COMMENTS

A MATTER OF (ANTI)TRUST: THE HARRY FOX AGENCY, THE PERFORMANCE RIGHTS SOCIETIES, AND ANTITRUST LITIGATION

I. INTRODUCTION

Although laypersons may often equate monopolistic antitrust practices with the size of a company's market share, courts examining antitrust allegations have stated that "the size of the market is not conclusive of monopoly or absence of it."[1] Nowhere is this proposition better illustrated than with the Harry Fox Agency ("HFA"), which controls mechanical licensing and collections for eighty percent of United States music publishers.[2] Unlike the performance rights societies—the American Society of Composers, Authors, and Publishers ("ASCAP"); Broadcast Music, Inc. ("BMI"); and the Society of European Stage Authors & Composers, Inc. ("SESAC")—which control much smaller performance licensing markets of approximately fifty-four, forty-three, and three percent, respectively,[3] HFA remains free from antitrust charges, while the societies share an extensive history of antitrust litigation.

This Comment examines whether HFA's large market share violates antitrust laws. In doing so, the Comment compares HFA's structure and operation to that of the performance rights societies and argues that the differences lead to HFA's immunity from antitrust charges, despite the agency's large mechanical licensing market share. Part II.A provides background information on both HFA and mechanical licensing. Part II.B discusses the three performance rights societies, performance royalty licensing, and the major antitrust challenges arising from the societies' practices throughout the twentieth century. Part III.A addresses the possibility that § 115(c)(3)(B) of the 1976 Copyright Act provides a statutory antitrust shield for common mechanical licensing and collection agents, such as HFA. Part III.B examines the operational differences between HFA and the performance rights societies and uses a rule of reason test to determine that HFA does not violate antitrust laws. Part III.C argues that HFA's large mechanical licensing market share stems not

1. *See, e.g.*, Affiliated Music Enters., Inc. v. SESAC, Inc., 160 F. Supp. 865, 874 (S.D.N.Y. 1958) (stating true indicator of monopoly is presence or lack of competitive market), *aff'd*, 268 F.2d 13 (2d Cir. 1959).

2. PETER M. THALL, WHAT THEY'LL NEVER TELL YOU ABOUT THE MUSIC BUSINESS: THE MYTHS, THE SECRETS, THE LIES (& A FEW TRUTHS) 176 (2002).

3. W. Jonathan Cardi, *Über-Middleman: Reshaping the Broken Landscape of Music Copyright*, 92 IOWA L. REV. 835, 843–44 (2007).

from illegal monopolistic behavior but from allowable, "fair and open salesmanship."[4] Finally, Part III.D analyzes a hypothetical situation in which HFA could potentially engage in trade-restraining behavior but ultimately concludes, through application of the rule of reason test, that the availability of the statutory compulsory license precludes any antitrust violations by HFA.

II. BACKGROUND ON HFA, THE PERFORMANCE RIGHTS SOCIETIES, AND THE LATTERS' HISTORY OF ANTITRUST LITIGATION

Throughout the past century, the Harry Fox Agency and the United States' three performance rights societies—ASCAP, BMI, and SESAC[5]—received significantly different antitrust scrutiny. HFA, which controls a substantial percentage of United States mechanical licensing and collection on behalf of its affiliated client-publishers, remains free from antitrust allegations, while ASCAP, BMI, and SESAC have a considerable collective history of such litigation.[6]

A. The Harry Fox Agency

1. Background

The Harry Fox Agency plays an important role in music industry administration. Created by the National Music Publishers' Association ("NMPA") in 1927, the agency exists as the NMPA's wholly owned subsidiary and functions as the "clearinghouse" agent charged with issuing client-publishers' United States musical composition licenses.[7]

According to its website, "HFA licenses the largest percentage of [musical composition] and digital uses of music in the United States."[8] The agency represents approximately 31,000 copyright owners and administrators, including eighty percent of American, and a majority of international, music publishers.[9]

4. Affiliated Music Enters. Inc. v. SESAC, Inc., 268 F.2d 13, 15 (2d Cir. 1959) (stating "fair and open salesmanship" does not equal economic coercion required for antitrust violations).

5. *See* THALL, *supra* note 2, at 205 (providing full names and abbreviations of performance societies).

6. See *infra* Part II.B.3.b for a discussion of antitrust litigation against the performance rights societies and Part III for a discussion of why HFA has not been subjected to the same treatment.

7. HFA, About HFA, http://www.harryfox.com/public/HFAHome.jsp (last visited June 28, 2009) [hereinafter HFA, About HFA]; HFA, General Information: What Is a Mechanical License?, http://www.harryfox.com/public/FAQ.jsp#6 (last visited June 28, 2009); *see also* Alden-Rochelle, Inc. v. Am. Soc'y of Composers, Authors & Publishers, 80 F. Supp. 888, 896 (S.D.N.Y. 1948) (explaining Harry Fox Agency takes its name from Harry Fox, its original operator). The NMPA is the preeminent trade association for American music publishers, and it operates as a legislative and regulatory advocate for its 700 members. NMPA, About NMPA, http:www.nmpa.org/aboutnmpa/index.asp (last visited June 28, 2009).

8. HFA, About HFA, *supra* note 7.

9. THALL, *supra* note 2, at 176, 235; Simon H. Rifkind, *Music Copyrights and Antitrust: A Turbulent Courtship*, 4 CARDOZO ARTS & ENT. L.J. 1, 5 (1985); HFA, The Harry Fox Agency Collects

HFA controls licensing for more than 1.6 million musical compositions, and it currently administers 11.95 million active licenses covering musical composition uses embodied within compact discs, vinyl records, cassettes, digital downloads, and ringtones.[10] These licenses generated royalties totaling $379.4 million in 2006.[11]

In addition to its licensing and collection services, HFA provides additional incentives for music publishers to become clients. The agency undertakes periodic record label audits to collect unpaid musical composition royalties, and it instigates copyright infringement actions on clients' behalf.[12] These services are especially beneficial to smaller publishers, even when auditing or administrative costs decrease the resulting settlement payments, because many would not have the financial or administrative resources to undertake the actions on their own.[13]

2. Mechanical Royalties

Every musical recording embodies two distinct and separate copyrights. The first copyright is the sound recording, which refers to the audible "aggregation of sounds."[14] As an example, the Beatles recorded the sound recording entitled "I Am the Walrus" and embodied it on the album *Magical Mystery Tour*. The second copyright is the musical composition, or written song.[15] John Lennon and

over $379 Million in Royalties for Its More than 31,000 Affiliated Publishers in 2006, at 1, http://www.harryfox.com/docs/2006HFARecap.pdf (last visited June 28, 2009).

10. HFA, *supra* note 9, at 1–2; NMPA, About NMPA: Harry Fox Agency, http://www.nmpa.org/aboutnmpa/hfa.asp (last visited June 28, 2009).

11. HFA, *supra* note 9, at 1. HFA takes an 8.75% commission on any royalties collected. Cardi, *supra* note 3, at 842.

12. M. WILLIAM KRASILOVSKY & SIDNEY SHEMEL, THIS BUSINESS OF MUSIC: THE DEFINITIVE GUIDE TO THE MUSIC INDUSTRY 165 (10th ed. 2007); THALL, *supra* note 2, at 176; Cardi, *supra* note 3, at 842. HFA does not audit the major labels (i.e., Warner, Sony/BMG, Universal, and EMI) on behalf of the majors' affiliated publishers (i.e., Warner/Chappell, Sony/ATV, Universal Music Publishing, and EMI Music Publishing), because the companies conduct their own internal audits. THALL, *supra* note 2, at 177. For a listing of major labels, see Henry H. Perritt, Jr., *New Architectures for Music: Law Should Get Out of the Way*, 29 HASTINGS COMM. & ENT. L.J. 259, 285 (2007), and for a listing of major labels' affiliated music publishers, see THALL, *supra* note 2, at 187, 195.

13. THALL, *supra* note 2, at 196.

14. M. WILLIAM KRASILOVSKY & SIDNEY SHEMEL, THIS BUSINESS OF MUSIC: A PRACTICAL GUIDE TO THE MUSIC INDUSTRY FOR PUBLISHERS, WRITERS, RECORD COMPANIES, PRODUCERS, ARTISTS, AGENTS 38 (7th ed., 1995). However, the sound recording does not include the "tangible medium of fixation" in which the sounds are fixed (i.e., the compact disc, cassette, or digital file). *Id.*; *see also* 17 U.S.C. § 101 (2006) (defining "[s]ound recordings" as "works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied").

15. *See* KRASILOVSKY & SHEMEL, *supra* note 14, at 133–34 (stating that copyright based on authorship is separate from physical expression).

Paul McCartney wrote the musical composition entitled "I Am the Walrus" from which the Beatles created the sound recording of the same name.[16]

Record labels typically own sound recording copyrights and pay ensuing sound recording royalties to recording artists, while music publishing companies typically own, control, or administer musical composition copyrights and pay the resulting royalties to songwriters.[17] To illustrate, whenever Capitol Records reproduces "I Am the Walrus" on a compact disc, the Beatles (i.e., John, Paul, George, and Ringo, or their designated heirs) each receive artist royalties for their sound recording performances; however, only the songwriters, John and Paul (and their designated music publisher), receive royalties for the musical composition reproduction.

The Supreme Court originally ruled that musical composition royalties accrued only for copies that could be "see[n] and read," i.e., sheet music.[18] Congress expressed its disagreement with the ruling by structuring the 1909 Copyright Act to specifically include musical composition copyright protection "in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read *or* reproduced," including mechanical reproductions.[19] "Mechanical reproduction" refers to musical composition embodiment in any format, such as compact discs or cassettes, which may be reproduced via a mechanical device, and such licenses and royalties are known as "mechanicals."[20]

In order to prevent music publishing monopolies from purposely stifling such reproductions, Congress enacted the very first compulsory license for musical compositions in chapter 320, § 1(e) of the 1909 Copyright Act:

> [W]henever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work . . . serving to reproduce mechanically the musical work, any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty of two cents on each such part manufactured . . . .[21]

16. ASCAP, ACE Title Search, http://www.ascap.com/ace/search.cfm (search for "I Am the Walrus") (last visited June 28, 2009).

17. THALL, *supra* note 2, at 235; *see id.* at 23–24 (stating record labels pay royalties to artists at rates provided for in negotiated recording agreements and discussing agreements between music publishers and songwriters).

18. White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1, 12, 17 (1908) (involving music publisher's copyright infringement claim against player-piano roll company that created rolls containing publisher's songs and holding that audible reproductions made via "mechanical devices" which cannot be "see[n] and read" do not constitute "copies" for infringement purposes).

19. Act of March, 4, 1909, ch. 320, § 1(e), 35 Stat. 1075, 1075 (superseded by Copyright Act of 1976, current version at 17 U.S.C. §§ 101–1332 (2006), except for works created before the Copyright Act of 1976 went into effect in 1978) (emphasis added).

20. *See* KRASILOVSKY & SHEMEL, *supra* note 12, at 161 (discussing "mechanical rights").

21. Act of March, 4, 1909, ch. 320, § 1(e); *see also* Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 CASE W. RES. L. REV. 673, 681 (2003) (discussing Congress's wariness of publishing monopolies).

The 1976 Copyright Act retains the 1909 compulsory license in § 115(a)(1), which provides:

> When phonorecords of a nondramatic musical work have been distributed to the public in the United States under the authority of the copyright owner, any other person, including those who make phonorecords or digital phonorecord deliveries, may, by complying with the provisions of this section, obtain a compulsory license to make and distribute phonorecords of the work.[22]

This means that as long as a "nondramatic musical work" (including most musical compositions) has been publicly distributed in the United States with the copyright owner's consent, any party may obtain a compulsory mechanical license to reproduce and distribute the work on phonorecords.[23] Returning to the Beatles example, in 1967, Capitol Records distributed a nondramatic musical work of the musical composition entitled "I Am the Walrus" in the United States with the consent of the composition's copyright owners, i.e., John, Paul, or their publishing designee. As a result, Epic Records had a statutory right to embody Oasis's cover of the composition on the group's 1998 album entitled *The Masterplan* as long as Epic followed the statutory requirements for notification and royalty payments.[24]

Although Congress specifically prescribed the compulsory royalty rate in the 1909 Copyright Act, the Copyright Royalty Tribunal now sets a new compulsory rate approximately every two years.[25] Currently, that rate is $0.091 for a song under five minutes in length.[26] For songs over five minutes, the rate equals the song's length (rounded to the highest minute) multiplied by $0.0175.[27]

3. Harry Fox's Mechanical Licensing

Despite the 1909 Congress's creation of the compulsory license as an antimonopoly mechanism, the 1976 Copyright Act's § 115(c)(3)(B) places the following proviso on compulsory licensing:

> *Notwithstanding any provision of the antitrust laws*, any copyright owners of nondramatic musical works and any persons entitled to obtain a compulsory license under subsection (a)(1) may negotiate and agree upon the terms and rates of royalty payments under this section and the proportionate division of fees paid among copyright owners,

22. 17 U.S.C. § 115(a)(1).

23. *See id.* (providing for compulsory license).

24. *See id.* § 115(b)–(c) (providing compulsory license notice and royalty requirements).

25. *See* Act of March 4, 1909, ch. 320, § 1(e) (requiring two-cent royalty per copyrighted work use); Rifkind, *supra* note 9, at 5 (explaining Copyright Royalty Tribunal was new agency created to regulate compulsory licensing rates); HFA, Historical Rates, http://www.harryfox.com/public/historicalrates.jsp (last visited June 28, 2009) (detailing historical compulsory royalty rates and dates increases went into effect).

26. HFA, Current Rate, http://www.harryfox.com/public/licenseeRateCurrent.jsp (last visited June 28, 2009).

27. *Id.* For example, the mechanical royalty for a 5:12 song is calculated as 6 x $0.0175 = $0.105.

> and may designate common agents on a nonexclusive basis to negotiate, agree to, pay or receive such royalty payments.[28]

This means that musical composition copyright owners and licensees may forego the statutory compulsory license in favor of negotiated licenses, and the copyright owners may assign the negotiation and collection responsibilities for such licenses to a common agent.[29] Pursuant to this provision, approximately eighty percent of United States musical composition copyright owners have designated the Harry Fox Agency as their "common agent" for mechanical royalty licensing and collection.[30]

Interestingly, while HFA's licenses facially assert themselves to be "compulsory licenses," the licenses are actually examples of such "negotiated licenses" under § 115(c)(3)(B). The HFA license form contains language granting licensees all rights and obligations under § 115(a)(1)'s compulsory license provision, as well as a waiver on behalf of HFA's publisher-clients from filing the otherwise statutorily required "notice of intention to obtain a compulsory license."[31] However, the District Court for the Southern District of New York held in *Rodgers & Hammerstein Organization v. UMG Recordings, Inc*.[32] that the HFA license instead constituted a "negotiated license" pursuant to 17 U.S.C. § 115(c)(3)(B).[33] Therefore, because the HFA licenses are not "compulsory licenses" pursuant to § 115(a)(1), HFA is not statutorily required to grant them.

B. The Performance Rights Societies and Antitrust Litigation

Three major performance rights societies currently exist in the United States—ASCAP, BMI, and SESAC. The United States government and various third party plaintiffs asserted antitrust charges against each over the course of the twentieth century.[34]

28. 17 U.S.C. § 115(c)(3)(B) (emphasis added).

29. *See id.* (permitting copyright owners to issue negotiated licenses and designate agents to administer such licensing).

30. *See* THALL, *supra* note 2, at 176 (stating HFA represents eighty percent of United States music publishers).

31. Rodgers & Hammerstein Org. v. UMG Recordings, Inc., 60 U.S.P.Q.2d (BNA) 1354, 1356 (S.D.N.Y. 2001); KRASILOVSKY & SHEMEL, *supra* note 12, at 166. A primary difference between HFA's licenses and the compulsory § 115 licenses is that HFA requires quarterly accountings, whereas the statute requires monthly accountings. KRASILOVSKY & SHEMEL, *supra* note 12, at 166. Thus, HFA's licenses are substantially easier for record labels to administer.

32. 60 U.S.P.Q.2d (BNA) 1354 (S.D.N.Y. 2001).

33. *Rodgers & Hammerstein Org.*, 60 U.S.P.Q.2d at 1356, 1358.

34. See *infra* Part II.B.3.b for a discussion of major antitrust litigation against the performance rights societies.

1. The Performance Rights Societies

a. ASCAP

Victor Herbert founded ASCAP in 1914 as a "clearing house[]" for public performance rights and royalties.[35] An unincorporated membership organization "owned by its [over 300,000] writer and publisher members," ASCAP controls the largest catalog and market share of public performance rights of all the United States performance rights societies.[36]

ASCAP licenses rights primarily via "blanket license," whereby a licensee wishing to publicly perform ASCAP-controlled music pays a single fee equaling just under two percent of the licensee's gross receipts for the year, subject to a minimum fee.[37] In exchange, the licensee obtains the right to perform any composition in ASCAP's repertoire for one year.[38] After subtracting its overhead expenses, ASCAP apportions fifty percent of the collected money to member publishers and fifty percent to member writers, with individual allocations within each group based on surveys detailing how often particular members' music was used.[39]

b. BMI

The National Association of Broadcasters created BMI in 1940 to obtain better public performance rate negotiation leverage with ASCAP.[40] Today, BMI is a New York corporation owned by more than 300 broadcasting stations.[41] It represents public performance rights for more than 375,000 songwriters and music publishers, as well as over 6.5 million musical compositions, giving the

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35. Linda McLeod, Comment, *H.R. 1195 Source Licensing: A Legislative Swan Song to the Blanket License*, 67 OR. L. REV. 735, 738, 740 (1988).

36. *See* Cardi, *supra* note 3, at 843–44 (discussing ASCAP's structure and market share); Bernard Korman, *U.S. Position on Collective Administration of Copyright and Anti-Trust Law*, 43 J. COPYRIGHT SOC'Y USA 158, 160–61 (1995) (describing ASCAP's structure and ownership); ASCAP, About ASCAP, http://www.ascap.com/about/ (last visited June 28, 2009) (detailing membership numbers).

37. KRASILOVSKY & SHEMEL, *supra* note 12, at 145; *see also* THALL, *supra* note 2, at 238 (discussing blanket licensing in context of Internet).

38. McLeod, *supra* note 35, at 744.

39. *See* KRASILOVSKY & SHEMEL, *supra* note 12, at 145 (stating amount apportioned to publisher and writer groups is equal); *id.* at 148–50 (discussing survey methods). ASCAP allocates payments within the writer and publisher groups based on surveys calculating musical composition use frequency. *Id.* For example, ASCAP fully surveys television networks by collecting "cue sheets," which list all musical compositions contained within each program. *Id.* ASCAP surveys radio station airplay through monitoring performance logs and the Mediaguide "digital fingerprint[ing]" technology. *Id.*

40. KRASILOVSKY & SHEMEL, *supra* note 12, at 194 (asserting desire to create competition for ASCAP); Cardi, *supra* note 3, at 844 (stating BMI formed after ASCAP attempted to institute monopolistic rate increases). The National Association of Broadcasters is a radio station trade association. Cardi, *supra* note 3, at 844.

41. *See* KRASILOVSKY & SHEMEL, *supra* note 14, at 194 (detailing society's ownership); Korman, *supra* note 36, at 160 (discussing BMI's structure).

society approximately forty-three percent of the public performance licensing market.[42]

BMI operates in a manner very similar to ASCAP. BMI licenses primarily via "blanket license," for which it charges approximately 1.6% of annual gross receipts.[43] The society also calculates its royalty payments based on surveying methods; however, BMI asserts that it conducts more sampling than ASCAP, giving members more opportunity to have music uses counted and paid.[44]

c. SESAC

SESAC began in 1930 as a private corporation owned and run by Paul and Ruth Heinecks.[45] Today, SESAC is the smallest performance rights society, and, although its catalog contains works by major artists such as Bob Dylan and Neil Diamond, it controls only three percent of public performance licenses issued.[46]

SESAC's operation differs substantially from ASCAP and BMI. While the other two societies calculate blanket license cost on a gross percentage of licensee's receipts, SESAC charges a fixed rate calculated on a variety of factors, including license type (e.g., television, radio, hotel), market population, and high one-minute advertising spot rate.[47] SESAC then apportions fifty percent, minus overhead expenses, of collected royalties to writer and publisher members, while retaining the other fifty percent.[48] To make its distributions to individual writers and publishers, the organization places less importance on surveys and, instead, favors special bonus payouts based on chart position.[49] Unlike ASCAP and BMI, SESAC operates for profit.[50]

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42. Cardi, *supra* note 3, at 844; BMI, About, http://www.bmi.com/about (last visited June 28, 2009).

43. KRASILOVSKY & SHEMEL, *supra* note 12, at 145–46.

44. KRASILOVSKY & SHEMEL, *supra* note 14, at 197.

45. Affiliated Music Enters., Inc. v. SESAC, Inc., 160 F. Supp. 865, 870 (S.D.N.Y. 1958) (listing original owners), *aff'd*, 268 F.2d 13 (2d Cir. 1959); KRASILOVSKY & SHEMEL, *supra* note 12, at 146 (providing founding date); THALL, *supra* note 2, at 205 (detailing SESAC's corporate status). Today, SESAC is owned by investors. KRASILOVSKY & SHEMEL, *supra* note 12, at 146; Korman, *supra* note 36, at 161.

46. KRASILOVSKY & SHEMEL, *supra* note 12, at 146 (discussing SESAC's size and artist roster); Cardi, *supra* note 3, at 844 (stating SESAC's performance licensing market share).

47. KRASILOVSKY & SHEMEL, *supra* note 12, at 146–47; SESAC, Obtain a License, http://www.sesac.com/licensing/obtain_a_license.aspx (last visited June 28, 2009); *see also* SESAC, SESAC, Inc. Radio Broadcasting Performance License, http://www.sesac.com/pdf/Radio_License_2006.pdf (last visited June 28, 2009) [hereinafter SESAC, Radio Broadcasting Performance License] (listing high one-minute advertising rates as calculation factor for radio license). For example, a radio station broadcasting in a five-million-person market with a high one-minute advertising spot rate of $6.00 would have paid an annual license fee of $4,668 in 2008. SESAC, Radio Broadcasting Performance License, *supra*.

48. KRASILOVSKY & SHEMEL, *supra* note 14, at 195.

49. *Id.* at 199. SESAC also examines cue-sheets and "spot-check[s]" television and radio stations. *Id.*

50. KRASILOVSKY & SHEMEL, *supra* note 12, at 146.

2. Performance Royalties

Section 106(4) of the 1976 Copyright Act provides that a valid musical composition copyright owner holds the exclusive right to publicly perform the composition.[51] "Public performance," as defined in the Copyright Act, means

> (1) to perform or display [a work] at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
>
> (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.[52]

This definition, taken in conjunction with 17 U.S.C. § 106(4), means that any time a song is played in public for persons other than a gathering of family or friends, the party responsible for the performance must obtain permission, through a license or otherwise, for the public performance of the musical composition.[53]

Congress initially created public performance rights in 1897; however, licensing and royalty collection proved to be an administrative difficulty.[54] Copyright owners were unable to effectively monitor and collect royalties from the various music and concert halls throughout the country that performed their music, giving said music and concert halls no incentive to actively seek out licenses.[55] Even when the halls wanted to obtain legitimate rights, they faced incredible difficulty locating the proper copyright owner.[56] For these reasons, copyright owners received no performance royalties until ASCAP's formation in 1914.[57]

Today, both domestic and foreign copyright owners, including writers and music publishers, transfer the burden of their performance rights administration to ASCAP, BMI, or SESAC.[58] Thus, the three societies control performance rights licensing and collection for "essentially 100 percent of the world's music."[59]

51. 17 U.S.C. § 106(4) (2006).

52. *Id.* § 101.

53. *See* KRASILOVSKY & SHEMEL, *supra* note 14, at 181–82 (discussing performance royalty sources, as well as several statutory exemptions provided in 17 U.S.C. § 110 for church services or classroom uses). Public performances include, but are not limited to, performances via television or radio stations, in bars or supermarkets, or via websites. *See id.* (providing public performance fee sources).

54. KRASILOVSKY & SHEMEL, *supra* note 12, at 142.

55. *Id.*

56. McLeod, *supra* note 35, at 739.

57. *Id.*

58. THALL, *supra* note 2, at 234–35.

59. *Id.* at 235; McLeod, *supra* note 35, at 739–40.

3. History of Antitrust Charges

a. Background

The United States Congress enacted two statutes to protect economic competition from the chilling power of monopolies. The Sherman Act, passed in 1890, "prohibited both combinations in restraint of trade and monopolization."[60] The Clayton Act, which followed in 1914, further condemned practices like mergers and acquisitions resulting in monopolies or "lessen[ed] competition."[61]

Pursuant to the Sherman Act, "[e]very contract . . . or conspiracy, in restraint of trade or commerce . . . is declared to be illegal" and "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony."[62] "Monopolizing conduct is 'the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'"[63]

The Clayton Act further provides that "[i]t shall be unlawful for any person engaged in commerce . . . to discriminate in price . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly."[64] This includes discriminating "in favor of one purchaser . . . upon terms not accorded to all purchasers on proportionally equal terms" or to "fix a price . . . on the condition . . . that the lessee or purchaser thereof shall not use or deal in the goods . . . of a competitor . . . where the effect . . . may be to substantially lessen competition."[65] As defined in both acts, "persons" is "deemed to include corporations and associations."[66]

b. Litigation and Consent Decrees

Throughout the past century, the performance rights societies faced multiple charges of wrongdoing under the antitrust acts. The parties settled the government suits through signature of several consent decrees modifying the performance rights societies' operations, and the societies' adherence to the

60. *The Sedona Conference: Introduction to the Legal and Economic Issues at the Intersection of the Patent and Antitrust Laws*, 8 SEDONA CONF. J. 57, 58 (2007).

61. Clayton Act, ch. 323, §§ 2, 3, 7, 38 Stat. 730, 730–32 (1914) (current version at 15 U.S.C. § 13(a) (2006)).

62. 15 U.S.C. §§ 1, 2.

63. Broad. Music, Inc. v. Hearst/ABC Viacom Entm't Servs., 746 F. Supp. 320, 326 (S.D.N.Y. 1990) (alteration in original) (quoting Del. & Hudson Ry. Co. v. Consol. Rail Corp., 902 F.2d 174, 178 (2d Cir. 1990)).

64. 15 U.S.C. § 13(a).

65. *Id.* §§ 13(e), 14.

66. *See id.* § 7 (providing definition within Sherman Act); *id.* § 12 (providing definition within Clayton Act).

decree terms has frequently served as a shield against third parties' antitrust allegations.[67]

The United States government filed criminal antitrust charges against both ASCAP and BMI in 1941 but dismissed the charges the same year after the organizations signed consent decrees.[68] ASCAP's consent decree specifically "limit[ed] ASCAP's ability to exert undue control of the market for music licensing rights through its control of a major portion of the music available for performance and its use of the blanket license as a means to extract non-competitive prices."[69] Among its provisions, the 1941 decree required ASCAP to offer a "per-program" license as an alternative to the society's typical blanket license.[70] The "per-program" license granted the right to use any musical composition in ASCAP's repertoire within a specific program, and it cost "either a dollar sum for each program with ASCAP music or a percentage of the station's advertising revenues from programs using a work in the ASCAP repertory."[71] While ASCAP's decree also required the society to grant membership to all interested parties and prohibited ASCAP from discriminating against any similarly situated licensees,[72] BMI's decree included no such obligations.[73] Instead, BMI retained the ability to treat similarly situated publishers differently, and this continued ability to offer "special deals" ultimately promoted the society's growth.[74]

In 1948's *Alden-Rochelle, Inc. v. American Society of Composers, Authors & Publishers*,[75] motion picture theater owners brought antitrust charges against ASCAP.[76] The theater owners argued that the society's exclusive stranglehold on members' public performance rights forced theatre owners to obtain ASCAP blanket licenses to perform the members' music, which often accounted for up to eighty percent of the films' scores.[77] The theatre owners further asserted that, because motion picture producers often owned the major publishing companies

67. A consent decree is "[a] court decree that all parties agree to." BLACK'S LAW DICTIONARY 441 (8th ed. 2004); *see also* Broad. Music, Inc. v. Columbia Broad. Sys., Inc. 441 U.S. 1, 13 (1979) (asserting deference to executive and judiciary monitoring of performance rights societies through consent decree adoption); Buffalo Broad. Co. v. Am. Soc'y of Composers, Authors & Publishers, 744 F.2d 917, 922–24 (2d Cir. 1984) (providing performance rights societies' consent decree history); K-91, Inc. v. Gershwin Publ'g Corp., 372 F.2d 1, 4 (9th Cir. 1967) (stating consent decree prevents performance rights society from price fixing through provisions providing for nonexclusive rights and judicial rate appeals).

68. *Buffalo Broad. Co.*, 744 F.2d at 922; Korman, *supra* note 36, at 162.

69. United States v. Am. Soc'y of Composers, Authors & Publishers, 157 F.R.D. 173, 177 (S.D.N.Y. 1994) (internal quotation marks omitted).

70. *Am. Soc'y of Composers*, 157 F.R.D. at 177–78 (quoting REP. OF THE SPECIAL MASTER at 11).

71. Korman, *supra* note 36, at 162.

72. *Id.* at 163.

73. *Id.* at 168.

74. *Id.*

75. 80 F. Supp. 888 (S.D.N.Y. 1948).

76. *Alden-Rochelle, Inc.*, 80 F. Supp. at 890.

77. *Id.* at 893.

that comprised ASCAP's membership, the producers' contractual requirements that the theaters obtain ASCAP licenses to perform the film music served only to force further payments to the producers.[78]

In its opinion, the District Court for the Southern District of New York asserted that "[ASCAP] is a monopoly, within the language of Sec. 2 of the anti-trust laws,"[79] and "[a]lmost every part of the [ASCAP] structure, almost all of [ASCAP]'s activities in licensing motion picture theatres, involve a violation of the anti-trust laws."[80] The ASCAP members, including music publishers owned by the motion picture producers, exclusively granted their public performance rights to the society.[81] Because motion picture producers then contractually limited film exhibition to theaters holding ASCAP licenses, the effect was that the motion picture producers and ASCAP conspired to intertwine their copyrights, which "constitute[d] an unlawful extension of the statutory monopoly of each . . . in restraint of trade."[82] The court stated that the "combination of the authors, composers and publishers in the [ASCAP] organization . . . have given [ASCAP] the power to fix the prices at which the performing rights are sold to the exhibitors."[83] Despite these violations, however, the court found that the theater owners did not suffer any injury and, thus, could not receive damages under the statute.[84] The court based this ruling on the theater owners' failure to prove that the ASCAP rates were excessive.[85]

In an amendment to the judgment, the court refused to force ASCAP to "divest itself of the picture performing rights of musical compositions and to assign those rights to the owners."[86] Instead, the court stated that ASCAP and its members could not enforce any motion picture performing rights as long as it continued "as an illegal combination and monopoly"[87] and that "pooling of the proceeds derived from the licensing of the copyrights through the illegal combination" simply dissolved any existing public performance copyright protection.[88]

Following *Alden-Rochelle*, the United States government amended ASCAP's 1941 consent decree.[89] The amended decree, entered into in 1950 and referred to as the "Amended Final Judgment," limits ASCAP to acquiring members' public performance rights on a purely nonexclusive basis, giving

78. *Id.* at 892.

79. *Id.* at 893.

80. *Id.*

81. *Alden-Rochelle, Inc.*, 80 F. Supp. at 894.

82. *Id.* at 892, 894.

83. *Id.* at 894–95.

84. *Id.* at 898.

85. *Id.* at 895–96.

86. Alden-Rochelle, Inc., v. Am. Soc'y of Composers, Authors & Publishers, 80 F. Supp. 900, 903 (S.D.N.Y. 1948).

87. *Id.*

88. *Id.* at 904.

89. *See* Buffalo Broad. Co. v. Am. Soc'y of Composers, Authors & Publishers, 744 F.2d 917, 922–23 (2d Cir. 1984) (discussing history of performance rights societies' consent decrees).

licensees the option to obtain such rights directly from the copyright owner.[90] The Amended Final Judgment also requires ASCAP to structure the per-program license fees "to avoid any discrimination among the respective fees fixed for the various types of licenses which would deprive the licensees . . . of a genuine choice,"[91] and it allows the District Court for the Southern District of New York to set "reasonable" ASCAP license fees where disagreement exists between the parties.[92]

In 1958, SESAC came under antitrust scrutiny with *Affiliated Music Enterprises, Inc. v. SESAC, Inc.*[93] In that case, a former SESAC employee responsible for building the society's "shaped note gospel music" repertoire left the society and attempted to lure SESAC publishers to his new company.[94] That new company, Affiliated Music Enterprises, wished to enter the public performance licensing market and build its client base; however, in marked contrast to the operations of ASCAP, BMI, and SESAC, Affiliated's business plan merely involved obtaining a middle-man's earnings slice by acquiring the client's public performance rights and then licensing those rights to one of the other performance rights societies.[95]

Through the former SESAC employee's contacts, Affiliated poached public performance rights from fifteen SESAC music publishers, all of whom then flooded SESAC's office with cancellation and assignment notices.[96] SESAC, not wanting to lose a sizeable chunk of its clients, quickly dispatched representatives to each publisher to explain how Affiliated's structure would detrimentally affect the publisher's interests and earnings, and SESAC succeeded in retaining fourteen of the fifteen publishers.[97]

90. *Id.* at 922–23.

91. *Id.* (quoting Buffalo Broad. Co. v. Am. Soc'y of Composers, Authors & Publishers, 546 F. Supp. 274, 278 n.6 (S.D.N.Y. 1982)).

92. *Id.* ASCAP bears the burden of establishing that its requested rates are reasonable in such rate hearings. *Id.*; *see also* United States v. Am. Soc'y of Composers, Authors & Publishers, 981 F. Supp. 199, 222 (S.D.N.Y. 1997) (setting per-program license fee at 0.06% of radio corporation's "adjusted gross revenue"); United States v. Am. Soc'y of Composers, Authors & Publishers, 831 F. Supp. 137, 166–67 (S.D.N.Y. 1993) (setting ABC's blanket license fee from January 1, 1986 through December 31, 1993, at $10.47 million dollars per year and CBS's fee from January 1, 1991 through December 31, 1993, at $9.75 million dollars per year); United States v. Am. Soc'y of Composers, Authors & Publishers, No. 13-95, 1989 WL 222654, at *24 (S.D.N.Y. Oct. 12, 1989) (setting Showtime/The Movie Channel's blanket license fees at $0.15 per cable service subscriber from April 4, 1984 through December 31, 1988).

93. 160 F. Supp. 865 (S.D.N.Y. 1958), *aff'd*, 268 F.2d 13 (2d Cir. 1959).

94. Affiliated Music Enters., Inc. v. SESAC, Inc., 268 F.2d 13, 14 (2d Cir. 1959). "Shaped note gospel music" refers to gospel music composed with notes deriving meaning from their shape (e.g., squares or triangles) instead of their position on the musical staff. *Affiliated Music Enters., Inc.*, 160 F. Supp. at 867. Such notation was popular in the southern United States at the time, and it provided an alternate method for learning to read music. *Id.*

95. *Affiliated Music Enters., Inc.*, 268 F.2d at 14.

96. *Affiliated Music Enters., Inc.*, 160 F. Supp. at 872–73.

97. *Id.* at 873.

Following SESAC's retention, Affiliated sued for antitrust violations.[98] Affiliated argued that, because SESAC licensed performance rights on behalf of more gospel publishers than any other performance rights society, SESAC held a "monopolistic stranglehold" on the genre which "pool[ed] . . . copyrights and revenues in restraint of trade."[99] The Court of Appeals for the Second Circuit ultimately ruled that SESAC did not violate antitrust laws, stating that Affiliated did not show that "SESAC has . . . power over price or to exclude a competitor which is the essence of the violations charged."[100] Instead, the court asserted that the dispute arose purely from "fair and open salesmanship" and competition between the two parties, which was the very thing that antitrust laws were meant to protect.[101]

The United States government and BMI entered into a new consent decree in 1966 after the government filed another round of antitrust charges against the organization.[102] BMI's continued ability to offer "special deals" to music publishers pursuant to the previous consent decree effectively resulted in its "acquiring a virtual monopoly on new music."[103] The 1966 decree sought to limit those effects by preventing BMI from engaging in practices such as providing rebates to broadcasters, publishing or distributing "sheet music or recordings," and structuring deals that required publishers to refrain from promoting songs controlled by the publisher's ASCAP-affiliated arm(s).[104] The decree also required BMI to grant membership to any interested party, putting BMI on par with the earlier ASCAP decrees.[105]

Despite ASCAP's operation within the 1950 consent decree terms, the society faced antitrust scrutiny again in 1967. In *K-91, Inc. v. Gershwin Publishing Corp.*,[106] a Washington state radio station charged that Gershwin and ASCAP conspired to fix prices for public performance blanket licenses.[107] While the Court of Appeals for the Ninth Circuit stated that ASCAP might be a combination, the court asserted that "not every combination is a combination in restraint of trade or a monopoly."[108] The court further stated that the stations could not charge ASCAP with price fixing, because ASCAP holds nonexclusive licensing rights and the consent decree specifically provides an opportunity for licensees to challenge ASCAP's requested fees in the District Court for the Southern District of New York.[109] According to the court, "ASCAP has been

98. *See id.* (explaining Affiliated sued SESAC for monopolization after SESAC retained publishers).

99. *Id.* at 867.

100. *Affiliated Music Enters., Inc.*, 268 F.2d at 15.

101. *Id.*

102. Korman, *supra* note 36, at 168.

103. *Id.*

104. *Id.* at 168–69.

105. *Id.* at 169.

106. 372 F.2d 1 (9th Cir. 1967).

107. *K-91, Inc.*, 372 F.2d at 2.

108. *Id.* at 4.

109. *Id.*

'disinfected' by the decree" and "so long as ASCAP complies with [it], it is not the price fixing authority."[110]

The performance rights societies' next, and perhaps greatest, antitrust challenge came in a lengthy, multitiered court battle with CBS. In *Columbia Broadcasting System, Inc. v. American Society of Composers, Authors & Publishers*,[111] CBS sued both ASCAP and BMI, asserting that the blanket licensing system required the network to pay considerable sums for programs containing no music and that the "per-program" license cost did not render it a true alternative to the blanket license.[112] The network further argued that such lack of choice effectively forced it to obtain blanket licenses from the societies, because, while CBS could theoretically license the rights from the copyright owners, such direct licensing was not economically or administratively possible.[113]

CBS's arguments did not persuade the district court. Because CBS made no assertions that the performance rights societies violated the consent decree terms, the court opined that the consent decree provisions (notably, the "per-program" license and the societies' nonexclusive licensing rights) prevented CBS from being forced into taking any license that it did not want.[114] Instead, the court found that CBS made no serious attempts to license performance rights directly and that the copyright owners' mere lack of administrative machinery did not constitute a refusal to deal.[115]

The United States Court of Appeals for the Second Circuit reversed, holding that the blanket license constituted price fixing.[116] The court stated that "when any group of sellers or licensors . . . sell[s] their products through a single agency with a single price" trade is restrained, and this restraint is continued, not eradicated, when a court fixes the price.[117] The mere availability of the blanket license constituted price fixing, the court argued, because it offered an "easy" option for licensees who then had less incentive to seek competitive pricing for individual rights.[118] While the court refused to grant an injunction against the blanket license's use, it suggested that ASCAP be required to offer "per use" licensing to remove the restraint on competition.[119]

When the case reached the Supreme Court in 1979 as *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*,[120] the Court disagreed with the court of

110. *Id.*

111. 400 F. Supp. 737 (S.D.N.Y. 1975).

112. *Columbia Broad. Sys., Inc.*, 400 F. Supp. at 745.

113. *Id.* at 745, 754–55.

114. *Id.* at 749.

115. *Id.* at 757–58.

116. Columbia Broad. Sys., Inc. v. Am. Soc'y of Composers, Authors & Publishers, 562 F.2d 130, 140 (2d Cir. 1977).

117. *Id.* at 136, 139. The court also noted that BMI could not assert judicial rate appeal availability as a defense because its consent decree did not provide for it. *Id.* at 138 n.23.

118. *Id.* at 140.

119. *Id.*

120. 441 U.S. 1 (1979).

appeals' holding that the blanket license system constituted a per se illegal price fixing mechanism.[121] In doing so, the Court recognized and deferred to the careful and continued monitoring of the performance rights societies' activities by the executive and judiciary through consent decree terms.[122] The blanket license's continued existence amidst such scrutiny, the Court reasoned, suggests that the system has legitimate economic value, and

> [t]he Sherman Act has always been discriminatingly applied in the light of economic realities. There are situations in which competitors have been permitted to form joint selling agencies or other pooled activities, subject to strict limitations under the antitrust laws to guarantee against abuse of the collective power thus created.[123]

Because blanket licenses offer a quick method to license public performance rights for an exceedingly large number of musical compositions, the licenses are "a necessary consequence . . . to achieve . . . efficiencies, and a necessary consequence of an aggregate license is that its price must be established."[124] Due to these economic benefits, the Court determined that blanket license challenges must be viewed through the double-pronged rule of reason test, which requires an analysis of "realistically available alternatives" and a weighing of the blanket license's anticompetitive and procompetitive effects.[125] The Court remanded the case to the Court of Appeals for the Second Circuit for such evaluation.[126]

On remand, the court of appeals applied the rule of reason test, examining "whether an agreement['s] . . . anti-competitive effects outweigh its pro-competitive effects," and determined that the blanket license did not constitute a trade restraint.[127] The court agreed that rights pooling might create such restraint in certain circumstances, but where the option exists to license individual musical compositions directly from copyright owners, any lacking competition between the individual compositions results from mere blanket license preference.[128] Where the "opportunity is fully available, and if copyright owners retain unimpaired independence to set competitive prices . . . the blanket license is not a restraint of trade."[129]

121. *Broad. Music, Inc.*, 441 U.S. at 6–7.

122. *Id.* at 13.

123. *Id.* at 13–14 (internal quotation marks omitted).

124. *Id.* at 20–21.

125. *Id.* at 24–25; *see also* Buffalo Broad. Co. v. Am. Soc'y of Composers, Authors & Publishers, 546 F. Supp. 274, 286 (S.D.N.Y. 1982) (providing rule of reason test prongs). The first prong of the rule of reason test requires courts to analyze whether the license unreasonably restrains trade by focusing on the availability of realistic alternatives. *Buffalo Broad. Co.*, 546 F. Supp. at 286. The second prong involves weighing the license's anticompetitive and procompetitive effects. *Id.*; Columbia Broad. Sys., Inc. v. Am. Soc'y of Composers, Authors & Publishers, 620 F.2d 930, 934 (2d Cir. 1980).

126. *Broad. Music, Inc.*, 441 U.S. at 25.

127. *Columbia Broad. Sys., Inc.*, 620 F.2d at 934, 938.

128. *Id.* at 935.

129. *Id.* at 936.

The court of appeals found CBS's assertions of trade restraint through copyright owners' lacking administrative machinery to be similarly unpersuasive. Because CBS licensed music through blanket licenses for almost forty years, "CBS [could not] expect the antitrust laws to assure it that a changeover to direct licensing [would] be accomplished instantly or at no expense."[130] The court also rejected CBS's argument that the copyright owners would not want to license directly, stating simply "if CBS [sought] direct licensing, 'copyright proprietors would wait at CBS' door.'"[131]

Later, in *Buffalo Broadcasting Co. v. American Society of Composers, Authors & Publishers*,[132] local television stations filed a class action suit against ASCAP and BMI asserting that "the blanket licensing system as it applies to local television stations constitutes an anticompetitive restraint of trade."[133] To evaluate the class's claim, the District Court for the Southern District of New York followed the Supreme Court's directive in *Broadcast Music, Inc.* and applied the two-pronged rule of reason test.[134] Under the test's first prong, the court examined whether the local television stations had a "realistically available alternative" to the blanket licensing system.[135] Because of the "per program" license's seemingly higher cost and administrative burden, as well as the local stations' insignificant bargaining power, the court determined that no such alternative existed.[136]

The test's second prong required the court to weigh the blanket license's anticompetitive and procompetitive effects.[137] Because the court believed that the blanket license prevented competition through rights pooling, where local stations lacked both the ability to control the music embodied in the programming and realistic alternatives to the license, the court held that the blanket license's benefits (efficiency, some reduced transactional costs, and flexibility) "do not balance the burdens."[138] Therefore, the district court ordered ASCAP and BMI enjoined from blanket licensing to local television stations.[139]

On appeal, the Court of Appeals for the Second Circuit reversed, stating that pooled blanket license rights are not a trade restraint against local television stations as long as a meaningful alternative to obtain individual rights exists.[140]

130. *Id.* at 937.

131. *Id.* at 938 (quoting Columbia Broad. Sys., Inc. v. Am. Soc'y of Composers, Authors & Publishers, 400 F. Supp. 737, 779 (S.D.N.Y. 1975)).

132. 546 F. Supp. 274 (S.D.N.Y. 1982).

133. *Buffalo Broad. Co.*, 546 F. Supp. at 277, 285.

134. *Id.* at 286.

135. *Id.*

136. *Id.* at 289, 292–93. The court stated that the "per program" license cost seven times more than the blanket license and required significant additional recordkeeping and reporting work. *Id.* at 289.

137. *Buffalo Broad. Co.*, 546 F. Supp. at 286.

138. *Id.* at 293–95.

139. *Id.* at 296.

140. Buffalo Broad. Co. v. Am. Soc'y of Composers, Authors & Publishers, 744 F.2d 917, 925–26, 933 (2d Cir. 1984).

The court of appeals opined that any license that is fairly priced for parties preferring it constituted such an alternative.[141] Here, the court asserted, the local stations failed to offer sufficient proof that the "per program" license was too administratively burdensome or costly where "the only valid test of whether the program license is 'too costly' to be a realistic alternative is whether the price for such a license . . . is higher than the value of the rights obtained."[142] Additionally, the court reminded, any plaintiff believing the "per program" license cost to be too high has the option to bring a rate hearing pursuant to the Amended Final Judgment.[143]

The court of appeals also held that direct licensing provided a potentially reasonable alternative to blanket licensing and that the plaintiffs would not meet their evidentiary burden by merely proving that they have less bargaining leverage than CBS.[144] The court instead framed the question as "whether the local stations have been shown to lack power sufficient to give them a realistic opportunity to secure direct licenses."[145] Here, the court found no evidence that the stations ever seriously attempted to acquire direct licenses; therefore, the stations could not have been prevented from obtaining them.[146]

In his concurring opinion, Judge Winter summarized the blanket license's boundaries in an effort to prevent repeated litigation over the same issues by every individual market using the license:

> [S]o long as composers or producers have no horizontal agreement among themselves to refrain from source or direct licensing and there is no other artificial barrier, such as a statute, to their use, a non-exclusive blanket license cannot restrain competition. . . . The lack of use of the alternatives does not signal a restraint on competition but merely reflects the competitive superiority of the blanket license.[147]

In sum, the Sherman Act states that combinations that restrain trade and create monopolies are illegal, and the Clayton Act further outlaws activities that lessen competition through price fixing.[148] The performance rights societies' blanket licenses came under frequent antitrust scrutiny for trade restraint and price fixing because the licenses require a fixed license fee, set by the copyright owner, for rights to a pool of musical composition copyrights, instead of allowing

141. *Buffalo Broad. Co.*, 744 F.2d at 927. The court of appeals determined the district court's assertion that the "per program" license was seven times the cost of the blanket license to be erroneous, because the two rates are calculated on different bases. *Id.* at 926. The "per program" license base is calculated on income derived from a specific program, while the blanket license base is calculated on the station's total revenue. *Id.*

142. *Id.* at 926–27.

143. *Id.* at 927.

144. *Buffalo Broad. Co.*, 744 F.2d at 928–29.

145. *Id.* at 929.

146. *Id.* at 928–29.

147. *Id.* at 934 (Winter, J., concurring).

148. See *supra* Part II.B.3.a for a discussion of the Sherman and Clayton Acts.

the market for individual compositions' rights to govern the cost.[149] However, an organization does not violate antitrust laws simply because it operates as a combination or has a large market share.[150] In such cases, courts employ a two-pronged rule of reason test to examine the presence of realistically available license alternatives and weigh the license's pro- and anticompetitive effects.[151] Where a realistic alternative is available, no trade restraint exists.[152] If there is no price fixing or trade restraint, courts may regard a large market share as stemming merely from superior business practice or "fair and open salesmanship."[153]

III. REASONS FOR HFA'S IMMUNITY FROM ANTITRUST VIOLATIONS

Unlike the performance rights societies, the Harry Fox Agency's substantial majority control of its particular licensing rights market does not rise to potential antitrust violations.[154] There are several reasons for this. First, while unclear, § 115(c)(3)(B) of the 1976 Copyright Act may provide a statutory antitrust exemption for copyright owners' designated common licensing and collection agents.[155] Second, operational differences between HFA and the performance rights societies remove HFA from problems historically plaguing the societies.[156] Such differences include, to HFA's benefit, the presence of a statutorily prescribed and guaranteed "compulsory license" mechanism for obtaining mechanical licenses.[157] This compulsory license ensures that a "meaningful alternative" will always exist in satisfaction of the first prong of the rule of reason test required by the Supreme Court in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*,[158] even in instances where HFA may refuse to issue

149. *See, e.g.*, K-91, Inc. v. Gershwin Publ'g Corp., 372 F.2d 1, 2 (9th Cir. 1967) (charging ASCAP with radio blanket license price fixing).

150. *K-91, Inc.*, 372 F.2d at 4; Affiliated Music Enters. v. SESAC, Inc., 160 F. Supp. 865, 874 (S.D.N.Y. 1958), *aff'd*, 268 F.2d 13 (2d Cir. 1959).

151. *See, e.g.*, Columbia Broad. Sys., Inc. v. Am. Soc'y of Composers, Authors & Publishers, 620 F.2d 930, 934, 938 (2d Cir. 1980) (applying rule of reason test to network television blanket license); Buffalo Broad. Co. v. Am. Soc'y of Composers, Authors & Publishers, 546 F. Supp. 274, 286 (S.D.N.Y. 1982) (applying rule of reason test to local television blanket license).

152. Buffalo Broad. Co. v. Am Soc'y of Composers, Authors & Publishers, 744 F.2d 917, 925–26 (2d Cir. 1984).

153. Affiliated Music Enters., Inc. v. SESAC, Inc., 268 F.2d 13, 15 (2d Cir. 1959); Broad. Music, Inc. v. Hearst/ABC Viacom Entm't Servs., 746 F. Supp. 320, 326 (S.D.N.Y. 1990).

154. See *supra* notes 7–11 and accompanying text for details regarding HFA's large mechanical licensing market share.

155. See *infra* Part III.A for a discussion of the interpretation of 17 U.S.C. § 115(c)(3)(B) (2006).

156. See *infra* Part III.B.1 for a discussion of the differences in licensing practices between HFA and the performance rights societies.

157. *See* 17 U.S.C. § 115(a)(1) (providing for compulsory license).

158. 441 U.S. 1 (1979).

licenses.[159] Instead of antitrust violations, HFA's large market share stems merely from "superior product, business acumen, or historic accident."[160]

A. A Statutory Antitrust Shield?

Depending on interpretation, the 1976 Copyright Act may contain a statutory antitrust shield for HFA's activities.[161] If so, then Congress chose to expressly except HFA's actions, as a common mechanical licensing and collection agent for copyright royalty owners, from antitrust violations.

HFA and the performance rights societies differ fundamentally in the rights that each administers.[162] While the performance rights societies license and collect public performance royalties resulting from exploitations pursuant to 17 U.S.C. § 106(4), HFA licenses and collects mechanical royalties accruing from reproductions pursuant to 17 U.S.C. § 106(1).[163]

Unlike public performance royalties, the 1976 Copyright Act prescribes a compulsory license for mechanical royalties.[164] Congress provided that the Copyright Royalty Judges would set the compulsory mechanical royalty rate, although Congress also allowed that "[n]otwithstanding any provision of the antitrust laws," copyright owners "may negotiate and agree upon the terms and rates of royalty payments . . . and . . . designate common agents on a nonexclusive basis to negotiate, agree to, pay, or receive" mechanical royalty payments.[165]

HFA is the "common agent" designated by many copyright owners for mechanical negotiation and payment receipt; however, the statutory language is not clear as to whether the "[n]otwithstanding any provision of the antitrust

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159. *Broad. Music, Inc.*, 441 U.S. at 24–25. See *infra* Part III.B.2 for a rule of reason test analysis of HFA's general practices and *infra* Part III.D for a rule of reason analysis of the hypothetical situation in which HFA refuses to issue licenses.

160. Broad. Music, Inc. v. Hearst/ABC Viacom Entm't Servs., 746 F. Supp. 320, 326 (S.D.N.Y. 1990) (quoting Del. & Hudson Ry. Co. v. Consol. Rail Corp., 902 F.2d 174, 178 (2d Cir. 1990)). See *infra* Part III.C for a discussion of HFA's services and benefits.

161. *See* 17 U.S.C. § 115(c)(3)(B) ("Notwithstanding any provision of the antitrust laws, any copyright owners of nondramatic musical works and any persons entitled to obtain a compulsory license under subsection (a)(1) may negotiate and agree upon the terms and rates of royalty payments under this section and the proportionate division of fees paid among copyright owners, and may designate common agents on a nonexclusive basis to negotiate, agree to, pay or receive such royalty payments.").

162. See *supra* Part II.A.2 for a discussion of mechanical royalties administered by HFA and *supra* Part II.B.2 for a discussion of public performance royalties as administered by the performance rights societies.

163. *See* THALL, *supra* note 2, at 235 (stating ASCAP, BMI, and SESAC license musical composition public performance rights and HFA licenses mechanical rights).

164. *See* 17 U.S.C. § 115(a)(1) ("When phonorecords of a nondramatic musical work have been distributed to the public in the United States under the authority of the copyright owner, any other person, including those who make phonorecords or digital phonorecord deliveries, may, by complying with the provisions of this section, obtain a compulsory license to make and distribute phonorecords of the work.").

165. *Id.* § 115(c)(3)(B)–(D).

laws" shield merely covers the actual copyright owners' negotiation and designation actions or whether it also extends to HFA's dealings.[166] In *Rodgers & Hammerstein Organization v. UMG Recordings, Inc.*,[167] the sole case discussing the issue, the District Court for the Southern District of New York answered the question dismissively and unsatisfactorily, asserting, without further analysis, "[d]efendants question whether the HFA licenses represent a conspiracy to restrain trade. This argument is frivolous since § 115(c)(3)(B) specifically exempts such negotiated licenses from the provisions of the antitrust laws."[168]

The section's legislative history offers additional confusion, despite initially and generally stating that "[t]his subparagraph clarifies that collective negotiations and agreements relating to statutory licenses are not prohibited by the antitrust laws."[169] Because the language provides that "collective negotiations" are not prohibited, one might infer that HFA's activities are, in fact, shielded from antitrust violations.[170] However, the legislative history continues, "[t]his subparagraph authorizes musical work copyright owners, record companies, digital transmission services, and any other persons entitled to obtain a compulsory license collectively to negotiate and agree upon the terms and statutory royalty rates . . . 'notwithstanding any provision of the antitrust laws.'"[171] HFA is not a "musical work copyright *owner*[], record compan[y], digital transmission service[], [or] any other person[] entitled to *obtain* a compulsory license."[172] While the legislative history provides that "[t]his exemption from the antitrust laws extends to . . . the designation of common agents to negotiate, agree to, pay, or receive royalty payments," it does not expressly state that the common agent's *actions*, as opposed to its mere designation, are also so exempted.[173]

Despite the District Court for the Southern District of New York's assertions, HFA's actions (and, by extension, its licenses) may or may not be statutorily shielded from antitrust violations.[174] If its actions are shielded, antitrust allegations against HFA will not stand. But if HFA is not so shielded, is it possible that the agency could run afoul of the antitrust laws as ASCAP and BMI have done in the past?

166. *See id.* § 115(c)(3)(B) (permitting copyright owners to designate agents for royalty negotiation and collection purposes "[n]otwithstanding any provision of the antitrust laws").

167. 60 U.S.P.Q.2d (BNA) 1354 (S.D.N.Y. 2001).

168. *Rodgers & Hammerstein Org.*, 60 U.S.P.Q.2d at 1361.

169. S. Rep. No. 104-128, at 38 (1995), *reprinted in* 1995 U.S.C.C.A.N. 356, 385.

170. *See id.* (stating "collective negotiations" are not prohibited).

171. *Id.* (quoting 17 U.S.C. § 115(c)(3)(B)).

172. *Id.* (emphasis added).

173. *Id.*

174. *See* Rodgers & Hammerstein Org. v. UMG Recordings, Inc., 60 U.S.P.Q.2d (BNA) 1354, 1361 (S.D.N.Y. 2001) (asserting HFA's licenses are exempted from antitrust violations pursuant to 17 U.S.C. § 115(c)(3)(B)).

B. HFA vs. The Performance Rights Societies: Comparison and Analysis

1. Operational Differences

HFA and the performance rights societies have several operational differences that may result in HFA's insulation from antitrust violations.[175] Differences beneficial to HFA for such purposes include prescribed statutory rates and lack of blanket licensing.

The court in *Rodgers & Hammerstein Organization* ultimately determined that HFA's licenses constituted negotiated, not compulsory, licenses under the Copyright Act.[176] If HFA is not shielded from antitrust violations pursuant to 17 U.S.C. § 115(c)(3)(B), the rates provided in these negotiated licenses could superficially appear to be, like the performance rights societies' set blanket license fees, price fixing.[177]

Unlike ASCAP, BMI, or SESAC, however, HFA does not set the price for its licenses.[178] Instead, HFA administers mechanical royalties payable on negotiated licenses whose rates mirror the compulsory royalty rate set, pursuant to the Copyright Act, by the Copyright Royalty Judges.[179] When the compulsory rate increases approximately every two years, HFA's license rate increases in the same manner, and HFA is often the first resource for information on such compulsory royalty rate increases.[180] According to the Ninth Circuit's decision in *K-91, Inc. v. Gershwin Publishing Corp.*,[181] HFA cannot be a "price-fixing authority" where such prices are set by another body.[182] Where HFA licenses are issued below the current statutory rate (for example, pursuant to a "controlled composition" provision in the applicable artist recording agreement),[183] HFA obtains the copyright owners' authorization prior to licensing, acting more as the

175. See *supra* Part II.A.3 for a brief discussion of HFA's mechanical licensing structure and Part II.B.1 for details on the performance rights societies' licensing operations.

176. *Rodgers & Hammerstein Org.*, 60 U.S.P.Q.2d at 1358.

177. See *supra* notes 106–47 and accompanying text for a discussion of cases concerning allegations of price fixing in the performance societies' blanket licenses.

178. *See* Rifkind, *supra* note 9, at 5 (stating mechanical rates are set by Copyright Royalty Tribunal); HFA, *supra* note 26 (showing HFA licenses at statutory mechanical rate).

179. *See Rodgers & Hammerstein Org.*, 60 U.S.P.Q.2d at 1358 (stating HFA licenses are negotiated licenses); Rifkind, *supra* note 9, at 5 (stating Copyright Royalty Tribunal sets prices for mechanical royalty rates); HFA, *supra* note 26 (listing HFA licenses conforming to statutory mechanical rate).

180. *See* HFA, *supra* note 25 (showing royalty increase approximately every two years).

181. 372 F.2d 1 (9th Cir. 1967).

182. *K-91, Inc.*, 372 F.2d at 4. In *K-91, Inc.*, the court determined that the District Court for the Southern District of New York was the price-fixing body pursuant to the terms of the consent decree. *Id.* Here, the price fixing body would be the Copyright Royalty Tribunal. Rifkind, *supra* note 9, at 5.

183. "Controlled composition" clauses are standard in recording agreements. *See* KRASILOVSKY & SHEMEL, *supra* note 12, at 14, 24–25 (discussing controlled composition clause among standard recording contract provisions). A typical controlled composition provision stipulates mechanical royalties for "any composition written, owned, or controlled, in whole or in part, by the artist" or members of the artist will be paid at seventy-five percent of the minimum statutory rate, subject to a ten-song cap. *Id.* at 24.

copyright owner's agent than an independent licensing body.[184] HFA's licenses differ from the statutory compulsory license primarily through accounting requirements that are less administratively burdensome to licensees.[185] Therefore, it is unlikely that the government or any third parties would attempt to bring, or be successful in proving, antitrust price-fixing allegations against HFA.

HFA's lack of blanket licensing provides another important operational difference. To obtain a blanket license, a licensee pays a single, yearly fee to a rights-holder for access to the rights-holder's pooled repertory, which, in the process, restrains trade by removing competitive pricing for rights to individual compositions.[186] The performance rights societies' antitrust trouble stemmed primarily from the use of such blanket licenses.[187] HFA, however, does not offer blanket licenses and, instead, licenses compositions on an individual basis, thereby avoiding the pooled rights problem.[188]

2. The Rule of Reason Test

The Supreme Court's rule of reason test provides additional insight into HFA's freedom from antitrust violations. In *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*,[189] the Supreme Court stated that a blanket license per se trade restraint ruling "must not merely subsume the burdensome analysis required under the rule of reason."[190] Following the Court's directive, lower courts have analyzed subsequent blanket license challenges with the two-pronged rule of reason test.[191] Although HFA does not issue blanket licenses,

184. *Cf.* HFA, Publisher Services, http://www.harryfox.com/public/publisherOnlineServices.jsp (last visited June 29, 2009) (detailing publishers' ability to approve pending HFA licenses online).

185. *See* 17 U.S.C. § 115(c)(5) (2006) (requiring compulsory royalty accounting every month); KRASILOVSKY & SHEMEL, *supra* note 12, at 166 (stating HFA requires quarterly accountings); HFA, *supra* note 26 (showing HFA licenses at statutory mechanical rate).

186. *See* Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 5, 20–23 (1979) (discussing blanket licensing); Buffalo Broad. Co. v. Am. Soc'y of Composers, Authors & Publishers, 744 F.2d 917, 925 (2d Cir. 1984) (stating trade restraint may occur when copyrights are pooled). See *supra* notes 37–38 and accompanying text for an overview of blanket licensing.

187. *See, e.g.*, *Broad. Music, Inc.*, 441 U.S. at 6 (television network challenging blanket license); *Buffalo Broad. Co.*, 744 F.2d at 919, 924 (local television stations challenging blanket license); Alden-Rochelle, Inc. v. Am. Soc'y of Composers, Authors & Publishers, 80 F. Supp. 888, 890 (S.D.N.Y. 1948) (motion picture theatres challenging blanket license).

188. Rifkind, *supra* note 9, at 5.

189. 441 U.S. 1 (1979).

190. *Broad. Music, Inc.*, 441 U.S. at 19 & n.33.

191. *See Buffalo Broad. Co.*, 744 F.2d at 924–33 (applying rule of reason test and holding blanket license for local television stations does not constitute trade restraint); Columbia Broad. Sys., Inc. v. Am. Soc'y of Composers, Authors & Publishers, 620 F.2d 930, 938 (2d Cir. 1980) (applying rule of reason test and holding blanket license for television network does not constitute trade restraint); Buffalo Broad. Co. v. Am. Soc'y of Composers, Authors & Publishers, 546 F. Supp. 274, 296 (S.D.N.Y. 1982) (applying rule of reason test and holding blanket licenses for local television stations constitutes trade restraint).

the rule of reason analysis proves a helpful exercise for understanding why HFA has not run afoul of the antitrust laws.[192]

The first prong of the rule of reason test concerns whether the licensing method causes "an unreasonable restraint of trade."[193] To examine such restraint, courts analyzing ASCAP and BMI historically focused on copyright pooling and lack of realistic alternatives to the challenged licenses.[194] Unlike ASCAP and BMI, HFA issues licenses solely for individual compositions;[195] therefore, HFA offers no situation where "rights to use individual copyrights . . . may be obtained only by payment for a pool of such rights."[196]

Licensees also possess realistic alternatives to HFA licenses. HFA serves as the nonexclusive licensing and collection agent for its publisher and songwriter clients.[197] Therefore, as with the performance rights societies, licensees have the option of bypassing HFA by dealing directly with the copyright owner.[198] In practice, the songwriters or publishers for whom HFA handles licensing and collection may lack adequate systems or simply not wish to "deal with" such administration themselves; however, courts examining similar arguments in the ASCAP and BMI contexts have held that such lacking machinery does not constitute an unavailable alternative or "unwillingness to deal" for trade-restraint purposes.[199]

The second rule of reason prong requires an examination, where no realistic alternatives exist to the contested license, of whether the license's anticompetitive effects outweigh the procompetitive effects.[200] Presuming, for the sake of analysis, that the HFA license had no realistic alternatives, it is highly unlikely that either pro- or anticompetitive effects would outweigh the other.

HFA provides a mostly "one-stop" shop for mechanical licensing. Due to the size of its client base and the inclusion of most major publishers, a licensee can license most needed compositions by dealing solely with HFA.[201]

192. *See* Rifkind, *supra* note 9, at 5 (stating HFA does not license compositions in bulk).

193. *Columbia Broad. Sys., Inc.*, 620 F.2d at 934.

194. *See Buffalo Broad. Co.*, 744 F.2d at 925 (stating pooled rights may restrain trade except where realistic alternative to obtain individual rights exists); *Columbia Broad. Sys., Inc.*, 620 F.2d at 935 (citing *Broad. Music, Inc.*, 441 U.S. at 32 (Stevens, J., dissenting)) (asserting blanket license copyright pooling prohibits price competition between individual songs).

195. *See* Rifkind, *supra* note 9, at 5 (stating HFA "does not offer a bulk license"); *cf.* KRASILOVSKY & SHEMEL, *supra* note 14, at 237–38 (stating only one type of HFA license exists, and it covers "the copyrighted work"; thus, each license covers one musical composition and is, therefore, individual license, not blanket license).

196. *Buffalo Broad. Co.*, 744 F.2d at 925.

197. *See* THALL, *supra* note 2, at 235 (stating mechanical licenses can be obtained through HFA or copyright owners).

198. *See Buffalo Broad. Co.*, 744 F.2d at 923 (stating Amended Final Judgment gave licensees option to license rights directly from ASCAP members).

199. *Columbia Broad. Sys., Inc.*, 620 F.2d at 937–38; Columbia Broad. Sys., Inc. v. Am. Soc'y of Composers, Authors & Publishers, 400 F. Supp. 737, 757–58 (S.D.N.Y. 1975).

200. *Columbia Broad. Sys., Inc.*, 620 F.2d at 934; Buffalo Broad. Co. v. Am. Soc'y of Composers, Authors & Publishers, 546 F. Supp. 274, 286 (S.D.N.Y. 1982).

201. *See* THALL, *supra* note 2, at 176, 235 (stating HFA represents approximately eighty percent

Theoretically, this breeds ease and efficiency, because licensees must request licenses from, and make payments to, only one source, resulting in less time and administrative paperwork. However, when licensees request licenses at rates lower than the statutory rate (as is customarily allowed in most recording agreements), HFA must obtain publisher approval, and HFA's involvement results in an additional, often time-consuming and follow-up-intensive, step in the licensing process.[202] Additionally, because not all songwriters and publishers are HFA clients, a licensee may still have to obtain licenses and remit royalties directly in multiple instances.[203] Unlike the blanket license, the difference between licensing via HFA and licensing directly does not result in a huge administrative benefit.[204]

There is also no appreciable procompetitive economic benefit to licensing through HFA. Because HFA issues its licenses at the statutory compulsory rate, licensees obtain the same rate through HFA as they would by going directly to the publisher.[205] This is in contrast to the blanket license, where the individual public performance rights may be substantially more expensive than the pooled-rights license.[206] Therefore, a court is unlikely to find HFA acting in restraint of trade under either rule of reason test prong.

C. "[F]air and open salesmanship"[207]

Absent a showing of price fixing or trade restraint, courts tend to view large market shares as superior business, and not antitrust, practices.[208] While HFA represents approximately eighty percent of United States music publishers, that figure alone does not constitute a monopoly.[209] As the District Court for the Southern District of New York stated in *Affiliated Music Enterprises, Inc. v. SESAC, Inc.*,[210]

> [T]he size of the market is not conclusive of monopoly or absence of it. An "appreciable part" of the market must be in the hands of the defendant, before he can be found to control prices and exclude

of United States publishers and collects United States mechanical royalties on behalf of mechanical rights societies in other territories).

202. *See* HFA, *supra* note 184 (discussing publishers' ability to approve license rates online).

203. *Cf.* THALL, *supra* note 2, at 176 (stating HFA only represents eighty, not one-hundred, percent of United States publishers).

204. *See* Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 20–22 (1979) (stating blanket license benefits include efficiency, quickness, less required monitoring, lower cost, and more music selection flexibility).

205. *See* HFA, *supra* note 26 (showing HFA licenses at statutory mechanical rate).

206. *See Broad. Music, Inc.*, 441 U.S. at 21 (stating blanket licenses differ from individual licenses through lower cost).

207. Affiliated Music Enters., Inc. v. SESAC, Inc., 268 F.2d 13, 15 (2d Cir. 1959).

208. *See, e.g.*, *Affiliated Music Enters., Inc.*, 268 F.2d at 15 (stating "fair and open salesmanship" does not equal economic coercion required for antitrust violations).

209. *See* THALL, *supra* note 2, at 176 (stating HFA represents about eighty percent of U.S. publishers).

210. 160 F. Supp. 865 (S.D.N.Y. 1958), *aff'd*, 268 F.2d 13 (2d Cir. 1959).

> competition. What is an appreciable part will vary with the market under consideration for the illegal power must be appraised in terms of the competitive market for the product.[211]

The court of appeals later asserted that "charges of antitrust violations must fall of their own weight" where there is not "any showing that . . . [there is] power over price or to exclude a competitor."[212] Therefore, instead of market-share size, the ultimate indicator of monopoly presence is whether an organization has the ability to fix prices and exclude competitors. Because HFA does not set its license prices and licensees retain the option to obtain licenses directly from copyright owners, HFA's large market share is irrelevant to the question of monopoly existence, and any antitrust allegations must fail.

Like SESAC in *Affiliated Music Enterprises*, HFA obtained its sizeable market prominence "not by the force of its existing contracts or by economic coercion, but by fair and open salesmanship."[213] As the administrative arm of the National Music Publishers' Association, the preeminent United States music publishers' trade organization, HFA was established to fulfill member-publishers' mechanical licensing and collection needs.[214] By offering such services, as well as others including label audits and copyright infringement suits, HFA provides a salesmanship-based incentive for writers and publishers to affiliate, especially where those writers or publishers do not have the resources to conduct such activities on their own.[215] HFA's success, then, appears to be more akin to allowable "superior product, business acumen, or historic accident" than trade-restraining monopoly power.[216]

D. HFA's Potential for Antitrust Violations? A Hypothetical

Under the rule of reason test, HFA escapes antitrust violations even in a hypothetical situation where the agency uses its large market share to coerce behavior from licensees. Despite HFA's seeming operation well within the boundaries of antitrust law, there exist hypothetical circumstances in which the agency's antitrust status becomes less clear.[217] Such circumstances include

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211. *Affiliated Music Enters., Inc.*, 160 F. Supp. at 874. The district court also stated that, while ninety percent market control could constitute a monopoly, sixty percent might not, and thirty-three percent certainly did not. *Id.* (citing United States v. Aluminum Co. of Am., 148 F.2d 416, 424 (2d Cir. 1945)).

212. *Affiliated Music Enters., Inc.*, 268 F.2d at 15.

213. *Id.*

214. *See* HFA, About HFA, *supra* note 7 (stating HFA provides information, monitoring, and mechanical licensing for clients).

215. *See* KRASILOVSKY & SHEMEL, *supra* note 12, at 165 (discussing HFA audits); THALL, *supra* note 2, at 176 (stating HFA is primary auditor of record companies); Cardi, *supra* note 3, at 842 (stating HFA undertakes copyright infringement actions).

216. Broad. Music, Inc. v. Hearst/ABC Viacom Entm't Servs., 746 F. Supp. 320, 326 (S.D.N.Y. 1990) (quoting Del. & Hudson Ry. Co. v. Consol. Rail Corp., 902 F.2d 174, 178 (2d Cir. 1990)).

217. See *supra* Part III.B for a discussion of HFA's operating structure compared with ASCAP and BMI, and how that structure has allowed the agency to remain free from antitrust allegations.

conspiring with musical composition copyright owners, in restraint of trade, to "blacklist" labels by withholding mechanical licenses.

As one of its services for member copyright owners, HFA performs frequent record label audits to ensure that the labels are accounting mechanical royalties correctly.[218] In instances where HFA and the audited label disagree over the royalty calculations or outstanding dollar amounts, HFA and the copyright owners for whom HFA acts as an agent could, hypothetically speaking, conspire together to refuse to issue any subsequent mechanical licenses to the label as coercion. Because of the large mechanical-rights pool controlled by HFA and its affiliated publishers, such a refusal could seriously handicap a label by thwarting its ability to obtain the requisite mechanical licenses for embodying and releasing musical compositions on records.[219]

Analyzing this hypothetical with the rule of reason test, HFA appears to remain free from antitrust violations. The test's first prong requires an analysis of whether the label would have a "realistically available alternative" to mechanical licenses issued by HFA or the copyright owners.[220] Per the District Court for the Southern District of New York in *Rodgers & Hammerstein Organization v. UMG Recordings, Inc.*,[221] HFA's licenses constitute a "negotiated license" pursuant to 17 U.S.C. § 115(c)(3)(B)—not a compulsory license pursuant to 17 U.S.C. § 115(a)(1).[222] Similarly, where a label requests a mechanical license directly from a copyright owner or publisher without following the statutorily prescribed compulsory notification requirements, such license would also be a "negotiated license" pursuant to 17 U.S.C. § 115(c)(3)(B).[223] Therefore, any label facing a hypothetical inability to obtain "negotiated licenses" from HFA or the respective copyright owner retains the ability to obtain a compulsory license pursuant to 17 U.S.C. § 115(a)(1) and, pursuant to the Second Circuit's decision in *Buffalo Broadcasting Co. v. American Society of Composers, Authors & Publishers*,[224] trade restraint does not exist where a meaningful alternative to obtain rights remains available.[225]

Because of the compulsory license's burdensome notification and monthly accounting requirements, any label forced to "go compulsory" may argue that

218. *See* KRASILOVSKY & SHEMEL, *supra* note 12, at 165 (discussing HFA audits); THALL, *supra* note 2, at 176 (stating HFA is primary auditor of record companies).

219. *See* 17 U.S.C. § 106(1) (2006) (stating copyright owner "has the exclusive right[] to . . . reproduce the copyrighted work in . . . phonorecords"). Where HFA or the music publishers refuse to grant mechanical licenses for the use of their compositions, a record label faces the choice of either not releasing an album or, after releasing the album, becoming liable for copyright infringement. *Cf. id.* § 501(a) ("Anyone who violates any of the exclusive rights of the copyright owner . . . is an infringer of the copyright or right of the author, as the case may be.").

220. Buffalo Broad. Co. v. Am. Soc'y of Composers, Authors & Publishers, 546 F. Supp. 274, 286 (S.D.N.Y. 1982).

221. 60 U.S.P.Q.2d (BNA) 1354 (S.D.N.Y. 2001).

222. *Rodgers & Hammerstein Org.*, 60 U.S.P.Q.2d at 1358.

223. *See id.* (stating option is either "serv[ing] the notice required to obtain a compulsory license" or getting "negotiated license").

224. 744 F.2d 917 (2d Cir. 1984).

225. *Buffalo Broad. Co.*, 744 F.2d at 925–26, 933.

the compulsory license does not provide a "meaningful alternative" to the less administratively intensive "negotiated license" terms.[226] Courts have long recognized that "[a]n antitrust plaintiff is not obliged to pursue any imaginable alternative, regardless of cost or efficiency, before it can complain that a practice has restrained competition."[227] However, where Congress statutorily prescribes the alternative, the label will face an incredibly high burden to prove that the statutory provisions do not provide a "meaningful alternative," and it is unlikely that, at least for a small label, the statute's notification and monthly accounting requirements will meet that burden.

The rule of reason's second prong requires a weighing of anticompetitive and procompetitive effects.[228] There is nothing apparently procompetitive where HFA and copyright owners hypothetically conspire to refuse to grant "negotiated" mechanical licenses to a label; however, arguably, where the mechanical license price is fixed by statute and the label may still obtain compulsory licenses, the anticompetitive behavior is disarmed and circumvented.[229] While such hypothetical anticompetitive behavior may constitute corporate bullying, it does not rise to an antitrust violation. Thus, even where HFA hypothetically conspires with member-publishers to refuse licenses to record labels as coercive bargaining leverage, HFA appears immune from antitrust violations, simply because the record labels always retain an ability to obtain statutory compulsory licenses.[230]

IV. CONCLUSION

Unlike the performance rights societies, the Harry Fox Agency's operations do not run afoul of the antitrust laws, despite the agency's large mechanical licensing market share.[231] This immunity stems from the fact that HFA does not issue blanket licenses, as well as the fact that the rates for the licenses that HFA does issue—individual mechanical licenses—mirror the statutory compulsory license rate prescribed by the Copyright Royalty Tribunal.[232] Through an analysis of HFA licenses under the rule of reason test, one may argue that potential licensees always retain a reasonable licensing alternative, namely the compulsory license provided for in the 1976 Copyright Act, even in the hypothetical instance in which HFA and its member-publishers collude to deny

226. *See* 17 U.S.C. § 115(b)–(c) (2006) (providing notification and royalty accounting requirements for compulsory license); KRASILOVSKY & SHEMEL, *supra* note 12, at 166 (stating HFA licenses allow for quarterly accountings).

227. *Buffalo Broad. Co.*, 744 F.2d at 925 (quoting Columbia Broad. Sys., Inc. v. Am. Soc'y of Composers, Authors & Publishers, 620 F.2d 930, 936 (2d Cir. 1980)).

228. Buffalo Broad. Co. v. Am. Soc'y of Composers, Authors & Publishers, 546 F. Supp. 274, 286 (S.D.N.Y. 1982).

229. See *supra* notes 25–27 and accompanying text for a discussion of mechanical royalty rate prescription.

230. *See* 17 U.S.C. § 115(a)(1) (providing compulsory license option).

231. See *supra* Part III for a discussion of the reasons behind HFA's antitrust immunity.

232. See *supra* Part III.B.1 for a discussion of HFA's operational advantages.

negotiated licenses.[233] Finally, depending on its true and correct interpretation, 17 U.S.C. § 115(c)(3)(B) may provide an express statutory antitrust exemption for the actions of copyright owners' common negotiation and collection agents, potentially giving HFA's operations a statutory defense to any antitrust charges.[234]

Michelle E. Arnold[*]

233. See *supra* Parts III.B.2 and III.D for analyses of HFA's existing and hypothetical practices under the rule of reason test.

234. See *supra* Part III.A for a discussion of the potential statutory shield that may exempt HFA from antitrust violations.

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