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Antitrust--Market Necessity As a Defense to Price-Fixing--CBS, Inc. v. ASCAP

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RECENT CASES

ANTITRUST—MARKET NECESSITY AS A DEFENSE TO PRICE-FIXING

CBS, Inc. v. ASCAP[1]

The American Society of Composers, Authors, and Publishers (ASCAP) is an association of more than 24,000 writers and publishers of musical compositions.[2] ASCAP's members have given the Society the non-exclusive right[3] to license the public performance rights in their copyrighted compositions to users of those works.[4] In effect ASCAP operates as a clearinghouse for the licensing of most copyrighted compositions in the United States.[5]

ASCAP employs several methods of licensing.[6] The most prevalent is the "blanket license." This license entitles the holder to perform for a stated term any of the compositions in ASCAP's repertory. Compensation, regardless of the number of compositions actually used, is based on a set fee or a percentage of the user's gross revenues. As a result of past antitrust litigation concerning the blanket license,[7] ASCAP also is required to offer broadcasters a "per program" license and to permit direct licensing between its members and music users.[8]

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1. 562 F.2d 130 (2d Cir. 1977), *rev'g* 400 F. Supp. 737 (S.D.N.Y. 1975).

2. Garner, *United States v. ASCAP: The Licensing Provisions of the Amended Final Judgment of 1950,* 23 BULL. COPYRIGHT SOC'Y 119 n.1 (1976).

3. AMERICAN SOC'Y OF COMPOSERS, AUTHORS, AND PUBLISHERS, ASCAP: THE FACTS; AMERICAN SOC'Y OF COMPOSERS, AUTHORS, AND PUBLISHERS, ASCAP, MUSIC AND THE LAW (uncirculated pamphlets).

4. Congress has given copyright owners the exclusive right to perform publicly or to authorize the public performance of their copyrighted works. Copyrights Act of 1976, 17 U.S.C.A. §§ 106-118 (West 1977). *See also* H.R. REP. No. 1476, 94th Cong., 2d Sess. at 63, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5676.

5. Garner, *supra* note 2, at 119 n.1.

6. CBS, Inc. v. American Soc'y of Composers, 400 F. Supp. 737, 742, 743-44 (S.D.N.Y. 1975). *See generally* Finkelstein, *Public Performance Rights in Music and Performance Right Societies,* in SEVEN COPYRIGHT PROBLEMS ANALYZED 69, 75-80 (Two-Volumes-in-One Ed. 1966).

7. United States v. ASCAP, [1940-41] TRADE REG. REP. (CCH) ¶ 56,104 (S.D.N.Y. 1941); United States v. ASCAP, [1950-51] TRADE REG. REP. (CCH) ¶ 62,595 (S.D.N.Y. 1950) [hereinafter cited as *1950 Amended Decree*]. *See also* Comment, *ASCAP and the Antitrust Laws: The Story of a Reasonable Compromise,* 1959 DUKE L.J. 258.

8. The per program license provides blanket coverage of the ASCAP repertory, but the fee is based on the number of programs using ASCAP music.

Practically, the blanket license is the sole method of licensing.[9] It would be virtually impossible for users and individual copyright owners to seek out the other to engage in direct licensing.[10] The copyright owner could not detect infringements of his copyright; the user could not practically protect himself from liability for infringment of copyrights because of his need for quick access to music and the impracticability of locating individual copyright owners. The nature of the music industry suggests that a type of license giving blanket coverage of the ASCAP repertory is necessary for some users.[11]

The Columbia Broadcasting System (CBS), a large user of ASCAP music, has held a blanket license for its television network since the early days of broadcasting. CBS sued ASCAP in 1969 and alleged violations of sections 1 and 2 of the Sherman Act.[12] CBS claimed that the present blanket licensing method constituted illegal price-fixing; that the existing licensing alternatives forced it to pay for music it did not want in order to obtain the music it desired (thus constituting an unlawful tying arrangement); and that the Society's members were guilty of attempted monopolization and actual monopolization.[13]

An injunction was sought under section 16 of the Clayton Act[14] to prohibit ASCAP from offering blanket licenses to any television network,

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However, the amount of music used on a program remains irrelevant in the fee calculation. The utility of the per program license is limited to "broadcasters whose schedule consists predominantly of non-musical programming." CBS, Inc. v. ASCAP, 562 F.2d 130, 134 n.9. (2d Cir. 1977). *See 1950 Amended Decree, supra* note 7, §§ V(A), VII, IX.

9. CBS, Inc. v. American Soc'y of Composers, 400 F. Supp. 737, 742 (S.D.N.Y. 1975).

10. *Id.* at 741; Timberg, *The Antitrust Aspects of Merchandising Modern Music: The ASCAP Consent Judgment of 1950,* 19 LAW & CONTEMP. PROB. 294, 297-98 (1954).

11. CBS, Inc. v. ASCAP 562 F.2d 130, 136-38 (2d Cir. 1977); Timberg, *supra* note 10, at 297.

12. 15 U.S.C. §§ 1-2 (Supp. 1975) provides:

> § 1. 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 hereby declared to be illegal. . . .
> § 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or perons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . . .

13. 400 F. Supp. at 745. Tying arrangements also are unlawful under § 3 of the Clayton Act, 15 U.S.C. § 14 (1970). However, § 3 applies only to leases or sales of "goods, wares, merchandise, machinery, supplies or other commodities. . . ." Thus, any tying arrangement respecting musical copyrights would be covered only by § 1 of the Sherman Act.

14. 15 U.S.C. § 26 (1970) provides that: "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws. . . ."

or alternatively to require ASCAP to provide a form of "per use" license to reflect CBS' actual use of music.[15]

The district court viewed the allegation of an unlawful tying arrangement as the central issue in the case. It found that direct licensing of individual copyrights was a feasible alternative to the blanket license for CBS.[16] Because CBS could seek competitive prices from individual copyright owners, it was not compelled to take a blanket license. Due to this absence of compulsion, the court held that ASCAP's blanket license did not constitute an unlawful tying arrangement, price-fixing, or monopolization, and dismissed the complaint.[17]

The Second Circuit Court of Appeals agreed that the feasibility of a direct licensing alternative vitiated the allegations of a tying arrangement and monopolization. However, the court held that the compulsion required for these violations is not an element of price-fixing,[18] and therefore the feasibility of direct licensing did not override the adverse effect on price competition caused by the set fee and royalty distribution formula under the blanket license. The Second Circuit thus held that the present blanket license constituted illegal price-fixing under the Sherman Act and reversed and remanded the case for proceedings on the appropriate remedy.

The court distinguished but approved the result in a similar case from the Ninth Circuit, *K-91, Inc. v. Gershwin Publishing Corp.*,[19] in which the parties and the Justice Department agreed that blanket licensing was a "market necessity" in the music copyright licensing field for the single radio station there involved.[20] Because of the finding in *CBS* that direct licensing was a feasible alternative for the CBS network, the court concluded that market necessity was not a defense to the charge of price-fixing against ASCAP. However, the court suggested that the blanket license served enough of a market need that it "need not be prohibited in all circumstances."[21] The court's recognition of the defense raises questions about the current status of price-fixing and its appropriate remedy under the antitrust laws.

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15. 400 F. Supp. at 747 n.7.

16. *Id.* at 779.

17. *Id.* at 780-83. *See* United States v. Paramount Pictures, Inc., 334 U.S. 131, 159 (1948) (compulsion and tying arrangements).

18. 562 F.2d at 138.

19. 372 F.2d 1 (9th Cir. 1967), *cert. denied,* 389 U.S. 1045 (1968), *noted in* 29 OHIO ST. L.J. 230 (1968).

20. CBS, Inc. v. ASCAP, 337 F. Supp. 394, 400, 401 n.4 (S.D.N.Y. 1972) (denying ASCAP's motion for summary judgment) (stipulation of the *K-91* parties); Memorandum of the United States as Amicus Curiae on Petition for Writ of Certiorari in the Supreme Court of the United States at 10-11, K-91, Inc. v. Gershwin Publ. Corp., 372 F.2d 1 (9th Cir. 1967), *cert. denied,* 389 U.S. 1045 (1968), *quoted in* CBS, Inc. v. ASCAP 337 F. Supp. 394, 400 (S.D.N.Y. 1972).

21. 562 F.2d at 140.

Antitrust analysis proceeds under one of two theories, the rule of reason or the *per se* approach.[22] Both theories condemn contracts or combinations which have as their purpose or effect the substantial reduction of competition in a given market. The major distinction lies in the extent to which a court will analyze the circumstances surrounding a particular practice and the justifications for that practice. If the main purpose of a combination is legitimate, and its effects on competition are adverse in some respects and beneficial in others, the court will employ the rule of reason and examine the surrounding circumstances. The activity will be condemned only if a substantial and unreasonable negative impact on competition is shown.[23] The *per se* theory provides that some activities, despite their stated purpose, have such an inherently restrictive effect on competition that once the activity is recognized, it is condemned without further analysis.[24]

Price-fixing generally has been regarded as a *per se* violation of section 1 of the Sherman Act.[25] Combinations having the purpose or substantial effect of "raising, depressing, fixing, pegging, or stabilizing" the price of a product have been held unlawful, without analysis of the possible benefits accruing from the arrangement or the reasonableness of

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22. *See generally* Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division* (pts. 1-2), 74 YALE L.J. 775 (1965), 75 YALE L.J. 373 (1966); L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST §§ 63-72 (1977).

23. Standard Oil Co. v. United States, 221 U.S. 1 (1911); Virginia Excelsior Mills, Inc. v. FTC, 256 F.2d 538 (4th Cir. 1958); Blue Bell Co. v. Frontier Ref. Co., 213 F.2d 354 (10th Cir. 1954); United States v. Columbia Pictures Corp., 189 F. Supp. 153 (S.D.N.Y. 1960); United States v. American Smelting & Ref. Co., 182 F. Supp. 834 (S.D.N.Y. 1960). *But see* Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933); Board of Trade of Chicago v. United States, 246 U.S. 231 (1918).

24. The *per se* approach has been applied to a variety of anticompetitive activity. *Price-fixing:* United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); United States v. Trenton Potteries Co., 273 U.S. 392 (1927). *Group Boycotts:* United States v. General Motors Corp., 384 U.S. 127 (1966); Silver v. New York Stock Exchange, 373 U.S. 341 (1963); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959); Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457 (1941). *Horizontal market division:* United States v. Topco Assoc., 405 U.S. 596 (1972); United States v. Sealy, Inc., 388 U.S. 350 (1967); Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951). *Vertical market division:* Albrecht v. Herald Co., 390 U.S. 145 (1968); United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967); United States v. Parke, Davis & Co., 362 U.S. 29 (1960). *Tying Arrangements:* United States v. Loew's Inc., 371 U.S. 38 (1962); Northern Pac. Ry. v. United States, 356 U.S. 1 (1958); International Salt Co. v. United States, 332 U.S. 392 (1947).

25. United States v. Container Corp. of America, 393 U.S. 333 (1969); United States v. McKesson & Robbins, Inc., 351 U.S. 305 (1956); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951) (setting maximum prices); United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

the price.[26] The only analysis employed is one of characterization, *i.e.*, a determination whether the activity constitutes price-fixing. Where an obvious design to set prices appears, this characterization is an easy task.[27] Where such a purpose is not so obvious, the court will look to the course of conduct of the combination and the actual effect on prices in making its determination.[28] The determinative element is whether price competition between the members of the combination has been eliminated or restricted.[29]

ASCAP's present blanket license "involves the fixing of a collective price."[30] ASCAP receives a single royalty from each licensee which is distributed among the members according to a schedule prepared by the Society.[31] The court in *CBS* found that the mere existence of blanket licensing "dulled the incentive" of ASCAP's members to compete in setting individual prices and to engage in direct licensing.[32] This restriction of competition dictated a finding of price-fixing under the *per se* rule.

Under the ancillary restraints doctrine,[33] courts have permitted some arrangements despite their effect on prices. If the challenged conduct is merely "ancillary to a transaction which is itself legitimate," this doctrine may take the case out of the *per se* approach and justify application of the rule of reason.[34] Although the doctrine originally was confined to cases in which a covenant restricting competition was necessary to protect one of the parties,[35] it has undergone expansion. It now permits "business arrangements of benefit to the parties, and perhaps to the public, which have no injurious effect in the sense of antitrust policy."[36]

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26. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940).

27. *Id.;* United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

28. United States v. Container Corp. of America, 393 U.S. 333 (1969); Plymouth Dealers' Ass'n v. United States, 279 F.2d 128 (9th Cir. 1960).

29. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 220 (1940).

30. 562 F.2d at 139.

31. *Id.* at 135-36. Finkelstein, *supra* note 6, at 75-80.

32. 562 F.2d at 139.

33. Edwin K. Williams & Co. v. Edwin K. Williams & Co.-East, 542 F.2d 1053 (9th Cir. 1976), *cert. denied,* 433 U.S. 908 (1977); United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *aff'd,* 175 U.S. 211 (1899); Sound Ship Bldg. Corp. v. Bethlehem Steel Corp., 387 Supp. 252 (D.N.J. 1975), *aff'd on other grounds,* 533 F.2d 96 (3d Cir. 1976), *cert. denied,* 429 U.S. 860 (1977); United States v. Columbia Pictures Corp., 189 F. Supp. 153 (S.D.N.Y. 1960); Walt Disney Prod. v. American Broadcasting-Paramount Theatres, Inc., 180 F. Supp. 113 (S.D.N.Y. 1960); United States v. Bausch & Lomb Optical Co., 45 F. Supp. 387 (S.D.N.Y. 1942), *aff'd in part,* 321 U.S. 707 (1944) (equally divided court).

34. United States v. Columbia Pictures Corp., 189 F. Supp. 153, 178 (S.D.N.Y. 1960).

35. United States v. Addyston Pipe & Steel Co., 85 F. 271, 281-82 (6th Cir. 1898), *aff'd,* 175 U.S. 211 (1899).

36. United States v. Columbia Pictures Corp., 189 F. Supp. 153, 178 (S.D.N.Y. 1960).

To qualify for removal from *per se* treatment, the restraint (1) must be "reasonably necessary to the legitimate primary purpose of the arrangement, and of no broader scope than reasonably necessary," (2) it must not "unreasonably affect competition in the marketplace," and (3) it must not be "imposed by a party or parties with monopoly power."[37] In *United States v. Columbia Pictures Corp.*[38] an agreement between a major motion picture producer and a subsidiary of one of its main competitors provided for joint formulation of sales policy and minimum rate schedules. This agreement was upheld against price-fixing attacks. The court found the challenged clauses necessary but ancillary to the legitimate business purposes of the parties.[39] The court noted that the company had relatively slight power in a heavily competitive industry, and added that there was no evidence that prices were ultimately affected.[40] Similarly, trademark licensing agreements containing price restrictions have been upheld under the doctrine.[41]

At first blush, blanket licensing appears to involve an ancillary restraint. The purposes of the combination—to establish an effective market for copyright licensing and to provide copyright owners with an effective infringement detection system—are clearly legitimate. However, it is questionable whether the price restraints of a fee set by ASCAP are inextricable from the advantages of the integration of licensing functions. A blanket coverage license with rates for individual compositions set by each copyright owner could service the same needs without stifling competition; price-fixing is not essential to the working of the licensing system in CBS' case.[42] Additionally, considering the pervasive role of ASCAP in the licensing field, it can hardly be contended that the effect of the present blanket license on price competition is not substantial. It is settled law that a valid purpose alone will not save an unlawful price-fixing scheme.[43] The blanket license is not valid as an ancillary restraint because price-fixing is *not* necessary to the legitimate purpose of the combination and the restraint *does* substantially affect competition in the

37. *Id.*
38. *Id.*
39. *Id.* at 178-79.
40. *Id.* at 178-81. *Cf.* Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 (1961) (under a very broad definition of the relevant market, the Court found that a 20-year requirements contract did not substantially lessen competition).
41. Denison Mattress Factory v. Spring-Air Co., 308 F.2d 403 (5th Cir. 1962); Evans v. S.S. Kresge Co., 394 F. Supp. 817 (W.D. Pa. 1975), *aff'd*, 544 F.2d 1184 (3d Cir. 1976), *cert. denied*, 433 U.S. 908 (1977).
42. *See* text accompanying note 62 *infra*. *Cf.* United States v. Line Materials Co., 333 U.S. 287, 310-15 (1948) (patent pooling).
43. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221 (1940); Paramount Famous Lasky Corp. v. United States, 282 U.S. 30, 44 (1930); United States v. American Linseed Oil Co., 262 U.S. 371 (1923). *Cf.* Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457 (1941) (group boycott).

marketplace. Therefore, the court in *CBS* was correct in deciding the case via the *per se* approach.

However, the court backed away from settled *per se* law in its recommendation of the appropriate remedy. Once price-fixing is established, the usual remedy is an injunction prohibiting the unlawful activity.[44] The *CBS* court declined to suggest a ban on the blanket licensing method. Rather it proposed a requirement that ASCAP offer an alternate form of blanket coverage license with compensation based on actual use of music (a "per use" license) in addition to the present blanket license.[45] Thus, it appears the court would permit the continued use of a method it has found to constitute price-fixing.

Apparently the basis for the court's stance is its newly-coined "market necessity" defense to price-fixing.[46] In essence the market necessity defense states that a combination, the purpose of which is to provide a workable marketplace for its members' products but which inevitably restricts competition among members, can be justified nonetheless as the only viable way to market the product. The distinction between ancillary restraints and market necessity is basically one of characterization. An activity which affects prices may be found lawful as an ancillary restraint, thus avoiding characterization as price-fixing. However, market necessity may permit the continuation of an activity even *after* it has been found to constitute price-fixing under the *per se* rule.

In *K-91* the parties stipulated that, for almost all broadcasters, it would be "commercially impossible" to acquire a separate license for each performance.[47] The Solicitor General agreed that "[i]f this market is to function at all, there must be—at least with respect to licensing the performance of recorded music—some kind of central licensing agency by which copyright holders may offer their works in a common pool to all who wish to use them."[48]

Thus, the market necessity of some type of blanket license has been previously recognized, although no court has openly relied on the defense. The court in *CBS* touched on market necessity in connection with its discussion of the appropriate remedy. The court noted that absence

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44. 562 F.2d at 140.

45. *Id.*

46. *Id.* at 136, 140. The opinion is unclear as to the exact role of market necessity in the case. Although market necessity was found not to constitute a complete defense for price-fixing, the court noted that "market need" may support a remedy that stops short of an outright ban on the present blanket license.

47. CBS, Inc. v. ASCAP, 337 F. Supp. 394, 400 (S.D.N.Y. 1972) (denying ASCAP's motion for summary judgment) (stipulation of the *K-91* parties).

48. 562 F.2d at 137 n.20 (quoting Memorandum of the United States as Amicus Curiae on Petition for Writ of Certiorari in the Supreme Court of the United States at 10-11, K-91, Inc. v. Gershwin Publ. Co., 372 F.2d 1 (9th Cir. 1967), *cert. denied,* 389 U.S. 1045 (1968)).

of a "market need" for the blanket license had not been shown.[49] It conceded that a blanket license might be desirable for some large users even if direct licensing were feasible.[50] With this in mind, the court indicated that the blanket licensing practice could continue if some alternative license were made available.

However, market necessity will not support even this partial toleration of the present blanket license. First, the proposed remedy still may amount to unlawful price-fixing. The court reasoned that a per use licensing system is feasible for CBS, but it failed to specify the method of pricing under such a system. CBS's proposal for a per use system, referred to by the district court, would provide blanket coverage of the ASCAP repertory with a fee specified for each performance of a composition from the pool.[51] The objectionable aspect of this proposal is that fees for individual compositions would be set according to a schedule prepared by ASCAP and based on the nature and duration of the use and the popularity of the composition.[52] A per use fee schedule set by ASCAP's administration is no less a price-fixing agreement than the present blanket fee.

The CBS proposal also provides for determination of the fee schedule by a court if ASCAP and the user are unable to agree on a price.[53] However, the court noted in deciding another issue[54] that a reasonable fee set by a court is no more a truly competitive system than an agreement between competitors to set a price.[55] Therefore, if the court was referring to the CBS proposal in its recommendation of an alternate per use system, it is difficult to find any real improvement in the nature of the pricing arrangement over the present blanket license.

If the court was referring to a per use system in which the copyright holders themselves set licensing fees, the result would be a definite enhancement of competition. However, such a proposal illuminates the second problem with the court's analysis of market necessity. If such a per use system is workable,[56] there appears to be no reason why the

49. 562 F.2d at 140.
50. *Id.*
51. 400 F. Supp. at 747 n.7.
52. *Id.*
53. *Id.*
54. Under the *1950 Amended Decree, supra* note 7, § IX, ASCAP or a user could petition the District Court for the Southern District of New York for a determination of a reasonable license fee in the event the parties could not agree. ASCAP claimed in *CBS* that this provision insulated the Society from a finding of price-fixing.
55. 562 F.2d at 138-39. The correctness of this view is placed in doubt by the existence of several patent cases which have allowed determination of "reasonable royalties" by a court as a method of correcting price-fixing violations. *See* United States v. United States Gypsum Co., 340 U.S. 76, 93-94 (1950); United States v. National Lead Co., 332 U.S. 319, 334-37 (1947).
56. *See* text accompanying note 62 *infra.*

present blanket license should not be banned and a strictly per use system instituted for users like CBS. The court's problem is its failure to distinguish clearly between the recognized market necessity for blanket coverage of a license[57] and non-necessary package pricing. A per use license with only blanket coverage of the ASCAP repertory would serve the legitimate interests of providing a functional licensing market and centralized infringement protection without the unsavory aspect of price-fixing. In this respect the court is unpersuasive in stating that, as to CBS, there is a market need or necessity for a blanket license with a price-fixing feature. Market necessity only justifies blanket licensing in this case, not blanket pricing.

Users with different characteristics than CBS present stronger arguments for the market necessity of a blanket license with package pricing. The performance rights to copyrighted compositions must be licensed for all "public performances" of these works.[58] Across the country there are countless small users (individual radio stations, movie theatres, concert halls, taverns with live music, university concert series, and even baseball parks) which currently are licensed by ASCAP.[59] A per use license in these situations would involve numerous problems of administration and policing. For example the tavern owner under a per use license would be required to log and report for royalties purposes every composition played in his club; ASCAP would need a "spotter" constantly in attendance to ensure complete reporting. In many cases the administrative costs of reporting and policing such a system might be as great as the present blanket license fee.[60] The impossibility of policing every user in a per use world would make the monopoly of the individual composer's copyright largely illusory. Both the blanket coverage and the package pricing of the present blanket license may be a necessary evil for some areas of music copyright licensing.[61]

Considerations of administration and policing do not support the market necessity of package pricing for CBS. CBS currently provides ASCAP with logs of its use of music. The logs are used in distributing

57. *See generally* authorities cited note 11 *supra.*

58. Copyrights Act of 1976, 17 U.S.C.A. §§ 106-118 (West 1977). *See also* H.R. REP. No. 1476, 94th Cong., 2d Sess. at 63, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5659, 5676.

59. Finkelstein, *supra* note 6, at 77.

60. Current blanket fees for small taverns and nightclubs run from $90 to $570 per year, depending on the amount and type of music provided. American Soc'y of Composers, Authors, and Publishers, General License Agreement—Restaurants, Taverns, Nightclubs, and Similar Establishments (ASCAP form contract) ¶ 3.

61. The *CBS* court noted that licensing of musical performing rights presents problems that are sui generis in both copyright and antitrust law. 562 F.2d at 132. The court recognized that it would be "difficult even to imagine another industry where such a 'market necessity' defense would be applicable." *Id.* at 138 n.22.

royalties among the Society's members.[62] Because CBS already is required to maintain such a reporting system, the additional costs of complete reporting under a per use system presumably would not significantly burden the network.

The unanswered question is how far the market necessity defense should extend. In other words, when will market necessity justify blanket licensing *and* package pricing? For example reporting and enforcement problems would be less significant for the limited number of programs in a university concert series than for the constantly changing music in a tavern or theatre. However, the differences between a large radio station and the CBS television network would not be as significant. No clear standard is apparent of the amount of burden either on the user or on ASCAP that would be sufficient to invoke the defense. Indeed, the policy of the antitrust laws against price-fixing is strong, and it is debatable whether factors such as burdensome administrative costs even should be considered as a defense.[63] Market necessity is a totally new exception to the prevailing view of price-fixing. In light of the impressive precedent supporting the *per se* theory, if the defense is to be applied at all, it should be strictly scrutinized and contained. Especially in cases like *CBS* where a viable method of doing business under fully competitive circumstances exists, the courts should adhere to the Sherman Act's mandate of open competition in the marketplace.

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62. Telephone interview with Richard H. Reimer, Counsel for ASCAP, New York (March 16, 1978).

63. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940); cases cited note 25 *supra.*