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Blanket Licensing of Music Performing Rights: Possible Solutions to the Copyright-Antitrust Conflict

Mary K. Kennedy

RECENT DEVELOPMENT

Blanket Licensing of Music Performing Rights: Possible Solutions to the Copyright-Antitrust Conflict

I. INTRODUCTION

Although copyright and antitrust laws share the goal of promoting innovation, the two bodies of law attempt to achieve this end through conflicting means. Antitrust legislation promotes innovation and productivity by removing restraints on competition and discouraging monopolization. Copyright laws, in contrast, attempt to foster creativity by granting composers a monopoly—the exclusive right to perform and to authorize performance of their musical works[1] for a limited period.[2] Individual composers formerly had no practical protection of or means to derive the maximum monetary benefit from their exclusive rights because use of their works was widespread, spontaneous, and ephemeral.[3] In 1914, however, a group of composers founded the American Society of Composers, Authors, and Publishers (ASCAP) to insure adequate enforcement of the copyright laws.[4] A group of radio broadcasters founded another performing rights organization, Broadcast Music, Inc. (BMI), in 1940 during a dispute with ASCAP.[5] These organizations serve as clearinghouses for the licensing of music performing rights.[6] Disgruntled licensees have waged antitrust attacks on the performing rights organizations' licensing practices over the last forty years.[7] These cases require courts to balance competing

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1. *See* 17 U.S.C. app. § 106(4) (1976).

2. *See id.* app. §§ 302-04.

3. BMI v. CBS, Inc., 441 U.S. 1, 5, 20 (1979).

4. *Id.* at 4-5. ASCAP presently consists of approximately 21,000 writer and 8000 publisher members. Buffalo Broadcasting Co., Inc. v. ASCAP, 546 F. Supp. 274, 277 (S.D.N.Y. 1982).

5. Garner, United States v. ASCAP: *The Licensing Provisions of the Amended Final Judgment of 1950*, 23 BULL. COPYRIGHT SOC'Y 119, 122-23 (1976). BMI now consists of approximately 38,000 writer and 22,000 publisher members and functions much like ASCAP. *Buffalo Broadcasting*, 546 F. Supp. at 277.

6. The performing rights societies grant music users licenses to perform members' works in return for a licensing fee based on a percentage of the music users' revenues. The most prevalent licensing format is the blanket license that offers music users unrestricted access to the performing rights societies' repertories during the license period. The performing rights organizations offer blanket licenses on an all-or-nothing basis. The license fee reflects the music user's ability to pay rather than the amount of mnsic he uses. *BMI*, 441 U.S. at 5; *see infra* notes 21 & 23 and accompanying text.

7. *See* Becker & Petrowitz, *Play It Again Sam, But Don't Forget to Pay the Fee*, 30 FED. B. NEWS & J. 29, 30-32 (1983); Note, CBS v. ASCAP: *Performing Rights Societies and*

antitrust and copyright policy considerations, but courts traditionally have rejected legal challenges to the organizations' blanket licensing practices by recognizing that the benefits which derive from enforcement of composers' exclusive rights through such licenses outweigh any attendant anticompetitive effects. The United States District Court for the Southern District of New York, however, recently diverged from the trend of protecting the performing rights organizations' blanket licenses in *Buffalo Broadcasting Co., Inc. v. ASCAP*.[8] Holding that blanket licensing of music performing rights to local television stations violated the antitrust laws, the *Buffalo Broadcasting* court enjoined further use of the blanket licensing system.[9] This decision made the Southern District of New York one of the first courts to enjoin blanket licensing,[10] and although *Buffalo Broadcasting* may have remedied the inequities present in that particular licensing situation, the decision has produced "utter chaos" in the performing rights industry.[11]

This Recent Development compares *Buffalo Broadcasting* with other blanket licensing decisions and predicts the reversal of *Buffalo Broadcasting* on appeal. Part II of this Recent Development discusses the organization and operation of the performing rights societies. Part III focuses on the pertinent antitrust principles and the history of antitrust litigation between the performing rights societies and various licensees. Part IV examines recent decisions addressing blanket licenses in which courts have used similar analyses yet reached differing results. Part V analyzes possible solutions to the confiict between antitrust and copyright laws in the blanket licensing context and concludes that resolution of this conflict will necessitate exempting the performing rights organizations from antitrust sanctions and placing them under a system of governmental or judicial control.

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the Per Se Rule, 87 YALE L.J. 783, 783 & n.2 (1978).

8. 546 F. Supp. 274 (S.D.N.Y. 1982).

9. The court found that the benefits of the blanket licensing system did not outweigh the anticompetitive effects the format produced in the local television industry. The court based its holding on the assumption that local television stations were unable to bargain at arm's length with the performing rights organizations. *Id.* at 292-93; *cf.* BMI v. CBS, Inc., 1983-2 Trade Cas. (CCH) ¶ 65,551 (S.D.N.Y. 1983). *BMI v. CBS, Inc.*, another in the series of blanket license cases, held that giant television organizations were able to bargain at arm's length with the performing rights organizations.

10. *Cf.* United States v. ASCAP, 1950-51 Trade Cas. (CCH) ¶ 62,595 (S.D.N.Y. 1950) (requiring ASCAP to offer fees that give music users a real choice between blanket and per-program licensing).

11. *See infra* note 210 and accompanying text.

II. PERFORMING RIGHTS SOCIETIES: ORGANIZATION AND OPERATION

The United States Constitution provides that "[t]he Congress shall have Power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[12] Congress passed the copyright laws[13] pursuant to this constitutional mandate and thereby granted copyright holders the exclusive right to perform or to authorize others to perform the copyrighted works.[14] Difficulties, however, arose soon after Congress had established the performance right in musical compositions in 1897.[15] Performances of the protected musical compositions occurred at various locations, such as theatres, dance halls, and taverns, with such frequency that individual composers had great difficulty in detecting unauthorized uses of their works.[16] In addition, music users had no practical means to locate and negotiate licenses with composers whose music they wished to perform.[17]

A group of composers and musicians responded to these difficulties by founding ASCAP in 1914.[18] ASCAP's primary functions are guarding against infringement of works in its repertory by monitoring public performances of music, bringing copyright infringement actions on behalf of its members,[19] and serving as a clearinghouse for copyright holders by collecting and distributing to the member composers and publishers royalties that licensees pay.[20] These composers and publishers authorize ASCAP to grant licenses for the use of their copyrighted works. These licenses are either blanket or per-use licenses. A blanket license costs a music user such as a broadcaster a flat fee, generally a percentage of the user's advertising revenue, and entitles him to unrestricted access to ASCAP's repertory for a specific period, usually a year.[21] A per-

12. U.S. CONST. art. I, § 8.

13. 17 U.S.C. app. §§ 101-810 (1976).

14. *Id.* app. § 106(4).

15. Act of Jan. 6, 1897, ch. 4, 29 Stat. 481 (repealed 1906) (current version codified at 17 U.S.C. § 106(4) (1976)).

16. *Buffalo Broadcasting*, 546 F. Supp. at 277; 2 NIMMER ON COPYRIGHT § 8.19 (1982).

17. *Buffalo Broadcasting*, 546 F. Supp. at 277.

18. *See supra* notes 4-5 and accompanying text. Except where otherwise indicated, this Recent Development will refer only to ASCAP when discussing issues common to ASCAP and BMI.

19. *But see* BMI v. CBS, Inc., 1983-2 Trade Cas. (CCH) ¶ 65,551 (S.D.N.Y. 1983) (holding that BMI lacked standing to sue on behalf of its members).

20. *See* Comment, *Price Fixing and the Per Se Rule: A Redefinition*—BMI v. Columbia Broadcasting System, Inc., 5 DEL. J. CORP. L. 73, 75 (1980).

21. CBS, Inc. v. ASCAP, 400 F. Supp. 737, 742 (S.D.N.Y. 1975), *rev'd*, 562 F.2d 130

use license, however, costs the licensee a percentage of only those advertising revenues that the programs which employ ASCAP music generate.[22] Both licensing systems operate on an all-or-nothing basis—the user pays the same price whether he uses one or one million of ASCAP's compositions during the license period.[23]

III. Antitrust Principles and Antitrust Litigation Concerning Music Performing Rights and Licenses

A. *Antitrust Principles*

Courts have developed two major lines of antitrust analysis under section 1 of the Sherman Act[24] to evaluate the anticompetitive effects of various business activities: the per se rule and the rule of reason.[25] The per se rule is a judicial time-saving mechanism. If the court repeatedly has dealt with a certain business practice that it views as "plainly anti-competitive,"[26] the court need not duplicate previous in-depth economic investigations of the practice's effects and the history of the industry to determine illegality. Instead, the court merely ascertains whether it has "considerable experience" with the industry[27] and whether the practice "lack[s]. . .any redeeming virtue."[28] If the court finds that both these conditions exist, it brands the practice per se illegal without further analysis.[29] Courts regard activities such as resale price maintenance,[30] tying contracts,[31] horizontal market restraints,[32]

(2d Cir. 1977), *rev'd sub nom.* BMI v. CBS, Inc., 441 U.S. 1 (1979); Note, *supra* note 7, at 785.

22. *Buffalo Broadcasting*, 546 F. Supp. at 282.

23. *BMI*, 441 U.S. at 5.

24. 15 U.S.C. §§ 1-7 (1976).

25. *See* L. Sullivan, Handbook of the Law of Antitrust §§ 68-72 (1977).

26. National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 692 (1978); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 50 (1977).

27. *BMI*, 441 U.S. at 9; United States v. Topco Assoc., Inc., 405 U.S. 596, 607-08 (1972); *see also* Van Cise, *The Future of Per Se in Antitrust Law*, 50 Va. L. Rev. 1165 (1964).

28. Northern Pac. R.R. Co. v. United States, 356 U.S. 1, 5 (1958). "There are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Id.*

29. *BMI*, 441 U.S. at 8 & n.11; *Continental T.V., Inc.*, 433 U.S. at 50 n.16.

30. United States v. Parke Davis & Co., 362 U.S. 29 (1960). An agreement to fix the price at whicb a buyer may resell a product constitutes a per se violation of the Sherman Act because it unreasonahly restrains alienation and forecloses price competition among potential buyers of the product. *See* L. Sullivan, *supra* note 25, at §§ 131-41.

31. International Salt Co., Inc. v. United States, 332 U.S. 392 (1947). If the seller of

and conspiracy to fix prices[33] as "naked" restraints on trade whose plainly anticompetitive effect renders them per se illegal. Courts use the rule of reason[34] to analyze other business activities that affect trade and allow them only if their anticompetitive effects are not "undue."[35] Under the rule of reason, a court evaluates the effect of a business practice on competition in the relevant market[36] to determine if the activity unreasonably restrains trade and thereby violates the antitrust laws.[37]

B. Performing Rights Organizations' Antitrust Litigation

1. The Consent Decrees

ASCAP and BMI, through their members, control the performance rights to virtually every domestic copyrighted composition.[38] Because the two performance societies dominate the licens-

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product *A* conditions the sale of product *A* to a buyer on the buyer's purchase of product *B*, a tie-in exists. The buyer must purchase the unwanted product *B* to acquire the desired product *A*. The purpose of such arrangements is to give a seller who has market power over the sale of product *A* concomitant market power for product *B*. Tying arrangements are a per se violation of § 1 of the Sherman Act and § 3 of the Clayton Act. *See* Northern Pac. R.R. Co. v. United States, 356 U.S. 1 (1958); *see also* L. SULLIVAN, *supra* note 25, at § 150.

32. United States v. Topco Associates, Inc., 405 U.S. 596 (1972). Horizontal price restraints are agreements among competitors at the same level to restrict output and to raise prices above competitive levels. For a general discussion of horizontal restraints on trade, see L. SULLIVAN, *supra* note 25, at §§ 59-107.

33. Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939). The Sherman Act prohibits parties from conspiring to stifle market competition through price fixing. *See* L. SULLIVAN, *supra* note 25, at §§ 108-14.

34. Professor Sullivan states the rule of reason test as follows:

> [A]ny concerted action which in purpose or effect would significantly hamper competition violates Section 1. Significance is judged by balancing any tendencies in the arrangement to enhance competition against any tendencies to injure competition. If the latter tendencies predominate, the arrangement is an unreasonable restraint and violates the Act.

L. SULLIVAN, *supra* note 25, at § 72.

35. Standard Oil Co. v. United States, 221 U.S. 1, 66 (1911); *see* L. SULLIVAN, *supra* note 25, at § 65.

36. *See supra* note 34.

37. Examples of business activities that courts have found not to restrain trade unduly are vertical territorial and customer restraints, *see* Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977), and market facilitation arrangements, *see* Board of Trust v. United States, 246 U.S. 231 (1918). *See also* L. SULLIVAN, *supra* note 25, at § 66.

38. CBS, Inc. v. ASCAP, 400 F. Supp. at 742. ASCAP's composition pool includes over three million works, while BMI's pool contains over one million compositions. *Id.* Another small performing rights organization, SESAC, Inc., also exists. *See* 2 NIMMER ON COPYRIGHT § 8.19 (1982). SESAC has approximately 300 publisher members and several hundred writer members. It also uses the blanket licensing system. Note, *supra* note 7, at 783 n.1. The industry-wide impact of small performing rights societies such as SESAC, however, is minimal. *Buffalo Broadcasting*, 546 F. Supp. at 282 n.17.

ing of musical compositions and engage "in a large and active line of commerce" between composers and music users, it is not surprising that "[n]either ASCAP nor BMI is a stranger to antitrust litigation."[39] In 1941 the government filed complaints alleging that the blanket license[40] illegally restrained trade and that the pooling of compositions with an all-or-nothing use of that pool permitted the performing rights organizations to charge arbitrary prices.[41] The government's objectives were to enjoin blanket licensing and require the organizations to institute new, less monopolistic forms of licensing.[42] The government and ASCAP settled the case by entering into a consent decree.[43] The decree allowed ASCAP to continue offering the blanket licensing format, but required the organization to offer users the alternative of purchasing a per-program license. This license based its rate on advertising revenues from the programs that actually used ASCAP music, while the blanket licensing rate was a percentage of a user's total advertising revenue regardless of the amount of music he used.[44] The 1941 consent decree also prohibited ASCAP from artificially inflating the price of its license by withholding parts of its repertory from licensees.[45]

The 1941 decree did not end ASCAP's antitrust troubles. As a result of private litigation in the late 1940's,[46] the government reopened and substantially revised the decree in 1950.[47] The 1950 amended decree, which still controls many of the organization's activities, requires ASCAP to charge blanket and per-program license fees that offer music users a real economic choice between

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39. CBS, Inc., v. ASCAP, 400 F. Supp. at 743, *quoted in BMI*, 441 U.S. at 10. As early as 1934 the Justice Department investigated claims that ASCAP's conduct unduly restrained free competition. *BMI*, 441 U.S. at 10.

40. In 1941 the blanket licensing format was the ouly type that tlie performing rights organizations offered. *BMI*, 441 U.S. at 10.

41. *Id.*; *see, e.g.*, Complaint, United States v. ASCAP, Civ. No. 13-95, at 3-4 (S.D.N.Y. 1941).

42. *BMI*, 441 U.S. at 11; *Buffalo Broadcasting*, 546 F. Supp. at 278.

43. United States v. ASCAP, 1940-43 Trade Cas. (CCH) ¶ 56,104 (S.D.N.Y. 1941) (consent decree).

44. *Id.*

45. *Id.* ¶ 56,104, at 405. The court also ordered the organization not to demand exclusive licensing privileges from its members. *Id.* ¶ 56,104, at 403.

46. Movie theater owners prevailed in a private antitrust suit against ASCAP. *See* 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 sub. nom.* M. Witmark & Sons v. Berger Amusement Co., 177 F.2d 515 (8th Cir. 1949); *infra* note 207 and accompanying text.

47. United States v. ASCAP, 1950-51 Trade Cas. (CCH) ¶ 62,595 (S.D.N.Y. 1950). For a thorough treatment of the consent decree, see Garner, *supra* note 5, at 122-23.

the two formats.[48] The decree also provides for judicial determination by the Southern District of New York of a reasonable license fee if ASCAP and a prospective licensee cannot agree on a price after sixty days of negotiations.[49] The court has never exercised its power to set reasonable fees, however; instead, it has assumed the role of mediator.[50]

2. The CBS Case

The most ambitious challenge to the blanket licensing system to date occurred in *CBS, Inc. v. ASCAP*,[51] in which the Columbia

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48. United States v. ASCAP, 1950-51 Trade Cas. (CCH) ¶ 62,595 (S.D.N.Y. 1950). The existence of the consent decrees has not stopped broadcasters from continuing to challenge the legality of the blanket license, but the courts generally have upheld the validity of the blanket licensing system. *See, e.g.*, K-91, Inc. v. Gershwin Publishing Corp., 372 F.2d 1 (9th Cir. 1967). In *K-91* an individual radio station sued by ASCAP for copyright infringement raised the defense that ASCAP's blanket licensing constituted price fixing and thus violated the Sherman Act. The Ninth Circuit reviewed the 1950 consent decree, rejected the radio station's antitrust violation argument, and held that the 1950 consent decree's provisions for judicial determination of license fees "disinfected" ASCAP from any allegations of price fixing. *Id.* at 4. The government, in an amicus curiae brief filed in *K-91* in support of the blanket licensing format, argued that blanket licensing is necessary because of the economic realities of the music industry:

> There are situations in which competitors have been permitted to form joint selling agencies. . . . This case appears to us to involve such a situation. The extraordinary number of users spread across the land, the ease with which a performance may be broadcast, the sheer volume of copyrighted compositions, the enormous quantity of separate performances each year, the impracticability of negotiating individual licenses for each composition, and the ephemeral nature of each performance all combine to create unique market conditions for performance rights to recorded music.

BMI, 441 U.S. at 14-15 (quoting Memorandum for United States as *Amicus Curiae* on Pet. for Cert., K-91, Inc. v. Gershwin Publishing Corp., O.T. 1967, No. 147, at 10-11 (footnotes omitted)).

49. The amended decree § IX(A) states:

> Defendant ASCAP shall, upon receipt of a written application for a license for the right of public performance of any, some or all of the compositions in the ASCAP repertory, advise the applicant in writing of the fee which it deems reasonable for the license requested. If the parties are unable to agree upon a reasonable fee within sixty (60) days from the date when such application is received by ASCAP, the applicant therefore may forthwith apply to this Court [Southern District of New York] for the determination of a reasonable fee and ASCAP shall, upon receipt of notice of the filing of such application, promptly give notice thereof to the Attorney General. In any such proceeding the burden of proof shall be on ASCAP to establish the reasonableness of the fee requested by it.

United States v. ASCAP, 1950-51 Trade Cas. (CCH) ¶ 62,595, at 63,754.

50. *See* Garner, *supra* note 5, at 127-28; Cirace, CBS v. ASCAP: *An Economic Analysis of a Political Problem*, 47 FORDHAM L. REV. 277, 303 (1978); Note, *supra* note 7, at n.51. BMI, whose licensing practices closely parallel those of ASCAP, operates under a similar consent decree that it entered into in 1966. *Buffalo Broadcasting*, 546 F. Supp. at 278-79.

51. 400 F. Supp. 737 (S.D.N.Y. 1975), *rev'd*, 562 F.2d 130 (2d Cir. 1977), *rev'd sub nom.* BMI v. CBS, Inc., 441 U.S. 1 (1979).

Broadcasting System (CBS)[52] brought suit[53] seeking to prevent ASCAP and BMI from using a blanket license to convey nondramatic performing rights to television networks.[54] CBS alleged that the blanket license format unreasonably restrained trade in violation of sections 1 and 2 of the Sherman Act through price fixing, a tie-in arrangement, a concerted refusal to deal, and monopolization. In addition, CBS claimed that the organizations' blanket licensing practices were a misuse of copyright.[55] The network sought an injunction under section 16 of the Clayton Act[56] that would prevent the use of the blanket licensing format, and in the alternative, asked the court to require performing rights societies to offer a license on terms proportionate to CBS' actual use of music.[57]

CBS wanted the court to declare blanket licensing per se illegal. The network contended that ASCAP members avoided price competition among themselves and that the pooling of compositions in ASCAP's repertory enabled the organization, on behalf of its members, to fix the price that a music user must pay to gain performance rights.[58] CBS also asserted that the blanket license format constituted an illegal tying arrangement[59] because it forced music users to purchase, along with desired compositions, music they did not want and would not use.[60] CBS claimed that the performance rights organization's composition pooling arrangement amounted to a concerted refusal by the members of ASCAP to deal directly with the network in the licensing of musical compositions.[61] In addition, CBS claimed that, through ASCAP, writers

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52. CBS operates one of the three major television networks and supplies its approximately 200 affiliates with approximately 7500 programs each year. The network is not only a television powerhouse but also possesses enormous power within the music industry. CBS is the world's largest manufacturer and seller of records and tapes. The network is "the giant of the world in the use of music rights." *BMI*, 441 U.S. at 4 (quoting a CBS witness).

53. When CBS' contracts with BMI and ASCAP expired on December 31, 1969, the network chose to bring an antitrust action against the performing rights organizations rather than apply to the Southern District of New York for judicial relief pursuant to the consent decrees. *See* Becker & Petrowitz, *supra* note 7, at 32.

54. In the alternative, CBS sought a modification of the performing rights licensing system to enable the network to pay ASCAP a predetermined amount for each use of a copyrighted composition. CBS, Inc. v. ASCAP, 400 F. Supp. at 741.

55. *Id.* at 745.

56. 15 U.S.C. § 26 (1976).

57. CBS, Inc. v. ASCAP, 400 F. Supp. at 741.

58. *Id.* at 745.

59. *See supra* note 31 and accompanying text.

60. CBS, Inc. v. ASCAP, 400 F. Supp. at 745.

61. *Id.* A concerted refusal to deal is a method of cartelization by which competitors obtain better prices as a noncompeting group than they could as competing individuals.

and publishers monopolized the industry and that their practices constituted copyright misuse.[62]

(a) *District Court Opinion:* CBS I

The district court resolved all issues favorably to ASCAP[63] and rejected CBS' claims that blanket licensing violated the antitrust laws. The court found that ASCAP had not compelled the network to take a blanket license because CBS, albeit with some difficulty, could have negotiated directly with composers and publishers.[64] The court's opinion carries an implication that the ability of CBS and ASCAP, both giants in their respective fields, to negotiate with one another at arm's length influenced the decision.[65]

(b) *Court of Appeals Opinion:* CBS II

The Second Circuit reversed the holding in *CBS I* and found that blanket licensing constituted illegal price fixing—a per se violation of the antitrust laws.[66] The court stated that although ASCAP had not compelled CBS to take a blanket license, a finding of compulsion or coercion was not a prerequisite to a finding of illegal price fixing.[67] Similarly, the court found that blanket licenses did not involve an illegal tie-in, yet recognized that this finding did not resolve the price fixing issue.[68] The court also rejected ASCAP's argument that CBS' proper remedy was to invoke the consent decree and request the Southern District of New York to set a reasonable license fee.[69] The court found that the performing rights organizations were not "disinfected" by the consent decrees,[70] and

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Such a group says, in effect, "[W]e will deal with you but only on our terms and as a group." Many, but not all, concerted refusals to deal are illegal. L. SULLIVAN, *supra* note 25, at § 90.

62. CBS, Inc. v. ASCAP, 400 F. Supp. at 745.

63. The district court articulated the issues in *CBS, Inc. v. ASCAP (CBS I)* as follows:

> (i) Whether defendants' [performing rights organizations] conduct constitutes an actionable restraint of trade and compels the plaintiff as alleged in the complaint; [to purchase a blanket license]
>
> (ii) Whether, if such restraint or compulsion exists, it is reasonable and justified or whether it may be achieved by less anti-competitive means.

Id. at 747.

64. *Id.* at 779-83.

65. For a recent case discussing arm's length negotiation in the music licensing industry, see BMI v. CBS, Inc., 1983-2 Trade Cas. (CCH) § 65,551 (S.D.N.Y. 1983).

66. CBS, Inc. v. ASCAP, 562 F.2d 130, 139-40 (2d Cir. 1977) (*CBS II*).

67. *Id.* at 138; *cf.* United States v. SoCony-Vacuum Oil Co., 310 U.S. 150, 225 n.59 (1940) (neither the power nor the ability to fix prices is necessary to establish conspiracy).

68. *CBS II*, 562 F.2d at 135; *see supra* notes 59-60 and accompanying text.

69. *CBS II*, 562 F.2d at 138; *see supra* notes 40-50 and accompanying text.

70. *CBS II*, 562 F.2d at 139. The court stated: "Nor do we think that the determina-

also rejected ASCAP's argument that because the blanket license offered a new product—unlimited access to a repertory of music—the price setting associated with the blanket licensing format was not a restraint of trade.[71] Concluding that the price fixing inherent in blanket licensing was not an absolute necessity for the survival of the performing rights, the court applied the per se rule and reversed the district court's decision.[72]

(c) Supreme Court Opinion: CBS III

Justice White, speaking for an eight member majority of the United States Supreme Court, reversed the Second Circuit's decision and remanded the case to that court for an application of the rule of reason.[73] In reaching this decision the Court held that blanket licensing was not a per se violation of the Sherman Act. The Court stated in *CBS III* that although ASCAP and its blanket licensing format had been subject to "intensive antitrust scrutiny" the Court lacked the experience with the industry necessary to brand the activity a per se violation of the antitrust laws.[74] In rejecting the Second Circuit's literal approach to price fixing,[75] the Court stated that not all literal price fixing is per se illegal.[76] The Court in effect classified price fixing as either "plainly anticompeti-

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tion of the 'reasonableness' of the price by a *court* saves the price that has been fixed by a combination from continuing to be an unlawful device in restraint of trade, absent the justification of market necessity." *Id.* at 138-39 (emphasis in original). The court also called attention to the Southern District of New York's failure to set a reasonable fee throughout the life of the decree. *Id.* at 139.

71. *Id.* ASCAP analogized a blanket license to a symphony orchestra in which the sound produced by the whole is different from the sound produced by each musician. The court found the analogy fallacious since the musicians in an orchestra do not join the orchestra to avoid competing with one another. *Id.* at 140.

72. *Id.* In reversing the district court, the Second Circuit seems to have adopted plaintiff's "Per Se Rule with a Market-Function Exception"—a rule that "price-fixing is per se illegal except where it is absolutely necessary for the market to function." *Id.* at 136. Several commentators have suggested that the Second Circuit either created an exception to or misapplied the per se rule by following a per se analysis without enjoining blanket licensing. *See* Comment, *supra* note 20, at 89; Note, *supra* note 7, at 796-800.

73. CBS, Inc. v. ASCAP, 441 U.S. 1 (1979) (*CBS III*). Justice Stevens filed the lone dissent. *Id.* at 25.

74. *CBS III*, 441 U.S. at 10; *see supra* notes 26-29 and accompanying text.

75. The Second Circuit reasoned that because the composers and publishers band together into performing rights organizations that fix a price for their blanket licenses, these practices constitute price fixing—a per se violation of the Sherman Act. *CBS II*, 562 F.2d at 135-36.

76. *CBS III*, 441 U.S. at 9. The Court gave the example of two partners who set the price for their goods and services. The partners' activity is literally price fixing, but historically courts have not considered such activities per se illegal. *Id.*

tive"—and therefore per se illegal—or subject to the rule of reason—and therefore capable of evaluation only through examination of the history of the business and the reasons for the restraint.[77]

The Court concluded that blanket licensing is necessary to protect the rights of copyright holders and, therefore, is not a "naked restraint of trade with no purpose except the stifling of competition."[78] The Court also found that a music user's purchase of a blanket license provides a different product than his purchase of a per-use license for the songs in ASCAP's repertory. The purchaser of a blanket license receives a package consisting of the right to use the licensed compositions and the performing rights organization's aggregating service. The Court stated that "[h]ere, the whole is truly more than the sum of its parts; it is, to some extent, a different product."[79] The Court viewed ASCAP not as "a joint sales agency offering the individual goods of many sellers" but rather a "separate seller" offering a new product—the blanket license—whose "raw material" is the copyrighted compositions of ASCAP's members.[80] Since the blanket license is a product separate from the individual compositions and, thus, on a different market level, ASCAP's blanket licensing format does not stifle competition among individual composers.[81]

The Court concluded that blanket licensing is not a "simple horizontal arrangement among competitors"[82] because it neither prevents individual composers from selling their works independently to any purchaser at any price nor conceals other agreements among ASCAP members concerning prices they charge for the use

77. *Id.* at 9. The decision in Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332 (1982), dispels any speculation that the Court in *CBS III* created an exception to the general rule that price fixing is a per se violation of the Sherman Act. In *Maricopa* Justice Stevens, the dissenter in *CBS III*, stated unequivocably that price fixing—in this instance the setting of prices for medical services—violates the antitrust laws per se. *Id.* at 342; *see also* Becker & Petrowitz, *supra* note 7, at 33.

78. *CBS III*, 441 U.S. at 20. The Court found that ASCAP's conduct was an integrated, efficient method of controlling unauthorized uses of copyrighted compositions. For a thorough discussion of integration, see L. SULLIVAN, *supra* note 25, at § 59.

79. *CBS III*, 441 U.S. at 21-22.

80. *Id.* at 22.

81. *Id.* n.40. The *Maricopa* Court refused to extend this reasoning to a medical association; the Court found that the medical association did not sell a product separate from that of individual doctors, but merely gained a competitive advantage in attracting patients. *Maricopa*, 457 U.S. at 356.

82. *CBS III*, 441 U.S. at 23. For a thorough discussion of horizontal restraints of trade, see L. SULLIVAN, *supra* note 25, at §§ 59-114; *supra* note 32.

of their individual works.[83] The Court also recognized that ASCAP was operating under consent decrees and that CBS had the option, which it failed to exercise, of asking the District Court for the Southern District of New York to set a fee for the network's music use.[84] The court, therefore, held that blanket licensing is not per se illegal and thus is subject to a rule of reason analysis.[85] The Court remanded the case to the Second Circuit for application of the rule of reason, declining to consider that issue itself.[86]

Justice Stevens, writing in dissent, agreed with the majority's holding that ASCAP's blanket licensing format was not a per se violation of the antitrust laws,[87] but disagreed with the majority's decision to remand the case for an application of the rule of reason. Justice Stevens maintained that the Court properly could reach the issue whether ASCAP's blanket licensing practices violated the rule of reason. He then analyzed the facts of the case under the rule of reason and concluded that the blanket licensing format was "a classic example of economic discrimination,"[88] which the Sherman Act proscribes as "a monopolistic restraint of trade."[89] Justice Stevens found ASCAP's all-or-nothing blanket licensing system "patently discriminatory"[90] because the organization based the rate on the user's ability to pay[91] rather than on factors such as the cost, quantity, or quality of the product that usually affect a product's price in a competitive market.[92] The Justice emphasized that ASCAP's blanket licensing program forced music users to pay inflated prices for music they neither wanted

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83. *CBS III*, 441 U.S. at 23-24.

84. *Id.* at 24; *see supra* notes 40-50 and accompanying text.

85. *CBS III*, 441 U.S. at 24.

86. *Id.* at 25. The Second Circuit, applying the rule of reason on remand, found, unlike the dissent in *CBS III*, that the blanket licensing practices of the performing rights societies did not violate the antitrust laws. CBS, Inc. v. ASCAP, 620 F.2d 930 (2d Cir. 1980). The Supreme Court then denied certiorari. CBS, Inc. v. ASCAP, 450 U.S. 970 (1981).

87. Justice Stevens agreed with the majority's finding that blanket licensing enabled the performing rights organizations to offer a product separate from that of the individual composers. *See supra* notes 79-81 and accompanying text. Justice Stevens insisted, however, that this new product—the aggregating and licensing of a pool of compositions—was nevertheless "a monopolistic restraint of trade proscribed by the Sherman Act." *CBS III*, 441 U.S. at 38 (Stevens, J., dissenting).

88. *CBS III*, 441 U.S. at 32 (Stevens, J., dissenting).

89. *Id.* at 38.

90. *Id.* at 30.

91. ASCAP based its licensing rates on a percentage of the music user's advertising revenues. *See supra* notes 21-22 and accompanying text.

92. *CBS III*, 441 U.S. at 31 (Stevens, J., dissenting).

nor intended to use.[93] Justice Stevens also suggested that blanket licensing increased the earnings of popular composers while discouraging the use of works by unknown songwriters,[94] and that it prevented new songwriters from breaking into the market by offering their works for sale at a lower price.[95] Finally, the dissent asserted that the concerted activities of the performing rights organizations unnecessarily prevented the market from being competitive.[96] Justice Stevens concluded that blanket licensing unreasonably restrained trade in violation of the Sherman Act because it fostered "marketwide price discrimination and significant barriers to entry [into the market]."[97]

IV. AFTERMATH OF CBS III

A. *Trend of Allowing Blanket Licenses:* Moor-Law *and* F.E.L. Publications

1. *Moor-Law*

In *BMI v. Moor-Law, Inc.*,[98] the performing rights organization brought a copyright infringement suit[99] for the unauthorized use of BMI compositions in defendant's nightclub, the Triple Nickel. Moor-Law, Inc. raised the affirmative defense of copyright misuse and counterclaimed that BMI had violated the antitrust laws because its failure to offer a realistic alternative to the blanket license constituted an illegal tie-in.[100]

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93. Under the ASCAP blanket licensing system, no competition exists between musical compositions. *Id.* at 32 & n.19. The licensee pays one price for access to ASCAP's entire repertory. *See supra* notes 21-23 and accompanying text.

94. *CBS III*, 441 U.S. at 32 (Stevens, J., dissenting). Since a music user pays the same price for access to a hit as for access to a little known work, the licensee naturally will use the popular song repeatedly instead of using a new, less well-known song.

95. *Id.* at 32-33.

96. *Id.* at 33. Justice Stevens rejected ASCAP's argument that the abolition of blanket licensing and the introduction of competition into the market would force a decrease in the price of performance rights, thereby leaving composers inadequately paid for their labors. He stated that "a conclusion that excessive competition would cause one side of the market more harm than good may justify a legislative exemption from the antitrust laws, but does not constitute a defense to a violation of the Sherman Act." *Id.* at 34-35; *see* National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 689-90 (1978).

97. *CBS III*, 441 U.S. at 37 (Stevens, J., dissenting).

98. 527 F. Supp. 758 (D. Del. 1981).

99. For a recent decision holding that a performing rights organization lacked standing to bring a copyright infringement action on behalf of its members, see BMI v. CBS, Inc., 1983-2 Trade Cas. (CCH) ¶ 65,661 (S.D.N.Y. 1983).

100. *Moor-Law*, 527 F. Supp. at 765; *see supra* notes 59-60 and accompanying text.

The district court relied on *CBS III* as controlling precedent and held that BMI's use of a blanket license was not an antitrust violation because the fee for the blanket license was a reasonable percentage of the establishment's entertainment expenses.[101] The *Moor-Law* court decided that the per se antitrust analysis should not apply because the court lacked the expertise to determine whether defendant's conduct within the unique performing rights market constituted blatant anticompetitive action.[102] The court instead applied the rule of reason analysis and proceeded to inquire whether the actual and potential adverse impacts of blanket licensing outweighed the format's positive contributions to the market.

Analyzing the benefits and costs of blanket licensing, the court determined that blanket licensing restrained trade in three ways: (1) by eliminating price competition among BMI's composer members, (2) by depriving music users of control over their total obligation to BMI, and (3) by erecting barriers to entry into the market.[103] The court stated bluntly that "[t]he first and most obvious restraint of trade . . . is . . . the elimination of price competition among those whose compositions are in [the performing rights organization's] pool of music."[104] The court found that, by banding together and selling their compositions on an all-or-nothing basis, the members of performing rights organizations frustrate active price competition, and that their conditioning the availability of a popular song on the purchase of undesired works borders upon a tie-in violation.[105] The court also acknowledged that a club such as the Triple Nickel is unable to regulate the amount it owes performing rights organizations because these organizations charge a fixed price that depends, not on factors in the control of the music user, such as the number of performances of a given composition, but rather on less controllable factors, such as the amount of the club's entertainment expenses.[106] Finally, the court found that the music user has an incentive to resist the entry of smaller performing rights organizations into the market, because given the limited performance time available to the music user, he would prefer to obtain compositions under one all-or-nothing blanket license than

101. Entertainment expenses are the cost to the establishment of hiring musicians. *Moor-Law*, 527 F. Supp. at 760.

102. *Id.* at 765.

103. *Id.* at 765-67.

104. *Id.* at 765.

105. *Id.* at 766.

106. *Id.*

to buy several blanket licenses from different organizations at a higher total cost.[107]

The *Moor-Law* court, however, also set forth several compelling factors that it ultimately used to justify the use of blanket licenses. These factors included the following: (1) The reduction of transaction costs; (2) the inability of clubs to identify which compositions they would use on any particular occasion; (3) the inevitable increase in monitoring costs in the absence of blanket licensing; and (4) the relative inexpensiveness of administering a license based on entertainment costs.[108] The court determined that the potential transaction costs of individual license negotiations between copyright owners and music users were substantial, and that blanket licensing of a pool of compositions therefore provided a practical means to complete the transaction cheaply.[109] The court also perceived a need for some form of blanket license to prevent unauthorized uses by establishments that could not predict which materials they would use on any given occasion.[110] Additionally, the court felt that monitoring expenses would rise dramatically if a judicially mandated, limited license forced BMI to oversee more closely the music use of licensee clubs.[111] Finally, the court recognized that pricing based on an establishment's entertainment expenses necessarily is a rough estimate. The court, nevertheless, maintained that such a system would not be difficult to administer, especially since establishments already had to record entertainment expense information for tax reasons.[112]

Defendant in *Moor-Law* proposed two alternatives to blanket licensing—a mini-blanket license based on the category of music that a licensee used, and alternative pricing that would compute license costs through retroactive determination of the amount of BMI music that licensees played each year—but the court rejected both proposals.[113] The district court proposed two alternatives of

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107. *Id.* at 766-67. The court stated that if new performing rights organizations entering the market offer only all-or-nothing licenses, the music user "may face a higher total price with each additional seller, rather than a reallocation of total price among different sellers." *Id.* at 766.

108. *Id.* at 767.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. The court rejected the mini-blanket license because the difficulties inherent in strictly categorizing music would cause market uncertainty. *Id.* at 768. Cross-over hit songs, for example, appeal to more than one audience. In addition, the differences in the style of various performances of a particular work might result in assignment of one song to multi-

its own, however: concentration of market power with the buyer/music user rather than with the performing rights organizations, and some form of continuing governmental regulation that would set and modify license prices.[114] Since judicial opinion cannot shift the concentration of market power and since governmental regulation is the province of Congress, however, the court entered judgement for BMI.[115]

2. *F.E.L. Publications*

In *F.E.L. Publications, Ltd. v. Catholic Bishop of Chicago*,[116] a hymnal publisher brought a copyright infringement suit against defendant.[117] F.E.L., which used royalties to purchase copyrights directly from individual composers, had allowed Catholic parishes to use its compositions in their custom-made hymnals at a cost of two cents per song for each copy of the compositions contained in the hymnals. Since unauthorized use of F.E.L. compositions was widespread, however, F.E.L. in 1972 developed an Annual Copyright License (ACL) that enabled music users to copy an unlimited number of F.E.L. compositions upon the payment of a yearly license fee.[118] The ACL, however, failed to halt unauthorized uses. F.E.L., believing that infringers would not heed the requirements of the ACL, filed suit in 1976 for copyright infringement and antitrust violations.[119]

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ple musical classifications. The court also recognized that a mini-license would "involve categorization costs, additional policing costs, and the costs of resolving . . . disputes over the scope of the license." *Id.* (footnotes omitted). The court then applied the rule of reason—"whether the restriction actually implemented is 'fairly necessary' in the circumstances of the particular case, or whether the restriction exceeds the outer limits of restraint reasonably necessary to protect the defendant"—and found that the mini-license was not a practical alternative. *Id.* at 769 (quoting American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230, 1248-49 (3d Cir. 1975)).

114. *Moor-Law*, 527 F. Supp. at 772.

115. The court, however, did recognize that "price regulation pursuant to legislative directive may well be the ultimate answer to the absence of price competition in this market." *Id.* at 771.

116. 1982-1 Trade Cas. (CCH) ¶ 64,632 (7th Cir. 1982).

117. The defendant, the Catholic Bishop of Chicago, is an Illinois corporation that owns all Catholic parish property within the archdiocese of Chicago. *Id.* at 73,461.

118. F.E.L. owned the rights to approximately 1400 hymns. The yearly license fee was $100, and the terms of the licensing contract stated that upon failing to renew the license the licensee must destroy all copies of compositions made pursuant to the ACL. F.E.L. also offered a one-time use license that allowed a music user to copy the publisher's hymns for use on a single occasion. In addition, the publisher sold songbooks, sheet music, and printed hymnals. The ACL, however, was the only licensing method that permitted parishes to use copyrighted compositions in their traditional custom-made hymnals. *Id.* at 73,461.

119. *Id.* F.E.L. also claimed that the Bishop's actions violated the Lanham Act, 15

The district court, holding that the ACL arrangement was a tying contract and thus a per se violation of the Sherman Act, granted the Bishop's motion for summary judgment.[120] The district court agreed with the Bishop's argument that the ACL allowed the purchase of the publisher's most popular songs only if the parish also bought access to the inferior songs, and found F.E.L.'s practice of refusing "to license one or more copyrights unless another is accepted" per se illegal.[121]

The Seventh Circuit, however, finding *F.E.L.* indistinguishable from *CBS III*,[122] determined that the application of the per se rule was inappropriate in light of the ACL's positive effects upon competition.[123] The court then applied the rule of reason, which called for a balancing of the ACL's procompetitive and anticompetitive effects.[124] The Seventh Circuit found such balancing unnecessary, however, because the ACL had no anticompetitive effects. The court reasoned that since the ACL was a "singular commodity"[125] consisting of a combination of individual song licenses plus the publisher's aggregating service, it could not be part of a per se illegal tie-in.[126] Furthermore, the Seventh Circuit determined that the blanket licenses offered through the ACL did not inhibit competition or otherwise restrain trade because alternative means were available to obtain access to F.E.L.'s copyrighted compositions.[127] Hence, no antitrust violation existed.

The courts in *Moor-Law* and *F.E.L.*, therefore, have followed the Supreme Court's decision in *CBS III* and have applied the rule

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U.S.C. § 1125(a) (1982), and Illinois statutes and common law forbidding unfair competition.

120. *F.E.L.*, 1982-1 Trade Cas. (CCH) ¶ 64,632, at 73,462; *see supra* note 31 and accompanying text.

121. *Id.* at 73,464. The court analogized F.E.L.'s conduct to that of the movie industry in the block booking cases. *See* United States v. Paramount Pictures, Inc., 334 U.S. 131, 158-59 (1948). In *Paramount*, the major movie studios forced theatres to take inferior films—the tied product—if they wanted to book the first rate films—the tying product. The Court held that the tactic was a per se antitrust violation. For a thorough discussion of block booking, see L. SULLIVAN, *supra* note 25, at §§ 158-59.

122. *F.E.L.*, 1982-1 Trade Cas. (CCH) ¶ 64,632, at 73,464.

123. *Id.* at 73,465.

124. *Id.* at 73,466-67; National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978); see supra notes 24-37 and accompanying text.

125. *F.E.L.*, 1982-1 Trade Cas. (CCH) ¶ 64,632 at 73,465; *see supra* notes 79-81 and accompanying text.

126. *F.E.L.*, 1982-1 Trade Cas. (CCH) ¶ 64,632, at 73,465. The court stated: "Because the ACL is a singular commodity—musical compositions—there can be no tied or tying product." *Id.*

127. *Id.* at 73,466; *see supra* note 118 and accompanying text.

of reason analysis to antitrust challenges of blanket licensing systems. These decisions have established that the blanket license is allowable because its procompetitive effects outweigh its anticompetitive aspects. The *CBS III* holding, then, has nurtured an emerging trend in the case law to find that blanket licenses do not violate the antitrust laws. The holding in *Buffalo Broadcasting*, however, raises doubt as to whether this trend will continue.

B. Buffalo Broadcasting*: A Departure from Judicial Acceptance of Blanket Licensing*

In *Buffalo Broadcasting Co. v. ASCAP*[128] a group of owners and operators of local television stations[129] brought a class action against the performing rights organizations. The plaintiffs challenged the blanket licensing format that ASCAP and BMI offered local television stations as violative of the antitrust laws. The plaintiffs also sought an injunction against blanket licensing so that competitive licensing systems could evolve. Holding that blanket licensing of music performing rights to local television stations unreasonably restrained trade in violation of the Sherman Act, the court enjoined ASCAP and BMI from continuing their anticompetitive practices.[130] In reaching its decision in *Buffalo Broadcasting*, the court first examined the programming needs of the local television stations and then discussed the antitrust conflict inherent in offering the blanket license to these independent stations.

1. Local Television Station Programming

Of the 750 local television stations currently in operation, approximately 600 affiliate with a major network; the others are independent.[131] Local television stations fill their broadcasting hours with programming from three sources: network programming, locally produced programming, and syndicated programming.[132] All

128. 546 F. Supp. 274 (S.D.N.Y. 1982).

129. A local television station is a commercial television station, which the FCC has licensed to broadcast, that none of the three major networks owns or operates. The major networks, which own or operate 15 stations, were not part of the *Buffalo Broadcasting* action. The plaintiff class in *Buffalo Broadcasting* consisted of approximately 450 independent owners of some 750 local television stations. The All-Industry Television Station Music License Committee had represented the local stations in their performance rights negotiations with ASCAP and BMI since 1949. *Id.* at 276-77 & n.2.

130. *Id.* at 296.

131. *Id.* at 279.

132. *Id.* Both network affiliates and independent stations use these three sources.

of these programs utilize musical compositions.[133] The complaint in *Buffalo Broadcasting,* however, concerned only the right to use the music that syndicated programming contained.[134] Because syndicated programming was essential to the survival of local television stations,[135] local stations within the same television market competed actively to obtain the broadcast rights to popular syndications from the producers. This intense competition, combined with the economic necessity of acquiring the most desirable shows, prevented local stations from bargaining at arm's length with the producers of the more popular syndicated programs.[136] Because the producers of these programs had exclusive control over the music that their programs contained, the local stations had to accept this preselected music if they wanted to air the programs.[137] Although local television stations acquired the broadcast rights to syndicated programs from the producer, however, the licensing of the music that syndicated shows used[138] was separate from the licensing of all other rights in the program.[139] Thus, the local television stations could not benefit from the producer's purchase of synchronization and performance rights[140] for the music that their syndicated programming contained. Instead, the local stations had to acquire a

133. *Id.* at 281. The music broadcast by local television stations, whether network affiliates or independents, falls into three categories: theme, feature, and background music. Theme music is a composition that introduces or closes a program. Background music enhances the action on the screen. Feature music is the sole object of the viewer's attention, such as a song that an artist performs on camera. The majority of music that local stations use in their non-network programming consists of background and theme music for the station's syndicated programs. *Id.*

134. Music that network programming used was not at issue in *Buffalo Broadcasting* because the networks obtained blanket licenses from the performing rights organizations. Since each local station paid for a portion of the network's license, a local station did not need an additional license from ASCAP to broadcast music included in network programming. *Id.* at 282 n.16. Local stations also could determine the selection and amount of music that their locally produced programming used. *Id.* at 281.

135. The court stated: "It was clearly established at trial that broadcast of syndicated programming is essential to the successful and profitable operation of virtually all local television stations." *Id.* at 279. Syndicated programming makes up between 65% and 75% of a local station's nonnetwork programming. Syndicated programming consists mainly of motion pictures and rerun series, but it also includes any material that producers and distributors offer local stations for broadcasting as nonnetwork programming. Thirty-five percent of syndicated programming consists of first-run programs produced especially for off-network syndication. *Id.*

136. *Id.* at 280.

137. *See id.* at 281.

138. ASCAP and BMI own the performance rights to the bulk of these compositions. *Id.* at 281.

139. *Id.* at 283.

140. *Id.*

blanket license from ASCAP to perform the syndicated programming music.[141]

2. Discussion

The plaintiff class of local station owners and operators argued that the granting of performance rights to local stations through the blanket license was "needless, anomalous, inefficient and coercive."[142] They contended that the splitting of musical performance rights from the television performance rights in syndicated programming[143] was inherently unfair and led to an absence of competition in the market. Furthermore, the plaintiffs urged that since a blanket license was a prerequisite to airing the syndicated programming so vital to the success of the local stations,[144] the very existence of blanket licensing prohibited local stations from seeking reasonable alternatives to the existing format. The plaintiffs also believed that an injunction against blanket licensing would result in local stations' procuring music performing rights directly from the syndicators, who already would have obtained licenses from authors and publishers.[145]

The defendants claimed that the court should have dismissed the action because *Buffalo Broadcasting* simply was a "rerun" of *CBS III*.[146] The court, however, stated that *CBS III* was controlling precedent and the rule of reason was the proper standard to apply.[147] The court then conducted a two-part inquiry. First, the court considered whether realistically available alternatives to blanket licensing of music performing rights to local television stations existed. Second, if no realistically available alternatives to blanket licensing existed, the court analyzed whether the format's anticompetitive effects outweighed its procompetitive effects.[148]

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141. *Id.*

142. *Id.* at 285.

143. *See supra* notes 138-41 and accompanying text.

144. *See supra* notes 135-37 and accompanying text.

145. *Buffalo Broadcasting*, 546 F. Supp. at 285. The plaintiffs also desired the opportunity to negotiate directly with composers for the performing rights to music that locally produced programming used. *Id.*

146. *Id.*

147. *Id.* at 285-86.

148. *Id.* at 286.

(a) Realistically Available Alternatives to Blanket Licenses

The court evaluated several factors before concluding that no alternative to blanket licensing was realistically available for local television stations.[149] Judge Gagliardi first determined that realistically available alternatives do not include "those alternatives so costly or inefficient as to be impractical and unappealing to any user choosing freely."[150] The *Buffalo Broadcasting* court stated that an alternative remained realistically available if the transition from the blanket licensing system to the alternative could be completed within one year.[151] The court discounted the importance of the fact that most local stations use blanket licenses,[152] however, by assuming that many local television stations would choose an alternative form of licensing if it were available.[153] According to the court, local stations have not sought actively an alternative licensing format, but instead merely have acquiesced in the development and maintenance of blanket licensing. The court believed local stations' behavior amounted to a grudging acceptance of blanket licensing as an inevitability of the industry; thus, the court rejected defendants' claim that local stations freely had chosen the blanket license over other available alternatives.[154]

The court then proceeded to evaluate alternative forms of licensing: per-program licensing, direct licensing, and source licensing. The court recognized that the per-program license[155] was available pursuant to the ASCAP and BMI consent decrees,[156] which required the performing rights societies to offer per-program licenses in addition to blanket licenses. Only 2 local stations held per-program licenses, however, while 748 stations operated under blanket licenses.[157] Per-program licensing also entailed onerous reporting obligations, and its rates were seven times that of blanket

149. The court rejected plaintiffs' contention that an alternative is realistically available if it is efficient and immediately available as well as defendant's contention that an alternative is realistically available if it is feasible. *Id.*

150. *Id.*; *see* CBS, Inc. v. ASCAP, 620 F.2d 930, 936 (2d Cir. 1980).

151. *Buffalo Broadcasting*, 546 F. Supp. at 287; *see* CBS, Inc. v. ASCAP, 620 F.2d at 937-38; *CBS I*, 400 F. Supp. at 759.

152. *See infra* note 157 and accompanying text.

153. *Buffalo Broadcasting*, 546 F. Supp. at 287.

154. *Id.* at 288.

155. The per-program license operates on an all-or-nothing basis, but unlike the blanket license, bases its rate on a percentage of the advertising revenues from programs which actually use ASCAP music. *See supra* notes 21-23 & 44 and accompanying text.

156. *See supra* notes 40-50 and accompanying text.

157. *Buffalo Broadcasting*, 546 F. Supp. at 288.

licensing.[158] The court, therefore, concluded that per-program licenses, since they were neither time- nor cost-efficient, were not a realistically available alternative to blanket licenses.[159]

The court next considered direct licensing, which provides for direct negotiation between local television stations and individual composers. Plaintiffs claimed that obtaining performance rights licenses from thousands of individual composers would be exorbitantly expensive and practically impossible for local stations.[160] ASCAP, however, maintained that direct licensing was a realistically available alternative. Defendants reasoned that if local stations actively pursued direct licensing, efficient alternatives to the performing rights organizations would arise to serve as clearinghouses for direct licensing.[161] The court rejected defendants' contention and found that any attempt by local stations to implement direct licensing necessarily would fail due to local stations' lack of bargaining power in the music industry.[162] The court concluded that direct licensing might be a realistic alternative for a powerful network like CBS[163] but not for plaintiffs' local television stations.

Under source licensing, the third alternative form of licensing that the court considered, producers of syndicated programming obtain necessary performing rights licenses from the source—the composers—and pass those rights to the local television stations.[164] Plaintiffs argued that source licensing was not currently an available alternative to blanket licensing, but that if the court enjoined blanket licensing, source licensing naturally would evolve as the most efficient licensing system.[165] The court recognized that the producers of syndicated programming would not change to source licensing willingly without an injunction of blanket licensing.[166]

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158. *Id.* at 288-89.

159. *Id.* at 289.

160. *Id.* at 289-90.

161. Defendants suggested the Harry Fox Agency as a possible alternative. The Harry Fox Agency licenses synchronization rights to the music in television shows and motion pictures. Defendants maintained that this agency could "expand its operations to include performing rights." *Id.* at 290; *see supra* notes 138-41 and accompanying text.

162. *Buffalo Broadcasting*, 546 F. Supp. at 291.

163. *See supra* note 52.

164. *Buffalo Broadcasting*, 546 F. Supp. at 291.

165. *Id.*

166. The court determined that the syndicators' recalcitrance was due to inertia and affiliated publishing interests. Unless local stations were willing to pay the syndicators a premium price, the syndicators would have little incentive to depart from blanket licensing. Moreover, most of the syndicators have affiliated publishing companies that receive royalties under the blanket licensing system and source licensing would cause a great loss in revenues to these affiliates. *Id.* at 292.

Furthermore, the court found that local stations lacked the market power to force syndicators to adopt source licensing and that any requests for change would go unheeded because the syndicators had no incentive to disrupt the blanket licensing system.[167] The court, therefore, determined that none of the three alternatives to blanket licensing were realistically available to the local television stations.

(b) The Anticompetitive and Procompetitive Effects of Blanket Licenses

After finding no suitable alternative to blanket licenses, the court turned its attention to the second major consideration—whether the procompetitive effects of blanket licensing predominate over the anticompetitive effects. The court identified four anticompetitive effects of blanket licensing.[168] First, the all-or-nothing access that the blanket licenses provide to the pool of compositions[169] prevents local television stations from competing freely for the individual compositions they want. A local station wishing to avoid copyright infringement, therefore, has little choice but to obtain rights to ASCAP's entire repertory by means of a blanket license.[170] The local station is thus unable to economize by obtaining only the music it desires.[171] Second, compositions controlled by a single performing rights organization do not compete with one another.[172] The local station has no incentive to use new or little-known works because it can broadcast an established, famous song at the same cost.[173] Blanket licensing thus prohibits free competition by preventing newcomers from successfully entering the music market. Third, the price that local television stations pay for music performing rights is not the result of arm's length negotiation. The local station has no control over the music that the producer selects for syndicated programming, yet must pay an extra fee to the music rights organizations for the use of the composition.[174] This system of splitting performing rights in syndi-

167. *Id.* at 292-93.

168. *Id.* at 293-94.

169. *See supra* note 23 and accompanying text.

170. *See Buffalo Broadcasting*, 546 F. Supp. at 281-82. Although a limited licensing format could provide for the music needs of the local television station, such licenses were not a viable alternative.

171. *Id.* at 293-94.

172. *See CBS III*, 441 U.S. at 32 & n.19.

173. *Id.*

174. *See supra* notes 137-41 and accompanying text.

cated programming unduly insulates composers and copyright holders from price competition. Last, the price of a blanket license to a particular local station reflects that station's financial success rather than the worth of the product itself[175]—contrary to the competitive market's pricing of products based on worth.

The court also analyzed the procompetitive effects of blanket licensing. First, the court stated that blanket licenses are a market necessity for small establishments, such as the Triple Nickel saloon in *Moor-Law*,[176] that cannot predict their music needs.[177] Second, because virtually all local television stations have chosen a blanket license over a per program license, defendants argued that blanket licensing was the winner in a competitive struggle with its available alternatives.[178] The court found this argument unpersuasive and concluded that although most television stations currently operate under blanket licenses, they have not chosen this alternative freely.[179] Third, defendants contended that local stations use more varied music because the blanket license allows unlimited use of the compositions for one fee. The court conceded this point, but concluded that since competition did not exist among ASCAP's pooled compositions, access to an unlimited number of works was no guarantee of competition in the pricing of music use.[180] Fourth, defendants argued that because blanket licensing required only an annual agreement between ASCAP and the All-Industry Television Station License Committee, a great reduction in the transaction costs of obtaining performance rights occurred.[181] The court conceded that some savings in transaction costs resulted, but characterized the impact as "negligible."[182] Fifth, ASCAP contended that blanket licensing eliminated the huge monitoring costs that would result under other licensing systems. The court rejected this contention and found that the real purpose of monitoring under blanket licensing was to facilitate the distribution of royalty payments rather than to detect unauthorized uses of copyrighted composi-

175. *Buffalo Broadcasting*, 546 F. Supp. at 294; *see supra* notes 21, 91-92 and accompanying text.

176. *See supra* notes 98-115 and accompanying text.

177. *Buffalo Broadcasting*, 546 F. Supp. at 294. The court recognized that local television stations prerecorded the vast majority of their programming and that unexpected music use was therefore rare. *Id.* at 279-80.

178. *See supra* note 157 and accompanying text.

179. *Buffalo Broadcasting*, 546 F. Supp. at 288, 293-94.

180. *Id.* at 294; *see infra* note 218 and accompanying text.

181. *See supra* note 129.

182. *Buffalo Broadcasting*, 546 F. Supp. at 295.

tions.[183] The court recognized that no necessity for an elaborate monitoring system existed because local television stations would not want to risk copyright infringement liability by failing to obtain performing rights to the music they broadcasted.[184] Thus, the court ultimately determined that the reduction in monitoring costs provided by blanket licensing was "not significant in the context of the local television industry."[185] Sixth, defendants claimed that by eliminating the need for the syndicated program producer to purchase music performing rights, blanket licensing reduced the up-front costs of producing a syndicated program.[186] The court found this benefit "insignificant" since the cost of television performing rights, including music performing rights, was infinitesimal in comparison with the other costs that syndicators incurred to produce a program.[187] Last, the defendants argued that blanket licensing offered individual music users the most flexibility by providing them access to a performing rights organization's full repertory at all times. The court stated that although maximum flexibility is important for music users who cannot predict their needs,[188] the advantage is slight for the majority of local television stations, which prerecord most of their programming.[189] The *Buffalo Broadcasting* court's ultimate determination, therefore, was that the procompetitive aspects of blanket licensing did not equal or surpass the anticompetitive effects resulting from the absence of price competition that blanket licensing visits upon the local television industry.

(c) Result and Consequences in Buffalo Broadcasting

After deciding that ASCAP's blanket licensing scheme violated antitrust principles, the district court examined the consequences that an injunction would have on the local television industry[190] and concluded that an injunction should issue. In its analysis the court assumed that if it enjoined blanket licensing, then source licensing[191] would evolve as the most efficient licensing

183. *Id.* The court stated that a source licensing format could distribute royalties equally well.
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. *See supra* notes 98-115 & 177 and accompanying text.
189. *Buffalo Broadcasting*, 546 F. Supp. at 295-96.
190. *Id.* at 296.
191. *See supra* note 164-66 and accompanying text.

system, and that if the injunction did not issue, then the producers of syndicated programming would not change to this alternative form of licensing.[192] The court reasoned that source licensing would allow all syndicated program producers to compete for the various music performance rights, thereby promoting competition among musical compositions.[193] The court compared the effects that blanket licensing and source licensing would have on competition in the music industry, and applying the rule of reason, dismissed ASCAP's arguments.[194] The court held that blanket licensing of music performing rights to local television stations was an unreasonable restraint of trade in violation of section 1 of the Sherman Act and enjoined the practice, presumably to permit the evolution of source licensing.[195]

The *Buffalo Broadcasting* court failed to apply the new product analysis that the *CBS III* decision espoused[196] even though it acknowledged *CBS III* as "controlling precedent."[197] The district court concluded that *Buffalo Broadcasting* was distinguishable from *CBS III* because local television stations, unlike major networks, lacked the market power and resources either to induce syndicators to adopt source licensing[198] or to institute direct licens-

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192. *See supra* note 166 and accompanying text.

193. Under a source licensing system, producers would procure music performing rights for their syndicated programming and pass these rights on to local television stations.

194. Having already dismissed defendants' arguments on blanket licensing's procompetitive effects, the court was unimpressed by defendants' claim that if an injunction issued prohibiting blanket licensing, copyright holders would unite to form an anticompetitive labor guild exempted from antitrust attack. The court stated that a threat of unionization could not deter it from remedying an antitrust violation. *Buffalo Broadcasting*, 546 F. Supp. at 296.

195. *Id.* The performing rights organizations are appealing the decision.

196. *See supra* notes 79-81 and accompanying text. The *CBS III* majority, applying the new product analysis, decided that blanket licensing was not a per se violation and remanded the case to the Second Circuit for an application of the rule of reason. Justice Stevens, dissenting, felt that the Court should not have remanded the case. He instead applied the rule of reason to the facts of *CBS III* and determined that blanket licensing unreasonably restrained trade. *CBS III*, 441 U.S. at 25-38 (1979); *see supra* notes 87-97 and accompanying text. The *Buffalo Broadcasting* decision parallels Justice Stevens' dissent in *CBS III*. Justice Stevens, because of his stance on blanket licensing in *CBS III*, probably would find the performing rights organizations' actions in *Buffalo Broadcasting* even more unreasonable given the local television stations' lack of arm's length bargaining power with ASCAP and BMI. On remand, the Second Circuit determined that ASCAP's blanket licensing format, which conveyed nondramatic performing rights to television networks, was not an antitrust violation. CBS, Inc. v. ASCAP, 620 F.2d 930 (2d Cir. 1980). The Supreme Court denied certiorari, 450 U.S. 970 (1981)—an indication that it approved the Second Circuit's application of the rule of reason.

197. *Buffalo Broadcasting*, 546 F. Supp. at 285.

198. "The court therefore finds that plaintiffs can neither compel source licensing by

ing.[199] Resolution of the *Buffalo Broadcasting* appeal, therefore, depends upon whether the court of appeals finds the case distinguishable from or consistent with *CBS III*. If the Second Circuit does not distinguish *Buffalo Broadcasting* from *CBS III*, then music performing rights packages that local television stations purchase are "new products," and the licensed compositions themselves constitute "raw material."[200] This finding would mandate a conclusion that the blanket license in *Buffalo Broadcasting* produces no anticompetitive effect,[201] does not substantially impede trade, and therefore does not violate the antitrust laws.[202] If the appellate court finds *Buffalo Broadcasting* distinguishable from *CBS III*, however, it must affirm the district court's decision.[203]

V. ANALYSIS

After the enactment of the amended consent decree[204] and prior to *Buffalo Broadcasting*, courts uniformly rejected legal challenges to blanket licensing.[205] The Second Circuit's decision in *CBS II*[206] arguably was the first decision since *Alden-Rochelle, Inc.*

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demanding it nor achieve source licensing by requesting it. Those with the incentive to change the system lack the power; those with the power lack the incentive." *Buffalo Broadcasting*, 546 F. Supp. at 292-93; *see supra* note 166-67 and accompanying text.

199. *Buffalo Broadcasting*, 546 F. Supp. at 291; *see supra* notes 160-63 and accompanying text.

200. See *CBS III*, 441 U.S. at 21-23; *see supra* notes 79-81 and accompanying text.

201. *CBS III*, 441 U.S. at 22 n.40; *see supra* note 81 and accompanying text.

202. *See* L. SULLIVAN, *supra* note 25, at § 68.

203. One commentator has stated:

> The strength of the court's decision in *Buffalo Broadcasting* is its recognition of the wide variations in the use of music in different music markets. The District Judge did not assume that because blanket licensing is appropriate to one market it is appropriate to all as apparently was determined by the *Broadcast Music* [CBS] decisions and, instead undertook to examine the licensing arrangement with particular attention to the specific requirements of independent television stations.

Becker & Petrowitz, *supra* note 7, at 34.

204. *See supra* notes 47-49 and accompanying text.

205. *See, e.g. CBS III*, 441 U.S. 1 (1978) (holding blanket license is not price fixing and thus not a per se violation of Sherman Act), *aff'd on remand*, 620 F.2d 930 (2d Cir. 1980), *cert. denied*, 450 U.S. 970 (1981); K-91, Inc. v. Gershwin Publishing Corp., 372 F.2d 1 (9th Cir. 1967) (rejecting radio station's defense that blanket licensing constitutes an illegal form of price fixing), *cert. denied*, 389 U.S. 1045 (1968); United States v. ASCAP, 341 F.2d 1003 (2d Cir. 1965) (holding third party has no standing to punish ASCAP for contempt for failure to comply with amended consent decree), *cert. denied*, 382 U.S. 877 (1965); United States v. American Soc'y of Composers, Authors and Publishers, 1971 Trade Cas. (CCH) ¶ 73,491 (S.D.N.Y. 1970) (television network not entitled to limited license); Cirace, *supra* note 50, at 299; Note, *supra* note 7, at 792; Note, *The ASCAP Consent Decree: The Effect on Potential Litigants*, 41 S. CAL. L. REV. 418 (1968).

206. The Second Circuit determined ASCAP's blanket licensing of nondramatic per-

v. ASCAP[207] to uphold an attack on blanket licensing. In *CBS III*, however, the Supreme Court adhered to the traditional view favoring blanket licensing, reversed the Second Circuit's decision, and remanded the case to that court for an application of the rule of reason. Two post-*CBS III* decisions, *Moor-Law*[208] and *F.E.L.*,[209] also followed the pro-blanket licensing trend. The courts in *Moor-Law* and *F.E.L.* applied the rule of reason analysis and concluded that blanket licensing was allowable. The *Buffalo Broadcasting* court, applying the same rule of reason, invalidated a blanket licensing system. Whether *Buffalo Broadcasting* is an anomaly, an indication of a new trend rejecting blanket licensing, or a decision limited strictly to its facts, the case nevertheless disrupts the music licensing system and fails to provide uniform guidelines for future action.[210]

The *Buffalo Broadcasting* and *CBS* decisions are arguably consistent if one assumes the courts tailored their decisions to the relative bargaining strengths of the parties. In *CBS III* the Supreme Court surmised that a giant television network[211] held equal bargaining strength with the powerful performing rights organizations,[212] and that ASCAP's practices, therefore, were not antitrust violations. The *Buffalo Broadcasting* court, in contrast, found that

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forming rights to CBS constituted a per se antitrust violation. *See supra* notes 66-72 and accompanying text.

207. 80 F. Supp. 888 (S.D.N.Y. 1948). Plaintiffs in *Alden-Rochelle* owned 200 movie theatres and defendant ASCAP controlled 80% of the musical compositions that the motion pictures used. The performing rights society issued blanket licenses to the plaintiffs, permitting them to perform music that accompanied the films they exhibited. The court held that ASCAP's practice of withholding performing rights unless the plaintiffs obtained blanket licenses violated the Sherman Act. *Id.*

208. *See supra* notes 98-115 and accompanying text.

209. *See supra* notes 116-27 and accompanying text.

210. A music industry trade publication describes the confusion that the *Buffalo Broadcasting* decision engendered:

> ASCAP and BMI are girding for a potential chain reaction of financial battering in the wake of the Federal Court decision here [New York] declaring blanket licensing of performance rights for independent television stations in violation of antitrust laws. . . .
>
> At issue is an annual take of about $80 million, or approximately one-third of all performance revenues realized by ASCAP and BMI. The senior society is estimated to earn some $50 million from independent television, with $30 million going to BMI.
>
> Ed Cramer, president of BMI, tags the Gagliardi opinion as "the most significant decision in decades in terms of potential impact." He sees "utter chaos" the prospect in clearing music for indie [independent] t.v. if the decision is upheld.

T.V. License Ruling Stirs Storm, BILLBOARD, Sept. 4, 1982, at 1, col. 3.

211. *See supra* note 52.

212. *See supra* note 38 and accompanying text.

local television stations[213] were powerless to demand or facilitate any changes in the current music rights licensing system, and that ASCAP's activities, therefore, unreasonably restrained trade.[214] Disparity in bargaining strength, however, does not provide a basis for explaining the decisions in *F.E.L.* and *Moor-Law*. In *F.E.L.* the Catholic Bishop of Chicago possessed considerable bargaining strength in his negotiations with the publisher of liturgical music because of the size of his parish and the relatively limited market for the music. In *Moor-Law*, however, the owner of the Triple Nickel could exercise only minimal bargaining leverage against the performing rights organization. In both cases, the courts determined that *CBS III* applied and held that the blanket licenses did not violate the antitrust laws.[215] Thus, the post-*CBS III* cases addressing blanket license systems demonstrate an ad hoc decision-making process that has upheld blanket licensing except in *Buffalo Broadcasting*.

Given the peculiar nature of the music industry and the competing public policy concerns in antitrust and copyright laws,[216] inconsistent ad hoc judgments may be inevitable in the blanket licensing area. Copyright holders founded the performing rights societies to ensure adequate enforcement of the copyright laws and adequate remuneration for use of their members' music.[217] Courts, in contrast, must strive both to promote competition and to ensure that composers receive just compensation for their works. Because regular market forces are incapable of setting a competitive price for performance rights in musical compositions,[218] aggrieved par-

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213. *See supra* note 129 and accompanying text.

214. *See supra* notes 198-99 and accompanying text.

215. *See supra* notes 98-127 and accompanying text.

216. Congress enacted the antitrust laws to preserve and promote competition through increased innovation and productivity. *Buffalo Broadcasting*, 546 F. Supp. at 296; *see* Northern Pac. R.R. Co. v. United States, 356 U.S. 1, 4 (1958). Copyright laws, however, give composers a legal monopoly over the use of their compositions in order to create substantial incentives for composers to produce more compositions. *See supra* notes 12-14 and accompanying text.

217. *See supra* notes 12-20 and accompanying text.

218. Professor Cirace has stated:

> Neither ASCAP's present blanket licensing system nor compulsory individual contracting between television networks and composers establishes economically acceptable bargaining rules in the market for musical performance rights. If ASCAP were to continue to bargain without restriction on behalf of copyright owners, then price would tend to the monopoly price, which is higher than a competitive price. If copyright owners were to deal directly with CBS, then price would tend to the monopsony price, which is lower than a competitive price.
>
> An attempt to avoid the monopoly-monopsony problem by asking what the price

ties often seek judicial relief—setting the stage for a clash of the competing dictates of copyright and antitrust laws. Such litigation places courts in the unenviable position of either promoting competition by invalidating blanket licensing systems at the expense of copyright holders, or protecting copyright holders by upholding potentially coercive blanket licenses at the expense of licensees.

The *Buffalo Broadcasting* decision may have remedied the inequities present in the particular instance of blanket licensing it addressed, but the decision has produced "utter chaos" in the music rights licensing field.[219] The Second Circuit likely will remedy this chaos by following the Supreme Court's ruling in *CBS III* and reversing *Buffalo Broadcasting*. A *CBS III* analysis would compel a finding that blanket licensing's advantages outweigh its anticompetitive effects, and thus should mandate that the Second Circuit reverse the decision in *Buffalo Broadcasting*. Furthermore, the appellate court should emphasize that the consent decree affords these plaintiffs an adequate remedy.

The 1950 amended consent decree, provides the judicial machinery to administer equitable blanket license pricing by empowering the Southern District of New York to set a reasonable price for musical performing rights when the negotiating parties fail to agree.[220] Dissatisfied parties, however, have never tested this judicial relief provision to determine whether it is an effective safety valve.[221] The facts in *Buffalo Broadcasting* present precisely the sort of situation in which the court should invoke the consent decree provision. The case arose because the performing rights societies dominated individual negotiations with local television stations. If the plaintiffs had applied for judicial relief under the consent decree, the Southern District of New York could have fashioned a form and rate of licensing agreeable to both parties. Instead, the local stations waged an intense antitrust attack on blanket licensing and won at the trial level.

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of musical performing rights would be if the market structure were theoretically competitive would fail. According to the theory of perfect competition, a product's price is efficient if it equals the cost of producing an additional unit, that is, marginal cost. In the context of this theory, it is difficult to determine a price for products such as musical compositions, which, once created, are costless to use. Because an additional performance is costless to the composer, the efficient price of musical performance right is zero.

Cirace, *supra* note 50, at 298.

219. *See supra* note 210 and accompanying text.

220. *See supra* notes 49-50 and accompanying text.

221. *Id.*

If excessive use of the amended consent decree's judicial relief provision places too great a burden on the Southern District of New York, then Congress, which in the past has regulated composers' rights,[222] could empower the Copyright Royalty Tribunal[223] to determine the price and format of music licenses and oversee music licensing disputes. If Congress imposed additional duties on the Tribunal, however, it would have to increase the Tribunal's staff and funding. The advantages of expanding the Tribunal's authority would be substantial because the Tribunal could draw upon its specialized knowledge of copyright law and of the structure of the music industry in making its licensing decisions. The Tribunal, with proper personnel, could resolve license disputes more expeditiously than could federal courts in antitrust cases such as *CBS*, which not only crowd the federal dockets but also take years to resolve.[224]

Several commentators recently have suggested some form of legislative exemption or government regulation as the ultimate solution to the conflict between copyright and antitrust laws.[225] One author,[226] writing after *CBS II*[227] proposed that Congress exempt performing rights societies from the antitrust laws as it does labor unions, agricultural cooperatives, state regulated insurance companies, and export trade associations.[228] Another author, also writing

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222. *See, e.g.*, 17 U.S.C. § 106 (1976) (combining markets for the sale of sheet music); 17 U.S.C. §§ 115, 801 (1976) (regulation of the right to make phonorecords); 17 U.S.C. § 118 (1976) (regulation of music performance rights licensed to noncommercial television stations); Cirace, *supra* note 50, at 300.

223. As part of the Copyright Act of 1976, 17 U.S.C. §§ 101-810 (1976), Congress created the Copyright Royalty Tribunal, a five-member independent agency, to oversee the compulsory licensing of noncommerical media, cable television, and jukebox operators. *See* 17 U.S.C. §§ 801-810 (1976) (governing organization and operation of Copyright Royalty Tribunal); 17 U.S.C. § 116(b) (1976) (jukeboxes); *see also* Brennan, *The Copyright Royalty Tribunal*, 25 BULL. COPYRIGHT SOC'Y 196 (1978).

224. The *CBS* litigation, for example, began in 1975 at the district court level and ended in 1981 when the Supreme Court denied certiorari and declined to rehear an appeal of the Second Circuit's decision on remand. CBS, Inc. v. ASCAP, 620 F.2d 930 (2d Cir. 1980), *cert. denied*, 450 U.S. 970 (1981), *reh. denied*, 450 U.S. 1050 (1981).

225. *See* Cirace, *supra* note 50, at 277; Comment, *supra* note 20, at 95; Note, *supra* note 7, at 784; *see also* BMI v. Moor-Law, Inc., 527 F. Supp. 758, 771 (D. Del. 1981).

226. Note, *supra* note 7, at 783.

227. *See supra* notes 66-72 and accompanying text.

228. *See* 15 U.S.C. § 17 (1976) (labor unions); 7 U.S.C. §§ 291-292 (1976) (agricultural co-operatives); 15 U.S.C. §§ 1011-1015 (1976) (state regulated insurance companies); 15 U.S.C. § 62 (1976) (export trade associations); *see also* Adams, *Business Exemptions from the Antitrust Laws: Their Extent and Rationale*, in PERSPECTIVES ON ANTITRUST POLICY 273 (A. Phillips ed. 1965). In addition, the author proposed that some form of government regulation accompany this exemption. Note, *supra* note 7, at 802-03.

after *CBS II*, advocated public regulation of the licensing of music performing rights.[229] This author maintained that Congress should preserve the blanket license system, but should allow licensees to seek administrative or judicial relief if blanket licensing fails to meet their needs.

Blanket licensing undoubtedly satisfies the performing rights organizations; and the major networks, with the notable exception of *CBS*, tolerate the system as it now exists.[230] Blanket licensing is unfair, however, to those music users who cannot negotiate at arm's length with the performing rights organizations. Since the performing rights organizations are unwilling to adopt other forms of licensing, legislative remedies are needed to lessen the effect of disparate bargaining positions.

The advent of a case like *Buffalo Broadcasting*, however, indicates that the antitrust interests in protection of economically weaker businesses now may be strong enough to rival the copyright interests that led to the formation of huge entities such as ASCAP and BMI. Thus, if society determines that these powerful performing rights organizations are too strong, a legislative solution may be necessary to lessen the effect of the performing rights organizations' tremendous bargaining strength. Although introducing government regulation into the performing rights industry could cause more problems than it solves, the realities of the music licensing market preclude reliance on natural market forces to produce a competitive price for the use of music. This Recent Development, therefore, advocates that as part of the ultimate resolution of the conflict between antitrust and copyright laws in the blanket licensing context, the performing rights organizations be exempted from antitrust sanctions, but concomitantly be placed under a system of government or judicial control.

VI. Conclusion

If an antitrust exemption for the licensing of music performing rights existed, courts would not have to make the difficult choice of maintaining or rejecting blanket licensing. Congress could declare performing rights societies exempt from the antitrust laws and empower an administrative body, such as the Copyright Royalty Tribunal, to handle license disputes, like that of *Buffalo Broadcast-*

229. Cirace, *supra* note 50, at 277.

230. The performing rights societies can negotiate at arm's length with the major networks. Cirace, *supra* note 50, at 281 & n.33.

ing, that arise between copyright holders and licensees. This administrative body, through rulemaking or adjudication, could replace blanket licensing with a license tailored to the parties' individual needs and circumstances. Such a license would further the twin aims of preventing free use of compositions and avoiding the potential coercion inherent in all-or-nothing licenses.

MARY KATHERINE KENNEDY