

PROBLEMS RAISED BY TECHNOLOGICAL  
ADVANCES ON COPYRIGHT IN  
MUSICAL COMPOSITIONS

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ABSTRACT

Title of Thesis: Problems Raised by Technological Advances  
on Copyright in Musical Compositions

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This thesis attempts to point out a number of lacks in the present Copyright Act which exist because of recent advances in electronic technology. Specifically, it attempts to indicate the enormous growth of electronic entertainment for the home, and to show how this new form of entertainment poses problems concerning copyright which never have existed before.

Since very few cases are on record which deal with the use of recorded music at home, it has been necessary to examine cases which deal with copyright and music in general terms and to draw analogies to adapt existing precedent to new situations. It is pointed out in some detail that the Copyright Act of 1909, still in effect today, does not treat present conditions as explicitly as might be liked, and results in considerable confusion where non-commercial and non-profitable use of recorded music is concerned.

The subject is of vital interest to copyright attorneys, manufacturers of recordings and recording equipment, performing rights societies, artists, and amateur hobbyists since no thorough analysis of problems raised by home recording has ever been made. The handful of acknowledged authorities on the subject have only a personal opinion on the outcome of any hypothetical case dealing with home recording.

Whether or not a home recordist violates the Copyright statute when he records music from a radio has never been officially determined. It is the intent of this paper to analyze the Copyright Act and its judicial and practical application and show how, by several lines of reasoning, home recording does not infringe.

The thesis is divided into chapters which deal with the growth of modern technology, the present Copyright Act, performing rights societies and judicial interpretation. Finally, a concluding chapter offers a solution to the mounting problem of home recording as it could be treated in a general revision of the Copyright Act.

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## CHAPTER I

### INTRODUCTION

#### A. A Technological Revolution

Since 1900 the world has undergone the greatest technological revolution in its history. The list of mechanical, chemical or electrical devices which have been aimed at making work easier, quicker or more efficient is quite lengthy. In the first six decades of the twentieth century civilization has seen the emergence or practical development of aviation, electronics, electricity, motion pictures and a vast number of conveniences designed for better living.

But of the many forms of technology which have been developed since the turn of the century, electronics has been one of the fastest growing. In some measure, our lives are affected daily by some application of electronics. Subsistence, entertainment, protection, transportation: all are aided in some fashion by electronics. In terms of finance, electronics has grown at a more rapid rate than any other single industrial endeavor. Factory sales of electronic products in 1914 amounted to roughly \$1 million. By 1959 the figure had topped \$10 billion.<sup>1</sup>

But growth in electronics has not been without pitfalls -- many of a legal nature. From Marconi's early experiments to stereophonic broadcasting, recently announced, legal arguments over ownership rights to patents and copyrights have flourished. But whereas legal guides to patent ownership have been fairly well defined, some rather confusing questions remain over the exact legal definition of "literary rights" in

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<sup>1</sup>Electronic Industries Association, 1960 Fact Book (Washington: Electronic Industries Association, 1960), p. 9.



musical compositions and the degree to which they are entitled to protection from non-commercial exploitation.

B. The Matter of Infringement

Roger Needham, a University of Michigan Law School student, prefaced his award-winning entry in the Burkan Memorial Essay Competition thus:

Today, with the marketing of inexpensive tape recorders and photocopy machines, it must appear to those concerned with protecting copyrights that 'do-it-yourself' home copyright infringement kits are available to everyone.<sup>2</sup>

Mr. Needham's words would imply that the problem of invasion of rights in musical compositions is current. But it is not new. Thirty-seven years ago Judge Mack recognized the new legal problems brought on by electronic development:

While the fact that radio was not developed at the time the Copyright Act...was enacted may raise some question as to whether it properly comes within the purview of the statute, it is not by that fact alone excluded from the statute. In other words, the statute may be applied to new situations not anticipated by Congress, if, fairly construed, such situations come within its intent and meaning.

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While statutes should not be stretched to apply to new situations not fairly within their scope, they should not be so narrowly construed as to permit their evasion because of changing habits due to new inventions and discoveries.<sup>3</sup>

C. Development of Music at Home

It has been the growth of radio, perhaps more than any other technological development in the field of home entertainment, which has raised the greatest number of legal problems. As performing rights societies

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<sup>2</sup>Roger Needham, "Tape Recording, Photocopying, and Fair Use," Copyright Law Symposium, Number Ten (New York: Columbia University Press, 1959), p. 75.

<sup>3</sup>Remick v. American Automobile Accessories Co., 5 F.2d 411 (1925).

were being organized to protect the composer from unfair use of his music, it was found that the greatest threat to uncompensated "pirating" of music was the broadcast medium. A number of cases -- most of them cited yet today -- arose because "free" music which was broadcast was put to commercial use without payment of royalty fees.

It was exactly this sort of activity which prompted Judge' Mack's admonishment of 1925. By that date radio broadcasting was still in its infancy. Stations KDKA, Pittsburgh, and WWJ, Detroit, had been on the air barely five years. The National Broadcasting Company did not begin network broadcasting for another year. Regular broadcasts of symphonic music and opera did not occur for another ten years. Even as a communications medium, radio by 1925 was just thirty-seven years old. It was in 1898 that Guglielmo Marconi took out his first patents (later contested) in England.<sup>4</sup>

Along with the airplane and the automobile, radio developed slowly but steadily in the first four decades of the twentieth century. Then came World War II, forcing rapid technological expansion to meet the needs of modern warfare. During the war electronics advanced at an unprecedented rate. As soon as possible after the war's conclusion, military developments were turned to consumer purposes. The result was a mass infusion of new instruments -- television, tape recorders, home sound movies, long playing records, high fidelity (and now stereo) and a host of others -- into the American culture.

Figures compiled by the Federal Communications Commission illustrate the tremendous growth which has taken place in the broadcast industry

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<sup>4</sup>Monroe Upton, Electronics for Everyone (New York: The Devin-Adair Co., 1959), p. 105.

since World War II. In 1945 the number of licensed AM broadcast stations in the United States was 1,056. By 1950 the number had grown to 2,232. Nine years later the figure was 3,450.<sup>5</sup> Many applications for new licenses are still pending. It is likely that the figures will continue to rise.

On the consumer level, interest in radio and in other instruments designed for home musical entertainment has shown a similar rise over the past fifteen years. Radio production prior to World War II was 11,831,000 units, representing a dollar volume of more than \$176,000,000. By 1947, in the first rush of post-war manufacturing, production climbed to 20,000,000 units, valued at \$650,000,000.<sup>6</sup>

Other forms of broadcasting also were on the rise. Television developed quickly after the war. In 1946 only six TV stations were operating. By 1959 the total was 570. FM radio was developed prior to the war but did not get its real start until afterwards. In 1945 there were forty-eight FM stations in operation in the U. S. Three years later the total was 750.<sup>7</sup>

Another form of home musical entertainment -- record playing -- rose in popularity after the war to become one of the nation's leading industries. Factory sales of phonograph records in 1940 were \$48 million. By 1945 the total had risen to \$99 million. Ten years later, after a gradual ascendency to \$235 million, record sales took a sudden spurt upward. By 1959 the total was \$462 million.<sup>8</sup>

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<sup>5</sup>Electronic Industries Association, op. cit., p. 21.

<sup>6</sup>Ibid., p. 14.

<sup>7</sup>Ibid., p. 21.

<sup>8</sup>Ibid., p. 19.

The rise in electronic technology and the vast increase in sales of devices designed for home entertainment signified a new trend in the pattern of American culture. Whereas motion pictures had dominated the entertainment scene during and in the years immediately following World War II, the trend during the fifties was toward entertainment within the home itself. A great deal of credit for this pattern can be ascribed to television, which made perhaps the greatest impression. But the figures showing the great rise in sales of phonograph records over the past five years indicates that a segment of the American public, at least, is turning to "canned" music for its entertainment.

Whereas most music composed in the twenties and thirties was intended for presentation from the stage, by live musicians, composers in the fifties looked to record sales for a large part of their profit. Jukeboxes, radio, TV, motion pictures and records reach a vast audience much larger than the crowds an artist (or composer) can reach in person.

#### D. Law and Technology

The shift from public to private enjoyment of music has been due, of course, to technological advancements in electronics which have made the equipment for private listening available. But, just as problems due to commercial use of broadcast music arose in the twenties, problems regarding private, or non-commercial, use of broadcast music have arisen in recent years. The problems have grown almost in direct proportion to the upsurge in record and equipment sales. Tape recorders have been used to capture broadcast musical performances for later use, and it is primarily because of the tape recorder that the legal problems discussed in this paper have arisen. Although there is little doubt regarding the use of recorded music for profitable purposes, much doubt exists as to the

lengths to which a home recordist may go in preserving and performing music he has recorded on tape.

As the technology advances, new problems will continue to arise. In recent years home movies have acquired a capacity for sound. Amateur photographers owning such equipment will want to add narration and musical background. The films will be shown to friends. To what extent is such an activity to be deemed "fair use" of a copyrighted composition?

Television recorders have appeared on the commercial market and indications are that ultimately a "home" version will be developed. Equipment for preserving TV programs will raise new questions over the legality of their use.

In the United States, the foremost performing rights society -- ASCAP -- overlooked a lucrative source of revenue in the public demonstration of high fidelity equipment with copyrighted music. Instead, ASCAP sought to plug a hole in the Copyright Law which permits jukebox operators an exemption from royalty payments. Nearly ten years of Congressional hearings have failed to provide either the attempted revision or a compromise solution.

The pirating of commercial records by "fly-by-night" independent record producers has reached substantial proportions.<sup>9</sup> By 1961 a bill had reached the Senate Judiciary Committee to make such practices criminal offenses. Thus far no criminal penalties have been provided.

Moves to increase protection for musical composers are being made in countries outside the U.S. In Germany, legislation to license tape

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<sup>9</sup>Wall Street Journal (New York), April 20, 1961, p. 1.

recorder owners is being considered. A recent decision there requires manufacturers to warn purchasers of the potential dangers of copyright infringement.<sup>10</sup>

The advance of technology has had its share of legal problems on the commercial scene, as well. Television programs previously were available only on film (if not presented "live") and were copyrightable as motion pictures. Recently the Copyright Office ruled that "video taped" TV programs also would be entitled to copyright, since the image they produce is visual (as in a motion picture) rather than audible, as in a record. The action was taken arbitrarily, despite an earlier, and still valid, ruling that records cannot themselves be copyrighted, since they are not "copies" in the legal sense.<sup>11</sup>

The declaration may, however, be simply a stop-gap move to pave the way for a thorough analysis of the Copyright Law, now past its fiftieth year of existence. The revision studies were begun in 1956. To date more than thirty-four reports have been prepared for the Senate Judiciary Committee's Subcommittee on Patents, Trademarks and Copyrights.<sup>12</sup>

But revision of the Copyright Law will not be an easy task. The complications of advancing technology are great. The 1909 Law was five years in preparation, and conditions were not nearly so complex as they are today.

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<sup>10</sup>The case was GEMA v. Grundig, decided in 1960.

<sup>11</sup>Regulations of the Copyright Office, Section 202.8(b). The regulation is based on White-Smith v. Apollo, 209 U.S. 1, (1908). Information on copyrightability of video taped programs is based on an interview with the chief of the reference division of the Library of Congress.

<sup>12</sup>Copyright Office, Library of Congress: Copyright Law Revision Studies (Washington: Government Printing Office, 1961).

Until firm answers to many questions of copyright validity and infringement are forthcoming, confusion will continue to dictate the actions of many individuals who deal with music, electronic entertainment and law. Delay will simply serve to postpone a solution to problems which are increasing with continued sales of electronic devices to the public.

It is the purpose of this paper to examine the Copyright Law as it has been applied since 1909 and to view its present provisions in the light of recent developments in radio and music. Actions dealing with copyright and music will be considered, and conclusions will be drawn regarding the degree to which the Copyright Law can be applied to non-commercial uses of recorded music.

## CHAPTER II

### COPYRIGHT LAW AND MUSIC

#### A. Early Protection for Composers

Many difficulties arising from interpretation of copyright law are due to the lack of foresight shown by legislators in 1909 when the present Copyright Act was drafted. Phonograph records were referred to in those days as "mechanical reproductions." Radio was not mentioned at all.

Copyright protection for composers of music in the United States dates from 1831. Originally it was intended to apply to live performances, in theaters, restaurants and carnivals.

In the American colonies a need for protection of literary property was recognized by framers of the Constitution who wrote:

The Congress shall have power. . .to promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries. . .to make all laws which shall be necessary and proper for carrying into execution the foregoing powers. . . .<sup>1</sup>

The first copyright statute in America had been written well in advance of the Constitutional Convention. A carryover from England, it was the "Act of Queen Anne," established in 1709.<sup>2</sup> The opening words were as follows:

Whereas printers, booksellers, and other persons have of late frequently taken the liberty of printing, reprinting, and publishing books without the consent of the authors or proprietors. . .to their very great detriment, and too often to the ruin of them and their families, for preventing therefore such practices for the future, and for the encouragement of learned men to compose and write useful books. . . .<sup>3</sup>

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<sup>1</sup>U.S. Constitution, Art. I, §8.

<sup>2</sup>Margaret Nicholson, A Manual of Copyright Practice (New York: Oxford University Press, 1956), p. 3.

<sup>3</sup>Ibid., p. 3.



The law granted an author exclusive rights for fourteen years, and provided a fourteen-year renewal period. Damages for infringement were one penny for every sheet of every book printed illegally.

Protection for composers' rights came earlier in Europe than in the U. S. Denmark enacted a copyright law in 1741. France followed in 1793 with a law which was passed on to Italy, Belgium, Switzerland and Holland as each came under the influence of Napoleon. Spain received a copyright law in 1847. In 1887 the Berne Convention resulted in the International Copyright Union, to which all important European nations became signatories.<sup>4</sup>

In the American colonies, copyright laws were adopted in Maryland, Massachusetts and Connecticut in 1783, and later in New Jersey, New Hampshire and Rhode Island. Ultimately all but Delaware had some sort of legislation. Difficulties of administering state copyright laws were foreseen, and Constitution architects provided, in Section 8, Article I, authority for Congress to enact a copyright law.<sup>5</sup>

The first federal copyright act was passed in 1790. It covered "books, maps and charts" but did little to prevent pirating of foreign books by United States publishers. A number of amendments followed over the next century, including one in 1831 which added music to the list of copyrightable material. Protection was extended from fourteen to twenty-eight years.

A series of amendments began in 1855. Dramatists were granted performance rights in 1856. Protection was extended to photographs in 1865. Another general act, passed in 1870, placed copyright matters under the Librarian of Congress. A Register of Copyrights was provided in 1897, while

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<sup>4</sup>Ibid., pp. 4-5.

<sup>5</sup>Eugene Mooney, "The Jukebox Exemption," Copyright Law Symposium Number Ten (New York: Columbia University Press, 1959), p. 197.

performance rights granted in 1856 to dramatists were extended to music.<sup>6</sup>

B. The Present Copyright Law

The present law was enacted in 1909, after five years of deliberation. The passage pertaining to music is Section 1(e) which reads, in part, as follows:

Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

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To perform the copyrighted work publicly for profit if it be a musical composition; and for the purpose of public performance for profit, . .to make any arrangement or setting of it or of the melody. . .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. . . .<sup>7</sup>

Section 2 established the rights of an author of an unpublished work:

Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor.<sup>8</sup>

The law establishes different conditions for copyrighted and unpublished music. The owner of an unpublished work can claim damages for all "copying, publication or use" of his composition. This protection is indefinite in length. It is not bound by the two twenty-eight year terms of protection provided for works which are registered. Claim can be handed from generation to generation, so long as the music remains unpublished, whereas a copyrighted piece of music can be protected for a maximum of fifty-six years.

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<sup>6</sup>Nicholson, op. cit., p. 7.

<sup>7</sup>17 U.S.C. §1(e).

<sup>8</sup>17 U.S.C. §2.

It may seem odd that the Copyright Office denies protection for phonograph records. The reasoning dates back to the turn of the century when phonograph records as we know them today did not exist. Player pianos equipped with music rolls were much in style. Makers of piano rolls did not pay royalties for the music they provided and eventually an action was brought, in White-Smith v. Apollo, for copyright infringement.<sup>9</sup> When the Supreme Court was faced with the question of whether the manufacture and sale of music rolls constituted an infringement of a copyrighted musical composition it ruled that it did not because the music rolls were not copies and their distribution did not constitute publication. By way of dictum, the Court stated that it is only "copies" which are entitled to protection, and went on to state that "mechanical devices" such as piano rolls and phonograph records are not "copies" within the meaning of the Act.

The Regulations of the Copyright Office maintain this philosophy today, by stating:

A phonograph or other sound recording is not considered a "copy" of the compositions recorded on it, and is not acceptable for copyright registration. Likewise, the Copyright Office does not register claims to exclusive rights in mechanical recordings themselves, or in the performances they reproduce.<sup>10</sup>

An individual cannot refuse to copyright a musical composition, in order to retain the benefits of common-law rights, and still permit records to be made and distributed. It was held in the Miracle Records case<sup>11</sup> that if a musical composition is recorded and distributed without the owner conforming to the formalities of copyright registration his rights to the

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<sup>9</sup>209 U.S. 1 (1908).

<sup>10</sup>Regulations of the Copyright Office, Section 202.8(b).

<sup>11</sup>91 F. Supp. 473.

composition are lost by default. The work then reverts to the public domain. A significant fact thus was established as a part of the law: that sale and dissemination of records constitutes publication.

Section 10 of the Copyright Act delineates the method of securing copyright by publication and filing with the Copyright Office, while Section 13 outlines the regulations governing deposit of copies following publication. Penalties for failure to deposit copies are enumerated in Section 14. Renewals are discussed in Section 25, and "date of publication" in Section 26.<sup>12</sup>

Chapter 2 of the Copyright Act, dealing with infringement, specifies damages for improper use of "mechanical reproductions of musical works."

The Act states:

Whenever the owner of a musical copyright has used or permitted the use of the copyrighted work upon the parts of musical instruments serving to reproduce mechanically the musical work, then in case of infringement of such copyright by the unauthorized manufacture, use, or sale of interchangeable parts, such as disks, rolls, bands, or cylinders for use in mechanical music-producing machines. . .no criminal action shall be brought, but in a civil action an injunction may be granted upon such terms as the court may impose. . . .<sup>13</sup>

Then follows the famous "compulsory provision" of the Act, which stipulates that a composer who has permitted his music to be recorded by one manufacturer cannot prevent another from recording the work, so long as manufacturer number two files the proper forms and pays a royalty of "2 cents on each such part manufactured."

The statutory damages allowed for copyright infringement are stated as follows:

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<sup>12</sup>17 U.S.C. § 10, 13, 14, 25, 26.

<sup>13</sup>17 U.S.C. § 101(e).

In the case of a dramatic or dramatico--musical or a choral or orchestral composition, \$100 for the first and \$50 for every subsequent infringing performance; in the case of other musical compositions \$10 for every infringing performance.<sup>14</sup>

Criminal provisions are discussed in Section 104 which makes willful infringement for profit a misdemeanor for which "conviction thereof shall be punished by imprisonment not exceeding one year or by a fine of not less than \$100 nor more than \$1,000, or both. . ."<sup>15</sup>

The Act places limitations on works entitled to copyright. Protection cannot be afforded mechanical reproductions of music published or copyrighted prior to July 1, 1909; to compositions of a foreign composer unless the nation of which he is a citizen grants equivalent protection to U. S. citizens; or to music performed on a jukebox unless a fee is charged for admission to the place where the performance occurs. If the copyright owner permits records to be made and fails to file the statutory notice that he has permitted such use failure to do so will be a complete defense to anyone else recording the work.<sup>16</sup>

It might be pointed out that in practice it is to the financial advantage of a composer to secure copyright by publishing his work on records as soon as possible, since the two-cent fee required by statute is usually greater than the contract fee established with the record manufacturer who processes the discs initially. Although rates vary, it is not uncommon for the contract fee to amount to considerably less than half

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<sup>14</sup><sub>17</sub> U.S.C. § 101(b).

<sup>15</sup><sub>17</sub> U.S.C. § 104.

<sup>16</sup><sub>17</sub> U.S.C. § 1(e).

the statutory minimum. This fee is further divided equally between the composer and publisher. A composer may wind up with less than half a cent per record.<sup>17</sup>

### C. Revision of the Copyright Act

Although other sections of the Copyright Act apply to music in general terms, the foregoing are the provisions which are chiefly concerned with music per se. The language of the Act leaves little doubt that modern technology was unforeseen in 1909. Even the few amendments which have been made over the fifty-two years of the Act's existence have done little to align it with advancing technology.

Many copyright authorities view stop-gap amendments with little favor. For example, many attempts have been made over the past ten years to amend the "jukebox exemption" but none have been successful. Legislative witnesses to the 1959 subcommittee hearings conceded that very probably ASCAP and the jukebox operators in business today never would be able to reach agreement. Most authorities feel that, ultimately, the small operators will succumb to economic pressures. When the field has narrowed to a handful of large associations, the cry that license payments to ASCAP would be an impossible strain no longer will be valid. Agreement on changes to the exemption then may be possible.

On the other hand, the Copyright Act may have received a general revision by then, and the problem may no longer exist. Congress voted funds for a survey of the Act in 1954, and the first of thirty-four studies

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<sup>17</sup>U.S. Congress, House of Representatives, Hearings on H.R. 5921, To Require Jukebox Operators to Pay Royalty Fees, 86th Cong., 1st. Sess. (Washington: Government Printing Office, 1959), p. 99.

was printed by the Government Printing Office in 1955. Dealing with many facets of the copyright situation, the studies have been published since 1955 as they have been completed.

Although most of the studies deal with the situation either in general terms or cover written works other than music, a few studies are directly concerned with musical copyright. Study No. 5, by Harry G. Henn, examines the compulsory license provisions of the Act; Study No. 6, by W. M. Blaisdell, investigates economic aspects of the compulsory provisions; while Study No. 26 covers unauthorized duplication (pirating) of sound recordings.<sup>18</sup>

Within a few years the Copyright Office probably will offer Congress a new Copyright Act. Undoubtedly, committee hearings will consume a considerable amount of time before definite action, if any, is forthcoming. Satisfying divergent interests in our present complex society will not be easy. Conceivably, a new Act never will materialize. Perhaps the courts will be called upon to settle the issues indefinitely. Many authorities would prefer to see this alternative, feeling it offers a less violent solution than general revision of the Act.

But whatever the method, answers to many copyright questions are urgently needed. Technology is becoming increasingly complex. Indications point to even greater complexity as the years advance. If confusion is not met by determination, it will continue to rise. Worst of all, it could result in a partial collapse of the present system of copyright protection.

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<sup>18</sup>All thirty-four studies are available from the Government Printing Office.

## CHAPTER III

### PRACTICAL COPYRIGHT ENFORCEMENT

#### A. ASCAP

As a practical matter it would be virtually impossible for individual composers to ferret out each and every infringement of their music. Although an action to recover for infringement normally is brought in the name of the composer, there exist in this country three associations which assist their composer members by serving as agents not only to guard against infringement but to pass on royalties collected through their vast licensing networks.

Such organizations are known as performing rights societies, and although there are numerous small societies with limited membership, most music written in the United States is licensed by one of the three which have come to be the most powerful. Foremost in size of membership and annual income is ASCAP -- the American Society of Composers, Authors and Publishers. ASCAP was formed less than four years after the present Copyright Law was enacted.

Smaller in membership but equally vigorous in its attitude is BMI -- Broadcast Music, Inc. -- which was formed by broadcasters in the early forties in defiance of ASCAP's music monopoly. The third society of importance is SESAC, Inc. -- formerly the Society of European Stage Authors and Composers.

The purposes for which ASCAP was formed, at Luchow's restaurant in New York City on a rainy night in October, 1913, were well stated by Nathan Burkan, one of ASCAP's nine original founders and the Society's first attorney:

Prior to 1914 it was the universal practice throughout the United States on the part of proprietors of places of public resort



operated for profit. . .to perform publicly for profit duly copyrighted musical works without the let, leave or license of the composers and authors. . .of such works. . . .

Throughout the length and breadth of the nation, in nearly every hotel, restaurant, motion picture theater, vaudeville theater, cabaret, dance hall and other place of public amusement, the most successful works of American authors were seized and appropriated and publicly performed for the profit of the proprietor. . .in violation of the copyrights of the author of such work. . . .

The illegality of such performances was extremely difficult to establish and prove unless a trustworthy and responsible person located in the vicinage where such illegal performance took place was on hand to witness and hear the same and could notify the infringer of his wrongful act, coupled with a demand that he cease and desist. . . .

In order for an individual to protect his lawful rights against infringement by this means, it would have been necessary for him to maintain an inspection station at more than thirty thousand different establishments located in practically every city in the United States, which was wholly impossible. . . .<sup>1</sup>

It was the Italian composer Giacomo Puccini who first suggested to George Maxwell, a representative of his publisher, that a performing rights society similar to one already established in Italy should be formed within the United States.

The Society was formally organized on February 13, 1914, by 100 composers and publishers, led by Nathan Burkan and Victor Herbert, one of the leading composers of the day. The functioning of the Society has been aptly described by Edward N. Waters, of the Library of Congress Music Division, in his biography of Herbert:

Fundamentally the operations of ASCAP are simple. The members assign to the Society the performing rights in their own works, and the Society in turn licenses the use of such works in return for royalties. The royalties are divided among the Society's members according to a scheme which is a completely confidential internal arrangement. There are always dissatisfied members; but human nature has its limitations, and the small earner invariably feels he receives less than he deserves.<sup>2</sup>

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<sup>1</sup>Edward N. Waters, Victor Herbert, A Life in Music (New York: The Macmillan Co., 1955), pp. 436-437.

<sup>2</sup>Ibid., p. 439

It is interesting to note, in the light of modern technology, that the copyright infringements which bothered ASCAP's founders were pro- pounded by "restaurants, dance halls, cabarets, midnight revues, dinner dances and after-theatre revues."<sup>3</sup> Today, however, the bulk of ASCAP's license fees come from broadcasters.<sup>4</sup>

The Society had not been in existence for half a year when a court battle threatened to overturn the principles upon which ASCAP had been founded. The John Church Co., publisher of John Philip Sousa's music, brought suit against the Hilliard Hotel Co., claiming that the Vanderbilt Hotel had played Sousa's march, From Maine to Oregon, without authoriza- tion and without paying a performance fee.

The publisher was upheld by Judge Lacombe in the U. S. District Court for the Southern District of New York. But the case was appealed, and Judge Ward, of the Circuit Court of Appeals, Second Circuit, reversed the lower court, stating:

We are not convinced. . .that the defendants played From Maine to Oregon for profit within the meaning of these words in our copy- right act. If the complainant's construction of it is right, then a church in which a copyrighted anthem is played is liable, together with the organist and every member of the choir, not only to in- junction, but in damages in the sum of \$10 for each performance. . . .<sup>5</sup>

Society members were stunned by this reversal. If music performed in restaurants was not to be considered by the courts to be "public per- formances for profit" within the meaning of the Copyright Act the concepts upon which the Society was established were invalid.

<sup>3</sup>Ibid., p. 436.

<sup>4</sup>U.S. Congress, House of Representatives, Hearings on H.R. 5921, To Require Jukebox Operators to Pay Royalty Fees, 86th Cong., 1st Sess. (Washington: Government Printing Office, 1959), 131.

<sup>5</sup>Church v. Hilliard, 221 Fed. 229 (1915).

Herbert and Burkan promptly initiated another action, this time against Shanley's Restaurant where it was alleged that an unauthorized performance of Herbert's Sweethearts was given. This time Herbert and Burkan sought damages under the dramatist's clause of the Act, which reserves exclusive performance rights, regardless of profit, to the composer. The song Sweethearts was part of a larger dramatic work by the same name. Herbert claimed the performance, irrespective of profit, was an infringement.<sup>6</sup>

The strategy failed. Judge Learned Hand cited Church-Hilliard as authority for the principle that music in a public restaurant is not performed for profit.

Herbert's appeal was unsuccessful. Judge Rogers stated that the dramatico-musical rights in the separate song Sweethearts had been lost because the sheet music version failed to state that the "comic opera from which the song was taken was itself copyrighted."<sup>7</sup>

Both Judge Hand and Judge Rogers overlooked the most fundamental issue, which was the profit motive. ASCAP's future appeared dubious. Herbert appealed once again, to the U. S. Supreme Court. On Jan. 22, 1917, Justice Oliver Wendell Holmes "achieved a musical immortality" by reversing the lower courts and deciding for Herbert. Both the Shanley case and the Church-Hilliard decision were embraced, and ASCAP's victory was complete. Justice Holmes' decision set the stage for a half-century of copyright litigation. The crux of the problem was stated thus:

If the rights under the copyright are infringed only by a performance where money is taken in at the door, they are very imperfectly protected. Performances not different in kind from those of the defendants could be given that might compete with and even destroy

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<sup>6</sup>Waters, op. cit., pp. 447-454.

<sup>7</sup>Ibid., pp. 452-454.

the success of the monopoly that the law intends the plaintiffs to have. It is enough to say that there is no need to construe the statute so narrowly. The defendants' performances are not eleemosynary. They are a part of a total for which the public pays, and the fact that the price of the whole is attributed to a particular item which those present are expected to order is not important. It is true that music is not the sole object, but neither is the food, which probably could be got cheaper elsewhere. The object is a repast in surroundings that to people having limited powers of conversation or disliking the rival noise give a luxurious pleasure not to be had from eating a silent meal. If music did not pay, it would be given up. If it pays, it pays out of the public's pocket. Whether it pays or not, the purpose of employing it is profit, and that is enough.<sup>8</sup>

Thus the stage was set for the growth of ASCAP as a powerful champion of composers' rights. It was seven years before the Society paid royalties to members. At the end of the first year only \$10,000 had been collected in hotel licenses.<sup>9</sup> But in the early twenties broadcasting began to grow, and the courts soon found that broadcasting constituted public and profitable performances of copyrighted music.<sup>10</sup> ASCAP began to issue annual contracts to radio stations, similar to its hotel and restaurant licenses, for rights to broadcast music under the Society's control.<sup>11</sup>

ASCAP's domain later was extended to motion pictures. After World War II television was added. In 1952, ASCAP's gross income had risen to \$17,672,000, of which \$16,343,000 was domestic.<sup>12</sup> In 1958, ASCAP's receipts from licenses totaled \$28,234,477. The organization spent

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<sup>8</sup>Herbert v. Shanley, 242 U.S. 591 (1917).

<sup>9</sup>Waters, op. cit., p. 442. The average rate per hotel was \$8.23 per month.

<sup>10</sup>Buck v. Jewell LaSalle, 32 F. 2d 366 (1929).

<sup>11</sup>Thomas H. Belviso, "Music Rights in Radio," Music in Radio Broadcasting (New York: McGraw-Hill Book Co., 1946), pp. 115-118.

<sup>12</sup>Variety, Apr. 8, 1953, p. 1, quoted in Stanley Rothenberg, Copyright and Public Performance of Music (The Hague: Martinus Nijhoff, 1954), p. 28.

\$5,180,083 on administrative expenses (roughly 17 percent) and distributed \$23,261,671 among its membership in the U.S. and abroad. Total receipts, including licenses, membership dues and interest on notes, were \$28,441,754.<sup>13</sup>

#### B. Broadcast Music, Inc.

ASCAP went to the broadcasters in 1932 with a new license fee system to replace the flat-fee contract which had been used previously. Broadcasters objected strenuously, but signed the new contracts and began operating under the percentage fee system. But the discontent grew stronger. Neville Miller, then president of the National Association of Broadcasters, said:

Having no source of music supply other than ASCAP and one or two individual publishers of classical music, broadcasters. . . were forced to submit to a principle which they then disapproved and have always regretted. That principle was the payment of a percentage of the broadcasters' gross receipts from the sale of broadcasting time, regardless of whether the time was consumed in playing ASCAP music, non-ASCAP music or no music at all. This principle never has been applied by ASCAP to any other industry using music. . . .<sup>14</sup>

Shortly thereafter an organization call The Radio Program Foundation was established by the broadcasters, "to create a music supply sufficiently large to allow all stations to forego their contracts with ASCAP."<sup>15</sup> Although the Foundation acquired radio performance rights for a number of domestic and foreign catalogs it still was necessary for broadcasters to do business with ASCAP, by virtue of the Society's increasing size and power.

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<sup>13</sup>U.S. Congress, House of Representatives, Hearings on H.R. 5921, To Require Jukebox Operators to Pay Royalty Fees, 86th Cong., 1st Sess. (Washington: Government Printing Office, 1959), pp. 218-219.

<sup>14</sup>Miller and Mills, ASCAP-NAB CONTROVERSY, The Issues, 11 Air. L. Rev. 394, 399 (1940), quoted in Rothenberg, op. cit., pp. 40-41.

<sup>15</sup>Ibid., p. 41.

At the expiration of ASCAP licenses in December, 1940, the Society again offered a new license fee system, this time embracing not only the individual stations but also the networks. The NAB promptly announced a boycott of ASCAP music commencing at midnight, December 31. ASCAP was forced to mediate, and the new contract represented concessions from both sides.<sup>16</sup>

But months of negotiation were sufficient to establish BMI which, formed by NAB, was stocked by independent non-ASCAP compositions and supplied by publishers not in the ASCAP fold. Its list has continued to grow since 1940.<sup>17</sup>

ASCAP's dual-payment proposal was modified considerably, not only by pressure from broadcasters and BMI but also by pressure from the government. The Consent Decree which resulted from the deliberations reads as follows:

In so far as network radio broadcasting is concerned, the issuance of a single license, authorizing and fixing a single license fee for such performance for network radio broadcasting, shall permit the simultaneous broadcasting of such performance by all stations on the network which shall broadcast such performance, without requiring separate licenses for such several stations for such performance.<sup>18</sup>

Present ASCAP contracts provide that the Society receive a percentage of gross after deductions of sales commissions and cost of interconnecting facilities, regardless of whether the sponsor pays the network or the affiliated stations.<sup>19</sup>

<sup>16</sup>Ibid., p. 43.

<sup>17</sup>Ibid., p. 42.

<sup>18</sup>Consent Decree, ASCAP, Civil Action No. 13-95 entered March 4, 1941, section II, 4, Ibid., p. 43.

<sup>19</sup>Ibid., pp. 43-44.

Despite agreement with ASCAP, BMI remained as an effective buffer for future negotiation. It also began to develop talent just as ASCAP had done in its early days. Today, both organizations are influential. In 1952 BMI had a gross income of \$5,607,842, which compares with ASCAP's \$17,672,000.<sup>20</sup>

In addition to ASCAP and BMI there are several smaller, privately-owned licensing organizations, of which SESAC is the largest. SESAC licenses principally classical and western music, as opposed to popular songs which are the mainstay of ASCAP and BMI. In 1952, SESAC received about \$1 million from performing rights licenses.<sup>21</sup>

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<sup>20</sup>Ibid., p. 44.

<sup>21</sup>Ibid., p. 28.

## CHAPTER IV

### JUDICIAL INTERPRETATION IN COPYRIGHT

#### A. The Matter of Performing Rights

Like most matters involving law, copyright enforcement has been highlighted since 1909 by a few landmark cases which today serve to guide copyright users in practical applications of the Act. A key "performance rights" case was Herbert v. Shanley.<sup>1</sup> described in the previous chapter, which established the doctrine that copyrighted music performed in a restaurant constitutes a "public performance for profit" within the meaning of the Act. The decision has been extended to virtually all public places of business which do not charge an admission fee but which are operated for profit. In the next chapter we shall investigate a notable exception involving one facet in the rise of modern technology.

As the years between the two world wars passed, cases in copyright law primarily were aimed at bringing more and more public business establishments under the "public performance for profit" doctrine. In 1928 Berlin v. Daigle<sup>2</sup> placed dance halls in the same category as restaurants, making them liable for infringement if not licensed by ASCAP. The next year, the Dreamland Ballroom case reaffirmed the doctrine.<sup>3</sup>

In 1922, deciding Harms v. Cohen, Judge Thompson cited the Shanley case as justification for extending the profit motive to motion pictures, saying: "I fail to see any distinction in law in favor of the performance

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<sup>1</sup>242 U.S. 591 (1917).

<sup>2</sup>26 F.2d 149 (1928).

<sup>3</sup>36 F.2d 354 (1929).



of copyrighted musical compositions in moving-picture theaters to which a charge for admission is made. . . ."<sup>4</sup>

The music referred to by Judge Thompson was played on a piano by an accompanist who watched the silent screen and played music appropriate to the action. The analogy could be made directly to live musicians playing in a restaurant or in any public establishment operated for profit.

#### B. Cases Dealing With Broadcasting

In the early twenties music and broadcasting were becoming synonymous in the public eye. Inevitably, ASCAP sought to add broadcasters to its license fee system. In 1923 the Society, acting in the name of M. Witmark & Son, one of its member publishers, brought suit against radio station WOR in Newark, New Jersey, claiming it had broadcast the song "Mother Machree" without paying a royalty fee. The defendant denied that the performance could be considered profitable, on grounds that the music was broadcast without charge to the radio listeners.

In the Shanley case Justice Holmes had drawn upon the lack of a direct admittance fee by stating: "The defendants' performances. . . are a part of a total for which the public pays. . . ." In Witmark v. Bamberger Judge Lynch applied the same reasoning. He stated:

We have already stated that the Bamberger Co. makes no direct charge to those who avail themselves of the opportunity to listen to its daily programs. The question then is: Is the broadcasting done for an indirect profit? In determining this we think it is proper to look to the reason for broadcasting at all. Why was it done? What was it done for? What was the object or, to use the term of Justice Holmes, what was the "purpose?" We know the purpose of the restaurant proprietor of the moving-picture theater. What was the purpose of the defendant in expending thousands of dollars in establishing and operating this broadcasting station?<sup>5</sup>

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<sup>4</sup>279 Fed. 276 (1922).

<sup>5</sup>5 F.Supp. 358 (1933).

Radio broadcasts of copyrighted music thus were deemed to be "public performances for profit" within the meaning of the Copyright Act. But the doctrine was not all embracing in its legal implications. Soon the question of whether a radio broadcast was a "public performance" at all was at stake. In Remick v. AAA Co., Judge Hickenlooper stated:

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

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We simply feel that the rendition of a copyrighted piece of music in the studio of a broadcasting station where the public are not admitted and can not come, . . . is no more a public performance. . . within the intent of Congress, than the perforated music roll, which enables the reproduction of copyrighted music by one without musical education, is a copy of such music. A private performance for profit is not within the act, nor is a public performance not for profit. All contemplate an audience which may hear the rendition itself through the transmission of sound waves, and not merely a reproduction of the sound by means of mechanical devices and electromagnetic waves in ether.<sup>6</sup>

But Judge Hickenlooper's analysis of radio broadcasting did not stand for long. The Sixth Circuit Court of Appeals reversed his decision in 1925. The words of Judge Mack are particularly significant:

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.<sup>7</sup>

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<sup>6</sup>Remick v. AAA, 298 Fed. 628 (1924).

<sup>7</sup>Remick v. AAA, 5 F.2d 411 (1925).

Judge Mack's acceptance of the inevitability of advancing technology was evident in his consideration of the new medium, radio:

While the fact that the radio was not developed at the time the Copyright Act was enacted may raise some question as to whether it properly comes within the purview of the statute, it is not by that fact alone excluded from the statute. In other words, the statute may be applied to new situations not anticipated by Congress, if, fairly construed, such situations come within its intent and meaning.

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While statutes should not be stretched to apply to new situations not fairly within their scope, they should not be so narrowly construed as to permit their evasion because of changing habits due to new inventions and discoveries.<sup>8</sup>

With broadcasters well within the fold, ASCAP then turned to the listener. It was the Society's aim to prove that radios operated in commercial establishments were done so for profit, and to force license fees from the owners. In 1928 suit was brought by Gene Buck, then president of ASCAP, against the Jewell-LaSalle Realty Co., alleging that the hotel operated by the company used radio instead of an orchestra to entertain its guests. The effort at first was unsuccessful. Judge Otis stated:

It is true that if one plays on his phonograph a record of a piece of music he is performing. If it is a copyrighted musical composition, and if the performance is public and for profit, then his act is an infringement of the copyright. Plaintiffs say 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. Obviously there is a difference. The record on bakelite is a separate and distinct thing from the original performance in the studio where the record was made. Playing that record is performing anew the musical composition imprinted on it. The waves thrown out upon the ether are not a record of the original performance. They are the original performance. Their reception is not a reproduction, but a hearing of the original performance.

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<sup>8</sup>Ibid.

The reception of a musical composition on a radio receiver is not a performance at all. . . If it was a performance of a musical composition, it was a performance, not by the defendant, but by the broadcaster, on the defendant's instrument.<sup>9</sup>

The case was appealed to the Supreme Court where, in 1931, the decision was made that radio broadcasting does, indeed, constitute performance and liability for infringement does not end at the broadcasting studio. Mr. Justice Brandeis, delivering the opinion of the Court, made the following classic statements:

The parties agree that the owner of a private radio receiving set who in his own home invites friends to hear a musical composition which is being broadcast would not be liable for infringement. For, even if this be deemed a performance, it is neither public nor for profit.

.....

We are satisfied that the reception of a radio broadcast and its translation into audible sound is not a mere audition of the original program. It is essentially a reproduction. . . Thus music played at a distant broadcasting studio is not directly heard at the receiving set.

.....

Reproduction. . . amounts to a performance.

In addition, the ordinary receiving set, and the distribution apparatus here employed by the hotel company are equipped to amplify the broadcast program after it has been received. Such sets clearly are more than the use of mere mechanical acoustic devices for the better hearing of the original program. The guests of the hotel hear a reproduction brought about by the acts of the hotel. . . . There is no difference in substance between the case where a hotel engages an orchestra to furnish the music and that where, by means of the radio set and loudspeakers here employed, it furnished the same music for the same purpose. In each the music is produced by instrumentalities under its control.<sup>10</sup>

The decision produced a new doctrine which would henceforth be applied to matters of broadcast copyright. It was the doctrine of "public reception for profit" and it would be applied in future years to a wide variety of

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<sup>9</sup>Buck v. Jewell-LaSalle, 32 F.2d 366 (1929).

<sup>10</sup>Buck v. Jewell-LaSalle, 283 U.S. 191 (1931).

situations involving radio reception. Of significance also was Justice Brandeis' comment that: "Intention to infringe is not essential under the act, and knowledge of the selection to be played is immaterial."

On the matter of profit, Justice Brandeis stated:

The defendant contends that there was no performance within the meaning of the act because it is not shown that the hotel operated the receiving set and loudspeakers for profit. Unless such acts were carried on for profit, there can, of course, be no liability. But whether there was a performance does not depend upon the existence of the profit motive.<sup>11</sup>

As a matter of fact, the question of profit in a hotel's use of music already had been established by Herbert v. Shanley and Justice Brandeis simply was establishing a guide for determining what constituted public performance in a hotel.

#### C. Other Cases on Musical Copyright

A significant case dealing with reception of a live broadcast which began as a private venture but developed profitable overtones as it progressed is Metropolitan Opera Assn. v. Wagner-Nichols Recorder Corp. In this case the "Corp." was a pair of private individuals who made a home tape recording of a Metropolitan Opera broadcast, had records pressed through a private laboratory, then offered the records for sale, ostensibly only to members of the chorus. Ultimately, however, copies of the records appeared in a New York record store, and it was this which precipitated the court action. The matter was not one of copyright, in this instance, since the music was in the public domain. Rather, the issue was unfair competition. In finding for the Opera Association, Justice Greenberg stated:

Such injury as may be inflicted on the defendants is the direct result of their unconscionable business practices and their invasion of the moral standards of the market place. The cry of the defendants that others similarly transgress does not confer immunity on them

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<sup>11</sup>Ibid.

for their forbidden activities, nor may they find solace in the claim that they have not been guilty of common-law fraud. . . . They have embarked upon a hazardous enterprise which equity will not hesitate to strike down. Cast in its proper environment, we have here a business venture purposed to gather in the harvest the seeds of which were planted and nurtured by others at great expense and with consummate skill.<sup>12</sup>

Had the broadcaster (The American Broadcasting Co.) been playing a record instead of a live performance, redress could well have come by virtue of the performer's unique common-law right in the performance. Such was the case in Pennsylvania in Waring v. WDAS.<sup>13</sup> Waring had made several recordings for the Victor Talking Machine Co. but had insisted on the wording, "Not licensed for radio broadcasts", being placed on the label. WDAS, a Pennsylvania radio station, broadcast two of these recordings, the music being covered by the station's license with ASCAP.

Waring promptly sued on the basis of the Pennsylvanians' unique performance. In the decision it was noted that the Copyright statute provides no rights for a performing artist in his interpretation of music, and noted that Waring had no statutory basis for complaint. But he was upheld under the doctrine of unfair competition, the court stating that an "orchestra which gave radio broadcasts for pay is in competition with broadcast station, and when latter, without authority, broadcasts phonograph transcription of music played by orchestra, such broadcast is enjoined as unfair competition."<sup>14</sup>

The court also noted that playing of a musical composition over radio does not "constitute publication which operates as abandonment to public

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<sup>12</sup>101 N.Y.S. 2d 483 (1950).

<sup>13</sup>194 Atl. 631 (1937).

<sup>14</sup>Ibid.

use." If this were not true, since a performance is not entitled to copy-right, common-law rights in the music would be sacrificed leaving the owner nothing on which to base an infringement proceeding.<sup>14A</sup>

Although the decision still stands in Pennsylvania, an opposing view-point was taken by Judge Learned Hand in RCA v. Whiteman when Whiteman sought to prevent the broadcast of records he had made for RCA by the WBO Broadcasting Corp. In refusing to grant the injunction, Judge Hand stated:

It is true that the law is otherwise in Pennsylvania, whose Supreme Court in 1937 decided that such legend as the records at bar bore, fixed a servitude upon the disks in the hands of any buyer. . . . We have, of course given the most respectful consideration to the conclusions of that great court, but with much regret we find ourselves unconvinced for the reasons we have tried to state. However, since that is the law of Pennsylvania and since the broadcasting will reach receiving sets in that state, it will constitute a tort committed there; and if an injunction could be confined to those sets alone, it would be proper. It cannot; for even if it be mechanically possible to prevent any broadcasting through the angle which the State of Pennsylvania subtends at the transmission station, that would shut out points both in front of, and beyond, Pennsylvania. We must therefore choose between denying any injunction whatever -- since in our judgment the act is unlawful only in Pennsylvania -- or enjoining W.B.O. Broadcasting Corp. from broadcasting throughout the Union and in Canada in order to prevent a tort in Pennsylvania alone. This would be an obvious misuse of the writ which goes only in aid of justice.<sup>15</sup>

Common-law rights in music cannot be retained after the records have been pressed and distributed. This was made clear by Judge Igoe in Shapiro, Bernstein v. Miracle Records:

It seems to me that production and sale of a phonograph record is fully as much of a publication as production and sale of sheet music. I can see no practical distinction between the two. If one constitutes an abandonment, so should the other.

#### On Motion for New Trial

It seems to me that publication is a practical question and does not rest on any technical definition of the word "copy". Nor do

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<sup>14A</sup>Publication is analyzed in P.H.Morrison, "Copyright Publication and Phonograph Records," Georgetown Law Journal, (Summer, 1960), 683.

<sup>15</sup>114 F.2d 86 (1940).

the notice and registration provisions of the Copyright Act. . . determine the issue here. Modern recording has made possible the preservation and reproduction of sound which theretofore had disappeared immediately upon its creation. When phonographs of a musical composition are available for purchase in every city, town and hamlet, certainly the dissemination of the composition to the public is complete, and is as complete as by sale of a sheet music reproduction of the composition. The Copyright Act grants a monopoly only under limited conditions. If plaintiff's argument is to succeed here, then a perpetual monopoly is granted without the necessity of compliance with the Copyright Act.<sup>16</sup>

Judge Igoe's decision has been widely criticized. It is not certain it would stand in all other states, although it has been cited with favor by a number of other judges.<sup>17</sup> A newspaper dispatch from Hollywood which appeared in The Billboard of August 6, 1955, reads in part as follows:

The Hon. Leon Yankewich, chief jurist of the U.S. Federal Court here and an eminent authority in the field of copyright law, this week declared he disagreed with the far-reaching Igoe decision, at a meeting of the California Copyright Conference.

Judge Yankewich, who addressed the group on the subject titled "What Does Copyright Protect?" indicated that it was a popular misconception that the Igoe decision was federal law. He averred that jurists in jurisdictions other than Judge Igoe's could hold that a recording of an uncopyrighted song does not constitute publication, and as such would not fall in the public domain.<sup>18</sup>

#### D. Common Law and Record Dubbing

Ever since the birth of the phonograph record, unscrupulous attempts to copy the discs and pass off the copies as originals, usually at considerable discount, have been recorded. In recent years the practice has grown to immense proportions.<sup>19</sup>

<sup>16</sup>91 F.Supp. 473 (1950).

<sup>17</sup>Stanley Rothenberg, Legal Protection of Literature, Art and Music (New York: Clark Boardman Co., Ltd., 1960), p. 64.

<sup>18</sup>Ibid., p. 66.

<sup>19</sup>Wall Street Journal, April 20, 1961, p. 1.



The present state of the electronic art makes the act of dubbing quite simple. A record purchased in a record store is re-recorded onto tape, and the tape re-processed to disc form by any one of several dozen processing firms in the United States. New jackets, identical to the original, can be printed by any color press. The product then is sold at discount to record store chains, grocery stores, discount merchandisers or any merchant interested in selling discs at less than retail price. The cost of pirating is vastly less than the cost of making an original record, since the pirate pays no royalties, no performance fees and no musicians' wages.

Protection against record pirating under the Copyright Act is extremely limited. The general damage provisions<sup>20</sup> are not applicable. Subsection (e) of section 101 states that a plaintiff is "entitled to recover in lieu of profits and damages a royalty" which, in section 1(e), is stated as "2 cents on each such part manufactured." In the absence of a valid license, the court may also award "a further sum, not to exceed three times the amount provided by section 1, subsection (e). . .by way of damages, and not as a penalty. . . ."21

The practical effect of this limitation is to make recovery of damages for record pirating equal to eight cents per infringing copy, instead of the \$250 minimum and \$5,000 maximum allowable under the general damage provisions.<sup>22</sup>

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<sup>20</sup>17 U.S.C. §101(b).

<sup>21</sup>17 U.S.C. §1(e).

<sup>22</sup>U.S. Congress, House of Representatives, Hearings on H.R. 5921, To Require Jukebox Operators to Pay Royalty Fees, 86th Cong., 1st Sess. (Washington: Government Printing Office, 1959), pp. 103-117.

But a discouraging problem of recovery is the inability to prove exactly how many discs were pirated. In Shapiro, Bernstein v. Remington Records<sup>23</sup> the defendant openly acknowledged that he did not keep records on the state of his business. As a result, although the plaintiff presented "expert testimony" on the number of discs purported to have been sold by Remington, the testimony was not allowed on the basis that it was "not within the realm of expert testimony and. . .purely speculative."

Perhaps the most famous case of all was Shapiro, Bernstein v. Goody.<sup>24</sup> Sam Goody operated a discount record store in New York City, where he sold records at far below the retail cost of his competitors. His record sales, according to testimony, were considerable, in excess, so witnesses said, of the numbers of discs supplied him by reputable manufacturers. But during the trial Goody maintained that his "records of the transaction" disclosed quantities of records which were vastly less than other witnesses were convinced (and alleged they could prove) he actually had received. As a result, the court reluctantly awarded the plaintiffs the two-cent royalty on the lesser number of "infringing copies." The court was forced even to deny the treble damages, saying: "The language providing for a recovery against the seller of 'a royalty' is scarcely adequate to provide a recovery of a sum amounting to the royalty plus the royalty trebled." The court took note of the insufficiency of statutory damages by stating:

In the Copyright Act of 1909, Congress. . .did not. . .include mechanical reproduction of music in its definition of copy, although to have done so would have been an easy solution, granting the musical proprietor complete copyright protection against mechanical reproduction.

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<sup>23</sup>265 F.2d 263 (1956).

<sup>24</sup>248 F.2d 260 (1957).

The inequities and the inadequacies of the present law cry out for correction. It is scant comfort to the publisher plaintiffs herein to be told that although their plight is distressing, there are others in the industry, notably recording companies and talented performers, who at present receive even less protection from record pirates and those who distribute their wares. It is equally harsh to tell them that their remedy lies in the legislatures when the problems of the recording industry have been before various legislative bodies over the years, and the conflicting interests involved have prevented any solution.<sup>25</sup>

The lack of adequate damages for relief under the statute has had a profound effect on the legal outlook not only with respect to record pirates, but to others who would use the music for non-commercial purposes. The trend in recent years has been away from relief under the Copyright statute and toward greater use of state common-law protection and the doctrine of unfair competition. As a matter of fact, the courts have been leaning in the direction of greater protection of performers and record manufacturers, despite a plea by some jurists that adoption of common-law principles will serve to negate the concept of a "temporary monopoly" which, they maintain, is all the Constitution intended. Common law protection may be unlimited, and there is growing evidence that protection under unfair competition may be equally unlimited.

Perhaps the most significant case in this area was Capitol Records v. Mercury Records.<sup>26</sup> Both Capitol and Mercury had purchased matrices of recordings made by Telefunken in Germany during the war and confiscated

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<sup>25</sup>U.S. Congress, House of Representatives, Hearings on H.R. 5921, op. cit., pp. 111-112. Difficulties of collecting damages for record pirating figured prominently in testimony of Julian T. Abeles, counsel for the Music Publishers' Protective Association, Inc., in hearings to amend the jukebox exemption. Two additional studies of the Goody case which warrant mention are "Civil Remedies for Disklegging," Southern California Law Review, (Winter, 1960), 190; and "Mechanical Reproduction of Musical Reproductions -- Liability of Non-Manufacturing Seller of Unauthorized Records," George Washington Law Review, (June, 1958), 745.

<sup>26</sup>109 F.Supp. 330 (1952).

afterwards by the Czechoslovakian authorities. The eventual award of the matrices to Capitol is relatively insignificant in this study. What is important is the court's view that the "copying or reproduction of a phonograph record is unfair competition," and that "the work of the artists. . .constituted. . .a valuable property right, which will be protected from unfair competition by one who misappropriated that property."

The court cited Metropolitan Opera v. Wagner-Nichols Recorder Corp.<sup>27</sup> which stated that unfair competition is no longer limited to "palming off" of goods. RCA v. Whiteman<sup>28</sup> also was quoted, the significant statement being: "It would follow. . .that, if a conductor played over the radio, and if his performance was not an abandonment of his rights, it would be unlawful without his consent to record it as it was received from a receiving set and to use the record."<sup>28A</sup>

The matter of an artist's rights in his "distinctive performance", first noted in Waring v. WDAS,<sup>29</sup> appeared again in Giesecking v. Urania Records<sup>30</sup> where it was held that a performer's right should be upheld. Judge Lupiano cited the Capitol Records case and stated:

<sup>27</sup>107 N.Y.S. 2d 795 (1950).

<sup>28</sup>114 F.2d 86 (1939).

<sup>28A</sup>Common-law aspects of the Capitol Records case are analyzed in "Common Law Literary Property -- Conflict of Laws," Baylor Law Review, (Fall, 1955), 442. Performance rights come under scrutiny in B. Kaplan, "Performer's Right and Copyright: The Capitol Records Case," Harvard Law Review, (January, 1956), 409.

<sup>29</sup>194 Atl.631 (1937).

<sup>30</sup>155 N.Y.S. 2d 171 (1956).

A performer has a property right in his performance that it shall not be used for a purpose not intended, and particularly in a manner which does not fairly represent his service. The originator or his assignee of records of performances of an artist does not, by putting such records on public sale, dedicate the right to copy or sell the record.

The trend which has emerged over the past fifty years, as evidenced by the cases enumerated here, shows a distinct decline in the significance of the Copyright Act of 1909 and a general move toward court-made law with common-law rights and unfair competition as its roots.<sup>31</sup>

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<sup>31</sup>Barbara A. Ringer, "The Unauthorized Duplication of Sound Recordings," Copyright Law Revision Study No. 26, (Washington: Government Printing Office, 1957), pp. 10-20.

## CHAPTER V

### RECORDING FOR FUN: AN APPRAISAL

#### A. 'Rights' in Musical Compositions

In attempting to outline the extent to which non-commercial recordings of music can be made, listened to and distributed by a non-professional, non-commercial recordist, some basic guidelines can be drawn very quickly.

The fundamental matter of "profit" serves to answer one of the first questions a home recordist is likely to raise: "Can I sell copies of phonograph records?" Obviously, he cannot. Although there is no specific clause in the Copyright Act which prohibits the "selling of pirated recordings" a number of actions under the doctrine of unfair competition are on record and give signs of becoming increasingly significant in coming years.<sup>1</sup>

If an individual cannot sell pirated recordings, can he make copies at all? And, assuming he can, would he be permitted to "give" them to a friend, either free or in exchange for a blank tape?

In order to answer this perplexing question it is necessary to consider the "rights" which exist in the commodity under transfer -- the music.

Before music has been conceived there can, of course, be no rights. But once the music exists as notes on staff paper it has substance. It is an idea, or collection of ideas, which has value. In the marketplace of literary ideas it can command a value equal to the prestige of its author. In rare instances it can command many times that figure, if overwhelming public acceptance follows.

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<sup>1</sup>The Metropolitan Opera and Capitol Records cases are perhaps the most significant in this matter.

Who owns this intangible product? Its creator, in the first instance, and the music performing rights society to which he assigns it, in the second. But there also are other owners: the artist who performs it; the manufacturer who records it; the radio station which broadcasts it. All have a share, and any one can sue for misappropriation.

The author has a vested common-law right in a piece of music until it is published. His common-law rights exceed those he will acquire by copyright. He has the right to "prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor."<sup>2</sup> If his music is pirated, he has the right to prosecute. He may permit his music the luxury of public performance, at a fee decided in advance with the musicians, without harming his common-law rights.

Unfortunately, a piece of music stands little chance of producing a profit for its owner if it remains unpublished and unrecorded. As a practical matter an author's common-law rights must soon be relinquished if his livelihood depends upon consistent creation and sale of music.

It is customary for a modern song writer to sign an agreement with a recording or publishing firm (or both) to record his music and simultaneously to publish it. His contract guarantees him a fee for each record which is manufactured. An established music writer also may receive a "bonus."

The music is recorded by an artist, paid by the recording company (the artist often receives more for his work than the song's composer). The publisher (or recordist functioning as publisher) files for copyright and submits the requisite number of file copies to the Register of Copyright.<sup>3</sup>

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<sup>2</sup>17 U.S.C. §2.

<sup>3</sup>U.S. Congress, House of Representatives, Hearings on H.R. 5921, To Require Jukebox Operators to Pay Royalty Fees, 86th Cong., 1st Sess. (Washington: Government Printing Office, 1959), p. 99.

Once a piece of music has been published a composer's rights, to a degree, are lessened, despite the formality of a government-backed guarantee. The Copyright Act reserves for the owner of a musical copyright only the rights to "public performance for profit."<sup>4</sup> He no longer can prevent mere public performance, nor can he prevent private performance for profit. In fact, because of the "compulsory provisions" of the Copyright Act, he is powerless to prevent further recording of his work by any company which so desires.

Although an author's rights are diminished, a copyright does protect him from unauthorized public performance for profit. An author can collect damages for all performances of his music which occur in public and which are intended for profit. He retains these rights for a period of twenty-eight years.<sup>5</sup> He may renew the copyright for another twenty-eight year period. After that his rights cease. The work reverts to the public domain.

An author may lose his rights under copyright by ways other than simple expiration of term. Copyright may be lost (or never gained) by failure to comply with the administrative requirements for copyright notice. These routines are spelled out in detail in the Copyright Act. They establish time limits for filing and provide for notice of the existence of copyright. Whenever copyright is lost by any of these means, the music immediately falls into the public domain.<sup>6</sup>

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<sup>4</sup>17 U.S.C. §1(e).

<sup>5</sup>17 U.S.C. §24; 17 U.S.C. §25.

<sup>6</sup>17 U.S.C. §14.



It had been thought that since records are not copies, in a legal sense, the sale and distribution of discs did not constitute publication which would end a composer's rights at common law. But precisely the opposite view was established in Shapiro, Bernstein v. Miracle Records. The judge showed a practical turn of mind when he stated: "It seems to me that publication is a practical question and does not rest on any technical definition of the word "copy."<sup>7</sup>

The decision shattered ownership rights in a number of recordings then on the market. Although the authors of the music contained on the recordings thought they had perpetual common-law rights, they were surprised to find that their failure to register and publish now meant forfeiture of all rights, the music reverting to the public domain.

When music has been recorded, the "compulsory provisions" of the Copyright Act permit anyone to make recordings simply by filing the proper forms and mailing "2 cents for each part manufactured" to the composer at an address shown on the records of the Copyright Office.<sup>8</sup>

Because of this provision it has been argued that a home recordist could comply with the law by filing intent-to-record forms and paying two cents for each tape he plans to make. Certainly this was not the original intent of the Copyright Act. But neither was the jukebox exemption, though it has survived twenty-two years of Congressional hearings.

In light of recent developments in copyright law it is important to note that filing and paying the two-cent fee would not protect a recordist from the threat of further litigation under unfair competition. The courts

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<sup>7</sup>91 F.Supp. 473 (1950).

<sup>8</sup>17 U.S.C. §1(e).

have been turning more and more toward a strict interpretation of this doctrine in favor of the record manufacturers. More will be said of this point later. But it occurs to this writer that the protection offered by such an obvious legal "dodge" would be complete, under the terms of the Copyright statute.

On the other hand, are such extreme measures really necessary? Does not the Act's stipulation that an infringer must present a "public performance for profit" protect the private listener who merely makes a recording for pleasure in the privacy of his home? It is this writer's opinion that it does, under the terms of the Copyright Act. It is further offered that the "public performance for profit" motive would protect non-commercial recordists from prosecution even in a relatively widespread tape exchange, so long as no money was involved and none of the tapes were sold for profit.

Many manufacturers have proclaimed the merits of copying records on tape and then playing the tape to preserve the record in its original, mint condition. The technical explanation for such a suggestion is that tape does not wear out from repeated playings, whereas discs do. No doubt this would be considered "fair use" in a court proceeding where the object was to prove unfair competition.<sup>9</sup>

But the step from such an action to "letting a neighbor listen to the tape" is a small one, indeed. The next few steps are, individually, equally small. If it would not be improper to lend the neighbor the record itself, how is it improper to lend him a tape of the record? If such a

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<sup>9</sup> Roger Needham, "Tape Recording, Photocopying and Fair Use," Copyright Law Symposium Number Ten (New York: Columbia University Press, 1959), p. 99.

loan is not unlawful when the recipient lives next door, is it unlawful when the homes are located 2,500 miles apart?

Where would the courts draw the line on this process of reasoning? Until a specific case is brought before them, no definite answer is possible.

It has been argued that copying a record on tape is unfair because it interferes with listening to another record. Surely such reasoning is ill founded. By similar token listening to one record would prevent one from listening to another record. The same analogy has been drawn with respect to recordings of radio programs. Listening to one program, however, is just as much a bar to hearing other programs as listening to a record or, for that matter, going to the movies.

#### B. Public Performance Analyzed

It is difficult to see how a recordist could engineer a "private performance for profit." Even if he could it would not constitute an infringement under the terms of the Copyright Act. The key phrase is "public performance for profit" and all three elements must exist simultaneously in order for an infringement to occur.<sup>10</sup>

What constitutes a "public performance?" The courts have held listening to a radio broadcast in a hotel room to be a public performance.<sup>11</sup> The fact that one's bedroom is found in a hotel instead of one's home does not make the hotel room less private, but that is essentially what the courts have said. Is there some magic number of attendees which separates a "public" performance from one which is distinctly private? Evidently there is none.

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<sup>10</sup>17 U.S.C. §1(e).

<sup>11</sup>Buck v. Jewell-LaSalle, 283 U.S. 191 (1931).

Remick v. General Electric established the fact that a radio broadcast constitutes a "performance" within the terms of the Act. It was stated:

The possessor of a radio receiving set attuned to the station of the broadcaster of an authorized performance hears only the selection as it is rendered by the performer. The performance is one and the same whether the "listener in" be at the elbow of the leader of the orchestra playing the selection, or at a distance of 1,000 miles.<sup>12</sup>

Applying old concepts to a new problem of secondary performances was not easy, and the trial court two years later found the analogies invalid and based a decision on policy, holding that a secondary performance is covered by the Copyright Act. The opinion read:

Certainly those who listen do not perform, and therefore do not infringe. Can it be said with any greater reason that one who enables others to hear participates in the unauthorized performance, so as to be a contributory infringer? Surely not, if, as is argued by analogy, he merely leaves the window open, so that the strains of the music may be heard by those in the street below.

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The acts of the broadcaster are found in the reactions of his instruments, constantly animated and controlled by himself, and those acts are quite as continuous and infinitely more complex than the playing of the selection by the members of the orchestra.<sup>13</sup>

Remember, too, that it was stated in Remick v. American Automobile

Accessories:

A performance. . .is no less public because the listeners are unable to communicate with one another. . .not within an inclosure, or gathered together in some open stadium or park or other public place. Nor can a performance. . .be deemed private because each listener may enjoy it alone in the privacy of his home. Radio broadcasting is intended to, and in fact does, reach a very much larger number of the public at the moment of the rendition than any other medium of performance. The artist is consciously addressing a great, though unseen and widely scattered, audience, and is therefore participating in a public performance.<sup>14</sup>

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<sup>12</sup>4 F.2d 160 (1924).

<sup>13</sup>Ibid.

<sup>14</sup>298 Fed. 628 (1924).

If one tape records a broadcast for listening at a later time, does the fact that the broadcast was public make the music public forever? If so, all music heard on the radio would be public regardless of when it was heard just as the courts now consider it public regardless of where it is heard. Certainly this cannot be true, if the technical analogy drawn by the court in the AAA case is valid. If the "acts of the broadcaster are found in the reactions of his instruments" then the acts of a home recordist are equally found in the reactions of his instruments. If a broadcaster's instruments serve to publicly disseminate the music, thereby making it "public" in the legal sense, then the acts of the recordist serve to confine the music to a single performance (each time the tape is played) and thereby, in this writer's opinion, render it "private."

By this line of reasoning music which has been broadcast and tape recorded in the home by a private recordist, although public at the time of broadcast when reception by millions was possible could be held, on later hearing in the privacy of the recordist's living room, to be a "private" performance, as private, in fact, as a performance of the original record, purchased by the recordist at a record store and played on his own phonograph.

The basis of this hypothesis is the fact that copyright reposes in the music itself, and not in the instruments upon which it is recorded. Records (and also, presumably, tape recordings) cannot be copyrighted. Whether music which has been recorded is broadcast and re-recorded or not makes no difference so far as the copyright in the original piece of music is concerned. Unless the tape is sold for profit, if its maker simply listens to it for esthetic satisfaction then the music which is recorded is being used as its composer intended when he first licensed its recording.

By such reasoning home taping of records off the air could be deemed "fair use" just as home taping of an individual's private record collection is fair use if the intent is to preserve the records against damage due to repeated playing.

### C. The Matter of Distribution

Carrying the analogy one step further, lending the tape to a neighbor could be considered no more an infringement of copyright than lending the neighbor a record that was purchased in a music store.

It was held in Shapiro, Bernstein v. Miracle Records that the "production and sale of a phonograph record is fully as much of a publication as production and sale of sheet music."<sup>15</sup> If the distribution of records is sufficient to satisfy publication, would the same sort of distribution be sufficient to satisfy the requirements for "public performance?" Probably not, unless the records actually were played in public. Although the distribution of sheet music does not require that the music actually be played on an instrument in order for publication to take place, a record must be given a public hearing, presumably before a group of persons gathered in an area open to the public, or over the radio, before it can be considered to have received a "public performance."

A tape exchange, in which a tape was passed from one private individual to another private individual, each of whom listens to it privately in his own home, would involve no element of public performance. Distribution, therefore, would not amount to "public performance."

A more fundamental matter is "profit." One individual has defined profit as "equal or greater value." A tape exchange would involve items

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<sup>15</sup>91 F. Supp. 473 (1950).

of "equal value." By this definition the exchange would create an element of profit. But the point is debatable.

Another definition of profit is "advantage." Certainly, a tape exchange would not be undertaken were it not for an advantage.

By one line of reasoning, a tape exchange might be considered "profitable" in matters of satisfaction, technical fulfillment or musical expression. But an exchange of commercial recordings, purchased at a music store, would satisfy the same purpose. There never has been any doubt that the exchange of commercial recordings is proper and above reproach.

It seems likely that application of all three elements which are essential to infringement -- public performance for profit -- would be unusual in any non-commercial tape exchange. It is the opinion of this writer that proving infringement would be extremely difficult, if not impossible.

From a practical side, the matter of damages probably would militate against any action to prove infringement in the case of a private recordist. At the present time restitution is limited to "2 cents per each part manufactured", with the possibility of an additional six cents by way of damages. The most any plaintiff could expect to receive in a suit against a private recordist is eight cents per tape. The cost of litigation would be many times this figure.

Unless the violation was widely advertised, it is not likely that a tape exchange would be attacked from the standpoint of copyright infringement, even if it involved a public performance for profit. The legal grounds are not at all clear. The danger to ASCAP of suing, and losing, is great. Failure in such a suit would simply proliferate the practice of home taping well beyond ASCAP's control.

Even the American Federation of Musicians, which normally would be expected to object to all unpaid performances of music, feels that home recording is a "trivial" matter generally unworthy of prosecution. When questioned on the matter of home recording, James C. Petrillo, late president of the AFM, stated: "Even though the recording companies are opposed to such practices. . .the infraction is so trivial that recording companies would take no action unless such home recording became widespread and impaired or destroyed the sale of records into the homes."<sup>16</sup>

There is always the possibility that a revision of the Copyright Act someday will establish legal dos and don'ts for the home recordist.<sup>17</sup> But until then, it would appear that non-profit recording of virtually any material could be defended on the basis of "public performance for profit," so far as the Copyright Act is concerned.

#### D. Infringement in the Marketplace

It is interesting to note that the growth of the high fidelity and stereo industries have been dependent to a large degree upon a conscious and widespread infringement of copyright. In Buck v. Jewell LaSalle it was stated:

It is true that if one plays on his phonograph a record of a piece of music he is performing. If it is a copyrighted musical composition, and if the performance is public and for profit, then his act is an infringement of the copyright.<sup>17A</sup>

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<sup>16</sup>Letter from James C. Petrillo dated April 10, 1956.

<sup>17</sup>It is the aim of this paper to provide a guide to copyright planners in matters of non-commercial recording.

<sup>17A</sup>283 U.S. 191 (1931).



High fidelity and stereo components, as well as conventional radio-phonograph consoles, are sold in stores which are open to the public and which are operated for profit. A high fidelity dealer is as much a businessman as the proprietor of the LaSalle Hotel, and his business is operated for the same purpose: profit. If playing a radio in a hotel infringes, then playing a radio in a high fidelity store also infringes.

Not only are radios played for purposes of demonstration to customers, but tape recorders are used to record music off the air, to demonstrate the tape recorders. Thus a recording of a broadcast performance becomes both public and profitable. Under the law it constitutes an infringement. But no performing rights society ever has sought to collect damages. The meagre amount of damages constitute one deterrant. But perhaps more important is the fact that high fidelity stores, department stores, record shops, etc. are the lifeblood of the music industry. For composers to chide them in court would be to bite the hand that feeds them.

Until a home recordist hears of a widespread campaign by ASCAP to stamp out such practices he probably can record with impunity virtually anything for which permission can be secured. As long as he does not sell his recordings, or advertise their availability too widely, he is not likely to be bothered either by ASCAP, the AFM, or a recording company. While his actions may not be morally proper, certainly they are not illegal. From a consideration of precedent, as outlined in the preceding chapters, it is likely that the courts would adopt this same view.

#### E. Few Facts but Many Opinions

From the foregoing it is evident that there are many opinions and few facts. Most copyright authorities are themselves unsure of the best way

to handle the home recordist, either legislatively or judicially. A newspaper story headlined, "Home Tape Recorders Worry Broadcasters" stated:

Broadcasting and record companies are looking for a way to keep home tape recorder owners from building up large, free music collections. . . . A man with a home recorder can take down a symphony from the radio minus commercials or can borrow and copy record albums and never go near a record shop. . . .As to a man's taping a broadcast or record purely for home consumption. . . .it might be possible for the producer to prove harm, or unfair competition, in that this would forestall a potential sale. . . .A spokesman for one major recording company told the News his firm's lawyers 'feel sure we can prove that and get a favorable ruling, but we're aiming much further before we make a move'. . . .He said that simply making the act of taping records or broadcasts illegal would do little good because 'it would be unenforceable. . . .The least we're aiming at is a licensing system where the burden would be on the applicant for a tape recorder to show that it would not be used to dupe off(record) records'. . . .<sup>18</sup>

An article entitled "Can You Sell Off-the-Air Recordings?" in a magazine published for tape recording enthusiasts reached the following conclusions:

Naturally, no one is going to stop you from sitting in the privacy of your home and taking recordings off the air. There's nothing illegal about that just as there's nothing wrong with taking pictures of a program on your television screen. But, the use you make of the recording is another story. The courts have held squarely that a program is valuable property and that when you sell a recording taken off the air you are appropriating and exploiting for your own benefit the result of the expenditures, labor and skill of another. . . .<sup>19</sup>

The author goes on to report the results of several cases dealing with home recording<sup>20</sup> and draws comparisons with activities which are similar. For example, he points out that the Supreme Court has held that a news service cannot copy news from bulletins put out by a rival agency. It has

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<sup>18</sup>Washington Daily News, February 21, 1956, p. 37.

<sup>19</sup>George Chernoff, "Can You Sell Off-The-Air Recordings?" Tape Recording (May-June, 1956), 40-41.

<sup>20</sup>Notably, the Metropolitan Opera case, which is the only case dealing directly with a home recordist.

also been held that motion pictures of sports events made by spectators cannot fairly be placed on sale.<sup>21</sup>

A similar comparison could be drawn for television, where the legal problems are even more complex than those which concern home recording of music. Until recently there was much speculation over the introduction of videotape. The Copyright Act exempts records "or other sound recording" from copyright, yet it permits motion pictures to be copyrighted. The Copyright Office has settled the question by interpreting videotape as a medium which produces a visual, rather than an audible, product, and is now accepting videotapes for copyright.<sup>22</sup>

It should be pointed out to home recordists, although no publication has yet done so, that taping a dramatic show on television or radio may be unlawful even if it is not later presented in public for profit. The law states that the copyright owner of a dramatic work shall have exclusive rights:

To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever. . . .<sup>23</sup>

The law leaves little to be presumed. If the drama has never been published, or copyrighted, the rights are equally conclusive. Since presentation on television does not constitute publication, common-law rights

<sup>21</sup>George Chernoff, "Can You Sell Off-the-Air Recordings?", op. cit., p. 40

<sup>22</sup>The first videotape was accepted for copyright in April, 1961.

<sup>23</sup>17 U.S.C. §1(d).

are not compromised in an uncopyrighted work. Either way, a drama is protected even from the act of recording, regardless of the use made of the tape.

In view of this fact it is difficult to comprehend the legal logic behind a headline in Tape Recording Magazine's account of the unveiling of RCA Videotape at Princeton, New Jersey. Reporting General Sarnoff's comments on future uses of videotape, the headline read: "Sarnoff looks forward to home taping of favorite TV shows."<sup>24</sup>

RCA, more than any other manufacturer, has long advocated home taping of broadcast material. Instruction sheets have been packed with RCA record players and tape recorders to guide purchasers in proper methods of taping discs and radio programs, and television commercials have glorified such activities as an advertising lure.

This latter practice, however, soon was curtailed. When queried by telephone in 1956, Harry Olsson, NBC attorney, said NBC had stopped accepting commercials "urging the use of tape recorders to record off the air, on any NBC outlet." Olsson did not, however, say the commercials could not be seen on other networks, or in other forms of advertising.

Olsson said RCA not only did not have a policy on home recording but "did not want to have to make a public policy, for obvious reasons." He cited as a reason for a policy in opposition to home recording the lack of control over the recording after it passes into second and third hands. A recording could turn up in an estate, for example, and, lacking background information on how it was made, be used illegally. But he agreed that policing such a policy would be virtually impossible.<sup>25</sup>

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<sup>24</sup>"TV Pictures on Tape," Tape Recording, (February, 1954), 22.

<sup>25</sup>Interview by telephone, April 26, 1956.

Another writer has the following to say about home recording:

In recording television, radio or other public entertainment, you may not legally reproduce or distribute your recording for commercial gain. This means that you may record unusual TV and radio performances, or copy your phonograph records onto tape, provided this is for your personal use. And your personal use will include lending your tapes to personal friends. A wider circulation, however -- such as lending a tape to the local school to be used for a charity bazaar -- is not legal and may cause trouble.<sup>26</sup>

Although he argues from a valid premise, this writer does not go far enough into the subject to be truly helpful to an amateur recordist. Furthermore, his advice on distribution is precarious, at best. Until the courts have established a firm meaning for the term "distribution" it will be uncertain how far a recordist can go in spreading his pirated recordings around his neighborhood.

A fairly searching study of the problem was made by Roger Needham, previously quoted, in which he stated:

That the practice of taping off the air is common cannot be doubted. At least two firms engaged in producing 'hi-fi' components offer free pamphlets entitled 'Tape it Off the Air.'

There is no American authority directly in point on this subject. The German case of *GEMA v. Grundig G.m.b.H.* involved a suit by the German counterpart of ASCAP against a manufacturer of recording machines. Plaintiffs sought to require defendant to obligate purchasers of his recorders to refrain from taping copyrighted music from the air. Perhaps because of practical difficulties, the court merely required defendant to give notice to purchasers that they would violate the copyright law if they recorded copyrighted music.<sup>27</sup>

Apparently the practical difficulties of enforcing a licensing system prevented the court from taking more than a precautionary outlook on problems raised by home recordists. No doubt the same difficulty has prevented a case on the same subject from reaching an American court.

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<sup>26</sup>Lee Sheridan, "Tape Recording and the Law", Tape Recorders and Stereo, (1958), 110-111.

<sup>27</sup>Roger Needham, "Tape Recording, Photocopying and Fair Use," Copyright Law Symposium Number Ten (New York: Columbia University Press, 1959), pp. 100-101.

The alternative for definitive solution -- legislation -- may offer more promise. But it is not likely that much legislation will appear before the general revision, now under consideration, is offered for a vote. Attempts at piecemeal solutions have been largely unsuccessful. The jukebox exemption has been on the chopping block in the House and Senate Judicial Subcommittees for the past twenty-two years, but it still remains a valid part of the Copyright Act.

Part of the reason for failure has been the way the bills have been worded. In 1959, when the last attempt to amend the Act was made, Representative Celler's wordy bill began:

The reproduction or rendition of a copyrighted musical composition publicly by or upon a coin-operated machine shall be deemed to be a public performance for profit, and the operator of any such machine shall be liable for any infringement of any such musical composition occurring through the use of such machine, etc. etc.<sup>28</sup>

Most legislative and copyright authorities prefer the much simpler "negative approach," in which the paragraph covering the exemption is stricken from the Act.

The 1959 hearings turned up considerable testimony with regard to record counterfeiting in the jukebox business, and underlined the lack of damages sufficient to justify legal countermeasures by ASCAP, BMI and SESAC attorneys. In 1961 a bill, also initiated by Representative Celler, was presented which would make record counterfeiting a criminal offense and provide substantial damages for pirating.<sup>29</sup>

A revision of the Copyright Act would solve many dilemmas posed by the 1909 statute's lack of appreciation for advancing technology. Television,

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<sup>28</sup> U.S. Congress, House of Representatives, Hearings on H.R. 5921, To Require Jukebox Operators to Pay Royalty Fees, op. cit., p. 1.

<sup>29</sup> Congressman Celler's bill was introduced on April 17, 1961.

for example, presents a new realm of legislative problems. Some authorities have advocated a partial revision of the Act to provide specifically for television, although it is generally conceded that a revision of the Act would do a better job. A major difficulty, however, is the length of time required for a revision to be proposed and enacted. With our present civilization being as complicated as it is, the committee hearings on revision could drag on considerably, postponing agreement on revision for many years.

The matter of recording for fun should be considered in some detail in any future revision of the Copyright Act. The report which accompanied the hearings on the present Act stated the purpose of copyright legislation in this manner:

Not that any particular class of citizens, however worthy, may benefit, but because the policy is believed to be for the benefit of the great body of people, in that it will stimulate writing and invention to give some bonus to authors and inventors. . . .<sup>30</sup>

If present lawmakers are to take the present state-of-the-art as a guide they are not likely to legislate very many restrictions on home recording. For if the skyrocketing rise in public demand for music at home over the past decade is any barometer, the "great body of people" indisputably relishes the privilege of listening, and many of them the satisfaction of recording, at home.

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<sup>30</sup>U.S. Congress, House of Representatives, Hearings on H.R. 5921, To Require Jukebox Operators to Pay Royalty Fees, op. cit., p. 198.

## CHAPTER VI

### A Guide for the Future

It is evident from the foregoing that technological progress has created a wealth of problems in the realm of copyright and music. From the steadily increasing rate of progress over the past several decades it is equally evident that existing problems will not diminish; rather, they are likely to increase with rapidity as technology places more and more electronic devices for entertainment in the hands of the American public.

The problem, therefore, becomes one of either adapting society to the antique provisions of a 52-year-old statute, or of adapting the statute to meet the demands of modern-day society.

It is to the first alternative that the bulk of this paper has been dedicated. Despite admonishments from ASCAP, the American Federation of Musicians and other artist or manufacturing interests to the contrary, it has been pointed out here that present law could be interpreted as condoning non-commercial use of copyrighted music, so long as the element of profit was totally absent. For the legal key to non-commercial, or simply "private", enjoyment of music is the existence or lack of profit.

It must be emphasized, however, that the courts have not clearly stated this fact as dictum. The reasoning is purely the author's. To date, there has never been a case before the courts in the United States where the issue was private use of recording music. If such a case ever should arise, the author feels certain it would be settled in favor of the private recordist, if the "public performance for profit" doctrine were applied strictly.



But what of the future? Mention has been made of impending changes in the Copyright Act. Is it possible that this might serve as the opportunity to update the law and provide for solution of a number of inequities presently existing?

This certainly could -- and probably will -- be done. But exactly how the question of home recordists, and many other problems raised by modern technology, will be solved is difficult to determine. A few suggestions, however, may be in order as a guide to copyright planners when the task of revision is undertaken.

Of paramount importance is a change in the law to permit records to be registered, not as a "copy", if the philosophy which says that "copies must be seen and not heard" is to prevail, but as a "copy of a copy", or "registered facsimile." The law might state that whereas disc (or tape) records are not themselves copyrighted, they represent a bona fide reproduction of the original and are to be considered in the same light as a book which is a bona fide reproduction of an author's original typescript.

To effect such a change would require a reversal of the Apollo case by the Supreme Court, but it would appear that enough evidence has accumulated in recent years of devices which supercede the pianola rolls which were in vogue in 1908 when the Apollo case first was heard on which to base a reversal.

This move could be followed by a provision for fines and imprisonment for record counterfeiting, sufficiently severe that record pirates would think twice before dubbing a record.

These two moves would serve to eliminate one of the chief problems affecting the record industry, and would go a long way toward eliminating the confusion over disc copyrighting which has resulted in a dual system of copyright protection: one for films and another for discs.

The "jukebox exemption" should be abolished. Again, conditions today make reliance on a 1909 technicality somewhat ridiculous. It can be understood that small-time jukebox operators would have a difficult time if they were forced to pay an additional yearly fee to ASCAP. But they would not be the first group of small businessmen forced to adapt to modern conditions and required to spend money in order to keep their business morally and ethically sound.

The separation of various forms of copyright in the Act should be eliminated, so far as is practically possible. All forms of artistic matter should be treated equally. Too often, in legislative composition, it has been the practice to enumerate specifics in order to appease special interest groups without regard for the consequences of evolution. In the case of music, the lack of foresight shown in 1909 by failure to allocate the general damage provisions for musical infringement is a case in point. Damages which are provided for musical copyright infringement are insignificant. This division of damages should be eliminated in the new copyright bill.

The "compulsory provisions" of the Act should be eliminated. There is no reason for a composer to be required to permit unlicensed recording of his music simply because he has once permitted someone else to make a recording of it. The practical matter of financing notwithstanding, the principle is one which is not equitable, and it should be eliminated.

Although it could be argued that under the present law "public performance for profit" serves to protect the private recordist from prosecution, not all authorities subscribe to this principle, and the new law should make allowance for private recording and otherwise non-commercial use of recorded music. It is significant to note that every proposed

copyright revision since 1909 has advocated, sometimes in elaborate terms, that use of copyrighted music by private persons should be exempt from liability. Such a statement would well end confusion over the legal role played by the home recordist.

A paragraph designed to protect the amateur from action for infringement might be worded as follows:

Nothing in the foregoing shall be construed as intending to prevent non-commercial use of copyrighted music by private individuals whose sole concern is pleasure and esthetic satisfaction.

This paragraph could be inserted at the end of Section 1(e), in place of the present jukebox exemption paragraph.

Another paragraph should free from liability firms engaged in demonstrating and selling audio equipment to the public. How audio supply houses could be separated from barber shops (insofar as both use radios to entertain customers) might prove difficult, but a solution would help end confusion arising from the fact that although such stores are certainly liable under present law they are not sued by ASCAP simply because of the society's "good will."

To this author it appears relatively insignificant whether broadcast music constitutes a "public performance" inasmuch as the question of profit protects the home recordist who does not sell recordings and separates him from hotels and other businesses which use broadcast music commercially. Nevertheless, the matter of "liability at the source" so vital to ASCAP might well be resolved by incorporating in the new Copyright Act a paragraph specifically freeing listener/users of broadcast music from liability, so long as the music is not used for profit.

It might be argued that such a provision would be redundant, inasmuch as the "public performance for profit" doctrine remains in effect. This

opinion is shared by this author, but so much litigation has ensued because of confusion over this point that a paragraph settling the question once and for all might well be in order.

On the question of publication, and its vital effect on cessation of common-law rights, the law should provide for publication of phonograph records concurrent with their release and distribution. This could be done in the same paragraph which provides for "registration" of phonograph records as "copies of copies." Although the fact probably would be understood, it might also be provided that unregistered records which are distributed automatically lose their claim to copyright, and would be declared in the public domain.

The matter of common-law rights, and the very dubious position individuals hold in the various states with respect to rights in music, could not be settled in the new statute, but the solution of the foregoing problems by statute certainly would tend to mitigate them. Most important, legislative provision for new forms of technology, new concepts and new means for expression would end the mass of confusion which has been building for the past 52 years by determining, for the guidance of the courts, the degrees to which composers and users are entitled to share the product which they both cherish -- the music. It would also end the growing tendency of the courts to settle everything by common law if there is any particle of doubt.

The Constitution did not intend for authors and composers to have perpetual rights in their compositions. Nor did it intend (in this writer's opinion) for individuals either singly or collectively as businesses to have perpetual rights in their performances or in the products they create. The concept of rights "for a limited time only"

has been developing for 300 years. It does not appear to this writer that the concept is so fragile that the courts should abolish it simply because there is no statutory hammer with which to nail a decision.

A new, revised Copyright Act would restore the concept of "limited rights" the way it was originally intended, and would adapt it to the fluid conditions of a twentieth-century society.

APPENDIX A

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