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Steven L. Bladek

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RADIO BROADCASTING AS AN INFRINGEMENT OF A COPYRIGHT

By Steven T. Blader

With the advent of radio, judicial tribunals were confronted for the first time with legal problems both new and perplexing. Litigation, many times novel in character, was presented to the courts of this and other countries for interpretation and solution. Prior to 1920, radio broadcasting was an undeveloped principle. With the meteoric rise of broadcasting stations, perfection of the new art, creation of coast-to-coast networks, and commercialism in this newest business field, it was not long before unusual legal situations arose to tax the judicial minds of the country’s leading jurists. Since specific legislation had not as yet been enacted, it rested upon the ingenuity of the courts to safely guide the new-borne doctrine to correct solutions.

Among the early problems with which the courts were faced, was the question whether radio broadcasting constituted an infringement of a copyright. The author in this article will attempt to trace the difficulties facing the courts in solving the problem, from the earliest date to that of the present. The decisions are not numerous, and a careful analysis and interpretation of the cases will be attempted in the honest hope that the reader will be better fitted to understand the situation as it stands today.

* LL. B. Univ. of Ky., 1938; now practicing law with Nicholas Martini, 668 Main Avenue, Passaic, N. J.

1 For early state of the law, see: (Annotations) 40 A. L. R. 1513; 66 A. L. R. 1366; 76 A. L. R. 1276; 82 A. L. R. 1109; 89 A. L. R. 424; 104 A. L. R. 876. Leading articles: Simpson, Broadcasting as Copyright Infringement, 1 Air L. Rev. 134 (1930); Sprague, Copyright and the Jewell-LaSalle Case, 3 Air L. Rev. 417 (1932); Silverstein & Spill, Radio Reception as Public Performance, 12 B. U. L. Rev. 243 (1932); Caldwell, The Broadcasting of Copyrighted Works, 1 J. Air L. 554 (1930); Caldwell, Piracy of Broadcast Programs, 30 Col. L. Rev. 1087 (1930); Caldwell, The Copyright Problems of Broadcasters, 2 J. Radio L. 287 (1932); Zollman, Radio and Copyright, 11 Marq. L. Rev. 146 (1927); Davis, Copyright and Radio, 16 Va. L. Rev. 40 (1929). For other notes on the subject, see: 20 Calif. L. Rev. 77 (1931); 99 Cent. L. J. 130 (1926); 24 Col. L. Rev. 30 (1924); 31 Col. L. Rev. 1044 (1931); 17 Cornell L. Q. 263 (1931); 20 Geo. L. J. 215 (1931); 39 Harv. L. Rev. 269 (1925); 43 Harv. L. Rev. 313 (1930); 47 Harv. L. Rev. 703 (1934); 26 Ill. L. Rev. 443 (1932); 26 Ill. L. Rev. 811 (1932); 1 J. Radio L. 367 (1931); 29 Mich. L. Rev. 1076 (1931); 7 N. Y. U. L. Q. Rev. 539 (1929);
The right of Congress to protect authors and composers is gathered from the United States Constitution, which provides that Congress shall have power: "To promote the progress of Science and the Useful Arts, by securing for a limited time to Authors and Inventors the exclusive right to their respective Writings and Discoveries."2

It is perfectly well settled that the protection given to copyrights is wholly statutory.3 In the last analysis, therefore, all of our cases will turn upon the construction of a statute.

By Congressional Act of March 4, 1909,4 "Any person entitled thereto, upon complying with the provisions of the Copyright Act shall have the exclusive right . . . (e) to perform the copyrighted work publicly for profit if it be a musical composition and for the purposes of public performance for profit." The Act further reads: "If any person shall infringe the copyright in any work protected under the copyright laws of the United States, such person shall be liable:

(a) To an injunction restraining such infringement . . .

(b) To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as the profits which the infringer shall have made from such infringement, and in proving profits, the plaintiff shall be required to prove sales only, and the defendant shall be required to prove every element of cost which he claims, or in lieu of actual damages and profits, such damages as to the court shall appear to be just . . . though not less than $250.00."5

Continuing: "Any person who wilfully and for profit shall infringe any copyright secured by this title, or who shall knowingly and wilfully aid or abet such infringement, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by imprisonment for not exceeding one year or by a fine of not less than $100.00 nor more than $1,000.00, or both, in the

9 N. Y. U. L. Q. Rev. 180 (1931); 10 N. C. L. Rev. 203 (1931); 9 Ore. L. Rev. 182 (1929); 15 St. Louis L. Rev. 100 (1929); 20 Va. L. Rev. 911 (1934); 34 Yale L. J. 109 (1924).
2 U. S. Const. Art. I, Sec. 8.
discretion of the court: Provided, however, that nothing in this title shall be construed as to prevent the performance of religious or secular works ... provided the performance is given for charitable and educational purposes and not for profit."

As to the intent of this proviso, the Supreme Court of the United States in a recent case7 said: "This proviso must contemplate the charge of an admission fee, because if the performance is really not 'for profit', it would be perfectly lawful, both under Section 1(e), and under the prior provision of Section 28 itself. We must attribute a more plausible intention to Congress. We think it was to permit certain high class religious and educational compositions to be performed at public concerts where an admission fee is charged, provided the proceeds are applied to a charitable or educational purpose."8

It would logically seem to follow that the exclusive right of the copyright owner, under the Act, would extend only to a "public performance for profit". A public performance which involved no profit, and a private performance though involving profit would not come within the confines of the act.9 The two elements, therefore, which we shall always search for, will be a "public performance" and "for profit". If they are combined, the Act of Congress will protect the author against an infringement.

We must first determine what constitutes a "performance for profit". In the case of John Church v. Hilliard Hotel Co.,10 plaintiffs owned a copyright of a musical comedy which contained a song entitled: "From Maine to Oregon", and had a separate copyright for the song, also publishing it separately. Defendant hotel company caused said song to be performed in its dining-room for the entertainment of its guests during meal times by an orchestra employed and paid by the hotel. Plaintiff claimed that this was a "public performance for profit". The Federal Circuit Court of Appeals, however, held that the

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performance in the hotel dining-room, though intended to increase patronage, but for which no admission fee was charged, was not a "performance for profit", since the words "for profit", as used in the Copyright Act, mean a direct "pecuniary charge for the performance, such as an admission fee."

In Herbert v. Shanley, a test case, the problem as to what constituted "a profit" within the meaning of the Copyright Act reached the Supreme Court. The exact question presented was "whether the performance of a copyrighted musical composition in a restaurant or hotel without a charge for admission to hear it infringes the exclusive right of the copyright to perform the work publicly for profit?" Plaintiffs were the composers and owners of the comic opera "Sweethearts", containing a song of the same title. Both the opera and the song were copyrighted, the song being published and sold separately. The Shanley Company, defendant, operated a public restaurant in New York City, and employed performers to entertain the patrons. There was no admission fee charged by the restaurant. Defendants caused said song to be performed by its professional entertainers. Plaintiffs sued to enjoin the unauthorized performance. The Federal District Court, and the Circuit Court of Appeals, both denied relief, in the ground that since there was no direct charge to the public, the performance was not one "for profit". The United States Supreme Court, however, reversed the decisions of the lower courts, on the ground that even though the charge to the public was indirect, it was nevertheless sufficient to make the performance one "for profit". Mr. Justice Holmes, who wrote the opinion, said:

"If the rights under the copyright are infringed only by a performance where money is taken at the door, they are very imperfectly protected. Performances not different in kind from those of the defendants could be given that might compete with and even destroy the success of the monopoly that the law intends the plaintiff to have. It is enough to say that there is no need to construe the statute so narrowly. The defendants' performances are not eleemosynary. They are part of a total for which the public pays, and the fact that the price of the whole is attributed to a particular item which those present are expected to order, is not important. It is true that the music is not the sole object, but neither is the food, which probably could be got cheaper elsewhere. The object is a repast in surroundings that to people having limited powers of conversation or disliking the rival

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221 Fed. 229, 231.
noise give a luxurious pleasure not to be had from eating a silent meal. If music did not pay, it would be given up. If it pays it pays out of the public's pockets. Whether it pays or not, the purpose of employing it is profit and that is enough."

So, with the Shanley case, we can safely say that even though no direct admission fee is charged, or no profit actually made, a performance for which an indirect charge is exacted, will amount to a performance for profit.\footnote{242 U. S. 591 at 594. Accord: Harms v. Cohen (D. C., Pa.) 279 Fed. 276 (1922). (The playing of music in a motion picture theatre to which a charge for admission was made was a performance for profit within meaning of the Copyright Act, though the music was selected because fitting and appropriate to the action of that portion of the picture at that precise instant being shown on the screen.) Witmark v. Pastime Amusement Co. (D. C. S. C.), 298 Fed. 470 (1924) (The rendering of copyright music as incidental to a motion picture show is a performance thereof for profit.) Witmark v. Calloway (D. C., Tenn.), 22 Fed. (2d) 412 (1927).} \footnote{Accord: Performing Right Society v. Hawthorne Hotel, Ltd., 149 L. T. R. 425 (Chanc., 1933).}

In the leading case of \textit{M. Witmark & Sons v. L. Bamberger & Co.},\footnote{291 Fed. 776 (D. C., N. J., 1923).} an analogous situation in radio broadcasting is presented. The Bamberger Company, a department store, operated a radio department, and radio broadcasting station WOR. The petitioner was the owner of the copyright of the song "Mother Machree". Petitioner alleged an infringement of his copyright, and sought by injunction to prevent further performance. The Bamberger Company claimed that since there was no charge or cost to the listeners, there was no performance "for profit". The company's slogan, however, was broadcast at the beginning and end of every performance. The Federal District Court of New Jersey granted the injunction, stating that the obvious purpose of the broadcasts was to stimulate sales through advertising. This was held to be an element of indirect profit, and sufficient to constitute an infringement, even as in the Shanley case.\footnote{Supra, note 11.}

The Bamberger case, therefore, gives us the rule that a broadcaster who broadcasts a copyrighted musical composition performed in his studio is engaged in a public performance "for profit" of that composition, and is liable for the infringement if he is not authorized by the copyright owner.\footnote{For foreign decisions in accord, see Caldwell, Broadcasting of Copyrighted Works, 1 J. Air L. 534, 536, footnote 12.}

It is interesting to notice that in the Bamberger case, the defendant company brought forth the contention that petitioner
was receiving free advertising service for his musical composition. District Judge Lynch answered this by saying:

"Our own opinion of the possibilities of advertising by radio leads us to the belief that the broadcasting of a newly copyrighted musical composition would greatly enhance the sales of the printed sheet. But the copyright owners and the music publishers themselves are perhaps the best judges of the method of popularizing musical selections. There may be various methods of bringing them to the attention of music lovers. It may be that one type of song is treated differently than a song of another type. But, be that as it may, the method, we think, is the privilege of the owner. He has the exclusive right to publish and vend, as well as to perform."

To-day, there would be another reason why the argument of the defendant that the song receives free advertising would have failed. If we were to follow logically the argument to a conclusion, we would immediately see that the free advertising would be a detriment rather than a benefit. In 1923, when the Bamberger case was decided, and radio still a recent art, there may have been a benefit accruing to the musical selection through advertising. However, with the rapid rise of broadcasting stations throughout the country, the frequent repetition of a musical composition over a number of stations by orchestra's vocalists, and recordings, would soon cause the composition to die a rapid death. The situation has advanced so rapidly, that the Society of Authors, Composers and Publishers has been forced to place certain musical numbers on a "restricted list" in order to prevent their being repeated too often, else a selection's average life or popular span would be tremendously decreased. Thus, the argument advanced by the Bamberger Company would of necessity have failed.

In the year following the Bamberger decision, the court, in Jerome H. Remick & Co. v. American Automobile Accessories Co.,21 considered the question as to whether a broadcast constituted a "public performance". In that case, defendant was a manufacturer of radio sets, and the owner of a broadcasting station in Cincinnati. Plaintiff was the owner of a copyright on the composition "Dreamy Melody". Defendant caused said composition to be played over his station by means of an orchestra and vocalist. Plaintiff alleged that the act was a "public performance for profit", and sought an injunction to prevent further performance. The Federal District Court held,

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21 291 Fed. 776, 780.
22 298 Fed. 628. (D. C., Ohio, 1924).
that since no audience was actually present, this was not a performance within the meaning of the Copyright Act, for under a strict construction of the Act, an audience was necessary in order to have a public performance. District Judge Hickenlooper said:

"In order to constitute a public performance in the sense in which we think Congress intended the words, it is absolutely essential that there be an assemblage of persons—an audience congregated for the purpose of hearing that which transpires at the place of amusement."[^2]...

"We simply feel that the rendition of a copyrighted piece of music in the studio of a broadcasting station, where the public are not admitted and cannot come, but where the sound waves are converted into radio frequency waves and thus transmitted over thousands of miles of space to be at last reconverted into sound waves in the homes of the owners of receiving sets, is no more a public performance in the studio, within the intent of Congress, than the perforated music roll which enables the reproduction of copyrighted music by one without musical education, is a copy of such music. A private performance for profit is not within the act, nor is a public performance not for profit. All contemplate an audience which may hear the rendition itself through the transmission of sound waves, and not merely a reproduction of the sound by means of mechanical device and electro-magnetic waves in ether."[^3]

On appeal, the case was reversed[^4], the court saying: "A performance is no less public because the listeners are not assembled within an inclosure, or gathered together in some open stadium, or park, or other public place. Nor can a performance be deemed private because each listener may enjoy it alone in the privacy of his home. Radio broadcasting is intended to, and in fact does, reach a very much larger number of the public at the moment of the rendition than any other medium of performance. The artist is consciously addressing a great, though unseen and widely scattered, audience, and is therefore participating in a public performance."[^5]

It is submitted that the modern radio audience at present day broadcasts would have made the opinions in the Remick case far easier of solution. The radio broadcasting studio to-day is really a radio theatre, with a visible audience of thousands of people who see, as well as hear, the performance. Broadcasting stations have for the past number of years been appropriating and building radio show palaces where an audience is able to view the proceedings at all times.

[^3]: 298 Fed. 628, 632.
[^5]: 5 F. (2d) 411, 412.
The Remick case further sustained the view that the phrase "for profit" did not mean that a direct admission charge must be made for musical compositions rendered in public, insofar as the purpose of publicly playing the pieces was to attract customers or satisfy them, it was sufficient to bring them within the confines of the Copyright Act. Furthermore, the fact that radio was not developed at the time the Federal Copyright Act was amended, did not prevent the radio from coming within the purview of the Act, since the Act may be applied to new situations not anticipated by Congress, and if fairly construed, such situations come within its intent and meaning.  

In the case of Jerome H. Remick & Co. v. General Electric Co., 27 the court was faced with the question whether one who merely broadcasts by microphone an authorized copyrighted musical selection, but who otherwise has no connection with the actual rendition of the song, was an infringer within the meaning of the Copyrighted Act. The court answered the question in the negative on the ground that if the orchestra rendering the selection was authorized by the owner of the copyright, the broadcasting was not an infringement, and moreover, that the performance was by the person or persons rendering the song, and not the performance of the broadcaster. Said the court: "So far as practical results are concerned, the broadcaster of the authorized performance of a copyrighted musical selection does little more than the mechanic who rigs an amplifier or loud-speaker in a large auditorium to the end that persons in remote sections of the hall may hear what transpires so upon its stage or rostrum. Such broadcasting merely gives the authorized performer a larger audience, and is not to be regarded as a separate or distinct performance of the copyrighted composition upon the part of the broadcaster." 28

This would, seemingly, indicate that under certain conditions the act of broadcasting, by itself, would not constitute a separate "public performance" of the copyrighted song. From the dictum in the General Electric case, 29 the court inferred that if

27 4 F. (2d) 160 (S. D. N. Y., 1924).
28 4 F. (2d) 160.
29 4 F. (2d) 160. ("If a broadcaster procures an unauthorized performance of a copyrighted musical composition to be given, and for his own profit makes the same available to the public served by radio receiving sets attuned to his station, he is to be regarded as an
the performance were *unauthorized*, then the broadcaster would be held as a contributory infringer. On the final hearing of the case on its merits,\(^3\) it was found that the performance was actually unauthorized, and the broadcaster was held to have participated in the infringement, and liable as a contributory infringer on the ground that he participated in the infringement by actively engaging himself in "transmitting to the radio audience the unauthorized production." Therefore, where the original rendition is unauthorized, the performer is primarily liable, and with him, the broadcaster, whom the courts designate as a "contributory infringer". Said the court:

"Certainly those who listen do not perform and therefore do not infringe. Can it be said with any greater reason that one who enables others to hear participates in the unauthorized performance, so as to be a contributory infringer? Surely not, if, as is argued by analogy, he merely leaves the windows open, so that the strains of the music may be heard by those in the street below. Such is not the case of the broadcaster, equipped with instruments animated by electricity constantly furnished, who throughout the performance of the orchestra picks up each note, translates it into electrical energy, and transmits it to persons within a radius of several hundred miles, so that they may hear the original sound. It is not enough to say that the broadcaster merely opens the window, and the orchestra does the rest. On the contrary, the acts of the broadcaster are found in the reactions of his instruments, constantly animated and controlled by himself, and these acts are quite as continuous and infinitely more complex than the playing of the selection by the members of the orchestra.

That in the process of transmission there is no audible rendition of the musical production until it is heard by the owners of radio receiving sets merely emphasizes the fact that the broadcaster is actively engaged in transmitting to the radio audience the original unauthorized production. In so doing, it seems clear that he participates in the infringement. Certainly, if he broadcasts without authority from the owner of the copyright a private rehearsal of a copyrighted production, he contributes to the resultant infringement. If, in the case at bar, the public had not been present in the public ballroom of the hotel while the orchestra continued to play, and the broadcaster to broadcast, he would have contributed to the infringement while the public was absent; but the presence or absence of an audience in the hotel cannot change the character of his acts of contributory infringement."

It must be remembered that reproduction of musical com-

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\(^4\) 16 F. (2d) 829.
positions vocally or orchestrally, or on piano rolls, or phonograph records, when performed publicly for profit constitutes infringement within the Copyright Act. It is no defense that no notice of the copyright appeared on the original. To this can now be added radio broadcasting. Intention to infringe is unnecessary. The result, and not the intention, determines the question of infringement. Control over the infringing performance is not a necessary element of liability. Furthermore, the fact that radio was unknown at the time the Copyright Act was passed does not prevent broadcasting from being an infringement of copyright.

The next question deals with the situation where the broadcasting of a copyrighted musical composition is brought to the audience by means of a receiving set and loudspeaker. In Buck v. Duncan, plaintiffs, the American Society of Composers, Authors and Publishers filed suit against the defendant company, which operates the LaSalle Hotel in Kansas City, and defendant Duncan, operating station KWKC. The hotel maintained a master receiving set which was wired to each of the public and private rooms for the entertainment of its guests. Thusly, programs received on the master set were transmitted simultaneously to all parts of the building. Defendants were notified by the Society to secure a license to play the Society's copyrighted numbers. This request was not complied with, and subsequently, the broadcaster played two musical compositions copyrighted

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23Lutz v. Buck, 40 F. (2d) 501 (1930); Buck v. Lester, 24 F. (2d) 877 (1928).
29Dreamland Ballroom, Inc. v. Shapiro, Bernstein & Co., 36 F. (2d) 354 (1929). (The owner of a dance hall was liable for an infringing performance even though the orchestra was an independent contractor over which defendant had no control, and for whose acts it would not ordinarily be liable.)
and owned by the plaintiffs, and these were received and heard through the apparatus maintained by defendant hotel. Plaintiffs sued for an injunction against the broadcaster, and hotel owner, alleging an infringement of their copyright. The lower court rendered a judgment for damages and injunction against the broadcaster, but denied relief against the hotel, on the ground that the reception of broadcast music by the hotel did not constitute a performance within the meaning of the Copyright Act. Said the court: "The defendant had a right to have a radio in its hotel for the entertainment of its guests and to operate that radio. If, while it was operating, someone other than the defendant, wholly without defendant's participation, put upon the ether and so threw into defendant's radio electric impulses which came out of the radio as an audible rendition of a copyrighted musical composition, that was not in any sense the act of the defendant. The intent of the defendant did not enter into that act. If it were a performance of a musical composition, it was a performance not by the defendant, but by the broadcaster on the defendant's instrument." 

The court's holding that the hotel did not perform was based on the analogies of a deaf person who hears a piano rendition by means of an amplifier which he operates, a person who hears a piano rendition by means of a telephone, and a person who opens a window and hears a street band. "He who only hears the performance is not performing. It can be said that if the sound waves from a piano fall on the unaided ears of a listener, that listener has no part in the performance, and if he is deaf so that he cannot hear without the aid of an amplifier electrically operated which magnifies the sound waves so that they become perceptible to him, he still has no part in the performance. It is true in the latter case he has been enabled to hear the music only by means of a machine operated by himself. By that means he has made that which was inaudible audible to himself. But he has not performed, because he has not created. He has heard only what the performer at the piano created and sent out to be heard." 

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42 F. (2d) 366, 368.

42 F. (2d) 366, 367, 368. (The court further said: "It is true that if one plays on his phonograph a record of a piece of music, he is performing. If it is a copyrighted musical composition, and if the performance is public and for profit, then his act is an infringement..."
And so, in this early case, reception was not a performance. However, the Society appealed, and the Circuit Court of Appeals certified the following question to the United States Supreme Court:

"Do the acts of a hotel proprietor, in making available to his guests, through the instrumentality of a radio receiving set and loudspeakers installed in his hotel and under his control and for the entertainment of his guests, the hearing of a copyrighted musical composition which has been broadcast from a radio transmitting station, constitute a performance of such composition within the meaning of Sec. 1(e) of the Copyright Act?"

The Supreme Court answered the question in the affirmative, Mr. Justice Brandeis delivering the opinion. The Court considered reception as essentially being a reproduction within the control of the person receiving the program, and hence, within the meaning of the Copyright Act, a "performance". Said the court:

"We are satisfied that the reception of a radio broadcast and its translation into audible sound is not a mere audition of the original of the copyright. Plaintiffs say that there is no difference in principle between playing by phonograph a record impressed in bakelite, and playing by radio receiver a record impressed on the ether. Obviously, there is a difference. The record on bakelite is a separate and distinct thing from the original performance in the studio where the record was made. Playing that record is performing anew the musical composition imprinted on it. The waves thrown out upon the ether are not a record of the original performance. They are the original performance. Their reception is not a reproduction, but a hearing, of the original performance. The reception of a musical composition on a radio receiver is not a performance at all. Of course, then, the defendant did not perform these copyrighted jazz pieces.

"Moreover, infringement must be an intentional act. I do not mean by that that one who performs a copyrighted musical composition publicly for profit is not guilty of infringement merely because he does not know the piece is copyrighted. The law is otherwise. There is an intentional performance when, for example, one plays on an instrument from a sheet of music a piece of music. There is an intentional performance when one plays on a phonograph record. In either of these cases, if the performance is public and for profit, there is an infringement if the musical composition is copyrighted, and that whether the performer is or is not cognizant of the copyright.

"Suppose, however, the proprietor of a hotel has a phonograph playing in his dining room for the entertainment of his guests, and suppose that without any request from him or participation on his part, a stranger surreptitiously places in the machine a record of a copyrighted musical composition. Would it not be unthinkable that that hotel proprietor would be held guilty of infringement, and subjected to damages. His intent in no wise entered into that performance. If it was a performance, in no sense was it his performance. It is not possible that mere ownership of a musical instrument carries with it liability for any use to which another may put the instrument."

'51 F. (2d) 726 (1931).

program. It is essentially a reproduction. As to the general theory of radio transmission there is no disagreement. All sounds consist of waves of relatively low frequencies which ordinarily pass thru the air and are locally audible. Thus music played at a distant broadcasting station is not directly heard at the receiving set. In the microphone of the radio transmitter the sound waves are used to modulate electrical currents of relatively high frequencies which are broadcast through an entirely different medium, conventionally known as the 'ether'. These radio waves are not audible. In the receiving set they are rectified; that is, converted into direct currents which actuate the loud speaker to produce again in the air sound waves of audible frequencies. The modulation of the radio waves in the transmitting apparatus, by the audible sound waves is comparable to the manner in which the wax phonograph record is impressed by these same waves thru the medium of a recording stylus. The transmitted radio waves require a receiving set for their detection and translation into audible sound waves, just as the record requires another mechanism for the reproduction of the recorded composition. In neither case is the original performance heard; and in the former, complicated electrical instrumentalities are necessary for its adequate reception and distribution. Reproduction in both cases amounts to a performance."

And so, it would seem that all previous decisions inconsistent with the Jewell case are overruled. Though the court agreed that the owner of a private radio set who invites friends to his home to hear a musical composition which is being broadcast would not be liable for an infringement, yet, a receiving set in a hotel, restaurant, or other public place was as much a performance as the one emanating from the broadcasting studio. With the Jewell case, radio broadcasting must now be regarded as definitely within the meaning of the Copyright Act. The copyright owner’s monopoly is completely secured by the Jewell case, and gives him at the same time the right to control reception so long as it is public and for profit. The case is a perfect example of the expansion of an old statute covering a new situation, not in the contemplation of the original enactors. To say the least, the court gave the statute a very liberal construction.

The following hypothetical cases will illustrate the far-reaching effects of the decisions thus far:

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"283 U. S. at 199. (Compare, Buck v. Heretis, 24 F. (2d) 876 (1928); Irving Berlin v. Daigle, 31 F. (2d) 832, 833 (1929)."  
"Davis, Copyright and Radio, 16 Va. L. Rev. 40 (1929)."  
"Taken from analogous situations in, Caldwell’s, The Copyright Problems of Broadcasters, 2 J. Radio L. 287 (1930)."
(a) Station XYZ broadcasts a football game. During the game, a school band plays a restricted number, not covered by the license. The broadcaster would be liable for infringement. Also, every hotel, barber shop, ice cream parlor, drug store, etc., which lets the program through to its listeners over the receiving set would be liable for an infringement in "publicly performing for profit".

(b) Again, one of the larger broadcasting chains plays a restricted number, infringing a copyright. Every station in the chain, every store, ice cream parlor, etc., would also be held if it carried the same program for the entertainment of its guests. This is hard to see. The parties are really innocent infringers. They have no control over such playing of a restricted musical number, and no means of protection, since they do not know that a restricted number is about to be played. The damages for an infringement in such case are high, and are in fact a penalty, since the proceeds go to the copyright owner, and not to the government.50

Suppose that the broadcaster has a license, but the receiver has none. In the Jewell case, the Supreme Court left the question open. Said the court: "Since the public reception for profit in itself constitutes an infringement, we have no occasion to determine under what circumstances a broadcaster will be held to be a performer, or the effect upon others of his paying a license fee."51

The nearest solution to this problem was the case of Buck v. Debaum,52 in which the defendant operated a cafe wherein he put in a receiving set through which he received programs of various broadcasters. The station, as distinguished from the Duncan case, was authorized to broadcast the composition. Though the court agreed that the act of the defendant was both "public" and "for profit", nevertheless, they held, that he did not "perform", insofar as the performance occurred entirely in

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51 283 U. S. 191, 198.
52 (D. C., Calif.) 40 F. (2d) 734 (1929). (For an excellent criticism of the Debaum case, see, 10 B. U. L. Rev. 536; also, Caldwell, The Broadcasting of Copyrighted Works, 1 J. Air L. 584, 590 (1930), for discussion of foreign decisions.)
the broadcaster's studio, and the action at the receiving set was in no sense a reproduction.\(^5\)

In England, the courts have reached conclusions similar to those of our American tribunals.\(^4\) In the case of *Chappell v. The Associated Radio Company of Australasia, Ltd.*,\(^5\) broadcasting by radio was held to be a public performance.

In *Messager v. British Broadcasting Company*\(^6\) a similar conclusion was reached, the court holding that anyone who switches on a receiving set in public is himself responsible for a public performance, and will commit an infringement of the author's copyright, notwithstanding that the performance at the broadcasting station was authorized. The court in that case held, that the defendants had performed because: "Instead of gathering the public into a vast assembly room, they set in motion certain ether waves knowing that millions of receiving instruments in houses and flats were tuned to the waves set forth, and knowing and intending also that acoustic representation of the opera would thereby be given to an enormous music audience of listeners."

In the case of *Performing Right Society, Ltd. v. Hammonds* (Chanc. 121, 1934).

\(^{53}\) 40 F. (2d) 734 at 735. ("One who manually or by human agency merely actuates electrical instrumentalities, whereby inaudible elements that are omnipresent in the air are made audible to persons who are within hearing, does not 'perform' within the meaning of the Copyright Act. The performance in such case takes place in the studio of the broadcasting station, and the operator of the receiving set in effect does nothing more than one would do who opened a window and permitted the strains of music of a passing band to come within the inclosure in which he located. It is true that it is the voluntary act of the person turning the dial on the receiving set that enables electricity to animate the mechanism so as to make audible within hearing distance of the receiving set that which is disseminated from the broadcasting station and which is 'on the air' by reason of the broadcast, but such voluntary action is far from 'performing' the copyrighted work. The performance which is licensed occurs entirely in the studio of the broadcasting station where the copyrighted musical composition is lawfully used, and the action occurring at the receiving set is simultaneous therewith, and is in no sense a reproduction of the musical composition that is being lawfully performed at the broadcasting studio.")


\(^5\) Victoria L. R., 350 (1925).

\(^6\) 2 K. B. 543 (1927), though reversed on other grounds, 1 K. B. 660 (1928), opinion of McCardie, J., was cited with approval by the Court of App. in *Performing Right Society, Ltd. v. Hammonds Bradford Brewery Co.* (Chanc. 121, 1934).

\(^7\) 2 K. B. 543 at 548.
Bradford Brewery Co., the defendant, a hotel proprietor, received on his radio a broadcast of copyrighted songs for the entertainment of his guests. The station was licensed to broadcast the music "for domestic and private use only". Plaintiff, owner of the copyrighted works, sought a judicial declaration that defendant had put on a public performance in violation of the Copyright Act. The court held, that the reception was a public performance in violation of the copyright.

It is interesting to note that the English court in the Hammonds case deals with the question of a possible implied license in favor of the hotel keeper. In the final decision, however, the proprietor of the hotel was restrained from assuming the benefits of the contract between the copyright owner and the broadcaster.

This "implied license" theory has also been discussed by our American courts. In the Debaum case, the court seemed to think that the reception of the program for commercial purposes was impliedly authorized. Said the court: "It seems to be clear that, when plaintiffs licensed the broadcasting station to disseminate the "Indian Love Call" (the composition played), they impliedly sanctioned and consented to any "pick up" out of the air that was possible in radio reception."

The Society of Composers, Authors, and Publishers subsequently adopted a standard clause in their license agreements limiting consent of the copyright owner to private reception, thus preventing any possible implied license. In a recent case, defendant company operated a two-channel master receiving set it installed in its New York hotel. The set was attuned on one channel to station WJZ of the N. B. C. system, and over this station, defendant heard the rendition of a certain song, which was sent on to the guest rooms. An employee of the plaintiffs heard the rendition and reported the occurrence. The N. B. C. had been licensed by the owners of the copyright to broadcast the song, but the hotel had no permission, and N. B. C.

58 49 T. L. R. 410 (1933), affirmed, 50 T. L. R. 16 (1934); Chanc. 121 (1934).
60 Discussed in 15 St. Louis L. Rev. 100, 101 (1930).
61 40 F. (2d) 734 (1929).
62 40 F. (2d) 734, 735.
had no power to give the hotel permission to perform the song. Plaintiff sued for damages, and for injunction. The court held, that the hotel was liable. This case differs from the Jewell case, in that no public rooms were wired here, only bedrooms receiving the radio programs. The defendant claimed that since the N. B. C. had authorization to broadcast the song, the grant resulted in an "implied license" in favor of the hotel keeper.

The court disagreed with this contention, saying that an implied license was not possible, since the contract between the copyright owner and the broadcasting station expressly negatived any such possibility.

In a recent Canadian case, a similar result was reached. The facts were similar to those of the last case, radio music being rendered by an authorized and licensed broadcast, and made available to guests of the defendant hotel in the manner of the Jewell case. The court discussed the possibility of implying a license, but reached the result of the case before. The court repudiated the argument of the Debaum case, saying: "It has been argued that the defendant could not have anticipated that the works in question would be transmitted from the broadcasting stations to which its receiving sets were from time to time attuned. If the defendant company desired to rebroadcast programs received from station CKAC, for the entertainment of its guests, it could have protected itself by first ascertaining from that station what copyrighted works would be broadcast during the day, and at what times, and by either shutting off its receiving set during the time of such performance, or making the necessary arrangements with the copyright owners."

The American Society of Authors, Composers and Publishers (and the similar foreign Performing Right Society) is undoubtedly the greatest protector of copyrighted material in the world. The Society was organized to protect the Works of its members against piracy, and against infringement by amusement enterprises. The Society has insisted from the very

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64 283 U. S. 191, 51 Sup. Ct. 410, 75 L. Ed. 971 (1931).
66 40 F. (2d) 734 (1929).
67 2 Dom. L. R. 391, 400.
68 See, Caldwell, Piracy of Broadcast Programs, 30 Col. L. Rev. 1087 (1930).
beginning that radio broadcasting constituted a "public performance for profit" within the meaning of the Copyright Act. The case of *Herbert v. Shanley Co.* bore them out. The Society insisted that the broadcasting stations make arrangements for payment of fees to them for the privilege of using their works, or to totally refrain from any use thereof. The reluctance of the broadcasters to pay was partly based on the fact that no existing law on the subject was then present, and that the Copyright Act did not include radio broadcasting. Radio, then, was still a novel thing. It was held not to be a musical instrument within the meaning of the Tariff Act, or the Exemption Statutes. Recent decisions, however, bore out the contention of the Society that the Copyright Act was broad enough to cover the field of radio broadcasting, and the stations were forced to give in. And so, the Society has worked out a schedule as to the amounts to be paid, basing the amount on such factors as power of the station, extent of commercializing, surrounding population, etc. The Society now supplies blanket licenses to various stations, hotels, etc. which afford complete protection under all circumstances.

To-day, broadcasters are not seeking to perform copyrighted works without paying for the privilege therefor. The early struggle to escape payment was the result of not foreseeing the huge commercial status that broadcasting would reach. The coast-to-coast chains with their large number of stations and unbelievably tremendous listening audiences have made radio one of the leading industries of the day.

It must be remembered that radio broadcasting is still a recent art. It is not, as yet, fully protected by present laws. Though the purpose of copyright acts, as shown by their historical development, and their purpose, makes them essentially monopolistic, and the acts given a liberal construction if their

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72 Dunbar v. Spratt-Snyder, 226 N. W. 22 (Iowa) (1929).
74 Davis, Copyright and Radio, 16 Va. L. Rev. 40 (1929).
75 Holdsworth, Press Control and Copyright in the 16th and 17th Centuries, 29 Yale L. J. 841 (1920); see also, Mr. Justice Holmes' opinion in *Herbert v. Shanley*, 242 U. S. 591, 594.
purpose is to be accomplished, new laws are badly needed. Obviously unsuited, and never intended to cover radio, present laws are inapplicable to the problems raised by radio communication. A revision of the entire law is most essential.\textsuperscript{76} Specific legislation clearly defining the rights and liabilities of all, and legislation exempting innocent infringers is essential.

Much attention was attracted to the subject at the National Radio Conference at Washington as early as 1926. A special committee, headed by the Hon. W. H. White, Congressman from Maine, was appointed to hear the different views. Because of the divergent paths taken by the Society of Authors, Composers and Publishers on one side, and the individuals representing the broadcasters on the other, no great success was possible, but the formation of the committee and its hearings was indicative of the importance of this problem even at that early date.\textsuperscript{77}

A few years ago, the Vestal Bill,\textsuperscript{78} a proposed revision of the Copyright Act, was presented to Congress. The provisions of this proposed general revision of the law which effect the most pronounced changes in existing law, were as follows:

(1). Automatic Copyright, by which the copyright is conferred upon the author upon creation of his work, a right so limited by various provisions of the bill as to be made a privilege.

(2). Divisible Copyright, which permits the assignee, grantee, or licensee to protect and enforce any right which he acquires from an author without the complications incident to the old law.

(3). International Copyright, which enables American authors, merely by complying with the provisions of this act, to secure copyright throughout all the important countries of the world without further formalities.

(4). Extension of the period of Copyright.

(5). Mitigation of penalty for innocent infringement.

(6). Abolition of the present obligatory registration of a claim of copyright.

Section 1, the provision affecting radio broadcasting, defines the scope of protection, and provides that "such copyright includes the exclusive right..."

"To copy, print, reprint, publish, produce, reproduce, perform render, exhibit, or transmit the copyrighted work in any form by any means, and/or transform the same from any of its various forms into any other forms, and to vend or otherwise dispose of such work; and shall further include the exclusive rights...

\textsuperscript{76} See editorials by Wigmore, 25 Ill. L. Rev. 799 (1931); 26 Ill. L. Rev. 42 (1931-32).

\textsuperscript{77} Davis, Copyright and Radio, 16 Va. L. Rev. 40 (1929).

\textsuperscript{78} H. R. 12849, 71st Congress, 2nd Session.

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any other methods or means for transmitting or delivering sounds, words, images, or pictures whether now or hereafter existing."

Though the Vestal Bill passed the House of Representatives, it never reached the final calendar of the Senate, and Congress failed to properly provide for the new field of endeavor. Other legislation has appeared from time to time, but nothing very constructive has as yet been done by our national legislators.

It is submitted, however, that the Model Copyright Act by Louis G. Caldwell, of the Chicago and Washington Bars, is the masterpiece in the field. A glance at a few of its provisions is enough to convince one of its worth. The sections on infringements read as follows:

Infringement. Section 9: "Copyright in a work shall be deemed to be infringed by any person who, without the consent of the copyright owner, does anything, the exclusive right to do which is conferred by this act on the copyright owner, subject, however, to the following ...

Subsec. (e). Nothing in this act shall be construed to prevent the performance of any literary, dramatic, or musical work by means of any recording or similar device unless a specific fee is charged for admission to the place where such performance occurs." (Mr. Caldwell tells us that by this section he is trying to prevent, so far as possible, any claim for infringement by the copyright owner based on the playing of ordinary phonograph records or the operation of radio receiving sets, in hotels, restaurants, ice cream parlors, barber shops, etc., where a specific admission fee is not charged.)

Subsec. (f). "Copyright of a recording which has been publicly sold or placed on sale, shall not extend to or prevent the broadcasting, rebroadcasting, or public reception for profit of any performance made by means of such recording."

(This section aims to restrict the copyright in recordings as such, so as to avoid giving phonograph record manufacturers the power to prevent the broadcasting of records, or use of such records in drugstores, barber shops, etc.)

Subsec. (g). "The broadcasting or rebroadcasting of performances of literary or musical works, where purely incidental to the broadcasting of public events and public occurrences and not originating with or controlled by the broadcaster, shall not be deemed to be an infringement by the broadcaster or by any receiving set proprietor;
nor shall any broadcasting or receiving set proprietor be held liable for broadcasting, rebroadcasting, or public reception of any speech, address, or similar matter over which the broadcaster is not permitted by law to exercise censorship in advance."

(The purpose of this subsection is to give effect to the "single performance" principle, so that, so far as possible, persons who perform a copyrighted work will be solely responsible for any infringement resulting from that performance, and persons who merely communicate that performance to the public and who have no means of protecting themselves against infringement by the performer, will be relieved of the penalties of such infringement. For example, the playing of a band at a football game, or political convention.)

Subsec. (h). "As to any work copyrighted after this act shall take effect, public reception of a broadcast or rebroadcast performance shall not be deemed to be for profit unless a specific fee is charged for admission to the place where such reception occurs."

In Section 19, subsection (e), the act provides that minimum damages be reduced to $10.00. The present Act of Copyright makes the minimum fee $250.00, so we can well see that Mr. Caldwell appreciates the problem of the innocent infringer.

Section 20, subsection (g), reads as follows:

"Where the infringement complained of is the broadcasting of a performance of a copyrighted work not produced by the broadcaster, the remedies of the copyright owner (1) shall be available against the broadcaster only if such broadcasting has not been authorized by the producer of the performance, and (2) shall otherwise be available only against the producer of the performance."

Subsec. (h). "Where the infringement complained of is the public reception for profit of any broadcast performance of a copyrighted work, the remedies of the copyright owner shall be available against the person operating the reception installation only, (1) if such reception has not been authorized by the broadcaster from whom the performance is received."

It is submitted that it would be wise for our legislators to adopt the Model Act, or to formulate an act on the same principles, and with similar provisions, which would protect innocent infringers, minimize damages, clearly define the rights and liabilities of all parties, and provide for future developments.

Radio is now a fabulous commercial enterprise. Hundreds of stations with listening audiences running into the millions are dotting the country everywhere. Much of the radio field is still an unknown territory. The art is still in its infancy, though its success has been assured. Further progress is inevitable. Television broadcasting is being even now perfected, and in a near future date, will be ready for national distribution.

The commercialization of the control of the air has engendered many novel legal situations, with others to follow suit.

"2 J. Radio L. 315.
Yet, specific legislation is still lacking. It is the duty of Congress to provide proper laws for the new art. Proper legislation would speed its even now rapid rise. The welfare of radio should be carefully guarded. **The Progress of Radio Continues.**