COMMENTS OF iHEARTMEDIA ON PRESERVING THE ASCAP AND BMI CONSENT DECREES

Before
The Department of Justice
Antitrust Division

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I. Introduction

iHeartMedia, Inc. respectfully submits these comments in response to the Antitrust Division's new review of the ASCAP and BMI consent decrees (the "decrees"). The decrees remain essential and effective remedies under the antitrust laws.

The relevant facts have not changed since the Department of Justice entered these consent decrees: ASCAP and BMI continue to wield tremendous market power – together representing more than 90 percent of American musical compositions – and continue to implement horizontal agreements among competing suppliers of music. A thriving American industry, a range of important judicial decisions, and numerous acts of Congress rely on the factual premise that these decrees will remain in place in their current form.

Nor have the relevant legal principles changed: antitrust law continues to view both large aggregations of market power and horizontal concerted action, such as collective pricing, with suspicion. Recent clarifications of the law governing unilateral conduct have not altered that. Nor are concerns about judicial price regulation in the context of unilateral action applicable here. The history of these decrees shows that they carefully manage the same inherent tensions between regulation and competition that currently give rise to some criticism of the decrees. And 80 years of experience, during which the American music industry has grown and evolved to the benefit of consumers, innovators, businesses, content creators, and the PROs themselves – which regularly report record annual revenues – lays to rest any doubt about judicial competency. The Division should conclude its review without altering these time-tested and well-balanced protections against serious and widespread competitive harm.

II. The Facts Have Not Changed

ASCAP and BMI have both the incentive and ability to harm competition – to raise consumer prices, reduce output of music, and limit consumer choice. The decrees continue to prevent those harms and to have tremendous practical significance for a healthy and innovative American industry.

A. ASCAP and BMI Have the Ability and Incentive To Harm Competition

ASCAP and BMI have the same role and the same power as when these decrees were first entered. Their fundamental role is still to implement horizontal agreements among competitors to fix prices for competing music. ASCAP and BMI together also still represent more than 90 percent of musical compositions. Moreover, numerous court decisions and widely accepted economic theory confirm that each PRO remains a monopolist over its own "must-have" catalog of music; that is, most music users must take a license from both in order to operate.[1] The existence of multiple must-have inputs creates what economics literature calls a "Cournot complements" problem: when split among separate sellers, the aggregate price of must-have assets (here, music performance rights) is artificially elevated above even the price that a single monopolist would charge.[2]

Their structure gives ASCAP and BMI natural incentives to limit licensing options and charge supra-competitive rates. The PROs' pre-decree practices show where those incentives lead. As the Department of Justice described in its initial complaint,[3] prior to the decrees,

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[1] *See BMI v. Hearst/ABC Viacom Entm't Servs.*, 746 F. Supp. 320, 326 (S.D.N.Y. 1990); *see also Meredith Corp. v. SESAC LLC*, 1 F. Supp. 3d 180, 196 (S.D.N.Y. 2014); *Radio Music License Comm., Inc. v. SESAC Inc.*, No. 12-cv-5807, 2013 WL 12114098, at *15 (E.D. Pa. Dec. 23, 2013).

[2] *See, e.g.*, Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 Tex. L. Rev. 1991, 2013 (2007) ("The Cournot-complements effect arises when multiple input owners each charge more than marginal cost for their input, thereby raising the price of the downstream product and reducing sales of that product. . . . As a result, if multiple input owners each control an essential input and separately set their input prices, output is depressed even below the level that would be set by a vertically integrated monopolist.").

[3] *See generally* Compl., *United States v. ASCAP*, No. 449 Q (E.D. Wis. Feb. 5, 1941) (describing ASCAP's anticompetitive conduct).

ASCAP forced broadcasters to pay for music using the revenues of programs that did not even use music. It required its members to grant ASCAP exclusive (as opposed to non-exclusive) performance rights, thereby preventing music users from contracting around the blanket license. It also refused to furnish to music users any complete list of the music in the ASCAP repertory, which made it impossible for music users to know whether they were using ASCAP music. ASCAP's "self-perpetuating board of directors" protected existing members by closing ASCAP's doors to many unrepresented composers, which effectively precluded those composers from having their music licensed at all. And ASCAP discriminated in the rates charged to similar broadcasters depending on whether a disfavored company (such as a newspaper) owned the broadcaster. BMI used similar methods. Because both PROs used illegal means to fight for market power – in what the Department of Justice dubbed "a private war at the expense of the public"[4] – an injunctive remedy was necessary to prevent harm to music users, composers, and consumers.

Even then, the initial decrees did not adequately protect against the competitive harms made possible by the PROs' control over the supply of music. Over the course of the 1940s, ASCAP invented a practice called "splitting" rights, in which ASCAP granted synchronization rights – the right to use music in a dramatic work (e.g., in a scene in a movie) – to the producers of motion pictures and then required theater owners to obtain separate performance rights for the same picture's music before it could be exhibited in their theaters. Two courts independently

[4] Public Statement, Dep't of Justice, Criminal Proceedings Against American Society of Composers, Authors and Publishers, et al. – Statement of Grounds for Action at 3 (Dec. 27, 1940).

enjoined the practice under the Sherman Act.[5] In 1950, in response to those two decisions and other complaints, the Department amended the ASCAP consent decree to explicitly limit ASCAP to non-exclusive performance rights and to preclude ASCAP from licensing synchronization rights.[6]

Still, under the revised and current decrees, ASCAP and BMI have repeatedly followed their natural economic incentives to exploit their monopolies, and the courts have repeatedly prevented a clear anticompetitive harm – higher prices – by enforcing the reasonable-rate requirements under the consent decrees. A few recent examples include *BMI v. DMX Inc.*, 683 F.3d 32, 47-49 (2d Cir. 2012), where the Second Circuit rejected the rates ASCAP and BMI demanded because those rates reflected the PROs' "market power" rather than the price that would have been "competitively set." Similarly, in *ASCAP v. MobiTV, Inc.*, 681 F.3d 76, 82 (2d Cir. 2012), the Second Circuit noted that the federal court settling rate disputes "must take into account the fact that ASCAP, as a monopolist, exercises market-distorting power in negotiations for the use of its music." *See also United States v. ASCAP*, 627 F.3d 64, 76 (2d Cir. 2010) (same); *United States v. BMI*, 426 F.3d 91, 96 (2d Cir. 2005) (same); *In re Pandora Media, Inc.*, 6 F. Supp. 3d 317, 353 (S.D.N.Y. 2014) (same).

The PROs have also chafed against the decrees' demands for alternative licensing structures and non-exclusive licenses. These requirements have prevented ASCAP and BMI from exploiting their market power through means other than straightforward pricing power.

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[5] *See Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888, 890 (S.D.N.Y.), *amended by* 80 F. Supp. 900 (S.D.N.Y. 1948); *M. Witmark & Sons v. Jensen*, 80 F. Supp. 843, 844-45 (D. Minn. 1948).

[6] *See United States v. ASCAP*, No. Civ.A. 42-245, 1950 WL 42273, 1950-1951 Trade Cases ¶ 62,595 (S.D.N.Y. July 17, 1950); *Meredith*, 1 F. Supp. 3d at 198; Susan Stager, *Musical Performing Rights in the Television Industry: Has the Blanket License Finally Seen Its Demise?*, 14 Sw. U. L. Rev. 569, 574-76 (1984).

Both the "per-program" license and the "adjustable fee blanket license," for example, help preserve competition because they allow music users who secure licenses directly from copyright owners to avoid or minimize paying twice for a license to the same song (once to the PRO, through a blanket license, and once to the copyright owner, for the specific song). In the absence of such alternative license structures, copyright owners would have no incentive to compete with one other or with the PROs. In order to keep copyright owners competing with each other, at least in some circumstances, the consent decrees have – from the beginning – required viable alternative license structures and non-exclusive licensing.

Nonetheless, as the Department determined as recently as 2000, "ASCAP has resisted offering a reasonable per-program license, forcing users desiring such a license to engage in protracted litigation, and often successfully dissuading users from attempting to take advantage of competitive alternatives to the blanket license." Mem. of United States in Supp. Joint Mot. To Enter Second Am. Final J. at 28, *United States v. ASCAP*, No. 41 Civ. 1395 (WCC) (S.D.N.Y. Sept. 4, 2000). BMI similarly has resisted keeping viable alternative license structures in place.[7] And SESAC, a PRO not under a consent decree (but now party to a private settlement that mirrors the decrees' terms), was subject to a successful antitrust suit for offering only a blanket license.[8]

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[7] *See*, *e.g.*, *United States v. BMI*, 275 F.3d 168, 177 (2d Cir. 2001) (holding, over BMI's objection, that the consent decree requires BMI to offer "a blanket license with a fee structure that reflects . . . alternative licensing," including direct deals with copyright holders); *WPIX, Inc. v. BMI*, No. 09 Civ. 10366, slip op. at 6-7 (S.D.N.Y. Apr. 28, 2011) (rejecting BMI's position that it was not required to offer an alternative fee blanket license option to television stations); *In re THP Capstar Acquisition Corp.*, 756 F. Supp. 2d 516, 541 (S.D.N.Y. 2010) (rejecting ASCAP's substantially identical contention).

[8] *See Radio Music License Comm., Inc. v. SESAC, Inc.*, 29 F. Supp. 3d 487, 502 (E.D. Pa. 2014) ("SESAC's anticompetitive conduct has driven up the price of copyright licenses and deteriorated the quality of service insofar as customers only have the option of purchasing a blanket license.").

Similarly, the PROs have sought to allow "partial withdrawals," which would enable rights-holders to limit which music users could license that owner's works. Partial withdrawals would eviscerate the consent decrees' fundamental, pro-competitive safeguards against discriminatory licensing by allowing copyright owners – especially the three dominant music publishers – to exclude individual music users from taking a blanket license to each PRO's complete repertory. That would threaten new entrants or innovative business models in the music delivery marketplace and force them to pay supra-competitive royalties not governed by the decrees. Indeed, ASCAP sought to use "partial withdrawal" in exactly that way when it allowed music publishers to withdraw the right to license to "New Media" outlets like Pandora.[9] In that instance, two of the top three music publishers, Sony and Universal, sought to force Pandora – then a nascent digital service – to separately negotiate rights for the publisher's massive repertoire of songs, all while withholding the list of works that license would cover. That put Pandora into a box: "shut down its business, face crippling copyright infringement liability, or agree to Sony's terms."[10]

The Department correctly concluded in 2016 that permitting partial withdrawals was inconsistent with the text and purpose of the decrees. Partial withdrawal would eliminate the pro-competitive efficiencies of collective licensing while leaving in place the PROs' ability to harm users who still require blanket licenses. That would raise prices, limit consumer choice, and harm competition.

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[9] *See In re Pandora Media, Inc.*, No. 12 Civ. 8035 (DLC), 2013 WL 6569872, at *1-2 (S.D.N.Y. Dec. 13, 2013).

[10] *Pandora Media*, 6 F. Supp. 3d at 359 (footnote omitted).

B. Reliance Interests

The continuing importance of the ASCAP and BMI consent decrees is confirmed by the degree to which the music industry, Congress, and the courts have come to rely on them. Music users of all kinds count on the decrees' protections. Among over-the-air radio stations, more than 20 percent of local radio members of the Radio Music License Committee ("RMLC") take a per-program license from ASCAP and BMI that, in all likelihood, would not be available without the decrees. More than 450 local television stations (roughly a third of the national total) also use per-program licenses. Large numbers of music users – both new media streaming services such as Pandora and Spotify, as well as more traditional radio and television stations – have relied on the decrees' non-discriminatory and reasonable rate adjudication provisions when unable to negotiate an agreement with the PROs.

iHeart, specifically, depends heavily on the decrees' protections – and is a powerful example of how these time-tested decrees are both remarkably effective, flexible, and beneficial to consumers. Over the past 10 years, iHeart, faced with new competition from platforms such as Google and Facebook, has invested heavily in technological solutions that allow it to expand beyond the traditional boundaries of terrestrial broadcasting to offer listeners and advertisers additional choices through digital, mobile, social, and on-demand music offerings. The competitive protections and flexibility offered by the decrees – for instance, the decrees' requirement that the PRO provide a license upon demand, subject to subsequently negotiated rates – have been indispensable to enabling iHeart to respond quickly to new competitive realities by implementing innovations that meet the corresponding rapidly changing demands of consumers and advertisers. This could not have happened if these protections were not in place. As a result of iHeart's investments in these new offerings, creators are being paid more money, and consumers have more options.

Congress relies on the decrees, too. Section 513 of the Copyright Act, for example, prescribes an intricate set of rules for "any performing rights society subject to a consent decree which provides for the determination of reasonable license rates or fees to be charged by the performing rights society."[11] And, in the Orrin G. Hatch–Bob Goodlatte Music Modernization Act of 2018 ("Music Modernization Act"),[12] Congress tweaked several procedural aspects of the decrees: (1) it changed the mechanism for assignment of judges in rate disputes under the decrees;[13] (2) it required the Department of Justice to notify Congress before altering the decrees;[14] and (3) it permitted consideration, in certain fee disputes, of fees for licenses of the public performance rights for sound recordings.[15] This incorporation of the decrees into other statutory fabrics goes far beyond ordinary legislative acquiescence.[16] It is hard to imagine clearer signals that Congress considers the decrees fundamentally valuable – and an appropriate use of the Department's power to enforce the antitrust laws. Any remaining doubt is resolved by the fact that the bipartisan, bicameral Judiciary Committee leadership in Congress, as well as other senior Senate Judiciary Committee members, have written to the Department to urge it to leave the decrees in place.[17] Given this reliance, the appropriate path is to maintain the decrees until Congress implements an alternative licensing structure if it sees fit.

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[11] 17 U.S.C. § 513.

[12] *See* Orrin G. Hatch–Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, 132 Stat. 3676 (2018).

[13] 28 U.S.C. § 137.

[14] 17 U.S.C. § 106 note (Performing Rights Society Consent Decrees).

[15] *Id.* § 114 note (Use in Musical Work Proceedings).

[16] *Cf. Bob Jones Univ. v. United States*, 461 U.S. 574, 600-02 (1983).

[17] *See* Letter from Senators Grassley and Feinstein, and Representatives Goodlatte and Nadler, to Assistant Attorney General Delrahim at 2 (June 8, 2018) ("Enacting the Music Modernization Act only to see the Antitrust Division move forward with termination of the decrees . . . could

Finally, removing or sunsetting the decrees would upset the legal framework courts have applied to ASCAP, BMI, and other PROs. In 1975, CBS sued ASCAP, BMI, and their members and affiliates, for violating Sections 1 and 2 of the Sherman Act. The Second Circuit held that the ASCAP/BMI practice of blanket licensing was *per se* illegal price-fixing.[18] The Supreme Court reversed, holding that blanket licensing would be judged instead under a "rule of reason" analysis – but the Court's decision rested explicitly on the fact that "the Federal Executive and Judiciary have carefully scrutinized ASCAP and the challenged conduct, have imposed restrictions on various of ASCAP's practices, and, by the terms of the decree, stand ready to provide further consideration, supervision, and perhaps invalidation of asserted anticompetitive practices."[19] In determining whether to apply a *per se* price-fixing framework, the Court noted that the "substantial restraints placed on ASCAP and its members by the consent decree must not be ignored."[20] On remand, the lower courts upheld the blanket license under the rule of reason because CBS had two feasible alternatives to the blanket license – direct licensing and per-program licensing. Both of these alternative licenses were required by the consent decrees and had not been possible prior to the decrees.[21]

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displace the legislation's improvements to the marketplace with new questions and uncertainties for songwriters, copyright owners, licensees, and consumers."); Letter from Senators Klobuchar, Leahy, Blumenthal, and Booker, Members of the Subcommittee on Antitrust, Competition Policy, and Consumer Rights, to Assistant Attorney General Delrahim at 1-2 (June 7, 2018) (explaining that "music licensing legislation before Congress assumes the continued existence of the framework established under the consent decrees").

[18] *CBS, Inc. v. ASCAP*, 562 F.2d 130, 140-41 (2d Cir. 1977).

[19] *BMI v. CBS, Inc.*, 441 U.S. 1, 13 (1979).

[20] *Id.* at 24.

[21] *See CBS, Inc. v. ASCAP*, 620 F.2d 930, 933 (2d Cir. 1980).

Other courts have since applied the same framework in subsequent challenges to blanket licensing of public performance rights. From the 1970s to today, numerous music users have alleged that the decrees still do not do enough to protect competition. Two courts have reaffirmed that the consent decrees provide essential limits on ASCAP and BMI, and that they protect competition by guaranteeing feasible alternatives for music users (such as per-program licenses or licensing directly from copyright owners).[22] In a third case, against SESAC – a much smaller PRO than ASCAP or BMI – private litigation achieved similar results to a consent decree. After the district court denied SESAC's motion for summary judgment,[23] SESAC entered a private settlement that mirrors the key provisions of the government consent decrees – including a procedure for settling rate disputes in arbitration, akin to the federal judicial review established by the ASCAP and BMI decrees.[24]

Given the broad reliance on the decrees by music licensees, lawmakers, and the courts, and the competitive protections upon which the current music marketplace has been built, to remove the decrees would create significant legal uncertainty and would effectively require private parties to protect music consumers from known competitive harms that fall well within the Department's enforcement powers.

III. The Law Has Not Changed

The PROs have suggested that revising the decrees is appropriate because the applicable antitrust framework has changed in light of the Supreme Court's decision in *Verizon*

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[22] *See Buffalo Broad. Co. v. ASCAP*, 744 F.2d 917 (2d Cir. 1984); *Nat'l Cable Television Ass'n, Inc. v. BMI*, 772 F. Supp. 614 (D.D.C. 1991).

[23] *Meredith*, 1 F. Supp. 3d at 224.

[24] *See* SESAC-RMLC Settlement Agreement (July 2015), http://dehayf5mhw1h7.cloudfront.net/wp-content/uploads/sites/893/2017/09/22194517/Final-SESAC-RMLC-Settlement-Agreement.pdf.

Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004). The *Trinko* Court declined to recognize a new antitrust duty to deal in part because of the practical difficulties – and the risk to competition itself – of enforcing specific, technical requirements of a separate regulatory scheme under the antitrust laws. *Id.* at 413-14. But that decision concerned only refusal-to-deal claims under Section 2 of the Sherman Act, not concerted action – like the horizontal agreement among competitors that ASCAP and BMI embody – covered by Section 1. *Trinko* expressly distinguished concerted action cases. *See id.* at 410 n.3 (distinguishing "cases [that] involved *concerted* action, which presents greater anticompetitive concerns"). Indeed, Justice Scalia's opinion for the Court in *Trinko* reaffirms that "compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion." *Id.* at 408. And the cases against PROs discussed above – many of which post-date *Trinko* – confirm that concerted action of the kind that ASCAP and BMI embody remains subject to the same legal framework, and raises the same competitive concerns, as it has for the last 80 years.[25]

Nor are *Trinko*'s concerns with the practical limits of judicial supervision present in this context. *Trinko* stated, again referring only to unilateral conduct claims under Section 2, that "[n]o court should impose a duty to deal that it cannot explain or adequately and reasonably supervise." *Id.* at 415. But no one can say that these decrees are inexplicable or too difficult to administer. Courts have done it for 80 years with both facility and success: the music industry has evolved, innovated, and grown, offering consumers more choices at affordable prices;

[25] *See Buffalo Broad. Co.*, 744 F.2d at 926-27; *Nat'l Cable Television Ass'n*, 772 F. Supp. at 627-28; *Meredith*, 1 F. Supp. 3d at 224.

content creators have expanded revenue streams; and the PROs themselves have thrived with revenues that "continue to break records."[26]

The concern that antitrust injunctions might be improperly regulatory is not new. Indeed, the consent decrees themselves were shaped by venerable leaders of the Department with exactly these concerns in mind. As described at greater length in the attached appendix, the decrees were entered at the direction of Attorney General Robert H. Jackson,[27] who had also supervised the first ASCAP case during his time as Assistant Attorney General for the Antitrust Division. During his time leading the Division, Jackson led the charge on several antitrust reforms that

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[26] Press Release, ASCAP, *ASCAP Annual Revenue and Distributions Continue to Break Records: 2018 Revenue Tops $1.227 Billion; Distributions Hit $1.109 Billion* (May 1, 2019), https://www.ascap.com/press/2019/05/05-01-financials-release; *see* Press Release, ASCAP, *ASCAP Delivers for the First Time More Than $1 Billion to Songwriter, Composer and Music Publisher Members* (Apr. 19, 2018), https://www.ascap.com/press/2018/04/04-19-financials-2017; Press Release, ASCAP, *ASCAP Delivers Record-High 2016 Financial Results: Collects $1.059 Billion in Revenue and Distributes More Than $918 Million to Songwriter, Composer and Music Publisher Members* (Apr. 5, 2017), https://www.ascap.com/press/2017/04-04-2016-financial; Press Release, ASCAP, *ASCAP Revenue Tops $1 Billion for Second Year in a Row: Market-Leading PRO Strengthens Core Business, Continues Transformation* (Apr. 27, 2016), https://www.ascap.com/press/2016/0427-ascap-revenue-tops-one-billion-for-second-year; Press Release, ASCAP, *ASCAP is the First PRO in the World to Report $1 Billion in Revenues* (Mar. 3, 2015), https://www.ascap.com/press/2015/0302-ascap-hits-a-high-note-in-its-100th-year; BMI, *2017-2018 Annual Review* 2, https://www.bmi.com/pdfs/publications/2018/BMI_Annual_Review_2018.pdf (detailing BMI's "record-breaking performance"); Press Release, BMI, *BMI Sets Revenue Records With $1.199 Billion* (Sept. 12, 2018), https://www.bmi.com/news/entry/bmi-sets-revenue-records-with-1.199-billion; Press Release, BMI, *BMI Announces $1.060 Billion in Revenue, the Highest in Company's History* (Sept. 8, 2016), https://www.bmi.com/news/entry/bmi_announces_1.060_billion_in_revenue_the_highest_in_companys_history; Press Release, BMI, *BMI Reports Record-Breaking Revenues of Over $1 Billion* (Sept., 10, 2015), https://www.bmi.com/news/entry/bmi_reports_record_breaking_revenues_of_over_1_billion.

[27] Jackson remains a subject of admiration within the Department. *See* Sadie Gurman, *Justice Department Chiefs Can't Get Enough of the Patron Saint of the Rule of Law*, Wall St. J. (July 13, 2019), https://www.wsj.com/articles/justice-department-chiefs-cant-get-enough-of-the-patron-saint-of-the-rule-of-law-11563019202.

remain important today.[28] First, Jackson focused antitrust enforcement on measurable economic effects. Second, he sought to clarify the bounds of the antitrust laws so that businesses would know, *ex ante*, when they were running afoul of them – and so that the government would know which cases to bring. Third – and most importantly here – Jackson was the leading advocate in the Roosevelt Administration for robust antitrust enforcement, as opposed to government price controls, as the proper solution to the monopoly-related problems in the national economy.[29] "The antitrust laws represent an effort to avoid detailed government regulation of business by keeping competition in control of prices," Jackson explained during his time in the Division.[30] "It was hoped to save government from the conflicts and accumulation of grievances which continuous price control would produce and to let it confine its responsibility to seeing that a true competitive economy functions."[31]

When he led the Division, Jackson was "very much perplexed" about the ASCAP case and requested recommendations from his deputies. His deputies agreed that a consent decree would be appropriate, but disagreed on whether to pursue a suit in the absence of a decree. Thurman Arnold, one of Jackson's deputies, would later go on to lead the Antitrust Division himself and eventually oversaw the first consent decrees. Arnold's view in 1937 was to leave ASCAP alone if no decree could be reached. But, by 1940, it had become clear that ASCAP's (and, by then, also BMI's) activities "went far beyond the necessity of protecting its members in their copyright privileges – practices which were designed solely for the purpose of eliminating

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[28] R. Hewitt Pate, *Robert H. Jackson at the Antitrust Division*, 68 Alb. L. Rev. 787, 789-91 (2005).

[29] *See id.* at 790-91.

[30] Robert H. Jackson, *Should the Antitrust Laws Be Revised?*, 71 U.S. L. Rev. 575, 576 (1937).

[31] *Id.*

competition in the furnishing of music, and securing a monopoly control over the supply."[32] Arnold thus recommended to Jackson, then Attorney General, that new suits be brought against the PROs. These suits ended with decrees of the sort that Jackson and Arnold had envisioned. Rather than being broken up, ASCAP and BMI would be allowed to continue to operate, thereby protecting composers from piracy and offering some opportunity for composers to gain bargaining power by pooling their rights. But ASCAP and BMI could no longer engage in the worst anticompetitive conduct enabled by their pooled rights and enormous market shares. The consent decrees – as Arnold and Jackson both recognized – provided a "working peace" in an industry whose "private war" had come "at the expense of the public."[33]

That all remains true today. Despite constant evolution in both the music industry's technologies and business models, neither relevant antitrust law nor underlying policy concerns have changed since these decrees were entered.

IV. A Sunset Without First Establishing an Alternative Framework Is Not a Solution

Because ASCAP and BMI still violate fundamental tenets of antitrust law, terminating or sunsetting the decrees would only replace stable, successful, and flexible decrees with a rash of new private litigation. Far from removing the PROs from judicial oversight, terminating or sunsetting the decrees without an alternative framework already in place would have the perverse effect of bringing *more* courts into the mix, creating *additional* burdens on the judicial system and reinstalling the very uncertainty and competitive harm to the entire industry that the decrees

[32] Public Statement, Dep't of Justice, Criminal Proceedings Against American Society of Composers, Authors and Publishers, et al. – Statement of Grounds for Action at 2 (Dec. 27, 1940).

[33] A more thorough explanation of this history, as well as primary sources, are attached to these Comments as an appendix.

were designed, successfully, to prevent. It would take the industry "Back to the Future" and unravel one of Robert Jackson's, and the Division's, enduring achievements.

If, despite their continued necessity and effectiveness, the Department decides to end or sunset the decrees, it is critical to a functional marketplace that it do so in a way that ensures continuity of protections for consumers and competition. To that end, while a sunset period may be appropriate *after* congressional enactment of a replacement legal framework, establishing a sunset period before a new framework is in effect would create instability and permit the exercise of unrestrained PRO market power.

V. Conclusion: The Decrees Should Be Left Intact

The music industry has changed in many ways since 1941. The premises of these decrees – the PRO's roles and the applicable law – have not. ASCAP and BMI still use concerted action to control 90 percent of the supply of public performance rights, and they have continued to earn record revenues for copyright owners even while subject to the decrees. Similarly, antitrust law still recognizes the inherent anticompetitive dangers – the natural incentives for abuse – that come with such concerted action and market power.

If the Department decides it must end these decrees, it must do so only after an alternative legal framework is put in their place. Congress has the ability to revise or replace the decrees if it sees fit, but it should not be forced to legislate against the clock. The Department should, in the meantime, continue to enforce the antitrust laws as it has done for 80 years, through 13 Administrations. Nor should substantial changes, like permitting partial withdrawals, be contemplated. Terminating the decrees – either outright or through a sunset – or significantly revising them, would create enormous instability in a thriving, innovative, and competitively dynamic American market. No change in fact, law, or policy provides a warrant for doing so. The Department should not unfix a solved problem.

Appendix

The ASCAP and BMI Decrees:
What Would Robert H. Jackson Do?

In his speech to the National Music Publishers Association, Assistant Attorney General for the Antitrust Division Makan Delrahim said that "[o]ne of [his] favorite Jacksons, with due respect to Michael, is Robert Jackson."[1] Robert H. Jackson headed the Antitrust Division from 1937-38 before serving as Solicitor General, Attorney General, Associate Justice of the United States, and the chief U.S. prosecutor at Nuremberg. Delrahim says Jackson is one his "personal legal heroes"[2] and has repeatedly stressed the importance of Jackson's role in the Antitrust Division.[3] Delrahim instituted a new annual Jackson-Nash address in honor of Jackson's and John Nash's contributions to the legal and economic halves of antitrust enforcement. One key reason for Delrahim's admiration of Jackson is that he shares Jackson's view that antitrust should promote competition as an alternative to regulation and price controls.[4]

Assistant Attorney General Delrahim has expressed concern that the ASCAP and BMI antitrust consent decrees involve improper regulation and price controls. This raises the question: What would Jackson do with the ASCAP and BMI consent decrees?

We know what Jackson ***did do*** regarding ASCAP and BMI. Jackson authorized antitrust lawsuits to challenge ASCAP's and BMI's anticompetitive practices. A look at Jackson's papers (excerpts of which are attached to this memorandum) reveals that it was no easy decision to bring the cases. Jackson inherited the ASCAP case – it had laid dormant for two years – when he joined the Division in 1937. It was a controversial issue. At Jackson's request, his deputies drafted memoranda and recommendations, but they could only partially agree about what to do. Jackson himself understood the difficulty too. He recognized the important role that ASCAP played in monetizing songwriters' copyrights and was therefore reluctant to break ASCAP up. But he recognized the serious anticompetitive harm to consumers that was caused by a massive aggregation of competing suppliers of music. In the end, his duty to enforce the antitrust laws came first. As Attorney General, Jackson authorized the ASCAP and BMI prosecutions and the two consent decrees that remain in place, in modified form, to this day.[5]

This memorandum discusses Jackson's history with the ASCAP and BMI cases, and the reasons – as good now as they were then – justifying the result he reached.

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[1] Makan Delrahim, Assistant Attorney Gen., Antitrust Div., Sign of the Times: Innovation and Competition in Music, at 7 (June 13, 2018).

[2] Makan Delrahim, Assistant Attorney Gen., Antitrust Div., Inaugural Jackson-Nash Address: Remarks, at 2 (Feb. 26, 2018).

[3] *See* Makan Delrahim, Assistant Attorney Gen., Antitrust Div., Remarks of Assistant Attorney Gen. Delivered at the New York State Bar Assoc. (Jan. 25, 2018); Dep't of Justice, Antitrust Div., Division Update Spring 2018, https://www.justice.gov/atr/division-operations/division-update-spring-2018.

[4] *See id.* (Division Update); Makan Delrahim, Assistant Attorney Gen., Antitrust Div., Public Roundtable on Anticompetitive Regulations, Tr. Part One at 27 (May 31, 2018).

[5] *See* Tab 6 at 84 (Memorandum from Assistant Attorney General Thurman Arnold to Attorney General Robert Jackson (Mar. 5, 1941)).

On December 27, 1940, the Department of Justice issued this release:

FOR RELEASE
Morning Papers, December 27, 1940

DEPARTMENT OF JUSTICE

Attorney General Robert H. Jackson announced today that he had authorized Thurman Arnold, Assistant Attorney General in charge of the Antitrust Division, to institute criminal proceedings under the Sherman Act against the American Society of Composers, Authors and Publishers, Broadcast Music, Inc., the National Broadcasting Company, and the Columbia Broadcasting System. The proceedings will be brought in Milwaukee, Wisconsin, immediately after the first of January, and will be based on the following charges:

1. The illegal pooling of most of the desirable copyright music available for radio broadcasting in order to eliminate competition and to monopolize the supply.

2. Illegal discrimination against users of copyright music.

3. Illegal discrimination against composers who are not members of ASCAP on Broadcast Music, Inc.

4. Withholding music from publication in order to exact fees not permitted by the copyright laws.

5. Illegal price fixing.

6. Restraining composers in their right to bargain for the sale of their own music.

7. Requiring users of music to pay for tunes on programs in which no music is played.

8. Mutual boycotts by ASCAP and by the broadcasting chains (through Broadcasting Music, Inc.) in an attempt by each of these conflicting groups to obtain for themselves control over the supply of music by depriving the others of control, which boycotts threaten to restrain and obstruct the rendition over the radio of about ninety percent of the desirable modern copyright music.

The suits described in that press release[6] were the end of a long and uncertain path, largely forged by Robert Jackson and Thurman Arnold during their years in the Department of Justice.

The Department of Justice first brought a case against ASCAP on August 30, 1934, before either Jackson or Arnold entered the Antitrust Division. That case was postponed indefinitely in June 1935, after two weeks of trial, by mutual consent of the parties. This pause – ostensibly to allow the parties to negotiate and enter a joint stipulation of facts – also seems to have corresponded with the radio broadcasters' and ASCAP's agreement (at the same time) to a five year license, due to expire on December 31, 1940.[7] The case laid dormant for years.

During this period of dormancy, in 1937, Jackson took on the role of Assistant Attorney General for the Antitrust Division. Antitrust enforcement changed significantly under (and after) his leadership. During his time leading the Division – as Assistant Attorney General Delrahim has repeatedly noted – Jackson led the charge on several reforms.[8] First, Jackson reformed antitrust enforcement to focus on measurable economic effects.[9] Second, he sought to clarify the bounds of the antitrust laws so that businesses would know, ex ante, when they were running afoul of them – and so that the government would know which cases to bring.[10] Third and most importantly, Jackson was the leading advocate in the Roosevelt administration for robust antitrust enforcement, as opposed to government price controls, as the proper solution to the monopoly-related problems in the national economy.[11] "The antitrust laws represent an effort to avoid detailed government regulation by keeping competition in control of prices," Jackson explained during his time in the Division.[12] "It was hoped to save government from the conflicts and accumulation of grievances which continuous price control would produce and to let it confine its responsibility to seeing that a true competitive economy functions."[13]

Jackson left the Antitrust Division to become Solicitor General in March 1938 and Attorney General in January 1940. But his impact on the Antitrust Division lasted beyond his time in that office. Even after becoming Solicitor General, Jackson remained involved in the antitrust reforms that the Division (and President Roosevelt) proposed to Congress. And his deputy, Thurman Arnold, assumed control of the Division and perpetuated – and strengthened – Jackson's vision for it.

Arnold shared Jackson's view that protecting competition through robust antitrust enforcement – rather than government price- and output-controls like the National Recovery Administration – was the best means of protecting consumers and free enterprise. Like Jackson,

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[6] Tab 1 at 2 (Dep't of Justice, Criminal Proceedings Against American Society of Composers, Authors, and Publishers, et al. – Statement of Grounds for Action (Dec. 27, 1940)).
[7] *See* Tab 4 at 42 (Memorandum from Thurman Arnold to Assistant Attorney Gen. Robert Jackson (May 1, 1937)).
[8] *See* Delrahim, *Jackson-Nash Address*, at 2-4; R. Hewitt Pate, *Robert H. Jackson at the Antitrust Division*, 68 Alb. L. Rev. 787, 789-91 (2005).
[9] *Id.* at 790.
[10] *Id.* at 790-91.
[11] *Id.* at 790.
[12] Robert H. Jackson, *Should the Antitrust Laws Be Revised?*, 71 U.S. L. Rev. 575, 576 (1937).
[13] *Id.*

"Arnold went out of his way to distinguish antitrust enforcement from either 'regulation' or the kind of emergency legislation experimented with in the NRA."[14] Also like Jackson, Arnold recognized that "all antitrust problems" are economic as well as legal problems.[15] Arnold even made a point of discontinuing the Division's former practice – which Jackson too had criticized[16] – of occasionally using the threat of criminal prosecution to obtain consent decrees with merely symbolic equitable relief. As Spencer Waller explained in his article on Arnold's antitrust legacy: "Consent decrees were limited to situations where defendants proposed industry-wide relief that fully restored competition beyond what could be achieved through a successful prosecution or civil action by the government and the defendants permitted meaningful monitoring by the government."[17]

During Jackson's time leading the Division, he was "very much perplexed as to what to do about" the ASCAP case. "The basic problem," he described in later recollections, "was that if ASCAP were dissolved, each individual producer in the United States would be pretty much at the mercy of the exploiters of his music, because he couldn't individually afford to check and determine violations of his copyright . . . . On the other hand, if nothing was done, it left ASCAP with pretty much a monopoly of the situation."[18]

Assistant Attorney General Jackson requested a recommendation from his deputies. Those deputies, Thurman Arnold and Andrew W. Bennett (Jackson's Special Assistant) could not come to a complete agreement. They submitted dueling memoranda. Both Arnold and Bennett agreed that a consent decree would be a good result.[19] But they disagreed on what to do in the absence of a decree – should they pursue a case to break up ASCAP or not? Bennett thought yes: The antitrust case against ASCAP was strong, and they should try to break up the monopoly if they could not get a meaningful consent decree.[20] Arnold thought not, largely on practical grounds. Arnold wrote it was a risky case (and thus a poor use of the Division's resources) because he suspected a court would likely permit some kind of coordination among composers/publishers in order to prevent piracy, and because he worried there were no standards under the muddled antitrust laws of that era by which to determine whether ASCAP had engaged in improperly discriminatory or monopolistic pricing.[21] Thus, Arnold's "tentative opinion" was that they should dismiss the suit rather than breaking up ASCAP if no decree was reached.[22] Jackson explained later that he "never had much sympathy" with the case for breaking up

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[14] Spencer W. Waller, *The Antitrust Legacy of Thurman Arnold*, 78 St. John's L. Rev. 569, 579 (2004).
[15] Tab 4 at 47-48 (Memorandum from Thurman Arnold to Assistant Attorney Gen. Robert Jackson); *see* Jackson, *Should the Antitrust Laws Be Revised?*, 71 U.S. L. Rev. at 575 ("Every antitrust problem is economic as well as legal.").
[16] *Id.* ("We should not spend great sums to obtain decrees which are economically unenforceable and, when carried out in form, are often only lessons in futility.").
[17] Waller, *The Antitrust Legacy*, 78 St. John's L. Rev. at 580–81.
[18] Tab 2 at 18 (Oral History Research Office, The Reminiscences of Robert H. Jackson (excerpt)).
[19] Tab 4 at 46-47 (Memorandum from Thurman Arnold to Assistant Attorney Gen. Robert Jackson); Tab 3 at 38 (Memorandum from Andrew Bennett to Assistant Attorney Gen. Robert Jackson (May 7, 1937) ("I am in full accord with any plan which may result in a consent decree.").
[20] *Id.* at 37-38.
[21] Tab 4 at 46 (Memorandum from Thurman Arnold to Assistant Attorney Gen. Robert Jackson).
[22] *Id.* at 47 (Memorandum from Thurman Arnold to Assistant Attorney Gen. Robert Jackson).

ASCAP.[23] But no consent decree was reached during Jackson's tenure in the Antitrust Division, and eventually Jackson moved to the positions of Solicitor General and then Attorney General, leaving Arnold in charge of the Division.

Despite the still-pending antitrust suit against it, ASCAP continued to engage in anticompetitive conduct to further secure and exploit its monopoly on performance rights. In response, in 1939, the broadcasters created BMI in an effort to offset ASCAP's market power. In the summer of 1940, ASCAP announced new rates that broadcasters, smaller music users, and the Department of Justice saw as "enhanced and non-competitive."[24] As the Department of Justice described in its complaint,[25] ASCAP was forcing broadcasters to pay for music using the revenues of programs that did not even use music. It was requiring its members to grant ASCAP exclusive (as opposed to non-exclusive) performance rights, thereby preventing music users from contracting around the blanket license. It also was refusing to furnish to music users any complete list of the music in the ASCAP repertory, which made it impossible for music users to know whether they were using ASCAP music. It had a "self-perpetuating board of directors"[26] that protected existing members by closing ASCAP's doors to many unrepresented composers, which effectively precluded those composers from having their music licensed at all. It discriminated in the rates charged to similar broadcasters depending on whether the broadcaster was majority-owned by a newspaper. BMI tried similar methods. There were mutual boycotts of the ASCAP and BMI repertories. ASCAP and BMI were using illegal means to fight for market power in what the Department of Justice called "a private war at the expense of the public."[27] The Department of Justice finally decided it must take action in response to the "constant complaints" about ASCAP (and BMI) activities that "went far beyond the necessity of protecting its members in their copyright privileges, — practices which were designed solely for the purpose of eliminating competition in the furnishing of music, and securing a monopoly control over the supply."[28]

The Department first "tried to obtain voluntary agreement to form the basis of a working peace which would eliminate the illegal activities and allow the associations of composers to continue their legitimate function of protecting their members from piracy."[29] But the Department finally had to bring new prosecutions when "[t]hose efforts, which a few days ago appeared to be on the verge of success, ha[d] failed."[30] Arnold recommended the new suit even in light of his former view that only a consent decree, rather than a new or continuing prosecution, could satisfactorily resolve the ASCAP problem.[31] Jackson himself authorized the suit. (It was the ordinary practice in that era for the Assistant Attorney General of the Antitrust

[23] Tab 2 at 19 (The Reminiscences of Robert H. Jackson).
[24] Tab 7 at 96 (Complaint, *United States v. ASCAP, et al.*, No. 449 Q (Feb. 5, 1941).
[25] *See generally id*. at 95-100 (describing ASCAP's anticompetitive conduct).
[26] *Id.* at 95.
[27] *See* Tab 5 at 56 (Dep't of Justice, Criminal Proceedings Against American Society of Composers, Authors, and Publishers, et al. – Statement of Grounds for Action (Dec. 27, 1940)).
[28] *Id.* at 55.
[29] *Id* at 56.
[30] *Id.*
[31] Tab 4 at 46-47 (Memorandum from Thurman Arnold to Assistant Attorney Gen. Robert Jackson).

Division to submit memos on proposed cases for the approval of the Attorney General.[32] And a memo from Arnold to Jackson confirms that the ASCAP situation remained well-known to Attorney General Jackson throughout its prosecution.[33]

Jackson's and Arnold's new prosecutions led swiftly to consent decrees with ASCAP and BMI. The BMI decree was entered in January 1941, designed go into effect as soon as ASCAP was subject to similar restrictions. The ASCAP decree was then agreed to on February 26, 1941 and entered by the court on March 4.

The consent decrees were – as Arnold, Bennett, and Jackson all recognized – the best solution to a "perplexing" problem. Rather than being broken up, ASCAP and BMI would be allowed to continue to operate, thereby protecting composers from piracy and offering some opportunity for composers to gain bargaining power by pooling their rights. But ASCAP and BMI could no longer engage in the worst anticompetitive conduct enabled by their pooled rights and enormous market shares. Where ASCAP and BMI had each used their market power to keep new composers out and drive performances toward their own members, they now had to admit any qualified composer who wanted their representation. Where ASCAP and BMI had previously demanded exclusive performance rights, thereby limiting composers from licensing their music independently, they could now demand and offer only non-exclusive performance rights. Where ASCAP and BMI had used their market share to offer only revenue-based blanket licenses, which in effect forced broadcasters to pay for music even on programs that did not use any, the PROs now had to offer a genuine choice between a complete blanket license and per- program licenses. Where ASCAP and BMI had boycotted various music users in an effort to fix prices and build market power, they now had to offer music on non-discriminatory terms to all similarly situated music users.[34]

Even so, the 1941 decrees did not solve every anticompetitive problem posed by the PROs. Over the course of the 1940s – after Jackson took his seat on the Supreme Court and Arnold (briefly) took a seat on the D.C. Circuit – ASCAP found new ways to exploit its market position. One way it did so was by "splitting" rights. Under that practice, ASCAP granted synchronization rights to the producers of motion pictures and then required theater owners to obtain separate performance rights for the same picture's music before it could be exhibited in their theaters. The courts enjoined that practice under the Sherman Act.[35] In 1950, the Department of Justice amended the ASCAP consent decree to explicitly limit ASCAP to non-exclusive performance rights and to preclude ASCAP from licensing synchronization rights.[36]

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[32] *See* Pate, *Robert H. Jackson at the Antitrust Division*, 68 Alb. L. Rev. at 792-94.

[33] *See* Tab 6 at 84 (Memorandum from Assistant Attorney Gen. Thurman Arnold to Attorney Gen. Robert Jackson (March 5, 1941) (noting, the day after the consent decree was entered, that "[t]he ASCAP . . . situation[]" remains "familiar to you").

[34] *See generally* Tab 7 at 95-100 (Complaint in *United States v. ASCAP, et al.*, No. 449 Q (Feb. 5, 1941) (describing ASCAP's anticompetitive conduct)).

[35] *See Alden-Rochelle, Inc., v. American Soc'y of Composers, Authors & Publishers*, 80 F. Supp. 888, 890 (S.D.N.Y.), *amended by*, 80 F. Supp. 900 (S.D.N.Y. 1948); *M. Witmark & Sons v. Jensen*, 80 F. Supp. 843, 844-45 (D. Minn. 1948); Susan Stager, *Musical Performing Rights in the Television Industry: Has the Blanket License Finally Seen Its Demise?*, 14 Sw. Univ. L. Rev. 569, 574-75 (1984).

[36] *See id.*at 575-76.

And the decrees have been amended several times since to account for the evolving anticompetitive possibilities inherent in such massive market concentration.

* * *

If Jackson were to be woken like Rip Van Winkle today, he would be pleased to see the Antitrust Division led by a successor so thoughtfully committed to applying the principles he advocated. There also is good reason to believe that he would be pleased that the "working peace" he established is still functioning 80 years later.[37] Jackson recognized the virtues of allowing composers to collectively bargain and collectively police public uses of their works – valuable roles under which ASCAP and BMI continue to earn "record-breaking" revenues for songwriters.[38] At the same time, Jackson would note with satisfaction that his decrees – and the Division's careful, periodic revisions of them – have continued to stave off the worst anticompetitive effects of allowing two organizations to control roughly 90% of American performance rights. ASCAP's and BMI's market power has not meaningfully changed since Jackson put the consent decrees in place. The inherent anticompetitive dangers – the natural incentives to abuse that market power – have not changed either. The one thing that has changed – the acceptance and ratification of the decrees by Congress[39] – counsels in favor of leaving to Congress any significant modifications. For these reasons, the question of what Jackson would do with the ASCAP and BMI decrees is easily answered: Having put the decrees in place, he would not disrupt the hard-won "working peace" by terminating them.

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[37] *See* Tab 5 at 56.

[38] BMI, 2017-2018 Annual Review 2, https://www.bmi.com/pdfs/publications/2018/BMI_Annual_Review_2018.pdf; *see* Press Release, ASCAP, ASCAP Annual Revenue and Distributions Continue to Break Records: 2018 Revenue Tops $1.227 Billion; Distributions Hit $1.109 Billion (May 1, 2019), https://www.ascap.com/press/2019/05/05-01-financials-release.

[39] *E.g.*, 17 U.S.C. § 513 (expressly relying on the consent decrees and the district court ratemaking procedure for determining reasonable license fees paid by small individual proprietors). *See* Letter from Sens. Grassley and Feinstein and Reps. Goodlatte and Nadler to Assistant Attorney Gen. Makan Delrahim, at 1 (June 8, 2018) ("Terminating [the decrees] without a clear alternative framework in place . . . would undermine our efforts on the Music Modernization Act which passed the House by a vote of 415 - 0."); Letter from Sens. Klobuchar, Leahy, Blumenthal, and Booker, Members of the Subcommittee on Antitrust, Competition Policy, and Consumer Rights, to Assistant Attorney Gen. Makan Delrahim, at 1-2 (June 7, 2018) ("music licensing legislation before Congress assumes the continued existence of the framework established under the consent decrees").

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3	27-38	05/07/1937	Memorandum from A. Bennett to Assistant Attorney Gen. R. Jackson (Library of Congress, Manuscript Div. – Jackson Papers, Box 79, Folder 11 (1816-1983))
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5	50-81	12/27/1940	Department of Justice, Criminal Proceedings Against American Society of Composers, Authors, and Publishers, et al. – Statement of Grounds for Action (Thurman W. Arnold Collection, American Heritage Center, Univ. of Wyoming, Box 59, Folder 7 – part 1a)
6	82-86	03/05/1941	Memorandum from Assistant Attorney Gen. T. Arnold to Attorney Gen. R. Jackson (Thurman W. Arnold Collection, American Heritage Center, Univ. of Wyoming, Box 59, Folder 7 – part 1a)
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Tab 1

PUBLIC STATEMENT

Released December 27, 1940

DEPARTMENT OF JUSTICE

Division for Enforcement of Antitrust Laws

Criminal Proceedings Against American Society of Composers, Authors and Publishers, et al.

STATEMENT OF GROUNDS FOR ACTION

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1941

FOR RELEASE
Morning Papers, December 27, 1940

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6. Restraining composers in their right to bargain for the sale of their own music.

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8. Mutual boycotts by ASCAP and by the broadcasting chains (through Broadcasting Music, Inc.) in an attempt by each of these conflicting groups to obtain for themselves control over the supply of music by depriving the others of control, which boycotts threaten to restrain and obstruct the rendition over the radio of about ninety percent of the desirable modern copyright music.

Tab 2

Oral History Research Office

The Reminiscences of

<u>ROBERT H. JACKSON</u>

Robert H. Jackson - Contents

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PART IV

ANTI-TRUST DIVISION

American Society of Composers, Authors and Publishers

The problem presented by the case of the United States v. the American Society of Composers, Authors and Publishers, known as ASCAP, was a difficult one. It was a civil case in equity filed in 1934. It was pending when I came to the division ~~on the theory~~ and it was expected that a stipulation of fact ~~should~~ would be entered into. It was a most difficult question - whether the ASCAP was a violation of either the letter or spirit of the statute.

In the first place, there was no doubt that the publishers, authors and composers of popular music - as well as ~~some~~ other, but particularly popular music - were being exploited and cheated of their copyright rights up to the time that ASCAP was formed. That exploitation became more possible and more serious with the advent of radio. A popular song was written. It took hold of the public imagination. It immediately began to be broadcast by every local radio station, records were put out and played in every juke box in every little corner dump, and the first thing you knew the public was tired of the song. It had been killed. The author wasn't able to collect royalties from the juke box owners, though he might from the record publishers to some extent. Generally speaking, the product of his work was killed by overuse without any return to him that was commensurate.

John Philip Sousa, Victor Herbert and Eugene Buck founded this association for the purpose of policing the agencies that were making public use and ~~making public~~ profit ~~presumably~~ out of playing the compositions of its members, and of bringing united pressure and action against agencies which didn't account for, and pay, proper royalties. Of course, it was a combination to restrain, in a certain sense, the production of music which was copyrighted to these authors. On the other hand, restraints sought were those which the copyright law gave the ~~right of control~~ to the individual author or copyright owner.

The hotels, restaurants, amusement houses, hot spots of various kinds were bitter when they were asked to pay for the music they were using. There was great protest against it. Undoubtedly, in some cases, ASCAP's action was arbitrary and unreasonable. I think it might have been true in some cases that ASCAP was using its power to collect fees whether music was played or not. I don't think that was their general practise. ASCAP would license amusement houses and then ASCAP would make a division among the authors of the proceeds of the license in accordance with what it considered to be the use of the author's music, as I recall it.

The basic problem was that if ASCAP were dissolved, each individual producer in the United States would be pretty much at the mercy of the exploiters of his music, because he couldn't individually afford to check and determine violations of his copyright. That could only be done by the resources of the united authors. On the other hand, if nothing was done, it left ASCAP with pretty much of a monopoly of the situation. The result was that the department's action had lain in a dormant state for many years. I was very much perplexed as to what to do about it and never did get to a solution of it so far as I can recall during my term of office.

Technically it was a ~~very great~~ serious question if there was not a violation of the anti-trust laws. On the other hand, to enforce it strictly would create this situation of absolute helplessness on the part of the copyright owner to whom the government had given a copyright in consideration of his original work, but where he would be economically unable to protect his rights.

Looking at the matter from the point of view of the public interest and trying to select ~~your~~ cases on the basis of the public interest, since ~~you~~ we never ~~have~~ had adequate staff and facilities to prosecute all cases in which there are complaints, it didn't seem to me that ASCAP warranted any great effort. Perhaps there were some incidental practises that ought to be checked, but on the whole it was not a harmful, and was probably a helpful, organization in protecting the intellectual property of those who had made contributions to the arts. I never had much sympathy with that case.

CHAPTER X

ASCAP

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CHAPTER XVI

Thurman Arnold

Attorney General Cummings was entitled to recommend my successor. There were several candidates within the administration. One of them was James Lawrence Fly, who had headed the communications commission. Cummings did not care for Mr. Fly, and I did not favor him. Another was Arnold, who had then returned, I believe, to Yale. Cummings, being a Yale man and having a good opinion of Arnold's ability, was inclined to Arnold. There were some men in the department who also were entitled to consideration, but it seemed, all things considered, that Arnold was probably the best choice. I was favorable to it. That choice was made.

Arnold at first was regarded as being unfavorable to vigorous enforcement. He had made some comments--rather sarcastic comments--on the failure of the anti-trust laws and their uselessness in one of his books. Senator William Borah threatened to oppose him for confirmation on the ground that he was not sufficiently interested in the anti-trust program. Arnold, however, soon proved to be a zealot in the enforcement and instituted many actions. He got much more publicity. He was quite an artist in attracting attention to the work of the division in the press. He instituted more criminal actions, and soon was regarded as the country's leading trust-buster. He continued there for a considerable period of time--much longer than I had been in the division.

As a matter of fact, with most of the men that I prosecuted we didn't have particularly bitter quarrels. We didn't have particularly bitter times over our cases, except perhaps the aluminum case. That threatened to be bitter. In the rest of the cases, such as the automobile finance case, when those attorneys had a chance to put a pretty biased account before Judge Geiger, I thought the stenographic account of their statement to Judge Geiger was a very fair one to me. In fact, I thought they went a little out of their way to be fair to me. But the business world is influenced not by its actual dealings so much as by the fears it has of what may be done in the vague state of the law. The task of administration and the duty of abiding by the law would both be greatly simplified and relations improved if the basic statute were drawn in more concrete terms.

Tab 3

AWB-jh

60-22-5

26 (4)

April 27, 1937.

MEMORANDUM FOR ASSISTANT ATTORNEY GENERAL JACKSON

Re: United States v. American Society of Composers, Authors and Publishers.

Reference is made to your memorandum of April 16th to Mr. Thurman Arnold. Mr. Arnold and I have discussed the ASCAP situation and because we disagree materially on major interpretations, we both are replying to the questions you propounded. In the interest of brevity, only facts, conclusions and summary references to the law involved are given herein. However, I will be glad to demonstrate the correctness and accuracy of all statements.

First, it should be pointed out that suit was instituted only after very intensive investigations both by the Department of Justice and by the Federal Trade Commission and after 12 years of legislative effort to amend the copyright laws had failed. These investigations were made independently of each other over an extended period of time and disclosed the existence of restraints which both the Department and the Commission, after carefully weighing the facts, concluded should be corrected by judicial action. Accordingly, the Federal Trade Commission transmitted its records to the Department, at the Department's request, and some three weeks later the petition was filed herein. Nothing has occurred since to change the restraints or improve conditions. On the contrary, the existence of the restraints and the evils thereof have been more definitely established by the efforts in 1936 and the unqualified failure of the defendants Harms, Inc., Witmark & Sons, Remick Music Corp., and several others to operate as non-members of ASCAP.

The investigations which resulted in the filing of suit were not instituted upon the complaint of any particular person or group of persons. For fifteen years the Department has been receiving numerous complaints from persons in all walks of life. These include (1) both composer and author members and non-members of ASCAP, (2) non-member music publishers, (3) musicians who charge they have been deprived of employment because their employer has been unable to meet ASCAP's license demands, and (4) users of music from the smallest roadside stand and country dance pavilion up to the financially strongest entertainment industries.

Interstate Commerce Affected: This includes (1) the sale and distribution of sheet music; (2) the sale and distribution of records manufactured for purpose of public performance; (3) leasing and distribution for exhibition purposes of motion picture films; (4) radio broadcasting.

Restraints: The evils inherent in ASCAP's method of licensing result in the following:

1. Inability of non-member composers and authors to obtain compensation from the sale of licenses for performance of their copyrighted compositions. This is caused by ASCAP's requirement of payment whether ASCAP material is used or not used since payment to non-members would constitute an unjustified double expenditure by licensee.

2. Substantial lessening of opportunity of non-member composers and authors to obtain performance of their compositions even without payment therefor, particularly by broadcast stations. ASCAP's licensing policy has destroyed the incentive to use non-member material. Since no saving can be effected, the added expense of selecting the good non-member compositions from amongst the poor, preparing necessary arrangements, definitely determining copyright ownership as protection against infringement suits, etc., is not economically justified.

3. Inability of non-member music publishers to acquire performance either with or without payment for reasons above stated.

4. Inability of non-member copyright owners to sell sheet music resulting from inability to obtain performance which is necessary in order to create desire in the market for sheet music.

5. Such inability of non-member publishers to acquire income either from sale of performance rights or sheet music has resulted in there now being practically no active non-member publishers and in forcing non-member composers and authors to sell their copyrights to member publishers on their own terms. Performance income from such non-member's compositions goes into the ASCAP treasury for distribution to members only.

6. Even though a non-member composer or author subsequently becomes eligible for ASCAP membership by having not less than 5 compositions published by ASCAP publisher members and publicly performed by ASCAP licensees, the composer and author has no assurance he will be admitted to membership as this is within the arbitrary power of the ASCAP's Board of Directors. Though immaterial to the case, there is evidence of such arbitrary refusal.

7. The result of all the foregoing is to maintain the concentration of musical copyrights and the income derived therefrom in the hands of ASCAP's comparatively few members.

8. No business dependent on the performance of music can continue to exist without acquiring a license from ASCAP at such prices as are dtermined by ASCAP. All forms of competitive buying of licenses have been suppressed by ASCAP's concentration of 90% of usable copyrights and its "pay whether used or not used" policy.

9. By concentrating exclusive performance licensing in ASCAP, manufacturers of recordings made for public performance purposes are limited in their sales to ASCAP licensees. This is because they are unable to obtain performance rights in conjunction with the recording license. Moreover, the copyright owner, by retaining the right to withdraw any composition from public performance is enabled to enforce enhanced recording fees greatly in excess of the 2¢ maximum prescribed by the Copyright Act.

Mr. Arnold's memorandum appears to me to be prddicated on the hypothesis that because benefits obtained by the comparative handful of composer and author members of ASCAP might be reduced, the Government should not endeavor to relieve the condition of the thousands of other citizens who are being adversely affected. It must be kept in mind that the only music generally available to users is that which has been published for distribution to the public and that almost invariably the copyright thereon is owned by the publisher. The 746 composer and author members of ASCAP can and have created only a fraction of the copyrights owned by the 233 publisher members and subsidiaries. The power of the "pool" is centered in the copyright ownership of the publishers. On the other side, those whose rights are being infringed represent -

1. Unknown thousands of non-member composers and authors who are being deprived of the opportunities to which they are entitled. A list prepared by ASCAP from the records of only 25 of its member publishers includes 4,876 such non-members.

2. Unknown thousands of dance halls, restaurants, refreshment and roadside stands, frequently equipped only with radio receiving sets, taxicabs having radios, and others. I understand that only recently a campaign again was started against radio-equipped taxicabs.

3. More than 12,000 hotels.

4. Between 15,000 and 20,000 motion picture theatres.

5. Over 600 radio-broadcasting stations, some two-thirds of which are small local stations.

6. All manufacturers of recordings made for public performance purposes.

QUESTIONS

I

Your first question propounded to Mr. Arnold is:

"1. Is the basic plan of ASCAP a violation of the Antitrust Laws in view of the rights of authors and publishers under the Copyright Laws?"

In my opinion this question must be answered "YES". When originally organized in 1914, 8 years before the advent of radio broadcasting, ASCAP's principal object was cooperation in the detection and prosecution of infringements, i.e., a cooperative policing unit, which is admitted to be legitimate. Subsequently, however, on January 1, 1921, the vesting in ASCAP of exclusive licensing rights was inaugurated under the written agreements between ASCAP and its members. Since then its primary activity has been the licensing of the "pooled" copyrights. The only license issued is a blanket license covering all copyrights in the "pool" and the yearly blanket fee is fixed by ASCAP.

The fact that the licensing pertains to property rights created by the Copyright Act confers no immunity from the operation of the Antitrust Laws. The Copyright Act gives to the copyright owner a monopoly only in the subject-matter of the particular copyright. In the case of musical compositions, it gives him only the right to control and dominate the use of the individual composition covered by the individual copyright. It does not give him the right to combine with other copyright owners to increase and extend the power of the individual monopoly created by the Act. There is attached a general discussion of the law which I have prepared on this point in case you wish more details.

Price fixing by concerted action of a monopolistic group is the classic example of antitrust violations. It is the power to fix prices which violates the law and the reasonableness or unreasonableness of the prices so fixed is immaterial (U. S. v. Trenton Potteries, 273 U. S. 392, 397). This rule is not changed by the fact that copyright monopolies are involved as the license fees may be a decisive factor in determining ultimate costs. If combining owners effectively dominate an industry, the power to fix and maintain royalties is tantamount to the power to fix prices and where the royalty demanded is a fixed percentage of the gross sales price (as in the case of broadcasting licenses), this relationship is clear (Standard Oil Co. v. U. S., 283 U. S. 163, 174). This is strikingly true in the radio broadcasting industry where each 1% added to ASCAP's present rate formula would require that progressively larger percentages be added to a station's charge for broadcast facilities in order that the station's present income be maintained. To illustrate: If 1% is added to the present rate formula, the station must add \$1.0638 to each \$100 charged for facilities. If the present formula is increased to 50%, the station must add \$90, or 90%, to each \$100 charged. The possibility of such a confiscatory increase as the latter does not appear so ridiculous when it is remembered that at the bottom of the depression in 1932 one publisher director of ASCAP strenuously advocated a 25% rate and two others advocated 15%. And under the present situation as it exists today ASCAP is just as free to charge 50% as it is to charge 5%.

II

Your second question propounded to Mr. Arnold is: "Has ASCAP been guilty of incidental practices which violate the Anti-Trust Laws?"

In my opinion this question also must be answered "YES". The evils, other than the restraints heretofore outlined, principally take the form of discriminations which are made possible by the power of the pool and the blanket licensing policy enforced. The concentration in the sole custody of a self-perpetuating Board of Directors of the entire operations of ASCAP, including the admission of new members, classification of members for the purpose of distribution of income, licensing and the fixing of fees therefor, appointment of officers and fixing salaries, etc., necessarily accentuates the feeling of dictatorial power which these individuals possess and frequently this has been reflected in the arbitrariness of their acts. At times it seems as though personal prejudice must be the determining factor. The publishers dominate the Board. Among the discriminations are:-

1. There is evidence of refusal to admit as members applicants duly qualified under the requirements of the Articles of Association.

2. Arbitrary distribution of income to certain members notwithstanding the ratio of performance of member's material which has caused almost continuous internal dissention. This has a tendency to stimulate demands for increasingly larger license fees in order to create greater income for distribution to disgruntled members.

3. Compensating agents throughout the country on a commission basis which necessarily caused ruthlessness on part of such agents. There is evidence that 25% of the "take" was commission. I understand that since the filing of suit an effort has been made to modify this practice by eliminating the commission method of compensation in some sections of the country.

4. Fee payments by small users such as refreshment and eating places, roadside stands, country dance halls, etc., apparently have no basis of uniformity, but are based on the opinion of the agent as to what the traffic will bear, frequently accompanied by threat to bring suits for alleged past infringement unless the demand is acceded to. The $250 minimum damages, plus costs and attorney's fees, prescribed by the Copyright Act for each individual infringement, makes this a most effective weapon against such small users.

5. Annual increases in fee payments over period of years by threat of cancellation of licenses, even during the period of the depression when every user was struggling for survival, culminating in

(a) September 1932 - average increase to broadcast stations from fees of preceding year of approximately 400%, including for the first time a percentage of the gross income.

(b) January 1934 - increases for hotels over fees of preceding year ranging from several hundred to as high as 1000%.

(c) July 1934 - demanded increases from motion picture exhibitors over fees of preceding year ranging from several hundred to as high as 1100%, but reduced to maximum of 100% five (5) weeks after filing of suit herein.

6. Discrimination in fees between competing and comparable motion picture theatres. A theatre having 799 seats pays $79.90 whereas one having 800 seats pays $120 although the identical programs may be given.

7. Discrimination in fees between competing and comparable broadcast stations:

(a) Between all stations generally and stations owned 51% or more by newspapers. This causes station not owned by a newspaper to pay approximately 100% more than same station would pay if owned 51% by a newspaper.

(b) Between comparable stations in either general or newspaper classification through variations in the amount of the fixed annual portion of the fee (fees are "X" dollars per year plus percentage of income.

(c) Between independent stations and National Broadcasting Company and Columbia Broadcasting System. The burden is placed on independent stations which must pay the percentage on their gross incomes whereas NBC and Columbia do not pay percentage on gross income, but only on a small portion thereof. Although NBC's and Columbia's network income represents about 50% of all broadcasting income, they pay nothing thereon, but only on that very small portion arbitrarily allocated to the few stations owned by them. By this method of network licensing, approximately 200 of the largest broadcasting stations automatically are compelled to acquire ASCAP licenses or lose their network affiliation. ASCAP has ordered discontinuance of network broadcasts to an independent station which was contesting by court action ASCAP's rights, thus compelling acceptance of its demands and discontinuance of the court action. Likewise, ASCAP has ordered discontinuance of broadcasts by remote control from establishments either unlicensed or in arrears in payment of fees in order to compel licensing or payment and has threatened sponsors of radio programs with infringement suits in order to compel acceptance of the terms of its license by the station.

While not all of the foregoing in and of themselves can be said to be illegal, they are all part of the general scheme made possible by the suppression of that competition which Congress has decreed is the best protection to the public from the evils of monopoly and price control. The fundamental purpose of the Sherman Act was to secure equality of opportunity and to protect the public against evils commonly incident to destruction of competition. (Ramsey Co. v. Bill Posters Ass'n., 260 U. S. 501, 512, and innumerable others).

CONCLUSIONS

The Petition herein at no point requires dissolution of ASCAP, but merely seeks its reformation to conform to law. In my opinion the evils of the present situation can be corrected, at least in large measure, by either of two different forms of decrees:

1. A decree in accordance with the prayers of the Petition requiring payment of fees on a "per use" basis, which the defendant E.C. Mills, General Manager of ASCAP, has repeatedly declared to be not only practical but the only sound economic basis of operation both for the collection of revenue from users and its distribution to those entitled thereto. Such decree also should contain clauses

   (a) Preserving the protective features of ASCAP.

   (b) Eliminating the self-perpetuating Board of Directors and providing for a democratic election of Directors and officers.

   (c) Abolishing the prohibitions imposed upon thousands of non-member composers and authors who now are discriminated against.

The decree may be broad enough to make it effective and to prevent evasion (See Local 167 v. United States, 291 U. S. 293, 299).

2. A decree which would enjoin ASCAP's exclusive licensing and include other safeguards. Such a decree would not correct as many evils as the first mentioned. I will discuss this phase of the matter in detail should it be desired.

The Government already has expended many thousands of dollars herein, both through this Department, the Federal Trade Commission and other Government units. Even at this date new complaints against the defendants' activities are received. Dismissal of the suit would be construed as a sanction by the Government of all practices of the defendants and would confirm statements by representatives of ASCAP that judicial determination of the issues would be prevented. Moreover, dismissal would be in direct contravention of the plans of the Attorney General looking toward more aggressive enforcement of the Anti-Trust Laws which were released for publication April 27, and would invite a deluge of criticism as a result thereof.

The delay already has resulted in the States of Montana and Washington passing since last February drastic laws to curb the activities of ASCAP. Similar legislation is pending in Minnesota, Texas and Nebraska and is being urged in other States. Unless an active effort to correct the evils of ASCAP is made by the Government through aggressive prosecution of the suit, composers and authors as well as publishers, both members and non-members of ASCAP, will be confronted with additional State legislative obstacles lacking uniformity which will increase their administrative problems many fold.

Mr. Arnold's suggestion that correction by Federal legislative enactment rather than by prosecution of the suit apparently does not take into consideration the failure of such efforts which have been almost continuous for years. The most recent attempt was at the last session of Congress. The Duffy Bill represented an attempt to afford by legislation the protection of composers and authors advocated by Mr. Arnold. It was drafted by the Interdepartmental Committee on Copyrights of which Dr. Wallace McClure of the State Department was Chairman, and was done at the request of the Foreign Relations Committee of the Senate which Committee was considering legislation recommended by President Roosevelt looking to United States adherence to the International Copyright Union. The basic idea underlying the State Department's Bill and adherence to the International Copyright Union was to vest the copyright in the composer and author without the necessity of publication and to legalize the divisibility of the rights so vested, thereby assuring the independence of the composer and author. The Bill was passed by the Senate, but it is most pertinent to note that it was strenuously opposed by ASCAP before the House Committee, where the bill was killed.

When corrective legislation is found necessary, it usually follows an adverse decision by the Courts and seldom precedes it. Such has been the history of the amendments to the Anti-Trust Laws and many others. It is my opinion that the present Anti-Trust Laws cover the situation, but should the Court decide otherwise, then consideration should be given to recommending legislation to correct the evils at which this suit is directed. The history of the unsuccessful attempts to amend the Copyright Laws during the past 12 years does not indicate any possibility of success through that medium at this time. However, a final decision by the Courts showing that existing laws are not applicable or adequate would form the basis for and justify such amendments. Support of this belief is afforded by a letter to the Attorney General dated September 10, 1934, from Senator C. C. Dill, then Chairman of the Senate Interstate Commerce Committee and a member of the Patents Committee. After complimenting the Attorney General on the institution of this suit, he said in part:

> "For the past ten years I have been trying to get some kind of a statute that would put some kind of a limitation on this organization. Because we have not been able to write a new copyright law, we have never been able to curb the racketeering practices of this organization.
>
> "You will probably be beseiged with propaganda against the suit, because they are about the cleverest organization in building up propaganda through the newspapers that I have ever encountered. I am sure, though, that you are right in this move and I certainly hope your department will press it with vigor and aggressiveness * * *."

RECOMMENDATIONS

1. It is urged that the suit be prosecuted to a final determination of the issues and that I be instructed to proceed with all dispatch commensurate with sound preparation.

2. If it is believed that Mr. Arnold's recommendation to dismiss should be followed, I suggest that Commissioner Ewen L. Davis of the Federal Trade Commission, who instituted the Commission's investigation, be contacted for his views with respect to the Commission's attitude and that the following be contacted for their views with respect to the possibility of obtaining corrective legislation on the subject: Dr. R. Walton Moore and Dr. Wallace McClure of the State Department, Senator Ryan Duffy who introduced the State Department Bill, and Senator Homer Bone, Chairman of the Copyright Sub-Committee of the Senate Patent Committee, who wrote the Committee's report on the Bill.

Respectfully,

Andrew W. Bennett,
Special Assistant to the Attorney General.

May 7, 1937.

The foregoing memorandum was prepared on the basis of Mr. Arnold's memorandum dated April 19th. However, since his memorandum has been rewritten as of May 1, eliminating his recommendation that Federal legislative correction be obtained and making certain other changes, a few specific observations seem necessary in order that a clear consideration of the merits may be made.

1. The statement (par. 2, page 1) that a situation arose with the growth of radio broadcasting which compelled composers of popular music and publishers owning copyrights to form an organization, etc., is in error. ASCAP was organized in 1914, nearly 7 years before the establishment of the first experimental broadcast station (KDKA-Pittsburgh) and 10 years before broadcasting became popular. Its licensing and policing systems were in full force prior thereto.

2. Repeated reference is made to the rights of composers, with "assumptions" based thereon, in such manner as to give the impression that ASCAP is operated for the protection of composers and that this suit is directed against them (par. 3, page 1; par. 1 and 4, page 5; par. 1 and 2, page 6; par. 3, page 8). Such statements and assumptions are not supported by the true situation and apparently do not give consideration to the unquestionable facts that

(a) the copyrights are almost invariably owned by the publisher.

(b) the composer members of ASCAP have written only a fraction of the copyrights in the pool.

(c) the majority of the copyrights in the pool represent works of non-member composers who are deprived of any income from performance, now the leading source of revenue.

(d) income derived from non-member composers' works is distributed to the comparative handful of composer members.

(e) the composer members also are members of a separate and distinct association known as the Songwriters Protective Association for the collective protection of their rights in dealing with publishers and others desiring their services or property.

What are these rights of which it is thought the comparative few composer members will be deprived and for which it is thought they need the protection of ASCAP's plan of licensing? Is it the right to receive performance income which rightfully belongs to non-member composers? Is it protection from their publishers which is one of the purposes of the Songwriters Protective Association? I know of no legal rights which require blanket licensing at annual rates and the suppression of competition. A specific answer seems necessary in order to determine whether the rights thought to exist are so great as to overshadow the legal right to protection against the evils commonly incident to destruction of competition (Ramsay Co. v. Bill Posters Ass'n, supra) which are possessed by the thousands of citizens adversely affected by the plan (See page 3 hereof).

3. References to ASCAP having many of the aspects of labor unions (par. 2, page 3) and assumptions as to rights resulting therefrom are without foundation in fact. Labor unions deal with a supply of labor. ASCAP deals with a completed product after it has been created and protected by copyright. It does not deal in or represent its members in negotiations for "labor". Such representation for composer members is by Songwriters Protective Association, above referred to.

4. Statements that there is no question of prices to the general public involved (par. 6, page 2; par. 3, page 3) are seen to be erroneous when it is borne in mind that the "public" includes everyone. The backbone of the suit is the fixing of arbitrary prices which must be paid by every member of the "public" who must perform modern music in their business. The term "public" is not limited to purchasers of products for consumption in the home.

5. Assumptions to the effect that ways and means would be found by the defendants to circumvent the provisions of any decree (par. 7, page 2; par. 2, page 3) and therefore that prosecution of the suit is useless might be applied with equal force to every anti-trust action and every prosecution. Such possibilities should be kept in mind when drafting the decree and may be guarded against (See Local 167, supra), but they are not a governing factor in determining whether a suit should be prosecuted.

6. The assumption that prices on a "use" basis may become standardized (par. 1, page 3) is no justification for dismissal of a suit, which dismissal in effect will put the seal of Government approval and sanction on ASCAP's licensing practices.

7. The futility of the thought that private rather than public prosecution should be invoked (par. 6, page 2; par. 1, page 4) is seen when it is recalled that ASCAP has the power to retaliate by destroying the user's business through (a) refusal to grant a license, or (b) to grant only on a confiscatory fee basis. This device was successfully demonstrated by ASCAP when dismissal of a suit brought by WCAU and acceptance of ASCAP's increased royalty demands were forced by threatening to cancel Columbia Broadcasting System's license if network programs were transmitted to WCAU. It again was demonstrated when threats to excessively increase fees upon the expiration of an existing license contract with substantial time to run forced the surrender of the existing license and immediate acceptance of another license at a lesser increased rate. The mere knowledge of the existence of the power is sufficient. It is not necessary to enforce it (U. S. v. Motion Picture Patents Co., et al., 225 Fed. 800, 809, 6 F.A.D. 204, 217, cited with approval by Supreme Court in Standard Oil Co., et al. v. U. S., 283 U. S. 163, 174-175).

8. The thought that ASCAP's present charges are not excessive (par. 3, page 5) is not held by a substantial percentage of licensees as indicated by complaints received. Moreover, the reasonableness or unreasonableness of the fees forms no basis for determining the legality of ASCAP's licensing plan. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow and remain unchanged because of the absence of competition (U. S. v. Trenton Potteries Co., 273 U. S. 392, 397).

Two wrongs do not make a right. The fact that copyright owners may need to combine and pool their resources for the purpose of detecting and prosecuting infringements does not justify a price fixing licensing pool having the power to destroy businesses engaged in interstate commerce and which in fact has substantially restrained interstate commerce. Judge Knox made a statement to this effect to Mr. Nathan Burkan, ASCAP's counsel, at the argument on the Government's successful motion to strike two-thirds of ASCAP's answer in the suit. Likewise, a price-fixing royalty agreement between only six (6) of the defendants herein was held to be a violation of the Sherman Act in U. S. v. Consolidated Music Corp., et al., decided in 1922 by Judge August Hand.

I am in full accord with any plan which may result in obtaining a consent decree. However, I question whether the method suggested by Mr. Arnold can result other than in failure. It is psychologically wrong to approach such a conference in the role of a suppliant and any possibilities of success which may exist are immediately destroyed. On the other hand, an approach which will convince them that their dilatory tactics have been unsuccessful and that the questions involved in the suit must be adjudicated may produce results, particularly in view of the difficulties which have been developing through State legislation. A recent occurrence demonstrates that it is highly doubtful ASCAP will maintain good faith in any dealings. A letter received today from Mr. Kenneth C. Davis, one of the attorneys representing the State of Montana in the suit brought by ASCAP to enjoin the enforcement of Montana's recent licensing law, states that ASCAP filed with the United States District Court hearing the petition (a three-Judge Court) what is alleged to be the latest draft of the Government's stipulation. Not only is this a gross breach of faith with the Department, since it definitely was agreed that its contents would not be made public until after a final agreement might be reached, but it is a deliberate perpetration of a fraud upon the Court because (a) it is not the Government's stipulation but primarily was written by ASCAP, (b) no portion of the draft has been agreed to, (c) it does not contain any of the exhibits without which many portions cannot be correctly interpreted, (d) many important statements contained therein can never be accepted by the Government, and (e) it is very doubtful whether an agreement can be reached.

ANDREW W. BENNETT,
Special Assistant to the Attorney General.

Tab 4

26 (5)

60-22-5 May 1, 1937 TWA:lr

MEMORANDUM FOR ASSISTANT ATTORNEY GENERAL JACKSON

In re: United States v. American Society of Composers, Authors and Publishers

Present Status of the Case

The bill in equity in this case was filed August 30, 1934. The proceedings at the trial were suspended for the purpose of entering into a stipulation as to the facts. After the lapse of time the possibility of a stipulation of facts becomes more and more remote. The question to which this memorandum is addressed is whether this case should be prosecuted further or dismissed.

Facts

Although complicated in detail, the essential facts are very simple. A situation arose with the growth of radio broadcasting which compelled composers of popular music and publishers owning copyrights to form an organization so that public performance of their music would not occur without payment of royalties. The association was not concerned with the sale of sheet music but only with the public rendition of music.

There seems little question that the protection against piracy offered by the association was reasonable and necessary. With the growth of radios, night clubs, etc., it became impossible for individual composers to protect themselves. To maintain that protection the composers gave the exclusive right to license public rendition of their music to the association, which now controls approximately 90% of the current popular copyrighted music. It gives to radio stations and other amusement places blanket licenses to use this music.

This pool exercises another function. It fixes the prices and distributes the proceeds among its members by a complicated scale of accounting based on the number of songs produced and their popularity.

The pool puts a handicap on nonmembers of the association because the control of the association over popular music is such that blanket license must be obtained from it. Any royalty paid to an independent producer would therefore be an additional expense.

Members are elected after making application, but there is no certainty that a qualified musician will be admitted. The society is controlled by a self-perpetuating board of directors.

The Government admits that in so far as the society protects copyright owners from unauthorized rendition of their music its objectives are legitimate. The suit attacks solely the fixing of prices by the association and purports to be an attempt to make composers and publishers compete with each other with respect to prices for public rendition on radio programs, etc.

The facts are set out in greater detail in the memorandum of Mr. Andrew Bennett, which accompanies this memorandum. There are no differences of opinion between Mr. Bennett and the writer on the essential facts. The only differences consist in the guess as to the probable outcome of the suit and as to the practical results of the decree.

Outside of the theoretical questions of law involved, I do think that the situation is one in which private rather than public prosecution should be invoked. There is no question of prices to the general public involved. The only interests which can be adequately protected are those of independent broadcasting companies. Restaurants, hotels and amusement places are, of course, affected by Ascap.

There seems, however, no way of protecting hotels and other amusement places without invalidating the basic plan. They are too numerous and the standards too vague to permit the Government to prosecute instances of discrimination under the basic plan allowing Ascap to combine for the purpose of getting a better collective bargaining position. If, on the other hand, the basic plan should be declared invalid, it seems almost impossible to prevent an informal combination of such a subtle character as to be immune from antitrust prosecution. The reason for this is that no one denies the desirability of a combination of musicians and publishers to prevent piracy. In order to exist, that combination must have unity and morale. It cannot succeed if it is a combination of people who are fighting each other on prices. It must have directors, committees and some sort of a code of ethics. It is inconceivable that such a combination would permit competition in any real sense. We see these forces operating in other industries where combinations for protection are not needed. We note in the building industries and in the textile industries that prices become pretty well standardized. There are no forces which will operate to make these publishers and composers who are now getting along very well together begin any sort of price wars. The experience in other industries does not lead us to believe that competition could be started in music where the members do not wish to compete.

The whole organization has many of the aspects of labor unions. A group of people have combined together for their own self-protection. The Government wishes to permit protection on one hand; i.e., against unauthorized public performance, and prevent competition on the other. Such an endeavor is, I think, bound to fail, even if the suit were won.

The suit has obviously very practical advantages for the broadcasting companies as a sort of threat against higher prices. Naturally, Ascap does not wish to put itself in a position where it can be accused of charging too high prices before the suit is tried. Once the suit is over, that particular advantage will be gone. The whole efforts of Ascap will be directed at finding a method of operating without violating the decree. It would be very surprising to the writer if they did not find one. Therefore, so far as public interest is concerned, the suit seems somewhat futile.

The answer is made that that is the responsibility of Congress and the Antitrust Division has no right to select its suits. It should prosecute all violations whenever they are called to its attention. As a practical matter, such an attitude is impossible because of the size of the Division. To prosecute all violations of the Antitrust Laws would take a personnel at least as large as the old Prohibition Bureau. Since a selection must be made, the writer is of the opinion that this suit is a poor one on which to spend time and money when there are so many other instances of violations which actually affect prices to the public.

The suit therefore seems one for which private prosecution is peculiarly fitted. A private suit was started by the Pennsylvania Broadcasting Company in 1933, which was dismissed after the Government's suit had been commenced. A representative of the National Association of Broadcasters informed the writer that the difficulty in private prosecution lay in the fact that Ascap would discriminate against anyone who brought suits against them and that as a practical proposition they could not fight Ascap and remain in business. While, of course, this is possible, there are dangers to Ascap in such retaliation during pendency of the suit. However, if they had possessed such power and if the national broadcasters will not band together but will take advantage of preferential contracts, discriminating against those stations which commence proceedings, there is little likelihood that any decree breaking up the basic plan would be effective. It would simply transfer the activities of Ascap from an open bargaining process to sub rosa retaliation. These are practical and nonlegal considerations which are not ordinarily argued as reasons for starting or dismissing suits. They are nevertheless very important factors.

To sum up the practical situation, the writer is of the very distinct opinion that this suit has been a very useful weapon in bargaining between broadcasters and Ascap. Indeed, one of the representatives admitted that the suit was more valuable pending than it ever would be, even if it were won. While, of course, the broadcasters are quite sincerely convinced that it is the duty of the Government to aid them in this battle, the writer does not think that the public question involved justifies it.

So much for practical nonlegal considerations. In your memorandum of April 16 you ask the following questions:

I

Is the basic plan of Ascap a violation of the Antitrust Laws in view of the rights of the authors and publishers under the Copyright Law?

In my opinion it is impossible to assert with any certainty whether the plan in the Ascap case is or is not a violation of Antitrust Laws. What is a reasonable combination in the music field has never been determined. In one respect the combination here is like a labor union. In another respect, so far as publishers are concerned, it resembles the sale of a commodity. Under the Copyright Laws there is no distinction made between a composer who has created a copyright and a publisher who has bought one. The association is composed of both.

From the point of view of fairness and reasonableness, different standards should apply to combinations of publishers and composers. The present Copyright Law compels us to apply the same standards to both. This makes it almost impossible to draw a decree which will remedy any of the evils of the plan without robbing composers of many legitimate and reasonable benefits. In such a confused situation my guess is that the Government, if it prosecutes this suit, will spend an enormous amount of money and time, and eventually lose. The reason that it will lose is because there seems to be an actual need of a combination of composers in order to permit them to bargain effectively.

The writer is frank to admit that a very plausible brief can be drawn supporting this suit. The outline of the argument in support is very well stated in Mr. Bennett's accompanying memorandum. Nevertheless, I believe that in spite of the arguments advanced by Mr. Bennett this case cannot be successfully prosecuted so far as the basic plan is concerned for the following reasons:

1. The amount of money now charged by Ascap is not excessive. Of course, no standards of how much ought to be paid for the use of music exist. Nevertheless, it is not the present charges but the bargaining future position of Ascap which is the chief objective of radio broadcasters. They feel that Ascap threatens future extortionate prices.

On the other hand, if the basic plan were invalidated and some informal organization did not take its place, the members of Ascap would be in a far less favorable bargaining position. No one knows what effect that would have upon the income of composers and publishers. However, when the main objection is the possibility of future extortion if a plausible case for combination in order to gain bargaining power with large radio chains is made, the writer does not think it likely that the court will interfere. The precedents are entirely too loose to permit a positive statement. The emotional atmosphere in the case is against us. The writer is personally convinced by a short investigation of the case that it would be unfair to the composers to take away their bargaining position so long as that position is not abused. Others differ. However, assuming a skilled presentation of Ascap's side, it is my belief that the court would get the same impression as the writer. If it did, there is no precedent which is definite enough to compel breaking up the basic plan.

Mr. Bennett points out that the publishers are in an entirely different position from the composers. They take advantage of composers in buying their copyrights, thereby becoming entitled to the sole royalties for public performance. It is a little difficult to see what economic service the publishers render which justify the advantageous position the Copyright Law gives them. However, under that law it is necessary to treat both composers and publishers alike. The publishers do not have a case which appeals particularly to one's sympathy. Composers do have such a case. The Copyright Law permits the publishers to hide behind the skirts of the composers.

This is unfortunate. Nevertheless, I believe that the chances are that the court would say that the composers needed the protection given by the plan, in spite of the fact that permitting that sort of combination does give undue advantages to publishers who have purchased copyrights.

As a test case, therefore, to create a precedent to govern the application of Antitrust Laws to the amusement field, this case has very obvious dangers. It appears to be an attempt to break up a combination of rather helpless individuals of small incomes, which combination is essential to their protection. There is no way of eliminating this unfavorable atmosphere from the suit, even by showing that nonmembers are discriminated against, because there seems no practical way to draw a decree permitting the combination and at the same time protecting nonmembers. There is a real danger that if this suit is prosecuted a very unfortunate precedent might be established by way of dicta which would interfere with other suits in connection with this new field.

II

The second question is whether the Ascap has been guilty of incidental practices which violate the Antitrust Laws. In this connection the following practices should be carefully scrutinized.

1. A real evil which is unnecessary for the protection of the musicians is the power given to a self-perpetuating board of directors to control the association. In the course of time such a board might take advantage of their completely independent position to impose exactions on both composers and those giving public rendition of the music. The self-perpetuating feature prevents the composers and

publishers from having any control over the situation; it makes it possible for a few men in the future to discriminate between composers by arbitrarily admitting some members to the association and not others; it has the potentiality of changing the society from a protective device into a racket.

I am very doubtful, however, whether the Antitrust Laws can reach the internal management of the association. There is certainly no clear precedent. As a practical matter, until a clear case of exorbitant prices can be shown, an attempt to change the method of electing directors would probably lose.

2. It is unnecessary for the protection of composers that an exclusive license be given to Ascap. A decree giving the copyright owner the right to license individually would not interfere with the blanket license given which could be purchased from the Ascap. Theoretically, it would create competition. Actually, however, the mere opportunity to license individual pieces would not be likely to have any practical effect whatever. With this amount of music under control, extensive users of music could not avoid taking out a blanket license.

3. Mr. Bennett suggests that Ascap be compelled to change its contract with the broadcasting stations in the following particulars. The present contract compels the broadcasters to pay a percentage of the total radio receipts for the use of a blanket license. The practical effect of this device is that programs which use no music are charged for the music as part of the overhead of the broadcasting company. For example, Father Coughlin, who used no music, had to pay a charge based on the total cost of music. Mr. Bennett suggests that this practice should be eliminated.

In addition to this, independent broadcasting stations are of the opinion that a decree compelling Ascap to charge only for the music used would prevent discrimination in prices by Ascap against them. They assert that the large broadcasting stations get together with Ascap and make arrangements as to price without consulting smaller stations. This leaves the smaller independent stations at the mercy of the association. Thus there is a great deal of discrimination between large broadcasting companies and independents. The independents are afraid to bring private suits under the Antitrust Law because Ascap will retaliate. They argue that a requirement that broadcasting stations pay only for the time during which music is actually used (instead of taking out a blanket license and paying for the music whether it is used or not), would give the independents greater bargaining power. If Ascap prices got too high they could use less music. There is much to be said in favor of a decree compelling Ascap to charge only on a time basis. It would certainly offer protection to independent broadcasting companies.

It would, on the other hand, decrease the bargaining power of Ascap to a considerable extent. The chief reasons to be urged against trying the suit to accomplish this objective is the doubt in the writer's mind whether the present discriminations are serious enough to justify the expenditure of the time and money required. This, however, is the most important practical objective of the suit. It is the only practical possibility which the writer sees in the entire situation.

4. There is much evidence of arbitrary determination of the prices charged for the use of Ascap music. Stations controlled by newspapers get the advantage on the theory that they are advertising radio programs. The general license to broadcasting companies which are theoretically based upon the size and importance of the station are actually determined by the advantageous bargaining position of the larger stations. The charges to hotels and restaurants and amusement places are based on what the traffic will bear.

We see, however, no way of reaching these instances of discrimination by Government suit. The change in the method of charging we outlined above might help considerably. As a suit, however, to determine whether the different prices charged to particular people were unreasonably discriminatory would end in complete confusion because there are no standards.

Conclusion

The writer's guess is that the necessity of a combination as a protective device to composers is sufficiently clear that no court would disturb the basic plan. Relief might be obtained by compelling Ascap to charge only for the music used. Whether this is worth the time and money involved in prosecuting the suit is doubtful, but it is the best point in the case.

Specific Recommendations

I recommend that every effort be made to obtain a consent decree, changing the method of blanket charges for music without relation to use. If such consent decree cannot be obtained, I would recommend dismissing the suit. I realize the negotiations are on a somewhat difficult basis because ordinarily in order to obtain a consent decree there must be some show of force. It has been consistently rumored all over the industry that the Government is about to dismiss the suit. Nevertheless, there are some trading points which could be availed of.

Ascap is getting very unpopular in many states. Legislation has been directed at the basic plan which is very disadvantageous to them. If they have any intelligent realization of the situation, they will recognize that there is a great deal of protection against hostile state legislation in the fact that a consent decree has been given and the matter settled with the Government. I think a frank talk about the Government's difficulties with the case would do no harm, because the other side already knows all about them. It would be no surprise to any of the attorneys to learn that there is considerable doubt within the Division itself about the suit. At the same time, they know that everything will not be clear sailing for Ascap if the suit is dismissed. There will be an enormous amount of protest; there will be campaigns in various states for legislation against them financed by broadcasting companies and there will be a great deal of adverse publicity.

In the event that a consent decree is impossible, I am of the tentative opinion that the suit should be dismissed. However, negotiations for a consent decree using as trading points the growing sentiment against Ascap's method of charging might develop points which would cause me to change my mind. I recommend, therefore, that a conference be had as soon as possible in order to see if a consent decree can be drawn up with relation to the method of charging non-users of music if the Government agrees to stop its attack upon the basic plan.

I wish to add to the report some general observations which are relevant to the Ascap case as a problem before the Department but not pertinent to the narrow questions set forth in your memorandum.

This suit illustrates a fundamental difficulty with antitrust procedure which deserves attention. Here a situation was presented to the Department which emphatically demanded investigation. Like all antitrust problems, it was an economic as well as a legal problem. Sensible and practical investigation cannot be conducted under the form of an adversary proceeding in which one party wins and the other party loses. The atmosphere of such a proceeding is to throw people with mutually irreconcilable interests in the same camp for self-protection. All of the testimony elicited must be directed to the narrow issues of the particular case. There is a handicap put on all parties to the investigation in frankly disclosing all of the angles of the problem because of this practical effect on the outcome of the suit. Hence each party necessarily has to object to testimony which may be relevant to the economic problem but which is thought to be damaging to their chances of winning. The whole atmosphere becomes that of a contest. The prestige of attorneys, both for the Government and for the defendant, becomes involved. Compromise becomes impossible because of the extreme positions which both parties necessarily have to take.

If the Government loses, the total effect of its efforts in investigating the situation becomes negligible. The Government cannot afford to lose many contests of this kind without serious criticism. It becomes difficult even to withdraw from a contest once started. Therefore, the Antitrust Division is limited to the selection of suits in which it has a chance to win. Problems which are not covered by the terms or precedents of Antitrust Laws but which nevertheless demand investigation from the point of view of those interested in the policy of those laws are excluded from consideration because of this method of procedure. No complete disclosure can be had prior to trial and disclosure at the trial is hampered and limited at every turn.

All this has happened in the Ascap case and the case is a typical one. There are hundreds of similar problems where investigation is badly needed but where prosecution is inadvisable. Therefore, investigation cannot be had.

The solution of antitrust problems falls into three categories: (1) those which should be prosecuted in the courts; (2) those in which the procedure of the Federal Trade Commission should be used, and (3) those which should be called to the attention of Congress.

The personnel of the Antitrust Division should be used in order to determine in which class any given problem falls. Their duty should be one of presentation to the proper body. If the decision and consideration of Congress is required, it should be in a position to present a record of sworn testimony to that body to enable it to act intelligently. The same type of record would be a useful preparation for the two other classifications.

It is suggested, therefore, that consideration be given to amending the Antitrust Act so that investigation can be conducted before trial examiners with the power of subpoena which would cover the broad aspects of any problem investigated, which would not be adversary in character, and which would not carry the atmosphere of prosecution of the parties called. These hearings should be public. The general limitations of fairness and relevance, as they are applied in tariff hearings, should govern the admission and the exclusion of evidence. A record should be prepared on the basis of examination of persons doing business in any field which would disclose all aspects of the problem. On the basis of such a record, the Antitrust Division would be in a position to refer the matter to the courts, to the Federal Trade Commission or to Congress.

Such proceeding would remove all the handicaps of the adversary proceeding under which investigations are now conducted. The publicity given to such a proceeding would have a powerful effect in eliminating bad practices in industry which often result from a tendency of business men to drift with the times. Bad business practice is more often the result of habit than intention. This has been shown by two similar investigations carried on by the Securities and Exchange Commission using such a procedure--i.e., the protective committee study and the investment trust investigation. Both of these investigations, which were conducted by lawyers under the question and answer method, have already had far-reaching effects.

There is need for just such an investigation in this case. The writer has made tentative conclusions about the distribution of music which are more or less guesses. These might be different if those familiar with the situation had been called to testify under oath as to the various practices in an investigation rather than a contest. The Antitrust Division is charged with the general policy of preventing unreasonable combinations in restraint of trade. That general policy cannot be effectuated by the present machinery, which leads only to the prosecution of extreme cases and handicaps the building of records which cover entire problems instead of narrow legal issues.

Respectfully submitted,

THURMAN ARNOLD.

Tab 5

PUBLIC STATEMENT
Released December 27, 1940

DEPARTMENT OF JUSTICE

Division for Enforcement of Antitrust Laws

Criminal Proceedings Against American Society of Composers, Authors and Publishers, et al.

STATEMENT OF GROUNDS FOR ACTION

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1941

DEPARTMENT OF JUSTICE,
December 27, 1940.

Attorney General Robert H. Jackson announced today that he had authorized Thurman Arnold, Assistant Attorney General in charge of the Anti-trust Division, to institute criminal proceedings under the Sherman Act against the American Society of Composers, Authors and Publishers, Broadcast Music, Inc., the National Broadcasting Company, and the Columbia Broadcasting System. The proceedings will be brought in Milwaukee, Wisconsin, immediately after the first of January, and will be based on the following charges:

1. The illegal pooling of most of the desirable copyright music available for radio broadcasting in order to eliminate competition and to monopolize the supply.
2. Illegal discrimination against users of copyright music.
3. Illegal discrimination against composers who are not members of ASCAP or Broadcast Music, Inc.
4. Withholding music from publication in order to exact fees not permitted by the copyright laws.
5. Illegal price fixing.
6. Restraining composers in their right to bargain for the sale of their own music.

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7. Requiring users of music to pay for tunes on programs in which no music is played.

8. Mutual boycotts by ASCAP and by the broadcasting chains (through Broadcasting Music, Inc.) in an attempt by each of these conflicting groups to obtain for themselves control over the supply of music by depriving the others of control, which boycotts threaten to restrain and obstruct the rendition over the radio of about ninety percent of the desirable modern copyright music.

Explaining the Department's decision to institute criminal proceedings, Assistant Attorney General Arnold said:

> For a number of years the Antitrust Division has received constant complaints against the activities of ASCAP. The original purpose of ASCAP was one which the Department recognizes to be legitimate, i. e., collective action to protect its members from piracy of their copyrights. Activities which further this purpose have not been questioned by the Department, and are not attacked in these proceedings. However, the Department for many years past has frequently called to the attention of ASCAP practices which went far beyond the necessity of protecting its members in their copy-copyright privileges,—practices which were designed solely for the purpose of eliminating competition in the furnishing of music, and securing a monopoly control over the supply.

> Recently, through Broadcast Music, Inc. (an association controlled by the major broadcasting chains), the National Broadcasting Company and the Columbia Broadcasting System have engaged in, and threaten to continue on a larger and larger scale, restrictive practices similar to those which the Department charges were illegally instituted by ASCAP. It is claimed that these activities were necessary to protect the broadcasting chains from the illegal activities of ASCAP. The Department is not concerned with the question as to which organization was the aggressor. Each of these groups today is charged with using illegal methods to wrest the control of copyright music from the other. The threatened conflict is already in its first stage. The mutual boycotts already begun will hamper and obstruct the rendition of all copyrighted music over the radio and deprive the public of the privilege of hearing that music except on terms dictated by the victor in the contest. In such a struggle the public is in the position of a neutral caught between two aggressive belligerents.
>
> This Department cannot sit by and see ASCAP and the broadcasters engage in a private war at the expense of the public, using violations of law as their weapons in order to fight fire with fire. We have tried to obtain voluntary agreement to form the basis of a working peace which would eliminate the illegal activities and allow the asso-

ciations of composers to continue their legitimate function of protecting their members from piracy. Those efforts, which a few days ago appeared to be on the verge of success, have failed. Now we have no choice but to proceed with a criminal prosecution to protect the interests of the public in orderly competition in the distribution of music.

It should be added that complaints have also been received against the Society of European Stage Authors and Composers, commonly called SESAC. These complaints are now being investigated.

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FOR RELEASE
Morning Papers, December 27, 1940

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3. Illegal discrimination against composers who are not members of ASCAP on Broadcast Music, Inc.

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PUBLIC STATEMENT

Released January 27, 1941

Department of Justice

Division for Enforcement of Antitrust Laws

United States

v.

Broadcast Music, Inc.

(U. S. D. C. E. D. Wis.—Civ. No. 459)

STATEMENT OF GROUNDS FOR ACTION

CONSENT DECREE

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1941

Department of Justice,
January 27, 1941.

The Department of Justice announced today that Broadcast Music, Inc., had signed a civil decree in the United States District Court for the Eastern District of Wisconsin in which it agreed not to engage in activities which the Department alleges would constitute violations of the Sherman Act.

In order to avoid placing Broadcast Music, Inc., at a competitive disadvantage, the decree will take effect only when similar restraints have been imposed upon the American Society of Composers, Authors and Publishers either by way of decree or litigation.

In the light of this voluntary action the Department will withdraw its previously announced prosecution against Broadcast Music, Inc., the National Broadcasting Company, and the Columbia Broadcasting Company.

There is no change in the Department's announced intention to proceed promptly with criminal proceedings against the American Society of Composers, Authors and Publishers. Negotiations looking toward a settlement of the Department's antitrust suit against ASCAP ended abruptly in late December.

Under the decree signed today, Broadcast Music, Inc., agrees, when the decree becomes effective, not to engage in the following practices which the Department deems to be in violation of the antitrust laws.

1. BMI agrees not to exercise exclusive control, as agent for any other person, over the performing right of music of which it does not own the copyright.

2. BMI agrees never to discriminate either in price or terms among the users of copyrighted music. All BMI compositions will be offered for performance to all users of the same class on equal terms and conditions.

3. BMI agrees to license music on a pay-when-you-play basis. That is, broadcasters will be enabled to buy BMI music either on a per piece or per program basis, if they desire, and in no case will a broadcaster be required to pay a fee which is based on programs which carry no BMI music.

4. BMI will never require a license from more than one station in connection with any network broadcast. Licenses will be issued to networks or originating stations.

5. Manufacturers of electrical transcriptions, or sponsors, or advertisers on whose behalf such electrical transcriptions are made, will, if they so desire, be able to obtain licenses for the use of such transcriptions for broadcast purposes.

6. BMI agrees never to engage in an all-or-none policy in licensing its music. That is, motion picture exhibitors, restaurants, hotels, radio stations, and all commercial users of BMI music will be able to obtain the right to perform any BMI compositions desired without being compelled to accept and take the entire BMI catalogue.

7. BMI agrees that it will not attempt to restrict the performance rights of its music for the purpose of regulating the price of recording its music on electrical transcriptions made for broadcast use.

The case was in charge of Victor O. Waters, Special Assistant to the Attorney General, and Warren P. Cunningham, Special Attorney.

FOR IMMEDIATE RELEASE
MONDAY, JANUARY 27, 1941

DEPARTMENT OF JUSTICE

The Department of Justice announced today that Broadcast Music, Inc. had signed a civil decree in the United States District Court for the Eastern District of Wisconsin in which it agreed not to engage in activities which the Department alleges would constitute violations of the Sherman Act.

In order to avoid placing Broadcast Music, Inc. at a competitive disadvantage, the decree will take effect only when similar restraints have been imposed upon the American Society of Composers, Authors and Publishers either by way of decree or litigation.

In the light of this voluntary action the Department will withdraw its previously announced prosecution against Broadcast Music, Inc., the National Boradcasting Company, and the Columbia Broadcasting Company.

There is no change in the Department's announced intention to proceed promptly with criminal proceedings against the American Society of Composers, Authors and Publishers. Negotiations looking toward a settlement of the Department's antitrust suit against ASCAP ended abruptly in late December.

Under the decree signed today, Broadcast Music, Inc. agrees, when the decree becomes effective, not to engage in the following practices which the Department deems to be in violation of the antitrust laws.

1. BMI agrees not to exercise exclusive control, as agent for any other person, over the performing right of music of which it does not own the copyright.

2. BMI agrees never to discriminate either in price or terms among the users of copyrighted music. All BMI compositions will be offered for performance to all users of the same class on equal terms and conditions.

3. BMI agrees to license music on a pay-when-you-play basis. That is, broadcasters will be enabled to buy BMI music either on a per piece or per program basis, if they desire, and in no case will a broadcaster be required to pay a fee which is based on programs which carry no BMI music.

4. BMI will never require a license from more than one station in connection with any network broadcast. Licenses will be issued to networks or originating stations.

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The case was in charge of Victor O. Waters, Special Assistant to the Attorney General, and Warren P. Cunningham, Special Attorney.

PUBLIC STATEMENT

Released February 26, 1941

Department of Justice

Division for Enforcement of Antitrust Laws

United States

v.

American Society of Composers, Authors and Publishers, et al.

(U. S. D. C. S. D. N. Y.—CIV. NO. 13-95)

STATEMENT OF GROUNDS FOR ACTION

SETTLEMENT OF CASE

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1941

DEPARTMENT OF JUSTICE,
February 26, 1941.

The Department of Justice announced today that the American Society of Composers, Authors and Publishers had signed a civil decree in the United States District Court for the Southern District of New York in which it agreed to cease engaging in activities which the Department alleges constitute violations of the Sherman Act.

This decree brings to an end litigation started by the Government against ASCAP in 1934 and paves the way for an immediate settlement of the difficulties between ASCAP and the Broadcasters which have resulted in the banning of ASCAP music from the air since January 1, 1941. All objectionable practices have been resolved by the instant decree. The only matter remaining for adjustment is one of price between ASCAP and the Broadcasters.

The decree, which becomes effective ninety days after entry, provides:

1. That ASCAP members will not license the public performance rights of copyrighted musical compositions exclusively to ASCAP but are free to license to anyone except Broadcast Music, Inc.

2. ASCAP agrees not to discriminate either in price or terms among the users of

copyrighted music. All ASCAP compositions will be offered for performance to all users of the same class on equal terms and conditions.

3. ASCAP agrees to license on a pay-when-you-play basis; that is, Broadcasters will be able to buy ASCAP music on a per program basis, if they desire. Users other than Broadcasters will be able to buy music on a per piece basis, if desired.

4. ASCAP agrees not to require a license from more than one station in connection with any network broadcast. Licenses will be issued to networks or originating stations.

5. Manufacturers of electrical transcriptions, or sponsors, or advertisers on whose behalf such electrical transcriptions are made, will, if they so desire, be able to obtain licenses for the use of such transcriptions for broadcast purposes.

6. ASCAP agrees not to engage in an all-or-none policy in licensing its music; that is, motion-picture exhibitors, restaurants, hotels, radio stations, and all commercial users of ASCAP music will be able to obtain the right to perform any ASCAP compositions desired without being compelled to take the entire ASCAP catalogue.

7. ASCAP agrees that it will not attempt to restrict the performance rights of its music for the purpose of regulating the price of recording its music on electrical transcriptions made for use in broadcasting.

8. ASCAP agrees to abolish its self-perpetuating board of directors and permit election of directors by the membership.

9. ASCAP agrees to modify its membership requirements so as to make eligible any composer who has copyrighted one tune. Under the existing arrangement publication of five tunes is required for eligiblity.

10. ASCAP agrees to modify the practice of compensating its members so as to make such compensation on the basis of the popularity of the tunes in any given period. Under the present method of distribution compensation is determined by an elaborate set of rules, including seniority, type of composition, etc.

Disposition of the civil suit by entry of the decree will not dispose of the criminal suit filed against ASCAP in the Eastern District of Wisconsin on February 5, 1941. That case will be disposed of by separate proceedings.

The case was in charge of Victor O. Waters, Special Assistant to the Attorney General, assisted by Warren P. Cunningham, Special Attorney.

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FOR IMMEDIATE RELEASE

FEB 26 1941

DEPARTMENT OF JUSTICE

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The case was in charge of Victor O. Waters, Special Assistant to the Attorney General, assisted by Warren P. Cunningham, Special Attorney.

PUBLIC STATEMENT
Released February 28, 1941

Department of Justice

Division for Enforcement of Antitrust Laws

Investigation of Booking Agencies, Concert Bureaus, Broadcasters, and Others Dealing With Artists in Musical Fields

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STATEMENT OF GROUNDS FOR ACTION

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1941

Department of Justice,
February 28, 1941.

The Department of Justice announced today that a grand jury will be convened shortly to investigate complaints relating to practices of booking agencies, concert bureaus, broadcasters and others in their dealings with artists in the musical fields. The investigation will cover the relationship existing between certain booking agency companies, the broadcasting chains and James C. Petrillo, president of the American Federation of Musicians. It will open with an inquiry into complaints which the Department has received that Petrillo and the booking agencies have combined against the American Guild of Musical Artists headed by Lawrence Tibbett and including among its members Jascha Heifetz, Albert Spalding, Jose Iturbi, Lauritz Melchior, Grace Moore, Mischa Elman, Lily Pons, Gladys Swarthout, and John McCormick.

The American Guild of Musical Artists (AGMA) is an organization of interpretive artists in grand opera, concert, recital and oratorio, affiliated through Associated Actors and Artists of America with the American Federation of Labor.

According to complaints received by the Department, these artists had never been represented by the AFM or by any other collective bargaining agency and, in 1936, in an effort to protect themselves in negotiating contracts with booking agencies and broadcasters they organized AGMA.

Now it is charged that Petrillo has entered into a conspiracy with the booking agencies and the broadcasters in an attempt to destroy AGMA and to force the artists either to join his own union, the AFM, or to lose the benefits of union protection. Both the AFM and AGMA are affiliated with the American Federation of Labor.

Information in the Department files shows that James C. Petrillo, president of the American Federation of Musicians, has notified Tibbett that unless the members of AGMA resign from that organization and join A. F. of M., he (Petrillo) will notify all radio interests, picture studios, symphony orchestra managements, grand opera companies, recording companies, booking agencies, etc., that members of AGMA will not be recognized by the A. F. of M. and the members of A. F. of M. will not be permitted to render any services at any function in which AGMA members participate. The notification stated further that the A. F. of M. had rightfully not interfered with such artists prior to organization of AGMA since they were not in competition with members of A. F. of M.

The Constitution and Bylaws of the A. F. of M. provide for a payment to that union of 10% of the proceeds from every engagement. They provide further for payment of a federation tax of 50% of all proceeds collected in radio engagements

by a guest conductor entering the jurisdiction of a local. The powers of Petrillo are absolute and subject to no control.

Complaints have also been made to the Department that the broadcasting chains and booking agencies have combined to monopolize the business of arranging concert tours and other public performances of interpretive artists who are members of AGMA and to dictate the terms under which such appearances can be made.

U. S. GOVERNMENT PRINTING OFFICE: 1941

FOR IMMEDIATE RELEASE
Friday, February 28, 1941

DEPARTMENT OF JUSTICE

The Department of Justice announced today that a grand jury will be convened shortly to investigate complaints relating to practices of booking agencies, concert bureaus, broadcasters and others in their dealings with artists in the musical fields. The investigation will cover the relationship existing between certain booking agency companies, the broadcasting chains and James C. Petrillo, president of the American Federation of Musicians. It will open with an inquiry into complaints which the Department has received that Petrillo and the booking agencies have combined against the American Guild of Musical Artists headed by Lawrence Tibbett and including among its members Jascha Heifetz, Albert Spalding, Jose Iturbi, Lauritz Melchior, Grace Moore, Mischa Elman, Lily Pons, Gladys Swarthout and John McCormick.

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PUBLIC STATEMENT

Released February 5, 1941

Department of Justice

Division for Enforcement of Antitrust Laws

United States
v.
American Society of Composers, Authors and Publishers, et al.

(U. S. D. C., E. D., WISCONSIN—NO. 449Q)

STATEMENT OF GROUNDS FOR ACTION

INFORMATION CHARGING VIOLATION OF THE FEDERAL ANTITRUST LAWS

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1941

DEPARTMENT OF JUSTICE,
February 5, 1941.

The Department of Justice announced today the filing in the United States District Court for the Eastern District of Wisconsin at Milwaukee of a criminal information against the American Society of Composers, Authors and Publishers. The information charges that the Society is an unlawful combination in restraint of trade in violation of the Sherman antitrust law. Specifically, it is alleged that the following practices of the Society and its members constitute illegal conduct:

(1) The members of the Society assign exclusively to the Society all public performance rights to the copyrighted music composed or published by the respective members thus eliminating all competition among the members in the exploitation of the public performance rights to their music.

(2) The Society is governed by a self-perpetuating board of directors which supervises all of the business of the Society and determines the method of distributing the revenues of the Society among the members and the amount to be received by each member.

(3) Membership in the Society is conditioned, among other requirements, upon the regular publication by the candidate for membership of not less than five musical compositions.

(4) Performance licenses for the Society's music are available only on an all-or-none basis. Licenses authorizing the performance of single compositions or groups of compositions are not available.

(5) The fees collected for these licenses are fixed arbitrarily by the Society to all commercial users of music. In the case of radio broadcasters, this fee is based upon a percentage of the gross revenue of the music user, whether or not such revenue is derived from programs in which music controlled by the Society is used.

(6) The Society has discriminated as to both price and terms among various commercial users of music, so that some users have received more favorable treatment at the hands of the Society than others who are similarly situated.

(7) The members of the Society have exercised their privilege of restricting from public performance popular and current musical compositions, so as to deprive the listening public of the opportunity of hearing the restricted music, and have used this privilege for the purpose of enhancing recording fees received by the members for the recording rights to their respective catalogues of music.

(8) Prior to December 31, 1940, the Society did not offer blanket licenses to radio networks, but required that each station in the network obtain a separate license. Radio stations affiliated with a network have no control over the copyrighted mu-

sical compositions which they receive from the originating station in the network. Nevertheless these radio stations have had to accept a license from the Society upon any terms and conditions imposed by the Society or subject themselves to numerous infringement suits.

Commenting on the Department's action, Thurman Arnold, Assistant Attorney General in charge of the Antitrust Division, stated:

> In plain language, ASCAP is charged with exploiting composers by preventing them from selling their music except on terms dictated by a self-perpetuating board of directors. That board has the power arbitrarily to determine on what basis various members of ASCAP shall share in the royalties from ASCAP compositions.
>
> In addition to discriminating against composers, ASCAP has been using its monopoly power to charge the users of music for songs they do not play. This is done by compelling the user to pay a percentage of his gross receipts on programs where other music is used or where no music is used. By this method, anyone who does not belong to ASCAP is excluded from the market. These practices we consider not only illegal but unjustifiable on any ground of fair dealing. Our proceeding is aimed only to compel ASCAP to stop such practices. Therefore, the Department will continue to hold the door open to proposals from ASCAP

which will eliminate these abuses. It does not desire to prevent ASCAP from protecting the copyright privileges of its members.

Persons named as defendants were Gene Buck, President of the Society, Louis Bernstein, Vice President, Otto A. Harbach, Vice President, George W. Meyer, Secretary, Gustave Schirmer, Treasurer, and 21 other directors of the Society. Also named as defendants were 19 music publishing firms which have had officers, agents, and representatives on the Board of Directors of the Society.

The information was filed after a comprehensive investigation of the activities of the Society and its members which has been conducted by the Department for several months. Negotiations for a settlement between representatives of the Society and the Department, respectively, ended abruptly late in December.

The case is in charge of Victor O. Waters, Special Assistant to the Attorney General, and Warren Cunningham, Jr., Special Attorney.

U. S. GOVERNMENT PRINTING OFFICE: 1941

FOR IMMEDIATE RELEASE
Wednesday, February 5, 1941

DEPARTMENT OF JUSTICE

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(2) The Society is governed by a self-perpetrating board of directors which supervises all of the business of the Society and determines the method of distributing the revenues of the Society among the members and the amount to be received by each member.

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In addition to discriminating against composers, ASCAP has been using its monopoly power to charge the users of music for songs they do not play. This is done by compelling the user to pay a percentage of his gross receipts on programs where other music is used or where no music is used. By this method, anyone who does not belong to ASCAP is excluded from the market. These practices we consider not only illegal but unjustifiable on any ground of fair dealing. Our proceeding is aimed only to compel ASCAP to stop such practices. Therefore, the Department will continue to hold the door open to proposals from ASCAP which will eliminate these abuses. It does not desire to prevent ASCAP from protecting the copyright privileges of its members."

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The case is in charge of Victor O. Waters, Special Assistant to the Attorney General, and Warren Cunningham, Jr., Special Attorney.

Tab 6

MAN ARNOLD
ATTORNEY GENERAL

105 (16)

Department of Justice
Washington

March 5, 1941

MEMORANDUM FOR THE ATTORNEY GENERAL

In response to your memorandum of February 18 I have prepared the attached compilation showing the number of antitrust cases pending in the courts and the number of grand jury investigations which have been authorized.

In general I may say that there is no congestion of antitrust proceedings in the courts. The difficulties in getting cases to trial are entirely due to efforts of the defendants to obtain postponement.

In New York City Judge Knox has complained about the general congestion of his docket and asked us not to bring antitrust proceedings there without consulting him. His principal inconvenience has been the aluminum case. The judge himself was largely responsible for that delay. Outside of the aluminum case we have not caused Judge Knox much trouble; the moving picture case was never tried; and many of the other cases have either resulted in pleas or appear likely to result in pleas. There are probably 12 to 15 cases which must be tried in New York - more than in any other district.

In the meantime, we have agreed with Judge Knox that no more cases will be brought in New York without consulting him. The last time we consulted him was at the request of the defendants in the case of United States v. American Optical Company. They wished the case brought in New York for their own convenience. We had no particular objection, but preferred it in the District of Columbia. Judge Knox decided that under the present situation he had no objection to having the case brought in New York, so we acceded to the defendant's request. In districts outside New York we have not observed any delays which are not occasioned by the natural reluctance of defendants to go to trial or by the complexity of the case. It is not an easy thing to push an antitrust proceeding forward with any speed regardless of the state of the docket.

AN ARNOLD
ATTORNEY GENERAL

Department of Justice
Washington

There are only two cases which can be said to be dead on the docket - United States v. Local 202 Teamsters and United States v. Marketing Truckmen's Association, both commenced in 1933. They are unimportant cases; the indictments are old and the situation has changed. We are preparing to nolle prosse them.

So far as the Government's ability to take care of its cases is concerned, it is sufficient to note that we have not yet made any request for continuances of any cases. All the continuances have been at the request of defendants and many of our most heated arguments have been in opposition to continuances.

We are fully aware of the importance of not bringing cases which cannot be disposed of within a reasonable time. We will be constantly on our guard to see that that situation does not develop. We believe, however, that in spite of the expansion of activities of the Division our record has been good on that score and is getting better. The summary statement which precedes the attached compilation shows that last year final disposition was made of one-half as many cases as was instituted. During the first two months of this year we have disposed of three-fourths as many cases as we have begun. When you consider the fact that not only are the cases complex and difficult, but also most of them are new, because of our expanding program the number of suits pending in comparison with the number filed is not disproportionate.

There are eight cases which have been pending for over two years - four criminal and four civil. Of the four criminal cases two were started in 1933 and will be nolle prossed. They may be characterized as attic furniture which we inherited. A third case, United States v. Local 202 Teamsters is similar to Local 807 which is now pending on appeal in the Circuit Court. We do not wish to push this case to trial until we get a decision from the Supreme Court. The delay in the fourth case, United States v. Standard Oil is not caused through fault or congestion of the docket. It is a re-trial of certain defendants in the Madison Oil case which has been pre-emptorily changed to May 10, 1941.

It is also significant that of the 93 cases only 21 have been pending for more than twelve months without trial.

ARNOLD
ATTORNEY GENERAL

Department of Justice
Washington

Of the four civil cases pending over two years only one can come under the category of neglected business. It is United States v. Dress Creators League of America, started in 1934. It is unimportant. There is no desire on either the part of the Government or the defendants to try it. It constitutes an inherited problem. It is significant, however, that it is the only instance of that kind we have on the civil docket.

The other old civil cases are well on their way to termination. United States v. ASCAP has been disposed of since this report was prepared. The trial of United States v. Western Union has been completed. United States v. Aluminum Company trial has been concluded. It is difficult to see, under the circumstances, how these cases could have been completed any faster. Certainly their delay has not been caused by lack of personnel in the Department or to crowded conditions of the docket. For example, the Western Union case was held off for over a year at the request of Senator Wheeler's committee. The ASCAP and the Aluminum situations are both familiar to you.

GRAND JURY INVESTIGATIONS.

We anticipate no congestion because of grand jury investigations. The speed with which many of our present cases are being terminated is amazing because of the fact that the evidence is so convincing that the defendants have little chance except to plead. As a single example, in the Redwood indictment the defendants paid fines the day the indictment was returned. In the Retail Grocers case in Denver they paid fines within ten days. In the Western Pine indictment and the Southern Pine indictment they paid a fine before any motions were filed. In practically all of our defense cases defendants are in talking about nolo contendre pleas and the only question is whether they should be accepted. We see no evidence of any gathering congestion through these investigations. As a matter of fact, the existence of the grand jury investigation itself, as you know, has become one of the strongest arms of enforcement.

Thurman Arnold
THURMAN ARNOLD,
Assistant Attorney General.

Title of Case	Dist.	Indict. Returned	No. Defendants Persons	Corps.	Unions	Set for Trial	Remarks
U.S. v. Dow Chemical Co. (No. 109-191)	S.D. N.Y.	1-30-41	5	5			At the defendant's request time for pleading to the indictment in this case has been extended to April 7, 1941.
U.S. v. Wayne Pump Co. (No.32597)	N.D. Ill.	1-31-41	5	5			Arraignment is set for February 25, 1941.
U.S. v. Wayne Pump Co. (No.32598)	N.D. Ill.	1-31-41	4	4			
U.S. v. American Society of Composers, Authors & Pub. (Information No.449-Q)	E.D. Wis.	2-5-41	26	20			The defendants in this case have agreed to plead nolo contendere and pay fines. Case should be disposed of by the first of March.
U.S. v. Western Wash.Wholesale Grocers Assn.	W.D. Wash.	2-7-41	13	12			Defendants have not been arraigned.
U.S. v. National Fertilizer Assn.	M.D. N.C.	2-10-41	36	70			Arraignment is set for March 5, 1941.

ANTITRUST CASES NOW PENDING IN THE COURTS
(CIVIL CASES ONLY)
February 19, 1941
(Inclusive)

Title of Case	Dist.	Complaint Filed	No. Defendants Persons	Corps.	Unions	Set for Trial	Remarks
U.S. v. Dress Creators League of America	S.D.N.Y.	8-13-34		19			Trial of this case has been postponed numerous times since January 17, 1937, at request of both defendantsand Government for purpose of settlement. It is now awaiting trial.
U.S. v. American Society of Composers, Authors and Publishers	S.D.N.Y.	8-30-34	37	95			This case will be terminated by a consent decree before the first of March.
U.S. v. Western Union Telegraph Co.	S.D.N.Y.	12-1-37	3	1			The trial of this case has been finished. The Government has until 1st of March to file a brief and oral argument will be had in May.
U.S. v. Paramount Pictures, Inc.	S.D.N.Y.	7-20-38		8			A consent decree was entered in this case as to thirteen defendants on November 14, 1940. The case is awaiting trial as to eight defendants.
U.S. v. Aluminum Co. of America (No. 85-73)	S.D.N.Y.	4-23-37	36	26			Trial of this case has been concluded. Final argument will be heard by the District Court on 3rd of March, 1941.

Tab 7

No. 449 Q (Criminal)

In the District Court of the United States for the Eastern District of Wisconsin

UNITED STATES OF AMERICA

v.

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

INFORMATION

VICTOR O. WATERS,
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Filed February 5, 1941

In the District Court of the United States for the Eastern District of Wisconsin

No. 449 Q (Criminal)

United States of America
v.
American Society of Composers, Authors and Publishers, et al., defendants

INFORMATION

At the January, 1941, Term of the District Court of the United States for the Eastern District of Wisconsin, held at Milwaukee, Wisconsin, in said District, comes the United States of America, acting through B. J. Husting, United States Attorney in and for said District, and leave of the Court having first been obtained, informs the Court as follows:

I

Description of defendants

1. That American Society of Composers, Authors and Publishers, hereinafter referred to as "Society", an unincorporated membership association of music composers, authors and publishers, having its principal office at 30 Rockefeller Plaza, New York, New York, is made a defendant herein.

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2. That the following individuals, who have been or are now officers or directors of Society as indicated after their names, actively engaged during the period covered by this Information in the management, direction and control of the affairs and policies of the Society, and in particular of those affairs and policies which are covered by this Information, who have authorized, ordered and done the acts of the defendants constituting the offenses hereinafter charged, are likewise made defendants herein.

1. Gene Buck, President and Director.
2. Louis Bernstein, Vice President and Director.
3. Otto A. Harbach, Vice President and Director.
4. George W. Meyer, Secretary and Director.
5. Gustave Schirmer, Treasurer and Director.
6. Fred E. Ahlert, Director.
7. Saul Bornstein, Director.
8. J. J. Bregman, Assistant Secretary and Director.
9. Irving Caeser, Assistant Treasurer and Director.
10. Max Dreyfus, Director.
11. George Fischer, Director.
12. Walter Fischer, Director.
13. Raymond Hubbell, Director.
14. Jerome Kern, Director.
15. Edgar Leslie, Director.
16. Jack Mills, Director.
17. Herman Starr, Director.
18. John O'Connor, Director.
19. J. J. Robbins, Director.
20. Oley Speaks, Director.
21. Deems Taylor, Director
22. Will Von Tilzer, Director.

23. John Mercer, Director.
24. Oscar Hammerstein II, Director.
25. E. C. Mills, Chairman Administrative Committee.
26. John G. Paine, General Manager.

The following corporations which have had divers officers and agents and representatives on the Board of Directors of the Society:

Shapiro, Bernstein & Co., Inc., Organized and duly authorized to do business under the laws of the State of New York;

Irving Berlin, Inc., Organized and duly authorized to do business under the laws of the State of New York;

Bregman, Vocco & Conn, Inc., Organized and duly authorized to do business under the laws of the State of New York;

Chappell & Co., Inc., Organized and duly authorized to do business under the laws of the State of New York;

T. B. Harms Company, Organized and duly authorized to do business under the laws of the State of New York;

J. Fischer & Bros., Organized and duly authorized to do business under the laws of the State of New York;

Carl Fischer, Inc., Organized and duly authorized to do business under the laws of the State of New York;

Mills Music, Inc., Organized and duly authorized to do business under the laws of the State of New York;

Words & Music, Inc., Organized and duly authorized to do business under the laws of the State of New York;

Robbins Music Corporation, Organized and duly authorized to do business under the laws of the State of New York;

Leo Feist, Inc., Organized and duly authorized to do business under the laws of the State of New York;

Miller Music, Inc., Organized and duly authorized to do business under the laws of the State of New York;

G. Schirmer, Inc., Organized and duly authorized to do business under the laws of the State of West Virginia;

Boston Music Company, Organized and duly authorized to do businesss under the laws of the State of West Virginia;

Willis Music Company, Organized and duly authorized to do business under the laws of the State of Ohio;

Harms, Inc., Organized and duly authorized to do business under the laws of the State of New York;

M. Witmark & Sons, Organized and duly authorized to do business under the laws of the State of New York;

Remick Music Corporation, Organized and duly authorized to do business under the laws of the State of New York;

Harry Von Tilzer Music Publishing Co., Organized and duly authorized to do business under the laws of the State of New Jersey

are made defendants herein.

3. That all members of the Society, in addition to those made defendants herein, are expressly named as co-conspirators herein.

II

The society

4. That defendant Society, an unincorporated association, was organized in or about the year 1914, by the leading publishers, composers and authors of musical compositions in the United States, for a period of ninety-nine (99) years from the date of its organization; that the purposes for which it was organized were, among other things, to grant licenses and collect royalties for the public performance of the works of its members, to allot and distribute the royalties collected, and to accumulate and maintain a reserve fund to be used in carrying out any of the objects of the Society; that its membership at the time of the filing of this Information consists of approximately 140 publishers and 1,200 composers and authors and includes the owners of the copyrights of a substantial amount, more than 75 percent, of all the copyrighted musical compositions demanded by the public of the United States for entertainment purposes at the time of the filing of this Information and for a number of years prior thereto; that the management of defendant Society is vested exclusively in a self-perpetuating board of directors consisting of 24 persons, 12 of whom represent publisher members, 6 represent composer members, and 6 represent author members; that each director is elected to serve for a period of three years, and is eligible for reelection upon the expiration of his term; that the terms of office of eight members of said board expire each year, and their

successors are elected annually by the remaining members of the board; that the directors have exclusive and absolute control of the management and of all activities of the Society and appoint all its committees, officers and employees; that admission to membership in the Society is by election thereto by the board; that each member upon admission must execute an agreement in the form required by the board of directors, assigning to the Society the exclusive nondramatic public performance for profit rights of all of the members' works for the period of any then existing agreement between the Society and its members; that the agreement between the Society and its members, a copy of which is hereto attached marked Exhibit "A" and expressly made a part hereof, expired December 31, 1940; that the agreements between the Society and its members, existing prior to December 31, 1940, have been renewed for a further ten-year period; that by reason of the vast number of copyrights of compositions controlled by the members of the Society, by reason of the great public demand therefor, and by reason of the vesting of the absolute management and control of all activities of the Society in the self-perpetuating board of directors, the twenty-four persons constituting such board have the power to and do fix the price of and control the public performance for profit rights of the greater part of the music demanded by the public of the United States for entertainment purposes.

5. That licenses to perform publicly for profit the musical compositions copyrighted by its members are issued by the Society upon application therefor; that

agents of the Society solicit applications for such licenses by threat of prosecution for infringement of the copyright laws of the United States, from all unlicensed persons, firms or corporations in the United States who use music in connection with their business; that defendant Society refuses to grant licenses to perform single musical compositions or groups of compositions selected by the licensees; that it grants only blanket licenses to perform any and all musical compositions of all its members upon the payment of such royalty as is demanded by the board of directors of the Society; that six forms of licenses have been and are in use, copies of which are hereto attached and marked Exhibits "B", "C", "D", "E", "F", "G", respectively, and are expressly made a part hereof; that Exhibit "B" is the form of license which radio broadcasting stations not owned at least 51 percent by newspapers were required to accept prior to December 31, 1940; that Exhibit "C" is the form of license which radio broadcasting stations owned at least 51 percent by newspapers were offered, accepted by many and outstanding prior to December 31, 1940; that Exhibit "D" is the form of license which theatres are required to accept; that Exhibit "E" is the form of general license which all other users of musical compositions are required to accept; that Exhibit "F" is the only form of license offered radio broadcasting stations not originating programs as part of a chain broadcast, or the simultaneous broadcasting of programs over two or more stations, subsequent to December 31, 1940; that Exhibit "G" is the only form of license offered radio broadcasting stations originating programs as part of a chain broadcast or the simultaneous broadcasting of a program or programs over two or more stations, subsequent to December 31, 1940.

6. That defendant Society maintains agents and representatives throughout the United States, whose duty it is to enforce the demands of the Society in the sale of licenses and in collecting royalties therefor.

III

The radio broadcasting industry

7. That the term "radio broadcasting station" is used herein to designate those radio stations operated for the entertainment of the residents of the United States and residents of adjacent and more distant foreign countries; that there are approximately 793 such radio broadcasting stations interspersed throughout the states of the United States and operated under authority of the Federal Communications Commission, pursuant to the Act of Congress known as the Communications Act of 1934, approved June 19, 1934, and prior Acts of Congress; that each station is required to broadcast a minimum regular operating schedule of two-thirds of the hours it is authorized to broadcast under the license granted it by the Communications Commission; that the continued existence, success and prosperity of a radio broadcasting station depends entirely upon the entertainment offered by it to the radio listening public within the range of the station's power; that music is the principal form of entertainment demanded by the radio listening public and must be offered by a station in order to

retain the continuing interest and patronage of the listening public; that approximately 50 percent of the time devoted to the transmission of energy, ideas and entertainment across state or national boundaries by radio broadcasting stations in the United States is devoted to the radio broadcasting of music in varying forms, and such music must represent the rendition of compositions most desired by the listening public; that the only income available to a station is derived from the sale of its facilities to persons desiring to communicate energy, ideas and entertainment to the public within listening range of the station's transmission power; that such sale of facilities consists primarily of sales to business concerns for the purpose of advertising the products of the particular concern and of creating good will on the part of the public for the services or products of the advertiser; that the desirability of a particular station for advertising purposes is directly dependent upon the number of persons listening to the programs broadcast by that station, and such persons can only be induced to listen to the station's broadcasts by furnishing the musical entertainment demanded by the radio audience; that a substantial portion of the entertainment furnished by the station must be furnished at the expense of the station, for which it receives no compensation or income.

8. That during all the time herein mentioned it has been and is essential to the continued operation of each of the stations in the United States broadcasting radio entertainment, in order to avoid liability for

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infringement of copyright, to obtain the permission or license of the owners of the copyrighted musical compositions the public performance of which is demanded by the radio audience.

IV

The interstate commerce involved

A. In radio broadcasting

9. That radio broadcasting stations in the United States are engaged in interstate or foreign commerce; that each station is an instrumentality through which energy, ideas and entertainment are transmitted across state or national boundaries to the radio listening population of the United States or foreign countries; that approximately 40 percent of the time devoted to the transmission of energy, ideas and entertainment across state or national boundaries by radio broadcasting stations in the United States has been devoted to the radio broadcasting of copyrighted musical compositions owned or controlled by the Society and its members; that as each radio station under the copyright laws must obtain permission from the copyright owners of musical compositions before such compositions can be broadcast in interstate commerce, any interference with or restraint upon the obtaining of such permission from the copyright owners upon a competitive basis restrains the interstate and foreign transmission of energy, ideas and entertainment by radio broadcasting stations.

10. That there has developed in the radio industry a practice which is commonly called "chain" or "network" broadcasting; that by this method of operation

several radio broadcasting stations are connected in a chain or network by means of leased telephone lines for the purpose of broadcasting simultaneously radio programs originating at one of the stations in the network; that this method is generally inaugurated and controlled by what is known as a network company; that the principal network companies presently existing in this country are the National Broadcasting Company, the Columbia Broadcasting System, and the Mutual Broadcasting System; that approximately 350 radio stations located in the United States are affiliated with and engaged in such "network" broadcasting; that only those network stations which originate network programs have control over the selection of the content of the programs which are broadcast simultaneously by all of the stations in the network; that approximately 45 percent of the total time devoted to network broadcasting in this country is devoted to the broadcasting of musical compositions; that a substantial number of the copyrighted musical compositions performed over radio networks during the period covered by this Information were owned or controlled by the Society and its members; that the network stations other than those originating network broadcasting, have no control whatsoever over the selection of the musical compositions which are performed by the several stations comprising the network.

B. In sheet music

11. That each defendant who is a publisher member of defendant Society prints, or causes to be printed, the music and lyrics, and special arrangements thereof,

of musical compositions; that such printed sheets of music are sold by such defendants to customers located in all states of the United States and are transported across state boundaries in interstate commerce; that the greater part of the musical compositions broadcast by radio stations is performed by entertainers located in the studio of particular broadcasting stations, or in close proximity thereto, from musical scores transported across state boundaries.

12. That the essential element in effecting the sale and distribution of sheet music throughout the United States is the transmitting of musical compositions to the ear of the public, in order to create a desire on the part of individual members of the public to purchase the printed score representing particular compositions; that radio broadcasting is the principal medium through which individual musical compositions are transmitted to the ear of the purchasing public and a demand for the printed score created; that by means of the combination and conspiracy hereinafter described, defendant Society through the issuance of only blanket licenses authorizing the performance of the Society's entire repertoire of music at a price which requires the payment of a percentage of the revenue derived from all radio programs regardless of whether Society owned or controlled music is performed, has destroyed the economic incentive on the part of radio stations, having the Society's license, to perform the musical compositions of authors, composers and publishers not members of Society, thereby depriving those owners of copyrighted musical compositions who are not members of defendant Society of the opportunity of transmitting their musical compositions to the ear of the purchasing public, with the result that the sale of scores written by nonmembers to purchasers in states of the United States other than the state where such scores were manufactured, and the transportation thereof across state and national boundaries, is and has been restrained.

C. Motion picture films

13. That motion picture films are produced primarily in the States of New York and California, and shipped to motion picture exhibitors located in every state in the United States; that these motion picture films are produced and shipped in interstate commerce for the sole and exclusive purpose of exhibition or public performance by motion picture exhibitors; that without the right to exhibit or perform, the motion picture films are rendered valueless and restricted from a free flow in interstate commerce; that a substantial portion of the motion picture films are synchronized with music to the extent that the films cannot be exhibited without performing the music synchronized therewith; that a great majority of the music synchronized with the films is copyrighted music, the public performance for profit rights of which are controlled by the Society; that the Society, therefore, has the power to fix the price of, control or otherwise unreasonably restrain the usage of a substantial portion of the motion picture films passing in interstate commerce.

D. Electrical transcriptions

14. That electrical transcriptions are mechanical devices upon which programs are recorded or mechani-

cally reproduced for the exclusive use of radio broadcasting stations; that more than 50 percent of the electrical transcriptions produced in the United States are produced or manufactured in the States of New York and California and shipped to radio broadcasting stations located throughout the United States; that upon practically all of these electrical transcriptions are recorded musical compositions; that a substantial portion of the music so recorded is copyrighted music owned or controlled by the Society and its members.

V

The combination and conspiracy

15. That for many years preceding as well as during the period of three years next preceding the filing of this Information, and continuing to the date of the filing thereof, defendants, and others to the United States Attorney unknown, well knowing the foregoing facts, have been engaged in the United States, and particularly in the Eastern District of Wisconsin, in a wrongful and unlawful combination and conspiracy in restraint of the aforesaid interstate and foreign trade and commerce in radio broadcasting, sheet music, motion picture films, and electrical transcriptions in violation of Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies" (U. S. C. A., Title 15, Section 1), commonly known as the Sherman Act, and have conspired to do all acts and things and to use all means necessary and appropriate to make said restraints effective, including the means, acts and things here-

inafter more particularly alleged and other means, acts and things which at the time of filing this Information are unknown to the United States Attorney; that as a part of said conspiracy the defendants have arranged and agreed among themselves to do the following things:

A. To create, maintain and utilize defendant Society as an instrumentality for promoting and maintaining the illegal combination and conspiracy herein described; to create defendant Society as such instrumentality with a self-perpetuating board of directors and to vest in the twenty-four persons constituting such board the exclusive power to control the activities of defendant Society; to restrict membership in defendant Society to such composers and authors who have written or composed and had regularly published not less than five copyrighted musical compositions, and to such publishers as may be approved by the board of directors; to have transferred to and to pool in defendant Society the sole and exclusive right to perform publicly for profit all musical compositions of which all the members of Society are the copyright proprietors, or which any member, either alone or jointly or in collaboration with others, wrote, composed, published, acquired or owned, or in which any member has any right, title, interest, or control whatsoever, in whole or in part, or which any member during the term of the agreement may write, compose, acquire, own, publish or copyright, either alone, jointly, or in collaboration with others, or in which any member may at any time, during the term of the agreement, have any right, title, interest or control, either in whole or in part; to have all members of defendant Society vest in defendant Society absolutely until and including December 31, 1940, the sole and exclusive right to license others to perform publicly for profit all their musical compositions; to renew and extend the agreements between Society and its members which expired December 31, 1940, for a further ten-year period.

B. To vest in defendant Society a complete monopoly of the right to license for public performance for profit all the musical compositions of all its members, aggregating an unknown number of musical compositions; to refuse to furnish to its licensees complete lists of the musical compositions in the Society's repertoire of music; to eliminate competition among members of defendant Society in the sale of rights to perform publicly their respective musical compositions, which, but for the illegal combination and conspiracy herein described, would have existed; to refuse radio broadcasting stations, advertisers (desiring to utilize the service of such stations to promote the sale of their merchandise), orchestras, theatres, and others desiring the right to perform publicly the copyrighted musical compositions of members of defendant Society, the right to acquire from the individual members of the Society the public performance for profit rights of their respective copyrighted musical compositions; to require commercial users desiring only certain musical compositions in the Society's repertoire to accept a blanket license from defendant Society for all of its copyrighted musical compositions, upon terms and conditions arbitrarily fixed by it.

C. To agree to establish and maintain, and pursuant to such agreement, to establish and maintain, by means of the pooling of their individual copyright monopolies, enhanced and non-competitive prices or royalties for licenses to perform publicly copyrighted musical compositions owned and controlled by individual defendants; to eliminate all competition among members of defendant Society in the sale of licenses to perform publicly their individual musical compositions and to exercise the power obtained by defendants through the unlawful pooling of their individual copyright monopolies, by concertedly refusing to license the public performance by radio broadcasting stations and all other persons engaged in the public performance for profit of copyrighted music of any copyrighted musical composition owned and controlled by a member of defendant Society, except on the basis of a general license covering any and all musical compositions of all members and except upon the basis of an arbitrary royalty for such general license, fixed and determined by the aforesaid self-perpetuating board of directors of defendant Society; to require compliance with the terms fixed by the defendants by radio broadcasting stations affiliated with radio "networks," prior to December 31, 1940, by issuing licenses to network affiliated radio stations only on the basis that the license issued to each station was not to be construed as authorizing the licensee to grant others any right to perform publicly for profit by any means, method or process whatsoever. The radio stations affiliated with a radio "network," other than the station originating the radio program, have had no control over

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the copyrighted musical compositions performed by the network affiliated stations simultaneously. Broadcasting stations affiliated with radio "networks" have had to accept a license from defendant Society upon any terms and conditions imposed by defendant Society, or subject themselves to numerous infringement suits in which they would be compelled to pay not less than $250 for each copyright infringement, as provided in the copyright laws of the United States.

D. Concertedly to demand and receive from radio broadcasting stations increased amounts as royalties for licenses to perform publicly copyrighted musical compositions owned and controlled by members of defendant Society; to notify on or about April 1, 1932, all radio broadcasting stations throughout the United States that, on and after June 1, 1932, defendant Society would issue to broadcasting stations only a general license covering all musical compositions of all members of defendant Society, which license would require the payment annually as royalty of a sum approximately equal to the annual royalty theretofore paid by them, and in addition thereto, 5 percent of the gross income of the broadcasting station from whatever source derived. This fee represented an increase of approximately 400 percent in so-called "royalty" payments over the aggregate royalty demanded for the previous year. Protests were made by the broadcasting stations to defendant Society and the then existing licenses were temporarily extended to September 1932. Thereupon efforts were made by the broadcasting stations, acting through a committee appointed for the purpose, to obtain licenses providing

for royalty payments by each station based on the number of performances by such station of copyrighted musical compositions owned and controlled by Society or its members. The defendants refused to agree to royalty payments based on actual use made of their musical compositions. Other proposals submitted by the broadcasting stations were also rejected by defendants. Each broadcasting station, in order to use the copyrighted musical compositions controlled by defendant Society and to avoid a multiplicity of infringement suits, acceded to the demands of defendant Society and accepted from defendant Society a three-year blanket license agreement, commencing on or about September, 1932, covering all musical compositions of all members of defendant Society, upon the basis of a royalty payment approximately equal to the fixed annual royalty paid for the preceding year, plus three percent of the station's net receipts during the first year of the agreement, four percent of such receipts during the second year, and five percent of such receipts during the third year. "Net receipts" as defined in said agreement, constituted the full amount paid to the station for the use of its broadcasting facilities, after deducting commissions not exceeding fifteen percent, if any, paid to an independent advertising agent or agency.

E. To refuse to alter or change the terms of the contracts executed by and between the Society and radio broadcasting stations in 1932, which expired December 31, 1935; and to issue an ultimatum on or about January 10, 1936, in writing, to the various radio broadcasting stations to the effect that the performance of copyrighted musical compositions in the Society's repertoire of music would constitute a copyright infringement unless the existing contracts were renewed by January 15, 1936. The radio broadcasters located throughout the United States had no alternative but to accept the terms dictated by the Society, since they could not operate without being subjected to the $250 minimum damage provision for each copyright infringement of the copyright laws by performing music owned or controlled by the Society and its members. Within the specified time they accepted renewals of the contracts executed in 1932. These contracts executed in 1932, expired on December 31, 1940.

F. To refuse to renew the licenses to radio broadcasters which expired December 31, 1940, under threat of withdrawing from the interstate commerce of radio broadcasting and public enjoyment the vast pool of copyrighted music acquired by the Society, by means of the illegal conspiracy alleged herein and under the further threat of inflicting the $250 minimum damage provision of the copyright laws, unless the radio broadcasters accepted the licenses attached hereto and marked Exhibits "F" and "G." The percentage of income demanded by members of defendant Society from radio broadcasting stations since 1932, represents a percentage of the entire income received by such broadcasting stations for the sale to advertisers of their operating time on the air. Such demand for the payment of these percentages constitutes a charge upon income received by radio broadcasting stations for their time devoted to the broadcasting of lectures, dramatizations, sporting events, and other programs,

which employ none of the copyrighted musical compositions of the members of defendant Society.

G. To withdraw on January 1, 1941, from approximately 568 radio broadcasting stations interspersed throughout the United States, including the three national network systems, National Broadcasting Company, Columbia Broadcasting System and Mutual Broadcasting System, who had not accepted a license at the price and terms fixed by the defendants, the right to broadcast in interstate commerce and to deprive the radio listening public of the privilege of hearing and enjoying all the copyrighted music of all the respective members of the Society.

H. To create and maintain, prior to December 31, 1940, a distinction and discrimination between the license agreements exacted of radio broadcasting stations owned at least 51 percent by newspapers and license agreements exacted from radio broadcasting stations not so owned. The license agreement offered by defendant Society to broadcasting stations owned 51 percent by newspapers, and accepted by many, did not require payment to defendant Society of a percentage of the station's income derived from all advertisers, but only required the payment of 3 percent of the income of the station received from advertisers whose programs included musical compositions owned or controlled by members of defendant Society. This 3 percent was payable until the total amount paid by the station equalled an amount agreed upon between the station and defendant Society. Thereafter, the station was required to pay 5 percent of all additional income received by it from programs in which musical compositions owned or controlled by members of defendant Society were used.

I. To insert provisions or terms in all the license agreements to users of music which permit the copyright owner, through defendant Society, to withdraw at will from the operation of the license any musical compositions owned or controlled by such copyright owner and thereby prevent its broadcast by the broadcasting station, thereby enabling members of defendant Society to withdraw musical compositions in the Society's repertoire in great demand by the general public, for the purpose of collecting additional compensation for the right to perform publicly for profit and for the further purpose of collecting enhanced and non-competitive fees for the right to record and reproduce mechanically copyrighted musical compositions reproduced for public performance for profit; and to force radio broadcasting stations to accept all terms and conditions imposed by members of defendant Society for the right to broadcast popular musical compositions which have been withdrawn from the Society's general licenses.

J. To require radio broadcasting stations to accept a blanket license as heretofore stated upon terms and conditions imposed by defendant Society, thereby securing for members of the Society the exclusive use of radio broadcasting as a means of conveying musical compositions to the ear of the public-at-large, destroying the economic incentive of broadcasting stations to use the musical compositions of composers, authors and publishers who are not members of defendant Society and thereby preventing non-members of defendant

Society from receiving the compensation for the rights of public performance of their musical compositions, which they would otherwise receive, and limiting and restricting the popular demand of the listening public to musical compositions controlled by defendant Society.

K. To require acceptance of their arbitrary and non-competitive demands for royalties by all classes of music users, as a condition precedent to the acquisition by such music users of the right to perform any copyrighted musical compositions of any members of the Society publicly for profit. The motion picture exhibitors interspersed throughout the United States must perform those musical compositions synchronized with the motion picture films in order to exhibit the motion picture films. Without the right to exhibit and perform the musical compositions synchronized therewith, the motion picture films received in interstate commerce are valueless. All users of music must perform those musical compositions demanded by their audiences. The limitation and restriction of popular demand to the musical compositions controlled by defendant Society has forced such users of music to obtain from defendant Society a license to perform music controlled by defendant Society so demanded by the public. The members of defendant Society, through defendant Society, have concertedly refused to grant such users permission to perform individual musical compositions selected by the users, but have insisted and still insist that general licenses be accepted which cover all the musical compositions of all the members of defendant Society, upon payment of a fixed amount therefor, irrespective of whether one or more of such musical compositions are actually performed. By this method of licensing the members of defendant Society have further restricted the popular demand to those musical compositions owned or controlled by the members of defendant Society, and, have prevented the use of musical compositions owned by non-members of defendant Society.

L. To prevent the sale and transportation in interstate commerce of musical scores owned by composers, authors and publishers who are not members of defendant Society, by refusing to issue licenses for the public performance of musical compositions owned or controlled by them, except upon the terms and conditions above set forth.

M. To adopt and maintain a comprehensive system for the acquiring of detailed and complete information relative to the musical compositions used by broadcasting stations, by means of which information the members of defendant Society have been and are enabled to conduct their operations through defendant Society so as to prevent the development of competition between members of defendant Society and owners of copyrighted musical compositions who are not members of defendant Society, and to maintain and enforce all provisions of the licenses between Society and radio broadcasting stations.

VI

Purpose and effect of the conspiracy

16. That the defendants have adopted the means and engaged in the activities aforesaid, with the intent,

purpose, and effect of unreasonably and unlawfully maintaining enhanced and uniform prices in the interstate commerce in copyrighted musical compositions controlled by Society, and have otherwise restrained unreasonably the interstate commerce of radio broadcasting, sheet music, motion picture films, and electrical transcriptions; that all members of defendant Society, through the mutual and identical agreements hereinbefore described, have actively and effectively restrained their own activities, have eliminated competition among themselves, and have created, maintained and utilized defendant Society as an instrumentality unreasonably to restrain and restrict, directly and indirectly the interstate trade and commerce, as hereinbefore described.

VII

Jurisdiction and venue

17. That the combination and conspiracy herein set forth has operated and has been carried out in part within the Eastern District of Wisconsin, and many of the unlawful acts pursuant thereto have been performed by defendants and their representatives in said District; that the interstate trade and commerce in radio broadcasting, sheet music, motion picture films and electrical transcriptions as herein described, is carried on in part within said District; that said defendants have usual places of business in the said District and therein transact business and are within the jurisdiction of the Court.

18. That this Information is filed and the jurisdiction of this Court is invoked against defendants

The exclusive right of public performance in every such musical work shall be deemed assigned to the *Society* by this instrument and shall vest in and be the absolute property of the *Society* for the term hereof, immediately upon the work being written, composed, acquired, owned, published or copyrighted.

The rights hereby assigned shall include:

(a) All the rights and remedies for enforcing the copyright or copyrights of such musical works, whether such copyrights are in the name of the *Owner* and/or others, as well as the right to sue under such copyrights in the name of the *Society* and/or in the name of the *Owner* and/or others, to the end that the *Society* may effectively protect and be assured of all the rights hereby assigned.

(b) The exclusive right of public performance of the separate numbers, songs, fragments or arrangements, melodies or selections forming part or parts of musical plays and dramatico-musical compositions, the *Owner* reserving and excepting from this assignment the right of performance of musical plays and dramatico-musical compositions in their entirety, or any part of such plays or dramatico-musical compositions on the legitimate stage.

(c) The right of public performance by means of radio broadcasting, telephoning, "wired wireless," and all forms of synchronism with motion pictures, and/or any method of transmitting sound: Provided, however, that the *Owner* shall have the right, in good faith, by written notice to the *Society,* to restrict, limit or prohibit the public performance by radio broadcasting of works the copyright of which is vested in the *Owner,* and the *Society* agrees that all licenses by it issued shall contain a provision reserving its right to restrict or limit, or to prohibit entirely, the performance by broadcasting of any works in its repertory: and Provided further, that if the *Owner* notify the *Society* in writing

to restrict, limit or prohibit the public performance of such copyrighted work, the *Owner* shall not, by the service of such notice, become repossessed of any of the rights transferred to the *Society* by this assignment.

2. The term of this agreement shall be for a period of five (5) years from the first day of January 1931, and expiring on the 31st day of December 1935.

3. The *Society* agrees, during the term hereof, in good faith to use its best endeavors to promote and carry out the objects for which it was organized, and to hold and apply all royalties, profits, benefits and advantages arising from the exploitation of the rights assigned to it by its several members, including the *Owner,* to the uses and purposes as provided in its Articles of Association (to which reference is hereby made), as now in force or as hereafter amended.

4. The *Owner* hereby irrevocably, during the term hereof, authorizes, empowers and vests in the *Society* exclusively, the right to enforce and protect such rights of public performance under any and all copyrights, whether standing in the name of the *Owner* and/or others, in any and all works copyrighted by the *Owner,* and/or by others; to prevent the infringement thereof, to litigate, collect and receipt for damages arising from infringement, and in its sole judgment to join the *Owner* and/or others in whose names the copyright may stand, as parties plaintiff or defendants in suits or proceedings to bring suit in the name of the *Owner* and/or in the name of the *Society,* or others in whose name the copyright may stand, or otherwise, and to release, compromise, or refer to arbitration any actions, in the same manner and to the same extent and to all intents and purposes as the *Owner* might or could do, had this instrument not been made.

5. The *Owner* hereby makes, constitutes and appoints the *Society,* or its successor, the *Own-*

er's true and lawful attorney, irrevocably during the term hereof, and in the name of the *Society* or its successor, or in the name of the *Owner,* or otherwise, to do all acts, take all proceedings, execute, acknowledge and deliver any and all instruments, papers, documents, process, and pleadings that may be necessary, proper, or expedient to restrain and recover damages in respect to or for the infringement or other violation of the rights of public performance in such works, and to discontinue, compromise or refer to arbitration any such proceedings or actions, or to make any other disposition of the differences in relation to the premises.

6. The *Owner* agrees from time to time to execute, acknowledge and deliver to the *Society,* such assurances, powers of attorney or other authorizations or instruments as the *Society* may deem necessary or expedient to enable it to exercise, enjoy and enforce, in its own name or otherwise, all rights and remedies aforesaid.

7. It is mutually agreed that during the term hereof the Board of Directors of the *Society* shall be composed of an equal number of writers and publishers respectively, and that the royalties distributed by the Board of Directors shall be divided into two (2) equal sums, and one (1) each of such sums credited respectively to and for division amongst (a) the writer members, and (b) the publisher members, in accordance with the system of distribution and classification as determined by the Classification Committee of each group, in accordance with the Articles of Association as in effect on January 1, 1931, except that the classification of the *Owner* within his class may be changed.

8. The *Owner* agrees that his classification in the *Society* as determined from time to time by the Classification Committee of his group

and/or the Board of Directors of the *Society,* in case of appeal by him, shall be final, conclusive and binding upon him.

The *Society* shall have the right to transfer the right of review of any classification from the Board of Directors to any other agency or instrumentality that in its discretion and good judgment it deems best adapted to assuring to the *Society's* membership a just, fair, equitable and accurate classification.

The *Society* shall have the right to adopt from time to time such systems, means, methods and formulae for the establishment of a member's status in respect of classification as will assure a fair, just and equitable distribution of royalties among the membership.

9. "Public Performance" Defined. The term *"public performance"* shall be construed to mean vocal, instrumental and/or mechanical renditions and representations in any manner or by any method whatsoever, including transmissions by radio broadcasting stations, transmissions by telephony, and/or "wired wireless"; and/or reproductions of performances and renditions by means of devices for reproducing sound recorded in synchronism or timed relation with the taking of motion pictures.

10. "Musical Works" Defined. The phrase *"musical works"* shall be construed to mean musical compositions and dramatico-musical compositions, the words and music thereof, and the respective arrangements thereof, and the selections therefrom.

11. The powers, rights, authorities and privileges by this instrument vested in the *Society,* are deemed to include the World, provided, however, that such grant of rights for foreign countries shall be subject to any agreements now in effect, a list of which are noted on the reverse side hereof.

Signed, Sealed, and Delivered, on this ----------- day of ------------, 19--.

--------------------,
--------------------,
Owner.

American Society of Composers,
Authors and Publishers,
By ——— ——— *Secretary.*

Foreign agreements at this date in effect

[See paragraph 11 of the within agreement]

Country	With (name of firm)	Expires	Remarks

Exhibit B

Original No.-----------
Operator's Broadcasting License Call----------

Memorandum of Agreement between American Society of Composers, Authors and Publishers, (hereinafter styled "Society"), and------------------- (hereinafter styled "Licensee"), as follows:

1. Society grants to Licensee, its successors and assigns, and Licensee accepts for a period of three (3) years from---------------, a license to publicly perform by broadcasting from Radio Station-----------, located at ----------------, non-dramatic renditions of the separate musical compositions heretofore or hereafter during the term hereof copyrighted or composed by members of Society, or of which Society shall have the right to license such performing rights.

2. The within license does not extend to or include the public performance by broadcasting or otherwise of any rendition or performance of any opera, operetta, musical comedy, play or like production, as such, in whole or in part.

3. Nothing herein contained shall be construed as authorizing Licensee to grant to others any right to reproduce or perform publicly for profit by any means, method or process whatsoever, any of the musical compositions coming within the purview of the within license performed pursuant hereto, or as authorizing any receiver of any such broadcast rendition to publicly perform or reproduce the same for profit by any means, method or process whatsoever.

4. The within license is limited to the separate musical compositions heretofore or hereafter during the term hereof copyrighted or composed by members of Society, or of which Society shall have the right to license the performing rights hereinbefore granted, in programs rendered at or from said radio station, or at or from any other place duly licensed by Society to perform such works (unless the performance originates at a place or from a source which Society does not customarily license), from which place rendition of such works is transmitted to said radio station for the purpose of being broadcast from there.

It is understood, however, that Licensee shall be guilty of a breach under this Article (No. 4) only in the event that it continues to broadcast a program rendered at such places other than the said station after Licensee shall have received notice from Society that such other places are not licensed by Society to perform.

5. The within license is granted upon the express condition:

(a) That should the power input as at present authorized by the Federal Radio Commission for the said station (-------- watts) be changed during the term hereof, the basic fee as provided in the first paragraph of Article No. 8 hereof shall be adjusted.

(b) That in event the license of said station from the Federal Radio Commission is terminated, cancelled, revoked or suspended, or in the event that radio broadcasting is supported from other sources or operated by other than private interests, than as now prevails, LICENSEE shall promptly notify SOCIETY thereof, and either SOCIETY or LICENSEE may then terminate this agreement; and in such event, LICENSEE shall be under no further liability to SOCIETY for the payment of any license fee hereunder; provided, however, that if the license of said station to broadcast is suspended for a period less than the term of the within license, then in such event LICENSEE shall be relieved from payment of the license fee hereunder only during such period of suspension.

6. LICENSEE agrees upon request to furnish to SOCIETY during the term of the within license a list of all musical compositions (or, at the option of LICENSEE, a list of all musical compositions heretofore or hereafter during the term hereof copyrighted or composed by members of SOCIETY or of which SOCIETY shall have the right to license the performing rights hereinbefore granted) broadcast from or through the said station, showing the title of each composition and the composer and/or author thereof; provided that LICENSEE shall not be obligated under this Article No. 6 to furnish such a list covering a period or periods in the aggregate during any one calendar year in excess of three months. The lists so furnished by LICENSEE to SOCIETY shall be strictly confidential and SOCIETY covenants that it will make no disclosure thereof or of the contents thereof.

7. SOCIETY agrees during the term hereof to maintain for the service of LICENSEE substantially its pres-

ent catalogue of compositions heretofore or hereafter during the term hereof copyrighted or composed by members of SOCIETY. SOCIETY reserves the right, however, at any time and from time to time to withdraw from its repertory and from operation of the within license any musical composition or compositions; and upon any such withdrawal, LICENSEE may immediately cancel the within agreement by giving written notice to SOCIETY of its election so to do.

In the event of any such cancellation by LICENSEE, or in the event of a termination of this agreement and the within license pursuant to the provisions of Article No. 5 hereof, or otherwise, SOCIETY shall refund to LICENSEE pro rata license fees, if any, paid for a period beyond the date of such cancellation or termination.

8. Under the terms and conditions hereinabove set forth, LICENSEE agrees to pay to SOCIETY, as compensation for the within license, the sum of ------------ Dollars ($--------) per annum, payable in equal monthly installments on or before the 10th of each month during the term hereof, plus

(a) For the first year of the term hereof, a sum equal to three percent (3%) of the net receipts (as hereinafter defined) of the LICENSEE from the sale of its broadcasting facilities; and,

(b) For the second year of the term hereof, a sum equal to four percent (4%) of the net receipts (as hereinafter defined) of the LICENSEE from the sale of its broadcasting facilities; and,

(c) For the third year of the term hereof, a sum equal to five percent (5%) of the net receipts (as hereinafter defined) of the LICENSEE from the sale of its broadcasting facilities.

(d) The term "net receipts" from the sale of its broadcasting facilities shall refer to the full amount charged by and actually paid to LICENSEE for the use of its broadcasting facilities (sometimes known as "time on the air"), after deducting commissions not exceeding fifteen percent (15%), if any, paid to the advertising agent or agency (not employed or owned in whole or in part by LICENSEE).

LICENSEE shall render monthly statements to SOCIETY on or before the 10th of each month covering the period of the preceding calendar month on forms supplied gratis by SOCIETY, and shall include in such statements all net receipts, without exception, during the said month from the sale of the broadcasting facilities ("time on the air") of the said station, which said statement shall be rendered under oath and accompanied by the remittance due SOCIETY under the terms hereof. Any such statement may also include a deduction by or credit to the LICENSEE for any amount reported by it as received during a prior month from the sale of its broadcasting facilities but which it has been compelled to refund as a "time discount." In the event that any such item shall be collected after it has been credited or deducted as aforesaid, it shall then be included again in the net receipts of LICENSEE on the monthly statement next succeeding the date of the actual collection.

9. SOCIETY shall have the right, by its duly authorized representative, at any time during customary business hours, to examine the books and records of account of LICENSEE only to such extent as may be necessary to verify any such monthly statement of accounting as may be rendered pursuant hereto; provided that such examination does not interfere with the usual conduct of business by LICENSEE.

It is understood and agreed that SOCIETY shall consider all data and information coming to its attention as a result of any such examination of books and records as completely and entirely confidential.

10. Upon any breach or default of any terms herein contained, SOCIETY may give LICENSEE thirty (30) days' notice in writing to repair or correct such breach or default and in the event that such breach or default has not been repaired or corrected within said thirty (30) days, SOCIETY may then forthwith cancel said license.

11. SOCIETY agrees to indemnify, save and hold LICENSEE harmless, and defend LICENSEE from and against any claim, demands or suits that may be made or brought against the LICENSEE with respect to renditions given during the term hereof in accordance with this license of musical compositions contained in SOCIETY's repertory heretofore or hereafter during the term hereof copyrighted or composed by members of SOCIETY.

In the event of the service upon LICENSEE of any notice, process, paper or pleading, under which a claim, demand or action is made or begun against LICENSEE on account of any such matter as is hereinabove referred to, LICENSEE shall forthwith give SOCIETY written notice thereof and simultaneously therewith deliver to SOCIETY any such notice, process, paper or pleading, or a copy thereof, and SOCIETY shall have sole and complete charge of the defense of any action or proceeding in which any such notice, process, paper or pleading is served. LICENSEE, however, shall have the right to engage counsel of its own, at its own expense, who may participate in the defense of any such action or proceeding and with whom counsel for SOCIETY shall cooperate.

Licensee shall cooperate with Society in every way in the defense of any such action or proceeding, and in any appeals that may be taken from any judgments or orders entered therein, and shall execute all pleadings, bonds or other instruments, but at the sole expense of Society, that may be required in order properly to defend and resist any such action or proceeding, and properly to prosecute any appeals taken therein.

In the event of the service upon Licensee of any notice, process, paper or pleading, under which a claim, demand or action is made, or begun against Licensee on account of the rendition of any musical composition contained in the Society's repertory but Not heretofore or hereafter during the term hereof copyrighted or composed by members of Society, Society agrees at the request of Licensee to cooperate with and assist Licensee in the defense of any such action or proceeding, and in any appeals that may be taken from any judgments or orders entered therein.

12. All notices required or permitted to be given by either of the parties to the other hereunder shall be duly and properly given if mailed to such other party by registered United States mail addressed to such other party at its main office for the transaction of business.

In witness whereof, this agreement has been duly subscribed by Society and Licensee this day of ____________, 193 .

American Society of Composers,
Authors and Publishers
By ____________________

Licensee.
By ____________________

Exhibit C

Operator's broadcasting license for newspaper-owned station

No.: ___________
Call: __________

Memorandum of Agreement between American Society of Composers, Authors and Publishers, (hereinafter styled "Society"), and ______________ (hereinafter styled "Licensee"), conducting a radio broadcasting station 51% or more owned and operated by a daily newspaper, as follows:

1. Society grants to Licensee, and Licensee accepts for a period of three (3) years from October 1, 1932, a license to publicly perform by broadcasting from Radio Station ____________ located at ____________, non-dramatic renditions of the separate musical compositions heretofore or hereafter during the term hereof copyrighted or composed by members of Society, or of which Society shall have the right to license such performing rights.

2. The within license does not extend to or include the public performance by broadcasting or otherwise of any rendition or performance of any opera, operetta, musical comedy, play or like production, as such, in whole or in part.

3. Nothing herein contained shall be construed as authorizing Licensee to grant to others any right to reproduce or perform publicly for profit by any means, method or process whatsoever, any of the musical compositions coming within the purview of the within license performed pursuant hereto, or as authorizing any receiver of any such broadcast rendition to publicly perform or reproduce the same for profit by any means, method or process whatsoever.

4. The within license is limited to the separate musical compositions heretofore or hereafter during the term hereof copyrighted or composed by members of SOCIETY, or of which SOCIETY shall have the right to license the performing rights hereinbefore granted, in programs rendered at or from said radio station, or at or from any other place duly licensed by SOCIETY to perform such works (unless the performance originates at a place or from a source which SOCIETY does not customarily license), from which place rendition of such works is transmitted to said radio station for the purpose of being broadcast from there.

It is understood, however, that LICENSEE shall be guilty of a breach under this Article (No. 4) only in the event that it continues to broadcast a program rendered at such places other than the said station after LICENSEE shall have received notice from SOCIETY that such other places are not licensed by SOCIETY to perform.

5. The within license is granted upon the express condition:

(a) That should the power input as at present authorized by the Federal Radio Commission for the said station (________ watts) be changed during the term hereof, the basic fee as provided in the first paragraph of Article No. 8 hereof shall be adjusted.

(b) That in event the license of said station from the Federal Radio Commission is terminated, cancelled, revoked or suspended, or in the event that radio broadcasting is supported from other sources or operated by other than private interests, than as now prevails, LICENSEE shall promptly notify SOCIETY thereof, and either SOCIETY or LICENSEE may then terminate this agreement; and in such event, LICENSEE shall be under no further liability to SOCIETY for the payment of any license fee hereunder; provided, however, that

if the license of said station to broadcast is suspended for a period less than the term of the within license, then in such event LICENSEE shall be relieved from payment of the license fee hereunder only during such period of suspension.

6. LICENSEE agrees upon request to furnish to SOCIETY during the term of the within license a list of all musical compositions (or, at the option of LICENSEE, a list of all musical compositions heretofore or hereafter during the term hereof copyrighted or composed by members of SOCIETY or of which SOCIETY shall have the right to license the performing rights hereinbefore granted) broadcast from or through the said station, showing the title of each composition and the composer and/or author thereof; provided that LICENSEE shall not be obligated under this Article No. 6 to furnish such a list covering a period or periods in the aggregate during any one calendar year in excess of three months. The lists so furnished by LICENSEE to SOCIETY shall be strictly confidential and SOCIETY covenants that it will make no disclosure thereof or of the contents thereof.

7. SOCIETY agrees during the term hereof to maintain for the service of LICENSEE substantially its present catalogue of compositions heretofore or hereafter during the term hereof copyrighted or composed by members of SOCIETY. SOCIETY reserves the right, however, at any time and from time to time to withdraw from its repertory and from operation of the within license any musical composition or compositions; and upon any such withdrawal, LICENSEE may immediately cancel the within agreement by giving written notice to SOCIETY of its election so to do.

In the event of any such cancellation by LICENSEE, or in the event of a termination of this agreement and the within license pursuant to the provisions of Arti-