

CBS v. ASCAP: Performing Rights Societies and the Per Se Rule

The licensing of musical performance rights through performing rights societies, principally the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI),¹ has presented difficult questions for federal antitrust law over the last thirty-seven years.² Through a consent decree first entered in 1941 and substantially amended in 1950,³ the Justice Department and

1. ASCAP, a nonprofit, unincorporated association, is the largest performing rights licensing society in the United States. It consists of 6,000 music publishing companies and 16,000 writers, composers, and lyricists; its repertory contains over three million compositions. *CBS v. ASCAP*, 400 F. Supp. 737, 742 (S.D.N.Y. 1975), *rev'd*, 562 F.2d 130 (2d Cir. 1977). Its members grant ASCAP the nonexclusive right to license users to perform their compositions. ASCAP licenses only "small"—or nondramatic—performing rights in musical compositions. 562 F.2d at 132. *See* 2 NIMMER ON COPYRIGHT § 125.6 (1976) (distinction between dramatic and nondramatic right). ASCAP collects revenues from licensees, 400 F. Supp. at 742, and it distributes royalties to composers and publishers. A composer may elect compensation based solely on the number of performances of his copyrighted works, or he may choose a more complex formula. Order Approving Consent Decree, Attachment A, *United States v. ASCAP*, Civ. No. 13-95 (S.D.N.Y., as amended July 30, 1976). A publisher is compensated solely on the basis of performances of the copyrighted works. *Id.*, Attachment B. For distribution purposes ASCAP surveys performances made by broadcast and certain nonbroadcast licensees. *Id.* § II; *see* note 27 *infra*. ASCAP also maintains a surveillance system to detect unlicensed users and institutes infringement actions on behalf of its members. 400 F. Supp. at 742; *see* note 27 *infra*. Detailed descriptions of the structure and operation of ASCAP are contained in Finkelstein, *Public Performance Rights in Music and Performance Rights Societies*, in 7 COPYRIGHT PROBLEMS ANALYZED 13-19 (rev. ed. 1961).

BMI, a nonprofit corporation, was founded by broadcasters in 1939 during a dispute with ASCAP, *see* Garner, *United States v. ASCAP: The Licensing Provisions of the Amended Final Judgment of 1950*, 23 BULL. COPYRIGHT Soc'y 119, 122-23 (1976); it remains wholly owned by broadcasters. It is affiliated with approximately 10,000 publishing companies and 20,000 writers, and it functions in the same general manner as ASCAP. It has a repertory of approximately one million compositions. 400 F. Supp. at 742. Both the trial and appellate courts in *CBS* treated ASCAP and BMI as identical for purposes of antitrust analysis. *See id.*; 562 F.2d at 132 n.1 (references to ASCAP to include BMI). Except where otherwise indicated, this Note will refer only to ASCAP when discussing issues common to both.

There are also a number of small, privately owned, performing rights societies. The most important of these is SESAC Inc. *See* 1 NIMMER ON COPYRIGHT § 107.6 (1976). SESAC Inc. has approximately 300 publisher affiliates and several hundred writer affiliates. Telephone conversation with Charles Scully, Director of Information Services, SESAC Inc., Dec. 6, 1977 (notes on file with *Yale Law Journal*). Its licensing and distribution techniques are similar to those of the two larger performing rights societies.

2. The antitrust history of ASCAP has been analyzed in, e.g., Garner, *supra* note 1; Timberg, *The Antitrust Aspects of Merchandising Modern Music: The ASCAP Consent Judgment of 1950*, 19 LAW & CONTEMP. PROB. 294 (1954).

3. *United States v. ASCAP*, Civ. No. 13-95, 1940-43 Trade Cas. ¶ 56,104 (S.D.N.Y. 1941) [hereinafter cited as 1941 Decree], *amended*, 1950-51 Trade Cas. ¶ 62,595 (S.D.N.Y. 1950) [hereinafter cited as 1950 judgment].

ASCAP have attempted to reconcile the Sherman Act with the most effective marketing technique for musical compositions—blanket licensing. Under the blanket license system, a customer pays a single fee for the right to perform any and all copyrighted musical compositions in the ASCAP repertory for the period covered by the fee, generally one year. The fee does not vary according to the number of compositions actually played.⁴

In *Columbia Broadcasting System, Inc. v. American Society of Composers, Authors and Publishers (CBS v. ASCAP)*,⁵ the Second Circuit recently sustained a claim that blanket licensing constitutes price fixing,⁶ but the court declined to apply the full force of the Sherman Act to ASCAP's activities. Instead, it fashioned an exception to the per se rule against price fixing⁷ in order to preserve the advantages of blanket licensing for users of copyrighted musical compositions other than television networks.

This Note argues that blanket licensing is incompatible with the antitrust laws and that the Second Circuit's attempt to reconcile the two threatens the effectiveness of the per se rule against price fixing. To preserve important cost advantages of the blanket license system, the Note proposes that performing rights societies be exempted from the antitrust laws and that the exemption be coupled with limited regulation of the licensing of musical compositions. This proposal will allow for the development of a diversity of licensing arrangements while ensuring the economical marketing of music and the protection of the value of copyright.

I. Performing Rights Societies and the Antitrust Laws

A. *ASCAP: Function and Rationale*

The composer of a musical work may obtain a copyright on the work. A copyright grants the composer the legal right to dictate the terms on which the work is reproduced, performed, distributed, displayed, or used as a source for derivative works.⁸ The performance right in a musical work is the exclusive right to perform or authorize the performance of the work.⁹ Very soon after the performance right

4. See p. 785 *infra*.

5. 562 F.2d 130 (2d Cir. 1977), *rev'g* 400 F. Supp. 737 (S.D.N.Y. 1975).

6. *Id.* at 140.

7. For discussion of the per se rule against price fixing, see pp. 787-88 & notes 23-39 *infra*.

8. Copyrights Act, Pub. L. No. 94-553, § 106, 90 Stat. 2546 (1976) (to be codified at 17 U.S.C. § 106). See generally 1 NIMMER ON COPYRIGHT §§ 100-108 (1976).

9. See generally 1 NIMMER ON COPYRIGHT § 107 (1976).

was first recognized by Congress in 1897,¹⁰ two related difficulties arose in connection with it. First, musical works were performed so frequently and in so many different locations that it was impossible for composers to detect unauthorized uses of their compositions.¹¹ Performances of musical works are by nature ephemeral—once an unauthorized performance is completed no evidence of the infringement remains. Further, those who wished to perform compositions without infringing the copyright found it costly to negotiate licenses from the many copyright owners whose works they wished to perform.¹²

ASCAP was formed in 1914 to reduce the twin costs of individual license negotiation and of policing infringements. It functions as a “clearing house” for copyright owners and users.¹³ Composers and publishers grant ASCAP the nonexclusive right to license their works, and ASCAP offers licenses to users on either a “blanket” or a “per program” basis. For a blanket license a broadcaster pays a fixed percentage of its total advertising revenues during the period the license is in force¹⁴—generally one year.¹⁵ For a per program license the user pays a fixed percentage of advertising revenues from only those programs that actually use ASCAP music.¹⁶ Under either license, however, the broadcaster can use the entire ASCAP repertory; the fee does not vary according to the number of compositions actually broadcast.¹⁷ ASCAP does not license individual compositions, nor does it act as an agent for individual authors who wish to do so.¹⁸ Music users are free to negotiate directly with composers, but

10. Act of Jan. 6, 1897, ch. 4, 29 Stat. 481 (repealed 1906) (current version at Copyrights Act, Pub. L. No. 94-553, § 106(4), 90 Stat. 2546 (1976) (to be codified at 17 U.S.C. § 106(4))).

11. Finkelstein, *supra* note 1, at 8.

12. See Finkelstein, *ASCAP as an Example of the Clearing House System in Operation*, 14 BULL. COPYRIGHT SOC'Y 2, 2 (1966). The problem persists. See A. NEALE, *THE ANTITRUST LAWS OF THE U.S.A.* 421-22 (2d ed. 1970); 1 NIMMER ON COPYRIGHT § 107.6 (1976).

13. Finkelstein, *supra* note 12, at 2.

14. Finkelstein, *supra* note 1, at 14.

15. 400 F. Supp. at 742.

16. *Id.* Originally ASCAP offered only a blanket license, but the 1941 Decree compelled ASCAP to offer a per program license. See pp. 789-90 *infra*. Virtually all radio stations and the three television networks obtain blanket licenses. 400 F. Supp. at 742. CBS has proposed a system of per use licensing to replace the blanket and per program licensing of television networks. See pp. 800-01 *infra*.

17. 562 F.2d at 133-34.

18. ASCAP does not deal in television synchronization rights—the right to record music on the soundtrack of a taped or filmed production—or movie performance or synchronization rights. The Harry Fox Agency, Inc., acts as a broker for producers wishing to obtain these rights. Licenses are issued for the specific compositions needed for individual television shows or films. The Fox Agency is involved only in the license negotiations between producers and music publishers and does not monitor television productions or films for possible copyright infringement. See 400 F. Supp. at 759-60.

these negotiations take place very rarely and are conducted outside the ASCAP framework.¹⁹

The value of ASCAP's clearing-house function lies in the reduction of the costs of market transactions. Some of the more obvious of these transaction costs are the costs of information about prices and market opportunities, the costs of negotiating separate contracts for each unit of production, and the costs of policing these contracts.²⁰ Without ASCAP, licenses for individual performances would have to be negotiated, and all performances would have to be policed by all composers. The costs would be enormous. A single radio station, for example, may broadcast as many as 60,000 performances of recorded musical compositions each year, involving as many as 6,000 separate compositions.²¹ As of 1975 there were 7,158 radio stations in the United States,²² as well as some 714 television stations²³ and thousands of restaurants, bars, hotels, theaters, and other businesses that use ASCAP music.²⁴ It has been estimated that there are now over one billion licensed performances of ASCAP music annually.²⁵ Although there are market mechanisms for reducing these transaction costs, such as the use of specialists who sell price information,²⁶ none of these techniques can eliminate the costs entirely. The "all-or-nothing" nature of both the blanket and per program licenses provides a very effective method of reducing transaction costs in the broadcast music business. A blanket or per program license allows a user to secure all the music it needs in one transaction—the purchase of the blanket or per program license. Even more important, however, since all compositions are licensed together, individual composers are protected against unauthorized uses and are spared the

19. See *United States v. ASCAP (In re Application of National Broadcasting Co.)*, 1971 Trade Cas. ¶ 73,491 (S.D.N.Y.), discussed in note 52 *infra*.

20. Coase, *The Nature of the Firm*, 4 *ECONOMICA* (n.s.) 386 (1937), reprinted in *READINGS IN PRICE THEORY* 332, 336 (K. Boulding & G. Stigler eds. 1952); see A. ALCHIAN & W. ALLEN, *EXCHANGE AND PRODUCTION: COMPETITION, COORDINATION AND CONTROL* 110-16 (2d ed. 1977).

21. Memorandum of the United States as Amicus Curiae on Petition for Writ of Certiorari, at 5, *K-91, Inc. v. Gershwin Publishing Corp.*, 389 U.S. 1045 (1968), denying cert. to 372 F.2d 1 (9th Cir. 1967) (citing finding of facts by district court).

22. FCC Rel. No. 73,357, AM and FM Broadcast Financial Data, 1975, at Table 4 (Nov. 8, 1976).

23. FCC Rel. No. 68,100, TV Broadcast Financial Data—1975, at Table 4 (Aug. 2, 1976).

24. Finkelstein, *supra* note 1, at 15.

25. J. Dean, *The ASCAP Survey: Its Design and Objectives* 1 (1963) (unpublished pamphlet).

26. For example, market and commodity specialists, employment agencies, brokers, and wholesalers all serve this function in the market. A. ALCHIAN & W. ALLEN, *supra* note 20, at 33, 110.

expense of monitoring the innumerable performances of their musical works.²⁷

B. *The Per Se Rule Against Price Fixing*

Price fixing and related practices such as division of markets, group boycotts, and tying arrangements²⁸ are per se illegal under section 1 of the Sherman Act.²⁹ In *United States v. Socony-Vacuum Oil Co.*,³⁰ the Supreme Court held that “[a]ny combination which tampers with price structures” is unlawful per se.³¹ The rule applies not only to agreements among sellers to set uniform prices directly, but also to any agreement whose purpose is effectively to control the price of a commodity.³² The finding that a particular practice “interfer[es] with the free play of market forces”³³ is sufficient to warrant a holding of illegality.³⁴ No inquiry into the economic justification of particular price-fixing agreements is necessary; they are all prohibited “because of their actual or potential threat to the central nervous system of the economy.”³⁵

27. To compute licensor royalties ASCAP currently surveys performances of ASCAP music. The survey covers all performances aired on the three television networks, but only samples performances on radio and local television programming. For the radio sample 60,000 hours of programming are collected each year, less than one percent of total radio programming hours; for the local television sample about 30,000 hours of local television programming are sampled. ASCAP also collects 4,000 hours of wired music (e.g., Muzak) programming. ASCAP does not survey performances in night clubs, bars and other similar establishments. Telephone conversation with Bernard Korman, General Counsel to ASCAP, December 12, 1977 (notes on file with *Yale Law Journal*).

The sampling technique is employed because of the impossibility of monitoring each of the more than one billion performances of ASCAP music each year. Taking a census of all performances would cost far more than the amount ASCAP collects. There would be no money left to distribute to any writers or publishers. *Id.* See Dean, *supra* note 25, at 3.

Even if it were possible to monitor performances for the purposes of policing infringement, blanket licensing is a superior solution since it avoids the cost of collecting and disseminating information on the various license arrangements of individual authors and the nature and extent of the performances of their works.

28. See Flittie, *The Sherman Act § 1 Per Se—There Ought To Be a Better Way*, 30 Sw. L. Rev. 523, 530 (1976) (listing practices labeled per se violations).

29. 15 U.S.C. § 1 (Supp. V 1975). See generally Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division* (pt. 1), 74 YALE L.J. 775 (1965).

30. 310 U.S. 150 (1940).

31. *Id.* at 221.

32. *Id.* at 223.

33. *Id.* at 221.

34. *Id.* at 221-22.

35. *Id.* at 224 n.59. The rationale of the per se rule against price fixing was first articulated in *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927). The Court there declined to inquire into the reasonableness of the fixed prices and identified four factors supporting this decision: first, every price-fixing agreement results in the elimination of competition; second, the power to fix prices whether reasonable or not carries with it the power to control the market and fix unreasonable prices; third, that a fixed price is

More modern statements of the rule have expressed its rationale in terms of a balance between the administrative costs of identifying the cases where the price fixing results in economic benefits and the economic benefits of such exceptional cases.³⁶ In the case of price fixing, the Court has determined that the potential economic benefits of the practice are too infrequent and insubstantial to justify the costs of identifying the cases where they occur and has thus adhered to its per se prohibition.

If, as the Second Circuit found in *CBS v. ASCAP*, ASCAP's licensing activities violate the per se prohibition against price fixing, there are three policy options available: (1) for courts to enforce the antitrust laws regardless of the consequences for the marketing and protection of copyrights; (2) for courts to ignore the per se rule against price fixing in this market; (3) for Congress to exempt the licensing of musical performance rights from the antitrust laws and to couple that exemption with regulation to prevent abuses. The first option would return the industry to its pre-1914 state by reimposing the enormous costs of individual license negotiation and policing. The second option, as will be seen,³⁷ would effectively destroy the per se rule against price fixing. This Note proposes that the third option be exercised.

II. ASCAP in the Courts

Since ASCAP is a combination of virtually every composer of significance,³⁸ its licensing arrangements have long been subjected to antitrust scrutiny.³⁹ ASCAP has entered into consent decrees with the Justice Department that have eliminated several anticompetitive practices but have left blanket licensing intact. In *CBS v. ASCAP*, however, the blanket licensing scheme was found to violate the Sherman Act. Yet the court, fearing a return to pre-1914 transaction costs, was reluctant to press for dissolution of ASCAP or for radical restructuring of its basic licensing practices.

reasonable at the time it is fixed in no way guarantees that changing economic conditions will not render it unreasonable; fourth, the Court wished to avoid the necessity of undertaking in each case the complex task of examining the market and the structure of the industry in question. *Id.* at 397-98.

36. *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 607-10 (1972); *United States v. Container Corp. of America*, 393 U.S. 333, 341 (1969) (Marshall, J., dissenting); *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1956).

37. See pp. 797-800 *infra*.

38. The district court in *CBS v. ASCAP* found that "[a]s a practical matter virtually every domestic copyrighted composition is in the repertory of either ASCAP . . . or BMI." 400 F. Supp. at 742.

39. For accounts of the antitrust history of ASCAP, see note 2 *supra* (citing sources).

A. *The Consent Decrees*

In the years before 1941, ASCAP held exclusive rights to license compositions of its members: members of ASCAP could license only through ASCAP and did not retain the right to license directly.⁴⁰ Moreover, ASCAP offered only the annual blanket license;⁴¹ per program licenses were not available. In 1941 the Justice Department challenged ASCAP's policy of requiring all users to take a blanket license⁴² and alleged that the practice of obtaining exclusive licenses from composers enabled ASCAP members to exact arbitrary prices from its licensees.⁴³ A consent decree was negotiated requiring ASCAP to offer broadcasters per program licenses as well as blanket licenses⁴⁴ and prohibiting ASCAP from withholding any of its repertory as a means of exacting higher prices from users.⁴⁵ Moreover, in order to provide an alternative to dealing with ASCAP, the decree enjoined ASCAP from demanding exclusive licensing privileges from its members and from interfering with individual licensing by members.⁴⁶ This last provision was ineffective, however, because under the terms of the decree ASCAP could compel a composer who licensed directly to pay into the ASCAP revenue pool the royalties he received from such independent licensing. Since distributions to composers from the pool were made at a rate fixed by ASCAP, there was little incentive to deal directly with music users.⁴⁷

The 1941 decree was substantially amended in 1950.⁴⁸ Three

40. See Finkelstein, *The Composer and the Public Interest—Regulation of Performing Rights Societies*, 19 LAW & CONTEMP. PROB. 275, 287-88 (1954).

41. See Garner, *supra* note 1, at 123.

42. *Id.* (citing Complaint of Plaintiff, United States v. ASCAP, 1940-43 Trade Cas. ¶ 56,104 (1941)).

43. See 562 F.2d at 133. Although there is no specific evidence as to the Government's intentions, see Garner, *supra* note 1, at 124, it appears that the primary goals of the suit were to force ASCAP to offer more than just the blanket license, to prevent ASCAP's interfering with the right of members to license their compositions to music users directly, and to curb ASCAP's power to exact arbitrary prices from users. *Id.* at 123-24; see 562 F.2d at 133.

44. 1941 Decree, 1940-43 Trade Cas. ¶ 56,104, at 404.

45. *Id.* at 405.

46. *Id.* at 403.

47. 562 F.2d at 133. Section II(I)(a) of the 1941 Decree provided that ASCAP could require that "all moneys derived from the issuance of licenses by the respective members of the defendant [ASCAP] to be paid by the licensee to defendant and distributed in the same manner as other revenues." 1941 Decree, 1940-43 Trade Cas. ¶ 56,104, at 403.

Since distributions from the ASCAP revenue pool were at that time based on factors other than the number of current performances, see 1941 Decree § I(10), *id.* at 405, a composer could not expect to make much more money by dealing directly, even if such direct dealing resulted in more performances of his works.

48. 1950 Trade Cas. ¶ 62,595 (S.D.N.Y. 1950). For detailed analyses of the 1950 Judgment, see Garner, *supra* note 1, at 125-27; Timberg, *supra* note 2, at 301-21.

After 1941 two federal district courts held that ASCAP's practices in licensing motion

changes were of particular importance to broadcasters. First, ASCAP could no longer compel payment into the ASCAP revenue pool of revenues from any direct agreements between users and composers.⁴⁹ Second, the parties agreed that the rates for the per program license had to be set so that a genuine economic choice existed between the annual blanket and per program licenses.⁵⁰ Third, a mechanism was established for judicial fee setting when the licensee and ASCAP were unable to arrive at a negotiated fee.⁵¹

The consent decrees substantially reduced ASCAP's market power by prohibiting exclusive blanket licensing, but they did not disturb the practice of blanket licensing itself. The terms of the decrees indicate that the Justice Department was most concerned that alternatives to the annual blanket license—the per program license or direct licensing—be available. The decrees demonstrate the continuing reluctance of the courts (and the Justice Department) to undermine the blanket licensing scheme that lies at the heart of ASCAP's clearing-house function.⁵²

picture exhibitors violated both § 1 and § 2 of the Sherman Act. *Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888 (S.D.N.Y. 1948); *M. Witmark & Sons v. Jensen*, 80 F. Supp. 843 (D. Minn. 1948), *appeal dismissed mem. sub nom. M. Witmark & Sons v. Berger Amusement Co.*, 177 F.2d 515 (8th Cir. 1949). In *Alden-Rochelle* motion picture exhibitors sued ASCAP claiming that ASCAP's prohibition of direct licensing by its members, together with its policy of refusing to grant licenses for musical performing rights to motion picture producers, compelled the exhibitors to obtain blanket music performance licenses from ASCAP in order to show films. 80 F. Supp. at 892. The court found that ASCAP had violated § 2 of the Sherman Act because ASCAP had the power to raise prices and to exclude competitors. 80 F. Supp. at 893-94. ASCAP's prohibition of direct licensing by members and its refusal to license motion picture producers were found to violate § 1 of the Act. *Id.* In *Jensen* these same arguments were offered by exhibitors as an affirmative defense to a copyright infringement action. The court explicitly adopted the holding in *Alden-Rochelle*, *M. Witmark & Sons v. Jensen*, 80 F. Supp. 843, 849 (D. Minn. 1948), *appeal dismissed mem. sub nom. M. Witmark & Sons v. Berger Amusement Co.*, 177 F.2d 515 (8th Cir. 1949), and refused to grant the copyright owners relief because they had illegally extended their copyright monopoly. *Id.* at 850.

As a result of these holdings and of the growing dissatisfaction with the 1941 Decree among music users, the government moved to reopen the 1941 Decree. *Timberg, supra* note 2, at 305-06.

49. 1950 Judgment, 1950-51 Trade Cas. ¶ 62,595, at 63,752.

50. *Id.* ¶ 62,595, at 63,753-54.

51. The essentials of the rate-fixing procedure established by § IX of the 1950 Judgment are as follows: if ASCAP and an applicant for a license cannot agree on a license fee after 60 days of negotiation, the applicant may apply to the District Court for the Southern District of New York for the court's determination of a reasonable fee. Once a fee for the license requested has been established, ASCAP must issue that license for the same fee to all other applicants similarly situated. *Id.* The district court has often been influential in encouraging parties to settle price disputes, but has never had to set a fee itself. Telephone conversation with Bernard Korman, General Counsel to ASCAP, October 25, 1977 (notes on file with *Yale Law Journal*).

52. The 1950 Judgment mandates only that ASCAP offer an annual blanket or per program license to broadcasters. 1950 Trade Cas. ¶ 62,595 at 62,753-54. In fact, § VI of the 1950 Judgment prohibits ASCAP from licensing individual compositions unless both the

Although the 1950 judgment ended ASCAP's troubles with the Justice Department, it did not pacify the broadcasters. Two principal complaints have come from the broadcasting industry: that under the rate schedule for the annual blanket license, broadcasters must pay royalties on programs using no music at all; and that under either form of license—blanket or per program—a broadcaster must pay the same royalties for a program using a few seconds of one ASCAP musical composition as for a program using many minutes of numerous ASCAP compositions.⁵³ In private antitrust actions,⁵⁴ broadcasters have argued that ASCAP's insistence on granting only blanket or per program licenses constitutes copyright misuse since such a license compels users to pay for rights to all of ASCAP's compositions in order to obtain licenses for the compositions that they desire.⁵⁵

licensee and the member have requested that ASCAP do so. If a user requests a license for an individual composition, and ASCAP is unable to reach the composer of the piece within 30 days, ASCAP may then issue the license. In *United States v. ASCAP (In re Application of National Broadcasting Co.)*, 1971 Trade Cas. ¶ 73,491 (S.D.N.Y. 1971), NBC requested a license under § VI for the 2,217 ASCAP compositions that were most frequently featured on NBC variety shows. NBC intended to obtain the rest of its music needs (such as background music for television shows) through direct transactions, see Garner, *supra* note 1, at 133 n.71, and thus avoid paying ASCAP for an annual blanket license for music that it could obtain directly. The court, however, interpreted § VI as not requiring ASCAP to act as an intermediary between broadcasters and individual composers. It noted that "[a] bulk user of music such as NBC can hardly avail itself of the limited procedures in Sections VI and IX." 1971 Trade Cas. at 90,009. Of course, under § IV(B) of the 1950 Judgment broadcasters are free to negotiate directly with composers for any or all compositions they need, 400 F. Supp. at 744, but virtually none do so, *id.* at 742.

53. See Complaint at 7, *CBS v. ASCAP*, 400 F. Supp. 737 (1975), *rev'd*, 562 F.2d 130 (2d Cir. 1977); Garner, *supra* note 1, at 128. Broadcasters would prefer to see an alternative licensing system devised. Under a "per use" system, for example, broadcasters would pay for only the compositions actually performed, Complaint at 7, *CBS v. ASCAP*, 400 F. Supp. 737 (S.D.N.Y. 1975), *rev'd*, 562 F.2d 130 (2d Cir. 1977), thereby allegedly promoting competition by encouraging direct licensing transactions. See Reply Brief for Plaintiff-Appellant at 20-21, *CBS v. ASCAP*, 562 F.2d 130 (2d Cir. 1977); pp. 800-01 *infra*.

54. The only option available to a broadcaster is a private antitrust claim. See note 60 *infra*. There have been only two such actions: *CBS v. ASCAP* and *K-91, Inc. v. Gershwin Publishing Co.*, 372 F.2d 1 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045 (1968). The courts have consistently prevented non-parties from using the consent decree as a vehicle for altering their relationships with ASCAP. *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 693 (1961) (unsuccessful attempt by nonparty to intervene to amend decree); *United States v. ASCAP (Application of Metromedia, Inc.)*, 341 F.2d 1003 (2d Cir.), *cert. denied*, 382 U.S. 877 (1965) (nonparty may not enforce decree through contempt action); *United States v. ASCAP (Application of Shenandoah Valley Broadcasting Inc.)*, 331 F.2d 117 (2d Cir.), *cert. denied*, 377 U.S. 997 (1964) (nonparty may not seek any relief not explicitly provided for by judgment).

55. 400 F. Supp. at 745; see 562 F.2d at 134. The district court, relying on *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969), held that proof that CBS was compelled to purchase the entire pool of copyrights was essential to the claim of copyright misuse and that CBS failed to prove such compulsion since direct negotiations with composers were held to be a practical alternative. 400 F. Supp. at 799-80. The issue at trial focused on the willingness of ASCAP members to negotiate directly with users and not on the transaction costs of such direct dealings. See *id.* at 752, 755 (summarizing issues). The

Broadcasters have also argued that blanket licensing is illegal price fixing.⁵⁶

Despite this longstanding discontent, prior to *CBS v. ASCAP* the Society appeared virtually immune from private antitrust attack.⁵⁷ In *K-91, Inc. v. Gershwin Publishing Corp.*,⁵⁸ the Ninth Circuit rejected a claim by radio broadcasters that the blanket license constituted price fixing, holding that the 1950 consent decree "disinfected" ASCAP by its provision for judicial supervision of the fee-setting process.⁵⁹

B. CBS v. ASCAP

The Second Circuit explicitly rejected the *K-91* court's conclusion that ASCAP was disinfected by the consent decree.⁶⁰ After the most thorough antitrust analysis of ASCAP's licensing practices yet attempted by a court, the Second Circuit found that "the ASCAP blanket license in its present form is price-fixing."⁶¹ Even though

closest the court came to analyzing transaction costs was its discussion of the contention that the absence of preexisting "machinery" for direct licensing effectively compelled CBS to purchase a blanket license. *Id.* at 757-65.

56. 562 F.2d at 135-36; *K-91, Inc. v. Gershwin Publishing Corp.*, 372 F.2d 1, 2 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045 (1968) (radio station argued ASCAP not entitled to relief in infringement action because it misused its copyright by fixing prices). The basis for this accusation is that an agreement among individual copyright owners to license their compositions necessarily restrains price competition. *See* pp. 793-94 & notes 65-69 *infra*.

CBS made both the price-fixing and copyright-pooling arguments in *CBS v. ASCAP* but was successful only on the price-fixing issue. 562 F.2d at 135, *aff'g in relevant part* 400 F. Supp. 737, 779 (S.D.N.Y. 1975); *see* note 55 *supra*.

57. *See* Note, *The ASCAP Consent Decree: The Effect on Potential Litigants*, 41 S. CAL. L. REV. 418 (1968).

58. 372 F.2d 1 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045 (1968).

59. *Id.* at 4. Several copyright owners—members of ASCAP—had sued a radio station operator for copyright infringement. The radio station operator admitted the infringement, but asserted as a defense that the copyright owners were misusing their copyrights and fixing prices. *Id.* at 2. For a case in which such a defense was successfully asserted against ASCAP, *see* *M. Witmark & Sons v. Jensen*, 80 F. Supp. 843, 850 (D. Minn. 1948) (denying relief in infringement suit because ASCAP had exceeded its legitimate copyright monopoly by fixing prices and by monopolizing market for performance rights for motion pictures).

60. 562 F.2d at 139 (citing *Sam Fox Publishing Co. v. United States*, 366 U.S. 683 (1961); *United States v. ASCAP* (Application of Shenandoah Valley Broadcasting, Inc.), 331 F.2d 117 (2d Cir.), *cert. denied*, 377 U.S. 997 (1964)). In *Sam Fox* a publishing company sought intervention as of right under FED. R. CIV. P. 24(a)(2) in a proceeding brought by the government to amend the 1950 judgment. The Supreme Court concluded that Sam Fox was not entitled to intervene, but noted that the firm was not foreclosed from a private antitrust action. 366 U.S. at 689. In *Shenandoah* a number of television stations sought a type of license not authorized by the 1950 judgment. In ruling that the applicants were entitled only to those licenses specified in the judgment, the Second Circuit noted that the applicants had the option of bringing "a private suit which our ruling here in no way affects." 331 F.2d at 124.

61. The district court had rejected CBS's price-fixing contention; it had suggested that the legality of blanket licensing was governed by the rules enunciated in *Automatic*

price fixing is a per se violation of the Sherman Act,⁶² the court did not enjoin blanket licensing.⁶³ Instead, it remanded to the district court for the formulation of a remedy and suggested that blanket licensing could continue if a remedy could be “fashioned which will ensure that the blanket license will not affect the price or negotiations for direct licenses.”⁶⁴

The Second Circuit’s finding that ASCAP fixes prices is squarely supported by *United States v. Socony-Vacuum Oil Co.*⁶⁵ and its descendants. When a group of sellers vend their product through a joint sales agency at a single price, competition among the individual sellers ceases to exist.⁶⁶ Market forces do not determine how much each seller is to receive for his product. Instead, the decision is made by the agent. ASCAP does not set the price for the licensing of single compositions as in simpler price-fixing schemes.⁶⁷ But by offering

Radio Co. v. Hazeltine Research, Inc., 339 U.S. 827 (1950), and Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969). As the Second Circuit correctly pointed out, however, these cases did not involve price fixing, since Hazeltine owned all the patents it licensed. 562 F.2d at 138; see Reply Brief of Plaintiff-Appellant at 11-12, CBS v. ASCAP, 562 F.2d 130 (2d Cir. 1977). On appeal CBS emphasized its price-fixing claim. See Brief for Plaintiff-Appellant at 20-22, *id.* Although the Second Circuit accepted the conclusion of the district court that ASCAP was not an illegal copyright pool, 562 F.2d at 135, it upheld the price-fixing claim, *id.* at 140.

62. See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940).

63. 562 F.2d at 140.

64. *Id.* It is difficult to conceive of circumstances under which the existence of an agreement to fix prices would not affect the price at which direct dealings would occur. In view of ASCAP’s and BMI’s domination of the market, the final price in any direct negotiation could hardly be the product of price competition, but would be influenced by the price fixed by ASCAP. Cf. F. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 164-73 (1970) (describing types of price leadership).

65. 310 U.S. 150 (1940).

66. 562 F.2d at 136. The district court found, and the court of appeals accepted, that although musical compositions are not perfectly fungible, within certain classes one composition will serve a programmer as well as another. *Id.* (citing 400 F. Supp. at 751-52).

67. If copyright owners were to agree to charge broadcasters a fixed amount for each performance of a musical work, the agreement would be a flagrant violation of the rule against price fixing and hence per se illegal. As the Court noted in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222 (1940): “An agreement to pay or charge rigid, uniform prices would be an illegal agreement under the Sherman Act.” If the individual composers were to appoint a committee to set the fee at which individual copyrights may be licensed, this too would be an elimination of price competition and illegal per se. *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969). In *Citizen Publishing* the Supreme Court held that a common sales agency created by two newspapers, which distributed the newspapers and sold advertising space at agreed upon prices, was illegal per se. *Id.* at 135. The restraints of trade were so apparent “as to justify the rather rare use of a summary judgment in the antitrust field.” *Id.* at 136.

A recent commentator has suggested that even after *Citizen Publishing* the courts may tolerate price fixing inherent in a joint venture of existing competitors. 91 HARV. L. REV. 488, 491 (1977). The “line of cases” offered to support this proposition consists of two district court cases decided long before *Citizen Publishing*. *Id.* at 491 n.24 (citing *United States v. Columbia Pictures Corp.*, 189 F. Supp. 153 (S.D.N.Y. 1960), and *United States v. Morgan*, 118 F. Supp. 621 (S.D.N.Y. 1953)). The state of the law of joint ventures after

a blanket license, it sets one price for all compositions, and price competition among members of ASCAP is eliminated as surely as if the rate for each performance were fixed at the outset.⁶⁸ Copyright owners, much as patent owners, may not pool their properties in order to fix prices.⁶⁹

Citizen Publishing indicates that courts will enjoin per se unlawful practices carried on by joint ventures of existing competitors. See Brodley, *The Legal Status of Joint Ventures Under the Antitrust Laws: A Summary Assessment*, 21 ANTITRUST BULL. 453, 456-58 (1976).

68. ASCAP's response to the charge that the blanket license eliminates price competition among ASCAP members was that the blanket license is a unique product that offers music users something no individual ASCAP member can offer—instant access to the entire ASCAP repertory. ASCAP argued that the blanket license suppressed competition among its members no more than the symphony orchestra suppresses competition among the musicians in the orchestra. Brief for Defendant-Appellees American Society of Composers, Authors and Publishers, at 75 n.*, 562 F.2d at 140. The court identified the fallacy in this argument:

[W]hen the orchestra plays as an ensemble it represents the only product of its kind. Here each composer, by contrast, records his own solo for separate broadcast. The musicians in an orchestra are not competitors; the contributors of copyrights for the blanket license in many situations are, and it is their price competition among themselves that is affected by the blanket license.

562 F.2d at 140. The court also rejected the defense that the provisions of the 1950 judgment for judicial fee setting guarantee the reasonableness of the fixed price: "That a price fixed by the agreement of competitors is 'reasonable' is not a defense . . ." *Id.* at 138 & n.23 (citing *United States v. Trenton Potteries Co.*, 273 U.S. 392, 396-97 (1927)).

ASCAP claimed that blanket licensing does not amount to fixing the price of individual performances since broadcasters have the option of negotiating directly with individual composers. Brief for Defendant-Appellee American Society of Composers, Authors and Publishers, at 67-73; 562 F.2d 138, 139. The possibility of direct licensing does not affect the legal determination that ASCAP is fixing prices. *Id.* at 138 ("Coercion is simply not an essential ingredient of price-fixing.") In every price-fixing conspiracy, cartel members have the option of selling at less than the fixed price. See G. STIGLER, *THE ORGANIZATION OF INDUSTRY* 42-45 (1968). In many cases where price-fixing arrangements have been declared illegal, the sellers actually exercised the option to deal at prices other than a single fixed price. See, e.g., *United States v. National Ass'n of Real Estate Bds.*, 339 U.S. 485, 488-89 (1950); *Plymouth Dealers' Ass'n v. United States*, 279 F.2d 128, 132 (9th Cir. 1960). The existence of the option does not alter the fact that ASCAP does fix prices.

ASCAP's activities have been compared to those of a middleman or wholesaler. See 91 HARV. L. REV. 488, 492-93 (1977). The activity of the middleman, it is argued, in purchasing from a group of sellers and then reselling at a single price "inherently involves the 'fixing of a collective price,'" *id.* at 492, yet such activity is not illegal under the Sherman Act. This argument, however, ignores the obvious distinction between a wholesaler and ASCAP: in the case of the wholesaler, price competition exists among those who sell to the middleman. Composers, through their agreements with ASCAP, designate an agent to suppress this price competition by fixing both the collective price of all copyrighted musical compositions and the level of compensation of individual composers. 562 F.2d at 136.

69. The Second Circuit correctly noted that patent pooling cases are in some respects analogous to the facts of *CBS*. 562 F.2d at 136. See *United States v. New Wrinkle, Inc.*, 342 U.S. 371 (1952) (finding per se illegality in arrangement among holders of competing patents to license combined patents and set minimum sale prices of goods produced using patented techniques).

If the pooling of patents to fix a resale price is per se illegal, the pooling of copyrights to fix a price at which copyright owners are compensated for individual performances should be illegal as well. In both cases the price of the "end product"—the manufactured product embodying the patent or the performance of the copyrighted composi-

Although the Second Circuit noted that “[p]rice-fixing . . . is generally unlawful per se,”⁷⁰ the court suggested circumstances under which ASCAP’s price fixing would be lawful. While it rejected the *K-91* “disinfection” holding,⁷¹ the *CBS* court quoted with approval the stipulation in *K-91* that for radio stations “[i]t would be commercially, practicably and virtually impossible for defendant and almost all other broadcasters to acquire a separate license for each performance broadcast over commercial stations.”⁷² The *CBS* court argued that for radio broadcasters blanket licensing (and its attendant price fixing) is a “market necessity” and therefore must be tolerated.⁷³ The court thus perceived at least two distinct markets for copyrighted musical compositions—network television and radio—although it applied the market necessity exception to ASCAP’s activities only in the radio market.⁷⁴

The fashioning of this “market necessity” or “market functioning” exception to the per se rule against price fixing is the heart of the Second Circuit’s effort to restrict the price-fixing holding in *CBS* to relations between the television networks and ASCAP.⁷⁵ The court adopted the argument of the Solicitor General in his *K-91* amicus brief that the price fixing inherent in blanket licensing is permissible in markets—such as radio—where it is impractical to negotiate and police direct licenses between broadcasters and composers.⁷⁶ On the basis of this analysis the court approved the result in *K-91*, a radio case, even as it declared the very same blanket licensing activities illegal for television networks.⁷⁷

tions—is not set by market forces but by the joint licensing agent of the individual licensors. See *United States v. Line Material Co.*, 333 U.S. 287 (1948) (cross-licensing agreement between patent owners that fixed price of final product illegal per se).

70. 562 F.2d at 136.

71. See note 60 *supra*.

72. 562 F.2d at 137 (quoting stipulation in *K-91, Inc. v. Gershwin Publishing Co.*, 372 F.2d 1 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045 (1968)).

73. *Id.* at 137-38.

74. The distinction drawn by the *CBS* court between the radio and television markets for copyrighted musical compositions has some validity insofar as marketing to radio broadcasters necessarily entails a greater number of transactions. Direct licensing in such a market would involve substantially higher transaction costs than direct licensing involving only three major television networks. The difference in transaction costs between the two markets, however, in no way justifies failure to apply the per se rule in one case—television—and not in the other, for the basis of the per se rule is judicial unwillingness to investigate the special characteristics of each case. See p. 788 & note 36 *supra*.

75. Both *CBS* and the Department of Justice recognized the existence of a “market functioning” exception. 562 F.2d at 136.

76. *Id.* at 137 (quoting Memorandum of the United States as Amicus Curiae on Petition for Writ of Certiorari, at 10-11, *K-91, Inc. v. Gershwin Publishing Corp.*, 389 U.S. 1045 (1968), *denying cert. to* 372 F.2d 1 (9th Cir. 1967)).

77. The Second Circuit took the view that the blanket licensing of television networks could not be saved by the market necessity exception, since the district court had found

After finding that blanket licensing in the television market is price fixing, the court, refusing to enjoin the practice, argued that the blanket license is not a "naked restraint" of trade. The court contended that blanket licensing may "serve a market need for those who wish full protection against infringement suits or who, for some other business reason, deem the blanket license desirable."⁷⁸ If a remedy could be devised to "ensure that the blanket license will not affect" direct licensing prices, blanket licensing could continue in certain circumstances.⁷⁹ While suggesting that blanket licensing might be allowed to continue if these conditions were met, the court recommended the development of a "per use" system, in which ASCAP would offer licenses to perform individual compositions at a set price.⁸⁰

There is a striking contrast between the finding of *per se* illegality of the blanket license and the suggestion that on remand blanket licensing could be preserved despite its illegality. The *CBS* court may have tolerated this apparent contradiction out of concern that elimination of blanket licensing would completely disrupt the market for copyrighted musical compositions.⁸¹ By splitting the market and applying the *per se* rule only to the licensing of television networks, the court prevented radio broadcasters from using its holding to challenge blanket licensing in the radio music market.⁸² And by suggesting that the blanket license could be preserved in the for-

that in the network television market direct licensing was a practical alternative. 562 F.2d at 138. ASCAP had proved this point in order to escape the charge of copyright misuse. ASCAP's brief on appeal did not even suggest that the blanket license could be saved by a market necessity exception. See Brief for Defendant-Appellees American Society of Composers, Authors and Publishers, at 67-82.

Since the district court rejected the contention that the blanket license constituted price fixing, 400 F. Supp. at 748, it never reached the issue of a possible market function exception.

78. 562 F.2d at 140. The court noted that the blanket license provides the licensee with a covenant not to sue for infringement and indemnification against suits brought by others.

79. *Id.*

80. *Id.*

81. It seems clear that the Ninth Circuit was motivated by this fear in holding in *K-91* that ASCAP was "disinfected" by the 1950 judgment; the court in *K-91* offered no analysis or case law to support its conclusion that the consent decree shields ASCAP from private antitrust attack. In fact, it has been held that even where a consent decree has expressly authorized activity amounting to a restraint of trade, the decree is incapable of shielding illegal activity. *United States v. Columbia Artists Management, Inc.*, 1963 Trade Cas. ¶ 70,955, at 78,800 (S.D.N.Y. 1963), *aff'd per curiam*, 381 U.S. 348 (1965). See note 60 *supra*. The *K-91* court faced an unappetizing choice because the parties had stipulated that there was no practical alternative to blanket licensing. See p. 795 *supra* (quoting stipulation). The court could either sanction obvious price fixing or enjoin what appeared to be the only means of both marketing copyrighted music efficiently and protecting copyright owners.

82. See 562 F.2d at 140 n.26 (distinguishing *K-91*).

mulation of a remedy, the court was expressing a desire to preserve the marketing and policy advantages of blanket licensing in the television market as well.

III. The Implications of *CBS*: The Exception That Swallows the Per Se Rule

The *CBS* case demonstrates the difficulty of reconciling the economic advantages of blanket licensing with the law of price fixing. The question of Sherman Act liability is complicated by the impossibility of formulating reasonable exceptions to the per se rule when the *raison d'être* of the per se doctrine is to eliminate case-by-case analysis. Even if liability is found, the additional problem of fashioning a remedy that eliminates price fixing without greatly increasing the transaction costs of marketing and policing copyrighted musical compositions remains. In *CBS* the court was unable to resolve either of these problems satisfactorily.

A. *A Rule with No Exceptions*

The *CBS* court's market functioning exception to the per se rule is not supported by prior cases. Indeed, the court did not make a serious effort to find such support, for it regarded the case before it as *sui generis*.⁸³ The court argued that:

"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."⁸⁴

Careful study suggests that the cases relied on by the court are largely irrelevant to the modern law of price fixing. Three of the cases cited by the court—*United States v. St. Louis Terminal*,⁸⁵ *Chi-*

83. *Id.* at 132; *see id.* at 138 n.22 ("[I]t is difficult even to imagine another industry where such a 'market necessity' defense would be applicable.")

84. *Id.* at 137 (quoting Memorandum of United States as Amicus Curiae on Petition for Writ of Certiorari, at 10, *K-91, Inc. v. Gershwin Publishing Corp.*, 389 U.S. 1045 (1968), *denying cert. to* 372 F.2d 1 (9th Cir. 1967)).

85. 224 U.S. 383 (1912). The Terminal Company, composed of 14 otherwise independent railroads, acquired ownership of and operated the three railroad bridge and terminal facilities in the St. Louis area. Due to the peculiar topography of the St. Louis area, *id.* at 405, the monopoly was unbreakable. The Supreme Court focused on the means by which this monopoly power was wielded. *See id.* at 405-06 (veto power on membership principal restraint of trade threatened by monopoly); *id.* at 408-09 (discrimination against

Chicago Board of Trade v. United States,⁸⁶ and *Appalachian Coals, Inc. v. United States*⁸⁷—were decided before the modern per se rule was announced in *Socony-Vacuum*.⁸⁸ The fourth, *Associated Press v. United States*,⁸⁹ was not a price-fixing case.⁹⁰

Of the four cases cited, *Appalachian Coals* provides the most direct support for the court's position. In that case the Supreme Court tolerated price fixing, but subsequent developments have cast doubt on the case's precedential value. If *Appalachian Coals* were good law the Second Circuit's market function exception would be firmly grounded, for the case involved a joint selling agency in the coal industry that was similar in many respects to ASCAP.⁹¹ Just as the depressed economic condition of the coal industry convinced the

nonmembers with respect to certain billing practices). Rather than order the dissolution of the Terminal Company, the Court eliminated the two objectionable practices that it considered unreasonable restraints of trade. *Id.* at 409-11. To the extent that the case is at all relevant to the issues in the *CBS* case, it suggests that ASCAP should be permitted to exist after its illegal price fixing is enjoined. Nothing in the opinion suggests that practices found to be unreasonable restraints of trade ought to be condoned, much less that price fixing, which is illegal per se, is permissible in the case of market necessity.

86. 246 U.S. 231 (1918). In *Chicago Board of Trade* the Court upheld the "call" rule of the Board. The rule stipulated that between the close of the call and the next business day a member of the Board could trade only at a price equal to the closing bid of the day. 246 U.S. at 237. Although it is not quite accurate to say that the case is bad law today, see Bork, *supra* note 29, at 820-28, the holding itself has had little application elsewhere. In *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927), the Court restricted *Chicago Board of Trade* to its facts by noting that the decision dealt "with a regulation of a board of trade, [and] does not sanction a price agreement among competitors in an open market." *Id.* at 401. Because of the narrow scope and negligible impact of the call rule, which was merely a regulation of the hours of trading, the case has been easily distinguished from most other price fixing cases. *E.g.*, *United States v. National Soc'y of Professional Eng'rs*, 555 F.2d 978, 983 (D.C. Cir. 1977); *Plymouth Dealers' Ass'n v. United States*, 277 F.2d 128, 133 (9th Cir. 1960).

87. 288 U.S. 344 (1933).

88. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

89. 326 U.S. 1 (1945).

90. In *Associated Press* the issue was whether the Sherman Act was violated by AP's bylaws, which prevented members from selling news to nonmembers and which allowed members to block the admission of their competitors. *Associated Press v. United States*, 326 U.S. 1, 4 (1945). The Court did not consider the legality of the existence of the AP, nor did it find or discuss any price fixing. It merely struck down those bylaws that blocked the admission of competitors, since they were designed to "reduce their competitor's opportunity to buy or sell the things in which the groups compete." *Id.* at 15. There is nothing in the opinion to suggest that the Court tolerated any illegal activity for the sake of a market necessity.

91. In *Appalachian Coals* over 100 producers of coal formed a joint selling agency to market their coal at the best possible prices. Prices were set by the officers of the agency and there were provisions for apportioning orders among members during periods when sales were slow. 288 U.S. at 358. Although the joint selling agency was clearly a price-fixing arrangement, the Supreme Court concluded that it was not in violation of the Sherman Act since the concerted action mitigated "evils" in the industry and fostered "fair competitive opportunities." *Id.* at 374; see *id.* at 366, 372 ("evils" included over-expansion of production, dumping of coal on market, and pyramiding of offers for sale of coal).

Supreme Court to allow price fixing in 1933, so the transaction costs involved in an ASCAP-less market convinced the Second Circuit to allow price fixing in the music industry.

The modern rule against price fixing, however, is a direct repudiation of the reasoning of *Appalachian Coals*. The linchpin of *Socony-Vacuum* is the statement that whatever the economic justification for particular agreements, the law does not permit an inquiry into their reasonableness.⁹² This principle has been repeatedly reaffirmed and governs the law of price fixing today.⁹³ It is not surprising that the *CBS* court could not find a single price-fixing case after *Socony-Vacuum* to support the proposed market function exception.⁹⁴

The market function exception created in *CBS* threatens to swallow the per se rule. The exception to the per se rule would force the courts to examine the anatomy of the market in every case where the defense is raised, thus defeating the simplifying purpose of per se rules. Further, the exception is phrased in terms that defy precise definition. What are the criteria for determining whether price fixing is "absolutely necessary for the market to function at all"? The only sensible interpretation would be that a necessity exists when buyer-seller transactions cannot take place on a widespread basis because, absent price fixing, the transaction costs in negotiating and policing contracts are prohibitive.⁹⁵ Phrasing the exception in terms

92. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940). Although *Socony-Vacuum* did not explicitly overrule *Appalachian Coals*, the broad sweep of the Court's language makes *Appalachian Coals* a dead letter.

The *Socony-Vacuum* case disposed of any distinction between aggressive and defensive price fixing: it is now settled law that no amount of distress or depression can justify trade agreements to suppress price competition or indeed to "tamper" in any way with the free working of the price mechanism. It also removed any residual doubts on this score left by . . . *Appalachian Coals v. United States* . . .

A. NEALE, *supra* note 12, at 38 (citation omitted); see F. SCHERER, *supra* note 64, at 431-32.

93. *E.g.*, *United States v. Container Corp. of America*, 393 U.S. 333, 337 (1967) ("interference with the setting of price by free market forces is unlawful *per se*"); *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 309-10 (1956) ("[The] illegality [of price fixing] does not depend on a showing of its unreasonableness, since it is conclusively presumed to be unreasonable. It makes no difference whether the motives of the participants are good or evil . . ." (footnote omitted)); *United States v. National Ass'n of Real Estate Bds.*, 339 U.S. 485, 489 (1949) ("Price-fixing is *per se* an unreasonable restraint of trade. It is not for the courts to determine whether in particular settings price-fixing serves an honorable or worthy end.") In a case subsequent to *Appalachian Coals*, the Fourth Circuit rejected a scheme substantially identical to that upheld in *Appalachian Coals*. *Virginia Excelsior Mills, Inc. v. FTC*, 256 F.2d 538 (4th Cir. 1958) (obligatory delegation of all discretion in fixing prices to single exclusive sales agent per se violation of Sherman Act).

94. *Associated Press v. United States*, 326 U.S. 1 (1945), offers no support for the proposition that there is a market function exception to the per se rule of *Socony-Vacuum*. The Court did not consider whether the conduct of the Associated Press constituted price fixing. See note 90 *supra*.

95. A. ALCHIAN & W. ALLEN, *UNIVERSITY ECONOMICS* 131-32 (2d ed. 1970) (transaction costs can be prohibitive).

The court seems to have had in mind two extreme cases: first, where the transaction

of what is "absolutely necessary for the market to function at all" is misleading, for it obscures the determination to be made: the court must decide what level of transaction costs is high enough to justify price fixing. This inquiry is identical to the determination of a "reasonable" fixed price that the courts long ago decided not to make.⁹⁶

B. *The Remedy*

The remedy requested by CBS and suggested by the Second Circuit is "per use" licensing. In a per use system, ASCAP would set the price of a license for a single performance of a musical work on network television. The fee would depend on the nature of the use—theme music,⁹⁷ background music,⁹⁸ or feature music⁹⁹—but it would not depend on the individual composition used.¹⁰⁰ Such a scheme, however, is still plainly price fixing: the per use price is set by ASCAP.¹⁰¹ Indeed, it would present a clearer case than would the current practice.¹⁰²

costs saved by the price-fixing activity are so minimal that application of the per se rule is clearly justifiable; second, where the elimination of the price fixing would drive transaction costs up so high that there would be virtually no transactions at all. The difficulty, however, lies in applying the market function exception to the infinite number of cases between the two extremes. The court never identified the point at which the reduction in transactions attributable to the elimination of price fixing justifies the invocation of the exception.

96. See *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 609-10 (1972) (that courts "are of limited utility in examining difficult economic problems" major reason behind formulation of per se rules); pp. 787-88 *supra*.

In order to retain the advantages of blanket licensing for those who desire it, the CBS court implicitly suggested that a "market need" for a practice can be defined by the user demand for the practice. 562 F.2d at 140. Since the court accepted the finding of the district court that direct licensing was a practical alternative to blanket licensing, 562 F.2d at 135, it could not preserve the blanket licensing of television networks. Unlike the blanket licensing of radio stations, where the court accepted the stipulation that direct licensing was commercially impracticable, *id.* at 137, no market necessity was established for the blanket licensing of network television. The court seems to be saying blanket licensing ought to be preserved, even though it is illegal price fixing, because some broadcasters think it is a convenient business practice. This kind of loose reading of the market function exception would undermine not only the per se rule against price fixing, but any rule against price fixing.

97. Theme music is the music used to introduce and close a program. *CBS v. ASCAP*, 400 F. Supp. 737, 755 (S.D.N.Y. 1975), *rev'd*, 562 F.2d 130 (2d Cir. 1977).

98. Background music is used to complement the action on the screen. *Id.*

99. Feature music is used as the main focus of audience attention—for example, a song sung by the host of a variety show. *Id.*

100. Proposed Findings of Fact of Plaintiff, at 116, *id.*

101. CBS admitted that "[n]ot only would the per-use fees at which ASCAP and BMI would continue to license represent fixed prices but . . . those rates would inevitably boost and stabilize direct-licensing prices." Reply Brief for Plaintiff-Appellant, at 19-20 (footnote omitted).

102. See pp. 793-94 & note 67 *supra*.

The proponents of the per use license attempt to justify it as “transitional relief”¹⁰³ that would begin a trend toward direct licensing at a negotiated price and bring the market closer to competitive conditions.¹⁰⁴ Whether or not the per use license would actually serve as transitional relief, under the logic of *Socony-Vacuum* and its descendants the per use system is illegal per se.¹⁰⁵ Per use licensing is nothing more than an agreed-upon price for individual performances, and as such its very existence would be unlawful regardless of its justification.

Moreover, the success of the per use system as transitional relief may not be desirable from the standpoint of the economics of the marketing and policing of copyrights. If the number of direct transactions increases, then to that extent the transaction costs of negotiating license agreements and monitoring performances increase.¹⁰⁶ Thus the proposed per use remedy may be the worst possible solution since it is both illegal and costly.

IV. A Legislative Proposal

No court has been able to reconcile satisfactorily the blanket licensing of performing rights with the per se rule against price fixing. *CBS* demonstrates that even if a court finds a performing rights society guilty of price fixing, the court can impose no remedy that both restores a truly competitive market and preserves the advantages of bulk licensing.

103. Reply Brief for Plaintiff-Appellant, at 20.

104. *Id.* at 20 n.*. They argue that with the knowledge that any composition in the ASCAP repertory could be obtained singly, networks would not purchase a blanket license. *Id.* at 20. Instead, the networks would probably attempt to negotiate with individual copyright owners for a royalty fee lower than the ASCAP per use fee. Certainly some composers, anxious to have their music aired on television, would agree to a lower price. Publishers would also be anxious to negotiate directly with broadcasters in order to ensure the use of their copyrighted compositions. Indeed, as direct licensing became commonplace ASCAP would cease to be a factor in the market, since there would rarely be a need for a per use license, and the market would become truly competitive. *Id.* at 21. The projected process would be a classical example of market forces acting to break down cartel discipline. See G. STIGLER, *supra* note 68, at 42-45.

105. See, e.g., *United States v. McKesson & Robbins*, 351 U.S. 305, 309-10 (1956); *United States v. Plymouth Dealers' Ass'n*, 279 F.2d 128, 132-33 (9th Cir. 1960).

106. See pp. 786-87 *supra*. The same problems apply to the suggestion that ASCAP be dissolved into several smaller performing rights societies. If these new societies were to license on a blanket basis, then they too would be fixing prices. Of course, it would be possible to mandate that the new societies be small enough so that their price-fixing activities would be de minimis, but in doing so the level of transaction costs necessarily increases. See pp. 786-87 & note 20 *supra*. It is likely that as the size of the new performing rights societies approaches the level where their power to fix prices would be de minimis, their usefulness as transaction cost savers will have become negligible as well.

The uniqueness of the conditions that prompted the development of performing rights societies suggests a possible solution.¹⁰⁷ The licensing practices of performing rights societies, like labor unions and agricultural cooperatives,¹⁰⁸ should be exempted from the antitrust laws. The Second Circuit's market functioning rationale has already exempted many of the activities of performing rights societies from the force of the Sherman Act but will lead to the unfavorable consequences outlined in Part III, for the courts will now be required to examine the market in every case in which such a claim is raised. A narrowly drawn legislative exemption, however, would preserve the *per se* rule, which would continue to apply wherever the legislature has not acted to reject it. The exemption should be accompanied by regulation to encourage a diversity of licensing options, to prevent the kind of anticompetitive practices that ASCAP attempted before the 1941 consent decree¹⁰⁹ and to ensure that blanket licensing—with its attendant price fixing—is maintained for only so long as is necessary for the minimization of transaction costs.¹¹⁰

The proposed legislation would establish an agency whose function would be to supervise the licensing practices of performing rights societies¹¹¹ and would mandate that, after reviewing the licensing practices and the provisions of the 1950 judgment, the agency promulgate new licensing regulations.¹¹² The criteria for revising the terms

107. See 562 F.2d at 132 ("In dealing with performing rights in the music industry we confront conditions both in copyright law and in antitrust law which are *sui generis*.")

108. 15 U.S.C. § 17 (1970) (labor unions); 7 *id.* § 291-92, 15 *id.* § 17 (agricultural cooperatives). For other examples of exemptions, see *id.* §§ 1011-1015 (state regulated insurance companies), and *id.* § 62 (export trade associations).

Although the propriety of certain existing antitrust exemptions is controversial, see *e.g.*, Adams, *Business Exemptions from the Antitrust Laws: their Extent and Rationale*, in PERSPECTIVES ON ANTITRUST POLICY 273 (A. Phillips ed. 1965), such specific disputes should not prevent the resolution of the antitrust status of performing rights societies.

109. See p. 789 & notes 40-43 *supra*.

110. One example of changing conditions that might radically alter the market for performing rights is the development of computer technology. Memorandum of the United States as Amicus Curiae on Petition for Writ of Certiorari, at 14 n.10, K-91, Inc. v. Gershwin Publishing Corp., 389 U.S. 1045, *denying cert. to* 372 F.2d 1 (9th Cir. 1967).

111. It might be possible to assign this task to the Copyright Royalty Tribunal established by § 801 of the recent Copyrights Act, Pub. L. No. 94-553, 90 Stat. 2594 (1976) (to be codified at 17 U.S.C. § 801). The Tribunal is a five-member independent agency established to review and to adjust periodically the statutory royalty rates for the use of copyrighted materials under the compulsory licensing of secondary transmissions on cable television, juke boxes, mechanical reproduction systems, and public broadcasting. Obviously if the regulation of license formats were to be entrusted to the Tribunal, appropriate steps would have to be taken to ensure that the Tribunal has the necessary expertise and support staff.

112. The regulations should preserve where necessary the provisions of the 1950 judgment that protect against ASCAP's nonlicensing anticompetitive practices, such as its tendency to discriminate among its members. For a discussion of this tendency, and for an outline of the provisions of the 1950 judgment designed to cope with these problems, see Timberg, *supra* note 2, at §11-20.

of licenses should be kept as general as possible for the sake of flexibility, but should favor any change that increases competition in the market for performing rights without sacrificing the protection of copyright owners or the cost efficiency of blanket licensing. The rates for licenses should be left to individual negotiations and subject to administrative fee setting only when the private parties cannot agree, as under the 1950 judgment.¹¹³

In addition, the legislation should establish a procedure whereby interested parties—most probably broadcasters—could periodically petition for adjustments in existing practices or request new license formats. The option to adjust license formats would break up the current freeze on the types of licenses ASCAP is permitted to offer.¹¹⁴ Users could petition for new licenses without encountering the delay, expense, and frustration of frontal antitrust attacks.

This proposal is designed to resolve the tension between the structure of the copyrighted music industry and the *per se* rule against price fixing. Judicial attempts at resolution have failed because a *per se* rule cannot be maintained alongside a willingness to seek case-by-case exceptions. Yet the need for a performing rights society persists, and Congress should act to satisfy that need.

113. The regulations should be designed to discourage administrative ratemaking, since the history of the 1950 judgment indicates that ASCAP and its licensees are capable of ironing out differences over price. *See* note 51 *supra*.

114. *See* note 54 *supra*. For example, the agency could in appropriate circumstances experiment with *per use* licensing or blanket licensing catalogues of music to accommodate radio stations that play only one style of music. *See* note 53 *supra*.