

## THE ORGANIZED MUSICIANS: II\*

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### MECHANICAL COMPETITION

LIKE many other unions, the AFM has long battled the threat of technological unemployment. Like their brother-unionists, the musicians have found that the man who has been displaced by a machine can take little comfort from the orthodox economist's<sup>121</sup> assurance that the long-run effect of all technological change must be the creation of a better life in which his remote descendants may share.<sup>122</sup> Consequently, they have resisted this change as best they could.

This problem can best be understood if one significant characteristic of the machine in the field of music be noted at the outset. In whatever form, the machine has never eliminated or even altered the musician's function. The machine does not make music—it merely provides a means of preserving and giving wider dissemination to the music made by the musician. That characteristic is significant in two respects. In the first place, by providing a means of reproducing musical performances and making wider dissemination of those performances possible, the machine has created a greater demand for music and probably inspired a greater number of people to become musicians without creating a correspondingly greater demand for the services of musicians.<sup>123</sup> Secondly, the machine is

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<sup>121</sup> See Douglas and Director, *The Problem of Unemployment*, c. x (1931), for a typical presentation of the argument, completely a priori, that the labor-displacing effects of technological development will ultimately be balanced by such compensating factors as reduction of prices and development of new industries. A more realistic study reaches this conclusion: "Today, a state of unbalance exists, and it seems likely that under present conditions unbalance will continue and perhaps become even more pronounced." Anderson, Lorwin, and Blair, *Technology in Our Economy* 220 (U.S. TNEC Monograph 22, 1941).

<sup>122</sup> The attitude of the displaced worker was well expressed by Philip Murray a few years ago: "Classical economic pronouncements about the automatic absorption of displaced workers by private industry, whether true in the long run or not, are just so much dribble to the men and women who are deprived of their accustomed way of making a livelihood. . . . As a famous economist once said, in the long run we are all dead." Hearings before TNEC pursuant to Pub. Res. 113, 76th Cong. 3d Sess., at 16,505 (1940).

<sup>123</sup> While no precise measurement of these effects has been made, available information indicates the tendency. Thus, federal census figures disclose that while the total population of the United States was increasing by some 43%, the number of gainfully employed musicians

still dependent on the musician for the original performance—a fact which has at once served to dramatize the musician's plight and to aid him in his struggle against mechanization.

In its original manifestations, the machine constituted no threat to employment opportunities. In 1896 the National Gramophone Company, by introducing a superior recording process and replacing the cylinder-type record with a flat disc, stimulated its only rivals, Edison and the American Graphophone Company (later Columbia Graphophone Company),<sup>124</sup> into activity which converted the phonograph from a scientific novelty heard through earphones in barrooms, bawdy houses, and penny arcades to a horn-equipped instrument which could be enjoyed simultaneously by the entire family. But this development did not mean new competition for the musician. Indeed, the phonograph opened an entirely new labor market for him. For by recording his performance he put it into a form which would be purchased for use in the home. And, except for an occasional engagement to play for private balls, the musician's employment opportunities had previously been limited to public performances.

The promise of this new market was soon fulfilled. In 1906 the Victor Talking Machine Company (1901 successor of National Gramophone Company) converted the phonograph into a thing of beauty by reversing the horn and enclosing it in the cabinet of the Victrola. With the aid of a best-selling line featuring Enrico Caruso, Victor launched a recording

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and music teachers, vocal and instrumental, decreased from 1910 (139,300) to 1940 (129,256) by 7%. Thirteenth Census of The United States, vol. iv, at 54 (1910); Sixteenth Census of The United States, vol. iii, part i, at 81, 83 (1940). Since the census counts only the occupation in which the individual makes most of his income (1910 Census) or to which he devotes most of his time (1940 Census), it gives no indication of the number of persons for whom music is a secondary vocation. Subject to distortions due to the facts that such persons were not completely unionized in the early years, that union rolls include some who no longer follow the profession at all, and that the AFM membership roll includes Canadian and duplicate memberships, some indication of the increase in the total number of persons seeking professional engagements as instrumental musicians may be secured from union membership figures. These figures reveal that the AFM's total membership in 1940 (135,000) represented a 77% increase, and in 1948 (232,000) a 200% increase, over the total claims of all unions representing instrumental performers in 1909 (76,000).

<sup>124</sup> As is not infrequently the case, the structure of the industry was governed by the ownership of patents. Edison's patent of 1878 covered a system of recording sound by means of indentations on a tinfoil-covered cylinder. American Graphophone Company operated under Bell & Taintor's 1886 patent on a process for cutting grooves in a wax-like cylinder. National Gramophone Company was built upon a patent issued to Emil Berliner in 1895 which substituted a flat-groove record for the hill-and-dale variety used by Edison and American; see *Victor Talking Machine Co. v. American Graphophone Co.*, 140 Fed. 860 (D.C. N.Y., 1905). With the expiration of these basic patents, a number of new companies, the most successful of which was the Brunswick Record Corporation, were able to enter the field.

boom that was to last fifteen years.<sup>125</sup> The musicians, who could now supplement their earnings from public performances with the income from recording engagements, had no reason to combat the phonograph.

True, there was one instance of mechanical competition during this time. Player-pianos and "automatic" phonographs were being used to provide accompanying music in the theaters for another new development—the motion picture.<sup>126</sup> To meet this threat, the AFM's 1912 convention authorized the Locals to demand that their members be employed to operate "any mechanical instrument which replaces all or part of an orchestra."<sup>127</sup> The Locals, invoking a variety of arguments,<sup>128</sup> a boycott of the Rudolph Wurlitzer Company (which manufactures musical supplies and instruments in addition to mechanical pianos and automatic phonographs), and the support of other unions,<sup>129</sup> proceeded to enforce the national policy. With substantial assistance from the stagehands' union, which had extended its jurisdiction to include motion picture projectionists in 1908, the Locals did so well that by 1916 the AFM expanded its demands to require that "the introduction of a music machine shall not interfere with the minimum number of men rule of the Local."<sup>130</sup> Within a few years thereafter the Locals had succeeded in placing union musicians, in numbers varying from a single pianist or organist to a full orchestra, in practically every movie theater in the country.

This result was achieved without any recorded instance of litigation on the merits of the Federation's campaign against mechanical competition.

<sup>125</sup> For accounts of the early history of the phonograph industry, see Taubman, 165,000 Discs a Year, *New York Times Magazine* 20 (Dec. 8, 1946); Phonograph Records, 20 *Fortune*, No. 3, at 72 (1939); Maraniss, A Dog Has Nine Lives: The Story of the Phonograph, 193 *Annals Amer. Acad. Pol. Sci.* 8 (1937); Yorke, The Rise and Fall of the Phonograph, 27 *Amer. Mercury* 1 (1932); Expiration of the Berliner Talking Machine Patent, 106 *Scientific American* 52 (1912).

<sup>126</sup> The birth of the motion picture dates from Edison's demonstration of his kinetoscope in 1899. Mechanical pianos were introduced at least as early as 1890; the automatic phonograph came fifteen years later. Neither proved an outstanding success as a coin-operated machine, perhaps in part because the customer had no choice in selecting the number to be played. Letter from E. L. Hahne, treasurer of the Wurlitzer Company, Jan. 20, 1948. But both were employed by early motion picture exhibitors.

<sup>127</sup> *International Musician* 10 (Supp., June 1912).

<sup>128</sup> Including the contention that all theaters should be required to hire orchestras because of the traditional panic-quelling effects of music in event of fire. *International Musician* 8 (Aug. 1914); *ibid.*, at 9 (Oct. 1915).

<sup>129</sup> The 1915 convention of the AFL adopted a resolution, introduced by AFM delegates, directing all AFL unions to "extend every possible assistance to the American Federation of Musicians in enforcing their demands on the employers of music where machines are placed." *Proceedings of Thirty-fifth Annual Convention of the American Federation of Labor* 197, 295 (1915).

<sup>130</sup> AFM By-Laws Art. IX, § 19 (1947).

That question was first judicially examined at a much later day (but in a similar setting) when the AFM invoked the assistance of the stagehands to prevent a traveling opera company from using phonograph records to supply the orchestral accompaniment for its performances. In that case, the New York Court of Appeals approved the issuance of an injunction, taking the occasion to announce the doctrine, which it later was to apply against the AFM again,<sup>131</sup> that any labor activity taken to achieve an objective which the court by some sort of intuitive inspiration should determine to be "unlawful" was both enjoined at common law and outside the coverage of New York's "little Norris-LaGuardia Act."<sup>132</sup>

By the time the machine had been ousted from the motion picture theater, it was beginning to appear in a new form. The radio, previously employed only as a signaling device, was successfully used for voice broadcasting in 1920, and thus was introduced a new industry which today operates more than 1,472 standard (AM) broadcasting stations.<sup>133</sup> Almost immediately this industry was faced with the problem which it has not yet solved—what to use for program material. Recorded music offered one answer, and the broadcasters embraced it so enthusiastically that the radio station became little more than an extension of the phonograph. This development disturbed the Department of Commerce, which was attempting to regulate the industry by a system of licensing under the rather dubious authority of the Radio Act of 1912.<sup>134</sup> As the Department described the situation later:

During the early days the programs of a majority of the stations consisted almost entirely of phonograph records. The announcers usually had favorite records which they repeated numerous times during a program. The Secretary of Commerce foresaw the danger of stations losing public interest if a change was not made in the programs.<sup>135</sup>

The Secretary sought to effect that change in 1922 by opening a new wave length to private broadcasters who would meet certain prescribed standards. Previously, all private broadcasting had been restricted to a frequency of 833 kilocycles, thus limiting each community to a maximum of one full-time station. By his new regulations, Secretary Hoover created

<sup>131</sup> *American Guild of Musical Artists v. Petrillo*, 286 N.Y. 226, 36 N.E. 2d 123 (1941), discussed in text at note 67 supra.

<sup>132</sup> *Opera on Tour, Inc. v. Weber*, 285 N.Y. 348, 34 N.E. 2d 349 (1941), motion to amend remittitur denied 286 N.Y. 565, 35 N.E. 2d 920 (1941), cert. den. 314 U.S. 615 (1941), rehearing den. 314 U.S. 716 (1942). The Court of Appeals had begun to lay the groundwork for this emasculating of the New York anti-injunction statute five years earlier; see *The Decline of the New York Court of Appeals*, 8 Int. Jurid. Ass'n Bull. 29 (1939).

<sup>133</sup> Hearings, *op. cit. supra* note 91, at 263.

<sup>134</sup> 37 Stat. 302 (1912).

<sup>135</sup> Annual Report, Chief of Radio Division, Department of Commerce 8 (1929).

a new Class B license to operate on 750 kilocycles, one of the conditions of the license being that mechanically operated musical instruments could not be used.<sup>336</sup> That restriction upon the holders of Class B licenses and the competition of such licensees with the holders of nonrestrictive licenses combined for a time to prevent excessive use of phonograph records on the air.

But even when not used in conjunction with the phonograph, the radio was not an unmixed blessing for the musician. True, by carrying music into the home it was helping to cultivate in each community the new market which the phonograph had opened.<sup>337</sup> But the radio-stimulated demand did not result in benefit to the musicians in each community, because the broadcasters soon introduced a new development.

The American Telephone and Telegraph Company inaugurated network broadcasting in 1923 when a program was broadcast simultaneously from its station WEAf (now WNBC) in New York and station WNAC in Boston by means of a connecting telephone line.<sup>338</sup> By the end of 1925 the A.T.&T. network served a chain of 26 stations, and the Radio Corporation of America had formed another chain based on its station WJZ in New York. From this beginning has grown a system of four nation-wide chains<sup>339</sup>—NBC, CBS, MBS, and ABC—and forty-five regional net-

<sup>336</sup> The original regulation provided that "mechanically operated musical instruments may be used only in an emergency and during intermission periods in regular programs." Bureau of Navigation, Radio Service Bulletin No. 65, at 11 (Sept. 1, 1922). One month later the regulation was amended to prohibit mechanical music entirely. *Ibid.*, No. 66, at 8 (Oct. 2, 1922).

<sup>337</sup> During the early years of broadcasting the musicians, like all other performing artists, aided the cultivation of this new market by donating their services. Jome, *The Economics of the Radio Industry* 176 (1925).

<sup>338</sup> FCC, Report on Chain Broadcasting 6 (1941), hereafter cited as FCC Chain Report.

<sup>339</sup> The National Broadcasting Company was formed by RCA, General Electric Company, and Westinghouse Electric and Manufacturing Company in 1926 to take over the operation of the WEAf and WJZ chains, which it operated as the "Red" and "Blue" Networks. In 1930 RCA acquired full ownership of NBC. In 1933, as the result of an anti-trust consent decree, General Electric and Westinghouse disposed of their substantial stock interests in RCA; see *United States v. Radio Corporation of America*, 3 F. Supp. 23 (Del., 1933); FCC Chain Report 7-8.

United Independent Broadcasters, Inc., was formed in 1927 by impresario Arthur Judson, three associates, and the Columbia Phonograph Company. The Phonograph Company sold its interest after a few months, and in 1928 the William S. Paley family acquired the controlling interest which it still holds. In 1929 the name of the company was changed to Columbia Broadcasting System, Inc. FCC Chain Report 21.

Mutual Broadcasting System, Inc., was formed in 1934 by a group of radio station operators, and is controlled by the Chicago Tribune's station WGN and R. H. Macy Company's station WOR. FCC Chain Report 26-28.

As a result of its investigation of chain broadcasting, the FCC required NBC to dispose of one of its two networks. NBC elected to dispose of the "Blue" (WJZ) system, which was set up as a separate corporation in 1942 and sold in 1943 to Edward J. Noble, the candy Life-Saver

works<sup>140</sup> through which a single program can be broadcast simultaneously in more than 450 different communities.<sup>141</sup>

Thus, although radio originally carried greater promise than the phonograph for the instrumental musician—because it provided a means for him to reach the family home with his performance without putting that performance in such form that it could be repeated mechanically—much of what radio offered it soon took away with the development of chain broadcasting. Although the AFM is acutely aware of the restrictive effect of the network device upon the employment opportunities of its members, it has not yet devised a strategy to combat that effect. After the networks had made a new bid for local patronage by introducing the “co-op show”<sup>142</sup>—a network program with cued blanks for the insertion of local advertisers’ blurbs—the Federation in September 1940 ordered its members not to participate in such shows. But that ban was lifted in December 1947 (perhaps because the producer of “Information Please” had filed unfair labor practice charges under the Taft-Hartley Act<sup>143</sup>); and new three-year contracts concluded between the network originating stations and AFM Locals in New York, Chicago, and Los Angeles in March 1948 expressly provide that musicians will perform on co-op programs.<sup>144</sup>

Meanwhile, the years which witnessed early developments in network broadcasting were marked by two other events which drastically affected the employment opportunities of musicians. One of these was the introduction of sound movies. Within a short time after Warner Brothers released “The Jazz Singer” in 1927, most of the motion picture theaters in the United States were equipped for sound, and 18,000 AFM members formerly employed to provide music for vaudeville and for silent films were out of work.<sup>145</sup> This sudden development caught the Federation com-

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king; see Radio Corporation of America, 10 FCC 212 (1943). In 1945 the name of the system was changed to American Broadcasting Company.

<sup>140</sup> Broadcasting Yearbook 334 (1948).

<sup>141</sup> As of January 1948 the four national networks had 1067 affiliates—ABC had 260, CBS had 164, MBS had 476, and NBC had 167. While most of these stations are affiliated with the networks only through contractual arrangements, ABC owns 5 stations, CBS owns 7, and NBC owns 6. Hearings, op. cit. supra note 91, at 258, 271, 280, 283.

<sup>142</sup> MBS introduced the co-op show in 1937. The four national networks now offer about fifty such shows. Newsweek 68 (Oct. 20, 1947).

<sup>143</sup> On the theory that the AFM ban on such programs constituted an illegal boycott under § 8(b)(4) of the Act. 21 Lab. Rel. Rep. 17 (1947).

<sup>144</sup> Variety, p. 38 (Mar. 24, 1948).

<sup>145</sup> Mermey, *The Vanishing Fiddler*, 227 No. Amer. Rev. 301 (1929); Hearings, op. cit. supra note 91, at 336, 405.

pletely unprepared. In 1927 President Weber had assured the membership that "a general danger to employment will not develop, as from present observation it appears that the public accepts the Vitaphone merely as a novelty."<sup>146</sup> When this prediction proved wrong, he essayed another: "It is the opinion of the Federation leadership, based upon exhaustive study, that mechanical music . . . will fail eventually to give satisfaction in any theater as a substitute for the appearance of artists in person."<sup>147</sup> And to accelerate public dissatisfaction with mechanical sound he persuaded the 1929 convention to authorize a nation-wide advertising campaign to expose the sound movie as an "anti-cultural development."<sup>148</sup>

Although the Federation's advertisements featuring robot musicians won commendation from experts,<sup>149</sup> the sound movie continued to thrive. And by the time it had become apparent that propaganda would not win the battle, the AFM was in a poor position to resort to anything else. A musicians' strike could not be called in the theaters—men must be employed before they can strike. While the supply of mechanical music could have been stopped at its source by calling a strike in the studios where sound pictures were made, the Supreme Court had held similar boycotts by the machinists' and stonecutters' unions enjoined under the Sherman Act by limiting the union-exempting provisions of the Clayton Act to disputes between the striking employees and the struck employer,<sup>150</sup> and the Federation was unwilling to risk a federal injunction.<sup>151</sup> When the stagehands, already preoccupied with the problem of extending their jurisdiction over projection machines to include sound equipment, refused to call their members out of the theaters under the 1913 AFM-IASTE agreement, the AFM was without any effective means of combating the new mechanical competition.

Of course, while the advent of sound movies meant unemployment for many musicians throughout the country, it also meant that there would

<sup>146</sup> *International Musician* 23 (Oct. 1927).

<sup>147</sup> *Ibid.*, at 1 (Feb. 1929).

<sup>148</sup> *Ibid.*, at 18 (May 1929); *ibid.*, at 1 (June 1929). And see Slichter, *Union Policies and Industrial Management* 211-13 (1941).

<sup>149</sup> "We have seen no more striking or convincing copy in any advertisement. . . ." *Editor & Publisher* 54 (Oct. 26, 1929).

<sup>150</sup> *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921); *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n*, 274 U.S. 37 (1927). The boycotts involved in these cases were at the opposite end of the distribution process—the machinists and the stonecutters refused to work on printing presses and cut stone purchased from non-union producers—but the rationale of the Duplex and Bedford decisions would be equally applicable to a strike against a producer who sold his product to non-union customers.

<sup>151</sup> *International Musician* 10, 14 (June 1930).

be some augmentation of the 200-odd musicians employed by the producing studios to supply "mood music" for the inspiration of the actors. And on this relatively minor phase of the matter, the AFM was in a better position to represent its members. A few years earlier it had come to the aid of the stagehands, carpenters, electricians, and painters in their campaign to unionize the studios. It had also joined with them in the 1926 Studio Basic Agreement with the major producers, the chief feature of which is to provide for negotiation of studio contracts at an annual New York meeting between officers of the unions and representatives of the producers.<sup>152</sup> Through its negotiations at the national level under this agreement, the Federation has been able to initiate the quota system previously mentioned under which about 500 musicians are employed at annual salaries of not less than \$6,900<sup>153</sup> to provide the music for pictures which play in more than 18,000 theaters with an aggregate weekly attendance exceeding 60,000,000.<sup>154</sup> And since 1938 it has sought to protect these musicians by requiring the producers to agree that sound tracks will be used only "to accompany the picture for which the music was performed" and will not be "disposed of, sold, leased, or used for any picture or purpose except to accompany a revival of the picture for which recordings were originally made."<sup>155</sup>

When the development of television suggested a new method for the use of sound films, additional provisions were inserted in the studio contracts to forbid the use of musical sound track for television broadcast without prior consent of the Federation.<sup>156</sup> Those provisions were included in two-year contracts negotiated in 1946 in the face of a Supreme Court decision which casts considerable doubt on their validity. *Allen Bradley Co. v. Local Union No. 3, IBEW*<sup>157</sup> found a violation of the Sherman Act in contracts entered into by the New York local of the electrical workers' union in order to create more employment opportunities for its members. The local had secured contracts with all electrical contractors in the New York City area providing that the contractors should recognize the closed shop and should purchase equipment from none but New York manufacturers who employed members of the local. Similar closed shop contracts had been made with the manufacturers, who agreed to confine their New

<sup>152</sup> Ross, *Stars and Strikes* 13-21 (1941).

<sup>153</sup> See text at note 97 supra.

<sup>154</sup> *Variety*, p. 9 (Apr. 28, 1948); Lindey, *Motion Picture Agreements Annotated* vii (1947).

<sup>155</sup> Ross, *op. cit. supra* note 152, at 206; Hearings, *op. cit. supra* note 68, at 506.

<sup>156</sup> Hearings, *op. cit. supra* note 68, at 199, 207, 232.

<sup>157</sup> 325 U.S. 797 (1945).



York City sales to contractors employing the local's members. The effect of these arrangements was not only to create more employment for the electricians but also to give the employers a monopoly on the sale and installation of electrical equipment in the New York City area. The Court found nothing in the Clayton or Norris-LaGuardia Acts or in its prior decisions construing those acts which would exempt the union's "combination with business groups" from the prohibition of the anti-trust laws. Apparently the agreements involved in that case constituted illegal combinations with business groups, as distinguished from legal collective bargaining agreements between union and employer, because they served to aid not only the union members in their competition for jobs but also the employers in their competition for markets. At least that seems to be the meaning of the explanation offered by the Court:

Section 6 of the Clayton Act declares that the Sherman Act must not be so construed as to forbid the "existence and operation of labor, agricultural and horticultural organizations, instituted for the purposes of mutual help. . . ." But "the purpose of mutual help" can hardly be thought to cover activities for the purpose of "employer-help" in controlling markets and prices. . . .

Since union members can without violating the Sherman Act strike to enforce a union boycott of goods, it is said they may settle the strike by getting their employers to refuse to buy the goods. Employers and the union did here make bargaining agreements in which the employers agreed not to buy goods manufactured by companies which did not employ the members of Local No. 3. We may assume that such an agreement standing alone would not have violated the Sherman Act. But it did not stand alone. It was but one element in a far larger program in which contractors and manufacturers united with one another to monopolize all the business in New York City, to bar all other businessmen from that area, and to charge the public prices above a competitive level. It is true that victory of the union in its disputes, even had the union acted alone, might have added to the cost of goods, or might have resulted in individual refusals of all of their employers to buy electrical equipment not made by Local No. 3. So far as the union might have achieved this result acting alone, it would have been the natural consequence of labor union activities exempted by the Clayton Act from the coverage of the Sherman Act. . . . But when the union participated with a combination of businessmen who had complete power to eliminate all competition among themselves and to prevent all competition from others, a situation was created not included within the exemptions of the Clayton and Norris-LaGuardia Acts.<sup>158</sup>

If a labor agreement is legal or illegal depending upon whether the employer was compelled to enter into it by economic pressure from the union or was induced to enter into it because of the competitive advantages it offered him, a contract with the motion picture producers which restricts the supply of program material available for television broadcasting is certainly suspect. But it seems doubtful that the studio contracts will be

<sup>158</sup> *Ibid.*, at 809.

tested under the *Allen Bradley* doctrine. Although great surprise was expressed in trade circles when the anti-television agreements were disclosed in congressional hearings last year,<sup>159</sup> their existence was a matter of public knowledge at the time the studio contracts were signed.<sup>160</sup> In addition, the major producers agreed with the AFM in August 1948 to renew the 1946 agreements for another year.<sup>161</sup> Yet neither the Department of Justice nor the television broadcasters have moved to invoke the anti-trust laws. So far, then, the AFM has been successful in its attempt to prevent further encroachment by sound motion pictures upon the musicians' employment opportunities.<sup>162</sup>

Not as graphic as the introduction of sound pictures, but of serious consequence to the musicians nonetheless, was the return of phonograph records to the radio. After two adverse decisions in the lower federal courts<sup>163</sup> and an opinion from the Attorney General advising that the Radio Act of 1912 gave him no authority to fix the wave length, time, or power at which a private broadcasting station might operate,<sup>164</sup> the Secretary of Commerce in 1926 abandoned all attempts to regulate private radio broadcasting.

The Federal Radio Commission, created in 1927 to take over that regulatory function, was unwilling to forbid the use of phonograph records as the Secretary had done, although it did not disagree entirely with his conclusions as to the desirability of such use. In view of its analysis of the matter, the Commission's position was rather indecisive:

By its General Order No. 16, issued on August 9, 1927, the commission, while not condemning the practice of using mechanical reproductions such as phonograph records or perforated rolls, required that all broadcasting of this nature be clearly described in the announcement of each number. The commission has felt, and still feels, that to permit such broadcasting without appropriate announcement is, in effect, a fraud upon the public. It is true that in the smaller communities which do not have adequate original program resources, the use of phonograph records may fill a need; it is true also that there may be developments in specially produced records which can be made use of to advantage by radio. On the whole, however, the commission is

<sup>159</sup> *Variety*, pp. 1, 55 (July 2, 1947); *ibid.*, p. 69 (July 9, 1947).

<sup>160</sup> See *New York Times*, p. 1 (Apr. 10, 1946); *ibid.*, p. 30 (Apr. 11, 1946); *ibid.*, p. 1 (Apr. 27, 1946).

<sup>161</sup> *Variety*, p. 18 (Sept. 1, 1948). The new contracts expire August 31, 1949.

<sup>162</sup> But foreign competition is appearing in a new form. The *New York Daily News's* new television station WPIX and the *Chicago Tribune's* WGN have arranged to televise a block of English films. 51 *Time*, No. 45, at 85 (May 10, 1948); *ibid.*, No. 47, at 73 (May 24, 1948).

<sup>163</sup> *Hoover v. Intercity Radio Co.*, 286 Fed. 1003 (App. D.C., 1923); *United States v. Zenith Radio Corp.*, 12 F. 2d 614 (D.C. Ill., 1926).

<sup>164</sup> 35 *Ops. Att'y Gen.* 126 (1926).

inclined to believe that the use of ordinary commercial records in a city with ample original program resources is an unnecessary duplication of service otherwise available to the public, and the crowded channels should not be wasted in this manner. General Order No. 49, issued on October 26, 1928, makes more rigid requirements as to announcements of mechanical reproductions.<sup>165</sup>

The Radio Commission never advanced beyond this point in its regulation of the use of records. And the Federal Communications Commission, which succeeded it in 1934, has done no more than to make refinements upon the old policy.<sup>166</sup>

Extensive use of recorded music by radio stations did not follow immediately after the lifting of the government proscription because of the waning popularity of such music. Introduction of radio broadcasting at first appeared to mean the end of the phonograph industry. After the 1921 high of 100,000,000 records, sales had declined. Although Victor's introduction of an improved recording process under license from the Western Electric Company and Brunswick's development of the electric phonograph had caused a brief spurt of record sales to the 65,000,000 level in 1929, sales had dropped to 10,000,000 by 1932.<sup>167</sup>

At this low point, a number of events conspired to bring new life to the recording business. Swing music was introduced and it swept the country like wildfire. Soon after the Twenty-first Amendment reopened the tavern and the cabaret, the automatic phonograph supplied each of them with a "multi-selective" juke box. Decca Records Company Ltd. created an American subsidiary, Decca Records, Inc., to supply clamoring swing fans with a thirty-five-cent record.<sup>168</sup> Consolidated Film Industries, Inc., which had brought Columbia and Brunswick into its American Record Company through a failure to anticipate that the film sound track

<sup>165</sup> FRC, Annual Report 19 (1928).

<sup>166</sup> Current FCC regulations require the broadcaster of mechanical reproductions to identify them as such at least once for each record, twice if the program exceeds five minutes, or every 30 minutes if the program exceeds 30 minutes. 13 Fed. Register 422 (1948).

<sup>167</sup> *Variety*, p. 46 (Mar. 19, 1947); *Phonograph Records*, 20 *Fortune*, No. 3, at 72, 74-75 (Sept. 1939); *Review of Reviews* 99 (Jan. 1926).

<sup>168</sup> *Standard & Poor's Corp. Records (C-E)* 1451; *Business Week* 14 (Nov. 10, 1934). The English company disposed of its holdings in American Decca in 1938. *Standard & Poor*, supra, at 1450-51. Currently, 10 per cent of Decca's stock is held by the family of Jack Kapp, president of the company. *Listing Statements*, New York Stock Exchange, vol. 189, A-12567. Bing Crosby is also a stockholder, but the identity of the remaining owners of the American company is one of the secrets of the trade. *Hearings*, op. cit. supra note 91, at 210. Agreements by which American Decca, English Decca, and Electrical & Musical Industries, Ltd. have divided world markets form the basis of an anti-trust complaint filed in the District Court for the Southern District of New York August 3, 1948.

would early replace the record in sound movies, diverted a part of its production to a twenty-five cent record.<sup>169</sup>

The swing craze, the juke box, and the cheap record swept the recording industry back to prosperity,<sup>170</sup> and with its returning popularity recorded music returned also to the radio. But with the phonograph record the broadcasters now combined a new type of mechanical reproduction—the electrical transcription, a development of the Western Electric Company which made it possible to record a fifteen-minute program on a single sixteen-inch disc.

The transcription, first licensed for production in 1930,<sup>171</sup> opened a number of new possibilities for the use of recorded music which were soon exploited by the broadcasting industry. As the uses of the transcription came later to be classified in the jargon of the trade, the most important are: 1) "Tailor made" transcriptions, recording an entire program complete with sponsor's plugs. Such transcriptions may be made in advance of broadcast time, or the initial broadcast may be transcribed at the time of performance for subsequent rebroadcast. 2) "Open end" transcriptions, recording a complete program with blank spots for later insertion of announcements. 3) "Spot commercials," recording a commercial plug for incessant re-use in the manner made notorious by the Pepsi-Cola jingle.<sup>172</sup> 4) "Library" transcriptions, made without commercial plugs or blanks therefor, for use on sustaining programs.

So extensive has the use of transcriptions and phonograph records become that when in 1942 the FCC conducted a survey of 796 of the 890 standard stations then operating, it discovered that while 76 per cent of the broadcast time of the average station is devoted to programs containing music, over 55 per cent of those programs used recorded or transcribed music. Among the stations not affiliated with a network, even greater use was made of mechanical reproductions—230 of the 298 non-affiliated sta-

<sup>169</sup> Phonograph Records, 20 *Fortune*, No. 3, at 72, 100 (Sept. 1939); Hearings before Committee on Patents on S. 3047, H.R. 11420, and H.R. 10632, 74th Cong. 2d Sess., at 626 (1936). Acquisition of the Brunswick Record Corporation did not include the right to use the Brunswick name on records. That was retained by the Brunswick Radio Corporation and went with the purchase of the latter company from Warner Brothers by American Decca in 1941. Standard & Poor's Corp. Records (C-E) 1451.

<sup>170</sup> See Ulanov, *The Jukes Take Over Swing*, 51 *American Mercury* 172 (1940).

<sup>171</sup> To Sound Studios of New York, a subsidiary of the World Broadcasting System. Kendrick, *Recorded Radio Programs*, 143 *Scientific American* 304 (1930).

<sup>172</sup> An electrical transcription can be played from 500 to 2,000 times—the ordinary phonograph record is good for only 100 to 150 playings. Phonograph Records, 20 *Fortune*, No. 3, at 72, 102 (Sept. 1939).

tions relied on recorded music for over 80 per cent of their musical programs.<sup>173</sup>

Alarm over this widespread resort to mechanical music is not confined to the musicians. It is shared by at least some of the networks. The small radio station which otherwise might be driven to a network contract by the dearth of local talent has in many cases been able to fill out its broadcasting hours with recorded music. Moreover, the electrical transcription affords a means for nationwide broadcasting of an entire program without resort to the networks.<sup>174</sup> Recognizing the threat of such competition, NBC in 1934 began gradually to eliminate all recorded programs on the stations which it operates. CBS soon adopted the same policy, and today recorded or transcribed shows are not broadcast over either network.<sup>175</sup> Such are the paradoxes of modern business practice that NBC felt constrained to adopt this policy although its parent, RCA, had purchased the Victor Talking Machine Company in 1929<sup>176</sup> and had entered the transcription business in 1934, and CBS, despite its similar policy, acquired the American Record Corporation (now Columbia Record Corporation) in 1938 and entered the transcription field in 1940.

Despite the AFM's growing concern over the extent to which mechanical music was being used, the first action to be taken by musicians with respect to such use was not taken by the Federation; nor was it a move inspired by fear of unemployment. Some of the musicians who make the records opened a campaign to increase their earnings from recorded performances.

Early in 1934 a Philadelphia lawyer, Maurice J. Speiser, published a translation of a French text on the legal rights of performing artists.<sup>177</sup> Al-

<sup>173</sup> Hearings before Subcommittee of Committee on Interstate Commerce pursuant to S. Res. 286, 77th Cong. 2d Sess., at 18-21, 26 (1942). For an example of the extreme extent to which some of the non-network stations rely upon recorded music, see Cannon System, Ltd. (KIEV), 8 FCC 207, 208 (1940).

<sup>174</sup> Keystone Broadcasting System, Inc., formed in 1940 to exploit the network-like possibilities of the electrical transcription, now serves 333 stations with two hours of transcribed sustaining programs per day. *Broadcasting* 74 (May 24, 1948). And the Frederick W. Ziv Company has twenty-three open-end transcribed shows which are heard on two-thirds of the radio stations in the country. *Business Week* 68-69 (June 21, 1947).

<sup>175</sup> Both networks make exceptions to this policy during periods of daylight saving time to allow the transcribing of complete programs for subsequent rebroadcast by affiliated stations in different time zones. Last summer both experimented with tape recorders, which seem destined eventually to replace the electrical transcription. *Variety*, p. 40 (Mar. 24, 1948); *Newsweek* 31 (May 3, 1948).

<sup>176</sup> Operated first as RCA Victor Company, Inc., and later as RCA Manufacturing Corporation, the recording business has been conducted as RCA-Victor Division since 1942. *Standard & Poor's Corporation Records (P-S)* 2082.

<sup>177</sup> Homburg, *Legal Rights of Performing Artists* (1934).

though the American copyright statute had never been construed to extend to the phonograph record or to the performance recorded on it,<sup>178</sup> Speiser added an "Addendum" to his translation in which he argued that the courts might be persuaded to recognize a legal interest for the performer in the recorded performance under one or more of four theories: 1) The common law afforded the literary artist protection against the unauthorized publication of his work, and this doctrine might be extended to cover musical performances. Since the "common law copyright" did not survive publication, however, Speiser concluded that this theory held scant promise. 2) In *International News Service v. Associated Press*<sup>179</sup> the United States Supreme Court had extended the common-law concept of unfair competition to prohibit a competitor's unauthorized use of uncopyrighted news collected by the Associated Press, and Speiser thought that a similar extension should be made to cover a radio station's unauthorized use of the musician's recorded performance, since the station in selling its recorded programs to advertisers was competing with the musician who sought to sell the advertiser live programs. 3) Ever since Warren and Brandeis had published their treatise on the "right to privacy" in 1890<sup>180</sup> the phrase had been recurring in legal literature, and the concept had found some judicial support. Although Speiser listed this theory as a possibility, he concluded that "it is extremely doubtful whether today it is of any aid to the performer." 4) Under a doctrine of "moral right," continental jurisprudence affords the artist protection which enables him, among other things, to prevent use of his work in such manner as to injure his artistic reputation.<sup>181</sup> Speiser suggested that a similar notion might be developed at common law to protect the performer against the use of imperfect recordings.

Within a few months after publication of this dissertation, the National Association of Performing Artists was organized, with Fred Waring as

<sup>178</sup> Section 4 of the Copyright Act of 1909, as amended, provides: "The works for which copyrightability may be secured under this Act shall include all the writings of an author." 17 U.S.C.A. § 4 (Supp., 1947). Section 5 lists thirteen categories of copyrightable works, including photographs and motion pictures, but makes no reference to phonograph records. Although Section 5 concludes with a proviso that "the above specifications shall not be held to limit the subject matter of copyright as defined in section 4," 17 U.S.C.A. § 5 (Supp., 1947), the Copyright Office is probably correct in concluding that the statute was not intended to confer a copyright upon either the recorder or the performer. See Chafee, *Reflections on the Law of Copyright*, 45 Col. L. Rev. 719, 734-735 (1945).

<sup>179</sup> 248 U.S. 215 (1918).

<sup>180</sup> Warren and Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890).

<sup>181</sup> See Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 Harv. L. Rev. 554 (1940).

president and Maurice J. Speiser as general counsel, and with membership open to any "actor, singer, conductor, instrumentalist, lecturer, and any other interpretative artist or performer."<sup>182</sup> This organization now claims over 800 members, including such AFM members as Paul Whiteman, Eddie Duchin, Jascha Heifetz, Andre Kostelanetz, Ray Noble, Arturo Toscanini, and Guy Lombardo, and such non-instrumental musicians as Al Jolson, Bing Crosby, Richard Crooks, and Lawrence Tibbett.<sup>183</sup>

Soon after its formation, NAPA set out to test Speiser's legal theories, selecting a Pennsylvania court for its forum and offering the following evidence for its case: In 1932 Fred Waring and his incorporated orchestra (in which Waring owned all but two qualifying shares of stock) recorded for Victor two currently popular songs, receiving \$250 for each recording. Anticipating that these records might be used for radio broadcast, Waring stipulated with Victor that they should be labeled: "Not licensed for radio broadcast."<sup>184</sup> After the records were made they were sold by Victor to its dealers, and by the latter to individual purchasers at a retail price of seventy-five cents each. Radio station WDAS purchased such records and in July 1935, after making the identifying announcements required by FCC regulations, broadcast them on a sustaining program.<sup>185</sup> At the time of this broadcast, Waring's orchestra was under exclusive radio contract to the Ford Motor Company at \$13,500 per week.

On this showing, the Pennsylvania Supreme Court in *Waring v. WDAS Broadcasting Station, Inc.*<sup>186</sup> affirmed a trial court order granting an injunction against unauthorized use of the Waring records. Its decision, rendered in a flush of pioneering zeal,<sup>187</sup> drew support from all of Speiser's

<sup>182</sup> Hearings, op. cit. supra note 169, at 675.

<sup>183</sup> Hearings before Subcommittee of Committee on Judiciary on H.R. 1269, H.R. 1270, and H.R. 2570, 80th Cong. 1st Sess., at 8, 209 (1947). A similar organization, the American Society of Recording Artists, was incorporated in California in 1934 with Al Jolson as President. NAB Reports 1495 (Sept. 1, 1936). Three years later it was merged with the Waring organization. Letter from Maurice J. Speiser, Dec. 16, 1947.

<sup>184</sup> Victor's recording license from the publisher of the songs also required Victor to place such a legend on the label. The composer's copyright includes the power to require separate licenses for publication, recording, and public performance for profit. 17 U.S.C.A. § 1 (Supp., 1947). Usual trade practice is for the composer to assign both the publishing and the recording rights to a music publisher and to assign the performance rights either to the American Society of Composers, Authors and Publishers formed in 1914 for that purpose, or to Broadcast Music, Inc., an organization formed by the broadcasting industry in 1939 during its battle with ASCAP over royalty rates for performance rights.

<sup>185</sup> WDAS had secured a performing license from ASCAP, since radio broadcasting is considered public performance for profit. *Witmark v. Bamberger*, 291 Fed. 776 (D.C. N.J., 1923), and cases cited in *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931).

<sup>186</sup> 327 Pa. 433, 194 Atl. 631 (1937).

<sup>187</sup> "The problems involved in this case have never before been presented to an American or an English court. . . . Sound can now be mechanically captured and reproduced, not only

theories and embraced Professor Chafee's notion of equitable servitudes on chattels as well.<sup>188</sup> A majority of the court thought that the musical performers' interpretation of the composer's work, at least where the performers were Waring's orchestra, constituted "such novel and artistic creation" as to "elevate interpretation to the realm of independent works of art" entitled to the protection of common-law copyright. Although this interpretation was the work of a number of musicians, no problem arose in allowing Waring alone to invoke protection for it, since he owned the corporation by which the musicians were employed. With the question whether the placing of that interpretation on records for general public sale constituted a "publication" which the common-law copyright would not survive,<sup>189</sup> the court had more difficulty. It observed, accurately enough, that a distinction is taken between a "limited" publication, which does not affect the copyright, and a "general" publication, which terminates it.<sup>190</sup> Then, disregarding the point that this distinction turns upon the extent to which the work has been made available to the public, rather than upon the form of its dissemination,<sup>191</sup> and brushing aside as "comparatively early" those cases which had held restrictions on the use to be made of the work by its purchasers ineffective to save the common-law right,<sup>192</sup> the court concluded that, in view of the restrictive label on the Waring records, there had been no "general" publication.

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by means of the phonograph for an audience physically present, but, through broadcasting, for practically all the world as simultaneous auditors. Just as the birth of the printing press made it necessary for equity to inaugurate a protection for literary intellectual property, so these latter-day inventions make demands upon the creative and ever-evolving energy of equity to extend that protection so as adequately to do justice under current conditions of life." *Ibid.*, at 435, 632.

<sup>188</sup> Chafee, *Equitable Servitudes on Chattels*, 41 *Harv. L. Rev.* 945 (1928), suggests the doctrine as a means whereby the manufacturer who sells his goods to dealers, thus escaping the business risks of retailing them himself, may nonetheless retain control over the retailer's resale practices and over the use to which the goods are put by purchasers from the retailer.

<sup>189</sup> Thus, Dr. Holmes's common-law copyright in "The Autocrat of the Breakfast Table" did not survive serial publication in the *Atlantic Monthly* so as to enable his executor to enjoin another from publishing it in book form. *Holmes v. Hurst*, 174 U.S. 82 (1899).

<sup>190</sup> "Limited" publication is found in the exhibition of a painting, *American Tobacco Co. v. Werckmeister*, 207 U.S. 284 (1907), the production of a play, *Ferris v. Frohman*, 223 U.S. 424 (1911), and the public performance of a musical composition, *McCarthy & Fisher, Inc. v. White*, 259 Fed. 364 (D.C. N.Y., 1919), as distinguished from unrestricted circulation of copies of the painting, drama, or musical score.

<sup>191</sup> *Holmes v. Hurst*, 174 U.S. 82 (1899).

<sup>192</sup> *Larowe-Loisette v. O'Loughlin*, 88 Fed. 896 (D.C. N.Y., 1898) (unrestricted sale of printed lectures with stipulation that purchaser was not to show his copy to anyone else); *Wagner v. Conrad*, 125 Fed. 798 (D.C. N.Y., 1903) (unrestricted sale of musical score with reservation of stage production rights); *Savage v. Hoffman*, 159 Fed. 584 (D.C. N.Y., 1908) (same); *Jewelers' Mercantile Agency v. Jewelers' Publishing Co.*, 155 N.Y. 241, 49 N.E. 872 (1898) (unrestricted leasing of credit reports with stipulation that lessee was not to show his copy to anyone else).



The novelty of the court's treatment of the publication question probably resulted from its failure to consider that point apart from its consideration of an alternative ground of decision. Prior cases finding a "general" publication were rejected by the court as being based "upon an assumed doctrine that restrictions and servitudes cannot be judicially recognized when imposed as conditions attaching to the sale of chattels." The court further held that the restrictive legend in this case was not in restraint of trade or otherwise contrary to public policy (a consideration which is irrelevant when the restriction is viewed merely as evidence of the extent of dissemination of his work which the artist has authorized). Out of this rather confused discussion emerged the conclusion that the restrictive label imposed a servitude on the use of the record which was enforceable in equity.

The same majority of the court, and one more judge who concurred on this ground alone, found a third basis for its decision in the law of unfair competition. Reliance here was almost entirely on the *Associated Press* case, a precedent whose current status is rather dubious.<sup>193</sup> The court had no difficulty in finding that Waring and WDAS were competitors for the business of advertisers and that to allow WDAS to use Waring's performances at a cost of seventy-five cents per selection, even on a sustaining program, might unfairly jeopardize his continuing ability to sell those performances for \$13,500 per week. And the court bolstered its conclusions on this point with certain considerations smacking of the doctrine of "moral right": It found that Waring's reputation might be damaged both by the broadcasting of records made before the orchestra had reached its present state of artistic proficiency and by the incessant broadcasting of any of its recordings.

Judge Maxey, concurring separately, argued—and cited the fathers of the doctrine to prove it—that the real basis for the protection accorded the artist was to be found in the right of privacy. Here Judge Maxey seemed to be laboring under the same sort of conceptualistic cloudiness that characterized the majority's treatment of the common-law copyright question. True, Warren and Brandeis had suggested that the artist's right to privacy left it to him "to decide whether that which is his shall be given to the public" and "to fix the limits of the publicity which shall be given," but there is nothing in their position to support Judge Maxey's conclusion that Waring could make copies of his performance available to all who cared to buy, yet retain the right to specify the use which the purchasers

<sup>193</sup> State and lower federal courts have been reluctant to apply the *Associated Press* doctrine to analogous situations. See Chafee, *Unfair Competition*, 53 *Harv. L. Rev.* 1289, 1309-15 (1940); Baer, *Performer's Right to Enjoin Unlicensed Broadcasts of Recorded Renditions*, 19 *N.C.L. Rev.* 202, 208-10 (1941).

could make of those copies. "The right is lost . . . when the author himself communicates his production to the public."<sup>194</sup>

But, whatever the imperfections in its dialectic, the Pennsylvania court had provided the performing artist with some legal basis for the collection of royalties on the commercial use of his recordings,<sup>195</sup> and NAPA set about to get similar decisions in other jurisdictions. Before the decision on appeal in the *WDAS* case had come down, NAPA had met defeat in two other cases. Because of its inability to show that Frank Crumit had required Decca to use the restrictive label which appeared on his records, NAPA was unable to enjoin their use by a broadcaster in New York.<sup>196</sup> And a similar attempt to enjoin the use of Ray Noble's records in a tap room in Massachusetts failed because Noble had assigned to RCA "all rights in and to the matrices and records" and hence was held to have no standing to claim any interest in the recorded performance.<sup>197</sup>

Neither of these difficulties arose in *Waring v. Dunlea*,<sup>198</sup> a suit to enjoin a North Carolina radio station from using electrical transcriptions made by Waring and bearing notices that they were to be used only on the Ford Motor program. Although this presented an ideal case for the application of the common-law copyright doctrine (the transcription never having been made available to the public), the rather jumbled opinion accompanying the injunction seems to be based on a blend of the concepts of unfair competition and equitable servitude.

By this time the broadcasters had turned to legislative halls. The North Carolina legislature immediately enacted a statute cancelling the *Dunlea* decision,<sup>199</sup> and the same statute was adopted in South Carolina shortly thereafter<sup>200</sup> and in Florida two years later.<sup>201</sup>

The recording companies were also developing an interest in the matter. When NAPA brought an action in the federal district court in New York

<sup>194</sup> Warren and Brandeis, *op. cit. supra* note 180, at 198-99.

<sup>195</sup> Although station *WDAS* stopped using *Waring* records after this decision, NAPA has not so far employed the decision to exact royalties from Pennsylvania broadcasters. Letter from Leslie W. Joy, General Manager, *WDAS* Broadcasting Station, Inc., Feb. 5, 1948.

<sup>196</sup> *Crumit v. Marcus Loew Booking Agency*, 162 N.Y. Misc. 225, 293 N.Y. Supp. 63 (1936).

<sup>197</sup> *Noble v. One Sixty Commonwealth Ave., Inc.*, 19 F. Supp. 671 (Mass., 1937).

<sup>198</sup> 26 F. Supp. 338 (N.C., 1939).

<sup>199</sup> N.C. Code Ann. (Mitchie, 1939) § 5126(s): "When any phonograph record or electrical transcription, upon which musical performances are embodied, is sold in commerce for use in this state, all asserted common law rights to further restrict or to collect royalties on the commercial use made of such recorded performances by any person is hereby abrogated and expressly repealed."

<sup>200</sup> 3 Code of Laws of S.C. (1942) § 6641.

<sup>201</sup> Fla. Stat. Ann. (1943) §§ 543.02, 543.03.

in the name of Paul Whiteman to enjoin the use of Whiteman's records by radio station WNEW, RCA filed an ancillary bill seeking similar injunctive relief plus an adjudication that Whiteman had no interest in the records. The case was submitted on RCA's bill and on evidence showing that all RCA records issued since 1932 had borne legends stating that they were not to be used for radio broadcast or were not to be used commercially, that prior to 1934 Whiteman's contract with RCA had assigned to the latter all "rights and equities . . . in and to the matrices and records," and that since 1934 the contract specified that RCA "does not acquire the right to manufacture or sell, or otherwise dispose of, records for broadcasting."

The District Court held 1) that Whiteman had a common-law copyright in his performance which he had assigned to RCA on records made prior to 1934, but which he had retained on all records made after that time, 2) that there was no common-law copyright in the records themselves which RCA could claim by virtue of its contribution to their production, 3) that the issuance of records bearing the restrictive label after 1932 constituted a "limited" publication only, so that the common-law copyright in the performances recorded thereon had survived, and 4) that in any event the broadcasting of records, regardless of the restrictive label, constituted unfair competition as against both Whiteman and RCA.<sup>202</sup>

On appeal, the Circuit Court of Appeals for the Second Circuit found all of this unpersuasive. Assuming for the purpose of its decision that Whiteman had a common-law copyright in his performance and, "what is far more doubtful," that RCA had a similar copyright in the recording, the court held that such rights were lost with the issuance of the records for public sale and that the restrictive labels would not operate either to limit the publication or to impose an equitable servitude. Nor did it view this case as an instance of unfair competition—*International News Service v. Associated Press* was to be confined to its particular facts. As for "the strange assertion that to broadcast the records in some way invades somebody's 'right of privacy'—presumably Whiteman's," the court found it hardly worthy of mention. More difficult was the problem presented by the fact that the Supreme Court of Pennsylvania had reached a contrary decision. That decision established the law in Pennsylvania,<sup>203</sup> and it meant that the broadcasting of Whiteman's records would constitute a

<sup>202</sup> RCA Manufacturing Co. v. Whiteman, 28 F. Supp. 787 (N.Y., 1939).

<sup>203</sup> Although the court here recognized that the matter is one of state law, it did not purport to examine the New York decisions in reaching its own conclusions. Had it done so, it would have encountered some of the few cases lending support to Professor Chafee's doctrine of equitable servitudes. See Baer, *op. cit. supra* note 193, at 206.

tort in that state. But there was no way in which WNEW could route its broadcasts around Pennsylvania, and the court finally concluded that it would not enjoin an otherwise lawful broadcast in order to prevent commission of a tort in Pennsylvania.<sup>204</sup>

NAPA's dismay at this reversal must have been shared by the recording companies, because immediately after RCA's victory in the district court, RCA, Columbia, and Decca had served notice on the broadcasters that they must purchase licenses to use their records.<sup>205</sup> Those claims were abandoned after the circuit court's decision had deprived the recording companies of any support as a matter of common law, although a then recent Supreme Court decision provided an entirely separate basis for their claims in the law of patents. In *General Talking Pictures Corp. v. Western Electric Co.*<sup>206</sup> the Supreme Court upheld the licensing system of a patent pool consisting of A.T. & T., General Electric Company, and RCA, whereby some retailers were licensed to sell patented amplifying tubes only for radio use and others were licensed to sell them only for non-radio use. The Court also affirmed the holding that one who purchased amplifying tubes for use in talking picture equipment from a retailer known to the purchaser to be licensed to sell only for radio use was guilty of contributory infringement. Phonograph records issued by RCA, Columbia, and Decca had long carried on their labels a legend reading:

Licensed by Mfr. under U.S. Patents [citing numbers] only for non-commercial use on phonographs in homes. Mfr. and original purchaser agree that this record shall not be resold nor used for any other purpose.

Hence, the *General Talking Picture* case seems apt precedent in support of the demands which the recording companies originally predicated on the district court's decision in the *Whiteman* case. Nevertheless, whether from lack of confidence in their patents, from doubts about the attitude of the new Justices toward the *General Talking Picture* case<sup>207</sup> and the doctrine

<sup>204</sup> *RCA Manufacturing Co. v. Whiteman*, 114 F. 2d 86 (C.C.A. 2d, 1940), cert. den. 311 U.S. 712 (1940).

<sup>205</sup> NAB Reports 3652 (Aug. 11, 1939); *ibid.*, at 3665 (Aug. 18, 1939); *ibid.*, at 3849 (Nov. 20, 1939); Pforzheimer, Copyright Protection for the Performing Artist in His Interpretative Rendition, ASCAP Copyright Law Symposium 9, 20 (1939).

<sup>206</sup> 304 U.S. 175 (1938), opinion on reargument 305 U.S. 124 (1938), rehearing den. 305 U.S. 675 (1939).

<sup>207</sup> The original decision in the case was 5 to 1, with Justice Black dissenting and Justices Roberts, Cardozo, and Reed not participating. On reargument, the decision was 5 to 2, Justice Cardozo having died, Justice Roberts again not participating, and Justice Reed joining Justice Black in dissent. Within a year after the decision on reargument, Justice Brandeis had retired and Justice Butler had died, leaving only Chief Justice Hughes and Justices McReynolds and Stone of the majority still on the Court.

of contributory infringement,<sup>208</sup> or from other considerations of business policy, the recording companies made no attempt to enforce their patent notices, and those notices have recently disappeared from Victor and Columbia labels.

Although the *Whiteman* case is the last NAPA effort to reach reported court decision, NAPA has not abandoned its attempt to secure royalties for the recording artist. Since 1936 it has had bills to give the performer a statutory copyright continuously before Congress, and the Scott Bill was introduced in the 80th Congress for that purpose.<sup>209</sup>

As long as it is the national policy to give a statutory copyright to the compilers of telephone directories<sup>210</sup> and citators,<sup>211</sup> the musical performer's plea for copyright can hardly be rejected on "artistic" grounds. And the fact that the Constitution authorizes Congress to "promote the Progress of Science and useful Arts by securing for limited Times to *Authors* and *Inventors* the exclusive Right to their respective *Writings* and *Discoveries*"<sup>212</sup> has not been thought to prevent an award of statutory copyright on such non-written works as photographs<sup>213</sup> and motion pictures.<sup>214</sup> A more serious difficulty is that of deciding who should receive the copyright. Rarely is a recorded musical performance the work of one man. At the very least it embodies the work of an orchestra, and usually it includes the contribution of one or more vocalists. Because of the number of people involved in any one performance and because the composition of even the most established orchestras is continually changing, a copyright shared by all participants in the performance would soon prove so unwieldy as to be unworkable. And few orchestras other than Waring's are incorporated.<sup>215</sup> The simplest solution, of course, would be to give the copyright to the recording company,<sup>216</sup> and this course has been recommended because

<sup>208</sup> See *Mercoird Corp. v. Mid-Continent Investment Co.*, 320 U.S. 661 (1944), rehearing den. 321 U.S. 802 (1944), motion to clarify den. 323 U.S. 672 (1944).

<sup>209</sup> H.R. 1270, 80th Cong. 1st Sess. (1947). Like all its predecessors, this bill died in committee.

<sup>210</sup> *Leon v. Pacific T.&T. Co.*, 91 F. 2d 484 (C.C.A. 9th, 1937).

<sup>211</sup> *Shepard v. Taylor*, 193 Fed. 991 (C.C.A. 2d, 1912).

<sup>212</sup> U.S. Const. Art. I, § 8 (clause 8; italics added).

<sup>213</sup> *Burrow-Giles Lithographic Co. v. Saxony*, 111 U.S. 53 (1884).

<sup>214</sup> *MGM Distributing Corp. v. Bijou Theater*, 3 F. Supp. 66 (Mass., 1933).

<sup>215</sup> As part of its attempt to relieve the musician of the taxes imposed on "employers" under the social security laws (see note 53 supra), the AFM in 1941 adopted a rule forbidding incorporation of bands and orchestras. AFM By-Laws Art. X, § 58 (1947).

<sup>216</sup> One consequence of giving a copyright to English record manufacturers has been that the English Musicians' Union, which is as well organized and as opposed to mechanical music as the AFM, has reached agreements with the recording companies whereby BBC is required

of its simplicity,<sup>217</sup> but it hardly seems calculated to bring the benefits of the copyright to the musical performer. At one time NAPA included an express provision in its bill giving the copyright to the orchestra leader,<sup>218</sup> and while strategy has dictated omission of that provision in subsequent bills, NAPA still favors that arrangement.<sup>219</sup> But NAPA's membership is made up only of orchestra leaders and vocalists well enough established to be able to protect their interests. There is little reason to believe that the instrumentalists in the orchestra would derive much benefit from a copyright awarded to the conductor.

Although considerably more complex than either of the above solutions, the only plan which offers protection to all of the musical performers seems to be one which gives an interest in the copyright to each of them but requires all to assign their interests in each recorded performance to one who would hold the copyright as agent only for licensing purposes. Just as the music publishers have as a matter of practice become the assignees of the composer's recording rights, and ASCAP and Broadcast Music, Inc., the assignees of his performance rights, it may reasonably be assumed that trade practice would eliminate problems arising out of numerous performers' copyright interests in different recordings by channeling all assignments of those interests to a few licensing agents. And the performer could be protected against abuses to which the composer has been subject by a provision in the statute limiting the compensation of the licensing agent.

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gradually to reduce the amount of broadcasting time devoted to phonograph records to a maximum of ten hours per week. *The Economist* 132 (July 24, 1948).

<sup>217</sup> Pforzheimer, *op. cit. supra* note 205, at 31. It has also been suggested that the copyright should be given to the record manufacturer because he is "the entrepreneur who brought together capital, artistic talent and technical necessities," Littauer, *The Present Legal Status of Artists, Recorders and Broadcasters in America*, 3 *Geistiges Eigentum* 217, 233 (Holland, 1938), and because in an analogous situation statutory copyright has already been given to the producer of motion pictures. Diamond and Adler, *Proposed Copyright Revision and Phonograph Records*, 11 *Air L. Rev.* 29, 49 (1940); Hess, *Copyrightability for Acoustic Works in the United States*, 4 *Geistiges Eigentum* 183, 197-98 (1939). Neither these proposals nor the suggestion that copyright be given to the recorder with a statutory requirement that a certain proportion of the royalty fees be paid to the performer, 49 *Yale L.J.* 559 (1940), makes any attempt to explain how promotion of progress in science and useful arts requires the award of copyright for the practice of a process already the subject of patent.

<sup>218</sup> H.R. 6160, 76th Cong. 1st Sess. (1939).

<sup>219</sup> Witness the following colloquy from hearings on the Scott Bill:

"MR. WALTER: Mr. Spieser, if H.R. 1270 became a law, would not every musician in a band be entitled to copyright his individual contribution to the interpretation of a musical piece?"

"MR. SPEISER: That would be true, sir. . . . But we would regulate by assignment. The person entitled would be the conductor of the band or the orchestral association under whose charter the band is performing. . . . The particular technicalities, sir, are of minor importance. . . . Due precaution would be taken before filing application of a copyright." *Hearings, op. cit. supra* note 183, at 211.

In any event, the only definite observation that can be made about the latest version of NAPA's proposal on this point is that it is impossible to determine from its provisions where the copyright would be lodged.<sup>220</sup> The Scott Bill would have granted a copyright on "recordings which embody and preserve any acoustic work in a fixed permanent form on a disk, film, tape, record, or any and all other substances, devices, or instrumentalities, by any means whatever, from or by means of which it may be acoustically communicated or reproduced." The copyright would have carried the exclusive right not only to "make or to procure the making" of such recordings, but also to "publish and vend such recordings of sound; and to communicate and reproduce the same acoustically to the public, for profit." But nowhere was the holder of such copyright identified. Although NAPA's purpose is clear, that purpose was not made explicit in the bill.

But, whatever the form of the bill, NAPA has strong opposition to overcome. Leading that opposition, of course, are the National Association of Broadcasters and the manufacturers and operators of juke boxes.<sup>221</sup> ASCAP, which had provided testimony for Waring in the *WDAS* case, has changed its mind and joined Broadcast Music, Inc., the Songwriters' Protective Association, and the Music Publishers' Association in opposition—too many copyrights may clog the sale of musical works.<sup>222</sup> No change has occurred in the position of the recording companies. Their view now, as in 1936, is that copyright protection should by all means be extended to recordings, but that the copyright should be given to the recording company.<sup>223</sup> They present the same argument which the district court rejected as a basis for common-law copyright in the *Whiteman* case: The technique of the recorder in operating the recording equipment is

<sup>220</sup> Because of this and other ambiguities the Copyright Office concluded that "whatever may be the merits of granting copyright to acoustic recordings, there are so many technical defects in the bill that the Copyright Office should not recommend it." *Ibid.*, at 263-66.

<sup>221</sup> Juke boxes are now exempted from the composer's right to collect royalties on public performances of his work for profit by a proviso in the Copyright Act that "the reproduction or rendition of a musical composition by or upon coin-operated machines shall not be deemed a public performance for profit unless a fee is charged for admission to the place where such reproduction or rendition occurs." 17 U.S.C.A. § 1(e) (Supp., 1947). But ASCAP is sponsoring a bill to eliminate this exemption, H.R. 2570, 80th Cong. 1st Sess. (1947), and NAPA, anticipating the possibility of the performer acquiring a copyright, has a similar bill, H.R. 1269, 80th Cong. 1st Sess. (1947).

<sup>222</sup> Hearings, *op. cit. supra* note 183, at 16-19, 25-51, 72-77, 84-86. Since the NAPA bill is not confined to musical recordings, it is also opposed by the Authors' League of America. *Ibid.*, at 279-83.

<sup>223</sup> Hearings, *op. cit. supra* note 169, at 622-25, 631-45, 1363-67; hearings, *op. cit. supra* note 183, at 63-69, 285-91.

fully as important to artistic creation as is the performance of the musician,<sup>224</sup> and if the copyright is given to the record manufacturer he "can then be free to share with the performer in any compensation which he receives for the use of that record."<sup>225</sup>

Least decisive of all interested parties in its attitude toward NAPA's campaign has been the AFM. In 1936 it appeared in support of the NAPA bill,<sup>226</sup> in 1937 it made a financial contribution to NAPA<sup>227</sup> and adopted a rule providing for the expulsion of "any member who assigns any property right in any recording to any recording company, or to any other party without the consent of the American Federation of Musicians";<sup>228</sup> and President Weber reported to the 1940 convention that the AFM was still supporting NAPA's efforts to amend the copyright laws.<sup>229</sup> But since that time the Federation has maintained a discreet silence on the entire matter.

Fundamentally, of course, NAPA's program is in conflict with the Federation's policy on recorded music. The AFM, as representative of all the musicians, is opposed to their displacement by mechanical reproduction, despite the fact that a few of its members are able to find employment in the making of such reproductions.<sup>230</sup> Any action which it may take in opposition to the use of mechanical music will be contrary to the interests of those few members, and the only effect of NAPA's campaign to increase the value of those interests must be to lessen the enthusiasm of such members for the Federation's policy.

But, while the AFM has vacillated in its attitude toward NAPA, it

<sup>224</sup> The broadcasters' reply to this argument is that their studio engineers make a similar contribution in "mixing" a musical show at the time of broadcast. *Ibid.*, at 81-82. Hearings, *op. cit. supra* note 183, at 81-82.

<sup>225</sup> *Ibid.*, at 53.

<sup>226</sup> Hearings, *op. cit. supra* note 169, at 662-64, 668-72.

<sup>227</sup> Hearings, *op. cit. supra* note 183, at 664.

<sup>228</sup> AFM By-Laws Art. X, § 57 (1947).

<sup>229</sup> International Musician 7 (June 1940). New York Local 802, which has a high proportion of recording musicians in its membership, made a financial contribution to NAPA in 1940. Hearings, *op. cit. supra* note 183, at 664.

<sup>230</sup> According to trade estimates, only about 5,000 AFM members derive any substantial amount of income from recording and transcribing work. Of this number, 500 in New York and another 500 in Hollywood supplement such employment with performances on live radio shows, and their combined income runs from \$12,000 to \$20,000 annually. The remaining 4,000 are the musicians in "name bands" who earn about \$1,000 annually from recording and transcribing engagements. About fifteen or twenty of the leaders of these bands have been able to get provisions in their recording contracts giving them royalties. *Variety*, p. 1 (Oct. 22, 1947), *ibid.*, p. 43 (Oct. 29, 1947). The AFM corroborates the 5,000 figure, but claims that the average musician, excluding orchestra leaders, earns less than \$400 per year from recording engagements. Hearings, *op. cit. supra* note 91, at 335, 390.



launched its own campaign against the use of recorded music shortly after NAPA began its suit in the *WDAS* case. The initiative came from Chicago Local 10, which announced early in 1937 that after February 1 of that year it would not permit its members to make recordings or transcriptions except under such conditions as the Local's executive board should deem best calculated to "end for all time the menacing threat of canned music competition."<sup>231</sup> And in June of the same year a number of resolutions calling for similar action by the Federation were referred by the national convention to the Executive Board with full power to act on the matter.<sup>232</sup>

Armed with this authority, the national officers entered into negotiations with the broadcasters and emerged with agreements requiring radio stations approximately to double their expenditures for staff musicians during the next two-year period.<sup>233</sup> Shortly thereafter, the AFM required each of the recording and transcription companies, as a condition to further performance by AFM members, to operate under a yearly "license" issued by the Federation. The terms of this license, which seems to have been designed solely for the purpose of capitalizing on the *WDAS* decision, required the licensee to label every transcription with a legend restricting its use to the specific purpose for which it was made, and to label every phonograph record with a statement that it was "only for non-commercial use on phonographs in homes."<sup>234</sup>

These arrangements settled the AFM's relations with the recording industry and the broadcasters for a time, but while negotiations with the broadcasters for renewal of the quota agreements were pending in 1939, Assistant Attorney General Thurman Arnold published a statement listing the trade-union practices which the Department of Justice considered

<sup>231</sup> International Musician 3 (Jan. 1937). Cessation of the use of all mechanical music had been one of the demands accompanying a strike called by Local 10 against Chicago radio stations in 1931, but the strike was settled without any concession from the broadcasters on that point. Hearings, *op. cit.* supra note 173, at 16.

<sup>232</sup> International Musician 1 (Aug. 1937).

<sup>233</sup> Each of the national network originating stations in New York, Chicago, and Los Angeles was required to increase its expenditures by \$60,000 annually. All other stations affiliated with networks undertook an annual aggregate increase of \$1,500,000. Unaffiliated stations whose gross income for 1937 exceeded \$20,000 agreed to spend an annual sum equal to 5½ per cent of the amount by which that gross income exceeded \$15,000. None of these agreements fixed wage scales for the staff musicians—that was left to negotiations between the stations and the various AFM Locals. Hearings, *op. cit.* supra note 75, at 91-101; Hearings, *op. cit.* supra note 173, at 16; NAB Reports 3807 (Nov. 3, 1939).

<sup>234</sup> AFM Standing Resolutions 52 (1938). Although no wage scales were specified in the license, most of the recording bands are traveling bands, and for that reason the Federation has fixed recording and transcribing rates at the national level since 1929.

“unquestionable violations of the Sherman Act.” Included in the list were “unreasonable restraints designed to compel the hiring of useless and unnecessary labor.”<sup>235</sup> As will later appear, that advice proved poor prophecy,<sup>236</sup> but it was enough at the time to arouse doubts in AFM councils as to the wisdom of negotiating another quota agreement on a national scale, and President Weber advised the Locals early in 1940 to seek their own terms with the broadcasters.

Since that time, negotiations for staff musicians have been conducted between the Locals and the individual stations,<sup>237</sup> with the Locals attempting not only to secure wage increases commensurate with rising living costs but also to obtain their own quota agreements in order to prevent reduction in employment. Data collected by the FCC indicate that they have not been completely successful. In 1940 the four national networks and 765 standard stations employed 2,237 staff musicians at average weekly salaries of \$60.<sup>238</sup> In 1945 nine networks and 876 standard stations employed 2,220 staff musicians at average weekly salaries of \$81.<sup>239</sup> In 1947 seven networks and 924 standard stations employed 1,939 staff musicians at average salaries of \$87.<sup>240</sup> And the three-year contracts concluded between AFM Locals and network originating stations in March 1948—which set the pattern for the industry—provide for no increase in quotas or in compensation.<sup>241</sup>

The above figures, it should be noted, do not give the full picture on the employment of musicians in the broadcasting industry. The AFM estimates that its members are currently earning \$23,000,000 a year from radio.<sup>242</sup> On the basis of an FCC survey for the week beginning February 1, 1947, it appears that the broadcasters paid about \$8,767,000 to their 1,939 staff musicians last year, and paid another \$2,777,000 to employ 1,423 part-time musicians.<sup>243</sup> The AFM estimate would leave ap-

<sup>235</sup> Department of Justice Press Release, Nov. 20, 1939, reprinted in *Hearings*, op. cit. supra note 173, at 62-64 and in Arnold, *The Bottlenecks of Business* 249-53 (1940).

<sup>236</sup> See *United States v. International Hod Carriers and Common Laborers District Council*, 313 U.S. 539 (1941), discussed in text at note 259 infra.

<sup>237</sup> But the national officers of the AFM participate in negotiations between Locals and network originating stations in New York, Chicago, and Los Angeles.

<sup>238</sup> FCC, *Statistics of the Communications Industry in the United States for the Year Ended December 31, 1940*, at 140 (1942).

<sup>239</sup> NAB Reports 63 (Jan. 28, 1946).

<sup>240</sup> FCC, Public Notice 8304 (June 23, 1947).

<sup>241</sup> *Variety*, p. 38 (Mar. 24, 1948). The new contracts run until January 31, 1951.

<sup>242</sup> *Hearings*, op. cit. supra note 68, at 228; *Hearings*, op. cit. supra note 91, at 337.

<sup>243</sup> FCC, Public Notice 8304 (June 23, 1947).

proximately \$11,456,000 as the earnings of musicians who are employed for specific programs and are paid by the advertising agencies or the program sponsors rather than by the station operators. But the total number of musicians employed full-time or part-time to supply music for programs reaching more than 70,000,000 radio sets<sup>244</sup> probably does not exceed 6,000, and the average local station employs "less than  $\frac{1}{3}$  of a full time musician."<sup>245</sup>

While the Locals were dealing with the problem of employment in the broadcasting station, new vigor was brought to the AFM's national leadership with the retirement in 1940 of 74-year-old President Joseph Weber and the election of James C. Petrillo as his successor. Petrillo immediately imposed the ban on cooperative radio programs and initiated the boycotts which resulted in the unionization of the Boston Symphony Orchestra and the bringing of all American Guild of Musical Artists instrumental and conductor members into the AFM.<sup>246</sup> Then he addressed himself to the problem of the phonograph record and the transcription.

From the 1941 national convention he secured authority to take action against mechanical music,<sup>247</sup> and in June 1942 he notified the recording and transcription companies that their AFM licenses, which expired August 1, would not be renewed. Although he subsequently offered to permit AFM members to make records for home use only, the recording companies disclaimed any power so to limit their use, and on August 1 the musicians stopped making records.<sup>248</sup>

Reaction to this move was cataclysmic. The Federation and its President became, almost overnight, subjects of nation-wide interest. Editorial writers and columnists throughout the land labored their readers with impassioned dissertations on "dictatorship," "labor czars," and "musical Hitlers." Elmer Davis, as Director of the Office of War Information, fanned the flames by injecting patriotism into the controversy. He announced that "the elimination of records . . . for use in restaurants, can-

<sup>244</sup> Hearings, *op. cit.* supra note 91, at 9, 53.

<sup>245</sup> FCC, Public Service Responsibility of Broadcast Licensees 39 (1946), popularly and unpopularly known as the FCC "Blue Book" and hereafter so cited.

<sup>246</sup> See Countryman, *The Organized Musicians: I*, 16 *Univ. Chi. L. Rev.* 56, 70-71 (1948). Petrillo also initiated negotiations resulting in 1942 in the termination of the AFM-IASTE agreement, which had been of little value to the AFM for the past twenty years and which operated to restrict the employment opportunities of AFM members because of IASTE'S lengthy unfair list. *International Musician* 1 (Apr. 1942).

<sup>247</sup> *Ibid.*, at 1 (Aug. 1941).

<sup>248</sup> Although the musicians continued for a time to make transcriptions which were used only once by any one station, the recording ban was extended to cover such transcriptions early in September 1942.

teens and soda parlors where members of the armed forces go for recreation, and for use in factories where war workers use juke boxes for organized relaxation" would seriously jeopardize morale "in the critical months ahead—months which may well decide the fate of this country's war effort," and that elimination of transcriptions would jeopardize the existence of "several hundred" small radio stations and thus "seriously interfere with the communication of war information and messages vital to the public security." Consequently, he called upon Petrillo "on behalf of the people of the United States and on behalf of the War Department, the Navy Department, the Marine Corps, the Coast Guard, the Treasury Department, the Office of Civilian Defense, and the Office of War Information," to end the recording ban.<sup>249</sup>

The fact that the AFM's recording ban did not have the effect of "eliminating," or even diminishing, the production of phonograph records,<sup>250</sup> but operated only to prevent the recording of new musical compositions after August 1, in no way diminished the effectiveness of the Davis letter or the indignation occasioned by the Federation's refusal to comply with the Davis request.

When AFM leaders, with characteristic lack of diplomacy, compounded their sins by demanding that NBC cease broadcasting the performances of student musicians from the National Music Camp, government agencies were stimulated to action. The Senate Committee on Interstate Commerce launched inquiries into AFM activities.<sup>251</sup> The FCC conducted a survey of the radio industry and reported to the Senate committee that 167 of the 890 standard stations then operating would probably be unable to continue without recorded and transcribed music.<sup>252</sup> The Department of Justice brought an injunction action under the anti-trust laws.

The Senate inquiry inspired several bills aimed at AFM practices,<sup>253</sup>

<sup>249</sup> Letter from Davis to Petrillo, July 28, 1942, reprinted in *Hearings*, op. cit. supra note 173, at 6-7.

<sup>250</sup> From their existing stock of matrices the recording companies continued to press and sell as many records as they could get material to manufacture under War Production Board quotas. In 1944 a War Labor Board panel found that "the number of pressings has been limited only by the supply of material and mechanical labor." *Electrical Transcription Manufacturers*, 16 War Lab. Rep. 369, 378 (1944).

<sup>251</sup> *Hearings*, op. cit. supra note 173; *Hearings before Subcommittee of Committee on Interstate Commerce pursuant to S. Res. 81, 78th Cong. 1st Sess. (1943)* (unpublished); *Hearings*, op. cit. supra note 89.

<sup>252</sup> *Hearings*, op. cit. supra note 173, at 33. The FCC prediction was based upon the fact that these 167 stations used recorded or transcribed music for more than 80 per cent of their musical programs and that their net income before taxes was less than \$5,000.

<sup>253</sup> S. 2874, 77th Cong. 2d Sess. (1942) (recording ban); S. 1332, 78th Cong. 1st Sess. (1943), (recording ban); S. 1957, 78th Cong. 2d Sess. (1944) (student broadcasts); H.R. 1648 and S. 63, 79th Cong. 1st Sess. (1945) (student broadcasts).

two of which, designed to forbid interference with student broadcasts, successfully passed the Senate,<sup>254</sup> but Congress' preoccupation with questions of greater importance precluded definitive legislative action during the war. Meanwhile, the Department of Justice went to trial in its anti-trust suit.

At the outset, the Department was confronted with a rather formidable body of precedent. Since 1932 the Norris-LaGuardia Act<sup>255</sup> had forbidden the federal courts to issue injunctions in labor disputes, and had defined "labor dispute" to include "any controversy concerning terms or conditions of employment . . . whether or not the disputants stand in the proximate relation of employer and employee." Two years before the recording ban, in *Milk Wagon Drivers' Union v. Lake Valley Co.*,<sup>256</sup> the Supreme Court had decided that this Act meant that no injunction should be issued in a labor dispute even though it was sought on the ground that the union's activity violated the Sherman Act. And the Court had found that a labor dispute existed even though the milk wagon drivers' union sought to compel dairy operators to cease using "independent vendors" and to hire union drivers to distribute their products, by picketing the retail stores which purchased milk from the "independent vendors" rather than by action taken directly against the dairy operators whose labor practices it sought to change.

Then there was the *Hutcheson* case.<sup>257</sup> Since the suit against the AFM was not a criminal action, the government was not here concerned with the mental gymnastics which Justice Frankfurter had employed to revive the Clayton Act's exemption from criminal prosecution without disturbing the decision<sup>258</sup> which had destroyed that exemption. But the *Hutcheson* decision had also found a labor dispute where the carpenters' union sought to compel operators of a brewery to take certain work from the machinists and give it to the carpenters by calling strikes against the brewery, a construction company employed by the brewery, and a construction company employed by one who leased certain properties from the brewery, by picketing both the brewery and its lessee, and by boycotting the brewery's product.

Finally, there was the case of the *Hod Carriers*, prosecuted under the Sherman Act for calling a strike against certain construction companies

<sup>254</sup> S. 1957 and S. 63, op. cit. supra note 253.

<sup>255</sup> 47 Stat. 70 (1932), 29 U.S.C.A. § 101 et seq. (1947).

<sup>256</sup> 311 U.S. 91 (1940).

<sup>257</sup> *United States v. Hutcheson*, 312 U.S. 219 (1941), discussed in text at note 150 supra.

<sup>258</sup> *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921).

to compel the companies either to cease using concrete truck-mixers or to hire standby employees whenever the truck-mixers were used. After a district court had dismissed the indictment in that case, the Supreme Court had affirmed without opinion on the authority of the *Hutcheson* decision.<sup>259</sup>

These decisions pretty well bracketed the AFM case. The government's complaint alleged that the purpose of the recording ban was to compel radio stations to cease using records and transcriptions and to compel hotels, restaurants, taverns, cabarets, etc., to cease using juke boxes.<sup>260</sup> On this theory the AFM, like the unions of the milk wagon drivers, the carpenters and the hod carriers, was seeking more work for its members. Like those unions, it sought to eliminate competition in its labor market. Like the unions of the milk wagon drivers and the carpenters, it resorted to a secondary boycott rather than to activity directly aimed at those whose labor practices it sought to affect. Like the hod carriers, it was resisting technological change rather than live competition. The only significant difference between the AFM case and any of those already decided was one which seemed to bring the dispute more clearly within the Norris-LaGuardia Act: Unlike some of those against whom union activity was directed in the *Milk Wagon Drivers* and *Hutcheson* cases, the recording and transcription companies were employers of union members.

With the law in this discouraging state, Assistant Attorney General Arnold offered a twofold argument in support of his complaint:<sup>261</sup> 1) He argued that the AFM's recording ban had nothing to do with terms and conditions of employment. The apparent contradiction of the *Milk Wagon Drivers* case was ignored.<sup>262</sup> The *Hutcheson* case was said to be distinguishable because it "involved only a jurisdictional strike." As for the *Hod Carriers* case, "no contractors were forced out of business. An unnecessary charge was imposed which could be and was collected. In the instant case the unnecessary charge was complete prohibition and was aimed at the elimination of smaller networks and smaller radio stations." 2) Relying

<sup>259</sup> *United States v. International Hod Carriers and Common Laborers District Council*, 313 U.S. 539 (1941).

<sup>260</sup> The complaint also included allegations based upon the National Music Camp incident and upon a strike called by the AFM against the Don Lee Broadcasting System, a regional network, to compel one of the stations affiliated with the network to hire more musicians.

<sup>261</sup> Statement as to Jurisdiction, Docket No. 670, October Term, 1942, Supreme Court of the United States.

<sup>262</sup> Compare the statement in the majority opinion in that case: "To say . . . that the conflict here is not a good faith labor issue, and therefore there is no 'labor dispute,' is to ignore the statutory definition of the terms; to say, further, that the conditioned abandonment of the vendor system, under the circumstances, was an issue unrelated to labor's efforts to improve working conditions, is to shut one's eyes to the everyday elements of industrial strife." *Milk Wagon Drivers' Union v. Lake Valley Co.*, 311 U.S. 91, 99 (1940).

on a dictum in the *Hutcheson* opinion (later to be confirmed in the *Allen Bradley* decision) that the Sherman Act would apply should a union "combine with nonlabor groups," he argued that "the union seeks a combination with manufacturers of phonograph records and electrical transcriptions to prevent independent radio stations and networks from acquiring such records and to prevent small amusement places from buying such records, thereby eliminating competing forms of musical production." But this argument includes the contention that the AFM sought to induce the transcription manufacturers to combine against their only customers and to induce RCA and CBS as manufacturers of records and transcriptions to conspire against themselves as broadcasters. Further, it could have been argued with exactly as much force that the hod carriers were seeking to combine with the construction companies against the manufacturers of truck-mixers and that the milk wagon drivers were seeking to combine with the dairy operators against the "independent vendors." And any union activity aimed at the elimination of non-union employees or employees affiliated with a different union, as in the *Hutcheson* case, would constitute an attempt to combine with the employer against such employees. In essence, then, this was merely another way of putting the first argument—union activity aimed at eliminating competition in the labor market has nothing to do with "terms and conditions of employment" within the meaning of the Norris-LaGuardia Act.<sup>263</sup>

The district court found these arguments insufficient and dismissed the complaint. On appeal the Supreme Court was able to dispose of the case summarily,<sup>264</sup> citing the *Milk Wagon Drivers* decision and *New Negro Alliance v. Sanitary Grocery Co.*<sup>265</sup> The latter case did not involve the Sherman Act but had found a labor dispute within the meaning of the Norris-LaGuardia Act where an organization of Negroes picketed a grocery store to compel it to abandon its "whites only" employment policy and hire Negro clerks.

Four days before the Supreme Court's decision was announced, the AFM offered to terminate the recording ban, which had then been in effect for six months, if the recording and transcription companies would agree to pay fixed royalties to the Federation for each record and tran-

<sup>263</sup> The rule later announced in the *Allen Bradley* case seems clearly inapplicable here, since the manufacturers of records and transcriptions have no economic interest in withholding their product from radio and juke box use. In fact, all of the major record manufacturers consider the disc jockeys such stimulators of record sales that they supply them with free records. *Variety*, p. 41 (Sept. 3, 1947).

<sup>264</sup> *United States v. American Federation of Musicians*, 318 U.S. 741 (1943).

<sup>265</sup> 303 U.S. 552 (1938).

scription made by AFM members. The sums so collected were to be used "for the purposes of reducing unemployment which has been created in the main by the use of the above-mentioned mechanical devices and for fostering and maintaining musical talent and culture and music appreciation; and for furnishing free, live music to the public."<sup>266</sup> The companies, however, refused to consider any such arrangement—not because of its cost, but because, out of a sudden concern for the union membership, they objected to contributing to any fund to be "disbursed in the Union's uncontrolled discretion," and because of the "dangerous fallacy" in the underlying assumption "that a specific industry owes a special obligation to persons not employed by it—an obligation based only on such persons' membership in a union."<sup>267</sup>

Instead, anti-trust remedies having failed, they took their case to the War Labor Board under the War Labor Disputes Act of 1943.<sup>268</sup> But while the WLB hearing was proceeding before a three-man panel, a break occurred in the hitherto solid ranks of the companies. Decca, producer of one-fourth of all phonograph records in the United States,<sup>269</sup> entered into a contract with the Federation. Furthermore, Decca brought with it the World Broadcasting System, the largest manufacturer of library transcriptions (whose stock Decca had recently acquired<sup>270</sup>), and WOR Recording Studios, chief transcription manufacturer for MBS.

This contract, to run until December 31, 1947, constituted a complete capitulation to the Federation's royalty demands.<sup>271</sup> "In order to give effect to the principle of a continuing interest which all members of the Federation have in the use of recordings containing instrumental music," the companies agreed to pay royalties ranging from one-fourth cent on a

<sup>266</sup> Hearings, *op. cit. supra* note 75, at 106.

<sup>267</sup> *Ibid.*, at 76.

<sup>268</sup> 57 Stat. 163 (1943), 50, App. U.S.C.A. § 1503 (1944). This Act gave the Board jurisdiction over any "labor dispute" which might lead to "substantial interference with the war effort." The Board found the recording ban to constitute such a labor dispute and set the case down for panel hearing in *Electrical Transcription Manufacturers*, 10 War Lab. Rep. 157 (1943).

<sup>269</sup> At the conclusion of its hearings the WLB panel found that Decca, Columbia, and Victor "issue practically all of the phonograph records in the United States. The annual production of the three companies is about 130,000,000 records, of which 56,000,000 are made by Victor; 39,000,000 by Columbia; and 35,000,000 by Decca." *Electrical Transcription Manufacturers*, 16 War Lab. Rep. 369, 372 (1944).

<sup>270</sup> Standard & Poor's Corporation Records (C-E) 1451. In August 1948 Decca sold World to Frederick W. Ziv Company, largest manufacturer of open-end transcriptions. *Broadcasting* 22 (Aug. 9, 1948).

<sup>271</sup> A copy of the contract is set out in NAB, Special A. F. of M. Bulletin 22 (Oct. 1, 1943), and in *International Musician* 1 (Oct. 1943).



thirty-five-cent record to  $2\frac{1}{2}$  per cent of the sale price of records selling for more than \$2.00. On electrical transcriptions the royalty was 3 per cent of the companies' gross revenue from sale, lease, or license of such transcriptions, except that transcriptions which were used only once by any one station were royalty-free. It was also provided that if the AFM should subsequently enter a contract with other companies "upon terms more favorable or different" from the Decca contract, the signatories to the Decca contract could cause their agreement "to be conformed therewith."

Within a month twenty-two small record and transcription manufacturers had signed the Decca contract, and four more large transcription companies had signed a second contract<sup>272</sup> patterned after the Decca agreement but containing two additional provisions available to the Decca signatories under the most-favored-company clause of their agreement: 1) The AFM agreed not to seek an increase in wage scales prior to October 1945.<sup>273</sup> 2) It was specifically provided in the contract that the royalty payments should be kept by the AFM in a separate fund and used "only for purposes of fostering and propagating musical culture and the employment of live musicians, members of the Federation."

Although the "Four Companies" contract was soon accepted by seventy-six more small recording and transcription companies, RCA and Columbia refused to enter into any such agreement, and the WLB proceedings continued. In March 1944 the panel issued its report, a lengthy document written by public member Arthur S. Meyer and substantially concurred in by employer member Gilbert E. Fuller, wherein the dispute received its first consideration on the merits. Although Meyer was not impressed by the companies' position that as a matter of principle they could not agree to make payments into a fund to be controlled by the Federation, a principle upon which he thought the companies stood "a little painfully," he found: 1) that the union had failed to prove that the phonograph, the transcription, or the radio had "decreased the employment of musicians"; 2) that although not more than one-third of the AFM membership was able to find full-time employment as musicians, the remaining two-thirds were able to supplement part-time musical work

<sup>272</sup> A copy of this contract is set out in NAB, Special A.F. of M. Bulletin 23 (Oct. 29, 1943), and in *International Musician* 16 (Nov. 1943).

<sup>273</sup> Wage scales at that time were \$10 per hour for popular records (not more than four 10-inch or three 12-inch matrices to be made in three hours), \$14 per hour for classical records (not more than forty minutes playing time per hour), and \$18 per hour for electrical transcriptions (not more than one fifteen-minute transcription per hour). AFM By-Laws Art. XV (1941). In October 1946 the Federation secured increases which brought the rates to \$13.75 for popular records, \$19.25 for classical records, and \$27.00 for electrical transcriptions. AFM, *Wage Scales, Rules and Regulations Applying to Recordings and Transcriptions* 3-5 (1946).

with other employment or to find full-time employment in other fields, and, at least during a war-time manpower shortage, the union could not ask for more; and 3) that even if an unemployment problem did exist, the War Labor Disputes Act authorized the WLB only to prescribe "wages and hours and all other terms and conditions (customarily included in collective bargaining agreements) governing the relations between the parties," and a royalty provision such as that demanded by the AFM was not "customary." Accordingly, the panel recommended, with labor member Max Zaritsky dissenting, that the Board direct termination of the recording ban and restoration of conditions prevailing on July 31, 1942.<sup>274</sup>

For all Meyer's painstaking care, his report seems to miss the point of the Federation's case. It is obvious that the phonograph, considered apart from its use on radio and juke box, did not decrease the employment opportunities of musicians—it did just the opposite. Hence, it was not surprising that the panel could discover President Weber saying in 1926 (while Secretary Hoover's licensing plan was keeping recorded music off most radio programs and before the introduction of the modern juke box) that the phonograph record had "advanced the development of the love of music among the people . . . and the result was an increase of employment opportunities for musicians."<sup>275</sup> Although the panel report was critical of the union's failure to submit data in support of its position, the ultimate logic of the Federation's position is that the phonograph record and the transcription have been used by radio stations and operators of small amusement places to fill a demand which otherwise would have created more jobs for live musicians. Obviously, no amount of investigation will prove that there would be more employment for musicians today if the phonograph and the radio had never been invented. Nor could the Federation muster statistics to show how many more jobs for live musicians would be made available if there were no juke boxes and if records and transcriptions were not used on the radio. It is apparent that the elimination of the juke box and the recorded radio program would in some measure increase the job opportunities of live musicians. That, in final analysis, is the Federation's contention, and years of surveying and statistics-gathering will not give it added weight or precision. But the panel did not recognize that contention, and its report did not deal with it.

In any event, the WLB did not follow the panel's recommendation. It accepted the principle of the union-administered royalty fund which the companies found so distasteful, and it ordered immediate termination of

<sup>274</sup> Electrical Transcription Manufacturers, 16 War Lab. Rep. 369, 370 (1944).

<sup>275</sup> *Ibid.*, at 380.

the recording ban and settlement by arbitration of the amount and disposition of royalty payments.<sup>276</sup>

But the AFM, with a large part of the battle won, was in no mood to arbitrate, and it refused to comply with the Board's order. The only compulsion, aside from adverse publicity, which the War Labor Disputes Act provided for enforcement of the order was seizure of the business concerned in the event that the Economic Stabilization Director found "that the war effort will be unduly impeded or delayed" by continuance of the dispute. Accordingly, when two months of extremely adverse publicity had failed to daunt the Federation, the Board referred the case to Stabilization Director Vinson, who concluded, reasonably enough, that continuation of the recording ban against RCA and Columbia would not unduly impede or delay the war effort. President Roosevelt then wired Petrillo, informing him of the Director's decision, but calling on the union in the name of patriotism and citizenship to comply with the Board's order voluntarily.<sup>277</sup> The Federation refused to accede to this request, pointing out that it had already reached agreements with 105 recording and transcription companies under which recordings had been made for the past year, and that under the most-favored-company clause an arbitration award on terms more favorable to RCA and Columbia might deprive it of part of the benefits of those agreements.<sup>278</sup>

The new flurries of editorial indignation caused by this defiance of governmental authority may have brought comfort to RCA and Columbia, but it brought no recording profits. And Jascha Heifetz's switch from RCA-Victor to Decca<sup>279</sup> was an omen of even greater long-run loss. Finally, two days after the 1944 Presidential election and almost twenty-seven months after the initiation of the recording ban, RCA and Columbia capitulated and signed the royalty contract, bringing the record industry back to full production.

With the end of the war, that industry entered a new era of prosperity. In 1945 it sold 165,000,000 records,<sup>280</sup> by 1946 it had raised the figure to 275,000,000,<sup>281</sup> and the 1947 output was 350,000,000.<sup>282</sup> A concomitant of such prosperity is, of course, the rise and fall of numerous new producers, and there are today literally hundreds of small recorders either in opera-

<sup>276</sup> *Ibid.*, at 369.

<sup>278</sup> *Ibid.*, p. 1 (Oct. 11, 1944).

<sup>277</sup> *New York Times*, p. 1 (Oct. 5, 1944).

<sup>279</sup> *Ibid.*, p. 14 (Oct. 5, 1944).

<sup>280</sup> Taubman, *op. cit. supra* note 125, at 20.

<sup>281</sup> As Crosby Goes, So Goes Chopin, 35 *Fortune*, No. 5, at 146 (May 1947).

<sup>282</sup> Lunde, *The American Federation of Musicians and the Record Ban*, 12 *Pub. Op. Quar.* 45, 46 (1948).

tion or in the process of going in or out of business.<sup>283</sup> Nonetheless, RCA-Victor, Columbia, Decca, and Capitol Records, Inc.—a newcomer which entered the record and transcription fields in 1942<sup>284</sup>—account for over 80 per cent of the entire record production.<sup>285</sup>

With the industry in this flourishing state, the Federation had collected \$3,700,000 in royalties by the end of 1947, and the AFM Executive Board, acting under directions from the national convention,<sup>286</sup> distributed \$1,130,000 among the Locals in 1947 according to a plan designed to accommodate both the employment needs of the Locals and the musical needs of the smaller communities.<sup>287</sup> With that allocation, supplemented in some instances by contributions from the Locals and from civic organizations and local government units, the musicians provided some 10,000 musical performances in ballrooms, concert halls, veterans' hospitals, and parks. These performances, which were divided almost evenly between popular and classical music, employed more than 30,000 musicians and played to audiences in 514 communities. A similar schedule of performances in 1948 was financed by a second allotment of \$1,736,000 from the royalty fund.<sup>288</sup>

Meanwhile, having acquiesced in the continued use of recorded music on the air, the Federation sought to invoke the principle it once had applied to the motion picture theaters—that the music machine should be operated by a member of the union. As president of Local 10, Petrillo had in 1928 converted Chicago radio stations to the practice of employing AFM members as platter-turners. But in other stations that work was done by announcers or studio engineers; in the network-owned stations it was done by the engineers. In January 1944, however, the AFM reached

<sup>283</sup> Sturdiest of the new entrants is MGM, which spent \$4,000,000 to convert a Bloomfield, New Jersey, war plant into a record factory, arranged to have its domestic distribution handled by the Zenith Radio Corporation and its foreign distribution by Electrical and Musical Industries, Ltd. (which does the same job for Columbia and RCA-Victor), and entered production in March 1947. As Crosby Goes, So Goes Chopin, 35 *Fortune*, No. 5, at 146 (May 1947); *Variety*, p. 39 (Aug. 13, 1947).

<sup>284</sup> Capitol was formed by songwriter Johnny Mercer, movie producer Buddy DeSylva, and Hollywood music store proprietor Glenn Wallichs.

<sup>285</sup> In terms of the number of records sold, it is estimated that RCA-Victor accounted for 27 per cent of the 1947 output, Decca 25 per cent, Columbia 23 per cent, and Capitol 8½ per cent. Lunde, *op. cit. supra* note 282, at 46.

<sup>286</sup> AFM By-Laws Art. I, § 10 (1947).

<sup>287</sup> Each Local received \$10.43 per member except the New York, Chicago, and Los Angeles Locals, which received \$10.43 for each of the first 5,000 members and \$2.00 for each additional member.

<sup>288</sup> *New York Herald Tribune*, § 2, p. 2 (Jan. 25, 1948); Hearings, *op. cit. supra* note 106, at 417.

agreements with the four national networks whereby they undertook to transfer their platter-turning work to AFM members. But before these agreements could be put into effect, the National Association of Broadcast Engineers and Technicians, an unaffiliated union representing the engineers employed in NBC and Blue (ABC after December 30, 1944) network stations, instituted representation proceedings before the National Labor Relations Board. On the basis of past bargaining history, the NLRB certified NABET as collective bargaining representative for units including platter-turners in NBC and Blue stations, and the only consequence of the AFM's insistence that the networks nonetheless comply with their contracts with the Federation, and of its belatedly-filed charge that NABET was company-dominated, was a court order requiring the two networks to bargain with NABET.<sup>289</sup> Since the established bargaining practice at other stations varied only in the identity of the unions whose members did the platter-turning work,<sup>290</sup> the AFM abandoned its attempt to secure such work for its members outside of Chicago and turned its attention to other technological problems which arose with the end of the war.

One such problem was the post-war growth of television, which has progressed from an experimental operation in 1941 to a commercial enterprise which now boasts 39 operating stations, 85 construction permits granted, and 310 applications pending.<sup>291</sup> Whether this new industry means more or less employment for musicians is not yet clear. If listener preference has any effect on the content of programs, television may prove a boon to the AFM membership. Certainly a televised version of today's disc-jockey program will have little audience appeal. And if television proves an effective competitor of the motion picture,<sup>292</sup> the musician

<sup>289</sup> NLRB v. NBC, 150 F. 2d 895 (C.C.A. 2d, 1945).

<sup>290</sup> NABET also represents the engineers employed at Mutual's station WOR and at some 50 other stations throughout the country. Letter from Harry E. Hiller, Executive Secretary, NABET, Apr. 9, 1948. The engineers at CBS-owned stations are represented by the International Brotherhood of Electrical Workers (AFL). Elsewhere, the engineers are represented either by the IBEW or by the CIO's American Communications Association. Announcers, who act as platter-turners on some stations, are represented by the American Federation of Radio Artists (AFL).

<sup>291</sup> Television Magazine 2 (Apr. 1948); Television Boom, 37 Fortune, No. 5, at 79 (May 1948); Hearings, op. cit. supra note 91, at 164.

<sup>292</sup> There is already some evidence of hedging on this score. Paramount Pictures operates two television stations, has applied for three more, and has acquired a 30 per cent interest in Allen B. DuMont Laboratories, Inc., which operates two stations. Warner Brothers and Twentieth Century-Fox have television applications pending before the FCC, and Twentieth Century-Fox is currently negotiating for the purchase of ABC, which owns one television station and has thirteen television affiliates. Television Boom, 37 Fortune, No. 5, at 79, 194-96 (May 1948); Variety, p. 3 (Apr. 21, 1948); *ibid.*, p. 5 (May 12, 1948); 51 Time, No. 51, at 77 (June 21, 1948). New York Times, p. 33 (Nov. 24, 1948).

should benefit from the fact that the new medium, even though operating through network arrangements, must offer its audience a far greater number of performances than does the movie industry.<sup>293</sup> On the other hand, television will constitute new competition for the legitimate theater, the ballroom, the concert hall, and standard broadcasting—all of which now offer employment opportunities for musicians. Moreover, the AFM may not be able to keep movie film out of the television studio indefinitely.

Confronted with this tangle of possibilities, AFM leaders were unable to decide whether to welcome television or to combat it, and they finally reached the rather ostrich-like conclusion that until they could learn more about it they would have nothing to do with it. Accordingly, they announced in February 1945 that Federation members would not play for any television broadcast "until further notice."<sup>294</sup>

"Further notice" was not given for three years. Then, without having gained a thing by their television ban, and apparently without even having formed any ideas about what they expected to gain, AFM leaders lifted the ban in new contracts concluded with the network originating stations last March and shortly thereafter, in order to assist the "infant industry," agreed on wage scales for television broadcasts which are considerably lower than those applicable to standard broadcasting.<sup>295</sup>

A somewhat more understandable but similarly bootless policy was pursued by the Federation with respect to FM broadcasting, which had gotten a fair start before the war and which has expanded rapidly since wartime restrictions on building were removed.<sup>296</sup> Insofar as FM broadcasting meant the opening of new originating stations,<sup>297</sup> it provided new

<sup>293</sup> During the 1946-47 season, motion picture producers released 313 features, excluding westerns. *Box Office* 28 (Nov. 15, 1947).

<sup>294</sup> *International Musician* 1 (Feb. 1945).

<sup>295</sup> Under a six-month contract concluded April 29, 1948, the scale for local television originations is  $\frac{2}{3}$  the local rate for standard broadcasting; for network originations it is  $\frac{1}{4}$  the standard rate; for duplicated standard-television broadcasts, the prevailing standard scale for the program is to be increased by \$3.75 for sustaining programs and \$7.50 for sponsored programs. It was also agreed that filmed records of a live television network show may be made for "single use over any station which is affiliated with the network at the time of the original telecast." This contract covers network-owned stations only. Television rates for all other stations are negotiated with the appropriate AFM local. *International Musician* 6-7 (May 1948).

<sup>296</sup> At the close of the war there were forty-eight FM stations in operation. FCC, Twelfth Annual Report 15 (1946). By September 1948 this number had grown to 640, with an additional 388 authorized, and 97 applications pending. *FM and Television* 44 (Sept. 1948).

<sup>297</sup> In addition to its advantages of near-perfect fidelity and static-elimination, FM eases the frequency shortage which previously restricted the number of stations which could operate, making it technically possible to have from 3,500 to 5,000 additional stations. *Siepmann, Radio's Second Chance* 240 (1946).

opportunities for musical employment. But to the extent that FM stations were to be operated by the standard broadcasters<sup>298</sup> as additional outlets for existing programs,<sup>299</sup> no new employment would result. To combat the latter tendency, the AFM notified the broadcasters in October 1945 that its members would not perform for any program broadcast simultaneously over AM and FM outlets unless a standby orchestra was employed.<sup>300</sup>

But while the AFM was fashioning its post-war strategy, the post-war Congress had fashioned the Lea Act,<sup>301</sup> and subsection (a)(3) of that Act, making it unlawful to attempt to compel a radio station "to pay or agree to pay more than once for services performed,"<sup>302</sup> was clearly drawn to fit the Federation's demand for standbys on duplicate AM-FM broadcasts. Without more, it seems apparent that this provision was violated by the AFM for more than a year after the Lea Act was passed. But there is more:

- (c) The provisions of subsection (a) and (b) of this section shall not be held to make unlawful the enforcement or attempted enforcement, by means lawfully employed, of any contract right heretofore or hereafter existing or of any legal obligation heretofore or hereafter incurred or assumed.

Hence, if the contracts between the AFM Locals and the radio stations contained provisions requiring payment of standby charges whenever a program was broadcast simultaneously over AM and FM outlets, there would be no violation of the Act.

But the contracts then in existence, which were renewed for one year in January 1947, were "absolutely silent on the question of frequency modulation."<sup>303</sup> Despite this fact, it was reported by *Variety*, a usually well-informed trade sheet, that the networks had persuaded the Department of Justice that their contracts brought the AFM within the protec-

<sup>298</sup> Of 380 FM stations operating in January 1948, 293 were operated by AM licensees, and 437 additional AM licensees were either building FM stations or had applied to the FCC for construction permits. Hearings, op. cit. supra note 91, at 73, 263.

<sup>299</sup> The FCC originally planned to require AM licensees who acquired FM licenses to devote at least two hours per day to new and original programs, but receded from that position in the face of outraged protests from the AM broadcasters. Siepmann, op. cit. supra note 297, at 244-46.

<sup>300</sup> Hearings, op. cit. supra note 91, at 68. With this move was coupled another blow at an old menace—the AFM refused to accept any new engagements on FM networks. This ban affected the Continental Network and twelve regional FM networks. *Ibid.*, at 27, 67, 126.

<sup>301</sup> 60 Stat. 89 (1946), 47 U.S.C.A. § 506 (Supp., 1947).

<sup>302</sup> See Countryman, *The Organized Musicians*: I, 16 *Univ. Chi. L. Rev.* 56, 80-82 (1948).

<sup>303</sup> Testimony of Joseph H. Ream, executive vice-president of CBS. Hearings, op. cit. supra note 91, at 297.

tion of subsection (c) of the Lea Act,<sup>304</sup> and network officials recently took that position before a congressional committee. NBC's Executive Vice-President Frank E. Mullen undertook to explain to the committee how these contracts, which said nothing about duplicate AM-FM broadcasting, nonetheless covered the matter completely:

When we came up to the negotiations of our 1947 agreement . . . the contract was extended for a year, with the only subject discussed being wages and working conditions.

That was by agreement with the union, and was the matter of negotiation, and even though it is not referred to in the contract, . . . it was clearly understood by both sides that our contract did not cover it.

Therefore, our lawyers, I think, are quite right in advising us now that the contract does not cover FM and if we duplicate it without any permission from Mr. Petrillo, we would be breaching our contract.<sup>305</sup>

Unfortunately for the development of American jurisprudence, Mr. Mullen's novel principle of interpretation will not receive judicial test. The new three-year contracts between network stations and AFM Locals expressly authorize simultaneous AM-FM broadcasting with no increase in pay for musicians.<sup>306</sup> But the position taken by the AM broadcasters lends color to the suggestion that they have not accorded FM an unqualified welcome.<sup>307</sup>

Sponsors of the Lea Act did not confine their legislative efforts to matters of current controversy. They obviously had the existing AFM royalty contracts with the record and transcription manufacturers in mind when they drew the subsection providing:

- (b) It shall be unlawful, by the use or express or implied threat of the use of force, violence, intimidation, duress, or by the use or express or implied use of other means, to coerce, compel or constrain or attempt to coerce, compel or constrain a licensee or any other person—
- (1) to pay or agree to pay any exaction for the privilege of, or on account of, producing, preparing, manufacturing, selling, buying, renting, operating, using, or maintaining recordings, transcriptions, or mechanical, chemical, or electrical reproductions, or any other articles, equipment, machines, or materials, used or intended to be used in broadcasting or in the production, preparation, performance, or presentation of a program or programs for broadcasting; or
  - . . . . .
  - (3) to pay or agree to pay any exaction on account of the broadcasting, by means

<sup>304</sup> Variety, p. 32 (Sept. 3, 1947).

<sup>305</sup> Hearings, *op. cit. supra* note 91, at 302.

<sup>306</sup> Broadcasting 13 (Mar. 22, 1948). The ban on FM network shows has also been lifted. Letter from Everett L. Dillard, president of the Frequency Modulation Association, June 11, 1948.

<sup>307</sup> See cautious testimony to that effect by J. N. Bailey, executive director of the Frequency Modulation Association. Hearings, *op. cit. supra* note 91, at 77, 91.



of recording or transcription, of a program previously broadcast, payment having been made, or agreed to be made, for the services actually rendered in the performance of such program.

But it is difficult to determine just what they had in mind when they made the exemption of subsection (c) for "means lawfully employed" in the enforcement of "any contract right heretofore or hereafter existing"<sup>308</sup> applicable to the above prohibitions. Clearly, that saved the existing royalty contracts. And seemingly it would also have saved any subsequent royalty agreements—if the Federation could secure such agreements without using force, violence, intimidation, duress, or any "other means."

Even that rather remote possibility was apparently enough to disturb the recording and transcription companies. Through the National Association of Broadcasters (which frequently displays a greater concern for the record manufacturers' problems than the interests of most of its members would warrant), they maintained the position which the WLB panel found them occupying "a little painfully" in 1942, and during the hearings which produced the Taft-Hartley Act the NAB called upon Congress for a law prohibiting the payment of royalties "to unions for their unrestricted uses."<sup>309</sup>

Section 302 of the Taft-Hartley Act<sup>310</sup> answers that call. It makes it unlawful for an employer to make any payment to a "representative of his employees," with an exception for payments into "a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents," such trust fund to be administered jointly by representatives of the employer and of the employees. This provision did not affect the distribution of funds collected under the AFM's existing royalty agreements,<sup>311</sup> but those agreements expired December 31, 1947. And the new law means that royalties collected by the union under any subsequent agreement cannot be used to provide employment for any musicians other than those

<sup>308</sup> See text following note 302 supra.

<sup>309</sup> Hearings before Committee on Labor and Public Welfare on S. 55 and S. J. Res. 22, 80th Cong. 1st Sess., at 2271 (1947). Similar requests came from the bituminous coal mine operators, objecting to the "collectivist" royalty-supported benefit plans first included in their contracts with the United Mine Workers in 1946 while the mines were being operated by the government. *Ibid.*, at 225-29, 762-70; Hearings before Committee on Education and Labor on Bills To Amend and Repeal the National Labor Relations Act and for Other Purposes, 80th Cong. 1st Sess., at 199-203, 635, 1225, 2349-50 (1947).

<sup>310</sup> 61 Stat. 157 (1947), 29 U.S.C.A. § 186 (Supp., 1947).

<sup>311</sup> Section 302(f) provides: "This section shall not apply to any contract in force on the date of enactment of this Act, until the expiration of such contract, or until July 1, 1948, whichever first occurs."

who made the records and transcriptions on which the royalties are paid—musicians who do not need such assistance. This interference with its unemployment relief plan served to aggravate the Federation's concern over a situation which, from its viewpoint, was growing steadily worse.

In the first place, the great post-war rise of the disc-jockey program has given further impetus to the use of recorded music.<sup>312</sup> Such leading AFM members as Tommy Dorsey and Duke Ellington have found it profitable to abandon their orchestras and become disc jockeys. Even Paul Whiteman, who had once sought to collect royalties for the broadcasting of his records, is now busily engaged in the royalty-free broadcasting of his own and other musicians' recorded performances. New York's station WNEW, devoting 15½ of its 24 hours per day to a stable of six disc jockeys, set the horrible example.<sup>313</sup>

And what the disc jockey is doing to the musician's opportunities in radio, the juke box is doing elsewhere. By the operator's own estimates, juke boxes now provide recorded music for more than 400,000 taverns, bars, night clubs, cabarets, etc., some of which would otherwise employ live musicians.<sup>314</sup> And to this form of mechanical competition must be added that of the "wired music" services, led by MUZAK of New York,<sup>315</sup> which pipe music from electrical transcriptions into some 750 hotels and restaurants all over the country.<sup>316</sup>

In view of this growth in the use of recorded and transcribed music, and while the Taft-Hartley proposals were still pending in Congress, the AFM's 1947 national convention authorized the Executive Board to initiate another recording ban.<sup>317</sup> Five months later, the Federation sent the following notice to all recording and transcription companies:

<sup>312</sup> Trade estimates in 1947 placed the number of disc jockeys at 2800. *Variety*, p. 41 (Sept. 3, 1947). Some indication of the number of broadcasting hours accounted for by such performers, as well as the current trend in their use, is illustrated by the situation in Chicago. In 1945 twelve disc jockeys accounted for 125 hours of broadcasting time weekly. Two years later thirty-nine disc jockeys divided a total of 268 hours. *Ibid.*, p. 30 (July 2, 1947). In New York, ninety-three disc jockeys use 400 hours of broadcasting time per week. *Ibid.*, p. 49 (Mar. 17, 1948).

<sup>313</sup> Frank, *Tycoons of the Turntables*, 119 *Colliers* 18 (Mar. 22, 1947).

<sup>314</sup> Hearings, *op. cit. supra* note 183, at 104, 110, 146. Non-industry estimates placed the total number of juke boxes at 400,000 seven years ago. Smith, *What's Petrillo up To?* 186 *Harpers Magazine* 90, 93 (1942).

<sup>315</sup> In addition to its wired music business, MUZAK also provided a transcription service for ABC until recently, when WOR Recording Studios took over that function. *Variety*, p. 69 (July 9, 1947).

<sup>316</sup> Smith, *Is There a Case for Petrillo?* 112 *New Republic* 76 (1945); Lunde, *op. cit. supra* note 282, at 50.

<sup>317</sup> AFM Standing Resolutions 4 (1947).

Your contract with the American Federation of Musicians for the employment of its members in the making of musical recordings will expire on December 31, 1947.

This contract will not be renewed because on and after January 1, 1948, the members of the American Federation of Musicians will no longer perform the services provided for in said contract.

This notice carries with it our declared intention, permanently and completely, to abandon that type of employment.<sup>318</sup>

These notices merely confirmed a declaration made four months earlier,<sup>319</sup> and before they were dispatched the industry had embarked on a mass scramble to build up a backlog of records and transcriptions before the end of the year. Every new composition that bore any promise of popularity was recorded. The musical selections from most of the motion pictures scheduled for 1948 release went onto matrices. Performers for transcribed musical programs worked long hours to build a stockpile of transcriptions. Plans were made to ration all new recordings. Trade rumors credited some companies with enough recordings to last two or three years, and RCA-Victor with a 25-year supply of matrices for classical records.<sup>320</sup>

In all this rush, the musicians gave the industry complete cooperation, even to the extent of canceling other engagements in order to devote more time to the making of matrices, and the Federation made no protest. Then, a few days before the new recording ban took effect, Petrillo gave notice of the Federation's claim that under the expiring contracts royalties must be paid to the AFM on all records pressed from matrices produced prior to December 31, 1947. Although this position finds support in the language of at least some of the contracts<sup>321</sup> and in the fact that royalties were not paid on records made during the period covered by the contracts from matrices cut prior to the contracts, the recorders refused to pay royalties on any records made in 1948 from matrices produced prior to the recording ban.<sup>322</sup> In any event, the Taft-Hartley Act quite clearly applies to any royalty payments on records made after July 1, 1948.<sup>323</sup>

<sup>318</sup> International Musician 6 (Nov. 1947).

<sup>319</sup> In July 1947 Petrillo told a House committee that the Federation intended to stop making records and that it might "go into the recording business itself, if we do not conflict with the anti-trust laws." Hearings, op. cit. supra note 68, at 184. Subsequently, the AFM announced that it had abandoned the idea of going into the recording business. New York Herald Tribune, p. 21 (June 9, 1948).

<sup>320</sup> 51 Time, No. 17, at 25-26 (Oct. 27, 1947); *ibid.*, No. 21, at 74 (Nov. 24, 1947).

<sup>321</sup> The "Four Companies" agreement provides for royalty payments on "phonograph records manufactured by you or others from masters hereafter recorded by you *during the term of this agreement.*" In the Decca contract, the italicized phrase is omitted.

<sup>322</sup> Variety, p. 33 (Aug. 18, 1948). <sup>323</sup> Note 311 supra.

Meanwhile, the production of matrices containing instrumental music ended with the end of 1947. Early in February 1948 the AFM agreed to allow its members to make transcriptions designed for one use only pending negotiation of new contracts with the networks, and the new contracts now provide for the continuation of that practice.<sup>324</sup> But with that one exception the ban was complete. During the first nine months of 1948 neither the Federation nor the companies made any attempt to seek a settlement whereby the recording ban would be lifted. Indeed it is probable that the recording companies did not want the ban ended until they had disposed of their accumulated stocks, since many of the recordings made in the closing months of 1947 would not sell in a market where the buyer had much choice. But by the end of September 1948 accumulated stocks of popular recordings were running low. While the recorders may have had a sufficient supply of classical records to last indefinitely, such records account for only 30 per cent of their total sales.<sup>325</sup> And the non-classical works from which most of their revenue comes are of such fleeting popularity that a constant stream of replacements is necessary. As the companies exhausted their stocks of tunes recorded in the last few months of 1947 replacements were not forthcoming.

There had been some "bootleg" recording, of course, just as there was last time, but it again was of little consequence. The companies imported some matrices and records from other countries, but for the most part the musicians of other countries showed little talent for the type of musical interpretation which sells the most records in the United States.<sup>326</sup> Moreover, foreign record manufacturers may prefer to do their own exploiting of what demand there is for their product in this country—Decca, Ltd. is already distributing substantial numbers of its "London" records in the United States through the London Gramophone Company, a subsidiary incorporated in New York in 1946.

The transcription companies were in little better position than the recorders. They could continue to manufacture singing commercials either without instrumental music or with instruments not regarded as musical

<sup>324</sup> Broadcasting 14 (Mar. 22, 1948).

<sup>325</sup> Taubman, *op. cit.* supra note 125, at 20; Variety, p. 46 (Mar. 19, 1947).

<sup>326</sup> During the first recording ban members of the English Musicians' Union refused to make records for export to the United States. During the first eight months of the current ban the English musicians not only made English records destined for United States markets, but also made records for American companies with American vocalists visiting in England and supplied American companies with recorded instrumental backgrounds for vocal recordings made in this country. In August 1948, however, the English union instructed its members not to provide any more instrumental music for American vocalists, although they continued to make English recordings for American consumption. Variety, p. 1 (Sept. 1, 1948).

by the AFM (ocarinas, ukeleles, etc.),<sup>327</sup> and continued production of tailor-made transcriptions seemed assured. But all library transcription production was stopped and more than one use of new open-end transcriptions made by AFM members was prevented by the recording ban. While music for such transcriptions could be dubbed in from the existing supply of recorded works, the transcription companies were in the same position as the record manufacturers with respect to new tunes.

The Federation's staying power seemed stronger than that of the companies, but not inexhaustible. The recording ban meant a reduction in the earnings of some of its members. Although those affected constituted less than 3 per cent of the total membership,<sup>328</sup> they were its most successful members and their superior financial (they also paid the most taxes to the union) and prestige positions made their attitude toward the recording ban of utmost importance to its successful maintenance. While they went along on the previous ban and there was no evidence that any substantial number of them were yet disposed to violate this one, it was not likely that they would be willing to give up their recording income forever. But at least until NAPA succeeded in its attempt to empower them to collect royalties on the commercial use of their records, they would probably be satisfied with a plan of settlement which took the phonograph record off the air and out of the juke box, since about 80 per cent of the demand for records comes from home users.<sup>329</sup>

There were new legal remedies available to the companies which had not been available during the last recording ban. The Taft-Hartley Act makes it an unfair labor practice under section 8(b)(4)<sup>330</sup> and the basis for a damage suit under section 303<sup>331</sup> for a union "to engage in . . . a strike or a concerted refusal . . . to perform any services, where an object thereof is: (A) forcing or requiring . . . any employer or other person to cease using . . . the products of any other producer, processor, or manufacturer, or to cease doing business with any other person. . . ."

This provision, stemming from the notion that the secondary boycott

<sup>327</sup> When some of the recording companies used harmonicas to provide the accompaniment for vocal recordings of post-1947 hits, the AFM Executive Board took a new reading of the By-Laws, ignored the competing jurisdictional claims of the American Guild of Variety Artists (AFL) and announced that harmonica players were "performers on musical instruments" and therefore eligible for AFM membership. *International Musician* 7 (May 1948).

<sup>328</sup> Note 230 supra.

<sup>329</sup> It is estimated that 1 per cent of all record production is purchased for radio use, 19 per cent for juke boxes, and the balance for home use. Lunde, *op. cit. supra* note 282, at 46.

<sup>330</sup> 61 Stat. 140 (1947), 29 U.S.C.A. § 158(b)(4) (Supp., 1947).

<sup>331</sup> 61 Stat. 158 (1947), 29 U.S.C.A. § 187 (Supp., 1947).

is an evil per se, is clearly designed to outlaw strikes "an object" of which is to cause the struck employer to cease dealing with a third party, regardless of what the union is seeking to obtain from the third party. But it does contemplate that the union be seeking to affect the third party in some fashion—it does not outlaw strikes called only to secure a concession from the employer against whom the strike is called.<sup>332</sup> And its terms certainly do not apply to a concerted refusal to work wherein the union is not even attempting to affect the conduct of the immediate employer.

The form of the Federation's announcement of the current recording ban was undoubtedly designed with these qualifications in mind. The refusal to work for the recording and transcription companies was not conditioned on their ceasing to deal with the broadcasters and juke box operators. Nor was any other demand made on those companies.

But in his testimony before the Hartley Committee in January 1948 Petrillo suggested that Congress "make some kind of a law that the musicians can make records for home consumption, and let the musicians and the fellow who has commercialized records fight it out. . . . We favor recordings if we can stop this commercialized business on recordings."<sup>333</sup> On the basis of this testimony, some of the transcription companies filed unfair labor practice charges against the Federation,<sup>334</sup> but it was far from clear that an unfair labor practice could be proved. Petrillo's testimony articulated what was perfectly obvious anyway—that the AFM's objection was not to recorded music as such but to the use of recorded music on the radio and in the juke box. That testimony did not establish, however, that the union either demanded or expected the recording ban to compel the recording and transcription companies to cease supplying their products to the broadcasters and to the operators of juke boxes and wired music services. Obviously, the transcription companies could never be induced to take such action, since broadcasters and wired music operators were their only customers. And the Federation recognized that there apparently was no way the recording companies could prevent the broadcasters and juke box operators from buying and using their records.<sup>335</sup>

<sup>332</sup> Thus, only by a strict regard for corporate entities could it be found that a strike against RCA-Victor to compel it to cease supplying recorded music to NBC or a strike against Columbia Records to compel it to cease rendering similar service to CBS was a strike for the purpose of forcing RCA-Victor or Columbia "to cease doing business with any other person."

<sup>333</sup> Hearings, *op cit.* supra note 91, at 340, 352.

<sup>334</sup> *New York Times*, p. 17 (May 14, 1948). The original complainants were Associated Program Service, Inc., Lang-Worth Feature Programs, Inc., and Standard Radio Transcription Service, Inc., none of which manufacture phonograph records. Associated Program Service Inc., subsequently withdrew its charges. *Variety*, p. 45 (June 30, 1948).

<sup>335</sup> Thus, Petrillo told the congressional committee that "the recording companies can't say that this record is made for home consumption and that this one is made for commercial

The most that Petrillo's testimony demonstrated was that the Federation entertained some hope that by thus dramatizing the problem it might induce Congress to take action to limit the commercial use of recorded music—an objective which is hardly within the prohibition of the Taft-Hartley Act.

The Lea Act also contains a provision aimed at recording bans. Subsection (b)(2) makes it unlawful to compel or attempt to compel a broadcaster or any other person, by use or threat of the use of force, violence, intimidation, duress or any other means "to accede to or impose any restriction upon . . . production, preparation, manufacture, sale, purchase, rental, operation, use or maintenance [of recordings or transcriptions] if such restriction is for the purpose of preventing or limiting the use of such [recordings or transcriptions] in broadcasting or in the production, preparation, performance or presentation of a program or programs for broadcasting." While this statute is not limited to the secondary boycott situation,<sup>336</sup> insofar as it proscribes union action taken to compel the producers of records and transcriptions to "impose" restrictions upon their production, it too requires some demand upon those producers. And if the phrase "to accede to" also contemplates some sort of cooperative action on the part of the producers, application of the Lea Act would present the same problems of proof as were encountered under the Taft-Hartley Act—magnified by the burden imposed on the prosecution in a criminal case. But if "to accede to" includes mere recognition of *fait accompli*, then the recording and transcription companies had certainly been compelled to accede to a restriction upon their production.

It would still be necessary to prove, however, that the restriction was for the purpose of preventing the use of records and transcriptions in broadcasting, and there was no direct evidence of such purpose. Inferences drawn from past conduct and from Petrillo's testimony<sup>337</sup> might be urged

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use. They can't separate the two, because of some court decision that says that the person who buys the record has it as his property and he can do with that record as he pleases." Hearings, *op. cit.* supra note 91, at 352.

<sup>336</sup> It would, for instance, apply to the situation described in note 332 *supra* even though corporate entities were disregarded.

<sup>337</sup> Petrillo's testimony probably would not be available against him. R.S. § 859, as amended, 52 Stat. 943 (1938), 28 U.S.C.A. § 634 (Supp., 1947), provides that "No testimony given by a witness . . . before any committee . . . of either House . . . shall be used as evidence in any criminal proceeding against him in any court. . . ." Petrillo did not assert his privilege against self-incrimination at any stage of the proceedings. But *United States v. Monia*, 317 U.S. 424 (1942), decided under another immunity statute which did not expressly require claim of the privilege, held that such claim was not necessary. And since R.S. § 859 does not limit the immunity to testimony given under subpoena, it should likewise be immaterial that no subpoena was issued against Petrillo. 8 Wigmore, Evidence § 2282 (3d ed., 1940); cf. *Sherwin v. United States*, 268 U.S. 369 (1925).

to contradict the union's "declared intention," but the *WAAF* case<sup>337a</sup> stood as a fresh reminder that in a criminal proceeding inferences may not be enough.

Neither the Lea Act nor the Taft-Hartley Act was tested against the 1948 ban. On October 5, 1948 representatives of RCA-Victor, Columbia, Decca, Capitol, and three of the smaller record companies met with AFM officials to discuss possibilities of settlement, and on October 28 it was announced that they had agreed upon a plan formulated by attorney Milton Diamond, who had represented Decca during the previous ban but who was retained by the AFM for this one.

The "Diamond plan," which is to run for five years, provides for continuation of the royalty payments at substantially the same rates as were applied under the previous royalty contract. The payments are to be made to a trustee, who is appointed by the recording companies while the Taft-Hartley Act is in effect but who is to be appointed by the AFM as soon as the Act is repealed or "so revised as to permit such appointment." Royalty funds are to be expended by the trustee "on musical performances where no admission fee is to be charged and without any profit to the trust fund, in connection with patriotic, charitable, educational, and similar programs." For this purpose the trustee is to distribute the funds among the AFM Locals on a per capita basis and to supervise the manner in which they are expended by the Locals. As a part of the agreement the AFM waived its claim to royalties on records pressed between January 1, 1948 and October 1, 1948 from matrices made under the old royalty contracts.<sup>337b</sup>

This agreement did not become effective immediately—its operation was conditioned upon assurance from the Department of Justice that it did not violate the prohibition of payments "to any representative of . . . employees" contained in Section 302 of the Taft-Hartley Act. But on December 13 the Department, departing from its usual practice, issued an opinion advising the parties that the trustee was not a "representative of employees" within the meaning of the Act, and AFM members began recording for signatories to the agreement the following day.<sup>337c</sup> The smaller recording and transcription companies will have no choice but to join in this agreement.

Thus have the companies secured peace by joining in a plan to avoid

<sup>337a</sup> See Countryman, *The Organized Musicians*: I, 16 *Univ. Chi. L. Rev.* 56, 82-84 (1948).

<sup>337b</sup> *Variety*, p. 37 (Nov. 3, 1948); *Broadcasting*, p. 21 (Nov. 1, 1948); *New York Times*, p. 1 (Dec. 14, 1948). The companies have designated Samuel Rosenbaum, a director of the Philadelphia Orchestra Association, as first trustee under the plan.

<sup>337c</sup> *New York Times*, p. 1 (Dec. 14, 1948).



the statutory prohibition which they had beseeched Congress to enact a year earlier. And peace seems assured for five years—the AFM's record for performance of its contracts is perfect. But it seems unlikely that the royalty system constitutes a lasting solution to the problem. The limited amount of employment which it provides falls far short of balancing the unemployment which the Federation attributes to the use of recorded music. The union may yet be driven by the force of its own arguments to the position that it will no longer provide recorded music for commercial use, and if the union takes that position the companies will doubtless make new demands for effective legal sanctions. The difficulties inherent in the application of the Lea Act and the Taft-Hartley Act indicate that legal sanctions, to be effective, may have to be made applicable to union activity without the necessity of proving a specific purpose.

But any attempt to fashion a statute which would forbid the recording ban regardless of its purpose would present an even more serious problem under the Thirteenth Amendment than the one avoided in the *WAAF* case. Although the question is still open,<sup>338</sup> that Amendment is not drawn in terms which indicate that it imposes no limitation upon federal power. It provides that involuntary servitude shall not exist "within the United States, or any place subject to their jurisdiction." Nor does the further provision giving Congress power "to enforce this article by appropriate legislation" suggest that Congress is to be left free also to adopt legislation of opposite effect. True, even though a right to strike should be found in this constitutional prohibition, it would not be unlikely that such right would be held subject to some legislative restriction based upon the purposes for which the strike was called,<sup>339</sup> and the provision of the Lea Act involved in the *WAAF* case might be sustained on that ground. But if the Thirteenth Amendment is to have any operation other than as an enabling ordinance for federation legislation prohibiting involuntary servitude created by state or individual action,<sup>340</sup> it must invalidate a federal statute which would forbid an individual to quit his job. And if it limits the federal power to that extent, it can be reconciled with a federal statute proscribing a concerted, unqualified refusal to work only by exhuming the

<sup>338</sup> See *The Reach of the Thirteenth Amendment*, 47 Col. L. Rev. 299 (1947); *The Lea Act: An Enactment To Proscribe Certain Coercive Practices Affecting Broadcasting*, 35 Geo. L. J. 79, 86-91 (1946).

<sup>339</sup> It has been decided that a state does not violate the Fourteenth Amendment by imposing criminal penalties upon a labor-union official who called a strike to enforce a stale wage claim of a former employee of the struck employer. "Neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike." *Dorcy v. Kansas*, 272 U.S. 306 (1926).

<sup>340</sup> See *Pollock v. Williams*, 322 U.S. 4 (1944), and cases cited; *Federal Power To Prosecute Violence against Minority Groups*, 57 Yale L.J. 855, 864 (1948).

legal abracadabra of civil and criminal "conspiracy" in labor cases from a deserved repose.

Moreover, it is not at all clear that the interest of the public (i.e., those of us who are not professional musicians and who have no financial interest in broadcasting, recording, juke box, and wired music businesses) requires governmental action of this sort. True, it would benefit the companies involved if the government were to end recording bans by compelling the musicians to return to their recording work. But recording bans could also be ended, in a manner beneficial to the musicians rather than to their opponents, if governmental power was exercised to compel the broadcasters and the juke box and wired music operators either to cease using recorded music or to use it only on terms agreeable to the musicians. As the record now stands, it has not been demonstrated that the public has more reason to have its government intervene on behalf of the industries than on behalf of the musicians.

Disregarding charges and countercharges pitched at the emotional level, the arguments which each side has presented to the various governmental forums in which the problem has been aired have centered around two main issues:

1) The Federation has offered but one justification for its recording bans—the employment needs of the musicians. In support of that argument, it offers estimates that not more than one-third of its 200,000 members are able to find full-time employment in the musical field. The companies, somewhat obliquely, treat these same estimates as evidence that the Federation faces no unemployment problem. They refuse to accept the total membership figure as any evidence of employment needs. They take the somewhat novel (for an employer) position that the Federation is too free with its memberships. Pointing to the low admission requirements, initiation fees, and dues, and to the fact that a member who finds little musical employment pays little to maintain his membership, they suggest that most of the AFM members are enrolled solely for the purpose of sharing in the royalties from the recording contracts and in such other benefits as the Locals may provide. They offer the results of certain spot-checks which they have made in a few cities which show that only about one-third of the union members in those cities classified themselves, either in city directories or in response to direct inquiry, as musicians, and that the remainder classified themselves in other vocations.<sup>34</sup> The final thrust

<sup>34</sup> These figures, if otherwise reliable, reveal only the number of union members who are still primarily employed as musicians or who are still seeking such employment, and hence afford no more basis for evaluating the AFM's claims than do the figures of the federal census reported in note 123 supra.

of their argument is that the 135,000 AFM members not engaged as full-time musicians are not competent musicians anyway.

This position is as untenable as the Federation's contention that every member not working full-time at music is an unemployed musician for whom musical work must be found. The true situation lies somewhere between the claims of the disputants. There are undoubtedly a substantial number of AFM members who are not capable of filling first-rate professional engagements: oldtimers who are no longer able to perform but who have an interest in Local benefit plans, and others of limited attainments who can expect no more than an occasional local engagement. But it cannot be assumed that all of those members who now find regular but less than full-time musical employment are not competent musicians. Nor does it seem feasible to require a survey to determine the competence of each AFM member. It will be time enough for the companies to assert that all competent musicians are already employed when they can produce evidence that the Federation is offering unqualified men to fill musical engagements.

Certainly, on the basis of presently available information we are not ready to conclude that all those who now seek unsuccessfully to make a living as musicians should be forced to transfer their efforts to some other vocation. Nor should we overlook the fact that some measure of opportunity must be maintained if new talent is to be encouraged to enter the field, and that a period of apprenticeship is necessary to segregate those new entrants who have talent from those who have not. There is no evidence that the demand for employable musicians has now reached the point where the only available supply is the untalented by-product of that segregative process.

2) The companies contend that the Federation's resistance to mechanical competition is but one more instance of a labor union's selfish efforts to deprive society of the benefits of technological progress. Such a contention is unassailable so long as "technological change" and "technological progress" are assumed to be identical, but such an assumption will not always bear analysis. Presumably, "progress" is embodied in technological development if that development provides a better product than was previously available or provides the same product at a lower price. To test the phonograph record and the transcription by that standard, it is necessary to examine them in the context of the commercial practices which the AFM opposes.

Does the phonograph record, in those instances where it has replaced the live musician, supply a better musical product? It is true that by using

phonograph records a radio station can in many instances bring to its listeners the performances of better musicians than it can employ. But does it follow that a program where such performances are used only to provide an occasional three-minute interval in the vacuous monologue of a disc jockey is preferable to a live program featuring less accomplished musical performers? The answer to that question is not to be found by consulting a poll which indicates that listeners may consider such a program preferable to the soap opera or the audience-participation show.<sup>342</sup> And even those who would come to the defense of the disc jockey are not likely to argue seriously that the strident blasting of the juke box is superior to the performance of even the most modestly endowed live musician.

Does the phonograph record provide a cheaper source of musical entertainment? Without question, the operator of the radio station can provide a recorded musical program at substantially less cost than he can employ a live orchestra. But do the listeners benefit by this saving? Clearly they do not benefit as listeners—the cost of radio programs is not reflected in the cost of receiving sets. If that benefit is to reach them at all, it must be in their capacity as consumers of the sponsor's product and must pursue a devious route through reductions in the cost of the program to the sponsor and corresponding reductions in the cost of his product. No such elaborate theory of derivative benefits is urged by the companies in support of their "technological progress" argument, and the only available bit of evidence indicates that economies effected in the production of radio programs are at least to a large extent absorbed at the source—during the eight-year period from 1938 to 1945 the broadcasting industry increased its ratio of net income to gross revenue from 17 per cent to 28 per cent.<sup>343</sup>

Of course, the benefit may reach the listener in another form. The availability of cheap recorded music permits the operation of small stations in some localities where the cost of live performers would prove prohibitive. To the extent that such stations provide their communities with local service not available to them otherwise, the local benefit may be attributed to savings effected through the use of mechanical music. But the broadcasters have been understandably reluctant to call attention to the local service offered by such stations. When the FCC examined the programs of 376 stations of 250 watts or less in 1945, it found that they devoted an average of two hours and forty-three minutes per day to "local live" pro-

<sup>342</sup> Local disc jockeys are reported to have higher local Hooper ratings than competing network shows. *Variety*, p. 92 (Jan. 7, 1948). But no recorded show is included in the Hooper listing of the top fifteen programs. *Variety*, p. 21 (Nov. 3, 1948).

<sup>343</sup> FCC Blue Book 48; FCC, Thirteenth Annual Report 18 (1947). Gross revenues during the same period increased 168 per cent.

grams (including, in many cases, the performances of local disc jockeys and of local announcers reading syndicated "wire" news), and that only forty-four minutes of this time was during the best listening hours (6 to 11 P.M.) of the day.<sup>344</sup>

Outside of the field of radio broadcasting, any traces of saving to the purchasers of musical entertainment are even more difficult to detect. Savings to the tavern keeper or night club operator who has replaced his orchestra with the juke box are apparent—what was previously an investment in customer-attraction whose value was highly speculative has now become a separate source of revenue.<sup>345</sup> But the customers who now pay out an estimated \$230,000,000 in nickels annually<sup>346</sup> to keep the juke boxes operating can hardly count occasional instances of elimination of cover charges or reduction in the cost of food and beverage as a clear gain.

A better case for "technological progress" can be made out for the electrical transcription—if we eliminate the spot commercial, which could be defended by none but its manufacturer and user.<sup>347</sup> As recently listed by the FCC,<sup>348</sup> the chief advantages of transcriptions which are relevant to musical programs are:

1. They "make possible the compilation of a permanent archive of the best in radio."
2. They facilitate the placing of programs at convenient hours, despite differences in time zones.<sup>349</sup>

<sup>344</sup> FCC Blue Book 38.

<sup>345</sup> Under current trade practice the proprietor of the amusement place gives nothing but his permission to have the juke box installed, for which he receives 50 per cent of the revenue, although there is a move on among the owners of the machines to reduce his share to 25 per cent. Hearings, *op. cit.* supra note 183, at 175-76.

<sup>346</sup> Schumach, A Juke Box for Every 500 Persons, *New York Times Magazine* 31 (Apr. 14, 1946); Hearings, *op. cit.* supra note 183, at 18. The juke box industry disputes this estimate, but professes complete inability to supply a more accurate one. *Ibid.*, at 98, 108, 140-41.

<sup>347</sup> A poll recently conducted for the National Association of Broadcasters by the University of Chicago's National Opinion Research Center reveals that when forced to choose between "singing commercials" and "straight commercials," 43 per cent of those polled chose the straight commercials, 37 per cent chose the singing variety, 18 per cent had no preference, and 2 per cent were undecided. Unfortunately, the poll did not seek a separate reaction to straight commercials against which these comparative figures might be measured, although it did establish that only 20 per cent of those polled would be willing to pay a license fee of \$5 per year to "get your present radio programs without any advertising in them." National Opinion Research Center, *Final Tabulations: 3529 Interviews of Second Study of Public Opinion Conducted for the National Association of Broadcasters 5-6 (1948)*. A similar poll conducted by the same Research Center in 1945 revealed that when asked to cite an example of "the worst advertising you've heard on the radio," 11 per cent cited a singing or rhyming commercial. The same stout 20 per cent was willing to pay a \$5 fee to get radio programs without advertising. Lazarsfeld and Field, *The People Look at Radio 111-12 (1946)*.

<sup>348</sup> FCC Blue Book 36.

<sup>349</sup> The FCC noted, however, that "some stations appear to use the transcription technique for shifting an outstanding network public service program from a good hour to an off hour when listeners are few and commercial programs are not available."

3. They make possible the sharing of programs among stations not affiliated with a network.
4. They provide an opportunity to edit the performance before it is released over the air.<sup>350</sup>

In each of these respects the electrical transcription is a factor contributing to a better radio product, and one which the listening public has a definite interest in retaining. But as long as a recording ban is not applied to transcriptions limited to one use per station it deprives the listener only of the first, and most dubious, of these advantages.

On such information as is now available, then, it appears that, apart from some inconvenience to the private collector of popular records, which is hardly a matter of national concern, recording bans cause hardship to none but the recording companies, the broadcasters, and the juke box operators, and that there is no apparent reason why the government should intervene on their behalf rather than on behalf of the musicians. Indeed, the musicians' economic interest in restricting the commercial use of phonograph records seems to a large extent to coincide with the public interest in better musical entertainment, so that if the government is to intervene at all, that intervention might more properly be in a form which would aid the musicians.

But governmental action to further the public interest in better musical entertainment hardly seems likely in the immediate future. Although the FCC's recent "Blue Book" pronouncement<sup>351</sup> has been both hailed and denounced as the opening wedge in a scheme of widespread governmental supervision of radio program content, the policy which it announces is aimed only at securing a reasonable allocation of broadcasting time to sustaining programs, local programs, and discussions of public issues, and at eliminating advertising excesses. Extensive use of recorded music is denounced only to the extent that it conflicts with that policy. And while attempts of the Commission to enforce its Blue Book policy may lead eventually to decisions indicating that it has authority under the Communications Act of 1934 to go even further to require the broadcasters to serve "public interest, convenience and necessity,"<sup>352</sup> there are no in-

<sup>350</sup> An even better opportunity for editing is presented by the tape recording, now used by ABC in the preparation of the Bing Crosby program and by NBC and CBS for their daylight saving time delayed broadcasts. *Variety*, p. 1 (Oct. 1, 1947); *ibid.*, p. 40 (Mar. 24, 1948); *Newsweek* 31 (May 3, 1948).

<sup>351</sup> Note 245 *supra*.

<sup>352</sup> The only decision yet rendered in review of FCC action under the Blue Book policy holds no more than that the Commission could find that public interest, convenience, and necessity would not be served by granting an application for power increase and frequency change filed by a licensee who planned to plug into the CBS network from 8 A.M. to 11 P.M.

dications that either the Commission or the Congress is yet approaching the point Secretary Hoover had reached in 1922.

As long, then, as we are content to leave program standards to the dictates of the market place, we should count as a fortuitous benefit the demands of a labor union which may serve to improve those standards.

It is not likely, however, that any such view of recording bans will prevail. The broadcasting and recording companies have a different view to present, and they may doubtless count on the same full cooperation from most of the newspapers as they have received in the past. Labor unions are always fair game for the press, which can make a national issue of a strike by New York City elevator operators but can find no occasion for comment in the refusal of industry to do anything about defense production on the eve of world war until commitments are obtained on terms of payment, profits, taxes, etc. Nor is it irrelevant, in the context of the recording controversy, that one-third of the broadcasting industry is owned by newspaper interests<sup>353</sup> and that newspapers and broadcasters depend on the same advertisers for their revenue.

The pattern of this cooperative effort during the first recording ban offers a reliable indication of what may be expected. Before the ban took effect, the National Association of Broadcasters had set up a public relations office in New York, had "brought the facts in this matter to the attention of the newspapers and of other interested groups," had contacted the advertisers and learned that "they are prepared to stand loyally with the broadcasting industry," and was able to announce that the initial reaction to its public relations campaign was "favorable" and that "a large number of newspaper editorials on the matter have been printed uniformly denouncing Mr. Petrillo's course of action."<sup>354</sup> In succeeding weeks it was able to point with pride to an "unprecedented" number of such editorials in newspapers throughout the country, from the *New York Times* to the *Wyoming Eagle*, all of which denounced the AFM, and few of which discussed the matter in anything but the inflammable invective of "dictatorship." After a month of this emotional haranguing, a resolution was introduced in the Senate to authorize the first congressional investigation of the AFM,<sup>355</sup> and Dr. Gallup reported that public reac-

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every day, saving only the hours from 5 A.M. to 8 A.M. for local programs. *Simmons v. FCC*, 169 F. 2d 670 (App. D.C., 1948).

<sup>353</sup> Newspapers hold more than one-third of all AM licenses, constitute more than one-third of all newcomers to FM, and are the largest single group of applicants for television licenses. *Variety*, p. 1 (Jan. 29, 1947).

<sup>354</sup> NAB, Special A.F. of M. Bulletin 1 (July 24, 1942).

<sup>355</sup> See note 173 supra.

tion to "Mr. Petrillo's ruling" was 75 per cent unfavorable and that 73 per cent of those polled approved of "the government taking legal action to stop Petrillo."<sup>356</sup>

When editorial fury began to subside, the NAB provided new impetus and new ammunition in the form of a pamphlet entitled "The C Is For Caesar" which rang the changes on the "technological progress" theme and pictured the plight of the small broadcasting station attempting to present a performance of the "Unfinished Symphony" with "two or three or even six local musicians of uncertain attainment."<sup>357</sup> When some of the companies withdrew from the controversy and signed royalty contracts, the NAB found solace in editorial condolences and drew strength from editorial tributes to those with the courage to continue the fight against tyranny.<sup>358</sup> When the AFM refused to comply with the WLB order and the President's request, newspaper comment reached a final despairing crescendo, decrying government's abdication to "irresponsible private dictatorship."<sup>359</sup>

The earlier ending of the second recording ban foreclosed resort to the same tactics this time, but all preparatory steps had been taken. A Special Industry Music Committee, consisting of representatives of the National Association of Broadcasters, the Frequency Modulation Association, the Television Broadcasters Association, the transcription companies, and the record manufacturers, was created in October 1947,<sup>360</sup> and the Committee retained public relations counsel.<sup>361</sup> Another congressional investigation of the AFM was conducted by the Hartley Committee in January 1948.<sup>362</sup> Some delay in the publicity campaign was neces-

<sup>356</sup> NAB, Special A.F. of M. Bulletin 5 (Sept. 4, 1942).

<sup>357</sup> *Ibid.*, No. 9 (Oct. 2, 1942).

<sup>358</sup> *Ibid.*, No. 23 (Oct. 29, 1942).

<sup>359</sup> *Ibid.*, No. 29 (Nov. 24, 1944). In its entire three-year history, the War Labor Board's orders were disregarded 27 times by unions and 24 times by employers. 17 Lab. Rel. Rep. 605 (1946). But the amount of publicity given the AFM case was rivaled in only one other instance, wherein publicity of a different sort resulted in a congressional investigation of the government's power to take over a business for noncompliance with WLB orders. Hearings before Select Committee To Investigate Seizure of Montgomery Ward & Co. pursuant to H. Res. 521, 78th Cong. 2d Sess. (1944).

<sup>360</sup> NAB Reports 880 (Oct. 29, 1947).

<sup>361</sup> *Variety*, p. 21 (Dec. 31, 1947).

<sup>362</sup> Hearings, *op. cit. supra* note 91. At these hearings industry spokesmen suggested additional legislation to outlaw nation-wide collective bargaining and to subject union activity to the anti-trust laws. *Ibid.*, at 58, 228, 235. Shortly thereafter Representative Hartley obligingly introduced H.R. 6074, 80th Cong. 2d Sess. (1948), which would have made the Norris-LaGuardia and Clayton Acts inapplicable to "any strike or other concerted interference with the operations of two or more employers which results from any conspiracy, collusion or concerted plan of acting between employees of such two or more employers" or wherever labor unions engage in "any combination or conspiracy, in restraint of commerce, if one of the purposes or a necessary effect . . . is to join or combine with any person to . . . restrict pro-



sary because negotiations on new network contracts were pending when the recording ban went into effect<sup>363</sup> and because of the recording companies' interest in avoiding any termination of the ban until existing record stocks were sold.<sup>364</sup> But if the ban had not ended before those stocks were exhausted, the press would undoubtedly have again discovered large moral issues in the controversy.<sup>365</sup>

#### CONCLUSION

In any evaluation of the American Federation of Musicians, the "dictatorship" issue may be put to one side. In its internal operations the Federation is no less democratic than most other organizations of comparable size. True, its members, like the members of most labor unions and the stockholders of most large corporations, are disposed to perpetuate the same men in office<sup>366</sup> and to leave the making of most policy decisions to the discretion of the officers. But, save for the attempt to disfranchise the members of New York Local 802, which failed twelve years ago, there is no evidence of irresponsibility on the part of AFM officers. As the employer member of the WLB panel said in 1944, "Mr. James C. Petrillo, while certainly in charge of his union, is certainly no more so than the head of every well-run corporation is of his company."<sup>367</sup>

Actually, when the employers raise the "dictatorship" charge, they do not attempt to support it by evidence of the manner in which the union is governed, save for an occasional reference to the provision in the AFM By-Laws authorizing the President to set aside existing laws and sub-

duction, distribution, or competition, or impose restrictions or conditions upon the purchase, sale, or use of any product, material, machines, or equipment. . . ."

<sup>363</sup> Final agreement between the AFM and the networks on a pay scale for television was reached on April 29, 1948. On the same day the Special Industry Music Committee announced that it had retained a new public relations counsel, who is reported as having explained that "a major part of his job will be to get across to the public the fact that the AFM's recent settlement of radio and television contracts has not entirely ended the Petrillo problem." *Broadcasting* 30 (May 3, 1948).

<sup>364</sup> The latter consideration was apparently overlooked by baffled Congressmen who sought in vain for some explanation from the recording companies for their failure to invoke the anti-boycott provisions of the Taft-Hartley Act last January. Hearings, *op. cit. supra* note 91, at 102-3, 202-3.

<sup>365</sup> The AFM, which has had no faith in publicity as a weapon since the failure of its campaign against sound movies, had apparently decided to give it another try. It had employed public relations counsel, and its version of the recording ban was sent to schools, libraries, and newspapers throughout the country. *Variety*, p. 45 (May 19, 1948).

<sup>366</sup> Leadership of the AFM during its fifty-two-year history has been divided between three men. Owen Miller, president of the St. Louis Local, served also as the first president of the AFM. He was replaced in 1900 by Joseph N. Weber who, save for a one-year retirement because of illness in 1914-15 when his place was taken by Frank Carothers, served until succeeded by Petrillo in 1940.

<sup>367</sup> *Electrical Transcription Manufacturers*, 16 *War Lab. Rep.* 369, 396 (1944).

stitute others of his own making. Instead, they point to the fact that Petrillo habitually serves the union's demands in the form of peremptory decrees which leave the employers no alternative but to acquiesce,<sup>368</sup> seeking to leave the impression that they have nearly always, under duress to be sure, acquiesced. But the record of past bargaining history hardly supports that position.<sup>369</sup> It suggests, rather, that in those cases where AFM leaders have been most arbitrary in their dealings with the companies, as in the instances of the bans on co-op, FM, and television broadcasting, their action stems from their complete inability to determine what sort of demands to make, and that this inability has ultimately operated to the advantage of the companies.<sup>370</sup>

Aside from the fact that its practice of calling musicians out of the studios without having formulated any policy to be served thereby has resulted only in depriving AFM members of years of employment in television and FM broadcasting and on co-op shows, the most serious complaint which can be made against the Federation leadership goes to the extremely myopic nature of some of the policies it has adopted. The most indefensible of its practices are those which have brought the least benefit to the membership. The complete elimination of all public performances by amateur musicians throughout the United States would probably not create enough additional work for professionals to support fifty AFM members—but to the pursuit of this trivial objective must be credited, in large part, the congressional indignation which found expression in the Lea Act. And though the union's quota rules and standby practices may have provided immediate relief for a greater number of musicians, such

<sup>368</sup> The form of the demand for standbys on duplicate AM-FM broadcasts is typical: "This is to advise you that after meeting between your company and the AFM held in my office, the matter was further discussed and we came to the final conclusion that beginning Monday, October 29, 1945, wherever musicians play for FM broadcasting and AM broadcasting simultaneously, . . . a double crew must be employed. Kindly govern yourself accordingly." Hearings, *op. cit. supra* note 91, at 68.

<sup>369</sup> Nor does the testimony of NAB President Justin Miller:

"MR. MILLER: . . . As I say, the trouble is the dramatic, the ultimatum technique . . . which he [Petrillo] prefers to use. Frankly, I think it is because it impresses his own large spread membership.

"MR. McCONNEL: In the past, have you usually given in to Mr. Petrillo?

"MR. MILLER: I should say it has been a matter of bargaining. There has been a compromise. There has always been some giving in, yes. You can see that from the rate of wages, I imagine.

"There probably has been too much giving in. Is that what you want me to say? I will be glad to say it. Personally, I think there has been too much giving in." Hearings, *op. cit. supra* note 91, at 18.

<sup>370</sup> Other unions in the broadcasting industry were outraged at the AFM's 1948 "Munich agreements" with the networks, wherein the Federation capitulated to all employer demands without getting anything in return. *Variety*, p. 27 (Mar. 24, 1948).

devices offer no lasting solution to unemployment. As private systems of social security, their method of distributing the cost is much too haphazard and unreliable to warrant approval. They have already contributed much to the enactment of restrictive labor legislation, and if that legislation proves inadequate to end those practices it is quite probable that Congress will try again.

On the matter which has provoked the most criticism and the greatest amount of adverse governmental activity, however, the Federation's position is quite defensible. The machine constitutes a real and growing threat to the future of the musical profession. Yet, while the future of that profession should be a matter of public concern, the only steps currently being taken in its behalf are those taken by the musicians themselves<sup>377</sup> within the restricted area left open to them under existing legislation. True, the AFM's method of dealing with the problem may not be the best method which could be devised. The public interest in radio service and in musical entertainment might be better served if the musicians were required to make library and open-end transcriptions and to keep smaller radio stations and home phonographs supplied with records of the latest tunes.

But, aside from the improbability of government intervention being limited to that extent, the case presents another factor in which the public has some interest. Although it is not yet clear as a matter of established legal doctrine, the personal liberties which are supposed to constitute an essential ingredient of our society should include freedom from compulsory service. And though those liberties may be subject to some abridgment when their exercise threatens the existence of that society, nothing like a "clear and present danger" to its existence is presented by the musicians' refusal to serve the recording companies. If future recording controversies prompt governmental action which fails to recognize that fact, the broadcasting and recording industries may count as well spent their investment in "public relations."

<sup>377</sup> The musicians and other artists have had occasional champions in Congress. Florida's Senator Fletcher kept bills to create a "National Conservatory of Music and Art" in the hopper for six years. S. 4874, 65th Cong. 2d Sess. (1918); S. 561, 66th Cong. 1st Sess. (1919); S. 622, 67th Cong. 1st Sess. (1921); S. 808 and S. 1320, 68th Cong. 1st Sess. (1924). Representative Connery of Massachusetts once introduced a bill to create a "Commission for the Advancement of Music and Art." H.R. 7161, 74th Cong. 1st Sess. (1935). And New York's Representative Sirovich for five years sponsored measures to create a cabinet "Department of Science, Art and Literature" or a "Bureau of Fine Arts" in the Department of Interior. H.J. Res. 200, 74th Cong. 1st Sess. (1935); H.J. Res. 79, 75th Cong. 1st Sess. (1937); H.J. Res. 671, 75th Cong. 3d Sess. (1938); H.J. Res. 149, 76th Cong. 1st Sess. (1939).