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RADIO V. ROYALTIES

INTRODUCTION

The Federal Constitution provides that Congress shall have the power “. . . to promote the Progress of Science and Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”¹ Acting under this authorization, in 1909, when radio was a much more uncoordinated infant than television is to-day, Congress passed an act to codify the law of copyrights.² Because of radio's relative obscurity at that date it is deemed inconceivable that the national legislature gave a great deal of attention to the possible effect of the new invention in drafting the Act.³ At any rate the lack of specific treatment of radio broadcasting in it opened the door to a Gargantuan struggle between the forces of the new industry and organized Composers.

The fight for the Composers has been led by the *American Society of Composers, Authors and Publishers*, a voluntary, unincorporated, non-profit association. This group was organized in 1914, by Victor Herbert, John Philip Sousa, Gene Buck and Nathan Burkan, and it now has a membership of over 1,000 of the country's best composers. The organization became necessary for the purpose of controlling violations of the Copyright Act which could not be coped with by individual action, because the expense involved in the law suit would not justify action against the offenders. The group has an extensive and almost fool-proof method of uncovering violations of the act. They receive copies of all programs to be given at clubs and other entertainment places and these reports are sent to field representatives, who will first give the offender three warnings and then prosecute

¹ Article I, Sec. 8.

² Copyright Act of March 4, 1909, c. 320, § 1, 35 Stat. 1075.

³ The subject of radio was first treated specifically by Federal Statute in 1910—Ship Act of 1910, 36 Stat. 629.

with the full backing of the *Society's* resources. Radio programs formerly checked in this manner are now ignored since all radio stations, as the result of the litigation of which this article shall treat, now pay yearly licenses for the privilege of using the *Society's* songs.⁴

The omission in the Copyright Act caused the courts little difficulty until 1923, fourteen years after its passage. Prior to this time the radio industry had been passing through successive stages of adolescence, and in 1923 it had reached some measure of maturity. In that year the court was faced with the problem of how to apply the Copyright Act to Radio.⁵ Should it be strictly construed to favor the Radio constituents or liberally construed at the instigation of the Composers? The Court's decision in that year was to open an extended controversy which this article shall attempt to present in both the legal and economic aspects.

The axis of the contest is Section 1 (e) of the Copyright Act of 1909 —⁶ "Any person entitled thereto upon complying with the provisions of this title, shall have the exclusive right . . . to perform the copyrighted work publicly for profit, if it be a musical composition and for the purpose of public performance for profit. . ." The application of this section to the rendition by radio of copyrighted musical selections presents several problems:

1. Is such a rendition "for profit" within the meaning of the Act?
2. Is it a "public performance" within the meaning of the Act?
3. And to just what extent may reception constitute a "public performance for profit" within the meaning of the Act?

⁴ READER'S DIGEST, Je. 1939, p. 95, "Our Music Masters."

⁵ *M. Witmark and Sons v. L. Bamberger and Co.*, 291 F. 776 (D. C. N. J., 1923).

⁶ *Supra* note 2

I. LEGAL ASPECTS

A. *What Constitutes Profit?*

Legal opinion of the first of these submitted questions was not uniform at the early stages of the controversy. In 1915 the Circuit Court of Appeals⁷ held that the words "for profit" in the Copyright Act contemplated a direct charge for the performance, such as an admission fee. The court ruled that a mere performance in a dining room for the entertainment of guests was not a performance for "profit." This would seem to conform with the more accepted meaning of the term. Webster says "profit" is "the excess of returns over expenditures, in a given transaction or series of transactions." The same lexicography states another definition to be—"advantage or benefit"; however, this is marked obsolete.⁸ Nevertheless it would seem that the courts were later to seize upon the second definition in their interpretation of the Act.

Another case not involving a radio performance followed the lead of the *Hilliard Hotel Case*,⁹ in 1915,¹⁰ but upon appeal to the Supreme Court of the United States, Mr. Justice Holmes in writing the opinion condemned the strict construction of the word "profit." In doing so he said: "If rights under the copyright are infringed only by a performance where money is taken at the door they are very imperfectly protected. Performances not different in kind from those of the defendant's might compete with and even destroy the success of the monopoly that the law intends the plaintiff to have. It is enough that there is no need to construe the statute so narrowly. The defendant's performances are not eleemosynary. They are a part of a total for which the public pays, and the fact that the price of the whole is attributed to a particular item which those present

⁷ *John Church Co. v. Hilliard Hotel Co.*, 221 F. 229 (C. C. A. 2d, 1915).

⁸ Webster's New International, Second Ed. (1936).

⁹ *Supra* note 7.

¹⁰ *Herbert v. Shanley Co.*, 222 F. 344 (S. D. N. Y., 1915).

are expected to order is not important. It is true that music is not the sole object, but neither is food, which probably could be gotten cheaper elsewhere. The object is repast in surroundings that to people having a limited power of conversation or disliking the rival noise give a luxurious pleasure not to be had from eating a silent meal. If music did not pay it would be given up. If it pays it pays out of the public's pocket. Whether it pays or not the purpose of employing it is profit and that is enough."¹¹

In view of this decision it would seem but a logical transition to extend the application of Holmes' view to radio broadcasting for advertising purposes. It was found so by the District Court of New Jersey in *M. Witmark and Sons v. L. Bamberger Co.*¹² In that case the defendant was the owner of a large department store, in which, among other things, it sold radios. Defendant also owned broadcasting station WOR. Throughout the day interspersed among the various programs the station gave its call letters, and in doing so it drew attention to the fact that L. Bamberger Co. owns one of the world's greatest stores. In one of its broadcasts, it rendered the copyrighted selection "Mother Macree." The plaintiff sought to enjoin a reoccurrence of such a performance, on the ground that it was an unauthorized public performance for profit and as such was forbidden by Section 1 (e) of the Copyright Act of 1909.¹³ The defendant denied the broadcast of the selection was for profit since there was no charge made to the listeners for the privilege of hearing the program. The court in discounting this contention adopted Justice Holmes reasoning in *Herbert v. Shanley*.¹⁴ It said in effect that a department store is not an eleemosynary institution, but one conducted primarily for profit, and since the costs of the broadcasting were charged directly against the general expenses of the busi-

¹¹ 242 U. S. 591, 37 Sup. Ct. 232, 61 L. Ed. 511 (1917).

¹² *Supra* note 5.

¹³ *Supra* note 2.

¹⁴ *Supra* note 11.

ness, it is part and parcel of the business system, and sale of radios is the aim of the broadcasts, even though such an objective may not be realized. Hence it cannot be said that the broadcasts of the defendant are not at least of indirect profit to it within the rule of the *Shanley Case*.¹⁵

However, a year later the District Court of Ohio¹⁶ repudiated such an application, though the *Bamberger Case*¹⁷ was cited in the plaintiff's briefs. The facts of the case were these: the complainant owned a copyrighted piece "Dreamy Melody" which was rendered over the station owned by the defendant. The defendant had no authority from the complainants. The court accepted as a fact that the defendant's station was operated by it solely for the purpose of stimulating interest in the defendant's radios, but denied that such advertising value constituted "profit" within the contemplation of the authors of the Copyright Act. The court said that — "While these statutes should be given a fair and reasonable construction, with a view to protecting the author in such a manner that he may have the benefit of the property right conferred for a limited term of years, it is clear that this protection should not be extended beyond the express language of the statute, nor a property right created which was clearly not within the mind of Congress when the Act was passed." The court concluded that a direct payment was the essence of the term "profit" and that it contemplated something vastly different from the indirect value within the purport of the *Bamberger Case*.¹⁸

This decision did not stand long, and upon its appeal to the Circuit Court of Appeals in 1925 the opinion delivered there by Judge Mack did much to settle the issue definitely in favour of the copyright owners and against the young radio industry. The learned judge said,¹⁹ ". . . A public

¹⁵ *Supra* note 11.

¹⁶ *Jerome H. Remick and Co. v. American Automobile Accessories Co.*, 298 F. 628 (S. D. Ohio, 1924).

¹⁷ *Supra* note 5.

¹⁸ *Supra* note 5.

¹⁹ 5 F. 2d 411 (C. C. A. 6th, 1925), reversing 298 F. 628.

performance may be for profit though no admission fee is exacted or no profit actually made. It suffices . . . that the purpose of the performance be for profit, and not eleemosynary; it is against a commercial as distinguished from a purely philanthropic, public use of another's composition that the act is directed. It is immaterial, in our judgment, whether the commercial use be such as to secure direct payment for the performance by each listener; or indirect payment as by a hat checking charge, when no admission fee is required, or a general commercial advantage as by advertising one's name in the expectation or hope of making profits through the sale of one's products, be they radio or other goods."

This decision is rather strong in view of the fact that the only possible advertising on the entire program was the announcement of the call letters "WLW" plus "The Crosley Manufacturing Company, Cincinnati, Ohio." This fragmentary announcement would seem to be more of an identification than an advertisement, however, the court was of a different opinion.

B. Public Performance

Of course to hold a broadcaster or listener liable for an infringement of the Copyright Act it must be shown not only that the performance was for "profit" but also that it was a "public performance." This leads to a discussion of the second proposed problem: "Is the rendition of a copyrighted selection by radio, a "public performance" within the scope of the Copyright Act?"

The first case involving the question of radio infringement, *M. Witmark and Sons v. L. Bamberger and Co.*²⁰ failed to discuss the question, it perhaps was assumed by counsel that the act of defendant constituted a public performance. At any rate the defense centered its attention on an attack

²⁰ *Supra* note 5.

which denied that the performance was for "profit." The court presumably held that the broadcast did constitute a public performance, since its verdict was for the plaintiff, who was given injunctive relief.

In *Jerome H. Remick Co. v. American Automobile Accessories Co.*²¹ the point was specifically attacked by the defendant, who contended that since the listeners were not congregated together, and could not communicate with each other, there could be no "public performance" but rather a series of private performances not within the scope of the terms as they are set out in the Act. The Ohio District Court sustained this contention,²² and according to its decision a performance in order to be "public" within the contemplation of the Act of 1909 must be directed toward a physically congregated assembly. Copyrights, the court maintained, receive their protection from a statutory source, and from that source only, and since the plaintiff's recovery under such statute was an arbitrary sum based upon no showing of actual damages, the statute should be strictly interpreted. Bearing this in mind the court found it impossible to rule that the defendant's conduct constituted a public performance. The judge explained that his decision was not in any way in conflict with *Herbert v. Shanley*,²³ because in that case there was an actual physical congregation for whom the artist directly performed; while in the case of a radio broadcast the court reasoned, there is no such an assembly, and no such direct performance, hence a radio rendition of a copyrighted composition does not violate the rule laid down in the *Shanley Case*.²⁴

The Circuit Court in reviewing this decision²⁵ said that the question would certainly be ripe for some clarifying legislation but since none had been enacted, it was necessary to

²¹ *Supra* note 19.

²² *Supra* note 16.

²³ *Supra* note 11.

²⁴ *Supra* note 11.

²⁵ *Supra* note 19.

discover if by reasonable interpretation the Copyright Act could properly embrace the new situation. The court found that it could and that the defendant had given a "public performance" within the meaning of the act, even though specific treatment is lacking in the Act. Judgment was rendered by Judge Mack, who ruled — "A performance in our judgment is no less public because the listeners are unable to communicate with one another, or are not assembled within an enclosure, or gathered together in some open stadium or park or other public place. Nor can a performance in our judgment be deemed private because each listener may enjoy it alone or in the privacy of his home. Radio broadcasting is intended to, and in fact does, reach a very much larger number of the public at the moment of rendition than any other medium of performance. The artist is consciously addressing a great, though unseen and widely scattered, audience, and is therefore participating in a public performance."

A new note arose in *Jerome H. Remick and Co. v. General Electric Co.*²⁶ In a hearing in the New York District Court it was assumed by the judge that the entertainer singing the song had been authorized to do so, and that the defendant by allowing her the facilities of its station did not thereby become an infringer. The court could not reconcile itself to a finding that there were two public performances in the act of singing into the microphone which was placed in a public place. It said that the microphone merely gave the singer a larger audience and that the performance is one and the same to the listener in the same room with the artist and the listener miles away. However, in a final hearing of the case, it was discovered that the original performance by the artist had been unauthorized and hence it was decided that the defendant was liable as a co-infringer. This finding of course made the decision in the earlier hearing mere *dicta*, since the problem therein presented was not necessary to the decision of the case. This *dicta* has not been followed to any

²⁶ 4 F. 2d 160 (S. D. N. Y., 1924).

extent in the later cases,²⁷ and the prevailing view seems to be that of Judge Mack in the *American Automobile Association Case*.²⁸

In 1926 the Act was interpreted to extend to one who picked up another's unauthorized rendition and retransmitted it.²⁹ It was argued by defendant's counsel that those who listen cannot be held as infringers, so how can it be that one who merely permits others to hear someone else's broadcast is a co-infringer with the original broadcaster. Counsel advanced the analogy of the open window, comparing the act of opening up a microphone to a forbidden broadcast, to the opening up of a window so that the passers-by might hear the broadcast. The court held, however, that the analogy would not fit as the rebroadcaster is equipped with electrical instruments, for the purpose of translating the sounds into electric energy, in order to send them over vast territories. The rebroadcaster *acts* through his electrical machines, and is not merely a passive element. Hence the window analogy advanced so strenuously by the radio constituency was discarded by the courts.

The English Courts, under a similar act, would seem to be in accord with the view of Judge Mack. In *Messenger v. British Broadcasting Co.*,³⁰ the defendant hired singers and an orchestra to give a performance of the opera "The Little Michus" which was protected extensively by the plaintiff's copyrights. This performance was given in defendant's private studio at Savoy Hill, to which the public was not invited. The performance was, however, broadcast, and the court decided that there was a "public performance." — "It was by means of electrical instruments that the defendants by modulating the waves in the ether, were able to affect, as they intended to affect, a vast number of electrical in-

²⁷ *Society of European Stage and Composers v. New York Hotel Statler Co.*, 19 F. Supp. 1 (1937).

²⁸ *Supra* note 19.

²⁹ *Supra* note 26.

³⁰ 2 K. B. 543 (1927).

struments possessed by members of the public, and thereby to render audible to that public the performance given within the walls of the defendant's studio. In my view, however, the defendants in doing what they did, clearly gave a public performance. Instead of gathering the public into a vast assembly room, they set in motion certain ether waves, knowing that millions of receiving instruments in houses and flats were tuned to the waves sent forth, and knowing and intending also that acoustic representation of the opera would thereby be given to an enormous number of listeners. If I did not hold this to be a public performance by the defendants I should fail to recognize the substance and reality of the matter, and also the object and intent of the Copyright Act." It is to be remembered that radio in England is operated by the government, hence this decision in effect amounts to a self-imposed penalty which makes it even more significant.

C. *Infringement by Reception*

A consideration of the third problem — "To just what extent may amplified reception constitute a public performance for profit within the meaning of the Act?"— would be greatly aided by an examination of the cases in which the question was raised.

In the most recent case,³¹ the defendant a hotel company, had a receiving set in each room for the accommodation of its guests. A system of master receivers and wires, controlled by the management and piped to each room-receiver gave the guest a choice of two stations, each representing the local outlet of competing national chains. The plaintiff complained that in thus making available a copyrighted piece, the defendants gave a "public performance for profit" within the meaning of the Copyright Act. This contention was supported by the court even in the face of the fact that the broadcasting station *had been licensed to originate the song*

³¹ *Supra* note 27.

over the air. The court holding for the plaintiff, also denied the contention of the defendant that the guests had a choice, and that there could be no public performance since all the guests were separated by the walls of their respective rooms. In negation the court said the act constituted a "public performance for profit" because it took place in a hotel, under the control of the management and furnished part of the consideration for the room rental.

Slightly less strong but to the same general effect is the decision in *Buck v. Jewel-LaSalle Realty Co.*,⁸² in which case the defendant was the owner of the LaSalle Hotel in Kansas City. This hotel had, through the medium of a master radio, received programs from the broadcasting station of one Duncan. Both Duncan and the defendant were warned by the plaintiff's society, an organization of composer and authors, that any transmission of a copyrighted song owned by the Society would be considered a violation of that body's copyright. Despite the warning, Duncan continued to broadcast and on numerous occasions the defendant, to receive renditions of prohibited songs. These songs as in the occasion in suit were further amplified, and wired to the rooms where they were made audible to such guests as desired to hear them. The plaintiff contended that the defendant was guilty of giving a "public performance for profit" in violation of the Federal Copyright Act. The defendant denied that there was any such performance involved in its action, and tried to persuade the court that the liability should be limited to the original broadcaster, the hotel being a mere passive listener. But the court rejected this contention and held the wiring of the program to the rooms with increased amplification was an independent performance. They ruled that there could be innumerable separate public performances resulting from one broadcast. By *dicta*, they did somewhat confine their "Frankenstein" by say-

⁸² 283 U. S. 191, 51 Sup. Ct. 410 (1931).

ing reception in a private home for the benefit of guests would not be contrary to the Statute.

Despite what one might think of the reasonableness of the previously stated cases it would seem the protection is not unreasonably extended in *Jerome Remick v. General Electric Co.*,³³ in which case the defendant owned a broadcasting station, the maintenance of which was justified by its value as an advertising medium for the defendant's products. In the operation of this station the defendant picked up and retransmitted to its own listeners a program emanating from another station, which contained a copyrighted number owned by the plaintiffs, who brought an action for violation of the Federal Copyright Act.³⁴ The defendant contended that it took no part in the original transmission, and hence its conduct was merely passive and did not constitute a "public performance for profit." The court in *dicta* implied that mere reception without retransmission would not be actionable but stated that the pick-up and rebroadcast of the defendant constituted affirmative action. It denied the defendant's contention that he had merely "opened a window" and allowed listeners to hear a song emanating elsewhere. Perhaps this decision would afford enough protection to a copyright, without extending liability to a mere unified system of private reception such as frequently exists in hotels and restaurants. The *dicta*, however, has been universally disregarded in the later decisions as may be noticed from a reading of the two cases stated immediately previous.

Those two cases also show a departure of judicial thought from the decision in a 1929 case,³⁵ which though it has never been expressly overruled has certainly received no support in the later decisions. In that case the plaintiff as president of the *American Society of Composers, Authors and Publish-*

³³ 16 F. 2d 829 (1926).

³⁴ *Supra* note 2.

³⁵ *Buck v. De Baum*, 40 F. 2d 734 (1929).

ers, brought suit against the defendant a cafeteria owner who had tuned in on a broadcast of the "Indian Love Call" a copyrighted musical selection, the broadcasting of which had been licensed. The defendant merely turned the dial of a receiver, located in his cafeteria, and by this act made the song audible to his guests. The plaintiff contended that in so doing the defendant violated the copyright by giving an unauthorized "public performance for profit." The court refused to accept this contention and absolved the defendant. The plaintiff in the judge's contemplation, had by authorizing the broadcast, impliedly assented to any pick-up of the program. He said that if the plaintiff wished to prevent reception of the selection it could very well have forbidden the broadcast. Particularly to the point was his closing reasoning, in which he said: ". . . if during the reception of such programs, one using the radio in his business is required to turn the dial of his receiving set so as to render inaudible any copyrighted composition the utmost difficulty and confusion will result, and a condition ensue that to my mind is unreasonable and one that was never within the intent of Congress in passing the Copyright Act or within the reasonable purview of the terms thereof."

If this judge's view is the more reasonable construction of the act it is unfortunately not followed in the United States. Nor is the English view under a similar Act any less compromising, a result which might be expected in view of the English policy of exclusive governmental operation of broadcasting stations. There in a recent Chancery case,³⁶ it was held that a person who makes a copyrighted musical composition available to the public, by receiving and amplifying that composition through the medium of a receiving set, is guilty of a copyright infringement, and it is no excuse that the original broadcast was licensed, because such license only extended to reception for domestic and private entertainment.

³⁶ Ch. 121 (1934).

Perhaps the most amazing extension of copyright protection is evinced in the English case, *Performing Right Society Ltd. v. Camelo*.³⁷ The court ruled in that case, that a person owning a radio in a private room adjoining a public restaurant, was guilty of an infringement of the Copyright Act, since the connecting door was frequently open for service. The court ruled that reception of a copyrighted number over this set rendered the owner of the radio liable for giving a "public performance" in violation of the English Copyright Act.

D. Legal Conclusions

From a perusal of the cases already discussed it would seem that the following answers, to the previously proposed questions, may be made:

1. Radio rendition of a copyrighted musical composition may constitute a performance for *profit*, if there is the slightest and most indirect connection between the monetary gain of the person or group responsible for the rendition and the broadcast. Any unauthorized broadcast of a copyrighted piece having the slightest advertising value to the business of the broadcaster is a performance for *profit*.

2. Such rendition constitutes a *public performance* even though those who hear it are separated by great distances and physical barriers.

3. Even mere amplified reception may constitute a *public performance for profit*, if the other conditions are fulfilled. That is if such reception is in a public place, and is of value to the owner thereof. The courts have, however, refused to hold that a private person may not entertain his guests with radio reception of copyrighted pieces, as this is neither a *public performance*, nor a performance for *profit*.

It will also be seen from the cases that the Composers have won most of the important court battles and that a

³⁷ 3 All E. R. 557 (1936).

liberal interpretation of the act, in their favour prevails. Of course, as might be imagined the radio industry has fiercely resisted this tendency of the courts, to, as they call it, "judicially legislate." In 1935 they made an attempt to break up the *American Society of Composers, Authors and Publishers*, when at that time the *National Association of Broadcasters* appealed to the Justice Department to dissolve the *Society* as being in violation of the Sherman Anti-Trust Act, but after the case had progressed for a very short time the government requested and obtained an adjournment, and has never re-opened the proceeding, though the indictment still stands.³⁸ It now appears therefore that the law as far as the courts are concerned is definitely settled in regard to radio violation of the Copyright Act.

E. Attempted Legislation

A determined effort has been made by the radio industry to push through Congress the *Vestal Bill*,³⁹ which would deal specifically with the problem of radio copyright infringement, and would relieve the receiver from any liability unless he charges a direct admission fee for entrance upon the premises where the radio is placed. The bill passed the House after much argument but failed in the Senate.

Mr. Tydings in 1931,⁴⁰ introduced a bill to amend section 1 of the Act of 1909, it provided in effect that the original sale of sheet music implied consent to the subsequent public performance of the composition for profit. This bill also failed to pass. In 1935, another bill,⁴¹ entitled *An Act To Amend and Consolidate the Acts Respecting Copyright*, was introduced; this bill also attempted to exempt radio receivers from liability unless admission or cover charges were made upon entrance. Another bill was introduced in 1935,⁴²

³⁸ *Supra* note 4.

³⁹ House Rep. 12549, 71st Congress, Second Sess.

⁴⁰ Bill S. 1035.

⁴¹ Bill S. 2465.

⁴² Senate Bill 3047.

by Mr. Duffy, to limit liability under the Act of 1909, but although the bill passed the Senate, the House did not act upon it. At the date of this writing there are no modifications of the Act of 1909 which would affect radio.

II. ECONOMIC ASPECT

Having seen that the legal aspect of the controversy is at least temporarily settled in favour of a liberal construction of the Copyright Act, let us examine the economic aspect of the situation, in an attempt to find some reason for the rigorous struggle of the composers against unauthorized radio broadcasting and reception.

It is the contention of the radio industry, that the radio is a great boon to the Composers whose songs are, by its wave lengths, made audible to thousands of listeners, and hence are given invaluable advertising, which greatly enhances the popularity of the songs. This view is given legal credence by Judge Lynch in *M. Witmark and Sons v. L. Bamberger and Co.*,⁴³ for though he upholds the plaintiff's injunction suit, he does say — "Our own opinion of the possibilities of advertising by radio lead us to the belief that the broadcasting of a newly copyrighted musical composition would greatly enhance the sales of the printed sheets. But the copyright owners and the music publishers themselves are perhaps the best judges of the method of popularizing musical selections."

Naturally if this were true the composers would welcome radio renditions of their pieces. However, their actions are motivated by very convincing statistics. In the middle "nineteen-twenties" the song "Till We Meet Again" sold 6,500,000 copies for an all-time high in popular music sale. The best selling songs since 1933 have sold well under the 300,000 copy mark. Since the composer's share in the proceeds from this sale is three cents a copy royalty, and a small percentage

⁴³ *Supra* note 5.

on phonograph records, it can readily be seen that this discrepancy in sales volume is of real concern to song-writers, who cannot live on uncompensated genius.⁴⁴

One may question the contention of the Composers that radio brought about this precipitous decline in the sale of sheet music. It might even be suggested that the quantity slump was attributable to a corresponding deterioration in the quality of more recent compositions. However, the Composers deny this and cite the case of Irving Berlin, whose 1926 song "All Alone" sold 1,125,000 copies, and earned for him \$80,000 in royalties, whereas the same composer's "best sellers" since 1933 "How Deep Is the Ocean?" and "Say It Isn't So" sold only 225,000 copies each.⁴⁵ Has Berlin's genius so declined? ask the Composers.

As a much more plausible explanation the Composers suggest that there is a very significant clue in the inverse ratio exhibited between the rise of radio and the decline of sheet music sale. This explanation, they contend, is logical enough. The more pleasing songs are naturally enough most frequently played over the air, and it being a human characteristic to react unfavorably toward constant repetition, 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.

Believing as they do in the soundness of their theories, the Composers through the agency of the *American Society of Composers, Authors, and Publishers*, have carried on their fight for survival, and indeed if their premises are sound they do so with reason. The controversy may become even more intense in the near future as the present contracts with the radio stations expire this year,⁴⁶ and the Radio industry may fail to meet with the terms of the Society.

Jack C. Hynes.

⁴⁴ COLLIER'S, April 8, 1939.

⁴⁵ *Supra* note 44.

⁴⁶ *Supra* note 4.