~~C.C.A.~~ 41, 1954

In the Privy Council.

No. 21 of 1953.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

BETWEEN

ASSOCIATED BROADCASTING COMPANY LIMITED, H. REIBSTEIN, BEECHER DENNIS and WESTMINSTER HOTEL LIMITED ... ... *Appellants*

AND

COMPOSERS, AUTHORS AND PUBLISHERS ASSOCIATION OF CANADA LIMITED ... ... *Respondent.*

APPELLANTS' CASE

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1.—This is an Appeal by special leave from an Order of the Court of Appeal for Ontario dated the 5th day of March, 1952, holding that the Respondent was the owner of that part of the copyright in certain musical works which consisted in the sole right to perform the same in public throughout Canada, that the said copyright had been infringed, and that the Appellants should be enjoined from further infringing the said copyright. By this Order the Court of Appeal for Ontario reversed an Order of the Honourable Mr. Justice Schroeder of the High Court of Justice for Ontario delivered on January 29th, 1951, in which Court the action had been instituted; that Court held that the copyright concerned in the action had not been infringed and gave judgment accordingly dismissing the action with costs. p. 263 p. 250

2.—The Appellants defended the action on the ground that, if they had performed the said musical works in public, they were exonerated from all liability in respect of such performance by reason of the provisions of Section 10B (6) (a) of the Copyright Amendment Act, Chapter 27 of the Statutes of Canada, 1938, Section 4, which provides that:

> "In respect of public performances by means of any radio "receiving set or gramophone in any place other than a theatre "which is ordinarily and regularly used for entertainments to "which an admission charge is made, no fees, charges or royalties

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" shall be collectable from the owner or user of the radio receiving " set or gramophone, but the Copyright Appeal Board shall, so " far as possible, provide for the collection in advance from radio " broadcasting stations or gramophone manufacturers, as the case " may be, of fees, charges and royalties appropriate to the new " conditions produced by the provisions of this subsection and " shall fix the amount of the same. In so doing the Board shall " take into account all expenses of collection and other outlays, if " any, saved or saveable by, for or on behalf of the owner of the " copyright or performing right concerned or his agents, in " consequence of the provisions of this subsection."

3.—The Appellants submit that the judgment of the High Court of Justice for Ontario was right and that the Court of Appeal for Ontario erred in the interpretation it placed upon the words " gramophone," " owner " and " user," as they appear in the Copyright Amendment Act, and that the Court of Appeal for Ontario failed to give effect to the interpretation of the first of those words as such word has been employed in standard works of reference and in judgments in the High Court of Justice of England, and as the two latter words were defined by the Judicial Committee of the Privy Council. The principal judgments to which the Appellants refer are those given in *Vigneux et al.* v. *Canadian Performing Rights Society Limited*, 1945 A.C. 108; *In the Matter of an Application by The Gramophone Company Limited to Register " Gramophone " as a Trade Mark* (1910) 2 Ch. 248; 27 R.P.C. 689; *Gramophone Company Limited* v. *Ruhl* (1910) 27 R.P.C. 269.

4.—The Appellants do not contest the subsistence of copyright in the works the performance of which is complained of, the title of the Respondent thereto, or the fact of public performance.

pp. 82–85, 86–87, 92, 99, 100–101

5.—The performances complained of were made by means of certain mechanism operating in the following manner. In the premises occupied by the Appellant Associated Broadcasting Company Limited (hereinafter referred to as A.B.C.) in the City of Toronto, there are located the usual records or transcriptions of the music proposed to be performed. These records are then placed in predetermined sequence upon a turntable operated by a motor. There are four of these turntables connected by gears so that the operator may disengage one turntable and engage another without any appreciable interruption of the programme. The usual suspension arm, consisting of a playing head holding a needle, is employed and the needle is placed within the sinusoidal grooves of the record to be played in the normal manner employed in operating a gramophone. The electrical impulses so generated are carried by electrical connecting wires from the playing head to an amplifier, through a step transformer, and thence, over wires leased from the Bell Telephone Company of Canada, to loudspeakers located on the premises of the Appellants other than A.B.C.

Exhibit 20

The step transformer is placed on the premises of A.B.C. so that only a low current is transmitted over the Bell Telephone Company wires in order to prevent electrical induction interfering with parallel wires of that company's system serving other of its customers. The loud-speakers are the same as those used in other types of gramophone. Thus, the component parts or means owned or used by the Appellants for the performance in public of musical works are the component parts or means composing a gramophone and producing the same result. One of the components or elements has merely been increased in length and an additional element has been included for a specific purpose.

6.—The Respondent carries on in Canada the business of acquiring copyright in dramatico-musical and musical works or the performing rights therein, and deals with or in the grant of licences for the performance in Canada of such works. It owns or controls within Canada the licensing rights for the performance of a very substantial body of music and no music user can perform in public any substantial variety of selections without its licence.

7.—The Appellant, Associated Broadcasting Company Limited, entered into contracts with its co-Appellants under the terms of which it agreed to supply music to the premises owned or occupied by those co-Appellants. The musical impulses created by the means above described in the premises of the Appellant, A.B.C., were carried over the wires of the Bell Telephone Company of Canada and conducted to a plurality of loud speakers, one or more of such loud speakers being placed in the premises of the co-Appellants, where the electrical impulses were transmuted into sound and emitted into the air in such a manner as to constitute public performances. None of the said premises was either alleged to be or was in fact a theatre. By their defence, the Appellants denied that this constituted an infringement and contended that the equipment owned or used by them was a gramophone within the meaning of Section 10B (6) (a) of the Copyright Amendment Act.

Exhibits 17–19

p. 5

8.—The trial took place before Schroeder, J. in the High Court of Justice for Ontario and judgment was delivered on the 29th day of January, 1951. The learned Judge held that, notwithstanding the separation of the component parts of the equipment, the Appellant, A.B.C. was, at the time and place in question, providing a public performance " by means " of a gramophone," and that the same could be said of the co-Appellants.

p. 234

9.—Much time was taken during the trial by an attempt on the part of the Respondent to distinguish between a gramophone and a phonograph, on the supposed ground that Section 10B (6) (a) of the Copyright Act exonerates public performances only by means of a gramophone and not by means of a phonograph. Further time was consumed by an attempt on the part of the Respondent to show such a distinction by the fact that gramophones made use only of records, whereas the instrumentalities

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used by the Appellants made use of what were described as electrical
p. 78 transcriptions. Admittedly, there is no difference between a record and an electrical transcription save as to their respective diameters and both the contentions of the Respondent broke down under cross-examination and were not seriously pressed before the Court of Appeal for Ontario.

pp. 82–85, 199–200, 207–209, 232–234 The evidence adduced, not only by the Appellants, but also by the Respondent, showed that the essential component parts of the equipment used by the Appellants are the same as those constituting an electrically operated gramophone.

The Respondent endeavoured to distinguish the component parts used by the Appellants from those constituting a gramophone by reason of two factors : (a) the presence of a step transformer, and (b) the presence of a plurality of loud speakers. The first of these was explained by the necessity of transmitting only low electrical impulses over the lines of the
pp. 85, 194, 216 Bell Telephone Company so as to diminish the possibility of induction into other lines of that Company. The second distinction was shown to
pp. 99, 182–185 be a common and well-known expedient in the gramophone and radio art, and that the addition of extra loud speakers does not alter the character of the component parts employed to make them other than a gramophone.

10.—There is, in the Appellants' submission, nothing in the evidence adduced by the Respondent which effectively contradicts the evidence of the Appellants' witnesses relating to the equipment used by the Appellants, its method of operation, the correct terms to be applied to its component parts and the history of performances by means of sound recording mechanism. In his reasons for judgment the learned trial Judge stated :

p. 240 " Both the defendant's expert witnesses Delbert Beverley " Black and William Edward Hodges are highly qualified in their " particular fields and I accept their testimony wherever there " is a material variance between it and the testimony of the " Plaintiff's witness Dowding whose training and experience " would not entitle his opinion to nearly as much weight as " should be attached to the evidence of Black and Hodges."

11.—In his judgment the learned trial Judge further stated as follows : As to the equipment used by the Appellants :

" It is quite unthinkable that Parliament in enacting " subsection (6) (a) of Section 10B could have intended to exonerate " from payment of fees or charges, a performance by means of " an antiquated, outmoded type of gramophone, but not a " performance by means of the most modern instrument of that " genus embodying all the latest improvements and refinements."

p. 250 " In my view altogether too much emphasis is laid by the " plaintiff on the location of the instrumentalities by reason of " which the performance is achieved. I feel constrained to hold

" on all the evidence that, notwithstanding the separation of the " component instrumentalities of the A.B.C. Company, it was at " the time and place in question providing a public performance " ' by means of a gramophone,' and the same can be said " of its co-defendants. In my judgment the location of the " instrumentality by which the performance is produced is " completely immaterial, provided that it occurs in a place other " than a theatre which is ordinarily and regularly used for " entertainments to which an admission charge is made."

On the question of motive of gain : pp. 249, 250

" The statute was designed as much for the protection of the " public as for the protection of copyright owners and calls for " a fair construction—fair not only from the standpoint of the " copyright owner but also from the standpoint of the public. " The judgment of the Privy Council in the Vigneux case " strengthens the view that the fact that the A.B.C. Company " directly and the other defendants indirectly performed for " profit, is not an answer. Adopting the principle that the sole " guide to the interpretation of the statute is the statute itself " the conclusion seems to me to be inescapable that Parliament " covered all the exceptions which it intended when it referred " to performances ' in any place other than a theatre which is " ' ordinarily and regularly used for entertainments to which an " ' admission charge is made.' "

12.—The Respondent appealed to the Court of Appeal for Ontario, Roach, Hope and Bowlby, JJ.A., and on the 5th day of March, 1952, its p. 253 appeal was allowed. The Court held that the only question being whether or not the totality of the equipment was a gramophone, within the meaning of the statute, and holding as the court did that it was not, it followed that the appeal must be allowed. Only one judgment was delivered in the Court of Appeal, by Roach, J.A., and it is set out in full at pages 253 to 263 of the Record. With this judgment Hope and Bowlby, JJ.A., agreed. Roach, J.A., stated as follows :

As to the equipment used by the Appellants : p. 256

(1) " I do not think there can be any doubt that by the " operation of all those instrumentalities the same result is accom- " plished as is accomplished by the operation of a gramophone but " that does not make the sum total of these instrumentalities a " gramophone."

p. 260

(2) " Here you have equipment, part of which is independently " controlled by one party, another part of which is independently " controlled by another, and in between is still a third part, " namely, the Bell Telephone wires, which is in control of neither " (although A.B.C. is entitled to the use of them), but is actually " in control of the Bell Telephone Company. To call the sum

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" total of that equipment a gramophone, to my mind, is to distort " the meaning of the word."

p. 262 (3) " It is obvious, therefore, that ' gramophone ' as it " appears in Section 10B (6) (a) must mean the same kind of " gramophone as was contemplated in the expression ' gramophone " ' manufacturer'. When we speak of gramophone manufacturers, " we think of persons engaged in the business of manufacturing " gramophones as completed units for sale to the public. No " manufacturer ever manufactured the totality of devices that are " here in question. As counsel for the Appellant said, no factory " in the world could hold the totality of those instrumentalities " in their completed form. No manufacturer of gramophones " ever manufactured as a completed unit, a gramophone that had " 600 to 700 loud-speakers, more than 190 amplifiers and switches " that would enable 190 different persons to shut off the sound as " each of them might choose without interfering with the user " thereof by the others."

As to " user " and " owner " :

p. 260 (4) " I cannot conceive of any person using a gramophone " unless he has control of, not only the gramophone, the whole of " it, but also the record on which it is operating. Neither A.B.C. " on the one hand, nor its co-defendants, on the other, have that " degree of control over the equipment that is inherent in the user " of a gramophone. A.B.C. has no control over the equipment " in the premises of its subscribers. A.B.C., through its servants " or agents, could set in operation the equipment on its premises, " but unless and until the subscriber connected up the equipment " on his premises with the balance of the system there would be " no reproduction of any sound, except perhaps a reproduction " in the studio of A.B.C. and that would not be a public perform- " ance. The subscribers have no physical control over the records " and no say in their selection."

p. 261 (5) " No one would suggest that when a person is using a " radio receiving set for the performance of a recorded musical " composition which is broadcast from a broadcasting station, " he is using the equipment which is located in the broadcasting " station. That equipment is in use, but the person using it is the " owner of the broadcasting station."

p. 261 (6) " Neither can it be said that the owner of the receiving " set and the owner of the broadcasting station together are " jointly using the sum total of all the equipment."

p. 261 (7) " It was argued that once the subscriber throws in the " switch which connects the equipment in his premises with the " equipment in the studios of A.B.C. and thereby causes a pro- " gramme originating in those studios to be heard in his premises,

" he and A.B.C. together are using the whole equipment to perform " that programme in public. I cannot accept that argument. " The subscriber is getting the benefit of the use to which A.B.C. " is putting the equipment over which it has control but he is not " using that equipment. He uses that which A.B.C. produces, " but he does not use the equipment by which it is produced. " A.B.C. delivers a commodity to the premises of the subscriber. " In the form in which it is delivered it is of no value to the " subscriber. The subscriber, in turn, accepts it and converts " it into a commodity which is of value to him by using equipment " over which he alone has control. In this respect the subscriber " and the owner of the radio receiving set are in identical positions. " Their legal positions, however, differ. Parliament has exonerated " the latter, but not the former, from the payment of fees or " royalties."

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(8) " A.B.C. and the owners of broadcasting stations are in " identical positions. It is common knowledge that radio broad- " casting stations broadcast musical programmes from discs or " records. It is inconceivable that Parliament would impose " upon the broadcasting stations the obligation of paying fees or " royalties where the medium of transmission is the ether and " exonerate a person, firm or corporation in the position of A.B.C. " which uses electrical wires for that purpose ; and, in my opinion, " Parliament did not provide such exoneration."

p. 262

13.—In the Appellants' submission the learned Justice of Appeal misdirected himself in the following particulars (referring by number to the relevant quotations above set forth) :

14. (1) The evidence clearly showed that the separation of the individual components does not alter the character of the totality of those components as constituting a gramophone.

pp. 182, 186–188, 191–192, 207–210, 225, 234

The evidence further establishes that Exhibit 24 accurately represents in schematic or diagrammatic form, the component parts used by the Appellants and equally, and as accurately, represents the component parts of a phonograph, gramophone or record player subject only to the fact that a domestic or cabinet gramophone usually has only a single amplifier and loud speaker.

pp. 82–85, 86–87, 92, 99, 100–101

A comparison of the individual elements and the totality of those elements with those composing what the Respondent acknowledges to be a gramophone shows that there exist the following identities

(A) of elements
(B) of the function of the individual elements
(C) of the combination of elements
(D) of the function of the combination.

Such identity would obviously demonstrate infringement in a case involving the application of the law relating to the patents of invention and,

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it is submitted, that such a principle is applicable, by analogy, to the present case.

In the submission of the Appellants, the learned Justice of Appeal failed in his interpretation of the word " gramophone " to accord to it a definition in keeping with the advance of modern technology and failed to recognize the principle stated by Stephen, J. in the *Attorney General* v. *Edison Telephone Company* (1880) 6 Q.B.D. 244.

That Parliament intended to exonerate installations of the type here under consideration is, in the submission of the Appellant, manifest from the fact that Section 10B (6) (a) of the Copyright Act was enacted by Parliament in 1938, following upon the decision in *Canadian Performing Rights Society* v. *Ford Hotel* (1935), 73 Que.S.C. 18. In that case, the present Respondent, under its then name, brought action against the Ford Hotel for damages and an injunction restraining the defendant from giving public performances by means of a centrally located radio receiving set on the premises of the defendant hotel, from which wires led to the individual rooms in the hotel in which were located individual loud-speakers. It is the Appellants' submission that Parliament intended to exonerate a radio receiving set of that character from fees, charges and royalties and the similarity of the means employed for giving performances, namely, a radio receiving set on the one hand and a gramophone on the other hand, raises the assumption that Parliament equally intended to exonerate both.

15.—(2) The main part of the quotation from the learned Justice of Appeal's reasons for judgment is answered under heading No. (1), but the Appellants further submit that the learned Justice of Appeal misdirected himself when he said that the Bell Telephone Company wires are in control of neither the Appellant, A.B.C., nor its co-Appellants. In fact, it is in the control of both. The Appellant A.B.C. leases the wires and thus has as much control over their use as the occupant of leasehold premises has over the subject of his lease. By contract with A.B.C. the co-Appellants have control of the wires, which control they can exercise at any time by switching on or off the loud-speakers in their premises.

16.—(3) The learned Justice of Appeal misdirected himself in endeavouring to interpret the word " gramophone " by reference to the words " gramophone manufacturers." A gramophone is or is not a gramophone regardless of the person by whom it is manufactured. Furthermore, the Appellants submit that the learned Justice of Appeal clearly erred in interpreting as a gramophone only those instruments, the totality of which is manufactured by one manufacturer. In fact, the totality of devices constituting any gramophone is seldom, if ever, manufactured by one manufacturer. There is, in addition, ample evidence that all component parts of gramophones and all component parts of the devices concerned in this appeal, may be purchased at retail from the manufacturers or their dealers.

pp. 48, 50–51, 72–73, 151, 185–186, 188–189, 231–232

It would be absurd to say that a home craftsman who constructed his own gramophone from parts purchased at retail from a dozen different sources, would not be exonerated from the payment of fees, charges and royalties.

The Appellants further submit that the learned Justice of Appeal was clearly in error in saying that no factory in the world could hold the totality of these instrumentalities in their completed form. There is no evidence on which this assumption can be based.

17.—(4) (5) (6) and (7) In the Appellants' submission, the question of the person having control over the equipment has nothing to do with the question of who is the user. In *Canadian Performing Rights Society Limited* v. *Ford Hotel,* supra, a servant of the hotel obviously had control over the radio receiving set, save as to the loud-speakers which were under the control of the occupants of the individual room. Each was thus the user of the radio receiving set. Furthermore, the learned Justice of Appeal failed to follow the interpretation of the word " user " accorded to it by the Privy Council in *Vigneux et al* v. *Canadian Performing Rights Society,* 1945 A.C. 108.

18.—(8) In the Appellants' submission, the learned Justice of Appeal here misdirected himself in the same manner that the learned President of the Exchequer Court of Canada and the Justices of the Supreme Court of Canada misdirected themselves in the *Vigneux* case, supra. They there held that Section 10B (6) (a) of the Copyright Act did not serve to exonerate performances of musical works by means of juke boxes owned by Vigneux Bros. and leased by them to the proprietors of restaurants. In the words of McLean, P. (1942, Ex. C.R. 129) :

> " In the case before me, it would seem inequitable and unjust
> " if the defendants could do as they are doing, with impunity,
> " using the plaintiff's copyright without licence or compensation,
> " something which is entirely against the whole purpose and
> " spirit of the Copyright Act, something which might affect the
> " interest not only of Canadian subjects but those of foreign
> " countries, under the provisions of the Berne Convention."

These words were quoted with approval by Sir Lyman Duff, C.J.C. when the case fell to be decided in the Supreme Court of Canada (1943 S.C.R. 348) adding :

> " I do not think the objects of the legislation, as disclosed
> " by the legislation itself, embrace the protection of the people
> " engaged in the business in which the Appellants are engaged."

When that case came to be decided on appeal by the Privy Council, Lord Russell of Killowan quoted these words of Sir Lyman Duff, C.J.C., but went on to point out that the exoneration of owners or users of receiving sets and gramophones from all payments in respect of public performances

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of musical compositions by means of those instruments in the specified circumstances is absolute, unqualified and unconditional.

In the Appellants' submission, the focus of attention should be directed to the word " performance " when considering the exoneration that is afforded by subsection 10B (6) (a). The exoneration is in respect of a public performance in a defined location *by means* of certain mechanism. It is the location of the performance and not of the means that is important and, so long as that performance is given by means which, in their totality can be designated as a gramophone then, in accordance with the principle established by the Judicial Committee of the Privy Council in the *Vigneux* case, there is a complete exoneration from any payment of fees, charges and royalties.

19.—On the 6th day of October, 1952, the Appellants applied by Petition to the Privy Council for special lave to appeal from the judgment of the Court of Appeal of Ontario and such leave was granted by Order dated the 21st day of October, 1952, as amended by Order dated the 15th day of December, 1952.

p. 265
p. 267

20.—The Appellants submit that the judgment of the Court of Appeal for Ontario should be reversed and that of the High Court of Justice for Ontario restored for the following among other

REASONS

(1) BECAUSE the public performances complained of were public performances by means of a gramophone in a place other than a theatre which is ordinarily and regularly used for entertainments to which an admission charge is made.

(2) BECAUSE the Appellant, Associated Broadcasting Company Limited, is the owner of the gramophone by means of which the musical compositions were publicly performed.

(3) BECAUSE the Appellants were the users of the gramophone by means of which the musical compositions were publicly performed.

(4) BECAUSE the Court of Appeal for Ontario has failed to apply the principles laid down by the Privy Council in *Vigneux et al.* v. *Canadian Performing Rights Society*, 1945 A.C. 108.

(5) BECAUSE the judgment of the Court of Appeal for Ontario was wrong and ought to be reversed and the judgment of the High Court of Justice for Ontario was right and ought to be restored.

P. STUART BEVAN.

In the Privy Council.

No. 21 of 1953.

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APPELLANTS' CASE

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