ORIGINAL

In the

Supreme Court of the United States

BROADCAST MUSIC, INC., ET AL.,

Petitioners,

v. No. 77-1578

COLUMBIA BROADCASTING SYSTEM, INC., ET AL.,

Respondents.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ET AL.,

Petitioners,

v. No. 77-1583

COLUMBIA BROADCASTING SYSTEM, INC., ET AL.,

Respondents.

Washington, D. C.
January 15, 1979

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Washington, D. C.

Monday, January 15, 1979

The above-entitled matter came on for argument at 10:04 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

JAY H. TOPKIS, ESQ., 345 Park Avenue, New York, New York 10022; on behalf of Petitioners, American Society of Composers, Authors and Publishers, et al.

AMALYA L. KEARSE, Hughes, Hubbard & Reed, One Wall Street, New York, New York 10005; on behalf of Petitioners, Broadcast Music, Inc., et al.

FRANK H. EASTERBROOK, Office of the Solicitor General, Department of Justice, Washington, D. C.; on behalf of the United States, as amicus curiae

ALAN J. HRUSKA, ESQ., One Chase Manhattan Plaza, New York, New York 10005; on behalf of the Respondents

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in Broadcast Music, Inc. v. Columbia Broadcasting, and the consolidated case.

Mr. Topkis, you may proceed whenever you are ready.

ORAL ARGUMENT OF JAY H. TOPKIS, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. TOPKIS: Mr. Chief Justice, and may it please the Court:

I appear before the Court representing the American Society of Composers and Authors and Publishers and various of its writer and publisher defendants who were sued by CBS in the Southern District of New York some eight years ago. With me are Ms. Amalya Kearse, who will be speaking for Broadcast Music, Inc., and its various affiliated defendants, and the Honorable Frank Easterbrook, Deputy Solicitor General, who will present the government's views. Ms. Kearse, Mr. Easterbrook and I each have fifteen minutes allotted to us, and for my part I propose to endeavor to present my initial presentation in about ten minutes, reserving some five for rebuttal if time permits.

Now, as the Court knows, this case is here pursuant to the grant of a writ of certiorari to the Second Circuit, CBS having sued ASCAP and its various member defendants and BMI and its various affiliated defendants under the antitrust

laws in late 1969. The issue was quite simple then and it remains quite simple today.

CBS claimed that its television network needed to broadcast a good deal of copyrighted music and that it couldn't obtain the licenses for those copyrights in direct negotiations with the copyright proprietors, therefore, said CBS in its complaint, it was compelled to take a blanket license from ASCAP and also from BMI. A blanket license, as I think the Court is aware, is one under which the user, the licensee has the right to use any or all of the compositions owned by all members of ASCAP -- and we have over 22,000 today -- and all of the more than thirty affiliated foreign societies around the world on whose behalf we license copyrights, as often, whenever, with whatever frequency the user wishes, and the user pays just one stipulated fee.

For a television network like CBS, I may say, that fee has been running well under one percent of the gross receipts from sponsors which the network experiences.

The compulsion of which it claimed --

QUESTION: It is not a percentage of gross receipts or anything like that, it is a dollar amount?

MR. TOPKIS: No, Your Honor. In the licenses which we used as of 1969, it was a percentage. We thereafter with NBC and ABC went to stipulated dollar amounts. With CBS, we haven't had a license since '69.

QUESTION: How much money?

MR. TOPKIS: NBC is something over $4 million a year; ABC something less than that. ABC has since come on rather strong, but they got us when they were weak.

QUESTION: The dollar figure for CBS, did you tell us that?

MR. TOPKIS: CBS, Your Honor, had settled with us in 1969 for five years, as I recall it, leading up to '69, and the average for those -- it was one lump sum, sums were allocated to each of the years, but the parties agreed that that wouldn't be referred to in any court proceeding so I prefer not to say that. But the average was something over $4 million a year for CBS also.

Now, the compulsion of which it complains, said CBS, violated the antitrust laws in all the usual ways. We were accused of everything, block booking, tying, price fixing, monopolization, section 1, section 2. And the compulsion sprang, said CBS, from two sources: First, CBS complained that although it had never approached so much as one member of ASCAP seeking a direct license, CBS was sure that ASCAP's members, if CBS approached them, would be disinclined to deal directly with CBS. They would insist, said CBS, on dealing through ASCAP. And second, said CBS, there was no machinery by which CBS could obtain direct licenses for the compositions in the ASCAP repetoire.

These were the central issues tried out as matters of fact before the District Court for eight solid weeks. And in what the Second Circuit called a painstaking appraisal and analysis of the facts, Judge Lasker, the District Judge, reviewed all of the evidence carefully and held against CBS as a matter of fact on every point. He said that CBS had not established that ASCAP's members would be disinclined to deal if CBS approached them. He said to the contrary, the evidence was that if CBS asked them, they would line up at CBS' door anxious to deal because, after all, what is their business. Their business is selling their music and getting it exposed on national television for the benefit of the record sales and sheet music sales which are promoted, of course, by network television exposure.

On the machinery issue, Judge Lasker said all CBS had to do was ask, the machinery already existed or would spring into existence quickly if CBS only indicated its interest. And so finding, the District Court dismissed all of CBS' claims.

I should note a most unusual aspect of this trial, and I think it deserves emphasis. CBS was not claiming the status of suffering victim. It didn't claim that it had attempted to obtain direct licenses from ASCAP's members or, for that matter, from BMI's members and been refused, nor had it found that the machinery for direct licensing wouldn't

work.

Rather, CBS's entire case was the product of speculation, of conjecture. CBS said that it --

QUESTION: Mr. Topkis, you answered earlier about the other two networks, that apparently they have long-term licenses, of four or five years?

MR. TOPKIS: Yes, although actually I think, Your Honor, their licenses have now expired and they are proceeding on interim arrangements.

QUESTION: Does the record tell us how long the license of CBS was that expired in '69?

MR. TOPKIS: We negotiated a deal with CBS retroactive through December 31, '69, retroactive to I believe 1962, Your Honor; typically network licenses have been for five-year periods.

QUESTION: Take the situation, say, in '66 or so when they might have started negotiating independently, were they then under a license?

MR. TOPKIS: Yes.

QUESTION: Expiring when?

MR. TOPKIS: Well, there was an interim arrangement, Your Honor, because the history of dealings between ASCAP and its television licensees have been studded by litigation. But there was an interim arrangement under the ASCAP amended final judgment, as Your Honors perhaps --

QUESTION Well, when would the license that was in effect, say, in 1966 or '67 expire?

MR. TOPKIS: It had no expiration date, Your Honor. CBS had applied to the Southern District Court, Judge Ryan, for the setting of reasonable fee for a license, and under the ASCAP amended final judgment whenever the court gets around to setting that fee, it will be retroactive to the time when the application was originally filed.

QUESTION: But were they obligated -- with the fee uncertain, were they obligated to comply with the blanket license for the next two or three years --

MR. TOPKINS: They were --

QUESTION: -- for '66 and '67?

MR. TOPKIS: No. They had the right to drop it whenever they wanted to.

QUESTION: It was terminable at will?

MR. TOPKIS: Yes, for all practical purposes. Retroactively, the court would still have the power to set the fees but not prospectively.

QUESTION: What I am concerned with is their argument that it doesn't make much sense to go out and get separate licenses when you are already obligated, you already have the right to all the music under the blanket license and in effect would be paying twice for the same music, I am just wondering, were they obligated to pay under a blanket

license during the period when you suggest they should have been negotiating?

MR. TOPKIS: No, Your Honor, they could have cancelled and gone out into the market. What the District Court suggested it would have been shrewd for them to do would be to announce let's say six months or a year in advance that they would be cancelling their license and then set up their direct licensing arrangements so that on a specific day they could shift over without the slightest penalty. There would have been no problem there at all.

QUESTION: Is there anything in the arrangements between ASCAP and its members which would preclude ASCAP from licensing a portion of its portfolio?

MR. TOPKIS: ASCAP undertakes to license all of the compositions of all of its members.

QUESTION: No, that is not my question. The question is, is there anything that would prevent ASCAP if it so decided to say just license one kind of music separately from the entire portfolio?

MR. TOPKIS: Well, our agreement with our members provides that we will license all of the members, all of each member's copyrights. Now, whether we could say to a member we've decided only to license your music in waltz time or your music in --

QUESTION: Well, that is not my question. Say you

have a hundred members in four different categories, just assume.

MR. TOPKIS: All right.

QUESTION: One is classical music, another is popular and another is waltz.

MR. TOPKIS: All right.

QUESTION: Is there anything that would prevent ASCAP if it thought it would be advisable to license a package just containing waltzes, say?

MR. TOPKIS: I don't know just how the amended final judgment would be read on that subject where it deals with the licensing of specified works, but by category I should think not. That is, I should think there would be no written bar. I can say it has never been done and I think the ASCAP members would regard it as a breach of their understanding with ASCAP.

Irving Berlin joined ASCAP to have all of his works licensed, not to have his serious compositions --

QUESTION: Say all of Irving Berlin's go in the same category, could you license, say, Irving Berlin and ten other composers as a separate smaller package without breaching an agreement with any of your members? Or is there an agreement among the members that you must license everything as a blanket?

MR. TOPKIS: The agreement provides that ASCAP will license the members' entire repetoire. Now, I can't really --

QUESTION: You studiously avoid answering the question.

MR. TOPKIS: Not deliberately, I assure you, Your Honor. It is not a question that has ever been raised in ASCAP's history and all I can say is that I think it would startle ASCAP's members to be told that some of their works were being licensed and not others.

QUESTION: But what you are telling us is that CBS could go to separate publishers and say we want to license your portfolio of music.

MR. TOPKIS: Right.

QUESTION: I am asking you if they could go to ASCAP and say we would like to license just the music published by "X"?

MR. TOPKIS: As a matter of contractual right, I think the issue is in doubt, Your Honor. That is all I can say. I think the expectation of ASCAP's members is that all of their compositions will be licensed whenever ASCAP grants a license.

QUESTION: ASCAP does not promote at all?

MR. TOPKIS: It does not promote in the -- well, to a slight degree, Your Honor, not significantly. We do make contributions to country music festivals and we do make contributions --

QUESTION: I mean you don't say that we will take

four records and sell them to you, because ASCAP doesn't do that.

MR. TOPKIS: No, no. We are, after all, we speak for all of our members, and that perhaps, Justice Stevens, goes to your question. We don't push the work of any member nor the type music of any member nor country music as opposed to rock and roll or soul. That would be entirely out of keeping with ASCAP's style of operation. We exist for the benefit of all of our members and represent them all simultaneously. Now --

MR. CHIEF JUSTICE BURGER: You are now dipping into your rebuttal time.

MR. TOPKIS: I am indeed, Your Honor, and I will close very quickly with just this reminder, if I may. Of the options that are open to CBS or any other television network, they are it seems to me of an extraordinary range and extraordinary benefit. First, CBS has the right, the District Court found, as well as the ability to deal individually and get all the music it needs. Second, if CBS wants to save the transactional costs and do without the bother and the trouble of dealing with individual members of ASCAP, it has the right to go to ASCAP and it can take its pick between a program license under which it pays only for each program that it broadcasts containing ASCAP music or a blanket license where its rights are absolutely unlimited.

And its options do not stop there, because it has

the right under the ASCAP amended final judgment in the Southern District of New York to have the court supervise negotiations between ASCAP and CBS, so that if ASCAP attempts to obtain an unreasonable fee the court is standing by to guarantee that there will be a reasonable fee. This I think makes CBS an economic entity having advantages that are just about unparalleled in our society. I cannot think of any other buyer who has the option of dealing individually with his suppliers or of calling upon them, indeed compelling them by virtue of the amended final judgment to ban together and sell him all of their products at a court-supervised price. I don't know any other business that has that kind of advantage, that kind of benefit, and with that I will stop.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Miss Kearse.

MISS KEARSE: Mr. Chief Justice, and may it please the Court:

I represent Broadcast Music, Inc., which we refer to commonly as BMI. We are here we believe on a simple question, the question as decided by the Second Circuit, is whether or not the offering of blanket licenses by BMI and ASCAP constitutes a per se violation of the antitrust laws.

This question was presented to the Second Circuit by CBS as a question of law. CBS did not attack the findings of fact of the District Court. CBS urged the Court of Appeals

not to make a rule of reason inquiry. CBS simply urged the Court of Appeals to find that as a matter of law the offering of blanket licenses was per se illegal.

The Court of Appeals did find that the offering of blanket licenses is per se illegal. The court did this despite the fact that it recognized that the offering of this kind of license is not a naked restraint, is not generally unlawful, is something that is required by some users, is something that is deemed very convenient by other users. And as a result of the recognition of the values and the advantages of the availability of blanket licensing, the Court of Appeals, despite the fact that it said blanket licensing is per se illegal, decided that the offering of blanket licenses should not be enjoined.

I think the reason the Court of Appeals fell into the error of finding that blanket licensing is per se illegal is apparent from one particular passage in its opinion in which it says the availability of blanket licensing gives the copyright owner the right to choose the way in which his work will be licensed. I say that is error because there is no support in the record for that at all.

As Mr. Topkis has indicated, the record in this case is a bit unusual because we have CBS pressing its claim not on the basis of anything that has happened to CBS, because CBS never attempted to get direct licenses from copyright

owners. The questioning at trial, the questioning on depositions was largely hypothetical -- would you grant a direct license to CBS if it asked; what would happen, CBS asked, if we tried to go the direct licensing route. There was a fair amount of speculation from CBS' witnesses on this score, but the speculation came from witnesses who had never talked to a writer or publisher.

The great bulk of the testimony from knowledgeable people in the industry was that direct licensing would definitely be available. As one of CBS' former vice presidents Mike Gann testified, the top composers and publishers are intensely eager to have their work performed and the average composer is out of work. If you let them know you are interested, you won't be able to get them out of your office. And this is why the District Court found that the record was replete with the Darwinian imagery of cutthroat competition of publishers hungry for performances of their works, and why he concluded, hyperbolically, of course, but why he concluded that if CBS just let them know that CBS was in the market for direct licenses they would line up at CBS' door. And these findings were adopted by the Court of Appeals which found that direct licenses are available, that there can be a market for direct licensing, that this market can coexist with the offering of blanket licenses.

QUESTION: Miss Kearse, there is nothing in the

composers contracts with ASCAP then that would prevent them from dealing directly with CBS?

MISS KEARSE: Nothing at all, Your Honor. As far as BMI is concerned, CBS has raised an issue in its briefs or attempted to raise an issue in its briefs as to the availability of direct licenses from BMI affiliates. Approximately a year and a half before trial, CBS and BMI entered into a stipulation which provided in effect that with respect to the availability of direct licenses from BMI affiliates, CBS and BMI would be governed by what the District Court found with respect to the availability of direct licenses from ASCAP members, and that --

QUESTION: That factual question is covered by the findings of the District Court with respect to ASCAP?

MISS KEARSE: Yes, it is, Your Honor, and at the trial repeatedly CBS used the stipulation in order to get into evidence depositions and documents which on their face related only to ASCAP members and the availability of direct licenses from ASCAP members, and BMI honored that stipulation and I see no reason why that stipulation should not remain in effect.

QUESTION: We are told that CBS did not seek direct licensing. Did other users do that?

MISS KEARSE: I know of no instance in which a television network has actually sought direct licenses.

QUESTION: Do you know of any instance or does the record show any instance in which a party who has entered into one of these blanket contracts sought direct licensing?

MISS KEARSE: We have in the record, Your Honor, two -- evidence with respect to two experiences in direct licensing or attempted direct licensing. In one instance -- both of which, I might add, were brought to the court's attention by CBS. One is known as the 3M incident throughout the court papers. 3M in the mid-1960's decided to offer for sale tapes of recordings of background music. 3M attempted to get a blanket license from ASCAP. ASCAP suggested for various reasons that 3M go directly to the writers and publishers. 3M did go to the publishers and approximately 80 percent of the publishers that 3M contacted did grant licenses. The other --

QUESTION: When you speak of 3M, are you not speaking of Minnesota Mining?

MISS KEARSE: Mr. Justice Blackmun, I am speaking of Minnesota Mining. It has come to be called colloquially as 3M.

The other instance in the record with respect to an attempt at direct licensing occurred --

QUESTION: Before you leave that, what is it, 27 out of the 35 did sign up, but there were eight that refused to, were there not?

MISS KEARSE: There were eight that did not eventually enter into agreements.

QUESTION: Is there any finding in the record -- the Judge did find that there would be publishers who would line up at CBS' door, but is there any finding with respect to what percentage of the total inventory of music could be obtained by direct licensing if they cancelled the blanket licensing, which I suppose they would have to do before they would want to do any separate licensing?

MISS KEARSE: I believe there is no finding in the record as to the exact percentage or the approximate percentage that would be available by direct licensing. But we must remember that most of the music that is used on CBS Television Network is composed specifically for the program.

QUESTION: But the problem, I take it, is with the feature music primarily, the feature programs?

MISS KEARSE: The feature music, most of it is composed by persons outside of the program packager's control. A great deal of evidence was introduced by both sides at the trial as to the proportion of CBS' programs that used feature music. When the trial started, there were I believe six or seven variety programs on CBS. By the time trial was over, there was only one.

QUESTION: I think the findings were that the feature music was small in percentage but extremely significant.

MISS KEARSE: That it was very small in percentage. It is significant, but in that the program packagers already are in touch with the copyright owners of that music, that it would not be --

QUESTION: Is there any finding as to how much of the feature music that would be needed for their programming they could obtain through direct licensing if they cancelled the blanket licensing?

MISS KEARSE: I don't believe there is a finding on that score, Your Honor.

QUESTION: They just don't differentiate among who would be lining up at CBS' door, do they?

MISS KEARSE: I think the judge concluded that publishers and writers in general would line up at CBS' door. Your Honor, even the eight publishers who did not eventually enter into agreements with 3M negotiated with 3M, and several of them, after refusing to enter into the agreements for the first series of 3M tapes, attempted to reopen negotiations later with respect to the second series. Some of them reached oral agreement with 3M, which 3M then decided were not appropriate or desirable.

Judge Lasker did find that there was no concert of action. All of the publishers had a very real problem with the concept of policing these tapes after the three-year license period would expire. The tapes were to be sold. The

amount of performance royalties was very small. The job of policing 20,000 doctors and dentists' offices to see who could be gotten to pay a royalty fee after that three-year period had expired would probably be a game not worth the candle. Policing was a concern that was voiced by all of the publishers with whom 3M dealt. Some of them decided to deal anyway, 80 percent of them. Some did not.

QUESTION: How do they police it now?

MISS KEARSE: I think --

QUESTION: Does ASCAP do it for them?

MISS KEARSE: After the three-year period was over, only about a third of the purchasers of the tapes renewed their licenses, and I think very little policing went on because of the small size of the fee that would be available and the great cost involved in policing. So I think the policing concern was --

QUESTION: Doesn't ASCAP generally police the transmissions of music such as that?

MISS KEARSE: ASCAP generally polices performances of music, but I believe that it took the position that with respect to the granting of direct licenses, it would not be appropriate for it to expend the funds that would normally be expended for the whole membership to police for a few; and even when it does police, I gather there is evidence in the record to the effect that it loses money on the infringement

suits that it brings, and the policing that it does. So it is not an economic proposition across the board, and certainly if there are only a few publishers involved, it is not --

QUESTION: I have some problem understanding the whole policing concept. Supposing that this 3M program just never asked for a license anywhere, they just started selling to doctors and doctors started playing records in their offices. Wouldn't ASCAP police that activity just as part of their general undertaking, engage in policing for their members?

MISS KEARSE: I assume that if ASCAP knew about it, it would do something about it, but in that instance I think it would have a much easier road to travel against 3M, rather than against the 20,000 doctors and dentists.

QUESTION: Is there evidence in the recrd as to how ASCAP goes about policing? Do they send patients into doctors' offices?

(Laughter)

MISS KEARSE: I believe that ASCAP has not policed the doctors and dentists. ASCAP polices public performances in night clubs, bars, that sort of thing.

The other evidence of an historical attempt to direct licensing that is in the record is the attempt that was made by Warner Brothers back in the 1930's when Warners, as a music publisher, had a valuable catalog that it wished to license

directly. Warner did not want to license through ASCAP and therefore withdrew its catalog from ASCAP and attempted to get broadcasters to take direct licenses. The broadcasters did not want direct licenses and therefore Warner was unsuccessful in this attempt.

So of the two historical situations we have in the record, we have one user who wanted direct licneses and got them --

QUESTION: In the Warner Brothers situation with the broadcasters who were not interested in dealing directly, did they have blanket licenses already?

MISS KEARSE: They had blanket licenses from ASCAP. Their blanket licenses did not cover the Warner catalog because Warner withdrew its catalog from ASCAP.

QUESTION: I see. So they would have had to choose in effect between the --

MISS KEARSE: They could have had both.

QUESTION: They could have had them both?

MISS KEARSE: They could have had both. They chose not to take the direct licenses, they chose to do without Warners' music. And I point out these two situations because they are opposite sides of the coin. In one, the user wanted direct licenses and got them, and the publishers who wanted to license only through a middle man did not have his music used. In the other, the publisher wanted direct licenses and

the broadcasters wanted to license through the middleman.

QUESTION: Does the record tell us why the broadcasters wouldn't take the Warner portfolio?

MISS KEARSE: I don't believe the record tells us that. It only tells us the fact that they refused.

QUESTION: Then what inference do you draw from the refusal? What does that tend to prove?

MISS KEARSE: I think the appropriate inference to be drawn is that it is the user's choice, which transactional method he uses to get his music. And if the music is not available by the means the user wants --

QUESTION: Maybe they were charging too much money or they didn't like the music. From that one instance, you draw the inference that the user is the one who dictates the terms of the bargain?

MISS KEARSE: I think these two instances together show that fairly clearly, Your Honor, and I think there is nothing else in the record to indicate to the contrary.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Easterbrook.

ORAL ARGUMENT OF FRANK H. EASTERBROOK, ESQ.,

ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

MR. EASTERBROOK: Mr. Chief Justice, and may it please the Court:

The United States believes that three considerations

govern the proper disposition of this case. First, under what circumstances should agreements among competitors be held unlawful per se; second, are the blanket licenses of ASCAP and BMI so likely to be anti-competitive that they come within this class; and, third, if blanket licenses are not always unlawful, should a per se rule nonetheless be employed because of the particular circumstances of one user or class of users in music. I will address those questions in turn.

My first proposition is that per se rules should be employed only when a particular species of conduct is so likely to be anti-competitive that a particular trial of particular circumstances would not be worth the time and effort because there are so few justified examples of that species. In those circumstances, there is no reason to go through a full trial.

Per se rules are attractive precisely because they are understandable and certain. They make compliance with the law simple and they make business counseling easy and they make trials short, and they are thus highly desirable, and the United States has consistently urged that per se rules be employed whenever that is feasible. But if certainty alone were enough to call for per se treatment, all of antitrust law would quickly be reduced to a series of homilies. There must be some reason for each rule.

When we say that certain conduct is so likely to be

anti-competitive that we can omit particular inquiry, we are talking about antitrust and economic injury. The court's focus has been on economic efficiency. When concerted conduct raises price, reduces the efficiency of production and decreases the amount of goods supplied, the consumer loses and he changes to less desirable substitutes.

The prospect of earning especially high profits also induces firms to spend their time and resources gathering a monopoly and all of the resources he used in this way are wasted.

But the harm in question is economic. Precisely because the harm is economic, the court has also considered economic benefits. Sometimes collaboration even between competitors yields new benefits, lower costs and so on.

QUESTION: Mr. Easterbrook, does the United States have a view as to whether or not the blanket licensing here has any impact on the price level?

MR. EASTERBROOK: The United States, Your Honor, did not participate in the trial of this case and has not fully examined the record of this case. There is a legitimate concern I believe about amonopolization under section 2, because the trial of this case went off essentially on tie-in and price-fixing grounds. The United States believes that the possibility of monopolization, what might be termed the Alcoa, the United Shoe Machinery theory, was not explored

as fully as it might have been.

It seems clear from the record in this case that there are limits on the effect that ASCAP could have on the price. At some point, the price ASCAP charges becomes sufficiently high, that it is less expensive for CBS or for anybody else to seek direct licenses. At that point, any authority ASCAP might have over price expires. So in that sense, it is clear from the record in this case that the price ASCAP is charging is less than the price that CBS would pay through direct licensing, assuming that CBS is behaving in a rational economic way.

QUESTION: Also, Mr. Easterbrook, ASCAP has to operate under the provisions of that consent decree which gives judicial supervision over at least --

MR. EASTERBROOK: It does, Your Honor. It does provide -- there is both a compulsion that ASCAP permit direct licensing, not interfere with direct licensing in any way, and a rule that the consent decree court can set a price for anyone who applies and can't reach an agreement with ASCAP. I must say that that never has been done, that is the consent decree court has never set a price. There have been numerous applications to the consent decree court that have all been settled, perhaps because the judicial machinery is even less well suited than the machinery of the Interstate Commerce Commission to setting reasonable prices for economic goods.

QUESTION: Mr. Easterbrook, I am not sure you have answered my question. My question is does the United States have a view as to whether or not the practice of blanket licensing by the two large sellers involved here has an impact on the price level?

MR. EASTERBROOK: I am sorry, Your Honor, if my answer sounded like an evasion.

QUESTION: If anything, it sounded like you were saying it tended to lower the price.

MR. EASTERBROOK: That is the tendency of my answer. I must say that I can't give a definite answer precisely because the United States does not --

QUESTION: If you don't have a view, you can simply say no, you don't have a view. If you do, I would like to know what it is.

MR. EASTERBROOK: I do not have a view, but there considerations that indicate that the price appears to be lower.

QUESTION: Well, Mr. Easterbrook, you are here I take it as a lawyer and not as a qualified expert testifying before a priors court as to the licensing of music and what its competitive effects are.

MR. EASTERBROOK: Most certainly not, Your Honor. I was just attempting to draw inferences from the record bearing on the question Mr. Justice Stevens asked. I am not qualified

as an economic expert by any stretch of the imagination.

QUESTION: No, but I understood your analysis at first see to have some relationship to your judgment about the economics of the situation.

MR. EASTERBROOK: It does, but that is also drawn from the record and from this Court's cases.

My point was that there are some forms of collaboration between competitors that are undoubtedly beneficial. The formation of new firms, the mergers between existing firms and the creation of joint ventures all involve competitors or potential competitors who cooperate in some way or other.

It is precisely because of these forms of economic cooperation without which one could not have cooperation or indeed much of any other economic enterprise, that are beneficial to the economy, the Court has been hesitant to apply per se rules to economic cooperation.

The basic distinction I am suggesting in the formulation of per se rules is the one recognized by Judge Taft in his famous opinion in Addyston Pipe & Steel and an important foundation of antitrust law between naked restraints and economic integration. Naked restraints between competitors rarely produce economic benefits and, because they sometimes cause loss, they are deemed unlawful per se. Forms of economic integration, on the other hand, although they contain the potential for economic loss, also contain a great

potential for gain.

That brings me to my second proposition, which is that ASCAP is not a naked restraint. ASCAP is clearly a form of joint venture. As a rule, blanket licenses issued by ASCAP produce real benefits. A blanket license is a product that only a joint venture can sell. No composer, no small combination of composers can sell what ASCAP sells. What ASCAP sells is the right to use great quantities of music on the spur of the moment, without searching for a composer, without negotiating for a contract, and without fear of infringing anyone's rights.

Users of music apparently find that package of rights valuable, if only because of the cost of searching for a composer and negotiating a contract in many cases exceeds the total value of the music. The figures given by CBS at page 22, the first note of its brief, disclose the costs of negotiating composition by composition through an agency, and they run from $5 up per composition. For many uses of music, radio, bars, and the like, the total value is significantly less than $5. And without some form of license of the sort ASCAP offers, those transactions would never take place at all.

QUESTION: Mr. Easterbrook, you repeatedly refer to ASCAP. Am I to understand that you mean that generically to include BMI?

MR. EASTERBROOK: I do mean it generally to include

BMI. I am generally referring to the practice of offering blanket licenses.

In any event, with apologies to Dr. Laskey, if there were no ASCAP, it would be necessary to create it. The blanket license is beneficial to music users and its economic value rather than any arguments about market necessity makes per se treatment inappropriate.

To say, as CBS does, that ASCAP is unlawful per se because it fixes a price is to make antitrust law depend on totalogies. Of course ASCAP fixes a price. It must fix a price. Every firm, every joint venture sets a price for the thing it makes, and the members of the firm or the joint venture don't compete against each other within the firm to sell the thing they make at a lower price. There is no competition in the sale of ASCAP licenses because only ASCAP makes ASCAP licenses, and similarly there is no competition in the sale of BMI licenses. There is also no competition in the sale of Shick razors because only Shick makes Shick razors. That is a trivial argument.

The important question is whether there is competition in the sale of performing rights, not whether the joint venture is trying to compete with itself. On that score, ASCAP and BMI have very little in common with price fixing cartels. The cartel tries to drive up the prices by curtailing supply. Here there is no curtailment, indeed because of

the low price under the license, it may be that there is too much music use. The cartel tries to stop competition among its members or at least they agree not to compete with one another individually. There is no such agreement here, and it seems conceded and the District Court found that they would line up at CBS' door if they were asked.

So my argument so far has been that blanket licenses produce economic benefits. The per se rule does not apply to them precisely because a joint venture of this sort, offering a product of this sort has some economic utility.

QUESTION: Why do you suppose, Mr. Easterbrook, the individuals haven't lined up at the door anyway?

MR. EASTERBROOK: Mr. Justice White, so long as CBS maintains its blanket license --

QUESTION: Has it got one now?

MR. EASTERBROOK: It is operating under an interim allowing it to use all of ASCAP's and BMI's repertoire.

QUESTION: I know, but it is terminable at will or whatever --

MR. EASTERBROOK: It is terminable at will.

QUESTION: Is there anything in the record to indicate that any individual has ever come around to CBS wanting to license individually?

MR. EASTERBROOK: The only indication in the record on that is the Warner Brothers episode which was discussed by

Miss Kearse, in which someone came to CBS -- not necessarily CBS, but to users, to radio networks and were turned down. The reason for that -- not necessarily the Warner episode, but the reason in general, if one publishing company showed up is that under the ASCAP blanket license CBS has the right to use those compositions at zero marginal cost. They won't pay additionally for them. The impetus to change the system has to come from the user who can announce, say, as of a year from now I will stop buying a blanket license and will shift to either individual licenses with particular composers or to program licenses to pick up those things on which I don't make individual deals.

QUESTION: So you think that the copyright, individual copyright holders just know when they would be doing a useless thing?

MR. EASTERBROOK: It would be completely useless for them to go to CBS now.

QUESTION: Mr. Easterbrook, is there something under these arrangements that prevents the -- I should say first, assuming there was no ASCAP arrangement at all, is there anything to prevent anyone from broadcasting or copying a copyrighted piece and then keeping a record and paying the royalty?

MR. EASTERBROOK: As a matter of convenience, it may be that if you keep a record and pay a royalty, no one

would prosecute you, but in fact the law requires that you have the license before you make the broadcast. That provides for free economic bargaining. If you first broadcast it and then go and tender $2, it is very difficult to reach an unbridled economic agreement between a seller of rights and a buyer of rights. It is a faite accompli, the deal is closed.

QUESTION: You can make a copy of a recording, may you not, under that $2 arrangement?

MR. EASTERBROOK: There is a provision in the law with respect to mechanical recordings, providing that anyone can use a copyright for a little more than two cents per copyright, and that compulsory license was put into the law because of difficulties in policing because of difficulties in setting royalties, et cetera. But that is I believe the only provision of the law providing for a compulsory license at a determinate fee. In other cases, fees are supposed to be negotiated in advance to seek the permission.

QUESTION: Is it a criminal offense to play it before you get the license?

MR. EASTERBROOK: It is a criminal offense.

QUESTION: Mr. Easterbrook, part of your answer to the Chief Justice reminded me of CBS' argument with respect to music that is already in the can, as it is called, recorded, and the fact that with respect to that there wouldn't and

couldn't be free negotiation, for the same reason that you indicated in part of your answer to the Chief Justice.

MR. EASTERBROOK: Mr. Justice Stewart, that is I think a little difficult to determine, how those negotiations would come out. As we say in our brief, that has some of the characteristics of bilateral monopoly. CBS which owns the music in the can can say unless you give me a license for cheap, I will never broadcast this and you will never get a penny. The owner of the copyright can say unless you pay me a great deal of money, I will deny you a license and you will never be able to get to broadcast it and it is worth a lot of money to you to broadcast it.

QUESTION: And it is that latter that CBS is arguing.

MR. EASTERBROOK: It is a two-party holdup, and what the District Court found was that in the circumstances of the two-party holdup, a fair price would be reached.

There are other answers to the music in the can problem, among them the per-program license. If for some reason CBS is unable to obtain individual licenses on those kinds of things, it can obtain a per-program license available under the consent decree. And there is also I believe some oddify in CBS' making this argument because for years it has always had the option of obtaining a contingent license, a license in the nature of if we ever drop the blanket license we are licensed to perform this at a royalty of blank percent

or blank dollars. That license, a contingent license of that sort should be easily available in the market on request. CBS has never requested such a license and to this day has not attempted.

QUESTION: And that kind of a license would cover music in the can?

MR. EASTERBROOK: Yes, it would, and it would alleviate the problem prospectively. But the suit began almost a decade ago. CBS has had the option of seeking such licenses and has never sought them.

QUESTION: It would have to pay for such a license, would it not?

MR. EASTERBROOK: It is not clear, Mr. Justice Stevens, what the nature of the payment might be.

QUESTION: Well, they would have to pay something. I don't imagine the publisher just as a matter of charity would say here, you can have this option.

MR. EASTERBROOK: It is in the nature of an option, Mr. Justice Stewart, and options are generally available although not necessarily at a high price. But the promise to pay, the major promise to pay would be if we ever use it outside a blanket license, would promise to pay.

QUESTION: But wouldn't you agree that there must be a price paid even for the option?

MR. EASTERBROOK: I would certainly agree that you

would have to pay a price for the option.

QUESTION: Which would be money down the drain if they never cancelled the blanket license.

MR. EASTERBROOK: Yes. But their argument, of course, is that they want to cancel the blanket license and they want to set up circumstances under which they can do it. The point I was making was that they have not set up the circumstance and now it is very hard for them to complain that they can be held up when they haven't done what is necessary and within their power to prevent the holdup.

QUESTION: If they are willing to pay for it.

MR. EASTERBROOK: Yes.

MR. CHIEF JUSTICE BURGER: Mr. Hruska.

ORAL ARGUMENT OF ALAN J. HRUSKA, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. HRUSKA: Mr. Chief Justice, and may it please the Court: I represent CBS, the plaintiff in this case and the respondent on this appeal.

The principal issue on this appeal is the correctness of the Court of Appeals determination that defendants fix prices or, more specifically, whether a combination of otherwise competing music publishing corporations are fixing prices in violation of section 1 of the Sherman Act when the prices at which they sell music performance rights for television network use are not determined by a process of price

competition but are determined and set by the combination itself and are indeed annual single package prices to a pool of all the members' copyrights.

By law, copyrights on original music compositions are granted to the composers of those compositions. As a matter of practice, those copyrights are assigned to the music publishing corporations. And the licensing of music rights to motion picture producers, to the makers of phonograph records, and to the publishers of sheet music, music publishing corporations do deal directly with those users and do engage in price competition. In the licensing of performance rights for television network use, such as CBS, music publishing corporations manage to sell in a thoroughly non-competitive way insofar as price is concerned.

How do they do that? By a far more structured, controlled and pervasive system than any ordinary price fixing arrangement. In the routine price fixing case, it is common to find that the sellers have gotten together, not uncommonly in a hotel room, either by explicit agreement or by some well-placed words and some winks and maybe some nods, have agreed to set price at maybe $1,000 a unit. Quite rarely will any of those sellers leaving that room actually sell at $1,000 a unit. They will negotiate down from that price, but it will be a focal point for negotiations, and such an arrangement is obviously illegal per se.

Here the music publishing corporations do not agree to sell individually at $1,000 a use. They agree to have a central instrumentality, a joint sales agency, ASCAP or BMI, sell a blanket license to their entire pool of copyrights at "X" million dollars a year and then to distribute $1,000 to themselves in respect of each use the licensee makes of their music. Now, this quite obviously is a very effective means of eliminating price competition among otherwise competing sellers, of removing --

QUESTION: Mr. Hruska, what is your answer to the petitioner's contention that if you have two individual general contractors that go into partnership, they cease competing, too, and bid as a unit rather than formally as they did supplying two separate prices. This wasn't tried under a monopolization theory, was it?

MR. HRUSKA: Yes, it was. We have charged in this case price fixing, tying and monopolization. We definitely did try them in a monopolization case.

QUESTION: And did the District Court and the Court of Appeals rule on your monopoly case?

MR. HRUSKA: Yes, indeed, they did. The District Court ruled that ASCAP and BMI were not monopolistic because they were not the sole source of supply of the music in their pools. That ruling we claim was wrong as a matter of law. A monopolist need not be the sole source of supply. Monopoly

is measured by the handicap that the monopolists can impose, and the handicap here, as I will get to in a few moments, is quite significant, based on the District Court's own findings.

QUESTION: What did the Court of Appeals do with it?

MR. HRUSKA: The Court of Appeals upheld that finding -- excuse me, upheld that ruling of law.

QUESTION: So you are challenging the two courts?

MR. HRUSKA: We are, indeed.

QUESTION: And what is your answer to the question about the two general contractors who form a partnership and from then on bid singly rather than separately?

MR. HRUSKA: Well, I think under existing law that is price fixing. However, I should make this point: I think that it is certainly a more difficult question when you get to two individual entities, otherwise competing entities which if they were to merge would clearly not violate section 2 and nevertheless are fixing prices. Now, the --

QUESTION: Do you think Judge Taft was wrong in his expression of views in the Addyston case?

MR. HRUSKA: Well, I think that we can be far more confident that the benefits for which we permit mergers to occur will actually be achieved when the firms decide to merge. On the other hand, when the firms decide not to merge but to fix prices and then to throw some integration into that process, then we can be far less comfortable. We are not dealing

here with two --

QUESTION: I have difficulty with your answer as my brother Stevens did with one of my Easterbrook's answers. Is that an answer to my question, do you agree or do you not agree with Judge Taft's observation in the Addyston case?

MR. HRUSKA: I am not sure I understand completely, Mr. Justice Rehnquist, which observation you refer to.

QUESTION: Well, the observation that if you applied the logic of your -- I won't say your principle, but this principle extended to its logical conclusion, it would extend it to individual businessmen who form a partnership.

MR. HRUSKA: Yes, the logic would extend not to form a partnership, no, but to enter into a price fixing arrangement on the bidding for a particular job, then perhaps yes, although --

QUESTION: Well, how about the --

MR. HRUSKA: I have got to complete my answer to that. I really have to make this additional point. Although the logic would extend to that, it is not necessarily so the law must extend to that. There has been no case in this Court which has so ruled, number one. Number two, we of course in this case are dealing with a total industry of otherwise competing sellers. We are not talking about two little firms. We are talking about all otherwise competing music publishing corporations in this industry.

Now, obviously if those people were to sit down in a hotel room and fix prices at $1,000 a unit, that would be a clear-cut case. What they have done is far more effective than that. They have created a central instrumentality which has control over that price, which insures that price. Now, if there is anything anomalyous in the antitrust laws, it would be to on the one hand prohibit a garden variety hotel room fix with no centralized control with cheating all over the place, as is common in routine price fixing cases, and on the other hand permit the same sellers to do it the most efficient way, to take price completely out of the harsh realities of the competitive marketplace.

If the steel companies were doing this, if the steel companies turned all their steel over to a joint sales agency, the American Iron & Steel Institute, and then have that institute sell their steel at $1,000 a ton, a defense to that case would be laughed out of court.

QUESTION: Well, what if two relatively minor steel companies merged and from then on they had a common sales agent who quoted a single price?

MR. HRUSKA: Well, if they merged, obviously under existing law the basic distinction we make -- we test that under section 2 or section 7, and we do that because we perceive certain benefits commonly achieved in monopolization cases, and we perceive the antitrust tools, sections 2 and 7,

adequately to judge whether those benefits outweigh the anti-competitive effects.

QUESTION: If I understand it, you would like to stay on both sides of this question.

MR. HRUSKA: No, no, not at all.

QUESTION: Well, you do though, don't you? You don't -- are you defending the results you got in the Second Circuit?

MR. HRUSKA: I am defending the result I got in the Second Circuit on price fixing, yes.

QUESTION: But you don't want to destroy the common sales agent, do you?

MR. HRUSKA: I certainly would like to enjoin ASCAP and BMI --

QUESTION: You would just like to get a better deal out of them?

MR. HRUSKA: No, I would prefer to enjoin them. I would prefer to enjoin blanket licensing. So does my client.

QUESTION: Yes, but is that the Court of Appeals holding or not?

MR. HRUSKA: The Court of Appeals suggested the adoption of a per-use system.

QUESTION: Yes. So --

MR. HRUSKA: We accept that. We don't prefer it, we accept it.

QUESTION: So are you defending it or not?

MR. HRUSKA: Yes, I am quite prepared to defend it.

QUESTION: Even though under your theory it is illegal?

MR. HRUSKA: Under my theory, if the defendants did it themselves, it would be illegal. On the other hand, though --

QUESTION: Are you defending a result, a remedy that the Court of Appeals gave which according to your theory is price fixing?

MR. HRUSKA: In the unique circumstances of this case, that happens to be sensible relief, like the relief granted in National Lead and Hazeltine and all of the other cases that --

QUESTION: So you still suggest that you are on both sides of this question.

MR. HRUSKA: Well, if that is both sides, then I am but I should say that compulsory licensing on reasonable royalty terms has been granted in patent cases, in the National Lead case and in the Hazeltine case and a block of others, it could be directed to the individual music publishing corporations, rather than ASCAP or BMI, although I don't think that makes much difference. The per-use system is an interim measure, naturally inherently it is going to be an interim measure, and that is so because the very process of per-use

licensing is going to break down the barriers of direct licensing that I will get to in a few moments.

QUESTION: If you are allowed to.

MR. HRUSKA: Yes.

QUESTION: I hate to continue the interruption, but sometimes the theory has trouble filtering through a very, very long brief. I would like to know whether your price fixing theory is that it is per se unlawful to have two competitors use a common sales agent, for example, automobile companies sometimes use the same -- say, a foreign car company and a domestic company use the same dealer. That is -- under your theory, is that per se unlawful, or alternatively is it your theory that it is only unlawful when it is a substantial portion of the market, for example, all of the automobile companies using a common sales agent?

MR. HRUSKA: Well, it is certainly our position that when a substantial portion of the market uses a common sales agent, it is per se unlawful, and it is not our case because we have not only substantial portion of the market, we have the entire market involved in this case. But it is also our theory, to be consistent with our theory, that if several or two otherwise competing sellers use a common sales agent, that in almost all circumstances that I can conceive of, that should be unlawful per se, and the reason I say that is it is very difficult to conceive of a situation in which those two

companies -- let's take the worst case, from my standpoint -- those two companies in order to achieve whatever integration benefits they are trying to achieve with their joint sales agency really have to fix the price. We have in this market, for example --

QUESTION: Well, just say they both want to use a very effective sales agency, they want to go to the same --

MR. HRUSKA: But they don't have to fix the price. The Harry Fox agency, for example, which handles on behalf of the music publishing corporations, which handles the licensing of the mechanical rights and rights for motion -- performance rights and synch rights for motion picture producers, does not fix the price. They get individual quotes from each music publishing corporation.

Now, you can run a common sales agency that way. There is nothing against it. In other words, each time the common sales agent wants to sell the goods of one of the members of this joint venture, he simply --

QUESTION: Well, he is more of a broker than --

MR. HRUSKA: Not necessarily, no. Harry Fox Agency does not consider itself a broker. They testified in this case that they consider themselves sales agents for the music publishing corporations. Harry Fox Agency is a subsidiary of the National Music Publishers Association. It is a wholly owned subsidiary of that trade association, and they are their

agent.

QUESTION: Just so I understand your theory then, your theory does not depend on the percentage of the market that the sales agent, common sales agent, that the principals of the common sales agent have?

MR. HRUSKA: True, it does not depend upon the percentage of the market.

QUESTION: As long as he can set the price?

MR. HRUSKA: That's right, as long as he is fixing the price for his members, in essence, or his clients or his customers. Now, on the other hand, a ruling in this case does not necessarily have to decide that question because, as I keep coming back to, we are not dealing with two little companies in a very large market. We are dealing with all of the companies in the market.

Now, the ASCAP defendants say we have a consent decree. When you, the television networks were formed and took your first license in 1946, ASCAP's right to license our pool was effectively exclusive, as the Court of Appeals found. But in 1950 that piece of paper, that consent decree was changed. Now that piece of paper makes ASCAP's right to license non-exclusive.

Well, that is very interesting, one might say, but has anything in fact changed for twenty-nine years as a result of altering that one word on a piece of paper, and the

clear answer to that is no, nothing is changed. Are you still selling your performers' rights at prices fixed by the ASCAP board, as you have done for sixty-five years, and the answer to that question is yes. And is that piece of paper somehow to unfix the prices at which you are actually selling through ASCAP, and the answer to that is no. And don't the conspirators in ordinary price fixing arrangement also have the right to sell at individually negotiated prices in view of the fact that price fixing agreements are unenforceable, of course the answer to that is yes. And aren't the case books filled with successful price fixing prosecutions of people involved in a fix, who frequently departed from the fixed price, and of course the answer to that is yes.

But ASCAP says, you, CBS, should ask, you should ask the music publishing corporations to engage in individual negotiations. Why? Why? Does any customer of a price fixing consortium have any obligation in law to ask the conspirators to please stop fixing prices to himself and all of the other customers in the market as a precondition for enjoining the fix? Certainly not. The fact that otherwise competing sellers are selling at agreed upon prices is enough.

If ten major oil companies fixed prices at $1,000 a barrel, could there be any doubt at all that a single buyer of oil who had refused to deal with those ten companies

precisely because of the fix and had dealt with none of the conspirators, any doubt at all that that company could enjoin the fix?

Or let's suppose that those ten major oil companies decided to fix prices to the fifty largest customers.

QUESTION: Is it entirely fair, Mr. Hruska, to analogize this case where you are dealing with copyrights which have to be policed in order to be enforced with barrels of oil?

MR. HRUSKA: I don't see why not. The policing aspect of this case is utterly meaningless. Music publishing corporations can police alone or they can police jointly, but they don't have to fix prices in order to police.

QUESTION: But some organization, each individual music publishing house would have great difficulty policing doctors offices and Muzak places and that sort of thing, would it not?

MR. HRUSKA: I think under the Aiken decision and the new copyright statute, doctors offices are not infringing on copyrights. Now, in today's world, anybody who wants to buy a phonograph and a phonograph record, whether he is running a barber shop or a hotel or a doctors office can set that record player up and start playing music. As I say, I don't think it is an infringement. But the policing aspect of this is really a separate thing. Publishers who police

together do not have to fix prices together. They don't have to sell together. There is really no necessary connection. The connection comes about as a result of the fact that when they do sell collectively, then of course they have got to have a vast monitoring system to keep tabs on everybody's uses so they can take that big lump-sum figure they get from the users and distribute it in this managed way to their members.

QUESTION: It was my understanding that the reason that they had the blanket license was that even though they all banned together for the purpose of policing, even though the large joint organizations, ASCAP -- I am sorry if I am interrupting your schedule --

MR. HRUSKA: No, no, I want to deal with the questions.

QUESTION: -- ASCAP or BMI were incapable of policing individual uses and therefore the blanket license.

MR. HRUSKA: Well, that may well have been and no doubt was one of the inspiring reasons for the creation of an organization like ASCAP. But as a matter of logic and as a matter of plain economic fact, which no one really disagrees about, in order for publishers to police together or monitor users' uses together, they do not have to fix prices.

For example, if they were to get out of the television network market, just get out, the cartel, ASCAP and

BMI, so that licensing could proceed on a direct basis, if they wanted to monitor the uses of the CBS Television Network and if they wanted to do it jointly, and indeed if they wanted to do it through ASCAP and BMI, that is fine, they can do that. Monitoring consists of nothing more than getting reports from the networks as to what is being used, turning your sound audio taping equipment on the networks --

QUESTION: Mr. Hruska, what about the man that has copyrighted three songs, who is going to protect him then?

MR. HRUSKA: His music publishing corporation protects him now. We don't --

QUESTION: I thought ASCAP protected him.

MR. HRUSKA: Well, in the dealings that his music enters into with respect to --

QUESTION: How can he negotiate with CBS, a man who has got three songs that are worth $1.75?

MR. HRUSKA: Well, if he hasn't got a music publishing corporation now, because as I say, as a matter of commercial practice --

QUESTION: Well, he would have to have somebody, wouldn't he?

MR. HRUSKA: Well, he has got to have somebody. He could have himself, he could have the publisher --

QUESTION: A person who has --

MR. HRUSKA: Excuse me?

QUESTION: A person that has got three songs can compete with CBS?

MR. HRUSKA: It is not a question of competing.

QUESTION: You said he could protect himself, and I want to know how in the world he could.

MR. HRUSKA: Well, the people who supply music now, who write music originally for television network use deal, of course, with the program packagers. CBS, as I am sure you understand, produces very few of its own programs. They deal with the program packagers and they do very well. They get between $1,000 and $2,500 a week for orchestrating, composing the music, orchestrating the music, and directing it. They deal for everything but the music performance right. That is copyright and is under the ASCAP license.

QUESTION: Here is a man that wrote a piece called, "Too Bad, Joe," and he goes to sell it to CBS and get CBS to use it. How could he do that? How could he tell CBS that if you use my piece I want to be paid? Say he lives in Hawaii, how could he be sure that he was being paid without ASCAP?

MR. HRUSKA: Well, there are really two different questions there. If they use the music, how can he be sure that he will detect such a use, and, two --

QUESTION: Well, isn't the real problem that if -- this is all set up long before the broadcasting industry and now you are trying to bring them both together now.

MR. HRUSKA: No, I am trying to take them apart.

QUESTION: I stand corrected.

(Laughter)

MR. HRUSKA: I was up to the point where I was positing the situation of major oil companies conspiring to fix prices to their fifty largest customers and suggesting that the fifty-first customer would plainly have a right to obtain an injunction against that price fix because the conspiracy would obviously pollute the market in which that customer was attempting to buy.

So that if CBS were to drop its ASCAP license and attemot to bypass ASCAP, CBS, like the fifty-first customer of oil, would certainly have the right to enjoin the price fixing that was still going on directly in sales to ABC and NBC, even though CBS has stopped dealing with the cartel.

QUESTION: Again -- and Mr. Justice Rehnquist asked you if the analogy really is fair -- the fifty oil companies don't sell anything that no one company could sell. But in this case the government particularly stresses the point that ASCAP sells a product that no one composer could sell, namely the blanket license, and that the blanket license has independent economic utility. How do you respond to that?

MR. HRUSKA: Absent conspiracy, 20th Century Fox cannot market the films made by MGM and United Artists and Columbia Pictures and all of the other motion picture companies,

but that is not excuse for price fixing, that is a definition of price fixing.

Now, the department's point is literally based on several "benefits" that the department believes it perceives in this situation, and those benefits are illusory. Those are things that we don't need. What we are dealing with here when those benefits are cited to us is a fixed price and a fancy bottle. The benefits consist of immediate access to songs as soon as they are written, that is very nice, and --

QUESTION: It is a benefit, too, isn't it?

MR. HRUSKA: But it is totally unnecessary. If we have got to choose between getting a competitive price and getting a fixed price in this particular fancy bottle --

QUESTION: Well, maybe you would rather have something else, but I don't think you can deny that there are some benefits to the blanket license.

MR. HRUSKA: They are not appreciable. They are not significant, and they are not justification for price fixing.

QUESTION: Well, as soon as you admit that there are some benefits, it seems to me it destroys your analogy to the oil companies and all the rest.

MR. HRUSKA: I don't believe so, Your Honor, because oil companies can create benefits, too. Any cartel of sellers can manufacture benefits if they cartelize their sales. For example, in some industries, you could have a situation where

fifty sellers would simply fire most of their salesmen, then achieve transactional efficiencies and they would be able to do so becuase they had a common sales agency. Are we going to permit price fixing to go on because that happens? That is a benefit, but it is certainly not a benefit justifying price fixing.

QUESTION: I get lost when anyone deals with a comparison of fifty oil companies selling oil presumably in about the same kind of containers and the kind of situation we are dealing with here. What is being sold here under the license is not fungible, is it?

MR. HRUSKA: No. They make it fungible by selling a blanket license, but it is not naturally or inherently a fungible product.

QUESTION: But the licensee doesn't just call up and say send me some music and accept jazz music when he is running a station which emphasizes classical music.

MR. HRUSKA: On the contrary. A great deal of investment is engaged in by the independent packager of each of these programs and simply the selection of the music for his program, so it is not fungible. On the other hand, the District Court did find that copyrights in various classes are reasonably interchangeable and they compete with each other, so we are not dealing with non-competitive products. We are certainly dealing with copyrights that compete with

each other when they are being purveyed to motion picture producers. Indeed, one of the ironies here is that some of the motion picture producers are the very people who are making television programs, and when they deal in motion pictures, when they are making motion pictures in their studioes, they are getting competitive prices on music, and when they are making television programs in their studioes, they are not. We have the market, as I say, cartelized.

But I would like to inject some further reality into this situation, the realities of purpose and effect. In the first place, we ought to look who the music publishing corporations that populate the ASCAP board year after year are, who are they that set these blanket licensing fees. They are Warner Brothers and they are 20th Century Fox, and they are MCA, Universal and Paramount which, as we all know, is a subsidiary of Gulf+Western, and United Artists, a subsidiary of Transamerica, and Chappel Music and Sherman Music and Shapiro-Bernstein, and the like, the hard core of the old-line music publishing corporations which control the standard compositions that are used so often on television networks. In other words, we are not dealing here with economic pigmies on the other side, and is there any doubt at all about their purpose in maintaining this system, the purpose of this combination, that it is to maintain prices. I submit that there is none at all.

Their very counter-claim in this case flatly states that CBS' attempt to enjoin the blanket licensing system is part of a plan designed to depress the price paid for music performance rights. And if their purpose in opposing the elimination of the blanket licensing system is to avoid a depression of the price, their purpose in maintaining the blanket licensing system is obviously to maintain the price. In other words, this argument by the ASCAP defendants is substantively identical to the argument made by the Society of Professional Engineers that competitive bidding would pressure price reductions. It is as clear an admission of anti-competitive purpose as one could possibly find, and it is far from the only one.

We have cited a rather large collection in our brief, such as the speech given by ASCAP's President some years ago that the central purpose of ASCAP and the Writers' Guild and similar organizations was to resist the splitting of our rights so that we could be picked off one by one. Well, the testimony given in this case by ASCAP's board member and officer, Mr. Brettler, who is also the head of the Shapiro Bernstein Publishing Company, that the benefits belonging to ASCAP which he describes as a leal monopoly, were that in unity there is strength and in disunity there is weakness. The record is filled with these.

And just as revealing of the defendants' intention

to maintain prices through the blanket licensing system are these facts: ASCAP pays out to its members on a per-use basis, i.e., it pays its members $1,000 for every feature use of their music on a television network, but ASCAP refuses to take in on a per-use basis, i.e., it refuses to charge the networks separately for each use. Is blanket licensing therefore unnecessarily restrictive and deliberately so, that is, deliberately designed to preclude price competition? Of course, it is, the blanket license is an all or nothing deal, either you take the entire pool or you get nothing. That means if you take the entire pool that direct licensing is obviously silly because no one is going to pay twice for the same music.

If ASCAP agreed to take in on a per-use basis, that would mean that the program packagers, the people who make the television programs and sell them to CBS could immediately start direct licensing for the preponderance of the compositions they use, both music written originally for television by their own staff writers and publishers music, and get some form of price competition, and so could CBS for the relatively few programs that it makes itself.

QUESTION: Mr. Hruska, what do you understand the theory of the Court of Appeals was in indicating that the only thing that is wrong with this arrangement is that licensing is not on a per-use basis? Under the Court of

Appeals decision, ASCAP would be wholly acceptable as long as it licensed on a per-use basis, is that it?

MR. HRUSKA: Well, they didn't say that exactly, Your Honor. They said ASCAP -- they said that the price fixing, the antitrust violation that was going on might be relieved by the per-use system. On the other hand, they recognized that the per-use system might have a continuing effect on direct licensing prices, they weren't persuaded that that was so, but they thought it might be so, and they suggested that this be tried out. But the whole suggestion there I suggest is --

QUESTION: What was the theory of the suggestion that perhaps per-use licensing might survive?

MR. HRUSKA: Well, because the Court of Appeals perceived that the present system creates a substantial disinclination, in other words cartel created values here to be preserved, and the Court of Appeals recognized those values, as this Court did in the Masonite case, and --

QUESTION: As I perceive your argument, you are not accepting that theory?

MR. HRUSKA: Oh, no, on the contrary, I am wholly endorsing that theory. In fact, I argued it to the Court of Appeals.

QUESTION: You are?

MR. HRUSKA: Yes, and I think it is right.

QUESTION: ASCAP may proceed as long as it gives you a better break?

MR. HRUSKA: No. If that is the theory you mean that I am wholly endorsing, the answer is I accept it, I do endorse it, even though I must note on behalf of my client that we would prefer to enjoin the system entirely, to enjoin blanket licensing for television networks. Now, the reason we prefer that --

QUESTION: Are you submitting -- of course, that would give you more of a remedy than you've gotten.

MR. HRUSKA: It would give us a more effective remedy I think ultimately, although there are arguments the other way.

QUESTION: It would certainly expand your relief under the judgment if we purported to agree with you.

MR. HRUSKA: I don't know that I would really regard it as an expansion. I think -- if you think of a per-use system, and it is a little hard to really --

QUESTION: I don't know how you can have it both ways. Right now there is a remand to the District Court under which a per-use licensing might -- would be tried out, and under your theory it shouldn't be tried at all.

MR. HRUSKA: No, Mr. Justice White, I haven't made myself clear. Let me try to do so now. I think in a relatively short period of time -- and I hesitate to quantify that

exactly, but in a relatively short period of time, either form of relief is going to end up at the same place. Now, the reason I think that -- and there is lots in the record to support this -- is that if you start with a per-use system, that means ASCAP -- that music will be available from ASCAP at whatever the court sets as a price, "X" dollars of use, and indeed the court may not set the price until he sees what the prices are under direct licensing transactions and gear the per-use price to that. But wherever that price is set, that will be the amount of money for which per-use you can get msuic from ASCAP.

On the other hand, you can also deal directly with the music publishing corporation. Now, to get to a per-use system, obviously there must be a declaration in this case of illegality. That declaration, coupled with the inauguration of the per-use system, is going to announce to the music publishing world, as it must, that blanket licensing is over, there is no further possibility of blanket licensing. They will have no choice whatever, short of a boycott, they will have no choice whatever then for the first time to create the direct licensing facilities.

We've got to recognize that we are dealing with the music publishing industry that lacks the personnel, the established operating procedures, any of the forms, any of the consents they are going to have to have from their writers to

engage in direct licensing, none of that is in existence, none of that is in place. The District Court found -- excuse me.

QUESTION: The District Court found, Mr. Hruska, that you gave them a year's notice or a year and a half or something like that, there would be plenty of time to set up all of that machinery.

MR. HRUSKA: Yes, the District Court found that with a long period of advance preparation, which he pater particularized at page 107 of the record -- and I make a note of that page because that is a very important page to resolve a dispute that seems to have come about through the reply briefs. It is clear as day that he found that from the time that CBS announced its intention to engage in direct licensing -- and he also said there would be no creation of direct licensing facilities until CBS made that announcement -- from the time that CBS announced to the time that they -- I think he referred to it as well-oiled machinery would be in place that would permit direct licensing to occur, would be at least a year. That is what he said.

Now, he also suggested to us a lot of things that we might do during the process of that year. We might require the movie companies who make our programs to cough up the catalogs of their music publishing subsidiaries, presumably on threat that their production services would not be greeted

with favor by CBS unless they did that. He suggested we go out and get mini-blanket licenses which are probably tying under this Court's decision in Loew's and Paramount. He suggested that we go a lot of other things.

Now, I suggest, Your Honor, I suggest that this sort of rigmarole to get yourself into a competitive market is really far worse than the rigmarole that a customer for engineering services had to go through in the professional engineer's case. After all, we recognize that that customer if he wanted to nominate one engineer and get his price and then rescind that relationship and then nomination another engineer and so forth to get himself access eventually into a competitive market. But here we are dealing with a far bigger problem and we've got to at least expend all of these efforts and take all these risks and buy all these options that Your Honor referred to before, and all economists in this case agree, we would have to pay for those options and pay dearly, we have to go through all this rigmarole to get to a competitive market, and I just don't think the antitrust laws require that. And bear in mind, the professional engineers case was not a case in which the engineers had agreed on the prices at which they would sell.

Here is a case in which the otherwise competing sellers are agreeing on the price at which they would sell, and there is no possibility, if we went through this rigmarole

and if we did pay the penalties on music in the can, there is no possibility that we would get a competitive price. Every ASCAP publisher knows, every time he sees a piece of his music being used on CBS, that is $1,000 in his pocket. If we abandon our ASCAP license, if we tried to license directly, the first place he is going to start, his first frame of reference is going to be $1,000 a use. We have plenty of testimony in this case about that, it is an admitted fact. You see that in the briefs. ASCAP is saying in their reply brief, you may be right, but what is so wrong with that, why is that any different from what any other seller in any ordinary market does, takes into account prior prices.

But here we are talking about not the influence of the seller's own prior prices, not the influence of the competitive market prices, we are talking about the influence of a consortium price, of a price that has been rigged, of a price that has been agreed upon, and that is different and that effect is inelectable.

Now, the Court of Appeals said it wasn't persuaded that that effect would occur, and I suggest that that was an error of logic and economics. This was an admitted point by economists, by the parties themselves, and once you -- and it is an obvious point -- and once you get a stabilization effect like that injected into a market, it doesn't go away unless you can reduce the price to zero, and that doesn't

exist outside of some pathological economic textbook model. It certainly doesn't exist in the motion picture field, where motion picture companies are paying between $750 and $20,000 for each use. BMI makes a ceiling price argument related to the per-use license which couldn't possibly have any effect at all if music prices could be driven down to zero.

The District Court made a finding in the 3M incident that a lot of publishers refused to deal because the money wasn't high enough. And remember who we are dealing with on the other side of this bargaining table. We are not dealing, as I said before, with economic pigmies, and it is not even CBS who is going to be buying the music, it is going to be the independent packagers, and those are the same people who very often pay $2,000 or $5,000 or $10,000 for music performance rights when they are making motion pictures.

QUESTION: Do you agree that the record doesn't indicate at all why it was that the broadcasters didn't want to deal with Warners, in that episode?

MR. HRUSKA: Well, the Warner Brothers incident occurred in the thirties, it was radio broadcasters, I don't think anybody was around still who was there in the incident except for one music publisher, Buddy Morris, who is a member of the ASCAP board, and Mr. Morris said that one of the reasons that Warner Brothers backed down and backed down pretty soon -- I mean, this thing didn't get off the ground,

really -- one of the reasons they backed down was because the writers were up in arms, and why were the writers up in arms, they were up in arms because of what they perceived to be Warner Brothers' disloyalty to ASCAP. Now --

QUESTION: The lyric writers or music writers?

MR. HRUSKA: The music writers, you know, the song writers who assigned their rights to Warner Brothers and then saw Warner Brothers leave the family, leave the --

QUESTION: The composers, you mean?

MR. HRUSKA: The composers, yes. And the 3M incident, well, you know, we don't really attack the court's findings in the 3M incident except for the arithmatical mistakes that the court made, which you have got to look at under the 3M as all the evidence the court did not look at. In 27 out of 35 he said dealt, and he said 8 didn't deal and even that is wrong, it was 9 that refused to deal, not 8. And when you compare the publishers who refused to deal, the 9, who by ASCAP's credit system account for 40 percent of CBS' uses -- and that is ASCAP credit system, you can't evaluate music in terms of equal numbers of compositions because some music is more valuable than other music and the credit system of ASCAp does that, and so that is probably the best way we have right now of evaluating the uses. The 9 who refused to deal supply 40 percent of CBS' uses.

The 27 or 26, whatever it was, who refused to deal

in the --

QUESTION: Who did deal.

MR. HRUSKA: -- who did deal, was a de minimis percentage. The total of them was 3.5 percent. When you take out 3 of them, which I will come back to in a moment, you get down to less than 1 percent. The three big ones who dealt were Jewel Music, and the President of Jewel Music testified in this case and he said he wouldn't do it again, he made a bad mistake -- this is in our Addenda A -- he said that when ASCAP is licensing a category of users, he believes that Music Publishing Corporation should not -- this was Jewel Music. And then we had two other big publishers, Shapiro, Bernstein and MCA. The President of MCA almost lost his job over this whole thing, it was so embarrassing that the attorney for 3M had to offer to tear up the contract and the publisher, the head of Shapiro, Bernstein who licensed said that the comparison between licensing this trivial way which was found money, an absolute windfall, and from his standpoint he expected to get as much as $500,000 for the licensing, and licensing of a television network was grains of sand compared to watermelons. He made a speech at the ASCAP board which said, you know, if we license these people at 3M and get this thing off the ground, they are going to have to come back to ASCAP anyway. That is how he justified it.

I don't really want to hang up on the --

QUESTION: That is sort of a digression. Let me just ask you this: In the motion picture market and in the sync right market, where I understand there is per-use transactions taking place --

MR. HRUSKA: Yes.

QUESTION: -- are there also blanket licenses offered in those markets?

MR. HRUSKA: I do not believe so, Mr. Justice Stevens, no, and a synch writer and performance writer is licensed in one transaction and they are licensed a use at a time, and that is a sensible way to license music. I think in the short time I have remaining I would like to jump to the rule of reason point and really mainly to make the point that the Court of Appeals really decided this case on rule of reason grounds as well as per se grounds. That isn't the label that the court used, but that is obviously what it did, in addition to holding this form of price fixing to be per se illegal. The Court of Appeals looked to see whether this price fixing was necessary for any market functioning purpose and found that it was not, the Court of Appeals looked to see whether this system created a disinclination to compete and found that it did inevitably. The Court of Appeals looked to see whether there was a less restrictive alternative and found that there was, the per-use system, and all of these were rule of reason determinations. And this was

obviously the basis of Judge Moore's concurrence which the defendants suggest was irrational.

Moreover, there is nothing of cognizable economic value that this unnecessarily restrictive system can be said to provide that would not be better provided by a competitive market. All we have really heard, and it is not really a rule of reason consideration, is that CBS is too big to be permitted to deal one on one with Aaron Copland or George Gershwin or the writer of several songs, but CBS will not be dealing with Aaron Copland even to the limited extent CBS is producing its own programs. The independent packagers will be dealing with them as they now deal with authors and actors and scenergy designers and set designers and everybody else who supplies elements for television programs, except ASCAP supplied music. And as I said before, the people who write music for television get between $1,000 and $2,500 a week, so it is plain that those people have adequate bargaining power.

I guess the last point I want to turn to is the defendants' expressed concern in their brief for treble damage liability if this judgment is affirmed. That too obviously has nothing to do with the rule of reason determination, but it should be -- also I think it has very little to do with this lawsuit. CBS has not sought damages in this case, treble or otherwise. The television stations have recently sued in New York, and they haven't sought damages either. And

if any group of users sue and if they do seek damages, and this Court believes for any reason that these music publishing corporations should not pay damages, this Court has the inherent power to so decide, so this case will not decide the question of whether music publishing corporations must pay damages. What it should decide, I submit, is that price fixing is unlawful, whether committed on something as beloved as a popular tune or on any other right, commodity or service.

QUESTION: You are not suggesting that the Court has discretion to decide in a suit for damages, a legitimate suit for damages whether the damages in an antitrust case shall be treble or double or single, are you?

MR. HRUSKA: I am suggesting that the Court has discretion not to award damages under --

QUESTION: Any damages.

MR. HRUSKA: -- even though there is liability, any damages, exactly. Yes, Your Honor, I am suggesting that.

QUESTION: But it has no discretion if it awards damages to say, well, in this case it will be single damages or double damages or one and a half times or one and three-tenths, but just actual damages, does it? That was suggested in City of Lafayette, I think.

MR. HRUSKA: Well, I think it is a nice question and --

QUESTION: Isn't the answer pretty clear?

MR. HRUSKA: Well, you could argue it both ways. I mean it has just never been decided. If I had run a brief on that, I would say if you are going to award damages, it ought to be treble under the statute.

QUESTION: Congress gave some thought to that, didn't they?

MR. HRUSKA: Well, they apparently did.

QUESTION: I think, Mr. Hruska, if you find an injury to the business or property of the plaintiff, they ask for damages, where does the judge get discretion to say no?

MR. HRUSKA: From the Simpson Oil case in which this Court stated exactly that, Your Honor.

QUESTION: But that had to do with retroactivity of a new rule, didn't it?

MR. HRUSKA: Yes.

MR. CHIEF JUSTICE BURGER: Mr. Topkis.

ORAL ARGUMENT OF JAY H. TOPKIS, ESQ.,

ON BEHALF OF THE PETITIONERS -- REBUTTAL

MR. TOPKIS: Mr. Chief Justice, and if the Court please: I attempted to reserve a couple of minutes. I will use no more than that, of course.

I think there was a question put about what the situation is today and so I thought I would perhaps bring the Court up to date on that. The fact is that today the Columbia Television System Network holds no license whatsoever from

ASCAP nor so far as I am aware from any ASCAP member. It cancelled the license it held with us many months ago, shortly after the Second Circuit came down with its decision. It has been playing ASCAP music constantly ever since that cancellation. It has paid neither ASCAP nor anybody else one dime for the exploitation of copyrights in which it has engaged, and it has merrily told us that if we bring suit for infringement on behalf of any of our members, it will defend with a claim that we have misused our copyrights and so it is immune against any claim for infringement, we are not privileged to enforce our copyrights. That is where matters stand today.

QUESTION: The same with BMI?

MR. TOPKIS: So far -- I won't attempt to speak for BMI, Your Honor. I am not sure of the fact there.

Now, that causes me to plead with perhaps special vigor for this Court, if it agrees with us that there has been no per se violation of law, not to remand this eight-year-old case for further inquiry or further trial or further anything else, but since the District Court found that CBS had failed totally in every assertion of fact that it made, we submit that the proper course is to end the matters here and in effect to serve notice on the world that antitrust litigation really is not and will not be tolerated by this Court to be endless.

I ask the Court to remind the parties here that it

can sometimes make sense to negotiate rather than litigate. We have been standing ready to do so for years and we still are. We would welcome the opportunity.

QUESTION: Mr. Topkis, I asked your opponent about the motion picture market and the sync right market, and he said there were no blanket licenses in those markets. And I would like to ask you, is that correct as a matter of fact, and if so, I wonder why not if they have an economic utility?

MR. TOPKIS: Well, Your Honor, I take it means a film company asking for a blanket license from ASCAP?

QUESTION: And the sync right market also applies to television, doesn't it?

MR. TOPKIS: The sync rights applies to television.

QUESTION: Let's just take the sync rights then.

MR. TOPKIS: Well, sync rights are negotiated individually in dealings between the producer of a show for television and the copyright proprietor. When a producer discovers that he needs a song, he calls up usually through the Harry Fox Agency and gets a quote on the sync right. Those transactions are relatively rare, Your Honor, a few hundred a year is the totality of them, and I think that probably explains why there are no blanket licenses for them.

QUESTION: Because they are so infrequent?

MR. TOPKIS: Yes. There is one lady in New York who handles the whole thing and --

QUESTION: But it is correct, there are no blanket licenses?

MR. TOPKIS: There are no blanket licenses.

QUESTION: Nor in the motion picture market?

MR. TOPKIS: Certainly not in the motion picture market.

QUESTION: Would you give the same answer as to the reason for no blanket license in the motion picture market, that they are so rare?

MR. TOPKIS: Well, in the motion picture field, Your Honor, we are enjoined under the amended final judgment from granting licenses, in any way dealing in licenses for performance rights. ASCAP is not in that business, so we couldn't issue a blanket license.

QUESTION: Is BMI also enjoined?

MR. TOPKIS: I don't know. Again, I will leave it to Miss Kearse to acquaint Your Honor with the facts there.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, counsel. The case is submitted.

(Whereupon, at 11:40 o'clock a.m., the case in the above-entitled matter was submitted.)

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