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Considering the Source-Licensing Threat to Performing Rights in Music Copyrights

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ENTERTAINMENT & SPORTS
LAW REVIEW

SPECIAL TOPICS IN THE LAW
OF COPYRIGHT

ARTICLES

CONSIDERING THE SOURCE-LICENSING
THREAT TO PERFORMING RIGHTS IN
MUSIC COPYRIGHTS*

E. SCOTT JOHNSON**

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I. INTRODUCTION

Source licensing legislation, first introduced in Congress in 1985¹ and re-introduced in 1987,² proposed dramatic changes in the manner in which performing rights for the copyrighted music portions of syndicated television programs are licensed. While these bills died in committee after vigorous opposition from music publishing and copyright advocacy groups, broadcasters can be expected to continue to press for source licensing. Presently, local broadcasters must acquire music performing rights before broadcasting syndicated programs or they risk infringing the copyrighted musical compositions synchronized with the visual images in the programs.³ The program producer conveys to its licensees all rights

1. H.R. 3521, 99th Cong., 1st Sess. (1985); S. 1980, 99th Cong., 1st Sess. (1985). Both bills proposed to amend the Copyright Act of 1976, 17 U.S.C. §§ 101-914 (1982 & Supp. V 1987), to require producers of television programs to convey the right to perform publicly the music accompanying the program along with all other rights. Presently, music performing rights must be acquired by the broadcaster separately. *See infra* text accompanying note 3. However, both the House bill and the Senate bill died in committee. Comment, *H.R. 1195 Source Licensing: A Legislative Swan Song to the Blanket License*, 67 OR. L. REV. 735, 757 (1988).

2. Bills were introduced in both the Senate, S. 698, 100th Cong., 1st Sess. (1987), and the House, H.R. 1195, 100th Cong., 1st Sess. (1987). According to the Senate version, the bill's purpose is "[t]o amend title 17, United States Code, to prohibit the conveyance of the right to perform publicly syndicated television programs without conveying the right to perform accompanying music." S. 698, *supra*. The two bills were similar, but the House version included a provision creating a collective bargaining right in composers. *See infra* notes 102-109 and accompanying text.

3. 17 U.S.C. § 108(4) (1982) (provides for an exclusive right to "perform the copyrighted work publicly").

To "perform" a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible."

to broadcast the dramatic performances and literary property embodied in its programs, except the music performing right, which the broadcaster must acquire separately.

Music performing rights usually are acquired pursuant to a blanket license⁴ from one of two performing rights organizations: the American Society of Composers, Authors & Publishers (ASCAP) or Broadcast Music, Inc. (BMI).⁵ A blanket license authorizes the licensee to perform any of the copyrighted musical compositions in the licensor's repertory during a specific period of time, usually one year. The performing rights organization charges a license fee based on station revenues.⁶ Since virtually every domestic composition is in the repertory of either ASCAP or BMI, blanket licenses from both organizations assure the broadcaster's ability to perform any program.⁷

Each local broadcaster is responsible for acquiring the license to perform the copyrighted music in the syndicated programs it broadcasts, even though all other rights are conveyed by the program producer or syndicator in its license agreement with the broadcaster.⁸ In short, after acquiring the rights to a syndicated television program from the program producer or syndicator, the local broadcaster cannot broadcast the program until it has acquired the music performing rights as well. The local station may acquire music performing rights directly from the composer, from the program producer, or from a performing rights organization. The established industry practice, however, is to purchase music performing rights from a performing rights organization.

In 1985, local broadcasters, acting through the All-Industry

17 U.S.C. § 101 (1982) (emphasis added).

4. See *infra* notes 39-43 and accompanying text.

5. A third performing rights organization, SESAC, Inc. (SESAC), licenses a small, but significant, catalog of music copyrights. SESAC originally was known as the Society of European Stage Authors and Composers. Although licenses typically are obtained through one of the three performing rights organizations, they can be obtained in other ways. For example, the broadcaster may negotiate directly with the composer or the music publisher for performance rights.

6. The blanket license also is used in other settings—*e.g.*, restaurants, nightclubs, and department stores—where a flat fee is charged, based on criteria such as square footage, number of speakers, or seating capacity.

7. See *infra* note 14.

8. Rights conveyed to the local station with the license include the right to broadcast other copyrighted elements of the work, including any underlying literary work, screenplay, and graphic designs used in the work, as well as the right to broadcast the actors' portrayals of characters or themselves in the program. Failure to acquire any of these rights would render the local stations unable to broadcast the program.

TV Music Committee,⁹ backed legislation that would outlaw the blanket license. Local broadcasters believe that the blanket license, which was valuable during the era when television was “live” and music selections unpredictable, is now outdated and unfair because the vast majority of programs are pre-recorded, making it possible to predict with certainty the compositions to be licensed. Further, broadcasters see the blanket license as an obstacle to free market competition in music performing rights because all music performances are credited at the same rate; in effect, there is no price competition between individual compositions. The broadcasters argue that composers, publishers, and performing rights organizations are unwilling to bargain in good faith for performing rights licenses covering individual compositions while the blanket license exists.

The source licensing bills required program producers to acquire the music performing rights for music contained in their programs from the composers. The program producers then would be required to convey these rights to the local broadcasters along with the license to broadcast the program. Legislatively mandated source licensing would end blanket licensing of music performing rights for syndicated television programs and would force a consolidation of the music performing right and the right to synchronize the music and video images,¹⁰ which currently are conveyed separately.¹¹

Proponents of the bills insisted that composers—like others creatively involved in the programs, including actors, scriptwriters, and directors—should receive compensation through marketplace negotiations with program producers. Arguing that it is irrational to separate out composers’ performing royalties for special, sepa-

9. The All-Industry TV Music Committee negotiates license agreements with the performing rights organizations on behalf of local broadcasters. Similarly, licenses for local radio broadcasters are negotiated by the All-Industry Radio Music Licensing Committee.

10. Synchronization or “synch” rights authorize the synchronization of copyrighted music with the visual images comprising a program. “Synch” rights are conveyed to the program producer by the copyright owner (the composer, publisher, or both). Although not specifically referenced in the Copyright Act, the synchronization right is included in the right of reproduction under 17 U.S.C. § 106(1) (1982). Under present practices, the synch right is conveyed alone, often for a relatively small fee, as a kind of composer’s loss leader. The composer depends on ASCAP or BMI to collect performance royalties based on performance “credits” accruing from actual performances monitored by the performing rights organizations and attributed to the individual composers by means of complex reporting systems.

11. Typically, the performing rights conveyance is facilitated by the composer’s non-exclusive transfer to ASCAP or BMI of the right to license performing rights and the subsequent acquisition of a blanket license by the broadcaster.

rate licensing,¹² broadcasters complain that the blanket license forces them to purchase the rights to music they neither want nor need in order to acquire the relatively small number of performing rights licenses that they do need. They insist that under the blanket license regime, efforts to deal directly with composers, or to acquire source-licensed programs, inevitably will fail. In their view, as long as the blanket license is permitted to exist, it will dominate the marketplace because composers, publishers, and program producers (whose interests are closely aligned with the publishers'—often they are the publishers) lack incentives to bargain seriously for alternative forms of licensing.

Opponents of source licensing legislation argue that, by requiring the conveyance of one exclusive right (performance) with another exclusive right (synchronization), mandated source licensing diminishes the value of copyrights in musical compositions vitiating an important principle of copyright law: the divisibility of the separable property rights comprising a copyright.¹³ By requiring conveyance of the performing right with the synchronization right, mandated source licensing would eliminate the separate market for performing rights.

Opponents of source licensing legislation argue that without a bargaining agent such as ASCAP or BMI, composers lack the bargaining strength to negotiate fair compensation for their performing rights.¹⁴ They claim that forcing the conveyance of performing

12. All-Industry Television Music Committee, *TV Music: The Case For Copyright Reform* (n.d.) (copy on file with the University of Miami Entertainment & Sports Law Review).

13. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 47, 61 (1976).

The five fundamental rights that the [Act] gives to copyright owners—the exclusive rights of reproduction [synchronization is a variety of reproduction], adaptation, publication, performance, and display—are stated generally in [17 U.S.C.] section 106. These exclusive rights, which comprise the so-called “bundle of rights” that is a copyright, are cumulative and may overlap in some cases. Each of the five enumerated rights may be subdivided indefinitely and . . . each subdivision of an exclusive right may be owned and enforced separately.

Id. (emphasis added).

14. ASCAP and BMI operate as clearinghouses for the vast majority of non-dramatic performance rights granted in the United States. “As a practical matter virtually every domestic copyrighted composition is in the repertory of either ASCAP, which has over three million compositions in its pool, or BMI, which has over one million. . . . Almost all broadcasters hold blanket licenses from both ASCAP and BMI.” *CBS v. ASCAP*, 400 F. Supp. 737, 742 (S.D.N.Y. 1975), *rev'd*, 562 F.2d 130 (2d Cir. 1977), *rev'd sub nom.* *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1978). A third performing rights society, Society of European Stage Authors and Composers (SESAC), licenses the smallest percentage of rights, and has not figured prominently in the litigation over blanket licensing. Whereas ASCAP and BMI combined represent over 65,000 composers, SESAC represents only 1,680. Nevertheless, “SESAC, like ASCAP and BMI, licenses virtually the entire broadcasting industry.” See

rights simultaneously with synchronization rights would compel composers to bargain away their performing rights "up front." By shifting the responsibility for payment from broadcasters to program producers, composers thus are forced prematurely to accept a buy-out for the use of their music before its value in the marketplace is determined. Only established "top name" composers would be able to command sizable up-front payments; lesser-known composers would be unable to bargain effectively for the speculative value of their performing rights.

This Article analyzes the arguments on both sides of this debate, beginning in Part II with a retrospective look at the development of the performing right under United States copyright law and the important role performing rights organizations¹⁵ played in giving effect to the non-dramatic music performing right.¹⁶ Part II examines the utility of the blanket license conveyance of performing rights in music, with specific emphasis on its use in the television industry. Part III discusses antitrust challenges to the blanket license regime, particularly the pivotal *CBS*¹⁷ and *Buffalo Broadcasting*¹⁸ decisions. Part IV identifies and discusses the source licensing bills and the principal arguments that have been advanced for and against that legislation. Finally, this Article concludes that blanket licensing does not foreclose other licensing methods, including source licensing, but, instead, offers a practical compromise of copyright and antitrust concerns; in contrast, the Article also concludes that mandated source licensing diminishes the value of copyrights in musical compositions by eliminating the copyright owner's ability to separately convey synchronization and performing rights. This diminution in copyright value that is likely to result from mandated source licensing would reduce the incentive for the creation of new music because the performing right, as a separate property right licensed under a blanket license, is often the largest source of income to the composer. If the blanket license—a form of license that assures continuing payment for continuing use—is eliminated, composers no longer could expect to share automatically in the financial success of syndicated programs featur-

generally S. SHEMEL & M. KRASILOVSKY, *THIS BUSINESS OF MUSIC* 183-86 (5th ed. 1985).

15. In general, references in this Article to ASCAP should be read to include the other performing rights organizations, BMI and SESAC.

16. See *infra* note 24 (defining "non-dramatic" performing right).

17. *CBS v. ASCAP*, 400 F. Supp. 737 (S.D.N.Y. 1975), *rev'd*, 562 F.2d 130 (2d Cir. 1977), *rev'd sub nom.* *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1978).

18. *Buffalo Broadcasting Co. v. ASCAP*, 546 F. Supp. 274, 277 (S.D.N.Y. 1982), *rev'd*, 744 F.2d 917 (2d Cir. 1984), *cert. denied*, 105 S. Ct. 1181 (1985).

ing their music.

II. PERFORMING RIGHTS IN MUSIC

A. Historical Development

The first Copyright Act,¹⁹ enacted in 1790, did not protect musical compositions. Copyright protection of musical works was not granted until 1837²⁰ and, even then, it was only applied to printed copies of the work; protection was not extended to performances of musical compositions. During the latter half of the nineteenth century, musical productions for the stage became increasingly popular.²¹ Despite this increase in the commercial value of musical works, composers had no recourse against unauthorized performances until 1897 when performing rights in musical compositions were accorded protection under the revised Copyright Act.²²

After recognition in 1897, the performing right immediately became valuable to composers in licensing "dramatic" performances²³ which were widely publicized and, therefore, easy to monitor; however, "non-dramatic" performances²⁴ remained unlicensed because of the inherent difficulties in determining the extent and value of such uses. There was "no market mechanism to bring creators and users together."²⁵ At the turn of the century, the only source of income for non-dramatic musical compositions was the

19. Act of May 31, 1790, ch. 15, 1 Stat. 124, § 1 (creating protection for books, maps, and charts).

20. Act of February 3, 1831, ch. 16, 4 Stat. 436, § 1.

21. Korman & Koenigsburg, *Performing Rights in Music and Performing Rights Societies*, 33 J. COPYRIGHT Soc'y 332, 336 (1986).

22. Act of Jan. 6, 1897, ch. 4, 29 Stat. 481 (recognizing performance rights in musical compositions). Subsequently, both the 1909 and 1976 Copyright Acts provided for performing rights. See *infra* note 30.

23. "Dramatic performance" rights are often termed "grand rights" and are not licensed under the ASCAP blanket license discussed herein. See generally S. SHELLEY & M. KRASLOVSKY, *supra* note 14, at 198-201; CBS v. ASCAP, 562 F.2d 130 (2d Cir. 1977), *rev'd sub nom.* Broadcast Music, Inc. v. CBS, 441 U.S. 1 (1978). "For our purposes it is enough to note that while ASCAP normally could license the performance of a song from, for example, *My Fair Lady*, it could not license the song in the context of a performance in whole or part of the play itself." CBS, 562 F.2d at 132.

24. As long as the musical composition is not performed as an integral part of a dramatic work—e.g., an opera, operetta, musical comedy, or play—it may be categorized as a "non-dramatic performance." Non-dramatic performances occur when a musical composition is played on the radio, television, or jukebox. Similarly, non-dramatic performances occur if the performance is in a nightclub by a band. Throughout this article, the phrase "performing rights" refers to non-dramatic performing rights. ASCAP and BMI license only non-dramatic rights through blanket licenses. Music users requiring dramatic rights must negotiate directly with the composer or publisher who owns the copyrighted work.

25. Korman & Koenigsberg, *supra* note 21, at 337.

sale of sheet music; the customary practice was to convey the performing right with the sale of the song sheet.²⁶ During the early part of the twentieth century, new technologies such as radio, the phonograph, and the jukebox spawned a significant increase in non-dramatic music performances and the concomitant ability to monitor such performances, primarily because larger individual music users, such as radio broadcasters, emerged. Today, the performing right is the largest source of revenue for the owners of copyrights in musical works,²⁷ and broadcast media provide the main source of performing rights revenue.

B. The Development of U.S. Performing Rights Organizations

The American Society of Composers, Authors & Publishers (ASCAP) was the first performing rights organization in the United States; today it remains as the largest.²⁸ ASCAP was organized in 1914 by composer Victor Herbert and a small group of prominent composers whose goal was to give meaning to the performing right with respect to non-dramatic performances by licensing and policing uses of ASCAP members' music. Since its inception, ASCAP has brought copyright infringement suits against unauthorized users on behalf of its composer members. The first copyright infringement suit was initiated in 1914 by ASCAP founder Victor Herbert who prevailed against a restaurant where a band was playing one of his compositions without authorization.²⁹ A series of early court battles helped to clarify the "performance for profit" requirement under the 1909 Act.³⁰ Even though ASCAP prevailed in its early litigation, it was not until 1921, seven years

26. Korman, *Performance Rights in Music Under Section 110 and 118 of the 1976 Copyright Act*, 22 N.Y.L. Sch. L. Rev. 521, 523 (1977), cited in Korman & Koenigsberg, *supra* note 21, at 337.

27. Korman & Koenigsberg, *supra* note 21, at 337.

28. *Id.*

29. *Herbert v. Shanley Co.*, 222 F. 344 (S.D.N.Y. 1915), *aff'd*, 229 F. 340 (2d Cir. 1916).

30. *See, e.g., Herbert*, 222 F. 344 (construing 17 U.S.C. § 1(e) (1909)). To establish a prima facie case of infringement of a performing right, the 1909 Act required that the alleged infringement be a "public performance for profit." The "for profit" requirement, although broadly construed by the courts, was ignored by Congress in the 1976 Copyright Act, 17 U.S.C. §§ 101-914 (1982 & Supp. V 1987), which accords rights in all public performances to copyright owners. Specific exceptions appear in § 110(1) ("performance . . . of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution . . ."), § 110(2) (classroom instruction or transmission related to governmental body or nonprofit educational institution), § 110(3) (religious works performed during the course of religious services), and § 110(4) (performances in connection with certain nonprofit, charitable, fundraising activities).

after its formation, that ASCAP's receipts exceeded its costs, thus enabling a distribution of royalties to its members.³¹

Radio broadcasters always have relied heavily on musical programming to attract audiences and advertisers.³² The growing popularity of radio, phonographs, and motion pictures during the early 1900's contributed to the demise of the parlor piano as the center of family entertainment, thus creating a decline in sheet music sales.³³ Sheet music, formerly the main source of income for songwriters, began to lose its economic importance, but the performing royalties from radio programming and movie theatres started to replace this lost income, eventually supplanting and exceeding it.³⁴

As the broadcast industry grew, ASCAP exacted higher fees for blanket licenses. By the end of the 1930s, broadcasters had become increasingly hostile toward ASCAP, finally boycotting ASCAP music³⁵ and forming a new performing rights organization to compete with ASCAP. Thus, in 1939, the broadcasters, responding to ASCAP's hegemony in the performing rights area, formed Broadcast Music, Inc. (BMI), a non-profit organization, to increase the broadcasters' bargaining power in negotiating performing rights licenses.³⁶

Although BMI and ASCAP are organized somewhat differently, both represent the overwhelming majority of composers and publishers in the licensing of performing rights and today are the two titans of performing rights licensing.³⁷ Each organization employs its own complex system of monitoring and "weighing" of various performance criteria to arrive at a schedule of royalty distri-

31. Korman & Koenigsberg, *supra* note 21. See generally Sobel, *The Music Business and the Sherman Act: An Analysis of the Economic Realities of Blanket Licensing*, 3 *LOV. ENT. L.J.* 1, 3 (1983).

32. Korman & Koenigsberg, *supra* note 21, at 337.

33. *Id.*

34. *Id.*

35. *Id.* at 351. "This period is known as the era of 'I Dream of Jeannie with the Light Brown Hair' by broadcasters and ASCAP alike [because broadcasters used predominately public domain music in their programs]. By late 1941, a peace of sorts had been restored between ASCAP and the broadcasters, with new license arrangements worked out." *Id.* at 351 n.87.

36. *Music Licensing Reform: Hearings On H.R. 3521 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. 49 (March 19, 1986) (statement of Ralph Oman, Register of Copyrights) [hereinafter *Statement of Ralph Oman*]; *CBS v. ASCAP*, 400 F. Supp. 737, 742 (S.D.N.Y. 1975), *rev'd*, 562 F.2d 130 (2d Cir. 1977), *rev'd sub nom.* *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1978).

37. BMI's revenues in 1984 were \$136 million. Korman & Koenigsberg, *supra* note 21, at 351. ASCAP's revenues for 1987 were about \$253 million. Daniels, *1986 A Sweet Year For ASCAP*, *DAILY VARIETY*, Feb. 19, 1987, at 1.

butions. Both organizations monitor television and radio broadcasts to detect unlicensed uses, and each has developed sophisticated formulae to distribute income to its affiliated composers and publishers.³⁸

C. *The Blanket License*

Convenience is the key to the blanket license.³⁹ A blanket licensee acquires rights to perform an extensive repertory of copyrighted music without having to acquire an individual license for each particular use. For certain music users, such as nightclubs and restaurants, a blanket license is virtually imperative. It is practically impossible for such users to predict their musical requirements far enough in advance to procure all the individual licenses needed to present variety entertainment. Transaction costs would be astronomical if such users were compelled to track down copyright owners (in some cases, heirs of owners) and separately negotiate performing rights licenses for each individual composition that might be performed in their establishments. Similarly, radio broadcasters are served well by blanket licensing. Because any music selected is covered automatically under the blanket licenses, broadcasters can program current records without the delays that would result from locating individual copyright owners and negotiating performing rights licenses.⁴⁰ Thus, the blanket license reduces transaction costs by efficiently licensing in one transaction the performing rights to a vast repertory of music. As noted by Judge Lasker:

As a practical matter, virtually every domestic composition is in the repertory of either ASCAP, which has over three million compositions in its pool, or BMI, which has over one million. Like ASCAP, BMI offers blanket licenses to broadcasters for unlimited use of the music owned by its "affiliates." Almost all broadcasters hold blanket licenses from both ASCAP and BMI.⁴¹

38. Although each organization strives for fairness to its members, the different statistical methods employed make disparity inevitable. For example, on one occasion a writer and publisher of a work received \$21,800 as compared to \$56,200 received by the co-writer and his publisher for the same quarter's earnings on the same song. Granville, *The Way To Go: Blanket or Direct*, BILLBOARD, May 25, 1985, at 10. While it is possible for a composition to be "split" according to the performing rights organization affiliation of each individual co-writer, once a writer makes the choice, all of that writer's compositions are represented by the performing organization selected for the term of the agreement.

39. CBS v. ASCAP, 400 F. Supp. at 742.

40. *Id.* at 742.

41. *Id.*

The Supreme Court described the competitive advantages of the blanket license:

[The] substantial lowering of costs, which is of course potentially beneficial to both sellers and buyers, differentiates the blanket license from individual use licenses. The blanket license is composed of the individual compositions plus the aggregating service. Here, the whole is truly greater than the sum of its parts; it is, to some extent, a different product. The blanket license has certain unique characteristics: It allows the licensee immediate use of covered compositions, without the delay of prior individual negotiations, and great flexibility in choice of musical material.⁴²

The inherent efficiencies of the blanket license allow ASCAP to bargain effectively for its members. For the composer, ASCAP performs a valuable union-like function by serving as a bargaining agent in negotiations with major buyers of music.⁴³

ASCAP monitors all media to detect infringements. When it discovers infringements, ASCAP institutes infringement actions without cost to the affected composers.⁴⁴ Through its reciprocal agreements with foreign performing rights organizations, ASCAP collects performance royalties for its members from overseas performances. In turn, a portion of the fees paid by domestic licensees is distributed to foreign performing rights organizations for distribution to their composer and publisher affiliates.⁴⁵ A delicate balance of reciprocal protections and practices has developed internationally and ASCAP performs an important role in assuring that American composers are fairly compensated for performances of their works worldwide.

D. The Blanket License and the Local Television Broadcaster

Local television broadcasters must acquire licenses for the performing rights to the music contained in the television programs they broadcast.⁴⁶ The local broadcaster pays a percentage of its

42. *BMI v. CBS*, 441 U.S. 1, 21-22 (1978).

43. ASCAP is not a union; in fact, composers have not been represented by a union in the film or television industries since 1972. See *infra* note 108.

44. The litigation costs are paid from the administration fees charged by ASCAP. In 1986, administration fees totalled \$47,737,000—equivalent to 18.9% of total receipts. Daniels, *supra* note 37, at 1.

45. See generally P. DRANOV, *INSIDE THE MUSIC PUBLISHING INDUSTRY* 124-26 (1980).

46. Performing rights must be obtained for all non-network programming—*viz.*, syndicated programming and locally produced programs. Network programming is covered by

revenue for blanket licenses from ASCAP and BMI.⁴⁷ Revenue attributed to network programming is excluded from the broadcasters' revenue base for purposes of calculating the fee for the blanket licenses.⁴⁸

As a result of antitrust litigation against it, ASCAP also makes available to local broadcasters a second type of license: the per-program license. The consent decree entered in the litigation⁴⁹ requires the availability of this "realistic alternative" to the blanket license.⁵⁰ A per-program license is a "mini-blanket" license; like the blanket license, it covers all the compositions in ASCAP's repertory.⁵¹ The essential difference is that the per-program license applies the blanket license to a particular program, not to all the broadcaster's non-network programming. The per-program license fee is calculated based on the revenues attributable to the particular programs licensed, but is considerably higher as a percentage of those revenues than the percentage of overall station revenues charged for an overall blanket license. This higher revenue-to-li-

blanket licenses obtained by the networks from ASCAP and BMI. *CBS v. ASCAP*, 400 F. Supp. 737 (S.D.N.Y. 1975), *rev'd*, 562 F.2d 130 (2d Cir. 1977), *rev'd sub nom.* *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1978).

47. Broadcasters obtain blanket licenses from both performing rights organizations to ensure their ability to broadcast virtually all copyrighted music.

48. *Buffalo Broadcasting Co. v. ASCAP*, 546 F. Supp. 274, 282 (S.D.N.Y. 1982), *rev'd*, 744 F.2d 917 (2d Cir. 1984), *cert. denied*, 105 S. Ct. 1181 (1985). One criticism of this license is that the provisions that carve out exceptions for network programming do not extend to syndicated programs "licensed at the source." The exclusion pertains only where the license at the source was obtained from ASCAP or BMI, as in network programming. For a proposal to amend the consent decrees governing ASCAP and BMI to allow just such a carve-out provision, see Comment, *supra* note 1, at 767.

49.

Since 1941, ASCAP and BMI have been governed by consent decrees entered in proceedings initiated by the Department of Justice under the Sherman Antitrust Act. Under the decree, ASCAP is enjoined from restraining trade by acquiring an exclusive performance right from its members. Prior to the decree, ASCAP held an exclusive performance right to the compositions in its repertory so that potential music users could not obtain a direct license from the original copyright owner. This practice forced music users to acquire a blanket license on ASCAP's terms. Today the nonexclusive nature of the performance right held by ASCAP gives a licensee the choice of obtaining the right from ASCAP or the original composer.

Comment, *supra* note 1, at 745-46. For a discussion of the original consent decree, see *infra* notes 68-74 and accompanying text. The 1941 consent decree was amended in 1950. See *infra* notes 75-78 and accompanying text.

50. The consent decree that regulates BMI does not require the availability of such an alternative. Comment, *supra* note 1, at 746 & n.65.

51. This is not to be confused with a "per-use" license, which is not offered by ASCAP or BMI, and has been the subject of litigation. See, e.g., *CBS v. ASCAP*, 400 F. Supp. 737 (S.D.N.Y. 1975), *rev'd*, 562 F.2d 130 (2d Cir. 1977), *rev'd sub nom.* *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1978).

cense fee ratio is justified by the added administrative costs ASCAP incurs in monitoring individual programs.⁵² Broadcasters dislike the per-program license because they perceive it as too costly and its reporting requirements as onerous.⁵³ Nevertheless, in the landmark decision *Buffalo Broadcasting Co. v. ASCAP*⁵⁴ the Second Circuit concluded that the per-program license is a realistic alternative to the blanket license.⁵⁵

The blanket license has proven an efficient way to license music "in bulk."⁵⁶ The Supreme Court, rejecting a lower court ruling that the blanket license restrained trade in licensing performing rights to networks, described the blanket license as a unique product, and more than merely the "sum of its parts."⁵⁷ Television broadcasters, however, do not view the blanket license as a convenience; instead, they view it as an anachronism, burdening their operations.

III. ANTITRUST CHALLENGES TO THE BLANKET LICENSE

A. Background

*Buffalo Broadcasting Co. v. ASCAP*⁵⁸ is the most recent in a series of antitrust challenges to the blanket license. In *Buffalo Broadcasting* local broadcasters argued that the blanket license restrains trade by "splitting . . . the licensing of television performing rights from the licensing of all other music rights at the source,"⁵⁹ thus eliminating price competition between individual musical compositions.

The district court, agreeing with the broadcasters, applied the "rule of reason" analysis and determined that no realistic alternatives to the blanket license existed. On appeal, the Second Circuit accepted the district court's factual findings, but rejected its legal

52. The blanket license involves little policing since all music performed is licensed automatically and, as such, non-infringing.

53. Even though stations have demonstrated their disaffection for the per-program license, it has been upheld consistently as a "realistic alternative" to the blanket license. See, e.g., *Buffalo Broadcasting Co. v. ASCAP*, 744 F.2d 917, 926 (2d Cir. 1984), cert. denied, 105 S. Ct. 1181 (1985).

54. 744 F.2d 917 (2d Cir. 1984).

55. *Id.* at 926. The court reasoned that the higher per-program rate is justified since it is charged directly from the revenue base of specific programs at a rate negotiated by the All Industry Committee and subject to judicial review under the Consent Decree. *Id.* at 926-27.

56. See generally Korman & Koenigsberg, *supra* note 21, at 358.

57. *BMI v. CBS*, 441 U.S. 1, 21-22 (1978).

58. 546 F. Supp. 274 (S.D.N.Y. 1982), rev'd, 744 F.2d 917 (2d Cir. 1984), cert. denied, 105 S. Ct. 1181 (1985).

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

conclusions, finding instead that realistic alternatives to the blanket license did exist.⁶⁰

The *Buffalo Broadcasting* litigation was the impetus for the recent spate of source licensing legislation. Source licensing legislation is the All-Industry TV Music Committee's attempt to achieve through legislation what it could not achieve in the courts. The antitrust arguments that failed in *Buffalo Broadcasting* have resurfaced as policy and fairness arguments in support of source licensing legislation.

While an understanding of *Buffalo Broadcasting* is integral in the analysis of the source licensing debate, this case was not a novel challenge to ASCAP and the blanket license. From the beginning, both ASCAP and the blanket license have encountered antitrust challenges.⁶¹

Even at birth . . . ASCAP was seen to possess the organs of a "combination." It offered, after all, a bulk license—in a single package, the licensee obtained the right to give non-dramatic public performances of all works in the ASCAP repertory, thereby avoiding the need for individual negotiation and licensing with individual copyright owners.⁶²

Antitrust challenges have come from the federal government,⁶³ state legislatures,⁶⁴ and, most notably, in private antitrust actions brought by music buyers.⁶⁵ The basis of the challenges has been alleged restraint of trade by composers and publishers. ASCAP has been characterized by plaintiffs as a "combination" of composers and publishers, refusing to sell performing rights licenses for individual compositions without conveying the blanket rights to all compositions in the ASCAP repertory.

Since 1941, the performing rights organizations have operated pursuant to consent decrees entered into in settlement of antitrust litigation.⁶⁶ One early decision, adverse to ASCAP, ordered source

60. *Buffalo Broadcasting*, 744 F.2d 917.

61. Rifkind, *Music Copyrights and Antitrust: A Turbulent Courtship*, 4 CARDOZO ARTS & ENT. L.J. 1, 2 (1985).

62. *Id.*

63. The Department of Justice filed an antitrust suit in 1934 alleging ASCAP's domination of the radio industry. The suit was never tried, in part because, in 1935, ASCAP and the All-Industry Radio Committee negotiated a compromise in the form of a five-year licensing agreement. Sobel, *supra* note 31, at 5.

64. Various states passed laws hostile to ASCAP's blanket licensing, none of which remain in force today. Rifkind, *supra* note 61, at 11-12.

65. *Id.* at 12-16.

66. *United States v. BMI*, 1040-43 Trade Cas. (CCH) ¶ 56,096 (E.D. Wis. 1941); *United States v. ASCAP*, 1040-43 Trade Cas. (CCH) ¶ 56,104 (S.D.N.Y. 1941). See generally

licensing of music performing rights to movie theatre operators.⁶⁷ It is this decision which has spurred broadcasters to seek a similar judicial mandate in the licensing of music performing rights for syndicated television programs.

B. *Movie Theatres*

The industry practice of "splitting" the performing right and the synchronization right has its roots in the early pre-sound days of motion pictures. In those days, movie theatre owners employed musicians—pianists, organists, and sometimes bands or orchestras—to accompany the silent films they exhibited. ASCAP issued annual blanket licenses to movie theatres based on the number of seats in each theatre, thereby authorizing each theatre's musicians to perform any music in the ASCAP repertory.

In 1928, as Al Jolsen's "The Jazz Singer" ushered in the era of sound motion pictures, live musicians quickly were displaced by the movie soundtrack. Film producers insisted that since theatre owners "performed" the films, it was appropriate for the theatre owners to continue to acquire performing rights licenses to the music contained in the soundtracks.

The producers had taken on a number of new expenses in providing music with movies; specifically, they had to pay musicians, arrangers, and conductors' fees, as well as for the right to reproduce the composer's copyrighted composition in the film soundtrack—i.e., the right to synchronize the musical composition with the film. This synchronization right was acquired by the film producers in a one-time transaction with the copyright owner at the time the music was recorded onto the soundtrack. Because it was the producer who reproduced the work and the theatre owner who performed it, each was paying for the right it needed.

In *Alden-Rochelle, Inc. v. ASCAP*,⁶⁸ motion picture theatre owners alleged that this practice of splitting violated federal anti-trust laws; the district court agreed. The court held that the composer members of ASCAP violated section one of the Sherman Act, which prohibits restraint of trade, when they combined to convey

Statement of Ralph Oman, *supra* note 36.

67. *Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888, 891 (S.D.N.Y. 1948).

68. *Id.* In 1947, ASCAP proposed an increase in the blanket license fees for theatres that would have resulted in price hikes of from 200-1500%. The theatre owners organized the Theatre Owners of America and managed to negotiate a blanket license agreement for 1948 that raised license fees by only 25-30%. Nevertheless, the theatre owners were angry and "rekindled a long-dormant antitrust suit that had been filed against [ASCAP]." That case was *Alden-Rochelle*. Sobel, *supra* note 31, at 12-13.

to ASCAP, via exclusive licenses, their nondramatic performing rights.⁶⁹ The court ordered that performing rights in music for motion pictures and theatrical exhibition must be conveyed with the synchronization rights. This meant that theatre owners no longer needed to acquire licenses from ASCAP, since their movies arrived with all exhibition rights—including music performing rights—cleared at the source, or “source licensed.”

Even though motion picture theatres are no longer licensed by the performing rights organizations, the practice of splitting the reproduction (synchronization) right and the performing right remains firmly entrenched in entertainment industry practice and copyright law. Movie theatres are the only commercial establishments⁷⁰ in the United States in which music is publicly performed without payment to performing rights organizations.⁷¹

C. Television

From the earliest days of commercial television in the 1940s, broadcasters have acquired blanket licenses from the performing rights organizations to perform publicly the copyrighted music contained in their programming. From 1941 until 1948, the ASCAP licenses were given gratuitously to the fledgling television industry.⁷² From 1948 until 1950, blanket licenses were granted pursuant to the terms of the 1941 consent decree. Negotiations for the annual license fees were conducted on behalf of the entire television industry by the networks. In 1949 the networks proposed that the *Alden-Rochelle* doctrine—mandating source licensing for motion pictures shown in theatres⁷³—should apply when motion pictures were broadcast on television; in essence, the broadcasters wanted to receive motion pictures with the music performing rights cleared at the source. ASCAP refused to concede the issue, and the 1949 blanket license agreement between ASCAP and the television in-

69. *Alden-Rochelle, Inc.* at 894. The Sherman Act is codified at 15 U.S.C. §§ 1-7 (1988).

70. The Copyright Act provides exemptions from the exclusive right to perform nondramatic musical works under certain conditions for churches, schools, and other non-profit enterprises. See 17 U.S.C. §§ 110-111 (1982).

71. Sobel, *A Movie and TV Producer's Guide to Acquiring and Earning Income from Soundtrack Music Part II*, 7 ENT. L. REP. 3, 4 (Dec. 1985). The splitting of American composers' works with respect to motion pictures still occurs outside the United States. European theatres obtain performing rights licenses from their local performing rights organizations, and ASCAP composers receive performance royalties from those foreign performances when American movies are shown in European theatres. *Id.*

72. See Statement of Ralph Oman, *supra* note 36, at 52.

73. See *supra* notes 68-70 and accompanying text.

dustry expressly included performing rights to music contained in movies broadcast on television, thereby effectively limiting *Alden-Rochelle's* source licensing requirement strictly to *theatrical* performing rights.⁷⁴

ASCAP's 1941 consent decree was amended in 1950.⁷⁵ The issues raised in *Alden-Rochelle* were addressed in the revised consent decree⁷⁶ which provides that ASCAP may not insist on the blanket license, but, instead, must offer a realistic alternative in the form of a per-program license.⁷⁷ Additionally, the fees ASCAP charges for the license are subject to ongoing judicial scrutiny for reasonableness by the United States District Court for the Southern District of New York.⁷⁸ It is this 1950 amended consent decree which today governs relations between local broadcasters and ASCAP.

1. *CBS v. ASCAP*

The amended consent decree has been challenged a number of times, but it always has been upheld.⁷⁹ The first case to raise anti-trust objections to the blanket license of television music under the amended consent decree was brought in 1975.⁸⁰ The CBS television network challenged the blanket license as a *per se* violation⁸¹ of

74. *Buffalo Broadcasting Co. v. ASCAP*, 546 F. Supp. 274, 287-88 (S.D.N.Y. 1982), *rev'd*, 744 F.2d 917 (2d Cir. 1984), *cert. denied*, 105 S. Ct. 1181 (1985). *See generally* Sobel, *supra* note 31, at 14.

75. *United States v. American Soc'y of Authors, Composers & Publishers*, 1950-51 Trade Cas. (CCH) ¶ 62,595 (S.D.N.Y. 1950).

76. Statement of Ralph Oman, *supra* note 36, at 53.

77. *Id.*

78. *United States v. ASCAP*, 1950-51 Trade Cas. (CCH) ¶ 62,595 (S.D.N.Y. 1950). If the potential licensee and ASCAP are unable to agree on a license fee within 60 days from the initial application date, the applicant may submit the dispute to the District Court, which then will set a fee.

79. *See United States v. ASCAP*, 1971 Trade Cas. (CCH) ¶ 73,491 (S.D.N.Y. 1970); *United States v. ASCAP*, 341 F.2d 1003 (2d Cir. 1965); *United States v. ASCAP*, 208 F. Supp. 896 (S.D.N.Y. 1962), *aff'd*, 331 F.2d 117 (2d Cir.), *cert. denied*, 377 U.S. 997 (1964).

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

81. In an antitrust action, the initial determination focuses on whether an alleged anti-trust violation is a violation *per se*, or is subject to a "rule of reason" determination:

Under the *per se* analysis, only concerted actions which unreasonably restrict competitive conditions violate section one [of the Sherman Act]; such actions are considered blatantly anticompetitive without redeeming quality, and are conclusively unreasonable, so the plaintiff's burden of proof is relatively low. For example, both horizontal and vertical price fixing agreements are *per se* illegal.

Statement of R. Oman, *supra* note 36 at n.47 (citing W. HOLMES, *INTELLECTUAL PROPERTY AND ANTI-TRUST LAW* § 5-4 (1983)).

The rule of reason analysis, unlike the *per se* rule, allows a legitimate business

antitrust law. After negotiations for a new blanket license broke down, CBS sued ASCAP and its composer members seeking an injunction requiring ASCAP to issue per-use licenses.⁸² If granted, it would have forced ASCAP to issue single performance licenses at reasonable fees, subject to judicial review.⁸³

The district court concluded that because CBS had the alternative of dealing directly with the copyright owners and therefore was not compelled to accept the blanket license, CBS had not proven "tying" or price fixing.⁸⁴ CBS appealed, and the Second Circuit reversed, holding that the blanket license was price fixing, and thus illegal *per se*.⁸⁵ Even though strict adherence to the *per se* rule would have required an injunction,⁸⁶ the court declined to enjoin the blanket license, noting that sometimes "market necessity" requires arrangements which otherwise would be *per se* violations.⁸⁷ The court remanded to the district court with special instructions that "if on remand a remedy can be fashioned which will ensure that the blanket license will not affect the price or negotiations for direct licenses, the blanket license need not be prohibited

purpose to outweigh an indirect effect on competition to sustain the legality of a particular practice. The rule of reason allows a balancing of the following factors to determine competitive unreasonableness: (1) the nature of the challenged restraint—size of the organization and importance of the market issues; (2) competitive effect and magnitude of the injury; (3) purpose of the restraint as a legitimate business purpose or solely to suppress competition.

Id. at n.61 (citing W. HOLMES, INTELLECTUAL PROPERTY AND ANTITRUST LAW §§ 5-25, 5-27 (1983)).

It is possible, however, that price-fixing, usually a *per se* restraint of trade, can nevertheless be legal under a "market necessity" rationale. See *CBS*, 562 F.2d at 136-37 ("[P]rice-fixing is *per se* illegal except where it is absolutely necessary for the market to function at all.").

82. *CBS*, 400 F. Supp. at 741.

83. See generally Cirace, *CBS v. ASCAP: An Economic Analysis of a Political Problem*, 47 FORDHAM L. REV. 277, 279 (1978).

84. *CBS*, 400 F. Supp. at 780-83. The district court believed that CBS had sufficient market power to cause the Harry Fox Agency (an organization which "clears" synch rights for motion picture producers) to expand to deal in performing rights, or to provide impetus for another agency to spring up to handle CBS's demand for performing rights. *Id.* at 962-68. Because of CBS's market power—it is the largest user of music in the world—the court found that if CBS chose to direct-license performing rights, copyright owners would "line up at their doors." *Id.*

85. *CBS*, 562 F.2d at 140.

86. *Id.* at 140. See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940) (noting that "[u]nder the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*.").

87. *CBS*, 562 F.2d at 136-38 (holding that "market necessity" did not apply since direct licensing was shown to exist as a realistic alternative to the blanket license).

in all circumstances."⁸⁸

ASCAP appealed to the Supreme Court, which heard the case in 1979.⁸⁹ Reversing the Second Circuit, and holding that the blanket license was not illegal *per se*, Justice White, writing for the majority, concluded that "in dealing with performing rights in the music industry we confront conditions both in copyright law and in antitrust law which are *sui generis*."⁹⁰ Justice White noted that in the 1976 Copyright Act Congress had provided blanket licensing for cable television, jukeboxes, and noncommercial broadcasts, thereby indicating that under some conditions blanket licenses were economically desirable.⁹¹ On remand, the Second Circuit affirmed the district court's original decision upholding the blanket license.

2. *Buffalo Broadcasting Co. v. ASCAP*

In 1982, local television broadcasters invoked antitrust principles to attack the blanket license. This time, the focus was narrowed to particular types of programming: syndicated television programs and commercials.⁹²

The background for this case, *Buffalo Broadcasting Co. v. ASCAP*,⁹³ was the Second Circuit's approval in its 1981 *CBS v. ASCAP*⁹⁴ opinion of the blanket license under the rule of reason analysis. In *CBS*, the court held that the blanket license did not have the alleged restraining effect on trade because the plaintiffs had failed to prove a *lack* of alternatives to the blanket license. Specifically, the court found that direct licensing of music performing rights from copyright owners was a realistic alternative to the blanket license, considering CBS's size and bargaining strength in the market.⁹⁵ The broadcasters in *Buffalo Broadcasting* claimed that their lack of market strength made it impossible for them to utilize the direct licensing option that the court in *CBS* found available to the network⁹⁶ and that they had no realistic alternative to the blanket license for acquiring the performing rights to the music

88. *Id.* at 140.

89. *CBS*, 441 U.S. 1 (1978).

90. *Id.* at 10 (quoting *CBS v. ASCAP*, 562 F.2d 130, 132 (2d Cir. 1977)).

91. *Id.* at 16.

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

93. *Id.*

94. *CBS v. ASCAP*, 620 F.2d 930, 957 (2d Cir. 1980), *cert. denied*, 450 U.S. 970 (1981).

95. *Id.* See also *supra* note 84 (discussing the market power of CBS).

96. *Buffalo Broadcasting*, 546 F. Supp. 274.

contained in syndicated programming.

The district court agreed that no realistic alternatives to the blanket license were available to the broadcasters.⁹⁷ The court then applied the rule of reason balancing test, evaluating the procompetitive versus the anticompetitive effects of the blanket license, and concluded that the anticompetitive effects outweighed the procompetitive effects: the blanket license restrained trade in violation of federal antitrust laws.⁹⁸

On appeal, the Second Circuit reversed, finding that both direct and per-program licensing provided local broadcasters with realistic alternatives to the blanket license.⁹⁹ The court noted that even though per-program fees were higher, they were not unreasonably higher.¹⁰⁰ Moreover, because the fees were subject to judicial review pursuant to the 1950 amended consent decree, adequate protections against unreasonable fees existed for the broadcaster. The court explained that only a horizontal agreement among composers to refuse to license through source or direct licenses would constitute anticompetitive activity, and the broadcasters had not shown that such an agreement existed. So long as the blanket license is one of several realistic means by which broadcasters can acquire licenses for music performing rights, no restraint of trade is shown by the mere fact of its competitive superiority to the other available licensing methods.¹⁰¹

IV. SOURCE LICENSING LEGISLATION

A. Background

After defeat in the courts, local broadcasters took their fight to Congress, convincing some legislators that the Copyright Act should be amended to mandate source licensing for syndicated programming. As a result, source licensing legislation was introduced in 1985.¹⁰² The legislation met strenuous opposition from composers, publishers, the U.S. Copyright Office, The Songwriter's Guild, The Delegation of the Commission of the European Communities, and others. Although source licensing bills initially attracted seventeen co-sponsors in the Senate and 164 in the

97. *Id.* at 293.

98. *Id.* at 296.

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

100. *Id.*

101. *Id.* at 933-34.

102. See H.R. 3521, 99th Cong., 1st Sess. (1985); S. 1980, 99th Cong., 1st Sess. (1985).

House,¹⁰³ both bills died in committee.¹⁰⁴

In 1987, the local broadcasters tried again. The 1987 bills, H.R. 1195 and S. 698, although amended to address some of the concerns of the 1985-86 opponents, attracted only seventy-five co-sponsors in the House and eight in the Senate.¹⁰⁵ This diminished

103. American Society of Composers, Authors & Publishers, Update on Source Licensing Bills (n.d.) (copy on file with the University of Miami Entertainment & Sports Law Review).

104. *Id.*

105. The bills were identical except for a provision (§g) in the House bill that granted collective bargaining rights to composers in work-for-hire situations. The provision was stricken from the Senate version to accommodate conservative interests in "right to work" states. H.R. 1195 provided:

A BILL

Entitled the "Syndicated Television Music Copyright Reform Act of 1987"

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Syndicated Television Music Copyright Reform Act of 1987."

Sec. 2. Title 17, United States Code, is amended by redesignating sections 113 through 118 as sections 114 through 119, respectively, and by inserting after section 112 the following new section:

"§ 113. LIMITATIONS ON EXCLUSIVE RIGHTS: USE OF MUSICAL WORKS IN SYNDICATED TELEVISION PROGRAMS

"(a) Notwithstanding the provisions of section 106, no owner, assignee, or licensee of a copyrighted audiovisual work may convey the right to perform publicly such work by non-network commercial television broadcast without simultaneously conveying the right to perform in synchronization any copyrighted music which accompanies such audiovisual work.

"(b) Notwithstanding section 101 of this title, for purposes of this section, the term 'audiovisual work' means any motion picture, prerecorded television program, or commercial advertisement.

"(c) Subsection (a) does not apply to works prepared by, for or under the direction of organizations that are exempt from Federal income tax under section 501(a) of the Internal Revenue Code of 1954 by reason of section 501(c)(3) of such Code."

Sec. 3 Section 106 of title 17, United States Code, is amended by striking out "118" and inserting in lieu thereof "119."

Sec. 4. Section 201 of title 17, United States Code, is amended by adding the following new subsection:

"(f) Whenever the right to perform by broadcast any motion picture or other audiovisual work containing a synchronous musical work as provided in section 113, is conveyed to any commercial broadcast station, the author or authors of such musical work (or in the case of a work made for hire the employer or employees who prepared the work) shall be entitled to an interest in any compensation paid to the owner of the copyright in such motion picture or other audiovisual work. The amount of such interests shall be determined by agreement between the owner of the copyright in the motion picture or other audiovisual work and the author(s) or employee(s) who prepared the work.

"(g) In any case in which a musical work, which constitutes a work made for hire under subsection (b), is synchronized with a motion picture or other audiovisual work, the person who prepared such work shall be considered an employee, for purposes of laws relating to collective bargaining, of the owner of

support is perhaps the result of the extensive education and lobbying efforts by ASCAP, BMI, and other affected organizations to explain the benefits of blanket licensing. This campaign began immediately upon introduction of the first source licensing bills and continues today.

The bills before the 100th Congress differed with respect to one provision which was included in the House bill¹⁰⁶ but had been stricken from the Senate version:¹⁰⁷ the composers' right to collectively bargain as employees of producers. This amendment was intended to address the concerns of many who feared that without the performing rights organizations as bargaining agents, many composers—especially new and unknown composers—would not have the bargaining power to negotiate effectively for fair compensation.

Special provision for the right to collectively bargain is necessary because composers today are considered independent contractors,¹⁰⁸ and thus are not recognized as "employees" under the National Labor Relations Act.¹⁰⁹ If source licensing is made mandatory, then such a collective bargaining provision is necessary to enable composers to acquire bargaining strength in their negoti-

the copyright in such motion picture or other audiovisual work."

Sec. 5. The amendments made by this Act shall take effect on the date of enactment of the Act, except that the amendment made by section 1 shall not affect a public performance occurring during the one-year period beginning on the date of enactment of this Act pursuant to a contract executed before such date of enactment.

H.R. 1195, 100th Cong., 1st Sess. (1987) (emphasis added).

106. *Id.*

107. S. 698, 100th Cong., 1st Sess. (1987). The full text of the House bill appears at *supra* note 105.

108. *Bernstein v. Universal Pictures*, 517 F.2d 976 (2d Cir. 1975). See generally Havlicek & Kelso, *The Rights of Composers and Lyricists: Before and After Bernstein*, 8 COLUM. J.L. & ARTS 439 (1984). Originally, composers were unionized and the Composers and Lyricists Guild of America (CLGA) was the bargaining representative for film/TV industry composers. The NLRB had recognized the CLGA in 1954 when many composers were traditional employees of studios. After an unsuccessful strike in 1972, the composers brought a suit alleging antitrust violations against the Association of Motion Picture and Television Producers (AMPTP). In order to pursue this cause of action, normally unavailable when a labor agreement is involved, the composers argued that they were not employees, but independent contractors. Although the composers won the proverbial battle in that they were partly successful in their antitrust challenge to AMPTP, they lost the war because the CLGA was no longer recognized as the bargaining agent for the composers. Subsequent attempts to organize have met with indifference from the AMPTP, which refuses to meet with any composers' organization, and the NLRB, which agrees that composers today are independent contractors and not covered under the National Labor Relations Act, 29 U.S.C. §§ 152-158 (1982).

109. See 29 U.S.C. § 152(3) (1982).

ations with producers comparable to other creators in the film and television industry. This issue, used to defeat the 1985 licensing bills which contained no collective bargaining provisions, was addressed by amendments to the 1987 bills, expressly guaranteeing the composers' right to bargain collectively. The Senate co-sponsors could not agree on this amendment, however, since Senators from "right-to-work" states found provisions guaranteeing the right to unionize inimical to their positions on collective bargaining. As a result, the collective bargaining amendment remained a part of H.R. 1195, but was deleted from S. 698.

Without the performing rights societies to negotiate licenses and monitor infringements, independent contractor composers occupy an inherently weak bargaining position in negotiations with program producers. Without the right to collectively bargain, composers will not be able to bargain effectively for their performing rights. Moreover, even with the right to unionize, it could take years to achieve recognition and develop effective representation.

B. Arguments For and Against Source Licensing Legislation

Proponents of source-licensing, principally broadcasters, have advanced five arguments in support of legislatively mandated source licensing and the legislative abolition of blanket licensing. First, they argue that under blanket licensing, payments for music are not related to the value of the musical components of the syndicated programming.¹¹⁰ The blanket fee is the same regardless of whether the programming features musical variety shows or news documentaries. Second, broadcasters contend that the blanket fee is charged even if a program uses no music, a patently unfair result.¹¹¹ Third, broadcasters assert their willingness to pay royalties to composers, but argue that only 40 cents of every dollar paid under the blanket license goes to composers. Out of the other 60 cents, 40 cents goes to the publishers and 20 cents to the performing rights organizations, in the form of administrative fees.¹¹² The broadcasters point out that many publishing houses are owned by the Hollywood studios that produce syndicated programs and

110. See Bostick, *Other Side of the Music Coin*, BROADCASTING, Aug. 10, 1987, at 22 (Letter to the editor from the President and General Manager of KWTX-TV, Waco, Texas).

111. *Id.* Although in theory this is true, this author has seen no statistics indicating that this ever actually happens. In fact, weather, sports, news and other "non-music oriented" programming generally has some musical component—theme music, background music, or both.

112. *Id.*

merely provide an additional source of revenue for producers. Broadcasters insist that producers who profit from the blanket licensing system have no incentive to alter the manner in which performing rights are licensed.¹¹³

Fourth, the broadcasters analogize the syndicated television program market to the motion picture market and insist that source licensing—ordered by the court for motion pictures in *Alden-Rochelle* in 1948—should be equally applicable to syndicated television.¹¹⁴ Finally, broadcasters maintain that the blanket license discourages the use of local composers' works. Because the blanket license provides access to the total repertory of a performing rights organization, it is more economical simply to turn to that repertory for needed music, rather than to a local composer.

Not surprisingly, supporters of the blanket license, most notably the performing rights societies whose very existence is threatened by mandated source licensing,¹¹⁵ argue strenuously against source licensing legislation. They advance six principal counterarguments in support of their position.

First, they claim mandated source licensing would force composers to set fees before public performance of the work—i.e., before the value of the work in the marketplace is known.¹¹⁶ Second, the huge financial investments and low success rates associated with television programs produced for syndication militate against a willingness on the part of producers to shoulder more “up-front” costs. This is particularly true where the up-front costs are for speculative performing royalties that may have no value if the program is not successful. Producers are likely to use less original music and more library music or public domain music, rather than add additional costs to an already huge initial investment.

Third, opponents to source licensing argue that the blanket license has operated as an incentive for new composers and that mandated source licensing would remove that incentive, thus stifling the creation of new works. Specifically, the new composer, unable to bargain for a large initial payment, often will compose new

113. *Id.*

114. 133 CONG. REC. S2921 (daily ed. Mar. 10, 1987) (Statement of Sen. Strom Thurmond).

115. The performing rights societies view any attack on the blanket licensing system as a threat to their existence. This is understandable in light of the 46-year history of lawsuits challenging the blanket license in other contexts.

116. American Society of Composers, Authors & Publishers, Don't Stop the Music (1987) (pamphlet outlining several arguments in opposition to S. 698 and H.R. 1195) (copy on file with the University of Miami Entertainment & Sports Law Review).

music for a low up-front payment, anticipating greater rewards from future performing royalties. Source licensing would reduce composers' incentives to do this because performance royalties would decrease, or even disappear, without the benefit of an established system for monitoring and valuing them. Alternatively, new composers, hungry to enter the market, may convey valuable rights for a fraction of their value. Presently, such a composer is encouraged to create by the chance of sharing in the success of a production in which his or her music is featured, by collecting performing royalties through a performing rights organization.¹¹⁷ The performing right, as presently administered, offers composers a "run at the brass ring" by guaranteeing that their sacrifice and effort will pay off if the program is a success.

Fourth, ASCAP argues that the policy favoring the divisibility of copyright is vitiated by a system that requires performing rights to be conveyed with synchronization rights.¹¹⁸ Copyright practitioners lobbied long and hard to obtain express recognition of the divisibility principle in the Copyright Act of 1976. Mandated source licensing chips away at this important property right. Fifth, ASCAP argues that currently four licensing options are open to broadcasters: Source, blanket, per-program, and direct. The mandated source license eliminates all choices except source licensing. Finally, foreign retaliation is predicted if source licensing is mandated in this country. At present, domestic composers enjoy favorable protection and income from foreign performances of their works; this favorable treatment would be jeopardized if American broadcasters are enabled to avoid ongoing payments for performing rights. Opponents of source licensing fear a retaliatory reaction by foreign broadcasters against American music and a concomitant loss in income for American composers.

C. Discussion

Both the Second Circuit in *Buffalo Broadcasting*¹¹⁹ and the Supreme Court in *CBS*¹²⁰ determined that the blanket license of music performing rights for syndicated television programming

117. Opponents argue that this system has created incentives for program producers to use more original music since composers are willing to accept low up front payments and take a chance, along with the producer, on the success of a show.

118. There are two sources of income from the division of the music copyright with respect to syndicated television programs. See *supra* text accompanying note 10.

119. *Buffalo Broadcasting Co. v. ASCAP*, 744 F.2d 917 (2d Cir. 1984), *cert. denied*, 105 S. Ct. 1181 (1985).

120. *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1978).

and network programming constitutes neither a *per se* restraint of trade nor an unreasonable restraint of trade under the rule of reason analysis. The courts concluded that the alternatives of source and direct licensing exist, even as they noted obstacles to their availability. The facts showed that neither the networks nor the local broadcasters had made *bona fide* attempts to license through either of these alternative means, and therefore were unable to prove their unavailability. The availability of realistic alternative licensing means was dispositive in these cases, and the blanket license survived legal challenge.

The Supreme Court observed that the prevalence of the blanket license is not the result of an unlawful restraint of trade, but is instead the natural result of the license's superiority as a "product." The Court particularly noted that the blanket license has certain inherent efficiencies which reduce transaction costs for licensees. However, the fact that realistic alternatives exist does not mean they are easily attainable, or attainable without cost.

Although the history of antitrust litigation involving the blanket license is extensive—the litigation has arisen in different industries and contexts—it appears that opponents of the blanket license in the television industry have exhausted their credible challenges with the *CBS* and *Buffalo Broadcasting* decisions. Many of the arguments put forward by the opponents of blanket licensing in support of their antitrust theories have resurfaced as policy and fairness arguments in support of source licensing copyright "reform" bills. It seems that the blanket license as applied to local television broadcasters and syndicated programming is not susceptible to further antitrust challenges because the Second Circuit's holding in *Buffalo Broadcasting* appears dispositive on the question. Consequently, the broadcasters have taken the fight to Congress, resting their hopes on source licensing legislation.

At the core of the broadcasters' position is the argument that local broadcasters ought to be treated the same as movie theatre owners, who possess the ability to obtain their programming with all rights licensed at the source. Broadcasters agree that in the early days of television the blanket license was necessary because programming was live and thus unpredictable; however, they insist that today's programming, in contrast, is preset and predictable, more akin to motion pictures. Broadcasters argue that television producers should be required to obtain a performing rights license from the music copyright owners just as motion picture producers

have been required to do since *Alden-Rochelle*.¹²¹ There are some notable differences, however, between the problems addressed by the court in *Alden-Rochelle* in 1948 and the present realities in syndicated television programming.

The *Alden-Rochelle* litigation arose in a different era of the entertainment industry, before the amended consent decree of 1950 pursuant to which ASCAP now licenses performing rights. In that earlier era, movie producers, music publishers, and ASCAP combined to restrict distribution of films to those theatres holding ASCAP licenses. ASCAP members had to convey *exclusive* rights to ASCAP;¹²² theatre owners could not negotiate directly with composers.¹²³ Per-program licensing was not available before *Alden Rochelle*; instead, only blanket licenses were offered. Moreover, theatre owners were unable to bargain effectively with ASCAP to set reasonable fees and fees for the blanket licenses were set unilaterally by ASCAP.

Today, local broadcasters deal with ASCAP through the All-Industry TV Music Committee which negotiates blanket and per-program license fees, both of which are subject to review by the United States District Court for the Southern District of New York. ASCAP is forbidden by the amended consent decree to obtain exclusive licenses from composers; consequently, local broadcasters, unlike the pre-*Alden-Rochelle* theatre owners, may bargain directly with composers for performing rights.

Beyond these legally significant differences, there are certain industry practices and practicalities that undermine the usefulness of comparisons between movie theatres and television broadcasters. For instance, there are far fewer motion pictures than television programs produced each year, translating into fewer opportunities for composers in the motion picture industry. Moreover, motion pictures are produced with larger budgets than television programs. Larger budgets mean motion picture producers can withstand more substantial up-front payments when negotiating for music synchronization and performance rights in one conveyance. Where increased payments to composers might discourage music use in lower budget television productions, motion pictures,

121. *Alden Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888, 891 (S.D.N.Y. 1948).

122. See Comment, *supra* note 1, at 747.

123. See *Alden-Rochelle, Inc.*, 80 F.Supp at 892. The *Alden-Rochelle* court noted that: "Motion picture producers rented their films to the exhibitors (theatre operators) with a provision in the contract that the film would be exhibited only in a theatre for which ASCAP had issued a license to perform publicly for profit the musical composition of ASCAP's members." *Id.* The textual assertion is an obvious corollary of this practice.

because of their huge budgets, have been able to adjust to the added costs without seriously reducing the use of music in films.

The fees paid to composers for the creation or use of music in films are much higher than those paid by television producers. Nevertheless, it is a one-time payment and forces a buy-out—at least with respect to performances of the composer's music in domestic movie theatres.¹²⁴ Other factors, present in the motion picture industry but not in television, have made source licensing tolerable for composers in the film industry, despite the forced buy-out.

One inducement for composers to create music for motion pictures is the relatively high incidence of soundtrack albums which are "spun off" from motion pictures. This is an additional opportunity for composers to earn profits from artist's (original performance) royalties,¹²⁵ mechanical royalties,¹²⁶ and performance royalties¹²⁷ from their completed work. Such soundtrack releases are much less common with television productions.

Although movie theatres in the United States do not pay performance fees to the performing rights organizations,¹²⁸ theatres in Europe do pay such license fees. When American movies are shown in European theatres, performing royalties are collected by foreign performing rights societies and returned to the composers through ASCAP and BMI. Additionally, once a movie has had its U.S. theatre run, it generally is packaged for licensing to networks, pay-TV companies, cable programming services, and syndicated program packagers. All these users of music (except the syndicators) must obtain performing rights licenses for the music contained in the movie soundtracks and, as a result, they all (except the syndica-

124. Foreign movie theatres continue to pay performing royalties to foreign performing rights societies. See *supra* note 71.

125. Record companies generally pay soundtrack composers 14-18% of the album's suggested retail price. Often composers receive large non-refundable advances against royalties from the record companies. Sobel, *A Movie and TV Producer's Guide to Acquiring and Earning Income from Soundtrack Music Part III*, 7 ENT. L. REPR. 3 (Jan. 1986).

126. The composer receives the artist royalty for the *performance* recorded initially onto the master recording from which records are made. A second royalty is paid for the underlying *musical compositions* embodied in the master recording. Mechanical license fees are paid for each record manufactured (*mechanically reproduced*). The rate is set by the Copyright Royalty Tribunal (CRT), and is about six cents per song per record at present (10 songs = 60 cents per record). Record companies generally negotiate a lower rate, typically 75% of the rate established by the CRT. *Id.* at 3-4.

127. Music from soundtrack albums receive airplay on radio, television, and in public facilities such as nightclubs and restaurants. ASCAP and BMI license these establishments, as well as broadcasters, providing income for the composers. *Id.*

128. See *supra* notes 68-71 and accompanying text.

tors) obtain blanket licenses from ASCAP and BMI.

Motion pictures constitute a significant portion of the syndicated programming that would be subject to source licensing legislation. The assurance of royalties from television performances constitutes an added incentive for composers in the motion picture industry. A change in the licensing of music contained in television programs will affect the film industry by forcing even higher up front payments for music, in effect compensating for the loss in performing royalties under blanket licenses from syndicated television performances of the motion pictures.

In evaluating the principal arguments advanced by the source licensing proponents, particular attention must be paid to the effect of mandated source licensing on existing contracts, as well as its effect on the rights of copyright owners under section 201(d) of the Copyright Act.¹²⁹

D. Retroactivity

Section five of S. 698¹³⁰ provided a one-year grace period to producers or syndicators; during this time programs broadcast pursuant to contracts executed before the effective date of enactment of the new law would not be affected by the amendment to section 113(a) of the Copyright Act.¹³¹ These pre-existing contracts need not have included music performing rights in the original conveyance. However, as most contracts covering program performing rights run from three to seven years or longer, this is problematic.¹³² A one-year grace period is therefore insufficient to serve as a transition to a new licensing system. In sum, the abbreviated transition period has the effect of retroactively impairing the producers' contracts.

Ralph Oman, the Register of Copyrights, addressed this issue on behalf of the Copyright Office in his remarks before the House

129. 17 U.S.C. § 201(d) (1982). Section 201(d) states:

(1) The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.

(2) Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred as provided by clause (1) and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.

Id.

130. S. 698, 100th Cong., 1st Sess. (1987).

131. *See supra* note 105.

132. Statement of Ralph Oman, *supra* note 36, at 77.

Committee on the Judiciary during the 99th Congress.¹³³ Oman argued that retroactive legislation must be avoided on principle, claiming that such legislation would be unfair to producers by requiring them to renegotiate existing agreements with composers to acquire the performing right.¹³⁴ Further, Oman expressed his belief that such legislation is violative of the fifth amendment prohibition on Congress' passing laws impairing the obligations of contracts.¹³⁵ Oman insists that, if source licensing legislation is enacted, it should be prospective, affecting only future programs, movies, and commercials.¹³⁶ Prospective legislation could, however, institute a self-defeating dual system as the blanket license would survive as the preferred licensing system for pre-existing programs.¹³⁷

E. Copyright Divisibility

Perhaps the most compelling argument against amending the Copyright Act to mandate source licensing is that such an amendment would undermine the divisibility of copyright principle, thus diminishing the value of copyrights in musical works. Broadcasters argue that composers' rights are no different from those of actors or directors and should be compensable by a similar residual payments system. Leaving aside the collective bargaining¹³⁸ differences, it is clear that the rights of composers are different from those of other creators because of policies underlying the copyright laws. Copyrights in musical works are subdividable into separate property interests, including the rights to reproduce (synchronize) and to perform (broadcast). "Producers synchronize; broadcasters perform."¹³⁹ Accordingly, each of these users of a subdividable right in the music copyright pays for the right it uses. Copyright owners are able to negotiate separately for each exclusive right.

Mandated source licensing would require that two *separate*,

133. Statement of Ralph Oman, *supra* note 36.

134. *Id.* at 77 (citing 2 SUTHERLAND, STATUTORY CONSTRUCTION § 41.02 (4th ed. 1973)).

135. *Id.* at 77 (citing 2 SUTHERLAND, STATUTORY CONSTRUCTION § 41.03 (4th ed. 1973)).

136. *Id.* at 77.

137. *Id.*

138. Actors and directors are represented by unions pursuant to collective bargaining agreements negotiated with talent buyers. Composers are unable to achieve this strength in the marketplace because, as independent contractors, they cannot be represented by a collective bargaining agent. See *supra* notes 108-109 and accompanying text. See generally Havlicek & Kelso *supra* note 108.

139. American Society of Composers, Authors & Publishers, The Facts Re: Source Licensing Legislation (n.d.) (copy on file with the University of Miami Entertainment & Sports Law Review).

exclusive property rights be conveyed *together*, in a single transaction.¹⁴⁰ This would diminish the value of the copyright as a whole because it would restrain alienation of the performing right except in the tandem synch/performing right conveyance. The policy of severability of property interests in copyright figured prominently in Congress' crafting of the 1976 Copyright Act. The House Report clearly expresses Congress' concern:

[The Act] contains the first explicit statutory recognition of the principle of divisibility of copyright in our law. This provision, which has long been sought by authors and their representatives, and which has attracted wide support from other groups, means that any of the exclusive rights that go to make up a copyright, including those enumerated in section 106 and any subdivision of them, can be transferred and owned separately. The definition of "transfer of copyright ownership" in section 101 makes clear that the principle of divisibility applies whether or not the transfer is "limited in time or place of effect," and another definition in the same section provides that the term "copyright owner," with respect to any one exclusive right, refers to the owner of that particular right.¹⁴¹

Under the proposed law, there could be no separate market for the performing right. As with other forms of property, intellectual property is held and traded freely, subject to private contracts of many types and the owners' reasonable expectations based upon copyright law, case law, and industry practices. Undermining copyright owners' ability to trade freely with the separate "sticks" in their bundle of rights would be a "highly negative precedent for all owners of intellectual property."¹⁴² The American Intellectual Property Law Association states:

Government interference with personal property rights deprives copyright owners of the right to freely use their property. Such serious action would only be justified, in our view, if the harm to the public is both clearly demonstrated and grievous.¹⁴³

Similarly, the Copyright Office believes it would be unwise to pass drastic legislation affecting the sanctity of contracts and divis-

140. See S. 698, 100th Cong., 1st Sess. § 2 (1987); H.R. 1195, 100th Cong., 1st Sess. § 2 (1987). Proposed § 113 of the Copyright Act would require conveyance of synch and performance rights in one transaction. See *supra* note 105.

141. H.R. REP. NO. 1476, 94th Cong., 2d Sess., pt. 2, at 123 (1976).

142. Letter from Thomas F. Smegel, Jr., President of the American Intellectual Property Law Association to Robert W. Kastenmeier, Chairman, Subcommittee on Courts, Civil Liberties, and the Administration of Justice. (March 18, 1986).

143. *Id.*

ibility of copyright when competitive licensing alternatives are apparently available.¹⁴⁴

V. CONCLUSION

Source licensing legislation proposed a major change in the administration of music performing rights. If successful, the legislation would have threatened the complex performing rights administration system that has evolved over nearly a half century. It would outlaw the blanket licenses ASCAP, BMI, and SESAC have offered for forty-five years for television performances of music in syndicated programming. The legislation does not provide for the replacement of performing rights organizations with another agency or organization to assure fair payment for composers' works, or to prevent infringements. Broadcasters argue that the administration fees charged by the performing rights societies are too high. Composers do not complain, however, when ASCAP, without cost to the affected composer, tracks down infringers and initiates legal action to prevent the infringing use.

Source licensing legislation would eliminate completely the blanket license for syndicated television programs. The *Buffalo Broadcasting* court has determined that three realistic forms of licensing are currently available: Source, direct, and blanket. If source licensing legislation is passed, two of these options will be eliminated.

By removing the amendment providing the right to collectively bargain, the Senate condemned composers to a weak bargaining position. The All-Industry TV Music Committee argues that actors, screenwriters, and others creatively involved in syndicated programs are able to successfully negotiate for and receive residual payments based on the resale of the programs, and that this is the appropriate way for composers to be compensated for the use of their music. It is important to recognize, however, that these other creators are members of unions or guilds that act as bargaining agents for them. Composers, conversely, are specifically prohibited from unionizing.¹⁴⁵ The inclusion of the collective bargaining amendment offered some hope that if the blanket license was outlawed, a collective bargaining representative could emerge to replace the performing rights organizations. Without such a collective bargaining provision, composers would be required to give

144. See Statement of Ralph Oman, *supra* note 36.

145. See *supra* notes 108-109 and accompanying text.

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up their long-established licensing system for a “pig in a poke.”¹⁴⁶

146. Berman, *TV Source Licensing: Trading Copyrights For “A Pig in a Poke”*, *BILLBOARD*, Dec. 20, 1986, at 9.