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THE BROADCASTING OF COPYRIGHTED WORKS

LOUIS G. CALDWELL*

The fact that near the close of the last session of Congress a determined effort was made to pass the Vestal Bill¹ and the probability that the effort will be renewed at the next session offers an occasion for a brief review of the present state of the law on the broadcasting of copyrighted works.^{1a} The primary purposes of the bill, as stated in the accompanying report² submitted by Congressman Vestal, from the Committee on Patents, are as follows:

"This general revision of the copyright law provides for—

"(1) Automatic copyright by which the copyright is conferred upon the author upon creation of his work, a right so limited by various provisions of the bill as to be made a privilege;

"(2) Divisible copyright, which permits the assignee, grantee, or licensee to protect and enforce any right which he acquires from an author without the complications incident to the old law;

"(3) International copyright, which enables American authors, merely by complying with the provisions of this act, to secure copyright throughout all the important countries of the world without further formalities."

It is not my purpose to discuss either the desirability of accomplishing these purposes or the adequacy of the bill thereto. I shall limit myself to calling attention to the only provisions which directly affect radio broadcasting. Section 1, in defining the scope of protection, provides that "such copyright includes the exclusive right"

"To copy, print, reprint, publish, produce, reproduce, perform, render, exhibit, or transmit the copyright work in any form by any means, and/or transform the same from any of its various forms into any other form, and to vend or otherwise dispose of such work; and shall further include (but not by way of limitation because of the specific enumeration of the subject matter hereafter stated) the exclusive rights—

* * * * *

"(g) To communicate said work to the public by radio broadcasting, rebroadcasting, wired radio, telephoning, telegraphing, television, or by any

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1. H. R. 12549. 71st Cong., 2d Sess.

1a. See chapter on the subject in Stephen Davis, *Law of Radio Communication*, New York, 1927, and note in *Univ. of Pa. Law Rev.*, Vol. 75, p. 549 (April, 1927), for excellent reviews of the state of the law up to 1927.

2. No. 2016.

other methods or means for transmitting or delivering sounds, words, images, or pictures whether now or hereafter existing."³

It is evident that the foregoing provisions are designed to accord the most complete protection to the author (including, of course, the composer) not only against broadcasting and rebroadcasting of a copyrighted work but also communication of the work to the public by loudspeaker, telephone wires, or any other means. In view of the automatic copyright provided by the bill and the elimination of any preliminary formalities, a great burden is placed upon the broadcaster and on the person operating a loudspeaker in a public place, which is only partly mitigated by the provision with respect to innocent infringement.⁴

On June 28, 1930, the bill was considered by the House of Representatives and, in the course of a heated debate, several amendments were agreed to.⁵ One of the amendments provided that the bill should not apply to reception by radio unless a specific admission were charged therefor.⁶ Considerable opposition having developed, Congress adjourned before a vote was taken on the bill.

Space will not permit a detailed review of the history and nature of amendments to the Copyright Act which have been proposed in Congress with a view to lighten the burden of broadcasters. Early efforts were directed toward the complete exemption of broadcasters from liability from infringement. At a later date the efforts were directed toward amending the Copyright Act so as to make the same provision for broadcasting as the Act now makes for mechanical music.⁷

Such decisions as have so far been rendered by United States courts on the broadcasting of copyrighted works have had to do

3. See also subparagraph (d) in which the word "broadcast" appears.

4. Sec. 15 (d).

5. Cong. Rec., Vol. 72, No. 157, June 28, 1930, pp. 12428 *et seq.*

6. Another amendment provided that reproduction of a musical composition on a coin-operated machine, or similar mechanical musical reproduction, should not be deemed a public performance for profit. Coin-operated radio receiving sets are now on the market. On the question whether a receiving set is a "musical instrument," "mechanical device," "machine," etc., see *Dunbar v. Spratt-Snyder Co.* (Ia., 1929), 226 N. W. 22; *People v. Congress Radio, Inc., et al.* (1929), 232 N. Y. Supp. 647, 133 Misc. Rep. 542; *The Augusta* (E. D., La., 1926), 15 F. (2d) 727; *The Katherine* (E. D., La., 1926), 15 F. (2d) 387; *Brand Co. v. U. S.* (1925), 47 T. D. 40649-G. A. 8929; *Allen Forwarding Co. v. U. S.* (1926), 49 T. D. 41506-G. A. 9123.

7. *Proceedings of the Fourth National Radio Conference*, Nov. 9-11, 1925, Govt. Pr. Off., 1926. To this end two bills, S. 2328 and H. R. 10353 (69th Cong., 1st Sess.) were introduced in Congress early in 1926. These bills were never reported out. See the printed record of the joint hearings held by the Committees on Patents, April 5-10, 1926, for the considerations urged for and against their enactment.

entirely with musical compositions, with respect to which the interpretation of the statutory phrase "public performance for profit"⁸ has been the important question. No decision defining the applicability of this phrase to broadcasting has yet been rendered by the Supreme Court of the United States, although, as is pointed out below, a case is now pending before that Court which may lead to such a decision. By reason of decisions of lower and intermediate courts⁹ and by reason of a refusal of the Supreme Court to grant a petition for certiorari¹⁰, one proposition, and one only, may be regarded as fairly definitely established: the broadcasting of a copyrighted musical composition performed in the studio of a broadcasting station is a "public performance for profit." The holdings that the performance is "for profit" are based largely on the decision of the Supreme Court in *Herbert v. Shanley*,¹¹ the holdings that the performance is "public" are based on obvious facts having to do with the nature and purpose of broadcasting. The same or similar conclusions have been reached by courts in a number of other countries,¹² although not in all countries.¹³

By reason of certain other decisions of district courts, two other propositions have been passed upon but, in the absence of decisions by reviewing courts, must be considered as not yet settled.

8. Sec. 1 (e) of Act of Mar. 4, 1909, 35 Stat. 1075. In the footnotes which follow I shall refer to *Revue Juridique Internationale de la Radio-electricite* as "*Rev. Jur.*," and *Archiv für Funkrecht*, as "*Archiv.*"

9. *M. Witmark & Sons v. L. Bamberger & Co.* (D. C., N. J., 1923), 291 Fed. 776; *Jerome H. Remick & Co v. American Automobile Accessories Co.* (C. C. A., 6th, 1925), 5 F. (2d) 411, reversing decision of district court reported in 298 Fed. 628.

10. *Jerome H. Remick & Co. v. American Automobile Accessories Co.*, 1925, 269 U. S. 556.

11. (1917), 242 U. S. 591.

12. There are, of course, differences in the phraseology of the statutes of different countries which might be important in a more critical study of the subject. See the chapter on *Funkurheberrecht* (Part V, Sec. 25) in Neugebauer *Fernmelderecht und Rundfunkrecht*, p. 812. Among the decisions may be cited the following:

Australia: Chappell & Co., Ltd. v. Associated Radio Co. of Australia, Ltd. (Sup. Ct. of Victoria, 1925), V. L. R. 350.

Great Britain: Messenger v. British Broadcasting Co., Ltd. (1927), 2 K. R. 543, reversed on another point, 44 T. L. R. 247, see note in no. 5.

France: Societe des Auteurs, Editeurs et Compositeurs c. Societe des Amis de la Tour Eiffel et Privat (Tribunal Civil de la Seine, 3e Chambre, Mar. 22, 1927); *Rev. Jur.*, Vol. V, p. 52; *Societe, etc. c. Lherbier, directeur regional des P. T. T. de Marseille* (Tribunal Correctionnel de Marseille, July 30, 1927), *Rev. Jur.*, Vol. IV, p. 166.

Germany: Entscheidungen des Reichsgerichts in Zivilsachen, May 12, 1926, I 287/25 and I 422/25; and cases cited in Neugebauer, p. 823, footnote 19.

13. *Austria: see Baumbach v. Oesterreichische Radio-Verkehrs a. b.*, *Rev. Jur.*, Vol. IV, p. 310, also see Vol. III, p. 113.

One of them has to do with the situation where performance of the copyrighted musical composition takes place in a place open to and patronized by the public (e. g., a theatre, hotel, restaurant, or dance hall), is brought to the broadcasting station's transmitter by means of microphone and wire connection pursuant to arrangement between the broadcaster and the proprietor of the public place, and is broadcast to the public. In the only reported case dealing with such a situation, the question first arose on a motion for temporary injunction and a cross-petition for dismissal of the bill; the district court held that if the performance of a musical composition by a hotel orchestra was authorized by the owner of the copyright, then the broadcasting of it

"merely gives the authorized performer a larger audience, and is not to be regarded as a separate and distinct performance of the copyrighted composition upon the part of the broadcaster."¹⁴

When the case was heard on the merits, however, it appeared that the performance by the hotel orchestra was unauthorized. The district court (another judge sitting) held that in such a case the broadcaster "participates in the infringement."¹⁵ The principle announced in the interlocutory decision (and not negated by the decision on the merits) has obviously many implications which are of great importance. It applies to the transmission of such authorized performances by means of wire and amplifiers to other rooms in the same hotel or to other places, public or private (including transmission by telephone or electric light companies to their subscribers). It applies to the transmission by wire of an authorized performance by the key station to a network of broadcasting stations and the broadcasting of the performance by such stations to the public. It applies as between a relay broadcasting station and a station which rebroadcasts.¹⁶

14. *Jerome H. Remick & Co. v. General Electric Co.* (S. D., N. Y., 1924), 4 F. (2d) 160.

15. *Jerome H. Remick & Co. v. General Electric Co.* (S. D., N. Y., 1926), 16 F. (2d) 829. The French decisions make it clear that whether or not the original performance is authorized the broadcaster must get specific authorization in order to broadcast. I have not made sufficient study of the German decisions to be able to say whether the same conclusion is to be drawn from them. See next footnote.

16. Neugebauer (*supra*, pp. 839-841) makes a curious distinction between rebroadcasting and the case where two stations, connected by wire with the same studio, broadcast simultaneously a program performed in that studio. The latter case he regards as a single performance; in the case of rebroadcasting he asserts that there are separate performances by the originating station and each rebroadcasting station. He is influenced by the language of Art. 11 *bis* of the Berne Convention for the Protection of Literary and Artistic Property, as revised at Rome in 1928 (to which the

The third proposition as to which the law is as yet unsettled is in reality an extension of the one just discussed. It has to do with the situation where the broadcasting of a copyrighted musical composition is, by means of a receiving set and one or more loudspeakers, brought to an audience in a public place. The original performance in the station's studio may or may not be authorized. The public place may be one to which an admission fee is charged (e. g., a theatre or a dance hall) or it may be one in which there is an indirect profit (e. g., the lobby of a hotel, a restaurant, a railroad club car or a barber shop) or it may be one which has no commercial aspects (e. g., a public building or park). The only reported decisions in the United States dealing with such situations are two by district courts, *Buck v. Duncan*¹⁷ and *Buck v. Debaum*.^{17a} In the former case the defendant hotel company in Kansas City had a master receiving set by means of which it furnished musical entertainment to its guests in its public rooms and also to two hundred private rooms by means of wires leading from the master receiving set; by means of this apparatus certain copyrighted musical compositions were heard in the hotel, the performance of which by the broadcasting station was unauthorized. The plaintiff sued as president of the American Society of Composers, Authors and Publishers. The court held that the defendant hotel did not "perform" these musical compositions in the sense in which the word is used in the Copyright Act. Among other things the court said:

"One who plays a musical composition on a piano, thereby producing in the air sound waves which are heard as music, certainly performs that musical composition, and, if the instrument he plays on is a piano plus a broadcasting apparatus, so that waves are thrown out, not only upon the air, but upon the ether, then also he is performing the musical composition. He who only hears the performance is not performing.

* * * * *

"The right to perform a musical composition is the right to translate that musical composition into waves of sound or waves of ether for the enjoyment of those who are enabled either by natural or artificial means to receive the auditory sensations those waves are calculated to produce. The right to perform a musical composition does not carry with it a proprietary

United States is not a party) which gives authors "the exclusive right to authorize the communication of their works to the public by radiodiffusion (broadcasting)," and interprets "radiodiffusion" in a technical sense. He is also influenced by the international problem which arises when Station B in Country Y rebroadcasts a program broadcast by Station A in Country X. It is his opinion that, in view of the technical facts, no distinction should be drawn between rebroadcasting and the operation of a loudspeaker in a public place. *Ibid.*, pp. 844 *et seq.*

17. W. D., Mo., 1929, 32 F. (2d) 366.

17a. D. C., S. D., Cal., 1929, 40 F. (2d) 734.

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 zephyr.¹⁸

* * * * *

"So in this case the defendant did not intentionally perform the copyrighted musical composition, even if it be granted that radio reception is performance. The defendant has a right to have a radio in its hotel for the entertainment of its guests and to operate that radio. If, while it was operating, some other than the defendant, wholly without defendant's participation, put upon the ether and so threw into defendant's radio electric impulses which came out of the radio as an audible rendition of a copyrighted musical composition, that was not in any sense the act of the defendant. The intent of the defendant did not enter into that act. If it was a performance of a musical composition, it was a performance, not by the defendant, but by the broadcaster, on the defendant's instrument."¹⁹

The Circuit Court of Appeals for the Eighth Circuit has certified to the Supreme Court the question as to whether the acts of the hotel company constitute a "performance."

In the other case, *Buck v. Debaum*, the defendant operated a café in Los Angeles wherein he installed a receiving set through which he received the programs of various broadcasting stations. By this means he made it possible for his patrons to hear a certain musical composition broadcast by a Los Angeles station. The station had authority to broadcast the composition; in this respect the case differs from *Buck v. Duncan*. The court held that while what the defendant did was done "publicly" and "for profit," the defendant did not "perform," and said, *inter alia*:

"The performance, which is licensed as just stated, occurs entirely in the studio of the broadcasting station where the copyrighted musical composition is lawfully used, and the action occurring at the receiving set is simultaneous therewith, and is in no sense a reproduction of the musical composition that is being lawfully performed at the broadcasting studio. The action, play, and use of the copyrighted composition has been completed within the studio.

^{19a}

"There are certain practical considerations that in principle are of such importance that an extension of the property right that is made secure by the Copyright Act to the facts of this case would be harmful, unnecessary, and would lead to endless confusion and disorder. The owner of a copyrighted musical composition can fully protect himself against any unauthorized invasion of his property right by refusing to license the broadcasting station to perform his musical composition; but, when he expressly licenses and consents to a radio broadcast of his copyrighted composition, he must be held to have acquiesced in the utilization of all forces of nature that are

18. 32 F. (2d) p. 367.

19. *Ibid.*, p. 368.

19a. 40 F. (2d) p. 735.

resultant from the licensed broadcast of his copyrighted musical composition."^{19b}

In June, 1929, the *Landgericht* in the Free City of Dantzig reached the same conclusion on a very similar state of facts.²⁰ The alleged performance by loudspeaker took place in the public rooms of an inn and, as in the two cases just discussed, the suit was instituted by the organization corresponding to the American Society of Composers, Authors and Publishers. To the same effect is a decision of the *Amtsgericht* at Sinsheim in September, 1927.²¹ French and Danish courts have reached the opposite conclusion. In one French case²² a merchant had placed a radio apparatus at the entrance to his store and thus made it possible for the public (both within and outside the premises) to hear works in the repertoire of the French Society of Authors, Composers and Publishers. The court held that the merchant had to get written authorization from the authors. It said, *inter alia*:

"There is nothing to justify a distinction between the direct execution of a work and its execution by the intermediary of radiotelephony from the point of view of collection of authors' royalties . . ."

19b. *Ibid.*, p. 736.

20. Reported in *Archiv*, Vol. II, p. 572; summarized in *Rev. Jur.*, Vol. VI, p. 33. The summary (translated from the French) is as follows:

"The performance of a work is the operation which permits that work to be heard, it being of small import whether it be due to the human voice or to instruments or by a purely mechanical means such as the phonograph.

"It therefore seems beyond question that the production in the studio, and the broadcasting thereafter, are two acts constituting one public performance.

"The producer of the broadcast concert is, therefore, the broadcasting company, and not he who captures that program, even if audition is made possible for a large number of persons by the installation of a loudspeaker, for the work is not produced by the loudspeaker, which does nothing but transmit the original production performed within the quarters of the broadcasting company.

"This enlarging of the circle of listeners, even if it be arbitrary and unjustified, is not a new performance.

"At the moment the program is broadcast, the work is offered to the public domain, without any limitation. Even if one wished to impose the payment of authors' royalties for the diffusion of a work, it is to be noted that this diffusion has already been made by the broadcasting company and that the public audition by loudspeaker does not diffuse a work but merely enlarges the circle of listeners."

21. *Archiv*, Vol. I, p. 403. In this case the proprietor of a café had intended to give a public concert for the guests at his café and had obtained the necessary authorization to perform copyrighted compositions. For some reason the concert did not take place and the proprietor, by the use of a loudspeaker, substituted music from the broadcasting station at Stuttgart.

22. *Tribunal de Commerce de la Seine, Rev. Jur.*, Vol. III, p. 166; see also dicta in *Societe, etc. c. Societe des Amis de la Tour Eiffel et Privat* (Tribunal Civil de la Seine, 3e Chambre; Mar. 22, 1927), *Rev. Jur.*, Vol. V, p. 52.

and found that the defendant's acts constituted a public performance. In another French case,^{22a} recently decided, the defendant had a concession consisting of a stand at the public market at Nantes at which he sold receiving sets. In conducting his business he operated a loudspeaker, but claimed that he did not give a public audition and that he confined himself to technical demonstrations for the purpose of showing and selling his apparatus. It appeared, however, that the auditions took place even when no spectators were present, and the court therefore found that the defendant's conduct did not come within an exception which had been recognized by the French Society, comprising

"stores not permitting a free entrance, the auditions at which are reserved solely for the purchaser and which therefore are clothed with a private character."

The court held that the defendant had given a public performance and was liable for authors' royalties. On January 20, 1930, the Supreme Court of Denmark affirmed a decision that reproduction of a copyrighted composition by means of a loudspeaker operating in a restaurant in the presence of customers is a violation of the composer's right.^{22b}

A judgment of the *Gerichtshof*²³ in Amsterdam rendered on October 24, 1929, in reality involves the same question. The defendant conducted in Amersfoort a so-called *radiozentrale*, an installation which received broadcast programs and distributed them by telephone wires to subscribers who paid therefor. He thus distributed a copyrighted work, broadcast by the station at Huizen, without authorization. The Dutch court held that the defendant had not performed the composition within the meaning of the Dutch statute.

There have been a few cases in other countries in which the courts have passed on the question whether an assignment or authorization given by the author (e. g., prior to the advent of broadcasting) covers the right to perform by broadcasting.²⁴ There have

22a. *Tribunal de Commerce de Nantes*, Feb. 22, 1930, *Rev. Jur.*, Vol. VI, p. 123.

22b. *International Association for the Protection of Composers' Rights in Denmark v. Joergensen*. IV, 403/1929. *Archiv*, Vol. III, p. 505. I am indebted to Mr. A. L. Ashby, General Counsel of the National Broadcasting Company, for information as to this decision.

23. No. 59/29. *Archiv*, Vol. III, p. 63. See Hagensis, *Das Rechtsverhältnis der Radiozentralen in Holland*, *Archiv*, Vol. III, p. 239.

24. *Messenger v. British Broadcasting Co., Ltd.* (1927), 2 K. R. 543, reversed on appeal 44 L. T. R. 247; judgment of *Reichsgericht*, Germany, Feb. 16, 1929, *Archiv*, Vol. II, p. 384. Under the Canadian statute (Copy-

also been cases involving the right of a newspaper or other periodical to print compilations of broadcast programs.²⁵

The efforts of the organized groups of composers, authors, and publishers to get international recognition of their claims both against broadcasters and against persons operating loudspeakers in public places furnish material for an interesting recital, but can be only briefly touched upon in this article. The subject has come up at each of the four International Juridical Congresses on Radio Communication.²⁶ By its *voeux* these Congresses have recognized the rights of authors in very broad terms as against "communication or diffusion by telegraph or telephone, with or without wire, or by any other analogous means serving to transmit sounds or images."²⁷ A text proposing that authors' royalties "are likewise due from all proprietors or operators of receiving stations in public places" was voted down.²⁸ As a result of an international conference at Rome in 1928 for the revision of the Berne Convention for the Literary and Artistic Property, the following article was added as Article 11 *bis*:

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

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

The reason for the qualification in the second paragraph of the foregoing was the viewpoint of some countries that because of the great

right Act, R. S. C., 1927, ch. 32, sec. 40 (3) it has been held that a grantee of an interest in a copyright cannot maintain an action under the Act unless his grant has been registered, *Canadian Performing Right Society, Ltd. v. Famous Players Canadian Corp., Ltd.* (1927), 60 O. L. R. 614, affirming 60 O. L. R. 280.

25. Such compilations were held to be protected by the British Copyright Act in *British Broadcasting Co. v. Wireless League Gazette Publishing Co.* (1926), 95 L. J. Ch. 272 (1926), Ch. 433, 135 L. T. 93, 42 T. L. R. 370. A contrary conclusion was reached in a French case mentioned in Schmoschewer, *La radiophonie et la protection de la propriété industrielle*, *Rev. Jur.*, Vol. VI, p. 99.

26. Held at Paris (1925), Geneva (1927), Rome (1928) and Liege (1930). For a brief account of the first three Congresses and the text of the *voeux* adopted at them, see *Air Law Review*, Vol. I, p. 211. The proceedings of these Congresses are available in French, and accounts of them are to be found in the *Revue juridique*.

27. *Proc. of 2e Cong. jur. int.*, p. 155.

28. *Ibid.*, pp. 122-23.

importance of broadcasting as a means of instruction, education, etc., public interest required that national legislatures be left free, within certain limits, to circumscribe the rights of authors and composers wherever necessary, particularly as against the exaction of unreasonable, capricious or discriminatory royalties.²⁹ The Third International Juridical Congress considered that Article II *bis* "constitutes the beginning of a satisfactory solution."³⁰

The national copyright statutes of the various countries have been grouped by some writers³¹ into two classes:

(1) Those recognizing the author's right as absolute and as an intellectual property protected against any use whatsoever. Thus under the French interpretation, it is a "property the basis of which is found in natural law and the law of nations, but the exploitation of which is regulated by civil law." The same conception is found in the legislation of Belgium, Bulgaria, Greece, Great Britain, Poland, Portugal and Roumania.

(2) Those considering the author's right simply as the sum total of certain exclusive rights enumerated in conclusive fashion by the legislator. This viewpoint is found in the laws of Austria, Brazil, Czecho-Slovakia, Denmark, Finland, Germany, Hungary, Japan, the Netherlands, Norway, Spain, Sweden, and Switzerland.

In the second group there is an implication of the idea that "at bottom the law on authors' rights is only the balance which the legislator has created between the individual's right over his work and the right of the public to have knowledge of the work of its members."³²

Our present Copyright Act falls into this second group; the Vestal Bill would change the theory of protection to that embraced by the first group.

One of the most interesting statutes is that enacted by Italy on June 14, 1928.³³ Two of the eleven sections are as follows:

Art. 1—The concessionaire of the broadcasting service has the right, in the name of expropriation for public use, to broadcast in public places (theatres, concert halls, etc.).

29. In countries like Poland, Switzerland and others, the question is very simply regulated (except for international complications). Higher taxes are paid on receiving sets operated in public places than on those privately operated. The broadcasting company (which enjoys a monopoly from the State) receives all or a large part of the proceeds of the tax and in turn pays the authors. Thus all questions of royalties are settled directly between the broadcaster and the authors (see Proc. of 2e Cong. jur. int., p. 104 et seq.).

30. Proc. of 3e Congres. jur. int., p. 186.

31. I have taken this material from Hoffmann, *Le droit d'auteur en matière de radiodiffusion*, *Rev. Jur.*, Vol. VI (1930), p. 113 et seq.

32. *Ibid.*, p. 115.

33. Anno VI, No. 1352, *Rev. Jur.*, Vol. IV, p. 302. See Caselli, *Les principes fondamentaux en droit d'auteur, d'édition et de radiophonie en Italie*, *Archiv*, Vol. III, p. 221.

The proprietors, the impresarios and all persons collaborating in the spectacle, are consequently required to permit the installations and the technical try-outs necessary for preparation for broadcasting.

The right of the concessionnaire does not extend to first performances in the theatre or to new works. A work shall cease to be considered as new as soon as it shall have been represented in three theatres.

When seasons of theatrical performances or of concerts of a duration equal to at least two months shall be involved, the right of the *concessionnaire* can be exercised only once a week.

Art. 4—The concessionnaire of the broadcasting service is required to accord to the owners of the copyright³⁴ an equitable compensation. The criteria for determination and distribution of the indemnity shall be determined by regulation.

The law provides for an arbitral commission, consisting of one representative of the owners of the copyright, one representative of the broadcasting company, and a person delegated by the Minister of Communications, the latter to act as chairman. The Italian statute, in a word, provides for compulsory licenses and controls the amount of royalty which may be exacted.

New Zealand has adopted the same theory in a law passed October 9, 1928, limited, however, to works of a dramatico-musical character.³⁵

In the same connection may be considered a decree of the Union of Socialist Soviet Republics of April, 1927, which provided that broadcasters enumerated in a special list (officially determined) might broadcast musical and dramatic works, lectures, reports, etc., executed in theatres, concert halls, auditoriums, and other public places, without paying any compensation in favor of authors, performing artists, theatre owners, producers, etc.³⁶ This decree, as explained by the head of the Department of International Communications of the Russian Government, was in recognition of the tremendous social importance of the broadcasting of literature, music, etc.³⁷

Emulating the organized groups of authors, composers and publishers, the International Union of Musicians has endeavored to secure recognition of special rights on the part of artists, both internationally and municipally. It has claimed an exclusive right in the musician to authorize the broadcasting, rebroadcasting or public dissemination by loudspeaker of his performance. In other words, where a musician belongs to an orchestra employed in a

34. "*Ayants droits*."

35. *Rev. Jur.*, Vol. V, p. 189.

36. *Proc. of 2e Cong. jur. int.*, p. 92.

37. *Ibid.*, p. 92 et seq.

hotel restaurant, he may veto *any* broadcasting of his performance. If he belongs to an orchestra employed in the broadcasting station studio, he may veto any rebroadcasting of his performance and any utilization of it by loudspeakers in public places. Consequently he may demand extra compensation from the broadcaster, rebroadcaster, or owner of a loudspeaker in a public place.

The right claimed has usually been predicated on two grounds: (1) that the musician or other artist *creates* an artistic production which is entitled to protection analogous to that accorded to the author whose work he is performing, and (2) that protection is necessary to prevent injury to the artist by distortion due to faulty transmission or reception. In answer to the first ground, it has been pointed out that in the ordinary case the musician (as distinguished from the great artist) does not create and is expected merely to interpret the thought of the composer as faithfully as possible. In answer to the second ground, it must be said that there is nothing to indicate any substantial basis in fact for fear of injury to the reputation of the artist due to technical distortion of his performance.³⁸ In the background, of course, is the very real economic consideration that broadcasting (like the phonograph and other forms of mechanical music) threatens greatly to limit the field of employment open to musicians.

The musicians were unable to obtain more than the adoption of a very general *voeu* from the Rome Conference for the revision of the Berne Convention:

"That the Governments which have participated in the labors of the Conference consider the possibility of measures to safeguard the rights of performing artists."³⁹

At the Third International Juridical Congress they were, however, able to obtain the adoption of a *voeu* as follows:

"In view of the *voeu* tending toward the protection of artists, actors and performers, expressed by the Rome Conference of 1928 for the revision of the Berne Convention:

"Considering that the essentially international character of radioelectric diffusion renders particularly desirable an international regulation of the exercise of the right of artists:

"The Congress expresses the *voeu*:

A. That, by a general convention, the Governments bind themselves to adopt the following minima measures of protection:

1. The proprietors of broadcasting stations, of relay stations and of retransmitting stations shall pay an equitable supplementary remuneration.

38. Proc. of 3e Cong. jur. int., p. 160.

39. Rev. Jur., Vol. IV, p. 227.

neration in favor of artists whose performances are transmitted, retransmitted or otherwise utilized by the said proprietors.

2. The States will take appropriate measures for settling rapidly and equitably differences between proprietors and artists.

3. Each State will see to it that the broadcasting of artistic performances is effected in accordance with the highest technical standards.

B. That the said measures be adopted by national legislatures in as uniform a fashion as possible."

In Europe there have been several interesting decisions by boards of arbitration and by industrial or labor courts, which, however, cannot be taken as having any great juridical significance.⁴⁰ Since in the United States the amount of compensation to be paid to the musician by his employer is a matter of contract between the parties, no legal question seems to be presented on this score which belongs within the scope of this article. Whether a musician may consider his contract of employment breached by a broadcasting or rebroadcasting of his performance is a matter of interpretation of that contract and, if the matter is not specifically covered, there is no great difficulty in covering it in the future. That the musician whose performance is legitimately broadcast has no claim against a person operating a receiving set in a public place seems too clear for argument; such rights as the musician has are against his employer and depend, or may be made to depend, on their contract. There are, however, other claims made in behalf of the artist which may have an important legal significance.

The instance of the refusal of Mme. Jeritza to sing in the Vienna Opera before a microphone for fear of making possible the manufacture of phonograph records of her performance, in violation of her contract with an American phonograph company,^{40a} is a case in point. Such cases will arise only where the artist is of unique and peculiar ability or of great popularity. It seems just that the law should protect the artist against unauthorized production of phonograph records, which have a permanent form, may be multiplied and sold to his detriment, and may directly or indirectly take profits from the artist to which he is entitled. I suggest that, under recognized principles of the law of unfair compe-

40. Judgment of Industrial Court, Vienna, April 9, 1926 (Cr. XII 62/26/4), *Archiv*, Vol. I, 673; Arbitration of Orchestra Arbitration Court, Munich, April 23, 1928, *Archiv*, Vol. I, p. 406; Arbitration of District Orchestra Arbitration Court, Frankfurt, April 24, 1928; Decision of Upper Orchestra Arbitration Court, Munich, Nov. 6, 1928, *Archiv*, p. 46; Regional Labor Tribunal of Königsberg, Mar. 18, 1929, *Rev. Jur.*, Vol. V, p. 192.

40a. Tabouis, *L'utilisation commerciale des émissions radiophoniques*, *Rev. Jur.*, Vol. IV, pp. 111-112.

tion, the artist may have a right to prevent the unauthorized recording of his programs and the sale of records thus made.⁴¹ The artist may or may not, under his contract with the broadcaster, surrender this right to the latter; he may (as many do, because of exclusive contracts with phonograph companies) expressly reserve it. At any rate, I see no necessity for conflict between the claims of broadcaster and artist.⁴²

An interesting diversion is furnished by a case which arose in Lyon, France. A broadcasting station gave a program on September 29, 1924, in which were included pieces from *Carmen* sung by Mlle. Charny and pieces from the *Cid* and *Sigurd* sung by M. Frantz, both lyric artists. The local newspaper in its announcement of the station's program, stated that the pieces were sung by the two artists. In reality, the artists did not sing over the station; the latter used phonograph records (which had been legitimately made) of the pieces sung by the artists. Mlle. Charny and M. Frantz brought suit for damages. The *Tribunal Civil* of Lyon, on January 27, 1925, gave judgment for the defendant broadcaster, on grounds that had more to do with the particular facts of the case than with any legal principle of interest. The court found that the alleged distortion of the artists' voices was more hypothetical than real; that it was well known that the station played nothing but phonograph records at that time of year; that the station announcer had described each piece as a phonograph record; and that in view of plaintiffs' contracts with Pathé (manufacturer of phonograph records) and in view of contracts of sale between the latter and the broadcaster, the plaintiffs' rights, if any, were against Pathé for any injury consisting in a diminution of their royalties from sale of records.⁴³

41. For instances (not too closely in point) of protection accorded the artist on principles of the law of unfair competition, see *Chaplin v. Amador* (Cal. Dist. Ct. of App., 1928), 269 Pac. 544 (in which the court upheld an injunction restraining defendant from dealing with motion pictures likely to deceive the public, in which defendant counterfeited plaintiff's role, and enjoining use of similar name, style of dress, and mannerisms in imitation of plaintiff's motion pictures); *Fisher v. Star Company* (1921), 231 N. Y. 414, 132 N. E. 133, 19 A. L. R. 937, certiorari denied, 257 U. S. 654 (in which the cartoonist was protected against appropriation of characters of "Mutt and Jeff"). An English statute of July 31, 1925, forbids unauthorized reproduction of an artist's performance by phonograph records, *Rev. Jur.*, Vol. III, p. 79; *Unauthorized Records of Performances*, 160 L. T. 10 (1926). A bill was introduced in the Belgian Chamber of Deputies on December 18, 1929, proposing to recognize a very broad right in the artist, *Rev. Jur.*, Vol. V, pp. 128-130.

42. See language of court in *Fonotipia, Ltd. v. Bradley* (C. C., E. D., N. Y., 1909), 171 Fed. 951 at p. 954.

43. *Rev. Jur.*, Vol. III, p. 111.

Another interesting diversion might be pursued in the nebulous field of the so-called "right of privacy." Suppose, for example, that an artist, believing that he is singing before a small private gathering, is unwittingly performing before a hidden microphone connected with a broadcasting station.⁴⁴ His situation is not unlike that of the pair of sweethearts who, it is said, were conversing over a telephone line in Buffalo, and whose conversation was broadcast to the listening public because of an accidental misconnection of the wires of the telephone company. I must, however, resist the temptation to discuss the rights of an artist thus imposed upon.⁴⁵

44. See such cases as *Binns v. Vitagraph Co.* (1913), 210 N. Y. 51; also *Harv. L. Rev.*, Vol. XLIII, p. 297.

45. Since the above was written, the following articles of interest have appeared: in *Archiv. für Funkrecht*, Vol. III, *Das Funkrecht auf dem Kongress der Association littéraire et artistique internationale in Budapest* (juni 1930), pp. 463, *Die Berücksichtigung des Funkurheberrechts in den Entwürfen zu einem neuen deutschen Urheberrechtsgesetz*, pp. 471, and *Rundfunk als Urheberrechtsverletzung*, pp. 495; and in *Revue Juridique Internationale de la Radioelectricite*, 6e Annee. No. 23, *Le droit des artistes exécutants, interprètes des auteurs*, pp. 169, and *Le droit moral de l'auteur et la radiophonie*, pp. 179.