

MUSIC COPYRIGHTS AND ANTITRUST: A TURBULENT COURTSHIP

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I. INTRODUCTION

If I were a biographer by profession, I would have entitled this lecture: "A Long Chapter in the Life of Herman Finkelstein." Because I fancy myself a trial lawyer, I have used a title more appropriate to that profession.

Whichever title you prefer, the text is the same. Herman Finkelstein's presence, courage, and imagination are reflected on almost every page and will materially shape the story, still unwritten, in the foreseeable future.

I propose to begin this excursion into the world of music copyrights and antitrust by discussing neither. Instead, for introductory purposes, I shall utter some words about an organization which for more than seventy years¹ has called itself the American Society of Composers, Authors and Publishers, or more popularly, ASCAP.

ASCAP, I submit, deserves to occupy such a prominent position in this lecture because the long history of its birth and maturation reveals how copyright and antitrust have learned to live with each other—a state of affairs which is an essential aspect of any successful courtship. But nowhere has the turbulent nature of that courtship been better reflected than in a series of litigations I shall soon mention to which ASCAP has been a party.

ASCAP was mothered by necessity. Someone else once told me that if ASCAP did not exist, it would have to be invented. Both statements, in capsule form (to be sure) express a valuable idea: it may well be that a performing rights organization such as ASCAP is not indispensable for the marketing of music copyrights; but over the years it has proved itself to be a highly effi-

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¹ The official date of ASCAP's formation is February 13, 1914.

cient and convenient means by which those rights may achieve commercial rewards.

Both statements, however, omit an important fact about ASCAP's birth—the concept of a performing rights organization was not an American invention. According to a memoir written by one of ASCAP's founding members,² at one of the first organizational meetings of ASCAP, Nathan Burkan, who was soon to become ASCAP's first general counsel, brought with him an English translation of the articles of association of the French performing rights society which had already been in existence for some fifty years.

The delay in founding ASCAP is easily understood. It was not until 1897 that Congress granted copyright proprietors exclusive rights to license non-dramatic public performances of their works.³ And, after the Congressional grant, it took the creators of music a few years to appreciate that the right granted might have commercial value.

Even at birth, and in its infantile nakedness, ASCAP was seen to possess the organs of a "combination." It offered, after all, a bulk license—in a single package, the licensee obtained the right to give non-dramatic public performances of all works in the ASCAP repertory, thereby avoiding the need for individual negotiation and licensing with individual copyright owners.

This new combination was boldly transplanted into a trade culture dominated by the theology of competition, of which the Sherman Act⁴ was the first commandment.

Over the past seventy years, that culture has repeatedly shown signs of rejecting the transplant. From time to time the Antitrust Division challenged ASCAP and the legislatures of numerous states passed laws hostile to ASCAP.⁵ More notably, challenges were mounted in private antitrust actions brought by a variety of users of music.⁶ The transplant, however, has survived the successive measures that have been taken to suppress the rejection—the most formidable measure, of course, being the Amended Final Judgment of 1950 in *United States v. ASCAP*.⁷

For the moment, equilibrium seems to be in place. Just re-

² Hubbell, *The Story of ASCAP* 3-5 (unpublished manuscript).

³ Act of Jan. 6, 1897, ch. 4, 29 Stat. 481, amended by Act of Mar. 4, 1909, ch. 320, § 25, 35 Stat. 1081, revised by Act of Oct. 19, 1976, Pub. L. No. 94-553, ch. 5, 90 Stat. 2541, 2584-2587 (currently codified at 17 U.S.C. §§ 501-510 (1982)).

⁴ 15 U.S.C. §§ 1-7 (1982).

⁵ See *infra* notes 45-48 and accompanying text.

⁶ See, e.g., *infra* notes 52-65 and accompanying text.

⁷ 1950-1 Trade Cas. (CCH) ¶ 62,595 (S.D.N.Y. 1950).

cently, the Supreme Court denied *certiorari* in *Buffalo Broadcasting Co., Inc. v. ASCAP*,⁸ thus bringing to an end the latest unsuccessful antitrust challenge to ASCAP. How long that state of affairs will continue only prophets can tell. The time may come when the tension will relax in response to the folk-tested advice: "If it ain't broke, don't fix it."

Some of you will be aware that this hoary advice was urged upon the Second Circuit by ASCAP in the *Buffalo Broadcasting* case. Indeed, it was the last sentence of ASCAP's brief⁹ in that Court—a brief authored and signed by my firm as counsel for ASCAP. This leads me to a confession that must be made if my subsequent remarks are not to be misconstrued.

For more than thirty years, I have not been a disinterested observer of ASCAP and its affairs. In the early and mid-1950's, I represented a then-fledgling organization known as the "All-Industry Television Per Program Committee" in its negotiations and litigation with ASCAP. For the last twenty-five years or so, I and some of my colleagues have been ASCAP's lawyers. Hence, the views I express today were not minted for this occasion. It is my hope, however, that these views will be judged on their merits, and so judged will be perceived as not merely the partisan statements of an advocate. Herman Finkelstein, I believe, would not want it any other way at a lecture named in his honor.

II. ASCAP IN ITS COPYRIGHT AND ANTITRUST SETTING

It is time to return to the world of copyright and antitrust, principally for the purpose of placing ASCAP in its appropriate copyright and antitrust setting.

I begin with the United States Constitution. Nowhere does that document prohibit monopolies or restraints of trade. On the contrary it authorizes Congress to create two very different classes of monopolies: patents and copyrights, one concerned primarily with substance, the other with words. Article I, section 8 of the Constitution confers upon Congress the power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries. . . ."¹⁰

The very first Congress exercised the power conferred by

⁸ 53 U.S.L.W. 3597 (U.S. Feb. 19, 1985) (No. 84-910); see *infra* notes 66-69 and accompanying text.

⁹ Brief for Appellant at 48, *Buffalo Broadcasting Co. v. ASCAP*, 744 F.2d 917 (2d Cir. 1984), *cert. denied*, 53 U.S.L.W. 3597 (U.S. Feb. 19, 1985) (No. 84-910).

¹⁰ U.S. CONST. art. I, § 8.

the Constitution by enacting the first patent and copyright laws.¹¹

One hundred years elapsed before Congress undertook, in the Sherman Act of 1890,¹² to regulate commerce by prohibiting monopolies and restraints of trade.

Then, in 1897, Congress expanded the reach of the copyright to include public performances of copyrighted musical compositions.¹³ In the 1909 Copyright Act, the "for profit" limitation as it affected public performances appeared for the first time.¹⁴

ASCAP was formed in 1914. The nature of the necessity to which ASCAP was the response was described by Justice White in *Columbia Broadcasting System v. ASCAP*.¹⁵ He said:

Since 1897, the copyright laws have vested in the owner of a copyrighted musical composition the exclusive right to perform the work publicly for profit, but the legal right is not self-enforcing. In 1914, Victor Herbert and a handful of other composers organized ASCAP because those who performed copyrighted music for profit were so numerous and widespread, and most performances so fleeting, that as a practical matter it was impossible for many individual copyright owners to negotiate with and license the users and to detect unauthorized uses.¹⁶

Thus, Justice White identified two of ASCAP's generating forces: the difficulty of individual negotiation and the near impossibility of individual policing and enforcement. Absent some method of overcoming these difficulties, the law-abiding would be unable to acquire the license to exploit the copyrighted material and the copyright owner would find the constitutional promise drained of value. And the purpose of the Constitution—to provide an incentive for authors and composers—would be frustrated.

This recognition of the necessity for performing rights organizations is a worldwide phenomenon. In the United States, besides ASCAP, there are two other such organizations, Broadcast Music,

¹¹ Act of April 10, 1790, ch. 7, 1 Stat. 109 (patents); Act of May 31, 1790, ch. 15, 1 Stat. 124 (copyrights).

¹² Act of July 2, 1890, ch. 647, 26 Stat. 209 (codified as amended at 15 U.S.C. §§ 1-7 (1982)).

¹³ Act of Jan. 6, 1897, ch. 4, 29 Stat. 481; see *supra* note 3.

¹⁴ Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075 (codified as amended at 17 U.S.C. §§ 101-810 (1982)).

¹⁵ The opinions in the *CBS* case are: *Columbia Broadcasting Sys. v. ASCAP*, 400 F. Supp. 737 (S.D.N.Y. 1975), *rev'd*, 562 F.2d 130 (2d Cir. 1977), *rev'd and remanded sub nom. BMI v. Columbia Broadcasting Sys.*, 441 U.S. 1 (1979), *aff'd on remand*, 620 F.2d 930 (2d Cir. 1980), *cert. denied*, 450 U.S. 970 (1981).

¹⁶ 441 U.S. at 4-5 (footnote omitted).

Inc. (BMI) and SESAC, formerly known as the Society of European Stage Authors and Composers. Performing rights organizations exist in every country which recognizes copyright. These organizations cooperate with each other on a worldwide basis. By virtue of agreements among them, an ASCAP licensee in the United States obtains, through the ASCAP license, access to the repertoires of some forty foreign societies. Equally, the ASCAP repertory is licensed abroad through these forty societies.

In this connection, mention should be made of other entities which play significant roles in copyright licensing. The Harry Fox Agency, Inc., which represents virtually every major music publisher in the United States, is one such prominent example. The Fox Agency, of course, does not offer a bulk license, such as ASCAP's blanket license, but it facilitates synchronization and mechanical rights transactions.

Finally, I must mention the latest example of Congressional intervention in the licensing of music copyrights. The 1976 Copyright Act¹⁷ provides three new *compulsory* licenses: (1) the cable compulsory license, which enables cable operators to retransmit broadcast signals;¹⁸ (2) the jukebox compulsory license, which enables jukebox operators to perform publicly all copyrighted music;¹⁹ and (3) the public broadcasting compulsory license, which enables public broadcasting entities to use copyrighted musical compositions and copyrighted pictorial, graphic and sculptural works in their broadcasts.²⁰

In addition, the 1976 Act continued a fourth compulsory license which had first been enacted in the 1909 Copyright Act—the “mechanical” compulsory license, which enables record companies to manufacture and distribute phonorecords.²¹

Congress entrusted regulation of key elements of these four compulsory licenses—including the amount of license fees paid by users and the allocation of license fees to copyright owners—to a new administrative agency, the Copyright Royalty Tribunal (CRT).²² As a result, the CRT has become a major force in the copyright world.²³

¹⁷ 17 U.S.C. §§ 101-810 (1982).

¹⁸ *Id.* § 111.

¹⁹ *Id.* § 116.

²⁰ *Id.* § 118.

²¹ *Id.* § 115.

²² *Id.* §§ 801-810.

²³ See Korman & Koenigsberg, *The First Proceeding Before the Copyright Royalty Tribunal: ASCAP and the Public Broadcasters*, 1 *Com. & L.* 15 (1979).

Thus, in the copyright cosmos, ASCAP, to be sure, is a star—but it is only one star in a constellation of related stars.

III. THE FIRST CHALLENGE—THE *SHANLEY* DECISION

In recent times, the significant challenges to ASCAP have been mounted in the antitrust context; I shall discuss four such challenges in a moment. Before I do so, however, I want to remind you that the first great challenge to ASCAP came in the copyright setting and was launched just a few short years after ASCAP's formation in 1914. I refer, of course, to a major judicial decision in 1917, interpreting the "for profit" limitation of the 1909 Copyright Act—*Herbert v. The Shanley Co.*²⁴ If *Shanley* had been decided differently, we might not be here today, or, if we were, it would be in a vastly different context.

The facts of *Shanley* are easily stated: Defendant owned and operated a restaurant of the "cabaret" type in New York City. The restaurant charged no admission fee to its dining room and obtained its revenues from the food and drink sold to its patrons.

It furnished entertainment to its patrons, while they were eating, by way of actors and singers who performed to the accompaniment of an orchestra. Defendant employed a singer who gave a performance of the song "Sweethearts," of which Victor Herbert had composed the music. Herbert sued for infringement, claiming a violation of the public performing right. ASCAP financed the litigation.

In the district court²⁵ and the court of appeals,²⁶ the holdings were for defendant. The phrase "for profit" was "to be limited to performances where an admission fee or some direct pecuniary charge is made."²⁷

The Supreme Court granted *certiorari*²⁸ and reversed.²⁹ Justice Holmes, writing for a unanimous Court, said:

If the rights under the copyright are infringed only by a performance where money is taken at the door they are very imperfectly protected. Performances not different in kind from those of the defendants could be given that might compete with and even destroy the success of the monopoly that the

²⁴ 242 U.S. 591 (1917), *rev'g* 229 F. 340 (2d Cir. 1916), *aff'g* 222 F. 344 (S.D.N.Y. 1915).

²⁵ 222 F. 344 (S.D.N.Y. 1915) (L. Hand, J.).

²⁶ 229 F. 340 (2d Cir. 1916).

²⁷ *Id.* at 343.

²⁸ 241 U.S. 665 (1915).

²⁹ 242 U.S. 591 (1917).

law intends the plaintiffs to have. It is enough to say that there is no need to construe the statute so narrowly. The defendants' performances are not eleemosynary. . . . If music did not pay it would be given up. If it pays it pays out of the public's pocket. Whether it pays or not the purpose of employing it is profit and that is enough.³⁰

Shanley, by holding that the performing right granted by Congress should not be so narrowly construed as to make it practically worthless, furnished the indispensable judicial prop for ASCAP's operations at a time when the organization's future was, at best, uncertain.

IV. THE ANTITRUST CHALLENGES

In recent times, however, the challenges to the legitimacy of ASCAP have all arisen under the antitrust laws. Before I consider these challenges, let me highlight for you those aspects of ASCAP's operations which have raised the most significant antitrust concerns.

First, ASCAP has always licensed its members' performing rights collectively and in bulk, principally via the so-called blanket license. Under this form of license, upon payment of a single fee, the user of the songs is entitled to perform any, some, or all of the millions of compositions in the ASCAP repertory with any frequency he desires. The user does not have the task of negotiating individual licenses for individual compositions to avoid being an infringer.

Thus, when a user takes a blanket license, there is one inevitable economic effect. Since the user does not deal with individual copyright proprietors, there is no price rivalry or competition between or among them over the terms of performing rights licenses.

Second, prior to 1950, ASCAP, for all practical purposes, obtained exclusive rights from its members. The user did not have the alternative of dealing with individual ASCAP members for individual licenses.

Third, prior to 1950, there was no legal restraint on ASCAP's ability to fix any license fee it deemed appropriate.

It was these latter two aspects which came under judicial scrutiny and condemnation in *Alden-Rochelle, Inc. v. ASCAP*,³¹ the first of the major antitrust challenges to ASCAP's existence. *Al-*

³⁰ *Id.* at 594-95.

³¹ 80 F. Supp. 888, *relief*, 80 F. Supp. 900 (S.D.N.Y. 1948).

den-Rochelle was a private antitrust action brought by a group of motion picture theatre exhibitors against ASCAP after the parties had failed in negotiating a new blanket license.

The then-existing business arrangements with regard to the licensing of motion picture music to theatres were as follows: the motion picture producer, when he obtained from an ASCAP member the right to record his musical composition on the firm, the so-called "synch" right, bargained for that right only and did not obtain the public performance rights for the composition. The producer did not acquire the performing rights from ASCAP members because the latter were prohibited by their arrangements with ASCAP from licensing those rights to motion picture producers. When the producer acquired the "synch" right from someone who was not a member of ASCAP, however, he normally received the public performance rights. The motion picture exhibitors obtained licenses from ASCAP which authorized them to exhibit films with ASCAP music.

The exhibitors claimed that if the producers followed the same course with ASCAP members as they did with non-ASCAP members, that is, if they obtained public performance rights at the same time as they obtained "synch" rights, the exhibitors would not need any license from ASCAP.

Against this background, Judge Leibell found for the plaintiffs. His legal conclusions were sweeping:

Almost every part of the Ascaph structure, almost all of Ascaph's activities in licensing motion picture theatres, involve a violation of the anti-trust laws. Although each member of Ascaph is granted by the copyright law a monopoly in the copyrighted work, it is unlawful for the owners of a number of copyrighted works to combine their copyrights by any agreement or arrangement, even if it is for the purpose of thereby better preserving their property rights. . . . The combination of the members of Ascaph in transferring all their nondramatic performing rights to Ascaph, is a combination in restraint of interstate trade and commerce, which is prohibited by § 1 of the anti-trust laws. . . . [B]y barring a member from assigning the performing rights to the motion picture producer at the same time that the recording right is assigned, the channels in which the films may be marketed is narrowed to those exhibitors who have a license from Ascaph covering the performing rights of the Ascaph music synchronized on the film.³²

³² 80 F. Supp. at 893-94 (citations omitted).

There was still another aspect of ASCAP's operations which received Judge Leibell's condemnation:

The combination of the authors, composers and publishers in the Ascap organization, their obligations to the association, the rights they conferred on Ascap and the reservations they made in their arrangements with the motion picture producers, have given Ascap the power to fix the prices at which the performing rights are sold to the exhibitors. . . . That Ascap was moderate in its demands in 1934 and considerate in the prices it fixed after negotiation with the exhibitors, does not detract from the fact that as a monopoly Ascap had the power to increase those prices to an unreasonable figure by demanding higher license fees, to the financial gain of its members. Ascap showed to what extent that power could be exercised when in August 1947 it attempted to increase the license fees as much as 200% to 1500%. This price fixing power coupled with the combination of the members copyrights constitutes an unlawful restraint of trade.³³

As we shall see, today, the precise holdings of *Alden-Rochelle* are only of historical interest. Yet that case has had a lasting significance. As an immediate consequence of the *Alden-Rochelle* decision, the Antitrust Division determined that a prior 1941 consent decree with ASCAP³⁴ was inadequate and that a new decree had to be framed if ASCAP were to be allowed to continue to exist.

That new decree, of course, was the Amended Final Judgment of March 14, 1950³⁵—a most notable feat of corrective surgery that was performed in an effort to permit the copyright and antitrust laws to live together.

It is to the eternal credit of the ASCAP Board of Directors that they turned to their very young lawyer, Herman Finkelstein, to be their counsellor in negotiating the terms of the Amended Final Judgment. For it was Herman, perhaps better than anyone else, who appreciated that if ASCAP were to survive, the flaws found by Judge Leibell in *Alden-Rochelle* needed to be addressed and eliminated.

The accomplishments of the Amended Final Judgment were many. First, the judgment dealt explicitly with the field of motion picture licensing. ASCAP was barred from licensing motion picture exhibitors.³⁶ While the decree permitted ASCAP to license motion

³³ *Id.* at 894-95.

³⁴ 1940-3 Trade Cas. (CCH) ¶ 56,104 (S.D.N.Y. 1941).

³⁵ 1950-1 Trade Cas. (CCH) ¶ 62,595 (S.D.N.Y. 1950).

³⁶ *Id.* at 63,752 (Sec. IV(F)(1)).

picture producers in limited circumstances,³⁷ that provision has had no long-lasting impact. Since the mid-1950's ASCAP has not entered into any such licenses, and today ASCAP's members convey both synch rights and motion picture theatre performing rights to motion picture producers.

Second, in unambiguous terms, the decree made it clear, that in its dealings with all other users, ASCAP's rights were to be non-exclusive. ASCAP was enjoined from acquiring any rights in copyrighted music other than rights of public performance on a non-exclusive basis.³⁸ Further, ASCAP was enjoined from interfering with the right of any member to issue a direct license to a user.³⁹

Third, the decree set out a procedure for the judicial determination of ASCAP license fees if the parties could not agree.⁴⁰ A user automatically became licensed merely by applying to ASCAP for a license.⁴¹ If the user, thereafter, could not negotiate a fee with ASCAP, he could petition a judge of the Southern District of New York to fix a "reasonable" fee.⁴² In any such proceeding, the burden was placed on ASCAP to establish the reasonableness of the fee it sought.⁴³

Fourth, the judgment contained anti-discrimination provisions. ASCAP was enjoined from "[e]ntering into, recognizing, enforcing or claiming any rights under any license for rights of public performance which discriminates in license fees or other terms and conditions between licensees similarly situated. . . ."⁴⁴

Fifth, provisions of the earlier 1941 decree were strengthened to insure that entry into and resignation from ASCAP by a writer or publisher became an easy matter.⁴⁵

And, finally, the decree insured that rewards would be distributed fairly. Section XI provided:

Defendant ASCAP is hereby ordered and directed to distribute to its members the monies received by licensing rights of public performance on a basis which gives primary consideration to the performance of the compositions of the members as indicated by objective surveys of performances (excluding those licensed by the member directly) periodically

³⁷ *Id.* at 63,753 (Sec. V(C)(1)-(5)).

³⁸ *Id.* at 63,752 (Sec. IV(A)).

³⁹ *Id.* at 63,752 (Sec. IV(B)).

⁴⁰ *Id.* at 63,754 (Sec. IX).

⁴¹ *Id.* at 63,752 (Sec. V).

⁴² *Id.* at 63,754 (Sec. IX(A)).

⁴³ *Id.* at 63,754 (Sec. IX).

⁴⁴ *Id.* at 63,752 (Sec. IV(C)).

⁴⁵ *Id.* at 63,752 (Sec. IV(G), 63,756 (Sec. XV)).

made by or for ASCAP.⁴⁶

After entry of the Amended Final Judgment, a disinterested observer could easily have concluded that, insofar as the antitrust laws were concerned, ASCAP had become a toothless tiger. Yet, ASCAP's power to perform services of public significance and utility was preserved. Its capacity to do economic harm was curbed, indeed eliminated. ASCAP's central function—the licensing of its members' works in a manner which made their statutory copyrights commercially valuable—was preserved.

But because ASCAP no longer had exclusive rights it was now merely an alternative to direct licensing by its members—the narrowing of the channels of commerce Judge Leibell had found in *Alden-Rochelle* was eliminated.

The fees ASCAP could charge were subject to the discipline of ASCAP's burden of establishing their reasonableness in a judicial proceeding if the parties were unable to agree. Moreover, if those fees exceeded the costs of direct licensing, the user always had the latter alternative.

On the demand side, no user could be denied an ASCAP license. On the supply side, ASCAP was an open society, rewarding its members in accordance with the popularity of their works. ASCAP had become a marketplace arrangement open to all producers, open to all consumers, with its prices subject to judicial review and its revenues distributable in accordance with a judicially approved mechanism. It is interesting to observe that Judge Leibell vacated the judgment in *Alden-Rochelle* immediately after Judge Goddard signed the Amended Final Judgment.⁴⁷

If in 1950 the prophets were forecasting that antitrust and copyright would now live in a symbiotic relationship, they were wrong. In fact, the turbulence of the courtship was just beginning.

The next major antitrust challenge to ASCAP was uttered in *K-91, Inc. v. Gershwin Publishing Corp.*⁴⁸ *K-91*, an infringement action against a radio station in the state of Washington, was the first post-*Alden-Rochelle* decision to deal with the issue of ASCAP's legality under the antitrust laws.⁴⁹ Another aspect of that decision, however, also deserves mention. By way of background, in the late 1930's, many statutes directed against ASCAP's activities and operations were enacted by state and territorial legislatures.

⁴⁶ *Id.* at 63,755 (Sec. XI).

⁴⁷ See *Alden Rochelle*, Civ. No. 18-6 (judgment vacated).

⁴⁸ 372 F.2d 1 (9th Cir. 1967), cert. denied, 389 U.S. 1045 (1968).

⁴⁹ 372 F.2d at 2.

The legislation may roughly be divided into four groups:

(1) The Nebraska type of legislation prohibited ASCAP's activities entirely.⁵⁰

(2) Some states—Georgia, Louisiana and Mississippi—imposed a large lump-sum occupational or privilege tax upon the business of collecting license fees within the state.⁵¹

(3) The Wisconsin-type statute required any person, firm, association or corporation, other than the original composers of musical works, which sought to issue licenses for the public performances of such works, to first obtain a license from the state, file detailed information with the Secretary of State, and pay an annual gross receipts tax.⁵²

(4) The State of Washington also had an anti-ASCAP statute with rather onerous filing requirements and with a provision that seemed to prevent ASCAP from offering blanket licenses in the state unless it also offered licenses where the fees were assessed on a "per piece" system of usage.⁵³

By the 1960's, most of this legislation had been repealed, but the Washington statute remained on the books.⁵⁴ A few broadcasters in that state, relying on the statute and ASCAP's alleged non-compliance with its terms, held no ASCAP licenses and regularly infringed. In the 1960's, ASCAP's members brought infringement actions against these broadcasters. All were eventually settled, except for the action against *K-91*.

There, the broadcaster, in addition to relying on the Washington statute,⁵⁵ defended on the ground that the plaintiffs were all members of ASCAP, an organization which, the defendant charged, fixed prices in violation of the Sherman Act.⁵⁶ And, in an effort to borrow a page from *Alden-Rochelle*, the broadcaster contended that if record companies, just like motion picture producers, would only acquire performing rights at the same time as they acquired mechanical rights, the broadcaster would not need an ASCAP license. He could get performing rights directly from the record company when he acquired the phonograph record.

The copyright owners prevailed at trial and the radio station

⁵⁰ NEB. REV. STAT. § 59-1301 (1943); 1937 Neb. Laws 138, *repealed by* 1945 Neb. Laws 139, § 9.

⁵¹ 1935 Ga. Laws 216; LA. GEN. STAT. ANN. §§ 8674:1-8674.3 (Supp. 1939); 1944 Miss. Laws 137.

⁵² WIS. STAT. § 17701, *amended in part by* 1937 Wis. Laws 247, *and by* 1941 Wis. Laws 177.

⁵³ 1937 Wash. Laws 218.

⁵⁴ *Id.*

⁵⁵ 372 F.2d at 5-6.

⁵⁶ *Id.* at 2.

appealed.⁵⁷ On appeal, Ninth Circuit Judge Stanley Barnes, a former head of the Antitrust Division, Circuit, rejected all of the station's claims regarding violations of the Washington statute.⁵⁸

He also rejected the defendant's federal antitrust claims. To refute those claims, he pointed to the two provisions of the Amended Final Judgment which were a direct response to the flaws found by Judge Leibell in *Alden-Rochelle*:

ASCAP cannot be accused of fixing prices because every applicant to ASCAP has a right under the consent decree to invoke the authority of the United States District Court for the Southern District of New York to fix a reasonable fee whenever the applicant believes that the price proposed by ASCAP is unreasonable, and ASCAP has the burden of proving the prices reasonable. In other words, so long as ASCAP complies with the decree, it is not the price fixing authority. . . . ASCAP's licensing authority is not exclusive. The right of the individual composer, author or publisher to make his own arrangements with prospective licensees, and the right of such prospective licensees to seek individual arrangements, are fully preserved.⁵⁹

ASCAP, in short, at least in the view of the Ninth Circuit, was indeed a toothless tiger. In due course, certiorari was denied.⁶⁰ The Bar had barely absorbed the *K-91* opinion before the next challenge to ASCAP's legitimacy emerged. This time the challenger was a major user—the CBS television network. The challenge was of epic proportions. *Columbia Broadcasting System v. ASCAP* (CBS)⁶¹ lasted for 11 years. Before it was over, there was an eight-week trial in the District Court,⁶² an appeal to the Second Circuit,⁶³ an appeal to the Supreme Court⁶⁴ and a remand to the Second Circuit.⁶⁵

Once again, the principal charge against ASCAP was that it was guilty of price-fixing.⁶⁶ To CBS, ASCAP's blanket license involved price-fixing in the literal sense: ASCAP's members joined together into an organization that set the price for the blanket license it issued.⁶⁷

⁵⁷ *Id.*

⁵⁸ *Id.* at 4-8.

⁵⁹ *Id.* at 4.

⁶⁰ 389 U.S. 1045 (1968).

⁶¹ 400 F. Supp. 737 (S.D.N.Y. 1975).

⁶² *Id.*

⁶³ 562 F.2d 130 (2d Cir. 1977), *reh'g denied*, 450 U.S. 1050 (1981).

⁶⁴ *Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1 (1979).

⁶⁵ 620 F.2d 430 (2d Cir. 1980), *cert. denied*, 450 U.S. 970 (1981).

⁶⁶ 400 F. Supp. at 741.

⁶⁷ *Id.* at 745-46.

As to the provisions of the Amended Final Judgment, providing for the judicial determination of reasonable fees which Judge Barnes had found to be significant,⁶⁸ CBS argued that the decree could not immunize ASCAP against its illegal activities and that, in any event, provisions for judicial rate determination were no substitute for the operation of marketplace forces. The non-exclusivity provisions of the Amended Final Judgment, which provided CBS with the alternative of dealing directly with copyright proprietors, were of no moment, urged CBS, because there were too many obstacles in the path of direct licensing to make it feasible for a prudent network manager to follow that course.

For relief, CBS asked for a so-called per-use license. Under this form of license, CBS would still be entitled to use any composition in the ASCAP repertory, but it would only pay by "the piece" as music was actually performed. The per-use license, CBS argued, would also be a transition to a world of direct licensing.⁶⁹

In the end, all of CBS' claims were rejected—but not before the judiciary had carefully examined the relationship between copyright and antitrust and concluded that the two could indeed live with each other.⁷⁰

Judge Lasker came to that conclusion after trial.⁷¹ On appeal, however, he was reversed.⁷² Judge Gurfein wrote:

The charge that there is a restraint of trade by price-fixing is founded upon the conception that when any group of sellers or licensors continues to sell their products through a single agency with a single price, competition on price by the individual sellers has been restrained . . . [E]ven if the members of the combination are willing not only to join in the blanket license, but also to sell their individual performing rights separately, the combination is nevertheless a "combination which tampers with price structures [and therefore] engage[s] in an unlawful activity."⁷³

But when Judge Gurfein's decision was reviewed in the Supreme Court, the result changed again.⁷⁴ Justice White wrote that: "[T]he performing rights to copyrighted music exists at all

⁶⁸ See 372 F.2d at 4.

⁶⁹ 400 F. Supp. at 747.

⁷⁰ *Id.* at 783.

⁷¹ *Id.* at 737.

⁷² 562 F.2d 130.

⁷³ *Id.* at 135-36 (quoting *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940)).

⁷⁴ 441 U.S. 1.

only because of the copyright laws.”⁷⁵ Thus, while those laws conferred no rights on copyright owners to fix prices or otherwise to violate the antitrust laws, according to Justice White:

[W]e would not expect that any market arrangements reasonably necessary to effectuate the rights that are granted would be deemed a *per se* violation of the Sherman Act. Otherwise, the commerce anticipated by the Copyright Act and protected against restraint by the Sherman Act would not exist at all or would exist only as a pale reminder of what Congress envisioned.⁷⁶

This statement of the relationship between copyright and antitrust should be compared with Judge Leibell’s rather different conclusion, in 1948, in *Alden-Rochelle*. I quoted his words to you before: “[I]t is unlawful for the owners of a number of copyrighted works to combine their copyrights by any agreement or arrangement, *even if it is for the purpose of thereby better preserving their property rights*.”⁷⁷

In *CBS*, Justice White found that the ASCAP blanket license was a reasonable market arrangement, not to be deemed a *per se* violation of the antitrust laws:

[T]he blanket license cannot be wholly equated with a simple horizontal arrangement among competitors. ASCAP does set the price for its blanket license, but that license is quite different from anything any individual owner could issue. The individual composers and authors have neither agreed not to sell individually in any other market nor use the blanket license to mask price fixing in such other markets. Moreover, the substantial restraints placed on ASCAP and its members by the consent decree must not be ignored. The District Court found that there was no legal, practical or conspiratorial impediment to CBS’s obtaining individual licenses; CBS, in short, had a real choice.⁷⁸

Thus, once again, the restraints of the Amended Final Judgment—the provisions which pulled the tiger’s teeth—served as a shield against a challenge to ASCAP’s legitimacy.

The lawsuit, however, was not yet over. The Supreme Court, finding that the blanket license could not automatically be declared illegal in all of its many manifestations, remanded the case to the Court of Appeals for “a more discriminating examination under the

⁷⁵ *Id.* at 18.

⁷⁶ *Id.* at 19 (footnote omitted).

⁷⁷ 80 F. Supp. at 893 (emphasis added).

⁷⁸ 441 U.S. at 23-24 (footnote omitted).

rule of reason.”⁷⁹

ASCAP survived this challenge as well—this time because the Second Circuit concluded, on remand, that CBS had realistically available marketing alternatives to the blanket license, to wit, the alternative of dealing directly with ASCAP’s members, the alternative that the Amended Final Judgment, since 1950, had guaranteed to the users of ASCAP music.⁸⁰ Judge Newman wrote:

[A] practice that is not a *per se* violation, and this blanket license has authoritatively been found not to be such, does not restrain trade when the complaining customer elects to use it in preference to realistically available marketing alternatives After carefully analyzing the evidence CBS offered, Judge Lasker concluded that “CBS has failed to prove the factual predicate of its claims—the non-availability of alternatives to the blanket license” 400 F. Supp. at 780-81. That ultimate finding is abundantly supported by subsidiary findings and by the record, which completely refute all of CBS’s allegations of barriers to direct licensing.⁸¹

And so, 11 years after it was commenced, the *CBS* case ended. But even before it ended, the next challenge to ASCAP was already underway. In 1978, in *Buffalo Broadcasting Co. v. ASCAP*, local television stations sued ASCAP for violation of the antitrust laws.⁸² Perhaps they were encouraged by Judge Gurfein’s 1977 ruling in favor of CBS in the *CBS* case. Thereafter, the Supreme Court’s decision in *CBS* disposed of the local stations’ *per se* price-fixing claim. But, the Second Circuit’s decision on remand in *CBS* did not dispose of the local stations’ rule of reason claim for this reason: the local stations asserted that they, unlike CBS, had no reasonably available marketing alternative to the blanket license. As individual stations, they contended they simply did not possess the market power, as CBS had, to by-pass ASCAP.

And, then, to complete the circle and to bring us back to where we started from, the local stations sought to resurrect *Alden-Rochelle*. For their filmed or taped syndicated programs, the local stations urged that they were in the same position as the motion picture exhibitors in *Alden-Rochelle*. If only the producers of these filmed or taped programs acquired performing rights from ASCAP’s members at the same time as they acquired synch rights, the local sta-

⁷⁹ *Id.* at 24.

⁸⁰ 620 F.2d 930.

⁸¹ *Id.* at 935, 937.

⁸² 546 F. Supp. 274 (S.D.N.Y. 1978).

tions could obtain performing rights from the producers and dispense with the ASCAP blanket license.

After trial, the local stations prevailed.⁸³ Judge Gagliardi found that ASCAP had violated the antitrust laws. For the second time in less than a decade—and this time despite the favorable rulings in *CBS* and *K-91*—ASCAP was again in peril.

On appeal, however, the Court of Appeals for the Second Circuit reversed.⁸⁴ In large measure, the reversal depended on the Second Circuit's finding that the local stations had failed to prove that they lacked realistic alternatives. But Judge Newman also addressed plaintiff's *Alden-Rochelle* argument that ASCAP's members had precluded price competition among songs by "splitting" performing rights from "synch" rights. He wrote:

[C]omposers have not "split" performing rights from "synch" rights; they have separately licensed distinct rights that were created by Congress. Moreover, the composers' grant of a performing rights license to ASCAP/BMI is on a non-exclusive basis. That circumstance significantly distinguishes this case from *Alden-Rochelle*, where ASCAP's acquisition of *exclusive* licenses for performing rights was held to restrain unlawfully the ability of motion picture exhibitors to obtain music performing rights directly from ASCAP's members.⁸⁵

Thus, once again, the judiciary confirmed that the Amended Final Judgment had done its job.

* * *

Now that I am almost at the end of my remarks, you will understand how I arrived at the title for this lecture. You will also understand my earlier tentative conclusion that, for the moment, equilibrium seems to be in place. *Buffalo Broadcasting* seems to have brought to an end the possibility of a successful challenge to ASCAP's activities under the antitrust laws. But there were probably many who thought that the Amended Final Judgment—or the *K-91* decision—or the *CBS* decisions had achieved the same result. Thus, you will also understand why I leave it to the prophets to predict the future.

Now there is a new development: from 1950 until 1981, the judge administering the Amended Final Judgment in *U.S. v. ASCAP* was never called upon to adjudicate a reasonable final fee for an ASCAP license. He was never even called upon to determine a con-

⁸³ *Id.*

⁸⁴ 744 F.2d 917 (2d Cir. 1984), *cert. denied*, 53 U.S.L.W. 3597 (U.S. Feb. 19, 1985).

⁸⁵ *Id.* at 932 (emphasis in original).

tested interim fee proceeding. All fees were established by negotiation.

Since 1981, however, there have been three contested interim fee motions.⁸⁶ Each of these disputes may require the Court to determine a final fee if the parties are unable to agree. What the outcome of these proceedings will be I am not prepared to guess.

It seems that the turbulence in the relationship between ASCAP and the users of its music cannot be eliminated, even though the scene has now shifted from the antitrust court to the rate-fixing court.

I have myself at times proclaimed the truism that hardly any cause is so poor that it cannot find an equally poor lawyer to champion it. The array of litigations which I have mustered, however, is not illustrative of that aphorism. The lawyers who tilted their lances at ASCAP were among the ablest of the profession. The actions they instituted presented fair grounds for litigation. The outcome was never wholly predictable. That we are now in a period of blessed repose allows the providers of music to devote all their attention to their noble and useful art and allows the commercial users of music to exploit the many opportunities which the efficient ASCAP system makes possible.

Thus ends a chapter in the story which is still unfolding. I have been proud to play a walk-on part in this generation-long drama.

Victor Herbert was the great hero at the inception of this epic tale. For my generation, its unquestioned hero was Herman Finkelstein, to whom I pay my heartfelt tribute.

⁸⁶ *United States v. ASCAP*, S.D.N.Y. (Civ. 13-95); *In re Application of American Broadcasting Companies, Inc.*, Applicant; *In re Application of Showtime/The Movie Channel, Inc.*, Applicant; *In the Matter of the Application of Buffalo Broadcasting, Inc.*, et al., Applicants.