BROADCASTERS' NEWS BULLETIN

Reporting accurately and promptly current happenings of special interest to Broadcasting Stations in the Commercial, Regulatory, Legislative and Judicial Fields

Issued by

THE NATIONAL ASSOCIATION OF BROADCASTERS

Incorporated

NATIONAL PRESS BUILDING

WASHINGTON, D. C.

Telephone District 9497

February 5, 1931

SPECIAL MEMORANDUM TO MEMBERS

The report of Chief Examiner Ellis A. Yost on the high power hearings is expected next week.

If you want a brief telegraphic summary of the report as it relates to your zone, mail the enclosed card immediately. If you desire a copy of the report, mark the card accordingly.

Twenty-four stations have applied for the eight positions which are available under the provisions of General Order No. 42, as amended, which must be followed in the report.

In the First Zone, WJZ, New York; WOR, Newark, N. J.; WHAM, Rochester, N. Y.; and WBZ, Springfield, Mass. are competing for a single position.

In the Second Zone, WHAS, Louisville, Ky.; and WCAU, Philadelphia, Pa. are competing for a single position.

In the Third Zone, WSB, Atlanta, Ga.; WBT, Charlotte, N.C.; WSM, Nashville, Tenn.; WAPI, Birmingham, Ala.; and KVOO, Tulsa, Okla. are competing for two assignments.

In the Fourth Zone, WMAQ, WGN, and WBBM, Chicago; WCCO, Minneapolis, Minn.; and WHO-WOC, Des Moines, Iowa, are fighting for two positions.

In the Fifth Zone, KOA, Denver, Colo.; KSL, Salt Lake City, Utah; KPO, San Francisco, Calif. and KGO, Oakland, Calif. are competing for two positions available.

The report also will consider the applications of WWJ, Detroit, Mich. WREC, Memphis, Tenn. WTMJ, Milwaukee, Wisconsin, and WCFL, Chicago, Ill. for high power on clear channel assignments.

Send the card by return mail in order that your copy of the report may be reserved. Telegrams will be sent COLLECT the minute the report is publicly released.

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SCHEDULE OF DEPRECIATION RATES FOR BROADCASTING STATIONS

The National Association of Broadcasters has obtained from the Valuation Division of the Internal Revenue Bureau a tentative schedule of depreciation rates for broadcasting station equipment.

This schedule is not to be regarded as official but it is recommended as a safe guide in the calculation of depreciation rates for income tax purposes. No official schedule has ever been published and this is the first tentative schedule ever announced.

There will not be complete agreement among broadcasting stations on all of the rates given and the Government itself does not have sufficient information to enable it to form a separate opinion as to the life of station equipment.

The Association is pleased to be able to present this schedule of rates and it is hoped that it will assist members in computing their income tax returns.

SCHEDULE OF DEPRECIATION RATES

FOR

BROADCASTING STATIONS

	Probable Useful Life Years
Adjusting and Testing Instruments	10
Amplifier Control	5
Amplifiers, Portable	3
Amplifier, Radio Frequency, Frame	8
Antenna and Ground Counterpoise System	7
Antenna and Ground System	
Radio Telegraphy	10
Radio Broadcasting (except steel masts - 10 yrs.)	5
Antenna Structure and Antenna Supports	5
Antenna Tuning Inductances	5
Audio Equipment	3
Batteries, Storage	
Radio Telegraphy	10
Radio Broadcasting	6-2/3
Cabinets, Mixed control	5
Checking and Reading Per Cent, modulation instrument	5
Circuit Breakers	6-2/3
Compensators	5
Condensers	5
Control, Amplifier	5
Control Relays	3
Control - Transmitter Units, Direct (Panel)	8
Control Units (Aircraft Radio Telegraphy)	3
Cooling Ponds	
Radio Telegraphy	10
Radio Broadcasting	6-2/3
Cooling Systems	10
Counterpoise (Station Equipment)	5
Equalizers, Line	3
Frequency Control Apparatus	3
Insulation	5
Listening Apparatus	4
Measuring Instruments	7
Microphones	3
Mixing Panels	3
Motor Generator Sets	6-2/3

	Probable Useful Life Years
Oscillators	5
Plate Supply	6-2/3
Plate and Filament	10
Power Control Equipment	6-2/3
Power Supply	
Radio Telegraphy	10
Radio Broadcasting(except motors and generators 10 years)	6-2/3
Pumps and piping	6-2/3
Receivers, Radio	6-2/3
Rectifiers, main	5
Signalling Apparatus	4
Sound Treatment of Studios	5
Speech Input equipment	3
Sprays and Cooling ponds	6-2/3
Switches and Controls	7
Towers and Masts	10
Transmission Lines, Radio Frequency	5
Vacuum Tube Transmitters(except high voltage supply 10 years)	3
Voltage Supply, high	3

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 138.

GENE BUCK, as President of the American Society of Composers, Authors and Publishers, and DE SYLVA, BROWN & HENDERSON, INC., a corporation, *Appellants*,

vs.

JEWELL-LA SALLE REALTY COMPANY, a corporation, *Appellee.*

No. 139.

GENE BUCK, as President of the American Society of Composers, Authors and Publishers, and LEO FEIST, INC., a corporation, *Appellants.*

vs.

JEWELL-LA SALLE REALTY COMPANY, a corporation, *Appellee.*

ON CERTIFICATES FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Motion of National Association of Broadcasters, Inc., for Leave to File Brief as Amicus Curiae, and Brief of Amicus Curiae.

LOUIS G. CALDWELL,
PHILIP G. LOUCKS,
Counsel for National Association of Broadcasters, Inc., as Amicus Curiae.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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ON CERTIFICATES FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

May It Please the Court:

The undersigned, as counsel for National Association of Broadcasters, Inc., respectfully moves this Honorable Court for leave to file the accompanying brief in this case as *amicus curiae.*

LOUIS G. CALDWELL,
PHILIP G. LOUCKS,
Counsel for National Association of Broadcasters, Inc., as Amicus Curiae.

IN THE

SUPREME COURT OF THE UNITED STATES.

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ON CERTIFICATES FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF NATIONAL ASSOCIATION OF BROADCASTERS, INC., AS AMICUS CURIAE.

PRELIMINARY STATEMENT.

This brief is directed solely to the following question:

> Question I. Do the acts of a hotel proprietor, in making available to his guests, through the instrumentality of a radio receiving set and loud speakers 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 17 U. S. C. Sec. 1 (e)?

This question is the only one certified in No. 138 (p. 7) and is the first of four in the consolidated series of questions certified in Nos. 139 and 140 (pp. 8-9). It was answered in the negative by the District Court below (Buck, *et al.* v. Jewell-LaSalle Realty Company, 32 F. (2d) 366), and by the District Court for the Southern District of California (Buck, *et al.* v. Debaum, *et al.*, 40 F. (2d) 734).

The material portion of Sec. 1 (e) of the Copyright Act of 1909 reads as follows:

> "Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right: * * *
>
> "(e) To perform the copyrighted work publicly for profit if it be a musical composition. * * *"

The National Association of Broadcasters, Inc. (hereinafter referred to as the "Association") is a Delaware corporation, not for profit. It has a membership of 136 broadcasting stations (out of a total of about 620) in the United States, including most of the larger and more important stations. As stated in its constitution:

> "The object of this Association shall be to foster and promote the development of the art of radio broadcasting; to protect its members in every lawful and proper manner from injustices and unjust exactions; to foster, encourage and promote laws, rules, regulations, customs and practices which will be to the best interest of the public and the radio industry."

The American Society of Composers, Authors and Publishers (hereinafter referred to as the "American Society"), is an unincorporated association with a membership exceeding 700, comprising authors, composers, and publishers of musical works (p. 2).

The certificate does not state, and appellant will not claim, that a license from the American Society for the public performance of the musical compositions controlled by its members will protect the licensee in the use of all copyrighted music used by broadcasting stations; or that there are not important classes of music used by broadcasting stations which are not controlled by the American Society, and as to which *other* organizations claim to have control and licensing authority; or that *any* broadcasting station, no matter how vigilant or how careful it has been to secure licenses from each of the known organizations of music publishers, has yet found it possible to protect itself against infringement claims by independent publishers and composers.

The number of radio receiving sets in use in the United States is generally estimated at approximately thirteen million. The radio audience cannot be exactly determined, but the number of receiving sets indicates its tremendous size.

In behalf of its members as well as of all broadcasting stations, the Association is interested in the above-quoted question for the following reasons:

1. The necessary result of an affirmative answer will be a reduction in the listening audience of broadcasting stations.

2. The question involves a principle of vital importance to broadcasters in more or less analogous situations arising in network or chain broadcasting, international or relay broadcasting, and remote-control broadcasting.

3. An affirmative answer to the question would seriously endanger judicial and legislative recognition of the right of the broadcaster to protection against unauthorized commercial exploitation of his programs by persons receiving those programs by means of receiving sets.

4. The question presents a proper occasion for determination of the underlying issue which has never been passed upon by this Court; i. e., whether in any event a broadcasting station which broadcasts a copyrighted musical composition is engaged in a public performance.

SUMMARY OF ARGUMENT.

I. The communication, by means of a radio receiving set and one or more loudspeakers, of a broadcast musical composition to listeners, is not a performance of the musical composition.

(1) The proper construction of the word "perform", with reference to the operation of a receiving set, depends on the physical acts constituting the alleged performance, and is independent of whether the broadcasting station is, or is not, licensed by the copyright owner.

(2) The broadcasting of a musical composition involves only one *actual* performance of that composition, i. e., the performance by the musician; the apparatus constituting a broadcasting station and the apparatus constituting a receiving set (linked by an hypothetical medium known as the ether) are like a telephone system and merely serve to communicate the musician's performance to listeners. The broadcaster may, if the musician be his employe, also be held to "perform" but, except for that, the broadcaster's acts consist simply in creating modulated radio waves. With the receiving set "turned on" and "tuned" to the broadcasting station, there is a clear avenue of communication from the musician to the listener. This cycle of purely physical events related by virtually instantaneous cause-and-effect is not strictly analogous to the slow succession of mixed physical events and human acts involved in the manufacture and playing of phonograph records.

(3) The consequences, viewed either practically or from the standpoint of the orderly development of the law, require that radio reception be held not to constitute performance. A contrary holding would be inconsistent with the policy of "free" reception heretofore followed by the United States and would result in reduction of the radio audience. It would

affect the use of devices similar to radio receiving sets and, depending on the principle adopted, would impose new burdens on broadcasting in such situations as those occurring in remote control, network, and international broadcasting. It would, again depending on the principle adopted, have an unfortunate effect on the development of sound legal principles, would introduce confusion where there should be simplicity, and would endanger recognition of legal principles necessary to protect broadcasting stations against unauthorized commercial exploitation of their programs.

II. If the communication by receiving set referred to in Point I is a performance of the musical composition then the broadcaster does not perform *publicly*. The theory on which the courts have hitherto held that the broadcaster does perform publicly is that the public listens to a performance by the broadcaster and not a multitude of performances by receiving-set operators.

(1) If appellant's theory is correct, every person operating a receiving set "performs", the only audience consists of persons listening to loud speaker performances, and, therefore, the broadcaster's "performance" is not public. The theory of "contributory infringement" is not appropriate since it would apply alike to public and private receiving-set operators.

(2) If the analogy between broadcasting and phonograph is correct, then it is clear that the broadcaster does not publicly perform the musical com-

position; he merely manufactures a fleeting record of it on modulated radio waves. The Copyright Act of 1909 does not cover this.

ARGUMENT.

Point I.

The Communication, by Means of a Radio Receiving Set and One or More Loudspeakers, of a Broadcast Musical Composition to Listeners is Not a Performance of the Musical Composition.

Section 1(e) of the Copyright Act of 1909 embodies three essential elements: (1) "perform"; (2) "publicly"; and (3) "for profit." The form in which the question is certified precludes any consideration of the second and third elements in the instant case, and the answer to the question turns exclusively on the proper construction to be given the word "perform."

(1) *The proper construction of the word "perform," with reference to the operation of a receiving set, depends on the physical acts constituting the alleged performance, and is independent of whether the receiving set is operated in public or in private, and of whether the broadcasting station is, or is not, licensed by the copyright owner.*

The physical acts of the person operating a receiving set consist essentially (a) in turning on a switch which provides the electrical current (from batteries or electric light lines) necessary to the operation of the set; (b) in "tuning" the set, by manipulation of a dial, so that it will respond to radio waves having

a given wave-length (or frequency) and proceeding from the desired broadcasting station; and (c) in adjusting, by manipulation of a dial, the amount of electric current used in the set so that the loudspeaker rendition will be of satisfactory volume. These acts may be simply summarized by stating that the person converts complicated electrical disturbances, which are known as modulated radio waves and are produced by a broadcasting station, into sound waves.

These acts are physically the same, whether done by a hotel proprietor in his public rooms for the entertainment of his guests or by a private owner of a receiving set in his home for the entertainment of himself and his guests. They are also physically the same, whether the broadcasting station to which the set is tuned happens to be licensed by the copyright owner or whether it is an infringer. If to turn on the switch and manipulate the dials is to "perform" in one case, so also is it in the other.

The intention, so far as it is material and concerns the word "perform," is the same in both cases. It is conceivable that a person, not knowing that a particular apparatus is a radio receiving set, or ignorant of its functions, might set it in operation accidentally. With this exception, every person operating a set intends the same result; i. e., the completion of the cycle of physical events by which a broadcast program is brought to the ears of all who happen to be within range of the londspeaker. Such circumstances as the public or private character of the place where the loudspeaker is located have to do only with whether the occurrence is "public" and "for profit." Likewise, the circumstance that the broadcasting

station is or is not licensed by the copyright owner has nothing to do with the fundamental question as to whether the occurrence is a "performance" of the copyrighted composition. Even if the receiving-set owner, knowing that the broadcasting station is not licensed and that the station will without authority broadcast a copyrighted composition at a given hour, intentionally operates the set so as to receive the composition, the question as to whether he "performs" is exactly the same as that presented in the present case where the LaSalle Hotel Company had no such knowledge or intention (p. 6).

Consequently, the statement made by Judge McCormick in *Buck v. Debaum,* 40 F. (2d) 734, 736, with reference to the opinion of Judge Otis in the instant case; i. e.,

> " * * * as far as the case discusses the meaning to be given to the word 'perform' in the Copyright Act, the decision is authority in this suit."

is neither incorrect nor *dictum,* as will be claimed by appellants.

(2) *The broadcasting of a musical composition involves only one actual performance of that composition, i. e., the performance by the musician; the apparatus constituting a broadcasting station and the apparatus constituting a receiving set, like a telephone system, merely serve to communicate the musician's performance to listeners.*

No extended discussion of the facts and principles of radio physics is necessary. The cycle of events

constituting the broadcasting and reception of a musical composition may be very simply stated.

The cycle begins with a performance of the composition by voice or by musical instruments; for convenience, it will be assumed to be by a single musician. The performance usually takes place in the studio of a broadcasting station. Frequently, however, it takes place elsewhere, at points commonly called "remote-control pick-ups", such as churches, theatres, dance-halls, hotels, restaurants, or on the college gridiron where a college band plays the composition during the intermission between halves in a football game.

Wherever the performance takes place, the musician's acts cause sound waves in the air which in turn cause vibrations in the diaphragm of a microphone connected by wire with the broadcasting station's transmitter. From that point on, there occurs a series of electrical phenomena which ends with the reproduction of the sound waves by a loudspeaker attached to a receiving set. The whole occurrence is like the transmission of a communication over a telephone system except that (a) the electrical phenomena are more complicated and involve, over the larger portion of the route between the musician and the listener, the use of radio waves traveling through an hypothetical medium called the ether, instead of through a tangible medium such as the wire (and sometimes the ground); (b) this medium, the ether, is not owned by the broadcaster, whereas the wire line is owned by the telephone company; (c) the radio receiver is usually owned by the person operating it, whereas the telephone receiver is usually rented from the telephone company; (d) in many

cases the broadcaster employs or otherwise controls the musician while the telephone company does not employ or otherwise control the person speaking over the telephone, and (e) the communication from musician to radio listener is all one-way whereas the ordinary telephone communication is two-way.

Throughout the entire series of events, which, for all practical purposes, occur simultaneously, only one performance has taken place, that of the musician who set the original sound waves in motion. Once they are set in motion, the acts of all others consist simply in *communicating* the musician's performance to the public. The broadcaster may, if the musician be his employe, also be held to "perform" but, except for that, the broadcaster's acts consist simply in creating the modulated radio waves. The receiving-set operator, who has no control over the musician, cannot be held to "perform"; his acts consist simply in reconverting the modulated radio waves into sound waves intelligible to himself and to any other persons within the audible range of his loudspeaker.

With the broadcasting station in operation and with the receiving set "turned on" and "tuned" to the broadcasting station, the sound waves originally produced by the musician set in motion a cycle of physical phenomena, related by a chain of pure cause-and-effect dependent on immutable scientific laws and uninfluenced by any human intervention. *There is a clear avenue of communication from the musician to the listener.* If, while that avenue is open, and during the course of a program (which may be a church service or a football game), the musician happens to play a copyrighted musical composition, this is not by reason of any act, command

or request of the person operating the receiving set.

The foregoing reasoning is, in substance, that adopted by the District Judge in the instant case, *Buck v. Jewell La Salle Realty Co.,* 32 F. (2d) 366, and approved by the District Judge in *Buck v. Debaum,* 40 F. (2d) 734. No better test of the soundness of this reasoning can be suggested than that implied in the following question: if it be assumed that a person desires to afford to listeners a rendition of a particular musical composition, can he do so solely by means of a radio receiving set? See *Dunbar v. Spratt-Snyder Co.* (Ia., 1929), 226 N. W. 22, in which it was held that a radio receiving set is not a "musical instrument" within the meaning of that term as used in an Iowa exemption statute.

It seems unnecessary to comment at length upon the differences between radio reception and the playing of phonograph records, which are pointed out by the District Judges both in the instant case and in *Buck v. Debaum, supra.* The chain of purely physical events related by virtually instantaneous cause-and-effect, which occurs when a musician's performance is broadcast to listeners, has little resemblance to the slow succession of mixed physical events and human acts consisting of the manufacture of a disque recording a musician's performance, the retailing of the record, its purchase, and the eventual playing of it from time to time by individual purchasers. Once the broadcasting cycle of sound waves, electrical disturbances, and again sound waves is permitted to die away, the performance is over and has vanished into the past beyond recall. To be repeated the musician must play again. With each playing of a phonograph record, a new cycle of sound waves is

set in motion, the nature of which depends upon the choice and act of the person playing the record. See *Brand Co.,* 2 United States, 47 T. D. 40649-b. A. 8929 (1925), in which it was held that a radio set is not a "similar article" to a phonograph under the Tariff Act.

If any analogy is to be enlisted, let broadcasting be compared with the telephone and let phonograph-record playing be compared with reading a written letter delivered by the post-office. The letter may be read and re-read at the will of the addressee; the voice over the telephone cannot be heard again unless the original speaker calls a second time.

3. *The consequences, viewed either practically or from the standpoint of the orderly development of the law, require that radio reception be held not to constitute performance.*

For convenience, the construction of "perform" heretofore urged in this brief will be called the "single performance" theory; the construction urged by appellants will be called the "multiple performance" theory. The terms are, of course, derived from the consideration that under the former theory, the only performance which takes place is that of the musician, while under the latter every person who takes part in communicating the performance to listeners is himself a performer, with the result that each broadcasting of a musical composition involves "performances" by countless persons. It must be kept in mind that under this heading we assume the correctness of the partly legal conclusions which have found their way into the "Statement of Facts" in the certificate in the instant case, wherein the Court states with reference to the broadcasting station KWKC:

> "Such renditions and performances were public and were made available to the public, and were for the purposes of profit, both for said defendant and for others using the station or procuring their names or business to be mentioned over it" (p. 4),

in other words, that the broadcasting of a musical composition is a public performance thereof for profit.

The consequences of the "multiple performance" theory are such as to cause grave apprehension. They may be summarized as follows:

(a) *Effect on the audience of broadcasting stations.* The United States, unlike most of the other countries in the world, has not adopted the system of licensing or taxing radio receiving sets. In many foreign countries, where broadcasting stations are operated by the governments either directly or indirectly through government-controlled corporations, the proceeds of receiving-set license fees are used in part to defray the expense of operating the broadcasting stations. In the United States reception is "free" and by all portents will remain so. To this policy may be ascribed, at least in part, the fact that the United States is immeasurably in advance of the rest of the world in *per capita* ownership and use of radio receiving sets, and broadcasting is a far more effective and more popular means of mass communication than elsewhere. Adoption of the multiple performance theory will necessarily effect some reduction in the radio audience by making hazardous the operation of receiving sets in hotel

lobbies and hotel rooms, restaurants, retail radio stores, railroad club cars, dance-halls, theaters, moving-picture houses, hospitals and other public places. The copyright owners, who are given complete monopolies for the term of protection, without regulation as to rates and without restriction against discrimination, will be given power to impose burdensome, arbitrary, and discriminatory license fees on persons operating receiving sets in such places.

Even, however, should the copyright owners pursue a reasonable course, there is no way in which the receiving-set owner can protect himself fully against claim of infringement. During the period of five years ending in 1929 alone, there were copyrighted 130,234 musical compositions (Thirty-Second Annual Report of Register of Copyrights, June 30, 1929, p. 28). The receiving-set owner has no control over what will be broadcast by the many broadcasters to whose stations he may tune, and cannot be expected to ascertain each broadcaster's program in detail in advance. In fact, the broadcaster himself frequently does not know what musical compositions will be performed before his microphone, as in the case of a college band during a football game.

The certificate does not state, and appellants will not claim, that a receiving-set owner can obtain a license from the American Society which will protect him as to all music likely to be broadcast, or that there is not a large body of music not covered by any blanket license from any organization. Even if the certificate did so state, it cannot be assumed that the American Society, which after all is an organization of private individuals and not a govern-

mental institution, will continue in existence. It is not certain that such an organization, if it should have or acquire control of all or the larger portion of music used by broadcasting stations, would not violate the federal anti-trust laws. *United States v. Standard Oil Co.* (N. D. Ill., E. D., 1929), 33 F. (2d) 617.

(b) *Effect on use of devices similar to radio receiving sets.* If the operation of a receiving set is a performance, so also is the operation of an amplifier in a public hall, or one connected with a public hall and located in other rooms in the same building. The sound waves caused by the musician's performance on the stage are converted into electrical phenomena carried by wire to loudspeakers which reconvert the electrical phenomena into sound waves. Under the "multiple performance" theory, if in a large auditorium there are twenty amplifiers, twenty performances of the musical composition will take place in addition to that of the musician, and the proprietor will be liable for at least twenty-one times the minimum statutory damages.

(c) *Effect on analogous situations in broadcasting.* Broadcasting frequently involves much more complicated processes than those involved in the simple case where the broadcaster transmits the musician's performance directly from his studio to receiving sets. The three important situations, of which a number of variations are possible, and all three of which may be present in a given case, are the following:

Remote control broadcasting. The words "remote control" are here used to denote the fact that the performance takes place at some point other than the broadcasting station's studio (not, however, in-

cluding another radio station) with a wire connection from such other point to the station transmitter. Instances of this are legion and include churches, theaters, hotels, restaurants, dance-halls, the college gridiron, legislative halls, and many others, from which a variety of events may be communicated, usually including a large amount of copyrighted music. In a few cases, of course, the broadcaster controls the musician; in most cases, he does not. In many instances (*e. g.*, hotel and restaurant orchestras, under the doctrine of Herbert v. Shanley, 242 U. S. 591) the performance is already public and for profit, independently of the presence of the microphone. Yet it has been held by two District Judges sitting successively in the same case, first, that if the musician's performance is authorized then

> "Such broadcasting merely gives the authorized performer a larger audience and is not to be regarded as a separate and distinct performance of the copyrighted composition upon the part of the broadcaster." (*Jerome H. Remick & Co. v. General Electric Co.,* S. D. N. Y., 1924, 4 F. (2d) 160).

and second, that if the musician's performance is unauthorized then the broadcaster is guilty of "contributory infringement" (*same v. same,* 16 F. (2d) 829). There is nothing in either opinion to indicate whether the broadcaster knew that the original performance was unauthorized, and only the first opinion clearly recognizes the distinction between *performing* (either directly or through an employee) and *communicating another's performance.*

Network or chain broadcasting. In this situation

the original performance takes place at the studio (or at a remote control pick-up point) of the key-station of a network of broadcasting stations interconnected by wire, and is broadcast simultaneously both from the key-station and each of the interconnected stations. The latter are for the most part separately owned and operated, and only a comparatively small portion of their daily schedules consists of chain programs. Each station transmits to its own audience the performance relayed from the key-station. Such hook-ups vary from two to over a hundred stations for a single program. Does each station "perform" the musical composition which is already performed by the musician?

International or relay broadcasting. In this situation the original performance takes place at the studio (or at a remote control pick-up point) of a foreign broadcasting station, usually in Europe, and is broadcast by that station to its own audience on its regular broadcasting wave length. The same performance is simultaneously transmitted by "short waves" (radio waves with a high frequency which, because of their peculiar properties, are useful for communication over very long distances) to all parts of the world, where they may be captured and utilized directly by persons having receiving sets adapted for such reception. These waves are also received at broadcasting stations in the United States (usually at the key-stations of national networks), relayed to other stations by wire, and broadcast to the public. In this kind of broadcasting, while the process is much more complicated and involves the opening of more gateways before there is a clear avenue of communication from the musician in Europe to the listener

in the United States, the cycle of events is still one of purely physical cause-and-effect, resembling international telephony. No station in the United States has control over the musician's performance in Europe. A particular musical composition may have fallen into the public domain in Germany and yet have copyright protection in the United States. Is each station in the United States a "performer" of the composition which it transmits under such circumstances?

(d) *Effect on orderly development of sound legal principles.* Sufficient has been stated to show that under the "single performance" theory, a very desirable logic and simplicity will rule the juridical relations between the parties. Under the law the copyright owner has complete control over the original performance, and by exercising that control he may make impossible any communication of that performance to the public by radio broadcasting and reception. No one else has that power, neither the receiving set operator, nor the member station of a network, nor the station receiving a program by short waves from abroad, nor the station receiving a program from a remote control pick-up point.

If, however, the copyright owner is to be given such rights against those who merely communicate a performance (and we do not agree that he should be), let it be done not by a strained judicial construction of the word "perform," but by legislation in which to "communicate" a copyrighted work is specifically made an infringement. This has been recognized by Congress in legislation now pending before it (the Vestal Copyright Bill, H. R. 12549, 71st Congress, 2d session, Report No. 2016) which was passed by the

House of Representatives on January 13, 1931; Section 1 (g) enumerates *communication* to the public for profit by wire or by radio broadcasting as an exclusive right of the author separate and apart from a public performance for profit, which is enumerated as Section 1 (d).

The "multiple performance" theory will wholly or partially block development of legal principles which, as is already apparent, will be necessary to the future protection of the broadcaster, particularly if and when practical radio television is achieved. The broadcast program, made up though it is in large measure of the works of others, calls for creative effort and genius, and is susceptible of unauthorized appropriation to the unjust enrichment of the appropriators. The nature of the practices against which the broadcaster will need protection is clearly indicated by occurrences which have already taken place in both the United States and Europe. To avoid enumerating these practices we take the liberty of citing a chapter in the leading American treatise on radio law, and a portion of the leading German treatise on radio law. Stephen Davis, *Law of Radio Communication,* New York, 1927, Chapter IX on "Control of Broadcast Programs," p. 140; Dr. Eberhard Neugebauer, *Fernmelderecht mit Rundfunkrecht,* Berlin, 1929, pp. 707 *et seq.* These practices indicate that, to attain the needed protection, the broadcaster may eventually have to have control over unauthorized commercial exploitation of his programs by persons operating receiving sets, either by the extension of existing recognized principles such as those governing unfair competition, or by legislation. If the copyright owner, who has already been paid by

the broadcaster for the use of his work in a program, is also to control the receiving set operator, it is unlikely that the broadcaster's claims against the same person will ever be recognized.

Point II.

If the Communication by Receiving Set Referred to in Point I is a Performance of the Musical Composition, then the Broadcaster Does Not Perform Publicly.

Under Point I we have assumed that the broadcaster gives a public performance for profit of each musical composition he transmits, at least where the original performance takes place in his studio or by a musician in his employ. The Circuit Court of Appeals has specifically made the same assumption in its certificate (p. 6). Whether or not these assumptions are correct involves the soundness of the decisions in M. Witmark & Sons v. L. Bamberger & Co. (D., N. J. 1923), 291 F. 776; Jerome H. Remick & Co. v. American Automobile Accessories Co. (C. C. A. 6th, 1925) 5 F. (2d) 411 (certiorari denied, 1925, 269 U. S. 556), and perhaps also Jerome H. Remick & Co. v. General Electric Co. (S. D. N. Y., 1926), 16 F. (2d) 829, as contrasted with the decision of the lower court in Jerome H. Remick & Co. v. American Automobile Accessories Co. (S. D., Ohio, W. D., 1924) 298 F. 628, and the interlocutory decision in Jerome H. Remick & Co. v. General Electric Co. (S. D., N. Y., 1924), 4 F. (2d) 160.

It will suffice to point out that the leading case holding the broadcaster to be engaged in a public performance for profit, the decision of the Sixth Cir-

cuit Court of Appeals, *supra* (in which certiorari was denied by this Court), is based on the theory that persons gathered about receiving sets are listening to a performance by the broadcaster and not a multitude of performances by receiving-set operators. This is clearly indicated in the following paragraph from the court's opinion:

> A performance, in our judgment, is no less public because the listeners are unable to communicate with one another, or are not assembled within an inclosure, or gathered together in some open stadium or park or other public place. Nor can a performance, in our judgment, 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. (p. 412.)

It is the purpose of this portion of our brief to demonstrate that if the appellant's theory be correct, the conclusion reached by the Sixth Circuit Court of Appeals is erroneous.

(1) *If appellant's theory is correct, every person operating a receiving set "performs", the only audience consists of persons listening to loudspeaker performances, and therefore the broadcaster's "performance" is not public.*

Under our Point I (1) we have argued that the proper construction of the word "perform" is inde-

pendent of whether the receiving set is operated in public or in private. Under appellants' theory, *all* persons operating receiving sets become "performers." *All* persons hearing the resulting sound waves are listening to performances by the receiving set operators. *No* member of the public is listening to the performance which takes place in the studio of the broadcasting station.

If all this be so, the broadcaster has no audience. He may be guilty of a mere performance in the privacy of his studio, but it does not become public by reason of his broadcasting.

Nor is the theory of "contributory infringement" appropriate, unless it be held that every receiving set operator, public or private, contributes to the infringement by converting the inaudible into the audible. It is the aggregate of listeners, in private homes as well as in public places, which constitutes the public referred to in the above-quoted portion of the decision of the Sixth Circuit Court of Appeals.

(2) *If the analogy between broadcasting and phonograph record is correct, then it is clear that the broadcaster does not publicly perform the musical composition; he merely manufactures a fleeting record by modulating radio waves.*

It will be contended that there is no difference "in principle between playing by phonograph a record impressed on bakelite and playing by radio receiver a record impressed on the ether." (Buck v. Jewell-LaSalle Realty Co., 32 F. (2d) 366, 367.) We are content to accept the contention as correct since its necessary corollary is that broadcasting does not involve a public performance.

It has never been held, or even suggested, that the manufacture of a phonograph record is a public performance of the musical composition impressed on the record; such a holding would necessarily assume that the "public" to which the composition is communicated, consists of the persons who may eventually hear the records played on phonographs. Prior to the Copyright Act of 1909, which for the first time protected the composer against the use of his composition in records or other instrument for mechanical reproduction, the recording of a musical composition in the form of a phonograph record or a perforated piano player roll was not a "copy" of the composition (White-Smith Publishing Co. v. Apollo Co., 209 U. S. 1; Stern v. Rosey, 17 App. D. C. 562). By virtue of amendments to the previous statute, embodied in Sec. 1 (e) of the Copyright Act of 1909, the composer was given the additional exclusive right

> "for the purpose of public performance for profit, and for the purposes set forth in subsection (a) hereof, to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced."

Thus Congress has not described the manufacture of records as a performance but has given it a separate classification. It has not yet provided a classification which covers the "manufacture" of modulated radio waves.

Without the acts of receiving-set operators (who, according to appellants, are performing just as they would if they were playing phonograph records), the Hertzian waves, launched into the hypothetical ether

from the broadcasting station antennae, would speed to the outer limits of the universe, unheard and unintelligible, as mute as a disque of bakelite when the phonograph is not in motion.

CONCLUSION.

This case, we believe, presents three possible alternative answers to the question certified: (1) that urged under Point I of our brief, the "single performance" theory, (2) that urged by appellants, the "multiple performance" theory, and (3) that urged under Point II of our brief, by which the phonograph analogy is accepted with its logical corollary, *i. e.,* that the broadcaster does not perform publicly. Of these, the National Association of Broadcasters, Inc., urges the Court not to adopt the second, both because of its inherent unsoundness and because of its unfortunate consequences. The third has some measure of logic to support it although it is not free from objection as to its consequences.

The National Association of Broadcasters, Inc., urges that this Court either (1) answer the question in the negative or (2), if the Court should answer it in the affirmative, it do so according to principles under which it will be held that the broadcaster, in the circumstances indicated, does not perform the copyrighted musical composition publicly.

Respectfully submitted,

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