# U.S. Supreme Court

## Herbert v. Shanley Co., 242 U.S. 591 (1917)

**Herbert v. Shanley Company**

**No. 427, 433**

**Argued January 10, 1917**

**Decided January 22, 1917**

**242 U.S. 591**

*CERTIORARI TO THE CIRCUIT COURT OF APPEALS*

*FOR THE SECOND CIRCUIT*

*Syllabus*

The performance of a copyrighted musical composition in a restaurant or hotel without charge for admission to hear it but as an incident of other entertainment for which the public pays infringes the exclusive right of the owner of the copyright to perform the work publicly for profit under the Act of March 4, 1909, c. 320, § 1(e), 35 Stat. 1075.

221 F. 229, 229 F. 340, reversed.

The cases are stated in the opinion.

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MR. JUSTICE HOLMES delivered the opinion of the Court.

These two cases present the same question: whether the performance of a copyrighted musical composition in a restaurant or hotel without charge for admission to hear it infringes the exclusive right of the owner of the copyright to perform the work publicly for profit. Act of March 4, 1909, c. 320, § 1(e), 35 Stat. 1075. The last-numbered case was decided before the other, and may be stated first. The plaintiff owns the copyright of a lyric comedy in which is a march called "From Maine to Oregon." It took out a

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separate copyright for the march and published it separately. The defendant hotel company caused this march to be performed in the dining room of the Vanderbilt Hotel for the entertainment of guests during meal times, in the way now common, by an orchestra employed and paid by the company. It was held by the circuit court of

appeals, reversing the decision of the district court, that this was not a performance for profit within the meaning of the act. 221 F. 229.

The other case is similar so far as the present discussion is concerned. The plaintiffs were the composers and owners of a comic opera entitled "Sweethearts," containing a song of the same title as a leading feature in the performance. There is a copyright for the opera and also one for the song, which is published and sold separately. This the Shanley Company caused to be sung by professional singers, upon a stage in its restaurant on Broadway, accompanied by an orchestra. The district court, after holding that, by the separate publication, the plaintiffs' rights were limited to those conferred by the separate copyright -- a matter that it will not be necessary to discuss -- followed the decision in 221 F. 229 as to public performance for profit. 222 F. 344. The decree was affirmed by the circuit court of appeals. 229 F. 340.

If the rights under the copyright are infringed only by a performance where money is taken at the door, they are very imperfectly protected. Performances not different in kind from those of the defendants could be given that might compete with and even destroy the success of the monopoly that the law intends the plaintiffs to have. It is enough to say that there is no need to construe the statute so narrowly. The defendants' performances are not eleemosynary. They are part of a total for which the public pays, and the fact that the price of the whole is attributed to a particular item which those present are



expected to order is not important. It is true that the music is not the sole object, but neither is the food, which probably could be got cheaper elsewhere. The object is a repast in surroundings that to people having limited powers of conversation, or disliking the rival noise, give a luxurious pleasure not to be had from eating a silent meal. If music did not pay, it would be given up. If it pays, it pays out of the public's pocket. Whether it pays or not, the purpose of employing it is profit, and that is enough.

*Decree reversed.*