

WHO KILLED THE RADIO STAR? HOW MUSIC BLANKET LICENSING DISTORTS THE PRODUCTION OF CREATIVE CONTENT IN RADIO

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According to popular and scholarly belief, video killed the radio star. The golden age of radio, culminating in the 1930s and 1940s, was gone with the rise of television in the 1950s and 1960s. In this Article, we advance the claim that television's role in the "death" of the radio star has been more limited than commonly believed. A major culprit, we argue, is the common licensing practice of musical content for broadcasting, or more precisely, the blanket license issued by copyright collective management organizations (CMOs). By setting a zero marginal price for broadcasting additional songs from the CMO's repertoire, CMOs' blanket licensing drives commercial radio stations to dedicate a larger

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portion of their programming to the broadcasting of recorded songs and to reduce the time and resources spent on producing or procuring other content.

This Article makes three main contributions to three fields: competition law and policy; copyright law and policy; and cultural history. For competition law and policy, this Article reveals that the analysis of blanket licenses should not be limited to their static effects (i.e., the trade-off between lower transaction costs and supra-competitive pricing), but should also include the dynamic effect of blanket licensing on the type and quality of content production. This dynamic effect also poses a challenge for copyright law and policy: while collective licensing may be beneficial to one class of copyright holders, it may hinder the production of other content and harm creators of such content, by depriving them of important opportunities for market and cultural participation. Regarding cultural history, our Article provides a novel explanation for the well-documented phenomenon of the “death” of the radio star and re-evaluates some of the existing explanations. Finally, we discuss some alternative models for music licensing that can mitigate the distortion created by blanket licenses.

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INTRODUCTION

It is commonly thought that video killed the radio star.¹ The golden age of radio, when programming “made ‘em laugh, [and] made ‘em cry, [and] made us feel like we could fly” was gone with the rise of television, and ever since, “all we hear is radio ga ga.”² This view is not limited to popular culture. Scholarly literature often credits the growing popularity of television in the 1950s and 1960s with being one of the main causes for the demise of radio.³ But could this be a case of false conviction? In this Article, we advance the claim that television’s role in the “death” of the radio star has been more limited than commonly believed and that a major culprit is still at large.

That major culprit, as the next pages argue, is the common licensing practice of musical content for broadcasting, or more precisely, the blanket licenses issued by copyright collective management organizations (CMOs). CMOs’ blanket licensing, we maintain, drives commercial radio stations to dedicate a larger portion of their programming to the broadcasting of recorded songs and to reduce the time and resources spent on producing or procuring other content.

While not as popular as it was in its heyday, radio is still very popular. Indeed, every week, more Americans tune into radio than watch television or use smartphones, computers, or tablets.⁴ On average, Americans listen to radio for more than two hours per day, which supports a nationwide industry of more than 15,000 stations

1. THE BUGGLES, *Video Killed the Radio Star*, on THE AGE OF PLASTIC (Island Records 1980).

2. QUEEN, *Radio Ga Ga*, on THE WORKS (EMI 1984).

3. See *infra* Part III.

4. See *How America Listens: The American Audio Landscape*, NIELSEN (Apr. 5, 2018), <https://www.nielsen.com/us/en/insights/article/2018/how-america-listens-the-american-audio-landscape> [<https://perma.cc/M72B-S75T>] (explaining that 93% of Americans tune into radio at least once a week, compared to 88% who watch television, 83% who use smartphones, and 50% who use personal computers).

that gross over twenty billion dollars in total annual revenue.⁵ The vast majority of these stations broadcast mostly music.⁶ Similarly, in Canada, according to a recent Canadian Radio-Television and Telecommunications Commission (CRTC) report, radio continues to be the main audio distribution platform for music, news, and narrated content despite the growth of online platforms.⁷ Music is crucial for radio broadcasting both as an input and as an output: broadcasters need music to create shows that they then broadcast to their audience. Copyright law requires broadcasters to obtain permission from the copyright owners of the musical works, but broadcasters rarely obtain it from the copyright owners directly. Rather, most copyright musical works are administered by CMOs that act on behalf of the right-holders and provide users, such as radio broadcasters, the requisite licenses in a centralized manner.⁸

In the United States, there are three major CMOs: the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and the Society of European Stage Authors and Composers (SESAC).⁹ A fourth collective, Global Music Rights (GMR), was founded in 2013.¹⁰ Licensing by CMOs prevails all over the world,

5. *Radio Industry Revenue in the U.S. 2012–2021*, STATISTA (Jan. 8, 2021) <https://www.statista.com/statistics/259981/radio-industry-revenue-in-the-us> (noting the total revenue in 2019 is estimated at \$23.26 billion); *see also* Press Release, FCC, *Broadcast Station Totals As Of March 31, 2019*, (Apr. 2, 2019), <https://docs.fcc.gov/public/attachments/DOC-356801A1.pdf> [<https://perma.cc/L93U-WNUK>] (providing that in 2019 there were 4,613 AM stations, 6,762 FM commercial stations, and 4,139 FM educational stations in the United States, totaling 15,514 stations).

6. *Radio Listening By Format*, RADIO ADVERTISING BUREAU, <http://www.rab.com/whyradio/reportresults.cfm> (last visited Oct. 5, 2021) (choose “Radio Listening by Format” from “Report Type” dropdown; then click “Submit”) (showing that news, sports, and all talk radio stations are a minority of stations compared to the large variety of music-specific stations).

7. *AM/FM Radio-Harnessing Change: The Future of Programming Distribution in Canada*, CANADIAN RADIO-TELEVISION & TELECOMM. COMM’N (May 5, 2018) [hereinafter *CRTC Future Programming*], <https://crtc.gc.ca/eng/publications/s15/a3.htm>.

8. See Daphne A. Bugelli & Daniel J. Gervais, *How Collective Management Organizations Remunerate Musicians Worldwide: A Guide for U.S.-Based Songwriters and Performers*, 9 LANDSLIDE 56, 57 (2017).

9. Stanley M. Besen et al., *An Economic Analysis of Copyright Collectives*, 78 VA. L. REV. 383, 385 (1992).

10. GLOBAL MUSIC RIGHTS, <https://globalmusicrights.com/About> [<https://perma.cc/AYG2-CRFE>].

except that in most countries the system is even more centralized and involves a single CMO.¹¹ In Canada, for example, licenses are provided by the Society of Composers, Authors and Music Publishers of Canada (SOCAN).¹² Each CMO administers a catalog of works and saves users and right-holders the need to negotiate with each other directly.¹³ CMOs negotiate licenses, collect fees, and distribute the collected fees to the right-holders.¹⁴ In the early 2000s, ASCAP and BMI accounted for approximately 97% of all U.S. public performance rights income, and royalties paid by radio and television broadcasters alone represented 80% of ASCAP and BMI's total revenues.¹⁵

CMOs typically issue blanket licenses, which allow licensees to use as many works in the CMOs' repertoire as many times as they wish in return for a license fee. The license fee may be a fixed amount, or, in the case of commercial radio, calculated as a percentage of the station's advertising revenue.¹⁶ The license fee is calculated independently from the number of works actually used, the number of times each work is played, or the song's popularity.¹⁷ Blanket licenses are often credited with providing several advantages: they economize transaction costs, provide users with certainty from involuntary infringement, and effectively price each additional performance of a work at its effective marginal cost (of zero).¹⁸ However, blanket licenses

11. *Id.* at 398 (1992); Ariel Katz, *The Potential Demise of Another Natural Monopoly: Rethinking the Collective Administration of Performing Rights*, 1 J. COMPETITION L. & ECON. 541, 542, 558 (2005) [hereinafter *Rethinking*].

12. See *Licensing*, SOC'Y COMPOSERS, AUTHORS & MUSIC PUBLISHERS CAN., <http://www.socan.com/what-socan-does/licensing> [<https://perma.cc/GPG2-6LT4>] (explaining that music users pay SOCAN a yearly fee and that fee is distributed to SOCAN Members, primarily composers, authors, and music publishers).

13. Michael A. Einhorn, *Intellectual Property and Antitrust: Music Performing Rights in Broadcasting*, 24 COLUM.-VLA J.L. & ARTS 349, 350 (2001).

14. See Bugelli & Gervais, *supra* note 8, at 57 (explaining that CMO's license music for users while relieving authors and songwriters from the need to individually negotiate each licensing contract for his or her works).

15. Einhorn, *supra* note 13, at 349–50, 355.

16. *Id.* at 353.

17. Besen et al., *supra* note 9, at 388; Einhorn, *supra* note 13, at 350; Ivan Reidel, *The Taylor Swift Paradox: Superstardom, Excessive Advertising and Blanket Licenses*, 7 N.Y.U. J.L. & BUS. 731, 733, 743 (2011) (noting that blanket licenses “price fame no differently than obscurity”).

18. Einhorn, *supra* note 13, at 350; WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 386 (2003).

have several disadvantages as well. For example, the all-or-nothing regime drives most users to “buy more music than they want at a price [that] . . . may well be far higher than what they would choose to spend for music in a competitive system.”¹⁹

The literature on CMOs tends to focus on an inherent trade-off that underlies CMOs’ operations. On the one hand, CMOs offer users a convenient way to obtain licenses and allow members to take advantage of economies of scale by reducing the costs of negotiating and granting licenses, collecting license fees, monitoring compliance with license terms, and enforcing against infringement.²⁰ On the other hand, collective administration of copyright leads to the elimination of price competition between copyright owners, the concentration of market power in the hands of monopolistic CMOs, and the potential abuse of such power.²¹

Due to their anticompetitive potential, CMOs and their practice of blanket licensing have attracted regulatory and legal scrutiny.²² In the United States, antitrust law has provided the dominant instrument of regulatory oversight of CMOs.²³ This oversight is carried out through judicially enforced consent decrees.²⁴ Other countries sometimes use other models such as administrative bodies that oversee the tariffs

19. Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 31–32 (1979) (Stevens, J., dissenting).

20. E.g., Ariel Katz, *The Potential Demise of Another Natural Monopoly: New Technologies and the Administration of Performing Rights*, 2 J. COMPETITION L. & ECON. 245, 253 [hereinafter *New Technologies*] (2006).

21. See, e.g., *id.* at 261; Besen et al., *supra* note 9, at 397–98; Denis De Freitas, *Copyright and Music*, 114 J. ROYAL MUSICAL ASS’N 69, 79 (1989); Christian Handke & Ruth Towse, *Economics of Copyright Collecting Societies*, 38 INT’L REV. INTELL. PROP. AND COMPETITION L. 937, 943 (2007); U.S. COPYRIGHT OFF., *COPYRIGHT AND THE MUSIC MARKETPLACE: A REPORT OF THE REGISTER OF COPYRIGHTS* 41 (2015); see also Kristelia A. Garcia, *Penalty Default Licenses: A Case for Uncertainty*, 89 N.Y.U. L. REV. 1117, 1123 (2014) (suggesting that while licenses for music broadcasting are deemed to increase certainty and stability and therefore efficiency, uncertainty can actually be utilized to increase efficiency in the marketplace).

22. Besen et al., *supra* note 9, at 395; Einhorn, *supra* note 13, at 351.

23. Katz, *Rethinking*, *supra* note 11, at 546.

24. See Besen et al., *supra* note 9, at 405 (explaining that the U.S. District Court for the Southern District of New York oversees license fees to ensure that collectives set reasonable fees); see also Einhorn, *supra* note 13, at 354–56 (providing a detailed history of the consent decrees and the judicial oversight).

proposed by CMOs and their related terms and conditions.²⁵ For example, in Canada, to “protect users from the potential exertion of unfair market power by collective societies,”²⁶ the Copyright Act²⁷ empowers the Copyright Board to oversee the proposed tariffs and their related terms and conditions²⁸ and to ensure that such tariffs are “fair and equitable.”²⁹

In this Article, we add a novel dimension to the analysis of CMOs’ costs and benefits. We illustrate that blanket licenses distort cultural production in radio broadcast by causing radio broadcasters to increase their broadcasting of pre-recorded music and to reduce the quantity of other types of content. In other words, CMOs’ blanket licenses channel resources towards the (copyright) music industry and away from the production of other content. This claim will be discussed in length below, but here it is in a nutshell.

Commercial radio broadcasters generate most of their revenue by selling advertisement time,³⁰ and their capacity to attract high-paying advertisers depends on their ability to attract and keep listeners. Therefore, broadcasters attempt to assemble an optimal mix of content that appeals to the tastes of as many listeners as possible in their targeted audience. Radio broadcasters can air two kinds of content: music and narrated shows.³¹ In assembling the content mix, beyond the selection of music and narrated shows, broadcasters consider whether to produce their content in house or to commission outside production and whether to use live or pre-recorded content.³²

25. Besen et al., *supra* note 9, at 405.

26. York Univ. v. Canadian Copyright Licensing Agency (Access Copyright), 2021 CanLII 32, para. 67 (Can. S.C.C.).

27. Copyright Act, R.S.C. 1985, c C-42, s 70(1) (Can.).

28. *Id.*

29. York Univ. v. Canadian Copyright Licensing Agency (Access Copyright), 2021 CanLII 32, para. 44 (Can. S.C.C.).

30. Jesse Holcomb & Amy Mitchell, *Revenue Sources: A Heavy Dependence on Advertising*, PEW RSCH. CTR. (Mar. 26, 2014), <https://www.pewresearch.org/journalism/2014/03/26/revenue-sources-a-heavy-dependence-on-advertising> [https://perma.cc/S4RW-N5AG].

31. We do not consider advertisements as content in the context of cultural production. Therefore, we do not discuss them here, though they are indeed a broadcast output.

32. We define “narrated content” as any kind of primarily verbal content even if music or sound is played in the background.

In order to maximize profit, commercial broadcasters wish to broadcast the content that will yield the highest net revenue (gross revenue minus the cost of producing or procuring the content).³³ Accordingly, a commercial radio station will choose any particular content based on the marginal net revenue it may earn by playing that piece of content.³⁴

Thus, in a competitive market for content, if a broadcaster chooses to broadcast a particular musical work, it does so because it expects that the net revenue from broadcasting that work will be higher relative to what it expects to earn from broadcasting any other content, be it another musical work or narrated shows.

However, music is rarely obtained in a competitive market. Rather, the permission to broadcast most musical works is typically granted by CMOs through blanket licenses. Since blanket licenses follow an all-you-can-eat model, the price of broadcasting any additional musical work from the CMOs' repertoire is essentially zero. By contrast, broadcasting any content not covered by the CMOs' repertoire would require incurring an additional positive cost. This creates a strong economic incentive for profit-maximizing commercial broadcasters to maximize the use of musical works from the CMOs' repertoire and to minimize the broadcasting of other content. In other words, because the marginal cost of broadcasting another song under the blanket license is zero, all things equal, the broadcaster will prefer broadcasting another song over equally attractive piece of content that is not part of the blanket license.

Such an incentive will be familiar to anyone who ever dined in a fixed-menu restaurant. Suppose, for example, that a restaurant offers a fixed-menu lunch that includes a choice of chocolate, vanilla, or strawberry ice cream for dessert. If you choose the fixed menu, you are more likely to choose an ice cream flavor from the fixed menu, even if you might have chosen another ice cream flavor or another type of dessert altogether had you not chosen the fixed-menu option. You will also be more likely to have this restaurant's ice cream, even though otherwise you would very much prefer that of the nearby artisanal gelato shop. You may choose the fixed-menu dessert not because you

33. Paul Audley & Marcel Boyer, *The "Competitive" Value of Music to Commercial Radio Stations*, 4 REV. ECON. RSCH. ON COPYRIGHT ISSUES 29, 32 (2007).

34. *Id.* at 32.

like it the best, but because with the fixed menu you can have *that* ice cream at zero additional cost, while choosing any other ice cream would require additional payment. Therefore, even though the fixed-menu ice cream gives you less pleasure than other ice creams, the net benefit from having it (i.e., the pleasure minus the cost) may be greater.

While the fixed menu may change diners' consumption patterns, these changes are not likely to have any market or industry-wide effect given the highly competitive nature of the dining industry and the many options from which diners can choose.

This is not the case with music and radio programming, where in many instances, a CMO's blanket license is the only viable option for broadcasters. Consequentially, the blanket license scheme can, and indeed does, distort cultural production in commercial radio broadcast by creating a very strong incentive to maximize the airtime dedicated to music and reduce the demand for, and supply of, other types of content. This licensing practice may benefit one class of creators (songwriters whose music is licensed by CMOs or the music publishers who often hold the copyrights in such music), at the expense of other creators such as creators of narrated content, or writers whose music is not licensed by CMOs. This practice also harms the listening public because it leads radio stations to forego the broadcasting of content that could result in greater listener satisfaction.

The distortion of cultural production in commercial radio broadcast by blanket licenses provides a novel explanation to two phenomena in radio broadcast. The first is the remarkable shift in cultural production in radio that took place in the 1950s. Until then, the primary content on radio was narrated shows, generally produced in house and broadcast live. However, since the 1950s, the primary content being broadcast on commercial radio became pre-recorded (blanket-licensed) music, and the majority of narrated content radio became ad-libbed talk shows. The second is the notable difference in the programming currently offered by commercial and public broadcasters. While the former mainly offer pre-recorded music and very little narrated content, the latter offer more varied programming that includes less pre-recorded music and more narrated content. To demonstrate our assertion, we analyze the shifts in radio broadcast in the 1950s as well as current differences in cultural production patterns

in public and commercial radio. We then evaluate different possible options for licensing music broadcast on radio to establish a clearer picture of possible licensing options as well as their advantages and shortcomings.

So far, discussions around CMOs have mainly focused on their ability to charge supra-competitive prices or impose onerous conditions on users. This Article, however, identifies another anticompetitive aspect of CMOs' blanket licenses: distortion in the content of cultural production. This effect has not yet garnered sufficient attention in the scholarly assessment of collective administration and in the legal and regulatory responses toward this phenomenon. We hope that this Article will draw such attention.³⁵

The Article proceeds as follows: Part I presents a simple economic model explaining how blanket licensing of music affects cultural production in commercial radio broadcasting. Part II provides a brief history of radio broadcasting and a description of cultural production in radio throughout radio's prime (1920s-1950s). We then describe the changes that the radio broadcast industry experienced in the 1950s. We examine the existing explanations to these changes and note that blanket licenses could explain why we witnessed these particular changes, and not others. We then turn to clarify why the industry felt the impacts of blanket licenses in earnest only in the 1950s, and not prior. Part III compares current cultural production patterns in public and commercial radio. We demonstrate that commercial radio offers a different product than public radio and explain that this may be a consequence of blanket licensing. In Part IV, we outline different options for administration of musical works. We discuss advantages and shortcomings of the different options and suggest that certain options might alleviate the distortion in cultural production and conceivably maintain many of the advantages of collective administration. The Article concludes with a call to action for

35. *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 32 (1979) (Stevens, J., dissenting) ("Because the cost to the user is unaffected by the amount used on any program or on all programs, the user has no incentive to economize by, for example, substituting what would otherwise be less expensive songs for established favorites or by reducing the quantity of music used on a program. The blanket license thereby tends to encourage the use of more music . . .").

considering new models for licensing music for radio broadcasting.

I. BLANKET LICENSES' EFFECT ON CONTENT: AN ECONOMIC ANALYSIS

In this Part, we offer an economic analysis of CMOs' blanket licenses and their impact on cultural production in commercial radio broadcasting. Radio broadcasters offer a mix of music and other content. We argue that blanket licenses distort the production of content by causing broadcasters to increase the amount of airtime dedicated to music at the expense of other content. Additionally, blanket licenses direct more resources into the pockets of CMOs and their members and away from other creators. As such, CMOs' practice of issuing blanket licenses presents a challenge not only to competition policy but also to copyright and cultural policy.

Under a CMO's blanket license, a broadcaster pays the same amount (either a flat fee or a percentage of its revenue or a combination thereof) regardless of how many songs it plays from the CMO's repertoire or how many times it plays them. In that sense, the blanket license provides an example of two-part pricing: it comprises an access charge to the CMO's entire repertoire and a variable charge at a rate of zero for additional performances.³⁶ Therefore, once the broadcaster obtains a blanket license, the marginal price of playing any song under the blanket license is zero.³⁷ And since the cost of broadcasting an existing pre-recorded song approximates zero too, some economists view the practice of collective licensing and the use of the blanket license as welfare enhancing: it expands the output of broadcast music relative to other forms of licensing.³⁸

William Landes, for example, maintains that in addition to lowering transaction costs, by setting the marginal price of songs at zero, CMOs' blanket licenses expand output compared to direct licensing where a broadcaster would license songs and pay on a per-song, per-

36. William M. Landes, *Harm to Competition: Cartels, Mergers and Joint Ventures*, 52 ANTITRUST L.J. 625, 634 (1983).

37. At least the copyright-related component of the cost. The blanket license will not affect other costs that the broadcaster has to incur in order to broadcast songs. We discuss some implications of this distinction *infra*, in Part II.

38. Landes, *supra* note 36, at 634.

performance basis.³⁹ Accordingly, Landes argues CMOs and their blanket licenses are procompetitive output-expanding beneficial joint ventures.⁴⁰ Richard Posner makes a similar point. He described ASCAP and BMI as “benign cartel[s]” because even though the fee a licensee pays for the blanket license is higher than what the licensee would pay if composers competed among themselves, that higher fee does not cause the licensee to play less music because it allows them to play as many songs as they wish at no additional cost.⁴¹

These observations and their enthusiastic embrace of the blanket license, however, miss a few important points. We agree that generally, a decrease in the price of a widget will result in greater consumption of that widget or in increased production of gadgets that incorporate widgets as input. However, the production function of a radio station is somewhat different. While songs are inputs in the production of radio programs, a radio station cannot simply respond to a decline in the price of songs by buying more inputs and broadcasting more programs. For one thing, there are only sixty minutes in an hour and only twenty-four hours in a day, so a lower marginal price for songs does not imply that a radio station can expand the number of songs it plays. No matter how expensive or cheap any song is, the radio station can only play a limited number of them at any given time. Since the average length of a song is three and a half minutes long,⁴² then a radio station can play no more than seventeen songs per hour. The blanket license would be output expanding only if the cost of direct licensing prevented the radio station from profitably securing licenses for the content that it wished to broadcast and forced the radio station to reduce its broadcasting time. Otherwise, the blanket license would have no quantitative effect on the radio station’s total output. Although, as we argue, it would affect the composition of that output.

Second, a lower price per song will not necessarily result in a lower price for and greater consumption of the radio station’s product—the broadcast program. The marginal cost of listening to a broadcast is

39. *Id.*

40. *Id.* at 632.

41. RICHARD A. POSNER, ANTITRUST LAW 30 (2d ed. 2001).

42. Daniel Sanchez, *What’s the Average Length of a Song? It’s Shorter Than You Think*, DIGIT. MUSIC NEWS (Jan. 18, 2019), <https://www.digitalmusicnews.com/2019/01/18/streaming-music-shorter-songs-study>.

already zero, and there is no price/cost constraint on the number of people who can listen to the program so long as they are located within the range of reception of the broadcast signal. The number of listeners will be determined predominantly by the quality of the programming, which is measured by the station's ability to broadcast content that attracts listeners.

Therefore, while we agree with Landes and Posner that the blanket license reduces the marginal cost of broadcasting songs covered by the license and therefore encourages radio stations to play more of those songs, we disagree with their conclusion that the blanket license is output expanding and hence procompetitive. This conclusion supposes that songs under the CMO's blanket license are the only content that the radio broadcaster could profitably broadcast (and therefore a lower per-song price would result in greater output of broadcast content). However, if there is other content that the radio station could profitably play, then the blanket license for music reduces the price of music relative to other content. But this change in the relative prices of inputs may have greater impact on the quality of the broadcaster's output than on its quantity; it drives the radio station to broadcast more music from the CMO's repertoire while reducing the production and broadcast of other content, which they would otherwise broadcast. This is the central claim of this Article, which we now turn to explore in greater detail.

Since their programs are broadcast over-the-air for free, commercial radio broadcasters' revenue depends almost exclusively on advertising.⁴³ In turn, advertisers' willingness to pay depends on the size and type of a radio station's audience.⁴⁴ Therefore, radio broadcasters will attempt to curate content that they hope will attract the largest number of listeners from a targeted demographic. As noted, often, this will consist of a mix of music and other content. Music nowadays consists mostly of pre-recorded and ready-made music (i.e., sound recordings produced by record labels and intended for mass distribution), but it could also include originally produced music, music commissioned exclusively, or live-performed music. However, in this Article, we use *Music* to refer to music that is within a CMO's repertoire. *Other Content* may include news

43. *CRTC Future Programming*, *supra* note 7.

44. Audley & Boyer, *supra* note 33, at 40.

and narrated shows (e.g., dramas, documentaries, comedies, and any other narrated content), which could be originally produced, commissioned exclusively, pre-recorded, or live performed. In this Article, however, we use *Other Content* to refer to any content, including music, that is not covered by the CMO's blanket license.

While choosing the most attractive content would likely maximize revenue, not all content costs the same. For example, originally produced or exclusive content may be more attractive (because competing stations will not have it), but it may be more costly compared to ready-made and widely distributed content. Similarly, higher quality content may be more attractive, but it could be more costly to produce. Likewise, pre-recorded content may be cheaper to broadcast than live content. And finally, content to which there are many equally attractive substitutes will be cheaper than content with fewer or no substitutes, and so on. Therefore, the choice whether to broadcast any content unit will depend on the net marginal revenue (*NMR*) it generates, i.e., the revenue the station expects to generate from broadcasting it minus the cost of producing or procuring the content ($NMR=R-C$).⁴⁵

Let us first consider what an optimal content mix might look like in a competitive market, i.e., when content producers (or those owning the copyright to already-created content) compete with each other.⁴⁶

45. *Id.* at 30 (“[A commercial radio station] will want to use a quantity of input (in this case, sound recordings) such that the value of the marginal product of this input is equal to its price. The value of the marginal product of sound recordings for commercial radio corresponds to the additional advertising revenue an operator of a music station can obtain from using an additional unit of sound recordings.”). We prefer referring to net marginal revenue instead of value of marginal product because “marginal product” connotes changes in the quantity of output, but in the case of broadcasting, as noted above, differences in productivity prices of content will have greater impact on the choice of broadcast content than on the quantity of broadcasting.

46. By “competitive market,” we do not mean a market without copyright, but a market in which copyright owners compete among themselves rather than offer a blanket license through a CMO.

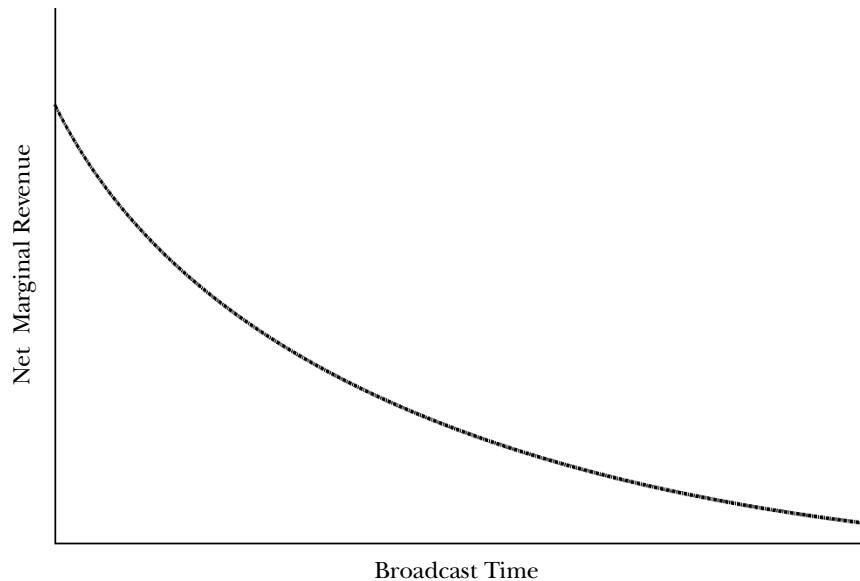


Figure 1: Broadcast Time and Net Marginal Revenue of All Content in a Competitive Market

Figure 1 represents such a market. The horizontal axis represents the amount of content broadcast within a time unit, while the vertical axis represents the *NMR* of that content. In a competitive market and without any external constraints,⁴⁷ the radio station is free to choose any type of content and will seek to choose a mix that generates the highest total product (i.e., highest revenue minus the cost of producing or procuring the content). The curve represents such a mix of all types of content and shows the diminishing *NMR* of content.

NMR is diminishing because the radio station presumably would first seek to broadcast content with the widest margin between its attractiveness to listeners (and the ad revenue derived from it) and the cost of producing or acquiring it. Once the radio station broadcasts this content, additional content that generates the same ad revenue may be more costly to obtain. Alternatively, that same content may cost the same, but may become less attractive and thus

47. Such as regulations mandating specific quotas for specific types of content.

generate less revenue. At some point, that content may become less appealing as well as more costly to obtain.

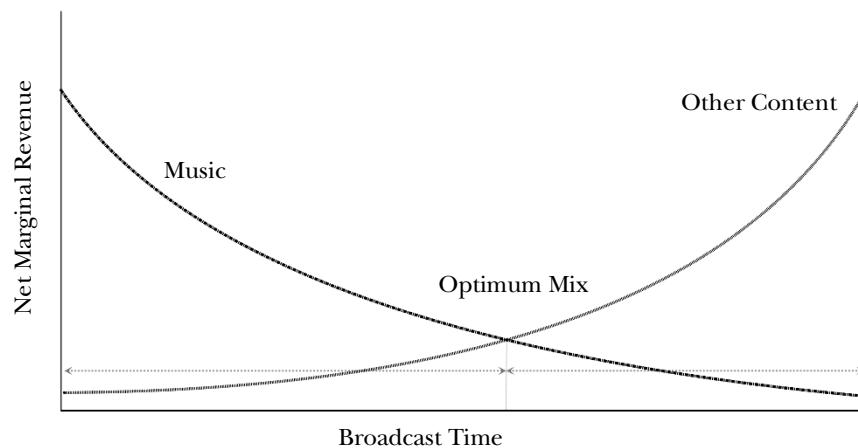


Figure 2: Broadcast Time and Net Marginal Revenue of Music and Other Content in a Competitive Market

Figure 2 also represents a competitive content market, except that instead of one curve representing all content, it shows two separate curves, one for *Music* and another for *Other Content*. The point where the two curves intersect shows the proportion of time allocated to broadcasting *Music* and *Other Content*.⁴⁸ We refer to this point as the “optimum mix” point, by which we mean that broadcasting more *Music* beyond that point would be less profitable than broadcasting *Other Content* and the radio station would be better off allocating the remaining time to *Other Content*. Likewise, the radio station would not want to increase the time allocated to *Other Content* beyond that point because that would be less profitable than broadcasting *Music*. In other words, the optimum mix point shows the most profitable proportion between *Music* and *Other Content*. The diagram also shows that many

48. The proportion we chose for this diagram is arbitrary. It could, in principle, be at any other point to the left or to the right, depending on the actual *NMR* of the available works, which could result in the curves sloping at different rates and thus intersecting at different locations on the time axis.

points on the vertical axis may correspond with two points, one on each curve, meaning that at that point the *NMR* for *Music* and for *Other Content* is the same ($NMR_{MusicComp}=NMR_{OtherContent}$). At those points, the broadcaster is, in principle, indifferent between choosing another unit of *Music* and *Other Content*: instead of broadcasting another piece of *Music*, the radio station could choose an equally profitable piece of *Other Content* and vice versa.

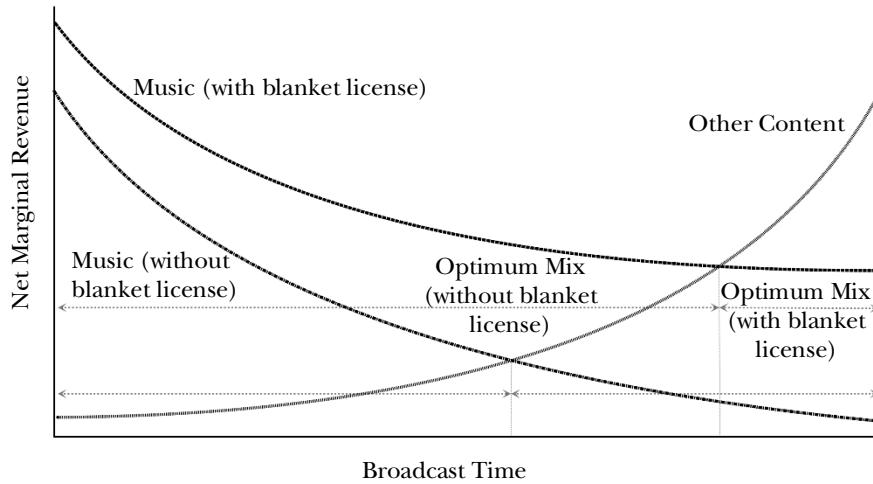


Figure 3: Broadcast Time of Music and Other Content with and Without a Blanket License

Figure 3 demonstrates our central claim. It shows the proportion of time allocated to *Music* and *Other Content* when *Music* is being licensed under a CMO's blanket license. With the blanket license, the price of every musical composition is zero. This increases the *NMR* of *Music* under the blanket license ($NMR_{MusicBL}$) relative to what it would be in a competitive licensing environment and relative to the *NMR* of *Other Content* $NMR_{OtherContent}$. This increase, reflected by an upward shift of the *Music* curve, occurs for the following reasons.

Recall that $NMR=R-C$. The mode of licensing does not affect the R , only C . Hence, under the blanket license, $C_{MusicBL}=0$ while the cost of content in a competitive environment (either *Music* or *Other Content*) is greater than zero ($C_{MusicComp}>0$, $C_{OtherContent}>0$). Therefore:

$NMR_{MusicBL}=R$, while $NMR_{MusicComp}=R-C_{MusicComp}$ and $NMR_{OtherContent}=R-C_{OtherContent}$

And since $R>R-C_{MusicComp}$ and $R>R-C_{OtherContent}$, it follows that, all things equal,

$NMR_{MusicBL}>NMR_{MusicComp}$ and $NMR_{MusicBL}>NMR_{OtherContent}$.

In addition to shifting upwards, the *Music* curve in *Figure 3* is flatter compared to the *Music* curve in *Figure 2*. This shows that the blanket license causes the $NMR_{MusicBL}$ to depreciate at a slower rate compared to that of $NMR_{OtherContent}$. This happens because under the blanket license, C becomes constant and zero, so the $NMR_{MusicBL}$ will diminish in a way that corresponds only to the diminishing rate of MR . By contrast, $NMR_{OtherContent}$ diminishes more rapidly because it combines both the decreasing rate of R and the increasing rate of C .

Importantly, this upward shift also means that a piece of *Other Content* that otherwise could have been as profitable to broadcast (in terms of the net revenue it generates) as a piece of *Music* becomes less attractive once *Music* is licensed under a blanket license. This further means that the blanket license allows *Music* to crowd out not only *Other Content* that is equally attractive to listeners (and hence generate the same advertising revenue), but also more attractive content that could generate higher advertising revenue.

Moreover, while the price paid for playing another song under the blanket license is zero, the price paid for the blanket license is fixed and remains the same irrespective of the total time devoted to *Music*. Therefore, a broadcaster who chooses to broadcast content not covered by the blanket license will have to incur additional costs in producing or procuring such content without achieving any corresponding savings in the cost of the music available under the blanket license.⁴⁹ Therefore, all things equal, a profit-maximizing commercial broadcaster will always prefer to broadcast content available under the blanket license (i.e., *Music*).

49. This holds true for any content not covered by the CMO's blanket license, whether it is narrated content or music not included in the CMO's repertoire.

If all things were equal, we would expect broadcasters to play only *Music* and no *Other Content* at all. However, there might be a point where broadcasting additional *Music* from the CMO's repertoire will not yield any additional revenue, while broadcasting *Other Content* will. At that point, which we earlier referred to as the optimum mix point, the broadcaster will cease playing *Music* and opt for playing *Other Content* yielding higher net revenue despite the additional cost. The optimum mix point may be reached at the stage where a substantial number of listeners is fed-up with listening to pre-recorded music and might either tune out from radio or tune into another station that offers more varied content.

Since the optimum mix point also reflects the respective proportions of *Music* and *Other Content* in the broadcaster's programming mix, *Figure 3* also shows how the blanket license affects this proportion: with a blanket license for *Music*, more broadcast time is devoted to *Music* while the time devoted to *Other Content* decreases. Thus, while the blanket license for music causes broadcasters to play more *Music*, it does not result in increased output of broadcast content. Instead, the blanket license leads to an increase in the share of broadcast *Music*, but this increase is offset by a corresponding *decline* in the output of *Other Content*.

Not only does the blanket license lead to a reduction of the output of *Other Content*, but the blanket license may also alter the *kind* and *quality* of *Other Content* produced for radio. One reason is that, as noted above, the blanket license allows *Music* to crowd out equally attractive and even more attractive content, lowering the overall quality of the broadcaster's output compared to what it would have been if music were procured in a competitive environment and making it less attractive than it could be to listeners and advertisers.

Moreover, the lack of competition between suppliers of *Music* allows the CMO to charge a supra-competitive price for the blanket license. This forces the broadcaster to spend a greater share of its revenue on *Music* compared to the total amount spent on music in a competitive environment and reduces the amount of money the broadcaster can use for producing or acquiring *Other Content*.

Furthermore, in countries such as the United States, Canada, and the United Kingdom, CMOs charge commercial radio stations a fee

based on a percentage of their revenue.⁵⁰ This can affect the quality of programming even further. This mode of pricing discourages the broadcaster from improving the quality of its programming by spending less on *Music* and more on quality *Other Content*. Not only will the radio station fail to achieve any cost savings by playing less music, but if substituting *Other Content* for *Music* indeed improves the quality of the programming and results in higher revenue, this will only increase the payment owed to the CMO and further reinforce the blanket license's tendency to cause broadcasters to play more *Music* and less *Other Content*.

In sum, it appears that the anticompetitive aspects of collective administration of copyright and the blanket license are not limited simply to higher prices resulting from lack of competition among copyright owners. The preceding analysis suggests that, contrary to the assertions of commentators such as Landes and Posner,⁵¹ the blanket license cannot be regarded as an output-increasing procompetitive arrangement. While it allows, and indeed encourages, radio stations to play more *Music*, this results only in an increase in the share of *Music* and a corresponding reduction in the share of *Other Content*. This change does not effect a quantitative change in broadcasters' output, but it does affect the quality of this output, causing broadcasters to choose inferior programming compared to what they could profitably choose if music had been licensed in a competitive environment.

This effect of CMOs' blanket licensing poses a challenge not only to competition policy but to copyright policy as well. From a competition policy perspective, CMOs and their blanket licenses reduce competition between copyright owners and increase the total price of *Music* while reducing the supply of equally or even more attractive *Other Content*. These effects are also challenging from a copyright policy perspective. While the blanket license for *Music* benefits one group of copyright owners (and by extension, one class of creators), this benefit comes at the expense of other creators who face suppressed demand for their works and fewer market opportunities, as well as at the expense of listeners in the form of lower overall quality and diversity of the content available to them.

50. Einhorn, *supra* note 13, at 350.

51. LANDES & PONSER, *supra* note 18, at 388.

While our analysis demonstrates that blanket licenses drive broadcasters to prefer broadcasting more pre-recorded *Music* and less *Other Content* than they otherwise would in a competitive licensing environment, it is worth emphasizing that the crucial distinction is between whether content is covered by the blanket license or not. Therefore, the blanket license also discourages the broadcasting of music that is not part of the CMO's repertoire, including music that could be used royalty-free because it is in the public domain or because it is offered under a suitable Creative Commons license.

The following two incidents, one historical and the other more recent, illustrate the issue. The first incident is the ASCAP boycott of 1941. ASCAP was founded in 1914 but remained fledgling until the advent of radio.⁵² Having secured exclusive rights over most popular songs, between 1931 and 1938 ASCAP had raised its fees by 448%.⁵³ In 1939, the radio broadcasters underwrote the founding of a competing CMO, BMI.⁵⁴ Yet, since ASCAP was the only source for the most popular content, BMI was not perceived as posing a credible threat to ASCAP's dominance.⁵⁵ ASCAP insisted on raising its fees to 7.5% of the networks' gross revenue,⁵⁶ but this time, the broadcasters decided to go on strike and refrain from playing ASCAP music.⁵⁷ For several months in 1941, broadcasters did not play any ASCAP songs.⁵⁸ Instead, they began playing music from BMI's repertoire, which consisted of new arrangements for public domain music that BMI licensed for free and music that had previously been excluded from ASCAP's repertoire.⁵⁹ Genres such as jazz, blues, country, folk, and Latin music, "which the snobby ASCAP gatekeepers had long shunned; music that was distinct from ASCAP's repertory and [was] not played on the radio

52. John Schneider, *This Boycott Changed American Music*, RADIO WORLD (May 4, 2015), <https://www.radioworld.com/columns-and-views/this-boycott-changed-american-music> [https://perma.cc/P2BN-NXNM].

53. Lawrence Lessig, *Laws that Choke Creativity*, TED, at 5:40 (Mar. 2007), https://www.ted.com/talks/lawrence_lessig_laws_that_choke_creativity.

54. *BMI's Timeline Through History*, BMI <https://www.bmi.com/about/history> [https://perma.cc/AF5R-D6TR].

55. Lessig, *supra* note 53, at 6:30.

56. IVAN L. PITTS, DIRECT LICENSING AND THE MUSIC INDUSTRY: HOW TECHNOLOGY, INNOVATION AND COMPETITION RESHAPED COPYRIGHT LICENSING 177, 178 (2015).

57. *Id.* at 177–78.

58. *Id.*

59. Schneider, *supra* note 52.

networks; and often ignored by the major music publishers as well," finally got radio airtime.⁶⁰

The ASCAP boycott and the resulting competitive entry of BMI not only resulted in lower fees, but also transformed American culture.⁶¹ According to Ivan Pitt, the boycott and its aftermath

introduced a wider range of musical compositions by an even broader set of indigenous American songwriters, and in the process exposed Americans to a richer variety of music, not particularly suited for either Broadway or Hollywood movies. Songwriters and composers were now able to take economic advantage of a new media platform, the radio, as the barriers to entry came tumbling down. Music publishers (and their subjective notions of what they considered artistic excellence) would no longer determine which one or two songs were to become hits. New record labels, like Capitol, were formed to cater to this new, eclectic variety of music, songwriters and consumers. ASCAP in later years would embrace some of these jazz composers, but only after years of pleading their cause due to ASCAP's selectivity, arrogance, racism, and cultural snobbery. As these alternative genres—non-ASCAP affiliated music outside of Tin Pan Alley music publishers—received more airplay, the genres became widely popular with several of the musical compositions reaching the number one spot on the charts, further weakening ASCAP's monopoly and increasing BMI's market share. Long after ASCAP's disastrous boycott ended, these musical genres would endure.⁶²

But if non-ASCAP music proved highly popular, why did radio stations not begin experimenting with such music earlier? Possibly, some of the tastemakers in radio might have shared the same arrogance, racism, and cultural snobbery as ASCAP did. However, we could expect that competition between radio stations and their inability to compete on price to attract listeners (as listeners could receive broadcasts for free) would drive broadcasters to pursue competitive advantage by seeking the most attractive content, thus providing strong incentive to experiment with new musical genres. And since ASCAP's blanket license made all the mainstream popular content equally available to all radio stations, innovation, in the form

60. *Id.*; Pitt, *supra* note 57, at 178.

61. Pitt, *supra* note 56, at 178–79.

62. *Id.*

of experimenting with new genres, should have pushed broadcasters to seek that non-ASCAP music much earlier. But that did not happen, and our core argument explains why. Broadcasting non-ASCAP music would require the radio station to pay additional license fees for that content without lowering the fees it paid ASCAP. And with ASCAP's revenue-based fees, even if broadcasting non-ASCAP music resulted in higher revenue, part of that additional revenue would be paid to ASCAP. So long as the radio station was paying license fees to ASCAP, ASCAP's blanket license created a very strong incentive to refrain from using non-ASCAP music, and it took an extreme event like the boycott to break away from this dynamic.

The second example is more recent. In 2010, the producers of *Spark*, a popular radio show of the Canadian Broadcasting Corporation (CBC), revealed that CBC forbade programs from using Creative Commons licensed music in CBC podcasts.⁶³ *Spark* explores "the intersection of technology and culture" and previously used Creative Commons licensed music because its producers believed this reflected and embraced the values of online culture.⁶⁴ The Director of Programming for CBC Radio explained that Creative Commons licensed music was banned because some Creative Commons licenses carry restrictions on commercial use and so

[i]n order to ensure that we continue to be in line with current Canadian copyright laws, and given the lack of a wide range of music that has a Creative Commons license allowing for commercial use, *we made a decision to use music from our production library* in our podcasts as this music has the proper usage rights attached.⁶⁵

63. Michael Geist, *CBC Bans Use of Creative Commons Music on Podcasts*, MICHAEL GEIST BLOG (Oct. 8, 2010), <https://www.michaelgeist.ca/2010/10/cbc-cc-ban> [<https://perma.cc/3V9E-RZ6U>]; Matthew Lasar, *Why the CBC Banned Creative Commons Music from Its Shows*, ARS TECHNICA (Oct. 12, 2010, 7:00 AM), <https://arstechnica.com/media/news/2010/10/cbc-radio-fans-crabby-over-creative-commons-snub.ars> [<https://perma.cc/42Q5-LAYX>].

64. Cameron, *FMA Guest Curator: Spark*, CREATIVE COMMONS (Apr. 21, 2010), <https://creativecommons.org/2010/04/21/fma-guest-curato-spark> [<https://perma.cc/MY6F-DWS7>].

65. Mike, *On CBC Podcasts and CC-licensed Music Available for Commercial Use*, CREATIVE COMMONS (Oct. 10, 2010) (emphasis added), <https://creativecommons.org/2010/10/10/on-cbc-podcasts-and-cc-licensed-music-available-for-commercial-use> [<https://perma.cc/CM5P-W5S5>].

Although the CBC could have allowed the use of Creative Commons licensed music that was available for commercial use, they implemented a complete ban on all Creative Commons licensed music and allowed using only blanket-licensed music.⁶⁶ Regrettable as that decision has been (for the authors, the producers, and listeners) it is somewhat understandable from the CBC's organizational point of view. While Creative Commons music may be used royalty free, using it is not entirely cost free because it would still require the CBC to figure out whether the chosen song comes with a Creative Commons license that permits commercial use.⁶⁷ CBC concluded that incurring such administrative costs was not worth its while, given that CMO-licensed music provides a hassle-free alternative that entails no additional cost.⁶⁸ This is the kind of distortion in cultural production that we discuss here: the blanket license led to the exclusion of Creative Commons music from the pool of creative material used to produce a show. The producers of *Spark* could not use the music they considered most suitable, despite being licensed free of charge, and the artists who wrote and performed that music were denied the benefit of being broadcast in a popular show by a national broadcaster.⁶⁹

These incidents demonstrate the exclusionary harm that the blanket license imposes on lesser-known artists. Justice Stevens discussed such

66. Geist, *supra* note 63.

67. See Lasar, *supra* note 63 (explaining that determining whether the Creative Commons license permits commercial use would be necessary to continue using Creative Commons music).

68. See *id.* (noting that the switch to CMO music eliminates the hassle of determining proper usage rights).

69. A similar problem exists with regard to orphan works. Due to uncertainties regarding copyright, broadcasters refrain from using them. Thus, yet again, another body of musical works does not get any exposure in the radio, affecting cultural production. See Robert Kirk Walker, *Negotiating the Unknown: A Compulsory Licensing Solution to the Orphan Works Problem*, 35 CARDOZO L. REV. 983, 986–87 (2014) (suggesting that a compulsory license for orphan works would help minimize costs for users, thus incentivizing investment in them). For other solutions to the orphan works problem, see Ariel Katz, *The Orphans, the Market, and the Copyright Dogma: A Modest Solution for a Grand Problem*, 27 BERKELEY TECH. L.J. 1285, 1286–87 (2012); Eden Sarid & Omri Ben-Zvi, *A Theoretical Analysis of Orphan Works*, 40 CARDOZO ARTS & ENT. L.J. (forthcoming 2022) (on file with the authors).

harm in his dissenting opinion in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*,⁷⁰ where he noted the following:

Because the cost to the user is unaffected by the amount used on any program or on all programs, the user has no incentive to economize by, for example, substituting what would otherwise be less expensive songs for established favorites or by reducing the quantity of music used on a program. The blanket license thereby tends to encourage the use of more music, and also of a larger share of what is really more valuable music, than would be expected in a competitive system characterized by separate licenses. And since revenues are passed on to composers on a basis reflecting the character and frequency of the use of their music, the tendency is to increase the rewards of the established composers at the expense of those less well known. Perhaps the prospect is in any event unlikely, but the blanket license does not present a new songwriter with any opportunity to try to break into the market by offering his product for sale at an unusually low price.⁷¹

Interestingly, the initial criminal complaint that the U.S. Department of Justice filed against ASCAP in 1934 identified two types of competitive harms:⁷²

First, “all competition among members of [the] . . . Society in the sole rights to perform publicly their respective musical compositions, which, but for the illegal combination and conspiracy . . . , would have existed, has been eliminated by said illegal combination and conspiracy;” second, “[b]y the means described the . . . Society [has] destroyed the incentive of broadcasting stations to use the musical compositions of composers . . . who are not members of the . . . Society and have prevented non-members of defendant Society from receiving the compensation for the rights of public performance of their musical compositions, which they would otherwise receive, and have limited and restricted the popular demand of the listening public to musical compositions controlled by defendant Society.”⁷³

70. 441 U.S. 1 (1979).

71. *Id.* at 32–33 (Stevens, J., dissenting).

72. United States v. ASCAP, Equity No. 78-388 (S.D.N.Y., filed Aug. 30, 1934).

73. Marcus Cohn, *Music, Radio Broadcasters and the Sherman Act*, 29 GEO. L.J. 407, 424–25 (1941). After the case started, “the Government was granted a mid-trial continuance and never returned to the courtroom.” *Broad. Music, Inc.*, 441 U.S. at 10.

Adding insult to injury, CMOs have claimed, at times successfully, that the increased share of music in commercial radio stations' programming justifies the payment of higher license fees. Since 1959, the license fees payable by Canadian commercial radio stations have increased from 2.75% of stations' advertising revenue to 3.2% in 1978 to 4.4% since 2005.⁷⁴ The Copyright Board has repeatedly relied on the increased proportion of music from the stations' programming as one of the main reasons justifying the increase.⁷⁵ Thus, the blanket license has generated a cycle that is virtuous for the CMOs and vicious for radio stations and creators of *Other Content*. The blanket license drives radio stations to increase the share of *Music* in their programming while reducing the share of *Other Content*, not because

Instead, it brought civil actions against ASCAP and BMI in 1940, which resulted in the first set of consent decrees. *Id.* at 10–11.

74. Until 1951, radio stations paid a fixed amount based on the number of registered radios in any broadcasting area (apportioned between the stations operating in that area). Beginning in 1952, the Copyright Appeal Board approved for the first time a fee calculated as a percentage of commercial radio stations' advertising revenue. The fee was initially set at 1.75% for CAPAC, while BMI Canada continued to collect a per-set fee. In 1959, BMI moved to a percentage-based fee and the combined fee for both CMO was set at 2.75%. During the 1960s and early 1970s, the fees were mostly determined through negotiated settlements, reaching 3% in 1973. In 1978, the Board increased the combined rate to 3.2% in order to "adequately reflect what the Board considers to have been the growth in the intrinsic value of music to the Industry." *See* Final Report to the Minister of Consumer & Corporate Affairs for 1987, Re 1987 CarswellNat 1524, 15 C.P.R. (3d) 129 (1987) (not reported). The history of these tariffs is described in Public Performance of Musical Works 2003–2007 & Public Performance of Sound Recordings 2003–2007, Re, 2005 CarswellNat 3359, 2005 CarswellNat 3360, [2004] C.B.D. No. 5, 44 C.P.R. (4th) 40, *rev'd in part*, Re Public Performance of Musical Works 2003–2007 & Public Performance of Sound Recordings 2003–2007, 2006 CAF 337, 2006 FCA 337, 2006 CarswellNat 3298, 2006 CarswellNat 5095, [2006] F.C.J. No. 1547, 152 A.C.W.S. (3d) 415, 354 N.R. 310, 54 C.P.R. (4th) 15, *reconsidered in* Re Public Performance of Musical Works 2003–2007, 2008 CarswellNat 403, 2008 CarswellNat 404, 64 C.P.R. (4th) 77. The current rate of 4.4% applies to revenue above \$1.25 million. The rate for the first \$1.25 million is 3.2%. Recent tariffs also include a reduced rate for low-use radio stations, defined as those who broadcast music for less than 20% of their total broadcast time. *See, e.g.*, *Statement of Royalties to Be Collected by SOCAN, Re:Sound, CSI, Connect/SOPROQ and Artisti in Respect of Commercial Radio Stations*, C. GAZ. (Apr. 23, 2016), <https://decisions.cb-cda.gc.ca/cb-cda/certified-homologues/en/item/366460/index.do>.

75. *See* Public Performance of Musical Works 2003–2007 & Public Performance of Sound Recordings 2003–2007, Re, 2005 CarswellNat 3359; COPYRIGHT BD. CANADA., ANNUAL REPORT 2005–2006 15 (2006).

Music is intrinsically more valuable but because it has become relatively more valuable under the current licensing structure. Without the ability to save costs by substituting *Other Content* for *Music*, radio stations spend more money on *Music*, leaving less money for producing or procuring attractive *Other Content*. This pushes radio broadcasters to further rely on *Music*, which in turn leads CMOs to claim that they deserve higher fees.

In sum, our analysis of the economics of blanket licenses in broadcast of musical works reveals two major harms that are the result of this copyright licensing scheme. The primary problem pertains to the distortion of creative production in radio broadcast. Blanket licenses benefit songwriters whose works are part of the CMOs repertoire and harm creators of other kinds of content. The blanket license scheme favors those songwriters by increasing the use of their product but is detrimental to creators of narrated content and non-CMO managed music, such as Creative Commons licensed music, because it incentivizes the use of other's content. Similarly, it creates a preference for blanket-licensed music versus public domain music and a possible “double dipping” practice wherein the inflated use of blanket licensed music results in CMOs demanding higher proportions of broadcasters’ revenue. This analysis may also help in explaining the substantial historical changes in radio broadcast in the 1950s, to which we now turn.

II. BLANKET LICENSES AND HISTORICAL CHANGES IN RADIO BROADCASTING

Since its debut in the 1920s, radio has been an influential medium. Radio’s impact on culture, political affairs, and entertainment cannot be overstated.⁷⁶ However, in the 1950s the radio broadcast industry experienced substantial changes: a shift from narrated content to music as the dominant type of content; a change in narrated content itself from sophisticated scripted programs to mainly ad-libbed talk-shows; transformation from in-house production to pre-recorded materials; and a rise in the number and proportion of stations dedicated to specific music genres. While the literature often explains

76. See Queen, *supra* note 2 (“And everything I had to know I heard it on my radio.”).

these changes as a product of technological advances, social transformations, and changes in regulatory requirements, we suggest that recognizing the impact of blanket licensing of music not only offers an additional explanation for the transformation of radio, but also accounts for the particular changes that have taken place in radio broadcasting.

A. *The Golden Age of Radio*

1920 marked the debut of organized radio broadcast in the United States, Canada, and the United Kingdom.⁷⁷ Within a few years, the “radio craze” captured the public’s attention; as radio gained significant commercial presence, radio sets could be found in almost every household, and the number of stations grew exponentially.⁷⁸ The 1920s marked the dawn of radio’s “golden age”—a term used to describe radio’s prominence in the fabric of daily life and its centrality in popular culture, entertainment, and politics.⁷⁹ Radio’s golden age lasted until the late 1950s, which denotes a decline in radio’s prominence, as well as substantial changes in programming and a drop in listenership.⁸⁰

Throughout the golden age, radio programming was similar to contemporary broadcast television programming. It relied on a block programming strategy to attract listeners.⁸¹ Narrated content consisted

77. RAY BARFIELD, LISTENING TO RADIO, 1920–1950, at 3 (1996); Gary McIntyre, *The Performance Rights Act: Radio Broadcasting Faces Major Challenge in Long Battle Against Music Licensing*, 17 J. RADIO & AUDIO MEDIA 135, 138 (2010); GEORGE H. DOUGLAS, THE EARLY DAYS OF RADIO BROADCASTING 1 (1987).

78. *Early Commercial Radio Broadcasting in Canada, 1918–1932*, PARKS CAN., <https://www.pc.gc.ca/en/culture/clmhc-hsmbc/res/information-backgrounder/diffusion-radio-broadcasting> [https://perma.cc/2MGS-LN4S] (last modified July 23, 2020); ALFRED BALK, THE RISE OF RADIO, FROM MARCONI THROUGH THE GOLDEN AGE 41 (2006); see also BRIAN REGAL, RADIO: THE LIFE STORY OF A TECHNOLOGY 76 (2005) (explaining that outside the United States, other countries were experiencing similar growth).

79. See *The Golden Age of Radio*, SPARK MUSEUM ELEC. OF INVENTION, <https://www.sparkmuseum.org/the-golden-age-of-radio> [https://perma.cc/J25V-7ZM6].

80. JIM COX, RADIO AFTER THE GOLDEN AGE: THE EVOLUTION OF AMERICAN BROADCASTING SINCE 1960 4 (2013); BALK, *supra* note 78, at 275; NORMAN H. FINKELSTEIN, SOUNDS IN THE AIR: THE GOLDEN AGE OF RADIO 113 (1993).

81. See MICHAEL C. KEITH, THE RADIO STATION: BROADCAST, SATELLITE & INTERNET 16, 92 (7th ed. 2007) (explaining that block programming is the arrangement of radio

mainly of scripted programs typically accompanied by background music and sound effects.⁸² Each show had a regularly scheduled timeslot.⁸³ Network radio stations used to broadcast a mix of original content including soap operas, musical shows, comic shows, variety programs, quizzes, crime dramas, news reports, and investigative radio journalism in a set weekly schedule.⁸⁴ Many shows became extremely popular and people followed their favorite shows avidly.⁸⁵ The content—from the opening theme, via the scripted content and the accompanying sound effects, up until the closing sequel—was routinely produced in house and, with few exceptions, was broadcast live.⁸⁶ Narrated content amounted to about half the overall broadcast time, with music occupying the other half, mainly outside of prime time.⁸⁷

Broadcasters preferred live broadcasting (of narrated content and music alike) for several reasons: first, live shows were considered the

programs so that similar types of programs are grouped together and aired in succession).

82. See *id.* at 282–83.

83. Steve S. Lee, *Predicting Cultural Output Diversity in the Radio Industry, 1989–2002*, 32 *POETICS* 325, 326 (2004).

84. COX, *supra* note 80, at 16–20; Lee, *supra* note 83, at 326.

85. COX, *supra* note 80, at 16–17; see also Fredrik Stiernstedt, *The Political Economy of the Radio Personality*, 21 *J. RADIO & AUDIO MEDIA* 290, 292 (2014) (noting that similar to nowadays television, radio personalities had the ability to attract crowds, and that the success of a show often rested on the shoulders of the dignitaries that narrated the shows. Radio attracted some of the era’s most notable talents—performers, comedians, and hosts).

86. See KEITH, *supra* note 81, at 306.

87. See COX, *supra* note 80, at 20; see also BALK, *supra* note 78, at 245 (mentioning that in prime-time hours about 20% of the content being broadcast was music and about 80% was narrated). Figures for 1938 and for 1941 show that about half of all broadcasting time was devoted to music programs. John Gray Peatman, *Radio and Popular Music*, in *RADIO RESEARCH* 1942–1943, at 335, 336 (Frank N. Stanton & Paul F. Lazarsfeld eds., 1944). A 1946 survey of commercial broadcasters in the continental United States provides that a total of 41% of broadcast time was dedicated to music programs. See Kenneth Baker, *An Analysis of Radio’s Programming*, *COMMUNICATIONS RESEARCH* 1948–1949 59 (Paul F. Lazarsfeld & Frank N. Stanton eds., 1st ed. 1949). It is interesting to note that, according to Baker’s survey, smaller stations dedicated 48% of broadcast time to music programs whereas in large stations this figure drops to just 33%. *Id.*

“real thing” and more authentic than pre-recorded shows.⁸⁸ Furthermore, broadcasters believed that if the performing artists knew that they were being recorded and additional ‘takes’ were perhaps possible, then they would not necessarily give their best performance right from the start (implicating, of course, the need to spend additional resources on recording).⁸⁹ Second, up until the mid-1950s records delivered inferior sound quality relative to live broadcast.⁹⁰ Third, the length of the records themselves was very limited—up to four minutes until the late 1940s, and just under fifteen minutes until the late 1950s.⁹¹ While this limitation may be less severe for many popular songs, for programming that involved longer segments it meant that broadcasting recorded content was a cumbersome operation that hindered the ability to broadcast smoothly. Consequently, national networks prohibited airing recorded materials.⁹² Moreover, until the 1940s, federal regulations required that broadcasters notify listeners that the pre-recorded music they were about to hear was not live.⁹³ Another notable factor was strong opposition from record companies and musicians to the broadcasting

88. See HUGH CHIGNELL, KEY CONCEPTS IN RADIO STUDIES 46 (2009); Christopher Rasmussen, *Lonely Sounds: Popular Recorded Music and American Society, 1949–1979*, at 24 (May 2008) (Ph.D. dissertation, University of Nebraska-Lincoln), <https://digitalcommons.unl.edu/dissertations/AAI3297654> (noting that as a result of “anti-record bias,” the Federal Communications Commission passed regulations forcing stations to disclose whether the music was pre-recorded or live to deter dishonesty or fraud); Stephen D. Perry, *The Demise of Live Radio Entertainment in the Heartland: A Case Study*, 20 J. RADIO & AUDIO MEDIA 134, 134 (2013) (commenting Commerce Secretary Herbert Hoover almost made live performances a requirement to operate a radio station during the 1920s); ASA BRIGGS, THE BBC: THE FIRST FIFTY YEARS 121 (1985) (discussing the preference of live performance to ensure performers did not give mediocre performances).

89. BRIGGS, *supra* note 89, at 121. Chignell notes that while in the golden age of radio almost all radio was broadcast live, currently most of what we hear is pre-recorded. However, he maintains, live broadcast is still a defining feature of radio. CHIGNELL, *supra* note 89, at 11, 87–89.

90. Perry, *supra* note 88, at 135.

91. See *infra* discussion in Section II.C.

92. However, some small local stations did use records. Rasmussen, *supra* note 88, at 24 n.24. The American Federation of Musicians even banned recording altogether. Perry, *supra* note 88, at 135.

93. Rasmussen, *supra* note 88, at 24.

of recorded music.⁹⁴ Across the industry, less than 9% of broadcast content was pre-recorded: of every 128 broadcast hours per week, merely eleven included pre-recorded sound.⁹⁵

Almost all radio stations also had their own orchestra (or orchestras), a house band, or at least some smaller ensemble of musicians.⁹⁶ The musicians were in charge of accompanying the narrated content with music—from the theme music to sound effects.⁹⁷ But that was not the musicians' only or even necessarily main pursuit; they also delivered full-length musical productions including popular, classical, and even jazz music.⁹⁸ Most stations played a mix of different types of music, and very few “specialized” stations, namely stations dedicated to a particular type of music, existed.⁹⁹ This is not to suggest that records were never played on the radio. Pre-recorded music preceded radio, and broadcasters occasionally used pre-recorded music.¹⁰⁰ However, broadcast music during the golden age was predominantly live.¹⁰¹

As listenership grew, so did the quest for radio talent. Radio personalities (narrators, presenters, etc.) were of “utmost importance to programming.”¹⁰² Radio personalities often became celebrities and

94. *Id.* at 24–25.

95. *Id.* at 24.

96. See Cox, *supra* note 80, at 15 (noting that the house bands contributed significantly to radio programming at major stations during this era); see, e.g., BALK, *supra* note 78, at 210, 212, 214, 216.

97. COX, *supra* note 80, at 15.

98. See *id.*; James P. Kraft, *Musicians in Hollywood: Work and Technological Change in Entertainment Industries, 1926–1940*, 35 TECH. & CULTURE 289, 305–06 (1994). In addition, the house bands were responsible for live advertising jingle melodies. COX, *supra* note 80, at 15. Even today, some of the bigger broadcasters (usually public broadcasters) have their own orchestras. *Id.* Famous examples include the BBC Orchestras, the Vienna Radio Symphony Orchestra, MDR Leipzig Radio Symphony Orchestra. *Id.*

99. COX, *supra* note 80, at 4.

100. See Rasmussen, *supra* note 88, at 23–24 (discussing how the recorded music industry felt threatened by the impact of radio, in fear it would become obsolete, and as a result, perpetuated resistance to playing pre-recorded music; “[a]cross the industry, for every 128 broadcast hours every week, only [eleven] [stations and networks] featured prerecorded sound”).

101. In fact, as mentioned, some stations prohibited the use of records due to their inferior quality. *Id.* at 24.

102. Stiernstedt, *supra* note 85, at 290.

enjoyed high regard and decent incomes.¹⁰³ Broadcasters employed radio personalities to attract listenership, increase audience predictability, and improve risk management.¹⁰⁴ At the same time, with some exceptions, singers did not enjoy the same celebrity status that they would acquire in later years.¹⁰⁵ While there were famous singers, songs were generally not linked to a particular performer and it was common for several versions of the same song to be produced by different record labels.¹⁰⁶

In its golden age, radio was at the core of cultural life. Cultural production in radio broadcast in that era was very different from what we know today. Radio broadcasters produced a variety of narrated content and music, which was often live and produced in house.¹⁰⁷ Radio was, as Norman Finkelstein describes, “a magical link to an enchanted world of entertainment, news and culture. By the mid-1930s, the radio was the most important item in the home. It provided shared experiences to everyone . . . [and] created an image of ideal America.”¹⁰⁸

B. Post Golden Age

In the 1950s, currents began to shift rapidly due to the rise of television as a broadcast medium, societal transformations, technological advancements, and changes in broadcast regulation. By the 1960s, radio’s golden age was over and cultural production in radio broadcast significantly changed. Four changes are of particular note. First, music dethroned narrated show’s dominance and became the primary content. Second, narrated content itself changed, with ad-libbed talk shows eclipsing scripted programs. Third, instead of relying on in-house production and live materials, greater emphasis was placed on broadcasting pre-recorded materials produced for wider consumption. Fourth, all-around stations gave way to the rise of genre-specific music radio stations (that is, stations

103. *Id.* at 291.

104. *Id.* at 292.

105. See ELIJAH WALD, HOW THE BEATLES DESTROYED ROCK ‘N’ ROLL: AN ALTERNATIVE HISTORY OF AMERICAN POPULAR MUSIC 17 (2009) (describing the replacement of amateurism with professional singers with whom celebrity was associated).

106. See *infra* discussion in Section II.C.

107. Stiernstedt, *supra* note 85, at 293.

108. FINKELSTEIN, *supra* note 80, at 117.

dedicated solely, or mainly, to one specific genre such as jazz, gospel music, Americana, etc.). We now turn to briefly describe each of these changes.

A fundamental change in the post golden age era was the shift in dominance of music broadcast vis-à-vis narrated shows. In the golden age, most of the prime-time content was narrated shows,¹⁰⁹ and while music was undeniably prominent in radio broadcast during the golden age, in the post golden age years its prominence surged.¹¹⁰ Music arguably became the defining feature of post golden age radio. Currently, music shows make up the vast majority of radio programming.¹¹¹

While music broadcasting indeed increased at the expense of narrated shows, much narrated content was, and still is, being broadcasted. Yet narrated content itself has also changed significantly in the aftermath of radio's golden age. This change was manifested both in the *kind* of narrated content and in the way it was *expressed*. The *kind* of narrated content changed from scripted programs to ad-libbed talk shows.¹¹² This meant that the limit of acceptable language was constantly being pushed.¹¹³ Respectable narrators, once broadcasters' most treasured asset, were widely replaced by talk-radio hosts expressing themselves in a deliberately offensive, inept, or provocative manner.¹¹⁴

Another essential change was a notable decrease in live broadcasting and in-house production, and a shift to pre-recorded programs often

109. In prime-time hours, about 20% of the content being broadcast was music and about 80% was narrated. BALK, *supra* note 78, at 245.

110. See CHIGNELL, *supra* note 88, at 28; BRUCE LENTHALL, RADIO'S AMERICA: THE GREAT DEPRESSION AND THE RISE OF MODERN MASS CULTURE 61 (2007).

111. Jarl Ahlkvist & Robert Faulkner, *Will This Record Work for Us??: Managing Music Formats in Commercial Radio*, 25 *QUALITATIVE SOCIO.* 189, 192–93 (2002); CHIGNELL, *supra* note 88, at 33.

112. See CHRISTOPHER H. STERLING & MICHAEL C. KEITH, SOUNDS OF CHANGE: A HISTORY OF FM BROADCASTING IN AMERICA 190 (2008) (describing the rise in talk radio across AM, FM, and satellite platforms).

113. *Id.* at 192.

114. *Id.* at 168, 235. A notable exception to this phenomenon is public radio, which during and after the golden age continued to provide highly regarded narrated content. See *infra* Part III; see also Michael McCauley, *Leveraging the NPR Brand: Serving the Public While Boosting the Bottom Line*, 9 *J. RADIO STUD.* 65, 67 (2002).

produced by centralized radio corporations.¹¹⁵ As mentioned, in the golden age, less than 9% of broadcast content was pre-recorded.¹¹⁶ In the post-golden age era, almost all the content is pre-recorded, and very rarely do broadcasters employ their own orchestra or a house band.¹¹⁷

An additional change in the radio broadcast industry was a shift from stations playing “general” music formats, namely a blend of different musical genres, to the proliferation of stations dedicated to narrowly targeted formats.¹¹⁸ This trend started in the 1950s, and increasingly grew in the following decades.¹¹⁹ Radio stations have become so specific that current estimates put the numbers at one hundred different music radio formats.¹²⁰ A station’s format, as some scholars have noted, is one of the most fundamental features that define a music radio station.¹²¹

The shifts described above demonstrate the remarkable changes to cultural production in radio broadcast after radio’s golden age. What caused these dramatic changes? That is the question we now turn to explore.

C. Explanations to the Changes in Radio Broadcasting

No single account fully explains what led to this remarkable change in cultural production in radio broadcasting. Several explanations together portray a changing landscape in radio broadcast, with substantial technological advances as well as social and cultural shifts being the most typically referenced explanations. Technological advances include the advent of television, new technologies allowing portability and ubiquity of radio, changes in recording technology, and the inception of FM radio. Social and cultural shifts include the growth

115. See KEITH, *supra* note 81, at 348–49 (7th ed. 2006); COX, *supra* note 80, at 123.

116. See Rasmussen, *supra* note 88, at 24.

117. With exception of some public radio broadcasters.

118. GABRIEL ROSSMAN, CLIMBING THE CHARTS: WHAT RADIO AIRPLAY TELLS US ABOUT THE DIFFUSION OF INNOVATION 65 (2012) (ebook); Robert L. Hilliard, *Format*, in RADIO BROADCASTING: AN INTRODUCTION TO THE SOUND MEDIUM 105, 105–07 (Robert L. Hilliard 2d ed., 1974).

119. ROSSMAN, *supra* note 118, at 65.

120. Current estimates suggest that there are over 100 different radio formats. This allows broadcasters to target specific demographics. See COX, *supra* note 80, at 110, 115.

121. ROSSMAN, *supra* note 118, at 64.

of suburban America, the rise of the rock star, and the introduction of the Top-40 format. We now turn to describe these changes.

Video, as the lyrics of the Buggles's famous song suggest, killed the radio star.¹²² Indeed, TV is often credited with being one of the main reasons for the demise of radio's golden age, and seemingly, rightly so. Soon after television was introduced, it replaced radio at the heart of American homes, culture, and entertainment.¹²³ Media reports from the 1950s demonstrate how impactful television's introduction was on radio broadcast, with headlines such as "TV is hot on radio's heels."¹²⁴ The impact of television was felt in almost every aspect imaginable, including in radio revenues, which declined as advertisers abandoned radio in favor of television and personnel retention, as salespersons, program producers, and radio talent moved to the new medium en masse.¹²⁵

The correlation between television's rise and radio's decline is striking. Television (as a commercial good) made its debut in 1948.¹²⁶ By 1951, a fourth of U.S. homes owned television sets, by the mid-1950s, about half of Americans had a television set, and by 1960, televisions could be found in almost 90% of American homes.¹²⁷ In the late 1930s, the average American listened to radio for five hours and fourteen minutes a day.¹²⁸ In 1949, radio witnessed the first slip in listenership by an average of nine minutes, followed by thirty-six minutes in 1951, and two hours and twenty-five minutes in 1955.¹²⁹ Radio advertisement sales sank to \$55 million in 1955 from \$133

122. The Buggles, *Video Killed The Radio Star*, *supra* note 1.

123. Marilyn J. Matelski, *Resilient Radio*, in *RADIO: THE FORGOTTEN MEDIUM* 5 (Edward C. Pease & Everette E. Dennis eds., 1995); Alan Albarran et al., "What Happened to our Audience?" *Radio and New Technology Uses and Gratifications Among Young Adult Users*, 14 J. RADIO STUD. 92 (2007).

124. Matelski, *supra* note 123, at 11.

125. *Id.*; COX, *supra* note 80, at 31–34.

126. COX, *supra* note 80, at 29.

127. *Id.*; BALK, *supra* note 78, at 279–80.

128. Paul F. Peter, *The American Listener in 1940*, 213 ANNALS AM. ACAD. POL. & SOC. SCI. 1, 3 (1941).

129. COX, *supra* note 80, at 29; BALK, *supra* note 78, at 279–80.

million in 1948 and the average station's revenue fell by almost 25% between 1947 and 1953.¹³⁰

Television was not only an exciting new technology; it also provided an experience that was seemingly better suited to many of radio's narrated formats. Formats such as soap operas, crime dramas, comedy shows, etc. transformed from a mere audio experience to an audio-visual one.¹³¹ Unlike radio, television did not require high audience imagination and concentration to provide effective entertainment.¹³² There is little doubt that television is one of the core reasons that led to the changes that radio broadcasting experienced in the 1950s.

Television, however, was not the only new technology that was introduced in the 1950s and impacted radio broadcast. Other technological advances contributed to the changing landscape as well. One notable example concerns the portability and ubiquity of radio. In the 1950s, radio finally became portable with the commercial production of the transistor radio in 1954 and the introduction of the car radio as a standard in most automobiles in the 1950s.¹³³ This, *inter alia*, meant that the environment in which listeners could tune into radio changed dramatically.¹³⁴ Radio was no longer a device confined to the family living room, around which all gathered to listen; but rather, it was to be found practically anywhere—from one's bedroom all the way to the beach. Radio changed from being a social experience to an (also) individual one.¹³⁵ The change in the location and means by which people listened to radio meant that the content had to

130. Total network radio advertisement sales "plummeted from a high of over \$133 million in 1948, to just under \$55 million by 1955." Rasmussen, *supra* note 88, at 48. The average station revenue fell from \$246,000 in 1947 to \$194,000 in 1953. *Id.*

131. WALD, *supra* note 105, at 172.

132. It is important to bear in mind, as Andrew Crisell notes, that "the distinctiveness of radio is not that it involves the imagination while the other media do not, but that it involves it to a different extent." ANDREW CRISELL, UNDERSTANDING RADIO 9 (2d ed. 1994).

133. Rasmussen, *supra* note 88, at 44; REGAL, *supra* note 78, at 52–53; Doug Firby, *The History of Car Radios, from AM to Apple* (Aug. 28, 2020), <https://www.theglobeandmail.com/drive/technology/article-the-history-of-car-radios-from-am-to-apple> [https://perma.cc/5Q2Y-TYF4].

134. MARK KATZ, CAPTURING SOUND: HOW TECHNOLOGY HAS CHANGED MUSIC 21 (rev. ed. 2010).

135. See Rasmussen, *supra* note 88, at 44 (describing the impact that portability had on individuals' ability to listen to the radio).

change too, so that it could comfortably fit in the new surroundings. Arguably, listening to radio in one's living room when there were minimal external distractions and radio was the focus of attention, was very different than listening to the radio in one's car or at the park where there were many distractions and the listener's concentration level was low. In addition, this portability (alongside other sociological changes, as will be described below) meant that listeners were less inclined to commit to a fixed programming schedule.¹³⁶

Broadcasters needed to start accommodating this new and growing kind of listenership. Narrated radio shows that required greater attention from their audiences were seemingly unfit to entertain those who listen to radio in the background. Music, thus, was a perfect fit for listeners because it did not require high levels of attention nor did it require commitment to a fixed broadcast schedule, making it the perfect background entertainment.¹³⁷ Ad-libbed talk radio has similar characteristics—it neither requires high levels of attention nor commands strict adherence to a fixed schedule.

Alongside these changes in radio technology, the music industry saw substantial changes in recording technology, record quality, and consumption patterns. New recording technologies (audiotape and vinyl) meant considerable improvements in sound quality and capabilities.¹³⁸ In addition, the playing time of records increased from four minutes playing time per side to approximately fifteen minutes playing time for each side of a record.¹³⁹ The advancements in sound recording technology and the advent of microwave transmission contributed to the decline of locally produced live broadcasts and reliance on pre-recorded shows, as well as central programming,

136. *Id.* (explaining that invention of the portable pocket radio altered Americans' listening habits); CRISELL, *supra* note 132, at 14 (discussing how the combination of the portability of radio and the imagination of its listeners allowed its listeners to enjoy radio while participating in other activities).

137. See CRISELL, *supra* note 132, at 14 (describing how listeners can enjoy the radio while multitasking).

138. See RADIO CULTURES: THE SOUND MEDIUM IN AMERICAN LIFE 173 (Michael C. Keith ed., 2008); Séan Street, Crossing the Ether: Public Service Radio and Commercial Competition in Britain with Special Reference to Pre-War Broadcasting 167 (Feb. 2003) (Ph.D. dissertation, Bournemouth University), http://eprints.bournemouth.ac.uk/393/1/Street,_Sean_Ph.D._2003.pdf [<https://perma.cc/82HV-2VW9>].

139. Rasmussen, *supra* note 88, at 46.

syndication, etc.¹⁴⁰ With these technologies, production of shows could achieve greater economies of scale.

Several sociological and cultural trends also drove the remarkable transformation radio broadcast witnessed in the 1950s. Notable examples include: the growth of the suburbs, the “birth” of the rock star, the initiation of the Top-40 format, and changes in social values. We briefly touch on each.

In the latter part of the 1940s, the United States, as well as many other countries, experienced a rapid expansion of the suburbs.¹⁴¹ The 1960s witnessed the first time in which the number of Americans living in suburbs was greater than the number of people living in cities.¹⁴² For radio broadcasters this meant that people spent more time listening to radio while commuting.¹⁴³ Commuters were a “captive audience” because they had no entertainment alternatives¹⁴⁴: radio was the only option so broadcasters needed very little to keep listeners engaged.¹⁴⁵

140. KEITH, *supra* note 81, at 348.

141. JON C. TEAFORD, THE AMERICAN SUBURB: THE BASICS 30–31 (2008); ROBERT A. BEAUREGARD, WHEN AMERICA BECAME SUBURBAN xi, 5–6 (2006).

142. TEAFORD, *supra* note 141, at 31; BEAUREGARD, *supra* note 141, at 42.

143. Rasmussen, *supra* note 88, at 93.

144. This, ostensibly, remains true even in current times. According to Nielsen’s 2018 report (measuring audiences across all media outlets): “One reason radio maintains its broad reach is due to high usage occurring away from the home. Automobiles are the most significant listening location, as 65% of all non-home radio use occurs there. That number increases to 77% on weekends.” NIELSEN, THE NIELSEN TOTAL AUDIENCE REPORT: Q3 2018 14 (2019), <http://www.nielsen.com/us/en/insights/report/2019/q3-2018-total-audience-report>; see also Duncan Stewart, *Radio Revenue, Reach and Resilience*, in TECH., MEDIA & TELECOMMS. PREDICTIONS 2019 60 (2018), https://www.deloitte.com/content/dam/insights/us/articles/TMT-Predictions_2019/DI_TMT-predictions_2019.pdf [https://perma.cc/S2LT-FQLV] (describing how many people enjoy listening to the radio without an agenda, e.g., as background noise).

145. Rasmussen, *supra* note 88, at 93–94.

Suburbanization built on post-war prosperity and the Interstate Highway Act reshaped American cities, and one of the many consequences was that more and more Americans spent a good portion of their days in cars. The transistor transformed the car radio from expensive luxury into an almost standard feature by the 1960s. . . . [B]ut it was not only the adults who were a captive audience. By 1961, half of all high school senior boys had their own cars, and an even larger number access to, and in fact expected regular use of, the family car.

Id.

Music and ad-libbed talk shows were sufficient; the alternative was, after all, silence.

Another important cultural development in the 1950s, which seemingly prompted change in radio broadcast's landscape, was the "birth" of the rock star. By the mid-1950s, rock and roll music replaced classic pop as the leading music genre.¹⁴⁶ This created a change in the status and importance of the performer—up until then, by and large, the song was far more important than the performer.¹⁴⁷ In fact, up until the early 1950s it remained standard for all major record labels to produce their own version of almost every major hit song.¹⁴⁸ Rock and roll changed this reality. With the advent of rock and roll, songs started being linked to a particular performer, and music stardom became commonplace.¹⁴⁹ When Elvis Presley, Bill Haley & His Comets, and Chuck Berry became celebrities, the audience was interested in hearing each artist's performance of their own song, rather than a rote performance of the song itself. The radio broadcasting industry had to react to this kind of demand and may have also participated in creating it. Thus, records of particular performers became more important, and house bands' renditions of those songs mainly obsolete.¹⁵⁰

146. See PETER FORNATALE & JOSHUA E. MILLS, *RADIO IN THE TELEVISION AGE* 37 (1980) (describing how record stores were selling mostly rock and roll records by the mid-1950s); Hilliard, *supra* note 118, at 112 ("In the 1950's the unfamiliar screaming sounds coming from portable radios were those of a new phenomenon, Rock and Roll.").

147. We are not suggesting that there were no music stars up until that point. There were. However, their importance and prominence were limited compared to stardom as we know it since the advent of rock and roll stardom. See WALD, *supra* note 105, at 18 (describing how, in modern times, we associate hit songs with their singers).

148. *Id.* at 85, 88.

149. *Id.* at 88.

150. There, seemingly, is a chicken and egg issue here: broadcasters might have merely responded to changing audience tastes; however, they might have played a role in creating them. The rise of superstars is linked to technological changes that make it possible to create a large market for the individual product (e.g., one performer). See Sherwin Rosen, *The Economics of Superstars*, 52 AM. SCHOLAR, 449, 459 (1983) ("Changes in the technology of communication and control of distribution have decreased the cost of cloning of talent in many areas and contributed substantially to turning mere stars into superstars."). Before the improvement in sound recording technologies, radio provided superior sound quality relative to records, but radio performances were live and the audience limited to that of any particular radio station. Therefore, even if a song became a hit, its rendition by a particular performer could

The introduction of a new format—“Top-40”—offers another explanation to the changes in cultural production in radio in the 1950s. The Top-40 format made its debut in the second half of the 1950s.¹⁵¹ The format is simple: a playlist consisting of the forty most popular songs.¹⁵² The format is based on playing pre-recorded music.¹⁵³ It was novel in that it challenged the orthodox view according to which music and live performance were considered almost synonymous.¹⁵⁴ It was also different in that it introduced broadcasters to a “low budget/high ratings” format.¹⁵⁵ The Top-40 format encouraged listeners to experience music as an individual, portable, and on-demand commodity, thus suppressing the notion of music as a social experience and turning it into a mere sonic one.¹⁵⁶ This also resulted in, and is associated with, the rise of the music star. Unlike their parents’ generation, which associated music with live performance, the 1950s generation saw music as something that could be experienced in multiple ways; for them, live performances were a social musical event, but music was not synonymous with live performance.¹⁵⁷

D. Blanket Licenses as an Explanation to the Changes in Cultural Production in Radio Broadcast

The above technological, social, and cultural accounts undeniably explain why we witnessed shifts in cultural production in radio broadcast. However, they may not fully explain why we witnessed the particular changes that occurred. We believe that the confluence of social, cultural, and technological changes *along with* the licensing practices affecting music, i.e., CMOs’ blanket licenses, can explain the

not scale. Thus, capitalizing on the popularity of the song required multiple performances by different performers. However, when the sound quality of records improved, radio stations could start playing a specific (recorded) performance, and improved transmission technologies made it possible to broadcast particular performances (recorded or live) to much wider audiences.

151. Rasmussen, *supra* note 88, at 65–66.

152. *Id.* at 66.

153. *Id.*

154. *Id.* at 53.

155. *Id.* at 52.

156. *Id.* at 53. Indeed, in classic “lemonade stand” terms, there is an economic incentive to cluster around a successful format, which could be better than being the only station to provide a niche product.

157. *Id.* at 3–4.

specific changes that occurred in radio—the increasing reliance on pre-recorded music, the decline of narrated content, and changes of the type of narrated content. We will demonstrate this assertion by examining the impact of television, transistors and car radios, and music preferences.

Television was introduced in the late 1940s to early 1950s. Competing for audience attention, television challenged the radio industry. However, the fact that television provides (audio-visual) narrated content does not at all imply that radio could not effectively compete with television in providing different or improved types of narrated content. Conceivably, television is better suited for productions that emphasize visual impact, but radio is perhaps better suited for other narrated formats such as storytelling, documentaries, and in-depth political discussions.¹⁵⁸ In the 1950s, radio broadcasters could have adjusted their narrated content to successfully face that of television. Moreover, they could have exploited radio's relative advantages over television (e.g., portability, lower production costs) as a competitive advantage. However, they primarily reacted by opting for pre-recorded music. Suggesting that opting for pre-recorded music was radio stations' only viable strategy for surviving the competitive pressure of television seems to us overly deterministic and, as we consider below, inconsistent with some contrary evidence.

First, narrated shows were, and remain, extremely popular. This is evidenced, for example, by their continuing popularity in public radio. After the 1950s, commercial broadcasters turned to pre-recorded music. Public broadcasters also started using more pre-recorded music, however, they kept broadcasting substantial amounts of narrated shows. To this day, the most popular shows on America's National Public Radio (NPR) are narrated.¹⁵⁹ Another current example of the

158. For example, with respect to documentaries, Chingell notes that radio can be advantageous relative to television because the lack of visual stimulation allows the listener to focus on the substance. CHIGNELL, *supra* note 88, at 22–23, 28. While high quality programs indeed necessitate high costs, the cost per listener can still be very low, provided that the show is able to attract large audiences. “The trouble is that, within the market, there is no incentive to recognize this.” David Hendy, *A Political Economy of Radio in the Digital Age*, 7 J. RADIO STUD. 213, 230 (2000).

159. Press Release, NPR, NPR Maintains Highest Ratings Ever (Mar. 28, 2018), <https://www.npr.org/about-npr/597590072/npr-maintains-highest-ratings-ever> [https://perma.cc/A79D-K4UP].

popularity and market demand for narrated content is the rise of podcasts.¹⁶⁰ We further discuss this point in Part III.

Similarly, the fact that radio receivers became portable does not in and of itself explain why commercially produced pre-recorded music was preferred over other content such as in-house produced music or narrated shows. The mobility of radio sets does not in and of itself make radio less suitable for listening to quality narrated content or unique musical shows produced by broadcasters.¹⁶¹ It can expand an individual's ability to listen to such content in places other than the family living room, and with the arrival of cassette recording, these opportunities expanded even further.

Likewise, the rise of rock and roll stardom and subsequent changes in music preferences (namely, the shift from satisfaction with nonspecific in-house renditions of a song to preferring performer-specific versions) conceivably explains why pre-recorded music was preferred over in-house produced music, but it does not explain why music content was preferred over narrated content.¹⁶² Even before the rock and roll and Top-40 era, people liked music and listened to it; nevertheless, narrated shows were the preferred content.¹⁶³ There is no indication that after the 1950s people suddenly preferred music to narrated content. The same technologies that contributed to the rise of music superstars and musical hits could have also propelled the emergence of narrated content stardom. The explanatory power of these changes is limited unless we also consider how CMOs' blanket

160. *Podcasts Playing A Greater Role in Spoken-Word Audio Consumption, Study Finds*, INSIDERADIO (Oct. 15, 2020), http://www.insideradio.com/free/podcasts-playing-a-greater-role-in-spoken-word-audio-consumption-study-finds/article_10caf00c-0eb4-11eb-9cc9-6b4963fa89d3.html [https://perma.cc/385J-3YJB].

161. See, e.g., Zachary Crockett, *Tiny Desk: How NPR's Intimate Concert Series Earned a Cult Following*, VOX (Nov. 12, 2016, 9:30 AM), <https://www.vox.com/culture/2016/11/21/13550754/npr-tiny-desk-concert> [https://perma.cc/527A-G388]; see also Anthony DeCurtis, *Live at the BBC*, ROLLING STONE (Jan. 25, 1991, 05:00 AM), <https://www.rollingstone.com/music/music-album-reviews/live-at-the-bbc-252205> [https://perma.cc/W98J-T4HL].

162. Nor does it explain why commercial broadcasters could not harness the rise of stardom to their advantage, e.g., by collaborating with popular performing artists to produce content that could be broadcast exclusively by stations affiliated with the broadcaster's network.

163. See LENTHALL, *supra* note 110, at 61 (describing how radio's most popular programs tended to be "serials or comedy/variety programs").

licenses changed the relative price of broadcasting pre-recorded music and made it cheaper relative to narrated content (or any content outside the blanket license).

Another way to illustrate our point is by conducting the following thought experiment: imagine we are in the 1950s witnessing many different social, cultural, and technological changes. However, licenses for broadcasting music are not available under a CMO's blanket license but rather obtained, like all other content, in a competitive market. Broadcasters need to cope with the new realities discussed above and continue providing audience-attracting content that will maximize their profit. They have two options: they can invest resources in creating music or narrated content that attracts listenership (option A), or they can negotiate with creators of pre-recorded music or pre-recorded narrated content to use their materials (option B).¹⁶⁴ As we discuss earlier, both options require expenditure. The closer the costs of options A and B, the greater is the possibility that option A will be more profitable and therefore chosen. Blanket licenses, if used for music content, widen the gap between these options. And indeed, blanket licenses, which widened the gap between pre-recorded music and other content created in the 1950s, explains why pre-recorded music was preferred. Thus, alongside technological and social accounts, it explains why we see more pre-recorded music content.

In essence, technological, social, and cultural changes illustrate the shift in cultural production within radio broadcast. The economics of content production and procurement, affected by the licensing practices pertaining radio music broadcast, i.e., blanket licenses, add an additional layer, suggesting why the *particular* changes happened. As Marilyn Matelski notes:

[S]tation owners redefined the medium to fit the new pragmatics—lower budgets, less live talent, [and] smaller audience . . . Clearly, the most serious threat was economic . . . [T]he financial landscape was not entirely bleak; despite lower station revenues, manufacturers and owners still had a vested interest in radio's solvency . . . Without network programming, most local stations could not afford to

164. There is the option of using in-house production, but the rock and roll stardom phenomenon makes it less viable. Similarly, there is the option of using public domain music, but this too is less desirable due to popularity of current music vis-à-vis older music (which is often the only music in the public domain).

underwire large variety shows or dramas, so they turned instead to pre-recorded music with [DJs] as hosts.¹⁶⁵

E. Why Only in the 1950s?

Assuming that our hypothesis about the impact of CMOs and their blanket licenses is correct, it is necessary to explore another angle: when radio broadcasting began and gained popularity in the 1920s, blanket licensing by CMOs already existed, yet the “death” of the radio star did not occur until several decades later. Therefore, defending our hypothesis requires us to explain this delay. To do that, we first distinguish between the effect of the blanket license on other *musical* content and then its effect on *narrated* content.

As our discussion of the ASCAP boycott in 1941 shows, the ASCAP blanket license did effectively crowd out non-ASCAP music, indicating that the exclusionary impact of the blanket license on other musical content was indeed felt from the very beginning of radio. Initially, however, the blanket license affected non-ASCAP musical content more than it affected narrated content. Therefore, the question remains, why did the blanket license not have the same exclusionary effect on narrated content until the 1950s? The explanation lies in a combination of several factors, including the limitations of sound recording technology, regulatory opposition to the use of sound recordings, industry wariness, and consumer preferences at the time, and the limitations of broadcasting technology that caused radio stations to rely mostly on live and local broadcasts. As we explain below, once the impediments to broadcasting recorded content were removed, the full impact of blanket licenses took effect.

Until the late 1950s, music records were relatively unimportant in the music industry.¹⁶⁶ They were considered faint and scratchy items, deemed a “generic” means to carry existing sounds around, and described as “brief, fuzzy snapshots of popular music, not the thing itself.”¹⁶⁷ Music on records sounded too rough and inferior in quality.¹⁶⁸ Radio broadcasters regarded records as “canned” music.¹⁶⁹

165. Matelski, *supra* note 123, at 12.

166. WALD, *supra* note 105, at 14.

167. *Id.*

168. *Id.*

169. *Id.*

In fact, broadcasters considered the quality of records at the time so poor that until the late 1940s the major national broadcasters in the United States banned playing pre-recorded music.¹⁷⁰ As a result, pre-recorded music accounted for less than 9% of all music being played on the radio.¹⁷¹ Not until the mid-late 1950s did technological improvements upgrade the sound quality of the records so that the use of pre-recorded material could be considered a viable option for radio broadcasters.¹⁷²

Certain U.S. federal regulations provide another reason why pre-recorded music was seldom used until well into the 1940s, despite the prevalence of blanket licenses. The Federal Radio Commission and later its successor, the Federal Communications Commission (FCC), were of the opinion that broadcasting recorded music was not in the public interest.¹⁷³ In 1922, the U.S. Secretary of Commerce, Herbert Hoover, sought to limit the use of pre-recorded materials in favor of live performances.¹⁷⁴ U.S. agency regulations dictated that new stations had to accept not to perform pre-recorded music or to subject to licensing scrutiny once their initial three-year license expired. Moreover, regulations required that broadcasters who played pre-recorded music notify listeners before each song that the music they were about to hear was not live.¹⁷⁵ In 1940, the FCC eased the listener notification requirement from prior to every song to once every thirty minutes, and by the end of World War II, it eliminated this

170. Rasmussen, *supra* note 88, at 24.

171. *See id.*

172. It is also worth noting the material from which the records were made; shellac was not very durable, and often records mailed to the stations were received broken. Only with the advent of vinyl in the late 1940s to early 1950s was this problem properly solved. The shellac 78 RPM records also had a short life span of 75–125 plays, which meant expenses to buy new ones. *Id.* at 46, 58; ANDRE MILLARD, AMERICA ON RECORD: A HISTORY OF RECORDED SOUND 202 (1995).

173. Rasmussen, *supra* note 88, at 24.

174. PERRY, *supra* note 88, at 134.

175. DEP'T OF COM., RADIO SERV. BULL. NO. 125, REGULATION GOVERNING THE BROADCASTING OF MECHANICAL REPRODUCTIONS, at 9 (1927); DEP'T OF COM., RADIO SERV. BULL. NO. 153, GENERAL ORDER NO. 78, CHARACTER OF ALL MECHANICAL REPRODUCTION MUST BE ANNOUNCED, at 10–11 (1929) (“All broadcasting stations shall announce clearly and distinctly the character of all mechanical reproductions broadcast by them, the announcement to immediately precede the broadcasting of each record.”); Rasmussen, *supra* note 88, at 24.

requirement completely.¹⁷⁶ That is, well into the mid-1940s, federal regulations implied that recorded music was poor, sub-standard and not the “real thing,” thus reinforcing the perception of recorded music as an inferior product.¹⁷⁷

Another important factor was the fierce opposition from musicians and record companies, who feared that broadcasting recordings would reduce employment opportunities and sales, respectively. From the 1920s through the 1940s, musicians and record companies took various measures to prevent or discourage broadcasting records.¹⁷⁸ These measures included direct agreements with broadcasters, recording bans, legislation initiatives, and legal actions based on claims of a common law public performance right to prevent unauthorized broadcastings of recorded music.¹⁷⁹ For example, the American

176. Rasmussen, *supra* note 88, at 24.

177. Interestingly, record companies themselves also contributed to broadcasters’ negative attitude towards pre-recorded music. Believing that radio play will result in loss of record sales, record companies in the 1930s stamped their products with “not licensed for radio broadcast” *Id.* at 25. Regulation, not just that of copyright, but also of other fields of law and especially antitrust, unsurprisingly, strongly impacts cultural production in radio broadcast. For example, in 1996 Congress increased the limits on the number of radio stations a firm can own within a single radio market. Empirical research conducted by Peter DiCola found, *inter alia*, that the concentration in the U.S. radio industry resulting from that decision had a positive effect on the variety of programming formats. Peter DiCola, *FCC Regulation and Increased Ownership Concentration in the Radio Industry* 17 (Nw. Univ. Sch. of L., Faculty Working Paper No. 33 2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1553483#.

178. See Zvi Rosen, *Common-Law Copyright*, 85 U. CIN. L. REV. 1055, 1093 (2017) (reiterating that several lawsuits were filed during this period to actively prevent the broadcasting of recording music from competing with live music); see also Robert A. Gorman, *The Recording Musician and Union Power: A Case Study of the American Federation of Musicians*, 37 SW. L.J. 697, 701 (1983) (discussing the attempts by unionized musicians to picket and protest live recordings as well as organize public relations campaigns).

179. See ROSEN, *supra* note 178, at 1086, 1088 (recounting the varied and fervent efforts by musicians, producers, and the government to come to an agreement over the broadcasting of records); see also Mindy Schwartz, Comment, *The American Federation of Musicians: An Unearned Encore for Featherbedding*, 47 WAYNE L. REV. 1339, 1342 (2001) (discussing the role of labor unions in the radio industry and their effort to continue securing contracts for musicians in the face of technological advancement); GORMAN, *supra* note 178, at 700 (noting the role of the American Federation of Musicians and their efforts during the 1920s and ‘30s to prevent record

Federation of Musicians, an organization which represented most professional musicians in the United States and Canada, “declared war” in the mid-1930s on radio and recorded music.¹⁸⁰ In the late 1930s, the Federation reached an agreement with key radio stations to significantly increase the size of radio staff orchestras.¹⁸¹ The Federation also made an agreement with record companies that the latter include a restrictive label on their records, stating that the records were restricted only to non-commercial use on phonographs at home.¹⁸² The intention behind this restriction was to establish an equitable servitude in the musical recordings that could allow musicians to enjoin their use in radio broadcast.¹⁸³

Similarly, the National Association of Performing Artists, which formed in 1935 and included some of the principal bandleaders of the time, firmly opposed recorded music.¹⁸⁴ This Association viewed recorded music as a threat to performing artists’ livelihood, or, in the words of the Association’s president, Fred Waring: “I felt it unfair . . . for [radio broadcasters] to have our records playing in competition to us, . . . and it was a growing menace to all performers.”¹⁸⁵ Indeed, in 1935, the Association took things to court, suing Philadelphia radio station WDAS for broadcasting a record despite the record including the inscription “Not Licensed for Radio Broadcast.”¹⁸⁶ The trial court, and later the Supreme Court of Pennsylvania, held that this inscription created an enforceable equitable servitude, and thus a valid ban on playing the record on the radio.¹⁸⁷ Soon thereafter, in 1942, the new

broadcasting from destroying the labor market for live musicians as a result of technological developments in entertainment).

180. ROSEN, *supra* note 178, at 1085–86; SCHWARTZ, *supra* note 179, at 1343; *see also* GORMAN, *supra* note 178, at 702–03 (noting that in 1937, an annual convention for the American Federation of Musicians mandated their president to take economic measures against the encroachment of record broadcasting).

181. ROSEN, *supra* note 178, at 1086.

182. *Id.*

183. *Id.*

184. ALBIN J. ZAK III, I DON’T SOUND LIKE NOBODY: REMAKING MUSIC IN 1950S AMERICA 20 (4th ed. 2010); VIRGINIA WARING, FRED WARING AND THE PENNSYLVANIANS 138–39 (1997).

185. ZAK, *supra* note 184, at 20; WARING, *supra* note 184, at 138.

186. Waring v. WDAS Broad. Station, Inc., 27 Pa. D. & C. 297 (Ct. Com. Pl. 1936), *aff’d*, 194 A. 631 (Pa. 1937).

187. Waring v. WDAS Broad. Station, 194 A. 631, 638 (Pa. 1937).

president of the American Federation of Musicians, James Petrillo, declared a nationwide recording ban.¹⁸⁸ This ban, as Robert Gorman argued, was not targeted against the recording industry, but rather against the broadcasting industry.¹⁸⁹ The ban resulted in a set of agreements signed in 1944 between the Federation and most recording companies, according to which the record companies paid royalties on each record sold.¹⁹⁰

Another measure taken by the Federation was negotiating quotas of orchestra size and expenditure with local radio stations, and the mandatory employment of “standby” orchestras.¹⁹¹ These actions resulted in direct action from Congress—the passage of the Lea Act¹⁹² in 1946, the Taft-Hartley Act¹⁹³ in 1947, and a slew of Congressional hearings to address issues caused by the Federation in 1948.¹⁹⁴ The Lea Act, for example, is applicable only to the broadcasting industry and outlaws or restricts many means of union pressure or collective bargaining that could compel broadcasters to maintain or increase their orchestras.¹⁹⁵ The Lea Act, as Gorman noted, “represented the beginning of the end for staff orchestras, at both the network and local levels.”¹⁹⁶ And indeed in 1948, the Federation reversed several of its policies in the broadcast industry.¹⁹⁷

As the above examples demonstrate, throughout most of the golden age, there was strong opposition from regulators, record companies, and musicians to broadcasting records on the radio as well as uncertainty as to the lawfulness of broadcasting records labeled “Not

188. GORMAN, *supra* note 178, at 705.

189. *Id.*

190. *See id.* at 707–08 (detailing the first agreements were signed in September 1943 but the ban was not lifted until 1944 when the final holdouts signed agreements).

191. *Id.* at 710–11 (explaining the American Federation of Musicians demands to hire entire extra orchestras to artificially encourage employment or pay a fee to local employers).

192. Pub. L. No. 79-344, ch. 138, 60 Stat. 89 (1946).

193. Pub. L. No. 80-101, 61 Stat. 136 (1947).

194. *See* Gorman, *supra* note 178, at 721 (explaining that congressional hearings in addition to other events like the passage of legislation lead the AFM to reverse many of their bargaining positions in 1948).

195. Note, *Lea Act, Taft-Hartley and State Remedies for Featherbedding*, 55 COLUM. L. REV. 754, 755 (1955).

196. Gorman, *supra* note 178, at 715.

197. *Id.* at 721.

Licensed for Radio Broadcast". This reality, it seems, likely delayed the use of pre-recorded music.

Records' playing time was yet another reason why radio broadcasters refrained from using pre-recorded content until the late 1950s. A record's playing time is contingent on the record's turntable speed and groove spacing.¹⁹⁸ The record's playing speed is dictated by its rotational speed, which is measured in revolutions per minute (RPM).¹⁹⁹ Until the late 1950s, the standard record was ten inches in diameter and had a seventy-eight RPM speed, meaning that the standard record could hold about three minutes.²⁰⁰ Even the bigger twelve-inch records could hold no more than five minutes.²⁰¹ After a few short minutes of music play, one would have to flip side or change the record.²⁰² This made the operation of playing pre-recorded material a cumbersome venture. Broadcasters preferred to avoid this burdensome, clumsy, and costly operation, so they refrained from using pre-recorded material until the advent of the long-playing record technology in the late 1950s.²⁰³ Long-playing technology allowed for high fidelity and longer recordings.²⁰⁴

Musical preferences, too, were a reason why broadcasters refrained from using pre-recorded music until the 1950s. As mentioned, prior to the advent of rock and roll, which gave rise to a new type of stardom, less emphasis was placed on whether it was a house band or a record being played.²⁰⁵ House bands and orchestras were in most cases, and definitely in the case of the bigger broadcasters, on the broadcasters' salary roll and earning fixed salaries (regardless of the amount of

198. Dyer v. Sound Studios of N.Y., Inc., 85 F.2d 431 (3d Cir. 1936).

199. See FRANCES A. KOESTLER, THE UNSEEN MINORITY 145 (2004) (providing differing playing durations based on the varying speeds of the turntable revolving measured as revolutions per minute).

200. WALD, *supra* note 105, at 92.

201. Scholars have noted that these technological constraints are part of the reason why many songs are less than five minutes long even nowadays. See Peter Yu, *How Copyright Law May Affect Pop Music without Our Knowing It*, 83 UMKC L. REV. 363, 370 (2014) (suggesting that there is an IP explanation as well—playing longer than 5:12 means record label will have to pay a higher statutory rate).

202. WALD, *supra* note 105, at 92.

203. Rasmussen, *supra* note 88, at 48.

204. *Id.* at 46.

205. *Id.* at 48–49.

music played in practice).²⁰⁶ Thus, from the broadcaster's point of view, there was no immediate cost incentive to prefer pre-recorded music. In fact, the broadcasters' house bands could be described as providing broadcasters with music at a marginal cost nearing zero, at least in the short term: once the musicians are on the station's payroll, the studio is built, and the music is licensed, the marginal cost of having the house band play another song is very low. Given audience indifference to the particular rendition of the song and that both playing a recorded version or having the house bands play it entailed a near-zero marginal cost, it came down to which was available to use in the moment, not to cost. For the reasons mentioned above, house bands were the likely answer.

But what about the choice between music and narrated content? As noted earlier, until the 1950s, technological limitations required broadcasters to focus on live productions.²⁰⁷ As a result, whether the broadcaster chose to broadcast music or narrated content such as drama or comedy, it would have to hire professional musicians and actors and pay for their labor. Therefore, even though the blanket license created a cost advantage for music relative to narrated content (as far as the copyright licensing component of the production is concerned), this cost advantage affected only one component of the cost of content production. So long as most content was produced in house and performed and broadcast live from the studio, the cost structure of music and narrated content was very much the same, and while the music blanket license's zero marginal cost for the music gave it some cost advantage over narrated content, the impact of this cost advantage was not as pronounced as it would become later.

Improvements in recording technologies and the arrival of long-range broadcasting changed the calculus. They allowed broadcasters to rely on pre-recorded programming and for the full impact of blanket licenses to take effect. The marginal cost of broadcasting a pre-recorded sound recording is nearly zero and hence broadcasting sound recordings presents a significant cost advantage relative to content produced inhouse. And once the quality of sound recordings

206. See Kraft, *supra* note 98, at 305–06; see also Perry, *supra* note 88, at 134 (stating that even the small stations that struggled to find talent went to lengths to secure live musicians, poaching from larger station's rejects).

207. See discussion *supra* notes 133–34, 138–40 and accompanying text.

improved, thereby eliminating the sound quality advantage of live broadcasts, consumer attitude changed. Additionally, regulatory restrictions on broadcasting pre-recorded materials were lifted. Radio stations were then able to take advantage of these various changes, reduce the share of content produced in house, and increase the share of pre-recorded content.

In principle, these cost advantages also applied to narrated content, but narrated content was not part of the CMOs' blanket licenses. Accordingly, the marginal cost of broadcasting narrated content was still positive and therefore higher than the marginal cost of playing another recorded song from a CMO's repertoire. If in the days of live, in-house produced programming the blanket license affected mostly the choice of which music to play and led to the exclusion of non-CMO music, the shift to relying on pre-recorded content expanded the reach of the blanket license's exclusionary impact and its capacity to crowd out any content.

The existing technological, social, and cultural explanations along with the economic incentives that blanket licensing generates, provide a compelling explanation as to why the particular changes in cultural production in commercial radio broadcast took place. We now turn to examine how this analysis can also explain the differences in patterns of cultural production between current commercial and public radio.

III. CURRENT TRENDS OF CULTURAL PRODUCTION IN PUBLIC AND COMMERCIAL RADIO

At present, public radio stations typically offer a listening experience that is different from commercial radio. For example, public radio offers much more narrated content, such as documentaries, in-depth discussions of topical issues, and investigative journalism. In this Part, we demonstrate that the economics of blanket licensing may explain why public and commercial radio typically offer a very different product. Essentially, our explanation is this: commercial broadcasters are mainly interested in maximizing profits where public broadcasters are non-profit organizations whose primary mission is providing a public service. The zero marginal cost of playing pre-recorded music from the CMO repertoire incentivizes commercial broadcasters to play as much of that music as possible. In principle, the marginal cost advantage of music under the blanket license should also be appealing

to public broadcasters, and they, just like commercial broadcasters, should feel a strong push to prefer music available under the blanket license over other content.²⁰⁸ However, while public broadcasters are not fully immune to the allure of the blanket license, their not-for-profit mandate allows them to partially resist it in a way that commercial broadcasters cannot.

“Public radio” covers a wide variety of activities by different broadcast organizations, providing a public service and typically operating on a non-profit basis.²⁰⁹ Public radio’s mission, generally defined, is to serve the public by fostering a marketplace of ideas and information.²¹⁰ Public radio mandates often include the promotion of cultural diversity, or reliance on locally produced content. Some also suggest that public radio is a means by which governments wish to correct market failures caused by the primary reliance on commercial providers.²¹¹

208. *See supra* Part I (discussing the CBC *Spark* incident).

209. There are several models of public radio funding: direct governmental funding, license fees that are tied to radio (or television) sets being purchased (these two are the popular funding scheme in Europe), funding by selling advertisements (this, along with some governmental funding is the Canadian model), or fundraising (as is in the United States). *See MICHAEL McCUALEY, NPR: THE TRIALS AND TRIUMPHS OF NATIONAL PUBLIC RADIO 4–5 (2005)* (explaining that NPR and other public radio formats in the United States receive funds from fundraising and the Federal Government); ROBERT ARMSTRONG, BROADCASTING POLICY IN CANADA 117–18 (2d ed. 2016) (explaining the basic purpose and definition of public radio); ALAN B. ALBARRAN & GREGORY G. PITTS, THE RADIO BROADCASTING INDUSTRY 134 (2000) (distinguishing “public radio” from other stations by purpose and band location).

210. *See Street, supra* note 138, at 10; *see also* Mission and Vision, NPR, <http://www.npr.org/about-npr/178659563/our-mission-and-vision> [<https://perma.cc/KD53-K9N5>] (declaring that “[t]he mission of NPR is to work in partnership with Member Stations to create a more informed public—one challenged and invigorated by a deeper understanding and appreciation of events, ideas and cultures”); Mission, Values and Public Purpose, BBC, <https://www.bbc.com/aboutthebbc/governance/mission> [<https://perma.cc/K6YM-AHPA>] (emphasizing the purpose is “to act in the public interest, serving all audiences through the provision of impartial, high-quality and distinctive output and services which inform, educate and entertain”); Mandate, CANADIAN BROAD. CORP., <https://www.cbc.radio-canada.ca/en/vision/mandate> [<https://perma.cc/2243-G79W>] (announcing the vision is to “be predominantly and distinctively Canadian” and to “provide radio and television services incorporating a wide range of programming that informs, enlightens and entertains”); *see Street, supra* note 138, at 10.

211. ARMSTRONG, *supra* note 209, at 117.

Compared to commercial radio, public radio programming contains substantially more narrated content as well as more in-house produced content. The narrated content includes more high-investment scripted shows (such as documentaries and radio drama) rather than low-investment ad-libbed talk radio that often characterizes commercial radio.²¹² These patterns are found both in overall airtime and in prime-time broadcast.²¹³ Many of the popular formats of radio's golden age that are currently rarely found on commercial radio, survived, and are even flourishing, on public radio.²¹⁴

Approximately 35% of the content broadcast in public radio in the United States is narrated,²¹⁵ whereas in commercial radio narrated content amounts to substantially lower figures, likely around 15%.²¹⁶ Narrated content in public and in commercial radio also tends to differ in its character: narrated content in commercial radio tends to be ad-libbed talk shows, whereas in public radio there tends to be more in-depth, high-investment and content-rich programs, such as investigative journalism, documentaries, in-depth news analysis, etc.²¹⁷ Narrated programs on public radio have been revered for their thoroughness of coverage and breadth of subjects in a way that “[n]o commercial network comes close to replicating.”²¹⁸

212. RON RODRIGUES ET AL., ARBITRON, PUBLIC RADIO TODAY 2013: HOW AMERICA LISTENS TO RADIO 6 (2013), [hereinafter PUBLIC RADIO TODAY] http://www.arbitron.com/downloads/PublicRadioToday2013_ExecutiveSummary.pdf [<https://perma.cc/5MLS-7JKM>].

213. *Id.* at 4–5.

214. See RON RODRIGUES ET AL., ARBITRON, RADIO TODAY: 2013 HOW AMERICA LISTENS TO RADIO 2, 6 (2013), [hereinafter RADIO TODAY] http://www.arbitron.com/downloads/Radio_Today_2013_execsum.pdf [<https://perma.cc/3JUE-T7QH>].

215. Figures are taken from Arbitron's dual *Public Radio Today 2013 How America Listens to Radio* reports and from the Nielson Total Audience Report. These, to the best of our knowledge, represent the latest publicly available figures. Moreover, when it comes to actual listenership (“audience share among all Public Radio listening”), the numbers are even more striking: narrated content (categorized as “News/Talk/Information”) amount to 51.7% of total listenership. See RODRIGUES ET AL., PUBLIC RADIO TODAY, *supra* note 2, at 6.

216. See RODRIGUES ET AL., RADIO TODAY, *supra* note 214, at 6; RODRIGUES ET AL., PUBLIC RADIO TODAY, *supra* note 212; see also Audley & Boyer, *supra* note 33, at 43–45 (calculating that during off peak times news accounts for approximately 19% of content, while during peak it can be as low as 8%).

217. See, e.g., ALBARRAN & PITTS, *supra* note 209, at 147.

218. See KEITH, *supra* note 81, at 15; see also ALBARRAN & PITTS, *supra* note 209, at 147.

In addition, commercial radio stations' narrated shows tend to be syndicated out-sourced programs, while public radio stations produce considerably more in house.²¹⁹ Moreover, in the United States, even when public radio broadcasts syndicate out-sourced programs, significant segments are left for local stations to fill with in-house content: NPR, for example, intentionally leaves large segments in its popular *Morning Edition* program for local stations' self-produced content.²²⁰ Many public radio broadcasters also support their own orchestras, and may support and broadcast local concerts and even town hall meetings on public affairs.²²¹

Public radio in the United States enjoys substantial listenership and high ratings, with an average of twenty-eight million Americans tuning in to NPR weekly, and a constant growth in donations and giving, revenue, broadcast reach, and investment in content.²²² In 2018, for example, NPR enjoyed the highest rating in its history.²²³ NPR's narrated programs *The Morning Edition* and *All Things Considered* enjoy a high weekly listenership in the United States, and are the two highest-ranking narrated programs in the country with over 14.5 million weekly

219. See Monroe Price & Marc Raboy, *Public Service Broadcasting in Transition: A Documentary Reader*, OTHER PUBL'NS FROM THE CTR. FOR GLOB. COMM'C'N STUD. Nov. 2011, at 23, https://repository.upenn.edu/cgi/viewcontent.cgi?article=1020&context=cgcs_publications [https://perma.cc/2WZK-EXNQ]; RALPH ENGELMAN, PUBLIC RADIO AND TELEVISION IN AMERICA: A POLITICAL HISTORY 23 (1996) (explaining that the need to maximize audiences and advertising revenue drove commercial stations toward syndication and the creation of networks).

220. *About Morning Edition*, NPR (Aug. 12, 2009, 2:57 PM), <http://www.npr.org/templates/story/story.php?storyId=5003> [https://perma.cc/EQ6N-S5FM].

221. KEITH, *supra* note 81, at 15. Moreover, public radio also has an important role in cultural participation. Public radio broadcasts certain musical contents that otherwise would not reach all publics. Berry and Waldfogel, for example, demonstrate that in the absence of public broadcasting, persons living outside the largest markets would receive very little classical music or jazz programming. See Steven Berry & Joel Waldfogel, *Public Radio in the United States: Does it Correct Market Failures or Cannibalize Commercial Stations*, 71 J. PUB. ECON. 189, 208 (1999). We do acknowledge that some, if not most, of this content is possibly pre-recorded (but that is beside the point).

222. See *Public Broadcasting Fact Sheet*, PEW RSCH. CTR. (June 29, 2021), <https://www.pewresearch.org/journalism/fact-sheet/public-broadcasting> [https://perma.cc/U8UW-LP92] (illustrating the consistent growth in revenue and content investment over the past three years for the top 123 news casting public radio licensees).

223. Press Release, NPR, *supra* note 159.

listeners each.²²⁴ Similarly, in Canada, CBC Radio One has the highest tuning share (15%) of all English-language market formats (while adult contemporary is the second most popular format with 11% tuning share). In the Canadian French-language market formats, ICI Radio-Canada Première has the second highest tuning share (19%) (while adult contemporary is the most popular format with 29% tuning share).²²⁵

Why is the cultural product produced by public broadcasters different from that of commercial broadcasters? One answer rests in simple economics. Commercial radio stations are for-profit businesses and depend on advertising as their primary revenue source.²²⁶ Since their profit depends on the difference between their ad revenue and the cost of production, they face a strong incentive, as we explain in Part II, to play as much music under the blanket license as possible.

By contrast, public broadcasters do not rely on advertising revenue at all or to the same extent.²²⁷ Although their funding may depend on the size of their audience (e.g., because it may be easier to maintain or increase public funding if the size of the audience is large or increasing than it is if it is small and decreasing, or it may be easier to get greater listener contributions from a larger pool of listeners, etc.), the willingness of those funders may also depend on the quality of

224. *Id.*; see also ALBARRAN & PITTS, *supra* note 209, at 147 (applauding the longevity and success of both *All Things Considered* and *Morning Edition* with radio listeners).

225. *CRTC Future Programming*, *supra* note 7, at 144–45 (2019). The public broadcaster’s dedicated music channels, CBC Radio 2 and ICI Musique, enjoy tuning shares of 3% and 5% respectively. *Id.*

226. *Id.*

227. For example, CBC’s radio programming is funded mostly by the federal government and is not permitted carrying advertising except for programs that are available to networks only on a sponsored basis. See *TV and Radio Advertising Basics*, CAN. RADIO-TELEVISION & TELECOMM. COMM’N (Nov. 19, 2020), <https://crtc.gc.ca/eng/television/publicit/publicit.htm>. NPR stations’ funding comes from several sources, including listener contributions, corporate sponsorship, in-kind and direct support from universities (for those licensed to a college or university), foundation grants and major gifts, grants from the Federally funded Corporation for Public Broadcasting, and in some cases, state and local governments. However, NPR itself is funded by membership fees paid by its stations plus corporate sponsors. Other sources of revenue include institutional grants, individual contributions, and fees paid by users of the Public Radio Satellite System. See *Public Radio Finances*, NPR, <https://www.npr.org/about-npr/178660742/public-radio-finances> [<https://perma.cc/B5M5-G778>].

programming and whether they consider the content appealing. Also, the mandate of public radio may often require it to broadcast the type of content that may not necessarily attract the highest number of listeners.

This funding structure attenuates the distorting impact of the blanket license on the choice between *Music* and *Other Content*. While the zero marginal cost of *Music* implies that playing another song is, from a net revenue perspective, preferable to playing other equally attractive content, maximizing net revenue is not the public broadcaster's goal. This is not to suggest that public broadcasters do not respond to cost-minimizing incentives, nor do we argue that the difference in the programming between public and commercial radio results solely from how they respond to the blanket license's incentive to maximize the broadcasting of pre-recorded music. Indeed, public broadcasters may have both internal incentives (e.g., mission orientation) and external ones (e.g., better pitches to donors) to differentiate their content from that of commercial broadcasters and might have differentiated their content even in a world without blanket licenses. However, the incentive that public broadcasters face to maximize *Music* and minimize *Other Content* is weaker compared to commercial broadcasters. Commercial broadcasters face a double disincentive to substitute *Other Content* for *Music*: first, because such substitution will not result in lower license fees for the blanket license, and second, because even if such substitution results in higher quality programming and hence greater revenue, the CMO will get a cut of that increased revenue. By contrast, public broadcasters do not pay a revenue-based license fee and therefore are affected only by the first disincentive but not the second.²²⁸ Not facing this dual disincentive allows public broadcasters to air content that might not otherwise find a place on airwaves entirely dominated by revenue maximization.

IV. POSSIBLE LICENSING MODELS FOR THE BROADCAST OF MUSIC

The current structure of blanket licensing of copyright musical works by CMOs distorts cultural production in radio broadcast. In this

228. In Canada, for example, CBC pays a fixed-sum monthly license fee. See Canadian Broadcasting Corporation Radio Tariff; 154 C. Gaz. 202, 46 (Can.), <https://decisions.cb-cda.gc.ca/cb-cda/certified-homologues/en/item/488274/index.do>.

Part, we inquire whether there might be alternative models that can alleviate the negative impacts of blanket licensing, at least in part. First, we consider some alternatives to the current model of CMOs providing blanket licenses. Second, we challenge the entrenched assumption that collective administration and all-you-can-eat blanket licensing must go hand in hand. Third, we demonstrate some of the distortion caused by the blanket-licensing model can be alleviated even if collective licensing by CMOs is maintained.

Most of the literature on CMOs and their blanket licenses tends to focus on a trade-off between lower transaction costs and monopoly market power. On the one hand, CMOs offer the convenience and the economies of scale in obtaining licenses, collecting license fees, monitoring compliance with license terms, and enforcement against infringers. On the other hand, collective administration of copyrights eliminates price competition between copyright owners, resulting in the concentration of market power in the hands of monopolistic CMOs and the potential abuse of such power.²²⁹ The conventional wisdom that underlies the common regulatory approach to collective administration of copyright seeks to optimize this trade-off by permitting such competition-reducing practice while limiting the CMO's ability to exercise the resulting market power and dictate supra-competitive prices.²³⁰ The CMO's market power is mitigated by imposing on it a duty to grant licenses and charge only "reasonable" or "fair and equitable" fees, which ideally, would approximate, as Canada's Copyright Act now states explicitly, "what would have been agreed upon between a willing buyer and a willing seller acting in a

229. Besen et al., *supra* note 11, at 338 (asserting that the prohibitive costs of administrating copyrights on an individual basis means that natural monopolies are likely to form); Glynn Lunney, *Copyright Collectives and Collecting Societies: The United States Experience*, in COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS 311–45 (Daniel J Gervais ed., 2006); Handke & Towse, *supra* note 21, at 939–40; *see, e.g.*, Katz, *Rethinking*, *supra* note 11, at 543 (explaining the natural monopoly phenomena and the competing perspectives for and against the monopolistic nature of music).

230. York Univ. v. Can. Copyright Licensing Agency, 2020 FCA 77, 95 (2020); *see also* Brit. Broad. Corp. v. Mech.-Copyright Prot. Soc'y Ltd., 2018 EWHC 2931 (CH), 86 (2018) ("It is common ground that the policy behind the establishment of the [Performing Rights Tribunal] and its transformation into the Copyright Tribunal was to curb the monopoly power of the collecting societies.").

competitive market with all relevant information, at arm's length and free of external constraints."²³¹

As effective as this regulatory paradigm may be to curb monopoly pricing, it is ineffective in addressing the harms we identify in this Article: even a perfectly regulated fee for the blanket license, calculated to match the sum of the amounts that a radio station would have paid to copyright owners offering licenses in competition with each other, would not remedy the exclusionary impact of the blanket license on *Other Content*. Accordingly, the present regulatory response to the competition policy dilemma that CMOs pose may help reduce transfer of wealth from broadcasters to the CMO, but it does not remedy the exclusionary harm that the current licensing practices inflict on creators of *Other Content*, and it does not relieve the harm to listeners who are deprived of content that would otherwise be broadcast to them in a more competitive licensing environment.

The additional harms that we identify in this Article justify, in our opinion, a re-evaluation of the conventional wisdom that informs the present regulatory paradigm and a serious consideration of whether the benefits of collective administration outweigh the various social costs. If collective administration were the only practical way to administer the performing rights of music (in the sense that the transaction costs involved in any alternative are prohibitive), then, so long as legislators decided to grant performing rights, the various costs might be regarded as unavoidable.²³² However, as one of us has previously noted, it is far from clear that competitive licensing alternatives would necessarily require prohibitively high transaction costs in all cases.²³³ In fact, commercial radio would appear to provide

231. Copyright Act, R.S.C. 1985, c C-42 (Can.).

232. Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 19 (1979) ("Although the copyright laws confer no rights on copyright owners to fix prices among themselves or otherwise to violate the antitrust laws, we would not expect that any market arrangements reasonably necessary to effectuate the rights that are granted would be deemed a per se violation of the Sherman Act. Otherwise, the commerce anticipated by the Copyright Act and protected against restraint by the Sherman Act would not exist at all or would exist only as a pale reminder of what Congress envisioned.").

233. See, e.g., Ariel Katz, *Copyright Collectives: Good Solution But for Which Problem?* in WORKING WITHIN THE BOUNDARIES OF INTELLECTUAL PROPERTY: INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY 19 (Harry First, Rochelle C. Dreyfuss, & Diane L. Zimmerman eds., 2009), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1416798

a good example of an industry where competitive alternatives could be easily envisaged.

Indeed, even back in 1979, immediately after exalting the benefits of collective licensing and the blanket license, the U.S. Supreme Court noted, with respect to radio and television networks, that “the necessity for and advantages of a blanket license for those users may be far less obvious than is the case when the potential users are individual television or radio stations, or the thousands of other individuals and organizations performing copyrighted compositions in public.”²³⁴ The Court further noted, in a prescient footnote, that “of course changes brought about by new technology or new marketing techniques might also undercut the justification for the practice.”²³⁵

Such new technologies and business models already exist. In 2010, the Copyright Board of Canada found that radio stations rely on third-party Media Delivery Systems (MDS) to obtain new releases of music and that 85% of the then-surveyed stations use the Digital Media Delivery System (DMDS) offered by Yangaroo, Inc.²³⁶ The Board’s description portrays a service that resembles iTunes but with features designed to satisfy the needs of content owners and broadcasters.²³⁷ According to the Board, record labels, their agents, and some

(explaining that the presence of prohibitive transaction costs are not reason enough to prefer CMOs as the sole solution to the issue of licensing and copyright protection); Katz, *Rethinking*, *supra* note 11, at 572 (arguing that if alternatives to blanket licensing were available, broadcasters would not necessarily lose money and that current licensing regimes are not inherently required); Katz, *New Technologies*, *supra* note 20, at 246 (2006) (noting that technological developments have begun to undermine the reasoning behind the monopolistic control over licensing usually justified by prohibitive costs); Ariel Katz, *Commentary: Is Collective Administration of Copyrights Justified by the Economic Literature?*, in COMPETITION POLICY AND INTELLECTUAL PROPERTY 466 (Marcel Boyer, Michael Trebilcock & David Vaver eds., 2009), <https://tspace.library.utoronto.ca/bitstream/1807/89454/1/Katz%20Commentary%20Collective%20Administration.pdf> [<https://perma.cc/4GCZ-A749>] (arguing that a policy of exemption, for example, would be one way to prevent rising prohibitive costs as a result of alternatives to the natural monopoly paradigm).

234. *Broad. Music, Inc.*, 441 U.S. at 21.

235. *Id.* at 21 n.34.

236. SOCAN, *Re:Sound, CMRRA-SODRAC Inc., AVLA-SOPROQ, Artisti - Tariff for Commercial Radio, 2008–2012*, [2010] Copyright Board para. 59 (Can.) [hereinafter SOCAN], <https://decisions.cb-cda.gc.ca/cb-cda/decisions/en/item/366711/index.do>.

237. *Id.* para. 60.

independent artists use the DMDS to deliver their materials to radio stations.²³⁸ When new content matches the radio station's music format, the station may be notified.²³⁹ The station can receive a stream for sampling the music and may download it in a broadcast-quality format, which it can then integrate into its own system.²⁴⁰ The files included are encrypted and therefore cannot be used unless the station is an authorized user, and they include watermarking that allows the DMDS operator to monitor the broadcaster's subsequent use of the file.²⁴¹

While Yangaroo's DMDS functions as an efficient intermediary between record labels, artists, and radio stations for delivering the content and monitoring its use, it apparently does not grant radio stations the licenses they need to broadcast it.²⁴² Those are administered collectively and overseen by the Copyright Board.²⁴³ However, it is hard to see why CMOs are necessary here. Since the record label that produces the song must have obtained a license from the songwriter to do that, and since it then uses the DMDS to deliver the recorded song to individual radio stations, a chain of license agreements beginning with the songwriter and ending with the broadcaster is clearly present. There is no convincing reason why that chain of license agreements cannot include the right to authorize the public performance of the song by the radio station. This makes the DMDS a perfect example of "changes brought about by new technology or new marketing techniques [that] might also undercut the justification for the practice [of collective administration]," which the U.S. Supreme Court envisaged in *Broadcast Music*.²⁴⁴

We recognize that even though the existence of new technologies and business models has weakened the theoretical basis for

238. *Id.* para. 61.

239. *Id.*

240. *Id.* para. 64.

241. *Id.* para. 65, 67.

242. *See id.* para. 151–52, 156, 158 (explaining that while a contractual relationship existed regarding the licensing of samples of music, DMDS did not have the authority to grant licenses directly to radio stations for the purpose of broadcasting).

243. *See id.* para. 166 (illustrating the Copyright Board's role in setting tariffs, making decisions on licensing, and acting as the authority for licensing and distribution of copyrighted material).

244. *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 21 (1979).

maintaining the current practices of collective administration of music in the context of commercial radio, the political economy of copyright may prevent or delay reforms that might seem justified and desirable. CMOs are not likely to volunteer to step down, copyright owners who presently benefit from the monopoly rents that CMOs distribute to them are not likely to embrace alternative models that could increase competition among them and between them and creators of *Other Content*, and legislators and competition regulators may not find the political muscle necessary to bring about such reforms. And even if they do, any transition from the existing models to more competitive ones would have to be gradual. Therefore, even if CMOs remain, we propose a few reforms that maintain collective administration but reduce some of the anticompetitive and content-distorting aspects of the existing licensing practices.

The first point that we would like to make is that in commercial radio broadcasting, collective administration, all-you-can-eat blanket licensing, and license fees calculated as a percentage of revenue, have become so entrenched that they are treated as one and the same—as if the one entails the others. This conflation tends to limit the range of regulatory responses that may be considered. However, it would be useful to note that collective administration does not necessarily entail a blanket license, and a blanket license does not necessarily entail all-you-can-eat pricing, and even all-you-can-eat licensing requires a percentage of revenue license fee. In the following sections we disaggregate these elements and suggest some modifications of the prevailing practices that could reduce some of their anticompetitive aspects.

A. *Collective Administration Without a Blanket License*

If, despite the technological changes described above, collective administration of copyrights still presents significant cost efficiencies that justify the continued existence of CMOs, many of those efficiencies may be realized without blanket licensing. The licensing practices with respect to copyrighted musical works in the production of visual media outputs (such as films, television shows, advertisements, video games, etc.) provide a strong example. Synchronization Licenses (licenses to use a certain composition in such productions), as well as Master Licenses (licenses to use a particular recording), are offered to users through several agencies, such as Harry Fox in the United

States,²⁴⁵ CMRRA in Canada,²⁴⁶ or newer competitors, such as Los Angeles-Montreal based Third Side Music.²⁴⁷ Not only do these agencies compete against one another, importantly for our purposes, they do not typically offer blanket licenses but licenses for individual works. Prices for licenses vary based on factors such as the intended use of the license and the popularity of the song in question. This creates competition between different songs, reflects the market value of specific works, and encourages the use of cover versions, original scores, and public domain music, thus fostering varied cultural production. The existence of these agencies and their roles demonstrate that many of the cost benefits of collective administration may be achieved without the blanket license.

B. A Blanket License with Pay-Per-Use Pricing

If the blanket license is retained, pay-per-use pricing, instead of license fees based as a percentage of a broadcaster's revenue, can ameliorate the exclusionary impact of the current practice. Recall that under the common present licensing model, radio stations cannot realize any cost savings by substituting *Other Content* for *Music*. And the use of *Other Content* is further discouraged because even if *Other Content* might increase the station's revenue, a percentage of that additional revenue would be shared with the music CMO. By contrast, a pay-per-use pricing model would mean that a radio station could choose to broadcast more *Other Content* and less *Music*, reducing its spending on music and increasing its spending on *Other Content*.²⁴⁸

245. HARRY FOX AGENCY, <https://www.harryfox.com> [<https://perma.cc/VE95-PU5W>].

246. CANADIAN MUSICAL REPROD. RTS. AGENCY, <https://www.cmrra.ca> [<https://perma.cc/Y4KJ-LTSK>].

247. THIRD SIDE MUSIC, <http://www.thirdsidemusic.com> [<https://perma.cc/Z8XY-HKMS>].

248. It should be noted that CMOs, particularly ASCAP, currently offer a "per program" license, in accordance with the consent decree between ASCAP and the Department of Justice. A per program license is similar to the blanket license because it authorizes broadcasters to use all music in the repertory. The fee will vary depending on the specific program and how much CMO-licensed music is broadcast. This could be a solution for a broadcaster whose discrete programming does not require licensing from the CMO (because the programs have no CMO music or all CMO music performed has been licensed directly). The consent decree attempts to ensure that a per program license is not disproportionately more expensive than a regular blanket

A pay-per-use pricing model means that the marginal cost of playing another song is positive, rather than zero, which in turn, reduces the incentive to maximize the use of *Music* under the blanket license and the resulting distortion in the creative choices of the radio station. Pay-per-use pricing may not directly mitigate the CMO's market power over music because the price-per-song, when determined by the CMO, may still reflect the lack of competition among the CMO's members. However, because pay-per-use allows the broadcaster to realize cost savings by substituting *Other Content* for music, it opens a source of potential competitive pressure on the per-use price that the CMO can charge. The higher the per-use price for *Music* is the greater the broadcaster's motivation to use *Other Content* becomes. Accordingly, a pay per-use pricing scheme will reduce the exclusionary effect of the current licensing model.

C. All-You-Can-Eat Blanket License with a Fixed, Yet Adjustable, Fee

The third alternative to the current pricing model retains the all-you-can-eat blanket license but sets a fixed-license fee, as opposed to a revenue-based fee. This is, for example, the pricing model used in Canada by the CBC, the public broadcaster. With a fixed fee, the marginal cost of broadcasting another song is still zero and hence it does not eliminate the incentive to maximize the use of *Music* and reduce the use of *Other Content*. However, a fixed fee avoids the additional distortion that exists when the CMO is entitled to a share of the revenue resulting from a radio station's decision to increase its revenue by broadcasting high quality.

Making the fixed fee adjustable could improve this model, as an increase in the broadcast time of *Other Content* will reduce the fees paid for *Music*.

license. See Second Amended Final Judgment at 2–4, 9, United States v. Am. Soc'y of Composers, Authors, & Publishers, No. 41-1395 (S.D.N.Y. June 11, 2001), 2001 WL 1589999 (defining various licensing terms used in ASCAP's consent decree and ordering ASCAP to offer broadcasters per-program licenses upon request). However, it should be noted that the per-program license is not the same as the pay per-use model suggested here, and it provides only a limited potential for cost savings. Furthermore, to take advantage of it, the broadcaster must be able to confine its use of ASCAP music to specific programs.

CONCLUSION

This Article employed an economic analysis of blanket all-you-can-eat licenses to examine the effect of the dominant blanket-licensing model for the broadcast of music on the radio, and in doing so it demonstrated that the practice has negatively impacted the production of cultural content in radio broadcast. Blanket all-you-can-eat licenses set the marginal price paid for the broadcast of each additional song (after the first) at zero, creating an economic incentive for broadcasters to use as much of the material that is included in the license as possible, thereby discouraging the use of other content. Consequently, radio broadcasters prefer pre-recorded music over any content that is not included in the blanket license. This includes not only narrated shows but even music that does not require payment such as public domain or music available under a Creative Commons license. We suggest that this understanding of the economics of CMO administered blanket all-you-can-eat licenses provides a novel law and economics explanation to two trends in radio: the historical changes that radio experienced in the 1950s, and the differences in content between present-day public and commercial radio.

Most economic analyses of the collective administration of copyrighted works tend to focus on harms resulting from supra-competitive prices as a consequence of collective administration. Our analysis demonstrates that in the case of music broadcast in radio, collective administration also causes distortions in the kind of content produced and broadcast. In addition, our analysis reveals that while collective administration might benefit one class of copyright owners, it does so at the expense of creators of other types of content.

Collective administration of copyright musical works has been around for a century. It is so entrenched that it is sometimes seen as the only feasible option for licensing musical works for radio broadcast. Moreover, blanket all-you-can-eat licenses are often perceived as synonymous with collective administration, a “take it or leave it” bundle. But we show that that is not the case. Contrary to common conventions, we show that there are various options for the administration of copyright musical works. Copyright musical works can be administered by collectives, by the record labels, or by the right-holders themselves. Furthermore, pre-recorded music can be offered on an all-you-can-eat or pay-per-use basis. Even if we maintain the view

that collective administration is the only viable option for administering the performing rights in musical works, if we stop perceiving collective administration as necessarily intertwined with all-you-can-eat blanket licenses, we might be able to find new models for licensing musical works for radio broadcast that alleviate harms associated with blanket licensing and increase varied cultural production and participation.