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INTRODUCTION

The intersection of intellectual property and antitrust presents one of the great ironies in the law. Antitrust law presumes that the advantages of monopoly are outweighed by the dangers inherent in concentrations of market power. Yet the law of intellectual property, especially copyright law, seems to presume the opposite. A monopoly is good—even one extended and protected by statute for many decades, as is copyright. In those cases where this natural tension between seemingly opposite forces ceases to exist, the danger of monopolistic malfeasance increases. Where these forces coalesce, as when a copyright owner also accomplishes unfettered market power, the results can be disastrous for consumers of products subject to intellectual property rights.

During those years when the federal government vigorously enforces the antitrust laws, consent decrees are entered into which attempt to delineate proper conduct into the future. However, such decrees may fail to anticipate how changes in technology and consumer habits alter market mechanisms and the effect the consent decree itself will have on how market actors behave.[1] Those de-

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1. The idea that those who negotiate a consent decree would fail to recognize the decree's own gravity in computing a fair result is not unlike the scientist who fails to rec-

crees which lack any meaningful provisions for modification will remain in place, self-perpetuating, and undisturbed during those periods when the antitrust laws are not vigorously enforced. At best, they become dormant and ineffective. At worst, the decree itself becomes anti-competitive when the market it had sought to control in the past no longer exists and the market structure created by the consent decree itself favors the former "monopolist" whose behavior the consent decree had sought, in the first instance, to control.

The explosive growth of the electronic media, with its concomitant increase in demand for public performance of copyrighted music, is casting doubt on the continued utility of consent decrees as a means of regulating anti-competitive behavior by the holders of intellectual property rights. Nowhere is this problem more evident than in the example of the consent decrees entered in *United States v. American Society of Composers Authors and Publishers*[2] and *United States v. Broadcast Music, Inc.*[3] Those consent decrees purport to control the market for the licensing of the exclusive right of public performance granted by statute to the owners of copyrighted musical compositions and exercised through performance rights societies.[4]

This Essay argues that inflexible consent decrees are inherently flawed as a tool for resolving antitrust enforcement disputes regarding intellectual property. Part I describes the copyright owner's right of public performance and relates that to the development of performing rights societies to enforce that right. Part II recounts the unsuccessful attempts by government and private liti-

ognize that his or her mere presence may have an effect on the observed phenomenon. *See generally* W. HEISENBERG, PHYSICAL PRINCIPLES OF THE QUANTUM THEORY (1930) (revealing the "uncertainty principle"). One way to minimize the risk is to insure that all antitrust consent decrees entered into by the government include an explicit, democratic, and workable mechanism to effect changes in the consent decree as market conditions change, either as a result of the consent decree itself or other changes.

2. 1950 Trade Cas. (CCH) ¶ 62,595 (1950). The 1950 decree superseded a previous decree entered in 1941. *See* 1941 Trade Cas. (CCH) ¶ 56,104 (1941).

3. 1966 Trade Cas. (CCH) ¶ 71,941 (1966).

4. The two largest performance rights societies are the American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI"). *See infra* Part I.B (containing a complete discussion of the development and operation of performance rights societies).

gants to regulate the performance right for copyrighted music, and further recounts anecdotal evidence of the subsequent exercise of unchecked market power by the performing rights societies. Part III argues that the demonstrated futility of seeking judicial and executive relief has left legislative action as the only remaining means of providing equity in the market for the right to publicly perform copyrighted music. This Essay concludes that Congress should provide an alternate mechanism to replace existing consent decrees as a means of resolving rate disputes between users of copyrighted material and the performing rights societies.

I. FEDERAL PROTECTION FOR THE RIGHT OF PUBLIC PERFORMANCE

It is often said, and correctly so, that the lasting strength of this country's political and economic institutions can be traced directly to the prescience of the Framers of the Constitution. Nowhere is this more evident than the Copyright Clause.[5] Long before the advent of television, compact discs, and motion pictures, the Founders recognized the economic, intellectual, and social gains to be made by granting Congress the power to grant copyrights and patents.[6]

A. *The Constitutional Stature of Intellectual Property Rights and the Public Performing Right*

The theory behind the copyright clause is simple. The law would create and protect a monopoly, limited in time, in the exploitation for profit of an author's work in exchange for a dedication of the work to the public domain at the end of the monopoly's term. Few would doubt the contribution our intellectual property laws have made to this country's cultural[7] and economic promi-

5. U.S. CONST. art. I, § 8, cl. 8.

6. *Id.* (granting Congress the power "[t]o promote the progress of science and useful arts by securing for a limited time to authors and inventors the exclusive right to their respective writings and discoveries"). It does not diminish the foresight of the founding fathers to note the English antecedent to the copyright clause, commonly known as the Statute of Anne. 8 Anne, ch. 19 (1710).

7. *See, e.g.*, Judith Beth Prowda, *U.S. Dominance in the "Marketplace of Culture" and the French "Cultural Exception"*, 29 N.Y.U. J. INT'L L. & POL. 193, 193-94 (1997)

nence.[8]

The holder of a modern copyright is said to have not one right, but, rather, a bundle of rights. With regard to a musical composition, these rights include the right to make copies of the work,[9] to make other versions of the work,[10] to sell copies and recordings of the work,[11] and to perform the work in public.[12] Consistent with the constitutional mandate of the copyright clause, under the federal copyright act these rights belong, with certain limited exceptions, to the copyright holder[13] for the statutory term.[14]

(discussing French objection to the "Americanization" of European television broadcasting).

8. *See* Melvin Simensky, *The New Role of Intellectual Property in Commercial Transactions*, N.Y. L.J., May 8, 1992, at 1 (quoting investment banker for the proposition that 80% of value of some companies is in trademarks and noting the important "role of intellectual property in the global marketplace").

9. 17 U.S.C. § 106(1) (1994) ("[O]wner of copyright . . . has the exclusive right[] . . . to reproduce the copyrighted work in copies or phonorecords.").

10. *Id.* § 106(2) ("[O]wner of copyright . . . has the exclusive right[] . . . to prepare derivative works based upon the copyrighted work.").

11. *Id.* § 106(3) ("[O]wner of copyright . . . has the exclusive right[] . . . to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership.").

12. *Id.* § 106(4) ("[O]wner of copyright . . . has the exclusive right[] . . . in the case of . . . musical . . . works . . . to perform the copyrighted work publicly."). The owner of a copyrighted musical work also enjoys the right to display the copyrighted work publicly. *Id.* § 106(5). To "perform" is broadly defined by the Copyright Act and "means to recite, render, play, dance, or act [the work], either directly or by means of any device or process . . . ." *Id.* § 101. Congress intended this definition to be all encompassing "including all kinds of equipment for reproducing or amplifying sounds or visual images, any sort of transmitting apparatus," and perhaps anticipating the increasing role of computers and digital technology "any type of electronic retrieval system, and any other techniques and systems not yet in use or even invented." H.R. REP. NO. 94-1476, 64 (1976).

13. Sections 107 through 121 of the Copyright Act contain exceptions to the rights granted by section 106. 17 U.S.C. §§ 106-121 (1994). Consistent with the historical view of United States copyright law that elevates the author over the performer, section 114 applies directly to the public performance right by exempting the public performance right from the bundle of rights held by the owner of a copyright in a sound recording. *Id.* § 114. Most of the other exemptions apply in some fashion to musical compositions, and generally exempt from the definition of copyright infringement arguably noncommercial uses that serve some greater societal good. Those uses include: criticism or parody, *id.* § 107 (fair use); library use archival activities, *id.* § 108; the alienability of copies purchased from copyright owner, *id.* § 109 (the so-called "first sale" doctrine); public performance to further teaching, religious and governmental activities, *id.* § 110, and increased dissemination, *id.* § 111(a) (non-commercial secondary transmission). These exemptions have little or no effect on commercial public performances administered by

Although Congress first passed a copyright act in 1790,[15] a statutory right of exclusive public performance for a musical composition did not exist until 1897.[16] The right of public performance for musical compositions continued through this century's first major revision of the copyright act in 1909 and maintained its important stature in the second major revision of the copyright law in 1976.

B. *The Historical Development of the Performing Rights Societies*

In the early days of the United States, the public performance right meant little more than the right to perform a musical composition by voice and acoustic instruments. The number of people who could hear—and therefore would be willing to pay to hear—a musical composition was delimited by the boundaries of physics

the performing rights societies. Certain other exemptions have an indirect effect through compulsory, statutory, or negotiated fee provisions. *See id.* § 111(b) (compulsory license for cable system secondary transmissions), *id.* § 116 (negotiated license or arbitration for public performances on jukeboxes), *id.* § 118 (compulsory license for public broadcasting after market failure), and *id.* § 119 (statutory license for satellite carriers). The complexity, scope, and necessity of these statutory fee-setting mechanisms are compelling evidence of the inability of the free market to set prices in the market of public performances, which is clear indicia of monopoly.

14. The statutory term for a musical work created on or after January 1, 1978 is currently the life of the author plus fifty years. *Id.* § 302. Congress is currently considering extending the statutory term to "life plus 70" in order to conform United States law to the current term of protection under the law of the European Union. On March 25, 1998, the House of Representatives passed The Copyright Extension Act, HR 2589, winning praise from BMI. In a press release, issued on the day of the bill's passage through the House, Frances Preston, president and chief executive officer of BMI, stated, "We're very pleased that the House has passed the Copyright Term Extension Act, often called Life plus 70. It will offer American creators and copyright holders the same protection now enjoyed by their peers in most developed nations around world." *See BMI Urges Senate to Pass Copyright Term Extension Act Without Harmful Amendment*, PR Newswire, Mar. 25, 1998, *available in* WESTLAW, 3/25/98 PRWIRE 17:39:00.

15. Act of May 31, 1790, ch.15, 1 Stat. 124, *repealed by* Copyright Act of 1802, ch. 36, 2 Stat. 171.

16. Copyright Act of 1897, ch. 4, 29 Stat. 481. *See generally* S. SHEMEL & M. KRASILOVSKY, THIS BUSINESS OF MUSIC 133 (6th ed. 1990). The availability of criminal sanctions under the Copyright Act of 1897 underlined the importance attached to this right. Willful infringement, if motivated by profit, was punishable by up to a year in prison, a misdemeanor. Rev. Stat. Section 4966.

and existing technology.[17] Since that time, the growth of technologies that facilitate and expand the number of people who can experience a public performance have rendered that right one of the most important protected by the copyright laws.[18] The widespread use of electricity and amplification alone has greatly expanded the audience for music.[19] From the success of radio earlier this century,[20] through the growth of television and cable in recent decades,[21] we have become increasingly exposed to copyrighted music. Indeed it is difficult to conceive of how someone in modern society could help but be exposed to public performances virtually every day, no matter where they went or the time of day.

17. Prior to the advent of mass media, the primary source of revenue for the owner of a copyright in a musical composition was the sale of sheet music. *See generally* Shull, *Collecting Collectively: ASCAP's Perennial Dilemma*, 7 ASCAP COPYRIGHT LAW SYMPOSIUM 35 (1956).

18. With regard to popular music the right of public performance may be more important than any of the other sticks in the bundle of rights. Many more people have heard, enjoyed, and in some way paid for the pleasure of listening to most popular songs than actually own an authorized "copy" of it.

19. *See, e.g.*, Buck v. Jewell-LaSalle Realty Co., 283 U.S. 191, 197 (1931) (ruling that placement of loudspeakers by hotel proprietor in public and private rooms to amplify infringing radio broadcast was public performance for profit under 1909 Act); *cf.* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 160 (1975) (limiting *Jewell-LaSalle* to its facts and holding that small restaurant's use of four speakers and home stereo equipment not a performance under the 1909 Act).

20. *See* Jerome H. Remick & Co. v. American Auto Accessories Co., 5 F.2d 411, 412 (6th Cir.), *cert. denied*, 269 U.S. 556 (1925) (ruling that radio broadcast constituted public performance under 1909 Act).

21. Under the 1909 Act certain acts of retransmission were held not to be public performances. In *Fortnightly Corp. v. United Artists Television, Inc.*, the Supreme Court held that the use of a community antenna system to retransmit a broadcast television signal was not a "performance" under the 1909 Act but merely an enhancement of "the viewers capacity to receive the broadcasters signal." 392 U.S. 390, 399 (1968). Similarly, the Court held that *Fortnightly* was controlling precedent even when the retransmission carrier added content and brought in distant signals, the forerunner of modern cable systems. *See* Teleprompter Corp. v. Columbia Broadcasting System, 415 U.S. 394 (1974). Congress took up the Supreme Court's challenge in *Teleprompter* to amend the Copyright Act if it disagreed with these decisions by expanding the statutory definition of "perform" as part of the 1976 revision of the Copyright Act. *See* H.R. REP. NO. 94-1476 (1976). Congress seems not to have been concerned that the broad definition of "performance" might bring about a windfall to the performing rights societies. *Cf. Aiken*, 422 U.S. at 163 (broad definition of perform would allow ASCAP to demand "untold number of licenses for what is basically a single public rendition").

When one adds together traditional broadcast sources,[22] commonplace technologies,[23] the more esoteric and developing delivery systems of microwave, satellite, pay per view,[24] closed systems in commercial and office settings such as Muzak, and the advent of the Internet,[25] it is difficult to fathom the enormous market for the public performance of copyrighted music.[26] In 1997 alone, the American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI") realized revenues of $495 million[27] and $428 million,[28] respectively.[29]

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22. *See* Hickory Grove Music v. Andrews, 749 F. Supp. 1031, 1036 (D. Mont. 1990) (playing music on radio "public performance" within the meaning of copyright law).

23. *See* Columbia Pictures Indus., Inc. v. Aveco, 800 F.2d 59 (3d Cir. 1986) (customer of videocassette rental business "publicly performed" work by playing tape on player in room rented to the general public).

24. *See* On Command Video Corp. v. Columbia Pictures Indus., 777 F. Supp. 787, 789-90 (N.D. Cal. 1991) (ruling hotel room viewing of pay-per-view movie to be public performance within the meaning of the Copyright Act).

25. Unlike a transmission over traditional media, a "broadcaster" over the Internet may owe a fee to the owner of the sound recording as well as one to the composer. *See* Martin Schwimmer & Craig S. Mende, *Madonna and Audio Streaming: Copyright Infringement on the Internet*, N.Y. L.J., Mar. 9, 1998, at S3.

26. *See* Judy A. Kim, *The Performer's Plight in Sound Recordings—Unique to the U.S.: A Comparative Study of the Development of Performers' Rights in the United States, England, and France*, 10 COLUM.-VLA J.L. & ARTS 453, 453 n.4 (1986) (describing the right as "one of the most important rights secured by the copyright laws").

27. Of this figure ASCAP paid out $416 million to its 75,000 members.

28. Of this figure BMI paid out $355 million to its 20,000 members.

29. The market value of any particular composition may also be expanded, somewhat inadvertently, by the compulsory licensing system for compositions fixed as sound recordings. Although a composer has the exclusive right to authorize copies of his or her work, that right is significantly modified once the composer grants the use of the composition in a sound recording. After publication in that medium, the composer is compelled by statute to allow the use of the composition in other recordings. In addition to "compulsory licensing," the composer loses the ability to set the price for the use of the composition. Instead, the compensation is set by arbitration and historically has resulted in royalties which do not favor the composer. This loss of revenue would seem to be offset, however, by increased revenues from the public performance right. Although the derivative sound recording and performance are compelled at a low royalty rate, the public performance of the recording of the underlying work must be paid for at the same rate that applies to any other public performance. Where a composition has become a recording standard, it may exist in a hundred different versions. Each public performance of that composition, in whatever version, means increased public performance royalties for the composer.

1. The Need For Performing Rights Societies: Why Individual Licensing Does Not Work

By virtue of the statutory right to control the public performance of a protected work, every time a song is broadcast over any medium or played live, the composer is entitled to compensation.[30] If the composer had control over when such performances occurred, there would be little difficulty in collecting the appropriate tithe or withholding the work from a public airing in the absence of a full and prompt license fee.[31] Ironically, however, if the composer exercises his or her other important statutory right to sell copies of the work, enforcement of the right to a royalty for public performance becomes a logistical impossibility. A popular song might be, and likely is, played simultaneously in a bar in New York City, over the radio in Texas, and as a part of a television commercial in California. In the absence of an effective honor system, no composer who sold copies of a work could ever be assured of a royalty payment for each and every public performance.

The remedy that developed for what would otherwise be a market failure—the inability of the seller of a product to collect revenue from a buyer or user—was the "performing rights society."[32] Stated simply, the society, for a fee, markets a composer's public performance right. More specifically, the society serves

30. The exclusive right to control a public performance is infringed even if the infringer gains no direct financial benefit from the performance. *See* Herbert v. Shanley Co., 242 U.S. 591, 592 (1917) (ruling that a restaurant infringed right of public performance even though no admission charged separately).

31. Unlike trademarks, which incur their value from public use, the owner of a copyright has no obligation, by statute or common law, to exercise any of the bundle of exclusive rights associated with copyrights. Unlike trademarks which may last indefinitely—assuming public use—copyrights extend only for a limited time at the end of which period the work enters the public domain, whether or not any of the rights of authorship are exercised during the statutory period.

32. Columbia Broadcasting Sys. v. ASCAP, 400 F. Supp. 737, 741 (S.D.N.Y. 1975) (stating that performing rights societies function as "clearinghouse" in order to put users and owners of copyright together where market realities precluded direct contact). *See generally* Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600 (1982) (discussing concept of market failure in context of copyright law); Comment, *The Fair Use of Free Broadcast Television: The Betamax Case and the Distinction Between Marketable and Disposable Software*, 15 SETON HALL L. REV. 52 (1985) (same).

two purposes. First, it acts as a broker between copyright owners and copyright users, earning a fee for itself and the composer, by licensing to users the right of public performance held by the owner. Although in theory a copyright owner could arrange such sales themselves, the owner would seem to profit from the economies of scale associated with a large licensing organization.[33] Second, the society acts as the eyes and ears of the composer ferreting out new customers by aggressively pursuing those who violate the owner's exclusive rights to public performance.

2. The Resulting Market Structure and Products: The Blanket License and the Per-Program License

In essence, performing rights societies sell two products to the market of those wishing to perform publicly copyrighted songs controlled by the societies. They are labeled as the "blanket license" and the "per-program license."

By far the most popular license for a broadcaster is the blanket license: the right to perform all of the songs in the repertory of a particular society at any time of the broadcasting day or night.[34] The advantage of this license is apparent. Having purchased access to all of the available songs controlled by that entity, the user virtually eliminates the risk that it will inadvertently infringe the public performance right of a particular work. Because the vast majority of songwriters have licensed either BMI or ASCAP[35] to

33. Broadcast Music, Inc. v. CBS, 441 U.S. 1, 19 n.32 (1978) (calling it inefficient not to use "rather large" organization to monitor use of copyrighted music). ASCAP's immense size has not always been beneficial to composers. Many have argued that the system favors famous composers at the expense of lesser-known authors. One example has been the long running efforts of jingle writer Steve Karmen for a more equitable slice of the ASCAP pie. According to Karmen, composers of musical standards receive one-third more royalties than a jingle writer even if the jingle is played publicly as long as the standard. Although this Essay has focused on the adverse impact on copyright users caused by unchecked market power, Karmen's complaint reminds us of the entry barriers that prevent any competitors to the performing rights societies oligopoly. *See*, Ralph Blumenthal, *Jingle Writer Wants ASCAP to Pay Him His Due*, SAN DIEGO UNION-TRIB. May 5, 1997, at E6.

34. The duration of the license is for a set period of time, usually one year. *See* ASCAP License, WXYZ Radio (on file with author).

35. ASCAP was formed in 1914 by many of the world's foremost popular composers. BMI was formed in 1939 by the radio broadcasting industry. A third performing

administer and market their public performance rights, a radio station that regularly programs a variety of music will inevitably hold a license from the two major societies. The same holds true for a tavern or restaurant with more than a minimal sound system[36] or one which regularly features live musicians.[37] Because the user is buying access to all of the societies' inventory without time restrictions, the price of a blanket license is high.

The other option is the per program license. Although the blanket license gives the user of a broad array of music the security of total access at any time, the user who can more easily define its programming needs for music theoretically needs only a per-program license for those periods of the broadcasting day when music will be played. For example, a talk radio format that breaks only once a week to air an "oldies" music show might want a license limited to that particular, albeit regularly scheduled, program. Nevertheless, although the performing rights societies are required to provide such a product under the consent decrees, per program licenses are rarely purchased. In most market segments the performing rights societies have made such licenses so expensive, the process so cumbersome, and the enforcement actions for inadvertent infringement so frightening, most users who can afford

rights society, SESAC, "was founded in 1930, making it the second oldest performing rights organization in the United States. SESAC's repertory, once limited to European and gospel music, has diversified to include . . . popular music, . . . Latina music, . . . jazz, . . . country and . . . contemporary Christian music." SESAC Internet Website, http://www.sesac.com (last visited March 25, 1998).

36. While the broad definition of "perform" added to the 1976 Act was intended to overrule the narrow judicial definitions underlying *Fortnightly*, *Teleprompter*, and *Aiken*, *see supra* note 21, Congress did express its intent not to alter the result in *Aiken* by adding an express infringement exemption for use of home style receiving and amplification equipment. 17 U.S.C. § 110(5) (not infringement to publicly receive "on a single receiving apparatus of a kind commonly used in private homes"); *see* H.R. REP. NO. 94-1476, 87 (1976) ("it is intended that the performances [in *Aiken*] would be exempt under clause (5)"). At least one court has interpreted section 110(5) broadly to the detriment of the performing rights societies. *See* BMI v. Claire's Boutiques, Inc., 949 F.2d 1482, 1494 (7th Cir. 1991) (ruling that a chain of 749 retail stores did not infringe public performance right by buying and installing home style radio equipment in each store).

37. Taverns and restaurants that feature live music face a special risk. While uniform radio programming assures some predictability, most eating and drinking establishments claim ignorance when it comes to predicting what songs live musicians might actually play. Situations in which establishments hold the license of one the societies but not the others are infringement actions waiting to happen.

to do so, and even those who can not, simply opt for the blanket license even if it means paying for some things they do not want, do not need, and will never use.

II. FEDERAL ENFORCEMENT EFFORTS BETWEEN 1934 AND 1966 AND THE RESULTING CONSENT DECREES IN *UNITED STATES V. ASCAP* AND *UNITED STATES V. BMI*, THE SUBSEQUENT FAILURE OF PRIVATE LITIGATION, AND THE RESULTANT EXERCISE OF UNCHECKED POWER

The combination of a constitutional grant of a monopoly, a comprehensive statute with severe infringement penalties, and the freedom from price competition inherent in the blanket license would prove to be sufficient to give the performing rights societies unfettered control over the market for performing musical compositions. As the government sometimes will, in the 1930s it acted to challenge this concentration of market power and restore some modicum of competition. The following section explains how the government's half-hearted effort not only failed to promote competition, but also, in the end, prohibited its natural growth.

A. *United States v. ASCAP*

The government's first salvo at the performing rights societies was fired in 1934. The Justice Department suit alleged that, through the pooling of copyrights, ASCAP had monopolized the market for performance rights for copyrighted songs played on the radio.[38] As the Second Circuit Court of Appeals would later recount, after two weeks of trial the government abandoned its case.

The government found the courthouse again in 1941, renewing its claim of an unlawful pooling, and adding the claim that the blanket license was an unlawful combination in restraint of trade.[39] The relief sought was an alternative to the blanket license, then the sole product packaged by ASCAP, which would allow the copyright to pay only for those songs the buyer actually used, a so-called "per use" license.

38. United States v. ASCAP, Equity No. 78-388 (S.D.N.Y., filed August 30, 1934).

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

After one impotent decree[40] and a collateral attack on ASCAP by a private plaintiff in a separate market,[41] the parties agreed on a settlement, without the benefit of "trial or adjudication of any issue of fact or law . . . and without admission by any defendant,"[42] which would have a prolonged and determinative effect on how copyright owners would be compensated for use of the public performance right, not only in the market for radio use, but also in the emerging and not yet imagined media markets of the future.

The 1950 consent decree is comprised of eighteen sections, six of which could be considered procedural in nature and twelve of which are substantive. For purposes of this discussion, four of the substantive provisions and three of the procedural sections are important and are discussed below.[43]

1. Section IV General Prohibitions and Section XIV Public Inspection of Repertory

Section IV marked a major departure from the 1941 decree and surely would have been pointed to by the government as the substance of any concession that ASCAP might have made in settling

40. *Id.* at 403. The government and ASCAP's first attempt at settling the matter did little to change the virtual lock ASCAP had on the power to negotiate for the sale of the performance right. Although the decree allowed direct negotiation between an owner and a user, ASCAP was allowed to compel the owner to pay the resulting fee over to ASCAP for distribution. Unless the owner could keep the fee for itself, the owner had little incentive to abandon ASCAP's convenient services. This "change" in market structure was therefore "illusory." CBS v. ASCAP, 562 F.2d 130, 133 (2d Cir. 1977).

41. In an important precedent, a district court held that ASCAP was a combination in restraint of trade because it compelled its members to assign to it the exclusive right to license the public performance of a song in a motion picture, an assignment ASCAP leveraged to prohibit producers from displaying the film in theaters lacking an ASCAP license. *See* Alden-Rochelle v. ASCAP, 80 F. Supp. 888 (S.D.N.Y. 1948).

42. *See* United States v. ASCAP, 1950 Trade Cas. (CCH) ¶ 62,595 at 63,751 (S.D.N.Y. 1950).

43. The sections of the consent decree not set forth in detail above are section I, which sets forth jurisdiction of the court; section II, providing definitions; section III, which defines parties to whom the decree applies; section V, which sets forth license issuance requirements; section VIII, which bars discrimination in fees; section X, which bars conflicts of interest; section XI, which mandates fairness in distribution of fees; section XII, which mandates changes in motion picture licensing; section XIII, which mandates democratic control by members; section XV, which mandates open membership; and section XVIII which sets the effective date of the decree.

the government's enforcement action. Although in settling the case, the government had abandoned its effort to force ASCAP to issue "per-use" licenses, this section made an effort to force a break in the pooling arrangement the blanket license represented. By prohibiting ASCAP from gaining more than a non-exclusive right in a copyrighted song and making clear the right of any ASCAP member both to leave ASCAP and issue licenses directly to users, the decree appeared calculated to unleash the powers of a free market. A separate provision, section XIV, which forced ASCAP to make its repertory public and name the individual owners would facilitate that market by providing some mechanism, at least on paper, of putting buyer and seller together without the involvement of ASCAP.

2. Section VI Non-Exclusive Licenses and Section VII License Fees

If the concession made by ASCAP in section IV was an illusory one, as copyright owners would later spend decades arguing, then these two sections were the reason why. Taken together, these two sections "ordered," by force of the decree, ASCAP to issue what it had always issued, and seemingly always wanted to issue—a blanket license and only a blanket license. Although section VII created the option of a "per-program" license and made clear that this option had to be offered to the user before the blanket license, this was nothing more than a blanket license for a specified program. As an unscientific but nonetheless empirical study would later show, ASCAP never made this option attractive to copyright users.

3. Section IX Court Determination of Reasonable Fee, Section XVI Compliance, and Section XVII Jurisdiction Retained

Although facially "procedural," sections IX, XVI, and XVII would also have a profound effect on the market ruled by the decrees. Presumably recognizing that the failure to completely break up the pooling arrangement might cause ASCAP to attempt to set monopoly prices, section IX took the extraordinary step of designating an Article III court, the United States District Court for the

Southern District of New York, to serve as an unpaid arbitrator, settling any dispute ASCAP and users would have over fees by setting a "reasonable rate." Sections XVI and XVII set forth the standard language of decrees of this type, promising the continuing vigilance of the Justice Department over any missteps the defendant might make, a promise that would never be fulfilled.

The salient features of the ASCAP decree would be repeated in a consent decree agreed to by BMI in 1966.[44] As set forth below, taken together these provisions, and the artificial and illusory constraints on ASCAP monopoly power they represented, would create a market structure in an atmosphere of governmental neglect that, even after years of sometimes bitter litigation by the nominal beneficiaries of the decrees, would insulate ASCAP from the more natural constraints of price competition.

B. *The Failure of Private Litigation between 1969 and 1984*

The explosive growth of television in the latter half of the twentieth century coupled with the inherent weaknesses of the consent decrees seemingly provided the perfect context for private attempts to achieve what the mid-century government enforcement efforts had failed to accomplish—a meaningful alternative to the blanket license. The following section recounts that failed effort and explains why the continued ascent of "rule of reason" analysis in antitrust jurisprudence spelled the end for any hope that the consent decrees would be modified by the stroke of a judge's pen.

1. CBS v. ASCAP

The first serious challenge to the market structure imposed by the performing rights societies and reinforced by the decrees came three years after the entry of the BMI consent decree and nineteen years after the ASCAP decree.[45] The challenge came from no less

44. The BMI consent decree is largely the same as the one entered into by ASCAP, but for one notable exception. Unlike the ASCAP decree, the BMI decree does not provide for a forum for disputes between users and authors. For all the problems associated with litigating against ASCAP in the Southern District of New York, the user with a dispute with BMI has nowhere to turn except to institute a new suit in district court. For many potential plaintiffs this is no remedy at all.

45. *See* CBS v ASCAP, 400 F. Supp. 737 (S.D.N.Y. 1975).

a foe than network television—then the dominant player in that medium, a major consumer of copyrighted music, and no stranger itself to oligopoly. It would take some ten years of litigation, but in the end the performing rights societies pronounced emphasis on the blanket license would survive antitrust scrutiny.[46]

i. The Per Se Challenge to the Blanket License and the District Court Denial

The complaint filed by the Columbia Broadcasting System ("CBS") in the Southern District of New York against both ASCAP and BMI squarely attacked the flat fee structure imposed by the blanket and per-program license system as a violation of both sections 1 and 2 of the Sherman Anti-Trust Act ("Sherman Antitrust Act").[47] The relief sought was, on its face, equitable in scope and tone—an injunction under section 16 of the Clayton Act[48] directing the defendant to charge a fee based upon the network's actual, rather than potential, use of the defendants' copyrighted works.

Thus, the suit did not allege a violation of the consent decrees but, rather, sought to force the performing rights societies through injunction to create a third product not contemplated by the decrees—a "per-use" license.[49] Why such a product did not already exist in the marketplace of network television use was clear enough to the plaintiff. Songwriters, acting in concert if you will, would not allow it, deferring to and insulating themselves through the device of the performing rights society in order to carry out an

46. *See id.* (rejecting a per se challenge to the blanket license system), *rev'd*, 562 F.2d 130 (2d Cir. 1977) (rejecting the blanket license system as a violation of the per se rule), *rev'd and remanded*, 441 U.S. 1 (1979) (instructing the Second Circuit to apply the rule of reason, rather than the per se rule), *aff'g district court on other grounds*, 620 F.2d 930 (1980) (upholding the blanket license system under the rule of reason analysis).

47. Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies ("Sherman Antitrust Act"), ch. 647, 26 Stat. 209 (1890) (codified at 15 U.S.C.A. §§ 1-2 (West 1998). The CBS network had held such licenses since the 1940s. The fee for each license was based upon a percentage of the network's net advertising revenue. In 1969, CBS paid ASCAP and BMI a total of $7.3 million for the blanket licenses, slightly more than 1% of net revenues. *CBS*, 400 F. Supp. at 743.

48. Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies ("Clayton Act"), ch. 323, 38 Stat. 730 (1914) (codified at 15 U.S.C.A. § 14 (West 1998).

49. CBS v. ASCAP, 400 F. Supp. 737, 746 (S.D.N.Y. 1975).

anti-competitive scheme. This refusal to deal, coupled with the market dominance of the all-or-nothing blanket license, was, in the view of the television networks, a horizontal restraint designed to extract monopolistic prices, a per se violation of the antitrust laws.

The district court disagreed, denying, after almost six years of litigation and an eight-week trial on the merits, each of the six antitrust claims advanced by CBS.[50] First, the court held that CBS had failed to prove an illegal combination designed to fix prices.[51] Because the consent decrees mandated the option of direct licensing and CBS had failed to disprove the viability of that approach, CBS had only supposed and failed to prove that composers would not compete against each other in a direct licensing scheme.[52]

Plaintiff's second claim, related to the first, that the blanket license fixed prices by forcing the purchase of an unwanted "package" also failed without proof that CBS could not purchase the individual elements of the package directly from the composers.[53] A "group boycott" claim, the fourth claim for relief, and a fifth claim for "copyright misuse," failed on the same basis as the second, tie-in, claim.[54] The plaintiff had failed to offer any evidence that the individual composers had acted in a concerted effort to prohibit competition among themselves.[55]

Plaintiff's third claim, also an unlawful tying theory—that ASCAP and BMI forced it through the blanket system to purchase the rights to unwanted songs—failed because of proofs suggesting that CBS had never sought to negotiate a "per-use" license with ASCAP, a theme the district court repeatedly referenced.[56]

50. *See id.*

51. *See id.*

52. *See id.* at 781.

53. *See id.* at 742 (holding that in a case of package licensing the test was one of "convenience" versus "compulsion"); *see also id.* at 749 (citing Automatic Radio Co., Inc. v. Hazeltine Research, Inc., 339 U.S. 827 (1950), and distinguishing Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969)). A plaintiff who had chosen as a convenience to itself to purchase the rights to items it might not later use had not suffered an antitrust injury. The plaintiff forced to choose between such a license and no license at all would have a viable claim. Because CBS had failed to prove its lack of options, no injury had been proven. *Id.* at 748-49, 781.

54. *See id.* at 781.

55. *See id.*

56. *See id.* The court was plainly bothered by the timing of the lawsuit and ex-

Lastly the court rejected the opportunity to hold that ASCAP and BMI had attempted and achieved a monopoly.[57] Defining the market more broadly—"performance rights to compositions suitable for television network use"—than the narrow definition of "BMI and ASCAP's blanket licenses" sought by the plaintiff, the court held that CBS could negotiate price with individual composers and license performance rights from sources other than BMI and ASCAP.[58] Because the performing rights societies could not control price or eliminate competition in the market, one broadly defined by the court, they were hardly monopolists.

ii. Application of the Per Se Rule in the Circuit Court of Appeals

Almost two years later, the Second Circuit Court of Appeals reversed.[59] In an opinion elegant in its simplicity, the appellate court, unlike the district court, focused directly on the effect the blanket license had on price.[60] When sellers agree to sell collectively at a set price, inherent in the arrangement is an agreement

pressed, at least indirectly, its doubts about the sincerity of CBS's legal positions. The court took great pains to note that: (1) the suit was brought only after negotiations for a new blanket license had failed, (2) CBS had helped to form and once owned a significant piece of BMI which issued blanket licenses to CBS during that time, and (3) CBS had never sought in good faith to negotiate for the relief it now sought judicially and had, in fact, used blanket licenses for decades without complaint. *See id.* at 753-54 ("CBS did not even view music licensing a business problem until immediately prior to suit.").

57. *See id.*

58. *Id.* at 780. The court offered:

> CBS might negotiate with the producers of its programs and films using "inside" music to secure favorable prices for licenses for music "in the can," and for music contained in new programs to be shown in the upcoming season; it could build up a large reservoir of music by requiring program packagers affiliated with major publishers to make their catalogs available for direct licensing in accordance with a fee schedule; it would negotiate with independent publishers for either "mini-blanket" licenses covering their catalogs or direct licenses using a fee schedule; it could send notices to all publishers of its intention to seek direct licenses for compositions in their catalogs; it could negotiate a per-program license with ASCAP and BMI whose fee would reflect the amount of music actually performed and failing that, it could bring proceedings under the consent decree.

Id.

59. CBS v. ASCAP, 562 F.2d 130 (2d Cir. 1977).

60. *See id.*

not to compete on price.[61] When the price for the collective product includes compensation for someone whose products are not consumed, the consumer may have paid too much.[62] But even if the collective fare is reasonable, the pooling arrangement "fixes" some fee for the pool member whose work is not used, even if the free market would have set the price at zero.[63] To the appellate court, such a market structure was an intolerable affront to the free market.[64] A structure that allowed for a price to be set by something other than the market was per se unlawful under section 1 of the Sherman Antitrust Act ("section 1").[65]

In the view of the court, the blanket license could survive a section 1 attack only if the market failed to provide a mechanism to supply a fair price.[66] Ironically, because ASCAP had argued vigorously to the district court that individual licensing was a viable option, such a mechanism could be relied upon to set prices.[67] The blanket license would have to go.[68]

Although not the classic "split in the Circuits," the Court of Appeals decision in *CBS* was at odds with an earlier Ninth Circuit which had rejected a per se challenge to the blanket license market structure in the context of the local radio market.[69] But even without the Ninth Circuit decision, the importance of the *CBS* case in the constant tug-of-war between owners and users of copyrighted materials and the challenge it represented to the growing use of rule of reason analysis insured Supreme Court review.

61. *See id.* at 140 ("[B]lanket licenses . . . reduce[] price competition among the members [to the agreement] and provide[] a disinclination to compete.").

62. *See id.* at 136 ("When the single price includes compensation even for those in the combination whose wares are not used, it may be said that the single price has been increased to take care of such compensatory factors which are irrelevant to true competition.").

63. *See id.* at 135-36.

64. *See id.* at 136.

65. *See id.* (citing section 1 of the Sherman Antitrust Act, 15 U.S.C.A. § 1 (West 1998)).

66. *See id.*

67. *See id.*

68. *See id.* at 140.

69. K-91, Inc. v. Gershwin Publ'g Corp., 372 F.2d 1 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045 (1968).

iii. Application of the Rule of Reason in the Supreme Court

The Supreme Court reversed the court of appeals' holding that the blanket license constituted a per se violation of section 1.[70] To Justice White who wrote the opinion, the simplicity of the court of appeals decision was not a strength but a weakness. "Price-fixing" was not a literal exercise but a conclusion reached "only after considerable experience with certain business relationships."[71] Echoing the factual foundations of the district court opinion, the Court was plainly concerned that none of the "considerable experience" set forth in the record suggested a per se violation. First, the government had earlier sued on such a theory and settled for less. Second, the consent decree, at least on its face, was designed to prohibit unfair pricing. Third, the plaintiff itself had operated under the blanket license system for years without complaint. And lastly, even the Justice Department, charged under the consent decrees with monitoring the defendants and the market, had filed an amicus brief urging the reversal of the court of appeals.

Although the Court acknowledged that none of these things standing alone could insulate truly illegal conduct, the complexity and uniqueness of the market, coupled with the passage of time, compelled the conclusion that only the use of the fact-sensitive, careful, balancing approach of rule of reason analysis would insure the proper result.[72] In the end, a blanket license just might be the kind of pooling arrangement that, with certain restrictions, could have economic benefit. Because the challenged restraint was "not a 'naked restrain[t] of trade with no purpose except stifling of competition'"[73] and did not necessarily threaten the market's ability to set prices—the "'central nervous system of the economy'"[74]—it had to be subjected to the more rigorous rule of reason

70. *See* CBS v. ASCAP, 441 U.S. 1 (1979) (White, J.).

71. *Id.* at 9 (quoting United States v. Topco Assocs., Inc., 405 U.S. 596, 607-608 (1972)).

72. *See Topco Assocs.*, 405 U.S. at 607-08.

73. *CBS*, 389 U.S. at 20 (quoting White Motor Co. v. United States, 372 U.S. 253, 263 (1963)).

74. *Id.* at 23 (quoting United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 226 n.59 (1940)).

test. Central to the Court's decision was the view that the rights sought to be protected by the market arrangement, the rights of copyright, were important statutory grants created by Congress.[75] Any effort to subvert or limit those rights would have to be justified by some higher, or at least equal, public good lest the private enforcement of the antitrust laws subvert the will of Congress.[76]

On remand, the court of appeals upheld the use of a blanket license under the rule of reason.[77] The ruling was not surprising because the district court essentially utilized a rule of reason analysis in the first round of litigation. Furthermore, each reason used by the Supreme Court in disallowing the use of the per se rule was, when reapplied under rule of reason, in and of itself a compelling argument for the practical necessity of the blanket licensing system.

With clear direction from the Supreme Court, the detailed decision of the trial court, and the failure of CBS in the subsequent appeals to challenge anything other that the trial court's per se rulings, the court of appeals needed only to affirm the district court.[78] Because the plaintiff had failed to establish at the trial court level that no alternative to the blanket license existed, the challenged restraint was, by definition, not a restraint at all.[79] Absent a true restraint there could be no anti-competitive effects and no violation of the rule of reason.[80] After years of litigation and a healthy scare, at least in the marketplace of network television, the blanket license was once again king.

2. Buffalo Broadcasting v. ASCAP

After the court of appeals had found the blanket license to be a per se restraint but before the Supreme Court reversal in *CBS v. ASCAP*, owners of certain local television stations brought suit in the Southern District of New York.[81] Their lawsuit, *Buffalo*

75. *See id.* at 28.
76. *See id.* at 18-19.
77. *CBS v. ASCAP*, 620 F.2d 930 (2d Cir. 1980).
78. *See id.* at 934-35.
79. *Id.* at 939.
80. *Id.*
81. *See* Buffalo Broad. Co. v. ASCAP, 546 F. Supp. 274 (S.D.N.Y. 1982), *rev'd*,

Broadcasting v. ASCAP,[82] echoed the claims of the CBS network and asserted that ASCAP and BMI, through the blanket license, also had restrained trade in the local television market.[83] The district court certified a class representing some 750 local television stations.[84]

By the time the matter went to trial and was ripe for decision, the Second Circuit had, in the *CBS* litigation, applied the rule of reason test mandated by the Supreme Court. Accordingly, in *Buffalo Broadcasting*, the district court applied the same test, which it defined as two-pronged, asking (1) whether the blanket license restrained competition because of the lack of a "realistically available" alternative and (2) on balance, if no alternative existed, whether the anti-competitive effects of the blanket license system outweighed the beneficial, or pro-competitive effects.[85] Answering the first question in the affirmative, the court went on to hold, under the second prong, that the restraint was unreasonable.

The district court's opinion began by contrasting the historical posture of local television stations toward the blanket license system with the passive attitude displayed by the networks and alluded to in the *CBS* trial court decision. Unlike the networks, whose opposition to the blanket license system seemingly sprung up two weeks before the institution of suit, local television stations had engaged in a lengthy cold war of sorts with the performing rights societies over the lack of direct negotiations with composers. They formed their own negotiating agent, distinct from the networks, had sought to negotiate alternatives to the blanket license, and had sued for fee determinations under the consent decrees. Local television stations, the court concluded, had not chosen the blanket license, but had fought hard against it as best as circumstances would allow.[86]

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

82. *Id.*

83. *See id.* at 276.

84. *See id.* at 277.

85. *Id.* at 286.

86. *Id.* at 288 (noting at least two failed efforts, *Application of Voice of Alabama, Inc.* and *Application of Shenandoah Valley Broad., Inc.*, made under the terms of the consent decree). The industry segment's negotiating arm, known as the "All Industry Committee," attempted to pursue one of the matters to the Supreme Court. *See* Application of

The court then proceeded to discount each of the alternatives to blanket licensing proffered by the performing rights societies. The per program license was too costly, not only because it was more expensive but because the onerous reporting requirements threatened to consume whatever marginal difference existed in the price. Direct licensing was not a realistic alternative for syndicated programming, the bulk of local content, because local stations, barred ironically by the antitrust laws from collective action, lacked the negotiating muscle of the networks. Without such market power, the court concluded, the stations could not compel the creation of the market machinery necessary to put buyers and sellers together.

In the court's view, this same lack of negotiating power doomed the alternative of so-called "source licensing," a method of obtaining programs from syndicators who had already secured the public performance right from the composer. But syndicators had not traditionally sold programming with that right attached, instead deferring to an industry practice of "splitting" the public performance right off to publishers affiliated with ASCAP and BMI, publishers controlled by the syndicators. Because syndicators were "more concerned by the prospect of abandoning long-standing business methods than by the possibility of disappointing their local station customers," source licensing was an illusory alternative.[87]

With no options available to the local stations, the question became one of reasonableness. Although the district court acknowledged that a market of blanket licenses was efficient, did not restrict output, reduced costs, and conferred flexibility on the users of the product, it could not overcome the scourge of blatant price-fixing. In the court's view, eliminating the blanket license would necessarily have the effect of causing composers to compete on the price of public performance, the only right in the bundle of copyrights held by the composer not subject to free market price competition. That principle was too fundamental to the antitrust laws not to carry the day.[88]

Shenandoah Valley Broad., Inc., 331 F.2d 117 (2d Cir.), *cert. denied*, 377 U.S. 997 (1964).

87. *Buffalo Broad.*, 546 F. Supp. at 292.

88. *See id.* at 296 (*citing* Northern Pac. R.R. Co. V. United States, 356 U.S. 1

The Second Circuit, sounding a little weary of the entire issue, and perhaps a little gun-shy after *CBS*, reversed.[89] Although it took pains to disavow any inclination to simply conclude that the remand opinion in *CBS* would serve as controlling precedent,[90] the appellate decision was little more than a rerun of the earlier case. As the court in *CBS* had found under its facts, and despite the factual findings of the district court in *Buffalo Broadcasting* to the contrary, the same alternatives to the blanket license identified in *CBS* existed in the market of performance rights for local television use. These alternatives—program, source, and direct licensing—precluded, as a matter of law, the conclusion that the blanket license was a restraint. No rule of reason analysis would be required. Although the decision lacked the power and reasoning of the *CBS* ruling,[91] the fallout was clear. Once and for all, the

(1958) (ruling that fundamental purpose of Sherman Antitrust Act is preservation of competition)).

89. *See* Buffalo Broad. Co. v. ASCAP, 744 F.2d 917, 919 (2d Cir. 1984) ("Once again we consider the lawfulness . . . of the blanket license . . . .").

90. The court paid at least lip service to the notion that the plaintiff in *CBS*, a powerful network, was not similarly situated to the disparate and fragmented local stations. *Id.* at 925 ("[I]t does not follow that the local stations lose simply because the CBS network lost.").

91. The *Buffalo Broadcasting* analysis was flawed for several reasons. First, and although it claimed not to be doing so, the court essentially overruled several key factual findings of the district court under the rubric of reversing an error of law. This blatant disregard for the deference usually accorded the district court's factual findings clouded the court's opinion and legitimately raises the issue of whether the court was result-oriented after *CBS*. Those facts that it liked, it kept. Those that it didn't were rejected as not supported by the evidence. Secondly, the court seemed to misstate the legal positions of the plaintiffs. For example, in analyzing the claim of a restraint on price competition, the court noted that syndicators routinely benefited from competition among composers as proof that competition existed in the market. That, however, was not the market challenged by the plaintiffs. That market was the sale of performing rights to the stations *by* the syndicators. Rather than supporting the defendants, the fact that the sellers enjoyed price competition when they were buyers of the same product should have only highlighted the lack of competition in the challenged market. *See id.* at 932. Syndicators were happy to realize the benefits of free competition among musicians but once having acquired the performance right for their own benefit, they were unwilling to allow competition among themselves.

Equally surprising was the court's placing of the market for performance rights on its collective head. It is the ordinary course in an open and efficient market for sellers to begin transactions by offering to sell at a given price. Indeed, price competition among sellers is the hallmark of a free market. Here, however, the court criticized the local tele-

ASCAP and BMI blanket license would remain intact as one of the few packaged products to withstand relentless antitrust attacks.[92]

C. *Use and Misuse: The Post-1984 Conduct of the Performing Rights Societies and the Unavailing Remedies*

Left unchecked by litigation and their market power entrenched by the unworkable consent decrees, the performing rights societies entered the late twentieth century with firm control over the market of public performance of musical compositions. Like all good monopolists before and after them, that market power was abused. The following section catalogues some of those abuses.

In litigation, as in baseball, it is often difficult to identify the players without a scorecard. By the mid-1980s, ASCAP had assembled an impressive line up of victories after four decades of defending its method of doing business. It had successfully converted a government-brokered consent decree from a shield to protect the public into a sword against the enemies of its market power. It had taken on and defeated CBS, at the time the most powerful media organization in the world, vindicating the preeminence of the blanket license in the marketing of performance rights for musical compositions. That victory in the network television market sector would be repeated in the markets of local television,[93] local radio,[94] and live music.[95]

These successes, coupled with enormous economic strength fueled by the media explosion, have created an atmosphere in which

vision stations, the users of copyrighted songs, for not opening negotiations with the syndicators by offering to buy at a certain price, instead of recognizing that the failure of the sellers to offer at any price was proof itself of their collective restraint. *Id.* at 930-31.

92. *See, e.g.*, National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Oklahoma, 468 U.S. 85 (1984). Ironically, the Second Circuit would later allow the price-fixing inherent in the blanket license to be used by the rate-fixing court as a factor in setting, under the ASCAP consent decree, reasonable rates for a blanket license to a cable channel. ASCAP v. Showtime/The Movie Channel, Inc., 912 F.2d 563, 570 (2d Cir. 1990) (affirming magistrate judge's determination that "ASCAP enjoy[ed] more market power than it would have in . . . freely competitive market").

93. *See Buffalo Broad.*, 744 F.2d 917.

94. *See* K-91, Inc. v. Gershwin Publ'g Corp., 372 F.2d 1 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045 (1968).

95. *See* BMI v. Moor-Law, Inc., 691 F.2d 490 (3d Cir. 1982) (mem.).

ASCAP and BMI engage in entrenched, unchecked, and systematic anti-competitive and other unlawful behavior in those smaller market segments not directly controlled by the litigated cases. In each of these examples, the context continues to be the pre-packaged "all or nothing" blanket license.

1. Continuing Violations of the Consent Decree?

A facet of this "all or nothing" approach is evidenced by the experience of a small AM radio station on the rural outskirts of a major media market. This Essay refers to this station as WXYZ.

WXYZ is a locally owned and operated independent radio station. Although it buys some syndicated programming, most of its content is produced at the station. The station prides itself on servicing the local citizenry and does a good job at it. It broadcasts things one would not find on a network station, such as high school sports and local town meetings, which aid civic pride and add to a sense of community. Partly because of the technical limitation of the AM bandwidth and partly because of the large cost of maintaining a music library, it carries only one music program. The program, which airs only on Sunday night at the same time each week, plays only the pre-selected recorded music of Frank Sinatra.

The station's limited and predictable use of music would seem to render it a prime candidate for either a per-program license, or ideally, a per-use license. Not surprisingly, neither is a realistic option. ASCAP will not provide a per-use license and no legal option exists to compel them to do so.

Even though the option of a per-program, or "mini-blanket," license is supposed to be offered first under the terms of the consent decree, you would never know it from the correspondence WXYZ receives from ASCAP. Every year at license renewal time, WXYZ receives a letter from ASCAP dictating the new rates for the yearly licenses. These rates, WXYZ is told, come from the Radio Music License Committee ("RMLC"), a negotiating entity controlled by major market radio stations—predominantly chain or network stations—which program mostly music and therefore always purchase a blanket license. The negotiated rate therefore favors a blanket licensee, rendering the per-program license rate even more expensive for a station that programs little or no music. Then, adding insult to injury, the letter states, presumably relying on the consent decree that prohibits price discrimination, that the agreement with the RMLC is binding on WXYZ even though WXYZ is not a member and has different music needs. Nowhere does the letter notify the station of the consent decree or the rate-setting function of the district court. When counsel to the station informs them of the decree and the cost of litigation in the Southern District of New York, WXYZ cuts the check for the unwanted and unneeded blanket license.

i. "Hey Buddy, You Got a License For That Song?"

Even if they were aware of it, the difficulty copyright users have in seeking any relief under the current consent decree is evidenced by a recent battle between ASCAP and the New Jersey Restaurant Association ("NJRA").[96] For years, restaurants and taverns have complained about the tactics used by the performing rights societies to collect royalties and enforce licenses. In a typical scenario, music monitors hired by the performing rights societies sit in a tavern or restaurant making notes of offending songs. The owner of the establishment is then confronted and a demand made for immediate payment of a blanket license fee, and the owner is reminded, in a less than subtle way, of the stiff per violation statutory damages in the Copyright Act. No advance notice is given, no questions are answered, and none of the remedies that might be available to the user, including those under the consent decree, are revealed. Pay or be sued is the short, and only answer. To some, it smacks of extortion.

Recently, the NJRA convinced the New Jersey legislature to pass a bill designed to combat some of the overreaching conduct. Key provisions of the bill included disclosure of the songs covered by the blanket licenses and a list of rates paid by similarly situated users.[97] What is striking about these provisions is that the pro-

96. Resorting to the consent decree is the only judicial remedy realistically available to owners of restaurants and taverns. *See* Broadcast Music, Inc. v. Moor-Law, Inc., 527 F. Supp. 758 (D. Del. 1982) (rejecting antitrust challenge to blanket license in market of small live music establishments), *aff'd*, 691 F.2d 490 (3d Cir. 1982) (mem.).

97. A similar bill is pending in the Michigan state legislature and was recently en-

posed state law would have merely imposed requirements already mandated by the federal consent decrees. Clearly, the legislature had found, at least in New Jersey, a widespread disregard by ASCAP and BMI of these judicially mandated requirements.

While this bill was awaiting the governor's signature, ASCAP petitioned the district court to allow it to withdraw from the New Jersey market. One would be hard-pressed to conceive of more conclusive proof of ASCAP's monopolistic power and conduct. ASCAP knew that if it withdrew from the market every public performance of one of its songs would amount to a per se violation of copyright law, exposing the responsible party to severe civil and potential criminal penalties.[98] By any number of theories of corporate or imputed liability, any tavern or restaurant that ran the risk of playing any music also ran the risk of a severe, even fatal, blow to their business.[99]

Despite this rather draconian threat to an important segment of

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dorsed by the Michigan Chamber of Commerce. H.B. 5576, 89th Leg., 1998 Reg. Sess. (Mich. 1998)(seeking to establish a code of conduct for music licensing agents). A press release issued in support of the bill, stated that:

> [I]t's equally important that the people who work for music licensing agencies conduct themselves in a businesslike and professional manner [which] . . . [u]nfortunately . . . has not always been the case . . . . For decades, these giant performing rights societies have used the federal copyright law as a license to intimidate and threaten small businesses.

Michigan Chamber Backs Legislation Establishing Code of Conduct for Music Licensing Agencies: It's Time for Performing Rights Societies to Change Their Tune, PR Newswire, Mar. 9, 1998, *available in* WESTLAW, 3/9/98 PRWIRE 15:45:00. The supporters of the bill also stated that:

> [Michigan House Bill No. 5576] would require agents of the music societies to be licensed by the state, show identification, and announce their presence when entering a business premises. The bill would also require the societies to keep a current list of the song titles covered by any royalty fee payment and present a fee schedule or formula used to compute the fee. [The supporters of the bill claim that] [s]imilar legislation has been adopted in 23 other states within the last three years.

Id.

98. *See* 17 U.S.C. §§ 501-511 (1994) (defining and setting forth remedies for infringement).

99. *See generally* Angela R. Dean, Note, *Expanding the Doctrines of Vicarious and Contributory Copyright Infringement:* Fonovisa, Inc. v. Cherry Auction, Inc. *Targets the Primary Distribution Channels for Counterfeit Merchandise*, 4 VILL. SPORTS & ENT. L.J. 119 (1997) (discussing theories of indirect liability for owner who fails to prohibit copyright infringement on premises).

the New Jersey economy, not to mention one that contributes much to a society's quality of life, the district court judge currently assigned to monitor the ASCAP consent decree, denied a petition by the NJRA to intervene in the underlying case. Simply put, absent a sympathetic Justice Department, no one was allowed to stand before the court and assert the substantial interests of the public. ASCAP could safely threaten to withdraw completely from the New Jersey market without any check, market-based or judicial, to counteract their arrogant posture.[100]

ii. You Bring the Marshmallows, I'll Bring the ASCAP License: *God Bless America* and the Girl Scouts

ASCAP's lack of sensitivity to how the public at large might view its exercises of market power came into sharp focus last year when several news articles reported that ASCAP had decided to take on the Girl Scouts for allegedly infringing the public performance right by singing campfire songs without a license.[101] Although the true facts were less dramatic, ASCAP had indeed identified what it perceived as an untapped market, ideal for the expansion of its monopoly—the unlicensed public singing of copyrighted songs at camps. Its efforts to tap that market for revenue spawned a colossal marketing and legal disaster.

It appears that sometime in 1995, ASCAP approached the American Camping Association and insisted that each of the association's 2,300 member camps, some of which were Girl Scout camps, obtain a blanket license from ASCAP. The association's

100. *See generally* Joe Tyrell, *ASCAP and Trenton Still in Disharmony*, STAR LEDGER (Newark, N.J.), Mar. 18, 1995, at 14; Joe Tyrell, *Music Licensing Firm Wins Round In Court*, STAR LEDGER (Newark, N.J.), Mar. 21, 1995, at 15.

101. Although almost surreal in its connotations, ASCAP's public relations disaster over the Girl Scout flap highlighted the inequities of ASCAP's stonewalling on the issue of per-use licenses. With apologies to Mick Jagger, even if the Girl Scouts would be willing to pay a fee for "God Bless America" to keep ASCAP's "music police" at a safe distance from the campfire, was there not more than a little irony in forcing them to license "Let's Spend the Night Together" as well? *See generally* Julien H. Collins III, *When In Doubt, Do Without: Licensing Public Performances By Nonprofit Camping or Volunteer Service Organizations Under Federal Copyright Law*, 75 WASH. U. L.Q. 1277 (1997) (arguing certain definable songs in ASCAP repertory are part of national fabric).

executives were at first shocked, but after consulting counsel, their shock turned to fear. According to the association's lawyer, singing at summer camp could indeed violate the public performance right.[102] The association later explained in a letter to its members that if the members opted to pass on the $250 per camp fee that the association had negotiated with ASCAP, members could face infringement actions and damages of $100,000 per performance.[103] Not surprisingly, many of the camps paid the fee, including at least sixteen Girl Scout camps.

In March 1996, not satisfied with, or probably inspired by, its success with the camping association, ASCAP wrote a letter to the other 6,000 camps in the United States demanding license fees of up to $1,439 per camp. Many Girl Scout camps refused and began instructing their counselors to avoid singing any songs not owned by the Girl Scouts. When an article appeared on the front page of the *Wall Street Journal*,[104] ASCAP quickly "descended into what its public-relations consultant, [Ken] Sunshine, described as 'PR hell.'"[105]

By then, however, the damage had been done, and ASCAP's subsequent announcement to return license fees to the Girl Scouts who had paid and license its entire repertory to them for $1 per camp did little to stem the criticism.[106] If anything, the concession only highlighted the highhandedness of ASCAP's initial approach

102. Under the 1976 Act, "to perform . . . a work 'publicly' means—(1) . . . at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered[.]" 17 U.S.C. § 101.

103. Under the 1976 Act, a victim of willful infringement may elect statutory damages over actual damages in an amount up to $100,000 for each act of infringement. *Id.* § 504(c)(2). Such damage awards are a statutory form of punitive damages designed to discourage the unlawful behavior. *See* Alan J. Hartnick, *Where a Cost-Benefit Analysis May Encourage Copyright Infringements: The Tale of the Doctrine of Multiple Infringements*, 10 ENT. L. REP. 3 (1989).

104. Lisa Bannon, *The Birds May Sing, But Campers Can't Unless They Pay Up—ASCAP Warns the Girl Scouts That "God Bless America" Can Hit Legal Sour Notes*, WALL ST. J., Aug. 21, 1996, at A1.

105. *See The Girl Scouts vs. ASCAP: Music Writers' Copyright Initiative Proves To Be Public Relations Debacle of Stunning Proportions*, MONTREAL GAZETTE, Jan. 5, 1997, at C8.

106. *See ASCAP and Camping Group Reach Agreement on Songs*, WALL ST. J., July 15, 1997, at B3.

to the camping industry, an approach spawned by its unfettered power to set prices.[107] In the end, the entire controversy fanned the growing flames of discontent over the unbridled activities of the performing rights societies.[108]

These examples demonstrate that ASCAP and BMI have continued to attempt to derive income from non-music programming, have failed to provide meaningful per-program licenses, and have sought to require royalties from entities engaged in non-compensable public performances. Each of these activities is a substantive violation of the consent decrees.

III. VARIOUS REMEDIES AND THEIR PITFALLS

If this parade of horribles in the market sectors of independent radio stations, restaurants and taverns, and non-profit organizations does cry out for some remedy against ASCAP's continued abuse of its statutory and judicially-created monopoly, what remedies exist today to curb these abuses? Available judicial remedies appear to be scarce.

A. *Option 1: Modification of the Consent Decree by the Department of Justice*

The most obvious choice would be a petition to the Justice Department to reopen its section 1 case. Even though the Justice Department claims to be contemplating some review of the decrees, it has left the decrees intact for almost five decades without having once sought to modify the decrees. The Antitrust Division has not held out any hope to the numerous small businesses that use copyrighted music—not after years of private enforcement efforts, including two judicial opinions finding the blanket license a restraint of trade, not after numerous states had passed legislation targeting abuses by the performing rights societies, not after years of technological change, not after the performing rights societies had be-

107. *See* James V. Delong, *The Best Things in Life Aren't Free*, NAT'L L.J., Mar. 10, 1997, at A17 ("The real problem is not principle, but price . . . . ASCAP's mistake was in asserting its members' right to charge a monopoly rate.").

108. *See Industry Fights to Modify Music Monopoly*, HOTEL & MOTEL MGT., May 19, 1997, at 29.

come enormous multinational cash machines, not after congressional hearings detailing abuses by the performing rights societies, and not even after ASCAP had gone after an American institution as venerable and benign as the Girl Scouts. On the contrary, whenever it had the opportunity, the government sought to perpetrate the market its outmoded consent decrees had helped to create.

B. *Option 2: Intervention and Modification*

Of course without Justice Department support, the continuing jurisdiction provisions of the consent decrees are meaningless. In a prime example of bad facts making bad law, a songwriter whose rambling pleadings suggested a form of mild paranoia sought leave in 1951 to intervene in *United States v. ASCAP*, ostensibly to challenge the decree itself.[109] The plaintiff, unnamed in the reported decision but named in a later decision as Edward Vance,[110] had repeatedly claimed in dismissed pleadings that ASCAP had conspired with numerous parties, including federal employees, to steal lyrics he had allegedly written, but failed to copyright properly, sometime before 1942. After nine complaints and amended complaints had been filed in four *de novo* proceedings in Missouri and New York, the persistent plaintiff sought to invoke two provisions in the 1950 consent decree and the Federal Civil Rules in a failed effort to intervene in the government's enforcement action.

Some of the provisions, at least on the surface, held out some hope that someone other than the government and ASCAP would have some say in the breadth and functioning of the consent decree. But it was not to be. Turning first to the decree itself, Judge Weinfeld summarily dismissed the claim that section IX, subsection D, provided any relief to this plaintiff. Because he was not an applicant for a license or a licensee, the plaintiff could claim no substantive right under a section of the decree designed primarily to allow such persons to defend an ASCAP infringement action by challenging the validity of the copyright of the allegedly infringed work.[111] The fact that the essence of the plaintiff's claim was that

109. United States v. ASCAP, 11 F.R.D. 511, 512 (S.D.N.Y. 1951) (Weinfeld, J.).
110. Vance v. ASCAP, 13 F.R.D. 109 (S.D.N.Y. 1952).
111. *See United States v. ASCAP*, 11 F.R.D. at 512-13.

ASCAP was enforcing a copyright, albeit against others, that had been "stolen" from the plaintiff was apparently of no import to Judge Weinfeld. Equally unavailing was section XVII of the decree that, by its express terms, limited the court's continuing jurisdiction to future applications by the parties. After ten years of litigation and negotiations, neither the government—which opposed the intervention attempt—nor ASCAP was likely to upset the apple cart.

But it was Judge Weinfeld's rejection of the plaintiff's attempt under the doctrine of permissive joinder[112] that, more than anything else, set the tone for any attempts to upset the balance struck by the consent decree. Indeed the language is so sweeping, and the source so well regarded, that one could not imagine a statement more chilling to whatever efforts one might contemplate to challenge any government-wrought antitrust decree. In Judge Weinfeld's view, "public policy" required that government lawyers, charged with vindicating the public interest, be free of any private "interference." [113]

Far from being unique, this view of the sanctity of government crafted consent decrees is an ingrained, and perhaps impenetrable barrier to private party actions to challenge unenforced and outdated decrees.[114]

112. FED. R. CIV. P. 24(b). The court summarily dismissed the plaintiff's claim for mandatory joinder under Rule 24(a). *See* FED R. CIV. P. 24(a). While no statute conferred a right of intervention, the court could have viewed the other provisions of the rule more liberally. It could be said, for example, that as the putative author of a song in the ASCAP repertory, the Court had within its custody and control property belonging to the plaintiff (presuming of course the validity of the underlying claim of authorship). *See* FED R. CIV. P. 24(a)(2). More importantly, the court could have defined "party" under Rule 24(a)(2) to include the intended beneficiaries of the market structure imposed by the decree. *See* FED R. CIV. P. 24(a)(2).

113. *United States v. ASCAP*, 11 F.R.D. at 513. Judge Weinfeld's logic relied upon the fallacy that "self-interest[ed]" private interests would never mirror a larger public good. While the plaintiff was clearly self-interested, it is also clear that the plaintiff was sincere, or perhaps clever, enough to invoke a wider interest. Although it is unclear from the abbreviated decision how the system harmed the plaintiff, the relief sought plainly included a change to the "blanket" licensing system at the heart of the present oppressive market system. *Id.* at 512.

114. *See generally* United States v. Bearing Distrib. Co., 18 F.R.D. 228, 231 (W.D. Mo. 1955) (denying intervention to private plaintiff claiming violation, and seeking expansion, of government negotiated consent decree; court chastising plaintiff for "as-

C. *Option 3: New Litigation*

Precedent suggests that at least with regard to broadcast media, any new litigation brought against ASCAP would be barred by the joint application of the doctrines of *res judicata* ("claim preclusion") and *parens patriae*. Under these cases, private parties seeking to sue a defendant previously sued in a government enforcement action ending in a consent decree must demonstrate that they are not in privity with the first plaintiff. If the second plaintiff is in privity with the first plaintiff, its claim is barred. In this context privity means whether the precluded party's interest is substantially the same as the first plaintiff and whether the first plaintiff was vested with the authority of representation and exercised that authority adequately.

Where the first plaintiff is the government it is difficult to justify a new action under a strict application of this test. A civil antitrust suit is surely brought not to benefit the Department of Justice but to benefit market players who face anti-competitive forces; in the case of the ASCAP litigation, public performers of copyrighted music. Moreover, whatever the reality might be, there is a presumption that the state will adequately represent their position.[115] Even if a judge could be convinced a new action is justified she might dismiss for forum non conveniens or grant a transfer to the

sum[ing] prerogatives of the Attorney General"); *see also* United States v. Loew's, Inc., 20 F.R.D. 423, 424, 425 (S.D.N.Y. 1957) (denying intervention to private party attempting to "displace the Attorney General as vindicator of the public interest" where retention of jurisdiction clause in consent decree limited to parties and "no others"); United States v. Shubert, 305 F. Supp. 1288, 1292 (S.D.N.Y. 1969) (denying motion of private party to appear as amicus curiae to oppose application of theater owner subject to consent decree because private party, unlike the government, apt to confuse private interest with the public good); *cf.* SEC v. National Student Mktg. Corp., 59 F.D.R. 305, 307 (D.D.C. 1973) (barring defendant in SEC enforcement action from cross-claiming against private parties because public policy militates against delaying, confusing, and complicating case brought by the government to enforce the law); SEC v. General Host Corp., 60 F.R.D. 640, 643 (S.D.N.Y. 1973) (same, citing risk of "diversion from main effort of [SEC] to enforce the laws").

115. *See generally* Satsky v. Paramount Communications, Inc., 778 F. Supp. 505, 510 (D. Colo. 1991), *rev'd*, 7 F.3d 1464 (10th Cir. 1993) (invoking claim preclusion to bar suit raising claims adjudicated in action brought by state and ending in consent decree) (citing Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 692 n.32 (1979)).

Southern District of New York, the forum of the consent decree and the equivalent of ASCAP's legal backyard.

Even assuming that the passage of time and changed circumstances would allow for new litigation, few if any small business owners such as independent radio stations have the financial strength to fight ASCAP. If they cannot afford to intervene in the underlying case, they cannot afford to undertake a new fight against ASCAP and its formidable counsel.

D. *A Pending and Proposed Solution*

Amidst all this doom and gloom has emerged very recently some hope that a legislative solution will be found for those market sectors who have not yet made their peace with the blanket license. In the absence of effective executive and judicial remedies these calls to action may be the only solution.

1. The Fairness in Musical Licensing Act of 1997

Prodded primarily by the National Restaurant Association ("NRA"), on January 21, 1997 Senators Strom Thurmond[116] and Jesse Helms[117] introduced Senate Bill 28 in the United States Senate, known popularly as The Fairness in Music Licensing Act of 1997.

This bill, which did not pass the 105th Congress, would have made great strides in resolving the problems addressed in this Essay. First, the bill would have eliminated the so-called "multiple performance" doctrine. If a business, such as tavern or retail store, played a radio or television during business hours the "performance" would be exempted from fees under section 110(5) of the Copyright Act if no separate admission charge was collected and if the original broadcast earned fees for the performing rights societies.[118]

116. Strom Thurmond, R. South Carolina.

117. Jesse Helms, R. North Carolina.

118. *See* S. 28, 105th Cong. § 2(a) (1997), *available in* ftp.loc.gov/pub/thomas/c105/s2s.is.txt (visited February 20, 1998); *see also*, David M. Lilenfeld, *Why Congress Should Eliminate the Multiple Performance Doctrine*, 58 OHIO ST. L.J. 695 (1997).

Second, echoing the Girl Scout controversy, the bill would have exempted certain original performances in market sectors where ASCAP and BMI had, in the view of some, been overly aggressive, such as county fairs and camping organizations.[119]

Third, the bill would have addressed the inequities inherent in what was, in effect, a binding forum selection clause bound up in the ASCAP consent decree. Instead of being forced to apply to the United States District Court for the Southern District of New York, ASCAP's domicile, for a fee determination, a procedure so costly it had been used only once in the first forty years of the ASCAP decree and then only by a major cable company, the bill would have allowed a non-broadcaster to initiate binding arbitration of a reasonable fee under the rules of the American Arbitration Association.[120] Similarly, although a broadcaster could not initiate arbitration, it could defend a local infringement suit by invoking court-annexed arbitration proceedings by admitting the infringement but challenging the reasonableness of the fee.[121]

A fourth provision, important to broadcasters like the hypothetical WXYZ, was a provision establishing a rate-setting formula that would have made per-program licenses a viable alternative to the blanket license and allowed radio broadcaster to compel the issuance of per-program licenses in any district court.[122] And lastly, the bill would have compelled the performing rights societies to make information about their repertory more complete and accessible.[123]

Not surprisingly, this sweeping set of proposed reforms was an anathema to the performing rights societies and they launched a vigorous counterattack. Rather than the salvation for small businesses its sponsors claimed it would be, ASCAP asserted that the bill would destroy the livelihoods of thousands of "songwriters and composers who often have to work more than one job to earn a de-

119. *See* S. 28, 105th Cong. § 2(b), (d) (1997), *available in* ftp.loc.gov/pub/thomas/c105/s2s.is.txt (visited February 20, 1998).

120. *Id.* § 3(d)(1).

121. *Id.* § 3(d)(2).

122. *Id.* § 4.

123. *Id.* § 5(f).

cent living."[124] Its Internet website urged readers to join in a letter signed by the likes of Billy Joel, Marvin Hamlisch, and Marilyn Bergman, the Way We Were lyricist and ASCAP's president, calling the bill a "legislative taking of our property."[125]

2. The Sensenbrenner Amendment to The Copyright Term Extension Act of 1998

While Senate Bill 28 was being debated, the owners of copyrights began to make progress on a long-simmering effort to prolong the term of United States copyrights. Successful efforts to extend protection to "life plus 70" in Europe threatened to put American authors at a disadvantage. When people also began to realize that certain American icons, like the original Mickey Mouse cartoons, might enter the public domain, the House of Representatives moved quickly to address the problem. To those who had been trying to reign in the performing rights societies, this presented an opportunity. If copyright owners wanted an expansion of their statutory monopoly, they would have to agree to certain restrictions on the right of performance.

On March 25, 1998, the House passed the Copyright Term Extension Act of 1998.[126] Attached to the bill was an amendment offered by Representative Sensenbrenner.[127] The Sensenbrenner Amendment was patterned after Senate Bill 28, sponsored by Senators Helms and Thurmond. The Sensenbrenner Amendment, however, omitted some provisions of Senate Bill 28 and softened others.

Rather than exempt all multiple performances, the amendment limited the exemption to smaller venues.[128] And even though the amendment included the important American Arbitration Association and court-annexed arbitration provisions, it abandoned the efforts to assist independent broadcasters by freeing them from the

124. *See* ASCAP Internet Website, http://www.ascap.com/legislative/s28facts.html (visited July 25, 1998).

125. *Id*. at http://www.ascap.com/legislative/s28letter.html (visited Feb. 20, 1998).

126. H.R. 2589, 105th Cong. (1998).

127. James Sensenbrenner, R-Wisconsin.

128. *See* Summary of Sensenbrenner Amendment to H.R. 2589 at H1447, *available in* http://www.thomas.loc.gov/cgi-bin (visited March 31, 1998).

rate-setting court and the blanket license. Gone were the exemptions for camps and fairs. Although the Copyright Term Extension Act easily passed the House with the Sensenbrenner Amendment, it remains to be seen if it passes muster in the Senate.

3. A "Performance Royalty Tribunal"

The Sensenbrenner Amendment is an important first step. Importantly, it recognizes what has been well known for years. Namely, that the rate-setting court provisions of the 1950 consent decree did more to inflate the fees for blanket licenses than it did to lower them. And if the mandatory arbitration provisions work well for non-broadcasters, and have the effect of lowering blanket fees for smaller market sectors such as fairs and camps, it could bode well for the continuing efforts to ease the arbitrary fees imposed on small market broadcasters.

But the Sensenbrenner Amendment begs an unanswered question. If non-broadcasters in small market sectors need protection for the performing rights societies, the question is whether those protections are not also needed in broadcast media. And while multi-district arbitration will certainly democratize rate setting, it might also fragment the decisions and raise the risk of inconsistent rulings and disparate treatment based on the vagaries of geographic, politics, and whim.

The best approach would be to require statutorily the creation of a national rate-setting body—a "Performance Royalty Tribunal"—funded by ASCAP through license fees. Both sellers and users of the performance right, and the government, have recognized the need for some non-market mechanism to set license fees.[129] If such a body fairly represented the interests of both buy-

129. The solicitor general of the United States, Erwin N. Griswold, wrote in the context of the right of public performance, "If this market is to function at all, there must be . . . some kind of central licensing agency by which copyright holders may offer their works in a common pool to all who wish to use them." CBS v. ASCAP, 562 F.2d 130, 137 (2d Cir. 1977), *rev'd*, 441 U.S. 1 (1979). Unless the issue becomes mooted by technology, a possibility that becomes more and more feasible each day, all broadcast users of copyrighted music will pay more than the price a free market would set if the rate-setting court created by the consent decrees remains as the machinery to insure fairness.

Technology will play a significant role in shaping the future licensing and rateers and sellers and did not burden taxpayers, it could retain the efficiencies of the performing rights societies without suffering from the arbitrariness of the current market structure.

CONCLUSION

There seems little doubt that when the *ASCAP* and *BMI* cases were resolved by decree in 1950 and 1960, respectively, the government believed that the terms of the decree would help to eliminate, or at least alleviate the harshness of, the anti-competitive behavior of the performing rights societies. In hindsight, and it is admittedly a long look back, the consent decrees have been a failure.

Rather than alleviate anti-competitive behavior, the consent decress have imposed a market structure—and in the case of the ASCAP decree, a dispute resolution mechanism—that has perpetuated, insulated, and even encouraged anti-competitive behavior. Yet there remains a need for some form of horizontal agreement. The system is skewed in favor of the performing rights societies and will remain so unless a forum is created where the powerful owners of copyright are made to stand on equal footing with less wealthy copyright users.

In the end, the story of these consent decrees is a cautionary tale in a land increasingly ruled by intellectual property rights. In those places where market failure or dominance, weak antitrust enforcement, and intellectual property rights converge, consumers and small business owners may find themselves without adequate remedies to battle monopolistic conduct. The increased costs will have a profound effect on every market sector that relies on such products or services. Given its increasing ubiquitousness, the ever-expanding computer industry is one market where this fear may soon be realized. Weak enforcement efforts crippled by concerns

setting mechanisms. SESAC already has announced new tracking technology that will allow it to monitor whenever a SESAC song is transmitted or broadcast digitally. *See* SESAC Internet Website, http://www.sesac.com (visited July 25, 1998) (describing "MusiCode"). If such technology proves to be reliable, cheap, and effective in all media, it will make "per-use" licensing not only feasible but desirable. Because it would be easy to determine which songs were actually used, the premise of the blanket license would be eliminated and users would be compelled to pay only for actual use on a per-song basis.

over the globalization of trade and stifling innovation, when coupled with the long statutory term of copyright protection, may raise the specter of pronounced and prolonged market concentrations, and monopolistic pricing, in the software industry. The impact on market prices would likely be significant. The harm will extend beyond the inevitable widening of the gulf between rich and poor such concentrations will inevitably produce.

More importantly, we, as a society, cannot afford the cost of unfair pricing if the effect is to reserve to only the rich and middle-class the benefits of digital advancements protected by copyright. We can only hope that any consent decrees entered to resolve these disputes, as they arise now and in the future, will recognize the synergistic effect of copyright and antitrust law and will not, as the *ASCAP* and *BMI* decrees do, perpetuate the evils of unchecked monopoly.