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No Happy Tune: ASCAP/BMI Flat Fee Licenses Do Not Constitute Illegal Price Fixing

In 1979, CBS, one of only three broadcast television networks, a system that carried over 7,500 programs per year, sued Broadcast Music Incorporated (BMI) and American Society of Composers, Authors, and Publishers (ASCAP), a collection of musical artists and publishers who, as a collective, set prices for the use of various copyrighted musical pieces used throughout CBS's daily programming schedule. These clearinghouses were set up in order to protect the artists, writers, and publishers who were members of the two groups (covering over three million copyrighted pieces of music), and to allow television and radio networks to use these pieces of music easily, while allowing fair payment to the artists themselves. CBS, up to this point, had paid a blanket license fee to use music from artists belonging to ASCAP/BMI, but they eventually sued, claiming that such blanket licensing fees were a form of price fixing strictly forbidden in the Sherman Antitrust Act under section 1 that forbids groups from conspiring together to limit commerce (by using the method of illegal price fixing) (Sherman Anti-Trust Act). The basic argument was that ASCAP/BMI represented so many artists together that no negotiation amongst single artists was even possible at that point, and the case was eventually remanded to the US Supreme Court.

In the lower courts, the US District Court that originally heard the case ruled that ASCAP/BMI did not constitute a per se violation of US antitrust laws. Per se violations are a part of antitrust law that makes it illegal to inherently limit commerce. These per se violations originally came about in 1897 after laws that made small changes to the Sherman Antitrust Act as a way to rule on violations. Per se violations, according to former dean of the Georgetown University Law Center, Thomas Krattenmaker, are those where nothing else has to be proven

other than that the defendant, in this case ASCAP/BMI, need only be shown to be in violation of any part of the antitrust act, and they are inherently (per se) anticompetitive in nature (Krattenmaker). Some violations are so plain and have no redeeming value that there is no need to look to the act's rules on "rule of reason" which dictates what, in particular, constitutes anti-competitive behavior. As Krattenmaker notes, it is not illegal to price fix per se, so long as there is a valid reason for doing so. Supreme Court Justice White gave the court's opinion with only one member, Justice Stevens, offering a dissent. In that opinion, White argued that there was no "per se violation," and that the ASCAP/BMI agreement did not amount to an illegal price fixing scheme under the Sherman Anti-Trust act or later acts that followed (including the Clayton Anti-Trust Act that specified, further, what constituted an illegal trust or price fixing schemes). He further argued that, since CBS and the other two broadcast networks, since the 1940's, had not had any other form of licensing with ASCAP or BMI, that such a situation was workable within the frame of the rules set by Congress and the lower courts. So, too, the fact remains that a blanket license was the best way in which to pay the various copyright holders- price fixing, even in a per se sense is okay as long as a justifiable reason exists to allow it. Besides these facts, ASCAP had, at various times, been the target of anti-trust scrutiny, and 1950 laws were passed by Congress and lower courts in order to restrain what ASCAP could and could not do. These rules were later applied to BMI as well. These rules allowed ASCAP to offer blanket licensing agreements (as did the subsequent 1976 Copyright Act), but that it also had to offer per performance agreements as well, even though blanket licensing is an easier method to collect funds for the use of copyrighted works and most broadcast companies routinely used only blanket agreements without issue up to the point of the 1979 case in question. In 1941, the US Justice Department decided that the use of blanket licenses were, in fact, a per se violation of the

Sherman Act, and that they were illegal for ASCAP to use. A consent decision was made by the courts, and strict rules were applied to ASCAP, rules in place still today and definitely in use during the 1979 trial in question. The rules applied by Justice Department decisions against ASCAP specifically allowed blanket licensing, and Justice White, in his ruling, argued that, though more difficult in nature, licensing agreements with each artist individually was a possibility, even if CBS and others rarely used that method, and that the clearinghouses did not actually make up one single unit, but rather a competitive unit of many thousands of artists, thus no anti-competitive situation arose. The District Court that ruled against CBS noted that CBS had, in fact, a “real choice,” and that the blanket licensing arrangement, in no way, made it impossible for them to bargain for rights to music on an individual basis. Even the Appeals Court that overruled the District Court’s decision on the price fixing measure, admitted that CBS did have the choice to deal one on one with the artists covered by the ASCAP and BMI agreements, and they could do so without any significant hurdles.

The Sherman Act was, most would plainly agree, fuzzy at best. The act is very short and does not, in any real way, measure what precisely amounts to anti-competitive behavior. The wording is vague, thus the later Clayton Anti-Trust Act clarifies much of the Sherman Act’s original wording. CBS argued that ASCAP/BMI specifically violated section 1 of the Sherman Act, going no further to argue any other acts of Congress nor any further legal decisions. They note that the Sherman Act specifically states that “every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.” Price fixing, in the horizontal fashion argued by CBS on the part of ASCAP/BMI would seem to be illegal, but given the per se rules of the act, later clarified by the courts, there is good reason to price fix here, and it makes economic sense

while having a truly redeeming value (that is, smaller arrangements on the part of each of the thousands of artists is not only technically difficult but would offer a much lower price point in which these artists would be paid.)

In fact, we can easily imagine an alternate reality where these blanket licenses were ruled an illegal form of price fixing, and they would, no doubt lead to a much lower supply from each individual artist. One can easily sketch a supply and demand equilibrium that is much lower had this ruling gone a different way. Individual artists would necessarily need to spend much more money to negotiate with companies like CBS. They would have to pay an attorney to wade his way through the legal system and its often confusing rules just to ensure that the artist was paid fairly for his work. And how would a single artist easily keep up with the number of contracts from each individual a company wanting to use his work and how many times his work was used. How would an artist even feasibly expect to know which companies were using his work on a daily basis without a sophisticated system in place to track such voluminous usage? A clearinghouse clearly lowers costs and boosts supply for their member artists but also cuts costs for a company like CBS who wants to use various musical pieces in their daily broadcasts. The consumer loses out no matter how you see this issue, as the supply of music used in various broadcasts would be drastically cut, and fewer artists would be able to thrive in such an environment, fewer of them even seeing the stage to begin with.

A ruling for CBS would, on the face it, seem to offer more competition, breaking apart what seems like a large and powerful monopoly, but perhaps monopolies aren't always a bad thing in light of the economic realities faced by artists who are members of ASCAP and BMI. Clearly, a system where each artist is forced into thousands of separate contracts for each of his works is not feasible in the technical sense, and it offers little economic incentive for artists or

companies like CBS to even deal with the system due to the absurdly high costs this would require. ASCAP argues, in its 2008 Artist Bill of Rights that “Without these rights, which directly emanate from the U.S.Constitution, many who dream of focusing their talents and energies on music creation would be economically unable to do so - an outcome that would diminish artistic expression today and for future generations (ASCAP)”. Clearly, this means a lower supply, and basic economics tells us that a smaller supply will eventually push prices up, and that trickle down effect will be felt from the artist down to the consumer who has fewer options in terms of what music would be featured on various television programs.

In his 1978 *Fordham Law Review* article on the case, John Cirace argues that natural market forces aren’t enough to keep things balanced between a company like CBS and ASCAP, and that government regulation, in some form, would be necessary (Cirace). He does argue that blanket licensing is clearly needed in order that costs not run into the millions by dealing with artists directly one on one, and that CBS acts as a monopsony (in no longer does with the rise of cable TV) and has such market power because it costs millions to produce primetime programs, and few companies could cross the barrier into the market to compete. Cirace believes that price discrimination is not the answer to the problem here, and that regulation that, perhaps, demanded one flat fee to all networks be a best solution. The issue is that, once produced, the works in question are costless, and there is no real way for the market to determine an actual price for the works, so there’s no clear equilibrium and natural market clearing. It seems clear, even if government regulation seems to need to be an issue, the downside of such intervention would be even more cumbersome than the hurdles already in place. With market power, a firm like CBS is able to dictate terms in a fashion that is already conducive to its own financial well being. A

reversal of this SCOTUS decision would necessarily mean higher costs to all of us, and the Sherman Act would be used as a means to destroy the economic good.

Additions to the original copyright law, resulting in the 1976 Copyright Law were made in order for the US to fully conform with the Berne Convention demands of copyright protections, and these laws were further amended in later years, with the Digital Millenium Copyright Act of 1996 that considered the needs for copyright provisions in light of the digital age and the changes it entailed for music and movie distribution and sales. The CBS case is a long line of decisions made from district courts all the way the US Supreme Court that have ruled on various parts of the Sherman Act and have set the country on a specific economic course, taking the demands of copyright protection and mixing it with the need for economic success that requires some level of price fixing and cooperation among firms and artists, if only to make economic activity easier to perform in a complex system. Price fixing is not always illegal, and it is not always anti-competitive. Firms must seek to work together in dealing with economic realities, and often times this means acting in such a way that might look anti-competitive in order to fully bolster true competition.

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