

pecuniary profit; that it maintained a radio broadcasting station in Cincinnati as a medium of advertising and publicity and as a means of bringing its radio products and supplies to the attention of the public and stimulating the sale thereof, and that the maintenance of the station was effective for those purposes; that the license from the United States Department of Commerce, Bureau of Navigation Radio Service to operate as a commercial station was issued upon application to operate for commercial purposes; that defendant announced its programme to the public by newspaper advertisements and bulletins, and that it started and ended its programs with the announcement, "Station WLW, Crosley Manufacturing Company, Cincinnati, Ohio." The bill further alleged that the defendant charged on its books the radio broadcasting service to its advertising and publicity account. It prayed for injunction and damages. Motion to dismiss the bill was sustained.

The question presented is whether, under the circumstances stated, the broadcasting of a copyrighted musical composition is an infringement of the statutory copyright. By the Act of March 4, 1909, Chapter 320, Section 1, 35 Stat. 1075, "Any person entitled thereto, upon compliance with the provisions of this Act, shall have 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."

While the fact that the radio was not developed at the time the Copyright Act was enacted may raise some question as to whether it properly comes within the purview of the statute, it is not by that fact alone excluded from the statute. In other words, the statute may be applied to new situations not anticipated by Congress, if, fairly construed, such situations come within its intent and meaning. Thus it has been held both in this country and England that a photograph was a copy or infringement of a copyrighted engraving under statutes passed before the photographic process had been developed. *Gambart v. Hald*, 14 C. B. N. O. 303; *Rossiter v. Hall*, 5 Blatchford, 362. While statutes should not be stretched to apply to new situations not fairly within their scope, they should not be so narrowly construed as to permit their evasion because of changing habits due to new inventions and discoveries.

Bills have been introduced in both House and Senate to permit broadcasting without infringing copyrights. The rights of composer, producer, performer and the public under this new method of reproduction are eminently matters for considered legislation; but until Congress shall have specifically determined the relative rights of the parties, we can but decide whether and to what extent statutes covering the subject-matter generally but enacted without anticipation of such radical changes in the method of reproduction are, fairly construed, applicable to the new situation.

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 inclosure 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 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 the 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.

That under the Copyright Act a public performance may be for profit though no admission fee is exacted or no profit actually made, is settled by *Herbert v. Shanley*, 242 U.S. 591. It suffices, as there held, 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 statute is directed. It is immaterial, in our judgment, whether that commercial use be such as to secure direct payment for the performance by each