

## COMMENTS

### COPYRIGHTS AND TV—A NEW USE FOR THE MULTIPLE PERFORMANCE THEORY

Influential in the financial fate of our most rapidly growing industry<sup>1</sup> will be the extent to which telecasters are protected from free commercial use of their product in public places of entertainment. Today television brings to the owners of hotels, clubs, and bars the benefits of greater patronage,<sup>2</sup> while at the same time it has brought to movie producers,<sup>3</sup> sports promoters,<sup>4</sup> and others who create the subject matter of telecasts,<sup>5</sup> the woes of smaller gate receipts. In the future these groups will demand compensation, and the courts soon will be faced with the question of which of those who benefit from television must bear its costs. Should there be a diminution in benefits as the veneer of novelty wears thin, it will nevertheless be necessary to determine whether there is sufficient property right in television to permit the exaction of payments

<sup>1</sup> "There were one million TV sets in use at the beginning of 1949, 3,600,000 a year later, and 5,800,000 on May 1, 1950. The industry estimates that nine million sets will be in use by the end of the year. It expects to reach a saturation point of about 30 million sets in 1955. In May 1950, 103 television broadcasting stations were operating in sixty large marketing areas with a population of about 70 million; a total of 121 stations was scheduled to be in operation before the end of the year." TV—Who's Afraid, 42 *Fortune*, No. 1, at 55 (July 1950). The Gillette Company paid \$800,000 for TV rights in the 1950 World Series—four times what it paid last year. Up and Up, 36 *Newsweek*, No. 10, at 48 (Sept. 4, 1950).

<sup>2</sup> The N.Y. Times, p. 41, col. 3 (June 10, 1948), reports that television profits from taverns have increased from 10% to 60%; 67% of taverns had sets at that date.

<sup>3</sup> "Surveys among the nation's 5,863,000 TV set owners show that their movie-going has fallen off by 20 to 30%." Pandora's Box, 55 *Time*, No. 22, at 86 (May 29, 1950). Consult Shared Blame, 36 *Newsweek*, No. 21, at 60 (Nov. 20, 1950).

<sup>4</sup> Except for minor league baseball, television has had a beneficial effect on sports attendance according to some authorities. *Business Week* 74 (May 27, 1950). But the British experience over a longer period indicates that this is a short-run phenomenon. "Agreed that television was slashing their gate receipts, leading British sports promoters met last week in London and came up with a novel proposal: Copyright all sports events and license viewing rights to hotels, clubs, pubs, etc." Copyrighted Contests, 35 *Newsweek*, No. 46, at 87 (April 24, 1950). More recent sources indicate that although sports attendance has risen in non-television areas, it has declined sharply where events are telecast. Truly "video is sabotaging the box office." *Wall Street Journal*, p. 1, col. 6 (Jan. 31, 1951). See also TV Disrupts Sports Business, *Business Week* 49 (Jan. 27, 1951).

<sup>5</sup> "The most sensational and controversial analysis of the impact of TV, made by Charles Allredge last January, showed that 400 TV-owning families in the District of Columbia reduced their movie attendance from 4.51 to 1.27 times a month after installing TV in their homes—a reduction of 72 per cent. The survey reported magazine reading off 22.6 per cent, book reading off 29.1 per cent, and newspapers off 4.7 per cent, baseball 36.6 per cent, wrestling and boxing 44.7 per cent. Members of these families said they spent on the average more than 40 per cent more of their free time at home during periods when television was on the air." TV—Who's Afraid, 42 *Fortune*, No. 1, at 55 (July, 1950).

from those who receive telecasts in public places for commercial purposes.<sup>6</sup> To prognosticate the trend of decisions requires careful examination of legally significant concepts in related fields and changes which lawyers and judges have made and may make in their meanings.

Precedent which has grown up about the radio industry provides the closest analogies to many of the problems in television law;<sup>7</sup> and definitions which radio cases have given to salient terms, especially in the realm of copyright law, are certain to exert influence in this field. Were it not for the copyright protection afforded composers, which enabled them to substitute license fees from radio stations, hotels, theaters, and taverns for reductions in royalties, radio might well have plugged popular songs to death without paying more for the privilege than the cost of sheet music or a phonograph record.<sup>8</sup> Where the subject matter of television is copyrightable, as in the case of lectures, dramas, movies, and music,<sup>9</sup> a creator complying with the Copyright Act<sup>10</sup> may sue for

<sup>6</sup> It is not, of course, contended here that advertising sponsors cannot or will not stand the brunt of increased cost; but it should be apparent from the radio cases which follow that this is not an inevitable occurrence. Insofar as they assume this burden, the question becomes one of determining other sources of income for telecasters, performers, authors, and promoters. As home television sets become more common, the attraction of sets in public places will certainly diminish; the exigencies of competition, however, will probably require tavern keepers, hotel owners, and their kind to continue using them. It is doubtful that copyright owners will forego the benefits of licensing them any more than they have done in the case of phonograph records or radio. See note 69 *infra*.

<sup>7</sup> This trend is already apparent in defamation cases where television would seem to present a more unusual problem than in the field of literary property. In *Remington v. Bentley*, 88 F. Supp. 166, 169 (S.D.N.Y., 1949), the district judge found that the "additional factor of pictorial representation" adds nothing to the form of defamation "in spite of the fact that defamation in motion pictures has been treated as libel." But see Barry, *Radio, Television, and the Law of Defamation*, 23 *Aust. L.J.* 203 (1949).

<sup>8</sup> "[A] song which without radio would move more slowly and searchingly over the country, now reaches its apex of popularity and inevitable decline in a much shorter time." Hynes, *Radio and Royalties*, 15 *Notre Dame Lawyer* 290, 306 (1940). In the mid-1920's, this same article points out, 6,500,000 copies of "Till We Meet Again" were sold, while after 1933 and the great radio boom the best-selling songs sold well under 300,000 copies. Irving Berlin's "All Alone" had sold 1,125,000 copies in 1926; but his equally popular pieces, "How Deep Is the Ocean" and "Say It Isn't So," could not achieve the 300,000 mark after 1933. The resort of harried composers was to copyright law; and decisions that both unauthorized broadcasting (*Jerome H. Remick & Co. v. American Automobile Accessories Co.*, 5 F. 2d 411 [C.A. 6th, 1925]) and unauthorized commercial reception (*Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191 [1933], and *Society of European S.A.A.C. v. New York Hotel Statler Co.*, 19 F. Supp. 1 [S.D.N.Y., 1937]) were acts infringing their copyrights made possible the exacting of fees from this new group of commercial users which more than adequately compensated them for losses in other areas. Cohn, *Music, Radio Broadcasters, and the Sherman Act*, 29 *Geo. L.J.* 407 (1941), contains the history and statistics.

<sup>9</sup> Works which are to be used solely in television broadcasts may be registered under the simple requirements of Section 12 which pertains to unpublished works, 61 Stat. 652 (1947), as amended, 17 U.S.C.A. § 12 (Supp., 1949), since telecasting will probably not constitute a publication within the meaning of the Act or the law of literary property. Cases cited notes 20-22 *infra*.

Section 12 provides the same protection for unpublished works as is afforded those published. *Shilkret v. Musicraft Records, Inc.*, 131 F. 2d 929 (C.A. 2d, 1942). Regulations of the Copyright Office permit registration of dramatic scripts and motion pictures designed for television transmission. 37 Code Fed. Regs. §§ 202.5, 202.13, 202.14 (1949).

<sup>10</sup> 61 Stat. 652 (1947), as amended, 17 U.S.C.A. (Supp., 1949).

an unlicensed reproduction or public performance of his work<sup>11</sup> or may assign his rights to the telecaster.<sup>12</sup> Commentators agree, however, that television broadcasts are themselves too ephemeral to come within the scope of the Act.<sup>13</sup>

Where the protection of the Copyright Act is not available, or where the creator has failed to take advantage of it, he may turn to common-law property rights.<sup>14</sup> If his work falls within the broad category of literary property<sup>15</sup> and no publication or dedication to the public is established,<sup>16</sup> he too will be protected from infringing acts. Although some broadcast material, such as news and sports events, may not in itself be subject to common-law property rights,<sup>17</sup> it has been well argued that telecasts which entail much effort, artistic

<sup>11</sup> In the case of musical compositions the performance must be for profit as well as public. Copyright Act, 61 Stat. 652 (1947), as amended, 17 U.S.C.A. § 1(e) (Supp., 1949).

<sup>12</sup> 61 Stat. 652 (1947), as amended, 17 U.S.C.A. § 28 (Supp., 1949). However, recent decisions may have qualified the rights of an owner of a large number of copyrights. Cases cited note 63 *infra*.

<sup>13</sup> The major obstacles appear to be difficulties in registration, 61 Stat. 652 (1947), as amended, 17 U.S.C.A. § 11, §§ 209-213 (Supp., 1949), and the improbability of bringing telecasts within even the court's liberal interpretation of "all the writings of an author" which phrase determines the coverage of the Copyright Act, 61 Stat. 652 (1947), as amended, 17 U.S.C.A. § 4 (Supp., 1949).

<sup>14</sup> Warner, Protection of the Content of Radio and Television Programs by Common Law Copyright, 3 Vand. L. Rev. 209 (1950); Cooper, The Limited Application of Property Concepts in the Law of Television, 10 Fed. Comm. B.J. 132 (1949); The Property Right in a Sports Telecast, 35 Va. L. Rev. 246 (1949); and Solinger, Unauthorized Use of Television Broadcasts, 48 Col. L. Rev. 848 (1949).

The availability of other theories, such as unfair competition and equitable servitudes, which are outside the scope of this paper, is also dependent upon an ability to prove an invasion of common-law property rights. *R.C.A. Mfg. Co., Inc. v. Whiteman*, 114 F. 2d 86, 88, 89 (C.A. 2d, 1940).

<sup>15</sup> "[A]n individual has a property right in his original, unpublished, intellectual productions." *Ketcham v. New York World's Fair, Inc.*, 34 F. Supp. 657, 658 (E.D.N.Y., 1940), *aff'd* 119 F. 2d 422 (C.A. 2d, 1941). For an almost exhaustive list of the works in which a common-law copyright has been found, including everything from a musical laugh to a ticker-tape quotation, see Warner, *op. cit. supra* note 14, at 211-13.

<sup>16</sup> *Stanley v. Columbia Broadcasting System, Inc.*, 192 P. 2d 495 (Cal. App., 1948), *aff'd* 208 P. 2d 9 (Cal., 1949); *Wheaton v. Peters*, 8 Pet. (U.S.) 591 (1834).

<sup>17</sup> *International News Service v. Associated Press*, 248 U.S. 215 (1918); *Associated Press v. KVOS, Inc.*, 80 F. 2d 575 (C.A. 9th, 1935), *rev'd on jurisdictional grounds*, 299 U.S. 269 (1936). In view of the finding of a quasi-property right as against a competitor in these cases, there is reason to question whether the commentators are correct in saying that news is entirely in the public domain.

As for sports events, there is a dispute as to whether or not there may be a property right in the exclusive privilege to broadcast a play-by-play description. *National Exhibition Co. v. Tele-Flash, Inc.*, 24 F. Supp. 488 (S.D.N.Y., 1936) stands for the proposition that there is none, while in both *Twentieth Century Sporting Club v. Transradio Press Service, Inc.*, 165 N.Y. Misc. 71, 300 N.Y. Supp. 159 (S. Ct., 1937), and *Pittsburgh Athletic Co. v. KQV Broadcasting Co.*, 24 F. Supp. 490 (W.D. Pa., 1938), the courts found a protectable property right in such a privilege. Cf. *Rudolph Mayer Pictures, Inc. v. Pathé News, Inc.*, 235 App. Div. 774, 255 N.Y. Supp. 1016 (1st Dep't, 1932), without opinion, and comment thereon in Solinger, *Unauthorized Use of Television Broadcasts*, 48 Col. L. Rev. 848, 858 (1948).

skill, and equipment, are "original unpublished, intellectual productions"<sup>18</sup> deserving of common-law copyright protection.<sup>19</sup> Surprisingly enough, the requirement of nonpublication can be fulfilled without great difficulty, for it has been fairly well established that neither a radio broadcast<sup>20</sup> nor the exhibition of a movie<sup>21</sup> constitutes a dedication sufficient to deprive an author of his common-law copyright.<sup>22</sup> Certainly television can be analogized to one of these.<sup>23</sup>

It is, then, quite possible that every obstacle to obtaining protection under either common-law or statutory copyright can be hurdled. All that remains is proof that the defendant has infringed the copyright by public performance, rendition, or reproduction of plaintiff's literary property.<sup>24</sup> Yet, paradoxically

<sup>18</sup> *Ketchum v. New York World's Fair, Inc.*, 34 F. Supp. 657 (E.D.N.Y., 1940), aff'd 119 F. 2d 422 (C.A. 2d, 1941).

<sup>19</sup> "Any television program, including a news, sports, or dramatic show . . . requires the use of technical and artistic skill—viz., lighting effects, camera angles, integration and synthesis of sight and sound to produce a finished television production." Warner, *op. cit. supra* note 14, at 216. Despite vigorous arguments in this article and in *The Property Right in a Sports Telecast*, 35 Va. L. Rev. 246, 256 (1949), there is good reason to believe that the law is contrary. The evanescence of a telecast would seem to distinguish it from photographs, cf. *Metter v. Los Angeles Examiner*, 35 Cal. App. 2d 304, 95 P. 2d 491 (1939), and photoplays, *Universal Film Mfg. Co. v. Copperman*, 218 Fed. 577 (C.A. 2d, 1914), to which they have been analogized. In a similar situation Judge Learned Hand in *R.C.A. Mfg. Co., Inc. v. Whiteman*, 114 F. 2d 86, 88 (C.A. 2d, 1940), had serious doubts as to whether a record manufacturer has any literary property in his skillfully produced records. Nevertheless, the injunctions restraining exhibition of the Louis-Walcott fight telecast must have been based upon some kind of property right in the event or telecast, cases cited note 74 *infra*. Besides, wise telecasters may simply incorporate copyrighted material into their uncopyrightable productions (e.g., musical compositions with sports events) in such a way as to protect them from piracy.

<sup>20</sup> *Stanley v. Columbia Broadcasting System, Inc.*, 192 P. 2d 495 (Cal. App., 1948), aff'd 208 P. 2d 9 (Cal., 1949); *Waring v. Dunlea*, 26 F. Supp. 338 (E.D.N.C., 1939); *Uproar Co. v. National Broadcasting Co.*, 8 F. Supp. 858 (Mass., 1934), modified without discussion on this point, 81 F. 2d 373 (C.A. 1st, 1936), cert. denied 298 U.S. 670 (1936). But see *Blanc v. Lantz*, 83 U.S.P.Q. 137 (Cal. Super. Ct., 1949).

<sup>21</sup> *Patterson v. Century Productions, Inc.*, 93 F. 2d 489 (C.A. 2d, 1937); *M-G-M Distributing Corp. v. Bijou Theatre Co.*, 59 F. 2d 70 (C.A. 1st, 1932); *Universal Film Mfg. Co. v. Copperman*, 218 Fed. 577 (C.A. 2d, 1914). But see *Blanc v. Lantz*, 83 U.S.P.Q. 137 (Cal. Super. Ct., 1947).

<sup>22</sup> Among analogous acts which have been held not to constitute publication are the production of a play, *Ferris v. Frohman*, 223 U.S. 424 (1912); the delivery of a lecture, *Nutt v. National Institute, Inc.*, for the Improvement of Memory, 31 F. 2d 236 (C.A. 2d, 1929); the playing of a musical composition, *McCarthy & Fischer, Inc. v. White*, 259 Fed. 364 (S.D.N.Y., 1919); exhibition of a painting, *American Tobacco Co. v. Werckmeister*, 207 U.S. 284 (1907).

<sup>23</sup> Such has been the approach in major articles on the subject. Authorities cited note 14 *supra*.

<sup>24</sup> "Copyright in any form, whether statutory or at common law, is a monopoly; it consists only in the power to prevent others from reproducing the copyrighted work. W.B.O. Broadcasting Corporation has never invaded any such right of Whiteman; they have never copied his performance at all; they have merely used the copies which he and R.C.A. Manufacturing Company, Inc., made and distributed." *R.C.A. Mfg. Co. v. Whiteman*, 114 F. 2d 86, 88 (C.A. 2d, 1940). Judge Hand's particular application of this principle may be considered incorrect,

enough, this obvious requirement may prove an insuperable barrier. Clearly, one who invites his friends into his home for an evening of "televieing" has violated no right of the telecaster or copyright owner.<sup>25</sup> At first blush, the act of a tavern keeper or hotel owner who permits his patrons to view his receiving set appears equally innocuous. However, whether or not such an act constitutes a copyright infringement depends largely upon the courts' interpretation of the concept "performance."<sup>26</sup> To predict their conclusion it is necessary to analyze carefully the application of that concept in the field of radio law where practically identical issues have already been resolved.

Historically, extension of the complex concept "public performance for profit"<sup>27</sup> to commercial radio broadcasting followed a logically reverse order; and only after determinations that broadcasts were "for profit"<sup>28</sup> and "public,"<sup>29</sup> did an examination of the "performance" issue occur. In earlier cases problems of performance were not involved, the infringing radio stations having themselves been responsible for playing the musical compositions. Whether a broadcast alone could constitute a performance was raised sharply, however, in

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*Waring v. WDAS Station, Inc.*, 327 Pa. 433, 194 Atl. 631 (1937); but the principle itself seems inherent in the concept "copyright." It is for this reason that courts have been forced to fit radio reception into an acceptable definition of performance. Nor is it difficult to sympathize with their confusion in attempting to give the act of turning a receiving set knob the indicia of reproduction.

<sup>25</sup> "[T]hose who listen do not perform, and therefore do not infringe." *Jerome H. Remick & Co. v. General Electric Co.*, 16 F. 2d 829 (S.D.N.Y., 1926). "He who only hears the performance is not performing." *Buck v. Duncan*, 32 F. 2d 366, 367 (W.D. Mo., 1929). "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." *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191, 196 (1931). "[T]he reception of a broadcast program by one who listens to it is not any part of the performance thereof." *Society of European S.A.A.C. v. New York Hotel Statler Co.*, 19 F. Supp. 1, 4 (S.D.N.Y., 1937).

<sup>26</sup> Insofar as statutory copyrights are concerned, the salient portions of the Copyright Act, 61 Stat. 652 (1947), as amended, 17 U.S.C.A. § 1 (Supp., 1949), read as follows: "1. Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right: . . . (d) To perform or represent the copyrighted work publicly if it be a drama . . . (e) To perform the copyrighted work publicly for profit if it be a musical composition."

<sup>27</sup> *Ibid.*

<sup>28</sup> Shortly after the first commercial radio station (KDKA, erected in Pittsburgh in 1920) had come into existence, the unauthorized broadcast of a copyrighted song was held to be "for profit." *Witmark & Sons v. L. Bamberger & Co.*, 291 Fed. 776 (N.J., 1923). Being a contest solely of this narrow issue, the case was easily decided upon the authority of *Herbert v. The Shanley*, 242 U.S. 591 (1917), in which Justice Holmes, overruling *John Church Co. v. Hilliard Hotel Co.*, 221 Fed. 229 (C.C.N.Y., 1915), found it unnecessary that a direct charge be made for atmosphere music in a hotel dining room to make its performance "for profit," the indirect advantage to the hotel owner in terms of increased patronage being sufficient.

<sup>29</sup> In *Jerome H. Remick & Co. v. American Automobile Accessories Co.*, 5 F. 2d 411, 412 (C.A. 6th, 1925), the court, conceding that radio listeners do not congregate in one place, nevertheless concluded that radio broadcasting was "public" since it was intended to reach "a very much larger number of the public at the moment of rendition than any other medium of performance."

*Jerome H. Remick & Co. v. General Electric Co.*<sup>30</sup> where the broadcaster had "picked up" an orchestra's unauthorized rendition. An injunction pendente lite had been denied on the ground that defendant broadcaster was simply making "a given performance available to a greater number of persons, who, but for his efforts, would not hear it."<sup>31</sup> Nevertheless, on final hearing the court concluded that defendant broadcaster's part in the performance was something more than the mere opening of a window (to which it had been analogized) and that he was liable as a "contributory infringer."<sup>32</sup> Clearly it was not decided that the broadcast was itself a performance, but simply that the role of the broadcaster in the infringement of the copyright was sufficiently important to make him equally liable with the performing artists.<sup>33</sup>

Appearing in a context more closely analogous to the subject at hand, the question as to what constitutes a performance again became significant in *Buck v. Debaum*<sup>34</sup> where the copyright owner claimed infringement by a cafe proprietor who had tuned in the licensed broadcast of a copyrighted song for the entertainment of his patrons. Assuming in light of prior decisions that such a use was public and for profit, the court nevertheless held that by authorizing the broadcast the plaintiff had "impliedly sanctioned" all radio reception.<sup>35</sup> In finding that "the operation of the radio receiving set in effect does nothing more than one would do who opened a window and permitted the strain of music of a passing band to come within"<sup>36</sup> the court appeared to negate the idea that radio reception could be performance in itself. Strengthening this interpretation is the court's approval of *Buck v. Duncan*,<sup>37</sup> a contemporaneous decision in which radio reception was expressly held not to be a performance within the terms of the Copyright Act.<sup>38</sup>

<sup>30</sup> 16 F. 2d 829 (S.D.N.Y., 1926).

<sup>31</sup> *Jerome H. Remick & Co. v. General Electric Co.*, 4 F. 2d 160, 160 (S.D.N.Y., 1924).

<sup>32</sup> "It is not enough to say that the broadcaster merely opens the window and the orchestra does the rest. On the contrary, the acts of the broadcaster are found in the reaction 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." *Jerome H. Remick & Co. v. General Electric Co.*, 16 F. 2d 829, 829 (S.D.N.Y., 1926).

<sup>33</sup> It is equally clear that the court, in using the phrase "contributory infringer," did not imply that the broadcaster would not have been liable if the orchestra had not itself been infringing. The opinion explicitly states that even if there had been no audience in the ballroom, the broadcaster's acts would have been a violation of plaintiff's copyright.

<sup>34</sup> 40 F. 2d 734 (S.D. Cal., 1929).

<sup>35</sup> "[W]hen plaintiffs licensed the broadcasting station to disseminate the 'Indian Love Call,' they impliedly sanctioned and consented to any 'pick up' out of the air that was possible in radio reception." *Ibid.*, at 735.

<sup>36</sup> *Ibid.*, at 735.

<sup>37</sup> 32 F. 2d 366 (W.D. Mo., 1929).

<sup>38</sup> "The right to perform a musical composition does not carry with it a proprietary interest in the waves that go out upon the air or upon the ether. They are as much the common property of all as the sunshine and the zephyrs." *Ibid.*, at 367.

The *Duncan* case involved reception of unauthorized broadcasts of ASCAP's copyrighted songs by a master-receiving set wired to loudspeakers in the private and public rooms of a hotel. It was subsequently reversed on appeal sub nom. *Buck v. Jewell-LaSalle Realty Co.*<sup>39</sup> where, in answering the contention of defense counsel that a single broadcast could be but a single performance under the copyright statute, Justice Brandeis wrote: "[N]othing in the Act circumscribes the meaning to be attributed to the term 'performance,' or prevents a single rendition of a copyrighted selection from resulting in more than one public performance for profit."<sup>40</sup> By thus subscribing to the doctrine of "multiple performance," the Supreme Court succeeded in breaking a single broadcast into three separate and potentially infringing performances; that of the performing artist to the studio audience, that of the broadcaster to the radio audience, and that of one who tunes in the broadcast. Under the "multiple performance" analysis, where chain broadcasting is involved, infringing performances have been held to be as numerous as the stations which participate.<sup>41</sup> A network broadcast received in enough public places could result in literally thousands of performances, each a basis for recovery.

Despite the breadth of protection afforded by the *LaSalle* opinion, one escape had been left open. In a footnote dictum Justice Brandeis hesitatingly sanctioned the position of *Buck v. Debaum* by stating that if the broadcast had been authorized, a license for commercial reception might have been implied.<sup>42</sup> This gap has been closed, however, by the opinion in *Society of European S.A.A.C. v. New York Hotel Statler*,<sup>43</sup> where, in a fact-situation almost identical with that of the *LaSalle* case except that the broadcast was licensed, the reception was held to constitute an infringement. Much weight might be placed upon the fact that the copyright owners, following Brandeis' hint, had expressly restricted the broadcaster's license so as to prohibit commercial reception;<sup>44</sup> but the district judge treated this clause as mere redundancy.<sup>45</sup>

With the closing of this gap, however, another was revealed which portends to be of even greater value to those commercial users who employ home-size

<sup>39</sup> 283 U.S. 191 (1931).

<sup>40</sup> *Ibid.*, at 198.

<sup>41</sup> "Plaintiff's composition was performed on three occasions by the National Broadcasting Company with chain hook-ups of 67, 66, and 85 stations, in all 218. Damages should be awarded on the theory that there were 218 performances, not three." *Law v. National Broadcasting Co.*, 51 F. Supp. 798, 799 (S.D.N.Y., 1943).

<sup>42</sup> *Buck v. Jewell-LaSalle Realty*, 283 U.S. 191, 199 n. 5 (1931).

<sup>43</sup> 19 F. Supp. 1 (S.D.N.Y., 1937).

<sup>44</sup> "Nothing herein contained shall be construed as permitting the licensee either expressly or by implication to grant to others the right to reproduce or perform publicly for profit or otherwise . . . any of said compositions . . . or in any way permitting any receiver of the broadcast of any of said compositions or works to publicly perform or reproduce the same for profit or otherwise." *Ibid.*, at 3.

<sup>45</sup> "It seems to me that the effect of the addition of this limitation to the license was merely to add emphasis to the fact that the license was given to N.B.C. solely for its own use, and hence that the limitation was a redundancy." *Ibid.*, at 6.

television or radio receivers unaided by other reproducing devices. In the *Hotel Statler* case it was stated:

[T]he reception of a broadcast program by one who listens to it is not any part of the performance thereof. Indeed both physically and mentally it is about as far removed from performance as can well be imagined. . . . I find that *when the owner of a hotel does as much as is done in the Hotel Pennsylvania to promote the reproduction within its walls of a broadcast program received by it*, it must be considered as giving a performance within the principle laid down by the Supreme Court in the *LaSalle Hotel* case . . . *copyright infringement depends, not on the broadcaster's rights, but on the receiver's acts.*<sup>46</sup>

Here, then, the existence of a performance is to be determined by the effort employed in reaping commercial advantage from another's work and by the extent to which those efforts have expanded the audience witnessing that work,<sup>47</sup> not by a set of purely verbal definitions making reception a performance per se. Under the *LaSalle* doctrine one who invites friends into his home to listen to his receiving set is shielded from liability because his "performance" is neither "public" nor "for profit," while in the *Hotel Statler* case he is not an infringer because he is not performing at all; he is merely listening to his radio.<sup>48</sup> This latter criterion depends upon a concrete determination as to where on the continuum between the extremes of passive listening and active performance the questioned acts of the defendant are located. Specifically, it represents a step on the road to repudiation of the "multiple performance" doctrine and return to the theory of *Remick v. General Electric Co.*<sup>49</sup> under which liability is dependent upon the degree to which the efforts of one receiving a broadcast have contributed to an invasion of another's copyright.

Illustrating the significance of this difference in definition, British and Canadian cases provide excellent examples of the consequences of extending the general language in *Buck v. Jewell-LaSalle Realty Co.* Although slower to determine that either radio broadcasting<sup>50</sup> or radio reception<sup>51</sup> was a public performance, the English judiciary arrived, three years earlier, at a result similar to that of *Society of European S.A.A.C. v. New York Hotel Statler*.<sup>52</sup> In *Performing Right Society v. Hammond's Bradford Brewery*,<sup>53</sup> commercial reception of an

<sup>46</sup> *Ibid.*, at 4 (italics added).

<sup>47</sup> By taking into account the effort required and the expansion achieved, this criterion permits those uses of broadcast material which are relatively innocuous and, in a sense, within the risk a copyright owner takes by authorizing the original broadcast.

<sup>48</sup> Cases cited note 25 supra.

<sup>49</sup> See text at note 31 supra.

<sup>50</sup> *Messenger v. British Broadcasting Company, Ltd.*, [1927] 2 K.B. 543, preceded by an Australian case, *Chappell & Co. v. Associated Radio Co. of Australia*, [1925] Vict. L.R. 359, which cited with approval *Remick v. American Automobile Accessories Co.*, 5 F. 2d 411 (C.A. 6th, 1925).

<sup>51</sup> *Performing Right Society, Ltd. v. Hammond's Bradford Brewery Co.*, [1934] 1 Ch. 121. The British Copyright Act, 1 & 2 Geo. V, c. 46 (1911), is very similar to the American excepting the absence of a requirement that infringing performances of a musical composition be for profit. Cf. *Ernest Turner Electrical Instruments v. Performing Right Society*, [1943] Ch. Div. 167.

<sup>52</sup> See text at note 43 supra.

<sup>53</sup> [1934] 1 Ch. 121.



authorized broadcast of copyrighted music was held to be an infringement. The George Hotel had attached loudspeakers to its receiving set for its guests who heard B.B.C.'s broadcast of plaintiff's copyrighted compositions. In the opinion of Lord Hanworth, M.R., the hotel's liability for infringement resulted entirely from the fact that without this attachment the broadcast could not have been heard beyond the limited circle of those who could gather about the receiving set.<sup>54</sup> Employing analogy reminiscent of the opinion in *Remick v. General Electric Co.*, he wrote:

It is not as if the guests at the hotel merely looked in at the window at a peepshow which was there for all and sundry to see, but it was by the authority and at the instance of the proprietor of the hotel that steps were taken to render the sounds audible to the additional audience.<sup>55</sup>

Unfortunately the less restricted language of the other Lord Justices spelled out an adherence to the "multiple performance" theory of *Buck v. Jewell-LaSalle Realty Co.*<sup>56</sup> Illustrative of the absurd results of such a doctrine is *Performing Right Society v. Camelo*<sup>57</sup> where defendant was held liable for an infringing "performance" which occurred when copyrighted music from the receiving set in his private living room was heard by the patrons of an adjoining restaurant.

Canada's copyright law might well have experienced a similar fate, a Quebec court having echoed Justice Brandeis' conclusion that the reception of radio waves constitutes a new performance of the broadcast material.<sup>58</sup> Before the *Camelo* type of situation presented itself, however, a wise Canadian legislature had amended its copyright statute to read:

In respect of public performances by means of any radio receiving set or gramophone in any place other than a theatre which is ordinarily and regularly used for entertainments to which an admission charge is made, no fees, charges, or royalties shall be collectible from the owner or user of the radio receiving set or gramophone but the Copyright Appeal Board shall . . . provide for the collection in advance from radio broadcasting stations or gramophone manufacturers . . . of fees . . . appropriate to the new conditions produced by the provisions of this subsection.<sup>59</sup>

<sup>54</sup> "By means of an installation there which included a loudspeaker the radio waves received at the George Hotel were converted into sound, audible not merely to the domestic circle of the George Hotel but to all its visitors. Without such an installation the general company of the hotel would not have had the opportunity of hearing what had been broadcast." *Ibid.*, at 132.

<sup>55</sup> *Ibid.*, at 134.

<sup>56</sup> See text at note 39 supra.

<sup>57</sup> [1936] 3 All E.R. 557 (Ch.). See *Performing Right Society v. George* (April 30, 1936, unreported), cited in the *Camelo* case, in which another English judge reached an identical conclusion on the basis of the decision in *Performing Right Society v. Hammond's Bradford Brewery Co.*, [1934] 1 Ch. 121.

<sup>58</sup> *Canadian Performing Right Society v. Ford Hotel*, [1935] 2 D.L.R. 391 (Quebec Super. Ct.).

<sup>59</sup> The Copyright Amendment Act, 1938, 2 Geo. VI, c. 27, § 4 (Canada, 1938). The vague attempt at definition of "theatre" is perhaps deserving of criticism.

An even wiser Privy Council concluded in the case of *Vigneux v. Canadian Performing Right Society*<sup>60</sup> that "the statutory license (or in other words the right to perform) which the subsection confers is in no way conditional upon payment of the charges . . . by broadcasting stations or gramophone manufacturers."

Still uncertain is the outcome of "multiple performance" theory in the federal courts. But even if it were fully sustained, there is serious question whether many copyright owners could avail themselves of its benefits. The difficulties inherent in the detection of copyright violations have made it impossible for unorganized individual owners effectively to enforce their rights. In the past, resort has been had to organized combinations capable of providing the necessary policing mechanism. Recent decisions, however, have greatly attenuated the powers of such groups. Relying in great part upon their legal position as a result of the *LaSalle* and *Hotel Statler* decisions, ASCAP<sup>61</sup> had, during the ten-year period succeeding the *Hotel Statler* case, been able to collect from three to seven million dollars annually in license fees from over twenty-nine thousand establishments, including radio stations, hotels, bars, restaurants, theaters, and dance halls.<sup>62</sup> So strong had this monopoly power become that the courts which had given with one hand were compelled to take away with the other. In 1948 two district judges held ASCAP's licensing system to be violative of the anti-trust laws<sup>63</sup> and may have so thoroughly emasculated its ability to enforce copyrights<sup>64</sup> that composers, authors, and publishers eventually will be no better off than they were in the chaotic years before its founding in 1914.<sup>65</sup>

<sup>60</sup> [1945] 1 All E.R. 432, 438 (A.C.). The result ensued that a juke box operator was not liable for what would have constituted an infringing performance before enactment of the statute, although the record manufacturer had no license from the copyright owner.

<sup>61</sup> ASCAP is essentially an association of composers and publishers banded together for the more efficient protection of their copyrights in musical compositions. Its central functions are policing infringers and licensing users of copyrighted popular music.

<sup>62</sup> *Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 889, decree modified, 80 F. Supp. 900 (S.D.N.Y., 1948). *Cohn, Music, Radio Broadcasters, and the Sherman Act*, 29 Geo. L.J. 407 (1941), exhaustively explores the financial as well as the legal history of ASCAP.

<sup>63</sup> *Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 889 (S.D.N.Y., 1948), and *Witmark & Sons v. Jensen*, 80 F. Supp. 843 (S.D. Minn., 1948).

<sup>64</sup> *Witmark & Sons v. Jensen*, 80 F. Supp. 843, 846 (S.D. Minn., 1948), denies equitable relief for infringement of his copyright to a member of ASCAP on the ground that "notwithstanding their seeming beneficent purposes, plaintiffs and their associates through Ascap [sic] have obtained by these methods and practices . . . monopolistic control over copyrighted films in which their music is integrated." Although ASCAP's policy of "blanket licensing" was the major violation of the anti-trust laws found by these courts, both judges admitted that licensing on a "per piece" basis is wholly unfeasible and could be ruinous to movie exhibitors. *Copyright Pooling and the Anti-trust Laws*, 17 Univ. Chi. L. Rev. 183 (1949) and *Music Copyright Associations and the Anti-Trust Laws*, 25 Ind. L.J. 168 (1950), present extensive studies of the monopoly problems involved.

<sup>65</sup> Of course, the central investigatory organization may continue to report infringements; but without power to enforce blanket licensing this remnant will hardly be useful (ASCAP makes very little from infringement suits), and it is quite likely that the courts will extend the

Despite uncertainty as to the position of copyright combines,<sup>66</sup> however, at least one group of copyright holders is capable of maintaining an efficient enforcement scheme without fear of anti-trust prosecution.<sup>67</sup> There can be no doubt that this group, individual telecasters,<sup>68</sup> would benefit by application of multiple performance theory to the field of television.

Evaluation of the interests contingent upon such an application may be greatly simplified by reflecting on the economic position in which extension of multiple performance theory would place copyright owners. It appears certain that program sponsors will foot at least part of the bill for audience losses which television produces in other fields;<sup>69</sup> and hence if allowed to exact license fees from other commercial users of telecasts, creators will be exacting what may in fact amount to a second payment. When the problem is viewed in this perspective, there seems little justification for extending monopoly power based upon such a distortion of terms as the multiple performance theory represents.

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Alden-Rochelle reasoning to licensing practices outside the motion picture industry, prohibitions similar to those applied to ASCAP in the Witmark case having been placed upon Dramatists' Guild of the Authors' League of America. *Ring v. Spina*, 84 F. Supp. 403 (S.D.N.Y., 1949).

<sup>66</sup> Perhaps the consent decree of 1950 under which ASCAP is required, inter alia, to "blanket license" television and movie producers will immunize the Society's activities from attack as violative of the Sherman Act. *N.Y. Times*, p. 34, col. 5 (Mar. 15, 1950); cf. *Remick Music Corp. v. Interstate Hotel Co.*, 58 F. Supp. 523 (Neb., 1944). However, the 1941 consent decree requiring ASCAP to permit its members to offer their works on a "per piece" basis as individual bargaining units did not have this effect in the Alden-Rochelle and Witmark cases; and far from following the reasoning of Alden-Rochelle, the 1950 decree appears to sanction practices there repudiated (although it contains language similar to the final decree in that case). Such action on the part of the Justice Department may be realistic and commendable but will probably not protect ASCAP or other "copyright pools" from private anti-trust suits. 38 Stat. 731 (1914), as amended, 15 U.S.C.A. § 15 (1941). It would seem more desirable to obtain legislative sanction for the recognition of monopoly power.

<sup>67</sup> Section 1 of the Sherman Act being inapplicable because the corporate or individual telecaster need not indulge in conspiracy, mere enforcement of a monopoly granted by the legislature does not constitute a violation of Section 2. 26 Stat. 209 (1890), as amended, 15 U.S.C.A. §§ 1, 2 (1951); see *Buck v. Newsreel, Inc.*, 25 F. Supp. 787 (Mass., 1938) and cases there cited.

<sup>68</sup> See note 19 supra.

<sup>69</sup> Judging from the fabulous sums that sponsors have been willing to pay for television time and rights, neither telecasters nor sports promoters will have much need for testing their property rights which in many cases are still unsettled and uncertain. See note 19 supra. "[T]he Gillette Safety Razor Company . . . signed up to pay \$7,370,000 over the next six seasons for All-Star world series radio and television rights." Vaughan, *Baseball Deal with Video Pension Saver*, *Chicago Daily Tribune*, pt. 3, p. 1, col. 7 (Dec. 28, 1950). Although telecasting reduced gate receipts from the recent Louis-Charles fight by \$100,000 below the lowest of Louis' previous championship fights, the difference was more than made up by the \$140,000 which Pabst Blue Ribbon paid for television rights. *TV Ruins the Gate But Boosts the Take*, *Business Week* 85 (Oct. 7, 1950). Perhaps the fact that sports events have been the greatest attractions on television's bill of fare thus far accounts for the relative lack of litigation. It is difficult to believe, however, that statutory copyright owners, thinking their rights well-established by *Buck v. Jewell-LaSalle Realty Co.*, will resist the temptation to employ a lucrative licensing system.

Rather, efforts should be directed toward correcting the distortion insofar as possible.

If Congress should succumb to the ever-present pressures for copyright revision reflected in recent decisions adverse to ASCAP, an excellent prototype for legislative action is the Canadian statute.<sup>70</sup> Not only does it modify the consequences of multiple performance theory by shifting the entire burden of copyright licenses to broadcasters and record manufacturers, but, at the same time, it gives legal sanction to copyright pools, without which many creators would be wholly unable to enforce their rights. Private parties dissatisfied with a copyright society's published fee schedules may apply to the Copyright Appeal Board which, in determining the reasonableness of fees, is authorized to consider losses imposed upon owners by statute. Through a simpler licensing and collecting system under governmental supervision, copyright monopoly is prevented from becoming an instrument "of oppression and extortion."<sup>71</sup> It is highly improbable that such legislation will be forthcoming. Despite persistent pressure Congress has not altered substantive copyright law for almost half a century;<sup>72</sup> and the change proposed represents so radical a departure from traditional copyright law that legislative inertia would be even more difficult to overcome.

It is the judiciary, then, which must determine when television reception constitutes copyright infringement. Having been committed by *Jewell-LaSalle Realty* to certain aspects of multiple performance doctrine, the courts cannot reject it wholly. At their disposal, however, are the interpretive tools with whose help it may be supplanted by a factual criterion determining whether reception constitutes infringement by the degree to which defendant's efforts have expanded the audience viewing a telecast. Under this criterion the decisions in *Buck v. Debaum* and *Buck v. Jewell-LaSalle Realty Co.* are in no way incompatible. On the continuum between opening a window and broadcasting to the world, reception solely by a home-size receiver lies within the realm of

<sup>70</sup> 2 Geo. VI, c. 27 (Canada, 1938) further provides in Section 1 that Section 10(1) of the Copyright Act, 1931, 22 & 23 Geo. V, c. 8 (Canada, 1931), be amended to read: "[E]ach society, association, or company which carries on in Canada the business of acquiring copyrights of dramatico-musical or musical works, . . . in current use in respect of which such society . . . has authority to issue or grant performing licenses or to collect fees, charges or royalties for or in respect of the performance of its works in Canada." In Sections 10A and 10B the amended statute provides for a Copyright Appeal Board empowered to hold hearings for the purpose of determining the reasonableness of rates set by the copyright societies and to alter the rate schedules in conformity with its findings. Copyright Amendment Act, 1936, 1 Edw. VIII, c. 28, § 2 (Canada, 1936). Of course, the coverage of the statute must be greatly expanded to encompass both common-law and statutory performing rights in practically all subject matters; it is the general framework of the Canadian act which is deserving of imitation.

<sup>71</sup> *Hanfstaengl v. Empire Palace*, [1894] 3 Ch. 109, 128.

<sup>72</sup> Responsibility for the recent judicial reaction against the power of copyright combines might well be laid at the feet of the legislators who failed to act when the time was ripe and the power not yet oppressive. The Performing Rights in a Musical Composition, 27 Va. L. Rev. 378, 384 (1941), analyzes the legislative attempts as of that date.

non-infringing acts, while reception over huge master receiving sets connected to hundreds of loudspeakers stands nearer the opposite pole in the realm of the infringing.<sup>73</sup>

Already, in *Louis v. Richman*,<sup>74</sup> a Pennsylvania court seems to have adopted this criterion by refusing to enjoin the showing of a sports telecast in commercial establishments employing screens no larger than eighteen by twenty-four inches and making no direct admission charge. Certainly, the judge's willingness to prohibit the use of television in a large hotel, although not in a bar and grill (a "poor man's club," as he called it) represents a justifiable restriction of the copyright owner's already over-extended power. It is submitted that, if courts follow the lead of *Louis v. Richman*<sup>75</sup> and the *Hotel Statler* cases in abandoning the absolutistic principle of multiple performance before they are irrevocably committed, the burden of copyright monopolies will not fall so heavily upon the society which grants them.

### RACIAL VIOLENCE AND CIVIL RIGHTS LAW ENFORCEMENT

The history of racial violence in the United States, filled with accounts of costly race riots and lynchings, is uncomfortably familiar.<sup>1</sup> Increasingly urgent is the question whether a great body of civil rights law must remain unenforced because of the specter of such violence.<sup>2</sup>

<sup>73</sup> *Society of European S.A.A.C. v. New York Hotel Statler*, 19 F. Supp. 1, 2-3 (S.D.N.Y., 1937), contains a most impressive description of the trouble and expense to which the Hotel Pennsylvania went in "piping" broadcasts to its 1900 guest rooms.

<sup>74</sup> Equity No. 1803, Pa. C.P. (Philadelphia, June 23, 1948). See *Louis v. Friedman*, Equity No. 1804, Pa. C.P. (Philadelphia, June 23, 1948) (injunction against exhibition of same telecast in a motion picture theater); *Louis v. California Products*, N.Y. S. Ct. (June 24, 1948) (same, against a ballroom operator); *Twentieth Century Sporting Club, Inc. v. Mass. Charitable Mechanics Association*, Equity No. 60230, Mass. Super. Ct. (June 22, 1948) (same); and National Broadcasting Co. pamphlet entitled: "Proceedings in Philadelphia Actions in C.P. No. 1, June Term, 1948, to enjoin commercial uses of the Louis-Walcott Fight."

<sup>75</sup> Equity No. 1803, Pa. C.P. (Philadelphia, June 23, 1948), unreported.

<sup>1</sup> Consult Myrdal, *An American Dilemma* 550-569 (1944); Chicago Commission on Race Relations, *The Negro in Chicago* (1922); Lee and Humphrey, *Race Riot* (1943); Raper, *The Tragedy of Lynching* (1933).

Racial violence is usually treated as an unmitigated evil. However, some observers feel that it may have positive value as a catalyst for progress in race relations. Myrdal, *Social Trends in America and Strategic Approaches to the Negro Problem*, 9 *Phylon* 196, 208 (1948). It may also provide an opportunity for minority group resistance to aggression, thus encouraging minority group members to establish positive identification with their group through collective action. Fisher, *The Problem of Violence, Observations on Race Conflict in Los Angeles* 17, 18 (*American Council on Race Relations*, 1947); Johnson, *Patterns of Negro Segregation* 313-15 (1943). Compare Sartre, *Anti-Semite and Jew* 59-141 (1948) and Broyard, *Portrait of the Inauthentic Negro*, 10 *Commentary*, No. 1, at 56 (July, 1950).

<sup>2</sup> Mangum, *The Legal Status of the Negro* 26 ff. (1940) contains a summary of the civil rights legislation passed in many northern states after post-Civil-War federal civil rights legislation was held unconstitutional. Much of the state legislation has ample enforcement provisions. An Illinois statute, e.g., provides that all persons are entitled to full and equal enjoyment of establishments maintained for public use (hotels, restaurants, department stores,