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CASE NOTES

TORT DAMAGES—PUNITIVE DAMAGES PROPERLY AWARDED AGAINST INTOXICATED DRIVERS—*Taylor v. Superior Court*, 24 Cal. 3d 890, 598 P.2d 854, 157 Cal. Rptr. 693 (1979)

Cameron Taylor, plaintiff and petitioner, filed suit in the Superior Court of the State of California seeking compensatory and punitive damages for injuries allegedly sustained in an automobile accident.¹ Taylor's complaint alleged that Claire William Stille, defendant and real party in interest, caused his automobile to collide with the plaintiff's, thereby seriously injuring the plaintiff. Taylor also alleged that the defendant was consuming alcoholic beverages while driving, was intoxicated at the time of the accident, and was a chronic alcoholic "well aware of the serious nature of his alcoholism" . . . and the dangerousness of his driving while intoxicated."² In addition, the complaint alleged that defendant Stille had a long history of traffic accidents, arrests, and convictions stemming from his use of alcohol, that the defendant had accepted employment requiring him to transport alcoholic beverages, and that the defendant was transporting such beverages at the time of the accident.³ Based on these allegations, Taylor asserted that Stille "acted with a conscious disregard of Plaintiff[s] safety. . . ."⁴ Taylor, therefore, sought the recovery of punitive damages.⁵

Stille demurred, contending the complaint did not allege actual intent to cause an accident or injury and therefore did not state a cause of action for punitive damages.⁶ After the trial court sustained the demurrer, Taylor petitioned the Cali-

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1. *Taylor v. Superior Ct.*, 24 Cal. 3d 890, 598 P.2d 854, 157 Cal. Rptr. 693, (1979).

2. *Id.* at 893, 598 P.2d at 855, 157 Cal. Rptr. at 695.

3. *Id.*

4. *Id.* at 893, 598 P.2d at 855, 157 Cal. Rptr. at 695.

5. *Id.*

6. *Id.*

ifornia Supreme Court for a writ of mandate.⁷ The court issued a peremptory writ overruling the demurrer and reinstating Taylor's cause of action for punitive damages, holding that a defendant who voluntarily commences consumption of alcoholic beverages to the point of intoxication knowing, that he must thereafter drive, demonstrates a conscious disregard of the safety of others.⁸ Therefore, those who become intoxicated knowing that they must thereafter drive act with malice sufficient to justify assessment of punitive damages.

In reaching its decision, the court examined the "statutory and decisional law"⁹ authorizing punitive awards against defendants who, in committing a tort, act with malice. The court began by reviewing prior judicial interpretation of malice under California Civil Code section 3294, the statutory basis of all punitive damage awards in California.¹⁰ The court noted that prior decisions described malice under section 3294 as "'malice in fact, as opposed to malice implied by law . . .,'"¹¹ and as "'an act conceived in a spirit of mischief or with criminal indifference towards the obligations owed to others.'"¹² The court reiterated their recent judicial characterization of malice as "'a conscious disregard of the plaintiff's rights,'"¹³ and rejected the trial court's basis¹⁴ for up-

7. *Id.* at 893-94, 598 P.2d at 855, 157 Cal. Rptr. at 695. The court noted: Although we rarely grant extraordinary relief at the pleading stage of a lawsuit, mandamus will lie when it appears that the trial court has deprived a party of an opportunity to plead his cause of action or defense and when extraordinary relief may prevent a needless and expensive trial and reversal.

Id. at 894, 598 P.2d at 855, 157 Cal. Rptr. at 695.

8. *Id.* at 899, 598 P.2d at 859, 157 Cal. Rptr. at 699.

9. *Id.* at 894, 598 P.2d at 855, 157 Cal. Rptr. at 695-96.

10. *Id.* CAL. CIV. CODE § 3294 (West 1970) provides:

In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

11. 24 Cal. 3d at 894, 598 P.2d at 855, 157 Cal. Rptr. at 695 (quoting *Bertero v. National General Corp.*, 13 Cal. 3d 43, 66, 529 P.2d 608, 624-25, 118 Cal. Rptr. 184, 200-01 (1974)).

12. 24 Cal. 3d at 894, 598 P.2d at 855, 157 Cal. Rptr. at 695-96 (quoting *Ebaugh v. Rabkin*, 22 Cal. App. 3d 891, 894, 99 Cal. Rptr. 706, 708 (1972)).

13. 24 Cal. 3d at 895, 598 P.2d at 856, 157 Cal. Rptr. at 696 (quoting *Neal v. Farmer's Ins. Exchange*, 21 Cal. 3d 910, 922, 582 P.2d 980, 986, 148 Cal. Rptr. 389, 395 (1978)) (emphasis in original).

14. See note 6 and accompanying text *supra*.

holding Stille's demurrer.¹⁵ The court concurred with the ruling in *G.D. Searle & Co. v. Superior Court*,¹⁶ "that a conscious disregard of the safety of others may constitute malice within the meaning of section 3294 of the Civil Code."¹⁷

The court carefully distinguished *Gombos v. Ashe*,¹⁸ which held that similar allegations of disregard for the safety of others¹⁹ did not constitute malice under section 3294 and hence did not state a cause of action for punitive damages.²⁰ The Taylor court noted that *Gombos* was decided prior to judicial acceptance of punitive damages awards based on a finding of "defendant's conscious disregard of the safety of others."²¹ The court held that the essential allegations of *Gombos*, namely, voluntary intoxication and driving while intoxicated, were sufficient to sustain a cause of action for punitive damages, and overruled *Gombos*' contrary holding.²² The court commented that Taylor's complaint alleged facts sufficient to support a finding of a conscious disregard of safety even absent the additional allegations of the defendant's prior drunk driving record and chronic alcoholism.²³

In adopting this rule, the court emphasized the deterrent function of placing punitive liability directly on the drinking driver.²⁴ The court indicated its concern with the great public hazard created by drunk drivers by citing numerous statistics and studies showing that at least one half of all fatal accidents and one third of all injury accidents are related to the consumption of alcohol.²⁵ The court reasoned that this "severe

15. 24 Cal. 3d at 895-96, 598 P.2d at 856, 157 Cal. Rptr. at 696.

16. 49 Cal. App. 3d 22, 122 Cal. Rptr. 218 (1975).

17. 24 Cal. 3d at 895, 598 P.2d at 856, 157 Cal. Rptr. at 696 (1979).

18. 158 Cal. App. 2d 517, 322 P.2d 933 (1955).

19. In *Gombos v. Ashe*, the plaintiff alleged that the defendant acted with "absolute disregard and callous indifference to the rights and safety of all persons on [the] highway" by overindulging in alcoholic beverages and subsequently operating a motor vehicle, "knowing that at said time and place the alcoholic refreshments consumed by him rendered him physically unfit to operate a motor vehicle . . . and a menace to all persons using said highway. . . ." *Id.* at 526, 322 P.2d at 939.

20. *Id.* at 526-27, 322 P.2d at 939.

21. 24 Cal. 3d at 896, 598 P.2d at 857, 157 Cal. Rptr. at 697.

22. *Id.* at 896, 900, 598 P.2d at 857, 859, 157 Cal. Rptr. at 697, 699-700.

23. *Id.* at 896, 598 P.2d at 857, 157 Cal. Rptr. at 697.

24. *Id.* at 897, 598 P.2d at 857, 157 Cal. Rptr. at 697-98. See CAL. CIV. CODE § 3294 (West 1970); *Harrell v. Ames*, 265 Or. 183, 508 P.2d 211 (1973) (holding that the imposition of a punitive award against a negligent drunk driver was properly used to deter others).

25. 24 Cal. 3d at 897-99, 598 P.2d at 857-58, 157 Cal. Rptr. at 697-98.

threat to public safety"²⁶ justified the harsh remedy of imposing punitive damages directly on the drinking driver.²⁷

The court considered, and rejected, the defendant's contention that alcoholics lack the volitional control associated with malice in fact. The court concluded that volition was a question of fact to be resolved at trial.²⁸ The court also rejected Stille's argument that the conscious disregard of safety test, if applicable to drunk driving cases, would also apply to willful violations of other traffic laws. The court specifically limited its holding to drunk driving cases.²⁹

Chief Justice Bird and Justice Newman concurred in the judgment, but disagreed with the court's expansive holding. In their view, only the allegations of Stille's habitual drunk driving supported the cause of action for punitive damages.³⁰ They concluded that most drunk drivers are not sufficiently aware of the probability of harm to possess the requisite malice justifying punitive damages.³¹

In a dissenting opinion, Justice Clark raised three principal objections. First, Clark questioned the court's imposition of punitive damages given the following factors: (1) compensatory damages fully compensate injured plaintiffs;³² (2) criminal law is the better vehicle for punishing wrongful conduct;³³ (3) punitive awards "interfere with policies governing trial procedures"³⁴ and "distract the trier of fact from its liability function;"³⁵ (4) the deterrent effect may only be marginal;³⁶ (5) punitive awards may exonerate liability insurers from paying the compensatory award to the plaintiff;³⁷ and, (6) the de-

26. *Id.* at 899, 598 P.2d at 858, 157 Cal. Rptr. at 698.

27. *Id.*

28. *Id.*

29. *Id.* at 899-900, 598 P.2d at 859, 157 Cal. Rptr. at 699.

30. *Id.* at 901, 598 P.2d at 860, 157 Cal. Rptr. at 700. *But see id.* at 896, 598 P.2d at 857, 157 Cal. Rptr. at 696-97.

31. *Id.* at 901, 598 P.2d at 860, 157 Cal. Rptr. at 699-700.

32. *Id.* at 902, 598 P.2d at 860, 157 Cal. Rptr. at 700.

33. Justice Clark noted that criminal triers of fact are guided by standards set by the legislature whereas no standards exist for punitive awards. *Id.* at 902, 598 P.2d at 861, 157 Cal. Rptr. at 700.

34. *Id.* at 902, 598 P.2d at 861, 157 Cal. Rptr. at 701.

35. *Id.* at 903, 598 P.2d at 861, 157 Cal. Rptr. at 701.

36. See note 44 and accompanying text *infra*.

37. According to Justice Clark, punitive damages are traditionally not covered by insurance in California, and in cases where they are awarded, both the compensatory and punitive awards are paid out-of-pocket by the defendant. Therefore, plaintiffs risk the chance of being completely uncompensated by seeking a punitive award

fendant may not be able to seek comparative fault relief from the plaintiff.³⁸ Clark suggested that these factors dictate the punitive damages should be awarded with the greatest caution in accident cases.³⁹

Justice Clark took issue with the court's interpretation of malice under California Civil Code section 3294. Clark noted that prior cases allowed punitive awards under the conscious disregard of safety theory where either the defendant was "aware both of the plaintiff and that his conduct [would] cause plaintiff injury"⁴⁰ or where "although injury to the plaintiff was uncertain, it was *probable* that the outrageous conduct would result in injury to someone."⁴¹ Clark disagreed with the court's finding that Taylor's allegations pointed to an awareness of probable injury sufficient to justify an award of punitive damages. He commented that the typical drinker "sets out to drink without becoming intoxicated, and because alcohol distorts judgment, . . . overrates his capacity, and misjudges his driving ability after drinking too much."⁴² Justice Clark concluded that the court's interpretation of the conscious disregard of safety test amounted to "negligence."⁴³

Clark based his third objection to the majority decision on his doubt that imposing punitive damages would deter intoxicated drivers. He noted that the following factors diluted the deterrence effect: (1) criminal penalties already exist; (2) the chance of self-injury is at least as great as that of injury to others; (3) accidents are fortuitous and unintended events; and, (4) punitive damages are discretionary award.⁴⁴

against a poor but insured defendant. *Id.* at 904, 598 P.2d at 862, 157 Cal. Rptr. at 703-05. See CAL. INS. CODE § 533 (West 1972), which provides in part: "An insurer is not liable for a loss caused by the wilful act of the insured." See also *Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263, 419 P.2d 168, 54 Cal. Rptr. 104 (1966).

38. Justice Clark impliedly argued that plaintiffs successful in recovering punitive damages will escape comparative fault because the defendant's conduct justifying the exemplary award may be construed as wilful misconduct. 24 Cal. 3d at 906, 598 P.2d at 863, 157 Cal. Rptr. at 703.

39. *Id.*

40. *Id.* at 907, 598 P.2d at 864, 157 Cal. Rptr. at 703-04.

41. *Id.* (emphasis in original) Clark also observed that these cases involved maintenance of a dangerous condition, *see, e.g.*, *Seimon v. Southern Pac. Transp. Co.*, 67 Cal. App. 3d 600, 137 Cal. Rptr. 787 (1977); or, wide distribution of a known dangerous product, *see, e.g.*, *G.D. Searle & Co. v. Superior Ct.*, 49 Cal. App. 3d 22, 122 Cal. Rptr. 218 (1975).

42. 24 Cal. 3d at 908, 598 P.2d at 864, 157 Cal. Rptr. at 704 (1979).

43. *Id.*

44. *Id.* at 909-10, 598 P.2d at 865-66, 157 Cal. Rptr. at 705. Clark also expressed

Taylor continues the California Supreme Court's effort to deter drunk driving,⁴⁵ but whether the decision will have a deterrent effect will depend on the public's knowledge of the new rule and the availability of insurance coverage for punitive damages.⁴⁶ *Taylor* marks a growing trend allowing punitive damages to be imposed against defendants whose conduct was previously characterized as merely negligent or reckless. There are many violations of safety laws from which a jury could reasonably conclude that a defendant consciously disregarded the safety of others, however, California courts may be reluctant to extend the *Taylor* rule to analogous situations.⁴⁷ In any event, *Taylor* imposes liability on defendants heretofore viewed as lacking the volition and malice justifying the imposition of punitive damages.

John F. Farbstein

concern that "[i]f drunken drivers may obtain insurance protection for losses caused by conduct warranting punitive awards the deterrent effects of both compensatory and punitive liability is further diluted." *Id.* at 905 n.3, 598 P.2d at 863 n.3, 157 Cal. Rptr. at 707 n.3. Although Clark speculated that present law in California made such possibility remote, compare *id.* and *Harrell v. Ames*, 265 Or. 183, 508 P.2d 211 (1973) with *Harrell v. Travelers Indem. Co.*, 279 Or. 2d 199, 205, 567 P.2d 1013, 1023 (1977) (dissenting opinion). The court in the latter case allowed the defendant's insurance company to pay the punitive award.

45. See, e.g., *Coulter v. Superior Ct.*, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978) (imposing liability on third party hosts for serving intoxicated persons); *Vesely v. Sager*, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971) (imposing liability on alcoholic beverage vendors for serving intoxicated persons).

46. See note 44 and accompanying text *supra*.

47. See 24 Cal. 3d at 899-900, 598 P.2d at 859, 157 Cal. Rptr. at 699. However, the California State Courts of Appeal appear willing to apply *Taylor* retroactively. See *Busboom v. Superior Ct.*, 113 Cal. App. 3d 550, 169 Cal. Rptr. 886 (1980). Cf. *Dawes v. Superior Ct.*, 111 Cal. App. 3d 82, 168 Cal. Rptr. 319 (1980) (allowing punitive damages where the defendant's conduct demonstrated a conscious disregard of safety independent from the defendant's "decision to drive and . . . driving in an intoxicated condition.") *Id.* at 88, 168 Cal. Rptr. at 322. But see *Mau v. Superior Court*, 101 Cal. App. 3d 875, 161 Cal. Rptr. 895 (1980), where the court refused to apply *Taylor* retroactively. The *Mau* court reasoned that retroactive application of *Taylor* was incompatible with the deterrence rationale for awarding punitive damages. *Id.* at 881-81, 161 Cal. Rptr. at 898. The *Mau* and *Busboom* decisions directly conflict, and may invite the California Supreme Court to render a decision on the retroactivity issue.

ANTITRUST—BLANKET LICENSING AS EMPLOYED IN THE TELEVISION INDUSTRY DOES NOT CONSTITUTE PRICE-FIXING, A PER SE VIOLATION OF THE SHERMAN ACT—*Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979).

Broadcast Music, Inc. (BMI) and the American Society of Composers, Authors and Publishers (ASCAP) operate as “clearinghouses”¹ for copyright owners and licensees to solve the problems associated with the licensing of music. Copyright owners grant to these organizations the right to license the nondramatic performances² of their musical compositions. BMI and ASCAP issue licenses, primarily blanket licenses,³ and distribute royalties according to a schedule⁴ based partly on the nature and amount of use of the music. A blanket license gives the licensee the right to use any and all of the compositions owned by members or affiliates of the licensor as often as desired during the term of the license. In 1969, after BMI had notified CBS of its intent to terminate a blanket license following the two companies’ failure to reach an agreement on higher fees, CBS wrote to both BMI and ASCAP re-

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1. The analogy is to a bank clearinghouse, based on the functions performed by BMI and ASCAP for their members and for users of their music. ASCAP and BMI license compositions in their repertories, collect license fees, monitor users to detect incidences of infringement, and initiate legal proceedings to redress infringement. Timberg, *The Antitrust Aspects of Merchandising Modern Music: The ASCAP Consent Judgment of 1950*, 19 L. & CONTEMP. PROB. 294, 298 (1954).

2. Licensing of performances of copyrighted music is a right owned solely by the copyright holder for the term of the copyright. Performing rights societies, such as BMI and ASCAP, are not interested in licensing dramatic plays, musical comedies, and operas, because the substantial advance preparations required to perform dramatic works allow sufficient time to negotiate with individual copyright owners. Finkelstein, *The Composer and the Public Interest—Regulation of Performing Right Societies*, 19 L. & CONTEMP. PROB. 275, 283 (1954).

3. Fees for a blanket license are either a percentage of total revenue or a flat dollar amount. Most contracts require payment of a minimum amount even for periods during which no licensed compositions are used. *CBS v. ASCAP*, 400 F. Supp. 737, 747 (S.D.N.Y. 1975).

4. The schedule of royalties reflects the nature of the music, the nature of its use by the licensee, the duration of the use, the popularity of the music, and the seniority of the composer within either ASCAP or BMI. *United States v. ASCAP*, [1950-1951] TRADE CASES (CCH) ¶ 62,595 (S.D.N.Y. 1950); *United States v. ASCAP*, [1960] TRADE CASES (CCH) ¶ 69,612 (S.D.N.Y. 1960).

questing each of them to submit the terms upon which they would individually be willing to issue a performance rights license whose fees reflected the actual use of the music. When neither BMI nor ASCAP agreed with its request, CBS chose not to discuss other alternatives to the proposed per-use license⁵ and the proffered blanket license and brought suit.

In its complaint, CBS charged that the issuance of blanket licenses by BMI and ASCAP was (1) illegal price-fixing,⁶ (2) a misuse of copyrights,⁷ and (3) a restraint of trade.⁸

The United States District Court held that, because direct negotiation with individual copyright owners for direct licenses was both available and feasible, issuance of blanket licenses by BMI and ASCAP was not restraint of trade, misuse of copyrights, or illegal price-fixing.⁹ The rationale was CBS had failed to prove the following: either that it had purchased blanket licenses under compulsion or that the price it had paid was fixed; that BMI or ASCAP had actually refused to negotiate with CBS for alternative methods of licensing; and that the licensing of performances of music necessary to its network programming could not be obtained through any possible alternate combination of direct licensing¹⁰ and per-program licensing.¹¹

5. A per-use license is a license, fees for which are to be specified for each performance of a composition in the repertory, plus an administrative fee. This definition generally describes CBS's proposed per-use license. *CBS v. ASCAP*, 400 F. Supp. 737, 747 n.7 (S.D.N.Y. 1975).

6. Illegal price-fixing is the cooperative raising, depressing, fixing, pegging, or stabilizing the price of a commodity, either among competitors or by controlling resale price in violation of the Sherman Antitrust Act. Coercion is not an essential element of price-fixing. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 225 n.59 (1940).

7. Misuse of copyrights is either a refusal to issue a license, an interference with other available means of obtaining a license, or the compelling of a party to obtain rights under a license which the licensee did not want. *CBS v. ASCAP*, 400 F. Supp. 737, 781-82 (S.D.N.Y. 1975).

8. Restraint of trade is unreasonable interference with either the ordinary, usual and freely-competitive pricing or the distribution system of the open market, or those restraints of trade, ordinarily reasonable, which are unreasonable because they are accompanied by specific intent to effect a forbidden restraint. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940).

9. *CBS v. ASCAP*, 400 F. Supp. 737, 780-83 (S.D.N.Y. 1975).

10. CBS and all potential licensees of musical compositions always have the option of attempting to obtain a "direct" or "individual" license from the copyright owner. Such a license gives the licensee the right to use a specific composition on bargained for terms. *Id.* at 744.

11. A per-program license is a license to use any compositions in the licensor's

The Court of Appeals for the Second Circuit reversed the district court's ruling on these three issues, holding that the blanket licenses issued to CBS, and to all other television networks, were a form of price-fixing which is illegal per se under the Sherman Antitrust Act,¹² and that the issuance of blanket licenses was a misuse of copyrights.¹³ Finding that the blanket license reduced price competition among the authors, composers, publishers, and other copyright owners who are members of BMI and ASCAP, the Second Circuit concluded that lack of incentive to compete might be cured if ASCAP and BMI were required to provide some form of per-use license. The court determined that individual composers could price direct licenses so as to compete effectively against per-use licenses.

The United States Supreme Court granted certiorari to consider whether a blanket license violates the per se rule of price-fixing and constitutes a misuse of copyrights.¹⁴ The Court reversed the court of appeals' judgment, ruling unanimously that the per se rule under the Sherman Antitrust Act is *not* violated by blanket licensing practices in the television industry, and that since the per se rule was not applicable, a finding of copyright misuse could not stand. The case was remanded to the Second Circuit for further proceedings that were to include an assessment, under the rule of reason,¹⁵ of

repertory (here the potential licensors are BMI and ASCAP) for the particular program. Fees are determined by the number of programs using compositions in the licensor's repertory. Such a license is in essence a "mini-blanket" license. *CBS v. ASCAP*, 562 F.2d 130, 133-34 (2d Cir. 1977).

12. 15 U.S.C. § 1 (Supp. I 1980) provides in 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. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony. . . .

13. *CBS v. ASCAP*, 562 F.2d 130 (2d Cir. 1977).

14. *BMI v. CBS*, 441 U.S. 1, 7 (1979).

15. The Court referred to the test stated in *Standard Oil Co. v. United States*, 221 U.S. 1, 65 (1910) as the proper statement of the rule of reason. In *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978), the Court paraphrased the *Standard Oil* test:

The test is . . . whether the challenged contracts or acts "were unreasonably restrictive of competitive conditions." Unreasonableness under that test could be based either (1) on the nature or character of the contracts, or (2) on surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices. Under either branch of the test, the inquiry is confined to a consideration of impact on competitive conditions.

the blanket license as employed in the television industry.¹⁶

The Supreme Court first addressed the issue of whether the blanket licensing practices of ASCAP and BMI violate the per se rule of price-fixing. The test for applying the per se rule is to focus on

whether the effect and . . . the purpose of the practice is to threaten the proper operation of our predominantly free market economy . . . , and in what portion of the market, or instead one designed to "increase economic efficiency and render markets more rather than less competitive."¹⁷

Applying this test to the facts of the case, the Court found that the practice of blanket licensing of performing rights of copyrighted music is not per se illegal. Rather blanket licensing "accompanies the integration of sales, monitoring, and enforcement against unauthorized copyright use."¹⁸

In reaching this conclusion, the Supreme Court applied the "per se rule with a Market-Functioning exception"¹⁹ and affirmed the court of appeals' holding "that price-fixing is per se illegal except where it is absolutely necessary for the market to function at all."²⁰ The Court found the blanket license to be a somewhat different product than the direct license because it eliminates the need for negotiations with individual composers and offers substantial savings in time and lower costs.²¹ Although the packaging of a license with a negotiation service, such as both BMI and ASCAP provide, creates a market in which individual composers are inherently unable to compete, the increased availability of compositions due to this

Id. at 690.

16. 441 U.S. at 25. The decision was eight to one, but the dissent agreed with the major holding of the case. Justice Stevens, in a dissenting opinion, disagreed with the majority on whether the issue of assessment of blanket licensing under the rule of reason was still before the court of appeals. See note 29 and accompanying text *infra*.

17. 441 U.S. at 19-20 (citing as authority *United States v. United States Gypsum Co.*, 438 U.S. 422 n.13, 441 n.16 (1978)). The Court continues, qualifying the simplified test: "that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output . . ." *Id.* 19-20.

18. *Id.* at 20. The Court sees the blanket license as a practical solution developed by those elements in the marketplace whose rights were threatened by the absence of effective means of monitoring use and enforcing payment of use royalties.

19. *CBS v. ASCAP*, 562 F.2d 130, 136 (2d Cir. 1977).

20. *Id.*

21. 441 U.S. at 21-22.

lowering of cost and savings in time benefits not only the licensee but also the licensor and the composer.

The Court's denial of the claim of price-fixing was further based on a consideration of the restrictions placed on both BMI and ASCAP by consent decrees,²² a consideration which was crucial to a characterization of the licensing practices of BMI and ASCAP as violative of the Sherman Act.²³ Both BMI and ASCAP are subject to consent decrees, but the restrictions imposed on the licensing practices of each organization are different. Only ASCAP is limited by consent decrees to obtaining only non-exclusive rights from its affiliates and to allowing its fees to be scrutinized by the district court in the event of disagreements between ASCAP and its licensees.²⁴ The Court postulated equal treatment, concluding that since ASCAP could not be guilty of price-fixing, neither could BMI.²⁵

As to ASCAP and its members and affiliates, CBS's charge of price-fixing ignores the consent decree issued by the United States District Court in 1950²⁶ which provides that the district court will set fees for licenses and royalties, if any dispute should arise as to the reasonableness of such fees. Because ASCAP does not ultimately set the price for its blanket licenses it cannot be guilty of price-fixing.

Secondly, the Supreme Court addressed the issue of misuse of copyrights. The Supreme Court agreed with the Second Circuit's analysis that a finding of misuse of copyright was de-

22. A consent decree is not a judicial determination of the rights of the parties, but is a recordation of the terms of the agreement reached by parties who are competent to contract. The decree is binding on the parties, but not on the court. A decree by consent is not reviewable upon a writ of error or upon appeal, nor may it be reheard. A consent decree is not *res judicata* upon the parties because it involves no litigation on the merits. *Consaer v. Wisnicwski*, 293 Ill. App. 529, 529, 13 N.E.2d 93, 94 (1938).

23. 441 U.S. at 13.

24. Compare *United States v. ASCAP*, [1950-1951] TRADE CASES ¶ 62,595 (S.D.N.Y. 1950), and *United States v. ASCAP*, [1940-1943] TRADE CASES ¶ 56,104 (S.D.N.Y. 1941) with *United States v. BMI*, [1940-1943] TRADE CASES ¶ 56,096 (E.D.Wis. 1941) and *United States v. BMI*, [1966] TRADE CASES ¶ 71,941 (S.D.N.Y. 1966).

25. The Supreme Court relied on a stipulation by the parties at trial to eliminate the need for separate analyses of each defendant, and to support equal treatment of the defendants by the Supreme Court's judgment. 441 U.S. at 12 n.20.

26. *United States v. ASCAP*, [1950-1951] TRADE CASES ¶ 62,595 (S.D.N.Y. 1950). This decree amended an earlier decree, *United States v. ASCAP* [1940-1943] TRADE CASES ¶ 56,104 (S.D.N.Y. 1941).

pendent upon a finding of per se illegal price-fixing.²⁷ Therefore, having found no illegal price-fixing, the Court summarily concluded that the blanket licensing practice was not copyright misuse.²⁸

Thirdly, the Court addressed the issue of restraint of trade. Whereas the Supreme Court found no per se illegal price fixing activity, it acknowledged that under the rule of reason the blanket licensing practices of both BMI and ASCAP might be characterized as a restraint of trade. A majority of the Court concluded that the issue of restraint of trade was not properly before it, remanding the case to the Second Circuit for a factual analysis of blanket licensing in the television industry under the rule of reason, which is to include consideration of the policies expressed in the several consent decrees to which ASCAP and BMI are subject.

The Supreme Court held, unanimously, that blanket licensing of nondramatic performances of copyrighted music is not per se illegal, nor a misuse of copyrights, and that such licenses should be judged by the rule of reason rather than by the per se standard. The Court remanded the case for a factual analysis under the rule of reason.²⁹

Within the facts of this case, then, the Supreme Court has reversed its long-standing opinion that price-fixing is *always* per se illegal.³⁰ Although the lower federal courts have long distinguished between per se illegal price-fixing and literal price-fixing,³¹ the United States Supreme Court has not made such a distinction before this case. Supreme Court application of the market necessity concept to future cases will no doubt be limited to fact patterns which closely approximate the circumstances of blanket licensing in the broadcast-

27. 441 U.S. at 6, 8.

28. *Id.* at 24.

29. The sole dissent was directed to the majority's decision to remand the case for analysis under the rule of reason. Justice Stevens concluded that the issue of whether the blanket license of performances of copyrighted music is unlawful under the rule of reason was properly before the Supreme Court and that the weight of authority required a finding that the practice was an unreasonable restraint of trade. *Id.* 25-38 (Stevens, J., dissenting).

30. In *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 213 (1940), the Supreme Court concluded that the rule of reason stated in *Standard Oil* had not changed the status of price-fixing as a per se illegal violation of the Sherman Antitrust Act.

31. See *K-91, Inc. v. Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967), *cert. den.* 389 U.S. 1045 (1968).

ing industry. The question remains whether blanket licensing is unreasonable restraint of trade. Although this issue was remanded to the court of appeals, the Supreme Court, in dicta, directed the Second Circuit's ruling.³² The Second Circuit, relying on the extensive fact-finding of the trial court and the guidance of the Supreme Court, held the practice of blanket licensing to be reasonable under the circumstances of the television broadcasting industry.³³ Taking the case as a whole, the majority presents the view that because blanket licensing when properly regulated, fills a legitimate need of both copyright owners and licensees, it is a reasonable and functional practice, not an unreasonable restraint of trade.

Lee Ann Gilbert

32. 441 U.S. at 13-16. The Court speaks of the amicus brief filed by the United States Department of Justice in the present case, the amicus brief filed by the Justice Department in *K-91*, and the portions of the 1976 Copyright Act (17 U.S.C. §§ 111(d)(5)(A), 116(c)(4), 118(b) (Supp. II 1978)), which suggest forms of pooling and blanket licensing as legitimate options open to copyright owners. *See generally* 17 U.S.C. §§ 101-810 (Supp. II 1978). These sources conclude either directly or indirectly that there are economically beneficial applications of the blanket license in some circumstances, and that the practice is not an unreasonable restraint of trade.

33. *CBS v. ASCAP*, 620 F.2d 930 (2d Cir. 1980).

