Supreme Court, U. S.
FILED
JAN 2 1979
MICHAEL RODAK, JR., CLER

Nos. 77-1578 and 77-1583

In the Supreme Court of the United States

OCTOBER TERM, 1978

BROADCAST MUSIC, INC., ET AL., PETITIONERS

v.

COLUMBIA BROADCASTING SYSTEM, INC.

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

v.

COLUMBIA BROADCASTING SYSTEM, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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Washington, D.C. 20530

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The brief filed by the United States in this case reproduced, as an appendix, a brief filed in this

Court in *K-91, Inc.* v. *Gershwin Publishing Corp.*, No. 147, October Term, 1967. We have discovered that, because of a printer's error, two pages were omitted from the reproduction of that brief. We therefore attach as an appendix to this memorandum the full "Discussion" section of the *K-91* brief, including the two pages that previously were omitted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

DECEMBER 1978

APPENDIX

DISCUSSION

In substance, the question presented by the present petition is whether the bulk-licensing methods by which ASCAP's members market rights to perform publicly for profit recordings of their copyrighted musical compositions violate the antitrust laws. The court of appeals concluded that no antitrust violations were shown, after finding "that as a potential combination in restraint of trade, ASCAP has been 'disinfected' by the decree" (Pet. App. 18), and pointing out that music users may make individual arrangements with separate copyright holders if they wish, instead of dealing with them through ASCAP. In the limited context of this case—the licensing of performance rights for broadcast by radio of recorded compositions—the result below, in our view, seems correct, and review by this Could not not appear to be warranted.

We do not understand the court below to have held that the consent decree now in force against ASCAP of itself makes lawful what would otherwise be unlawful (see Pet. App. 17-18). To the extent that ASCAP's activities, whether under the consent decree or unregulated, violate the antitrust laws, both the United States and private parties have a continuing remedy under the Sherman Act. Nothing in the holding below is to the contrary.

The existence and operation of agencies which collectively license the right to perform musical works

raise difficult problems under the antitrust laws. See, *e.g.*, *Alden-Rochelle, Inc.* v. *ASCAP*, 80 F. Supp. 888 (S.D.N.Y.); *M. Witmark & Sons* v. *Jensen*, 80 F. Supp. 843 (D. Minn.); *Affiliated Music Enterprises* v. *SESAC Inc.*, 60 F. Supp. 865, 875 (S.D.N.Y.). Since the musical works of copyright holders compete with each other, a combination of these holders through use of a common selling agency is subject to charges of illegal pooling and price-fixing. But the Sherman Act does not affect all situations in the same way. Thus, even though the antitrust laws apply with full force and effect to collective licensing agencies such as ASCAP, account must be taken of the relevant economic setting—here, the relationship between the business of recorded music and commercial broadcasting.

The sale of the right publicly to perform for profit a copyrighted musical work, through the playing of a record of the composition, is not wholly comparable to the sale of a manufactured product or the sale of a license to make, use or vend a patented product. Compare *Bobbs-Merrill Co.* v. *Straus*, 210 U.S. 339, with *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U.S. 191, 197. Broadcast of a recorded song over the radio is an intangible, audible event of a few minutes' duration. The resulting public "performance" for profit is not an alienable object like a copyrighted film or the phonograph record itself. The "performance" cannot be owned or transferred; it occurs only while the recording is being played over the air. Each playing is a separate performance subject to the copyright

holders' control over performing rights. Congress has made that right wholly separate from the right to reproduce and sell recordings of the copyrighted work (17 U.S.C. 1(e)).

The exclusive right to make (*i.e.*, copy) and vend copyrighted works is analogous to the right to make and vend patented products, and the same antitrust considerations have been applied to abuses of these exclusive rights as are applied to patent rights. *United States* v. *Loew's Inc.*, 371 U.S. 38; *United States* v. *Paramount Pictures*, 334 U.S. 131. However, whatever the legality of a combination of copyright holders to pool and jointly sell these incidents of their copyrights, performing rights for recorded music are, for obvious practical reasons, subject to somewhat different considerations.

The market for the evanescent right to broadcast a piece of recorded music is completely unlike the market for the right to perform the music in a commercial film's sound-track. Cf. *Alden-Rochelle*, *supra*, and *Witmark*, *supra*. Recordings are available everywhere to everyone, without distinction between home and commercial users, and the copyright holders have no voice in their sale. Once the holder has agreed to a recording of his work, it may be recorded by any company upon the giving of appropriate notice subject to the payment of the royalty of two cents per record (17 U.S.C. 1(e)). There are over 1,400 AM and 1,744 FM broadcasting stations located in every part of the United States (FCC Ann. Rep., pp. 106, 110 (1966)). Most of these stations broadcast re-

corded music for a substantial part of their operating day. They may acquire ownership of any recording they wish, and in the present state of technology there appears to be no effective means by which the enormous number of separate performances broadcast each year by commercial stations across the nation can be accounted for by copyright holders. Nor is it feasible for these stations to deal on a "per piece" basis with the thousands of individual copyright holders across the country in order lawfully to exploit recorded music, for the value of the right to broadcast a single performance of one recorded composition is far less than the cost of negotiating a separate license. It would appear, therefore, that there must be some form of centralized licensing system which serves the mutual interests of copyright holders and of music users, and which enables the marketing of performing rights for recorded music to be effectively accomplished.

The Sherman Act has always been discriminatingly applied in the light of economic realities. There are situations in which competitors have been permitted to form joint selling agencies or other pooled activities, subject to strict limitations under the antitrust laws to guarantee against abuse of the collective power thus created. *Associated Press* v. *United States*, 326 U.S. 1; *United States* v. *St. Louis Terminal*, 224 U.S. 383; *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344; *Chicago Board of Trade* v. *United States*, 246 U.S. 231. This case appears to us to involve such a situation. The extraordinary

number of users spread across the land, the ease with which a performance may be broadcast, the sheer volume of copyrighted compositions, the enormous quantity of separate performances each year,[7] the impracticability of negotiating individual licenses for each composition, and the ephemeral nature of each performance all combine to create unique market conditions for performance rights to recorded music.

If this market is to function at all, there must be —at least with respect to licensing the performance of recorded music—some kind of central licensing agency by which copyright holders may offer their works in a common pool to all who wish to use them. ASCAP's repertory includes a large percentage of the nation's copyrighted music. This results in a situation which can lead to abusive discriminations among users, if not effectively regulated. Thus, it is quite reasonable to require ASCAP to offer the same terms to all users similarly situated. And because users' requirements for separate pieces are continuous, the volume of demand enormous, and the value of each single performance small, separate negotiations on a per piece basis are not practicable. There is simply no escaping, as a practical matter, the licensing of the works in bulk. Although bulk licensing must thus be tolerated, the opportunity to make separate arrangements directly with the indi-

[7] Individual stations broadcast thousands of playings of musical compositions each year, and ASCAP has in excess of one million musical compositions in its repertory at any one time (see Pet. App. 6).

vidual copyright holder should also be preserved for those who might be able to take advantage of it. Therefore, the right to license in bulk delegated to the collective agency must be nonexclusive, so that users have the option of choosing a blanket license or negotiating with individual copyright holders. Cf. *United States* v. *Paramount Pictures*, 334 U.S 131, 159. These are, of course, some of the central terms of the government's present consent decree against ASCAP.

Petitioner maintains that individual arrangements are simply not practical (Pet. 17). We agree that in most, if not all, instances this is true.[8] But this simply reinforces the justification for a blanket licensing system. Indeed, petitioner seems to suggest that ASCAP might constitute a lawful arrangement if it offered a greater variety of license packages, for example, western, religious, rock, classical, etc. (Pet. 7). Thus, petitioner concedes that the issue is not the validity of ASCAP's existence in the field of licensing recorded music, or the legitimacy of its bulk licensing as such in this field, but rather the size of the package ASCAP offers.

Alternatively, petitioner argues that its objections might be avoided if ASCAP were required to negotiate licenses with recording companies so that the performance rights would be sold at the source, *i.e.*, anyone acquiring ownership of the record would also

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[8] Broadcasters with special needs may find it feasible to deal directly with publishers.

own the right to perform it publicly for profit.[9] But there is nothing in the record to indicate that recording companies have ever sought such rights, that they have any economic incentive to do so, or that ASCAP has ever attempted to prevent them from obtaining such licenses. The reasons for this readily suggest themselves. Such companies earn their income from the sale of recordings, not from the public performance of the recording for profit. Moreover, the value of the performing right for a single song cannot be determined until it has been exposed to the public and the extent of demand for its playing can be assessed. Finally, since the same record may be used at home or in the broadcast studio, the price of the performing right would be reflected in the price of the record sold to the general public, thus requiring the record-buying public to subsidize the operating costs of radio stations which broadcast the musical compositions.

If the record here furnished any substantial basis for concluding that practical alternatives exist to bulk

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[9] Such an arrangement has been adopted under the ASCAP decree with respect to the performance of music incorporated into the sound track of motion pictures distributed to movie exhibitors. Prior to 1948 ASCAP required exhibitors to obtain a license from it in order to play the music on the sound track of films they had rented. The 1950 amendment to the decree forbade this, thus requiring ASCAP to negotiate with the motion picture producers a license for public performance of the music which would operate to the benefit of anyone renting the film. See Timberg, *The Antitrust Aspects of Merchandising Modern Music,* 19 Law & Contemp. Prob. 294 (1954).

licensing of recorded music, a different case would be presented. We do not suggest that a private litigant has the burden of conclusively establishing the feasibility of such alternatives. Rather, in the light of the stipulated facts which show the practical need for bulk licensing in order for the market to function (see *supra*, p. 5), petitioner should at least have come forward with evidence demonstrating a reasonable possibility that alternative methods are feasible. That has not been done.

There is no question, of course, that the combination of copyright holders which ASCAP represents requires the closest scrutiny under the antitrust laws. Collective activity necessary for a market to function must go no further than absolutely necessary. For it is only the preservation of the market, not the protection of the copyright privilege, which justifies the combination (cf. *Watson* v. *Buck*, 313 U.S. 387, 404), and it is only for that purpose that the combination is tolerated. Because of the competitive threat represented by ASCAP, the United States sued it under the Sherman Act in 1941 and obtained a consent decree against it. As conditions change [10] or abuses are disclosed, it may become necessary, as in 1950 (see, pp. 3-4, *supra*), for the government to seek modifications of that decree or to file suit for additional relief.

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[10] For example, the difficult problem of accounting for millions of separate performances each year may ultimately be solved by developments in computer technology. Such a change might warrant a completely new approach to the operation of the market for performance rights to recorded music.

Private parties, of course, always have the option of seeking relief in their own behalf, notwithstanding any consent decree accepted by the government. We believe, however, that nothing has been shown on this record to warrant a finding that the antitrust laws have been violated. Accordingly, the court below appears to have reached the correct result.[11]

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1967.

[11] What we say here applies only to the record in this case. Other ASCAP licensing activities are not involved and we take no position concerning them.

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