

# The Burger Court Opinion Writing Database

*Broadcast Music, Inc. v. Columbia  
Broadcasting System, Inc.*

441 U.S. 1 (1979)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

March 29, 1979

Dear Byron:

Re: 77-1578 Broadcast Music Inc, v. CBS, Inc.  
77-1583 American Society of Composers, Authors  
and Publishers v. CBS, Inc.

I join.

Regards,



Mr. Justice White

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

April 10, 1979

RE: Nos. 77-1578 and 77-1583 Broadcast Music & ASCAP  
v. CBS, Inc.

Dear Byron:

I agree.

Sincerely,



Mr. Justice White

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

February 26, 1979

Re: 77-1578 and 77-1583 - Broadcast Music, Inc. v. CBS

Dear Byron:

I am glad to join your opinion for the  
Court.

Sincerely yours,

Mr. Justice White

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

February 27, 1979

Re: 77-1578 and 77-1583 - Broadcast Music, Inc. v. CBS

Dear Byron:

I would have no objection whatever to the changes suggested in Harry's letter to you of today.

Sincerely yours,

Q.S.

Mr. Justice White

Copies to the Conference

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice White

Circulated: 22 FEB 1979

Recirculated: \_\_\_\_\_

**1st DRAFT**

**SUPREME COURT OF THE UNITED STATES**

Nos. 77-1578 AND 77-1583

Broadcast Music, Inc., et al.  
Petitioners.

77-1578  
Columbia Broadcasting System,  
Inc., et al

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

77-1583  
Columbia Broadcasting System,  
Inc., et al.

On Writs of Certiorari to  
the United States Court  
of Appeals for the Second  
Circuit.

[February —, 1979]

MR. JUSTICE WHITE delivered the opinion of the Court.

This case involves an action under the antitrust and copyright laws brought by respondent Columbia Broadcasting System, Inc. (CBS), against petitioners, American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI), and their members and affiliates.<sup>1</sup> The basic question presented is whether the sale by ASCAP and BMI to CBS of blanket licenses to copyrighted musical compositions is price fixing *per se* unlawful under the antitrust laws.

CBS operates one of three national commercial television networks, supplying programs to approximately 200 affiliated

<sup>1</sup> The District Court certified the case as a defendant class action. 400 F. Supp. 737, 741 n. 2 (SDNY 1975).

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

1, 2, 4, 6, 7, 11, 13-18, 20-24

From: Mr. Justice White

Circulated:

Recirculated: 24 FEB 1979

2d  
1st DRAFT

## SUPREME COURT OF THE UNITED STATES

Nos. 77-1578 AND 77-1583

Broadcast Music, Inc., et al..  
Petitioners,

77-1578 v.  
Columbia Broadcasting System,  
Inc., et al.

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

77-1583 v.  
Columbia Broadcasting System,  
Inc., et al.

On Writs of Certiorari to  
the United States Court  
of Appeals for the Second  
Circuit.

[February —, 1979]

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To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
~~Mr. Justice Marshall~~  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice White

Circulated:

1 MAR 1979

Recirculated:

3rd DRAFT

## SUPREME COURT OF THE UNITED STATES

Nos. 77-1578 AND 77-1583

Broadcast Music, Inc., et al.,  
Petitioners,

77-1578 v.

Columbia Broadcasting System,  
Inc., et al.

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

77-1583 v.

Columbia Broadcasting System,  
Inc., et al.

On Writs of Certiorari to  
the United States Court  
of Appeals for the Second  
Circuit.

[February —, 1979]

MR. JUSTICE WHITE delivered the opinion of the Court.

This case involves an action under the antitrust and copyright laws brought by respondent Columbia Broadcasting System, Inc. (CBS), against petitioners, American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI), and their members and affiliates.<sup>1</sup> The basic question presented is whether the issuance by ASCAP and BMI to CBS of blanket licenses to copyrighted musical compositions at fees negotiated by them is price fixing *per se* unlawful under the antitrust laws.

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<sup>1</sup> The District Court certified the case as a defendant class action. *CBS, Inc. v. ASCAP*, 400 F. Supp. 737, 741 n. 2 (SDNY 1975).

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice White

Circulated: \_\_\_\_\_

Recirculated: 10 APR 1979

STYLISTIC CHANGES THROUGHOUT.  
SEE PAGES: 4-6, 11, 13, 15-17,

20, 21

*Ja. after 26 resubmited*

4th DRAFT

## SUPREME COURT OF THE UNITED STATES

Nos. 77-1578 AND 77-1583

Broadcast Music, Inc., et al.,  
Petitioners,

77-1578 v.

Columbia Broadcasting System,  
Inc., et al.

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

77-1583 v.

Columbia Broadcasting System,  
Inc., et al.

On Writs of Certiorari to  
the United States Court  
of Appeals for the Second  
Circuit,

[April —, 1979]

MR. JUSTICE WHITE delivered the opinion of the Court.

This case involves an action under the antitrust and copyright laws brought by respondent Columbia Broadcasting System, Inc. (CBS), against petitioners, American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI), and their members and affiliates.<sup>1</sup> The basic question presented is whether the issuance by ASCAP and BMI to CBS of blanket licenses to copyrighted musical compositions at fees negotiated by them is price fixing *per se* unlawful under the antitrust laws.

I

CBS operates one of three national commercial television networks, supplying programs to approximately 200 affiliated

<sup>1</sup> The District Court certified the case as a defendant class action. *CBS, Inc. v. ASCAP*, 400 F. Supp. 737, 741 n.2 (SDNY 1975).

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

March 5, 1979

Re: 77-1578 - BMI v. CBS  
77-1583 - ASCAP v. CBS

Dear Byron:

Please join me.

Sincerely,

T.M.  
T.M.

Mr. Justice White  
cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

February 27, 1979

Re: No. 77-1578 - Broadcast Music, Inc. v. CBS  
No. 77-1583 - ASCAP v. CBS

Dear Byron:

"As presently advised," I am able to join all of your opinion except part IIIC.

The opinion takes an "all factors considered" approach, and emphasizes the prior consent decree. My difficulty centers in the fact that the test announced on page 17 does not seem to be an "all factors considered" test but seems, instead, to emphasize "productive efficiency." The status of "productive efficiency" in antitrust law, I believe, is controversial and is perhaps attributable to the Chicago school which emphasizes efficiency to the exclusion of other political and social criteria that have played a leading role in the Court's prior interpretations of the Sherman Act. I believe that productive efficiency, in the past, has not been given controlling significance in antitrust analysis because, first, it would justify some clearly anticompetitive activity (such as a merger which produced a more efficient monopoly) and, second, because productive efficiency is difficult to identify. I do not believe the cases cited on page 17 say that productive efficiency creates an exception to per se rules.

I would be content if the eighth line on page 17 were made to read "designed to promote market activity." This is wholly consistent with your summary sentence on pages 19-20 which emphasizes that ASCAP "made a market in which individual composers are inherently unable to fully effectively compete." If you can see your way clear to make this change, you have my joinder.

Sincerely,

Mr. Justice White

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

March 2, 1979

Re: No. 77-1578 - BMI v. CBS  
No. 77-1583 - ASCAP v. CBS

Dear Byron:

I am glad to join your recirculation of March 1.

Sincerely,



Mr. Justice White

cc: The Conference

✓  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

March 1, 1979

77-1578 Broadcast Music, Inc. v. CBS

Dear Byron:

Please join me.

Sincerely,

*L. Powell*

Mr. Justice White

lfp/ss

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

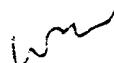
February 26, 1979

Re: Nos. 77-1578 and 77-1583 - Broadcast Music v. CBS,  
et al.

Dear Byron:

Please join me.

Sincerely,



Mr. Justice White

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

February 26, 1979

Re: 77-1578; 1583 - Broadcast Music  
v. CBS, et al.

Dear Byron:

"As presently advised," I expect to concur in your conclusion that a blanket license is not illegal per se, but to dissent from the conclusion that a blanket license, coupled with ASCAP's refusal to license on any other basis, is not a violation.

I'll try not to hold you up too long.

Respectfully,



Mr. Justice White  
Copies to the Conference

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: APR 6 79

1st DRAFT

Recirculated:                   

## SUPREME COURT OF THE UNITED STATES

Nos. 77-1578 AND 77-1583

Broadcast Music, Inc., et al.,  
Petitioners,

77-1578      v.

Columbia Broadcasting System,  
Inc., et al.

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

77-1583      v.

Columbia Broadcasting System,  
Inc., et al.

On Writs of Certiorari to  
the United States Court  
of Appeals for the Second  
Circuit.

[April —, 1979]

MR. JUSTICE STEVENS, concurring in part and dissenting in part.

The Court holds that ASCAP's blanket license is not a species of price fixing categorically forbidden by the Sherman Act. I agree with that holding. The Court remands the case to the Court of Appeals, leaving open the question whether the blanket license as employed by ASCAP and BMI is unlawful under a rule of reason inquiry. I think that question is properly before us now and should be answered affirmatively.

There is ample precedent for affirmance of the judgment of the Court of Appeals on a ground that differs from its rationale, provided of course that we do not modify its judgment.<sup>1</sup> In this case, the judgment of the Court of Appeals was not

<sup>1</sup> See *United States v. New York Telephone*, 434 U. S. 159, 166 n. 8; *Dayton Board of Educ. v. Brinkman*, 433 U. S. 406, 419; *Massachusetts Mutual Insurance Co. v. Ludwig*, 426 U. S. 479, 480-481; *United States v. American Railway Express Co.*, 265 U. S. 425, 435.