York City wherein was located a platform or small stage upon which orchestral selections were rendered and songs were sung by paid performers for the entertainment of persons visiting the restaurant. No admission fee was charged. The owner of a copyright song known as "Sweethearts," alleging that his property rights were being invaded because his song was being sung by Shanley's performers, sought injunctive relief in the United States Court for the Southern District of New York. This relief was denied, it being the view of the District Judge (and the Judges of the Circuit Court of Appeals concurred) that because no admission was charged at the door of the restaurant, there was no performing of the song "Sweethearts" *publicly for profit* within the meaning of the Copyright Act. The United States Supreme Court, however, took a different view. Justice Holmes, in speaking for the court of last resort, had this to say:

> "If the rights under the copyright are infringed only by a performance where money is taken in at the door they are very imperfectly protected. Performances not different in kind from those of the defendants could be given that might compete with and even destroy the success of the monopoly that the law intends the plaintiffs to have. It is enough to say that there is no need to construe the statute so narrowly. The defendant's performances are not eleemosynary. They are 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 are expected to order, is not important. It is true that the music is not the sole object, but neither is the food, which probably could be got cheaper elsewhere. The object is a repast in surroundings that to people having limited powers 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. Decree reversed."

It is strenuously argued in behalf of the defendant in the instant cause that it was the view of the court of last resort that the facts, as developed in the Shanley situation, showed that there was a *direct* charge to those who patronized the restaurant—a *direct* charge for and on account of music which was collected from persons dining there. So far as appears, there was only one "item" charged for, to wit: food. In fixing the charge for food the restaurant proprietor undoubtedly took into consideration many items in addition to the cost of the food and the preparation and service of it. There was "attributed to" the "item" food the musical entertainment and other attractions afforded the patrons. The dinner at no time had the subject of entertainment charge called to his attention except in the high price of the food which he was permitted to procure. This, in our opinion, was an *indirect* way of collecting the charge for musical entertainment from those who were there to pay. To constitute a direct charge, it seems to us, that there would have to be an admission fee charged at the entrance of the dining hall or a specific fee for entertainment would have to be charged the listener either while in or about to leave the premises.

There is another case which strikes us as being quite helpful. In the case of Harms et al. v. Cohen, 279 Fed. 276, District Judge Thompson held that the playing of copyrighted music by a pianist in a motion picture theatre was an infringement of the copyright and relief was accorded the owner thereof. In that case an admission charge was collected from all who entered the theatre for the purpose of viewing motion pictures. Incidental to the exhibition was the playing by a pianist of music which, to the pianist, seemed appropriate to the development of the play or events which were being portrayed on the screen.