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Copyright Law: Broadcast of Phonograph Records Held a Public Performance for Profit in Violation of Section 1(e) Even though Made in Connection with Sale of the Records

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unfairness. Taxation of the entire proceeds as ordinary income deprives the seller of his basis in the stock or assets of the business. A partial legislative solution would be to permit capital gains treatment of the excess of fair market value of the business[37] over the seller's basis, and to tax the excess of the price received over fair market value as ordinary income to the seller.[38] Bootstrap sales to charities would not thereby be prohibited, but exempt organizations and other purchasers of businesses would be placed on a more equal competitive basis. The charity would still be able to pay a better price because of its exempt status, but the increased price would not be worth as much to the seller because of the imposition of tax at ordinary rates on the excess received. The seller would not be deprived of capital gains treatment on the portion of the price received not depending on the charity's tax status, and the Commissioner's loss of revenue would be reduced.

Copyright Law: Broadcast of Phonograph Records Held a "Public Performance for Profit" in Violation of Section 1(e) Even Though Made in Connection With Sale of the Records

The defendant owned and operated a Merchandise Mart containing a music department[1] in Middleton, Pennsylvania, for which it handled all advertising. Both advertising announcements and phonograph records were broadcast from defendant's offices within the Mart, and on stipulated dates defendant broadcast phonograph recordings of plaintiffs' copyrighted musical compositions over its loudspeaker system throughout the premises and parking lot of the Mart. Plaintiffs sued for damages alleging a violation of their exclusive right to perform their copyrighted works publicly for profit as provided in Section 1(e) of the Copy-

37. If the sale in the instant case had not occurred and one of the petitioners were to die, a determination of a fair market value of the business would have to be made for estate tax purposes. For guidelines to be used in the determination of the fair market value of a closely held corporation, see Rev. Rul. 59–60, 1959–1 CUM. BULL. 237.

38. The existing statute does not appear to permit this result. Therefore, it is suggested as possible legislation.

1. The music department was leased from defendant by Mid-City Trading Company.

right Act.[2] The trial court found for plaintiffs and awarded statutory damages,[3] plus attorneys' fees,[4] and enjoined defendant from further performing the compositions publicly.[5] The Third Circuit affirmed, *holding* that the facts constituted a public performance for profit within Section 1(e) of the Copyright Act,[6] and that the renditions were impermissible even if they amounted to advertisement of the recordings. *Chappell & Co. v. Middletown Farmers Mkt. & Auction Co.*, 334 F.2d 303 (3d Cir. 1964).

The facts in *Chappell* compelled the Third Circuit to find a "public performance for profit" within the established construction of section 1(e). Playing records constitutes a performance whether the defendant plays them on his own phonograph[7] or relays the broadcasting of records played by others through radio or other equipment.[8] A *public* performance may be to a con-

2.

§ 1. Exclusive rights as to copyrighted works.

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

. . .

(e) To perform the copyrighted work publicly for profit if it be a musical composition; and for the purpose of public performance for profit . . . to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced . . . .

17 U.S.C. § 1(e) (1958).

3. Copyright Act, 17 U.S.C. § 101(b) (1958).

4. Copyright Act, 17 U.S.C. § 116 (1958).

5. Copyright Act, 17 U.S.C. § 101(a) (1958).

6. For similar cases see Irving Berlin, Inc. v. Daigle, 31 F.2d 832 (5th Cir. 1929); Schwartz v. Broadcast Music, Inc., 180 F. Supp. 322 (S.D.N.Y. 1959); Edward B. Marks Music Corp. v. Foullon, 79 F. Supp. 664 (S.D.N.Y. 1948), *aff'd*, 171 F.2d 905 (2d Cir. 1949); Remick Music Corp. v. Interstate Hotel Co., 58 F. Supp. 523 (D.C. Neb. 1944), *aff'd*, 157 F.2d 744 (8th Cir. 1946); Famous Music Corp. v. Melz, 28 F. Supp. 767 (W.D. La. 1939); Harms v. Cohen, 279 Fed. 276 (E.D. Pa. 1922).

7. See Irving Berlin, Inc. v. Daigle, *supra* note 6; Harms Inc. v. Sansom House Enterprises, Inc., 162 F. Supp. 129 (E.D. Pa. 1958), *aff'd sub nom.* Leo Feist, Inc. v. Lew Tendler Tavern, Inc., 267 F.2d 494 (3d Cir. 1959); Buck v. Heretis, 24 F.2d 876 (E.D.S.C. 1928).

8. See Buck v. Jewell-LaSalle Realty Co., 283 U.S. 191 (1931); Society of European Stage Authors v. New York Hotel Statler Co., 19 F. Supp. 1 (S.D.N.Y. 1937).

For discussions of infringement problems in conjunction with radio broadcasts or receptions, see Botsford, *Some Copyright Problems of Radio Broadcasters and Receivers of Musical Compositions*, 2 COPYRIGHT L. SYMPOSIUM 71 (1940); Gitlin, *Radio Infringement of Musical Copyright*, 1 COPYRIGHT L. SYMPOSIUM 61 (1939).

stantly shifting audience;[9] it need not reach a group gathered together in a contained area.[10] Finally, to be for profit the performance need not provide direct pecuniary benefit to the defendant; it is enough that a commercially attractive atmosphere is created.[11] Thus a "public performance for profit" within section 1(e) includes any playing of a copyrighted record from which commercial benefit may derive.

Defendant maintained that even if a public performance for profit was found, the broadcasts advertised the records and therefore did not violate section 1(e). The trial court did not determine to what extent advertising value resulted from the

9. See Society of European Stage Authors v. New York Hotel Statler Co., *supra* note 8. Other court decisions have defined public to include private dining and drinking clubs which are open to anyone who will pay a nominal membership fee. See Lerner v. Schectman, 228 F. Supp. 354 (D. Minn. 1964); M. Witmark & Sons v. Tremont Social & Athletic Club, 188 F. Supp. 787 (D. Mass. 1960); Lerner v. Club Wander In, Inc., 174 F. Supp. 731 (D. Mass. 1959).

10. See Jerome H. Remick & Co. v. American Auto. Accessories Co., 5 F.2d 411 (6th Cir. 1925).

11.

> If the rights under the copyright are infringed only by a performance where money is taken at the door they are very imperfectly protected. . . . The defendants' performances are not eleemosynary. They are 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. . . . 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.

Herbert v. Shanley Co., 242 U.S. 591, 594–95 (1917).

Courts following the rule in *Herbert* have found profit seeking performances in restaurants, *e.g.*, Irving Berlin, Inc. v. Daigle, 31 F.2d 832 (5th Cir. 1929); nightclubs, *e.g.*, Lerner v. Club Wander In, Inc., 174 F. Supp. 731 (D. Mass. 1959); hotels, *e.g.*, Buck v. Coe, 32 F. Supp. 829 (M.D. Pa. 1940); ballrooms, *e.g.*, Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co., 36 F.2d 354 (7th Cir. 1929); theatres, *e.g.*, M. Witmark & Sons v. Pastime Amusement Co., 298 Fed. 470 (E.D.S.C. 1924), *aff'd*, 2 F.2d 1020 (4th Cir. 1924); radio stations, *e.g.*, Associated Music Publishers Inc. v. Debs Memorial Radio Fund Inc., 141 F.2d 852 (2d Cir. 1944); M. Witmark & Sons v. Bamberger & Co., 291 Fed. 776 (D.C.N.J. 1923). In the *Debs* case the radio station was a nonprofit organization which had accepted advertisements for one-third of its programs.

For discussions of the expanded scope of public performance construction since *Herbert v. Shanley* see 5 COPYRIGHT L. SYMPOSIUM 256 (1954), 3 COPYRIGHT L. SYMPOSIUM 53 (1940), 5 J. MARSHALL L.Q. 278 (1939), 35 MISS. L. REV. 295 (1964).

broadcasts; the appellate court noted that the renditions may have performed two functions: record sales promotion and entertainment of Mart customers. Determination of the primary purpose was unnecessary, however, in light of the court's determination that "Sections 1(e) and 27 of the Copyright Act do not authorize the public performance for profit of a copyrighted musical composition even in connection with the sale of a mechanical reproduction of the work."[12]

This suggestion that the advertising benefit to the composer does not exempt the performance from the stricture of section 1(e), even if the primary purpose of the performance is to sell the particular record, is alarming. The language of section 1(e) may be broad enough to cover record broadcasts in a music store or music department of a larger store, a broadcast solely within a store selling only records, and a broadcast in a record booth for a potential customer. Policy considerations indicate that in at least some of these situations, the literal language of section 1(e) should not be stretched to the limits suggested by *Chappell.*

Although not litigated, playing a record for a customer in a booth probably would be a "public performance for profit." Arguably if the customer plays the record himself there is not a performance by the dealer. The dealer, however, provides the environment, equipment, and the inducement for the performance. In analagous situations the provider has been found liable.[13] In that the performance is for a single listener, the claim may be made that this is not "public" within the terms of section 1(e). As judicially interpreted, however, "public" means that the public have an opportunity to hear, not that they actually hear;[14] and as the record booth is available to any customer, the performance is arguably public. The seller's primary reason for encouraging the playing is to sell the record, hence the profit element is obvious.

The extension of section 1(e) to the prepurchase performance seems undesirable as both an unnecessary restraint on sales efforts and a negation of statutory licensing purposes. In the record booth situation the sole reason for the performance is to induce the customer to purchase the recording. The performance directly

12. 334 F.2d at 305. This argument was first presented in M. Witmark & Sons v. Bamberger & Co., *supra* note 11, and was again raised and rejected in Harms v. Cohen, 279 Fed. 276 (E.D. Pa. 1922).

13. See 64 COLUM. L. REV. 355 (1964) and cases cited therein.

14. See cases cited in notes 9 & 10 *supra.*

benefits only the seller and copyright holder and others with interests in *that* record. A copyright holder might want to restrict the playing of his copyrighted work where profits from different recordings varied. Thus, if the copyright holder received more than two cents for each record sold, he would prefer sales of that copy over sales of recordings for which he received only the two cents provided by statute.[15] Allowing the copyright holder to discriminate would hinder the operation of the compulsory licensing provisions of section 1(e). The public would be deprived of the expanded exposure of the copyrighted work, which the licensing provision contemplates. Furthermore, the stimulus for competition in the record industry, which the licensing provision was intended to provide, would be lessened.[16]

The record department and record store broadcasts lie somewhere between the *Chappell* situation, in which the broadcaster receives most of the benefit, and the record booth situation, in which the copyright holder clearly receives all the benefit to which he is entitled. The performance right given the copyright holder in section 1(e) is designed to preserve for him commercial benefits derived from the performance of his work. The literal language of the act applies to both situations. But the commercial benefit to the broadcaster as compared with the composer is greater in the case of the record department than in the record store situation. Record department broadcasts may stimulate sales of a wide variety of goods; record store broadcasts, however, promote the sale of records solely. In viewing copyright holders as a class, they receive from record store broadcasts all the commercial benefit that section 1(e) seems designed to provide them; while the copyright holder is not solely benefited by such a broadcast of his record, it promotes the sale of other copyright holder's records and broadcast of their records may similarly benefit him.

15.

> And as a condition of extending the copyright control to such mechanical reproductions, that whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work, any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty of 2 cents on each such part manufactured, to be paid by the manufacturer thereof . . . .

Copyright Act, 17 U.S.C. § 1(e) (1958).

16. See, *e.g.*, *Hearings Before the Committees on Patents of Senate and House of Representatives on Pending Bills To Amend and Consolidate the Acts Respecting Copyright*, 60th Cong., 1st Sess. 247 (1908).