EXHIBIT 13

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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BUFFALO BROADCASTING COMPANY, INC., et al.,

Plaintiffs,

-against-

AMERICAN SOCIETY OF COMPOSERS, AUTHORS and PUBLISHERS, et al., and BROADCAST MUSIC, INC., et al.,

Defendants.

- -x

78 Civ. 5670

MEMORANDUM DECISION

GAGLIARDI, D.J.

The five named plaintiffs in this action for treble damages and injunctive and declaratory relief due to alleged antitrust violations and copyright misuse have moved for class certification under Rule 23, Fed. R. Civ. P., of both plaintiff and defendant classes.

The named plaintiffs are five owners of seventeen local television stations. Plaintiffs purport to represent a class of all owners of local commercial television stations in the United States which obtain licenses to broadcast copyrighted musical compositions from the defendant organizations, American Society of Composers, Authors and Publishers ("ASCAP") and/or Broadcast Music, Inc. ("BMI"). The proposed class consists of approximately 400 owners of more than 700 local television stations, excluding those stations owned and operated by one of the three national television networks, and including stations either "affiliated" with one of the net-

works (that is, stations which receive a substantial portion of their programming from the networks) or independent of any network affiliation.

The named defendants include ASCAP, the President and six members of ASCAP, BMI, and six affiliates of BMI. Defendant ASCAP is an unincorporated membership association engaged in the business of licensing performance rights in the copyrighted musical compositions of its members. ASCAP's members - one of the proposed defendant classes - include more than 16,000 music composers and more than 6,000 music publishers who have granted ASCAP the right to license to third parties the performance rights for over three million musical compositions. Defendant BMI is a New York corporation similarly involved in the licensing of performance rights in the copyrighted musical compositions of its affiliates. BMI's affiliates - also a proposed defendant class - include more than 33,000 music composers and more than 16,000 music publishers who have granted BMI the right to license performance rights for over one million musical compositions.

Plaintiffs challenge the legality under the antitrust laws of the "blanket" licenses which are offered by ASCAP and BMI and accepted by virtually all local television stations.[1] The blanket license entitles a television station to performance rights in any or all of the musical compositions in the repertory of either ASCAP or BMI, in return for a fixed percentage of the revenues derived by that station from all non-network programming. Or, as plaintiffs would state

the matter, the blanket license requires that the station obtain and pay for performance rights in the entire ASCAP or BMI repertory regardless of which compositions are actually needed, desired or used. Plaintiffs allege that these blanket licenses have the purpose and effect of restraining price competition among ASCAP members and BMI affiliates in the conferral of television performance licenses in violation of Section 1 of the Sherman Act.[2] Plaintiffs also contend that the blanket licenses constitute tying arrangements unlawful under Section 1, and that ASCAP and BMI have monopolized the market for the licensing of performance rights in copyrighted musical compositions to local television stations in violation of Section 2 of the Sherman Act.[3]

Plaintiffs further allege that defendants have artificially and unlawfully "split" the licensing of synchronization rights in the copyrighted compositions from the licensing of performance rights in those compositions. Summarizing for the purposes of the instant motion, "splitting" occurs according to plaintiffs as follows. When a television program is produced, the producer engages in negotiations with individual ASCAP members or BMI affiliates, or their agents, in order to obtain synchronization rights[4] for the musical compositions which the producer wishes to incorporate into his program's sound track. Synchronization licenses are usually conferred on a per composition basis, at a flat dollar fee, and are unlimited with respect to that particular program -- allowing that composition to be re-used without additional charge. Per-

formance rights to those musical compositions, however, are usually not bargained for between the producer and the copyright holder, and that practice is the gist of plaintiffs' complaint.

Local television stations use copyrighted musical compositions almost exclusively on pre-recorded programs which have completed their network runs, such pre-recorded programs comprising the predominant portion of local television broadcasting. When syndicators, who apparently obtain licensing rights from the original producers, offer these programs to local stations, the syndicators possess only synchronization rights, not performance rights. Thus, the television stations are required to procure blanket performance licenses from ASCAP and BMI. Moreover, as plaintiffs allege, even in the event a producer obtained both synchronization and performance rights from a copyright holder (a procedure termed licensing "at the source"), the local television station would still be required under its license to pay royalties on that program to ASCAP and BMI, thus removing any incentive the producer might have to obtain licenses "at the source" for the benefit of the local television stations. Plaintiffs also assert that producers have acquiesced in these allegedly anti-competitive practices because of the financial interests maintained by many producers in music publishing companies which are members of ASCAP or affiliates of BMI.

Plaintiffs claim that the exclusive use of blanket licenses eliminates competition among ASCAP members and BMI

affiliates in the licensing of musical compositions and precludes any meaningful negotiations between program producers and copyright holders over such licenses. Further, the practice of splitting the licensing of synchronization and performance rights creates, according to plaintiffs, an artificial need for blanket licenses. Without the need to obtain licenses for pre-recorded programs, plaintiffs argue, the stations would need licenses only for the minimal music contained in locally-produced programming, obviating the need for blanket licenses.

Plaintiffs seek to act as representatives of a class which they define as all owners of local television stations which obtain performance rights pursuant to music license agreements with defendant ASCAP and/or defendant BMI. Under Rule 23, an action may be maintained as a class action if it satisfies all of the prerequisites of Rule 23(a) as well as one of the three requirements of Rule 23(b). Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 163 (1974). The plaintiff class is hereby certified under Rule 23(b)(3).

Rule 23(a) sets forth four prerequisites to maintenance of a class action: numerosity; common questions of law or fact; typicality; and adequate representation. Plaintiffs meet these requirements.

Rule 23(a)(1) requires that the members of the class be so numerous as to render joinder impracticable. The requisite numerosity has been found present in classes ranging from 70 members, Korn v. Franchard Corp., 456 F.2d 1206, 1209 (2d

Cir. 1972), to 500 members. Elkind v. Liggett & Myers, Inc., 66 F.R.D. 36, 39 (S.D.N.Y. 1975). Courts will also consider the geographic dispersion of proposed class members. DeMarco v. Edens, 390 F.2d 836, 845 (2d Cir. 1968). In the instant case, the proposed class of over 400 owners of more than 700 local television stations spread across the United States is sufficiently numerous and geographically disparate as to render joinder impracticable.

Rule 23(a)(2) requires that there be questions of law or fact common to the class. The common thread among the members of the plaintiff class is that each is party to an identical blanket license agreement with ASCAP or BMI. The common issue asserted by plaintiffs is whether the members of the plaintiff class have suffered injury due to the allegedly anti-competitive blanket licensing and "splitting" practices of ASCAP and BMI. These common aspects satisfy the minimal requirements of 23(a)(2). Further consideration of the commonality of class issues may properly be postponed until the overlapping discussion, infra, of the more stringent 23(b)(3) requirement that "questions of law or fact common to the members of the class predominate over questions affecting only individual members." See 1 Newberg, Newberg on Class Actions §1032a (1977); 3B Moore's Federal Practice ¶23.06-1 (1980).

Rules 23(a)(3) and (a)(4) require that the claims of the named plaintiffs be typical of the class and that the named plaintiffs adequately represent the class. Defendants argue at length that these requirements are not satisfied -

that the interests of the representatives are adverse to those of the class, that the named plaintiffs are not financially committed to the lawsuit, that plaintiffs' counsel are violating ethical canons - but such arguments, though exhaustive, are unpersuasive. Where the proposed plaintiff class is diverse, the named plaintiffs are equally diverse, ranging from Metromedia, Inc., the largest independent broadcaster in the country and owner of seven local television stations, to Kid Broadcasting Corp., owner of a single television station located in Iowa. The court finds no basis for doubting either the commitment of the named plaintiffs to represent the proposed class or the adequacy of retained counsel.

Plaintiffs have requested class certification under 23(b)(1) or 23(b)(2), with subdivision (b)(3) as a fallback. Because the court is not convinced that all local television stations disfavor the blanket license system, the right of a class member to opt out under Rule 23(c)(2) must be preserved. Certification under subdivision (b)(1) or (b)(2) - which would bind all members of the approved plaintiff class to the res judicata effect of judgment in this lawsuit - is therefore denied.

For certification under subdivision (b)(3) the court must find that common issues predominate over individual ones and that a class action is superior to other methods of adjudicating the controversy. In opposition to plaintiffs' motion for class certification, defendants make three principal arguments, each attacking the notion that the plaintiff

class may appropriately be treated as a class. These arguments address the policies of Rule 23(b)(3), and discussion of defendants' contentions wil serve as discussion of the requirements of subdivision (b)(3).

First, defendants argue that plaintiffs purport to represent a class comprised of such divergent interests that class treatment is improper. The conflicts of interest asserted by defendants include, inter alia, the following: some local television stations own music publishers and/or program producers; approximately 610 local stations are network affiliated, while approximately 100 are independent; some stations rely heavily on programming involving copyrighted music, while others do not. The gravamen of these contentions is that not all members of the proposed plaintiff class appear equally, if at all, opposed to the blanket license system. Plaintiffs counter that over 400 television stations have contributed financial support to this litigation, and only 35 stations accepted BMI's 1978 offer to renew their blanket licenses.

In an antitrust action alleging monopoly and conspiracy in restraint of trade, where the central issue is whether defendants' practices are anticompetitive, potential conflicts among the plaintiffs and divergent views as to the proper remedy need not deter class certification.

> In anti-trust litigation, it is the existence of the conspiracy which is the central issue in the litigation and it is the restoration of competition which is the benefit derived from the litigation. Differences in view among the members of the class as to the appropriate remedy once a violation is established, are sec-

> ondary to the basic liability issue of establishing the existence of the conspiracy. Therefore, divergent views on the appropriate remedy, or even whether there should be a remedy, do not destroy the representative status of a particular plaintiff insofar as the central liability issue of conspiracy is concerned. If, during the course of the litigation, such divergent views on the appropriate remedy create a real, as distinguished from a theoretical, conflict in interest, then the court may divide the class into subclasses. However, such subdivision of the class should await the surfacing of the problem and need not be done while the case is still in its liability stage.

Jacobi v. Bache & Co., Inc., 16 F.R. Serv.2d 71, 74 (S.D.N.Y. 1971); see also Robertson v. National Basketball Ass'n., 389 F. Supp 867, 898-903 (S.D.N.Y. 1975), aff'd, 556 F.2d 682 (2d Cir. 1977).

A class of over 400 radio stations similarly challenging ASCAP's blanket licensing system was recently certified as a Rule 23(b)(2) class in Alton Rainbow Corp. v. ASCAP, No. 78 Civ. 352 (S.D.N.Y. Mar. 19, 1979). Defendants contend that that opinion is precedent for denying certification in the instant case, since the court expressly found that the relief sought would not void all blanket licenses, but would provide a choice among blanket per-program and per-use licenses. This argument, though, is unavailing. While the instant plaintiffs do seek a declaration voiding any use of blanket licenses, any relief granted would be that necessary to restore competition, and it is an idle exercise now to speculate what ultimate form a judgment would take. Furthermore, certification in Alton Rainbow, supra, was granted under

23(b)(2), not 23(b)(3), and while "[s]ubdivisions (b)(1) and (2) are keyed to the effect of the relief sought," it is well settled that subdivision (b)(3) "looks to the existence of a group defined by the dependence of the individual members on the determination of common issues [and] any relief ultimately granted may vary among the class members." 3B Moore's Federal Practice §23.45 [1] (1980).

Second, defendants contend that the decision of the Second Circuit in Columbia Broadcasting System v. ASCAP, 620 F.2d 930 (2d Cir. 1980), requires denial of class certification. In the CBS litigation, CBS challenged under the antitrust laws the blanket licensing system of ASCAP and BMI. The CBS complaint was initially dismissed by the District Court on the ground that CBS had not demonstrated that the blanket licensing system actually restrained trade and competition. CBS v. ASCAP, 400 F. Supp. 737 (S.D.N.Y. 1975). The Second Circuit reversed, finding the blanket licensing system to be price-fixing per se. CBS v. ASCAP, 562 F.2d 130 (2d Cir. 1977). The Supreme Court then reversed the Second Circuit and remanded for assessment of the blanket license under the rule of reason. BMI v. CBS, 441 U.S. 1 (1979). On remand, the Second Circuit affirmed the original District Court decision denying relief. CBS v. ASCAP, supra, 620 F.2d 930 (2d Cir. 1980).

The decisive issue in the Second Circuit's decision was the availability of feasible market alternatives to the blanket license. CBS v. ASCAP, supra, 620 F.2d at 935-36.

Defendants assert that the inquiry necessary in the instant case - whether there is for each plaintiff a realistic opportunity to obtain licensing at the source or any other non-blanket license - is an inquiry requiring individual determination, thus precluding class certification. The Court will not pre-empt discussion of the merits of this lawsuit by ruling now on the applicability to this litigation of the standard applied by the Second Circuit to the challenge by the network CBS of the blanket licensing system. Nevertheless, the Court notes briefly that CBS is one of the three national network giants, in contrast to the 400 owners of more than 700 local stations who seek to be plaintiffs in the instant case. The relation of CBS to the blanket licensing system differs not only due to CBS' size and status, but due also to CBS' practice of producing its own programs. That practice affords CBS more potential to license at the source, while the instant plaintiffs use predominantly syndicated programs that have completed their network runs and thus have no similar access to producers or copyright holders. The Second Circuit, moreover, expressly stated in its CBS decision that "[s]ince the parties are agreed that the relevant market is the licensing of performing rights to the television networks, we assume our consideration should be similarly confined to the blanket license as employed by the television networks." In a footnote the Second Circuit explicitly connected that limitation to the instant case, noting that "[t]he distinction [between network and non-network plaintiffs] may have significance, since the

lawfulness of the blanket license has also been challenged by non-network broadcasters." 620 F.2d at 934 & n.6. The rule announced by the Second Circuit in the CBS case, whatever its ultimate bearing on the merits of this case, will not prevent certification of the plaintiff class.

Third, defendants contend that class action is an inappropriate means of adjudicating plaintiffs' tying and monopoly claims. Plaintiffs' tying claim, stated simply, is that as a result of the blanket license system television stations are required to purchase rights to unwanted music (the tied product) in order to broadcast desired music (the tying product). Defendants assert that since proof of tying requires proof of individual coercion, see, e.g., Ungar v. Dunkin' Donuts of America, Inc., 531 F.2d 1211 (3d Cir.), cert. denied, 429 U.S. 823 (1976), class treatment is precluded. Where, however, the tying claim is founded upon express contractual provisions common to all members of the proposed plaintiff class, class certification is warranted. See Bogosian v. Gulf Oil Corp., 561 F.2d 434, 452 & n.12 (3d Cir. 1977), cert. denied, 434 U.S. 1086 (1978); Siegel v. Chicken Delight, Inc., 271 F. Supp. 722, 726 (N.D. Cal. 1967), modified sub nom., Chicken Delight, Inc. v. Harris, 412 F.2d 830 (9th Cir. 1969), on modification, 311 F. Supp. 847 (N.D. Cal. 1970), aff'd in part, rev'd in part, and remanded, 448 F.2d 43 (9th Cir. 1971), cert. denied, 405 U.S. 955 (1972). In the instant case, the blanket licenses to which all plaintiffs are party provide the common element, permitting class treatment

of the tying claim. Should proof of individual coercion subsequently appear necessary, certification of this claim may be vacated.

Defendants also assert that class treatment of the monopolization claim is inappropriate. The cases cited by defendants though, e.g., Windham v. American Brands, Inc., 565 F.2d 59, 66-69 (4th Cir. 1977), cert. denied, 435 U.S. 968 (1978); Chestnut Fleet Rentals, Inc v. Hertz Corp., 72 F.R.D. 541, 548-49 (E.D. Pa. 1976), are predicated more on the difficulty of deciphering damage claims than on the problems of adjudicating liability in a class action. Class certification will not be denied due to the difficulty of establishing damages. See Barr v. WUI/TAS, Inc., 66 F.R.D. 109, 115 (S.D.N.Y. 1975); City of Philadelphia v. American Oil Co., 53 F.R.D. 45, 67 (D. N.J. 1971). Defendants argue further that class treatment of the monopolization claim is improper because no common inquiry is possible given the numerous local markets among which the plaintiff class would necessarily be divided. See Chateau de Ville Productions, Inc. v. Samuel French, Inc., No. 76 Civ. 2926 (S.D.N.Y. Nov. 22, 1976). Plaintiffs have made very little showing regarding the appropriateness of class treatment for this monopolization claim; nevertheless, it would needlessly complicate matters to sever at this stage this single claim. Again, should class adjudication of the monopolization claim subsequently prove unmanageable, the Court will order that the claim be tried individually.

For the above reasons, the Court finds that a class action is the appropriate means for adjudicating this lawsuit.[5] A legally cognizable plaintiff class exists, despite differences among class members in size and status, despite defendants' allegations of disputes among the television stations, and despite defendants' assertions that many members of the proposed class are satisfied with the blanket license. Should the inevitable diversity in a class of over 700 television stations develop further and render adjudication unmanageable to any degree, sub-classes may be formed. Barr v. WUI/TAS Inc., 66 F.R.D. 109, 115 (S.D.N.Y. 1975).

Plaintiffs also seek certification of two defendant classes: the class of ASCAP members, consisting of all persons or entities from whom ASCAP has obtained the right to license music performance rights to third parties; and the class of BMI affiliates, consisting of all persons or entities from whom BMI has obtained the right to license performance rights to third parties. The identical defendant classes were certified by the District Court in the CBS case, supra, 400 F. Supp. at 741 n.2, and there is no reason to dwell at length on defendants' myriad objections to certification by this Court.

The prerequisites of Rule 23(a) are satisfied. There are more than 22,000 ASCAP members and more than 49,000 BMI affiliates, rendering joinder impracticable. The common elements among all defendants are that each has entered into similar agreements regarding performing rights with ASCAP or BMI and each has granted only synchronization rights to pro-

gram producers. The common questions include: whether the class members' agreements with ASCAP or BMI constitute conspiracies in violation of the antitrust laws, and whether those agreements constitute copyright misuse. There is no contention that the defenses of the representative parties are not typical of the class or that the named defendants will not adequately represent the class.

Adjudication in individual actions of plaintiffs' challenge of defendants' blanket license and "splitting" practices might as a practical matter substantially impair the ability of other members not parties to protect their interests. Thus, the requirements of Rule 23(b)(1) are satisfied.

Should plaintiffs' claims subsequently depart from the focal conspiracy-splitting claim and require individual determination on such matters as intent to monopolize or the existence of agreements among the thousands of members of the defendant classes, the Court will de-certify the defendant classes as to those issues.

The plaintiff and defendant classes are hereby certified. Before an order is entered, the required notice shall be given to members of the certified classes.

Submit order in accordance with this decision.

Lee P. Gagliardi

U.S.D.J.

Dated: New York, New York
December 5, 1980.