

When allowance is made for the shrieks, howls and sibilent noises attributable to static and interference, the possessor of a radio receiving set attuned to the station of the broadcaster of an authorized performance, hears only the selection as it is rendered by the performer. The performance is one and the same whether the "listener in" be at the elbow of the leader of the orchestra playing the selection, or at a distance of a thousand miles.

If a broadcaster procures an unauthorized performance of a copyrighted musical composition to be given, and for his own profit makes the same available to the public served by radio receiving sets attuned to his station, he is, in my judgment, to be regarded as an infringer.

It may also be that he becomes a contributory infringer in the event he broadcasts the unauthorized performance by another of a copyrighted musical composition. To this proposition, however, I do not now finally commit myself.

For the reasons stated, I shall deny defendant's motion to dismiss the complaint.

The Affidavits submitted upon plaintiff's application for an injunction Pendente Lite, are such as to throw considerable doubt upon the right to preliminary restraint.

The performance of the selection, "Somebody's Wrong" by the orchestra at the New Kenmore Hotel in Albany, New York, is claimed by defendant to have been given under an implied license from the plaintiff. It also appears that a representative of the complainant addressed a letter to the leader of the orchestra, giving him permission to broadcast any of plaintiff's copyrighted musical compositions. Such authority is said by plaintiff to have been revoked prior to the alleged infringement of the copyright upon "Somebody's Wrong," but, if it was, the fact may better be determined when all evidence tending to show the right of the hotel orchestra to perform the selection is before the court. Should it appear that the performance of the selection was authorized by plaintiff, it will be impossible to find infringement upon the part of the broadcaster.

Aside from the question of statutory construction presented by the bill of complaint, defendant makes the point that plaintiff's title to the copyright in question is not sufficiently alleged. It is not without merit, and I shall require plaintiff to so amend the complaint as to show unmistakably that it is now entitled to ask relief against the defendant for its alleged infringement of the copyright upon "Somebody's Wrong."
September 30, 1924.

C.

UNITED STATES CIRCUIT COURT OF APPEALS
SIXTH CIRCUIT

JEROME H. REMICK & COMPANY,	} No. 4190
<i>Appellant,</i>	
vs.	} APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION
THE AMERICAN AUTOMOBILE ACCESSORIES	
<i>Appellee.</i>	

Decided April 9, 1925

Before DENISON, MACK AND DONAHUE, *Circuit Judges*

MACK, *Circuit Judge*: The plaintiff brought bill in equity to enjoin defendant from reproducing by radio broadcasting a musical composition entitled "Dreamy Melody," the copyright of which is owned by plaintiff. The bill alleged that defendant manufactured and sold radio products and supplies for