NON-EXCLUSIVE LICENSING IN AMERICA

APRA has maintained that if its rights were non-exclusive, it would not be able to adequately enforce its members’ rights. That is, APRA would not be able to commence proceedings and composers and publishers would be required to prosecute all infringements. This is because of the combined operation of sections 115, 119 and 120 of the Copyright Act (Australian Act). The ACCC has sought further clarification of the reasons why the US societies are able to acquire the rights of their respective members on a non-exclusive basis and still perform as effective enforcers of their members’ rights in that jurisdiction. Briefly, the answer is that the US collecting societies are unable to enforce their respective rights as effectively as APRA (and other societies that are assigned rights in the works of their members). This is because the US collecting societies face certain difficulties – of procedure, of public relations and of principle – that creators in other jurisdictions do not. APRA submits that, considering the following, the ACCC cannot justifiably consider the US approach to be superior to the exclusive rights (as modified by licence back and opt out) granted in Australia and throughout the rest of the world.

Non-exclusive rights

At the outset, APRA refers the ACCC to the confidential opinion of Mark Leeming SC – as his Honour then was – titled ‘The Consequences of Non-Exclusivity’, dated 19 March 2013 and included as attachment 27 to the submissions in support of the application. In his learned opinion, it was set out that only owners or exclusive licensees of copyright have a prima facie right to bring infringement proceedings under the Australian Act. Further, whether the Australian Act permits a non-exclusive licensee to participate at all in infringement proceedings, on the basis that the copyright owners are joined as co-plaintiffs, is a question of considerable uncertainty and therefore cannot be taken for granted. Importantly, even if it is permissible, the joinder of an APRA member as a co-plaintiff, which would be the result of APRA controlling merely non-exclusive rights, is attended by extensive practical and procedural difficulties.

APRA also reiterates its concerns that if it were required to join its members as co-plaintiffs, it would need to obtain the cooperation of, and also coordinate, many of its and its affiliates’ members for the sake of the litigation. Presumably, many of the co-plaintiffs would require legal advice, and might not agree to be exposed to the risks of a failed litigation. The individuals involved, being APRA members but also members of foreign affiliates, would be dispersed around the globe (often touring), would speak different languages, and are not necessarily of such a high level of sophistication that litigation procedures would be immediately comprehensible. Litigating on non-exclusive rights is also profoundly problematic because the plaintiff must prove an absence of licence where there is a possibility that a copyright owner might have independently granted a non-exclusive licence. By law, non-exclusive licences may be granted orally and may also be implied including by conduct. The nature of this requirement is such that any plaintiff without exclusive rights is exposed to such enormous risks in initiating proceedings against infringers, as to render litigation near unfeasible.

Enforcement of non-exclusive rights in America

In the US, under §501 of the Copyright Act (US) (US Act), the legal or beneficial owner of an exclusive right under a copyright is entitled to institute an action for any infringement of that particular right committed while he or she is the owner of it. This is the US counterpart of section 115(1) of the Australian Act.
Section 120 of the Australian Act requires that where the owner and exclusive licensee have concurrent rights of action for an infringement, and one brings the action, the applicant may not proceed (without leave of the court) unless the other is joined in the action or added as a defendant. The remainder of §501 of the US Act contains the (different) US version of this provision: The court may require such owner to serve written notice of the action with a copy of the complaint upon any person shown, by the records of the Copyright Office or otherwise, to have or claim an interest in the copyright, and shall require that such notice be served upon any person whose interest is likely to be affected by a decision in the case. The court may require the joinder, and shall permit the intervention, of any person having or claiming an interest in the copyright.

It appears that the US legislation does not have an equivalent of section 119, which essentially gives the exclusive licensee the same rights in the works and to remedies for infringements thereof as the owner.

ASCAP, by agreement with its members, holds “all the rights and remedies for enforcing the copyright or copyrights of such musical works, whether such copyrights are in the name of the owners 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 granted.” By agreeing with those who have standing to sue for infringement to be exclusively able to bring claims for infringement, ASCAP appears to circumvent the requirement that the applicant must be the owner of the infringed works – it is the exclusive owner of the right to initiate proceedings. ASCAP is technically not the applicant, the owners are. The owners just have no say about (nor, necessarily, notice of) the fact that proceedings are initiated in their names. APRA notes that Dr Leeming SC queries whether this right exists under Australian law.

ASCAP’s usual practice is to bring proceedings against infringers, much as APRA does. However, the originating process lists only the owners, being the writers and the publishers. Below is a screenshot of an extract of a sample Complaint, which does not name ASCAP but does name owners such as Bruce Springsteen.

![Complaint Example](image)

ASCAP is able to conduct the proceedings, but ASCAP members must bring the claim.
By US statute, a court is empowered to require an owner to serve written notice of the action with a copy of the complaint upon any person shown to have or claim an interest in the copyright, but doing so is not mandatory unless the person’s interest is likely to be affected by a decision in the case (§501(b) of the US Act). Infringement litigation by collecting societies does not call into question an owner’s interest in the owner’s work; it only enforces an owner’s right to seek a licence for dealings with the work. Therefore, strictly speaking, a collecting society’s members need not be notified of any claim brought on their behalf. The member agrees upon executing the membership agreement that ASCAP in its sole judgment may join the member or others in whose names the copyright may stand, as parties, plaintiff or defendants in suits or proceedings. The result is the following: an American collecting society is entitled to expose its members to the risks of litigation, but does not – unless a court happens to elect to order it – need to notify the member of the litigation. Accordingly, as a product of the consent obtained as part of a pro forma membership agreement, generally given in a context other than one of pending litigation, a US collecting society may institute proceedings in the name of its members.

This can lead to severe difficulties in the ability to enforce copyright, and ones that are immediately visible if we compare APRA’s ability to enforce its members’ rights to that of its US counterparts. By being made a party to proceedings, an APRA member would be exposed to a number of risks including that of failed litigation and extensive costs and discovery orders.

There are also considerable public-relations concerns that must be taken into account. In February 2010, reports emerged of Bruce Springsteen suing a New York pub, Connolly’s Pub & Restaurant. Springsteen published a statement, declaring that he did not know about the lawsuit: “ASCAP was solely responsible for naming Bruce Springsteen as a plaintiff in the lawsuit. Bruce Springsteen had no knowledge of this lawsuit, was not asked if he would participate as a name plaintiff, and would not have agreed to do so if he had been asked. Upon learning of this lawsuit this morning, Bruce Springsteen’s representatives demanded the immediate removal of his name from the lawsuit.” Springsteen’s lawyers had his name removed from the claim, leaving his co-writer as the sole plaintiff. It is entirely foreseeable that, in a similar case, but where there is no co-writer, or a co-writer that shared Springsteen’s concerns, the litigation would have collapsed. Having to litigate in the personal name of an individual songwriter impedes the ability of a collecting society to enforce its members’ rights. Moreover, Springsteen’s concerns notwithstanding, it is clear that ASCAP did not do anything that it was not entitled to do, or anything that deviates from its typical operations. Annexed to this document is an article that comprehensively reports the story: Ben Sheffner, ‘Born to Sue: Bruce Springsteen’s lame effort to back out of a copyright lawsuit’, Slate New York, 9 February 2010.’

The Springsteen situation is an example of one of the difficulties that may arise in an environment of non-exclusive licensing, especially with respect to member- and public-relations. It also raises a further issue of principle. Generally speaking, infringement actions arise when an entity performs a vast range of music without taking a licence. By way of example, APRA may litigate against a nightclub that operates each night without a licence, despite APRA’s demands (often over the course of many years) that a licence agreement be entered into. During the course of the nightclub’s infringements, many hundreds, if not thousands, of works will be performed without authorisation. APRA will obtain evidence of a sample of the works infringed, and cite those works as evidence of infringement. Individuals who happen to hold rights in the small sample of songs arbitrarily collected on one occasion during a lengthy period of infringement might object to being the face of an infringement suit, particularly against a small establishment, for public-relations reasons, or from fear of being ‘blacklisted’ by the venue. It is also logistically difficult, for reasons APRA has previously submitted. But a collecting society placing the burden of enforcing the blanket licence model on a few members is also unprincipled. The defence of the society’s rights to insist on users entering into blanket licences should be the burden of the entire membership, not the handful of owners who happen to control the works in the sample of evidence collected for the procedural requirements of the proceedings. The way to best spread the burden of enforcement
across the entire membership, which is how it should most appropriately be arranged, is for the society to litigate in its own name, without co-plaintiff songwriters.

Finally, it should be noted that it is not necessarily the case that a non-exclusive regime in the US was in response to, or motivated by, any antitrust concerns. The US collecting societies are certainly shaped by the Consent Decrees that were promulgated in the 1940s under the Sherman Act. At the time of the various changes to the unique system in which the US collecting societies operate, deals (in particular, “at source” licences) had already been struck between owners and consumers, and these agreements would have been jeopardised by the requirement that collecting societies are assigned the rights in a work. The US creative marketplace was far more advanced than that of Australia at the corresponding time, and it was a more pressing concern to protect already existing agreements and business practices. APRA attaches a useful exposition of the history of the environment in which the US collecting societies have operated: Professor John M. Kernochan, ‘Collective Administration of Authors’ Rights: Music Performing Rights Organizations in the United States of America: Special Characteristics; Restraints; and Public Attitudes’, 10(3) Law & The Arts, (1986).

It is important to not confuse an historical anomaly relevant to one jurisdiction, on the one hand, with an ideological effort to protect the benefits had by competition, on the other.

Conclusion

Considering all the ramifications of a non-exclusive licensing regime, it should be noted that there is little to be gained by instituting one. The principal competitive benefit had by causing APRA to hold its members’ rights non-exclusively is that it would allow for consumers to deal directly with APRA’s members. But consumers are already able to deal directly with owners by virtue of APRA’s licence-back, opt out and resignation facilities. In particular, the licence back facility delivers the benefits of non-exclusivity, but without any of its detriments. A non-exclusive licensing regime would devastate APRA’s ability to enforce its members’ rights, and would provide no perceptible benefit to the marketplace.
Born To Sue
Bruce Springsteen's lame effort to back out of a copyright lawsuit.
By Ben Sheffner | Posted Tuesday, Feb. 9, 2010, at 2:41 PM

It was a classic piece of music industry journalism: Rapacious Big Music beats up on hapless Little Guy, with The Artist, who just wants to make *ars gratia artis*, caught in the middle.

This time, Big Music was ASCAP, the American Society of Composers, Authors, and Publishers, which collects licensing royalties for songwriters, composers, and music publishers. The Little Guy was a humble Irish bar called Connolly's Pub & Restaurant. And The Artist was none other than New Jersey's own "rock & roll working-class hero," Bruce Springsteen.

As first reported by the New York Daily News, The Boss sued Connolly’s last week for copyright infringement after the bar allegedly failed to obtain a license from ASCAP to publicly perform his songs, including "Growin' Up" and "Because the Night." But shortly after the story about the lawsuit broke, Springsteen's flacks claimed it was all a big misunderstanding, blamed ASCAP, and said he was ditching the suit.

"ASCAP was solely responsible for naming Bruce Springsteen as a plaintiff in the lawsuit," said a Feb. 4 statement from his PR reps at Shore Fire Media. "Bruce Springsteen had no knowledge of this lawsuit, was not asked if he would participate as a named plaintiff, and would not have agreed to do so if he had been asked. Upon learning of this lawsuit this morning, Bruce Springsteen's
representatives demanded the immediate removal of his name from the lawsuit."

Sorry, Boss, but if you say you really believe all that, then it won't be you that's on fire—it will be your pants. And since small-time songwriters rely on big-timers like you to enforce these copyright protections, you shouldn't try to back out of this lawsuit anyway. (As of this writing, Springsteen still hadn't withdrawn.)

*Update, Feb. 10, 2010:* Bruce has indeed bailed from the lawsuit. On Feb. 5, just two days after the suit was originally filed, Springsteen's lawyers filed a first amended complaint, which omits all reference to The Boss and his songs. Left alone to fight against Connolly's is (the late) Clinton C. Ballard Jr., whose song "You're No Good" was allegedly played at Connolly's without permission.

Contrary to Springsteen's protestations, ASCAP is not freelancing here. In fact, Springsteen—like all members of the 96-year-old organization—has given ASCAP explicit permission to file lawsuits in his name against noncompliant venues. Paragraph 4 of the ASCAP Membership Agreement states that members:

irrevocably ... authorize[ ] , empower[ ] and vest[ ] in the Society the right to ... litigate ... and in its sole judgment to join the [member] and/or others in whose names the copyright may stand, as parties plaintiff or defendants in suits or proceedings; [and] to bring suit in the name of the [member] ....

ASCAP often gives a heads-up to members before it sues on their behalf, but that's not required. Despite my repeated inquiries to Springsteen's press people, attorney, and manager, as well as ASCAP, no one would tell me whether anyone on his team was alerted in this specific case. (The Code of Silence reigns.)

In any case, Springsteen's claim of fawnlike innocence, that he's the kind of guy who would never file a suit against a poor, defenseless little bar, crumbles in the face of the dozens of nearly identical copyright suits he has filed over the past decades against bars and restaurants that wouldn't pay their ASCAP fees. Here are just a few of the fine establishments the Boss has sued: Bull & Bear Pub, in Syracuse, N.Y.; Aftershock Sports Bar & Grill, in Wentzville, Mo.; the Deerhead Tavern, of Evansville, Ind.; Corky's Pub, of Beach Park, Ill.; Pretenders, in Benton, Ill.; J.R.'s Pub & Grille, in Dunellen, Fla.; and Monaco's Ristorante, of Winsted, Conn. Also, Meritage, in Charleston, S.C.; Southern Belle's, in Charlotte, N.C.; and the aptly named Rolling Thunder Road House Cafe in Folly Beach, S.C. And he even sicced his lawyers on the Holiday Inn way down in the U.S. Virgin Islands, though it was owned by a limited partnership in his beloved New Jersey. And as anyone with a few minutes and a few bucks to spend on the federal court database PACER can quickly confirm, these are but a small sample of Springsteen's Shermansesque march of litigation across the American Land.

In fairness, there's no reason to believe Springsteen is any more litigious than the average songwriter or music publisher. His name likely appears in the caption of so many complaints
simply because his songs are played so often in bars and restaurants. ASCAP sends increasingly stern letters to unlicensed venues; if those letters are ignored, it sends investigators, who note the songs they hear. Those songs then appear as "Schedule A" on the numerous complaints it files each year.

Restaurants and bars don't like ASCAP's practices, and they occasionally kvetch to the local press. But the backlash rarely hits well-known artists, because the named plaintiffs are usually faceless corporate entities like "Sony/ATV Tunes LLC" or "Jobete Music Co., Inc.," recognized by few except the songwriters who cash their checks. Springsteen is only in the news because he had the balls—or the lack of foresight—to publish his songs as "Bruce Springsteen."

The right of copyright owners to sue over unlicensed performances of their songs at bars and restaurants is hardly in legal doubt. None other than Supreme Court Justice Oliver Wendell Holmes heartily endorsed the practice in a 1917 case called Herbert v. Shanley Co. He noted that music provides "to people having limited powers of conversation, or disliking the rival noise ... a luxurious pleasure not to be had from eating a silent meal." In other words, any songwriter or composer whose sounds fill the awkward pauses, or drown out the babbling of the drunken boor at the adjacent table, deserves to be paid for the favor.

By withdrawing from the Connolly suit, Springsteen may think he avoided the PR hit that comes from beating up on a little guy (though Connolly's, a mini-chain with four locations in Midtown Manhattan and an elaborate live-music setup, isn't exactly a hole-in-the-wall). But the reality is that his actions harm a different brand of little guy: the no-name songwriters and composers who—unlike Springsteen—don't make any money by recording and performing their tunes, and depend on their ASCAP (or BMI or SESAC) checks to pay the rent. If big-name songwriters like Springsteen aren't willing to step up and fight for their rights when they're infringed upon, the system that enables them to make a living will eventually collapse. If no one is willing to sue the noncompliant bars and restaurants, why would they pay their license fees? As music licensing expert and 37-year former ASCAP executive Todd Brabec told me, lawsuits like the one against Connolly's serve as a valuable "reminder to all users [of music], large and small, that yes, these are copyrighted works out there, and you have to have permission to use them."

Springsteen receives regular and very large payments from ASCAP, some portion of which come from fees paid by bars and restaurants and other portions of which can be attributed to lawsuit judgments and settlements. Springsteen and other artists also benefit from the deterrent value of suits exactly like the one against Connolly's. Isn't it a bit churlish of The Boss to go missing as soon as the press notices?
Many of the Founding Fathers Were Actually Twentysomethings During the American Revolution

Professional Women: Damned If They're Fashionable, Damned If They're Not

A 3-Year-Old Shot and Killed Himself, and for Once the Cops Did the Right Thing

Ben Sheffner is an attorney in Los Angeles and a former newspaper reporter. He blogs at Copyrights & Campaigns.

Photograph of Bruce Springsteen by Roger Kisby/Getty Images.

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Bruce Springsteen backs out of a copyright lawsuit.

By Ben Sheffner | Posted Tuesday, Feb. 9, 2010, at 2:41 PM
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As first reported by the New York Daily News, The Boss sued.
Music Performing Rights Organizations in the United States of America: Special Characteristics, Restraints, and Public Attitudes

by John M. Kernochan*

Editors' Note

This article was written for non-U.S. readers to acquaint them with the evolution, nature, and some of the operations and problems of the U.S. performing rights organizations. The article originally appeared, with minor variations, in the November 1985 issue of Copyright, published by the World Intellectual Property Organization (WIPO), and has attracted wide interest abroad and in the United States.

The editors believe that it deserves reprinting in the Journal of Law & the Arts, where it will reach many U.S. readers who would not normally see the WIPO periodical. For the nonspecialist lawyer (in or out of VLA, with its many affiliates around the nation) who is called on to deal with legal problems of the music world, it provides detailed background on the evolution of U.S. performing rights organizations. With this article as an introduction, it is our intention to discuss in later issues of the Journal those aspects of the U.S. organizations which are of the most interest to composers and publishers seeking (with or without a lawyer’s help) to learn what each organization has to offer its members or affiliates. Such information is essential if informed choices are to be made. It is hoped that the present article may also contribute, for all readers, to the urgent task of educating the public about the needs and difficulties of securing payment for their efforts for those who create intellectual and artistic works.

* Nash Professor of Law, Columbia University School of Law, New York. This article first appeared in Copyright (Nov. 1985), published by the World Intellectual Property Organization (WIPO). Copyright © 1985 by John M. Kernochan. All Rights Reserved.

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I. Introduction

To the non-U.S. observer, and even to non-specialists in the U.S., the institutions and methods by which music performing rights are defined and licensed and by which the license fees are collected in the U.S.A. may seem very strange. In fact, it is difficult for users, the public—even lawyers—to grasp the very concept of performing rights, that one who has purchased or acquired a device containing or emitting copyrighted performable music—be it sheet music, or tape or record, or film, or broadcast—should pay a further fee for performing rights in certain conditions. Nonetheless, the existence of performing rights and the institutions for their implementation are important features shared by American and European copyright laws.

It is the purpose of this paper: (1) to review briefly the present U.S. situation and how it developed; (2) to sketch some of the special legal and practical restraints affecting the nature and operation of the U.S. music performing rights organizations; and (3) to comment briefly on public attitudes—i.e., the attitudes of exploiters and consumers—toward payments for music performing rights and toward the performing rights organizations against the background of the restraints described.

As this article is designed as an introduction for readers unfamiliar with the U.S. legal arrangements regarding music performing rights, it paints with a broad brush, emphasizing features of the U.S. system which differ significantly from the features found generally in other systems. These include, most obviously, the presence of at least three licensing organizations (rather than the usual single one) which enjoy no actual or quasi-governmental status and are in active competition with each other. They include vigorous antitrust regulation by governmental and private action. They include the role of Congress and state legislatures in restricting collection and/or payment in various ways, and legislative resort to compulsory licensing and official fee-regulating machinery. Also included are judicial attitudes and rulings on copyright generally and performing rights in particular. Finally, some attention is given to certain self-imposed limitations observed by the U.S. organizations. All these features are operative today, of course, in a context where new technology, while providing opportunities, is eroding the substance of authors' rights through progressive loss of control over reproduction.

Despite the many restraints and limitations affecting performing rights in the U.S., purportedly for the public benefit, the U.S. public
remains largely unaware of these or unmoved by them. Exploiters and users have not shown particular willingness to accept the principle or obligations of payment to authors\(^1\) for their work. There is an evident, urgent need for a massive national, and even international, educational effort regarding authors' rights if these attitudes are to be changed and a viable system of authors' rights developed and maintained both in the U.S. and in the world as a whole.

II. Genesis of the U.S. Music Performing Right

It is interesting to compare the origin of the music performing right in each of the three nations (England, the U.S. and France) which first adopted laws protecting authors' rights. In all three countries, performance rights for dramatic works were recognized by statute earlier than for nondramatic music. In France, the dramatic performing right was recognized as early as 1791 and a society concerned with this right\(^2\) was formed in 1829. A celebrated litigation brought by Victor Parizot and other French composers in 1847 over uncompensated use of their music at the Cafe-Concert "Les Ambassadeurs" led to the creation in 1851 of SACEM,\(^3\) the French music performing rights society. In England performing rights in dramatic works were recognized in 1833; those for music were established in 1842. The United States lagged in such matters. It was not until 1856 that the dramatic public performing right was expressly provided for in U.S. law,\(^4\) and the music performing right was not added until 1897.\(^5\) Even after this, it was some time until the U.S. music performing right was effectively enforced—as it could hardly be without the existence of some special machinery, which neither the 1897 Act nor its successors provided. It is a curious fact that the first British and U.S. music performing rights organizations (PRS and ASCAP) were both established in 1914, long after the French precedent.

When the U.S. Copyright Law was revised in 1909,\(^6\) Congress redefined the nondramatic music right, limiting it to one of "public

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1. "Author" is a statutory term of art for the creator of any copyrighted work. Thus, the term covers composers, artists, and so forth, as well as authors in the traditional sense.
2. Société des auteurs et compositeurs dramatiques—SACD.
3. Société des auteurs, compositeurs et éditeurs de musique.
performance for profit."” The dramatic right was not so limited. Interestingly, however, when performing rights were finally extended to nondramatic literary works in 1952, a “for profit” limitation was also imposed with respect to such works. This drastic curb endured until 1978, the effective date of the new, and currently applicable, Copyright Revision Act of 1976 which, in an important measure, did away with the limitation.

III. U.S. Performing Rights Organizations

A. Generally

The need for music performing rights organizations has been generally acknowledged. Without the aid of such an organization, a composer, author or music publisher in a country of any size would not have the capability of finding out whether, and if so where, by whom and when, his or her work is being performed publicly with or without authority. Most would be hard pressed also to administer the multiple burdens of monitoring, licensing, and collecting and distributing fees. Such burdens would divert attention from their primary work of composing, writing, editing, promoting, etc. They would generally be unable to carry the high costs of infringement litigation against the many users who resist payment. On the other hand, the clearing-house service provided by performing rights organizations makes easier the task of honest users seeking licenses—especially bulk licenses—to perform protected works without risking infringement. And the public has, after all, a vital interest in convenient access to music at fair rates under fair license arrangements.

Foreign observers are inevitably startled to learn that the United States, in lieu of the usual single, monolithic agency, currently has no less than three vigorously competing entities of widely diverse character. While other organizations have from time to time licensed nondramatic musical performing rights in the U.S., and others may appear, the three principal organizations which dominate the U.S. licensing field today are—in the order of their emergence—ASCAP, SESAC and BMI. Some of the special characteristics of each are discussed below.

7. Id., § 1(e) (emphasis added).
9. Canada also diverges from the customary pattern, having two competing organizations: CAPAC and PRO/CANADA. Brazil, too, has multiple organizations.
B. Structure and Size

The American Society of Composers, Authors and Publishers (ASCAP), the first U.S. music performing rights organization, is an unincorporated nonprofit membership association established under the laws of the State of New York. Its members are composers, lyricists and music publishers. The Society's affairs are managed by a Board of Directors, consisting of 12 writers (elected by writer members) and 12 publishers (elected by publisher members), 3 of each representing so-called "serious" or symphonic music. Membership meetings are held regularly. Today's membership numbers some 25,800 writers and some 9,600 publishers. To be eligible for full membership, a writer need have created no more than one work which has been regularly published or commercially recorded or performed via ASCAP-licensed media. ASCAP's domestic and foreign receipts in 1984 exceeded $208,000,000.

The ASCAP of today has changed in major respects in structure and operation since 1914. Its current character reflects the results of governmental antitrust challenges and consent decrees and challenges by the users of its music, including successively emerging and powerful new industries—motion picture, recording, radio, television, cable, and so on. Battles continue in many sectors, especially as new technology develops. Even where it is acknowledged that public performance must be paid for, the struggle continues over how much should be paid. ASCAP also has been and will be affected by the shape and activities of the second major U.S. performing rights organization, BMI.

While it was the third of the U.S. organizations to be established, BMI is now an entity of major importance and a significant ASCAP rival. Most publishers today find it essential to maintain at least two separate business entities, one a member of ASCAP, one affiliated with BMI. BMI was the offspring of confrontation between ASCAP and the broadcasters in the late 1930's, culminating in a boycott of ASCAP music. It was created by broadcasters to establish a new source of contemporary music as an alternative to ASCAP, whose licensing terms were judged unacceptable. The repertoire of SESAC, the third organization, was deemed too limited to fill the need.

BMI is a corporation whose stock is entirely owned by broadcasters. While the networks were among its initial shareholders, no BMI shares are presently held by the networks. A 1969 article on BMI by its Senior Vice President states:

BMI stock was issued to broadcasting stations at five dollars a share with
a clear understanding that the company would never pay dividends and that the sale of the stock would be restricted so as to keep it out of the hands of people who might want to obtain control of the organization for the purpose of lessening its competitive capacity. BMI has never paid dividends. The stock is still valued at five dollars a share. It does not appreciate in value. It gives no special privileges to stockholders. Today there are approximately 500 stockholders, most of whom are broadcasters, retired broadcasters or broadcasters' estates, all of whom, in effect, hold their stock in trust.10

The ownership of a performing rights organization by broadcasters—primary users of its music—is a situation not replicated in any other such organization.11 Such ownership, as will appear, has not prevented broadcasters from suing ASCAP and BMI together on grounds of antitrust violation, an extraordinary situation on its face. While no writer or publisher is a member of BMI's governing board or has any voice in its management, BMI urges that this allows it greater objectivity in fixing rates and making decisions on repertoire and on its other "not for profit" activities.

BMI's approximately 45,000 writers and 28,000 publishers are designated as "affiliates," rather than "members." In contrast to ASCAP's initial but now-abandoned restrictive membership policies, BMI from the outset adopted an "open door" policy designed to give any legitimate writer or publisher access to the performing rights marketplace. It began with a monitoring or logging system broader than ASCAP's (now broadened also) designed to identify performances of types of music not reached in ASCAP surveys. BMI reported domestic and international receipts of some $150,000,000 for the fiscal year ending June 30, 1985.

As with ASCAP, the present shape of BMI reflects the effect of contests with users who resist payment or fight vigorously to minimize fees and with new industries that seek to perform music without paying for it. BMI, as will appear, has its own anti-trust consent decrees and restraints to live with, and its own special continuing need as a user-owned organization fairly to reconcile this status with the interests of its affiliates.

Although third in size, SESAC was a relatively early competitor of ASCAP in the marketing of performing rights, anedating by nine years BMI's entry into operation. It was founded in 1930 and incorporated in 1931 by Paul Heinecke, a former music publisher belong-

11. Cf. infra Section IV as to movie industry ownership of ASCAP publishers.
ing to ASCAP. He had organized Associated Music Publishers (an earlier performing rights organization, later purchased by BMI). Originally, SESAC's name stood for Society of European Stage Authors and Composers, Inc., its catalog being based on American performing rights to European music—including music controlled by the Society of Spanish Authors and Composers, the Society of German Stage Authors, and the Polish Composers Organization. After a drive begun in 1932, most broadcasters of the time became SESAC licensees. Wartime difficulties over European rights led SESAC to seek out American music not previously represented by any other organization and to specialize in so-called "country and gospel" music. "SESAC" is now simply an arbitrary trade name for an organization representing both European and American works, the latter now embracing pop, rock, R&B, soul, and jazz, as well as "classical" material.

SESAC has always been a private, family-owned corporation. Originally all its affiliates were publishers but, beginning in the early 1970's, writers were admitted and there are now roughly 1800 writer and roughly 1130 publisher affiliates. Neither writers nor publishers participate in the management of SESAC, which is conducted by an administrative staff. In this aspect, SESAC, like BMI, is unusual among the world's performing rights organizations. SESAC invites would-be affiliates to submit inquiry forms and a sample recording of music. As to its review of submissions, SESAC describes itself as "highly selective" in its affiliation of writers and publishers—a position that differs, it would seem, from the "open door" policies that now characterize both ASCAP and BMI.

SESAC's size and annual intake (over five and one-half million dollars in 1984-85) have permitted it to work with a "low profile," and its character and operations have been relatively unaffected by ASCAP and BMI wars with government and users. It is not bound by any consent decree. It is not a litigation-oriented enterprise, though it does bring infringement suits against stations that perform SESAC material without license.

C. Scope of Activities and Methods of Operation

As explained further below, ASCAP members and BMI affiliates now grant to their respective organizations the nonexclusive right to license non-dramatic public performances of their works. Note that ASCAP is not empowered to and does not purport to collect fees for dramatico-musical performances of its members' works, or so-called "mechanical fees" based on the making and sale of records and cas-
settes of members’ works. BMI’s contracts with its affiliates give it some relatively limited or “ephemeral” rights in both these areas. In contrast to European societies, neither organization collects fees from movie exhibitors when film music controlled by either is publicly performed in an exhibited film.

SESAC, alone among the United States performing rights organizations, calls upon its publisher-affiliates by contract to transfer to it all rights in publications they control, save the “right to publish, print, vend and distribute copies of the publications.” Thus, the transfer is of various exclusive rights and covers dramatico-musical works. As to works covered, SESAC in fact secures so-called grand (dramatic) rights and from most publishers mechanical and synchronization rights as well. Under SESAC’s agreements with writers, the latter grant SESAC all rights of public performance and rights to license the same, but a proviso reserves to the writer the power to issue non-exclusive licenses to music users to publicly perform “for profit” any of his publications. SESAC’s writers assign to it limited or “ephemeral” recording and synchronization rights, including the right to license these in connection with public performance by radio and television, although (in contrast to the publishers) these rights are assigned on a non-exclusive basis. Through its subsidiary, Music Royalties, Limited, SESAC offers services in relation to mechanical and synchronization rights similar to those offered by the Harry Fox Agency.\(^\text{12}\)

The three organizations license the rights described above and collect license fees therefor. The principal licensees are broadcasters, including networks and non-network-affiliated local television stations, and radio stations. Other licensees include such non-broadcaster users as bars, restaurants, taverns, nightclubs, background music services, hotels, motels and purveyors of live concerts. Fees are also collected under compulsory licenses established in the 1976 Copyright Revision Act for cable television,\(^\text{13}\) jukeboxes\(^\text{14}\) and public broadcasting.\(^\text{15}\) The Copyright Royalty Tribunal, a governmental agency located in Washington, D.C., oversees the adjustment of rates and the allocation of fees among claimants under these compulsory licenses.

ASCAP, BMI and SESAC all have relationships with foreign societies which collect and remit fees for performances of their respective

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12. The Harry Fox Agency handles mechanical and synchronization rights under the aegis of the National Music Publishers Association (“NMPA”).
15. Id., § 118.
catalogs in foreign jurisdictions. The catalogs of the foreign societies, in turn, are licensed in the United States through the U.S. organizations. SESAC also has agreements with foreign mechanical rights organizations.

In dealing with parties who seek to perform their music, ASCAP and BMI offer many different kinds of licenses, which have in common the fact they are "blanket" licenses, granting access to the entire ASCAP or BMI repertory, including new works added during the license term. Broadcasters may choose between a "blanket" license or a "per program" license. Both are blanket licenses in that they allow access to the whole repertoire of the relevant society. "Blanket" license fees are based on a percentage of all revenues from sponsors after deductions. The "per program" license fee, however, calls for a higher percentage based on net receipts from sponsors of only those programs using the relevant organization's music. An array of blanket licenses is available to non-broadcast users, with fees based on a number of objective variables applicable to the licensee.

SESAC's licenses for public performance are "blanket" licenses, requiring monthly payments and authorizing use of any SESAC work as often as needed, live or recorded. Its fees from broadcasters are not based on percentages of receipts but on certain "determinants," including the market population of the area served, and the station's own rate card. Non-broadcast licensee's fees are based on standard factors applicable to the type of facility concerned. While license fees have not generally been negotiated through industry-wide committees, but individually with the users, users that are similarly situated pay similar fees to SESAC.

There are differences between the three societies in their methods of monitoring performances and distributing fees. ASCAP resorts to diverse logging, sampling and monitoring techniques to find out what is being performed in a given period and, thus, who should receive the fees collected. Logs and cue sheets are used for complete coverage of network television programming. Local television and radio program samples are taped for review. Concert licensees submit programs and major background music services submit logs. General licensees (bars, taverns, etc.) are not surveyed but fees for their uses are distributed on the basis of a "proxy" of featured radio and television uses, as revealed by the sampling in those areas. ASCAP distributes the license fees it collects, deducting only its administrative costs (currently 18-19% of its gross annual revenue); distributable revenues are distributed one-half to publishers and one-half to writers, who may receive payment on a "current performance" basis or (if they so
elect after an initial period) on a basis that combines current performance with averaging over a period of years.

BMI also receives daily network logs. It monitors all local radio and television stations in the course of a year using what is styled a "randomly selected stratified probability sample" covering, in each quarter's logging, stations of varying size and type of location. A census, rather than a sample basis, is employed to cover syndicated shows and films on all local stations. In contrast to ASCAP's analysis of actual tapes of local stations, BMI methods stress station logs. As to its mode of distributing fees collected, BMI publishes a rate schedule informing affiliates of the minimum rates applicable to each type of broadcast performance. As a nonprofit organization, it distributes quarterly all available income (less operating costs, taxes and a "reasonable reserve") and fees paid are usually substantially higher than the rates specified in the schedule. The system calls for identical royalty payments to affiliated writers and publishers for the performance of a given work.

Given SESAC's size and intake, resort to exterior services to conduct sampling surveys is deemed prohibitively expensive. SESAC does receive, and make payments based on, network logs as well as pay-TV logs and educational television and radio cue sheet data. Local performances on radio and television are spot-checked. Radio performances are monitored daily through Billboard Information Network (B.I.N.). Various other factors also play a role in the SESAC formula and in its application to determine the quarterly payments allocable to each affiliate, with publisher and writer receiving 50% of the fees for most uses. These factors include various types of information from the major trade publications such as "chart activity" (reports on sales of the top recordings), with bonuses awarded for certain kinds of chart results.

IV. Development of the U.S. Performing Right

The music performing right has been the focus of intense struggle since ASCAP's birth in 1914. From the beginning of ASCAP's efforts, there was resistance—rooted in incredulity, lack of comprehension, a want of sympathy for the right and a consequent unwillingness to pay for it. Each commercially significant group, already existent or newly emerging over the years with new technology, has fought, first, to deny the validity of the right or its applicability to the use in question; second, to escape its impact if applicable; and, third, to pay as little as possible for its use, often by harassing or seeking to reduce or
destroy the power of any entity with the temerity to try to enforce such a right.

ASCAP, as the first, and for a time the only, substantial U.S. performing rights organization, bore the brunt of early efforts to establish the principle that public performance of protected nondramatic music for profit must be paid for. The 1909 Act with its "for profit" limitation on the right was then the governing law. The case of Herbert v. Shanley, 16 carried all the way to the U.S. Supreme Court, was an early victory of tremendous import for ASCAP and creators. Not only did it approve a compensable nondramatic performing right in a song ("Sweethearts" by Victor Herbert) drawn from a dramatico-musical work ("Sweethearts"), it also gave a narrow reading to the "for profit" limitation, requiring Shanley's Restaurant to pay Victor Herbert for the use of his music to entertain diners who were not directly charged for the music provided with the meal. Later cases made clear that incidental performance of music—whether in a restaurant, movie theater or dance hall, on the radio or in hotels—without consent and proper payment (if demanded), was an actionable infringement of copyright. To be sure, that principle is still—today—a focus of conflict in particular applications. But Herbert v. Shanley has provided a sturdy enduring foundation for ASCAP's work.

Over the years, ASCAP, and later BMI, did battle with each developing user industry: with the movies (particularly the exhibitors) in both silent and "talkie" eras; with radio; with television; with jukebox owners, cable operators and public broadcasters. The adversaries keep coming. Old ones find new grounds for resistance; new industries raise new problems.

Among the strategies employed by resistant users faced with ASCAP's aggressive early demands were (1) pooling funds to fight the society in the courts and elsewhere, (2) assembling repertoires of unprotected music, (3) seeking changes in the federal copyright law to exempt particular users or uses or to curb particular activities of the performing rights organizations, (4) participating in ASCAP, as the motion picture industry did through ownership of ASCAP publisher members, (5) seeking state legislation to outlaw, impede or harass ASCAP, BMI, etc. within state borders or to press Congress for copyright law changes, (6) contesting coverage and payment "to the last ditch," in court and out, sometimes with baseless defenses, and thereafter resisting collection of judgments, (7) challenging ASCAP's and

BMI's structure, status, licenses and license terms under the antitrust laws both before the Justice Department and in the courts, (8) boycotting the broadcast of ASCAP music, as most broadcasters successfully did for one year beginning October 1, 1940, (9) establishing a broadcaster-owned-and-operated competitor to ASCAP, namely BMI, effective February 15, 1940, and (10) pressing Congress for protective compulsory licensing arrangements.\textsuperscript{17} Some of the principal strategies among these will be discussed later.

V. Restraints on U.S. Organizations

ASCAP, BMI and SESAC—three organizations which, as we have seen, vary significantly in structure and in scope and mode of operation—are subject to a substantial number of special restraints. These restraints do not affect all three equally, and some may have (at least so far) no impact at all on one or another of the three. But one must be aware of all of them if the operation of music performance licensing in the U.S. is to be understood. Some of them affect quite directly the relations between the U.S. organizations and their foreign counterparts and the services the former can render the latter. A number of the restraints may be or seem special to the United States and to have no parallels in other nations whose societies do business with ASCAP, BMI and SESAC. Some restraints, however, are now emerging as potentially significant in other sectors of the world—in particular, for example, antitrust laws with their pressures to ensure competition, and (regrettably) perhaps also the compulsory license and comparable devices.

A. Competition

As is well-known, the basic policies of the United States economic system and the legal framework that supports it favor free competition. Numerous compromises and practical adjustments have been made in the system and governmental regulation dominates important areas so that the system falls far short of total laissez-faire. But in many areas, government regulation is partial, minimal or virtually nonexistent. Insofar as regulation is absent, the operative premise is that free competition is to be encouraged as the best means to secure the welfare of the consumer—by keeping prices down, stimulating initiative, making possible reasonable profit and encouraging quality. Monopoly, beyond the more familiar right to real and personal prop-

\textsuperscript{17} See, e.g., H. Warner, Radio and Television Rights 341-42, 366-69 (1953).
erty, is sometimes a necessary condition of accomplishing certain ends, but is viewed as generally undesirable—leading to high prices, to lack of innovation and choice and to undesirable concentrations of political and economic power. Even a constitutionally-sanctioned property right, such as copyright (deemed by some a natural right), may be viewed as a questionable "monopoly" and treated strictly and with suspicion. Judicial and other official actions often reflect this attitude.

The first special restraint to be noted as affecting the three U.S. organizations is, thus, the necessity that they compete effectively against one another to endure. No single organization is in sole control of copyrighted, performable music.

There is certainly competition between the three organizations for composers, publishers and music. The modes of dealing with, and the benefits offered to, their respective members and affiliates do differ as between the organizations, and the members and affiliates have choices they would not have if only one such entity existed. It seems also true that, in this situation, no one entity can risk outrageously high price terms that could isolate it and damage its relative competitive position. And it is also doubtful that any one entity would be able to survive an extended effort to gain a greater market share by reducing its prices significantly below those of its competitors. The writers and publishers of that entity, for example, might well resent efforts to sell their works more cheaply than those of their counterparts in other organizations and thus be led to desert one entity for another. It would seem to follow that the margin for price differentiation between the major organizations vis-à-vis consumers and users is relatively constricted as a practical matter.

A key fact often overlooked in theoretical discussions of competition or music performing rights "monopolies" in the U.S. is the existence of a vast, ever-increasing public domain of music—popular, classical, folksong, etc.—to which all consumers and users have free access. Nor is the public domain in the United States composed only of older music. Failures to comply with statutory formalities of notice and renewal which have been a condition of U.S. copyright for many years, and even abandonments or purposeful dedications of copyright, mean that many recent works are likewise available for free use. Moreover, older public domain music can be rearranged, decked out in the new garb currently in fashion, and then exert its appeal all over again in a modern guise. Added to all this is the music of foreign nations with which the U.S. has no treaty or other agreement requiring that U.S. copyright protection be accorded to the pub-
lished works of their nationals. Thus, any "monopoly power" over music enjoyed by any or all of the three existing organizations is at best a highly diluted one. Can it be argued then that the competition element in this area was never as important as claimed? Note that for certain purposes, some musical works may be regarded by users as fungible.

With at least three organizations and a vast public domain all in competition, no one organization is indispensable to the public and none by itself can choke off the supply of viable music to the public or risk a boycott by actions that alienate consumers or users to the point where a boycott is activated. On the other hand, one may pose the question whether it would be easier and less expensive for users to deal with one organization for all music performing needs than it is to deal with three or more, or to embark in addition on direct licensing with multiple creators who will surely be driven in due course to organize themselves into some kind of protective collectivity to confront the power of major users. Does the existence of three organizations rather than one lead to higher costs for the consumer or user and to less return for the composers and authors (and the publishers assisting them)? Does the existence of three methods, machineries and staffs to monitor U.S. music performances multiply the resources and expense devoted to a single basic task? Economies of scale in staffs, in litigation against infringers, are lost. And that we have three organizations in the U.S.A. with which major users find it necessary to deal is no guarantee that the number of such organizations may not proliferate further. Do the recent claims of the Italian Book Company and of Latin American publishers to a share of music performing royalties arising from jukebox uses presage a new proliferation of rights organizations? Against these factors must be weighed the value of whatever real choices the differentiated organizations offer their members or affiliates.

A final point must be made here. To the competition already described as affecting and restraining the operations of ASCAP, BMI and SESAC in the United States must be added the competition afforded (under the consent decrees and/or the contracts of the organizations) by the availability of direct licensing—that is the securing by the user of a performing license directly from the composer and/or publisher of the work concerned. In all cases, a would-be user may bypass the licensing organization in favor of an effort to deal with rights-retaining writers or publishers. How this situation arose and why, its significance for the three organizations, and its merits, are discussed later.
B. Antitrust Laws

Here, the main concern is a brief examination of the restraints imposed on the performing rights societies by U.S. antitrust laws\(^{18}\) which have been invoked either by private parties in private litigation or in suits brought by the U.S. Government, or implemented in several landmark "consent decrees" evolved by the Department of Justice with ASCAP and BMI.\(^{19}\) Antitrust restraints on U.S. performing rights organizations have had more to do than any other factor with shaping the operations of ASCAP and BMI today. Even SESAC, never involved in any consent decree, must mind the antitrust signposts erected through the years in the field of music performing rights. For foreign observers, an understanding of this aspect of performing rights history in the United States is indispensable to comprehension of the U.S. system.

It is not necessary to review here all the voluminous detail of antitrust litigation and related activity of early decades. It is enough to focus on the amended consent decree of 1950 which, with some later amendments, regulates much of ASCAP's present organization and functioning. Some initial reference to the *Alden-Rochelle*\(^{20}\) case, to the earlier ASCAP consent decree of 1941 and to the BMI consent decrees is, however, essential.\(^{21}\)

In the late 1930's, the opposition of broadcasters, movie exhibitors, and other users to ASCAP's bold demands intensified to a critical degree. We have already listed many of the counter-measures taken. The broadcasters boycotted ASCAP; BMI was born. Judicial disapproval was clearly expressed. In December, 1940, the Department of Justice, having heard much complaint, announced it would proceed under the antitrust laws against ASCAP, BMI, CBS and

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18. Principally the Sherman Act of July 2, 1890, codified at 15 U.S.C. §§ 1-7, which now provides in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal..."

19. A "consent decree," issued by a court and developed by government officials in consultation with the parties, is a means of resolving antitrust claims without a trial or admission of wrongdoing. In effect, the government agrees not to press antitrust charges in return for the accused party's agreement to conduct its affairs in accordance with the terms of the decree.


NBC. The last three named defendants were released when BMI signed a civil consent decree, but the U.S. filed a comprehensive criminal antitrust suit against ASCAP on February 5, 1941. On February 26, 1941, ASCAP signed a consent decree\textsuperscript{22} abjuring or revising practices complained of in the Government's charges, and the Government's criminal suit was dropped. Thereupon ASCAP began the "life under consent decree" which endures to this day. A few highlights of this 1941 decree may be mentioned. ASCAP's exclusive right to license was reduced. It was not to discriminate between similarly situated users. It was to license certain users "at the source" (i.e., radio networks and makers of electrical transcriptions for broadcast), so that, for example, the license to a network would cover a network's affiliated stations. Per program licenses, on certain conditions, had to be offered radio broadcasters. Per piece licensing was to be available to users other than broadcasters. Some reform of ASCAP's internal organization and procedures was mandated, including a modification of membership rules to make eligible for membership any professional composer or author with one regularly published composition. In this regulated setting, new license terms offered by ASCAP to the broadcasters were accepted as fair in 1941, and again in 1949.

Bitter difficulties later developed, however, between ASCAP and a group of movie theatre operators who pursued a private antitrust suit against ASCAP, seeking treble damages and injunctive relief, in the famous \textit{Alden-Rochelle}\textsuperscript{23} case. The decision in this case on July 19, 1948 dealt ASCAP perhaps its gravest blow, ruling that its activities were generally barred by the antitrust laws. Extensive findings of fact and conclusions of law in a strongly-worded opinion proved very influential for ASCAP's future. Spurred by \textit{Alden-Rochelle} and other factors, the U.S. Government reopened its earlier 1941 decree and evolved the 1950 amended consent decree (amended again in 1960 in respects not pertinent here) which provides the basic charter for ASCAP operations.

On March 14, 1950, when the 1950 amended consent decree was promulgated, the \textit{Alden-Rochelle} judgment was vacated. Following is a description of some still-effective features of the 1950 consent decree, as reported (in 1958 Congressional Hearings) by Victor Hansen, then Assistant Attorney General in charge of the Antitrust Division of the U.S. Department of Justice:

\textsuperscript{22} ASCAP 1941 Consent Decree, supra note 21.

\textsuperscript{23} 80 F. Supp. at 888.
The changes contained in the amended judgment sought to add protection to users, including two new mediums, television and wired-music systems (such as Muzak). The new judgment took the approach that has been called open-door and open-window to ASCAP's internal operations. The major changes made in the 1941 decree were in substance as follows: ASCAP members were given the unrestricted right to license their own works. Membership requirements were eased so that a writer applicant need have only one composition regularly published, and a publisher applicant need only have its publications distributed on a commercial scale for one year and bear the normal risk of the publishing business. Subject to contractual obligations of ASCAP, a member might withdraw and take his compositions with him. Thus the right of ingress and egress was adequately protected.

The principle of licensing at the source was applied [to network television as it was earlier to network radio] to wired-music service, and motion picture production; i.e., members were required to license performance rights when the synchronization rights were licensed. ASCAP was prohibited from licensing theater operators for performances of ASCAP music on film.24 The compulsory licensing provisions were extended to cover television broadcasting and ASCAP was required to use its best efforts to give its licensees a genuine economic choice among the various types of licenses.

An important provision of the amended judgment protects users from any exorbitant demands by ASCAP for the use of an admittedly necessary collection of compositions. The amended judgment provides for compulsory licensing of performing rights and for court determination of what constitutes a reasonable royalty if the applicant and ASCAP are unable to agree in preliminary negotiations. This right to secure licenses at reasonable royalties given users of ASCAP music has been invoked many more times than has the comparable right given in other judgments in connection with patent licenses.

The 1950 amended judgment eliminated the subjective standards to be used to determine the basis of distribution of revenues to its members. It required ASCAP to distribute its revenues primarily on the basis of objective surveys periodically made.25

The 1950 amended decree contains a few other significant restraints, including, for example, a prohibition against licenses (except

24. This provision, mandating "licensing at the source" for motion pictures, differentiates the power of U.S. performing rights organizations from that of their European counterparts. As former Justice Department Attorney Sigmund Timberg, Esq. (a principal architect of the 1950 decree) has remarked, "[ASCAP] is the only performing rights society in the world thus restricted." Timberg, ASCAP, BMI and the Television Broadcasters, Int'l Bus. Law., Feb. 1985, at 57. ASCAP's U.S. competitors have not considered themselves free to act differently and do not do so.

for motion pictures) of more than 5 years' duration,\textsuperscript{28} and required maintenance of a list of the ASCAP repertoire available for inspection.\textsuperscript{27} A further consent decree provision, discussed later, bars ASCAP from licensing "any rights in copyrighted musical compositions other than rights of public performance on a nonexclusive basis,"\textsuperscript{28} and restricts ASCAP's concerns to nondramatic (small) rights.\textsuperscript{29}

BMI is also governed by a 1941 consent decree, revised in 1966, but the BMI decrees do not include many of the restraints imposed on ASCAP, other than, for example, certain source-licensing requirements (movie exhibitors are not referred to) and the bar against discrimination. Under 1966 revisions, BMI must allow its affiliates to engage in nonexclusive direct licensing. BMI's agreements with its affiliates are held to five years duration. There is no provision for judicial rate-fixing.

So far we have mainly described restraints imposed by the government via antitrust suits and consent decrees. But note that private suits—e.g., the Alden-Rochelle case—have played a major part in triggering government action. And, in recent years, private suits on antitrust grounds against both ASCAP and BMI have dominated the stage. The two competitors have found themselves linked in common defense against some of the most powerful of economic interests—first, the mammoth CBS network (supported by the other networks) and, second, the local television broadcasters. So far, ASCAP and BMI have won important victories. Because these have made front-page news across the world they will only be briefly described here. Generally such private suits involving antitrust questions have challenged the antitrust legality of blanket licenses offered by ASCAP and BMI. At root, these disputes have arguably concerned the amount of fees to be paid and have represented efforts by users to reduce the fees. To the extent the latter is true, such disputes, at least in ASCAP's case, might better (more cheaply and expeditiously) have been dealt with in the judicial forum provided in ASCAP's consent decree. But the plaintiffs concerned pitched their efforts at securing new types of licenses geared more precisely to their actual uses of music, an objective beyond mere rate-fixing. They have thus preferred to bypass ASCAP's judicial rate-fixing machinery. The treble damages available to a victor in private antitrust litigation, and

\begin{itemize}
  \item \textsuperscript{26} ASCAP 1950 Consent Decree, supra note 21, Art. IV (D).
  \item \textsuperscript{27} Id., Art. XIV.
  \item \textsuperscript{28} Id., Art. IV (A). See infra text accompanying note 82.
  \item \textsuperscript{29} Id., Art. II (B).
\end{itemize}
a calculation that high litigation costs favor the economically more powerful party, may also have influenced the choice among avenues of attack.

Private antitrust claims may arise not only as modes of attack but also as defenses to infringement suits (e.g., for unlicensed performances). An example is *K-91 Inc. v. Gershwin Pub. Corp.*, in which a radio station defended an infringement action by urging that ASCAP and/or its members were violating the antitrust laws. This defense has generally failed for want of proofs necessary to sustain such a claim. The language of the Court of Appeals in *K-91* forms an apt prelude to the two major cases referred to earlier. In sharp terms, the *K-91* Court commented:

We agree . . . that the activities of ASCAP do not constitute a combination in restraint of trade or a monopoly within the meaning of the Sherman Act. ASCAP is certainly a combination, but not every combination is a combination in restraint of trade or a monopoly. ASCAP cannot be accused of fixing prices because every applicant to ASCAP has a right under the consent decree to invoke the authority of the United States District Court for the Southern District of New York to fix a reasonable fee whenever the applicant believes that the price proposed by ASCAP is unreasonable, and ASCAP has the burden of proving the price reasonable. In other words, so long as ASCAP complies with the decree, it is not the price fixing authority. We cannot agree with the contention that the danger of unreasonable activity that might arise from ASCAP's activities makes everything that it does a violation of the antitrust laws, when those of its potential activities that might have this effect are prohibited by the decree. No contention is here made that ASCAP's actual activities do not comply with the decree. In short, we think that as a potential combination in restraint of trade, ASCAP has been "disinfected" by the decree.\(^{31}\)

Notwithstanding such language, CBS soon thereafter, in 1969, began what became a gigantic "marathon" suit against both ASCAP and BMI. It sought "per use" licensing, and a ruling that the blanket and per program licenses offered by both organizations were illegal under the antitrust laws. This litigation, lasting 12 years, included a crucial decision by the Supreme Court of the United States to the effect that blanket licensing was not illegal per se, but must be tested under a "rule of reason" analysis.\(^{32}\) In an ultimately authoritative rul-

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\(^{30}\) 372 F.2d 1 (9th Cir. 1967), cert. denied, 398 U.S. 1045 (1968).

\(^{31}\) 372 F.2d at 4.

\(^{32}\) BMI v. CBS, Inc., 441 U.S. 1 (1979). In BMI v. Moor-Law Inc., 527 F. Supp. 758 (D. Del. 1981), aff'd mem., 691 F.2d 490 (3d Cir. 1982), where a nightclub owner defended an infringement action on antitrust grounds, the court upheld blanket licensing via a classic "rule of reason" analysis, rejecting inter alia a claim that it created an unlawful tying arrange-
ing in April 1980, the Court of Appeals for the Second Circuit upheld the challenged licenses, concluding that CBS had "failed to prove that the existence of the blanket license has restrained competition." It was crucial that CBS failed to show it had no realistically available alternative to the blanket licenses. The available alternative emphasized was that of a direct license from the copyright owner. When the Supreme Court refused to review this ruling, CBS concluded five-year blanket license agreements with ASCAP and BMI, which expired December 31, 1985. CBS renewed its blanket license from BMI for a further term of years.

An earlier lower court opinion ruling against ASCAP and BMI in this great case encouraged other plaintiffs, including religious broadcasters and, most importantly, certain local television stations who had filed suit in November, 1978, in what became known as the Buffalo Broadcasters case. Inter alia, the Buffalo plaintiffs eventually argued that for them—in contrast to CBS—there was no realistically available alternative to the blanket license, that they were unable to obtain direct licenses. Harking back to Alden-Rochelle, they called for a compulsory combining of synchronization and performing rights in packaged shows at the producer level and for delivery of both rights by the producer to the stations—in effect, "licensing at the source" as decreed in 1948 for motion pictures. Victorious at the district court level, plaintiffs' arguments were rejected firmly and unanimously by the Second Circuit Court of Appeals and the Supreme Court refused review. Again, the Court of Appeals found a failure to show that blanket licensing was an unlawful restraint of trade when tested by the standard of reasonableness. The availability of other types of licenses—per program or direct—was a key factor. These two cases were of major import to ASCAP and BMI, bringing a halt to the religious broadcasters' suit. The result should, for a time at least, discourage further antitrust claims.

But it seems clear that the struggles between ASCAP and BMI and the broadcasters will continue, though the form or forum may alter. The latter have amply showed (a) the strength of their conviction that the blanket license is too costly, and (b) an unrelenting determi-

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nation to find a way to pay less by paying only for what they actually use. At this time, two points deserve emphasis.

First, it may be expected that the broadcasters and other users will heed the judicial stress on the direct licensing alternative. CBS, it is known, is actively seeking direct licensing agreements with composers, publishers and producers. It is reported to have adopted a policy of pressing the producers of its packaged programs to secure music performance rights directly from their composers and publishers along with "synch" rights ("licensing at the source"). One arrangement proposed is an option for CBS to acquire television performance rights in exchange for a fee to be negotiated, if the network (in the absence, presumably, of blanket licensing) decides to exercise its option. If 60 days of negotiation on the option yield no agreed fee, the amount of fee (stipulated as the "competitive market value" of the performing right) will be arbitrated in Los Angeles at CBS' expense. Whether, and if so when and how far, these tactics will succeed bears watching. Direct licensing could at some point become a serious problem for the performing rights societies. Note that the broadcasters' efforts may continue in other ways, too. For example, current reports in Variety of court proceedings and intramural maneuvers indicate that the defeated Buffalo plaintiffs (some of them BMI shareholders) may be taking their battle into the shareholders' meetings and boardroom of BMI.

But the most daunting restraint or limitation emerging from these

36. "Licensing at the source," discussed in the consent decrees and, e.g., in the Buffalo Broadcasters case, is a device fraught with danger for the interests of the authors and composers seeking fair compensation for their work. Generally, no one can be certain, when a film, a network radio or television show, or a "wired-music" compilation is prepared, what the economic returns on the whole or its parts will ultimately be. In this state of uncertainty "at the source," the typically weak bargaining power of the composer is at its weakest. He may be forced, as a practical matter, to accept lump-sum compensation for his work that bears no relation to the quality or success of the work. Unless the composer has sufficient power to bargain successfully for fair "residual" payments proportioned to actual uses, or for a short, renegotiable grant of rights, his prospects for obtaining such terms are dim. There exists no screen composers union at present to secure these for him in relation to "works for hire." Typically, producer contracts today leave to the author the ASCAP or BMI payments, which will reflect multiple uses. Without this, the purposes of copyright law to secure fair compensation to individual creators for actual use may be almost wholly frustrated.


antitrust cases for ASCAP and BMI is the sheer financial cost in earned music dollars of the public and private legal proceedings that have gone on without respite for decades. It is a supreme irony that legal expenses approaching $15-20,000,000 of music moneys will find their way into the coffers of law firms rather than into the pockets of the creators the U.S. Constitution and Copyright Act seek to encourage. Even as it grudgingly appropriates donations or grant moneys for the National Endowment for the Arts for composers and other artists, Congress seems oblivious to the legal burden and costs the existing antitrust laws impose on composers and authors. There is a clear need for authors to combine to deal with the great economic powers that would use their work. Unionization—as in the Writers Guilds—secures exemption from antitrust laws and costs, but at the sacrifice of copyright ownership and authorship. There is a strongly arguable need for a sui generis status for organizations of or for artists, if suitable safeguards are provided for the public against internal abuses, restrictive practices and unreasonable charges. The consent decrees, the Copyright Royalty Tribunal, arbitration panels, the ASCAP monitors, the ASCAP judicial rate-setting mechanism—all these suggest avenues for achieving safeguards. One minimum need is for speedy, efficient, expert, inexpensive dispute-settling machinery to eliminate the waste of precious arts dollars in litigation.

C. National Legislative Restraints Beyond Antitrust

In addition to the restraints on musical performing rights imposed by general national legislation—such as the antitrust laws—which is not expressly or exclusively aimed at the musical field, there are specific legislative restraints on music performance rights in the present Copyright Act itself.

The framers of the 1976 Act recognized there was no justification for continuing the unqualified "for profit" limitation that hedged the performing right for nondramatic music in the earlier Act. The growth of huge, highly subsidized "non-profit" organizations (e.g., public broadcasting) exploiting music on a major scale without payment dramatized the inequity of an exemption difficult to justify from its inception. Section 106(4) of the 1976 Act provides an unqualified right of public performance.

Alas, what is promised by the broad terms of section 106(4) is retracted in significant ways, for example, in section 110 (1)-(4) and (6). The right is further reduced substantially in potential value by the
addition of three compulsory licensing schemes to the previously existing compulsory mechanical provision. New exemptions have recently been added by Congress to those already in section 110—e.g., section 110(10). New groups stand in the wings, pressing for special exclusions, and new compulsory licensing schemes await legislative consideration.

1. Section 110 Exemptions in 1976 and Later

The text of section 110 as enacted in 1976 gave eloquent evidence of the power of certain lobbying groups in American society to persuade Congress they should be exempted from paying composers for performance of their music. It demonstrates Congressional willingness to heed—or inability to resist—pleas by special interests to give away the intangible property of composers. Congress would surely flinch from any such disposition of the products of industrial concerns more traditionally labeled as commercial.

Section 110, as of 1976, exempted from acts of infringement: use of musical works by non-profit educational institutions for face-to-face instruction; certain broadcasting of musical works for systematic instructional purposes (involving governmental bodies or non-profit educational institutions) primarily to classrooms, to the disabled or others unable to attend classes or members of governmental bodies; use of musical and even dramatico-musical religious works in services at places of religious worship or assembly; performances of nondramatic musical works when promoters, performers and organizers are not paid, if there is no admission charge or the proceeds are exclusively for religious, educational or charitable purposes; communication of a transmitted performance received by the public on a single home-type receiver unless a charge is made to hear it or there is further transmission to the public; and musical performances by a government body or a non-profit agricultural or horticultural organization during annual fairs conducted by any of them (concessionaires, etc. are not exempted). There are also exemptions for vendors who play in public at their shops the music they are sell-

40. See infra notes 56-61 and accompanying text.
41. 1976 Act, § 110(1).
42. Id., § 110(2).
43. Id., § 110(3).
44. Id., § 110(4). This exemption may not apply if the copyright owner files objection. N.B. that there is, however, no provision for notice to the owner.
45. Id., § 110(5).
46. Id., § 110(6).
ing\textsuperscript{47} and for the handicapped.\textsuperscript{48} In 1982 a further exemption was added for veterans and fraternal organizations.\textsuperscript{49} Dance studios have also sought relief. Further efforts to extend educational and religious exemptions are a possibility.

Works created by composers and authors are the product of labor and it would seem that compensation should be paid for their use. Why should creators be singled out by law to donate their work to educational, religious, or fraternal groups or veterans that pay for their other materials and services?\textsuperscript{50} Or to tax-supported governmental bodies (referred to in section 110(2) and (4))? It is easier to explain such things on grounds of dubious history and undoubted lobbying power than to excuse or justify them. There is no certainty that the creators' line of defense can be held as different groups—be they dance studios or others—come before Congress in turn to clamor for exemption.

2. Compulsory Licenses and Rate Tribunals

Who could have foreseen the ultimate implications of the precedent set when Congress in 1909 created the first statutory compulsory licensing scheme for so-called mechanical (recording) rights—enacted as a result of fears probably baseless in 1909 and surely so today?\textsuperscript{51} An opportunity to do away with this particular device in the 1976 Act was lost when composers and publishers, in return for better fees, gave up the effort to undo a scheme to which they had become accustomed and on which the U.S. recording industry had come to depend—or so it argued—and for whose continuance it fought vehemently.

The multiplication of such licenses in the 1976 Act has created serious restraints on American performing rights organizations. Arguments advanced for compulsory licensing have included: avoidance of excessive transaction costs; avoidance of a threatened monopoly;\textsuperscript{52} providing a clearing-house mechanism where none existed previously (public broadcasting); and subsidizing a user industry claimed to be unable to pay market rates (cable). And it may be that without such

\begin{itemize}
\item \textsuperscript{47} Id., \S 110(7).
\item \textsuperscript{48} Id., \S 110(8)-(9).
\item \textsuperscript{49} Id., \S 110(10).
\item \textsuperscript{50} Note that the composer is not granted here any privilege to object to the performance as he is in \S 110(4), illusory as that provision may prove as a practical matter.
\item \textsuperscript{51} The compulsory license scheme for mechanical rights is traditionally ascribed to legal fears that a particular company would monopolize the piano roll market.
\item \textsuperscript{52} 1909 Act, \S 1(e).
\end{itemize}
devices the now licensed user industries would contribute nothing to the copyright. On the other hand, the evils attributed to compulsory licenses are familiar. Fixing statutory fees for a privately produced commodity is, of course, an anti-competitive anomaly in a competitive system. Payment for popular works is barred by statute from rising beyond the fixed rate, whatever the market demand. In addition, compulsory licenses impair the creator's ability to prescribe the terms on which his personal creation reaches the public. The quality of uses is placed largely beyond the creative control. Finally, the compulsory license device further depersonalizes the relations between creative individuals and society, putting the artist in a measure at the mercy of governmental organizations. Was it not a major purpose of copyright or droit d'auteur to liberate authors from dependence on public control or subsidy or private patronage?

In the 1976 Act, the compulsory licensing device was extended to three types of music performance uses which had previously wholly or partly escaped any contribution to the copyright. In each case, as the Hon. Barbara Ringer succinctly reminds us, the establishment of compulsory licensing "was preceded by a complex exemption from copyright liability and . . . enormous industries had been built upon a foundation of free use of copyrighted works"—with, one might add, a major concomitant power in these industries to make their will felt in the legislatures. In the case of jukeboxes, the blame for this state of affairs rested on Congress's enactment of a little-noticed statutory provision in the 1909 Act, exempting from payment the performance of music on "coin-operated machines." What may have seemed a trifling matter in 1909 became a major exemption over the years. Even the compromising of the license fee in the 1976 Act at the low initial rate of $8 per box did not prevent obdurate resistance to payment. In the case of cable retransmission, the blame rests with rights holders who failed to assert their interests early, and with Supreme Court decisions which gave a strained reading to the Copy-

53. In the case of the mechanical compulsory license, for example, a fee set in 1909 was allowed by Congress to stand unchanged for decades. Moreover, through the years, the statutory rate operated as a "ceiling" in lopsided bargaining that generally resulted in a rate well below that authorized by statute.


56. 1909 Act, § 1(e).

57. See, e.g., Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968);
right Act in a seeming effort to save what was perceived as an "infant industry"—an industry that proved so redoubtably strong in Congress as to delay the entire Copyright Revision effort for many years. The eventual cable compulsory licensing compromise enacted in 1976 is now outmoded and has been judged less fair to copyright holders today than it was then. 58 In the case of the public (non-commercial) broadcasters, an enormous volume of unpaid-for public performance of music developed in the shelter of the "for-profit" limitation of the 1909 Act, discussed above. With the removal of that limitation, the public broadcasters pleaded in the closing stages of copyright revision for a compulsory license. The license scheme finally adopted for their benefit was anomalously applied only to published nondramatic music and pictorial, graphic and sculptural works. Interestingly, this particular compulsory license scheme laid unusual stress on efforts by interested parties to achieve voluntary rate agreements. 59

If one bears in mind the drawbacks of compulsory licensing, but is mindful also of the circumstances that led to them and of the nature of Congressional processes, there is something to be said for Ms. Ringer's assessment: "Given the strength of the special interest pressures generated in these situations, the establishment of any degree of copyright control—even one subject to a compulsory license—must be considered something of an accomplishment." 60 At the base of the problem here, as discussed later, is the weakness of rights-holders' interests in the American legislatures.

The provision in the 1909 Act for a fixed mechanical license fee with no means of adjustment in changing economic circumstances was eliminated in the 1976 Act. While there are more compulsory licenses, the license fees are now subject to review, adjustment and settlement by a statutory five-member Copyright Royalty Tribunal (CRT), subject to judicial review. This is itself another restraint, to


59. An interesting account of this compulsory license and its implementation will be found in Korman and Koenigsberg, The First Proceeding Before the Copyright Tribunal: ASCAP and the Public Broadcasters, 1 Com. and L. 15 (1979).

60. See S. Stewart, supra note 55, at 496.
be sure, and one exercised by a governmental agency, but at least it offers hope that fees may change as economic circumstances change.

The CRT's determinations have generally withstood judicial review so far despite serious problems of personnel and resources. Particular licensee interests (e.g., jukebox, cable) have been seriously dissatisfied with judicially-approved CRT rulings. There is continuing danger of a successful appeal to the legislature by such disgruntled licensee groups to upset CRT rulings or the CRT itself. For example, the jukebox operators turned recently to Congress for legislation providing for a one-time payment—and no more—to copyright owners. The performing rights organizations were forced to mobilize a major effort of persuasion and to enter into a bargain, yielding some part of fees approved as reasonable by the CRT and the reviewing courts, in exchange for better compliance with the law. Cable interests have already turned to Congress to roll back compulsory license fees mandated by the CRT.

Given what we have said about compulsory licensing, it is disturbing to observe an apparently growing readiness of Congress to see the device as a panacea for adjusting the divergent interests of copyright holders and users wherever these may clash in new contexts. Such licenses may be found in pending or proposed legislative measures for performers' royalties, for dealing with audio and video home taping. Some of these would resort to arbitration procedures rather than utilize the CRT.

3. General Restraints

At the root of the legislative incursions on music performing rights in section 110 as adopted in 1976, or thereafter, or now pending or proposed, and at the root of the proliferation of compulsory licenses, there is a cardinal problem which restrains and curbs in law, or in fact, all the activities of the American performing rights organizations. This is the poor bargaining position, and the lack of supporting constituent and vote-power, of the minoritarian interest of creators in U.S. legislatures. The American Congress and state legislatures, unlike European Parliaments operating under the control of prime ministers and cabinets, are “open” legislatures whose members are, with a few notable exceptions, largely uninformed about and frequently unsympathetic to the need, and appropriate measures, for protection of creators. These legislators are highly vulnerable to pressures from majoritarian interests or from powerful economic

groups or consumer groups whose numerically substantial memberships translate into major blocs of votes at election time. Since Theodore Roosevelt, the Executive has shown little interest in copyright. The threat of adverse legislative action is a "sword of Damocles" poised perpetually over the heads of ASCAP, BMI and SESAC. It is a restraint that deters their full realization of rights the law undoubtedly gives the creators of music. A powerful user group that becomes mutinous, rather than merely sullen, may provide the motive power for new and destructive legislative inroads on existing rights. And it is necessary to be wary lest even smaller groups—alienated too far—be led to combine in a "critical mass" of power to elicit damaging action by lawmakers. A recent example of the continuing threat of legislative incursions was a threatened Congressional bill to exempt altogether, or extend the existing exemption for, radio broadcasts relayed to the public over loudspeakers by commercial establishments. The source of this threat was a retail merchants association in a midwestern state complaining to its Senator in Congress. Substantial and costly counter-efforts in Washington, D.C. and locally by the rights organizations have been required and have so far held off the threat.

D. State Legislation

As part of a program of attacks on ASCAP beginning in the 1930's, the broadcasters secured enactment of a number of restrictive state statutes. Such a statute might prohibit ASCAP from operating in any way within a particular state, or might bar blanket licenses as opposed to per piece licensing and set up onerous administrative requirements involving fees, or it might impose taxes on the business of collecting music performance fees (while exempting collection by individual copyright owners). One type of statute required any collector of performance fees, other than the composer, to obtain a state license both for itself and its investigators and to pay annual taxes (as high as 25%) on gross receipts. ASCAP's struggles with these state acts were closely intertwined with mounting questions about the legality of ASCAP operations under the federal antitrust laws, culminating in the consent decrees discussed in Section B, supra. Following the consent decrees, damaging state legislation began to be repealed or modified. It has now become a relatively minor element in the general pattern of restraints on U.S. performance licensing activity,

though some few states\(^6\) still retain burdensome and largely useless filing requirements.

But it would be a mistake to ignore the fact that restrictive state legislation remains available as a weapon of harassment for disgruntled groups—old or new—resistant to paying performance fees or offended by pressures from collective licensors. And apart from adopting adverse legislation of their own, state legislatures can also, for example, be mobilized to put pressure on Congress to enact or change national legislation.\(^4\)

State lawmakers—and their constituents—especially in states other than New York, California, or Tennessee, are, in general, poorly informed about copyright and unsympathetic to the interests of creators of music. The state legislatures are thus particularly responsive to pleas of local users of music, who are generally far more numerous, vocal and politically powerful than the creators or publishers of music within the state.

E. Judicial Restraints

We deal here with judicial decision-making—mostly statutory interpretations by federal courts—as a source of restraints on the music performing rights organizations and the rights they enforce. The effects of judicial applications of the antitrust laws have been discussed. Of concern at this point are non-antitrust judicial actions that directly or indirectly affect and may restrict the scope and enforcement of music performing rights in the U.S.A. The risk of unfavorable judicial decisions exists of course in virtually all nations, though the volume of U.S. litigation and the attitudes of U.S. courts toward copyright pose some special problems in the American system.

The subject of American judicial treatment of copyright in general

\(^6\) Kansas, Nebraska, New Mexico, North Dakota and Wyoming.

\(^4\) This is neatly illustrated by a recent Washington State legislative resolution, promoted by local establishments, calling on Congress to prohibit what are described as "fines imposed by ASCAP" for use of broadcast music to give pleasure to customers on commercial premises. House Joint Memorial No. 7 introduced in 1985 (but not so far adopted) in the Legislature of the State of Washington recites in part:

**NOW, THEREFORE,** Your Memorialists respectfully pray that the President and Congress recognize the necessity of allowing commercial establishments to transmit radio broadcasts through loudspeakers without violating copyright law, and take the necessary steps to pass legislation to accomplish this purpose.

**BE IT RESOLVED,** That copies of this Memorial be immediately transmitted to the Honorable Ronald Reagan, President of the United States Senate, the Speaker of the House of Representatives, and each member of Congress from the State.
and performing rights in particular is so large that one can do no more here than touch on a few highlights.

1. Decisions Establishing Perimeters and Enforceability

ASCAP's early litigation, we have seen, won judicial approval for a relatively generous view of the statutory right of public performance for profit. Many of the cases involved non-broadcast users, such as restaurants, dance halls, bars and other commercial establishments. BMI in recent years has borne a share of the voluminous litigation of this kind, brought to induce non-broadcast users to pay for music performed by them. 66 SESAC, though involved in some important early cases, has not been particularly active in litigation for some time. The high cost of court proceedings to enforce rights inevitably imposes major restraints on the efforts of the organizations to secure general compliance in a nation as large as the U.S. 66

2. Some Recent Decisions on New Uses of Performing Rights

While early cases created a firm foundation for enforcing the music performing right, and later antitrust cases by contrast threatened the rights organizations (ASCAP in particular), more recent cases have gone in at least two main directions in the Supreme Court of the United States. On the one hand, there have been the notable recent victories by ASCAP and BMI in antitrust litigation, first with the CBS television network and later in the Buffalo case. 67 But the Supreme Court of the United States, and lower federal courts, have on a number of occasions shown reluctance to interpret the performing right as set out in the Copyright Statute broadly enough to encompass particular new technological uses involving the right. In the Fortnightly 68 and Teleprompter 68 cases, the Supreme Court drew back from reading the term "performance" to include cable retransmissions. Similarly, in the Aiken 70 case, the Court interpreted "public performance" narrowly in a situation where performances broadcast on radio were used to entertain customers of commercial establishments. Despite a 1976 legislative attempt to draw a new, clear line in

66. For data on ASCAP-BMI enforcement activity, see infra Section VI.
67. See supra Section V (B).
68. 392 U.S. 390.
69. 415 U.S. 994, 405.
70. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 164 (1975).
the *Aiken* area, disputes continue regarding that line. 71 One may note that in dealing with other examples of new technology not involving performing rights, the Supreme Court seemed either unable to come to any decision—see *Williams & Wilkins* 72 (wholesale photocopying), where the Court was evenly split—or after argument and reargument, unable to steel itself to take a firm step into the future—see *Sony-Betamax* 73 (home audiovisual taping for librarying purposes)—even though the 1976 statutory language clearly indicates a Congressional intention that the new Copyright Act should be read to encompass new uses. In the famous (or infamous, depending on one's view) *Sony-Betamax* case, Mr. Justice Blackmun, speaking for four dissenters, noted the Court's apparent tendency in these cases to "evade the hard issues" 74 and leave them to a Congress where the minoritarian interest of creators must confront, in unequal contest, the clamor of users and consumers. The *Sony-Betamax* majority opinion contains language which, if taken literally in later cases, can make the path of future litigation more difficult for copyright holders. Most recently, in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 75 the Court seemed to readjust its perspective in dealing with a vital fair use issue.

Of course, the explosion of new technology (e.g., satellites, computers, as well as new phenomena already mentioned) should perhaps be identified by itself as a factor imposing restraints or raising obstacles to the viability of authors' rights, including rights of performance. Insofar as the courts prove reluctant to read the Copyright Law to cover new uses, the performing rights organizations are once more faced with struggling in Congress for the principle of fair compensation for authors. It must be said that the Supreme Court and other federal courts have not uniformly shown understanding of or sympathy for the authors' interest—disguised as it sometimes is by the appearance of large industrial employers (e.g., the movie companies) as plaintiffs to vindicate the copyright interest. A strain of adverse attitudes toward copyright persists—in some judicial quarters—where it

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74. Id. at 457 (Blackmun, J., dissenting).

is seen as a monopolistic privilege restrictive of a free economy, to be read narrowly and allowed grudgingly, if at all.\textsuperscript{76}

3. \textit{Judicial Decisions on Copyright Generally}

There is a steady flow of judicial opinions that do not deal directly with the performing right, but may adversely affect its scope and impact and prove to be restraints on the work of the rights organizations in certain ways. Thus strict decisions invalidating copyrights for non-compliance with formalities wipe out performing rights as well as other elements of the copyright.\textsuperscript{77} Extensions of the "work for hire" concept may shift authorship and rights, including the performing right, from the creative individual whom copyright fundamentally seeks to protect to an entrepreneur.\textsuperscript{78} Continuing confrontations between copyright and First Amendment claims may affect the scope of the performing right.\textsuperscript{79} But in the recent \textit{Harper \& Row} case, the Court's statements give some hope that the First Amendment interest underlying copyright will be increasingly recognized and invoked to damp down largely avoidable and unreal conflicts between copyright and free speech values.

Perhaps the greatest copyright battleground under the 1976 Act today is "fair use." One is led to wonder whether in the end it was wise to incorporate this doctrine expressly into the new statute where

\textsuperscript{76} The varying attitudes of the Supreme Court may be seen in its vacillation as to copyright precedents and principle. In decisions hostile to copyright, the Court refers to United States v. Paramount Pictures, Inc., 354 U.S. 151 (1948), stating that:

The copyright law, like the patent statutes, makes reward to the owner a secondary consideration. . . . "The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors."

Id. at 158, quoting Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932).

In decisions favoring copyright, the Court relies on the language of Mazer v. Stein, 347 U.S. 201, 219 (1954), stating that:

The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in "Science and useful Arts." Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.

It is interesting to compare with these judicial statements the comment by James Madison on the U.S. Constitution's copyright clause (of which he was the draftsman) that, with respect to copyright protection for authors, "[t]he public good fully coincides . . . with the claims of individuals." The Federalist No. 45, at 309 (B. Wright ed. 1961).

\textsuperscript{77} See, e.g., Original Appalachian Artworks, Inc. v. The Toy Loft, Inc., 684 F.2d 821 (11th Cir. 1982).

\textsuperscript{78} See, e.g., Aldon Accessories Ltd. v. Spiegel, Inc., 738 F.2d 548 (2d Cir. 1984).

it seems openly to invite judicial expansion at the expense of copyright despite legislative history disclaiming any such Congressional intention. The substance of the performing right can be threatened by too generous readings of "fair use" whether in the context of parody, or incidental use, or news use, or noncommercial use, or insistence on showings of harm before copyright interests can be honored, 80 or otherwise. This means that performing rights organizations must continuously be alert against possibly harmful implications in all manner of copyright decisions proliferating in the federal courts of 50 states and the District of Columbia as well as in the Supreme Court of the United States. Eternal vigilance and speed of intervention are the price of any effort to maintain, with any hope of success, the integrity of the U.S. performing right. The cost is great and, in itself, a major burden on the organizations.

Note that much of the time, the American rights organizations must conduct their litigation in quiet low-keyed ways that will not provoke extravagant decisions in their favor (whether in terms of damages sought or principles asserted). Lapses may result in pressures for redress in Congress or in the state legislatures which, as earlier seen, may easily be mobilized for attacks on copyright.

F. Some Additional Restraints

Discussion of the restraints under which the American organizations function would not be complete without mention of certain limitations they themselves, or some of them, have chosen to place on the scope of their own operations; and of certain additional limitations primarily traceable to the way in which the American rights organizations have evolved.

1. Reproduction Rights

ASCAP, in its contracts with its members, does not take from them any rights over reproduction of musical performances. It has neither the right to record performances on phonorecords nor the so-called "synch" right to record performances on sound tracks in timed relation with audiovisual works. BMI's contracts with its affiliates today provide in pertinent part:

4. Except as otherwise provided herein, you hereby grant to us for the period:

(a) All the rights that you own or acquire publicly to perform, and to license others to perform, anywhere in the world, any part or all of the works.

(b) The non-exclusive rights to record, and to license others to record, any part or all of any of the works on electrical transcriptions, wire, tape, film or otherwise, but only for the purpose of performing such work publicly by means of radio and television or for archive or audition purposes and not for sale to the public or for synchronization (i) with motion pictures intended primarily for theatrical exhibition or (ii) with programs distributed by means of syndication to broadcasting stations.

(c) The non-exclusive right to adapt or arrange any part or all of any of the works for performance purposes, and to license others to do so.81

It should, of course, be noted at this point that under section 112 of the 1976 Copyright Act transmitting organizations (such as radio or television broadcasters) which are entitled to transmit a performance to the public may now make one copy of their transmission for their own retention and use and for archival purposes.

SESAC, we have noted, in contracts with affiliated publishers requires assignment to it of exclusive non-publishing reproduction rights, including both recording and "synch" rights; from writers, it takes such rights, for limited or "ephemeral" uses, on a nonexclusive basis. In this area it competes (a) with the Harry Fox Office which, under the umbrella of the National Music Publishers Association, acts as a broker negotiating mechanical and "synch" licenses for both non-dramatic and dramatico-musical uses, including film uses, and (b) with publishers or composers who license such uses themselves.

Since 1950, ASCAP's consent decree82 has expressly limited its field of activity to performing rights. It cannot arguably expand in the direction of reproduction rights, unless the decree is amended. BMI's limited activity in this area is defined by Section 4(b) of its contract.83 BMI's 1966 consent decree84 expressly bars it from commercial publication and recording and from commercial distribution of publications or recordings.

2. Dramatico-Musical (Grand) Rights

Apart from mechanical and "synch" reproduction rights, it seems more remarkable that ASCAP (in contrast to SESAC and, in a lesser

81. BMI at one time had a publishing arm or arms engaged in the publication of sheet music (an activity BMI has now discontinued).
82. ASCAP 1950 Consent Decree, supra note 21, Article IV (A).
83. See supra text accompanying note 81.
84. BMI 1966 Consent Decree, supra note 21, Article IV (B).
degree, to BMI) has always restricted its concern with music performing rights to the nondramatic or "small" performing rights. With French SACEM or British PRS as models, one might expect this. But in France there was in existence, before SACEM began, a society devoted to effectuating dramatic rights—i.e., SACD. In the U.S., there is no truly comparable single organization. Thus there might seem to have been some incentive for ASCAP to cover the dramatico-musical area in whole or in part. But in times before radio and television and wide-spread sound recording, such rights could practically be controlled by publisher or writer members who were in sole possession of the substantial and arduous-to-copy materials needed to produce a dramatico-musical work. A fresh look at this problem may be in order today.

BMI, we have seen, required and still requires its affiliates to assign to it some measure, at least, of the dramatico-musical performing rights. Thus the latest BMI Writers Contract provides in pertinent part:

5. (a) The rights granted to us by sub-paragraph (a) of paragraph 4 hereof shall not include the right to perform or license the performance of more than one song or aria from a dramatic or dramatico-musical work which is an opera, operetta, or musical show or more than five minutes from a dramatic or dramatico-musical work which is a ballet if such performance is accompanied by the dramatic action, costumes or scenery of that dramatic or dramatico-musical work.

(b) You, together with the publisher and your collaborators, if any, shall have the right jointly, by written notice to us, to exclude from the grant made by sub-paragraph (a) of paragraph 4 hereof of performances of works comprising more than thirty minutes of a dramatic or dramatico-musical work, but this right shall not apply to such performances from (i) a score originally written for and performed as part of a theatrical or television film, (ii) a score originally written for and performed as part of a radio or television program, or (iii) the original cast, sound track or similar album of a dramatic or dramatico-musical work . . . 85

SESAC requires from its publishers all dramatico-musical performing rights, though its writers apparently retain non-exclusive rights to license their publications in this as in other areas.

Over the years, and with new technology, the problem of control over certain dramatico-musical performances has altered. Control based on possession of essential musical and other materials is now diluted, if not seriously undermined, by the ability of licensees with-

85. Section "Fourth" of the latest BMI Publishers contract contains substantially identical language.
out detection to make and retain copies of materials in their hands as lessees. Moreover, an opera, operetta or musical show may be available on records, cassettes or audio or video tapes. Insofar as individual publishers or writers manage and license use of the materials, detection of unauthorized copying or of unlicensed live or broadcast performances (perhaps at remote locations) may be virtually impossible. The task of monitoring, licensing and collecting for radio, television, cable or other broadcast performances of the dramatico-musical works thus poses today, in a considerable degree, the same kind of problem for copyright holders that originally led to the formation of "small-rights" organizations. Admittedly, licensing and fees here pose specialized problems different from small rights. But it is arguably time to reappraise and perhaps revise the jurisdiction of all the performing rights organizations, with their elaborate monitoring capacities, in relation to grand rights. ASCAP under Article IV(A) and II (B) of its 1950 consent decree86 may only traffic in the nondramatic or small performance right. But it might consider monitoring broadcast performances of dramatico-musical works in its surveys and perhaps seek amendment of the decree to permit some coverage of such works. BMI could expand the scope of its coverage in this area, and SESAC improve its methods for monitoring unlicensed use of the grand rights it takes by contract. The fact that BMI (in some degree) and SESAC have contracted for grand rights without objection so far should embolden all to try to fill more effectively an existing gap in protection. Publishers or writers always retain the capability of direct licensing. But failure to provide effective policing mechanisms throughout the area of grand rights can only encourage public and exploiter ignorance or disregard of rights all should be educated to recognize and pay for.

3. Other Performance and Display Rights

One final area of performing rights—even though non-musical in nature—has, for that reason no doubt, been neglected so far by music performing rights organizations, though they include authors among their members or affiliates. Indeed it has been neglected by all organizations. The area is that of the live or broadcast public performance of nondramatic literary works and (except for public broadcasting's rights under section 118 of the 1976 Act) the display of pictorial, graphic and sculptural work. It may be that implementa-

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86. ASCAP 1950 Consent Decree, supra note 21.
tion of these rights calls for new organizations or clearing houses or some adaptation or collaboration by existing organizations (since, again, duplication of monitoring and staffing costs only wastes precious earned arts dollars). No specific recommendation is offered here. But the reason for mentioning these relatively unexploited performing rights at this point is to indicate another area in which a failure adequately to assert compensable authors' rights may contribute to general public and exploiter failure to recognize artistic labors as meriting compensation when used. When the fruits of certain artistic labors are made available gratis, public misunderstanding and resentment may be expected to increase in relation to other artistic works—e.g., nondramatic music performances—when payment is demanded for their use.

VI. Public Attitudes

We have now reviewed the main limitations or restraints affecting the operation of performing rights organizations in the U.S., some not encountered, or if so only rarely, in other parts of the world where authors' rights are protected.

What, if any, impact have these U.S. restraints and limitations had on U.S. public attitudes toward payment for music performing rights? The aim of a number of the restraints has, after all, been, in major part, to produce greater public access to, and lower user costs for, music performance. Have the beneficiaries of these measures—the public, the users—been led by them to anything like appreciation—grudging or otherwise—of their impact, or to a greater willingness to pay in the measure called for by the current U.S. system?

To this last question, the answer of this observer would have to be a clear "no." To be sure, the answer is based largely on personal impressions, some experience of the music business, readings and reports from the "legislative" front, as well as on enforcement figures detailed later and on considerations drawn from the previous account of restraints and struggles. Serious social science research should be undertaken in this area—as indeed across the whole field of authors' rights and their acceptance and enforcement. Attitudinal and comprehensonal surveys, as well as economic studies and statistical data

87. In recent years, at least two new collecting and clearing house organizations have been established in the United States: Visual Artists and Galleries Association (VAGA) for rights of artists and galleries and the Copyright Clearance Center (CCC) for reproduction of periodical articles.
to verify or correct what are now largely impressions, should be carried out. But the answer (if not its dimensions) seems plain, even without such studies.

Competition as a restraint is most appreciated, perhaps, by creators and publishers who thereby achieve a choice of organizations. With the present competition, we noted, no one entity can any longer choke off the supply of contemporary music, or make outrageous demands. Users and public gain from this state of affairs. But the option for any one entity to lower prices may be inhibited, and users are now faced with paying three entities (replicating costs to be recouped) rather than one. Do they pay more as a result, we asked, of the triopoly? Are smaller users more burdened by having to deal with a number of organizations? Economic studies are needed here to appraise actual effects.

In the antitrust area, the consent decrees have surely served the public interest in many ways, reducing abuses and promoting fairer operations and rates. Judicial rate-fixing, inter alia, provides a model, perhaps to be used more broadly if better dispute-settling machinery cannot be devised. But users have not been entirely satisfied with this recourse. They have sought a tribunal that cannot only settle rates but deal with the types of licenses offered under the consent decrees. They have resorted to treble damage private suits, at astronomical costs, that have satisfied no one and cut deeply into the moneys available for music. The contest will surely go on, as users seek licenses tailored and priced more precisely to actual use. Blanket licensing will require continuing reappraisal, as users look for alternatives they believe fairer. That composers must somehow combine to deal effectively with major users seems clear. Elsewhere, I have suggested a need to consider sui generis treatment under the antitrust laws for certain types of artists’ organizations, with public safeguards (against mismanagement, restrictive practices and unfair prices) that can be enforced speedily by efficient expert tribunals without the high costs of antitrust litigation. Thus far, users—despite antitrust curbs imposed on the organizations—are unreconciled and hostile, if not to authors’ rights or payment, at least to the rates asked. Some of the measures just proposed could benefit them. But it may be, of course, that industrial users, necessarily striving always to pay less for rights, can never be brought wholly to acceptance, especially in an area where, as noted later, there is no basic generally accepted standard regarding fair compensation.

For both the general public and many users, the failure of competition and antitrust curbs to create favorable public attitudes is expect-
able. Most are unaware they are or may be enjoying, due to U.S. restraints, special privileges of access or low cost unavailable in other nations with different systems. Most have no standard of comparison with other nations to inform their judgment. U.S. user attitudes toward the principle and the rates of payments are based almost entirely on domestic experience (or lack of it). If ASCAP and BMI have been "disinfected" by the consent decrees in some degree, these—coupled as they are with memories of ASCAP's early demands and its movie industry ties and BMI's broadcaster ties—have not wholly cleansed the "image" of the organizations in the minds of courts, users, legislators or some of the public, however unjust this may be. And what, in the end, is a fair price for music, whoever charges it?

Does lack of the governmental or quasi-governmental status enjoyed by the collection society in some European countries (it is a "public monopoly" in Italy, a "private association subject to regulatory control" in West Germany) make more difficult the task of the American organizations which must strive to collect fees without the cachet of authority enjoyed by an "arm of government"? Washington State commercial interests, it will be recalled, object to "fines" imposed by a private organization. Perhaps, then, the private character of the U.S. organizations is a handicap. But would not government status also trigger undesirable side-effects—controls, more immediate pressure on Congress by dissidents, etc.?

The "open" majoritarian American legislative process we have described (whether in the 1976 Copyright Act, or in later amendments or threats of amendment, or in the actions of state legislatures) threatens as nothing else does the precarious position of arts interests. Only three of 50 states—California, New York and Tennessee—contain very substantial centers of U.S. arts effort and so can be said to have substantial voting communities that support those interests. Legislators, as is well known, often tend to reflect constituent sentiment rather than to shape it. Considering this, it is, in fact, surprising that creative interests fared as well as they did in the 1976 Copyright Revision Act—gaining, for example, reduction in the not-for-profit exemption, lengthened copyright duration, a new termination right and less barbaric sanctions for lapses in formalities. Much of this is owed to a few effective advocates, and to heroic Registers of

89. See supra note 64.
Copyrights and courageous Senators and Representatives who have stood fast for artists and their rights. But the inroads on performing rights in section 110, in compulsory licenses, and in later enacted or looming exemptions demonstrate that arts interests must focus future attention on our legislators and those who maintain them in office.

In the courts, we have seen, along with some major victories, the results for creators have been mixed. Damaging majority statements in the Sony-Betamax case\(^{90}\) give cause for deep concern about future judicial attitudes toward copyright. Sympathetic statements in Harper & Row\(^{91}\) restore some hope. Justifiable fear of judicial "evasion of the hard issues" haunts the scene, however, as ease of duplication under new technologies threaten to make authors victims of a judicial and public preference for convenience and freedom of access to artistic work over fairness and payment. Judicial evasions will move questions back to the unpersuaded legislatures. Academic scholars of "low protectionist bias" have not encouraged the courts to resolve copyright doubts in favor of creative interests.\(^{92}\)

It was suggested that performing rights organizations reexamine their own attitudes toward some of the limits (some self-imposed) within which they operate, as well as toward collaboration with other musical and non-musical sectors of the arts community. Authors rights embrace more than nondramatic music performing rights and public respect for one right may be affected by non-respect for others.

Data requested by the writer from the major performing rights organizations as to the annual volume of litigation engaged in to enforce the music performing right seem to confirm earlier judgments about public and user resistance to copyright some seventy years after *Herbert v. Shanley*.\(^{93}\) ASCAP reported that 751 matters, mostly infringement suits against non-broadcaster commercial users (taverns, bars, restaurants, shops, etc.) who resist licensing, were referred to counsel for action in 1984, an increase from 364 matters ten years earlier. BMI reported over 450 infringement suits actually brought yearly against similar defendants (including almost 200 per year against unlicensed jukebox operators) and, in addition, reported over 100 arbitration proceedings against delinquent licensees. This, too,

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90. 464 U.S. 417.
91. 105 S. Ct. 2218.
93. 242 U.S. 591 (1917).
represents a significant increase over the years. These figures could of course be explained by increased ASCAP-BMI enforcement efforts, or greater litigiousness of defendants, or an increase in users, or more effective monitoring, or other causes not due to public or user attitudes. But it would be difficult to infer from them that any greater willingness to pay for music performance has resulted from the restraints examined.

VII. Conclusion

One imperative need seems to emerge from this discussion of U.S. performing rights organizations and the attitudes towards them. It is not new. The tocsin has been sounded eloquently by others. But it is more urgent than ever before, and grows more urgent each day.

It is the need to educate the public—users and consumers, national and even international—regarding the work of creative artists and the necessity that they be fairly compensated for that work. Especially is this need a dire one at this time when new technology threatens to overwhelm traditional modes of securing protection and payment for artists' work unless public action is taken. As long as the public remains as uninformed as it is about artists' problems, its attitudes cannot be expected to stir or support legislative action on those problems.

The reasons for public and user ignorance, incomprehension, disregard and hostility lie partly in the failure of the performing rights, and all other, arts organizations to carry out the educative effort essential to a change of attitude. They stem partly too from the difficulty of that task, especially perhaps in the United States.

First, to speak only of music performance, it must be recognized that society in general is disposed to think of music in hand as free for all to use. As noted at the beginning of this Article, the concept of performing rights is strange to most Americans. Not only is the concept difficult to grasp, it seems bizarre. As one writer comments:

For the most part our economy is predicated on the principle that an individual who purchases a commodity may use it as he sees fit and the seller is precluded from attaching conditions on its use. Thus the owner of an automobile may convert the same into a commercial enterprise,

viz., taxicab, without the payment of an additional fee to the Ford Motor Company, etc.\textsuperscript{95}

If ASCAP, BMI or SESAC attempts to collect a fee from a merchant for relaying broadcast music to his customers, it is seen, in the words of the Washington State Resolution quoted earlier, as an unjustifiable "fine." The notion that there is an intangible creator's right of performance ("splittable," in addition, from other intangible rights such as rights of reproduction/copying) inhering in something in the hands of others must be explained and justified if it is not to be misunderstood, resented and resisted.

Second, there is a common impression that creating music is not labor and that a completed piece of music is not a product of labor. It is "play."\textsuperscript{96} Not untypical is the remark "so you're an artist—how nice!—and do you also work?"\textsuperscript{97} Moreover, art is something a true artist is "impelled" to generate, regardless of external rewards. It comes easily to the gifted. From all this, it follows that the artists' product should be available without payment, or at least not much payment. The "sacrificial days" of creative effort mentioned in Mazer \textit{v. Stein}\textsuperscript{98} should indeed be just that: "sacrificial." When one successful seeker of the performance exemption in section 110(10) was asked why he was willing to pay for the beer he and his fellows drank but not for the performance of music, the reply was "music is different."\textsuperscript{99} At this point, it is well to recall Dr. Johnson's view that "no man but a blockhead ever wrote except for money,"\textsuperscript{100} and Macaulay's statement:

> It is desirable that we should have a supply of good books; we cannot have such a supply unless men of letters are liberally remunerated; and the least objectionable way of remunerating them is by means of copyright.\textsuperscript{101}

In sum, it must be brought home to all that creating worthwhile music, poetry, books or paintings is mostly hard work, the fruit of labor that deserves to be paid for when used. Paying a gifted creator for

\textsuperscript{95} H. Warner, supra note 17, at 450.
\textsuperscript{96} "I loafe and invite my soul . . . ." W. Whitman, Song of Myself, l. 4, in Leaves of Grass (1855).
\textsuperscript{98} 347 U.S. 201, 219 (1954).
\textsuperscript{101} T. Macaulay, supra note 54, at 495-96.
use of his work enables him to continue working and—hopefully—to live by his art.

Third, is it wholly fanciful to suggest that the U.S. public (in particular, those official and unofficial sectors of it that shape public policy) displays less concern for its creative artists and their work and for other works of the mind, than does the public in, say, Britain, France, or many other European nations? It is questionable whether the justifications for copyright protection have been accepted to a comparable degree in the U.S., whether one looks to economics or to "property right" or *droit moral* arguments. Quaere, also, whether there is adequate recognition that successful art can create national assets of value, increasing human understanding of society, or that such art may achieve an international asset value and enhance a nation's status among nations? Professor Chafee wrote in 1945 (in support of copyright) that "authors, musicians, painters are among the greatest benefactors of the race." But others have not shared this view, or at least his deductions from it. That copyright and patent were deemed worthy by the Founding Fathers of special notice in the U.S. Constitution is not, in this observer's experience, a matter of common knowledge even among educated citizens; nor are the history and traditions that brought this about. How many in U.S. society are aware that authors' rights are recognized, with the approval of many nations, in the Universal Declaration of Human Rights and the International Covenant on Human Rights? Even among U.S. law-

102. See the cogent summary in S. Stewart, supra note 55, at 5-4.

103. For example, arguments based, respectively, on the need of investment and recoupment to stimulate production and the public goods character of the product, on the premise that a creator has a "right of property" (natural or legal) in his creation rather than a narrow privilege/mopoly interest, and on the premise (*droit moral*) that a work of art is the expression of a creative personality to be protected as such. There have been recent stirrings in relation to *droit moral*—see, e.g., Gilliam v. ABC, Inc., 538 F.2d 14, 24-25 (2d Cir. 1967), and the recent "moral rights" statutes: California Art Preservation Act of 1979, Cal. Civ. Code §§ 987-89 (West Supp. 1984), New York Artists' Authorship Rights Act of 1983, N.Y. Arts and Cultural Affairs Law §§ 14.03 (McKinney Supp. 1986) and Massachusetts Art Preservation Act, Mass. Gen. Laws Ann., ch. 231, § 855, and ch. 260, § 2C (West 1985). As to copyright as a property right, compare, for instance, Baker v. Libbie, 210 Mass. 599, 604-05, 97 N.E. 109, 111 (1912), with Breyer, supra note 92, at 288-89.


105. B. Kaplan, supra note 92, and Breyer, supra note 92.

106. In the Universal Declaration, see Art. 27, § 2; and in the International Covenant, see Art. 15, § 1. N.B. that visitors to the U.S. sometimes ask why in U.S. villages, towns or cities, there seem to be relatively few streets, plazas, squares, schools named after great domestic authors, poets, composers, artists or intellectual innovators—a phenomenon common in Europe. The U.S. has tended rather to honor in this way its public officials, economic achievers, and sports heroes, with a scattering of performers and creators in the more popular art forms.
yers, how many perceive a relation between protection of artistic expression and the generally prized freedom of speech (which surely assumes freedom, and even encouragement, to create protected speech)? There has long been need for an authoritative statement such as that made only recently in Harper & Row, Publishers, Inc. v. Nation Enterprises by Justice O'Connor, for a majority of the Supreme Court: "[T]he Framers of the Constitution intended copyright to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the incentive to create and disseminate ideas."\textsuperscript{107}

Whether or not one fully shares Professor Chafee's views, it may be that a special educative effort confronts a nation so oriented—an education reaching our schools, colleges and media with such force as to reshape, in a measure, some basic societal habits of thought.

Fourth, any educational effort undertaken must strive especially to reach the users and exploiters of copyright. It is probably natural in a competitive system that industry should try to pay as little as possible for what it buys—whether it be performing rights or some other commodity. So also that it should then charge as much as possible, with as little sharing of revenue with creators as can be managed. It is expectable that what performing rights organizations deem a fair price should be deemed unfair by the buyers. Who is right—considering the market and the objective? To resolve this question, some generally accepted standard would help. It should be based on impartial study of what is needed and viable to attain the objective of copyright: self-sufficiency for the meritorious artist so that he can live by his art at least as decently as other professionals—e.g., teachers—in our society.\textsuperscript{108} We do not really know whether copyright does what it should to achieve this goal. We need such knowledge to appraise the existing law and the adequacy of payments made or asked for music performance or other art uses, and for the education of users.

Fifth, of all the mischiefs demanding education of the public and users, one of the most recent, dangerous and insidious has been aptly labeled "consumer politics" by Stephen Stewart, Q.C., of the United Kingdom, who comments:

\textit{[T]he doctrine means that the consumer should have the widest possible access to all copyright material at the lowest possible cost, in many cases,}

\textsuperscript{107} 105 S. Ct. at 2230.
\textsuperscript{108} Compare the differing standards of Breyer, supra note 92, at 284-91, and T. Macaulay, supra note 54.
free. Almost everybody in our modern society is a consumer of copyrights in several respects: as a reader of books, newspapers, or other printed copyright material, as a listener to music, as a viewer of television or as a parent of a child at school who should have his school books cheap or free, to name only the most common uses. Thus, put in electoral terms, on most copyright issues the overwhelming majority of voters are on one side and a comparatively very small number of voters, who are copyright owners are on the other side of the argument. Furthermore, only a tiny fraction of this small number of voters, who are copyright owners become millionaires, but it is those few who are constantly in the public eye. No politician, even if he is the opposite of a populist, could totally ignore this when taking a position on a copyright issue. The counter-argument, as you all know, is that without copyright, the liberty of the subject, including the liberty of speech and the freedom of expression in literature and the arts, would be in danger and ultimately some of the values of western civilization would be at risk. But this counter-argument is not as obvious as the populist argument of cheap access to copyright works by the general public.109

"Consumer politics" in this sense have mushroomed today when every man, woman, or firm or performing organization is "his, her or its own publisher," equipped at home or in the workplace with instruments for display, for performance and for copying, all of them more convenient to employ than arrangements for purchase or rental. It is an international as well as a U.S. problem. That access to art should be free and is a matter of right is increasingly argued everywhere as copyright becomes more difficult to enforce. Fair use is often the rubric under which the argument is made. The Sony-Betamax110 case illustrates this and (in the dissent) some of the arguments in reply. No task is more pressing than to impress upon the public throughout the world that new technology does not alter the fact that use of art, including music performance, is the use of a product of labor, and that it must be paid for, even if new methods must be found to achieve this end.

Finally, it must be stressed once more that the urgent national and international educational effort needed from WIPO, UNESCO and the U.S. and other national performing rights organizations to educate the public regarding music performance must be undertaken jointly with other arts organizations and across the whole spectrum of the creative arts.111 All of the arts must cooperate for each to achieve

111. The beginnings of U.S. joint efforts can be seen in such organizations as the American Copyright Council, American Arts Alliance, and Volunteer Lawyers for the Arts—to name but a few among a growing number of groups. The message to be conveyed, the argu-
the maximum understanding. In closing, one can hardly do better than quote and endorse the eloquent words of Stephen Stewart, Q.C.:

The copyright argument needs to be put again and again in differing forms and in all countries. Once this is acknowledged, the task of constantly arguing for the maintenance and development of copyright, which may at times appear repetitive, or even tedious, becomes a necessity, even a noble pursuit, humanist in the best sense of the word.\textsuperscript{112}

\textsuperscript{112} Stewart, supra note 94, at 370.