DECISIONS OF THE UNITED STATES COURTS AND CIVIL DIVISION OF HAMBURG RELATING TO COPYRIGHTED MUSIC

Decisions marked "A", "B" and "C" hereunder following were considered in the course of the evidence given by Witnesses Nathan Burkan and J. C. Rosenthal on March 30th. See pages 232-238 and 247 of the Proceedings.
Decision marked "D" was sent to the Committee on April 23rd. Submitted and ordered printed with the Proceedings.

A

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

M. WITMARK & SONS, a corporation, Plaintiff.
vs
L. BAMBERGER & Co., a corporation, Defendant.

In Equity
OPINION.

MESSRS. WALL, HAIGHT, CAREY & HARTPENCE, and SAMUEL M. HOLLANDER, Esq., Solictors, for Plaintiff. THOS. G. HAIGHT, Esq., of counsel.

Messrs. PITNEY, HARDIN & SKINNER, Solicitors for Defendant. ALFRED F. SKINNER, Esq., of counsel.

LYNCH, District Judge.

The defendant conducts a gigantic department store in the City of Newark, New Jersey, and sells its wares at retail throughout the State of New Jersey, if not in adjacent states. Since February, 1922, it has conducted a radio department wherein radio equipment of all sorts is sold. It has also established and conducts a licensed radio broadcasting station known as Station WOR, from which vocal and instrumental concerts and other entertainment and information are broadcasted on a wave length of 405 meters. The plaintiff owns the musical composition entitled "Mother Machree" and, under the Copyright Act of 1909 possesses the exclusive right to perform that composition publicly for profit.

The plaintiff, alleging that the defendant performed, or caused to be performed, its composition "Mother Machree" by means of singing from the broadcasting station WOR and that this performance by the defendant was publicly for profit, prays that a preliminary injunction issue restraining the defendant from the further performance of its copyrighted song. The defendant denies that this broadcasting of the copyrighted "Mother Machree" was or is *for profit*, its contention being that because everything it broadcasts is broadcasted without charge or cost to radio listeners, there is no performance *publicly for profit* within the meaning of the Copyright Act.

It being extremely unlikely that any facts developed upon final hearing will alter the undisputed situation now presented and both parties desiring a speedy final determination of the issue, the court is disposed, at this time, to register its conclusions as to the law.

The question simmered down is: What is meant by the words "publicly for profit?" Fortunately, those words have been construed by the United States Supreme Court in the case of Herbert v. Shanley Co., 242 U.S. 591, a case frequently referred to by counsel on both sides of this cause. The facts there were as follows: The Shanley Co. conducted a public restaurant in New