

COMMENT

MUSIC COPYRIGHT ASSOCIATIONS AND THE ANTITRUST LAWS*

ORIGIN, STRUCTURE, AND FUNCTION OF ASCAP

The Constitution has given to Congress the power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." While Congress early granted songwriters limited statutory control over their creations, it was not until 1909 that this power included the exclusive right to public performances for profit.¹ And it was 1917 before the composers were able to enforce this right.² The number of public amusement enterprises scattered throughout almost every city in the country prevented the individual copyright holder from policing and protecting his performance rights. It was also difficult for the music user to seek out the composer, or his successors or assignees, to secure performance rights.

The solution to this geographical dilemma began with the formation of the American Society of Composers, Authors, and Publishers (ASCAP) in 1914. Restaurant and hotel owners refused to pay royalties for the performance of music in their establishments for which they did not charge their customers. The concerted opposition of this group united a group of composers including Victor Herbert, John Philip Sousa, Gene Buck, George Maxwell, and copyright attorney Nathan Burkan, to form the Association. In 1914 Herbert brought an infringement action against a New York restaurant owner. On appeal, the United States Supreme Court, through Mr. Justice Holmes, rejected the owner's argument that the music was not performed for profit, but was only incidental to the restaurant business which derived its income solely from the sale of foods and beverages. He reasoned

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1. 35 STAT. 1075 (1909), 17 U. S. C. 647, § 1 (1947):

§ 1: Exclusive rights as to copyrighted works. Any person entitled thereto, upon complying with the provisions of this act, shall have the exclusive right:

(a). To print, reprint, publish, copy and vend the copyrighted work; . . .

(e). To perform the copyrighted work publicly for profit if it be a musical composition and for the purpose of public performance for profit; and . . . to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced.

In England the performing rights as separate rights were recognized in 1842. SHAFER, *MUSICAL COPYRIGHTS*, 277 (1st ed. 1939).

2. *Variety*, Jan. 5, 1949, p. 172, col. 1.

that "If music did not pay it would be given up. If it pays it pays out of the public pocketbook. Whether it pays or not, the purpose of employing it is profit, and that is enough."³

During the next five years ASCAP brought scores of infringement suits as it beat down concentrated opposition.⁴ Simultaneously, it issued licenses to hotels, restaurants, night clubs, taverns and theatres.⁵ By the early twenties the Society had achieved its goal of licensing the entire music using industry.⁶ The battle was a losing one financially until 1921, although the officers were unsalaried and Nathan Burkan gave his legal services free.⁷ Distributions to members were determined by the number of times their music was played or sung, and the cost of tabulation was so high that nothing remained for the composers. In 1921 ASCAP evolved a new plan of distribution, the heart of which was a new classification system requiring less expense for tabulation. Twelve song writers appraise themselves and their colleagues quarterly on the basis of popularity and prestige, the merit of their works, seniority, and the relative number of times their compositions are performed. Popularity is determined by a survey of compositions played during a specified period. Twelve publisher members use similar standards to classify themselves and their co-publishers. Any member dissatisfied with his rating can appeal to a Board of Appeals and from there to the entire Board of Directors, which is composed of twelve authors and composers and twelve publishers. The composer and publisher groups each receive one-half the annual net income. Under this new system ASCAP has been able to assure its members substantial royalties.⁸ The annual distributions varied from three to seven

3. *Herbert v. Shanley*, 242 U. S. 591 (1917).

4. *5,000,000 Songs*, 7 *Fortune* 27, Jan., 1933.

5. Allen, *The Battle of Tin Pan Alley*, 181 *Harpers* 514, 517, Oct., 1940. Unrestricted use of ASCAP tunes is permitted after payment of blanket license fees which are computed on the basis of such variables as gross receipts, rooms, seating capacity, type of entertainment (floorshow, dancing, vocalists, etc.), admission or cover charge, hours, and frequency of music performance.

6. By prosecuting infringement suits, ASCAP had compelled the music users to accept licenses. *Irving Berlin Inc. v. Daigle*, 31 Fed. 832 (5th Cir. 1929); *Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co.*, 36 Fed. 354 (7th Cir. 1929) (dance halls); *Shanley v. Herbert*, 242 U. S. 591 (1917) (restaurants). Also see *5,000,000 Songs*, *op. cit. supra* note 4, at 29. Currently, ASCAP has issued about 15,000 licenses covering the performing rights of the copyrighted music of its members to hotels, restaurants, night clubs, and other places of entertainment. Correspondence from Herman Finkelstein, resident counsel for ASCAP—hereafter cited Finkelstein correspondence.

7. *5,000,000 Songs*, *op. cit. supra* note 4, at 29.

8. Distribution to writer members ranges from \$20 per year in the lowest class to \$19,000 in the highest class. Some members of this top class are: the Victor Herbert estate; the John Philip Sousa estate; the Lorenz Hart estate; the Vincent Youmans estate; the Jerome Kern estate; Irving Berlin; Oscar Hammerstein II; Richard Rodgers; Sigmund Romberg; Cole Porter; and Hoagy Carmichael (Finkelstein correspondence).

A top publisher receives approximately \$200,000 per year. *Variety*, Apr. 9, 1949, p. 19, col. 1.

Moreover, should a once successful writer fall into misfortune, ASCAP has made

million dollars between 1937 and 1947, and reached an all-time height of eight and one-half million dollars in 1948.

Although ASCAP is the largest of the music copyright associations, other groups of composers have been formed in increasing numbers. In 1940 the National Broadcasters Association, after failing to reach a licensing agreement with ASCAP, formed Broadcast Music Incorporated (B.M.I.). This organization has licensed virtually all of the radio stations in the United States and has extended its activities throughout the musical entertainment industry.⁹ It follows the ASCAP pattern in dealing with music users; but royalties to its members are determined by the number of radio performances of their compositions.¹⁰ The growth of B.M.I. is evidenced by a log analysis published in 1949. Standard radio performances for 1948 of songs licensed by B.M.I. increased 30.6 per cent over 1947 performances, with the per station rise averaging 4.2 per cent.¹¹ B.M.I. now has over one thousand affiliated publishers and its catalogue includes approximately one hundred and seven thousand copyrighted works, compared to ASCAP's more than two thousand members and catalogue of well over two million copyrighted works.¹²

Other musical copyright associations operating in the United States are Society of European Stage, Authors and Composers, Society of Jewish Composers, and a newly organized group, Israel Composers, Authors, and Publishers, Inc. The blanket licensing system is utilized by all of them.

Copyright ownership of performing rights and group collection of royalties was established in Europe long before the founding of ASCAP. Many of the foreign groups are officially recognized as the national protectors of music rights and, though not subsidized, are aided in their business routine by government agencies.¹³ ASCAP has entered into reciprocal agreements with many of these foreign associations, whereby the contracting parties license

this pledge: "No member of ASCAP who writes successful music or anyone dependent upon him, shall ever want." The death in a charity ward of Stephen Foster is often cited as an example of what might occur if a centralized licensing and collection system did not exist. The Society pays pensions and medical, funeral, food, rent and insurance expenses. All dues paid by members are used for relief, and this is supplemented by substantial contributions from the funds received as license fees. The dues of writer members are \$10 per year, while publisher members pay \$50 annually. (Finkelstein correspondence). The relief committee established by the Articles of Association consists of one author, one composer, and one publisher.

9. Correspondence from Robert J. Burton, Vice President of B.M.I.

10. *Ibid.*

11. *Variety*, Apr. 9, 1948, p. 20, col. 4.

12. More than 2000 writers and over 350 publishers are listed in the ASCAP DICTIONARY. As long ago as 1941 ASCAP's catalogue included approximately two million publications. *VARIETY RADIO ANALYSIS VI*, 1940-1941.

13. Cohn, *Music Radio Broadcasters and the Sherman Act*, 29 *Geo. L. J.* 407, 437 (1941).

and collect for the performance of music controlled by the foreign association.¹⁴

With an understanding of ASCAP's structure, we may now examine its activities in specific music using industries.

RADIO

In the early twenties, when ASCAP had been reluctantly accepted by the bulk of the entertainment field, a new medium—radio—appeared. The Society did not anticipate that radio would become its greatest source of revenue. Nor did ASCAP suspect that the radio industry, for the succeeding twenty years, would be the most vehement opponent of its supremacy in the music licensing field. When radio was struggling for financial stability, ASCAP gave licenses to fledgling stations free or for a nominal sum. But when business became aware of the potentialities of radio advertising and began to pour money into the broadcasters' coffers, the Society sought to share in the additional profits. A new legal issue was presented: What was the copyright status of music performed via the air waves? Despite ingenious arguments advanced by radio spokesmen, broadcasting was found to constitute performance for profit and the imposition of license fees was upheld.¹⁵

In 1933 ASCAP charged four per cent of a radio station's gross income for a blanket license, which permitted the station to use any tune in the ASCAP catalogue. In 1934 a five-year contract raised the fee to five per cent.¹⁶ Negotiations for a new contract in 1940 were deadlocked when ASCAP for the first time demanded a license fee from the national net-

14. Government proceedings against ASCAP in the Federal District Court for the Southern District of New York resulted in a consent decree on March 14, 1950 which required ASCAP to refrain from membership in any international organization of societies which would help ASCAP to maintain a monopoly of foreign music in this country. ASCAP was also required to terminate arrangements giving it exclusive control of a foreign country's music or compelling societies to deal exclusively with ASCAP. *New York Times*, Mar. 15, 1950, p. 34.

15. ASCAP at first succeeded in collecting infringement damages from the sponsor of a radio program. *M. Witmark and Sons v. L. Bamberger & Co.*, 291 Fed. 776 (D. N. J. 1923). Shortly afterward broadcasting stations were classified as "contributory infringers" and it was held that a radio broadcast was a public performance for profit. *Jerome H. Remick & Co. v. American Automobile Accessories Co.*, 5 F.2d 411 (6th Cir. 1925), *cert. denied*, 269 U. S. 556 (1925). The following year the broadcaster's liability was extended to include musical renditions not played in the broadcaster's studio and not under his supervision, as when music is "aired" from a dance hall or an athletic event. *Jerome Remick & Co. v. General Electric Co.*, 16 F.2d 829 (S. D. N. Y. 1926). See 2 SOCOLOW, *LAW OF RADIO BROADCASTING* 1129 (1939). In *Buck v. Jewell-LaSalle Realty Co.*, 283 U. S. 191 (1931), the Court held that making available to hotel guests the reception of a copyrighted musical composition which had been broadcast from a radio station constituted a performance of the composition within the meaning of the copyright act, even though no choice of selection was given to the hotel proprietor. Mr. Justice Brandeis stated: "Intention to infringe is not essential under the act." *Id.* 198.

16. WHO USES MUSIC AND WHY. ASCAP, N.Y.C. (1934).

works, while reducing the fee for smaller individual stations. For ten months the radio stations broadcast non-ASCAP music. The Mutual Broadcasting System then grew doubtful of the aims of B.M.I. and signed with ASCAP, charging that the entire episode was an attempt by other networks to monopolize the radio industry.¹⁷ Shortly thereafter, the remaining networks came to terms with ASCAP and agreed to pay 2.75 per cent of their gross intake instead of 7.5 per cent which was originally demanded. The nine-year contract was automatically renewed in 1949.¹⁸

TELEVISION

Currently ASCAP is confronted with the problem of devising an acceptable scale of fees for the latest entrant in the entertainment field. Television operated under a dollar-a-year blanket license from ASCAP until 1949, when the contract expired. Since then thirty and sixty day extensions have been agreed upon pending the negotiation of a permanent contract. ASCAP is chiefly concerned with the decline of radio receipts since the appearance of the new competition and feels that this loss should be borne by television. Television representatives reply that television is still operating at a deficit and that operating costs must be kept at a minimum. Both parties, however, are confident of agreement in the near future.¹⁹

MOTION PICTURES

Before the introduction of sound in the motion picture industry, music was supplied by either a piano player or an orchestra. Theatre owners at first refused to pay any royalties for performance rights to the compositions. After ASCAP's successful campaign,²⁰ the theatre owners capitulated. In 1923, an exhibitor's association accepted a blanket license form of agreement under which fees were correlated to seating capacity.²¹

New problems arose with the introduction of sound in 1928. Eighty per cent of all music recorded in films is controlled by ASCAP.²² Until

17. MUTUAL BROADCASTING SYSTEM'S WHITE PAPER (1942).

18. *Variety*, Jan. 12, 1949, p. 63, col. 3.

19. *Variety*, Apr. 6, 1949, p. 41, col. 3. The 1950 consent decree requires ASCAP to offer television stations a single license covering all performances of network telecasts. This decree was entered in the Federal District Court for the Southern District of New York on March 14, 1950. *New York Times*, March 15, 1950, p. 34.

20. (Finkelstein Correspondence).

21. On the basis of twenty-five compositions per film and six shows a day for every day in the year, the fee charged averages about one mill per musical composition performance in a 500-seat house.

Payments made to ASCAP per theatre from 1917 to 1949

| <i>Seats</i> | <i>1917-28</i> | <i>1928-34</i> | <i>1934-49</i> |
|--------------|----------------|----------------|----------------|
| 500 | \$30 | \$30 | \$30 |
| 800 | 60 | 80 | 80 |
| 1000 | 75 | 100 | 150 |

22. *M. Witmark & Sons v. Jensen*, 80 F. Supp. 843, 848 (D. Minn. 1948).

recently, the Society licensed motion picture producers only to record the music, expressly reserving performance rights. The producers, accordingly, stipulated that the pictures could be exhibited only in theatres licensed by ASCAP to perform the music.²³ In their dealings with non-ASCAP composers, the producers insist upon acquiring performance rights along with the synchronization rights.²⁴ The exhibitors feel the same course of dealing should be followed with ASCAP composers, thus relieving the exhibitors from acquiring ASCAP licenses. But in either case, one may expect the theatre owners to bear the ultimate cost of performance rights.

The relations between ASCAP and motion picture producers have not always been harmonious. In 1924 the producers spent one hundred thousand dollars in an unsuccessful attempt to organize their own counter-part to ASCAP. Subsequently, many producers purchased established music publishing firms which were members of ASCAP. In 1935 Warner Brothers launched a new type of competition when its subsidiary publishers resigned from the Society, believing they could collect higher receipts from non-movie performances through their own efforts. The major radio stations, rather than sign separate contracts, omitted Warner music, even though it comprised over twenty per cent of ASCAP's previous catalogue. Warner's returned to the ASCAP fold within eight months, after theatre owners complained that Warner's musicals were failures without the benefit of advance radio advertising. Moreover, the company's sales of sheet music and phonograph royalties had suffered. At the present time the motion picture producers, as owners of publisher members of ASCAP, share in the funds collected by ASCAP from all sources. They receive thirty-seven per cent of the one-half net proceeds allotted to publisher members of the Society.²⁵

STATE LEGISLATION

After fighting a losing and costly battle in the courts, where statutory minimum damages were \$250 for each infringement,²⁶ the music users turned

23. *Alden-Rochelle v. ASCAP*, 80 F. Supp. 888, 892 (S. D. N. Y. 1947).

24. *Id.* at 893.

25. *Id.* at 892.

26. 37 STAT. 489 (1912), 17 U. S. C. § 101(b) (1947). Full costs are allowed, and the court may award to the prevailing party a reasonable attorney's fee as part of the costs, 17 U. S. C. § 116 (1947). See Cohn, *supra* note 13, at 415:

This provision is not a source of revenue to ASCAP. In the first 27 years of its history ASCAP collected only \$8,800. In infringement suits, its chief value is the deterrent effect it has upon those who would otherwise attempt non-discoverable infringements. If prior to 1941, the average radio station broadcast for one day without a license from ASCAP, it would be liable for infringement damages of about \$50,000, that is on the average basis of using 200 compositions a day.

to Congress.²⁷ The Duffy Bill, introduced in 1935, would have repealed the minimum damages clause and placed on the individual composer the burden to prove actual damage.²⁸ The bill failed of enactment, however, and the broadcasters spearheaded an attack against ASCAP through the state legislatures.²⁹ Here they met with more success and, in 1937, statutes outlawing or materially restricting ASCAP and similar combinations were passed in five states.³⁰ As of 1946, two additional jurisdictions had passed such legislation.³¹ In six states the activities of copyright owners and their assignees are restricted or regulated indirectly by the imposition of drastic taxes.³² Compar-

27. Allen, *supra* note 5, at 520 (1940): "Under pressure from radio stations and other ASCAP customers, bills to limit the Society's power by change in the copyright laws have been introduced in virtually every session of Congress."

28. S. 2465, 74th Cong., 1st Sess. (1935). The variables one would have to take into consideration would be such intangibles as past and present popularity of the composer, popularity of the song, volume of the broadcasting station, size of audience, manner of presentation (sung solo, choir, band, symphony, etc.).

Minimum damages are discussed in: Note, 37 COL. L. REV. 487 (1937); Note, 51 HARV. L. REV. 918, 920 (1938); see Pforzheimer, *Copyright Reform and the Duffy Bill*, 47 YALE L. J. 433 (1938).

Affidavit of Gene Buck, Transcript of Record 93, 127, *Gibbs v. Buck*, 307 U. S. 66 (1939); New York Herald Tribune, December 26, 1940, p. 12, col. 3; Harpers, *supra* note 5, at 520.

29. National Association of Broadcasters has been charged with being the chief proponent of these bills. See Note, 53 HARV. L. REV. 458, 459, n. 13 (1940). These early statutes resulted from systematic, thorough and expensive pressure programs by music users. State legislators were generally unfamiliar with the function and purpose of the copyright associations.

30. Laws of Florida (1937), c. 17807, p. 204; Laws of Montana (1937), c. 90; Laws of Nebraska (1937), c. 138; Tennessee Public Acts (1937) § 7912(5); Laws of Washington (1937), c. 218.

31. Laws of Alaska (1939), c. 13; Laws of Kansas (1943), c. 212.

32. Laws of Delaware (1937) Vol. I, c. 14 §§ 15 and 61; Laws of Georgia (1935) No. 216; LA. GEN. STAT. ANN. §§ 8674.1-8674.3 (Supp. 1939); Laws of Mississippi (1944), c. 137; Laws of Vermont (1939) No. 32; WIS. STAT. § 17701 (Brossard, 1937), amended in part, Laws of Wisconsin (1937), c. 247, Laws of Wisconsin (1941), c. 177.

While recognizing some overlap one may classify these statutes into four groups. The original Nebraska type of act prohibits the activities of the associations entirely, and it requires that within the confines of the state the benefits from the federal copyright laws must be derived on an individual basis. In addition, it provides that when copyrighted musical compositions are sold they must have printed upon them a price to be paid for all conceivable uses of the work.

The Washington-type statute provides that the combination may function in the state if it issues "licenses on rates assessed on a per-piece system of usage." Furthermore, the association is required to file a complete list of copyrighted compositions annually, accompanied by a list of royalties. Monthly additions and revisions are required. The name and date of the copyright on each separate composition must be listed, together with the names of the publisher and the present owner. Authors and composers who act individually are exempt from the filing requirement. The original Montana Statute differed from this only in that a filing fee of two cents per composition was charged.

Georgia, Louisiana, and Mississippi impose a large lump-sum occupational or privilege tax upon the business of collecting license fees within the state. Individual copyright holders are exempt here also.

Lastly, the Wisconsin approach requires any person, firm, association, or corporation, other than the true and original composer of a copyrighted number, which seeks to issue

able proposals are still being advanced in other states.³³ ASCAP resorted to the courts to enjoin enforcement of the Florida and Nebraska acts, but the United States Supreme Court vacated the injunctions imposed by the lower federal courts on the ground that the provisions challenged by the injunction proceedings were valid and complete in themselves. The Court declared that those statutory provisions found invalid by the lower courts should not invalidate the entire act until the state court had an opportunity to construe the statute.³⁴

After these early successes of the music users, however, a counter-trend developed. In 1941 the Montana legislature repealed its 1937 act which had declared copyright combinations unlawful.³⁵ That same year the Florida legislature passed an act allowing combinations of music copyright owners to contract with theatre owners for the performance of copyrighted music, despite earlier acts outlawing such combinations. The new act provides for a three percent tax on ASCAP's gross receipts.³⁶ Two years later the Tennes-

licenses for the public rendition of such numbers, to first obtain a license from the State, then file certain detailed information with the Secretary of State, and further, to pay an annual tax based on the gross receipts received by it from such license in the state. The same act provides that investigators employed by such person, firm, etc. shall also pay a fee. Violation of either of these provisions is usually a misdemeanor punishable by fine. The scales imposed by the various states using this form range from three to twenty-five per cent of the annual gross receipts collected in the state by the association. This last type appears to be the most popular.

33. A bill called "The Anti-Music Monopoly Law" was introduced in the last session of the Indiana legislature and would outlaw any licensing association whose membership is composed of owners or assignees of musical copyrights. S. B. No. 68, Jan. 21, 1949. It resembles the statutes passed in Florida and Nebraska in 1937. In a proposed Senate Concurrent Resolution, which was not adopted, the 86th General Assembly of the State of Indiana would have memorialized the Congress of the United States to amend the Copyright Act of 1909 to provide that a person who has a copyright on a musical work and who offers it for sale to the public shall not have the exclusive right to perform the copyrighted work publicly for profit, nor be entitled to receive any fee or price in addition to the purchase price, for permission to use the composition in a public performance for profit, nor be entitled to any penalty if the composition is so used without the permission of the copyright proprietor.

A bill introduced in the Minnesota State Senate on March 28, 1949, would outlaw all blanket licensing agreements and would require registration of all copyrighted music used in the state, and a performance fee schedule would have to be listed. The proposal also included a three per cent gross receipts tax on all performance fees collected within the state.

34. *Watson v. Buck*, 313 U. S. 387 (1941) and *March v. Buck*, 313 U. S. 406 (1941). In *Giboney v. Empire Storage and Ice Co.*, 93 U. S. 649 (1949) the Court recognized the power of the states to prohibit competing dealers and their aiders and abettors from combining to restrain freedom of trade. A state, however, cannot entirely deprive a copyright holder of the right to exact fees for the use of his works.

35. Laws of Montana (1941), c. 40.

36. Laws of Florida (1941), c. 20991.

see Act was held unconstitutional and repealed,³⁷ and in 1945 the 1937 anti-ASCAP legislation of Nebraska was replaced by a statute requiring all copy-right licensors to file with the Secretary of State a complete copy of each licensing contract. No filing fee was required, but an annual gross receipts tax of three per cent was imposed on the income from "all such sales, licenses or other disposition of performing rights."³⁸ With regard to this statute, one writer remarked:

. . . without an over-all collection agency to deal with, music users found it impossible to keep track of the thousands of copyrighted tunes and pay each individual composer and publisher. Hence, the music users found themselves face to face with the threat of costly copyright infringement suits running into the thousands. One stiff damage suit and a small user might be out of business.

So it was by weight of numbers rather than by size that the smaller music interests, mainly tavern keepers and concessionaries, were able to overwhelm those who were still out after ASCAP's scalp and get a repeal bill passed.³⁹

But the Mississippi legislature, after rejecting anti-ASCAP legislation in 1940, enacted in 1941 a statute authorizing and empowering the board of supervisors of the several counties in the state, along with the municipalities, to collect a one thousand dollar privilege tax from each collecting agent for music copyright holders.⁴⁰ The act, if utilized, would prohibit ASCAP's activities.

FEDERAL ANTITRUST LAWS

A copyright is intended to be a complete individual monopoly. But have ASCAP and similar associations, by combining individual monopolies, become violators of the Sherman Antitrust Act?⁴¹ We have seen that music users, to

37. The 1937 Act was declared unconstitutional in *Buck v. Harton*, 33 F. Supp. 1014 (D. C. 1940). The decree was entered on the written consent of Harton. The Act was then repealed by Laws of Tennessee (1943), c. 12, p. 67.

38. Laws of Nebraska (1945), c. 139, pp. 439-441. See *Remick Music Corporation v. Interstate Hotel Co. of Nebraska*, 58 F. Supp. 523 (D. Neb. 1944) where eleven individual copyright holders who complied with the restricting act of 1937 sued night club, dance hall, roller rink, and hotel owners and cooperators for infringement on their copyrights. They recovered counsel fees in addition to the minimum statutory damages. This case was probably the immediate cause of the repeal. The court at p. 539 says:

. . . ASCAP, an outlaw in Nebraska, may be, in fact is, a lawful society elsewhere and is even regarded in other states as a practical meritorious device by way of accommodation for the purpose of its erection.

39. *Business Week*, May 5, 1945, p. 91.

40. Laws of Mississippi (1944), c. 137.

41. Section 1 of the Sherman Anti-Trust Act, 15 U. S. C. § 1, provides in part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared illegal." Section 2 is aimed at monopolizing or attempting to monopolize.

In holding that the right to perform musical compositions for profit is embraced within the Sherman Act one court said:

avoid liability for copyright infringement, were compelled to obtain from ASCAP licenses for the public performance of copyrighted music for profit. When judicial decisions were adverse to the music users' efforts to decapitate ASCAP, and legislative attempts were only partially successful, they looked to the Sherman Act as their last hope for success.⁴² While ASCAP was strengthening its bargaining position and increasing its rates, the users tenaciously insisted that the federal antitrust laws be invoked against the Society. In 1934 the Department of Justice brought proceedings against ASCAP.⁴³ The petition complained of monopolistic conduct and of several practices restraining trade, two of which were:

. . . all competition among members of (the) . . . Society . . . which, but for the illegal combination and conspiracy . . . would have existed, has been eliminated by said illegal combination and conspiracy.

. . . (the) Society (has) destroyed the incentive of broadcasting stations to use the musical compositions of composers . . . who are not members of the Society and have prevented non-members of defendant Society from receiving the compensation for the rights of public performance of their musical compositions, which they would otherwise receive, and have limited and restricted the popular demand of the listening public to musical compositions controlled by defendant Society.

ASCAP was termed "a self-perpetuating body dominating the music indus-

. . . the act says nothing expressly about rights or commodities. The statute is aimed at restraints of trade and commerce, and not at the "subject" of the trade or commerce. Rights may be and often are the subject of trade and commerce, and the Sherman Law limits restraints of trade in "rights" as well as in commodities.

Buck et al. v. Gallagher et al., 36 F. Supp. 405, 407 (D. Wash. 1940). Jurisdiction postponed under name of *Buck v. Case*, 315 U. S. 780 (1942).

The English counterpart of ASCAP has been held not to be in violation of the general common law notions of monopoly and restraint of trade. *Performing Right Society, Ltd. v. Magistrates and Councillors of the City of Edinburg* (1922) S. C. 165, 59 Sc. L. R. 194; ISAACS, *LAW OF THEATRE, MUSIC-HALLS, CINEMA* 297 (1927).

42. In infringement suits brought by ASCAP one defense relied on was that plaintiff was acting in restraint of trade. This defense has usually been rejected. *Harms v. Cohen*, 279 Fed. 276 (E. D. Pa. 1922); *Buck v. Newsreel Inc.*, 25 F. Supp. 787 (D. Mass. 1938). But in recent years the defense has been recognized. In *M. Witmark & Sons et al. v. Jensen et al.*, 80 F. Supp. 843 (D. Minn. 1948), equitable relief against copyright infringement was denied where the grant of such relief would serve to continue practices by copyright owners which are in violation of the anti-trust laws and which serve to extend their copyright monopolistic control beyond its proper scope. This case has been appealed to the Court of Appeals for the Eighth Circuit. In *Buck v. Gallagher*, 36 F. Supp. 405 (D. C. 1940), ASCAP was denied the right to question the constitutionality of the Washington statute because, as a violator of the antitrust laws, it had not come into court with clean hands.

43. *United States v. American Society of Composers, Authors and Publishers*, Dist. Ct., S. D. N. Y. No. E 78-388 (1934). A previous suit, *Pennsylvania Broadcasting Co. v. Buck*, filed in the United States District Court, S. D. N. Y., September 7, 1933, was dismissed when the government's suit was filed. See Cohn, *supra* note 13, at 424.

try and radio" and was charged with unlawfully and unreasonably maintaining prices and with licensing music users on terms and conditions arbitrarily fixed by the Society. Four days after the case came to trial, it was adjourned on motion of the government's attorneys. When, in 1939, ASCAP sought to impose upon one class of users an increase in its rates,⁴⁴ complaints were again filed with the Department of Justice, and the 1935 suit was re-activated. And in 1940 criminal proceedings were instituted against ASCAP and B.M.I.⁴⁵

In the civil action ASCAP was forced to accept a consent decree in 1941.⁴⁶ Under the compromise ASCAP and B.M.I. were no longer to be the exclusive agents for their members if any member preferred to deal individually with music users. The associations were enjoined from executing performance agreements entailing price discrimination between similarly situated licensees, from requiring for performances in commercial broadcasts payments of license fees based upon a percentage of the income obtained by the broadcasters from non-licensed performances, from requiring for performances in sustaining program fees unrelated to actual performances of licensed compositions or to the number of programs in which such compositions are used, from requiring more than one license for network or transcription broadcasts, and from improperly restricting the performance of copyrighted compositions by the licensees. The broadcasters were given the option to obtain a license on either a blanket agreement basis or on a per-piece or per-program basis. Also, ASCAP was compelled to eliminate the self-perpetuating power of its Board of Directors by giving to the general membership the right to elect new officers. Thus, while the Board retained power to distribute royalties, newcomers and low rating members were assured of some degree of equitable treatment. The requirement for membership was reduced from five published songs to one.⁴⁷ After a plea of *nolo contendere* to the criminal prosecution,

44. *Supra* p. 171.

45. Eight charges were made: 1. Illegal pooling of copyrights to monopolize supply; 2. discriminating against outside composers; 3. discriminating against users of music; 4. withholding music from publication to exact fees not permitted by the copyright laws; 5. illegal price fixing; 6. restraining composers in their right to bargain for the sale of their own music; 7. requiring users of music to pay for tunes on programs in which no music is played; 8. mutual boycott by ASCAP and the broadcasters in an attempt by each to obtain control over the source of music. Department of Justice Release, December 27, 1949.

46. CCH Trade Reg. Reporter, par. 52, 533 (1941). B.M.I. had reached an earlier agreement with the government. *Id.* at par. 52, 816.

47. Consent decree entered March 4, 1941 in the United States District Court for the Southern District of New York:

Defendant . . . shall not require as a condition precedent to eligibility for author or composer membership in the Society the regular publication of more than one musical composition or writing by any person who regularly practices the profession of writing music and the text or lyrics of musical works.

CCH Ct. Dec., par. 52, 533.

finances totaling \$35,250 were imposed upon ASCAP and forty-five of its officers, directors, and members.

Subsequently when a music user sought a declaratory judgment to determine the validity under Florida laws of his contract with ASCAP, the court, after discussing the substance of the 1941 decree, said:

The price-fixing, if it be called such, as is reflected by the contract under consideration, is not such as to be in restraint of trade, because there is no monopoly. It is specifically provided that the users of the material which is licensed by the Society may contract directly with the owner of the copyright or may otherwise acquire the right to use the material as such contracting party may see fit.

The creation of the Society appears to have been in the interest of authors, composers, and publishers and they are all members of said Society, the policy of which is controlled by the election of its officers. Such a society may become an instrument of oppression and its affairs might be so conducted as to violate our statute . . . , and to violate the Federal Antitrust Laws. But the record here shows that the affairs of the Society are not so conducted.⁴⁸

The language is especially significant because it emanates from a court in a state which was among the first to brand ASCAP as a monopoly acting in restraint of trade.

Rarely do any users apply for a per-program or per-piece license agreement despite the consent decree which required that such agreements be available.⁴⁹ This and the fact that B.M.I., though brought about by the instigators of the 1941 litigation, has also instituted the blanket licensing system substantiates the claims that as a practical matter these organizations and the licensing system utilized are essential to the musical entertainment industry as it is now constituted. It is probable that the entire dispute centers about the rate scale.

In 1947 ASCAP, through its president, Deems Taylor, announced a new method of computing license fees for theatres. The formula, similar to that in operation in other countries,⁵⁰ involved the scale of admission prices instead of seating capacity. The net effect meant a general increase in fees. In some cases the boost was as high as 1200 to 1500 per cent. ASCAP contended that a portion of the profits accruing from increased admissions to movie houses throughout the country should be passed on to its members.⁵¹ This proposal proved to be the final straw. The exhibitors, individually and through their associations, objected vociferously; and at once, *Alden-Rochelle*,

48. *Palm Tavern Inc. v. ASCAP*, 15 So.2d 191, 193 (1943).

49. *Alden-Rochelle et al. v. ASCAP et al.*, F. Supp. 888, 893 (S. D. N. Y. 1948).

50. *New York Times*, August 22, 1947, p. 9.

51. *Ibid.*

Inc. v. ASCAP, a case dormant for five years, was reactivated.⁵² Though ASCAP shortly thereafter withdrew the proposal, the litigation continued.

Theatre owners, 164 plaintiffs operating 200 motion picture theatres, sought treble damages and injunctive relief for alleged violations of the federal antitrust laws by the Society, its officers, and members. The case was tried early in 1948 and the court held that ASCAP's activities constituted a violation of the antitrust laws. It was said that reasonableness of the licensing fee was insignificant since it in no way diminished ASCAP's control over the performance of musical compositions in motion picture films which enabled the organization to "sound the death knell" to any theatre in the United States. What may prove to have the greatest impact was the following portion of the district court opinion :

Almost every part of the ASCAP structure, almost all of ASCAP's activities in licensing motion picture theatre pictures, involved a violation of the antitrust laws. Although each member of ASCAP is granted by the copyright law a monopoly in the copyrighted work (it) is unlawful for the owners of a number of copyrighted works to combine their copyrights by any agreement or arrangement, even if it is for the purpose of thereby better preserving their property rights. (cases cited) The result of such a combination is to add to the monopoly of the copyright in violation of the patent cases involving tying clauses.⁵³

Money damages were denied the exhibitors because they failed to prove any damages, but the court held that ASCAP's power was such a threat to the exhibitors as to entitle them to injunctive relief.⁵⁴ The court concluded that ASCAP should ". . . divest itself of all right of public performance for profit through the exhibition of motion picture films, of musical compositions which have been synchronized with motion picture films, and to assign said performance rights to the owners of the copyright of said musical compositions."⁵⁵ Settlement of decree was delayed. The court, at a subsequent hearing to determine the scope of injunctive relief, felt that divestiture would be difficult to enforce and productive of further litigation, and substituted a provision

52. *Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888 (S. D. N. Y. 1948). This opinion was withdrawn by order of the court and an amended judgment was issued by Judge Leibell on November 13, 1948. ASCAP was enjoined from enforcing or attempting to enforce motion picture performance rights as long as they act as an illegal combination and monopoly in violation of the antitrust laws. They were enjoined from obtaining any motion picture performance rights of any musical composition and the Society must grant synchronization rights and performing rights simultaneously to the movie producer, while a specific provision warns against collusion aimed at exhibitors between ASCAP and producers. 80 F. Supp. 900 (S. D. N. Y. 1948).

On December 13, 1948, the United States Court of Appeals for the Second Circuit, by Judges Learned Hand, Chase, and Frank issued an order granting a stay pending appeal.

53. *Alden-Rochelle v. ASCAP*, 80 F. Supp. 888, 893 (S. D. N. Y. 1948).

54. *Id.* at p. 898.

55. *Id.* at p. 900, n. 2.

restraining ASCAP, so long as it remained an illegal combination, from enforcing motion picture performance rights to any musical compositions.⁵⁶ The members of ASCAP were also restrained from enforcing these performance rights. Another reason given by the court for denying divestiture was that the United States had filed petitions against ASCAP and might seek the same relief.⁵⁷ The court was of the opinion that the latter proceeding was the proper place to determine the propriety of divestiture. Other provisions of the decree compelled ASCAP to license synchronization and production rights to the musical compositions simultaneously, so as to allow the exhibitors to deal directly with the film producers in procuring licenses for musical productions.⁵⁸

In finding a violation of the antitrust laws, the court relied heavily upon prior antitrust proceedings involving patent licensing agreements imposed by several patentees who combined their patents for this purpose. It is significant to note that most of the condemned agreements contained price-fixing clauses, restricting prices at which the licensee could sell the patented product.⁵⁹ Under ASCAP licensing agreements, there is no price-fixing clause requiring the maintenance of minimum or fixed prices when utilizing the licensed music.

Disregarding the differences between the condemned patent licensing agreements and those of ASCAP, there is a basic difference between patents and copyrights which renders the patent decisions of questionable applicability. A leading copyright authority declares that "The copyright protects the intellectual product of the author and if the same can be expressed in a plurality of totally different manners, a plurality of copyrights may result, and no infringement will exist." But "one may infringe a patent by the innocent reproduction of the patented machine, even though he arrives at the same result by an independent road."⁶⁰ Because the patent is more restrictive on the economy, the patent grant has come to be construed very strictly.⁶¹ A more modern distinction between patents and copyrights has

56. *Alden-Rochelle v. ASCAP*, 80 F. Supp. 900, 902 (S. D. N. Y. 1948).

57. See *infra* p. 183.

58. *Alden-Rochelle v. ASCAP*, 80 F. Supp. 900, 902 (S. D. N. Y. 1948).

59. *United States v. Line Material*, 333 U. S. 287 (1941). There was a cross-licensing agreement to fix sales prices of devices embodying the exchanged patents. It was economically impossible for the manufacturer to fabricate the product without getting licenses from both companies. Licensees were compelled to submit to price and production control in return for a release from claims for past infringement. Mr. Justice Reed distinguished *United States v. General Electric*, 272 U. S. 476 (1926), where the Court found only a single patentee and allowed him to fix sales prices for his licenses. Mr. Justice Douglas urged overruling of *General Electric*, labelling price fixing illegal *per se*, and, in combination with cross-licensing, a powerful inducement for abandonment of competition.

60. BALL, *LAWS OF COPYRIGHTS AND LITERARY PROPERTY*, § 151 (1st ed. 1944).

61. Zlinkoff, *Monopoly versus Competition*, 53 *YALE L. J.* 514 (1944).

been noted by Judge Frank who has said: "It is worthy to note . . . that while the individual inventor seems to be rapidly giving way to the corporate research laboratory, so that the patent grant is no longer the same stimulus to personal genius that it once was . . . no such development has taken place among authors and songwriters. With respect to such persons, the full achievement of the objectives of the Constitutional provision is still easily possible."⁶²

The restraint of trade cases involving copyrights and relied upon by the court in *Alden-Rochelle* are also distinguishable. In *Ring v. Spina*⁶³ an association of playwrights was held to be acting in restraint of trade when it attempted to gain control of all American stage productions by establishing a code whereby members could contract only with managers in good standing with the association at a minimum royalty rate; and under which all disputes were required to be finally adjudicated by arbitration. The agreement forbade outright sale of radio, television, and other subsidiary rights in the play prior to its stage presentation; and even after stage presentation such sales required the Guild's written permission. The difficulties that confront the individual holder of a musical copyright do not exist to the same extent for the playwright. The production of a play entails large expenditures of time and money and necessitates a considerable amount of publicity if economic success is to be expected. There is opportunity for the playwright to deal individually with producers and to detect infringements. There is, moreover, a difference between a minimum royalty on rights to a single production and an optional group rate on a large number of compositions which, if accepted, ties them together.

Judge Leibell in his original opinion in the *Ring* case also quoted from *Associated Press v. United States*⁶⁴ where it was said, "Arrangements or combinations designed to stifle competition cannot be immunized by adopting a membership device accomplishing the purpose." In the *Associated Press* case the restraint of trade was found in a concerted refusal to deal with non-members of the association, accompanied by severe restrictions upon admission to membership. In ASCAP's case membership is open to anyone who has published a musical composition, and no music user is barred from obtaining a license in order to stifle competition. In another case cited, *Fashion Originators' Guild of America, Inc. v. Federal Trade Commission*,⁶⁵ the Court, after discussing how the activities of the association directly affected the entire industry, declared, ". . . the aim of the petitioner's combination was the

62. *N. Witmark & Sons v. Fred Fisher Music Co.*, 125 F.2d 949, 961 (2d Cir. 1942). (Dissenting opinion).

63. 148 F.2d 647 (1945).

64. 326 U. S. 1 (1945).

65. 312 U. S. 457 (1941).

intentional destruction of one type of manufacture and sale which competed with Guild members." The evidence does not warrant the imputation of such behavior to ASCAP.

The motion picture copyright cases are factually analogous to the ASCAP proceedings to the extent that both the producers and ASCAP use the "block-booking" system. In the *Paramount* case,⁶⁶ the Court condemned this system because exhibitors were not given the opportunity to contract for single films, which it is both practical and beneficial for them to do. Music users, since the 1941 consent decree, have had the option to license music on either a per-piece or per-program basis. The decree is, therefore, evidence negating any intent by the Society to monopolize or restrain competition.⁶⁷ But the option is not practically available to motion picture exhibitors because the mechanics of film production render it impossible for the exhibitors to know in advance what music will be recorded in specific films. Although this unavailability to exhibitors of per-program music licenses constituted a restraint of trade, still this condition did not warrant the dissolution of the entire music association structure. As was suggested in *Alden-Rochelle*, this can be remedied by simultaneous licensing of performance and recording rights, while the system of optional blanket licensing can be retained as to motion picture producers, as the 1941 consent decree retained it for other music users. The producers can pass on this added expense to the exhibitors, but such a scheme may subject the Society and the producers to charges of conspiracy if, over a period of time, the increased rates received by the Society from the producers are almost identical with the additional license fees extracted by the latter from the exhibitors. And ownership by the producers of thirty-seven per cent of the publishing membership of ASCAP may serve to substantiate such charges.

The government proceedings against ASCAP, referred to in the *Alden-Rochelle* decision, have now been concluded by a consent decree which replaces the 1941 decree.⁶⁸ With regard to the domestic activities of ASCAP, the decree requires the Society to offer motion picture producers and television stations a single license covering all performances of motion pictures or network telecasts. This is the same license now offered radio stations. The decree also prohibits ASCAP from suing exhibitors for royalties. Other provisions allow ASCAP members to license their works independently, and to resign from the Society at any time without penalty, thereby prohibiting

66. *United States v. Paramount Pictures*, 334 U. S. 131 (1948).

67. In infringement suits prosecuted by ASCAP, the 1941 consent decrees have been cited to rebut charges that the musical copyright associations were monopolistic and acting in restraint of trade. *Remick Music Corporation et al. v. Interstate Hotel Co. of Nebraska*, 58 F. Supp. 523 (D. Neb. 1944).

68. *New York Times*, March 15, 1950, p. 34.

the Association from thereafter licensing their music. The provisions of the *Alden-Rochelle* decree are substantially incorporated into the new consent decree. The theory of this latest decree recognizes music copyright associations as essential to the preservation of composers' statutory rewards. The decree seeks to protect the individual members from the domination of the Society, and to regulate the activities of ASCAP to prevent the accumulation of such power as would restrain competition. If this is a proper understanding of the rationale of the decree, it may be assumed that ASCAP is not regarded as so dominant in the music licensing industry that its every action is necessarily in restraint of competition. Thus, the Society does not fall within those precedents condemning certain combinations involving patents.⁶⁹ Patents are still regarded as more exclusive than copyrights, and it is still recognized as proper to attach different restrictions under the anti-trust laws to the use made of patents and copyrights. With the activities of the Society governed by the 1950 consent decree, there seems little reason to doubt that the beneficial purposes generating the formation of ASCAP can be continued without the danger of accompanying monopolistic power.

69. In *United States v. Hartford-Empire*, 323 U. S. 386, 570 (1945), a patent pool created by cross-licensing and acquisition of patents by one company in which other conspirators had control was held to be a violation of the Sherman Act. And in *United States v. United States Gypsum Co.*, 333 U. S. 364 (1948), the Court was presented with an industry-wide licensing scheme. At page 391 the Court said: "Conspiracies to control prices and distribution, such as we have here, we believe to be beyond any patent privilege." And at page 400 the majority declared that the *General Electric* decision does not authorize a patentee, "acting in concert with all members of an industry, to issue substantially identical licenses to all members of the industry under the terms of which the industry is completely regimented, the production of competitive unpatented products suppressed, a class of distributors squeezed out, and prices on unpatented products stabilized."