BROADCASTERS' NEWS BULLETIN

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COPYRIGHT LEGISLATION

With a view to drafting a bill to bring existing copyright laws up to date, Chairman Sirovich of the House Patents and Copyrights Committee began early this month to hold hearings on the general subject of copyright.

The National Association of Broadcasters requested an opportunity to be heard and the Committee immediately and willingly granted the request.

Since the hearings have been of a general nature it was deemed advisable to review the whole subject of copyright from the viewpoint of the broadcaster. Mr. Louis G. Caldwell, who last year represented the Association in connection with the Vestal Bill, was engaged as special counsel to present the broadcasters' case before the House Committee and his testimony is reproduced in the special Bulletin.

The testimony was not presented exactly in the order given in this Bulletin but certain points were elaborated upon under questioning by the Chairman and other points were eliminated entirely for the sake of brevity.

The Association urges every member to give close study to the following testimony and preserve it for future reference. Mr. Caldwell's testimony begins on the next page.

The broadcasting industry is the youngest of those that will appear before you. It is only a little over eleven years since November, 1920, when the first broadcasting station in the United States (and, indeed, in the world) sent out the first broadcast program, consisting of election returns. Since then the industry has pursued a course of development and has assumed a magnitude and public importance that were foreseen by almost no one. To a large extent the broadcasting station has replaced the public platform and it has become one of the major avenues by which the public is entertained, instructed and kept informed of current events.

With this development have come a host of problems; legal, economic and social, which are novel and perplexing. One of the most important of these problems, both to the broadcasting industry and, we believe, to the owners of some 12 or 15 million receiving sets, is that of obtaining copyright legislation which will at the same time give the author and composer the protection he should have and yet will not lend itself to abuses which will stifle this new industry and cripple the service which it is giving the public. The problem is not made any easier by the rapid progress which radio continues to make, and the uncertainties as to new discoveries which may change the whole structure tomorrow. For example, no one knows whether television will be commercially practicable in the near future, or, if it is, what form it will take or what its economic basis will be.

It is not difficult to give you a list of the evils from which the broadcasting industry suffers under the present copyright law and from which it desires protection under any new law you may draft. With reference to some of these evils, however, it is not so easy to tell you how to remedy them, particularly if future developments are to be properly safe-guarded. Much depends on the structure and theory of copyright law you adopt; in one kind of bill a certain provision might be necessary, whereas in another kind of bill an entirely different provision would be called for. I assume, however, that you are at present more interested in a general presentation of our problems than in specific remedies, and that you will permit us to cooperate with you in the working out of the latter.

It is necessary first to call your attention to a few facts about the broadcasting industry, as a background for what I shall have to say. There are slightly over 600 broadcasting stations in the United States. As you know, these stations derive their authority to broadcast from licenses issued from time to time by the Federal Radio Commission, which was established under an Act of Congress approved February 23, 1927. Until December 31, 1930, under restrictions imposed by Congress, the licenses were for a maximum of three months. Under the law as it has been since then, the Commission may issue licenses for a period as long as three years although at present it issues them on a 6-months basis. The courts, in construing the Radio Act, have so far denied that a broadcaster has a property right as against the United States in the continued operation of a station but the courts have, on the other hand, recognized that a broadcaster has sort of a continuing right to renewal of his license unless some very grave reason is shown for putting him out of business. The entire industry is, of course, fervently hoping for a longer license period so that it may enjoy a corresponding increase in stability that will be reflected in improved service to the public.

The broadcasting station, to receive a license, must meet the test which Congress laid down in the Radio Act, "public interest, convenience or necessity." Some people contend that under this language broadcasting stations are public utilities; others say the contrary. I shall not attempt to answer that question. But it is clear that, if the entire United States is to receive some measure of broadcasting service, there must be a fairly equitable distribution of stations in sparsely settled areas as well as in the thickly populated centres. Congress has prescribed a rather rigid yardstick for accomplishing this and the Commission is attempting to carry it out. At any rate, I think you will agree with me that where a business is operated under license from the Government, as the broadcasting business is, and is stamped with a public interest, no private individual or combination of individuals should have the power under the law to nullify a license. Yet, as I shall show you a little more fully later on, that is just what the present Copyright Act permits. This is a matter which concerns not merely the broadcaster but the entire listening public.

Naturally there is a great disparity in the economic condition of the 600 broadcasting stations in the United States. A number of factors enter into this, but by far the most important is the station's location. A station of small or medium power in a large metropolitan center has a larger potential audience and is more attractive to an advertiser than a high power clear channel station in the sparsely settled Rocky Mountain area. The highly exaggerated stories you sometimes hear about profits in the broadcasting business are based largely on a few instances of this sort, of stations with a small overhead, fortunately located. The great majority of the smaller stations (which account for over five-sixths of the 600 broadcasting stations) are located in small cities and towns where the advertising support is, to say the least, precarious. On the other hand, the high power clear channel stations, even in large centres, have to maintain so high a standard of varied public service and have so great an overhead, that most of them are even now on a losing basis. About half of the stations are permitted to operate only part time; they divide time with each other or they must close down at sunset, etc.; still, in most respects they have the same overhead as full-time stations have. The truth is that the great majority of stations are in no position to be subjected to heavy burdens of expense for research in copyright matters or for defending litigation for alleged copyright infringements which are innocent and yet impossible to guard against in the present state of the law.

Broadcasters are interested in copyright legislation from two points of view, first, as users of copyrighted works (principally music) and second, as creators of original works. The first of these seems much the more important at present but the second is important enough so that it can not be disregarded, particularly in view of possible future developments.

By the term "users," which I use for want of a better word, I mean those industries through which the author's work reaches the public. The term carries with it no opprobrium; the group is indispensable both to the author and to the public. Examples of users are:

1. Publishers both of literature and music in the form of printed copies.

2. Persons who convert the copyrighted work into some form of mechanical record from which it may be reproduced, heard or seen, e.g. manufacturers of phonograph records, mechanical piano-player rolls, moving pictures, etc.

3. Persons who perform the copyrighted work in public, e.g. the theatrical producer, the concert artist, the moving picture exhibitor, etc.

4. Persons who communicate the copyrighted work to the public, e.g. the broadcaster whether by radio or by wire.

Obviously, in several industries these different uses overlap. For example, the larger broadcasting stations with their numerous staffs of employes engaged in program production, engage extensively in adapting and arranging music, in performing music through artists employed for the purpose, and in communicating such performance to the public.

I do not need to tell you, for it is already apparent from this and previous copyright hearings, that it is characteristic of each class of users to claim rights superior to the other classes and sometimes at the expense of the author. I gather from the testimony I have already heard that some publishers of literary works insist on the dramatic rights, the moving picture rights and every other kind of rights as against the author. I know that the publisher of music insists on keeping control of the performing rights and broadcasting rights; that is why he is opposed to divisibility of copyright and insists that the copyright be assignable only as a whole and not in part.

Let me make clear at this point that the broadcasters have no quarrel with the claims made in behalf of the author and composer at these hearings, as I have understood them. In other words, we agree

1. That the copyright should originally vest in the author or composer who creates the work.

2. That the author or composer should have the right to assign to whomever he chooses.

3. That the author or composer should have the right to assign divisible portions of his copyright, in other words, divisibility of copyright, and give good title to the several assignees.

These, of course, are all subject to proper safeguards by way of notice and registration, which I shall discuss presently.

Let me also make it clear that the broadcasters are not seeking the privilege of broadcasting of copyrighted works without paying therefor. A charge to the contrary is made against the industry every so often but it is absolutely without foundation. It dates back to a period 8 years ago at a time when it was not foreseen that broadcasting would acquire a commercial status, and virtually all stations were operated without economic support. Ever since broadcasting has become a business the broadcaster has readily recognized that he is under obligation to pay a reasonable fee for the use of copyrighted works. There have been intense differences of opinion at times as to how much that fee should be, in negotiations between the broadcaster and the American Society of Composers, Authors and Publishers, but there is no difference of opinion on the fundamental principle.

The copyrighted works which chiefly concern the broadcaster are musical compositions. Stations vary, of course, in the proportion of music used in their programs but it would be fair to assume, I think that on an average 60 to 70% of a station's hours of operation are taken up with music and that a full-time station will broadcast somewhere between 100 and 200 musical compositions a day. A large proportion of these are copyrighted and cannot be played without a license from the copyright proprietors. For the sake of simplicity I shall assume that musical compositions are the only kind of copyrighted work that is used by broadcasting stations. To make the broadcaster's problems clear to you I shall have to review very briefly the interpretation which has been placed on the present Copyright Act.

The Courts have so far held

1) 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 infringement if he is not authorized by the copyright owner.

2) That a broadcaster who broadcasts a copyrighted musical composition performed elsewhere than in his studio (e.g. by a hotel orchestra connected with the station by remote control) is likewise engaged in a public performance for profit of that composition, and is liable if neither he nor the person actually performing the composition (e.g. the hotel proprietor) is authorized by the copyright owner.

3) That a hotel proprietor that operates a receiving set and loud-speaker for the entertainment of the hotel guests is likewise engaged in a public performance for profit of that same musical composition and is liable for infringement if neither he nor the broadcaster is authorized by the copyright owner.

Questions which are not yet settled are such as the following:

1) Is the hotel proprietor in the case last mentioned liable if he does not have a license but the broadcasting station to which the receiving set is tuned does have a license?

2) Is the broadcaster liable for a program which he receives by remote control from a hotel dining room or a dance hall where the broadcaster does not have a license but the hotel or dance hall proprietor does have a license?

The American Society is attempting to settle such questions by itself in the form of license agreement which it imposes on the broadcaster.

Leaving such questions aside, I want you to get the complete picture of what happens as the result of the decisions already made by the courts. Let me give a few cases of what are almost every day occurrences.

Case No. 1 A broadcasting station which has done its best to protect itself by securing licenses broadcasts a football game and, in the intermission between the halves, lets the listening public hear the college bands. These bands may play, and frequently do play, compositions not covered by the license from the Society or any of the other organizations. Or they may play what is known as a restricted number, that is, a composition controlled by the Society but not permitted to be played except by special permission. Not only is the broadcaster liable for infringement, so also is every hotel, restaurant, barber shop, or drug store proprietor, which lets that program go to the listening public over a receiving set.

Case No. 2 Take a performance of a musical composition which originates in the key station of a national network such as the National Broadcasting Company or Columbia Broadcasting System. Such organizations, of course, take every possible precaution to avoid infringement and yet occasionally have been unable to avoid them. If, innocently, an unauthorized number is broadcast, the network is guilty of infringement, so also are the 40, 50 or 60 stations which take the program by wire and broadcast it in all parts of the country, so also are the countless hotel, restaurant, barber shop or drug store proprietors which operate receiving sets.

If time permitted I could recite a number of such pitfalls for the innocent infringer. The sort of case I have described leads us to advocate the principle which we have come to call the single performance principle. We urge that the man who has no control over what music is played and who cannot possibly protect himself against infringement, no matter what precautions he takes and no matter how many license fees he pays, should not be held liable under sound copyright legislation. It

seems unsound to us to say that the hotel proprietor who operates a radio receiving set is "performing" the musical compositions which happen to be transmitted from some broadcasting station, or to say that a station in Washington, D. C. temporarily hooked up to a network is performing a composition which it receives by wire and which is really being performed at the studio of the key station of a chain in New York. Let all responsibility and all liability rest with the person originating or controling the original performance, but let all others be protected. The copyright owner is not injured by such a principle; presumably the court will allow him considerably greater damages against a network where the performance has been relayed to, and broadcast over 60 stations than where it is limited to one station. Similarly, a license to the key station will protect all the other stations, as well as all hotel proprietors, etc. Such a rule will not relieve the other stations from paying fees for broadcasting music. The stations not directly operated by the networks do not take chain programs exclusively or even a major portion of the time. They put on their own programs, for which they have to accept responsibility and must pay. But they will be protected from innocent infringement.

This brings up the question of damages. Under the present law there is a minimum of $250 specified for each infringing performance. The nature of this provision is best described in the language of the attorney for the American Society at the hearings held before the Senate Committee on Patents last year. He said, in a brief filed with the Committee (Hearings on HR 12549, p. 309):

> "The broadcasters overlook the purpose Congress has in mind in fixing the amount of recovery for infringement. The amount fixed in the statute does not represent the value of the composition, nor does it represent the license fee, or license value of the work. The purpose of the statute is to prohibit infringement of the author's work and in order to effectuate that purpose and intent, the law must have teeth so as to discourage the pirate; otherwise why not have a compulsory license fee?"

In other words, the minimum damages are not damages (as they are described in the statute); they are a penalty (which the statute expressly says they are not), and are payable not to the United States Government, but to the copyright owner. This statutory provision gives a combination of copyright owners power to cumulate vast claims for damages against a broadcaster, $250 for each musical composition (plus attorneys' fees) and then, armed with the threat of a claim for $50,000 or $100,000, to force the station to enter into the sort of license agreement the combination desires. It is our position that the minimum should be reduced so as to correspond somewhere near to the damage actually suffered by the copyright owner; that in the case of innocent infringement (particularly where there has been no copyright notice or registration) there should be no damages at all, and that there should be adequate provision against the cumulating of statutory damages out of all proportion to the actual injury. In other words, damages should be damages and not penalties. Penalties should go to the United States Government. I do not know of

any other Federal statute which gives private parties the right to collect penalties from other private parties such as does the present Copyright Act. This minimum penalty clause, together with the provision for attorneys' fees, is one of the cornerstones of the power which the American Society has exercised over broadcasting stations, hotels, restaurants and others. It is the means by which an unscrupulous lawyer can make a living out of innocent infringements. It is a club by which organizations such as the American Society force broadcasting stations not only to pay license fees but to help the Society collect fees from others. For example, in the standard license form now used by the American Society, there is a paragraph reading:

> "This license is limited solely to the copyrighted works of members of Society in programs rendered at said radio station or at a place duly licensed by Society to transmit rendition of such works to said radio station for the purpose of being broadcast thereupon."

In other words, a broadcasting station at Washington cannot broadcast music played by the Wardman Park Hotel Orchestra unless the Wardman Park Hotel also has a license. If the station does so, it immediately hears from the Society, and is put in the position of having to persuade the Hotel to take out a license.

Take another paragraph which reads:

> "This license does not grant any right, license or privilege to transmit such renditions or performances, to any other party for re-performance or rendition, by any means, method or process whatever, except and unless the receiver of such transmission shall have license of the Society."

That is to say, a network cannot give chain programs to a station which does not have a license, and the fact that a station has a license confers no privilege on a restaurant proprietor who operates a receiving set for the benefit of his guests. Thus the Society gets around the points which are still uncertain in the law, although the Supreme Court intimated in its recent decision on the hotel case that if the broadcasting station had a license then that might be held to imply authority to the hotel proprietor to permit his guests to hear the music composition as rendered by the receiving set.

Take still another instance. The Music Publishers Protective Association, which has its offices in the same quarters as the Society, and which has in part the same directors, has retained control over recorded music, that is, phonograph records, etc. Under the Copyright Act as it now stands there is a fixed royalty of 2¢ a record. I understand, however, that the Publishers Association makes certain claims about what we call electrical transcriptions. Electrical transcriptions are phonograph records, usually of a large size, which are specially prepared for broadcasting and are not sold commercially to the public. I understand that the publishers claim that not only must the manufacturer of these records pay a royalty to the publishers, the amount of which I do not know, but he must also pay something like 50¢ a record for each time that a broadcasting station broadcasts each record. The station must also, of course,

pay a license fee to the American Society covering, in most cases, the very same music that is on the record.

Now I want to say a few words directly about the American Society of Composers, Authors and Publishers. Representatives of the Society will undoubtedly appear before you and will give you detailed information about the Society's set-up, its by-laws, forms of contract and ways of doing business. A large amount of material appears on this subject in the transcripts of previous hearings. I shall be very brief, therefore, in describing the Society to you.

It was originally organized about February 13, 1914, by a few composers, including some men of high repute and fame such as Victor Herbert. It was patterned after a similar society which had been organized in France in January and February, 1851. I may say here that one reason why the foreign notions of copyright have developed along the lines they have, first in France and later reflected in the international conventions, is due to the constant activities of this organization which preceded by many years any effective organization on the part of users of copyrighted material.

The activities of the Society were short-lived and they came to a stop in the winter of 1915 with the handing down of a decision by a Federal Court (John Page Co. v. Hilliard Hotel Co. 221 Fed 229). This was a case in which it was held by a lower federal court that the playing of copyrighted musical numbers in a hotel dining room where no direct admission fee was charged was not an infringement of the copyright. The principle of this case was reversed by the Supreme Court of the United States on January 22, 1917, in Herbert v. Shanley Co. 242 U.S. 591. After the Supreme Court's decision the Society resumed its activities, its first meeting being held February 20, 1917.

Until the end of 1920 the Board of Directors of the Society consisted of 21 directors, 9 of whom were publishers, 6 composers and 6 authors. The fees collected by the Society under the articles of association were divided 1/3 to the authors, 1/3 to the composers and 1/3 to the publishers. In other words, the authors and composers had the controlling voice and the greater portion of the fees. Due to complaints on the part of the publishers, the Society was reorganized so that it thenceforth had a board of 24 directors, 12 of whom were publishers and the other 12 were composers and authors. I understand that the royalties collected go half to the publishers and the other half to the composers and authors. It is obvious that with such an arrangement control is really in the hands of the publishers.

Every member of the Society, including both publishers and composers and authors, was required to confer upon this Society the exclusive nondramatic performing rights in copyrighted works controlled by him for a period of 5 years from January 1, 1921. This arrangement has been continued from time to time and the present arrangement will expire, I think, in 1935.

The Society has in its membership about 95 music publishers and several hundred composers.

I am not going to try to tell you just what percentage of all copyrighted music is controlled by the Society because I do not know. In previous hearings they have claimed to control about 90% of all copyrighted popular music, a lesser per cent of what may be called classical music and about 100% of what is called production music, that is, music contained in musical comedies, etc. I am speaking, of course, only of the small performing rights which, however, are an all-important matter. Whatever the percentage is, a broadcasting station can not go through the usual day's programs which the public wants and expects without using music controlled by the Society.

It is true that every copyright is in a sense a monopoly for a certain term of years. On the other hand, just as one of the witnesses has already told you, copyrighted works compete with each other. If there is competition, while I may not be able to get a license from a given music publisher to perform one musical composition, I may easily be able to get a license from another music publisher to perform another composition which is of the same general character and which will serve the purpose just as well. This competition is destroyed when any large proportion of copyright owners are permitted to pool their interests in one combination, especially when that combination has control of enough music so as practically to have a veto power on the continued operation of a broadcasting station. In other words, copyrighted music is one of the most important raw materials from which a broadcast program is made. Yet, control over a very large percentage of this raw material is lodged in one organization. This is a condition which is not permitted by law in most industries or, in the cases where it is permitted, the combination is subjected to severe restrictions and regulation.

I have already called to your attention some of the abuses which this power has made it possible for the American Society to inflict on the broadcasting industry as well as on hotels, restaurants, barber shops. There are some others which I now want to mention.

One of the most disastrous results of the situation is that a broadcaster has no assurance as to the cost of running his business next month or next year. In the past it has been the practice of the Society to enter into license agreements for one year periods with most stations and it has consistently refused to enter into arrangements which cover a longer period of time or which permit the broadcasting industry to know what the future will be. At the end of each year it has been the practice of the Society to impose enormous increases of royalties on the licensees who are virtually powerless to oppose these increases since there is no equality of bargaining power. The station must either take the agreement or refuse it on the Society's terms and there is no room for negotiations.

Right now instead of a yearly basis practically all stations are on a month to month basis. The Society announced last November that on or before January 1, 1932, it planned to announce new terms as the basis of licenses, existing licenses to become inoperative on February 1, 1932. This, of course, meant higher rates. In its published announcement the Society complained that the sale of sheet music had fallen off 90% during the previous 12 months and blamed it all on broadcasting.

Since then on account, I believe, of illness and death of its general manager, the Society has postponed the date of reckoning, first to March 1 and probably for 2 or 3 more months. In other words, the broadcasting stations do not know right now whether they will have the right to broadcast music controlled by the Society two or three weeks from now, and yet have to carry on a business of tremendous proportions which like every other business requires advance knowledge of what costs will have to be paid before contracts can be entered into.

Another instance of the abuse of the Society's power is the right it reserves in its license agreement to conduct an inquisition into the business of every broadcaster. The agreement, for example, requires the licensees upon demand by the Society upon forms supplied by the Society to furnish a list of all music rendered at the premises, showing the title of each composition and the publisher thereof. Elaborate questionnaires have been sent out in the past, inquiring with more detail into the business of broadcasters than does the United States Government.

Needless to say, the Society recognizes no limitation on the amount of fee it may charge and recognizes no obligation not to discriminate between stations in the same class.

Now take the other side of the picture and let us see what protection the broadcaster gets who takes out a license from the Society. In the first place the license does not give him the right to perform all music controlled by the Society but only such numbers as have not been withdrawn from its repertory. Every so often the Society issues rather extensive lists of music which may not be played by the licensee. This list consists in part of music which may not be played at all and in part of music which may only be played upon permission granted after special request which is usually made by telegram or letter. In the latter case the broadcasting station must announce that the number is played by special permission of the copyright owner. In the list of restricted music are either the whole or part of many musical comedies and operas. There were about 40 of these in the list last issued. The list is added to or changed frequently by mimeographed notices, and is published in printed form, I think, about every 2 months. It means that every station to be safe must exercise a constant check which requires the time of an employe which the smaller stations are in a poor position to afford.

Even, however, if this difficulty be overlooked, the broadcasting station is not protected. The American Society does not control all of the American music by any means and only controls a portion of foreign music. There is another organization in this country known as Associated Music Publishers, Inc. which claims to control some 600,000 foreign titles, about 10% of which are registered in the United States and have copyright protection. A large number of stations have felt it necessary to take out licenses from this organization which has made a demand upon virtually all of them. There is still a third organization which during the past 18 months has appeared on the scene, Elkan-Vogel Company of Philadelphia, which claims to have the grand performing rights on French music. So far as foreign music is concerned the license of the American Society gives protection, or is supposed to give protection, on music controlled by similar organizations in Brazil, Denmark, Finland, France, Great Britain,

Hungary, and Sweden. This, however, does not cover all the music in all these countries. For example, three important English publishing houses do not belong to the English Society (Stainer & Bell, Novello & Co. and Gould & Co.). The very important music of Germany and Austria is in an unsettled state. A few German and Austrian publishers are represented by this second organization, the Associated Music Publishers. There is still another organization known as the Society of European Stage Authors and Composers, which controls music which is not covered by the license of the American Society, including the Society of Spanish Authors and Composers, the Society of German Stage Authors, and miscellaneous publishers. You will notice that the Italian music is not included in the lists I have mentioned. You can readily see what would happen if all foreign music were given automatic copyright protection in this country, and the number of new organizations broadcasters might have to deal with.

To return to American music, I want to tell you briefly what one broadcasting organization has felt it necessary to do to protect itself. It is true that it is the largest but its problems are no different in kind than that of every station. In addition to securing licenses from the American Society and the Associated Music Publishers, it has found it necessary to secure 265 other licenses from other organizations, mostly American controlled music of one sort or another which is commonly necessary to the giving of programs which the public wants. This organization has to maintain a large department of employes to check every individual number on every program. Even with all this care, it suffers occasional claims for infringement. I know of one instance where the leader of the Navy Band, who is a composer himself, could not play his own number over a broadcasting station, because the publisher of his music was not a member of this Society, until he had obtained special permission. There is music which no broadcaster can get permission to broadcast. This includes MacDowell's "To a Wild Rose."

I trust that you will appreciate from what I have told you, what a problem is faced by the small broadcasting station which can not possibly maintain a sufficient staff to protect itself. A small station may be playing phonograph records for a large part of the day as many of them have to, and in so doing may run counter to the performing rights of a large number of organizations.

I have told you of the evils suffered by the broadcasting industry in the present situation. It is not so easy to tell you what the remedy should be. In view of the conflicting interests involved, and the uncertainty as to what provisions you may find necessary to protect the composer from the publisher, I think it will be best if I simply give a brief statement of the different remedies which have been proposed at one time or another in the past and not attempt to make any specific recommendation.

It has been proposed from time to time that the law should be amended so as to make a combination such as the American Society illegal. In fact, such a proposal was made on the floor of the House last year. In opposition to this it is claimed by the composers that for them the Society is an economic necessity, since the individual composer cannot, as a practical matter, protect himself against unauthorized performances of his work. I am not sure whether the broadcasters would not be better off if they had to deal with competing music publishing houses. In view of the

position taken by the composers, however, I am willing to assume, for the purpose of this hearing at least, that their claim is correct and that they do need such an organization. I may say in passing that several years ago there were several attempts to have the American Society declared an illegal monopoly. For example, the motion picture people filed a complaint against the Society before the Federal Trade Commission, which on January 2, 1923, announced its conclusions that the case was not one calling for the exercise of the Commission's corrective powers (hearings on S. 2600, April, 1924, pp. 195-196). In 1918, an action was brought by the corresponding organization in England, Performing Rights Society (Ltd) against one Thompson, in the High Court of Justice, King's Bench Division, 34 T. L. R. 351. The legality of the Society, its objects and methods were put in question, and the court upheld the Society. (Hearings on S. 2600, p. 197). An action was brought in behalf of the motion picture exhibitors to restrain the Society from demanding license fees from the plaintiff, in a case known as One Hundred and Seventy Fourth Street and St. Nicholas Avenue Amusement Company v. George Maxwell, 109 NYS. 895 (hearings on S. 2600, p. 189). This also resulted in a victory for the Society.

In Harms et al v. Cohen (E. D. Pa. Mar. 25, 1922) 279 Fed 276, it was held that it is no defense to a suit for infringement of copyright of musical selections that the authors, composers and publishers have formed an unlawful combination in violation of the Sherman Anti-Trust Act; that the copyright is an intangible thing and the right to perform a musical composition under a copyright is not "trade or commerce," and such combination of composers, authors and publishers under which extortionate license fees are demanded for public performances for profit of musical numbers copyrighted by the various members does not constitute a violation of the Sherman Anti-Trust Act. (Suit against a moving picture theatre owner).

On the other hand, in the case entitled U. S. v. Consolidated Music Corporation et al, E. 18-320, in the United States District Court for the Southern District of New York, the Government sought to enjoin an alleged unlawful conspiracy in violation of the Sherman Anti-Trust Act against six music publishers, who it was claimed had combined to fix royalties, and to make certain requirements of manufacturers of mechanical musical devices. Judge Augustus N. Hand wrote an opinion dated February 27, 1922 which found that the practices of the defendants were unlawful (hearings on S. 2600, 264-265).

(See also Standard v. Sanitary Manufacturing Co. 226 U. S. 20; U. S. v. Motion Picture Patent Company, 235 Fed 800; Ferris v. Frohman, 223 U. S. 424; Standard Oil Co. of Indiana et al v. United States, 283 U. S. 163).

On the whole, it appears from the decisions so far rendered that the Society has successfully resisted the charge that it is an illegal combination. This has been due to reasoning based partly on the fact that a copyright is in itself a monopoly, and partly on the view that interstate commerce was not involved. I do not know what the courts would hold today if a showing were made as to the restraint placed by such a combination on broadcasting. Broadcasting is clearly interstate commerce; a number of courts have so held.

Another type of remedy proposed is that which has been adopted by a number of foreign countries. In these countries, the existence of such a combination is recognized, but the combination is subjected to certain restrictions and regulation.

The first country to enact regulation along this line was, I believe, Italy, which adopted a statute on June 14, 1928, providing that as to certain classes of music the broadcaster had the right to broadcast it to the public, but was under the obligation to pay to the copyright owner an equitable compensation, the amount of which was to be determined by an arbitration commission (hearings on HR 12549, before Senate Committee on Patents, 1931, p. 71; Journal of Radio Law, Vol. I, p. 161).

New Zealand adopted the same theory in a law passed October 9, 1928, limited, however, to the broadcasting of works of a dramatico-musical character. Incidentally, Russia, under a decree of April, 1927, provided that broadcasters might broadcast certain musical and dramatic works without providing any compensation at all.

Since then, both Norway and Canada have followed suit. In Norway, there was a continuous legislative struggle between the broadcasters on the one hand and the copyright owners on the other, which resulted in protracted legislative deliberations from 1925 until June 6, 1930, when the law now in effect was finally passed. This law provided the following:

> "When one year has passed since the first publication of the work, the Ministry having authority may (subject to the provisions of the last paragraph of Article 13) authorize the broadcasting of the work, if the author and the broadcasting company are unable to reach an agreement. In such case, the Ministry will fix the amount of compensation to which the author is entitled. If a dramatic work or a musical composition of substantial length is involved the Ministry shall not grant the authorization unless the work has been played in Norway." (Journal of Radio Law, Vol. I, pp 421-423).

The Canadian statute is even more striking. It was passed on June 9, 1931, after hearings in which the American Society played a prominent part:

> "Each association, society or company which carries on in Canada the business of acquiring copyrights of dramatico-musical or musical works or of performing rights therein, and which deals with or in the issue of grant of licenses for the performance in Canada of dramatico-musical or musical works in which copyright subsists, shall, from time to time, file with the Minister at the Copyright Office: -
>
> (a) Lists of all dramatico-musical and musical works, in respect of which such association, society or company claims authority to issue or grant performing licenses or to collect fees, charges or royalties for or in respect of the performance of such works in Canada; and

(b) Statements of all fees, charges or royalties which such society, association or company proposes from time to time or at any time to collect in compensation for the issue or grant of licenses for or in respect of the performance of such works in Canada.

Whenever in the opinion of the Minister, after an investigation and report by a Commissioner appointed under the Inquiries Act, any such society, association or company which exercises in Canada a substantial control of the performing rights in dramatico-musical or musical works in which copyright subsists, unduly withholds the issue or grant of licenses for or in respect of the performance of such works in Canada, or proposes to collect excessive fees, charges or royalties in compensation for the issue or grant of such licenses, or otherwise conducts its operations in Canada in a manner which is deemed detrimental to the interests of the public, then and in any such case the Governor in Council on the recommendation of the Minister is authorized from time to time to revise, or otherwise prescribe the fees, charges or royalties which any such society, association or company may lawfully sue or collect in respect of the issue or grant by it of licenses for the performance of all or of any such works in Canada.

No such society, association or company shall be entitled to sue for, or collect any fees, charges or royalties for or in respect of licenses for the performance of all or of any such works in Canada which are not specified in the lists from time to time filed by it at the Copyright Office as herein provided, nor to sue for or collect any fees, charges or royalties in excess of those specified in the statements so filed by it, nor of those revised or otherwise prescribed by Order of the Governor in Council."
(Journal of Radio Law, Vol. I, pp. 638-640).

It has been this type of law, and the school of thought which believes that broadcasting is of sufficient social importance to require a somewhat different rule than where public performances are given to limited audiences in theatres, where an admission fee is charged, that led to the provision in the Rome Convention for the protection of literary and artistic property in 1928. This provision is as follows:

"(1) The authors of literary and artistic works enjoy the exclusive right to authorize the communication of their works to the public by radio diffusion (broadcasting).

"(2) It belongs to the national legislatures of the countries of the Union to regulate the conditions for the exercise of the right declared in the preceding paragraph, but such conditions shall have an effect strictly limited to the country which establishes them. They can not in any case adversely affect the moral right of the author, nor the right which belongs to the author of obtaining an equitable remuneration fixed in default of amicable agreement, by competent authority."

In other words, the Rome Convention expressly recognizes the right of each country to adopt a different rule in the case of broadcasting than it adopts in the cases of industries where payment is received directly from the audience which enjoys the performance.

This leads directly into a question upon which we can be somewhat more specific in our position. From what I have already said, you will readily see the importance to the broadcaster of being able to ascertain what musical compositions are protected by copyright and what are in the public domain. This is why we have so vigorously urged that where copyrighted works are published, they must be accompanied by a printed notice of copyright, and also that they must be registered in a central office such as is now done under the present Copyright Act. The term of copyright protection must also be a definite term of years so that the broadcaster or other user of music can tell when the work passes into the public domain and is free for use by anyone.

Naturally, the small broadcaster is not going to be able to conduct his own research at the Copyright Office. We fully appreciate, furthermore, the difficulties and imperfections of the present system which do not make it any too easy to determine what music is in the public domain. Nevertheless, it is the hope and purpose of the broadcasters through their association or some other organization acting in their behalf to compile and collect a trustworthy list of musical compositions in the public domain which will be available to all broadcasters. There is an enormous amount of music in the public domain, but even now it is hard enough to determine what it is. You have already heard one of the witnesses tell when the publishers have four or five songs which are substantially the same thing, they pick out one of them to publish and agree to abandon the others. We know that a large amount of music is taken by publishers and composers from sources in the public domain and is published and copyrighted under a slight disguise. Copyrights which have long since expired are kept alive by so-called arrangements and adaptations which in a large percentage of cases have no real originality whatsoever.

If the floodgates are completely opened with automatic copyright in the sense which it is in force in Europe, together with a copyright term consisting of the life of the author plus 50 years so that no one can tell when the term ends, there will hardly be any public domain and there will in reality be almost perpetual copyright.

I confess that I am not able to understand the reasoning of those who urge that copyright is a natural right, in fact, a sacrosanct property right which justifies all this. The Supreme Court of the United States has held that it is not a natural right but a statutory right; committees of Congress in reporting copyright statutes have said the same thing; the Constitution itself makes it clear, since it gives power to Congress only to give protection for a limited time. Congress does not have to give this protection at all; there is nothing in the Constitution which requires it, and if it chooses to give this protection, it can give something less than the whole and subject it to restrictions and regulations. Otherwise, every Copyright Act we have ever had would be invalid, since they all impose some sort of restriction on the author's right.

The truth is, of course, that the extent of copyright protection is to be judged, like everything else, by the best interests of the public. This is only just, since the purpose of such legislation is not simply to benefit the author, but to benefit the author in so far as this will also benefit the public. No literary or musical work is completely original; every author or composer draws heavily on his contemporaries and on the literature and music which have been handed down to us from the past, a public inheritance upon which we may all draw at will.

Our law frequently suffers from figures of speech. No better instance of this can be found than that of the use of the word "property" with reference to the statutory rights conferred upon the author by copyright legislation. By use of the word "property" many persons who have appeared before this Committee seem to think that they have demonstrated that the same rules should apply (when they seem advantageous) as applied to a pair of shoes or other personal property. The fact is, of course, that copyright protection is not given to the tangible reproduction of the author's thought, such as a book which may be sold to anyone and which is in itself personal property. Copyright protects something intangible, the author's thought, which cannot be known or recognized unless it is somehow recorded; it is more a right not to have others profit from the author's thought without his consent.

We do not desire to stand in the way of the authors' wish to have the United States enter the International Union if the broadcasters' vital interests can at the same time be protected. Last year, in connection with the Vestal Bill, we proposed certain definite amendments which in substance took away virtually all rights to sue for infringement from anyone who had not fulfilled the requirements of notice and registration. There may be other ways of accomplishing the same thing. For example, and this is only a personal suggestion to which I have not given mature thought, it may be that automatic copyright could be given to the author and composer without notice and registration as against reprinting or publishing the work, but that notice and registration would be necessary as against the use of the work by certain classes of users, e. g. the broadcasters, the moving picture industry, the phonograph record manufacturers, etc. In a word, what may be loosely described as performing rights would be protected only where there are notice and registration.

There are other issues in which the broadcasters are interested as users of copyrighted works, but time will not permit me to take them up in detail. For example, if we enter the International Union the United States will be under an obligation to give legislative protection to what is known as the author's moral right. As described in the Rome Convention (Art. 6 bis) this is

> "the right to claim the paternity of the work, as well as the right to object to every deformation, mutilation or other modification of said work, which may be prejudicial to his honor or to his reputation."

Each country retains sufficient liberty, under the Convention, to determine on the form which its legislation on this subject shall take. Mr. Solberg has already mentioned the subject.

No one knows exactly where this moral right begins and ends. As interpreted by some, it is innocuous and we can all agree with it. As interpreted by others, it is extremely unjust and dangerous. The broadcaster is interested only in seeing that any legislation on this subject does not prevent him from any reasonable arrangement or adaptation of a copyrighted work for broadcasting where he has a license from the copyright owner to broadcast it, or from any of the usual incidents of broadcasting.

Another issue that is likely to arise has to do with giving phonograph records copyright protection as such. Phonograph record manufacturers do not enjoy this protection at present. If a station broadcasts a phonograph record of a copyrighted musical composition it is, of course, responsible to the copyright owner but not to the manufacturer of the phonograph record. It will probably be urged that you should give the latter such protection. This would be very prejudicial to the smaller broadcasting stations, particularly those located in small towns which do not have adequate program resources to support a program of live talent. Such a broadcaster would then be subject to two license fees, one to the music copyright owner and one to the phonograph record copyright owner. Or he may find that he is forbidden to play phonograph records altogether. I am speaking, of course, of ordinary commercial phonograph records sold to the public. I do not see that it makes any difference to the broadcaster whether you extend copyright protection to the manufacturer of electrical transcriptions specially prepared for broadcasting and not sold to the public.

A word more about the International Union. Last year and in previous years, any number of organizations represented to this Committee that it was absolutely imperative that the United States adhere to the Union immediately, or at least prior to August 1, 1931, and that

> "if the United States fails to enter the Union, the evidences are convincing that its authors, publishers, and producers will be subject to retaliatory legislation abroad within a very few months" (Report of House Committee on Patents, HR 12549, 71st Congress, 2d Session, p. 4)

The threatened calamity has not happened, and does not seem likely to happen. So far in these hearings this year, we have heard nothing more about the danger of retaliatory legislation. I do not say this for the purpose of arguing against adhering to the Union, but simply to point out that there is no need for rash or precipitate action. The United States may want to place reservations on its entry into the Union; if it does, it will not be the only country to attempt to do so. The Canadian Copyright Act is, as I read it, not at all consistent with the interpretation of automatic copyright which has been urged before this Committee, yet Canada is a member of the Union. Sec. 9 of the Canadian Act of June 9, 1931, provides for the registration of a grant of an interest in a copy-

right but if such grant is not registered any assignment thereunder is void (see Canadian Performing Right Society, Ltd v. Famous Players Canadian Corporation, Ltd, 1927, 60 O.L.R. 614, affirming 60 O.L.R. 250, holding that under Copyright Act, R.S.C. 1927, ch. 32, sec. 40-3, a grantee of an interest in a copyright cannot maintain an action under the Act unless his grant has been registered). Even Turkey has placed a reservation on its adherence to the Rome Convention, although I understand that the adherence has been rejected on that account. The United States may desire sufficiently to guard its entry into the Union so that protection will not be given to foreign works which are now in our public domain.

Now I turn to the interests of broadcasters as creators of artistic works. As you know, many stations, and particularly the larger ones, have large staffs engaged in the production of programs, in arranging and adapting music, in writing skits, dialogues and plays, etc. It is a distinctly creative work, analogous to what the moving picture producer does. The moving picture producer must get a license from the copyright owner of a novel, but once having done so and having turned it into a moving-picture production he can get copyright protection on that production. Similarly, if I make an arrangement and selection of a dozen songs in a book, having secured the necessary permission of the persons owning the copyright on those songs, I can also get a copyright on the resulting book. The same thing can be done on works in the public domain, so far as the original adaptation or arrangement is concerned. We feel that the broadcaster should have the same protection, particularly in view of the possible advent of television. In other words, the broadcaster, having secured from the copyright owner the exclusive right to adapt a work for broadcasting and to communicate it to the public by broadcasting, and having made a large expenditure in adapting it and in securing artists to perform it, should be protected against unauthorized use of it by others.

Now I do not mean that the broadcaster wants to collect royalties from hotel or restaurant proprietors or other persons operating receiving sets who do not profit from a direct admission fee. We believe that no one, either author, publisher or broadcaster, should have such a right. The persons listening to such receiving sets are part of the broadcaster's audience, to reach whom the advertiser pays the broadcaster. Such persons receive much more than merely a bare musical composition; they receive the benefit of large expenditures by the broadcaster in creating a satisfactory performance of the composition, and the copyright owner is not entitled to collect royalties for all this. If anyone is to have such a right it should be the broadcaster.

The broadcaster is interested in situations of a very different sort, such as the following:

> 1. The broadcaster broadcasts the rendition of a song by a very famous artist and A reproduces the performance on phonograph records by attaching suitable apparatus to a receiving set and sells them.

2. Or A takes the performance as received over a receiving set and sends it out to subscribers over telephone or electric power lines for a fixed monthly fee.

3. Or A opens up a theatre where he charges admission and uses the performance as rendered by the receiving set to entertain the audience.

This last instance is a very real possibility if television develops and if television receiving apparatus proves too cumbersome or expensive for the home. It will then go into the theatre where it might conceivably replace the motion picture. I don't know whether this is going to happen or not.

The other two instances are not imaginary. They have already happened. The case of piracy of a broadcast program by the phonograph record method has gone to a high court in Germany where the broadcaster was upheld in his right to enjoin it (see Columbia Law Review, Dec.1930, p. 1104). The use of programs over telephone lines is occurring right now in three important American cities and in several European cities. In several European countries, the broadcasters have been given statutory protection against these practices.

I concede that the subject seems complicated, but believe that satisfactory provisions can be worked out based on the theory that the broadcaster, having obtained a right from the copyright owner, is entitled to be protected in the exercise of that right both as against the copyright owner himself and as against third parties who utilize the broadcaster's production for direct profit. The American Society, which also foresees the growing importance of the subject, is doing its utmost to prevent its recognition, e.g. by clauses in its license agreements, as I have already pointed out. As long as it has the whip-hand it will force broadcasters to surrender this right on paper, unless there is specific statutory protection.

The points in which broadcasters are interested may be summarized as follows:

1. A trustworthy and practicable means by which copyrighted works can be distinguished from works that are in the public domain. In the present state of our knowledge we believe that copyright notice, registration and definite term of copyright protection are all necessary for this purpose but we shall maintain ourselves openminded and receptive to any substitute which adequately accomplishes the same purpose.

2. Protection against penalties, particularly for innocent infringement. This means

a. That the minimum damage clause should either be made to correspond with the actual damages suffered or be eliminated. Penalties, as distinguished from damages, should be payable to the United States Government, not to private parties.

b. That the single-performance principle should be recognized, so that only the person originating the performance will be liable and no person who does not have control over what music will be played can be held.

3. Protection against abuses of power on the part of combinations of copyright owners.

4. If the author's so-called moral right is to be recognized, protection against the exercise of it against the usual incidents of broadcasting.

5. That ordinary commercial phonograph records shall not be given copyright protection as such.

6. Protection of broadcast programs from piracy.

In conclusion, I must apologize for this rather lengthy discussion of the broadcasters' position on copyright legislation. I know that I speak for the whole industry in commending this Committee on the open-mindedness with which it is conducting this inquiry and its desire to understand the complicated problems which modern scientific developments have introduced into this branch of the law.

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