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# Monopoly -- Violation of Anti-Trust Laws Through Copyright Combination

It is submitted that in deciding that the Navy had power to make an authoritative declaration with respect to the scope of its court-martial jurisdiction, the court construed the statute in an unanticipatedly liberal manner. Heretofore a growing civil judicial sentiment against the extension of military judicial power has resulted in a narrower construction.[15]

## MONOPOLY—VIOLATION OF ANTI-TRUST LAWS THROUGH COPYRIGHT COMBINATION

Defendant, American Society of Composers, Authors and Publishers, a voluntary association, separated the legal rights[1] flowing from copyrights assigned to Ascap by its individual members. The synchronization right, for use as background music in motion pictures, was sold to the film producers, while the right of public performance was specifically excepted in the sale of the synchronization right to the producers, and was sold to the plaintiff motion picture theatre operators by annual blanket licenses over a thirteen-year period. Plaintiff exhibitors contended that Ascap's refusal to permit buying of both rights when purchasing a complete motion picture from the producers, coupled with the payment of annual blanket license fees to Ascap, violated the Sherman Anti-Trust Act[2] and the Clayton Anti-Trust Act.[3] Claims for injunctive relief[4] from Ascap's practices, and for damages based on past license fees, were predicated upon both statutes. *Held,* that Ascap's indulgence in these practices constituted a violation of the anti-trust laws; but since plaintiff failed to show injuries, money damages denied. *Alden-Rochelle, Inc., v. American Society of Composers, Authors and Publishers,* 79 F. Supp. 315 (S. D. N. Y. 1948).

A copyright holder is granted a monopoly,[5] albeit limited by statute, in his work; but the protection granted by law does not extend to a combination of patents or copyrights effecting a restraint of trade,[6] even though necessary

15. See *Ex parte* Drainer, 65 F. Supp. 410 (N. D. Cal. 1946), *aff'd sub nom.* Gould v. Drainer, 158 F. 2d 981 (C. C. A. 9th 1946); see generally, Note, *The Amenability of the Veteran to Military Law,* 46. COL. LAW REV. 977 (1946).

1. 35 STAT. 1075, 1088 (1909), 17 U. S. C. §1 *et seq.* (1946).

2. 26 STAT. 209 (1890), 15 U. S. C. §§ 1-7 (1946); Westor Theatres v. Warner Bros. Pictures, 41 F. Supp. 757 (D. C. N. J. 1941).

3. 38 STAT. 731 (1914), 15 U. S. C. § 15 (1946); emphasis is upon the threatened loss in Duplex Printing Press Co. v. Deering, 254 U. S. 443 (1921).

4. 38 STAT. 737 (1914), 15 U. S. C. § 26 (1946).

5. See note 1 *supra.*

6. "It thus appears that patent pools in the future cannot be built on a structure where a license to the pool is all that is allowed, but presumably if any license is offered, then the licensee must be permitted, if he so desires, to obtain a license to any single patent." U. S. v. Paramount Pictures, 68 Sup. Ct. 915 (1948), Levi, *The Antitrust Laws and Monopoly,* 14 U. OF CHI. L. REV. 153, 181 (1947). "The lawful individual monopoly granted by the patent statutes cannot be unitedly exercised to restrain competitors." Standard Oil Co. (Indiana) v. U. S., 283 U. S. 163 (1931); State v. Creamery Package Mfg. Co., 110 Minn. 415, 435, 126 N. W. 126 (1910).

to preserve property rights.[7] Further illegal combination was found by the court in the instant case in the contractual agreement between the producers and Ascap, which agreement limited exhibition of producers' films to theatres licensed by Ascap, thus combining the motion picture copyright monopoly with that of the pooled copyright assignments of the defendants in an illegal extension of the statutory monopoly of each.[8]

The court based its denial of damages upon the finding that the public performance rights obtained by virtue of the blanket licenses were of value and that, although purchased under a legally unenforceable contract,[9] the plaintiff exhibitors nevertheless paid a reasonable price for value received.[10] The provisions of the Sherman and Clayton Acts authorizing recovery of treble damages[11] by persons injured through violation of the anti-trust laws should be strictly construed; the right is an unusual one and the remedy is drastic.[12] Plaintiff cannot recover unless required to pay in excess of the value of the right.[13] Where the paucity of evidence renders impossible the determination of value received, as in the instant case, it follows that the overcharge is speculative.

In granting injunctive relief,[14] the court directed Ascap to: (1) divest itself of the public performance right whenever the producer has the synchronization right, and re-assign the public performance right to the copyright holder; (2) refrain from retaining both rights, or acquiring the public

7. Ring v. Spina, 148 F. 2d 647 (C. C. A. 2d 1945); *see* Watson v. Buck, 313 U.S. 387, 404 (1941); Strauss v. American Publishers' Association, 231 U. S. 222 (1913). Such agreements cannot be justified by the necessities or conveniences of the copyright holder, Mercoid Corp. v. Mid-Continent Investment Co., 320 U. S. 661 (1944); nor by ruinous market conditions, United States v. Socony-Vacuum Oil Co., 310 U. S. 150 (1940); nor as a means of coercion reasonably necessary to prevent an infringement of rights, Fashion Originators' Guild of America, Inc. v. Federal Trade Commission, 312 U. S. 457 (1941). It is invariably held that the addition of a monopoly to a statutorily restricted monopoly, *i.e.*, a copyright, violates the principle of both the copyright laws and the anti-trust laws.

8. *Ibid.*

9. See note 7 *supra.*

10. *Compare with* United States v. Trenton Potteries, 273 U. S. 392 (1927); Anderson v. Shipowners' Association, 272 U. S. 359 (1926); United States v. Addiston Pipe and Steel Co., 85 Fed. 271 (C. C. A. 6th 1898). "If the combination is in fact in restraint of trade and monopolistic in tendency, it is illegal however reasonable the prices fixed thereto or however great the reason for self-protection." *See* AM. JUR. 492, 493.

11. See note 3 *supra.*

12. Westor Theatres v. Warner Bros. Pictures, *supra;* 15 U. S. C. A. § 8 (1948 Supp.).

13. Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U. S. 390 (1906). *But see* Northwestern Oil Co. v. Socony-Vacuum Oil Co., 138 F. 2d 967 (C. C. A. 7th 1943), *cert. denied*, 321 U. S. 792 (1944); Farmers Co-operative Oil Co. v. Socony-Vacuum Oil Co., 43 F. Supp. 735 (N. D. Iowa 1942), *modified on other grounds*, 133 F. 2d 101 (C. C. A. 8th 1942).

Actions under 15 U. S. C. §§ 1-7 and 15 sound in tort, and are both deterrent and compensatory.

14. Ascap's plea that the exhibitors were barred from equitable relief by the doctrine of "unclean hands" was rejected for lack of immediate and necessary relation to the equity in litigation. Morton Salt Co. v. Suppiger, 314 U. S. 488 (1942), *contra*, is noted in 61 HARV. L. REV. 539 (1948), and approved on the ground that the public interest requires that such a plea be upheld. The importance of the public interest has been considered in analogous trade-mark legislation reaching an antithetical result: 60 STAT. 439 (1946), 15 U. S. C. A. § 1115 (Supp. 1946) provides that use of the mark in violation of anti-trust laws may be a defense in an infringement action.

performance right, if the synchronization right has been acquired by the producer; (3) permit the producer to have the right of public performance whenever he buys the synchronization right; (4) refrain from indirect licensing of exhibitors.[15] The effect of the injunction is to separate the rights which Ascap may sell by requiring re-assignment of one upon sale of the other. As a result, both rights do not flow from Ascap, but both do accrue to the producer; exhibitors, in the future, will acquire both rights when buying from the producer. It is submitted that since both rights have been found to be of value, although difficult of estimation, the separation by the court will require the producer to pay more to acquire both, thus adding to the cost of the complete film bought by plaintiff. The effect of the decision is to shift the burden of payment; but the court has succeeded in eliminating the contractual monopoly between Ascap and the producers which discriminated against exhibitors who lacked an Ascap license.[16]

In basing its decision upon the finding that "Almost every part of the Ascap structure . . . involves a violation of the anti-trust laws," the instant case relied upon three broad criteria: Ascap dominated its field to such an extent that it could abuse its power almost at will;[17] through its membership device it could deny its facilities to those whose businesses required such service;[18] through blanket annual licenses—a marketing device—it could extend its control over the entire market.[19] The fact that the membership device used was not a defense has been interpreted as presaging a broadening of substantive remedies under the anti-trust laws.[20] The instant case seems indicative of the same trend.

If, then, Ascap falls within these three criteria, how may one interpret the nature of the relief granted? Are the courts faced with the difficult problem of judicial control of industry to such an extent that a plaintiff who is a private party, as distinguished from the Government—plaintiff in other leading cases—will fall strictly within the rules of private relief?[21] Or, in extending anti-trust remedies to include a voluntary and unincorporated combination

15. "Per piece" buying as a solution was rejected as impracticable in both the principal case and United States v. Paramount Pictures, 68 Sup. Ct. 915 (1948).

16. See note 7 *supra*.

17. United States v. Aluminum Corp. of America, 148 F. 2d 416 (C. C. A. 2d 1945). The extent controlled is material even though it be within a small area. United States v. Crescent Amusement Co., 323 U. S. 173 (1944). The fact that Ascap did not abuse its power was not a justification. American Tobacco Co. v. United States, 328 U. S. 781 (1946).

18. Associated Press v. United States, 326 U. S. 1 (1944), noted in 55 YALE L. J. 430 (1946). Mr. Justice Roberts' dissent, joined by the Chief Justice, de-emphasized the importance of the membership device and stated that the ratio of decision properly implied emphasis on the outward flow from the gathering organization. It is submitted that it is the actual dissemination of the services necessary to business in the field which is affected in the instant case.

19. United States v. Paramount Pictures, 68 Sup. Ct. 915 (1948); *see also* note 6 *supra*.

20. Ellis, *Paradoxes of the AP Decision—A Reply*, 13 U. OF CHI. L. REV. 471 (1946).

21. Westor Theatres v. Warner Bros. Pictures, 41 F. Supp. 757 (D. C. N. J. 1941).

of assignments, is the court following its action in regulating the activities of an associated news organization? [22]

It has been suggested that our anti-trust tradition, swinging as it has from remedies against abuse of power to a clearer recognition of the danger of the potential abuse of power as such, has become so confused that the relief necessary to cover all cases, regardless of the nature of the plaintiff and the cause of the violation, would better be vested in a federal administrative agency.[23] It is submitted, however, that the recent flexibility of judicial regulation to reach a pragmatic result, together with the cogent judicial recognition of the dangers inherent in the mere possession of a relative excess of power, even though in an unincorporated organization marketing restricted rights in an intangible commodity, are indicative of an affirmation of the broad principles of public policy underlying the anti-trust laws,[24] and of an intent to give relief commensurate with the extent of possible injury to the complainant.

## TAXATION—DISALLOWANCE OF DEDUCTION FOR UNREASONABLE SALARY PAID UNRELATED NON-PARTNER BY PARTNERSHIP

A partnership contracted in writing in 1941 to pay its bookkeeper a $2,400 minimum salary plus 10% of the net sales but not to exceed 22½% of the net profits. The employee, originally hired in 1937, had worked faithfully with the firm in its formative years for very little compensation. Near the end of 1940 the partnership signed a contract with General Motors Corporation which resulted in a boom in business. In 1943 the bookkeeper's total salary under the contingent compensation contract was $46,049.41. The Commissioner, sustained by the Tax Court,[1] held that since the inflated salary was due to the war boom, rather than to the employee's capabilities and services, that only $13,000 was reasonable and disallowed the remainder. *Held*, affirmed, under I. R. C. Sec. 23 (a) 1,[2] the Commissioner and the Tax Court

22. Continuing jurisdiction was retained in the District Court in the *Associated Press* case in an attempt to solve in the most practicable manner the monopoly caused by the membership by-laws. In both the *Associated Press* and the *Ascap* cases, the courts damaged the structure of the organization only insofar as was necessary to solve the problem immediately at hand.

23. Levi, *supra* note 6.

24. See Note, 54 YALE L. J. 860 (1945).

1. 16 P-H TC MEM. DEC. ¶ 47, 119 (1947).

2. "Sec. 23. Deductions from gross income.

"In computing net income there shall be allowed as deductions:

"(a) [As amended by Section 121 of the Revenue Act of 1942, c. 619, 56 STAT. 798 (26 U. S. C. § 23 [1946])].

"Expenses,—

"(1) Trade or business expenses.—

"(A) In General. All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, *including a reasonable allowance*