



---

Fall 9-1-1987

## Blanket Music Licensing And Local Television: An Historical Accident In Need Of Reform

Frederick C. Boucher

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr>



Part of the [Antitrust and Trade Regulation Commons](#), [Communications Law Commons](#), and the [Intellectual Property Law Commons](#)

---

### Recommended Citation

Frederick C. Boucher, *Blanket Music Licensing And Local Television: An Historical Accident In Need Of Reform*, 44 Wash. & Lee L. Rev. 1157 (1987).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol44/iss4/3>

This Article is brought to you for free and open access by the Washington and Lee Law Review at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact [christensena@wlu.edu](mailto:christensena@wlu.edu).

# WASHINGTON AND LEE LAW REVIEW

---

Volume 44

FALL 1987

NUMBER 4

---

## BLANKET MUSIC LICENSING AND LOCAL TELEVISION: AN HISTORICAL ACCIDENT IN NEED OF REFORM

FREDERICK C. BOUCHER\*

### I. INTRODUCTION

The copyright laws of the United States confer upon the holder of a musical composition copyright a number of exclusive prerogatives, including the right to perform the work publicly.<sup>1</sup> In the early 1900's, as performances of copyrighted music by nightclubs, taverns, hotels, and radio broadcasters became increasingly numerous, scattered, and widespread throughout the country, it became evident, as the Supreme Court has noted, that this legal right was not "self-enforcing."<sup>2</sup> In 1914, the first performing rights organization—the American Society of Composers, Authors and Publishers (ASCAP)—was formed to deal with the problems of locating establishments performing copyrighted musical works, securing payments for composers and music publishers whose works were being performed and prosecuting as infringers those entities which failed to obtain copyright licenses.

This "milieu" in which ASCAP (and thereafter, in 1939, Broadcast Music Inc. (BMI)) emerged<sup>3</sup> dictated creation of an unusual licensing tech-

---

\* Mr. Boucher is a United States Representative from the State of Virginia. A Member of the Judiciary Committee, he has patroned legislation to alter the means by which television stations acquire broadcast rights in the music contained in the soundtracks of syndicated programs

1. See Copyright Act of 1976, 17 U.S.C. § 106(4) (1982), and its predecessor provision, § 1(e) of the Copyright Act of 1909, which provided exclusive rights in public performance for *profit* (a distinction which is not material here). The right of public performance was first adopted in the Copyright Act of 1897, 29 Stat. 481 (1897).

2. *Broadcast Music, Inc. v. Columbia Broadcasting Systems, Inc.*, 441 U.S. 1, 4 (1979). The Supreme Court in *BMI v. CBS* remanded the Second Circuit's first decision in *Columbia Broadcasting Systems, Inc. v. American Society of Composers, Authors and Publishers*. See *CBS v. ASCAP*, 562 F.2d 130 (2d Cir. 1977) *reversing*, 400 F. Supp. 737 (S.D.N.Y. 1975). The Second Circuit's opinion after remand is reported at 620 F.2d 930 (1980) [hereinafter *CBS Remand*], *cert. denied*, 450 U.S. 1050 (1980).

3. *BMI v. CBS*, 441 U.S. at 20.

nique, which would accomplish several objectives: (i) permit users rapid access to a large body of copyrighted material; (ii) avoid the cost and delay of individual negotiations over specific copyrighted works; and (iii) ensure the copyright owners reasonable payment for exploitation of their works. What emerged is a form of license called the blanket license, at once a brilliant solution to a thorny problem and, as experience has shown, a potent tool of monopoly.

This duality of the blanket license—its useful role in effectuating the copyright law in certain contexts and its creation of vast monopoly power for copyright owners subjecting it to possible misapplication—permeates more than seventy years of experience with this marketing device. Rarely has commercial practice been so persistently attacked, by both the Government<sup>4</sup> and private sector “customers”<sup>5</sup> alike, and yet survived so intact. The issue which bears closer analysis is whether the historical tolerance for blanket licensing in certain settings has improperly insulated that licensing technique from condemnation in other, far less compelling circumstances.

#### A. *The Blanket License, Copyright and Competition Policy*

As a premise of their operations, ASCAP and BMI have obtained from their participating copyright proprietors the right to determine the types of licenses to be conferred on users and the prices at which such licenses will be offered.<sup>6</sup> From this sweeping grant of rights, ASCAP and BMI have

4. ASCAP and its blanket license were investigated by the Department of Justice as early as 1926. See Cohn, *Music Radio Broadcasters and the Sherman Act*, 29 GEO. L.J. 407, 424 n. 91 (1941). A later Government investigation culminated in the filing of an antitrust complaint against ASCAP in 1934, a case which ultimately was discontinued after trial had commenced. See Complaint for Plaintiff, *United States v. American Society of Composers, Authors and Publishers*, E 78-388 (S.D.N.Y. 1934). In 1941, the United States charged that the ASCAP blanket license was an illegal restraint of trade and that arbitrary prices were being charged as the result of an illegal copyright pool. See Complaint at pp. 3-4, *United States v. American Society of Composers, Authors and Publishers*, Civ. No. 13-95 (S.D.N.Y. 1941). That case ultimately was settled by a consent decree which placed various restrictions on ASCAP's licensing procedures. *United States v. American Society of Composers, Authors, and Publishers*, 1940-1943 Trade Cas. (CCH) 56,104 (S.D.N.Y. 1941). This decree was reopened and extensively amended in 1950, following numerous complaints by television licensees and successful litigation against ASCAP by movie theatre exhibitors (see Section V, *infra*). *United States v. ASCAP*, 1950-1951 Trade Cas. (CCH) 62,595 (S.D.N.Y. 1950).

5. See, e.g., *BMI v. CBS*, 441 U.S. at 5 (television networks); *Buffalo Broadcasting Co., Inc. v. ASCAP*, 546 F. Supp. 274 (S.D.N.Y. 1982), *rev'd*, 744 F.2d 917 (2d Cir. 1984), *cert. denied*, 105 S. Ct. 1181 (1985) (local television stations); *K-91, Inc. v. Gershwin Pub. Corp.* 372 F.2d 1 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045 (1968) (radio); *Broadcast Music, Inc. v. Moor-Law, Inc.*, 527 F. Supp. 758 (D. Del. 1981), *aff'd mem.*, 691 F.2d 490 (3d Cir. 1982) (general licensees).

6. ASCAP currently licenses, on a non-exclusive basis, the small (non-dramatic) performing rights in some three million compositions, and has more than 30,000 composer and music publisher members. BMI has approximately 80,000 composer and music publisher affiliates, and licenses the small performing rights in some one million compositions. A third, considerably smaller licensing organization, SESAC, operates in similar fashion to ASCAP

offered only performing rights licenses covering the entirety of the works in the organizations' repertoires to users of musical compositions. No other forms of licenses have ever been offered.<sup>7</sup> These so-called "blanket" licenses permit a user to perform any or all of the licensed music for the duration of the license. Significantly, blanket license fees always have been set by ASCAP and BMI on a basis such that the actual amount and type of music used by the licensee will have no bearing on the fee. Instead, fees have been based either on a stipulated annual fee applied to specified categories of users<sup>8</sup> or on a formula keyed to the user's revenues derived from the business for which the performance license is required.<sup>9</sup>

It can be readily observed that the blanket license, by setting a single fee for access to millions of works of different creators, eliminates price competition among copyright holders over the value of their individual works<sup>10</sup> and fails to further the notion of the copyright law that individual works should compete, and be rewarded, on their own merits. The blanket license, as the Department of Justice has observed, reflects "substantial deviations from the competitive norm . . ." through, *inter alia*, insulating copyright owners from price competition and permitting ASCAP and BMI to price their "product" in a manner reflecting not its market value, but the ability of users to pay.

This deviation from antitrust and copyright norms would appear to be tolerable to the extent that it enables a market for spontaneous performances of copyrighted music fruitfully to exist or, in the words of the Supreme Court, "to effectuate . . . the commerce anticipated by the Copyright Act."<sup>12</sup> But what about the circumstances where such "market-making" conditions do not exist? It would seem that in such contexts the burden should rest with those benefiting from the license to justify its application.

In the nearly 100 years since enactment of the Sherman Act, it has been

and BMI. See *Buffalo Broadcasting*, 744 F.2d at 920; BMI Annual Report for the year ended June 20, 1986, p. 1.

7. Under their respective consent decrees, the performing rights organizations technically have been required to offer a variant of the blanket license known as a per program license. Under this license form—in reality a "mini-blanket license"—the licensee still purchases access to the organization's entire repertoire. License payments, though, are based not on total programming revenues, but on revenues related to a specific program or "programming period." While technically available, the per program license rarely has been utilized as the rates at which it historically has been offered have made its use economically infeasible for almost all broadcaster licensees.

8. The television networks serve as an example of this type of user.

9. The blanket license fee for a local television station is predicated on the station's revenues.

10. *Broadcast Music, Inc. v. Columbia Broadcasting Systems, Inc.*, 441 U.S. 1, 32 (1979) (Stevens, J., dissenting); *Columbia Broadcasting Systems, Inc. v. American Society of Composers, Authors, and Publishers*, 620 F.2d 930, 935 (2nd Cir. 1980).

11. Brief for the United States as *Amicus Curiae*, *American Broadcasting Systems, Inc. v. American Society of Composers, Authors, and Publishers*, 620 F.2d 930 (2nd Cir. 1980). (No. 75-7600 (November 5, 1979) at 16).

12. *BMI v. CBS*, 441 U.S. at 19.

a fundamental premise of our economy that "the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress."<sup>13</sup> It has long been recognized that copyright owners are not immune from these basic tenets: "[T]he copyright laws confer no rights on copyright owners to fix prices among themselves or otherwise to violate the antitrust laws. . . ."<sup>14</sup> Indeed, our system of copyright protection envisions but a limited grant of monopoly power to copyright owners. The underlying rationale is that such a grant is

[n]ot primarily for the benefit of the author, but primarily for the benefit of the public. . . . Not that any particular class of citizens, however worthy, may benefit, but because the policy is believed to be for the benefit of the great body of people, in that it will stimulate writing and invention to give some bonus to authors and inventors.<sup>15</sup>

While our copyright law seeks to promote creativity by granting limited protection to creators, it also seeks to assure that this "[p]rotection should not go substantially beyond the purposes of protection."<sup>16</sup> Our copyright law, in short, requires a careful balancing of the needs of creators, users and the general public. It was not meant to "impose a burden on the public substantially greater than the benefit [it] give[s] to authors."<sup>17</sup> In the effort to benefit the public by stimulating creative works, it was intended to ensure that authors retain the exclusive right to exploit their works without fear of infringement—and nothing more. Where a licensing practice created to effectuate copyright principles goes beyond bestowing such a benefit on copyright proprietors, it upsets the balance contemplated by the Act.

These precepts apply with no less force to the specific circumstances of those holding copyright interests in musical compositions. As the Congress wrote in conjunction with enactment of the 1909 Copyright Act:

The main objective to be desired in expanding copyright protection accorded to music has been to give to the composer an adequate return for the value of his composition, and it has been a serious and a difficult task to combine the protection of the composer with the protection of the public, and to so frame an act that it would accomplish the double purpose of securing to the composer an adequate return for all use made of his composition and at the same time prevent the formation of oppressive monop-

---

13. *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).

14. *BMI v. CBS*, 441 U.S. at 19.

15. H.R. REP. NO. 2222, 60th Cong., 2d Sess. 9 (1909).

16. Chaffee, *Reflection on the Law of Copyright*, 45 COLUM. L. REV. 502, 505-506 (1945). See also, *Intellectual Property Rights in an Age of Electronics and Information*, United States Congress, Office of Technology Assessment (1986) at 286.

17. Chaffee, *supra* note 16, at 507.

olies, which might be founded upon the very rights granted to the composer for the purpose of protecting his interests.<sup>18</sup>

### B. *The Blanket License and Its Application To Local Television*

The circumstances of local television broadcasters pose a stark example of a user group which has been remitted to living with the blanket license in circumstances where it is not a market necessity and where its application creates a distortion of the market for music performing rights.

The blanket license arose, and historically has been justified, in those market circumstances in which users have required spontaneous access to a large repertoire of music, without the delay involved in engaging in prior individual negotiations with copyright owners.<sup>19</sup> Its application is not justified in those circumstances when music uses can be and are planned in advance and when a mechanism exists whereby individual copyright owners can negotiate with the entity selecting the music involved. The presence of the blanket license in these circumstances is not only unnecessary to make the market function, it actually inhibits free market transactions.

The experience of the theatre exhibitors in the 1930's and 1940's, and the more recent experience of the local television broadcasters, confirms that the blanket license in these latter circumstances *supplants* normal market mechanisms, is aberrational, and is not justified as a matter of sound antitrust, economic, or copyright doctrine. Ironically, the burden has been shifted to broadcasters to demonstrate why they should not be saddled with a licensing device which is not appropriate to their circumstances, yet from the grasp of which they cannot, through self-help, escape.

Given this state of affairs, legislation to require source licensing<sup>20</sup> offers the only prospect of restoring the proper functioning of copyright and free market principles to the licensing of music performing rights for local television.

## II. ORIGINS OF THE BLANKET LICENSE

The fundamental basis or justification for the formation of the performing rights organizations, ASCAP and BMI, extends from the goal of our copyright law "[t]o promote the [p]rogress of science and useful [a]rts by securing for limited [t]imes to [a]uthors and [i]nventors the exclusive

18. H.R. REP. No. 2222, 60th Cong., 2d Sess. 10 (1909).

19. *BMI v. CBS*, 441 U.S. at 5, 20; Brief for the United States as *Amicus Curiae*, *CBS v. ASCAP*, No. 77-1583 (November 1978) at 21; Garner, *U.S. v. ASCAP: The Licensing Provisions of the Amended Final Judgment of 1950*, 23 *Bulletin*, Copyright Soc. of the U.S.A. 119, 121-122 (1975-76); DeFelice, *Buffalo Broadcasting: Expensive Music for Expensive Customers*, 8 *COL. J. OF ART AND LAW* 207, 209 (1983).

20. H.R. 1195, 100th Cong., 1st Sess. (1987); S. 698, 100th Cong., 1st Sess. (1987) would require program syndicators to acquire and convey music performing rights along with other rights necessary to the airing of the program.

[r]ight to their respective [w]ritings and [d]iscoveries.”<sup>21</sup> An exclusive right in the public performance of musical compositions was first recognized in 1897.<sup>22</sup> As included in the Copyright Act of 1909,<sup>23</sup> this right of authors and composers was limited to public performances “for profit” (which term—subsequently eliminated by the 1976 revision of the Act—was broadly construed to require a performing rights license in those situations where even indirect commercial benefit to the user was to be expected).<sup>24</sup>

For this newly granted right to have any value, a method had to be found by which composers could be compensated for the numerous indirect or secondary uses<sup>25</sup> of their music precipitated by the principal users of copyrighted music of that era. These “users” were primarily restaurants, taverns, hotels, and nightclubs (commercial establishments where music was performed as an incidental sidelight of the business’ chief undertaking) and radio broadcasters.

By 1914, songwriters and publishers realized that, given the fleeting nature of these users’ performances of music occurring spontaneously throughout the country, the value of their performing rights could be exploited only by establishing an organization able to deal effectively with the numerous and widespread “performers” of copyrighted music.<sup>26</sup> As a result, in 1914 a group of composers organized the first United States performing rights society, ASCAP, in recognition that

those who performed copyrighted music for profit were so numerous and widespread, and most performances so fleeting, that as a practical matter it was impossible for the many individual copyright owners to negotiate with and license the users and to detect unauthorized uses.<sup>27</sup>

ASCAP’s purpose was two-fold:

to provide a [clearinghouse] through which users of musical works would be able to obtain licenses to use the copyrighted works of all of the members on the payment of a single fee without accounting separately for each work performed; and . . . to provide composers and publishers with a central means through which they could license performances of their works, and at the same time enable

21. U.S. CONST., art. I, § 8.

22. See 29 Stat. 481, 481-82 (1897).

23. 17 U.S.C. § 1(e) (1970) (1909 Copyright Act).

24. See, e.g., *Herbert v. Shanley Co.*, 242 U.S. 591 (1917); *Buck v. Jewell-LaSalle*, 51 F.2d 726 (8th Cir. 1931); *M. Witmark & Sons v. L. Bamberger & Co.*, 291 F. 776 (D.N.J. 1923).

25. Secondary uses reflect uses of music in situations where no admission is charged as a function of the performance of that music.

26. See Note, *Performing Rights Societies and the Per Se Rule*, 87 YALE L.J. 783, 785 (1978). See also Finkelstein, *The Composer and the Public Interest*, 19 LAW & CONTEMP. PROB. 275, 284 (1954) (citing Dep’t of Justice complaint in *United States v. ASCAP*).

27. *BMI v. CBS*, 441 U.S. at 4-5.

them to detect any infringements in thousands of places throughout the country.<sup>28</sup>

Thus, ASCAP arose to serve the needs of both copyright proprietors (who needed a means to monitor and license performance of their works) and music users (who could not be expected to obtain a license from each composer for each performance).<sup>29</sup> It sought to accomplish this task through the vehicle of the "blanket license" format previously described. As the Supreme Court was to explain:

ASCAP and the blanket license developed together out of the practical situation in the marketplace. . . . Most users want[ed] unplanned, rapid, and indemnified access to any and all of the repertory of compositions, and the owners want[ed] a reliable method of collecting for the use of their copyrights. . . .<sup>30</sup>

It was, in short, "market necessity . . . [that] justify[ed] ASCAP blanket licenses for restaurants, night clubs, skating rinks and even radio stations;"<sup>31</sup> and it was "in th[at] milieu . . . that the blanket license arose."<sup>32</sup>

to establish and maintain, by means of the pooling of their individual copyright monopolies, enhanced and non-competitive prices or royalties for licenses to perform publicly copyrighted musical compositions owned and controlled by individual defendants; to eliminate all competition among members of defendant Society in the sale of licenses to perform publicly their individual musical compositions and to exercise the power obtained by defendants through the unlawful pooling of their individual copyright monopolies, by concertedly refusing to license the public performance by radio broadcasting stations and all other persons engaged in the public performance for profit of copyrighted music of any copy-

### III. EARLY CONCERNS ABOUT THE ANTICOMPETITIVE CONSEQUENCES OF THE BLANKET LICENSE

Even with these understandable roots, at an early date the blanket

28. H. Finkelstein, *PUBLIC PERFORMANCE RIGHTS IN MUSIC AND PERFORMANCE RIGHTS SOCIETIES* 8 (Rev. Ed. 1961). See also Finkelstein, *ASCAP as an Example of the Clearing House System in Operation*, 14 BULL. CR. Soc'y 2, 3 (1966).

29. See *Alden-Rochelle, Inc. v. ASCAP*, 80 F.Supp. 888 (S.D.N.Y. July 19, 1948) (findings of fact and conclusions of law 20). See also *BMI v. CBS*, 441 U.S. at 5.

30. *BMI v. CBS*, 441 U.S. at 20.

31. *CBS v. ASCAP*, 562 F.2d at 140 n. 26.

32. *BMI v. CBS*, 441 U.S. at 20. BMI, the second major performing rights organization in America, was formed in 1939 by radio broadcasters to serve as an alternative to ASCAP as a source of music for radio. The formation of BMI reflected a combination of the radio broadcasters' recognition of their need for instantaneous, "blanket" access to music, and their disinclination to accede to the blanket license rate hikes proposed by ASCAP at that time. See Cohn, *Music, Radio Broadcasters and the Sherman Act*, 29 GEO. L.J. 407 (1941) (discussing ASCAP-radio industry controversies which led to the formation of BMI); Shull, *Collecting Collectivity: ASCAP's Perennial Dilemma*, 7 COPYRIGHT L. SYMP. (ASCAP) 35 (1956) (same).



license was the subject of significant concern by the Department of Justice as to its anticompetitive effects and overall anticompetitive potential. After several false starts<sup>33</sup> the Justice Department in 1941 sued both ASCAP and BMI alleging a variety of antitrust offenses arising from their blanket licensing practices.<sup>34</sup> Of central concern was the organizations' practice of refusing to issue any licenses other than blanket licenses to users at royalty rates determined by the organizations. The ASCAP complaint specifically charged ASCAP and its members with an agreement

righted musical composition owned and controlled by a member of defendant, except on the basis of a general license covering any and all musical compositions of all members and except upon the basis of an arbitrary royalty for such general license, fixed and determined by the . . . self-perpetuating board of directors of defendant Society. . . .<sup>35</sup>

The Government's conclusions about the elimination of competition under the blanket license were indisputable.<sup>36</sup> As the courts would later hold in the context of a private lawsuit challenging the blanket license, "[T]here is no price competition between separate musical compositions. . . . [U]nder a blanket license . . . [n]o price considerations affect the choice among songs because the [user] holds a blanket license to perform all songs."<sup>37</sup>

Apparently unwilling to challenge the Government in court, ASCAP promptly moved (within a week of the Government's filing of its complaint) to work with the Government toward entry of a consent decree to settle the Government's 1941 lawsuit (the "1941 Decree"). The 1941 Decree sought primarily to: (i) curb ASCAP's power to compel higher fees through threats of withholding its repertoire; and (ii) modify certain of ASCAP's other licensing practices.<sup>38</sup> At the same time, in determining to drop its lawsuit

33. An investigation of ASCAP was commenced in 1926, and an antitrust complaint was filed in 1934. Both were withdrawn shortly thereafter.

34. See *United States v. ASCAP*, 1940-1943 Trade Cas. (CCH) 56,104 (S.D.N.Y. 1941); *United States v. Broadcast Music Inc.*, 1940-1943 Trade Cases 56,096 (E.D. Wis. 1941).

35. Complaint at 15 (c), *United States v. ASCAP*, 1940-43 Trade Cas. (CCH) 56,104 (S.D.N.Y. 1941).

36. See *Gibbs v. Buck*, 307 U.S. 66, 81-82 (1939) (Black, J., dissenting). Justice Black recognized, in his dissenting opinion in this case where ASCAP had challenged a state statute making it unlawful for owners of copyrighted music to combine to fix performance license fees, that blanket licensing arrangements constitute a "flagrant" price-fixing combination by requiring purchasers "to take, at a monopolistically fixed annual fee, the entire repertory of all numbers controlled by the combination."

37. *CBS Remand*, 620 F.2d at 935. As earlier noted, this was echoed by the Department of Justice when it determined that the blanket license reflects a "significant deviation from the competitive norm." See *supra* text accompanying note 11.

38. *United States v. ASCAP*, 1940-1943 Trade Cases 56,104 at II(8). Among other things, the 1941 Decree enjoined ASCAP from seeking exclusive licenses from its members, and required it to offer its broadcast users (then radio stations and networks) a licensing alternative to the blanket license—namely, the per program license granting blanket access to the repertoire on a program-by-program basis. *Id.* at II(1) and II(3). See *supra* note 7 (discussing per program license).

in favor of a consent decree, the Government apparently recognized the qualified need for the blanket license (at least in the market circumstances which had prevailed until that time) to accomplish the *bona fide* concerns of copyright monitoring and enforcement which had led to the creation of the performing rights organizations in the first place.

The tension between the anticompetitive tendencies of the blanket license and the benefits of tolerating it in certain market contexts thus emerged virtually from the beginning. It was not, however, until ASCAP's relationships with movie theatre operators evolved that the full anticompetitive potential of the blanket license was realized. The movie theatre setting presented a circumstance where the blanket license could *not* be justified based upon market necessity; its use here had the quite opposite effect of eliminating a competitive market alternative which could and would have functioned *but for* the presence of the blanket license.

#### IV. THE MOVIE EXHIBITOR EXPERIENCE

The history of ASCAP's license arrangements with theatre operators has been chronicled in the records of, and court opinions from, repeated litigations.<sup>39</sup> ASCAP first became involved in licensing theatre owners during the 1920's, in the era of silent movies. At this stage in the evolution of the motion picture industry, films were exhibited without soundtracks, and were typically accompanied by a live piano player or orchestra hired by the theater owner.<sup>40</sup> The selection of musical accompaniment was not pre-planned and could vary from night to night. The nature of music use thus was not unlike the spontaneous, unpredictable uses made by taverns, night-clubs and radio stations of the same era.

ASCAP, on behalf of its members, sought blanket license agreements with the theatre exhibitors with respect to such performances, and by 1923 it had obtained such licenses. The licenses, covering ASCAP's entire repertoire, predicated fees upon a theatre's seating capacity.<sup>41</sup>

In 1928, "talking" motion pictures were introduced. At first, the sound (including music) was recorded on phonograph records which could be played in synchronization with the film. Soon afterward, the soundtrack technique was developed to record the sound directly on the celluloid on a separate track, paralleling the picture. This event marked the first instance of recording music in synchronization with the movie's visual elements.<sup>42</sup>

The synchronization of music with film fundamentally altered the nature of music use by theatre exhibitors. The music in "talkies" became pre-planned and pre-selected by the film's producer and permanently embedded

---

39. See, e.g., *Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888 (S.D.N.Y. 1948), *relief*, 80 F. Supp. 900 (S.D.N.Y. 1948); *Alden-Rochelle, Inc. v. ASCAP*, (findings of fact and conclusions of law) (S.D.N.Y. 1948) [hereinafter *Alden-Rochelle Findings of Fact*]; *M. Witmark & Sons v. Jensen*, 80 F. Supp. 843 (D. Minn. 1948), *appeal dismissed*, 177 F.2d 515 (8th Cir. 1949).

40. See *Alden-Rochelle*, 80 F. Supp. at 895.

41. *Id.* at 891-92.

42. *Id.*

on the soundtrack of the film. Thus, no longer did an exhibitor make the kinds of spontaneous and "fleeting" usages of ASCAP music which had served as justification for the blanket license device in the first place. Instead, the theatre owner merely exhibited the reel of film as furnished by the movie company's distributor, with whatever pre-recorded music might be contained "in the can." The fact that the music in "talkies" was pre-planned allowed film producers to obtain directly from composers<sup>43</sup> licenses covering the performance of the music in movie theaters at the same time the producers selected the music and obtained other copyright licenses from the composers (including the right to record or synchronize the music onto the film's soundtrack).<sup>44</sup>

The significant change in the nature and manner of music use by theater owners eliminated any rationale for blanket licensing in that context.<sup>45</sup> ASCAP, however, did not withdraw voluntarily from licensing theatre owners on a blanket license basis. ASCAP's members systematically refused to provide producers the performing rights for a negotiated fee, thus perpetuating the theatre owners' dependence upon ASCAP blanket licenses.

The technique by which movie and theatre blanket licensing was perpetuated was both rigid and effective. When dealing with the film producers, ASCAP's members adopted the uniform practice of granting to the producer the right to record their musical works as part of the soundtrack of the films,<sup>46</sup> *but specifically withheld* from the producer the license to perform publicly the music in conjunction with the exhibition of the films.<sup>47</sup> The specific understanding between ASCAP's members and the film producers was that these public performance rights would be licensed, instead, through the blanket license arrangements between ASCAP and the theatre exhibitors.

The splitting off of the licensing of music performing rights from the other music rights granted to the producer contrasted sharply with the manner in which every other creative right in a film was licensed. Specifically, in order to assure the theatre owner that he was obtaining all rights necessary to exhibit a film, the film producer made it a practice to obtain all such rights (including other copyright performing rights and non-ASCAP music performing rights) in direct negotiations "at the source" with each of the individuals whose acting, writing, directing or other talents comprised the film. Producer "source" licensing of constituent film elements made eminent economic sense, since motion pictures were "commercially valueless" to movie exhibitors without all rights needed to perform them.<sup>48</sup>

The effect of the ASCAP members' refusal to convey music performing

43. Direct licensing of film producers by songwriters who were not members of ASCAP was a common practice.

44. See *Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888 (S.D.N.Y. 1948) (findings of fact and conclusions of law 84).

45. See generally *Alden-Rochelle*, 80 F. Supp. at 888; *M. Witmark*, 80 F. Supp. at 843.

46. This right is commonly referred to as the synchronization right.

47. See *Alden-Rochelle*, 80 F. Supp. at 888 (findings of fact and conclusions of law 36, 78).

48. See *id.* findings of fact and conclusions of law 37, 77, 82, 84.

rights to the producer was the anomalous exclusion of but one element from the film package licensed to the exhibitor. While each and every other creative talent right, including *other music rights*, was cleared and warranted by the producer to the exhibitor, performing rights to any ASCAP repertoire music were excluded. Solely as to those rights, the producers expressly placed with exhibitors the responsibility for obtaining licensing.<sup>49</sup>

One may question why movie producers so readily acquiesced in this disparate treatment of motion picture theatre performing rights. A significant part of the answer lies in what were (and, indeed, remain to this day) the producers' own intimate ties to ASCAP.<sup>50</sup>

The ASCAP distribution system provides for equal payments to the songwriter and publisher of each musical work that earns an ASCAP royalty distribution.<sup>51</sup> The predominant music contained in motion pictures is of the theme and background (or "score") variety written expressly for the film's producer by a "composer-for-hire." This music written specifically for movie soundtracks was created and "marketed" independently of traditional music publishers. The absence of a traditional publisher for movie music, when combined with ASCAP's distribution system, created a unique opportunity for the movie producers to, in essence, step into the shoes of the traditional publisher for purposes of receiving ASCAP royalty distributions.

The producers—when dealing with requests by ASCAP composers to withhold the grant of performing rights because of their preference for licensing through ASCAP—accordingly adopted the following practice: they permitted the ASCAP composers to withhold these rights, *provided* that the right to receive the publisher's share of the ASCAP distributions relating to performances of the music were transferred to a music publishing subsidiary of the producer. By this process, the movie producers essentially received "something for nothing" (*i.e.*, half of every dollar paid out by ASCAP on account of performances of that music without having to function in the role of a traditional publisher).<sup>52</sup> Such a system created an obvious incentive for the producers to leave the ASCAP blanket license as applied to movie exhibitors in place.

These circumstances, and ASCAP's demand for large fee increases, ultimately led the theatre exhibitors in the 1940's to mount the *Alden-Rochelle v. ASCAP* and *M. Witmark & Sons v. Jensen* challenges to the legality of the ASCAP blanket license as it applied to motion picture exhibitors. The findings of fact and conclusions of law reached by both the *Alden-Rochelle* and *M. Witmark* courts reflect the courts' attempts to

---

49. See *id.* findings of fact and conclusions of law 37, 77-78, 82-84.

50. See generally *id.* findings of fact and conclusions of law 86-89, 95 (discussing history of movie producers and ASCAP).

51. This method of allocation derives from the time of ASCAP's formation, when composers virtually always retained the services of a music publisher to publish and exploit their works, with the composer and publisher sharing in royalty proceeds equally.

52. See *Alden-Rochelle*, 80 F. Supp. at 888 (findings of fact and conclusions of law 83, 86-89, 95); *Buffalo Broadcasting*, 546 F. Supp. at 283 n. 21.

harmonize the fundamentally competing considerations of the need for a blanket license in some contexts versus the license's overt anticompetitive consequences when applied in other settings.

The courts' findings firmly support the central thesis of this article: (i) that, when applied in contexts in which a user makes spontaneous, unpredictable uses of music, a blanket license permitting rapid and random access to a performing rights organization's repertoire may be the only way to balance effectively both the copyright owners' infringement concerns and users' need for a license; *but*, (ii) that, where the music being used is essentially pre-recorded and planned in advance, and where sound economic principles dictate that in the absence of the blanket license, music copyright owners would be able effectively to license their works to producers "at the source," in competitive transactions, the application of the blanket license is inappropriate.

In this vein, the *Alden-Rochelle* court emphasized that it was the producers' practice to clear all other rights "at the source,"<sup>53</sup> including all music rights not controlled by ASCAP,<sup>54</sup> and that, but for the existence of the blanket license,

normal economics would require that performing rights as well as synchronization rights should be simultaneously acquired by the producers of the motion pictures, because a motion picture film production is economically valueless without the right to exhibit it.<sup>55</sup>

The *M. Witmark* court concurred in this analysis, further noting that the source licensing of both music synchronization and performing rights "would provide for a free competitive market in the motion picture industry for all copyright owners of music suitable for use in sound films."<sup>56</sup> As the *Alden-Rochelle* court appropriately concluded, consideration of "the good intentions" underlying the origins of the ASCAP blanket license cannot justify an elimination of price competition in circumstances where the parties are effectively insulated from doing business "on a competitive basis in a free market."<sup>57</sup>

The relief afforded in the *Alden-Rochelle* case against ASCAP and its members essentially forbade either from licensing performing rights directly to movie exhibitors. The judgment in that case, among other things, expressly prohibited ASCAP and its members from withholding the grant of music performing rights at the time when the music was selected by (and when synchronization rights to the same music were granted to) the film producer. It was recognized that the only time a competitive market con-

---

53. *Alden-Rochelle*, 80 F. Supp. at 888 (findings of fact and conclusions of law 37, 77).

54. *Id.* findings of fact and conclusions of law 82, 84.

55. *Id.* findings of fact and conclusions of law 85.

56. *M. Witmark*, 80 F. Supp. at 850.

57. *Alden-Rochelle*, 80 F. Supp. at 895.

cerning the price and quality of music to be used in a pre-recorded film could ever exist is at the time the music is selected by the producer from among competing alternatives.<sup>58</sup> As a consequence of *Alden-Rochelle*, movie producers gained the opportunity to negotiate and purchase the music performing rights at the same time they obtained other required music copyright licenses such as synchronization rights. This relief was to become one of the primary features of the 1950 amendment to ASCAP's Consent Decree.<sup>59</sup>

The immediate post-*Alden-Rochelle* experience regarding the licensing of theatrical music performing rights is also particularly instructive.<sup>60</sup> Between 1951 and 1955, ASCAP offered and entered into blanket license arrangements directly with the film *producers* covering the music in each producer's entire motion picture production schedule, at a fixed fee for each producer. In 1956, however, ASCAP sought to induce the producers to pay for their blanket licenses based upon a percentage-of-revenue formula. The producers uniformly rejected that request, and instead began to explore a source licensing arrangement for obtaining motion picture theatre performing rights directly from the copyright owners at the same time that they acquired synchronization rights for the music.

Since 1956, producers uniformly have obtained movie theatre performing rights through at-the-source, competitive negotiations with music copyright holders. "Normal economics" has prevailed.<sup>61</sup> As indicated in the following discussion, however, the benefits of such a free market in music have never been available to the industry that has evolved to mirror closely the movie industry in its use of music—local television.

## V. EVOLUTION OF THE LOCAL TELEVISION BLANKET LICENSE

### A. ASCAP's Early Dealings With the Local Television Industry

Television began developing commercially in the early 1940's. In that era, it was principally a "live" medium.<sup>62</sup> Music use was also "live," in the sense that music was selected and performed "on the spot." In these

58. Once selected and synchronized in the film, of course, there can be no further competition among musical works.

59. See *infra* notes 71-77 and accompanying text.

60. See *Buffalo Broadcasting*, 78 Civ. 5670 (S.D.N.Y. Gagliardi, J.): Plaintiffs' Trial Exhibit 65; deposition testimony of Herman Finkelstein at pp. 142-44, 507-12, 514, 538-43, 547-48, 571-72, 607, 610-15; Amended and Supplemental Stipulation of Facts 115-116 (complete recitation of the post-*Alden-Rochelle* experience is found in these portions of the trial record).

61. See *Alden-Rochelle*, 80 F. Supp. at 888 (findings of fact and conclusions of law 85). Although the *Alden-Rochelle* and *Witmark* litigations challenged only ASCAP's licensing practices, the result of those decisions has been that the theatrical performing rights of both BMI's and ASCAP's composer members have been licensed through competitive negotiations "at the source."

62. See Reply Affidavit of ASCAP's General Counsel, Bernard Korman, submitted in support of ASCAP's motion for modification of the Amended Final Judgment, *United States v. ASCAP* (Civ. 13-95) (WCC), 24 (1984) (wherein Mr. Korman acknowledges that, during this period, "television was a live medium.")

early years, in-studio orchestras were a common feature of television programming. Thus, it could be said that, at this point in television's evolution, music use was not unlike that of ASCAP's traditional blanket licensees—nightclubs, radio stations and the theatre exhibitors during the silent film era—insofar as the need for access on short notice to a wide range of works was concerned.

In 1941, ASCAP began issuing blanket licenses to the then-infant television industry on a "gratuitous" basis.<sup>63</sup> While those licenses were to last through 1948, as of 1945 ASCAP was already formulating plans which would enable it to capitalize on television's potential as a source of revenue to ASCAP's members.<sup>64</sup> By October 1948, ASCAP's efforts to obtain permission from its members to license television performing rights had intensified. ASCAP informed its members that fee-bearing television licenses would soon be sought for their benefit since "[t]he progress of commercial television within the past year can only be described in terms of 'leaps and bounds. . .'"<sup>65</sup> At this time, television programming and its music content remained predominantly "live,"<sup>66</sup> although television networks and stations increasingly were broadcasting theatrical films after their theatrical runs had been completed.

#### B. ASCAP's Efforts To Circumvent Application of the Principles of *Alden-Rochelle* to Its Licensing of Local Television

The entry of the final judgment in *Alden-Rochelle*<sup>67</sup> in November 1948 posed potential devastation for the future of ASCAP's television licensing activities. While the *Alden-Rochelle* case had involved an attack upon ASCAP's blanket licensing practices limited to motion picture theatre exhibitors, Judge Leibell's ruling constituted a sweeping condemnation of ASCAP's monopoly power and practices, decreeing "[a]lmost every part of the ASCAP structure" to be in violation of the antitrust laws.<sup>68</sup> Of particular concern to ASCAP was the reach of the court's judgment, which prohibited ASCAP and its members from continuing the illegal "splitting" of performing rights from synchronization rights in connection with the exhibition of motion picture films in theatres *or by any other means of exhibition—including* by television broadcast.<sup>69</sup>

63. ASCAP issued such licenses as of this time even though its authority to license television performing rights on behalf of its members was not clear.

64. See Affidavit of ASCAP's General Counsel, Herman Finkelstein, Dec. 26, 1961, submitted in *United States v. ASCAP* (Application of Shenandoah Valley Broadcasting, Inc.), (S.D.N.Y. 1941) at 4-5, Civ. No. 13-95.

65. *Id.* at 4-6; Exhibit B.

66. See *supra* note 62.

67. 80 F. Supp. 900 (S.D.N.Y. 1948).

68. *Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888, 893 (S.D.N.Y. 1948). See *supra* text accompanying notes 58-59 (nature of the relief granted).

69. ASCAP's consternation over the impact of the judgment upon its television licensing activities is reflected in the affidavits of its General Counsel, Herman Finkelstein and Oscar Hammerstein, then Vice-President of ASCAP, filed in support of ASCAP's motion to stay

ASCAP immediately sought means of avoiding the impact of the *Alden-Rochelle* decision insofar as ASCAP's dealings with the television industry were concerned. On the heels of the *Alden-Rochelle* judgment, ASCAP notified the television industry, on December 1, 1948, that, "in view of the fact that the television industry ha[s] passed from the experimental to the commercial stage of its development, the gratuitous licenses would be terminated effective December 31, 1948."<sup>70</sup> Concerned over the possible withdrawal of the entire ASCAP repertoire, the television networks agreed, in October 1949, to the terms of a new blanket license with ASCAP, which was to set the pattern for all television industry blanket licenses to follow.

Notwithstanding the provisions of the *Alden-Rochelle* judgment, the ASCAP television license required payment by the television broadcasters for ASCAP music contained in any motion picture films which might be exhibited on television, even if the same rights had been cleared at the source by the producer for theatrical exhibition.<sup>71</sup> By compelling broadcasters to acquire performing rights from ASCAP, this license provision effectively eliminated any opportunity for television broadcasters to obtain the benefits of competitively negotiated performing rights in transactions between the producers of motion pictures and other pre-recorded works and individual copyright holders, the very relief sought to be afforded in the *Alden-Rochelle* and *M. Witmark* cases.

ASCAP now confronted having the inconsistency between this aspect of its television license and the relief which Judge Leibell had ordered in *Alden-Rochelle* pass muster with the Department of Justice, which was formulating a major revision of the ASCAP Consent Decree in conformance with the *Alden-Rochelle* judgment. Contemporaneous documents reveal a sharp difference in approach between ASCAP and the Justice Department on the subject of television. The Department of Justice regarded the "source licensing" principles of *Alden-Rochelle* to be equally applicable to the exhibition of motion pictures and other film, whether exhibited in theatres or on television. ASCAP, on the other hand, strongly desired strictly to limit the scope and effect of the *Alden-Rochelle* decision and judgment to theatrical exhibitions of motion pictures.

Reflecting the Government's thinking is a 1949 memorandum criticizing ASCAP's draft decree revisions: "The [relief contemplated by *Alden-Rochelle*] should not be limited to exhibition of film in a motion picture theatre since to do so excludes music synchronized in the films used in telecasting."<sup>72</sup> Commenting later on its own counter-draft, the Justice De-

---

the applicability of the *Alden-Rochelle* judgment to users other than theatre exhibitors. ASCAP's motion for a stay was subsequently granted. *Alden-Rochelle*, ASCAP Notice of Motion and Affidavits in Support of Motion for a Stay of Judgment, *Alden-Rochelle, Inc. v. ASCAP* (S.D.N.Y. Nov. 24, 1948).

70. Finkelstein Aff., *supra* note 64, at 6.

71. See 1949 ASCAP-Network Television license at § 5H; *Buffalo Broadcasting, supra* note 5 (Plaintiff's Trial Exhibit 267).

72. May 19, 1949 Department of Justice memorandum from W.D. Kilgore, Jr. to Sigmund Timberg. See Plaintiff's Trial Exhibit 565 in *Buffalo Broadcasting Co., Inc. v.*



partment's draftsmen explained that "it is intended that the new judgment include television and such modifications as will eliminate the practices found to be illegal in the *Alden-Rochelle* case."<sup>73</sup>

The Government's rationale was succinctly stated by Sigmund Timberg, the Chief of its Judgment Enforcement Section, in a June, 1949 memorandum to the head of the Antitrust Division. Echoing *Alden-Rochelle* and *M. Witmark*, Mr. Timberg explained that "[t]he split-up between synchronization rights and performing rights is a historical accident and has an artificial legal basis"; that "[t]he transfer of motion picture performing rights away from ASCAP is consistent with the valid economic preference for licensing copyrights at the source wherever possible"; and that "[b]lanket licenses are not necessary in the motion picture industry."<sup>74</sup>

ASCAP nonetheless pressed the position that any decree amendment should reflect the holding of *Alden-Rochelle* in the most narrow fashion possible. It was ASCAP's fervent desire to limit the applicability of *Alden-Rochelle* to ASCAP's dealings with motion picture exhibitors, leaving ASCAP free to continue to deal on a blanket license basis with the still-developing television industry.<sup>75</sup>

ASCAP ultimately succeeded in its objective. By the time the decree amendment was finalized, in March of 1950, the source license protections earlier proposed by the Government for television licensees had been eliminated. Instead of providing the television industry with the full benefits of the *Alden-Rochelle* decision and judgment, the final decree left ASCAP fully empowered to license television broadcasters under the very blanket

ASCAP, 546 F. Supp. 274 (S.D.N.Y. 1982), *rev'd*, 744 F.2d 917 (2d Cir. 1984), *cert. denied*, 105 S. Ct. 1181 (1985).

73. See Plaintiff's Trial Exhibit 569 in *Buffalo Broadcasting Co., Inc. v. ASCAP*, 546 F. Supp. 274 (S.D.N.Y. 1982), *rev'd*, 744 F.2d 917 (2d Cir. 1984), *cert. denied*, 105 S. Ct. 1181 (1985) (August 29, 1949, Department of Justice memorandum from Harold Lasser and Beatrice Rosenberg to Sigmund Timberg). See also *id.* (Plaintiff's Trial Exhibit 588).

74. See June 29, 1949 Department of Justice memorandum from Sigmund Timberg to Herbert A. Bergson (*Buffalo Broadcasting*, *supra*, note 5 (Plaintiffs' Trial Exhibit 566)). Notably, BMI—today a staunch opponent of source licensing relief for the television industry—agreed whole-heartedly with these Justice Department views. In a 1949 memorandum submitted by BMI to the Department of Justice, BMI stated:

BMI believes that the views of both District Courts [*Alden-Rochelle* and *M. Witmark & Sons*] are entirely sound. As found by Judge Leibell, all other licensors, such as BMI have licensed both synchronization and performing rights in licensing the use of musical compositions with motion picture film. . . .

The synchronization and performance rights in all motion picture film, *whether used for exhibition in theaters or for television broadcasting*, should be treated as suggested herein. This theory was followed by Judge Leibell who enjoined ASCAP from enforcing its motion picture performance rights against *all* persons, which would of course include television broadcasters . . .

BMI Memorandum to the Department of Justice on Proposed Modifications of the Consent Decree in *U.S. v. ASCAP*, submitted Oct. 25, 1949 at pp. 72-73 (emphasis added) (on file in the trial record of *Buffalo Broadcasting*, *supra*, as Plaintiffs' Trial Exhibit 153).

75. See Jan. 24, 1949 Department of Justice memorandum from W.D. Kilgore, Jr. to Files; July 22, 1949 Department of Justice memorandum from Sigmund Timberg to Herbert A. Bergson; August 29, 1949 Department of Justice memorandum from Harold Lasser and Beatrice Rosenberg to Sigmund Timberg September 13, 1949 Department of Justice memoran-

arrangements which the Government's enforcers only months previously had recognized were an "economic anomaly" without justification.<sup>76</sup>

Why did the Government accede to ASCAP's proposal that television receive different treatment than movie exhibitors? It appears that the Government was persuaded by ASCAP's arguments that: (i) the television industry was in its infancy and was still developing; (ii) television was, as of 1950, essentially a live medium and, therefore, was more analogous to radio than motion pictures; and (iii) as of 1950, very few motion pictures and other films were being broadcast on television.<sup>77</sup>

However cogent these arguments may have been at that time, there can be no doubt that these factors have no bearing on the television industry as it operates today. It is indisputable that after 1950, television developed into virtually an exclusively pre-recorded medium, in which there is scarcely any "spontaneous" use of music.<sup>78</sup> Old variety shows broadcast live with studio orchestras have today been replaced with pre-recorded programming packaged by third parties and shipped to the stations "in the can," in which the music is pre-selected.<sup>79</sup>

In short, in terms of music use, local television broadcasters today have evolved into "at-home" theatre exhibitors: they simply exhibit reels of filmed product in which the music is known and was selected by the producer well in advance of the time of broadcast. In light of the stations' changed circumstances, it is evident that the blanket license—predicated upon the need for spontaneous use and random access to the entire ASCAP and BMI repertoires—has become as much a misfit for television as it had become for theatre exhibitors by 1950. Yet, as a result of a stroke of the Government's pen in amending the ASCAP Consent Decree in 1950 and ASCAP's subsequent consistent refusal to provide *Alden-Rochelle-type* treatment to television broadcasters after their program and music use patterns became clear<sup>80</sup>, the stations remain subject to the same blanket license structure that existed at the advent of television in the 1940's.

This structure has persisted notwithstanding that the very conditions which led the *Alden-Rochelle* court to disallow ASCAP's blanket licensing

---

dum from Sigmund Timberg to Harold Lasser and Beatrice Rosenberg (on file in the trial record of *Buffalo Broadcasting*, *supra* note 72, as Plaintiff's Trial Exhibits 557, 567, 569 and 571, respectively).

76. Timberg, *The Antitrust Aspects of Merchandising Modern Music: The ASCAP Consent Judgment of 1950*, 19 LAW AND CONTEMPORARY PROBLEMS 294, 301-302 (1954).

77. See *Buffalo Broadcasting*, Deposition Testimony of Sigmund Timberg (March 13, 1981) at pp. 63-68, 71-74, 178-79, 232-33; Plaintiffs' Trial Exhibits 586-87 (including transcript of proceedings in *U.S. v. ASCAP* dated March 14, 1950); see also Affidavit of ASCAP General Counsel Bernard Korman, *supra* note 62, acknowledging that "[i]n March 1950, when the Amended Final Judgment was entered, . . . television was a live medium. . . . In 1950, no one even dreamed that television would ever become a medium depending almost entirely on pre-recorded film or taped programming."

78. See *supra* note 77, *Buffalo Broadcasting* trial transcript, *Buffalo Broadcasting*, *supra* note 60 at 65, 81; Affidavit of Howard P. Kitt at ¶¶ 34, 45, 225-231, sworn to November 11,

79. See Amended and Supplemental Stipulation of Facts, *Buffalo Broadcasting*, *supra* note 60 at 65, 81; Affidavit of Howard P. Kitt at §§ 34, 45, 225-231, sworn to November 11, 1981, submitted as expert testimony in *Buffalo Broadcasting*, *supra* note 60.

80. See *infra* text accompanying notes 88-92.

of the theatre operators in the 1940's have come to characterize ASCAP's and BMI's licensing of television stations—to wit: (i) the continued absence of any price competition among the copyright holders whose works are contained in the pre-recorded product broadcast by television stations; (ii) the continued uniform and anomalous practice of ASCAP and BMI members to withhold the licensing of television performing rights to film producers, pursuant to arrangements whereby the composers and producers agree to license the television performing rights through ASCAP or BMI and further agree to share in the royalties paid by those organizations by virtue of the grant of the "publisher" royalty share to producer-affiliated companies;<sup>81</sup> and (iii) the conceded recognition that, absent the blanket license, "normal economics" dictate that performing rights would be licensed in competitive negotiations at the source.<sup>82</sup>

### C. *The Local Television Broadcasters' Unsuccessful Efforts to Obtain Source Licensing*

The history reveals that the non-application of *Alden-Rochelle* principles to television was the product of ASCAP's determination to limit source licensing to the realm of theatrical exhibition, at a time when television arguably was developing as a different type of music user than motion picture theatres. ASCAP persists in using this early victory to resist the development of television source licensing—notwithstanding the fundamental changes which have occurred in television programming and music use. For example, when in 1958 the Government, in apparent recognition of the development of television into a pre-recorded medium, inquired of ASCAP as to the rationale for excluding television from the benefits of source licensing, ASCAP, through its counsel, responded by claiming that the "problem was considered and disposed of" (evidently forever, in ASCAP's view) in the negotiations leading to the 1950 Decree.<sup>83</sup>

ASCAP's (and later BMI's) tenacity in seeking to avoid development of a television source licensing market is also reflected in its post-1950 license history with the local television industry. Local television broadcasters have repeatedly attempted to obtain source licensing for television through

81. This practice applies even to the music in a movie that appears on television after its theatrical run, for which the composer—since the *Alden-Rochelle* era—has granted the theatrical performing rights in the same music to the producer in competitive source licensing transactions.

82. ASCAP in its Trial Memorandum in *Buffalo Broadcasting* noted: "Obviously, in a world where telecasters did not have blanket licenses, producers and publishers would have every incentive to negotiate over performing rights—and there is no reason to believe they would not do so." Trial Memorandum of Defendants ASCAP, et al., *Buffalo Broadcasting*, *supra* note 60, dated November 13, 1981, at p. 53.

83. Letter from ASCAP outside counsel, Arthur Dean, to Robert A. Bicks, dated September 17, 1958, *Buffalo Broadcasting*, *supra* note 60, (Plaintiffs' Trial Exhibit 326), at 9. See also September 10, 1959 Department of Justice Memorandum from John Wilson to Files (*Buffalo Broadcasting* trial record, Plaintiffs' Trial Exhibit 325) ("Finkelstein says this problem [i.e., ASCAP's right to license television performing rights to music in motion picture films and other pre-recorded programming] was argued out in 1950. . .").

negotiations with ASCAP and BMI,<sup>84</sup> through intervention of the ASCAP judicial rate court,<sup>85</sup> through efforts to obtain antitrust relief,<sup>86</sup> and, most recently, through the introduction of copyright reform legislation.<sup>87</sup>

Local television broadcasters began their efforts to obtain source licensing in 1949, during the very first round of negotiations with ASCAP over a fee-bearing license. Through a committee representing the local (as opposed to network) television industry,<sup>88</sup> the local stations—which in 1949 were broadcasting movies and other pre-recorded films to a far greater extent than television networks—pressed vigorously for a license that would have accorded stations the benefit of the *Alden-Rochelle* decision for films aired on television. Notwithstanding the similar nature of television stations and motion picture theatres with respect to the exhibition of films (both receive the product “in the can” well after the point in time when any competition over music performing rights licensing can take place), ASCAP “would have none of it” and rejected the stations’ clearance-at-source proposals.<sup>89</sup>

After expiration of the first series of ASCAP blanket licenses at the end of the 1950’s, the local broadcasters again attempted to achieve source licensing relief at the bargaining table. By this time, pre-recorded television programming dominated the airwaves. The stations accordingly sought to negotiate with ASCAP a new form of license which would exclude syndicated, pre-recorded movies and other filmed product from the coverage of the blanket license in order to allow for the development of source licensing for such product. ASCAP refused to entertain the proposal. The local broadcasters thereafter commenced a proceeding under the ASCAP Consent

---

84. See *United States v. ASCAP, Application of Shenandoah Valley Broadcasting, Inc.*, 208 F.Supp. 896 (S.D.N.Y. 1962), *aff’d* 331 F.2d 117, 121 (2d Cir. 1964), *cert. denied*, 377 U.S. 997 (1964) [hereinafter *Shenandoah*]; *Buffalo Broadcasting*, 546 F. Supp. at 288.

85. The rate court was created under the 1950 Consent Decree as a hoped-for check on ASCAP’s monopoly pricing power. It is charged with setting a “reasonable” license fee upon application by any ASCAP licensee.

86. See *Buffalo Broadcasting*, 546 F.Supp. at 288.

87. See *supra* note 20. The respective House and Senate bills would effectively require music copyright holders to convey music performing rights licenses applicable to copyrighted music contained in syndicated programming to the producer of such programming.

88. Initially, all television broadcasters, networks and local stations alike, were represented in license negotiations by the Music Committee of the National Association of Broadcasters (NAB). After negotiations between ASCAP and the overall NAB Committee broke down in early May of 1949, ASCAP initiated negotiations solely with the networks, until a network blanket license agreement was reached in the Summer of 1949. The local stations, finding the network arrangement unacceptable, formed their own committee and resumed negotiations with ASCAP concerning local station licenses in September of 1949. See Amended Supplemental Stipulation of Facts, *Buffalo Broadcasting*, *supra* note 60 at 142-143.

89. See *Buffalo Broadcasting* trial record, deposition testimony of Robert Myers at p. 64. This occurred at the same time that ASCAP was successfully urging the Justice Department to back down from the Government’s initial position (which, unbeknownst to the local broadcasters, was on all fours with the broadcasters’ position at the bargaining table) that the clearance-at-source principles of *Alden-Rochelle* should be applied to films exhibited on television.

Decree seeking an order directing ASCAP to issue the requested new form of license.<sup>90</sup> That request ultimately was denied by the Court which—without passing on the *bona fides* of the stations' request or the competitive concerns involved—simply concluded that it was without power under the Consent Decree to order ASCAP to issue the specific form of license requested.<sup>91</sup>

The stations' unsuccessful source licensing foray in the *Shenandoah* proceeding ended in the execution of another decade-long license agreement, which expired in 1977. At that time the stations again sought source licensing relief, by means of an antitrust attack focused upon the competition-eliminating effect of the blanket license as applied to the stations' syndicated film portion of their program day.<sup>92</sup>

By the time the stations had their day in court in the antitrust proceeding, in the Fall of 1981, the state of antitrust doctrine regarding ASCAP's and BMI's blanket licensing arrangements had taken a curious turn. In its decision in *Broadcast Music, Inc., v. Columbia Broadcasting System, Inc.*, the United States Supreme Court had determined, in the context of a television network challenge to the blanket license, that the antitrust legality of the blanket license was to be tested under the rule of reason, in light of the individual market circumstances presented by particular users.<sup>93</sup> Upon remand to the Second Circuit Court of Appeals for a rule of reason determination on the network facts, the Court of Appeals determined that, while a rule of reason determination ordinarily "requires a determination of whether an agreement is on balance an unreasonable restraint of trade, that is, whether its anticompetitive effects outweigh its pro-competitive effects,"<sup>94</sup> such inquiry might be *avoided altogether* if, as a "threshold"

---

90. See *Shenandoah*, *supra* note 84, at 120.

91. *Id.* at 122-24. Given the prior acquiescence of the Justice Department in 1950 to ASCAP's pleas that television not be given the benefits of source licensing, the conclusion reached by the court is not surprising. One would not readily assume that a court would accomplish by indirection (*i.e.*, expansive interpretation of a consent decree) that which the Government in 1950 affirmatively declined to accomplish directly.

92. *Buffalo Broadcasting Company, Inc. v. ASCAP*, 546 F. Supp. 274, 285-86 (S.D.N.Y. 1981).

93. 441 U.S. 1, 24 (1979). Notably, the Supreme Court in *BMI v. CBS* found that since the blanket license "allows the licensee immediate use of covered compositions, without the delay of prior individual negotiations," *id.* at 22, there were some circumstances where, absent the blanket license, "the commerce anticipated by the Copyright Act and protected against restraint by the Sherman Act would not exist at all. . . ." *Id.* at 19. The Court made clear its reference here to the "milieu" of "individual radio stations, nightclubs, and restaurants," *id.* at 20, where "[t]he disk-jockey's itchy fingers and the bandleader's restive baton" precluded as a practical matter the negotiation of music rights "well in advance of the time of performance." *Id.* at 22 n. 37. The Court at the same time contrasted those instances from the situations in which music rights could be individually and directly negotiated in advance—"dramatic rights. . . [and] other rights, such as sheet music, recording, and synchronization"—where there would be little, if any, justification for a blanket license. *Id.* The Court concluded from such analysis that, "when attacked, [the blanket license] should be subjected to a more discriminating examination under the rule of reason." *Id.* at 24.

94. *CBS Remand*, 620 F.2d at 934.

matter, it can be shown that the "complaining customer elects to use [the blanket license] in preference to realistically available marketing alternatives."<sup>95</sup> The Court of Appeals proceeded to dismiss CBS's lawsuit on the grounds that it had long used the blanket license and had failed to prove the absence of such "fully available" alternatives.

This unprecedented departure from a traditional rule of reason examination of challenged marketing practices was sharply attacked by the Government as analytically incorrect;<sup>96</sup> however, the ruling not only stood, but became the governing legal standard for the local television stations' own case.

At trial, the local television stations succeeded, even under the Court of Appeals' demanding test, in demonstrating that the blanket license, as applied to their pre-recorded program day, violated the Sherman Act by foreclosing a competitive, source licensing market.<sup>97</sup> The Court of Appeals reversed, essentially on the grounds that the stations had not satisfactorily proved the absence of "fully available" alternatives to the blanket license—thus obviating the necessity of evaluating the possible anticompetitive effects of the blanket license.<sup>98</sup>

Whatever may be said about the correctness of the mode of legal analysis which now governs antitrust challenges to the ASCAP and BMI licenses, it is this observer's view that the very history which, since the 1940's, has remitted the stations to blanket licensing, also contributed strongly to the stations' undoing in the antitrust litigation. As noted, the Court of Appeals for the Second Circuit in the *Buffalo Broadcasting* case put the burden on the stations to *prove* that they could not fight their way out of the blanket license. The Court seemingly adopted the view that, if the broadcasters had been serious all of these years about achieving source licensing, such alternative would have been readily obtainable. The very fact that the broadcasters have been operating under a blanket license for many years served, for the Court, as evidence of the stations' apparent preference for it. The Court reached this conclusion in the face of the trial testimony of a series of broadcasting executives and extensive documentation indicating the enormous difficulties encountered in the effort to obtain source licensing. The Court's conclusion in reliance on history also flies in the face of the record of persistent and costly efforts on the part of the broadcasters to

---

95. *Id.* at 935.

96. Upon CBS's petition for certiorari, the Solicitor General, asked by the Supreme Court for his views, expressed the Government's sharp disagreement with the truncated analysis embraced by the Court of Appeals. The Government brief noted: "[I]t does not necessarily follow that the existence of economic alternatives demonstrates that the respondents' licensing scheme has no anticompetitive effect." The Solicitor General cautioned that, "if the court of appeals intended to establish a rule of general applicability on this point, its decision would be clearly wrong and appropriately subject to summary reversal." Brief for the United States as *Amicus Curiae* at 7-8, *CBS v. ASCAP*, 450 U.S. 970 (1981) (No. 80-323).

97. *Buffalo Broadcasting*, 546 F. Supp. at 291-93, 296.

98. *Buffalo Broadcasting*, 744 F.2d at 933.

achieve fundamental licensing relief. Why would costly litigative and legislative efforts be undertaken if source licensing were available simply for the asking?

## VI. THE NEED FOR A LEGISLATIVE SOLUTION

Television broadcasters are, analytically, no different than movie theatre exhibitors in their use of copyrighted music on filmed product. As was demonstrated to be the case with motion picture exhibitors, a blanket license is no longer necessary in the context of local television "to make the market function."<sup>99</sup> Yet, the Government's hesitancy in 1950, the subsequent entrenchment of the blanket license system, and the *sui generis* treatment which the courts have afforded ASCAP and BMI have brought about an inversion of the antitrust analytical process. The burden has been placed on the broadcasters to justify their entitlement to the benefits of a competitive market. A presumption has been made in favor of monopoly over competition, of regulation through a rate court over free market price determinations, contrary to the purpose of the copyright and antitrust laws. Why should not the burden of justification for a licensing system which departs from these norms be placed upon the beneficiaries of that system?

The ability of the local television broadcasters to initiate a so-called "rate court" proceeding under Article IX of the 1950 ASCAP Consent Decree (although not under BMI's 1966 Decree) serves as no solution to the broadcasters' present predicament. The limited scope of such a proceeding is to establish "reasonable" license fee levels, *i.e.*, to make a guess as to the value of the music required by the broadcasters, under a continued regime of blanket licensing. The rate court thus not only perpetuates the current licensing structure, it also represents a costly, cumbersome and artificial substitute for a free market determination of the value of music through a source licensing system.

In practice, moreover, the rate court has proven to be ineffective. The ASCAP Consent Decree prescribes no guidelines for determining what constitutes a "reasonable" fee, and in thirty-six years the court has provided none. Proceedings have traditionally devolved into wide-ranging discovery expeditions focusing less upon issues of music use and value than upon users' ability to pay. It is not surprising, given the foregoing, that the rate court has never adjudicated a case to conclusion. Such a flawed judicial mechanism can hardly be said to provide a meaningful avenue for local television broadcasters to achieve their legitimate licensing objectives.

Television stations are trapped by their history. They are being penalized for having lived with a system they did not want from the outset and from which they have struggled to escape.

---

99. See *BMI v. CBS*, 441 U.S. at 23; *Broadcast Music Inc. v. Moor-Law, Inc.*, 527 F.Supp. 758 (D. Del. 1981), *aff'd mem.*, 691 F.2d 490 (3d Cir. 1982) (antitrust challenge to blanket licensing of small establishments offering live music dismissed upon finding that blanket license was necessary and that there were no feasible alternatives in that market).

When changes in society and technological innovation alter the market for copyrighted materials, our courts have consistently looked to Congress to amend, as necessary, copyright law and policy.<sup>100</sup> Indeed Congress, itself, has explicitly acknowledged that changes in the technologies of motion pictures, sound recordings, radio and television may engender imbalances which require correction.<sup>101</sup>

It is appropriate, therefore, for Congress to correct the "historical accident"<sup>102</sup> which has resulted in the anomalous licensing practice which prevails for television music. Such relief would be wholly consistent with what the architect of the ASCAP Consent Decree alluded to as "the valid economic preference for licensing copyrights at the source wherever possible."<sup>103</sup> In today's world of pre-recorded television, it is not only possible to have copyrighted music so licensed, but effective copyright and antitrust policy would seem to require it.

---

100. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 430-31 (1984).

101. See H.R. REP. No. 94-1476, 94th Cong, 2d Sess. at 47 (1976) (noting that technical advances within these mediums frequently cause "the business relations between authors and users. . . [to] evolve new patterns").

102. See *supra* note 74 (Dept. of Justice Memorandum from Sigmund Timberg to Herbert A. Bergson),

103. *Id.*



