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The Infringement of Copyrighted Musical Compositions

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Dicta Observes

A committee of students from the University of Denver School of Law approached the Editorial Staff of Dicta recently and asked for permission to "take over" our May issue. The Editors have allowed that committee the responsibility of selecting and editing the material herein presented, all of which was written by members of the Senior Class.

It is to be noted that the article on the subject of copyright law was adjudged to be the winner in the Nathan Burkan Memorial Competition, sponsored by the American Society of Composers, Authors and Publishers, recently conducted at the school. This article has of necessity been condensed from the original.

THE INFRINGEMENT OF COPYRIGHTED MUSICAL COMPOSITIONS

COPYRIGHT is usually defined as the exclusive right of printing or otherwise multiplying copies of an intellectual composition or production, and of publishing and vending the same, including the right to prevent others from doing so.[1]

It has also been termed: the right of an author or proprietor of a literary work to multiply copies of it to the exclusion of all others,[2] the sole and exclusive right of multiplying copies of an original work of composition,[3] the right of publication and reproduction of works of art or literature,[4] and the exclusive right of multiplying copies after publication.[5] Lord Mansfield said, "I use the word 'copy' in the technical sense in which that name or term has been used for ages, to signify an incorporeal right to the sole printing and publishing of something intellectual, communicated by letters."[6]

Title seventeen of the United States Code, section one (1909) sets out the exclusive rights which the owner of the copyright shall have in the copyrighted work. Here for the first time is found an indication that the rights obtained are protected against invasions other than those contained within the terms "copying," or "printing." In subsection

[1] 13 C. J. 945.
[2] Palmer v. DeWitt, 47 N. Y. 532, 536.
[3] Bobbs-Merrill Co. v. Strauss, 147 Fed. 15, 19.
[4] American Tobacco Co. v. Werkmeister, 207 U. S. 284, 290.
[5] Werkmeister v. American Lith. Co., 134 Fed. 321, 323.
[6] The quotation appears in 8 Pet. (U. S.) 591, 673.

(d) there is mention of the "performance" of a copyrighted work if it be drama, and in subsection (e) there is mention of the "performance" publicly for profit if it be music. Therefore it is clear that the statutes of the United States have attempted to keep up with the times in affording protection to the many and increasing types of property interests and have allowed protection to the owners of copyrights against infringements which were not contained within the scope of the common law. Before going further it would be well to mention that the common law rights have been superseded by statutes in both the United States and in England.[7]

The statutes of the United States have replaced the common law, and under them there are many matters worthy of consideration. There is no doubt that the laws of the United States pertaining to copyright apply to musical compositions. That granted, there remains the question—what does constitute infringement of the copyright? The normal situation would be the case where someone other than the author, and without his permission, secured the possession of a musical composition of the author either before or after the time when it had been presented, but after the time when the composer had obtained a copyright to it, and such other person caused it to be printed and circulated in some form. In one case[8] the court held that the copyright of two musical compositions was not violated by the unauthorized production and sale of music rolls by which the music of these two compositions could be reproduced on player pianos, as such rolls were not "copies" within the meaning of the statute. The date of the case was 1908, and Congress in the next year amended the Act so as to place such publication within the control of the owner of the copyright, thus affording him protection.[9] The case of *F. A. Mills, Inc. v. Standard Music Roll Co.*[10] was decided after the Act referred to, and dealing with the question of whether or not the defendant had infringed the rights of the plaintiff (where the plaintiff had given or sold to the defendant the right to use the musical composition of the plaintiff in the manufacture of music rolls and records) the court held that the defendant in the printing and distribution of the words of the copyrighted musical composition had infringed the copyright. The case shows that after the Act of 1909 the composer could protect his rights in the composition against publication by another in the form of records or music rolls.

It would appear that by reason of the fact that since any and all of the protection of which the author or composer may really hope to

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[7]The cases show that there is a great deal of conflict as to this point, some holding that the statutes destroyed the common law rights, others that the common law rights exist independently of the statutes. See Holmes v. Hurst, 19 Sup. Ct. 606, 607, and Ferris v. Frohman, 223 U. S. 424. The weight of authority seems to be contained in the statement set out.

[8]Smith-White Music Publishing Co. v. Apollo Co., 209 U. S. 1. See also Whitmark v. Standard Music Roll Co., 221 Fed. 376; Stern v. Rosey, 17 App. (D. C.) 562, and 13 C. J. 1148, note 19.

[9]Act of March 4, 1909, c. 320, section 1, 35 Stat. 1075, 17 U. S. C. A. (1926).

[10]223 Fed. 849.

avail himself is derived from the statutes of the United States, a most important phase of the study of the subject is an analysis of that part of the Act whereunder such rights emanate. For the most part section one of title seventeen of the United States Code is the important one because it sets out the rights in the author or composer which are exclusive. Section (e) shows that persons complying with the Act shall have the exclusive right: "To perform the copyrighted work publicly for profit if it be a musical composition[11] and for the purpose of public performance for profit; and for the purposes set forth in section (a)[12] hereof, to make any arrangement or setting of it or the melody of it in any system of notation or any form of record in which the thought of an author may be recorded, and from which it may be read or reproduced: PROVIDED, * * *."[13] Under this section, which has to do with musical compositions, the author or composer would seem to have the exclusive right to perform the acts in relation to the composition which are set out in the statute, and to be protected against the performance of those acts by anyone else. The cases dealing with the subject go into the question of intent, which is not mentioned in the Act. It would naturally appear that the intent should be considered as immaterial, and so the cases have held,[14] the fact of infringement having been established. One case held that where there was an unlawful printing, copying, etc., the facts once having been proved, the unlawful intent to violate the act will be presumed.[15]

Even though there may appear to be irreconcilable conflict in and between the cases dealing with intent, it is evident that there is a thread of logic and reason which may be carried through all of them. The common law protected the author because of the fact that the composition was a creation of his in which he had a property interest by reason of the fact that he created the work. The statutes are not new law, but merely a reenactment of the common law in such form as to more properly provide for the needs of today. Therefore, while the modern cases talk about situations wherein two separate and independent compositions are identical, some of them holding that both works should be copyrightable and others that the one copyrighted first in point of time should be protected against the other, the strictly proper result would be that each composition should be copyrightable and subsequently protected in the absence of the proof of the fact of infringement, the similarity being evidence of the fact. The weight of the evidence would depend in some degree upon the extent of the similarity, and absolute proof of infringe-

[11]Hubbell v. Royal Pastime Amusement Co., 242 Fed. 1002, discusses the punctuation at this point and states that there should be a semi-colon inserted here, otherwise the phrase does not make sense.

[12]Sec. (a), "to print, reprint, publish, copy, and vend the copyrighted work."

[13]The "proviso" shows that the composition must be copyrighted and published after 1909, that the section does not apply to foreign compositions, and provides for royalties and like matters which were not considered as pertinent to this discussion.

[14]Harper v. Shoppell, 26 Fed. 519; Fishnel v. Lueckel, 53 Fed. 499; Reed v. Holliday, 19 Fed. 325.

[15]Journal Publishing Co. v. Drake, 199 Fed. 572.

ment would necessarily depend on more than mere identity or similarity alone.

The cases vary greatly in the explanation of what is necessary to constitute an infringement. One holds that infringement consists in the exact or substantial reproduction of an original, using such original as a model, as distinguished from an independent production of the same thing.[16] Others show that there actually must be some copying,[17] and that the mere fact of similarity, or even of identity, between the two works does not of itself make the one an infringement of the other.[18] But it is well to note that the cases do not state that there will not be an infringement unless there is copying, nor do the cases hold that where there is a similarity or identity, without actual proof of copying, that there will be no infringement. There may be other evidence of fact showing infringement, and there are means of infringement, to be discussed later, other than copying. Similarity has been treated by the courts as evidence of copying,[19] and where there is absolute identity, the proof is stronger than where there is a mere similarity. In the cases of infringement of musical copyright there is, as shown, protection given by the statute as in the cases concerning literature, and the cases hold that the exclusive right to print, publish, copy, and sell is infringed by the multiplication, publication, or selling of what is a substantial copy of the copyrighted musical work,[20] and this was the law prior to the Act of 1909,[21] under which the composer secured protection against infringement through the use of mechanical devices[22] for the reproduction of music.

Again as to the "copying" phase, there is the further question as to the quantity of copying which is necessary in order that the composition may be held to be an infringement of another, previously copyrighted. The copying must be of a substantial part,[23] and where the theme or melody of two musical selections is substantially the same, there was held to be an infringement even though it was shown that the result reached by the composers was pure coincidence.[24] In another case where the theme and the execution of the musical compositions were considerably different, if there was in fact a single phrase of music and words which was nearly identical to that of another composition, then there might be an infringement. Such was the case of *Boosey v. Empire Music Corporation.*[25] That case is particularly illustrative of the prob-

[16]West Publishing Co. v. Edward Thompson Co., 169 Fed. 833.

[17]Davis v. Bowes, 209 Fed. 53.

[18]Stetcher Lithograph Co. v. Dunston Lithograph Co., 233 Fed. 601.

[19]13 C. J. 1213.

[20]13 C. J. 1147.

[21]Supra, note 9.

[22]Supra, note 8 and cases cited therein.

[23]Boosey v. Empire Music Co., 224 Fed. 646; also 13 C. J., sec. 280.

[24]Haas v. Leo Feist, 234 Fed. 105; but see Arnstein v. Marks Music Corpn., 82 F. (2d) 275, contra, which supports the proper result suggested above.

[25]See note 23, supra. Also see Hirsch v. Paramount Pictures, 17 Fed. Supp. 816, relating to similarity of bars, accents, harmony or melody.

lem because in each instance the words, "I hear you calling me," were used in conjunction with music which was practically identical. In the one instance there was a jazz or syncopated rendition given by Al Jolson, acting a negro part, wishing for the hills of Tennessee; in the other instance John McCormack sang another song, the subject of which was a man singing over the grave of his departed wife. The former, the syncopated version, was held by the court to be an infringement of the copyright of the latter, the latter, of course, having been copyrighted before the former. The court said that even though the similarity extended only to the use of the particular phrase mentioned, that as far as the untutored public was concerned, that phrase has a kind of sentiment in both cases that causes the audiences to "listen, applaud, and to buy copies of the song in the corridor on the way out of the theatre." But the case is unusual in that most of the cases hold that slight similarities will not in themselves constitute an infringement. In the cases where the music is the same but is adapted by another to different instruments there may be an infringement;[26] as where an opera is arranged for a piano,[27] or where an orchestration is made from a piano arrangement,[28] or an orchestration of a composition for the piano.[29] Also in the case[30] where there was an unauthorized use of either the words or music when they were not separately copyrighted there may be an infringement.[31]

It is to be noted that there have been two classes of cases which have dealt with the problems of infringement. The one class has been inclined to hold as to a few given facts that there is an infringement of copyright in every like case; the other cases hold that the same few facts *may* constitute an infringement of copyright.[32] It is hard to see how any court could successfully maintain that there exists a distinct set of rules which govern the question of infringement vel non. Ruling Case Law states, "But there appears to be no precise rule of general application by which to determine what constitutes an infringement of a musical copyright, although in some of the cases there have been attempts to lay down just such rules."[33] Undoubtedly this confusion is caused by the fact that music is of an intangible and metaphysical nature. For instance, in some of the cases, where the court is acquainted personally with either of the compositions in question, as must have been the situation in the Boosey case,[34] the court is more willing to lay down a rule which, if taken without a consideration of all the attending facts, may lead to disastrous consequences in another case, the facts of which are dissimilar. In other cases, where the court may not be so well informed as to the music, the result will be more cautious, and therefore better law. The

[26]D'Almaine v. Boosey, 4 L. J. Exch. 21, 221.
[27]Wood v. Boosey, 3 Q. B. 223.
[28]The Mikado Case, 25 Fed. 183.
[29]Chappell v. Columbia Graphophone Co., 2 Ch. 124.
[30]Standard Music Roll Co. v. Mills, 241 Fed. 360; also note 8, supra.
[31]See note 19 in 13 C. J. 1148 for the reasons for contrary holdings.
[32]Hirsch v. Paramount Pictures, supra, note 40.
[33]6 R. C. L., Section 64.
[34]Supra, note 23.

question of infringement is, as has been shown, one of fact, and, as in the determination of negligence in tort cases, there are may factors which may contribute to a finding by the court or jury that there is, or is not, present in the case, infringement.

Another phase of the infringement of musical copyright is that of the performance of the copyrighted musical selection by some person who has no authority from the owner to do so. This aspect is also covered in the statute. The history of the law shows that this type of infringement was neither recognized nor protected against prior to the Act of 1897.[35] This was based upon the concept that an acoustical rendition was not "copying, publishing, or selling."[36] But the law was changed, as was shown in the discussion of *White-Smith Music Publishing Co. v. Apollo*,[37] so as to place musical compositions on an equal footing with dramatic works. The present law is (based on statute, of course) that the owner of the copyright has the exclusive right to perform the copyrighted work publicly for profit if it be a musical composition and for the purpose of public performance for profit.[38] It is interesting to note that in the cases involving the unauthorized performance of a copyrighted work there is a susceptibility of proof in greater detail than in those where a writing was copied. This situation arises because there is often no concrete or permanent record from which the proof may be derived, except in the cases dealing with music rolls, records, and the like, mentioned before, and is, perhaps, one of the reasons why this type of infringement was not recognized before the time of the Act.

The cases, however, influenced by the Act show that where there has been a performance acoustically represented which, if when it was reduced to writing would constitute an infringement, the performance itself would be an infringement,[39] provided that the performance was in public[40] and for profit.[41] The cases have shown that where there was a performance in a restaurant or dining room by the employees of the proprietor thereof, without charge, that there was a violation of the exclusive right of the owner of the copyright to perform the composition publicly for profit.[42] The same case reported in another place held that the performance of a dramatico-musical composition need not be for profit to infringe the copyright.[43] It also holds that there may be an infringement of a dramatico-musical composition or work where there is an unauthorized performance of but a part of it, for instance, where there is lacking the usual stage setting. On the other hand, the case of *John Church Co. v. Hilliard Hotel Co.*[44] indicates that there must be

[35]Act January 6, 1897 (20 St. L. 481).
[36]Mikado case, supra; Stern v. Rosey, 17 App. (D. C.) 562.
[37]Supra, note 8.
[38]13 C. J. 1148; also Hubbell v. Royal Pastime Amusement Co., cited in note 11, supra.
[39]See 13 C. J. 1147, sec. 320, notes and text.
[40]Boosey v. Wright, 1 Ch. 122.
[41]John Church Co. v. Hilliard Hotel Co., 221 Fed. 229.
[42]Herbert v. Shanley Co., 242 U. S. 591.
[43]222 Fed. 544, reversing the Herbert case, supra, note 42.
[44]Supra, note 41.

BOTH the performance in public and the element of profit, as does the case of *M. Witmark & Sons v. Pastime Amusement Co.*[45] In the former of the last two cases there was no admission charged for entrance into the room wherein the music was played, while in the latter it was played in a movie house. Thus the facts may be a ground for distinguishing the two cases which seemingly support one another. Other cases have held that the playing of the chorus of a composition may constitute infringement,[46] and that the absence of sheet music during the performance should make no difference.[47] Most of the cases, including the modern ones, as will be shown, seem to insist on the profit element, but are willing to go to the greatest extremes in the finding of that element.

One most interesting phase in the acoustical performance classification, and one which is more modern in origin than the others, is the infringement of copyright through radio broadcasting. The first matter to consider is whether or not when there is a simple broadcast, solely for the purposes of broadcasting, and not for the purposes of advertising, there is such performance of the copyrighted musical selection as will constitute a performance "for profit."[48] While the cases are not uniform on the point, the Circuit Court of Appeals has decided the matter in the affirmative, and this ruling[49] has been generally accepted by the broadcasters as the true statement of the law. Because there would in all probability be a lessening in the value of the composition to the composer, even though it could not be shown that any gain, benefit, or profit resulted to the broadcaster through such use of the property of another, any diminution in the value of the property ought to be a basis for protection.

A significant problem, derived from the foregoing, arises when there is a public performance of a copyrighted musical selection at a cafe or other place, with the consent of the composer. Is a broadcasting company in the broadcasting of such program obliged to obtain a "fresh" or new consent from the owner of the copyright? Or is it, on the other hand, a case where the first authorization creates a sort of implied license in the broadcaster? Mr. Stephen Davis in his work, "The Law of Radio Communication,"[50] intimates that the question is still open. It would appear that, because of the fact that the common law rights of authors are the basis and background of copyright law, such performance by the broadcasting company would be a violation of the owner's right of property in the composition. There is one case which has, more or less, answered the query suggested by Mr. Davis, viz., *Fred Waring v. WDAS Broadcasting Station*,[51] in which case the court did not deal with the question of copyright as such, but based its decision on the right to

[45]298 Fed. 470, affirmed in 2 F. (2d) 1020.
[46]Idem.
[47]Leo Feist v. Demarie showing that playing "by ear" may constitute infringement.
[48]See Stephen Davis, "Law of Radio Communication," McGraw-Hill Book Co. (1927), Chapter VIII.
[49]Idem, at page 159.
[50]Supra, note 48.
[51]194 Atl. 631 (Oct. 8, 1937, Penn.).

privacy and on unfair competition. That case was one where Waring had made several recordings, on each of which was printed, "Not licensed for radio broadcasting." The station obtained the permission of the owners of the copyright and proceeded to broadcast the records. The court pointed out[52] the common law rights of authors and the like, showed that protection should be afforded, and granted an injunction.[53] Mr. Davis also says that the courts at first questioned whether the copyright laws[54] would cover radio broadcasting, but that they soon held that the application of the statutes to situations not actually anticipated by the legislative body is not without precedent,[55] and then held that the broadcasting of music was, under a fair interpretation of the statute, a public performance.[56]

The matter of the necessity for profit in the determination of the question of whether there is an infringement of copyright is one as to which the cases have been in conflict. The older ones had to do, for the most part, with situations where there was little or no difficulty in finding the element of profit; but in the broadcasting cases the courts found that the profits could be indirect, or, that there could be a profit found even in the cases where there was no direct charge made.[57] In the case of *Herbert v. Shanley*[58] the court was faced with the difficulty of determining the point at which the profit derived from the performance became so indirect as not to constitute an infringement. In spite of the fact that any performance of the work of another before the public does, as has been shown, constitute a violation of his right in the property, the cases dealing with the radio problem are rather insistent that the element of profit be present before there will be held to be a violation of the copyright. In the statute[59] under section (e) the phrase, "public performance for profit," is used in two different places. It is, perhaps, because most of the cases have been decided under section (e) that we encounter the profit element so frequently. The Act, therefore, would seem to be of faulty construction as evidently it does not give the full protection to the owners of the copyrights which the courts have for so long expected. Perhaps the solution would lie in the application of the theory used in the libel and slander cases where the medium was radio. The cases[60] there involved show that radio broadcasting is a publication, and that theory in conjunction with the exclusive rights given in the statutes as to publication[61] ought to lead to a better result than has been attained.

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[52]51 Harvard Law Review 171; See also 37 The Brief 99 (Phi Delta Phi Quarterly).

[53]The case deals with the rights of the performer, not the composer.

[54]Title 17, U. S. C. A., supra.

[55]Kalem Co. v. Harper Bros., 222 U. S. 55.

[56]See Chappell v. Associated Radio, cited 39 Harvard L. R. 269.

[57]Harms v. Cohen, 279 Fed. 276.

[58]242 U. S. 591.

[59]Supra.

[60]State v. Haffer, 162 Pac. 45; see also Davis, "The Law of Radio Communication," supra, Chapter X.

[61]Supra, note 12.

Nevertheless the cases have held that the broadcasting of a copyrighted musical selection will constitute a performance for profit,[62] and we shall therefore deal with the situation as it actually exists, and not as it should. The case of *Jerome Remick & Co. v. American Automobile Accessories*[63] was one in which the defendant maintained a radio station as an incident of its business, and the expense of maintaining the station was carried on the books of the company as advertising expense. The company broadcast without the authority of the owner, the plaintiff, a selection which had been copyrighted, and the court held that the broadcasting consisted in a public performance for profit, a violation of the rights of the plaintiff. In other words the case was one in which the court found that the profit was direct enough to sustain the action. The Shanley case[64] held the same way, and the court there laid down the rule that an unlicensed performance for the entertainment of patrons of a commercial establishment is actionable even though no admission fee is charged. The results of these cases show that the courts have gotten away from the idea that the profit had to be direct, and that indirect profits would suffice. This factor would seem to create far-reaching liabilities in the performance of copyrighted works in restaurants, saloons, dance halls, and shops, without the authority of the composer. The most of these problems, however, are handled as much as possible by the publishers in their license agreements with the composers and performers.

At this point in the development of the law we come to the case of *Buck v. Jewell-La Salle Realty Co.*,[65] which marks a most liberal attitude toward the protection of the rights of authors and composers. That was a case where the defendant maintained in his hotel a master radio receiving set with loud speakers in the various public and private rooms. With this set the defendant received for the benefit of the guests of the hotel selections of copyrighted music which were unlawfully broadcast. The court held that this action on the part of the defendant constituted a public performance and was a violation of the copyright of the plaintiff. The case marks a departure from cases such as *Buck v. Duncan*,[66] which held that in such a situation there was not a public performance for profit, *Holmes v. Hurst*,[67] wherein Dr. Holmes lost his copyright to "The Autocrat of the Breakfast Table," and the White-Smith Music Co.[68] case, all

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[62]Supra, note 48.

[63]5 F. (2d) 1020.

[64]Supra, note 58.

[65]283 U. S. 191 (1931); see also Witmark & Sons v. Bamberger, 291 Fed. 776; Remick v. General Electric, 16 F. (2d) 829, to the same effect, and Remick v. American Automobile, supra.

[66]32 F. (2d) 366 (1929), modified in 51 F. (2d) 730; see also 43 Harvard Law Review 318.

[67]174 U. S. 82.

[68]Supra, note 8. Other cases as to what performance is necessary are: Irving Berlin v. Daigle, 31 F. (2d) 852 (cinema); Witmark & Sons v. Calloway, 22 F. (2d) 412 (theatre); Buck v. Heretis, 24 F. (2d) 876 (restaurant), all of which show that playing of records, etc., may constitute infringement.

of which cases indicate that at one time the United States Supreme Court took a very narrow view of the situation. The Jewell case, as will be noted, deals with the situation where the broadcast received was originally not authorized to be broadcast. In another case[69] the court held that where the broadcast was licensed, then the reception would not constitute infringement, and this factor may be of use in distinguishing many of the cases which are seemingly inconsistent.[70]

Although the opinion has been expressed that the result of the Jewell case is a happy one, still the eventual outcome may be in the other direction. Take, for instance, the practical result of the problem. In the first place the situation is not always the one where the composer wishes to bring an action against another for the infringement of the copyright of his work. There are many instances in which the composer would be only too willing to have someone "plug" his composition for him in order that it may become popular, enabling him to receive royalties at some future date. With the result of the Jewell case and many of the other cases there will be a great reluctance to provide entertainment for guests and others through means which may result in legal liability. Therefore, while the cases afford a broader protection for the authors and the composers, still the effect may be a lessening of royalties.

No attempt has been made herein to deal in detail with the problems concerning sound moving pictures or other forms of performance, such as victrola records, because of repetition of the principles which have already been expressed in relation to music rolls and radio; only the fact situations differ greatly.

The study of the law of copyrights shows several characteristics. In the first place it concerns the protection of property rights developed under the common law. In the second place it deals with the application of situations and questions of fact to statutes which are extensions of the common law. In the third place it is badly in the need of such reform as will enable the layman to anticipate, at least in some degree, the possible results of his participation in the use of the property protected. The reform is coming about slowly, but until some codification is developed, the effect of which will be the clarification of the principles to be followed, the law will always be behind the social need for it.

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[69]Buck v. Debaum, 40 F. (2d) 734. The case also holds that the mere actuation of an instrument to produce sounds may not be infringement.

[70]Further material on Jewell Case: 9 Ore. L. R. 182; 29 Mich. L. R. 1076.