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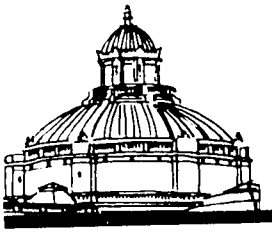
# "SYNDICATED TELEVISION MUSIC COPYRIGHT REFORM ACT OF 1987": A LEGAL ANALYSIS OF THE BILLS



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ABSTRACT

"Source licensing" bills under consideration in the One Hundredth Congress propose to make direct changes in the long-established "blanket licensing" system for composers and songwriters which operates under existing copyright law. This report examines the bills, the existing system, the proposed system, and arguments supporting and opposing the existing system and an amended system.

## EXECUTIVE SUMMARY

H.R. 1195 */ and another similar bill under Congressional consideration, S. 698 **/ are known as "source licensing" bills. These bills propose to make direct changes in the long-established "blanket licensing" system for songwriters and composers which operates under existing copyright law. The source licensing bills would modify these licensing rights by amending the Copyright Act to prohibit the conveyance of the right to perform publicly syndicated television programs without simultaneously conveying the right to perform the accompanying music.

Various arguments favoring and opposing this legislation have been advanced. Discussion has focused on bargaining positions and anti-trust considerations. Commentators have taken opposing views on the fairness and the effectiveness of the current licensing system. Certain public policy arguments have been raised regarding the merits of the present system, as opposed to an amended system. Other issues of concern include the future quality of the music broadcast under a source licensing system; the impairment of contracts and related retroactivity issues; and the divisibility of copyrights.

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*/ H.R. 1195, 100th Cong., 1st Sess. (1987).

**/ S. 698, 100th Cong., 1st Sess. (1987).

TABLE OF CONTENTS

INTRODUCTION. . . . . 1

BACKGROUND. . . . . 1

DEVELOPMENT OF THE BLANKET LICENSING SYSTEM . . . . . 3

LEGISLATION . . . . . 5

NINETY-NINTH CONGRESS. . . . . 5
ONE HUNDREDTH CONGRESS . . . . . 5
SUMMARY OF PENDING LEGISLATION . . . . . 6

ARGUMENTS FOR AND AGAINST SOURCE LICENSING LEGISLATION. . . . . 8

ANTI-TRUST CONSIDERATIONS. . . . . 9
POLICY CONSIDERATIONS. . . . . .12
CONTRACTUAL CONCERNS . . . . . .14
DIVISIBILITY OF COPYRIGHT. . . . . .15

CONCLUSION. . . . . .16

APPENDIX

"SYNDICATED TELEVISION MUSIC COPYRIGHT REFORM ACT OF 1987":
A LEGAL ANALYSIS OF THE BILLS

INTRODUCTION

Congressional interest has focused on the existing system whereby television stations secure the broadcast rights to copyrighted musical compositions. The One Hundredth Congress is considering the enactment of possible modifications to the existing television broadcast licensing system.[1/] This report examines the current licensing system and analyzes the proposed legislation.

BACKGROUND

The current licensing system involves the use of "performing rights societies" which represent the interests of the composers and the performing artists.[2/] The two chief performing rights societies are ASCAP--the American Society of Composers, Authors and Publishers, and BMI--Broadcast Music, Inc.[3/] The performing rights societies negotiate a fee schedule for the television station to obtain the rights to perform copyrighted compositions.[4/] The most typical arrangement is to have the licensing society issue a "blanket

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1/ H.R. 1195, 100th Cong., 1st Sess. (1987). S. 698, 100th Cong., 1st Sess. (1987)(copies in Appendix). See, Broadcasting, Mar. 2, 1987 at 62; Broadcasting, April 6, 1987 at 61.

2/ See, 2 Nimmer, Nimmer on Copyright § 8.19 (1985)(cited to afterwards as "Nimmer").

3/ Id.

4/ A fee schedule may operate on a variable basis. See, Henn, Copyright Primer, 219-222 (1979)(cited to afterwards as "Henn").

license" which permits the licensee/broadcaster to publicly perform for profit in a nondramatic manner any of the songs in the performing rights society's repetorie in return for either a flat fee or a percentage of gross receipts fee. 5/ The development of this "blanket licensing" system and the implications of its utilization are discussed below.

Congress has explored means to modify the existing licensing system and to develop a "source licensing" system which would restructure the existing licensing system. 6/ "Source licensing" would require producers and/or syndicators to deliver programs to the television stations with the music performance rights included as part of the transfer package. 7/ Source licensing would require the program producer to obtain performing rights from the creator and/or copyright owner in a one-time buyout, before any performances occur, and then these rights would be passed on to the broadcasting stations which would give the performances of the music when the program is broadcast. 8/ Implementation of source licensing would, in effect, reduce the traditional role of the performing rights societies. 9/ Thus, under the proposed source licensing approach, television stations would obtain music performance rights as part of the television program "package," rather than securing music performance rights separately from the performing rights organizations. 10/

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5/ Id. See, also, Nimmer, at § 8.19.

6/ Broadcasting, Mar. 17, 1986, at 90.

7/ Broadcasting, April 6, 1987, at 61-62.

8/ See, Korman and Koenigsberg, Performing Rights in Music and Performing Rights Societies, 33 J. of Copyright Soc. of America, 332, 356 (Cited to afterwards as "Korman").

9/ Billboard, Nov. 29, 1986, at 9.

10/ Broadcasting, Mar. 2, 1987, at 62-63.

DEVELOPMENT OF THE BLANKET LICENSING SYSTEM

The basic concept of American copyright law, as well as foreign copyright law, is that a copyright is a property right.[11/] American copyright laws have developed and have been modified since 1790.[12/] Legislation enacted by Congress in 1897 mandated the composer's exclusive right to publicly perform his or her work.[13/] Thereafter, each performance of a musical work is under the exclusive control of the copyright owner. Each unauthorized performance of a musical work in public is considered to be an infringement.[14/] Composers and songwriters learned that it was impossible to independently locate and monitor unauthorized public performances of their compositions.[15/] On the other hand, the users of the copyrighted works had no useful means to contact the composers of the music that they sought to perform.[16/]

In response to these problems, ASCAP was founded and has remained one of the most significant of the performing rights societies.[17/] BMI is another important performings rights society and there are several small performing

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11/ Henn, at 1-2.

12/ Id.

13/ Act of Jan. 6, 1897, ch. 4, 29 Stat. 481 (currently codified at 17 U.S.C. § 106(4)(1982).

14/ Id. See, Source Licensing: Hearings on S. 1980 Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Committee on the Judiciary, 99th Cong., 2d Sess. 48-49 (1986)(cited to afterwards as "Hearings"). See also, Nimmer at 8-238.

15/ Id. See, also, Oman, "Source Licensing: The Latest Skirmish in an Old Battle," 11 Colum.-VLA J.L. & Arts 252-255 (1987).

16/ Id.

17/ ASCAP, The ASCAP License: "It Works for You," 1-2 (undated)(cited to afterwards as "ASCAP"). See, also, Nimmer at 8-238.

rights groups.[18]

The performing rights societies function in a somewhat complex manner.[19] The operation of ASCAP will be used as a general model, although significant operating differences exist within the various performing rights societies.[20] ASCAP serves as the transferee of its members and licenses the non-dramatic performing rights in the musical works of its members.[21] Thereafter, anyone wishing to perform such a work in a nondramatic matter must negotiate with ASCAP, or under certain circumstances, the individual composer.[22] ASCAP grants two forms of licenses: one is a blanket license permitting the licensee to perform in public for profit in a nondramatic manner any of the songs in the ASCAP repertory in return for either a flat fee or a percentage of gross receipt fee; the second is a license which provides for the payment of a specified fee for each program in which any such music is performed.[23]

The fees collected by ASCAP are pooled in a common fund and are later divided between the publisher members and the writer members.[24] The individual allocation within such two groups is then made according to intricate formulae.[25]

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18/ Id. One of the most important of these smaller groups is SESAC, Inc., the Society of European State Authors and Composers.

19/ Korman at 349-354.

20/ Id., at 351-352.

21/ Nimmer at 8-238.

22/ Id., at 8-239.

23/ Id. See, also, Henn at 220-221.

24/ Nimmer at 8-240.

25/ Id.

## LEGISLATION

### Ninety-Ninth Congress

In the 99th Congress, two bills were introduced which proposed the implementation of a source licensing system.[26] These bills proposed to amend copyright law so as to prohibit a copyright holder from conveying the right to publicly perform an audiovisual work on non-network commercial television without simultaneously conveying the right to perform any copyrighted music which accompanied that work.[27] Wide public and Congressional interest was generated by these bills and hearings were held before the Subcommittee on Patents, Copyrights and Trademarks of the Senate Judiciary Committee.[28] These bills were never voted on and died with the Ninety-Ninth Congress.

### One Hundredth Congress

Two companion bills entitled the "Syndicated Television Music Copyright Reform Act of 1987" have been introduced in the One-Hundredth Congress.[29] These bills have also generated much Congressional and public interest and debate.[30] Generally speaking, these bills are similar to each other and to those previously introduced in the Ninety-Ninth Congress. However, one significant difference does exist between the two bills introduced in the One Hundredth Congress.

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26/ S. 1980, 99th Cong., 1st Sess. (1985); H.R. 3521, 99th Cong., 1st Sess. (1985).

27/ Id.

28/ See, Hearings. See, also, Broadcasting, Mar. 17, 1986, at 90-91.

29/ H.R. 1195, 100th Cong., 1st Sess. (1987); S. 698, 100th Cong., 1st Sess. (1987). (Copies attached in Appendix).

30/ See, for instance: Cashbox, Jan. 1, 1987 at 6; Broadcasting, April 6, 1987 at 61-62.

The House bill provides that when a musical work which constitutes a work made for hire is synchronized with a motion picture or other audiovisual work, the person who prepared such a work shall be considered an employee, for the purposes of law relating to collective bargaining, of the owner of the copyright in such motion picture or other audiovisual work.[31] This provision is not contained in the Star Print of the Senate bill.[32] Thus, under the Senate bill, composers would not be considered to be employees and hence would not be covered under collective bargaining employment contracts.

Summary of Pending Legislation[33]

The bill[34] proposes to amend certain copyright law provisions.[35] If enacted, the bill would prevent the owner, assignee, or licensee of a copyrighted audiovisual work from conveying the right to publicly perform such a work by nonnetwork commerical television broadcast without simultaneously transferring the right to perform in synchronization any copyrighted music which accompanied such audiovisual work.[36] This language would in effect require all syndicators who license programs to nonnetwork commercial television

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31/ H.R. 1195, § 4(g), 100th Cong., 1st Sess. (1987). Aside from the abovementioned provision, the Senate and House bills are identical.

32/ S. 698, 100th Cong., 1st Sess. (Star Print)(1987).

33/ References in this discussion are made to the language contained in H.R. 1195, 100th Cong., 1st Sess. (1987)(cited to afterwards as the "bill").

34/ Id.

35/ 17 U.S.C. §§ 113, et. seq. (1982).

36/ Bill, § 2.

stations to convey the right to perform the copyrighted music on the soundtrack of these programs at the same time that they convey other rights in the programs.[37] Under existing industry practice, program producers do not necessarily own the right to perform the nondramatic music publicly. Ordinarily that right is held by the composer and/or the music publisher, who may or may not be a subsidiary of the program producer. Thus, the syndicator would have to acquire the performance rights in all music that accompanies the program to be syndicated before the syndicator can license the program for local broadcasters.[38]

For the purposes of this legislation, the bill defines the term "audiovisual work" as meaning any motion picture, prerecorded television program, or commercial advertisement.[39] It appears that this definition would cover most kinds of prerecorded programs that might contain accompanying music. Provisions of the bill are not made applicable to works prepared by, for, or under the direction of tax-exempt organizations.[40]

Section 4 of the bill provides that whenever the right to perform by broadcast any motion picture or other audiovisual work that contains a synchronous musical work is conveyed to any commercial broadcast station, the author(s) of such musical work (or in a work for hire, the employer

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37/ Rights to most network and syndicated programming, which utilize copyrighted music that is prerecorded on a soundtrack, are purchased by the networks or the local stations from the independent television or motion picture companies, known as "program packagers." See, Buffalo Broadcasting Co. v. ASCAP, 546 F.Supp. 274, (S.D.N.Y. 1982), rev'd, 744 F.2d 917 (2d Cir. 1984), cert. denied, 469 U.S. 1211 (1985). Syndicated programming includes theatrical motion pictures, prerecorded television programs, and live programs which are offered by program packagers and distributors to be broadcast as non-network programs.

38/ Id.

39/ Bill, § 2.

40/ Id.

or employee(s) who prepared the work) shall be entitled to an interest in any compensation paid to the owner of the copyright in such motion picture or audiovisual work.[41] The amounts of such interest are to be determined by an agreement between the owner of the copyright in the motion picture or other audiovisual work and the author(s) or employee(s) who prepared the work.[42] When a musical work which constitutes a work made for hire is synchronized with a motion picture or other audiovisual work, the person who prepared such a work shall be considered an employee, for purposes of law relating to collective bargaining, of the owner of the copyright in such motion picture or other audiovisual work.[43]

The bill provides that the amendments shall take effect on the date of the bill's enactment, except that certain provisions shall not affect a public performance occurring during the one-year period beginning on the date of the bill's enactment pursuant to a contract executed before the date of enactment.[44]

ARGUMENTS FOR AND AGAINST SOURCE LICENSING LEGISLATION

Several general positions have been advanced favoring and opposing source licensing legislation.[45] These arguments are summarized below.

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41/ Id., § 4.

42/ Id.

43/ Id. This provision is not contained in the Star Print of S. 698, 100th Cong., 1st Sess. (1987). Thus, it would appear that under S. 698, composers would not be considered employees and hence would not be covered under collective bargaining employment contracts. See, discussion at pages 5-6.

44/ Bill, § 5.

45/ See, Boucher, Open Letter to Songwriters, Reforming Music Licensing Procedures, 7 Billboard (Nov. 29, 1986)(Cited to afterwards as "Boucher"). See, Berman, TV Source Licensing, Trading Copyrights for "A Pig in a Poke," 9 Billboard (Dec. 20, 1986)(Cited to afterwards as "Berman").

The current licensing system usually involves the broadcasters dealing with music licensing agencies that represent music writers, performers, and others.[46/]

Various groups who are involved in the licensing, broadcasting, and copyright fields have taken different positions regarding source licensing. The performing rights societies very much oppose source licensing and strongly espouse the existing blanket licensing system.[47/] The U.S. Copyright Office has taken a position that also opposes implementation of a source licensing system.[48/] In sharp contrast to these positions is the stance of many broadcasters who strongly favor the enactment of legislation which would implement a source licensing system.[49/] Each group has arguments to support their position which are discussed below.

Anti-Trust Considerations

There are certain antitrust considerations when copyrights are licensed in bulk through large licensing organizations.[50/] Throughout the years of their existence, ASCAP and BMI have been subject to various actions charging them with violations of federal antitrust laws.[51/] Early federal actions against ASCAP for alleged antitrust violations resulted in the

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46/ See, note 3.

47/ ASCAP, "The Facts," printed and distributed by ASCAP (undated)(cited to afterwards as "Facts").

48/ Hearings, at 86-90.

49/ See, Boucher.

50/ Korman at 354.

51/ Kennedy, Blanket Licensing of Music Performing Rights: Possible Solutions to the Copyright-Antitrust Conflict, 37 Vanderbilt L.J. 184, 188-189 (1984).

government and ASCAP entering into a consent decree.[52] Subsequent modifications were made to this consent decree.[53]

The performing rights organizations and broadcasters have been involved in various cases involving alleged antitrust issues.[54] Columbia Broadcasting System--CBS--was involved with lengthy litigation seeking to prevent ASCAP and BMI from using a blanket license to convey nondramatic performing rights to television networks. CBS based its challenges to the ASCAP system on antitrust grounds.[55] The Supreme Court examined the advent of the performing rights organizations, their functions, and the antitrust laws.[56] The Court determined that in these particular circumstances, the blanket licensing system was not a restraint of trade and hence was not violative of the antitrust laws.[57] The Court concluded:

> With this [historical] background in mind, which plainly enough indicates that over the years, and in the face of available alternatives, the blanket license has provided an acceptable mechanism for at least a large part of the market for the performing rights to copyrighted musical compositions, we cannot agree that it should automatically be declared illegal in all of its many manifestations. 58/

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52/ Id.

53/ Id., at 188-189.

54/ Kennedy at 196-201.

55/ Columbia Broadcasting System, Inc. v. ASCAP, 400 F.Supp. 737 (S.D.N.Y. 1975), rev'd, 562 F.2d 130 (2d Cir. 1977), rev'd sub nom. BMI v. CBS, Inc., 441 U.S. 1 (1979).

56/ BMI v. CBS, Inc., 441 U.S. 1, 20 (1979).

57/ Id., at 20-21.

58/ Id., at 24.

The Court did not evaluate the possible merits or problems arising from the implementation of a source licensing system. Rather, the current licensing system was viewed by the Court as efficient.[59/]

Following the CBS case, the next major challenge to the existing blanket licensing system occurred in Buffalo Broadcasting Co. v. ASCAP.[60/] In this case, a group of owners and operators of local television stations brought a class action against the performing rights orgnizations. The owners challenged on antitrust grounds the blanket licensing format that ASCAP and BMI offered local television stations. Factual circumstances differed in this case from those in the CBS. In this case blanket licenssing for local stations was examined, whereas in CBS, blanket licensing for national networks was evaluated. In an unexpected decision, the U.S. District Court for the Southern District of New York determined that ASCAP's blanket licensing scheme violated antitrust principles.[61/] The district court stated that if blanket licensing would be enjoined, then source licensing would evolve as the most efficient licensing system.[62/] This decision appeared to be at odds with the body of decided caselaw and legal commentators expected a judicial reversal.[63/]

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59/ Id., at 20-21.

60/ 546 F.Supp. 274 (S.D.N.Y. 1982), rev'd, 744 F.2d 217 (2d Cir. 1984), cert. denied, 469 U.S. 1211 (1985).

61/ 546 F.Supp. 274 (S.D.N.Y. 1982).

62/ Id., at 295-296.

63/ Kennedy at 210-215.

On appeal, the U.S. Court of Appeals for the Second Circuit reversed the district court's findings and concluded that the current licensing system was not violative of anti-trust principles.[64/]

Source licensing supporters assert that source licensing would enhance marketplace activities for licensing music performance rights by reducing the alleged abuse of the supposed "monopoly" powers that certain broadcasters claim that the licensing societies now exert.[65/] Supporters argue that local broadcasters have limited bargaining power and cannot negotiate at arms length with the major licensing societies.[66/] Opponents of source licensing argue that the American courts have determined that the blanket licensing system is not a monopoly or in violation of American anti-trust law.[67/]

Policy Considerations

A variety of other arguments favoring and opposing source licensing have been raised. Proponents of source licensing argue that the cost of the blanket license has a limited relationship to the amount or the quality of the music that a local station really utilizes.[68/] They argue that the current system forces broadcasters to pay for all available music instead of the music that they actually use. Supporters vigorously

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64/ 744 F.2d 917 (2d Cir. 1984), cert. denied, 469 U.S. 1211 (1985).

65/ See, Boucher.

66/ Id.

67/ See, Berman. See, also, Berman, Source Licensing: The Proposed Deal is no Deal; Cashbox 6 (Jan. 31, 1987); Broadcasting, Mar. 2, 1987 at 62.

68/ See, Boucher.

argue that source licensing would provide a fairer pricing system, based on the music actually used. 69/

Opponents of source licensing assert that the blanket license fee is reasonable and that unlimited access to the licensing society's total holdings minimizes transaction costs and is convenient for the user and also for the copyright holder. 70/ In addition, they argue that over the years the licensing fee has been renegotiated and adjusted downward. 71/

There is a running argument regarding the quality of music which would be broadcast if a source licensing system were put in effect. Supporters of source licensing have argued that its implementation would improve the quality of music on syndicated programs, as broadcasters would be able to select better quality music. 72/ They argue that broadcasters would be able to pick and choose only the music that they would wish to play, rather than paying for all of the music in the performing rights societies' collections. Therefore, broadcasters could be selective and chose only the highest quality music. 73/ Opponents of source licensing argue that source licensing system would severely disrupt the current compositional system and that unknown and struggling composers would have

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69/ Id. Broadcasting, April 6, 1987 at 61.

70/ See, note 66.

71/ Id.

72/ See, Boucher.

73/ Id.

little or no bargaining power against television broadcasters.[74] Furthermore, opponents argue that the quality of broadcast music would deteriorate. They suggest that music in the public domain--not under copyright protection--and poor quality music would be widely used in television programs and television "movies."[75] ASCAP argues that it would be the music composers, especially those not of national reputation, who would suffer financial hardship from the implementation of source licensing.[76]

Contractual Concerns

Certain concerns have arisen regarding the effectiveness date proposed by this legislation and the lack of drafting clarity in this section.

> Sec. 5. The amendments made by this Act shall take effect on the date of enactment of this Act, except that the amendment made by section 1 shall not affect a public performance occurring during the one-year period beginning on the date of enactment of this Act pursuant to a contract executed before such date of enactment. [77]

It appears that this provision would grant a one year period of transition or grace period to producers regarding contracts concerning public performances which were entered into prior to the bill's enactment. However, questions have been raised regarding contracts entered into prior to the date of enactment which are longer than a year in duration.[78] Concern has centered on the concept of the "sanctity of contract" and the possibility that if the bill were enacted, it would impair existing contracts.[79]

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74/ See, Berman.

75/ See, ASCAP at 2.

76/ Id.

77/ Bill, § 5.

78/ Hearings at 76-77.

79/ Id., at 89.

Directly related to this concern is the issue of retroactivity.[80] It has been argued that the bill presents two retroactivity issues: (1) the intended effect on preexisting contracts and (2) the effect on the inventory of movies and television programs.[81] It could be argued that the bill's approach could create inequities due to possible retroactive application to existing contracts which run for longer than the bill's one year transition period.[82] On the other hand, it could be argued that the bill's approach is desirable since it would minimize a transitional period from blanket licensing to source licensing.

Divisibility of Copyright

Another concern that has been raised is that the implementation of a source licensing system would negate or modify the principle of "divisibility of copyright."[83] Copyright law renders a copyright divisible by defining copyright owner, as referring, with respect to any of the exclusive rights, to the owner of that particular right.[84] The copyright owner is given standing to sue for the infringement of that right.[85] In addition, "transfer of copyright ownership" is defined as an assignment, exclusive license, and any other grant except a nonexclusive license.[86]

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80/ Id., at 77.

81/ Id.

82/ Id. A possible solution to this problem would be to have this legislation apply only to movies, television programs, and commercials made in the future.

83/ Id., at 89.

84/ Henn at 62-63. See, 17 U.S.C. § 101 (1982).

85/ Id., at 63.

86/ Id.

Therefore, current American copyright law provides that various aspects of copyright ownership are able to be divided among different owners. The proposed legislation would require that the music performance rights would have to be transferred simultaneously with the television broadcast rights. [87] This would in effect make the music performance rights "indivisible" from the television broadcast rights and would seemingly have the effect of changing the concept of American copyright law from a system that has divisible rights, to a system that in this instance would have indivisible rights.

CONCLUSION

The source licensing bills propose to make direct changes in the long-established blanket licensing system for songwriters, composers, and broadcasters which operates under the existing copyright law. The proposed legislation, if enacted, would modify licensing rights by amending the Copyright Act to prohibit conveying the right to perform publicly syndicated television programs without simultaneously conveying the performance right to the accompanying music.

Numerous arguments favoring and opposing this legislation have been advanced. Discussion has focused on consideration of bargaining positions and anti-trust concerns. Commentators have taken opposing views on the fairness and the effectiveness of the current system. In addition, certain policy arguments have been raised regarding the merits of the current system, as opposed to an amended system.

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87/ Bill, at § 2.