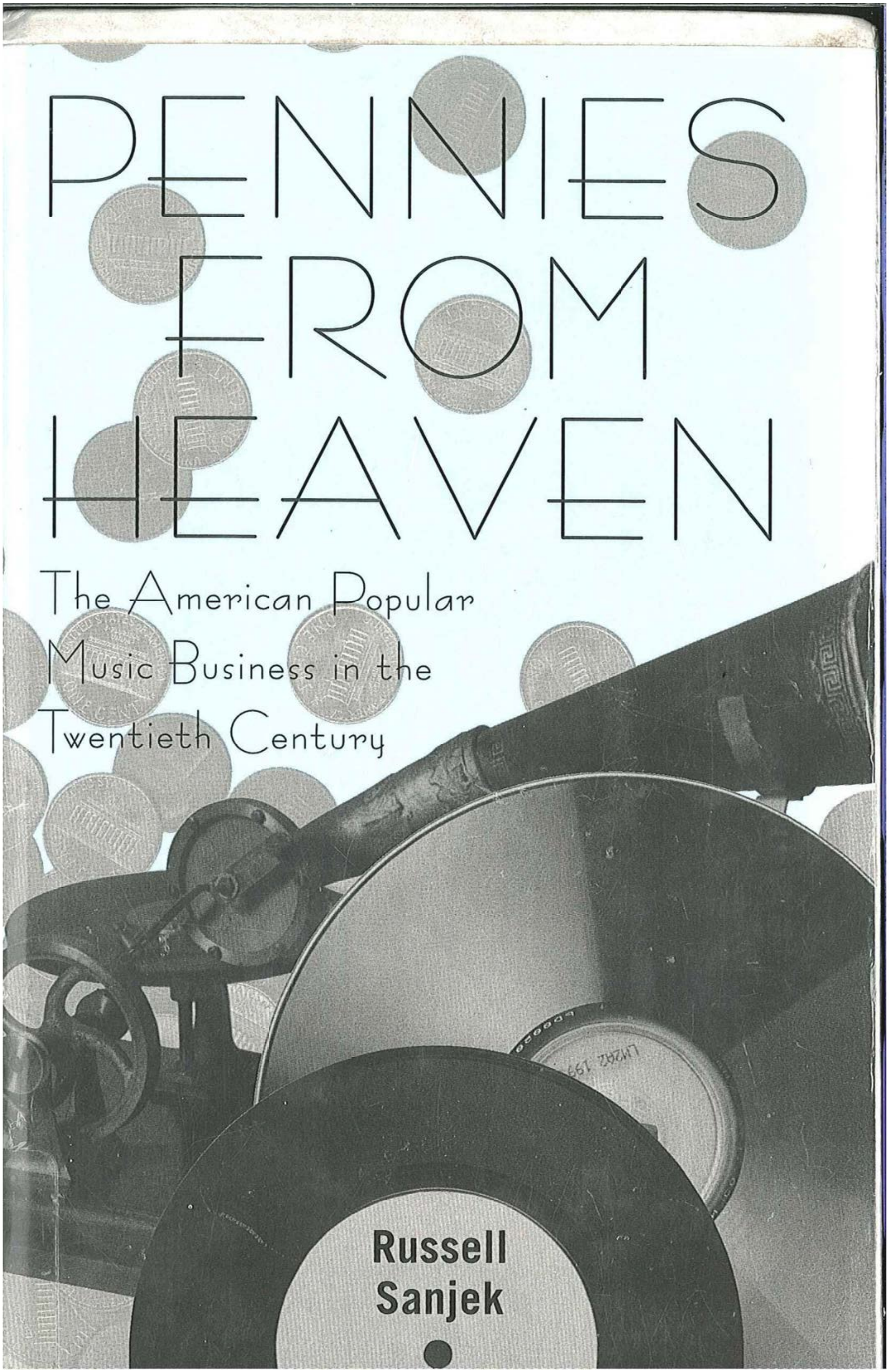
PENNIES FROM HEAVEN
The American Popular Music Business in the Twentieth Century
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Contents

CHAPTER 12

Popular Music and Radio

After a temporary early setback, the steady economic growth of radio broadcasting throughout the 1930s, and its increasing importance to show business, was paralleled by the quick advance of news about it from the back pages of *Variety,* chief chronicler of popular entertainment. In 1930, a few columns devoted to general industry news, gossip, and reviews of new programs followed such ephemera as "Foreign Show News," "Times Square Chatter," and "Literati," with only "Music," "Outdoors," and "Obituaries" after them. When the decade ended, "Pictures" and "Radio" shared the publication's front half and first page. These two major sources of Americans' favorite entertainment had much in common in seeking the widest audiences, who paid an average of twenty cents to see movies, but got radio programs without charge, though they were expected to spend a substantial portion of their income for products advertised on the air. Sensitive only to box-office figures and time-sales billings, they catered to the most homogenized tastes. Each placed much dependence on music to attract customers, and both were in frequent dispute with ASCAP. All three were under continual government scrutiny, but only radio, in theory and sometimes in fact, was under the supervision of a federal agency.

Picture returns went into four years of constant decline beginning in late 1930, whereas network income rose in 1931. NBC and CBS enjoyed a combined gross of $35.7 million that year. However, the industry's total expenses exceeded total income by $237,000, and half of all stations operated in the red, taking in an average of $3,000 from all sources.

Initially regarding network radio as only a temporary phenomenon, whose future was in doubt, major advertising agencies ventured into on-the-air advertising only at the insistence of clients who thought radio might be a better way to sell their products. Magazine advertising, which produced 15 to 20 percent commissions for space buyers, was still the major source of agency profit, and every effort was made to discourage the use of radio. This hesitancy produced the individual time broker and station representative, who purchased blocks of time and then dealt directly with sponsors. They were so successful that radio departments were formed by the advertising agencies in order to take advantage of the commissions offered by the networks on time charges, production costs, and talent.

At its start, when programing was on a hit-or-miss experimental basis, with audience mail the only measure of response, NBC created most of the nighttime shows it offered. Reacting to the new importance of radio to advertisers, the agencies began to take ever greater control of program content, holding over network officials' heads the alternative of electrically transcribed broadcasts, over which they already had full power. In 1931, all but three of the 702 stations in America were equipped with the Vitaphone–Western Electric turntables and amplifiers, capable of reproducing the standard sixteen-inch, 33⅓-speed disks. The holdouts were NBC's two New York flagships, WEAF and WJZ, and an affiliate in Rochester, New York. These followed the company's policy against the use of recorded sounds, either on transcriptions or on records made for use in the home.

Because of the time difference, "Amos 'n' Andy" and all other popular network programs were heard on the West Coast at 5:00 and 6:00 P.M., too early for the family audience. Two live broadcasts daily, with mounting relay charges, became too expensive, so programs were recorded for one-time use only in better time periods. With a choice between the entire national market at any time desired and those fewer than 100 stations connected in the chain operations, some sponsors opted for the cost-saving broader market offered by "radio disks." Many important clients, even RCA's own Victor Record company, chose transcriptions as the most effective medium to carry their messages. Seventy-five national sponsors went on the air with electrical transcriptions, an increase of 175 percent in a two-year period.

To remove the potential threat of dissolution by government action, General Electric and Westinghouse entered into a consent-decree settlement of the antitrust action against them, A T & T, and RCA. Their stock in RCA was disposed of, and all cross-licensing agreements among the four giants were voided. NBC and all its stations, the radio-connected manufacturing divisions, and other communication facilities were turned over to David Sarnoff's administration. Only RCA's control over the patents on radio tubes was found to be in violation of antitrust laws. Now free to concentrate on the realization of his dream to make radio the principal medium for home entertainment, Sarnoff directed the formation of West Coast NBC auxiliary networks and moved some national program production to San Francisco.

With almost complete rule over sponsored network programs, the advertising agencies, which found it in their best interest to respond to "what the public wants," instituted the use of surveys, charts, and graphs as the basis on which to build radio shows. Listeners were no longer satisfied with those once-reigning stars radio had created, so the agencies sought out the best-known names of Broadway and big-time vaudeville. George Burns and Gracie Allen were teamed with Guy Lombardo's orchestra, Eddie Cantor began a series of scripted comedy shows, and other headliners made the move from variety to the broadcast studio. In September 1932, Rudy Vallee moved the brightest stars of the Palace to his hour-long Fleischman's Yeast "Rudy Vallee Varieties" on NBC. Performers who did not care to be recorded on transcriptions became a part of the commercial advertising that was integrated into live programs. Products once peddled in sonorous tones, with copy written for the eye rather than the ear, became the butt of comedy stars. Dramatized commercials provided a new relief from monotony, and sales increased when network officials reluctantly permitted mention of product prices. Purveyors of food, drugs, toiletries, and tobacco, all of whose products sold for less than fifty cents, became the largest time buyers on network radio, spending $39 million in the 1932–33 season.

In the face of hard times for most independent broadcasters, the networks' prosperity had created dissension within the industry. It was exacerbated by the latest resolution of radio's decade-long war with ASCAP. Tin Pan Alley and the society were also plagued by the problems that faced all American business. Sheet-music profits and record royalties were seriously depressed, and music publishers and songwriters depended on their ASCAP distributions to survive. ASCAP had successfully thwarted the passage of an amendment to the Copyright Act that would have freed the use of musical works of any license fees. Armed with this and other court decisions in its favor, the society entered into negotiations with the National Association of Broadcasters for a new agreement, hoping to double or triple annual earnings over the $833,000 in sustaining fees paid by all broadcasters in 1931. A new document, tendered with NAB approval, called for a fixed fee on the use of music by individual stations on sustaining (commercial-free) programs, and three percent of receipts from time sales in 1933, with annual increments to five percent in the final year, 1935. Several deadlines for ratification by the industry were set and passed, while cries of "monopoly" were heard from broadcasters, and petitions were made to the government for dissolution of ASCAP.

A new antagonist entered the scene in the person of Oscar Schuette, who was retained by the NAB to coordinate negotiations with ASCAP and handle all government and public-relations aspects of the situation. He had been so effective in an earlier battle by independent radio-receiver manufacturers against RCA control of tube patents that the corporation itself recommended Schuette to the broadcasters' association. Schuette advocated and pursued a waiting policy, hoping to force more acceptable terms on ASCAP.

A second committee, assigned to negotiate the networks' contract, made up of a CBS and an NBC executive and an independent station manager to represent the affiliates, finally arrived at an agreement. It was quickly approved by the NAB and ASCAP and signed by the chains and most of their affiliated stations.

Public discussion of the independent stations' differences with ASCAP was barred by new NAB officials at the November 1932 annual convention. The dissidents were urged, for the time being, to accept the proffered licenses in order to avoid mass infringement suits. Oscar Schuette was appointed the director of copyright activities for the NAB and given a free rein in any action involving ASCAP. Convention proceedings were given over mostly to the issue of the amount, $8 and $10 million annually, paid to A T & T for line charges, 60 percent of it by the networks, and to the welter of legal, technical, and economic problems facing an industry threatened by the presence of a new president, Franklin Delano Roosevelt, thought by many to be antibroadcasters.

With the opening, in early 1933, of the RCA–Rockefeller family's $250-million Midtown New York real estate development, Rockefeller Center, built around the NBC headquarters and main studios, *Variety* moved its coverage of broadcasting up to a spot immediately ahead of "Vaudeville," which the radio chains had supplanted as a national institution. One of the front-page headlines soon after, NO DEPRESH FOR RADIO, was correct as far as the networks were concerned. Engaged in developing a mass medium for the nation, they had created the chief soapbox on which American business could make its honey-coated appeals to the broad base of consumers, 60 million listeners, among whom unemployment had risen to 25 percent of the work force. Eleven of the twelve top-rated radio shows advertised products made to sell for less than a dollar, and on the twelfth Al Jolson plugged the merits of General Motors' lowest-priced Chevrolet automobile.

The NAB's strategy in 1933 to effect relief from the music-trust monopoly was dedicated, almost entirely, to winning a per-program system of payment to copyright owners, which had been introduced by Claude Mills during discussions with broadcasters in the mid-1920s. With Schuette as its president, the Radio Program Foundation was activated, to demonstrate the viability of such a licensing process, as well as to build a source of tax-free music for radio, supplied by songwriters and composers not affiliated with ASCAP. One of the purposes outlined in the RPF's charter was to "own stock in, lend money to, and otherwise assist" independent publishers. Some music-publishing veterans of the 1923 NAB v. ASCAP music war took advantage of the offer—publishers in Chicago and New York and the prestigious former ASCAP member G. Ricordi of Milan (which was long represented in America by George Maxwell, the society's first president).

Schuette's enthusiasm and promises were not sufficient to produce a single hit song or earn enough performances of the RPF library, and the project died within the year for lack of support, only 10 percent of the NAB membership contributing.

The networks and large stations were simultaneously engaged in a struggle with American newspaper publishers for the right to broadcast "news." In its formative years, radio was regarded as a source of amusing items, but as sets in use increased, many papers began to carry daily program listings and radio columns, in return for which stations read from the daily papers, properly crediting the sources. Later, some installed wire-service tickers to provide a wider range of news. Declines in advertising revenue, coupled with radio's Election Day coverage of the Hoover-Roosevelt race for the presidency and the on-the-spot broadcasts reporting an attempt on the new president's life, which killed the afternoon extra editions, led many papers to remove all program logs except as paid advertising. The wire services, Associated Press, United Press, and International News Service, allowed only local independent stations to use their tickers, on a for-pay basis. NBC and CBS opened their own news-gathering departments, the latter on a more ambitious scale, employing local correspondents around the United States and gaining access to foreign news services. Fearful of losing even its ineffectual relations with the press, NBC was the first to capitulate to the publishers' demands; it reduced the activities of its news department, sweeping CBS along with it. A truce was arranged, and a Press-Radio Bureau was formed, with permission from the publishers' association, to be used only in connection with nonsponsored broadcasting. The networks' news departments were scrapped. When newspaper advertising revenues began to grow again, and more news publishers acquired their own broadcasting facilities, the constraints imposed on network news loosened, the tension decreased, and program listing returned to many newspapers. Except on the local level, however, news and commentary did not form an important aspect of broadcasting for several years. Some eight hours of news and commentary were regularly scheduled on the networks each week in 1934, doubling in 1940, but only after shortwave news broadcasts and the war in Europe attracted that 70 percent of all Americans who believed that radio news was more accurate than that in newspapers.

The NAB conventioneers were mainly not correct in their apprehension in November 1932 of President Roosevelt's view of broadcasting, mastery of which he immediately asserted with the first of his "fireside chats." Talking directly to the people about momentous events facing the nation, he continued to use the medium as his chief means of communication throughout the twelve years of his administration. In imprinting his own stamp on the government, he originally called for the creation of a single commission to regulate communication by telephone and broadcasting. The Federal Radio Commission, formed in 1927 as a temporary body, was seven years old and the good friend of broadcasters, affirming that relationship with the statement that "any plan to eliminate the use of radio facilities for commercial advertising purposes will, if adopted, destroy the present system of broadcasting." The declaration came in response to pleas from groups of educators and representatives of cultural organizations for the allocation of one fourth of all time on the air to nonprofit educational, religious, and other public-service broadcasts, which would truly represent the operation "in the public interest" called for in the commission's mandate. During public hearings conducted by the commission, radio shared with Hollywood clamorous attacks on their "creeping degeneracy," by the Legion of Decency and other church-associated organizations. The new Congress came up with a compromise bill, substantially duplicating the 1927 act but with a few minor provisions endorsed by the broadcasters. It became law on July 1, 1934, and the seven-man Federal Communications Commission replaced the FRC. The public-service protagonists were mollified by a requirement that the new commission study the allocation of fixed percentages of time to nonprofit groups. The FCC, like the former commission, was provided with a single restraint: the power to reject renewal applications after three years, on the basis of findings from public hearings. Broadcasters were already governed by two sets of regulations, their own NAB Code of Ethics and Practices, adopted in 1929, and the NRA Code, imposed by the federal government. Both dealt with many familiar trade abuses: manipulation of rate cards; monopolistic and discriminative practices; payment of gratuities for song plugging on the air; blue-sky claims. Both were abused by various elements in the business.

The firm hold of NBC and CBS on chain broadcasting was loosened in 1934 by the formation of several small networks. Eight-, ten-, and twelve-station hookups, involving major NBC affiliates, were formed to handle transcribed commercial programs and spot advertising on a cooperative basis; and MBS, the Mutual Broadcasting System, owned by the *Chicago Tribune,* was established. NBC addressed the challenge by introducing a station-relations department to deal with unhappy affiliates, added a music-library service to its electrical-transcription division, and went into the now important national spot-advertising business on behalf of its affiliates.

MBS remained a four-station network for two years—the *Tribune*'s local station, WGN; Macy's WOR in New York; and stations in Detroit and Cincinnati. In 1936, twenty-three stations in New England and ten in California were affiliated with it; the total was forty-five the next year. Mutual paid all stations their regular commercial rates, deducting only a small sales commission, advertising-agency fees, and wire charges. Programs were created by originating stations or by sponsors and their agencies, the network itself owning no studios or transmitting facilities. It was in fact no more than a business office with sales and station-relations representatives.

The ASCAP situation had taken second place to the newspaper-radio problem, but there was much activity behind the scenes and on a local level, where broadcasters in thirty states were instrumental in the introduction of legislation against music licensing. The NAB brought in a new attorney to handle the copyright situation, Newton D. Baker, Cabinet member in Wilson's administration and a powerful figure in Democratic Party circles. His connections were responsible for a Department of Justice investigation of ASCAP, the second major examination of the society since the mid-1920s, when it had been given a clean bill of health. It resulted in an antitrust suit against the society's officers, all its members, and other music-business organizations. Eleven pages of the complaint were devoted to a listing of the defendants' names. ASCAP filed an answer in late 1934. The NAB and its members were confident that a decision would be reached before September 1, 1935, when the current three-year contract was to expire.

Complaints by NBC and CBS affiliates about the excessive share of ASCAP royalties they were asked to pay and the meager compensation payments they received from the networks threatened to split the NAB at its next annual meeting. They were little mollified by announcements in January 1935 of new affiliation rates. NBC abandoned any charge for sustaining programs, for which it had been collecting $1,500 per station each month in return for several hours of free evening time. Compensation to affiliates was boosted on the basis of a sliding-scale percentage of time rates, increased to 25 percent by NBC and 22 percent by CBS. Under previous contracts, the networks had grossed $42 million in 1934, of which affiliates received less than half, and spot and local advertising garnered them an additional $30 million. Altogether, radio paid ASCAP approximately $850,000.

A number of events in 1935 added a new perspective to the use of music on radio, and to its future course as well: a new program rating service; George Washington Hill's determination to have his own way on his own radio programs; the resignation from ASCAP of the Warner Brothers' music businesses; and Martin Block's introduction of ''Make Believe Ballroom.''

Block's influence was not felt immediately. Only jukeboxes provided a truly varied fare of recorded music. That heard over most radio stations was a bland homogenization of Hollywood songs and those in the familiar Tin Pan Alley hit pattern, as well as the ever reliable music favored in the early days. The selection of popular music was left mostly to the orchestra leader or guest singing talent. Format music programing was anticipated only on Lucky Strike's ''Your Hit Parade,'' broadcast over the NBC Red Network on Saturdays, beginning in September 1935. It was the creation of the American Tobacco Company's flamboyant president, George Washington Hill, who was known for programs that were ''the noisiest on the air.'' Immortalized in the 1950s' novel *The Hucksters,* Hill was one of the first to enforce a formula, or music format, on orchestra leaders. His budget to advertise Luckies in 1931 was nearly $20 million, a sum of such significance to NBC that its executives mildly suffered his brash, boorish behavior and joined him at Saturday-morning rehearsals to test the "foxtrotability" of every selection programmed. *Variety,* in 1931, quoted from Hill's music formula:

> The program shall consist of songs that made Broadway Broadway. Not songs that are making Broadway Broadway, but the songs that made Broadway Broadway. People like to hear things their ears are attuned to, not new numbers. Songs that have so rung in the public ear that they mean something, recall something, start with a background of pleasant familiarity. Occasionally a new song may be used, but only when it has been presented first as a part of a Saturday program and is reviewed by the executive group at a Saturday dress rehearsal.
>
> Only the chorus of such songs shall be played. That is to say, the characteristically familiar melody content, not the introductory part. . . . There shall be no extravagant, bizarre, involved arrangements—"no pigs squealing under the fence." . . . The opening and closing numbers must be particularly stirring and rousing. Consideration must be given to contrasts particularly where the specialties are introduced. As they should constitute the soft element of the program, the numbers following must be particularly lively, and snappy. . . .

Variety, was not impressed with the premiere of "Your Hit Parade," doubting that Hill could capture a large audience with "an ordinary aggregation of musicians, [forty, under Lennie Hayton's direction] and warblers [five soloists and two vocal groups] and whip them into something extraordinary." As for the week's fifteen top hits, the paper declared: "If Lucky plans on playing 'em according to the actual standings it will have to do lots of repeating each week. They don't turn over in the music business that fast."

Program ratings, the measurement of listener preference and share of audience that determines program content on both radio and television today, advanced in 1935 from the "listener preference" letters of the twenties. The first of the twelve methods current in 1935 was the Crossley Report, which was introduced by the American statistician Archibald M. Crossley and adopted by the Cooperative Analysis of Broadcasters, an association of advertising agencies and national advertisers. Relying on a group of listeners' memories to determine which programs they had heard the previous day, Crossley used a telephone recall check. Coincidental telephone checking had been introduced by the Clark-Hooper Service, later Hooper Rating Reports, in 1934; the next year it became the official survey of the CAB. Experiments began in 1939 with the Nielsen Audimeter Survey—meters attached to radio sets that recorded the exact length of time various stations were tuned in. The A. C. Nielsen organization had developed the Audimeters to supplement survey methods employed in connection with its three-million-dollar business in statistical checking of food and drug inventories in retail outlets.

Until the broadcasting industry itself adopted other means, the networks operated on the principle that radio coverage could be measured like magazine circulation, and based all time rates on the 21 million sets in homes, a figure representing all the radio receivers believed to be in working order. The size of an audience for a network program was reckoned to be the accumulated number of sets within range of each participating station's transmitter. The result was that advertisers spent three fourths of their radio budgets on one third of all stations. Local rate cards employed the same measurement, and cutthroat competition among the stations within a market induced rate cutting and dissension. Newspaper publishers were quick to jump on the statistical inconsistencies in the networks' claims, followed by advertisers and their agencies, and the validity of radio's claim to be the better advertising medium was in serious jeopardy until it, too, based rates on quantitative studies.

The NAB convention in July 1935 set a new record for attendance; more than 400 broadcasters met to discuss the economic consequences of the networks' bombshell announcement of an extension of the five percent ASCAP rate for five years. The society had insisted on collection from owned-and-operated network stations on the basis of card rates, but compromised when NBC accepted an increase in the sustaining-fee payments from flagship stations in New York, from $15,000 to $25,000 a year beginning in 1936.

Many independents had been meeting with Claude Mills to discuss a change to "payment at the source" licensing of all network broadcasts, and they believed the society was ready to negotiate a new formula based on that principle. The government's antitrust suit had gone to trial, but was adjourned after nine days at the government's request. At that point, the assistant attorney general handling the case joined the NAB staff. Network representatives argued that the suit had been inadequately prepared and would probably be lost, in which event far more onerous terms would be demanded.

A complicating issue was Warner's announcement of its resignation from ASCAP. In the final days of 1935, NAB officials and members desperately negotiated for the improvement of a contract proposed by Warner, asking for 40 percent of the ASCAP sustaining rate and 2 percent of gross receipts. The latter figure was grudgingly reduced, but at the new year between 20 and 40 percent of the total ASCAP repertory, depending on whose statistics were accurate, was not available to most American radio stations. In the next six months, until the Warner catalogue was restored to ASCAP, most of the music of Gershwin, Rodgers and Hart, Herbert, Romberg, the songs from Warner's lavish musical film hits and those of many leading songwriters, Broadway composers, and lyricists were not heard on the air. More to the point, there was little complaint from listeners about the omission.

A more than coincidental factor in the film company's defection was Jack Warner's hope to diversify his holdings and acquire control of a third national radio network. When his offer to purchase the Mutual Broadcasting System, for more than one million dollars, was finally rejected in April 1936, plans were stepped up for the activation of Muzak-wired radio, to compete with network radio, once Interstate Commerce Commission permission was granted. Muzak already offered eighteen hours of commercial-free recorded music on three channels: dance and popular music; light classical; "better" instrumental and vocal, familiar standard, and palm-court music; and news broadcasts on the hour, interspersed with cultural and religious programs and symphonic music. Carried to subscribers on telephone wires, Muzak programs were recorded on celluloid Millertape, and the resulting wide-range high-fidelity sound was superior to any on radio. Sixty-five percent of all homes in Belgium and Holland were already wired for entertainment, and wired radio was spreading on the Continent and in England.

The first patented plan to provide music, news, and entertainment to that half of all American homes already wired for electricity had been proposed to the mammoth public-utilities holding company North American in 1922 by General George Owen Squier, chief army signal officer during World War I. His scheme to use electric-power lines to transmit programs directly into homes and offices was immediately acquired by North American, and a subsidiary was formed, Wired Radio. A license to ride piggyback on power lines was contained, and plans were shaped for a nationwide broadcasting network. Large-scale experiments and irregular local service were interrupted by the Depression. They were resumed in 1934 when the Muzak Corporation was formed in New York and began to lease popular and dance music to night clubs, cafés, hotels, and restaurants. Among the parent Wired Radio's board members in 1935 were two financial figures associated with the moving-picture business: Wadill Catchings, a member of the Warner board, and Harris Connick, Kuhn, Loeb's original representative in Hollywood.

The veteran bandleader and recording artist Ben Selvin, who was a music supervisor for Brunswick under Warner's ownership, headed the Muzak recording operation in ERPI-Warner Vitaphone's former New York studios. Many of the artists he used were under contract to Columbia and Brunswick, but they worked for him on condition that their names not be used. Muzak had an open-end agreement with ASCAP, but depended for much of its music on Associated Music Publishers, a holding company for non-ASCAP music, chiefly standard classical and operatic selections published by French, German, and Viennese houses.

In 1938, when Muzak was unable to secure permission from the FCC to compete with the networks, it concentrated on special music services designed for offices and factories, as well as the home audience, under Warner Brothers' majority ownership, and a new transcribed-music library service for radio was instituted using the AMP label.

Ten years after its inception in 1927, network broadcasting enjoyed a $55-million year, and the price for a single affiliated station was at a new high: the $1.2 million paid by CBS for the Los Angeles KNX operation, to serve as the principal point of nighttime programing. An increased emphasis on improved relations with affiliates, following the findings of an independent business consulting service urging it to do so, was responsible for a change in the method of compensating NBC stations for time used on chain broadcasts. A new, more equitable, though not completely satisfactory, contrast was accepted by the affiliates. It extended the term for cancellation privileges, guaranteed sixteen day and night hours a week for local commercial broadcasts, and continued to absorb line charges. CBS affiliates remained under the standard contract introduced in the early 1930s, without the local-station option time. One quarter of all stations were owned by newspaper interests, but the war with news publishers was at an end. Sponsors spent $22 million for network talent, and half that for electrically transcribed advertising and entertainment. Following the impact on small stations of WNEW's successful "Milkman's Matinee" programs from midnight to dawn, all-night record shows became a new attraction for night workers and the wakeful.

Anticipating the next confrontation with ASCAP, the NAB formed yet another tax-free catalogue, the Bureau of Copyrights, to replace the bankrupt Radio Program Foundation. No complete listing of active musical compositions yet existed, most broadcasters being unaware of what percentage of the music they used was licensed. The bureau embarked on a program of recording an initial 100 hours of tax-free music for sale to radio stations, and special arrangements of non-ASCAP music were made. But the project foundered late in 1937, owing to the recession that began in the autumn and to the American Federation of Musicians' new demands for more jobs for members.

Local action in Chicago had already increased the number of stand-by union members to the number of those used on any commercial recording or electrical transcription played over a Chicago station. An ultimatum from the AFM in the summer of 1937, asking for the implementation of a similar stand-by practice by all stations and the guarantee of a minimum allocation of an additional $2.5 million for the employment of union musicians in the studios, came as a shock. A series of meetings between NBC and CBS and the AFM produced a tentative agreement that at least $1.5 million of this would come from the networks and their affiliates. The ill will generated by the earlier "sellout" to the songwriters and publishers still rankled, as did the networks' continuing refusal to consider the concept of taxation, or "clearance," at the source, which would make the networks responsible for obtaining licenses and paying fees for network programs broadcast by affiliates.

The firebrand of the AFM, James Caesar Petrillo, president of the Chicago local and a member of the national executive board, was the chief goad in the drive for more money from radio. Possessed of a modest command of the English language, the result of only a few years in the Chicago public schools, he had a storehouse of expletives. He had learned the trumpet as a child, but had abandoned the four-piece neighborhood band he formed at fourteen to open a cigar store, and later operated a saloon. In 1918, he joined the violence-ridden all-white Chicago AFM Local 10, and was elected its president eight years later. His years in that office were notable for strides made on behalf of his constituents, a successful strike against Chicago theaters, the first contract with an American radio station, establishment of peace with the city's hotels, and support of the local Democratic Party.

He burst on the national labor scene at the 1937 AFM convention, leading a fight against "canned music." He virtually dictated the threat that all AFM musicians would walk out on August 17 if broadcasters did not accept the group's new terms. The record manufacturers had already been persuaded by a walkout threat to print a more stringent warning against use on the air of commercial disks, and now engaged in discussions that brought an agreement guaranteeing the employment of union musicians and union-approved talent only.

Broadcasters again split into factions: one, representing the new National Independent Broadcasters group, ready for a fight to the finish; the other wanting to make the best deal possible. The second body was made up of network representatives and many of the most important affiliates, united in a belief that a strike would cause great loss of income and alienate not only a Washington administration viewed as prolabor, but also sponsors with similar beliefs. A new coalition—the Independent Radio Network Affiliates—was activated inside the NAB. It assumed sole responsibility for dealing with a union determined to ensure the employment of its 3,000 members at wages of twenty-five to forty dollars a week, estimated to total $5.5 million annually, almost twice the total paid to ASCAP.

Network officials made it plain to the IRNA that they would not stand for a strike. Sensing a new feeling of appeasement, the union agreed to a series of extensions that postponed the strike until, in October 1938, a final contract was ratified by a majority of stations. Terms for network affiliates were based on a percentage of time sales, which on the basis of 1937 revenue amounted to a general five and a half percent. A group representing 388 independent stations that used electrical transcriptions and commercial records dealt separately with the AFM, and by October, 162 of them had agreed to contracts with locals in their cities. Approximately 200 small stations, whose average income in 1937 was under $20,000, were exempted from any obligation to employ live union musicians.

The lives of an already problem-laden NAB board and staff were further complicated in 1937 by an appeal from members for help in dealing with the Society of European Stage Authors and Composers, which sold music licenses. This group was owned and operated by Paul Heinecke, a European who had represented German and Austrian music firms in the United States during the 1920s and then organized them into a holding company, Associated Music Publishers, which he sold to North American's wired-radio division in 1929 for a reputed $250,000. SESAC had been formed two years later to handle music licensing for various foreign publishers not affiliated with ASCAP. Heinecke's first important radio deal was made in 1932 when Sydney M. Kaye, a young CBS attorney, and other network executives settled an infringement suit against CBS by negotiating a fifty-cents-per-performance arrangement with SESAC, calling for a minimum annual fee of more than $52,000. SESAC's victory in a 1936 action, against a New York hotel, that established the right to collect when loudspeakers in hotel rooms came under the purview of the law on performing rights solidified Heinecke's position. As their representative, he split all radio and mechanical-license collections with music publishers on a fifty-fifty basis, collecting an estimated $100,000 dollars for himself in 1937. Wild reports of his income prompted some leading broadcasters to suggest publicly that they should float a stock issue of between $10 and $20 million for the purpose of buying into the music business, and thereby profit from an industry into which they were pouring several million dollars to ASCAP alone.

SESAC's new contentiousness, impending failure of the Bureau of Copyrights and, with it, the NAB recorded music library, and the negotiations with the AFM represented to many IRNA members situations from which they should withdraw at once. The networks and some more pragmatic broadcasters, wishing to maintain a show of industry solidarity, suggested a reorganization of the NAB, with new directors and staff, and a paid full-time president. A search began at once for candidates for that post, someone with clout in Washington and proper regard for the industry's more powerful elements.

The recession that temporarily blocked a national recovery began in late 1937. For the first time in its history, modern radio suffered nationwide declining time sales. Automobile companies, tire makers, suppliers of auto accessories, manufacturers of laundry soaps and cleansers— the largest network time buyers—reduced or canceled advertising on the chains and moved to local stations. Those affiliates who had signed with the AFM were required to add paid professional musicians and other talent, something new for most of them. The responsibility for producing daytime musical shows shifted from the owned-and-operated stations in New York, Chicago, San Francisco, and Los Angeles to the affiliates, some of whom soon had staff orchestras of as many as fifteen musicians. Given the opportunity for the first time to show their skills to a national audience, local program directors and musical talent raised the general quality of daytime shows from the sloppy levels to which they had fallen. NBC alone added forty-five programs from affiliates to its regular schedule, and national advertisers looked for programs and performers in the once-derided hinterland.

Many American broadcasters were still asking for moratoriums on past-due bills and salary checks in June 1938, when the NAB's hunt for a paid president ended. He was an attorney, Neville Miller, once provost of Princeton University, mayor of Louisville during the recent catastrophic flood, when his use of radio to reach the outside world for help brought him to national attention.

The new NAB board instructed Miller to make resolution of the ASCAP problem his first order of business. They authorized him to enter into immediate talks with the society, and directed a committee representing national and regional networks, station affiliates, and large and small independent stations from all parts of the country to advise and assist him. John Paine, ASCAP general manager, and Claude Mills, who was serving the society chiefly as a roving ambassador to broadcasters, reminded Miller and the committee members that any new license would hinge on higher rates of payment, probably at the expense of the networks. At one point, Mills mentioned a 15 percent music charge, the same as that refunded to advertising agencies in commissions.

Nearly half a hundred bills and resolutions affecting broadcasting were presented during the 75th Congress, in 1937–1938. Proposals called for more strenuous censorship of program content on the networks, an increase in public-service programs by all stations, more evidence of self-regulation, and amendments to the 1934 Communications Act that would curb the existing monopoly situation in national and regional chain radio. Music licensing was removed for the moment from Miller's attention when the FCC announced new hearings. After a series of aborted starts, an investigation of all networks began in November with David Sarnoff. In a typically statesmanlike manner, part teacher, part defender of the medium for whose present structure and position he was so markedly responsible, he sought to avert government regulation with the theme of his prepared statement: "Self-regulation is the democratic way for American broadcasting." This provided a battle cry for the industry, number-one problem for the NAB—the preparation of a new code governing standards—and a new chore for Miller—selling it to sponsors, opinionmakers, legislators, and 722 broadcast licensees. The industry had paid little attention to the earlier codes, in 1928 and 1929, neither of which had any real teeth. The 1933 NRA code had been ruled unconstitutional by the Supreme Court a few years after its adoption. A few voices rose in opposition to the new document framed by the NAB, which among its provisions sought to draw the line between controversial and noncontroversial content. They spoke in solemn measure, arguing that radio should never worry about majority points of view or taste, that anything new was by its nature controversial. The Bill of Rights, one said, demanded concern for minority opinion and taste. This issue was to surface again two decades later.

There were technological developments in the latter part of the 1930s, too, ones that would also shake the structure of the networks and all radio: television and frequency modulation (FM)—the static-free transmission of sound to which radio is inextricably bound. RCA-NBC continued to maintain the lead taken when it built the first modern television transmitting station in 1935, two years before CBS did. With it began the development of an experimental program service and manufacture of a limited number of RCA television sets, to be "deployed at strategic points of observation." Competition increased from other radio companies and laboratories—Zenith, Philco, GE, the Allen B. Dumont Laboratories, and the Farnsworth Company. Sarnoff welcomed their presence in the field, since RCA was required by a consent decree to license its patents on a royalty basis to competitors. RCA technology was essential to the manufacture of all television sets, and thus kept the electronic giant abreast of new approaches to the final mastery of the medium once regarded as "Sarnoff's folly." Shortly before his appearance at the FCC hearings, he had announced the technical feasibility of television in the home and the inauguration of a limited "radiovision" service in the New York market, to begin with public demonstrations at the 1939 World's Fair.

Static-free reproduction of sound to accompany image, transmitted over ultrahigh frequencies, was imperative, and Sarnoff, ready to spend as much as one million dollars to obtain his patents for FM broadcasting, began negotiations with Edwin H. Armstrong. Armstrong had earned his first million from RCA in 1922 from the sale of an important patent, promptly married his friend Sarnoff's secretary, and returned to the laboratory inspired by Sarnoff's suggestion that "a little black box to eliminate static" could bring in the same sum. It was ready ten years later—not a small box, but a patented new system of broader-range frequency-modulated signal transmission through upper frequencies. It was immediately moved to RCA facilities atop the Empire State Building. The revolutionary sound was first sent from there to a point seventy miles away in 1934. But because of RCA's concentration on television and Sarnoff's now-certain realization that FM would make obsolete overnight the present structure of broadcasting and slow the development of television by preempting ultrahigh frequencies, he ended further collaboration with Armstrong, who was asked to remove his apparatus, to make room for telecasting.

Armstrong persevered, and eventually received permission from the FCC to build a 50,000-watt FM station in New Jersey, which went on the air in the late winter of 1939. In twelve months, the mass production of FM sets was in full swing at GE and other manufacturers, and the FCC was deluged with 150 applications for FM stations. In October 1940, FM was given the go-ahead signal by the commission, and a new technology seriously threatened entrenched amplitude modulation (AM).

Variety hailed the broadcasters' ratification of a new code of practices, at their June NAB convention, as a historically significant decision, one demonstrating that they ''have become progressively more responsive to public opinion . . . and reasonably consistent in observing their own rules.'' The press was barred from several sessions but did learn of other issues discussed: the probability of a nationwide AFM strike by mid-January; an adverse decision in a lawsuit challenging radio's right to play disks made ''for home use''; and the need to call an emergency meeting of the entire industry in September, to discuss the formation of a new music-licensing organization, if ASCAP did not cease its ''run-around'' tactics.

ASCAP's president, Gene Buck, who had taken negotiations into his own hands, was not present when the NAB Copyright Committee came to New York to meet with him in early August. It was informed by Paine that a new contract had not yet been framed. A war of press releases began: radio seeking to portray itself as engaged in a fight with a ''city slicker'' ready to foreclose the mortgage, and the society depicting the broadcasters as greedy monsters who were employing scare tactics to build up a war spirit preliminary to bargaining.

The traditionally splintered radio business was united on at least one issue, and knew exactly what it was after. Even the most combative elements no longer wanted a per-use contract, having found it too expensive and time consuming (much to the relief of Claude Mills, who had first broached it in the mid-1920s, but now was amenable to a per-program method of payment). Except for the stations owned by NBC and CBS, payment at the network source was regarded as mandatory, royalties to be paid only for local programs on which ASCAP music was performed.

Neville Miller began extended meetings with Sydney Kaye, a member of the CBS law firm headed by Paley's personal attorney, Ralph Colin. Regarded as a leading authority in the field, Kaye had been made available to the NAB to advise on copyright matters. In 1935, when both NBC and CBS were considering the consequences of a renewal of the favorable ASCAP contract, he had submitted a plan proposing the creation of a reservoir of non-ASCAP music, which would have the effect of placing radio in a position of trading equality with the society, and which would eventually create the most important source of music, relegating ASCAP to a secondary position. In addition to securing rights to music controlled by societies other than ASCAP—SESAC, AMP, and approximately 150 small independent firms—Kaye urged that inducements be offered to a few conspicuous American composers to let their ASCAP contracts terminate, and that they be given direct, favorable compensation for the use of their works on radio. They could retain all publishing, stage-performance, and other property rights. The plan had been pigeonholed after contracts were renewed. Now Miller and the NAB committee asked for a similar proposal, brought up-to-date, for consideration at the special NAB meeting.

The new, fifteen-page Kaye blueprint for building an alternate source of music was a masterful and tidy outline for NAB's future course. In it, he revealed a new and better knowledge of the music business, whose success and profits depended almost entirely on an ability to control network plugging of selected songs. The extent of that control was illustrated in information made public in 1940. Thirteen music firms affiliated with Hollywood interests completely dominated Tin Pan Alley and "Your Hit Parade," receiving 60 percent of the $2.5 million paid to the 165 ASCAP publisher members in 1939. A study of ASCAP research, on the basis of which distributions were made in 1938, showed that 368 selections received 47.1 percent of air play, and, altogether, 2,500 selections furnished 83 percent of all performances on NBC's Blue and Red and the CBS networks.

Kaye urged the industry to bear in mind that because the proposed organization would be a money-spending, rather than money-making, company, no dividends would accrue, and he suggested initial broadcaster pledges of up to $1.75 million to get it off the ground. Funding would be raised by an SEC-approved sale of 100,000 shares of capital stock, at five dollars, of Broadcast Music Incorporated, one dollar of which would constitute capital; the balance, surplus. Each investing broadcaster would receive stock in the amount nearest 25 percent of the sum paid to ASCAP in 1937 (the only year in which a survey of total expenditure on music was undertaken). License fees would be equal to 40 percent of ASCAP payments. No provision was made for network payment at the source, and one fifth of the BMI stock was allocated to NBC and CBS. Both agreed to maintain a unified front and not make a deal with ASCAP without their affiliates' approval. An April 1, 1940, deadline was set for implementation of the project and the start of BMI operations, provided that at least $400,000 had been raised from stock sales. The plan was unanimously approved at the Chicago meeting in September. Kaye believed, as did many others there, that if ASCAP saw a show of strength and resistance, it would modify its demands, and that an additional five-year term would be accepted.

A coast-to-coast survey of ASCAP's relations with radio was published by *Variety* on October 18, 1939. It painted an industrywide perception of the society as an organization that felt nothing but ill will toward broadcasters and was "working one huge squeeze play whose only virtue seems to be that it is legal." The reporter found that ASCAP had failed in everyday public and customer relations. Even the newspaper-owned stations, which got lower rates than others, found that discount a Machiavellian scheme to sunder solidarity, one they would not support. There was real enthusiasm for BMI everywhere but at the network-owned stations, whose managements awaited word from New York before making public statements.

ASCAP responded to the *Variety* piece with a new users' relations department, staffed by pleasant young men, whose principal function was to be the handshaking the society had so long neglected. Broadcasters who asked these representatives about progress toward new terms were told that ASCAP would do away with all sustaining fees and apply the payment-at-the-source principle to all stations, network or not. Estimates of ASCAP income for 1939 only exacerbated the situation. A total of $6.9 million was anticipated, $4.3 from radio.

Armed with a new line, IRNA officials assured all that NBC was no longer wavering, and CBS was more anxious than ever to win the fight. Privately, both tended toward a settlement that involved a specific sum, which they would in turn allocate among their affiliates. When official reports of network income were issued, enthusiasm waned for even that compromise. Out of estimated gross industry sales of $165 million, NBC had made $45.2 million in 1939, and CBS, as always second, but gaining, had the best single month in network history in November, and had collected $35.5 million in annual time sales. ASCAP income from radio, of which the networks paid about 20 percent, had risen from $757,450 in 1932 to $5.9 million in 1937, and had then dropped to $3.8 million the following year. It increased by 12 percent, to $4.3 million, in 1939.

The war in Europe and the possibility of America's involvement, plus the uncertain general business economy, were expected to reduce radio revenues in 1940 by half. The recent AFM situation had been resolved only with the added expenditure of more than three million dollars, which was certain to increase after new talks with the union. The cost of developing television, to which the networks were committed, and FM, as well as rising pay scales, made inevitable by the proliferation of craft and labor unions, could not possibly be adequately covered by anticipated revenues. Buoyed by the first general boom in a decade in sheet-music and record sales, music men looked for the same in music licensing, and talked about a 100 percent increase. The latest Crossley-CAB ratings gave them good reason for optimism. National spot business looked good, and there was an increase as high as 13 percent in some markets. Network evening ratings had jumped more than a third over 1938–39.

Although Kaye and Miller and the NAB staff had done yeoman work, meeting with people from 400 stations, only one quarter of the million dollars pledged had come in by January 1940. BMI opened an office in February, with rented furniture and a staff of four, hired on a temporary basis.

The first adverse publicity for ASCAP came on George Washington's Birthday, when Gene Buck was arrested for extradition from Phoenix on a warrant telegraphed from Montana. Several station owners there had complained that Buck and eleven others, including NBC and CBS officials, were obtaining money from broadcasters under false pretenses, and they had taken the matter to a small-town judge. Ever the showman, Buck took advantage of the comedy and played to a national public gallery with such effect that he and his negotiating committee were able to keep the broadcasters off balance, and then withheld the new contract for a month.

When it came, just before BMI's self-imposed deadline of April 1, the manner of its presentation solidified the radio business to an unexpected degree, a tactical misstep that cost the society dearly, and the repercussions lasted for years. Rather than deal with radio's designated agent, ASCAP did not invite Miller, and, surprisingly, Mills was not present. Hoping once again to split the industry, Buck called in representatives of the three networks, several major affiliates, and one independent. John Paine read them the new contract provisions.

Radio was divided into four categories: some 300 stations whose gross billings were under $50,000 would pay 3 percent of sales receipts, less agency and other deductions, and a one-dollar a month sustaining fee; an intermediate group of about 255 stations that grossed between $50,000 and $250,000 annually would pay 4 percent and a sustaining fee reduced by twenty-five percent; the large network stations would pay the present 5 percent charge; and, for the first time, regional and national chains would be charged 7½ percent. The duration of the proposed agreement was not yet fixed.

When Paine completed his reading, Edward Klauber, executive vice-president for CBS, rose to say that only the NAB would negotiate for his organization, and then walked out. Others followed, one pausing to say in a loud voice to Oscar Hammerstein II that broadcasters would grind the society into the dust. Hammerstein's fervent recitals of the incident, years after, were still marked by the feeling of contempt for broadcasters it roused in him. A letter castigating Klauber's behavior as "unbecoming a gentleman, and completely discourteous" was hand-delivered to Paley. Furious, he rejected "ASCAP's attempt to split our industry into hostile camps," and wrote that he agreed with his vice-president, who would continue to represent CBS in all business affairs. Throughout the next year, Paley and Klauber were BMI's most ardent champions.

The CBS representative's unceremonious departure provided Buck with the opportunity to bring into play a public-relations strategy that had been successful for broadcasting—making targets for personal attacks out of leading players in the game. Klauber and Miller, whose status Buck challenged, asking whether he represented the stations or the rich networks, bore the brunt in the next barrage of news releases. Hazy arithmetic was employed by both sides, ASCAP saying that 540 stations would pay between 20 and 50 percent less than in 1939, the networks countering with claims that they were being asked to pay an additional $3.25 million. *Variety* calculated that, using 1939 as a sample year, ASCAP would have collected $7.1 million, instead of $4.3 million, if the new system had applied, $4.125 million from the networks, which would have to add this to the nearly $28 million spent for technical, program, sales-promotion, and general administrative expenses.

With such millions at stake, the support of the small stations, who represented 49 percent of all licensees, was essential for industrywide support of BMI. An experienced supersalesman, former California broadcaster, and proverbial modern Renaissance man was brought to New York to serve as director of station relations. He was Carl Haverlin, who led BMI as president in later years and brought it to a position of international dominance of the music world. The son of a mining engineer, he had spent four years of his childhood in Mexico, and his little formal education was gotten in Arizona and California, where he came into contact with American folk music and the common man's vernacular songs. After flunking out of high school, he went on tour as a vaudeville dancer, and acquired an increasingly wide education in local libraries and secondhand bookstores. The first of many careers in broadcasting began in the early 1920s at KFI, a leading Los Angeles station. As announcer, station promotion man, time salesman, sales and station manager, he was at the heart of the station's successes, among them the first radio performance of the entire Shakespearean canon and the initiation, in 1926, of Standard Oil of California's vaunted classical-music broadcasts. In the radio booth at the 1929 New Year's Day Rose Bowl football game, he took the microphone from a suddenly ailing Graham MacNamee, and described the famous "wrong-way sprint," when California captain Roy Riegels ran to his goal line by mistake, as "running backwards," which was forever after ascribed to the more famous sports announcer.

Leaving KFI in 1936, Haverlin moved, with his growing family, to the California desert, to write for the pulp action and detective magazines. When he returned to Los Angeles in 1938, he worked as a salesman for a local transcription service. He came to Kaye's attention when his employer wrote an open letter attacking the BMI plan, and the attorney soon learned of Haverlin's reputation among broadcasters for an exceedingly wide vocabulary and a readiness to conjure up mental images and articulate them in magnificent speeches that persuaded reluctant customers. Haverlin could be had for a small salary, and he was at once regarded as the logical candidate to sell the new organization to holdouts at all levels of the business.

The task was a formidable one. Half of the network stations and nearly two thirds of the independents had not yet closed ranks. Among them was a hard core of broadcasters who were still smarting from earlier network surrenders to ASCAP. Haverlin's work on the road, spreading the gospel and ameliorating old enmities, raised the number of subscribing stations and brought in more than 85 percent of the industry's time-sales income. His efforts were substantially assisted by the ASCAP mailing to all stations of the new contract. In it, the term was for five years, but television rights were excluded, as was any reference to either a per-piece or per-program alternative.

In the light of later developments, it was a blunder by ASCAP to offer a per-piece arrangement to stations in Montana and Washington, where state laws, instigated by broadcasters, prohibited the society from intrastate business. Radio operators in other states, who had been seeking this relief for years, were angry and signed with BMI.

At the next convention, Haverlin and other BMI executives explained their sliding-scale license charges, ranging from one and a half to two and a half percent of revenues above $100,000, to which the networks were asked to add half a percent of their time sales. Haverlin's arsenal included regular updated reports of progress.

An experienced music man of stature, capable of managing the BMI operation, and not afraid of repercussions from the music business should it fail, was hard to find. Neville Miller, president of the NAB, became BMI president, also, but because he was unable to be on the scene every day, Kaye was elected operating head and attorney. For general manager, Kaye chose Merritt Tompkins, former head of Schirmer, and most recently president of the AMP.

BMI's staff and the flow of printed sheet music and arrangements for various instrumental and vocal combinations were constantly increased. Though Tompkins's experience had been primarily in classical and foreign concert music, under his direction BMI was soon releasing one new popular song a day, and twenty-five new arrangements of public-domain, non-ASCAP musical numbers a week. With the support and a promise of suitable financial backing from CBS, which was also interested in acquiring a major ASCAP firm, and support from NBC, negotiations were conducted to purchase the MGM Big Three music catalogues for $4.5 million. Robbins, Feist, and Miller copyrights provided one seventh of all ASCAP music used in 1939, and could keep radio going for at least three months. Only a warning from songwriters published by the Big Three that their rights were nontransferable from ASCAP, and the possibility that MGM might be named a co-defendant in a rumored federal indictment against ASCAP frustrated the deal.

By September, BMI had 220 full-time employees, including all the available union arrangers, copyists, autographers, and proofreaders in New York, who turned out fourteen printed popular songs and thirty-five arrangements of BMI-licensed familiar public-domain music each week. In addition to regular new releases of transcribed selections in the BMI Bonus Library, made available without charge of subscribing stations, 400,000 units of printed music were shipped to them each month, together with vast quantities of music from thirty affiliated publishers. These included Ricordi, of Milan, some American standard-music houses, and the M. M. Cole Company, of Chicago, a former SESAC affiliate and a leading publisher of hillbilly and cowboy music, available in cheap folio editions that sold in the Midwest and South and were promoted at Saturday-night barn dances and on transcribed hillbilly-music shows.

Before the year ended, BMI cracked a tenuous ASCAP-publisher front and executed long-term contracts with Ralph Peer and Edward B. Marks. The latter was a veteran music man and a founder of Tin Pan Alley. Each of them had regularly petitioned ASCAP for a reclassification of ratings, but without getting any relief. Their copyrights proved to be crucial to BMI's survival during its first year, Peer's because of the Latin-American popular music he provided, and Marks's because it answered pleas by advertising agencies for recognizable music suitable for their network programs.

When he left RCA Victor in 1932 as the sole owner of Southern Music Publishing Company, a business formed in association with the Victor Talking Machine Company for its race and hillbilly songs, Ralph Peer left behind a favored-nation licensing understanding with the recording firm and began the world-wide expansion of his Peer International Corporation. He opened offices in England and on the Continent, in South Africa, Latin America, and Canada. In the United States, he owned a number of ASCAP companies, among them the Charles K. Harris catalogue, and was a director and officer of the MPPA. His first international foray was in 1930 in Mexico, where Southern and Peer International gained control of a major catalogue of native popular and classical music for exploitation locally and around the world. Nine years later, in association with Don Emilio Aczcarraga, a leading financier and owner of major broadcasting properties, Peer formed Promotora Hispana Americana de Musica, in which he held a 49 percent interest, and Aczcarraga 35 percent. Peer also held the majority interest in the American Performing Rights Association, an enterprise that owned rights to a large catalogue of Latin-American compositions, including music from Cuba and other Caribbean countries. ASCAP refused to deal with either organization, because of their private ownership and profit-making nature, leaving Peer only SESAC or the new BMI to license his music in the United States. When rumors of Peer's negotiations with BMI reached ASCAP, a representative was dispatched to deal with Latin-American publishers and songwriters, only to learn that Peer had scooped up the cream of the lot. These and his Southern Music catalogue made Peer's copyrights a formidible source of music suitable to many stations, as well as for jukeboxes, now a major force in promoting new music.

BMI's continuing efforts to ally itself with a dissident but well-established ASCAP house that owned a substantial catalogue of past hits culminated in late 1940 with the signing of the E. B. Marks music business for five years, with a guarantee of $225,000 annually, and $25,000 to attorney Julian Abeles, who masterminded the deal. The networks' financing of this reflected their apprehension about the effect a switch from almost all ASCAP music to the BMI repertory would have on sponsors and advertising agencies, and the name bandleaders on commercial and late-night broadcasts.

Because the Warner music blackout in 1936 had demonstrably produced little complaint from listeners, most sponsors, other than George Washington Hill, reluctantly agreed to go along with the networks. The tobacco magnate, who threatened to take "Your Hit Parade" off the air unless BMI could guarantee familiar music, regarded that Marks acquisition as a personal victory, and promised to hold the line until the end of March 1941, playing only "the ten most popular songs available to radio." After several unsuccessful attempts to bring in the FCC or the Justice Department to knock heads together, and after BMI had bought a million-dollar infringement-suit insurance policy to protect itself and advertisers and their agencies, the most intractable Madison Avenue men went along with the sponsors who paid their commissions.

Remembering their experience in late 1935, when they prepared for a Warner music companies' strike with a gradual tapering off of music from those catalogues, the networks required, first, a reduction of ASCAP music by degrees on sustaining programs, and threatened to cut off remote pickups of bands that failed to comply. There was grudging acceptance until bandleaders found they could make more money plugging their own music and opened small publishing companies, licensed through BMI. By October, ASCAP music was reduced from 80 percent on sustaining programs and 76 percent on commercial broadcasts to 25 percent and 31 percent respectively.

Kaye's blueprint contained only a brief mention of compensation to songwriters and composers. Reference was made to original music "created by employees of the corporation," the work-for-hire principle that was then being tested in the courts in the "Come Josephine in My Flying Machine" case. Kaye thought that composers would be better off if they "received no compensation for performing rights, provided they received a fairer share of the revenue incidental to music publication and to the sale of mechanical rights."

Contracts with BMI's thirty affiliated publishers, who at the start were paid only an annual guaranteed sum, did not obligate them to pay their authors and composers for performing rights, though it was expected they would. As for the songwriters and composers whose music BMI published itself, the share of publication and recording rights was more generous than that in general practice. They were paid one penny per performance, either live or recorded, per station, based on a new system devised by Paul A. Lazarsfeld, of the Columbia University Office of Radio Research. It involved monthly examination of 60,000 hours of program logs listing all music, supplied to BMI by 150 stations in all parts of the country, as required in their contracts with the licensing body. One striking difference from the ASCAP method was payment for recorded performances, on both transcriptions and commercial disks, something the society did not do until the early 1950s. This gave a decided advantage to BMI in a new world in which "canned music" began to dominate time on the air.

On the day after Christmas in 1940, spokesmen for the Justice Department announced that it was entering the music war, and would add the NAB, BMI, NBC, CBS, and "possibly some others not yet specified," to the list of defendants in a criminal antitrust action in Wisconsin. Thurmond Arnold, the new assistant attorney general in charge of the antitrust division, was already furious with ASCAP for its "foot-dragging" in signing the consent decree for which the society had asked, to settle the revived action instituted in 1934. Denouncing the "ASCAP welchers and double-crossers," according to *Variety,* Arnold insisted that ASCAP meet every one of the six points raised in the 1934 complaint, rather than only the few covered by the proposed decree. In a recent book, *The Bottlenecks of Business,* the former Yale law professor had argued that "when copyright owners, each engaged in selling articles on which he holds valid copyrights, agree with each other to sell or distribute their copyrighted articles upon the same terms and conditions, such agreements and concert of action is outside any privileges conferred by the copyright law, and the resulting restraint of trade, if unreasonable, is prohibited by the Sherman Act."

While expressing surprise that they and their associates were to be indicted, both Gene Buck and Neville Miller praised Arnold for his intention to investigate their opponents. An invasion by network presidents, their most important assistants, and BMI board members swept into Washington on January 27, to meet with the NAB president. In the afternoon, Kaye visited the Justice Department, where he met with Arnold and his staff, but learned only that the preliminary investigation was not yet complete, that others would be indicted in short order, and that Arnold regarded BMI as a substitution of one monopoly for another.

There was little for the visitors to Washington to do, except to close ranks and hope for the best. On reflection, any last-minute compromise with ASCAP, renewing the present form of licensing, which the government appeared to regard as a violation of antitrust laws, would put them into additional jeopardy. Unlike 1935, radio was now prepared to take all possible precautions to avoid infringements. The society had set up listening posts in major centers to record as many as sixteen hours of broadcasting to document illegal use of its music. Of the million-dollar protection policy, a $30,000 premium check had already been cashed. A total of 660 stations, out of the 796 commercial facilities, were signed to BMI. Among the last-minute stragglers were members of the National Independent Broadcasters, who voted en masse to support BMI, despite the lure of ASCAP contracts offering lower rates. Others, antinetwork to the death, intended to perform only ASCAP music. Some were already to be all-night oases of Tin Pan Alley and Hollywood music with midnight-to-dawn broadcasts, and to cash in on the situation.

The last week of December was the first without any ASCAP music on the networks and their affiliates. RCA Victor and Columbia Records, owned by the networks, were printing legends affirming the ASCAP or BMI status of each selection on all new releases, and small new companies were doing the same. Guy Lombardo and other name bandleaders were prepared to go on the air on New Year's night with tax-free arrangements of "Auld Lang Syne."

The ASCAP v. radio music war was beginning in earnest.

CHAPTER 13

ASCAP versus the Broadcasters

There was general pessimism all along Tin Pan Alley as music publishers faced the prospect that popular sheet music had seen its day, that the business could no longer survive in its present state. A year or two earlier, the biggest song hits had sold between 500,000 and a million copies of sheet music. By 1931 the sale of 200,000 was extraordinary. Sold wholesale for between eighteen and twenty cents to music stores, retail dealers, jobbers, and syndicate stores, in equal proportion, four pages of printed music still cost about a nickle to produce, but few firms had more than a single hit in a year. Business was down everywhere. Kresge's, the largest outlet in America, since Woolworth had closed down its sheet-music departments, reported a 25 percent drop in sales, along with a 65 percent decline in three-for-a-dollar dance disks. The major record companies began laying off their most expensive artists when the sale of the most popular disks began to slip under the 40,000 mark. The chief source of income for members of the Music Publishers Protective Association was from mechanical licensing—the twenty-five cents collected by the association for four minutes of radio play on electrical transcriptions. After a strict rationing of free orchestrations, the sale of printed dance arrangements tripled, wiping out, for most large houses, losses from the operations of their professional departments.

Song pluggers, piano players, counter boys and girls were being fired and branch offices reduced to those in Chicago and Los Angeles. In New York, only those bands that were on the air with a sponsored show or at least five times a week on sustaining programs were sent free music. On the West Coast, the twelve top bands, out of sixty working in the area, got free music; the others received only orchestrations with some parts removed, so that a complete copy would have to be bought.

For the first time, bandleaders headed for the long-shunned hinterland, traveling in large buses to cut expenses. They played one-night stands at dollar-a-couple ballrooms, on a straight percentage of receipts, with or without guarantee. Many were ready to play free of charge, hoping one engagement might lead to others.

Many music men believed that the spreading practice of cutting in bandleaders as the authors of new songs, in return for plugging on the air, was a poison that was destroying the business. Long an industry plague, this generally condoned form of bribery was assuming proportions greater than existed in the mid-1920s, when ASCAP and the MPPA invoked curbs, which proved no cure. More than 300 new songs were constantly involved in the process, creating great confusion among sheet-music buyers, whose leisure-time expenditures had been drastically reduced. The most popular bandleaders and singing stars were rich and independent, beyond such control as Albee and Murdock once imposed by banning all non-MPPA music. They called their own tunes, from which they collected royalties in addition to a weekly payment, and regarded both as part of the trade. In the past year, Rudy Vallee, proud that he had collected $75,000 in sheet-music and mechanical royalties, was cut in on seventy-five new songs, Guy Lombardo on sixty-five, Vincent Lopez on forty. In the case of the current hit ''I'm Gonna Get You,'' two rival West Coast bandleaders were listed among its authors, neither having seen the music before an advance copy was shown to him. One of the most frequent ''collaborators,'' Ben Bernie, won a breach-of-contract suit by demonstrating in court that he could neither read nor write music.

A controversial resolution aimed at the practice, calling for a fine of half a year's ASCAP distribution, was unanimously approved at the annual meeting in March 1931. With their chief sources of revenue—sheet music and record royalties—about to be unimportant by-products, publishers deeply involved in the payoffs rushed to make deals with new artists and bandleaders before the regulation became effective later in the year. For Class A publishers, the penalty would amount to $20,000; for top-rated writers, about $2,500. Six months passed before the first formal charge was made; it was against Roy Turk and Fred Ahlert, who cut in Bing Crosby on their new song ''When the Blue of the Night Meets the Gold of the Day,'' in order to get the crooner to use it for the theme song of his CBS show.

Turk and Ahlert were among the AA ASCAP writers who joined Billy Rose, Sigmund Romberg, Harry Warren, and others in a fraternal group formed two years earlier to serve as a counterbalance to the publishers' association. There was some disagreement about restoring the division of performing rights to the two-to-one writer-publisher ratio abandoned in 1921, but everyone was united behind the idea of a uniform songwriters' contract and a closed shop for members of the Songwriters. The publishers had recently cut all sheet-music royalties to a penny a copy, citing the reduction to a 16½-cent maximum wholesale price forced on them by Kresge's and the jobbers. A new Songwriters Protective Association emerged from the deliberations. It opened its rolls to ASCAP members who agreed to join for life. In August 1931, Billy Rose was elected president of the SPA, and his friend Arthur Garfield Hays, attorney for the Authors' League, was hired to guide the group in framing a suitable new contract. It was expected to change the order of things and put songwriters on the same footing as authors and dramatists, who could hold copyrights in their own names throughout the two terms of protection, for fifty-six years. The SPA hoped to push through a clarification of who owned the small rights, in favor of songwriters, who could then license each of them: publication, mechanical reproduction, public performance. To demonstrate their concern for the future of ASCAP, all SPA members, 100 of them by the end of 1931, were ready to grant the last right to the society for life. The MPPA would not make a similar offer.

The very mention of a possible affiliation with the American Federation of Labor, which was discussed with its president, William Green, stiffened the publishers' opposition to the SPA. Lobbying in Washington, where Rose had many contacts, produced the introduction of an amendment to the Copyright Act that would make it, like the patent laws, call for registration in the name of the creator. As practical men, the SPA leaders were forced to agree with those voices of caution among the membership who believed that the SPA might have gone too far. Demands were modified, and ASCAP was asked to arbitrate.

While meetings between the SPA and the MPPA continued, the half-dozen New York music houses that published almost all the hits demonstrated their control of the business as an object lesson to the "presumptuous" songwriters. Though there was little profit in foreign songs, now that ASCAP income provided most of a firm's funds, the first agreement between ASCAP and the British Performing Rights Society, to run for three years beginning on January 1, 1930, called for a blanket payment of $15,000 a year to the British music business. Most of the American firms that published European songs shared performing rights with their foreign partners, at best a minuscule portion of the small sums paid to the licensing societies. Nevertheless, in the first half of 1932, these six music houses selected imported songs for their number-one plugs. Radio and movie crooners found these "different" popular songs to their liking and were cut in on most. Almost single-handed, Rudy Vallee plugged the British "Goodnight, Sweetheart" into a half-million-copy hit.

After seven months, a "standard uniform popular songwriters' contract" was ready for distribution, having won the approval of both ASCAP and the MPPA at the board level. The agreement did not establish any minimum royalty from sheet-music sales; instead, it called for individual negotiation. A minimum 33⅓ share of mechanical and foreign rights was fixed, as well as of "receipts from any other source or right now known or which may hereafter come into existence.'' Its vague language permitted publishers to withhold any share of the rapidly mounting radio transcription disk fees collected by the MPPA on behalf of its members, or from the talking-picture synchronization fees. The first of these was regarded as a ''grant right,'' and not as the double taxation on broadcast performances it might otherwise be described. The contract introduced regular accounting periods and gave the writers the right to have an accountant examine the publishers' books. It did not deal with the issue on which Romberg and others intended to stand firm: Who owns the small rights?

The death of ASCAP's general manager, J. C. Rosenthal, in late December 1931, created a vacuum in management that was filled, at the behest of his publisher friends, by Claude Mills. NBC's six-million-dollar venture into the music business, with the purchase of eight ASCAP music companies, had proved to be less profitable than Warner's $10-million purchase, and both were engaged in ridding themselves of all or part of these properties and employees. Mills had been a principal in the network's music operation, but when the subsidiaries were sold back to their original owners, at a substantial loss, he was asked to remain as a consultant to NBC until his contract ran out. Over the protests of songwriters, who remembered his role in arranging their capitulation to the publishers in 1920, he was brought back to ASCAP at a salary of $50,000 a year from ASCAP and set to work on what he regarded as the first order of business: changes in the method of distribution and of license-fee collections—along lines he had unsuccessfully tried to introduce in 1928.

The society's latest try to rectify injustices had been made the previous April, when the publisher payment ratios were rearranged and a new double-letter classification was added to the top three classes. The amount of payment to each class was also changed. Storms of protest and pleas for reclassification came from all but those in Classes AA and A. Jack Robbins was the loudest. He was the only large publisher to have been punished for a violation of the cut-in rules; his income was reduced by 75 percent when he was moved from Class A to Class D. He also claimed discrimination, because MGM, which held the majority interest in his business, would not join ASCAP as a publisher member. Irving Berlin resumed his continuing unsuccessful efforts to gain recognition as both an author and a composer, and Edward Marks, owner of a catalogue of music dating back to the 1890s, got no response to his request for a higher rating.

In the summer of 1932, Robbins took his cause to the courts, filing an antitrust suit against ASCAP, which for the first time made public the workings of publisher classification and exposed the extent of control of the board of directors by motion-picture interests. By voting together, Warner Brothers, Paramount, the music houses of Irving Berlin and the Santley brothers, which had agreements with Universal Pictures, and Max Dreyfus's half-dozen firms that represented major Broadway production writers were in a position to dominate the society, or, if they chose, to split away and form their own licensing collection agency. Soon after, Robbins was voted a return to Class A and retroactive royalties, and the suit was dropped. Mills's proposal for a new payment system, which would distribute 70 percent of all money on the basis of use by customers, was temporarily shelved, as was a campaign to increase license fees from motion-picture theater operators for the first time since 1917.

A year earlier, Gene Buck, the ASCAP president, had warned that to press for higher fees from radio would only lead to legislation harmful to ASCAP. Rosenthal, who was excusing the delinquencies of broadcasters near bankruptcy, also urged caution. Now that it was obvious that income from radio would fall below the 1931 levels, and most songwriters and small publishers could no longer rely on their ASCAP money for support, the time had come for an increase from the business that killed music through repeated use. A modest one of 25 percent, to $1.25 million a year, was proposed, and, of course, rejected by the National Association of Broadcasters.

Anticipating a fight to the finish with ASCAP, the NAB made plans for another tax-free library of music to take the place of the society's copyrights if the need arose. There were many in the music business who welcomed the prospect of a war with radio, whose concentrated use of a small body of hit songs was killing them off within a few months. They were ready for a showdown and a return to the old ways of song plugging in theaters, dance halls, vaudeville houses, and restaurants, which could, they predicted create substantial hits and prolong their lives.

Claude Mills was assigned to meet with former network colleagues and began discussions with executives from CBS, NBC, and an independent affiliated station. Edward Klauber of CBS handled the final negotiations. Seeking to hasten a settlement, the network representatives suggested that the chains would cooperate provided some recognition was made of their vast expenditures for the development of radio through furnishing sustaining programs to their affiliates and for experimental work not reimbursed by their affiliates. It was proposed that, rather than tax the networks "at the source," ASCAP collect its royalties from the income by all local stations, including their owned-and-operated facilities.

With Mills, Klauber forged an agreement, to expire at the end of 1935, calling for fees that would rise annually from three to five percent of all commercial time sales, less specified deductions, over the next three years. The networks' first contracts with ASCAP contained what was to become known as the "twilight zone exclusion," which allowed the chains to escape from any ASCAP fees for commercial programs other than those by their owned-and-operated stations. Unaware of the full ramifications of this provision, the ASCAP board approved the agreement, and members of the