafter *AFJ2*].

7. Memorandum of the United States in Support of the Joint Motion to Enter Second Amended Final Judgment, United States v. ASCAP, No. 41-1395 (S.D.N.Y. 2000), <http://www.usdoj.gov/atr/cases/f6300/6395.pdf> (last visited Feb. 19, 2001) [hereinafter *AFJ2* Memorandum].

8. The most recent publicly available breakdown for the domestic aggregate is television and cable (\$165.8), radio (\$133.1), general (\$68.0), and symphonic and concert performances (\$4.3). ASCAP, ANNUAL REPORT (1999).

programmers, and commercial and noncommercial radio stations. This group is increasingly joined by digital transmitters, which include music subscription services, digital satellite radio, and station-owned and independent Webcasters now based on the Internet. General non-broadcast licensees include colleges and universities, symphony orchestras, concert presenters, and individual establishments for eating, drinking, sports, and amusement.

Performance rights organizations (PROs) provide a key administrative service for music users, who might otherwise need to deal directly with songwriters and composers to obtain the rights to perform copyrighted music.⁹ PROs negotiate and establish license contracts, collect revenue, deduct overhead, and pay remaining amounts to songwriters and publishers. As the grande dame of the business, ASCAP historically has offered the larger and more prestigious catalog, including the greatest names in American music—Aaron Copland, Duke Ellington, Irving Berlin, Leonard Bernstein, Harold Arlen, Cole Porter, and George Gershwin, to name a few.

Since ASCAP's inception in 1914, the PROs have made pooled performance rights for catalogued works available to music users mostly through *blanket licenses*. Blanket users may perform, or convey the rights to perform, on their premises all the catalogued works of a PRO without limit. During the length of a contract, blanket fees do not vary with customer usage. Rather, blanket payments are generally fixed as an inflation-adjusted flat fee, a percentage of revenue, or a multiple of square footage, seating capacity, or some other measure of physical space. Blanket licenses economize on transactions costs, insure against involuntary infringement, and efficiently price each additional performance unit at zero, which is the immediate marginal cost of provision.

However, blanket licenses can also be deployed as anticompetitive arrangements that have attracted Justice Department attention since 1934.¹⁰ These licenses, which had been ASCAP's sole license offer until 1941, would compel each user to make an "all or nothing" choice that would practically force acceptance of a full license contract. By limiting user

9. The U.S. Solicitor General in 1967 made the case for centralized licensing.

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 impracticality 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. If this market is to function at all, there must be . . . some kind of central licensing agency by which copyright holders may offer their works in a common pool to all who wish to use them.

Memorandum of the United States as Amicus Curiae on Petition for Writ of Certiorari in the Supreme Court of the United States at 10-11, *K-91, Inc. v. Gershwin Publishing Corp.*, 389 U.S. 1045 (1968) (mem.) (No. 67-147), *denying cert. to* 372 F.2d 1 (9th Cir. 1967) [hereinafter K-91 Amicus Brief].

10. *See United States v. ASCAP*, Equity No. 78-388 (S.D.N.Y., filed Aug. 30, 1934).

choice, blanket licenses also reduced the incentive and ability of music users to choose from alternative arrangements that might otherwise decrease payments to the PRO.

The Antitrust Division of the Justice Department negotiated Consent Decrees regarding competitive practices with ASCAP in 1941¹¹ and 1951,¹² and with BMI in 1941¹³ and 1966.¹⁴ Per the terms of these Consent Decrees, ASCAP and BMI must offer to radio and television stations *program licenses* that make the full catalog available on an individual program basis. The Consent Decrees specify that program licenses must provide a “genuine choice” to the blanket. Despite the stipulation, television and radio broadcasters subsequently continued to allege that ASCAP and BMI program licenses were priced anticompetitively.

On September 5, 2000, the Antitrust Division and ASCAP filed with the U.S. District Court of the Southern District of New York a Joint Motion to enter a newly negotiated Second Amended Final Judgment (AFJ2) that resolves many outstanding issues in performing rights.¹⁵ As discussed in an accompanying memorandum, AFJ2 generally expands and clarifies ASCAP’s obligation to offer genuine license alternatives to more user groups, such as background music providers and Internet companies.¹⁶ It also streamlines administrative provisions for resolving rate disputes and modifies or eliminates restrictions that now govern ASCAP’s relations with its members.

The paper reviews the economics and history of the market for performing rights and the recent Amended Final Judgment that ASCAP and the Justice Department entered. It is organized as follows. Section 2 overviews the legal nature of the performance right in musical compositions and the means of its enforcement. Section 3 introduces blanket licensing and the historic Consent Decrees that the U.S. Department of Justice negotiated with ASCAP and BMI. Section 4 discusses the antitrust cases that upheld, with restrictions, the legality of blanket licensing, while Section 5 considers ratemaking matters that subsequently resulted in important rulemakings in U.S. District Court. Sections 6-8 discuss AFJ2, particularly as it concerns competitive licensing and writer relations. Section 9 concludes the paper.

11. *United States v. ASCAP*, 1941-1943 Trade Cas. (CCH) ¶ 56, 104 (S.D.N.Y. 1941).

12. *United States v. ASCAP*, 1950-1951 Trade Cas. (CCH) ¶ 62, 595 (S.D.N.Y. 1950).

13. *United States v. BMI*, 1940-1943 Trade Cas. (CCH) ¶ 56, 096 (E.D. Wisc. 1941).

14. *United States v. BMI*, 1966 Trade Cas. (CCH) ¶ 71, 941 (S.D.N.Y. 1966).

15. AFJ2, *supra* note 7.

16. AFJ2 Memorandum, *supra* note 8, at 3-4.

THE PERFORMANCE RIGHT AND ITS ENFORCEMENT

Copyright for the words and lyrics embedded in musical compositions is now protected by the Copyright Act of 1976, which was enacted on January 1, 1978 and codified in Title 17 of the U.S. Code.¹⁷ Section 106 grants four exclusive rights to composers/writers who create musical works. These rights include:

1. The right to reproduce the work in copies or phonorecords,
2. The right to prepare derivative works based upon the work,
3. The right to distribute copies or phonorecords of the work,
4. The right to perform the work publicly,
5. The right to display the work publicly.¹⁸

The fourth right, embedded in section 106(4), represents the *public performance right* for musical compositions that is the topic of this paper.¹⁹ Public performance rights in musical compositions should not be confused with previous rights to physically reproduce, derive, and distribute the music or lyrics of a musical composition. These rights together compose the *mechanical right* or, when applied to video soundtracks, the *synchronization right*. Writer copyright in musical compositions also should not be confused with copyrights in the actual *sound recordings* that are made by singers and instrumentalists and owned by their recording labels. Sound recording rights are now protected in the U.S. only for non-broadcast digital audio transmissions.²⁰

17. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2591 (1976) (codified as amended at 17 U.S.C. §§ 101-1101). As extended in 1998, all audio or visual works completed in the U.S. after the act's 1978 effective date are now copyrighted for 70 years after the creator's death. 17 U.S.C.A. § 302(a) (West Supp. 2000). Anonymous works, pseudonymous works, and works made for hire are protected until the earlier of 95 years after publication, or 120 years after creation. § 302(c). Prior to the passage of the new act, the previous 1909 Copyright Act protected works for a period of 28 years after publication. Copyright Act of 1909, ch. 320, § 23, 35 Stat. 1075, 1080. Copyright was renewable for an additional 28 year term. *Id.* Through subsequent amendments, the renewal period for works completed between 1964 and 1977 was extended to 47 years and renewal for a second term was made automatic. 17 U.S.C. §§ 303-304. In eliminating the need for renewal, the United States first adopted existing international standards established in Article 7 of the Berne Convention for the Protection of Literary and Artistic Works, *revised* Jul. 24, 1971, *amended* Sept. 28, 1979, S. TREATY DOC. NO. 99-27 (1986).

18. Copyright Act of 1976, 17 U.S.C. § 106 (1994).

19. Per Section 101 of the Copyright Act, 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." 17 U.S.C. § 101.

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) The right 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.

Id.

20. See 17 U.S.C.A. § 106(a) (effective Feb. 1, 1996); 17 U.S.C.A. §114(d) (West Supp. 2000)

There are two general categories of performance rights. *Small* or *non-dramatic* rights pertain to compositions (including popular songs) that are performed independently of a created story (or dramatic or concert excerpt thereof). Since use here may be spontaneous, individual licensing between user and writer is often impractical. Consequently, the PROs reasonably act as transactions agents for licensing material, monitoring performances, and collecting royalties on behalf of their members or affiliates. By contrast, *grand* or *dramatic* rights pertain to musical compositions that are performed as part of a larger theatrical production or concert excerpt thereof. Because dramatic rights can be negotiated in advance of actual performance, PROs do not license them.

ASCAP and BMI are the two major American PROs that license non-dramatic public performances of copyrighted musical compositions. After composing a song, a writer will enlist one of the PROs to act as her collecting agent.²¹ Once affiliated, a writer will enlist the services of a PRO-affiliated music publisher, to whom she passes the copyright.²² The PROs distribute license revenues evenly to publishers and writers based on estimated number of performances.²³

Fees for broadcast licensees are negotiated periodically with individual networks/stations or their collective agents (such as the Radio Music Licensing Committee and Television Music Licensing Committee). Each radio station generally pays a fixed percentage of its adjusted advertising revenue for a blanket license. Cable channels pay blanket fees based on advertising revenues or numbers of subscribers. The three full-time television networks pay fixed fees that are adjusted annually for inflation. Local television station fees are negotiated for the industry as a whole and subsequently apportioned to each station based on estimated viewership.

In addition to blanket licenses, broadcasters have other ways of “clearing” music used on television programs. Per the terms of the relevant Consent Decrees, PRO license arrangements must be *non-exclusive*; i.e., licensees may directly contract with writers and publishers for usage rights for particular compositions. *Direct licensing* entails contracts between broadcast stations and writers for individual musical works that may be

(exempting certain broadcast transmissions from the provisions of §106(6) and providing statutory licensing for others).

21. Dual affiliation of an individual is not permitted, but different members of a writing team may belong to different PROs.

22. A publisher markets songs to record labels, administers the copyright, collects mechanical royalties, and sometimes edits the song.

23. Each organization compensates its writers based on censuses or samples of broadcast airtime. Performances on TV networks, syndicated shows, and cable programs are practically surveyed by universal census, while radio and local TV stations are monitored through scientific samples of program logs, cue sheets, or off-the-air tapes.

performed on station-produced shows, such as themes for local news and talk shows. *Source licensing* entails deals between copyright owners and program producers who hire music for prerecorded soundtracks used on network and syndicated programs. Once secured by a producer, performance rights can be conveyed with the program to station buyers.²⁴

Finally, each PRO must offer a *program license*, which is a “mini-blanket” that confers full usage rights for all catalog music used during the presentation (i.e., non-commercial) of specified programs or day parts. Total program payments for a particular licensee depend upon the total number of programs in which catalogued music is used. Program licenses should not be confused with per use licenses that would price each individual performance. As program fees can be reduced as more programs are “cleared” through source or direct-licensing, a station can save licensing revenues if it can source- or direct-license its music at a rate that is below the prevailing program fee. Program licenses are augmented with separate *commercial* “mini-blankets” that license off-program uses that surround the feature presentations.

A broadcast station or network can then obtain the same rights with a blanket license or a combination of direct, source, program, and commercial licenses. The licensee will then choose its most preferred licensing system by comparing blanket fees with amounts from a modular alternative. If the market were perfectly competitive, the fee for each program license would equal the rate of the best direct- or source-license alternative, and blanket fees would differ from the sum of the composites only by the incremental administration costs that the providing PRO would save by implementing the blanket.

BLANKET LICENSING AND CONSENT DECREES

The U.S. Congress first extended copyright to theater music in 1856²⁵ and to non-dramatic performances in 1897.²⁶ Since music use in non-dramatic settings was exclusively live and often spontaneous, performance rights were difficult to enforce and unauthorized performances were frequent. Consequently, several prominent composers (including Victor Herbert, Irving Berlin, John Philip Sousa, and James Weldon Johnson) established ASCAP, the first American PRO, in order to protect the performance rights of writers and publishers in non-dramatic settings. An unincorporated collective owned and governed by its songwriters and publisher *members*, ASCAP instituted a system of blanket licenses that enabled music halls, movie theaters, and other licensees to perform,

24. The wide majority of this material is commissioned work-for-hire. The remainder is prerecorded songs that may add to the background of the program.

25. Act of Aug. 18, 1856, ch. 169, 11 Stat. 138, 139.

26. Act of Jan. 6, 1897, ch. 4, 29 Stat. 481, 482.

without infringement, any registered composition in its entire catalog for a specified contract period. ASCAP distributed blanket revenues to its members based on a monitored count of public performances.

ASCAP's license revenues grew substantially in the 1920s as music made its way to broadcast radio. A second PRO in the U.S., SESAC, was formed in 1930.²⁷ Relatively small, privately owned, and for-profit, SESAC has always operated without Justice Department and court involvement. To license alternative content to enable a radio boycott of ASCAP in 1940, the radio industry established a third organization, BMI, which picked up many country, blues, and early rock writers that ASCAP did not admit. Owned by private broadcast stations, BMI is a nonprofit corporation that counts songwriters and publishers as *affiliates*.

Licensing 80 percent of all music performed on the radio, ASCAP attracted its first antitrust suit from the Antitrust Division in 1934. The Department contended that ASCAP dominated the radio industry and should be dissolved.²⁸ The case became dormant after the government received a continuance after a two-week trial. In 1941, the Department sued both ASCAP and BMI on the principal ground that their blanket licenses, which were their sole offerings, were in restraint of trade. Consent Decrees quickly followed that specified, among other things, that licensing practices must be *non-exclusive* and that licenses and individual members/affiliates should be allowed to directly contract with one another.²⁹

ASCAP's Consent Decree specified that ASCAP could not discriminate in prices or terms charged to similar users,³⁰ stipulated that ASCAP must offer a per program alternative to the blanket license,³¹ required that radio network licenses cover the downstream broadcast by local radio stations,³² and imposed a number of membership obligations.³³ A related criminal action against ASCAP was settled immediately afterward, when ASCAP, its president, and its entire board of directors were convicted of criminal acts on pleas of *nolo contendere*. After signing the Decree, ASCAP immediately moved to require that all direct license revenues be pooled, thereby negating any writer incentive to pursue the alternative licenses that the Department had envisioned.

27. The full organization name, Society of European State Authors and Composers, is not relevant. The organization is quite small, numbering little more than 2000 affiliates.

28. *United States v. ASCAP*, Equity No. 78-388 (S.D.N.Y., filed Aug. 30, 1934).

29. *United States v. ASCAP*, 1941-1943 Trade Cas. (CCH) ¶ 56, 104 (S.D.N.Y. 1941); *United States v. BMI*, 1940-1943 Trade Cas. (CCH) ¶ 56, 096 (E.D. Wisc. 1941).

30. Act of Jan. 6, 1897, ch. 4, 29 Stat. 481, 482.

31. *Id.* at 404.

32. *Id.*

33. *Id.* at 405.

Despite the fact that accompanying music on movies had moved after 1929 from live theater instruments to pre-recorded soundtrack, ASCAP continued to license soundtrack music in movie theaters in the subsequent years. In 1948, 164 cinema owners sued ASCAP for violations of Sections 1 and 2 of the Sherman Act regarding its requirement that movie producers contract only with theaters that purchased ASCAP licenses. In a key district court decision, ASCAP was found to be a combination in restraint of trade because all members were required to license works at pooled rates and could not therefore compete against one another in marketing their performance rights.³⁴ The district court issued an injunction against the practice.³⁵

With the advent of television, the Justice Department negotiated a new Consent Decree with ASCAP in 1950.³⁶ Under Sections VII and VIII, ASCAP agreed to extend to television broadcasters the program license and to avoid any “discrimination among the respective fees fixed for the various types of licenses which would deprive the licensees . . . of a genuine choice from among such various types of licenses.”³⁷ The Consent Decree also reaffirmed the need for license non-exclusivity (IV(A-B), VI),³⁸ banned price discrimination between “similarly situated” licensees (IV(C)),³⁹ and restricted the length of each non-motion picture performance license to five years or less (IV(D)).⁴⁰ The Decree foreclosed ASCAP from movie soundtracks by requiring that synchronization and performance rights be licensed at the same time (i.e., by the composer). (IV(E), V(C)). A fee-setting Rate Court was established in the District Court for the Southern District of New York for hearing license disputes, with the burden of proof upon ASCAP to show reasonableness (IX).⁴¹ The Justice Department and BMI modified their respective Decree in a similar fashion in 1966⁴² and instituted a Rate Court provision in 1994.⁴³ BMI is now about to litigate its first major license matter before its respective Rate Court.

The modified Consent Decree served ASCAP well in 1967, when the organization brought suit against a radio station in Washington that contended that ASCAP’s blanket license was an unlawful combination in violation of the Sherman Act. The Ninth Circuit Court of Appeals affirmed a district court decision that upheld ASCAP because its blanket licenses were non-exclusive and its license fees were under the surveillance of the

34. Alden-Rochelle, Inc. v. ASCAP, 80 F. Supp. 888, 894 (S.D.N.Y. 1948).

35. *Id.*; See also M. Witmark and Sons v. Jensen, 80 F. Supp. 843 (D. Minn. 1948).

36. United States v. ASCAP, 1950-1951 Trade Cas. (CCH) ¶ 62, 595 (S.D.N.Y. 1950).

37. *Id.* at 63, 754.

38. *Id.* at 63, 752-53.

39. *Id.* at 63, 752.

40. *Id.*

41. *Id.* at 63, 754.

42. United States v. BMI, 1966 Trade Cas. (CCH) ¶ 71, 941 (S.D.N.Y. 1966).

43. United States v. BMI, 1996-1 Trade Cas. (CCH) ¶ 71, 378 (S.D.N.Y. 1994).

district court.⁴⁴ The U.S. Solicitor General supported the decision⁴⁵ and the Supreme Court denied certiorari.⁴⁶

PERFORMANCE RIGHTS AND ANTITRUST

Music use on broadcast television in the 1940s and early 1950s was much as it had been on radio—spontaneous use on popular variety shows. Consequently, a blanket license here was as useful as it had been to radio stations. However, with the advent of pre-recorded programs and music soundtracks, spontaneous use declined considerably. Over 95 percent of usage minutes on television now appear on pre-recorded soundtrack.⁴⁷ Like movie producers, television producers can reasonably consider source-licenses for soundtrack music that combine synchronization and performance rights.

However, this cost-saving exercise is pointless unless savings are made possible in the licensing fees that ASCAP and BMI charge to television stations. As soundtrack prerecording became more prevalent in the 1950s, television networks and stations came to challenge blanket licenses more aggressively than had their radio predecessors. In 1961, local station plaintiffs sued in the ASCAP Rate Court to compel a modified blanket license that would have allowed stations to carve out syndicated programs with pre-recorded soundtracks. When the district court narrowly interpreted its rulemaking authority under the Consent Decree and denied the request, the Second Circuit affirmed the denial.⁴⁸ In denying this application, the district court suggested that applicants initiate a private antitrust suit or urge the Justice Department to attempt to modify the Decree. This threw down the gauntlet for the antitrust action that would follow.

Following a fee dispute with BMI, CBS brought an action against both PROs in 1969. The plaintiff argued that blanket licensing embodied illegal

44. *K-91, Inc. v. Gershwin Publ'g Corp.*, 372 F.2d 1 (9th Cir. 1967).

45. *K-91 Amicus Brief*, *supra* note 10.

46. 389 U.S. 1045 (1968) (mem.), *denying cert. to* 372 F.2d 1 (9th Cir. 1967).

47. Usage minutes can now be categorized as feature (1.4%), theme (3.2%), background instrumental (41.4%), and commercial (54.0%). Holden, M., 2000, "ASCAP and BMI Usage Weightings – Out-of-Step with the World?" 3 *FILM MUSIC MAGAZINE*, 345. *Feature music* includes compositions that are the primary focus of audience attention, *theme music* is used to open and close programs, *background music* is used to complement screen action, and *commercial music* includes advertising jingles, public service announcements, and promotional music that pitch other programs. Theme, background, and commercial music invariably entail pre-recorded soundtrack.

48. "A consent decree, though it is a judicial decree, is principally an agreement between the parties . . . and must be interpreted consistently with 'plain meaning' or 'explicit language'" — *U.S. v. Atlantic Refining Co.*, 360 U.S. 19, 22-23 (1959); *Suarez v. Ward*, 896 F.2d 28, 30 (2d Cir. 1990); *Berger v. Heckler*, 771 F. 2d 1556, 1568 (2d Cir. 1985) — "and not by reference to what might satisfy the purposes of one of the parties to it." *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 574 (1984) (quoting *United States v. Armour & Co.*, 402 U.S. 673, 681-682 (1971)).

price-fixing, unlawful tying, a refusal to deal, and a misuse of copyright. It was therefore *per se* illegal under both Sections 1 and 2 of the Sherman Act⁴⁹ and the Declaratory Judgment Act.⁵⁰ The complainants sought a ruling to require ASCAP and BMI to offer a system of direct licenses where licensees and members/affiliates would individually contract with one another.

A 1972 district court dismissed the tie-in and block-booking charges since PRO licenses were non-exclusive.⁵¹ In 1977, the Second Circuit Court of Appeals reversed, holding that BMI was engaging in *per se* illegal price-fixing, and remanded the matter.⁵² Supported by an *amicus* brief from the Justice Department, ASCAP and BMI appealed the decision to the U.S. Supreme Court in 1979.

In an oft-cited decision, Justice White ruled that blanket licenses were properly examined under a rule of reason that generally applied to Sherman Act cases.⁵³ The proper inquiry must focus on whether the effect is designed to “increase economic efficiency and render markets more, rather than less, competitive.”⁵⁴ In this context, the blanket license is not a “naked restraint of trade with no purpose except stifling of competition.”⁵⁵ Rather, it is greater than the sum of its parts [and] to some extent, a different producer [with] certain unique characteristics. It allows the licensee immediate use of covered compositions, without the delay of prior individual negotiations, and great flexibility in the choice of musical material.⁵⁶ Continuing, the blanket is a distinct good “of which the individual compositions are raw material” and enables a market “in which individual composers are inherently unable to compete fully effectively.”⁵⁷ On remand, the circuit court affirmed the original District Court decision, finding that the blanket licenses were non-exclusive.⁵⁸

Antitrust issues reemerged in 1981 when five owners of local television stations, representing a class of 450 owners of 750 stations, sought to preclude ASCAP and BMI from issuing blanket licenses. The complainants argued that the program license was uneconomically priced. Blanket licensing was alleged to be a violation of Section 1 of the Sherman Act⁵⁹ and a misuse of copyright.

49. 15 U.S.C. §§ 1, 2 (1994).

50. 28 U.S.C. §§ 2201, 2202 (1994).

51. *CBS v. ASCAP*, 337 F. Supp. 394 (S.D.N.Y. 1972).

52. *CBS v. ASCAP*, 562 F.2d 130 (2d Cir. 1977).

53. *BMI v. CMS*, 441 U.S. 1 (1979).

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

55. *Id.* (quoting *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963)).

56. *Id.* at 22.

57. *Id.*

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

59. 15 U.S.C. § 1.

The district court concurred, noting that the percentage-of-revenue in the ASCAP program license exceeded sevenfold its blanket counterpart and that only two stations consequently had chosen an ASCAP program license.⁶⁰ With this comparison, the Court concluded “that the per program license was too costly and burdensome to be a realistic alternative to the blanket license.”⁶¹ The court then issued an injunction that prohibited the practice of blanket licensing.

Influenced by a seminal law review article,⁶² the Second Circuit in 1984 reversed the district court, finding that blanket arrangements do not restrain trade if alternative means of acquiring performance rights are “realistically available.”⁶³ Judge Newman ruled that the “the only valid test of whether the program license is ‘too costly’ to be a realistic alternative is whether the price for such a license . . . is higher than the value of the rights obtained.”⁶⁴ The sevenfold markup of program licenses was held to be reasonable because the respective program and blanket percentages were based on different revenue bases.

THE ASCAP RATE COURT

The matter of rate determination for program licenses moved in 1990-91 to the ASCAP Rate Court, which conducted an administrative hearing in which 963 independent and 20 network-owned stations sought final determination of blanket and program fees for historic periods in which interim license fees had prevailed. These local stations were attempting to negotiate with ASCAP an all-industry fee aggregate that could be subsequently assigned to individual stations based on respective audience size, day part ratings, and program clearance. Hearing Magistrate Michael Dolinger issued a decision in 1993.⁶⁵

Consolidating testimony from two opposing testifying economists, the Magistrate found that there is no applicable economic theory for determining blanket rates for performance licenses. Previous fee levels—tempered by the recognition of changing circumstances—were the only reasonable starting points for subsequently administered fee-setting.⁶⁶ The magistrate then applied—with adjustments for annual inflation and station growth—fee levels from a prior blanket license in 1972. This produced a

60. *Buffalo Broad. Co. v. ASCAP*, 546 F. Supp. 274, 289 (S.D.N.Y. 1982).

61. *Id.*

62. Lionel S. Sobel, *The Music Business and the Sherman Act: An Analysis of the “Economic Realities” of Blanket Licensing*, 3 *LOY. L.A. ENT. L. REV.* 1 (1983).

63. *Buffalo Broad. Co. v. ASCAP*, 744 F.2d 917 (2d Cir. 1984).

64. *Id.* at 926.

65. *United States v. ASCAP (In re Buffalo Broad. Co.)*, 1992-1994 Copyright L. Dec. (CCH) ¶ 27,088 (S.D.N.Y. 1993).

66. *Id.* at 26, 370.

serious reduction from ASCAP's requested amount for the blanket percentage.

ASCAP had urged the court to set the percentage-of-revenue for program licenses at a fourfold multiple of any blanket fee amount, together with an unspecified increment to cover additional expenses that it would have incurred in administering and monitoring the program. The magistrate held that this proposal was designed to render the program arrangement "technically available, but practically illusory for virtually all stations."⁶⁷ It "would trivialize what was plainly not intended to be a trivial set of provisions" in the Consent Decree.⁶⁸

To resolve the problem, Magistrate Dolinger designed the program fee in a manner where the typical local television station would pay to ASCAP equal amounts under the blanket and program alternatives, exclusive of additional administration costs. To do this, the magistrate estimated that the typical local station used the ASCAP program license in roughly 75 percent of its programming. Magistrate Dolinger set the percentage-of-revenue in the program license at a 1.33 multiple of the blanket rate. This roughly ensured "revenue equivalence" between program and blanket revenues for the typical station (i.e., $1.33 \times .75 = 1$).⁶⁹ A 7 percent increment was then added to compensate ASCAP for the additional inefficiencies and administrative costs that inhere in program licensing.⁷⁰ Facing the retroactive application of his formula to eleven historical years, the magistrate's stated intent for the implemented program licensing system was to limit switching from blanket to program licensing.⁷¹

ASCAP and its licensees subsequently agreed to an additional 10 percent increment on the program license amount to provide a separate "mini-blanket" to cover all commercial music used during the day. This modification enabled stations to clear individual programs simply by attending to music within the actual content of the show, rather than the more difficult process of clearing both content and commercial music.⁷² However, this second rider added yet another cost to the program license

67. *Id.* at 26, 383.

68. *Id.* at 36, 385.

69. *Id.* at 26, 391.

70. *Id.* at 245.

71. "The hypothetical average station will find the blanket license somewhat less expensive than the per-program license, unless the station undertakes to clear some amount of its programming either by source or direct licensing, or by other methods, all of which involve their own costs. Under these circumstances, *we are unlikely to see such a rush of stations seeking to utilize this license as to impose undesirable burdens and inefficiencies on the functioning of the music license market.*" *Id.* at 26, 392 (emphasis added).

72. This "mini-blanket" was actually part of Dolinger's original decision. However, a subsequent District Court disallowed Dolinger's commercial license as beyond the wording of the 1950 Consent Decree. *United States v. ASCAP (In re Capital Cities/ABC, Inc.)*, 157 F.R.D. 173, 204 (S.D.N.Y. 1994).

compared with the blanket alternative, which automatically covers commercial uses at no additional cost.

ASCAP's present fees for program licenses for radio stations, which were established outside of Rate Court and designed with no reference to revenue equivalence relationship, now offer even less of a "genuine choice." Commercial radio stations pay fees that are based on a percentage of adjusted station revenue; the percent fees can be negotiated individually or by an all-industry licensing committee. ASCAP's blanket license for major radio stations is 1.615 percent of adjusted gross revenue.⁷³ For program users, percentage fees per licensed program are set at 4.22 percent of the first 10 percent of weighted program hours where feature music is used.⁷⁴ Fees for all additional hours with feature music are set at 2.135 percent. ASCAP then adds an additional 0.24 percent for a "mini-blanket" to cover all music used on radio commercials.⁷⁵ Depending on the number of weighted hours, the markup of the program percentage above the blanket rate may range from 60 to 177 percent. The matter took a turn in 1995 when a group of radio stations unsuccessfully sought to apply Magistrate Dolinger's equivalence formula to obtain a better program license for their particular situation.⁷⁶ Not yet under a Consent Decree, ASCAP's licenses for Webcasters incorporate similar discounts for blanket licensees.⁷⁷

SECOND AMENDED FINAL JUDGMENT

Faced with the ongoing responsibility generally to enforce the nation's antitrust laws and specifically to afford to music licensees a "genuine choice" between blanket and program licenses, the Antitrust Division targeted ASCAP's licensing practices as a necessary first step to reform licensing in the performing rights industry:

73. *Frequently Asked Questions About Licensing*, at <http://www.ascap.com/licensing/licensingfaq.html> (last visited Feb. 22, 2001).

74. *Id.*

75. *Id.*

76. The applicants, Salem Media and New England Continental Media, included 429 local radio stations that broadcast a largely religious format featuring mixed talk and music. They argued that music use in their station group was substantially below the all-music format of most radio stations and pressed for a "genuine choice" in a per program alternative. The applicants acknowledged that ASCAP's offered blanket fee, 1.615% (which was based on net advertising revenue), was reasonable. However, the applicants contended that the per program fee of 4.22% was useful only to a station that used music in 33 per cent or less of its programming. They felt that the per program license fee to their member stations should reflect a true percent equivalent for daily music usage for their particular station group, as in Dolinger's decision. However, the application of the application of the equivalence formula was rejected in District Court, which found that the station group was not typical of the radio group as a whole and not entitled to a separate license. *United States v. ASCAP (In re Salem Media of California, Inc.)*, 902 F. Supp. 411 (S.D.N.Y. 1995); *see also United States v. ASCAP (In re Salem Media of California, Inc.)*, 981 F. Supp. 199 (S.D.N.Y. 1997).

77. Publicly available information for Webcaster licenses for ASCAP and BMI are found respectively at <http://www.ascap.com/weblicense/webfaq.html> and <http://www.bmi.com/iama/webcaster/faq.asp> (visited Feb. 22, 2001)

Notwithstanding the clear requirement . . . that ASCAP offer broadcasters a genuine choice between a per-program and a blanket license, ASCAP has consistently resisted offering broadcasters a realistic opportunity to take a per-program license. Among other things, ASCAP has sought rates for the per-program license that have been substantially higher than the rates it has offered for the blanket license, and it has sought to impose substantial administrative and incidental music use fees and unjustifiable and burdensome reporting requirements on users taking a per-program license [including the costs of protracted litigation]. In addition, ASCAP has refused to offer a per-program or per-program-like license to users other than those explicitly named in the decree, although, over time, such licenses would be practical for more and more types of users.⁷⁸

The Justice Department negotiated a second version of the Amended Final Judgment, AFJ2, which is designed to enhance competition between ASCAP and providers of direct- and source-licenses.⁷⁹

The objective is to ensure that a *substantial number of users* within a similarly situated group will have an opportunity to substitute enough of their music licensing needs away from ASCAP to provide some competitive constraint on ASCAP's ability to exercise market power with respect to that group's license fees.⁸⁰ (Emphasis added)

This statement contrasts with Magistrate Dolinger's stated intent to limit exit from the ASCAP blanket license.⁸¹ The Department is now negotiating a similar decree with BMI.

In this pro-competitive context, Subpart VII(A)(1) of AFJ2 would oblige ASCAP to offer per-program licenses, upon request, to any requesting broadcaster or on-line transmitter. Subpart VII(A)(2) extends the idea of program licenses to *segment licenses* that may implicate day parts (on radio), page links (on Web sites), broadcast channels (on music subscription services), or other means of breaking down music usage by time or location. The per-segment license aims to ensure that users that do not transmit "programs" may nonetheless have access to a license that varies with music use. Accordingly, AFJ2 would allow the Rate Court magistrate great flexibility in its implementation.⁸²

78. AFJ2 Memorandum, *supra* note 8, at 24-25.

79. AFJ2, *supra* note 7.

80. AFJ2 Memorandum, *supra* note 8, at 32.

81. *See* BMI v. CMS, *supra* note 55.

82. AFJ2 Memorandum, *supra* note 8, at 26.

The new segment license conceivably could enable stronger competition between ASCAP and BMI. Because music licensees generally require catalog from both organizations, the two PROs do not compete against one another to sell blanket licenses and have no incentive to undercut the other's blanket fee. Rather, each may use the other's blanket fee as a benchmark for its own in its next negotiation with the particular industry group at hand. However, the two organizations could be given incentive to compete in the sale of segment licenses to broadcast and Webcast radio users, who can readily bunch songs from different writers to provide exclusive "all-BMI" or "all-ASCAP" segments. In a competitive market where license revenues depend on the number of segments actually sold, each PRO would have financial incentive to sell more exclusive segments by cutting license fees and assisting with material designed to extend the length of the segment.

Net of a surcharge that is designed to cover the additional costs of administering the program license, AFJ2 aims to ensure that the "total license fee [including commercial uses] for a per-program or per-segment license approximate the fee for a blanket license" for a typical user.⁸³ Music licensees are then to be categorized in groups of similarly situated customers that operate comparable businesses and use music in analogous manners.⁸⁴ Each category must have a Court-approved "representative music user"; i.e., a hypothetical licensee whose frequency and intensity of usage are typical of the license group-at-large.⁸⁵

For this representative user, the total expected payment for a necessary slate of ASCAP-program licenses should approximate its fee for the blanket alternative.⁸⁶ That is, if 50 percent of a representative station's programs use ASCAP music (defined as *any* music written by an ASCAP composer *regardless* of how it is eventually licensed), the appropriate percentage multiple for the program license should be 2 (i.e., 1/.5) times the percent rate for the blanket. The representative station may pay a blanket fee of 1 percent of its total advertising revenues, or a program fee of 2 percent of advertising revenues for the particular programs that it actually licensed. Once derived, the multiple is then extended to all stations in the user group. If ASCAP were actually able to license all the programs where its music was used, payments of the representative user would be identical under the blanket and program alternative licensing systems. However, payments to ASCAP diminish as more programs migrate to competitive alternatives.

83. AFJ2, *supra* note 7, at 6; AFJ2 Memorandum, *supra* note 8, at 29.

84. Among others, classifying factors include nature and frequency of performances, ASCAP's administration cost, competition among licensees, and licensee revenue source. AFJ2, *supra* note 7, at 5-6.

85. *Id.* at 5.

86. *Id.* at 11.

There is a significant difference between the formula described above and the Dolinger formula set out in *Buffalo Broadcasting*. In AFJ2, *all* of the station's programs that contain performances of music written by ASCAP members are to be counted as part of the 50 percent that use ASCAP music, *regardless of eventual license source*. This contrasts with Magistrate Dolinger's Section 5 formula (*supra*), which bases a program multiple on the fraction of station programs for which the ASCAP program license was *actually deployed*.⁸⁷

To further illustrate the difference, suppose in the above example that the representative station was able to source- or direct-license music requirements in 60 percent of its music-using programs, reducing the need for the ASCAP program license to 20 percent of all programs (i.e., $.50 \times (1 - .6)$). Dolinger's per program rate for the representative station and all users in its group would, thus, have increased to 5 percent (i.e., $1/.2$), a rate that takes into account that ASCAP program licenses were actually deployed in 20 percent of all programs. However, the revised fee percentage under AFJ2 would be just 2 percent (i.e., $1/.5$), since 50 percent of all programs continue to use ASCAP music under one license or another. Substantial savings are evidently possible in the latter system and ASCAP can no longer increase the program rate as usage of its program license declines.

As another pro-competitive gain, AFJ2 permits to each program licensee a full offsetting allowance for the "mini-blanket" fees for commercial and promotional music that is now used outside of the program. This amendment contrasts with previous procedures (see Section 5, *supra*) that fixed charges for the commercial "mini-blanket" as an *addition* to the program total. As previously mentioned, ASCAP may also fix a surcharge to compensate for its additional costs of administering the program license.⁸⁸

As an important economic matter, AFJ2 does not clearly specify whether the program/blanket multiple that is used to derive a particular station's program percent rate must be used to establish equal percent rates for *each* ASCAP-licensed program in the station's portfolio, or merely establish an *average* percent rates. Under strict nondiscrimination, the percent rate for each program licensed through ASCAP would necessarily be equal to one another. Alternatively, only the aggregate amount of program fees could be restrained as a percent of underlying program revenues, with individual discounts and upgrades permitted around the average for licenses charged to single programs. Enforced equality has been the case, but AFJ2 seems ambiguous.⁸⁹ However, to provide to ASCAP the greatest ability to match

87. Although AFJ2 does not specify it, program counts and proportions can be weighted by advertising revenue, which is the instrument upon which licenses are based.

88. AFJ2, *supra* note 7, at 10.

89. A clause against discrimination in Section IV(C) may applicable to customer discrimination,

competitive providers of source and direct licenses, this strict equality should be relaxed. This point is discussed further in a technical memorandum soon to be made available by this author.

While AFJ2 provides economic incentives for a station licensee to *substitute* a source- or direct- alternative for an ASCAP program to, the draft Decree is somewhat more protective against license *exit*, as would result when radio stations switch from music to talk formats. In the latter case, no license would be needed at all. However, if the representative user were able to reduce its usage of ASCAP material (program, source, and direct) from 75 percent to 50 percent of all segments in the day, its program multiple would be adjusted in AFJ2 to restore its original revenue stream.⁹⁰ Upward adjustments of this nature would limit ASCAP's incentives to lower prices aggressively to maintain a program or segment license against exit threats. A related competitive problem will occur in the market for exclusive segment licenses (discussed above), where rate adjustments will protect ASCAP from segment shifts to BMI, and vice versa.

WRITER RELATIONS

As a second key modification, Section XI of AFJ2 entirely dispenses with an amendment to the original Decree known as the "1960 Order."⁹¹ Recognizing ASCAP's then-control over 85 percent of all catalogued music compositions, the "1960 Order" was designed to govern ASCAP's arrangements and operating procedures regarding its member writers. The Order constrained principally the weights used to divide ASCAP's royalty pool among its membership for different uses of music (e.g., feature vs. commercial), but also prescribed rules for voting, performance surveys, and mechanisms for resolving disputes among members.⁹² These rules were to

program discrimination, or both. ASCAP is enjoined from "entering into, recognizing, enforcing, or claiming any rights . . . of public performance which discriminates in license fees or other terms and conditions between licensees similarly situated." *Id.* at 7.

90. The original amount of program revenue can be restored by adjusting the program/blanket multiple from $1.33 = 1/.75$ to $1.5 = 1/.67$

91. *United States v. ASCAP*, 1960 Trade Cas. (CCH) ¶ 69,612 (S.D.N.Y. 1960).

92. The ASCAP royalty pool is divided over sampled performances that are weighted based primarily on broadcast type, time of day, and usage category (feature, background, theme, advertising, and promotional). The weights assigned to different music uses are based upon judgments of relative worth that have no comparable market benchmarks. The ratio of most valued (i.e., feature) to least valued (i.e., commercial) music is 1:1 in the U.K., 3:1 in France, 4.5:1 in Germany, and 33.3:1 at ASCAP. Holden, *supra* note 32.

Because of the difficulty in assessing composer's investment and opportunity costs, a true regulatory price for musical compositions could probably not be determined The investment in musical compositions, however, cannot be estimated accurately Even if the investment could be assessed, however, a fair rate of return, or opportunity cost, for composers could probably not be gauged because of the difference in quality and popularity of various musical compositions.

John Cirace, *CBS v. ASCAP: An Economic Analysis of a Political Problem*, 47 *FORDHAM L. REV.* 277, 305 (1978).

be made public and changes submitted to the Department or Rate Court for approval. Nonetheless, ASCAP's relations with its soundtrack and commercial writers have been quite contentious and the Rate Court has often declined jurisdiction.⁹³

In moving to vacate the "1960 Order," the Department confirmed that there are no practical economic standards useful in judging the relative worth of different kinds of performance minutes and expressed some discomfort that ASCAP claimed a Department imprimatur on the fairness of its rates.⁹⁴ Rather, Section XI(B)(1) would allow ASCAP to distribute, without DOJ oversight, collected monies (less costs) to writers based on the number of ASCAP-licensed performances of their works, with varying weights for different kinds of music based on ASCAP's subjective assessment of the value. Special awards are permitted to writers of material with particular prestige value. The chosen weighting method must be consistently applied and made public; upon request, a writer may learn exactly how her resulting royalty check was determined.

For members who contend that ASCAP's payment system is unfair, AFJ2 greatly restricts ASCAP's existing ability to impede writer exit. Contingent upon the entry of a similar rule in the BMI Consent Decree (which is yet to be negotiated), Section XI(B)(3) would enable writers to leave at the end of each calendar year without penalty. The Department suggests that its surveillance of ASCAP payments can be vacated because BMI, with a market share now roughly equal to ASCAP's, and SESAC now present more substantial competitive alternatives than they did in 1960. Presumably, any ASCAP member dissatisfied with its royalty system would willingly move to another PRO, having the financial means to compensate the new migrant.⁹⁵

The Department may nonetheless be relying here on untested economic theory and ignoring some important administrative considerations that now limit the financial ability of ASCAP and BMI to compete. BMI's considerable increase in market share in 1960-1994 resulted, at least in part, from the fact that ASCAP was fee-regulated while BMI was not. BMI now

93. See *United States v. ASCAP (In re Karmen)*, 914 F. Supp. 52 (S.D.N.Y. 1996); *United States v. ASCAP (In re Salem Media of Cal., Inc.)*, 739 F. Supp. 177 (S.D.N.Y. 1990).

94. The Department has been unable to identify any principled way to evaluate whether the changes are appropriate and therefore has almost never objected to the changes. The requirements . . . thus impose costs on ASCAP (and consequently its members), on the Department, and on the Court, but provide little if any protection to members. Yet ironically, when members do object to ASCAP's distribution practices, ASCAP frequently invokes the Department's review of its formula and rules as demonstrating that its distribution practices are fair and appropriate.

AFJ2 Memorandum, *supra* note 8, at 41-42.

95. *Id.* at 42.

operates in a similarly regulated world that continues to keep its license fees some amount short of ASCAP's.

Despite a 1993 district court ruling that blanket fees paid to a PRO should be tied primarily to changes in usage of its particular catalog, adjusted for revenue growth and inflation,⁹⁶ subsequent actions have not granted to ASCAP and BMI the financial ability to compete across-the-board to attract talent from one another. In the short run, there is no administrative procedure by which either organization can adjust blanket licenses for quarterly or annual changes in catalog size or usage. Consequently, royalties for acquisitions of new writers and material covered by a blanket license can only be distributed by reducing payments to other writers.⁹⁷ With no immediate correspondence between license fees and usage levels, a "zero sum game" of this nature evidently limits competition.

Presumably, ASCAP can earn more at its next major negotiation if it can attract talent from BMI. Here too there is no demonstrated dependence of contract fees upon catalog size. Though each may pursue a limited number of "star" writers who enhance the prestige of their catalog, the connection between catalog prestige and actual negotiated amounts is also quite tenuous.

Aggressive competition for migrating writers would be conceivable if license payments could be adjusted immediately for changes in PRO market share. For example, if blanket licenses were adjustable for quarterly changes in market share, license amounts due to ASCAP and BMI would change in appropriate and opposite directions if shares were to shift. However, unless overall usage increased, the combined amount paid to the PROs would not change.

However, usage-based pricing would be difficult to implement for a number of practical reasons. First, under a system with different Rate Courts, there is no single legal authority to tie ASCAP and BMI blanket rates to changes in their respective market shares. Second, there is no objective way to weigh and aggregate different music usage types. Attempts to do so introduce an arbitrary judgment element, as each advocate is likely to produce a weighting scheme that is particularly

96. "Surveying the fluctuations in the amount of music used by a network over time provides an adequate proxy by which to gauge whether the significance of music to network programming has changed relative to prior years; assuming all other factors remain constant, the direction in which a network's music use has headed should chart the course for the music licensing fees owed to ASCAP." *United States v. ASCAP (In re Capital Cities/ABC, Inc.)*, 831 F. Supp. 137, 156 (S.D.N.Y. 1993). "It appears to the Court that a formula that factors into the calculation of a royalty . . . the changes in both the levels of gross income earned by a network and the degree to which music is used by a network, provides an approach that addresses many of the concerns raised by the parties." *Id.* at 158.

97. To a degree, some additional savings may be made possible by reducing overheads.

favorable to its own market position. Adjudicating between them would be a difficult administrative task.

OTHER SAFEGUARDS

There are a number of other provisions in AFJ2 that will enhance not only license competition between ASCAP and its membership, but also the power of users to achieve a more efficient outcome.

Collective Licensing: Under Section IV(B), ASCAP may not interfere with the right of its members to license compositions directly or through any agent other than another PRO. This extends member rights from the direct licensing of individually controlled compositions to contracting with agents, such as music libraries, that can negotiate and contract on behalf of a group of writers.

“Through to the Audience”: Under the terms of AFJ2, ASCAP must offer to each broadcaster, background music provider, or on-line transmitter a “through to the audience” license that automatically conveys performance rights from licensee to a secondary user; e.g., from cable network to cable operator.⁹⁸ This would allow the original entity, which controls decisions regarding the deployment and licensing of musical content, to make competitive choices and convey savings to downstream users. “Through to the audience” licensing can represent a major competitive gain for Internet transmitters, who do not now have an explicit right under the present Consent Decree to request and contract for such licenses.

First Time Rules: Under the terms of AFJ2, ASCAP may not use license fees negotiated during the first five years it licenses a particular industry as a benchmark for subsequent fees that it may seek.⁹⁹ AFJ2 presumes that new music users are fragmented, inexperienced, lacking in resources, and unduly willing to acquiesce.

Digital licensing: Recognizing the potential of digital rights management to supplant the need for ASCAP monitoring and protection of digital rights, the DOJ’s memorandum accompanying AFJ2 states:

Technologies that allow rights holders and music users to easily and inexpensively monitor and track music usage are evolving rapidly. Eventually, as it becomes less and less costly to identify and report performances of compositions and to obtain licenses for individual works or collections of works, these technologies may erode many of the justifications for collective licensing of

98. United States v. ASCAP (*In re Turner Broad. Sys., Inc.*), 782 F. Supp. 778 (S.D.N.Y. 1991), *aff’d*, 956 F.2d 21 (2d Cir. 1992).

99. AFJ2, *supra* note 7, at 13-14.

performance rights by PROs. The Department is continuing to investigate the extent to which the growth of these technologies warrants additional changes to the antitrust decrees against ASCAP and BMI, including the possibility that the PROs should be *prohibited* from collectively licensing certain types of users or performances.¹⁰⁰

(Emphasis added).

CONCLUSION

The Department of Justice and ASCAP have negotiated a proposed Amended Final Judgment that promises improvement in a long problematic area for television and radio broadcasters: the presence—or lack—of a “genuine choice” between blanket and program licenses charged for the right to publicly perform music in non-dramatic settings. If implemented for ASCAP and extended to BMI, AFJ2 would provide broadcast licensees with a reasonable opportunity to use a system of program, direct, and source-contracts as a means of avoiding “all-or-nothing” blanket licenses that they may find overpriced. Consequently, broadcast licensees increasingly will be able to contract directly with composers rather than being required to enter into licenses with their respective performing rights organizations. ASCAP and BMI will have to offer program licenses that compete with their own members and affiliates, and broadcasters, advertisers, and the public-at-large will benefit from the outcome.

However, AFJ2 and the Rate Courts may be lacking in their governance of the competitive market between ASCAP and BMI. If all protections for payouts to ASCAP members are vacated, the DOJ will need to rely on head-to-head competition between the two organizations for new writers in order to ensure fairness. As explained above, ASCAP and BMI do not currently operate under administrative rules that can consistently adjust blanket license fees in response to changes in usage or catalog size. Consequently, they do not have the financial ability to engage in the competition that the Department envisions.

If the Courts cannot establish rules to enable vigorous across-the-board competition for songwriters and composers, the Antitrust Division might tell us what purpose is served by having two (or three) PROs, as opposed to just a single PRO. At the dawn of the Internet era, this is a timely issue that broadcasters, Webcasters, artists, legislators, and regulators need to resolve in short order. With administrative difficulties in systematically relating blanket fees to music use and catalog size, the most efficient means of providing a blanket license for radio and television broadcasting now

100. AFJ2 Memorandum, *supra* note 8, at 9 n.10.

appears to be regulated monopoly. Writers and publishers may benefit considerably from scale economies in litigation and administration costs that could be achieved if the blanket license for musical compositions were so operated, as is now the case in every nation except Brazil.¹⁰¹ Based on recent data, for every dollar paid out to members and affiliates, ASCAP and BMI, respectively, retain 15.4 cents¹⁰² and 22.0 cents. These numbers, as well as all implicated negotiation and administrative costs incurred by music licensees, might reasonably be halved if blanket licensing of performance rights were restructured as a regulated monopoly. Legislators could then reasonably call upon the Department to state exactly where it sees workable competition emerging between ASCAP and BMI and the ways in which its Consent Decrees will facilitate that competition.

As a final matter, the Department's suggested prohibition on digital licensing is a practical idea that can be implemented for Webcasting and other non-interactive services now eligible for compulsory licensing of sound recordings under Section 114(d)(2) of the Copyright Act.¹⁰³ In November 2000 (after the release of AFJ2), the Recording Industry Association of America (RIAA), the trade association for the five major record labels, unveiled the online arm of its Sound Exchange royalty payment system, which now collects digital royalties for sound recordings broadcast over digital satellite and music subscription services.¹⁰⁴ As of the time this writing was written, Sound Exchange had entered into contracts with 280 record companies, with Big Five contracts likely to follow very soon. The system will monitor online performances of all sound recordings, and distribute royalties evenly between recording labels and artists. Evident transactional economies would be possible if Sound Exchange or similar label organizations were additionally empowered to administer the performance rights for the underlying musical compositions and split royalties evenly between publisher and writer. Indeed, a joint

101. A monopoly in performance rights, the Performing Rights Society in the U.K. shares administrative costs with the Mechanical Copyright Protection Society and most recently retained 16.9 cents from every paid out pound. *PRS Year End Results 1999*, at http://www.prs.co.uk/prs.nsf/sitepages/press_results99 (last visited Feb. 22, 2001). The organization has a long run target of 14.5 percent. In Germany, GEMA economizes by collecting royalties for both performance rights and mechanical reproductions.

102. *ASCAP Ushers in New Millenium With West Coast Membership Meeting*, at <http://www.ascap.com/press/meeting-020800.html> (Feb. 1, 2000).

103. Copyright Act of 1976, 17 U.S.C.A. § 114(d)(2) (West Supp. 2000). The Digital Performance Rights in Sound Recordings Act of 1995 amended sections 106 and 114 of the Copyright Act to extend sound recording rights to non-broadcast digital audio transmission, such as music delivery services that charge subscription fees. Digital Performance Rights in Sound Recordings Act, Pub. L. No. 104-39, 109 Stat. 336 (1995). The Digital Millenium Copyright Act of 1998 further amended Section 114 to include digital audio performances on the Internet and satellite radio. Digital Millenium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2890 (1998). Eligibility conditions for a compulsory license for non-interactive services were made consistent with existing limits on broadcast radio play to ensure that broadcast transmissions do not displace record sales.

104. Andrew Morse, *Treating the Web Like Royalty*, THE STANDARD, Nov. 28, 2000, at <http://www.thestandard.com/article/display/0,1151,20422,00.html>.

collection process now exists for tax revenues collected on digital audio recorders and tapes under the Audio Home Recording Act, which statutorily assigns two thirds of revenues to copyright owners in the sound recording, and one-third to the musical composition.¹⁰⁵

Administrative efficiencies would also be considerable if digital performances of musical compositions and sound recordings could be regulated together. License fees for statutory licenses for digital sound recording performances and secondary mechanical reproductions are determined periodically in arbitrations at the Copyright Office, where all affected players have equal standing to comment and present arguments.¹⁰⁶ Such a process is more open and more efficient than the present system for performance rights that operates under two independent Rate Courts that interpret Consent Decrees narrowly, fail to coordinate operations, and deny standing to all parties except the Department, ASCAP, and BMI.¹⁰⁷

105. 17 U.S.C. §§ 1004-1006.

106. See Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings, 37 C.F.R. § 260 (2000); Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, 37 C.F.R. § 255 (2000). On the narrowness of interpretation, see note 33, *supra*. See, United States v. ASCAP (*In re* Salem Media of Cal., Inc.), 739 F. Supp. 177 (S.D.N.Y. 1990); United States v. ASCAP (*In re* Shenandoah Valley Broad. Co.), 208 F. Supp. 896 (S.D.N.Y. 1962), *aff'd*, 331 F.2d 117 (2d Cir. 1964) (licensee standing); United States v. ASCAP (*In re* Karmen), 914 F. Supp. 52 (S.D.N.Y. 1996); United States v. ASCAP (*In re* Karmen), 708 F. Supp. 95 (S.D.N.Y. 1989) (writer standing).

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