In the

Supreme Court of the United States

TWENTIETH CENTURY MUSIC CORPORATION)
AND MARY M. BOURNE,)
)
Petitioners)
)
v.) No. 74-452
)
GEORGE AIKEN)
)

Washington, D. C.
April 21, 1975

Pages 1 thru 35

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

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v. : No. 74-452

GEORGE AIKEN

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Monday, April 21, 1975

The above-entitled matter came on for argument at 10:05 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

SIMON H. RIFKIND, ESQ., 345 Park Avenue, New York, New York 10022 For Petitioners

HAROLD DAVID COHEN, ESQ., 1000 Ring Building, Washington, D. C. 20036 For Respondents

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments first this morning in No. 74-452, Twentieth Century Music Corporation against Aiken.

ORAL ARGUMENT OF SIMON H. RIFKIND, ESQ.

ON BEHALF OF PETITIONERS

MR. RIFKIND: Mr. Chief Justice and may it please the Court:

This case comes here on a petition for certiorari to review a decision of the Court of Appeals for the Third Circuit.

The Petitioners have brought this suit to enforce their copyright claim against the Respondent Aiken who, they alleged, had infringed their rights by a public performance for profit of two songs, one the copyright of which belonged to each of the Petitioners respectively.

The district judge granted the statutory damages in favor of the Plaintiff below of $250 for each infringement.

The Court of Appeals reversed. Its asserted grounds for reversal was that Aiken's conduct did not amount to a performance, though it was public and it was for profit.

The facts are simple. Respondent Aiken owns and operates a chain of fast food restaurants in the City of

Pittsburgh.

He decided to entertain his customers and to improve the efficiency of his employees by furnishing them with popular musical performances throughout the business day. There were, as I believe we can take judicial notice, available to him several methods by which his purposes could be accomplished.

One, he could hire one or more musicians to play such compositions as he or his agent selected from the sheet music generally available to the public.

Secondly, he could, if he chose, equip the premises with one or more machines that reproduce music mechanically when supplied with either records or tapes or piano rolls depending upon the nature of the particular machine that he decided to use and these, too, are generally available for purchase by members of the public.

Or, he could subscribe to a service like Muzak which provides musical compositions for use in premises by machinery equipped for that purpose.

And, finally, he could, if he wished, equip his premises with a radio receiving set connected to an electric source of energy, install a sufficient number of loudspeakers so as to disseminate the sound agreeably throughout the premises that he wished to serve and cause the radio receiving set to be oriented by his selection to

any kind of music that he preferred from among the many that were being broadcast within the Pittsburgh area by the several stations doing business there.

Aiken, in fact, chose the last-mentioned method. I don't think I need to argue the point that it was the least-costly method.

The district judge, after trial, found that on the 11th of March, 1972, Aiken had caused the customers and employees in one of his restaurants to be entertained by two compositions of which the Petitioners were respectively the copyright owners.

These compositions were received over Aiken's radio and were distributed to his restaurant and employment spaces through five loudspeakers which he had installed in the premises.

These two compositions which he so played were broadcast that day by an FM station located in Pittsburgh and licensed to broadcast those compositions. Aiken, however, had no license for the public performance for profit of these compositions and the radio station had no authority to confer such permission upon Aiken.

QUESTION: There was no possibility of any implied license, then, as that was referred to in Jewell-LaSalle.

MR. RIFKIND: That is it precisely, Mr. Justice Rehnquist. The possibility of an applied license had been

expressly and explicitly withdrawn in the license issued by the copyright owners to this particular station, as to all stations and that had been true since 1932.

QUESTION: I am not sure it is terribly important, but I could not find in the record the aggregate number of loudspeaker outlets in all of his establishments.

MR. RIFKIND: My understanding of the record is that there were five.

QUESTION: Just five.

MR. RIFKIND: Some in the public spaces, where customers were entertained, and some in the work spaces where the employees were .

QUESTION: Well, that is just in the one restaurant, is it not?

MR. RIFKIND: It is all in one restaurant.

QUESTION: And he has only one --

MR. RIFKIND: Oh, no, he has other restaurants but this particular infringement was, of course, brought as a test situation for the particular two songs that we are talking about.

The district court granted the plaintiff below the monetary damages requested, which was $250 for each composition at the statutory rate.

As I have already stated, the Court of Appeals reversed that and I submit that I can state with confidence

that the business purpose behind the selection of any one of the methods by which Aiken could have supplied musical entertainment to his guests and employees was identical.

It was to entertain guests and it was to improve the efficiency of his employees. This much, I believe, is clear on the record and all of these methods, whichever one he selected, would have to have recourse to music created by composers and made available to the public by means of either sheet music, records, tapes, piano rolls or broadcasts of electrical impulses and I suggest that until the Third Circuit had spoken it was firmly established that no matter by which method Aiken entertained his guests and employees, he was bound to abstain unless he had a license from the copyright owner, such as ASCAP, of course and of course, such licenses were universally available under the compulsion of a decree which is enforced with respect to ASCAP.

I believe that it is still unquestioned that live performances in the restaurant by live muscians would be subject to the copyright laws and subject to Section I thereof and that has been true, certainly, since Mr. Justice Holmes wrote Herbert against Shanley way back in 1917.

I believe it is still Unquestioned that the record, tape, piano roll method or electronic method of Muzak is a public performance for profit and, indeed, so the Third

Circuit itself upheld on a number of times.

And now the Third Circuit has decided that the last method, namely, the radio-plus-loudspeaker method, although realistically and functionally indistinguishable from any of the other methods of furnishing the music is, for some reason, beyond the reach of Section I of the Copyright Act, although it is public, although it is profit -- for profit -- but the Circuit Court said it is not a performance and at arriving at that conclusion that it was not a performance, it said that it acted under the compulsion of this Court's mandate as expressed in the two CAPV cases, the Fortnightly case and the Teleprompter case and it is that determination of the Court of Appeals that I most distinctly want to challenge.

We challenge it and we challenge that decision on several grounds. We assert first that the old landmark decision rendered in 1931 entitled Buck against Jewell-LaSalle and reported in 283rd U.S. by a majority court in an opinion written by Mr. Justice Brandeis controls this case and that the judgment, therefore should have gone for the Petitioner.

We also assert that Buck against Jewell-LaSalle can coexist in the same legal universe as Fortnightly and Teleprompter and that there is no incompatibility between them because Fortnightly and Teleprompter, unlike this case,

were concerned with a new technological development, never prior thereto brought within the copyright system and never subjected to copyright royalty burdens and restpectively, Congress had been quite certain.

And, thirdly, that in any event, private arrangements have for over 40 years been made between the creators and consumers of music in reliance on Jewell-LaSalle and that Jewell-LaSalle therefore ought to be allowed to survive until Congress directs otherwise.

As far as the Congressional voice is concerned, if I can read the incomplete compositions of august body, I can say that it seems to be targeted towards the continued viability of the doctrine of Jewell-LaSalle.

Now, to develop some of those points a little more explicitly, in a sense this case is, of course, concerned with the construction of the section of the copyright law, Section I thereof and that is of primary interest to the authors, composers and publishers of music whom the founding fathers expressed the desire to encourage in the copyright and patent clause of the Constitution.

But from the point of view of the development of our jurisprudence I believe that more is involved than whether Respondent Aiken has to pay $5 a month for the privilege of entertaining his business guests and improving the morale of his employees with music created by the

copyright owners.

I suppose that the statute means exactly what this Court declares it means and as I stated a little while ago, every since 1931, which is 44 years ago, the meaning of that statute was made plain in the case that I have cited, Buck against Jewell-LaSalle.

It declared that Section I meant that one situated exactly like Aiken in this case and who did exactly what Aiken did in this case, subjected himself to liability as an infringer of copyright unless he was licensed to do what he did.

The Court of Appeals in its analysis acknowledged that the case here under review is on all fours with the facts of the case in Jewell-LaSalle. Over 5,000 contracts are now extant that we know of which have been entered into in reliance and in observance of Jewell-LaSalle and in that case, Mr. Justice Brandeis for the unanimous Court said, "There is no difference --" we give you the exact language, if I may.

"There is no difference in substance between the case where a hotel engages in orchestra to furnish the music and that where, by means of the radio set and loud-speakers here employed, it furnishes the same music for the same purpose."

QUESTION: Is not there one difference, Mr. Rifkind,

in this sense, possibly -- I'll put it as a question:

Do you think there is a difference, since the radio station is selling advertising, presumably, and I would assume that as a matter of economics the advertising rate is based upon the coverage of the radio station, that it differs from the orchestra in the sense that the orchestra has no advertising and the radio station is getting -- the radio station having paid the royalty -- is getting a larger income because of the expanded audience of restaurants, hotels, business establishments, et cetera.

MR. RIFKIND: Let me explain that most explicitly. The rates established between the licensing organization, in this case, ASCAP, which speaks for the owners of these compositions, and the radio industry, is determined under a system which is subject to judicial surveillance under the decree in United States against ASCAP which has been administered in the southern district of New York since 1940 and amended in 1950 if my history and my recollection of the dates is correct, and I believe that it is.

Those terms are negotiated in terms of what rights are conferred upon the broadcaster. In this particular situation, broadcasters are expressly excluded from the right of conferring any authority upon people in Aiken's position and, consequently, the rate that they pay takes into account the fact that ASCAP will collect another fee

from the Aikens of this country and therefore, the fee paid by the broadcasters, does not overlap the fee paid by the agency.

The District Court and the Court of Appeals both agreed that the circumstance that the radio station in Jewell-LaSalle was unlicensed and that here it was licensed was a difference without significance.

The -- I have explained why the suggestion that Mr. Justice Brandeis made in the footnote, as I believe Mr. Justice Rehnquist calls attention, that there might conceivably be -- the argument might be made that there is an implied license is no longer valid because in 1932 that was explicitly excluded.

Logically, I should say, the suggestion of an implied license underscores the conclusion that the hotel or Aiken was performing and performing publicly for profit because if he was not performing, or not performing publicly and for profit, there would be no point in talking about a license.

It is only public performance for profit that requires a license. So Mr. Justice Brandeis' discussion of a possible implied license necessarily emphasizes his view that there was a performance and, of course, a performance for profit.

Now, the Third Circuit seemed to be under the

impression that Jewell-LaSalle had been overruled by this Court and I believe that therein, again, I find myself in sharp disagreement with that court.

I suppose it cannot be challenged that this Court has never yet uttered the talismanic phrase which actually would decanonize Jewell-LaSalle.

This Court had said in Fortnightly that Jewell-LaSalle should be understood as limited to its own facts. The facts here are the very facts to which the Court said they should be limited to and that is the very converse of treating it as overruled.

Words of limitation to facts, a phrase not unusual in the opinions of this Court, I have always thought meant that the principle of the case may no longer be regarded as an axiom from which new theorems and new propositions might logically be deduced.

The Court of Appeals went much further than that. It has acted in reliance on the anticipation that this Court will overrule Jewell and we entertain the hope that that prophesy is not a valid one.

We contend that the Court should not overrule Jewell. Indeed, we assert that this case presents the conspicuous example of the salutary purposes of the rule of stare decisis.

First, as I have already mentioned, very many

many people have shaped their business conduct in observance of and in reliance on that case.

Moreover, the rule offends no moral principles. It does not offend good judgment, as is evidenced by the fact that all over the world Jewell-LaSalle is, in fact, lived by and if it should appear that this Court thinks that some different policy should now prevail, it seems to me that the proper agency to grapple with that is the Congress.

And, indeed, the Congress is grappling with that problem at this very moment. As your Honors know, the Copyright Act has been under active consideration by the Congress for some time and the delay in the new bill has been not Jewell-LaSalle but the delay has been caused by the inability of the Congress to decide what to do about CATV.

Fortnightly, the first CATV case, was the first occasion on which the Jewell decision was ever questioned in this Court. In that case, there were a number of -- there was one dissent and three non-participants.

In that case, the Court confronted a brand-new industry which had never been subjected to the copyright system, a new technology and then, in 1974, the Court encountered a further development of that same technology in Fortnightly, which brought signals beyond the realm of

the original antenna.

But neither the majority nor the minority in either of those cases suggested that Jewell should be overruled. The majority never even mentioned Jewell in the last Teleprompter case and no justice expressed the thought that hotel-keepers and restauranteurs were free to entertain guests and stimulate employees by the free use of their music.

Aiken's behavior belongs in the unsophisticated realm of what we are fully familiar with and it wouldn't be a bad idea, therefore, to see how the world regards that kind of behavior.

I shall be brief and say that Great Britain, Canada, New Zealand, Australia, France, Germany and every other country I could find any evidence of treats Aiken's performance as breech of the copyright privilege.

In the functional sense, which is the idea introduced into this field by the decisions in Fortnightly and Teleprompter, comparison was made to the viewer erecting a giant antenna and I would like to suggest that another way to look at it would be as if it was a giant ear-trumpet which made it possible for the listener to get signals which otherwise he couldn't hear and here is the point I want to make, the distinction between those two kinds of cases.

The purveyor of ear trumpets doesn't exploit music, even though he sells them in the lobby of the opera house but the furnisher of music to his customers does explit music, no matter by what means, as long as they are within his control that he brings it to bear upon his business guests and his business employees.

QUESTION: What if you go to a barber shop and the radio is turned on? It is a three-chair barber shop. Does the barber have to pay ASCAP a --

MR. RIFKIND: That is a fair question. I think the real question is, is the barber playing that music for his own entertainment or is he doing it for a business purpose?

QUESTION: Well, let's say the facts are stipulated that he is doing it for the pleasant reaction of his customers.

MR. RIFKIND: I will only report that the practice, the practice has been to impose no royalty charge on the one-set type of operation.

QUESTION: Why not?

MR. RIFKIND: Because it is impossible to draw the line on a nationwide basis.

QUESTION: You are drawing the line.

MR. RIFKIND: I am what?

QUESTION: What do you mean, impossible? You have

critical word under the statute, is it not?

MR. RIFKIND: Each is a performance but it is hard to see that you can say with assurance in any particular case -- your Honor suggests to me one where it is stipulated that he is doing it for business purposes. I think that if it was stipulated for business purposes, then technically speaking he would be performing publicly for profit and be subject to a charge.

But as a practical matter, no licensing organization that I know of has ever pursued such a course of conduct.

QUESTION: How about a dentist's office?

MR. RIFKIND: Same thing. No one-step type that is usually used in the home has ever been subjected to a royalty or to a license requirement.

QUESTION: No,we're not talking about a home. We are talking about a public performance.

MR. RIFKIND: No, I say the whole type of radio has ever been subjected to the kind of things that a man would have in his home. And the Congress recognizes the distinction in all of the new bills that have been introduced.

QUESTION: Well, Congress hasn't enacted anything.

MR. RIFKIND: Not yet.

QUESTION: So it hasn't recognized anything.

MR. RIFKIND: The House has passed a bill, in '67. The Senate passed a bill in '74. They are substantially the same on this. The Senate bill was passed, I think, by a majority of 70 to one. They recognized the principle of Jewell-LaSalle -- both bills do and the thing that has slowed down the enactment has been the problem with the CATV stations.

I will suspend, if I may, and I would like to reserve the balance of my time for response.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Rifkind.

Mr. Cohen.

ORAL ARGUMENT OF HAROLD DAVID COHEN, ESQ.,

ON BEHALF OF RESPONDENT

MR. COHEN: Mr. Chief Justice, and members of the Court:

The argument of my distinguished adversary has a captivating sound but, essentially, I believe it begs the very question in dispute. I think Mr. Justice Stewart has put his finger on the point.

The question is whether the Court of Appeals erred in deciding that when Mr. Aiken, in his fast foods shop, where he has people in for not more than 15 minutes at the most, 60 percent of the customers come in and pick up the delicatessen and take it out within two or three minutes. If they decide to consume it on the premises,

then they can take it on disposable paper over to a counter. No waitresses are supplied and they can stay there and eat it and it is usually about 10 minutes, a maximum of 15 minutes.

I would agree with my learned brother that if Mr. Aiken hired the Pittsburgh Symphony Orchestra to perform in his fast food establishment or a trio of musicians or he put in complicated equipment whereby he could go out and buy tapes, select tapes and decide when they should be run, without commercials and perhaps with some advertisements for Aikens, that he might well be chargeable with infringing the copyright of the music he performed but that is not this case.

We are concerned with the simple question whether, on this particular day, in this one store -- and the record deals only with one store and I think it is a euphemism to call it a restaurant -- whether on this day he engaged in a performance of ASCAP's two musical compositions when he turned his radio to an FM station in Pittsburgh and the radio broadcasts came through the air to his store and were heard by his three employees and such customers as happened incidentally to be on the premises.

QUESTION: Let me see if I understood your illustration, Mr. Cohen. If the restaurant or store or factory took a typical taperecording machine which many

people now use to preserve good programs and copied all the good programs that he thought his customers would like and eliminated the advertising and then had those running by five loudspeakers or three or 10 within his establishment, do I understand you to say that might run afoul of the Buck case?

MR. COHEN: No, not of the Buck case. The Buck case had to do with radio broadcasts. I think it might run afoul of another provision or section or part of Section 1E of the Copyright Act. That is, there is an exclusive right to record performances and I think if there were tapes or records, that might be an infringement.

QUESTION: This would be like copying recordings.

MR. COHEN: Right.

QUESTION: And they would have to pay a royalty.

MR. COHEN: But in this instance, he has no control over what comes in. The broadcasters, as this Court has stated in the Fortnightly case and repeated in the Teleprompter case, are performing.

They are the ones who go out and select the programs. They are the ones who make the arrangements with the talent sources, with the record companies, with ASCAP and other performing rights organizations.

QUESTION: And they pay for the licenses.

MR. COHEN: They pay ASCAP for their royalties.

QUESTION: And they charge their own customers --

MR. COHEN: They charge their customers --

QUESTION: -- on the basis of how large a listening audience they have.

MR. COHEN: Exactly. And I am sure that when this FM station goes out and makes the pitch to the advertiser, he says, we can reach people whether they are at their home or in their cars driving to or from their homes or whether they are in stores or whether they are waiting in doctors' offices or whether they are sitting in a barber's chair or wherever.

In other words, he tries to maximize his audience so that his revenues will be greater and, in turn, ASCAP profits because the amount which it receives from the broadcaster is a percentage of the broadcaster's revenues.

So what, in effect, they are trying to do here, stripped of some of the language, is to exact a double payment.

There is nothing in the record that indicates that when they go to the broadcaster they say, well, we are not going to charge you as much as we otherwise might because we are going to get Mr. Aiken to give us $60 a year, so we are going to take -- deduct that from the amount that you are going to have to pay.

QUESTION: Well, Mr. Rifkind says they have been

doing that for 40 years and they are doing it on the authority of Jewell-LaSalle.

MR. COHEN: It is curious, indeed, that if, for 40 years, they have been doing it, they have 5,150 licenses. I think we can take notice of the fact that there are hundreds of thousands of establishments in this country like Mr. Aiken's, barber shops, beauty salons, doctor's offices, if you will, restaurants and if they have 5,000 licenses and these are hotels and motels and large supermarkets and the like, it does not show that they have vigorously relied upon Jewell-LaSalle as a basis for --

QUESTION: Does that include Muzak, the 5,000 figure?

MR. COHEN: No, the 5,000 figure does not include Muzak. Muzak is a performer. That is, the Muzak franchisee which supplies or actually performs a music to the business establishment, does perform, does pay a royalty to ASCAP and that is separate and that will continue to be paid in whatever amount the Court may deem reasonable and nondiscriminatory, that will continue to be paid regardless of the outcome of this case.

QUESTION: Do you think this case is factually distinguishable from Jewell-LaSalle?

MR. COHEN: Is factually distinguishable --

QUESTION: In any rational manner.

MR. COHEN: Well, certainly, the ground that you indicated, namely the license implied in this case -- which may be implied in this case by virtue of the fact that the broadcasting station was authorized in Pittsburgh, whereas the broadcasting station in Kansas City in the Jewell-LaSalle case was not authorized by the copyright owners, is a significant point of distinction.

QUESTION: But I thought the terms of the license to the broadcasting station negated any authority on its part to license anyone else.

MR. COHEN: We are not saying that there is necessarily a license implied in fact. But there certainly is a license implied in law. I do not believe that ASCAP can contrive language whereby they can say to a broadcaster, we are going to license you to broadcast -- that is, disseminate to the public our compositions and we want you to pay us a royalty.

These are to go over the air to all members of the public and then say that Mr. Aiken or his customers, who are members of the public, cannot receive those broadcasts without payment of a fee.

Another point of distinction, of course, is that if we got into the quantitative test which, of course, has since been discarded by this Court, obviously, what Mr. Aiken has done in his store, which is a small room with

two outfits in the ceiling of the public area -- or two speakers are located -- and three other speakers, one in the washroom, the girls' washroom, one in the kitchen and one in the office for his employees, is vastly different from the complicated mechanism of the large master radio-receiving set in Jewell-LaSalle which piped music to 200 rooms throughout the hotel or in the Statler Hotel case in New York where they had a radio engineer and two assistants on top of the building and they piped music through the ducts to 1,900 rooms and they held it was a performance upon the authority of Jewell-LaSalle.

That is not this case. However, I am not relying upon that because I think this Court has clearly stated, in the Teleprompter case and on the Fortnightly case before, that viewers of television -- and by a parody of reasoning, listeners to radio broadcasts, do not perform. The broadcasters perform.

It is difficult to conceive functionally how Mr. Aiken can be said to be performing music in his establishment when he has no control over what is being broadcast, when it is being broadcast.

He has no dealings with advertisers. He has no idea of the tempo of the music or the kind of the music that is coming over, except as Mr. -- Judge Rifkind pointed out. Of course, he may select one station because he

thinks it may be more pleasing to him or people in his store, particularly his employees, than another station, but the fact is, he does not attempt to edit anything that comes over. He gets the commercial announcements. He gets the station identifications, the public service announcements, the news, as well as the music.

I am sure that it would put an unbearable strain upon the ordinary meaning of performance to have someone sitting in Mr. Aiken's shop consuming a hamburger, regarding Mr. Aiken as the performer of the music.

"This music is coming to you from station WKJF-FM" and there is nothing that Mr. Aiken does to intervene between that broadcast and the listening by the people, primarily his employees. Incidental --

QUESTION: Mr. Cohen.

MR. COHEN: Yes, sir.

QUESTION: What about a record player that is hooked up to an amplifier system?

MR. COHEN: Well, the record player, I would say --

QUESTION: A record player or tape -- a tape player, either one.

MR. COHEN: Well, I would say -- I would be inclined to say that that would be a performance because of the special provision in the statute. But if he has a record player or a tape machine, he goes out and buys the

or selects the tapes.

QUESTION: And selects what he wants.

MR. COHEN: Selects what he wants, has control over what is being sent out and presumably he can intersperse his own commercial announcements. He may say, for the next five minutes you can get Aiken's chicken at 10 percent off.

He could not do it here. He can't --

QUESTION: Well, what if he doesn't? That's a performance, isn't it? That is clearly a performance.

MR. COHEN: Yes.

QUESTION: As a juke box, so-called.

MR. COHEN: Well, the juke box -- there is a special exemption for juke box in the law which Congress is trying to modify to have an $8 juke box charge imposed.

So far as the legislation is concerned on which Mr. Rifkind depends, I think it is pretty hard to find in the silence of Congress over these last 10, 15 years, any indication that Jewell-LaSalle must be adhered to.

Otherwise, this entire complex of business relationships is going to fall.

QUESTION: Well, do you think this Court in Jewell -- in Teleprompter, rather, intended to overrule Jewell-LaSalle, which was a unanimous statutory decision on which presumably property rights have been established?

MR. COHEN: Well, obviously, this Court did not use the word "overrule." And I think the Supreme Court generally is reluctant to state explicitly that a former decision of the Court is overruled but to say that Jewell-LaSalle must be understood to be limited to its own factual context and to undermine the basic rationale of Jewell-LaSalle, the basic premise on which Jewell-LaSalle was decided, namely, that there is a performance because of this -- of what the hotel did by having this elaborate equipment and substitute the functional analysis test of Fortnightly and Teleprompter, obviously, in effect, emasculates Jewell-LaSalle; the vitality of Jewell-LaSalle is not what it was prior to Fortnightly decision.

QUESTION: Well, Mr. Cohen, it is -- I think the phrase was, it is limited, must be understood to be limited to its own facts.

MR. COHEN: Right.

QUESTION: And one of the facts in Jewell-LaSalle was that the broadcasting station was unlicensed.

MR. COHEN: That was an important fact, as I pointed out previously.

QUESTION: And that is one of its own facts.

MR. COHEN: That is right. Now --

QUESTION: From what you have said, Mr. Cohen, I take it that all of your arguments would apply equally to

the factual situation we have here and the hypothetical restaurant, let us say, that seats 1,000 people -- if there are such -- with 20 different rooms and in each room there was one outlet.

MR. COHEN: It could use radio broadcasts. I think it would logically. The difference comes, of course, a restaurant of that kind, as the restaurant in the Herbert v. Shanley case to which my adversary alluded, may go in for a much different type of entertainment.

To say that the business motivation of Mr. Aiken is like that of a hotel owner in Herbert v. Shanley, seems to me to be fictional.

The Vanderbilt Hotel in New York was concerned with the ambience of its hotel restaurant so it had an orchestra play and it had some valuably [?] liveried waiters and it had fine napkins and tablecloths.

That is not true of an establishment of this kind, which is willing to have just the radio come in and have two speakers in the public area where the sound can be audible evenly throughout the premises.

The point is that my adversary is attempting to draw a line which I think is an arbitrary one, an artificial one, between having a radio behind the counter encased in one cabinet -- that is, it might have one speaker or two speakers -- and that would not be a performance but he

did have that in this particular shop but he found it blared if you were close to it, if you heard it too loudly.

If you were a little further away, you might not hear it as well and if it blared, it interfered with conversations with customers so, instead, he had speakers.

Now, it is not unusual these days, I am told -- in fact, it is quite common when you buy a radio, to have speakers outside of the tuning device and you may put them 10 feet away, you may have them in the other part of the room or you may put it in another room. But so far as Mr. Aiken's "performance" is concerned, he did nothing more than install this equipment.

He did not manipulate it once it was installed and it is no different than if he had just one unit with the speakers encased in the cabinet so far as his function relative to the broadcasts were concerned, was concerned.

I think the reasoning of this Court in the Fortnightly and Teleprompter cases is dispositive of ASCAP's claim. I think the Court of Appeals correctly perceived it to be. It is certainly illogical, I would think, to declare that the function of a cable system has little in common with the function of a broadcaster because like viewers and unlike broadcasters, they do not perform the programs they receive and carry and then turn around and hold Mr. Aiken to be engaged in a performance.

Mr. Aiken is obviously on the listening side of the line.

As a matter of fact in the Fortnightly case and Teleprompter, many CATV systems served commercial establishments as well as subscribers in their homes. To say, on the one hand, that the CATV system is on the listening side, or the viewing side of the line but Mr. Aiken, who is a subscriber jumps over to the performing side of the line seems to me to be arbitrary.

QUESTION: Now, what would be the situation of the Aikens if the proposed new statute comes along?

MR. COHEN: Well, the proposed new statute is rather complicated. I must take issue with my friend, Judge Rifkind.

QUESTION: You mean, you are liable to be here even under the new statute, making the same argument?

MR. COHEN: I think the new statute attempts -- and I have the legislative history in the case of establishments such as Aikens, small establishments, barber shops or so forth, would not be subject to liability and also, I may point out, that the statute provides that there may be transmissions even by a hotel to guest rooms without incurring any copyright liability.

As a matter of fact, the legislative history will disclose that even ASCAP, Judge Rifkind's client, did not

attempt to enforce Jewell-LaSalle against hotels which piped music to guest rooms.

After the Statler case in New York was a victory for SESAC, SESAC, which is a counterpart of ASCAP, there apparently was some question whether this was a performance for profit. At any rate, the legislative history discloses that there was very little attempt to enforce the rights of the performing rights of organizations against hotels which transmitted programs to private rooms and hotels, even though Jewell-LaSalle presumably gave them that right under the Jewell-LaSalle construction of the 1909 Act.

So the answer to the question, Mr. Justice Brennan, is that I would be foolhardy if I attempted to prognosticate the effect of pending legislation.

As you know, there has been -- they have been studying the revision of the copyright law since 1955. There was an authorization from Congress to the copyright office. Extensive studies were made. There was -- I refer to a report in 1961 as being the culmination of the studies but my opponent's reply brief said it was not the culmination but, of course, the foreword to the report is that it is the culmination of studies.

At any rate, there were a lot of comments and discussions and compromises and they came out with a statute. They passed one House, as Judge Rifkind pointed

out, did not pass the other.

I do not know what may eventually come out of this but, certainly, we are concerned here with the construction of an existing statute and if this Court, in 1931, decided a case on a premise or doctrine which has been found not to be found, not to be logical, it should be the responsibility of this Court to correct that decision, not to wait for Congress to correct it.

Thank you.

MR. CHIEF JUSTICE BURGER: You have about four minutes left, Mr. Rifkind.

REBUTTAL ARGUMENT OF SIMON H. RIFKIND, ESQ.

MR. RIFKIND: I gathered, as I listened to my learned friend, that there might be a distinction drawn between Jewell-LaSalle and this case and that the station in Jewell-LaSalle, the broadcast station, was unlicensed and here it is licensed.

I think the argument advanced by one of the dissenting justices in Fortnightly, Mr. Justice Fortis --

QUESTION: He was the only dissenting justice.

MR. RIFKIND: The only -- excuse me, your Honor. Of course you are right. I was thinking for the moment of Teleprompter.

QUESTION: Yes.

MR. RIFKIND: In Fortnightly, he pointed out that

the interpretation of that term, "perform," cannot logically turn on the question of whether the material that is used is licensed or not licensed and I don't think there is any way of meeting that logical proposition.

More importantly, we have the -- the distinction of an unlicensed station was judicially first noticed and abandoned back in 1937 when Judge Woolsey in the Southern District decided the Hotel Statler case and since then, and before then, never once in all the literature on this subject, in all the discussions of the copyright office, in all the legislative discussions, has there been so much of a trace of a distinction attributable to this coincidental effect.

I can't see how logically it can play the role.

I heard the argument advanced that perhaps Aiken's performance was not for profit. You heard suggestion that the customers only spent a little bit of time there and so on and so forth.

Well, on the merits, of course that issue has been resolved by Herbert against Shanley where Mr. Justice Holmes made the cogent remark, "It is true that music is not the sole object and neither is the food," he said.

"If music didn't pay, it would be given up."

Mr. Aiken spent money to furnish music to his customers. He must have regarded it as money well-spent. I

I say, the issue below is treated as established. Indeed, it was not challenged seriously, as the Court of Appeals pointed out. So that the issue is not really in this Court.

The petition for cert didn't mention it. Neither did the answer for petition for cert.

To suggest now at this late stage of this case, this Court should consider whether only music which is offered for sale by a ticket at the door is within the copyright statute, I think that is to extend the implication to this case far beyond what we are now confronting.

There was a question as to how many licenses of this kind were outstanding and the figure was given correctly, over 5,000. But what was not stated is that there are 75,000 establishments which use Muzak, so I do not know and have no evidence of any information that there are lots of Aikens around this country.

But even if there were, that would not change the facts. If the copyright owners have a right against Aiken, they have a right to enforce it.

The suggestion was made that even though the implication -- the suggestion of an implied license is no longer tenable, in fact, because the license to the radio station expressly excluded it, that there was some kind of a doctrine by which ASCAP was prohibited from

entering into that kind of an arrangement with the broadcast station.

Well, all I can say is, is that that is a startling notion. Every time a piece of sheet music is sold at the corner store, it is -- confers authority upon the buyer to play it in his home. That doesn't mean that he may give a performance for profit on that sheet music and escape royalty obligations.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 10:56 o'clock a.m., the case was submitted.]