Radio and Copyright

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THE enormous influence exerted by radio in every line of human endeavor particularly education and amusement was bound to bring questions of copyright in connection with this new means of communication into the foreground. A vigorous competition between various radio stations has developed in their efforts to obtain and hold a large though unseen audience. To fascinate this motley crowd reclining on sofas and davenports, sitting in parlors, kitchens and shops, and standing at pooltables and bars, classical music and literary productions on which the copyright had expired were found to be insufficient. The demand naturally was for the “latest” just as it was in the days of St. Paul when the Athenians were always eager for new things. The latest, however, was usually protected by copyrights. The use of copyrighted material without a license from the owner was the natural consequence. The aftermath in the courts was just another proximate result. Enough cases have already been decided to clarify every essential portion of this new field. The question before the courts was the application of the copyright statute passed before radio was thought of to a new form of literary or musical piracy.

It needs no extended argument to prove that broadcasting is a public performance within the copyright statute. We speak of theaters and concert halls as public places though their capacity is necessarily limited and the public is not admitted to them except on the payment of an entrance fee. A performance which may be heard by millions of people cannot but be public in the sense in which the word is here used. A performance is public though the listeners are not assembled in an enclosure, stadium, or park, cannot communicate with each other and enjoy the performance in the privacy of their own homes. Radio in fact reaches a far greater public than can any other performance. The artist, speaker or performer is constantly addressing a great though unseen and widely scattered audience.¹ Though perhaps in the strict sense of the word radio may not be affected with a public interest it certainly is very close to the domain of public interest and has therefore become the subject of extended regulation in many countries including our own.

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Is the broadcasting of a copyrighted song, story or other musical or literary production a public performance of the same for profit within the copyright act? The answer is clearly in the affirmative where a class A radio station is entitled to a part of the fees collected from 13,000 general and special receiving apparatuses—the special licensees being hotels, restaurants and other public places which pay a higher fee—and broadcasts, after extensive advertising, a copyrighted musical composition. After all a copyright is merely a special application of the command "Thou shalt not steal." It is sound public policy to protect from larceny the intangible but nevertheless real contributions of artists, musicians, and writers. It would be a blot on our civilization to refuse to literary property the protection against theft now accorded to cabbages and potatoes. "A man has no right even to be philanthropic with stolen money and the interests back of radio broadcasting while legitimate are far from philanthropic."

The question is somewhat closer where, as is the case in the United States, no license fee is imposed on the receiving sets and the broadcaster, therefore, is dependent for his profit on voluntary contributions on the part of his listeners or, as is more frequently the case, on the advertising which he by his broadcasting gives to himself and the goods which he has on sale.

There is no incentive to the purchase of a receiving set unless something of interest may be heard thereby. Without broadcasting stations a radio set would be exactly as saleable as a victrola for which there were no records extant. Broadcasting is done to make possible the sale of receiving sets at a profit, and many thousands have been sold. A large and profitable industry has been built up which depends solely on broadcasting and which would become valueless instantly if broadcasting were stopped or if the programs rendered failed to interest.

Therefore stations maintained by manufacturers or vendors of radio apparatus pay performers, send out daily programs and furnish entertainment designed to be so pleasing that the public will purchase receiving apparatus in order to enjoy it. Radio, therefore, though it is doing a great public service, is doing what it does as a commercial proposition and should not be allowed to do this at the expense of those whose talent has brought into existence the musical, literary or other product. Though Congress did not have any such situation in mind when it used the language "perform publicly for profit" a broadcasting station infringes the copyright on a song by means of having it

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sung with an orchestra accompaniment. The fact that radio was not developed at the time when the statute was passed does not take it out of its provisions. The statute may be applied to new situations not anticipated by Congress if, fairly construed, such situations come within its intent and meaning. While statutes should not be stretched to apply to new situations not fairly within their scope they should not be so narrowly construed as to permit their evasion because of changing habits due to new inventions and discoveries. A photograph was an infringement of a copyrighted engraving under statutes passed before the photographic process had been developed. Direct payment, therefore, is not necessary to make a performance one for profit, but indirect payment by a hat checking charge in the case of a cabaret or a general commercial advantage by the advertisement of one’s name and business is sufficient. Such indirect benefit may be as great or greater than the profit derived from an admission fee. If the broadcasting stimulates the broadcaster’s business in the sale of radio equipment or of any other article and great advantage is derived from his name and slogan being constantly brought to the attention of many people, a profit certainly results.

A broadcasting station which broadcasts a copyrighted song cannot defend an action for infringement of the copyright on the ground that its broadcasting greatly enhances the sale of the printed sheets. The copyright owner and the music publishers are the best judges of the method of popularizing musical selections. The method is the privilege of the owner. He has the exclusive right to publish and vend as well as perform. It stands to reason that a person who has heard a novel over the radio would hardly buy the book. What is true of books may even be true of songs. The modern “song hit” is a most ephemeral thing. Who today sings “Yes we have no bananas”? One tires of such songs after hearing them a few times. Radio therefore is apt to “kill” such songs by constant repetition rather than advertise them. Authors in consequence suffer in their pocketbook.

The rule that radio broadcasting of copyrighted material is a public performance for profit is just and should not be relaxed. Since, however, broadcasting is an entertainment which appeals to many who have invested heavily to enjoy it and opens up opportunities to rural dwellers to hear music which heretofore was open only to city dwellers, the broadcasting business should, without impairment of copyright and without undue exactions, be put into a position to furnish not only

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classical selections but also the "latest" which of course is usually protected by copyright. It seems, however, that at present an association controls the situation but maintains no uniform scale of charges, charging for licenses in accordance with the various circumstances of the trade. Should not radio broadcasting be put on the same basis as mechanical reproduction, with respect to which the copyright act provides that if the owner licenses a mechanical reproduction by any person, he must grant a like license to any other person at a royalty fixed by the statute.\(^8\) The public performance of music and other means of entertainment while not recognized as strictly affected with a public interest is very close to the domain of public interest. It would seem to be subject to regulation as much as is the "scalping" of theater tickets.\(^9\)

The question of whether an authorized performer of a song is guilty of an infringement where he also broadcasts his performance has been raised in New York.\(^10\) It has been held that the performer by means of the radio art simply makes a given performance available to a great number of persons who, but for such art, would not hear it. The broadcaster does little more than the mechanic who rigs up an amplifier or loud speaker in a large auditorium to the end that persons in remote sections of the hall may hear what transpires upon the stage or rostrum. The authorized performer thereby obtains a larger audience but his performance is the same. There is in other words no separate and distinct performance of the copyrighted composition on the part of the broadcaster.

The programs made up in this country by the various broadcasting stations will hardly lead to any court action for infringement of copyright. It is in the interest of all stations to obtain as much publicity as possible and hence any publication of their programs will be welcomed and even paid for rather than resisted as a copyright infringement. However, in England where broadcasting is a true monopoly, a different situation exists. The British Broadcasting Company, drawing an income from a license fee imposed on the individual receiving sets and publishing its daily programs for each week in advance in the \textit{Radio Times}, is naturally interested in selling as many copies of this publication as possible and for this purpose seeks to prevent other papers from coming into this field. Where, therefore, the defendants undertook to publish in the first (and only) number of the \textit{Wireless League Gazette} a selection from a weekly program as published in the \textit{Radio Times}, referring their readers to the \textit{Radio Times} for the full

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\(^8\) Infringement of Copyright to Radio, 30 Law Notes 22.


programs and actual clock times of the performances, the court held that the copyright statute had been violated and issued an injunction as prayed for. In support of its opinion the court referred to another case in which it had been held that copyright subsisted in examination papers as "original literary work" and cited from the opinion of the court the following extract:

The words "literary work" cover work which is expressed in print or writing, irrespective of the question whether the quality or style is high. The word "literary" seems to be used in a sense somewhat similar to the use of the word "literature" in political or electioneering literature and refers to written or printed matter. . . . The word "original" does not in this connection mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought, and in the case of "literary work," with the expression of thought in print or writing. The originality which is required relates to the expression of the thought. But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work—that it should originate from the author.

The court then intimated that the compilation of a single program would be within the copyright act if it involved literary authorship and concluded that even if the court were in error on this point the compilation of seven such non-copyright daily programs into a weekly program required very considerable work and was protected by the copyright act because it was not a mere collection of what had already been prepared.11