The Struggle over Performing Rights to Music: BMI and ASCAP vs. Cable Television

Janet L. Avery

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by Janet L. Avery*

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Introduction

Broadcast Music, Inc. (BMI), The American Society of Composers, Authors, and Publishers (ASCAP), and the cable television industry have been fighting over the price of music. Specifically, the dispute centers on the blanket licenses issued by BMI and ASCAP to cable companies. These licenses authorize the cable companies to transmit all musical compositions that BMI and ASCAP control.

BMI argues that during the past twenty years, while the cable industry was developing, BMI allowed it to use music in BMI's repertoire at bargain rates.¹ Now that cable has become extremely profitable, BMI believes that owners of copyrighted music used in cable programming should receive a larger percentage of the cable industry's profits.²

BMI attempted to increase its profits from cable television by insisting that previously unlicensed basic cable programmers purchase a blanket license.³ BMI also tried to increase fees paid by pay cable programmers.⁴ Finally, BMI attempted to require cable operators, who previously were partially covered by licenses paid by pay cable programmers, to purchase separate licenses.⁵

There is no indication that ASCAP followed BMI's lead in trying to license basic cable programmers. However, ASCAP did make an attempt to substantially increase the fee paid by a pay cable programmer.⁶ ASCAP also litigated the right to acquire separate licensing agreements with cable operators.⁷

Cable programmers and operators resisted BMI's and ASCAP's demands for a larger share of the cable industry profits, and to some degree they were successful. The fee that ASCAP received as a result of litigation with the pay cable programmer was not substantially more than that paid in the past.⁸ The courts also found that neither ASCAP nor BMI

². See HBO Sued, supra note 1; see also Appleson, supra note 1.
⁴. Id. at 25.
⁵. Id. at 32-34.
⁷. See Showtime/The Movie Channel, 912 F.2d at 571. The rate court based its determination of a reasonable fee for ASCAP's blanket license on BMI's current blanket license fee for Showtime. Id.
could require cable operators to purchase blanket licenses for programming supplied by cable programmers.9 However, these were small victories for the cable industry.

Cable programmers and operators have been unsuccessful in their attack on blanket licenses in general.10 The cable companies claimed that BMI was demanding unreasonable fees for its blanket licenses.11 Consequently, BMI and the cable programmers and operators were unable to negotiate acceptable license agreements and, in some instances, the cable companies were operating without them.12 BMI brought multiple copyright infringement suits against such cable programmers and operators.13 Several cable companies either counterclaimed or brought separate actions against BMI claiming violation of an existing consent decree, antitrust violations, and misuse of copyright.14 The court in one of these actions found in favor of BMI on all issues except the ability to license cable operators.15 The cable companies filed an appeal but eventually settled.16 The other cases also settled.17

This note will focus primarily on the dispute between BMI and the cable programmers and operators. ASCAP has been less active than BMI in pursuing increased profits from the cable industry because it is restricted by provisions in a consent decree to which BMI is not subject. Specifically, ASCAP is required to grant a blanket license to all applicants, and if a fee cannot be negotiated, then a rate court will determine a reasonable fee.18 As a result, BMI has more bargaining power in negoti-

14. See, e.g., Id.
ating higher fees from cable entities. This note will examine and suggest solutions to the problems that remain as a result of BMI's considerable bargaining power.

I

BMI and ASCAP

A. Overview of BMI and ASCAP

Members formed performing rights societies to enforce the public performance rights to music because members have more bargaining power collectively than individually.\(^1\) ASCAP is an unincorporated membership association formed in 1914.\(^2\) BMI is a nonprofit corporation organized in 1939 by members of the radio broadcasting industry "to counter what they perceived to be ASCAP's exorbitant licensing fees and unacceptable practices."\(^3\)

BMI and ASCAP together control ninety-five percent of the market in the United States for performance rights to musical compositions, making them the two largest performing rights societies in the United States.\(^4\) BMI represents more than 100,000 composers and publishers and has a repertoire of approximately 1.5 million compositions.\(^5\) ASCAP represents more than 40,000 members and controls a repertoire of approximately 3 million compositions.\(^6\) Virtually all musical compositions of any marketable value in the United States are represented by either BMI or ASCAP.\(^7\) Very few compositions are represented by both BMI and ASCAP; only those songs that are co-authored by a member from each organization are represented by both.\(^8\) Consequently, licen-
sees who regularly perform musical compositions must generally have licenses from both organizations.27

B. BMI's and ASCAP's Methods of Licensing Performing Rights

BMI and ASCAP grant blanket licenses to numerous types of organizations, including traditional television and cable television systems.28 Blanket licenses allow the licensee to perform any song in the performing rights society's repertoire without having to obtain an individual license for each song.29 The fee for a blanket license does not depend upon the quantity or popularity of the songs used—rather, it is a single, negotiated fee that is usually either a flat rate or a percentage of the licensee's gross revenue.30 The television or cable company may purchase either a blanket license to cover all of its programming or ask BMI or ASCAP to grant it a per program blanket license.31 A per program blanket license lets the licensee use any composition in the performing rights society's repertoire but the fee is based on only those programs that use BMI or ASCAP music.32

II

Cable Programmers and Cable Operators

A. Cable Programmers' and Cable Operators' Functions in the Cable Industry

The cable industry is a two-tiered system comprised of cable programmers and cable operators. Cable programmers supply programming via satellite to cable operators.33 These cable operators then retransmit the programming via cables to subscribers.34 Two types of cable programmers exist. Basic cable programmers supply the program-

27. Id.


30. Fujitani, supra note 21, at 103, 106 n.15 (citing S. SHEMEL & M. KRASILOVSKY, THIS BUSINESS OF MUSIC 163 (rev. ed. 1977)). ASCAP's and BMI's consent decrees do not provide required methods for calculating fees for blanket licenses.

31. United States v. BMI, 1966 Trade Cas. (CCH) ¶ 71,941, at 83,326 (S.D.N.Y. 1966) (VIII. Discriminatory Rates (B)); United States v. ASCAP, 1950-1 Trade Cas. (CCH) ¶ 62,595, at 63,753 (S.D.N.Y. 1950) (VII. License Fees (B)).


34. Id.
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mizing included in the base fee that subscribers pay to access cable television. Pay cable programmers supply programming that costs subscribers an additional fee.

B. Types of Programming

Cable programmers provide two types of programming to cable operators—original and syndicated. Original programming is produced by the cable programmer itself or independent producers hired by the cable programmer. Syndicated programming is purchased by the cable programmer from an outside producer, distributor, or syndicator.

Cable programmers are only one source of cable operators' programming. Operators may also retransmit the broadcasts of local or distant traditional television stations. Additionally, they may transmit local origination programming and public access programming. Local origination programming may be purchased or produced by the operator for its local channel. Public access programming is created by community and public groups, the government, or educational groups, and transmitted by the operator as a community service.

III

Recent Litigation Involving BMI

A. BMI vs. Basic Cable Programmers

BMI tried to persuade previously unlicensed basic cable programmers to purchase blanket licenses for the public performance rights to music used in their programming. In 1988 and 1989, BMI sued three basic cable programmers for infringement—Rainbow Programming Services (Rainbow), Lifetime Cable Health Network (Lifetime), and the Christian Broadcasting Network, Inc. (CBN). Rainbow settled with

36. Id.  
38. Id.  
40. Id. at 14-15.  
41. Id. at 14-15 n.1. Local origination programming also includes commercials the operator produces and transmits. Id.  
42. Id.  
43. Id. at 27-28.  
44. Complaint for Declaratory Relief, Preliminary and Permanent Injunctive Relief Class Action at 20, American TV and Communications Corp. v. BMI, No. 90-0447 (C.D. Cal. filed Jan. 29, 1990); Complaint at 27-28, National Cable TV Ass'n v. BMI, No. 90-0209, 1991 U.S.
BMI shortly after BMI filed suit. Lifetime and CBN counterclaimed, alleging that BMI's licensing practices violated antitrust law.

When BMI approached other basic cable programmers about purchasing blanket licenses, they sued BMI, asking the courts to declare BMI's practices illegal. The Arts & Entertainment Cable Network (Arts & Entertainment) filed suit against BMI in the Southern District of New York. Black Entertainment Television (BET) joined The Disney Channel (Disney), a pay cable programmer, and two trade associations (representing cable operators) in a suit filed in the District Court for the District of Columbia. The basic cable programmers in these suits claimed that they have always operated without licenses because they have been unable to negotiate acceptable fees with BMI.

The District of Columbia case was decided in favor of BMI in August of 1991. Shortly thereafter, Lifetime, CBN, and Arts & Entertainment settled with BMI.

B. BMI vs. Pay Cable Programmers

During fee negotiations in the fall of 1989, BMI told Home Box Office (HBO) that it expected to receive between two and three times more money for a blanket license than HBO had paid in the past. HBO refused to comply. HBO's blanket license expired and, since a renewal fee had not been agreed upon, HBO continued to transmit BMI music.

Dist. LEXIS 11389 (D.D.C. Aug. 16, 1991). Rainbow is doing business as Bravo, American Movie Classics, and Prism cable services. Lifetime Cable Health Network is doing business as Lifetime Television. CBN is also known as the Family Channel. Complaint for Declaratory Relief, Preliminary and Permanent Injunctive Relief Class Action at 20, American TV and Communications Corp. v. BMI, No. 90-0447 (C.D. Cal. filed Jan. 29, 1990).

45. COMMUNICATIONS DAILY, Sept. 29, 1989.
53. Id.
without permission. In December, 1989, BMI filed suit against HBO for this unauthorized use. This was the only suit BMI filed against a pay cable programmer. BMI and HBO reached a settlement in January, 1991.

Disney, a party in the District of Columbia case, was the only other pay cable programmer involved in litigation with BMI. Disney, claiming that BMI had threatened suit for copyright infringement if it did not accept increased renewal fees, asked the court to declare BMI's demands for higher fees illegal. As mentioned previously, the court entered judgment in favor of BMI.

C. BMI vs. Cable Operators

Blanket licenses purchased by pay cable programmers have historically included the right for operators to retransmit the programming to their viewers. This is known as “through-to-the-viewer” licensing. BMI tried to change this system so that each programmer would have a license to transmit to the operators and each operator would also have a license to transmit to the viewer. This is called “split” or “dual” licensing. BMI also attempted to require that operators purchase blanket licenses for local origination and public access programming because cable operators had never purchased blanket licenses for those types of programming.

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55. HBO Sued, supra note 1.
58. Id. at 46-47.
60. Third Amended and Supplemental Verified Complaint at 6, 24-25, BMI v. HBO, No. 89 Civ. 8579 (S.D.N.Y. filed Mar. 15, 1990).
61. Id.
62. Id. at 24-25; Complaint for Declaratory Relief, Preliminary and Permanent Injunctive Relief Class Action at 4, American TV and Communications Corp. v. BMI, No. 90-0447 (C.D. Cal. filed Jan. 29, 1990).
64. See Third Amended and Supplemental Verified Complaint at 13, BMI v. HBO, No. 89 Civ. 8579 (S.D.N.Y. filed Mar. 15, 1990).
BMI included Manhattan Cable Television (Manhattan), a cable operator, as a defendant in its suit against HBO. BMI alleged that Manhattan was infringing BMI members' copyrights by retransmitting programming from HBO, a pay cable programmer, because HBO no longer held a through-to-the-viewer license. BMI also claimed that Manhattan infringed members' copyrights by retransmitting programming from basic cable programmers because basic cable programmers had never held through-to-the-viewer licenses. Finally, BMI asserted that Manhattan infringed the copyright of music it used in local origination programming.

Cable operators challenged BMI's attempt to establish split licensing en masse. Seventeen cable operators (including Manhattan) sued BMI in the District Court for the Central District of California. Two trade associations representing cable operators, the National Cable Television Association, Inc. (NCTA), and the Community Antenna Television Association, Inc. (CATA), joined in the suit against BMI in the District Court for the District of Columbia, requesting that the court declare BMI's practices and demands illegal.

When BMI and HBO settled, the claim against Manhattan in the same suit was dropped as part of the agreement. Manhattan remains unlicensed for original and public access programming. However, the settlement with HBO included a through-to-the-viewer license that covers Manhattan's retransmission of HBO's programming. The case brought by the seventeen cable operators in California was also settled as

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67. Id. at 13.
68. Id.
69. Id.
71. See National Cable TV Ass'n v. BMI, Nos. 90-0209, 90-0262, 1991 U.S. Dist. LEXIS 11389 (D.D.C. Aug. 16, 1991). Disney and BET were the other plaintiffs in this suit. Id. “NCTA is the principal national trade association of cable system operators, whose members account for approximately 90 percent of the nation's 50 million cable television subscribers. . . . CATA is a national trade association of cable system operators, and represents over 2,000 cable systems located throughout the United States.” Complaint at 10-11, National Cable TV Ass'n v. BMI, No. 90-0209, 1991 U.S. Dist. LEXIS 11389 (D.D.C. Aug. 16, 1991).
72. See id.
part of the HBO settlement.\textsuperscript{75} As mentioned previously, the court, in the case involving the trade associations representing cable operators, entered judgment in favor of BMI.\textsuperscript{76}

IV
Areas of Dispute

A. BMI's and ASCAP's Consent Decrees

1. History of the Consent Decrees

Because they control the performance rights to virtually all musical compositions in the United States, BMI and ASCAP have been involved in several suits claiming that their business practices violate antitrust law. The Justice Department sued BMI for antitrust violations in 1941, and a consent decree regulating BMI's licensing practices was issued.\textsuperscript{77} This consent decree was last renegotiated in 1966 following a monopolization complaint filed in 1964.\textsuperscript{78} The Justice Department also sued ASCAP for antitrust violations in 1941, resulting in a similar consent decree regulating ASCAP's licensing practices.\textsuperscript{79} ASCAP's consent decree was last renegotiated in 1950 due to "complaints relating to the television industry, successful private litigation against ASCAP by movie theaters, and a [g]overnment challenge to ASCAP's arrangements with similar foreign organizations."\textsuperscript{80} Therefore, both performing rights societies are regulated by consent decrees which were negotiated before the cable industry existed.

BMI's and ASCAP's consent decrees contain two similar provisions that are relevant to the current dispute. First, both performing rights societies must issue a single license to a "telecasting network"\textsuperscript{81} or "regularly constituted network" which authorizes the retransmission of its

\textsuperscript{75} Telephone interview with Richard Hirsch of Time-Warner, Inc. (Sept. 26, 1991) (counsel for HBO).


\textsuperscript{77} United States v. BMI, 1940-3 Trade Cas. (CCH) ¶ 56,096 (E.D. Wis. 1941).

\textsuperscript{78} BMI v. CBS, 441 U.S. 1, 11 n.20; United States v. BMI, 1966 Trade Cas. (CCH) ¶ 71,941 (S.D.N.Y. 1966).

\textsuperscript{79} United States v. ASCAP, 1940-3 Trade Cas. (CCH) ¶ 56,104 (S.D.N.Y. 1941).

\textsuperscript{80} BMI v. CBS, 441 U.S. at 11; United States v. ASCAP, 1950-1 Trade Cas. (CCH) ¶ 62,595 (S.D.N.Y. 1950).

\textsuperscript{81} United States v. ASCAP, 1950-1 Trade Cas. (CCH) ¶ 62,595, at 63,752 (S.D.N.Y. 1950) (V. License Issuance Requirements).
programming by its affiliates. Second, neither performing rights society is allowed to discriminate between similarly situated licensees.

2. Prohibition Against Dual or Split Licensing

Both BMI's and ASCAP's consent decrees require them to offer "regularly constituted networks" a single license authorizing both the broadcasting of the network's programming by the network and the simultaneous broadcasting by its "affiliates." In 1966 and 1950, when the consent decrees were entered into respectively, only the three traditional television networks, ABC, NBC, and CBS, existed. The cable companies argued that cable programmers are equivalent to "regularly constituted networks," and that cable operators are equivalent to television "affiliates," therefore, BMI and ASCAP must issue through-to-the-viewer licenses for cable programmers that cover the retransmission of programming by cable operators.

In United States v. ASCAP, ASCAP argued that cable programmers and operators differ significantly from television networks and affiliates. Therefore, the provision in ASCAP's consent decree prohibiting split licensing could not be interpreted to apply to the cable industry.

82. United States v. BMI, 1966 Trade Cas. (CCH) ¶ 71,941, at 83,326 (S.D.N.Y. 1966) (IX. Broadcast Licensing (A)).
83. United States v. ASCAP, 1950-1 Trade Cas. (CCH) ¶ 62,595, at 63,752 (S.D.N.Y. 1950) (IV. General Prohibitions (C)); United States v. BMI, 1966 Trade Cas. (CCH) ¶ 71,941 at 83,326 (VIII. Discriminatory Rates (A)).
84. United States v. BMI, 1966 Trade Cas. (CCH) at ¶ 83,326 (IX. Broadcast Licensing (A)).
87. Id. The difference between television networks and affiliates and cable programmers and operators cited by ASCAP are the following: (1) Television affiliates transmit over-the-air while cable operators transmit by cable. (2) Television affiliates only provide one channel while cable operators provide simultaneous programming on numerous channels. (3) There are more cable program suppliers than traditional networks. (4) In most locations there are at least three competing television affiliates, whereas there is usually only one cable operator. (5) Most local television stations are only affiliated with one network while cable operators obtain programming from a number of cable programmers. (6) Networks pay their affiliates stations to broadcast network programming, while pay cable programmers usually receive a share of the operators' subscriber fees, and basic cable programmers usually derive their profit from both advertising and operators' subscriber fees. (7) No television affiliates own a majority of shares of any network, and networks are prohibited by the FCC from owning and operating more than five stations. Also, networks are not allowed to own production companies that supply the network with programming. Contrastingly, the cable industry contains multi-system operators that own a large number of cable operators and, in some cases, cable programmers. (8) Television networks distribute their programming exclusively through their affiliates, while cable programmers distribute some of their programming directly to subscribers and even through local television stations. (9) Cable operators also retransmit over-the-air
The court held that none of the differences between television networks and affiliates and cable programmers and operators presented by ASCAP were relevant to the issue of whether the split licensing prohibition applied to cable programmers and operators.88

The court held that the purpose of the provision in ASCAP's consent decree was, "to protect the ultimate users of ASCAP music who would otherwise be subjected to 'the harassment of suits' if they failed to comply with ASCAP's fee demands."89 The court explained,

"[t]elecasting network" is to be read in its functional sense, that is, to cover the supplying of programming by a packager to another entity for transmission, under the packager's name, to household televisions, and should not be limited based on either the particular technology used to transmit the programs into the homes of the ultimate audience or the particular financial arrangement existing between the packager and the local transmitter of the programs.90

In short, the court held that, because the underlying goal of protecting the users of ASCAP music from harassing suits does not depend upon the technical or financial aspects of cable television, the through-to-the-viewer provision in the consent decree should apply to both traditional television and cable television.

*United States v. ASCAP* rejected the views of the Department of Justice on whether the through-to-the-viewer licensing provision applies to the cable industry.91 The Department of Justice agreed that cable programmers could be interpreted as "regularly constituted networks" under the consent decree.92 However, the Department reasoned that the through-to-the-viewer licensing provision should not apply to the cable industry because it would be stretching the language of the consent decree too far to define cable operators as "affiliates."93 The court stated that the differences between cable operators and television affiliates were no greater than the differences between cable programmers and television networks.94 Thus, the court held that the Department of Justice's analysis was unreasonable and that the through-to-the-viewer licensing provi-

88. *Id.* at *81.
89. *Id.* at *51.
90. *Id.* at *51-52.
91. *Id.* at *95-96. The Department of Justice briefed this issue at the invitation of the court. *Id.* at *83.
92. *Id.* at *88.
93. *Id.* at *88-89.
94. *Id.* at *90.
sion in ASCAP's consent decree does apply to cable programmers and operators.95

National Cable Television Association, Inc. (NCTA) v. BMI96 held that BMI's consent decree also requires BMI to grant through-to-the-viewer licenses to cable programmers. The court relied on the decision in United States v. ASCAP regarding the similar provision in ASCAP's consent decree.97 The court in NCTA v. BMI agreed that requiring through-to-the-viewer licenses for the cable industry is clearly within the spirit of the decree and common sense requires this interpretation.98

3. Prohibition Against Discriminating Among Similarly Situated Licensees

ASCAP's and BMI's consent decrees prohibit them from discriminating among similarly situated licensees.99 Cable programmers and operators argued that they are similarly situated to traditional television networks and affiliates.100 They also claimed that the fees BMI tried to negotiate with cable programmers and operators were discriminatory because they would be many times what traditional television networks and affiliates now pay for blanket licenses.101

The court in NCTA v. BMI never discussed the issue of whether or not cable programmers and operators are similarly situated to television networks and affiliates. The court merely held that no violation of BMI's consent decree's antidiscrimination provision was shown.102

The courts could reasonably find that cable programmers and operators are similarly situated to television networks and affiliates since they have been found to be functionally the same for purposes of through-to-the-viewer licenses.103 However, the antidiscrimination provision in BMI's consent decree also provides that,

differentials based upon applicable business factors which justify different rates or terms shall not be considered discrimination within the meaning of this section; and ... nothing contained in this section shall prevent changes in rates or terms from time to time by reason of

95. Id. at *95-96.
97. Id. at *116-17.
98. Id. at *124.
101. Id.
changing conditions affecting the market for or marketability of performing rights.\textsuperscript{104} Therefore, BMI may argue that higher rates for cable programmers and operators than for television networks and affiliates are justified by the differences between the two systems. For example, BMI may argue that, since a television affiliate only broadcasts one channel while a cable operator transmits numerous channels,\textsuperscript{105} a higher licensing rate for a cable operator is justified. BMI might also argue that, since television networks only broadcast through their affiliates but cable programmers sometimes broadcast directly to subscribers with satellite dishes,\textsuperscript{106} a higher rate for cable programmers is not discriminatory. Finally, BMI might argue that since cable television has become widespread and extremely profitable, the marketability of performing rights has been affected, and thus BMI is justified in raising its fees significantly under the terms of the consent decree. In light of these arguments, it would be extremely difficult for cable programmers and operators to prove that BMI’s fees are discriminatory.

B. Antitrust Law

1. History of Antitrust Claims Brought by Broadcasters Against BMI and ASCAP

a. CBS v. ASCAP

Several organizations have challenged the legality of the blanket licenses BMI and ASCAP issue to both traditional broadcasters and cable companies. In CBS v. ASCAP,\textsuperscript{107} the district court rejected CBS’s arguments that BMI and ASCAP “are unlawful monopolies and that the blanket license is illegal price fixing, an unlawful tying arrangement, a concerted refusal to deal, and a misuse of copyrights.”\textsuperscript{108} The court of appeals agreed with all but one of the district court’s holdings.\textsuperscript{109} It held that the blanket license was a form of price fixing that was illegal per se under section one of the Sherman Act.\textsuperscript{110} The Supreme Court reversed,
holding that the blanket license is not a per se violation of section one of the Sherman Act but that it is subject to the rule of reason standard often applied in such cases.111

On remand, the Second Circuit explained that “[a] rule of reason analysis requires a determination of whether an agreement is on balance an unreasonable restraint of trade, that is, whether its anti-competitive effects outweigh its pro-competitive effects.”112 The court determined that the blanket license has no anti-competitive effect because it is not a restraint upon potential competition between musical compositions.113 This holding was based on the theory that if an alternative opportunity to acquire the right to publicly perform a musical composition is realistically available, the blanket license is merely an option for acquiring that right, not a restraint on trade.114 The court then discussed other ways CBS could acquire the performing rights to musical compositions.

The court first considered the feasibility of direct licensing. If CBS used direct licensing, it would have to negotiate for the performance right for each composition with the individual copyright owners.115 CBS argued that direct licensing was not a viable option because it was already obligated by agreements for blanket licenses with both BMI and ASCAP, and therefore direct licenses would be redundant and a waste of money. In rejecting this argument, the court said that CBS could begin using direct licenses once its blanket licenses expired.116 Next, CBS claimed direct licensing was impractical because it could not negotiate the large number of necessary agreements. The court rejected this argument based on evidence that a system to negotiate direct licenses could be developed even though it might require CBS to expend some time and money.117 CBS also claimed that individual copyright owners would be reluctant to deal with CBS directly because they would rather let BMI and ASCAP represent them.118 The court found that this was not true because evidence suggested individual copyright owners would be eager to deal directly with CBS.119 Finally, CBS said that copyright owners

111. Id. at 8-10, 24-25. The court of appeals defined a per se violation of section one of the Sherman act as “a practice with such a high likelihood of having unjustifiable anti-competitive effects that it is condemned under the antitrust laws without the need to assess its effect in a particular case.” CBS v. ASCAP, 620 F.2d 930, 935 (2d Cir. 1980), cert. denied, 450 U.S. 970 (1981).
113. Id. at 934, 938.
114. Id. at 935-36.
115. Id. at 937-38.
116. Id. at 934.
117. Id.
118. Id.
119. Id. at 938.
would demand unconscionably high fees for their works because, since the music would already be incorporated into the program, CBS would be obligated to acquire the performing rights and therefore be placed in a poor bargaining position. The court found this claim to be groundless, pointing out that producers currently negotiate the music recording rights (known as synch rights) directly with artists after a program is completed. Committing themselves to using certain music before obtaining the synch rights has not hindered the producers' bargaining power. Thus, the court reasoned that CBS's bargaining power would also not be hindered in similar circumstances. Since all of CBS's arguments against direct licensing failed, the court found it to be a realistically available alternative to obtaining a blanket license.

In reaching this result, the court relied not only on the weakness of CBS's arguments against direct licensing but also on ASCAP's consent decree. The court stated that even if CBS attempted direct licensing and found that it was not feasible, CBS could immediately obtain a renewed blanket license because ASCAP would be required to grant one under the terms of its consent decree. Furthermore, if an acceptable renewal fee could not be negotiated, a rate court would set one. Thus, CBS would incur little risk by attempting direct licensing. Although BMI was also a defendant, the court did not address the facts that BMI is not required to grant licenses to all applicants and is not subject to a rate court.

b. *Buffalo Broadcasting v. ASCAP*

Another important case challenging BMI and ASCAP's blanket licenses for broadcasters was *Buffalo Broadcasting v. ASCAP.* Local television stations brought an antitrust suit against BMI and ASCAP claiming that requiring blanket licenses for local television stations unreasonably restrained trade. The district court stated that under the rule of reason analysis, the court must first determine whether the

120. *Id.*
121. *See id.*
122. *Id.* at 938.
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
129. *Id.* at 274.
130. *See infra* notes 175-78 and accompanying text (description of the rule of reason analysis).
blanket license restrained competition within the context of music licenses issued to local television stations.\textsuperscript{131} If there were realistically available alternatives to the blanket license for local television stations, then no restraint existed.\textsuperscript{132} Finding that the alternatives were too costly or inefficient to be realistically available, the court held that blanket licenses were a restraint on competition.\textsuperscript{133}

The district court examined three alternatives to blanket licenses that local stations could employ. The first alternative was the per program license that ASCAP and BMI offer under the terms of their respective consent decrees.\textsuperscript{134} A per program license is a blanket license whose fee is based upon revenue generated only by programs that use protected music rather than total revenue of the licensee.\textsuperscript{135} The court rejected this system as unfeasible because it would require time-consuming and expensive reporting and record-keeping obligations, and because BMI and ASCAP charge higher fees for per program licenses than for blanket licenses.\textsuperscript{136}

The second alternative considered was direct licensing.\textsuperscript{137} The court rejected direct licensing as a realistically available option “because it would be unreasonably impractical and expensive for local stations to search for and obtain licenses from thousands of composers and publishers.”\textsuperscript{138} The court said that the record did not support a finding that any agency would develop to provide the brokerage function necessary for local television stations to replace blanket licenses with direct licensing.\textsuperscript{139}

The third alternative examined was source licensing.\textsuperscript{140} Source licensing would require producers or syndicators to obtain performing rights for the music they incorporate into their movies or programming.\textsuperscript{141} Producers currently negotiate for the synch rights to music,\textsuperscript{142} so performance rights to music would be merely an additional right to be acquired when dealing with the artists. The court found that source licensing was not a realistically available alternative because producers

\textsuperscript{131} Id. at 286.
\textsuperscript{132} Id.
\textsuperscript{133} Id. at 296.
\textsuperscript{134} Id. at 288-89.
\textsuperscript{135} Id. at 288.
\textsuperscript{136} Id. at 289.
\textsuperscript{137} Id. at 289-91.
\textsuperscript{138} Id. at 290.
\textsuperscript{139} Id.
\textsuperscript{140} Id. at 291-93.
\textsuperscript{141} Id. at 291.
\textsuperscript{142} See id. at 290.
would not "willingly change to a source licensing system." The court based this finding on the belief that producers would resist change and the conclusion that local television stations lacked the economic clout to persuade producers to adopt source licensing.

Consequently, the court concluded that blanket licenses restrained competition among musical compositions because realistic alternatives to blanket licenses were not available to local television stations. Since blanket licenses were found to restrain competition, the second part of the rule of reason analysis required the court to determine whether the anticompetitive effect of blanket licenses outweighed the procompetitive effects. The court found the anticompetitive effect of the blanket license to be a lack of price competition among individual musical compositions because all copyrighted music was being "pooled and sold on an all-or-nothing basis." The procompetitive effects were nominal savings in transactional costs, the elimination of the cost of monitoring programs for unauthorized use, and the flexibility of spontaneous use of music. The district court held that the anticompetitive effect of blanket licenses outweighed the procompetitive effects and that the blanket license was an unreasonable restraint of trade when issued to local television stations. The court enjoined the issuance of blanket licenses to local television stations, believing that source licensing would result.

The court of appeals reversed, holding that the blanket licenses granted to local television stations did not restrain competition among musical compositions. According to the court, the plaintiff failed to carry its burden of showing that per program licenses, direct licensing, and source licensing were not realistically available alternatives to blanket licenses for local television stations.

The court of appeals first rejected the district court's finding that per program licenses were too expensive in comparison to the cost of blanket licenses. The court of appeals found that the district court had errone-

143.  Id. at 292.
144.  Id.
145.  Id. at 293.
146.  Id.
147.  Id.
148.  Id. at 294-96. The court probably meant the ability to use any composition in the repertoire without fear of infringing a copyright when it listed the flexibility of spontaneous use of music as a procompetitive effect.
149.  Id. at 296.
150.  Id.
152.  Id. at 933.
153.  Id. at 926-32.
154.  Id. at 926.
ously calculated the difference in rates between the two types of licenses.\textsuperscript{155} Furthermore, the court said that even if the per program licenses were priced unreasonably high, the rate court could provide relief.\textsuperscript{156}

The court of appeals also rejected the district court's finding that direct licensing would not be feasible for local television stations.\textsuperscript{157} The district court had found that there was no proof any agency \textit{would} develop the mechanism required for copyright owners to deal directly with local television stations.\textsuperscript{158} The appellate court stated that the proper inquiry was whether there was any proof showing that such mechanisms \textit{would not} develop.\textsuperscript{159} The proof offered by the plaintiff that such mechanisms would not develop if local television stations attempted direct licensing was inadequate.\textsuperscript{160} The court of appeals also maintained that the argument about the infeasibility of direct licensing was undermined by the finding that local stations secured direct licenses for music used in locally produced programs.\textsuperscript{161} Since per program licenses were realistically available for programming other than local programming,\textsuperscript{162} a blanket license was not a necessity.\textsuperscript{163}

Finally, the court of appeals rejected the district court's finding that source licensing was not a feasible alternative to blanket licensing.\textsuperscript{164} The court of appeals said producers would probably respond positively to an "aggregate demand from stations willing to pay a reasonable price for source licensing of music performing rights."\textsuperscript{165} The court rejected the local television stations' argument that producers, who often hold the

\begin{itemize}
\item \textsuperscript{155} Id. The district court found that the rates for per program licenses were seven times higher than the rates for blanket licenses. This was because the per program license rate was nine percent and the blanket license rate was between one percent and two percent. Id. (citing Buffalo Brdct. v. ASCAP, 546 F. Supp. 274, 289 (S.D.N.Y. 1982), rev'd, 744 F.2d 917 (2d Cir. 1984), \textit{cert. denied}, 469 U.S. 1211 (1985)). The court of appeals stated that this did not support a finding that per program licenses were too costly because the rates were charged against different bases. "The blanket license rate is applied to a station's total revenue; the program license rate is applied only to revenue from a particular program." Buffalo Brdct. v. ASCAP, 744 F.2d 917, 926 (2d Cir. 1984), \textit{cert. denied}, 469 U.S. 1211 (1985). As a result, the blanket license rate was lower because its base included revenue from programs that did not use music and programs which used music already paid for by the network via through-to-the-viewer blanket licenses. \textit{Id.}
\item \textsuperscript{156} Id. at 927.
\item \textsuperscript{157} Id. at 928-29.
\item \textsuperscript{158} Id. at 928.
\item \textsuperscript{159} Id. at 928-29.
\item \textsuperscript{160} Id. at 929.
\item \textsuperscript{161} Id.
\item \textsuperscript{162} Id.
\item \textsuperscript{163} Id.
\item \textsuperscript{164} Id. at 931.
\item \textsuperscript{165} Id.
\end{itemize}
performance rights to the music in their productions, would be unlikely to give up the revenue from blanket licenses by engaging in source licensing. The court found that the revenue each producer collected from the blanket licenses was so small that it would not dissuade producers from adopting source licensing. Therefore this argument failed to persuade the court.

In summary, the court of appeals held that the blanket license was not a restraint on trade due to the realistically available alternatives of per program licensing, direct licensing, and source licensing. Therefore, under the rule of reason analysis, it was unnecessary for the court to decide whether the blanket license's anticompetitive effects outweighed its procompetitive effects.

2. Current Status of Blanket Licenses

The courts have indicated that despite the decisions in CBS v. ASCAP and Buffalo Broadcasting v. ASCAP, the practice of issuing blanket licenses is not invulnerable to attack under antitrust law. In Buffalo Broadcasting, the court of appeals said, "The fact that CBS did not prove that blanket licensing of networks restrained competition does not necessarily mean that blanket licensing of local stations may not be shown to be a restraint." Accordingly, even though cable programmers and operators closely resemble television networks and local stations, theoretically they could still prove that blanket licenses restrain competition when applied to them. Indeed, the court stated, "[T]he context in which the blanket license is challenged can have a significant bearing on the outcome" of a suit for antitrust violations.

The court in BMI v. Lifetime Television denied summary judgment for BMI on the issue of whether blanket licenses violate antitrust law for cable programmers, but the court never reached the merits of

166. Id.
167. Id. The evidence showed:

[BMI] typically distributes to a publisher between 50¢ and 85¢ for theme and background music in a half-hour episode of a syndicated program shown on a single station; by contrast, the syndication licensing fee can exceed $60,000 for a single episode of a popular series shown in a major television market. Though some of the major producers that own music publishing companies have received more than $1 million in annual television distributions of music royalties, those royalties are a small fraction of their syndication revenue.

Id.
168. Id. at 925.
169. Id. at 933.
171. Id.
the case because the parties settled. In *NCTA v. BMI*, the court found that BMI's blanket licensing of cable programmers and operators did not violate antitrust law. This decision was appealed, but, again, the case settled. Consequently, the legality of blanket licenses is still questionable although the weight of precedent is against a finding that blanket licenses violate antitrust law.

3. **Determining Whether BMI's Activities Violate Antitrust Law**

a. **The Rule of Reason Analysis**

The Supreme Court established the test for determining whether BMI's blanket licenses violate antitrust law in *BMI v. CBS*. The Court held that the blanket license is subject to the rule of reason analysis. This analysis first requires courts to look at whether the higher priced blanket licenses would in any way restrain competition among musical compositions. Second, if it is found that blanket licenses would restrain competition, the court must determine if the blanket licenses' anticompetitive effects outweigh their procompetitive effects. The courts in *CBS v. ASCAP* and *Buffalo Broadcasting v. ASCAP* held that blanket licenses do not restrain competition among musical compositions if realistically available alternatives to blanket licenses exist.

b. **Realistically Available Alternatives to Blanket Licenses for Non-Syndicated Programming**

BMI and the cable programmers and operators agree that realistically available alternatives to blanket licenses exist for non-syndicated programming. The copyright performance fees for music included in the broadcasts of local or distant traditional television stations retransmitted by cable operators are paid to a tribunal established under the 1976 Copyright Act, which then distributes the fees to the copyright owners.

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175. 441 U.S. 1, 8-10 (1979).
176. Id.
179. 620 F.2d at 934.
180. 546 F. Supp. at 286.
owners. 182 The performance rights for music used in original programming produced by cable programmers and local origination programming produced by cable operators can be negotiated directly with the artists. 183 Direct licensing is possible for the original programming of cable programmers and operators because the cable companies select the music used in programming that they themselves produce. 184 Thus, cable programmers and operators have the option of choosing only music for which they are able to obtain a direct license. Performance rights for music used in public access programming is obtained by the organizations that are allowed to use the public access channels. 185 The organizations which produce public access programming usually provide representations and warranties to the cable operators that the organization has obtained the necessary performing rights for all music contained in the programming. 186 Therefore, cable programmers and operators have at least one realistically available alternative to blanket licenses for all non-syndicated programming.

c. Realistically Available Alternatives to Blanket Licenses for Syndicated Programming

Since the performance rights for music contained in all other types of programming may be obtained through some method other than a blanket license, the only programming at issue in the recent litigation was syndicated programming. 187 Generally, cable programmers and operators complained that music used in syndicated programming is already incorporated into the soundtrack, or "in the can," before the cable programmers and operators purchase the syndicated programming. 188 Furthermore, the cable programmers and operators are bound by agreements with the syndicators not to delete the music used in the programming. 189 Consequently, the cable programmers and operators have no control over the musical content of syndicated programming.

Cable programmers and operators claimed that because they have no control over the use of music in syndicated programming, it is impossible to obtain the performing rights for music used in syndicated programming without purchasing a blanket license. 190 They maintained

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184. Id.
185. Id. at *20 n.17.
186. Id.
187. Id. at *22.
188. Id. at *42.
189. Id. at *21, *42.
190. Id. at *42.
that they have no bargaining power in negotiating performing rights where they have no choice but to obtain the rights in order to transmit the programming.\textsuperscript{191} However, the courts in both \textit{NCTA} \textit{v. BMI} and \textit{CBS} \textit{v. ASCAP} found that music "in the can" has never hindered the negotiation of synch rights, and therefore should not be a stumbling block for the negotiation of performance rights.\textsuperscript{192} Both courts also found that any restrictions caused by music "in the can" were a result of either the cable programmers' or television networks' failure to negotiate the performance rights before the programming was produced, rather than a result of a blanket license.\textsuperscript{193}

Although the courts have found that the "in the can" nature of music used in syndicated programming does not limit cable programmers' and operators' options to blanket licenses, cable programmers and operators argued that other licensing methods are not reasonably available for other reasons. These arguments are addressed below.

\textbf{i. Direct Licensing}

Cable programmers and operators maintained that direct licensing is not a realistically available alternative to blanket licenses for syndicated programming because it would be "unreasonable, impractical, and unduly expensive for a cable network to search for and obtain licenses from thousands of individual composers and publishers."\textsuperscript{194} A similar argument was rejected by the court in \textit{Buffalo Broadcasting v. ASCAP}, which found no evidence to support the conclusion that an agency would not develop to handle these transactions.\textsuperscript{195} For example, the \textit{Buffalo Broadcasting} court noted that the Harry Fox Agency handles the negotiations of synch rights between producers and individual artists.\textsuperscript{196} The court in \textit{NCTA v. BMI} stated that, "an economic expert testified persuasively that the required intermediaries would arise"\textsuperscript{197} to handle direct licensing negotiations, and that the fact that the Harry Fox Agency negotiated all synchronization rights supported this conclusion.\textsuperscript{198}

Cable programmers and operators also stated that "a copyright owner would have no incentive to license its work at a price below that

\begin{itemize}
  \item \textsuperscript{191} \textit{Id.} at *77.
  \item \textsuperscript{192} \textit{Id.} at *79-81 (citing \textit{CBS} \textit{v. ASCAP}, 620 F.2d 930, 938 (2d Cir. 1980)).
  \item \textsuperscript{193} \textit{Id.}
  \item \textsuperscript{194} \textit{Id.} at *31.
  \item \textsuperscript{195} \textit{Buffalo Brdcst. v. ASCAP}, 744 F.2d 917, 928 (2d Cir. 1984), \textit{cert. denied}, 469 U.S. 1211 (1985).
  \item \textsuperscript{196} \textit{Id.}
  \item \textsuperscript{197} National Cable TV Ass'n \textit{v. BMI}, Nos. 90-0209, 90-0262, 1991 U.S. LEXIS 11389, at *64 (D.D.C. Aug. 16, 1991).
  \item \textsuperscript{198} \textit{Id.}
which it receives from BMI for each performance." In fact, HBO attempted direct licensing for some of its programming and found that publishers insisted on receiving at least the same amount as they would through a blanket license. Nevertheless, NCTA v. BMI did not find that the publishers' demand for the minimal equivalent of a blanket license fee made direct licensing an unrealistic alternative. Instead, the court found that HBO's conclusions as to the feasibility of direct licensing were "largely speculative" and, the fact that HBO's attempts at direct licensing began after BMI filed suit against it "call[ed] into question the results obtained."

Cable programmers and operators also claimed that "[c]opyright owners prefer the quiet life conferred by the blanket licensing system to the risks of a competitive market." Yet, for years, copyright owners have negotiated synch rights directly with producers in a competitive market. Therefore, the risks cannot be overwhelming. In CBS v. ASCAP, the court of appeals described the argument that copyright owners would refuse to negotiate directly with television networks as the "disinclination issue." The court found that "if CBS were to seek direct licensing, 'copyright proprietors would wait at CBS' door'" in order to have their music performed by a national television network. Similarly, the court in NCTA v. BMI found that music publishers were willing to issue direct licenses to cable programmers and operators when asked.

Although the court in NCTA v. BMI held that direct licensing was a realistic alternative to blanket licenses for cable programmers, the court also held that direct licensing was unrealistic for cable operators. The court found that cable operators lack control over syndicated programming because they do not select the programming and they are controlled by BMI.

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201. Id. at *62.
202. Id.
203. Id. at *63.
206. 620 F.2d at 937.
207. Id. at 938 (quoting CBS v. ASCAP, 400 F. Supp. 737, 779 (S.D.N.Y. 1975), rev'd, CBS v. ASCAP, 562 F.2d 130 (2d Cir. 1977), rev'd, BMI v. ASCAP, 441 U.S. 1 (1979)).
209. Id. at *65.
210. Id. at *70.
tractually bound to retransmit the programming without alterations.\textsuperscript{211} Furthermore, cable operators transmit “up to several dozen different cable program services, each with up to hundreds of syndicated programs containing BMI music—amounting in some cases to tens of thousands of compositions every month.”\textsuperscript{212} Thus, the court held that direct licensing would be too cumbersome and, therefore, unrealistic for cable operators because of the magnitude of syndicated programming transmitted by the cable operators and the lack of control over that programming.\textsuperscript{213}

ii. \textit{Source Licensing}

The cable programmers and operators argued that source licensing is not a realistic alternative to blanket licenses for syndicated programming because syndicators are disinclined to negotiate source licensing.\textsuperscript{214} Cable programmers and operators claimed that syndicators have no motivation for offering source licensing because the industry standard is blanket licensing.\textsuperscript{215} Cable programmers and operators argued that since they cannot obtain source licensing from \textit{any} syndicators, syndicators are not at risk of losing customers to their competitors for not offering source licensing.\textsuperscript{216} The court in \textit{NCTA v. BMI} stated that the cable programmers and operators ignore the nature of supply and demand.\textsuperscript{217} The court found that, “if cable performing rights were demanded, the syndication market would provide them to avoid the risk of losing sales.”\textsuperscript{218}

Cable programmers and operators also claimed that syndicators are disinclined to negotiate performing rights with individual artists because syndicators often receive additional profits from blanket licenses.\textsuperscript{219} Some syndicators receive these profits because they own the copyrighted music used in the programs they produce, are members of BMI or ASCAP, and therefore receive royalty payments for their music when their programs are transmitted by cable programmers and operators.\textsuperscript{220} Cable programmers and operators argued that “it would be commercially impracticable and prohibitively costly for the cable networks to attempt to induce a change in current industry practice, in circumstances where eve-
ryone except the cable program services stands to gain from preserving the status quo.”

The court, in *Buffalo Broadcasting v. ASCAP*, rejected a similar argument made by local television stations. While local television stations claimed that syndicators would gain by allowing blanket licensing to continue, the court said that, “[t]he undisputed evidence shows that [ASCAP royalties received by syndicators] are far too small to persuade syndicators to refuse to undertake source licensing in the face of reasonable offers.” The court in *NCTA v. BMI* found that “the amount of such royalties, even in the aggregate, is minuscule in caparison to the dollar figures involved in syndicated programming transactions.” The *NCTA v. BMI* court held that the royalties paid by BMI to syndicators are not a barrier to source licensing.

In summary, cable companies lack evidence that source licensing is not feasible. Like the plaintiffs in *Buffalo Broadcasting v. ASCAP*, the cable companies have not offered any proof of serious attempts to negotiate source licensing with producers. Consequently, there is no evidence that, if cable programmers and operators were to approach syndicators with reasonable offers for the performance rights of musical compositions, syndicators would be unwilling to establish source licensing as the industry standard.

Unlike direct licensing, the court in *NCTA v. BMI* found that source licensing is a realistic alternative for cable operators as well as programmers. Although cable operators have less direct contact with syndicators, the court found that source licensing is available to cable operators through cable programmers. When negotiating performance rights through source licensing, cable programmers could obtain the performance rights for both the transmission from the cable programmer to the cable operators and the retransmission from the cable operator to the subscribers. The court in *NCTA v. BMI* found that cable programmers would probably agree to negotiate the performing rights for cable operators because usually only one cable operator exists in any geographical

221. *Id.* at 30.
223. *Id.* at 931.
225. *Id.* at *91.
228. *Id.* at *70-71.
229. *Id.*
Thus, if a cable programmer wants to reach a particular geographical location, it must reach an agreement with the only operator in that area.

iii. Per Program Licensing

As mentioned previously, per program licenses grant a licensee the right to perform any music in the issuer's repertoire for a fee that is based on the revenue generated only by those programs that contain such music. As with blanket licenses, the cost of the per program license does not depend upon the amount or quality of the music used in the programming.

Cable programmers and operators argued that per program licenses are not a realistic alternative to blanket licenses because they are more expensive than blanket licenses. BMI offered per program licenses at a rate of 4.5% of cable programmers' or operators' total revenue multiplied by the fraction of the programming that used BMI music. BMI offered blanket licenses at a rate of 1% of total revenue. Thus, whether the cost for per program licensing would exceed the cost for a blanket license would depend upon the amount of programming carrying BMI music. If approximately 22% or less of a cable programmer's or operator's programming used music in BMI's repertoire, then per program licensing would be cheaper at these rates.

The court in NCTA v. BMI found an absence of evidence indicating that per program licenses are not realistically available alternatives to blanket licenses because cable programmers and operators never attempted to negotiate the fees for per program licenses. Cable programmers' and operators' argument that per program licenses are too expensive is based on the first offer made by BMI. Cable programmers and operators failed to ascertain what the cost for per program licenses would be if they were seriously pursued. The court also noted that

230. Id. at *73.
231. Id. at *65.
234. Id.
235. Id.
236. Id. at *67.
237. Id.
238. Id.
cable programmers and operators failed to show that BMI's suggested prices for per program licenses exceeded their value.\textsuperscript{239}

The court in \textit{Buffalo Broadcasting v. ASCAP} also found per program licenses to be a realistically available alternative for two reasons.\textsuperscript{240} First, the plaintiffs had not proven that per program licenses were unreasonably expensive because no evidence was offered to show that per program licenses failed to reflect the market value of music or that the blanket license was not actually priced at a bargain rate.\textsuperscript{241} Second, the court stated that ASCAP's rate court would enforce reasonable fees for both blanket and per program licenses.\textsuperscript{242} This rationale does not apply to BMI because BMI is not bound by a rate court and can attempt to set its fees higher than the true market value for blanket licenses.\textsuperscript{243} Cable programmers and operators must rely strictly on negotiations to obtain reasonable fees for per program licenses from BMI, but cable programmers and operators have not shown that this is impossible. Consequently, without further evidence to the contrary, per program licensing is another realistically available alternative to blanket licenses.

Per program licenses may also be useful to cable programmers and operators when used in conjunction with other licensing methods. If, for example, a cable programmer or operator could not negotiate direct or source licenses for a program, then it could purchase a per program license for that program. Both BMI and ASCAP offer per program licenses,\textsuperscript{244} therefore per program licenses insure that cable programmers

\textsuperscript{239} \textit{Id.} at *68 n.54.
\textsuperscript{241} \textit{Id.} at 927.
\textsuperscript{242} \textit{Id.} The court in \textit{CBS v. ASCAP}, 620 F.2d 930 (2d Cir. 1980), \textit{cert. denied}, 450 U.S. 970 (1981), also relied on the fact that ASCAP was subject to a rate court in finding that CBS had a realistically available alternative to the blanket license. The court said:

Pervading these assessments of each of the CBS contentsions of alleged barriers to direct licensing is one indisputable fact that perhaps overshadows all others. If CBS were to forgo the blanket license, seek direct licenses, and then discover, contrary to the facts found by Judge Lasker, that a competitive market among copyright owners was not a feasible alternative to the blanket license, it would be entitled, under the consent decree, to assure itself of continued performing rights by immediately obtaining a renewed blanket license. Indeed, Paragraph IX of the ASCAP decree permits CBS to use any music covered by a license application, without payment of fee, subject to whatever fees are subsequently negotiated or determined to be reasonable by the [rate] court if negotiations fail. \textit{Id.} at 938. Because the court found that CBS could feasibly obtain performing rights through direct licensing, this language was merely dictum. The rate court merely provided insurance in the event the court's findings proved erroneous. \textit{Id.}

\textsuperscript{244} \textit{United States v. ASCAP}, 1950-1 Trade Cas. (CCH) ¶ 62,595, at 63,753 (S.D.N.Y. 1950) (VII. License Fees (B)); \textit{United States v. BMI}, 1966 Trade Cas. (CCH) ¶ 71,941, at 83,326 (S.D.N.Y. 1966) (VIII. Discriminatory Rates (B)). In \textit{United States v. ASCAP}, Civ.
and operators can obtain performance rights for programming if alternative methods fail. The availability of per program licenses thus undermines cable programmers' and operators' arguments that converting to another licensing method entails the risk of failing to secure performance rights.245

d. Second Part of the Rule of Reason Analysis

The NCTA v. BMI court found that direct licensing, source licensing, or per program licensing are realistically available alternatives to blanket licensing for the music used in syndicated programming.246 Thus, blanket licenses sold to cable programmers and operators are not a restraint of trade and a violation of antitrust law.247

Under the rule of reason analysis applied in antitrust cases, if blanket licenses were found to be a restraint of trade, the court would have to determine whether the anticompetitive effects of blanket licenses outweigh their procompetitive effects.248 The NCTA v. BMI court stated that, even if it had found blanket licenses to be a restraint of trade, the anticompetitive effects of blanket licenses do not outweigh their procompetitive effects.249

The cable programmers and operators argued that the anticompetitive effect of blanket licenses is the elimination of price competition among musical compositions.250 The court said that, since source licensing and direct licensing are available alternatives, price competition could exist if cable programmers and operators chose to use these methods of licensing.251 Additionally, the cable programmers and operators failed to show that blanket licenses have inflated the price of musical compositions above what the price would be without blanket licenses.252

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246. See generally id.
247. Id. at *91.
250. Id. at *93.
251. Id. at *95.
252. Id.
The NCTA court found that a procompetitive effect of blanket licenses "is the tremendous efficiency of the blanket license, which, ultimately, reduces costs to buyers and maximizes output."\(^{253}\) Blanket licenses eliminate the costs of marketing songs individually, including negotiating prices, monitoring the performance of compositions, auditing licensees, and bookkeeping.\(^{254}\) The court noted that without blanket licenses, output would be reduced because individual composers and publishers could not afford to perform these tasks.\(^{255}\) In addition, blanket licenses promote the goals of copyright law by protecting copyright holders from infringement and providing them with compensation.\(^{256}\) Consequently, the procompetitive effects of blanket licenses, including the reduction of costs, the maximization of output, and the promotion of copyright law, outweighs the possible anticompetitive effect of a lack of price competition. Therefore, even if there were no realistically available alternatives to blanket licenses, they would not be a violation of antitrust law under the rule of reason analysis.

C. Copyright Law

1. Transmission Between a Cable Programmer and a Cable Operator

The Copyright Act of 1976 provides copyright owners the exclusive right to control the public performance of the copyrighted work.\(^{257}\) Cable programmers claimed that their transmissions to cable operators are not public performances within the meaning of copyright law and are, therefore, not copyright infringement.\(^{258}\)

In *BMI v. Lifetime Television*, the defendants questioned whether a transmission from a cable programmer to a cable operator was a public performance, because the only parties receiving the transmission were the operators, who then retransmitted it to their subscribers.\(^{259}\) In resolving this question, the *Lifetime* court relied on *David v. Showtime*/

\(^{253}\) *Id.* at *103.*
\(^{254}\) *Id.* at *104.*
\(^{255}\) *Id.*
\(^{256}\) *Id.* at *109.*
\(^{257}\) 17 U.S.C. § 106(4) (1988). The 1976 Copyright Act says that to perform a work publicly means to perform ... it at any 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 or to transmit ... a performance ... to the public, by means of any device or process, whether the members of the public capable of receiving the performance ... receive it in the same place or in separate places and at the same time or at different times.

*Id.*

The Movie Channel, in which the plaintiffs (ASCAP members) claimed that Showtime and The Movie Channel had infringed the plaintiffs' copyrights by publicly performing their music in their pay cable programming without authorization. Showtime and The Movie Channel are pay cable programmers who transmit their programs to cable operators, who then retransmit the programs to individual subscribers.

The court in David v. Showtime/The Movie Channel considered "whether the transmission of copyrighted material to an intermediary for ultimate transmission to the public falls within the scope of the Copyright Act." The court held that, as a matter of law, the transmission to the cable operator by a cable programmer is a public performance. The decision relied on the House Report accompanying the Copyright Act of 1976 in determining that the legislative intent was to broadly define "public performance." The court said that "Congress intended the definitions of 'public' and 'performance' to encompass each step in the process by which a protected work wends its way to its audience.

Using this analysis, cable operators were considered "public" and the transmission to them by cable programmers was a public performance. The result is that cable programmers and cable operators are independently liable for copyright infringement unless they purchase the rights to perform the musical compositions in the programming they transmit.

In Coleman v. ESPN, Inc., the court stated that, "transmissions by a cable network or service to local cable companies who in turn transmit to individual cable subscribers constitute 'public performance' by the net-
work under [The Copyright Act]." The court in NCTA v. BMI agreed with the decisions in David v. Showtime/The Movie Channel and Coleman v. ESPN, Inc. and held that the Disney and BET had publicly performed music controlled by BMI and were liable for infringement.

2. Misuse of Copyright As a Defense to BMI's Infringement Actions

Although copyright owners have the exclusive right to authorize public performances of their music, misuse of that right may be a defense to a copyright infringement action. For example, in BMI v. Lifetime Television, the defendant alleged copyright misuse as a counterclaim to BMI's infringement action. The court refused to grant BMI summary judgment because if the plaintiffs could show that BMI "used its legal monopoly power to force cable program services to purchase the blanket license at exorbitant prices[,] . . . this would constitute an illegal extension of BMI's monopoly." The court was unable to find a single copyright infringement case where recovery was denied due to misuse of copyright. Nevertheless, the court stated that recent decisions by other courts supported the doctrine of copyright misuse as an affirmative defense.

The court in NCTA v. BMI also recognized the defense of copyright misuse. However, the court rejected the defense as applied to BMI because the cable programmers and operators failed to show that BMI "illegally extended its monopoly or otherwise violated the public policy underlying copyright law." The cable programmers' and operators' defenses of, not only copyright misuse, but equitable estoppel and unclean hands, depended on a finding that BMI had violated either its consent decree or antitrust law. As discussed previously, cable

270. Id. at 15.
271. Id. at 16-17. The court found recovery on the issue of copyright misuse to be remote. Id. at 17.
272. Id. at 16.
273. Id.
275. Id.
276. Id. at *132-36.
programmers and operators failed to show that BMI had violated either its consent decree or antitrust law.277

V

The Remaining Problems

A. BMI's Excessive Bargaining Power in Negotiating Blanket License Fees

Cable programmers and operators have failed through litigation to stop BMI from increasing its fees. The only victory for the cable companies is that the courts have held that BMI’s and ASCAP’s consent decrees do not allow BMI and ASCAP to force dual licensing on cable programmers and operators. Cable programmers must still obtain performance rights to music used in original and syndicated programming and cable operators must obtain performance rights to music used in local origination programming. Therefore, pay cable programmers and cable operators must either purchase a blanket license at higher rates or find some other method of licensing in order to avoid continuing liability for infringement.

Two important differences between the BMI and ASCAP consent decrees give BMI an advantage in negotiating blanket licenses with cable programmers and operators. First, ASCAP’s consent decree requires ASCAP to issue a blanket license to any user of ASCAP’s music who applies for one.278 BMI’s consent decree does not contain such a provision. Thus, BMI can refuse to grant a blanket license if an acceptable fee cannot be negotiated.279 BMI can then sue parties who continue to use its music, after negotiations have broken down, for copyright infringement. This gives BMI a negotiating advantage, since the threat of a lawsuit could influence licensees’ decisions to accept higher fees.

The second important difference between the two consent decrees is that only ASCAP’s consent decree provides for a rate court.280 The rate court sets a reasonable license fee if ASCAP and the applicant cannot agree on one within sixty days of the beginning of negotiations.281 ASCAP is then required to offer a comparable fee to similarly situated applicants who apply after the court’s determination.282 ASCAP is thus strongly motivated to successfully negotiate with each applicant so that it

281. Id. (IX. Court Determination of Reasonable Fee (A)).
282. Id. (IX. Court Determination of Reasonable Fee (C)).
will not be bound by a court-determined fee for multiple applicants. Since BMI is not subject to a rate court, BMI does not have as strong a motivation to reach an agreement with each applicant.

B. ASCAP’s Ability to Increase Its Fees Based on Fees Negotiated by BMI

If cable programmers and operators agree to substantially higher fees for BMI’s blanket licenses, ASCAP may also be able to increase its rates. ASCAP’s rate court recently based its determination of a reasonable licensing fee for a cable company on BMI’s fee to that same company.\(^\text{283}\) Therefore, if cable programmers and operators agree to BMI’s higher rates, a precedent may be set for future rate court determinations of the reasonableness of ASCAP’s fees.

C. Cable Programmers and Operators Fear the Risk of Alternative Licensing Methods

Cable programmers and operators probably fear the risk of switching from blanket licensing to another licensing method. They are presumably concerned that changing their licensing method individually will be too costly and render them unable to compete with other cable programmers and operators. Then, if they wish to renew their blanket licenses, BMI will have even more bargaining power. The cable companies probably want the courts to declare blanket licenses illegal so that all cable companies would be forced to develop another form of licensing at the same time and none of them would be at a competitive disadvantage. However, since there is currently no basis for the courts to declare blanket licenses illegal, cable companies cannot rely on this strategy to change the industry standard.

VI Proposal

A. Organize Cable Programmers and Operators to Persuade Syndicators to Negotiate Source Licensing

Cable programmers and operators claim that source licensing is not a realistically available alternative to blanket licenses because only cable programmers and operators have any motivation to change the status quo.\(^\text{284}\) While this may be true, cable programmers and operators underestimate their power to effect such a change. Although syndicators might be unwilling to purchase the performing rights for music if only a


single cable company proposed doing so, if a large number of cable companies requested that syndicators negotiate performing rights when they negotiate synch rights, syndicators would probably comply in order to continue marketing their product to the cable industry.

The effectiveness of the cable industry’s bargaining power depends upon organization. The two national trade associations of cable system operators mentioned previously, the National Cable Television Association, Inc. (NCTA) and Community Antenna Television Association, Inc. (CATA), sued BMI for a declaratory judgment that BMI’s licensing practices are illegal.285 If these organizations can represent cable operators in litigation, they can also represent their members in negotiations with syndicators for source licensing.

Cable programmers and operators are also well organized in another sense. The ownership of cable programmers and operators is remarkably consolidated. Several multi-system operators (MSOs) own numerous cable operators, and some MSOs own or control some of the cable programmers.286 In fact, “fifteen of the largest MSO’s own 60 percent of all [cable operators] and the fifty largest own nearly 82 percent.”287 These large, powerful MSOs could pressure syndicators into source licensing of performing rights to music in syndicated programming. Together, cable programmers and operators, either in the form of trade associations, MSOs, or some other structure, have the necessary bargaining power to convince syndicators to negotiate source licensing in exchange for a reasonable price.

B. Petition the Justice Department to Amend BMI’s Consent Decree to Substantially Comply with ASCAP’s

The courts have held that source licensing is a realistic alternative to blanket licensing.288 The suits filed by the cable programmers and operators against BMI indicate that the cable programmers and operators would prefer source licensing.289 The facts indicate that cable programmers and operators could demand source licensing if they were so inclined. However, the cable programmers and operators chose to sue BMI rather than to pursue the source licensing alternative.

287. Id. at *75 n.16.
Cable programmers and operators may not have wanted the courts to declare blanket licenses illegal. Instead, they might simply have been resisting BMI’s demand for higher license fees in the hope that they could negotiate lower fees with BMI in settlement proceedings. Perhaps cable programmers and operators are not as interested in source licensing as they suggest, or at least not enough of them are interested to effectively pursue such a change. It may also be true that blanket licenses are still the most cost effective method for cable operators to cover their music licensing needs. Even with source licensing, cable programmers and operators would be required to negotiate performing rights for non-syndicated programming, such as local origination programming.

If this is true, and blanket licenses are still the most effective system, cable programmers and operators should petition the Justice Department to amend BMI’s consent decree to include the same limitations as those to which ASCAP is subject. Specifically, cable programmers and operators should request that BMI be required to issue a blanket license to all applicants and be subject to a rate court that would determine a reasonable licensing fee if the parties could not successfully negotiate a fee within a reasonable time.

The Justice Department recently denied a petition by BMI for a rate court. Although this is an era of deregulation, the Justice Department should reconsider and grant BMI’s petition, or a petition by cable programmers and operators, because requirements that BMI issue blanket licenses to all applicants and submit to a rate court have several advantages. These amendments would end long and expensive antitrust litigation. BMI would not be able to increase fees significantly above those charged by ASCAP, with a resulting precedent for ASCAP to rely upon in future appearances before a rate court. Furthermore, if cable pro-

290. Precedent exists for amending consent decrees. In Buffalo Brdst. v. ASCAP, the court said that “[t]he restraining nature of the ASCAP blanket license, as applied to movie theater operators, prompted the Government to re-open the 1941 ASCAP consent decree and secure in 1950 a significant amendment.” 744 F.2d 917, 922 (2d Cir. 1984), cert. denied, 469 U.S. 1211 (1985). The court also stated, “if the blanket license was serving to restrain trade unreasonably in violation of the antitrust laws, the stations’ remedy was to urge the Department of Justice to seek modification of the consent decree or to initiate a private suit.” Id. at 923 (citing United States v. ASCAP, 31 F.2d 117, 124 (2d Cir. 1964), cert. denied, 377 U.S. 997 (1964) (In re Application of Shenandoah Valley Brdst., Inc.)).


grammers and operators decided to experiment with alternative licensing methods, they would have the security of a guaranteed blanket license at a reasonable rate to fall back on.

Establishing a rate court for BMI would benefit all of the parties involved. Cable programmers and operators who have never held BMI blanket licenses could purchase them at a reasonable fee and avoid copyright infringement liability. Members of BMI would benefit because they would receive royalties from cable programmers and operators that have been unlicensed in the past. Potential members would not be deterred from joining BMI because royalty payments would be consistently distributed under blanket licenses if they were not constantly disputed and fees were not tied up in litigation. Thus the advantages of an amendment to BMI's consent decree to both the cable industry and BMI should convince the Justice Department to grant such an amendment.

VII

Conclusion

The cable industry has been ineffective in its reaction to BMI's and ASCAP's attempts to increase profits from cable television. Cable programmers and operators claimed that BMI's licensing attempts were illegal under its consent decree, antitrust law, and copyright law. The consequence of long, expensive, and unnecessary litigation of these claims will be an ultimate determination in BMI's favor. Instead, cable programmers and operators should organize and convince programming syndicators to change the industry standard for music performance rights from blanket licensing to source licensing. The cable industry has the bargaining power to persuade syndicators to negotiate source licenses in exchange for reasonable compensation for the service.

If cable programmers and operators prefer reasonably priced blanket licenses to source licensing, they should petition the Justice Department to amend BMI's consent decree to conform to ASCAP's consent decree. The Justice Department should grant the petition, even though the trend is towards deregulation, because the circumstances in this dispute warrant it. BMI's consent decree should require BMI to issue a blanket license to all applicants and to submit fee disputes to a rate court. These amendments would benefit all of the parties involved.