

No selection of music was made up by the proprietor of the theatre or consented to by him in any way. There was no fee for musical entertainment called to the attention of the patron of the theatre at any time.

The pianist being permitted to use his own judgment as to what musical selections to play, played the musical composition entitled "Tulip Time" from the "Ziegfeld Follies, 1919." It was held by Judge Thompson that the furnishing of music was an attraction which added to the enjoyment of persons viewing the motion pictures and that although the proprietor had nothing whatever to do with the selection of the musical compositions rendered, the fact that the pianist was paid by the proprietor to supply the music moved the court to hold that the proprietor was furnishing music *publicly for profit*. There being no *direct* charge on account of musical entertainment furnished, there was what we term an *indirect* charge or fee therefore.

If our construction of the opinion of the Supreme Court in the Shanley case, *supra*, be sound, that is to say, if there was found to be an *indirect* charge for the use of copyrighted musical compositions because of which the court held that the owner of the copyright was entitled to relief, the problem now presented for solution is not so difficult.

We have already stated that the Bamberger Co. makes no direct charge to those who avail themselves of the opportunity to listen to its daily broadcasting programs. The question then is: Is the broadcasting done *for an indirect* profit? In determining this we think it is proper to look to the reason for broadcasting at all. Why was it done? What was it done for? What was the object, or to use the term of Justice Holmes: What was the "purpose"? We know the purpose of the restaurant proprietor and we know the purpose of the proprietor of the moving picture theatre. What was the purpose of the defendant in expending thousands of dollars in establishing and operating this broadcasting station?

Adopting the language of Justice Holmes, the defendant is not an "eleemosynary institution." A department store is conducted for profit, which leads us to the very significant fact that the cost of the broadcasting was charged against the *general expenses of the business*. It was made a part of the business system.

Next we have the fact, already referred to, that the defendant sells radio receiving instruments and accessories. Whether a profit has resulted from such sales is not material in determining the object. It is within the realms of probability that many departments of a large store at times show losses rather than profits. Paraphrasing the comments of Justice Holmes "Whether it pays or not the purpose is profit and that is enough." While the defendant does not broadcast the sale prices of its wares, or refer specifically thereto, it does broadcast a slogan which appears in all of the defendant's printed advertisements. That slogan which is "L. Bamberger & Co., one of America's Great Stores, Newark, N.J.," is broadcasted at the beginning of every periodical programme and also at the conclusion thereof. A person listening to the programme of WOR will hear at the beginning the statement that L. Bamberger & Co. regard themselves as the proprietors of one of America's great stores.

If the development or enlargement of the business of the department store was completely out of the minds of the promoters of this broadcasting enterprise is it reasonable to believe that the slogan "L. Bamberger & Co., one of America's Great Stores, Newark, N.J.," would be announced to all listeners one, two, three, four, five or six times a day? If the defendant desired to broadcast for purely eleemosynary reasons, as is urged, is it not likely that it would have adopted some anonymous name or initial? Undoubtedly the proprietors in their individual capacities have done and do many things of a public spirited and charitable nature on account of which they are entitled to the highest commendation. But it does not appear and the court cannot believe, that those charitable acts are all