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Copyrights—Musical Composition—Reception for Profit

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same view as the American cases, although some of the cases are put on different grounds.

In a few cases the courts have seemed too ready to call the transfer fraudulent, but this probably has resulted from the somewhat loose construction which they placed on what appeared to them an unfair transfer. *Leach v. Duvall* (1871), 71 Ky. 201; *Ward v. Ward* (1900), 63 Ohio St. 125, 57 N. E. 1095; *Youngs v. Carter*, above. *Taylor v. Taylor* justly follows a long line of authorities and does not unnecessarily presume fraud, which is patent in the case. G. S., '31.

COPYRIGHTS—MUSICAL COMPOSITION—RECEPTION FOR PROFIT.—In *Buck v. Duncan et al.* (D. C. W. D. Mo. 1929), 32 F. (2d) 366, a suit for infringement of the copyright of a musical selection, the plaintiff, owner of the copyright, permitted a radio station to broadcast the piece. The defendant, owner of a hotel in Kansas City, received the selection over his master set and transmitted it to headpieces in each room in the hotel. The plaintiff sued for damages for infringement of its copyright upon the ground that the hotel owner performed the work publicly for profit. *Held*, there was not an infringement of the copyright.

The language of the copyright statute is as follows: "Any person entitled thereto upon complying with the provisions of this act, shall have the exclusive right: . . . To perform the copyright work publicly for profit if it be a musical composition and for purposes of public performance for profit." 17 U. S. C. sec. 1 (e). One who performs a copyright work publicly for profit without the consent of the owner obviously infringes.

The court holds to the view that in relaying the selections to each room the defendant was merely extending the hearing possibilities of his guests so as to allow them to hear the original performance as broadcast. The court concedes that there is a public performance for profit where a copyrighted phonograph record is played to an audience for a direct or indirect monetary gain. An unauthorized use of a music roll of a copyrighted selection in a player piano as an accompaniment to a photo-play for which admission is charged is an infringement. *M. Witmark and Sons v. Calloway et al.* (D. C. Tenn. 1927), 22 F. (2d) 412. But the court contends that there is a difference in fact between playing a phonograph record and receiving and using a record impressed on the ether. The court writes: "The record on bakelite is a separate and distinct thing from the original performance in the studio where it is made. Playing the record is performing anew the musical composition imprinted on it. The waves thrown out upon the ether are not a record of the original performance. Their reception is not reproduction, but a hearing of the original performance." This technical distinction seems too unreal to furnish a proper basis for the decision. Whether the master receiving set sends the original on to the rooms or sends it reproduced, the hotel owner profits by furnishing the composition to his guests. It is this economic fact which is determining in other cases.

Thus a broadcaster who plays and sends out an unauthorized musical composition and for profit makes this selection available to the public is an infringer. He is also a contributory infringer if he broadcasts the unauthorized performance by another of a copyrighted musical composition. *J. H. Remick & Co. v. General Electric Co.* (D. C. N. Y. 1925), 4 F. (2d) 160. The master set owner, it would seem, is in the same relative position.

The court in the instant case based its decision upon the further ground that the defendant did not intentionally perform the copyrighted selection. But lack of intention does not relieve him from liability. The result, and not the intention, determines the question of infringement. *Lawrence v. Dana* (1869), 4 Cliff. 1, Fed. Cas. No. 8136; *M. Witmark and Sons v. Calloway et al.* (D. C. Tenn. 1927), 22 F. (2d) 412.

On other grounds than those put forth by the court it might be held that the defendant is not liable. The doctrine might be set up that the contract between the copyright owner and the broadcaster is for the benefit of all who wish to receive and use the program, whether for personal enjoyment or for profit.

Looking at the decision from the point of view of its practicality, there is much to be said for it. A decision in favor of the copyright owner would affect not only hotels but also restaurants, music shops, and similar establishments which constantly make use of broadcasts. The result would be great inconvenience and a constant threat of unwarranted litigation.

When Congress framed the copyright act it did not foresee the advent of the radio with its new problems. The balancing of interests which is necessary in determining the scope of the protection to be afforded by a copyright is one which Congress should deal with in further legislation. Compare *Associated Press v. International News Service* (1918), 248 U. S. 215 at p. 248, per Brandeis J. dissenting. M. E. S., '31.

INSURANCE—DUTY OF INDEMNIFIER TO SETTLE WITHIN POLICY LIMIT.—
In a suit against an indemnity company the assured sought to recover the amount spent above the amount of the indemnity to satisfy a claim which defendant company had allowed to go to judgment instead of settling for less than the amount of the indemnity bond, as it could have done. The Texas court in deciding in favor of the plaintiff, in *Stowers Furniture Co. v. American Indemnity Co.* (Tex. 1929), 15 S. W. (2d) 544, said that the insurance company owes a duty of reasonable diligence in settling a suit against the assured.

At first glance such a holding may seem very far-fetched since the assured is never precluded from intervening and settling for whatever he deems proper, and may then enforce his claim to the indemnity, even though the liability was not established by a judgment. *Mendota Electric Co. v. N. Y. Indemnity Co.* (1926), 169 Minn. 377, 211 N. W. 317; *Hoagland Wagon Co. v. London Guaranty Co.* (1919), 201 Mo. A. 490, 212 S. W. 393; *Rieger v. London Guaranty Co.* (1920), 202 Mo. A. 184, 215 S. W. 920. Under such a view the assured takes the entire responsibility in case of a