GC 1 S 41, 1954

No. 21 of 1953.

In the Privy Council.

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.*

38045

Case for the Respondent

RECORD.

1. This is an appeal by special leave from the judgment of the Court of Appeal for Ontario dated March 5th, 1952, reversing a judgment of the Honourable Mr. Justice Schroeder dated January 29th, 1951, and awarding to the Respondent damages in the sum of $75.00 and an injunction restraining all the Appellants from infringing the Respondent's copyright by performing in public the musical works "Moon Glow," "Sophisticated Lady," "April Showers," "Ol' Man River," "Who" and "Make Believe." pp. 263–264. pp. 250–251.

2. It is not now disputed by the Appellants that each of them in fact performed or authorised the performance in public of the said works and therefore, prima facie, infringed the Respondent's copyright. The sole question in this appeal is whether any of the Appellants are entitled to claim exemption from liability on the ground that his performance was given by means of a gramophone owned or used by him. The Appellants rely upon sub-sec. (6) (*a*) of Section 10B of the Copyright Amendment Act (1938) Chap. 27 Sec. 4, which reads as follows :— p. 8.

> "(6) (*a*) 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 "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 sub-section 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 sub-section."

pp. 10–17, 21–34, 36–38; Exhibits, pp. 1–4.

3. The performances in question were in fact given on the 8th and 9th April, 1949, in rooms frequented by the public in premises occupied and controlled by the respective Appellants Reibstein, Dennis and Westminster Hotel Limited. The said performances were given by means of apparatus in the respective premises owned by the respective Appellants other than Associated Broadcasting Company Limited (hereinafter referred to as " A B C ") and installed by A B C, consisting of batteries of six or more loudspeakers permanently installed in the walls of such premises. The electric current operating these loudspeakers was obtained from the public supply paid for by the respective Appellants but the modulations providing the variations of sound waves heard from the loudspeakers and constituting the programme were produced by connecting the apparatus to incoming telephone wires owned by the Bell Telephone Company of Canada. Switches, coil transformers, heavy duty transformers and amplifiers on premises owned by these respective Appellants and operated and controlled by them or their guests enabled the programmes to be switched on or off and to be made more or less audible at their choice.

p. 63.

pp. 33–36; Exhibits, pp. 5–6.

pp. 48–49, 64–65, 70.

pp. 35–36, 47–48, 194.

4. The telephone wires owned by the Bell Telephone Company of Canada as aforesaid are laid in conduits maintained by that Company traversing streets in the City of Toronto and form part of that Company's general telephone system. They carried the modulations in question to the premises of the said respective Appellants over distances of up to a mile from the premises of the Appellant A B C at 1195 Bay Street in the City of Toronto.

pp. 62, 200–201.

pp. 57–58, 61, 107–108; Exhibits, p. 8.

5. The modulations were produced at the premises of A B C by the use of four special instruments acquired by it under the trade name " transcription turntables " and of a substantial amount of special equipment similar to that which is installed in radio broadcasting studios. The special equipment consisted chiefly of amplifiers, switches, connecting panels, a monitor loudspeaker and a step-down transformer. By the use of such equipment it was possible to create modulations of electric current originating from discs placed on any one of the transcription turntables and of a suitable amplitude for transmission to the premises of the other Appellants and to other persons over the said telephone wires. The amplitude of the modulations was required by the Bell Telephone Company to be controlled so as not to interfere with its general telephone system.

pp. 58, 70–73, 83–85.

p. 85.

pp. 47–48; Exhibits, pp. 5–6.

pp. 54–56, 74, 77.

6. The discs used by A B C on the transcription turntables were of the kind familiarly described in the trade as " electrical transcriptions " and were a special type of 16 inch disc prepared for use at a frequency of

$33\frac{1}{3}$ revolutions per minute on turntables of a diameter not available in the gramophone trade. These transcriptions are not available to the public for purchase but are supplied by a Company known as Muzak Corporation for the purpose of its system known as "Music by Muzak." This system involves the supply of such transcriptions to persons carrying on business in various areas of a nature similar to that carried on by A B C. Exhibits, pp. 1–3 pp. 33, 36, 118, 129, 131–133.

7. By means of the various apparatus aforesaid A B C were able to supply to the other Appellants and, at the material time, to some 187 other subscribers the means of giving public performances of the music recorded on the transcriptions. The actual performances however were in the exclusive control of the other Appellants or subscribers or their respective guests who could switch on or off or affect the amplitude of the sounds heard from the loudspeakers. The apparatus involved in each such performance consisted of a number of elements manufactured by and purchased from different sources and, as is apparent from the foregoing, was in the ownership of different persons. p. 50. p. 70. p. 48.

8. The contractual arrangements involved consisted of arrangements between A B C and the Muzak Corporation for the use of the transcriptions, arrangements between A B C and the other Appellants and other subscribers to supply the necessary modulations for a substantial fee, arrangements between the subscribers and the appropriate supplier for the supply of hydro-electrical power, and arrangements between A B C and the Bell Telephone Company for the use of their wires. p. 36. pp. 30–33. p. 63. p. 35.

9. The Respondent brought an action for infringement of performing right alleging that each Appellant had performed or authorized the performance in public of the works above-mentioned and claimed the usual relief in such cases. The Appellants raised a number of defences but the only one now relied upon is that sub-section (6) (*a*) of Section 10B (above set out) exempts each of them from liability. In this connection the Appellants relied upon the decision in *Vigneux* v. *Canadian Performing Right Society Ltd.* [1945] A.C. 108. pp. 1–4. pp. 5–6.

10. At the trial before Schroeder, J., the Appellants relied upon opinion evidence of witnesses, who testified that the sum total of the apparatus used by the Appellants was a gramophone because it contained all the characteristic ingredients of a modern electric gramophone or phonograph. Those witnesses were firstly, Raymond, Manager of A B C, who was not qualified as a technical expert. Raymond said "In our studio we have what is in effect a phonograph," and was led by counsel for the Appellants to describe the apparatus used thereafter consistently as a "gramophone." The second witness, Black, saw only the apparatus in the control room of the Appellant A B C. He testified as to the meaning of the word "gramophone" to him. The third witness, Hodges, gave theoretical evidence only and did not testify to having examined any part of the apparatus used by any of the Appellants. The substance of his evidence was that he defined the meaning of "gramophone" in such terms as necessarily to include the apparatus in question in this appeal. p. 38, cf. p. 40 ff. pp. 179, 189–190. pp. 227–230.

None of those witnesses said they had ever heard of the apparatus which was in fact bought and installed by A B C being sold under the trade description of "gramophone" or "phonograph." The witness Black, upon whom the Appellants chiefly relied, testified as to his experience in the installation of similar systems in public schools. On cross-examination he did not suggest that either the word "gramophone" or the word "phonograph" had been used in the specifications, nor was the system described as a gramophone or phonograph installation. "They asked us to provide a system, a sound equipment which will provide certain facilities to the principal of the Swansea school;" and the generic name of the device used for originating sound was not "gramophone" or "phonograph," but the witness called it "a record player assembly." The whole was called by the witness "a sound system." The witness Hodges had no specific experience to discuss. None of the Appellants' witnesses, other than Raymond, had been engaged in commercial activity in selling at retail any kind of sound reproducing instruments. Raymond made no point of his experience. It was 15 years before the trial.

pp. 176–179.

pp. 203–207.

pp. 50, 208, 226 ff.

11. For the Respondent the witnesses Low and Evans, who had each for twenty or more years been engaged in selling music and musical instruments to the public, testified that in commerce in Canada instruments sold as "gramophones" or "phonographs" always were sold in one package, and that accessory equipment by means of which the sounds derivable by the operation of electrically operated gramophones and phonographs could be duplicated in any other locations, at whatever distance the duplication might be desired, were always bought and sold as supplemental equipment under appropriate descriptions such as "loudspeaker," "amplifier," "wiring," "switches" and the like. No gramophone or phonograph was sold as such with accessory loudspeaker equipment included in the package described under the name gramophone or phonograph.

pp. 112–114, 154–155.

pp. 128, 158–159.

Exhibits, pp. 29–31.

12. This is corroborated by the catalogues of the two principal department stores in Toronto in their advertising of wares for sale to the public. These catalogues were published at a period contemporary with the enactment in question.

13. On that state of the record, Schroeder, J., held that, since the essential component parts of the apparatus used by the Appellant A B C and of the installations in the several premises of the subscribers to its service were all of a character known and in existence prior to 1938, and were all of a character found in one form or another in electrically operated gramophones and phonographs, the performances in question in this action were performances by the owner or user of a gramophone by means of a gramophone, and the Respondent's action was dismissed. The uncontradicted evidence, however, shows clearly that other devices, which are clearly not known as gramophones or phonographs, such as tape recorders and dictaphones, answer to the same description.

pp. 234–250.

p. 59.

14. In this respect Schroeder, J., omitted to give effect to evidence that gramophones do not contain more than one turntable, are not owned as to different parts by different persons, do not contain switches for

diverting the impulses derived from operation with a record on the turntable from one point to multiple other points, are not equipped with step transformers to reduce and with compensating amplifiers to restore an original volume of current to make sound audible in remote loudspeakers, nor are they equipped with multiple loudspeakers subject to control simultaneously by numerous persons at numerous remote points. pp. 234–250.

15. The Respondent appealed from the said judgment at the trial to the Court of Appeal for Ontario and its appeal was allowed by the unanimous judgment of the Court of Appeal. pp. 253–263.

16. After describing the provisions of the Copyright Act which provide for regulation of the fees, charges or royalties which may be charged by the Respondent for the issue or grant of licences by it to perform in public works over which it has the control, Roach, J.A., delivering the judgment of the Court, observed as to the situation which existed prior to the enactment of subsection (6) (*a*) :—

> " It may be unnecessary because it is so obvious, but it " nevertheless may be helpful to here remind ourselves that under " the plan thus adopted by the legislature, the person who desired p. 258.
> " to reproduce in public a musical work contained on a gramophone " record, and the performing right to which was vested in the " society, would be required before he could use that record for " such public performance to pay or at least tender the fee as " fixed by the Copyright Appeal Board. To play that record " either in public or for his own private pleasure, he would have to " use a reproducing device which would include a gramophone. " If he used a reproducing device for that purpose, whether it " be a gramophone or any other reproducing equipment, of " necessity he had at the same time to use the record. The one " without the other could accomplish nothing."

17. Having quoted the narrative given by Sir Lyman Duff, C.J.C., in *Vigneux* v. *Canadian Performing Right Society Limited* [1943] S.C.R. 348, at pp. 352 and 353, of the history of provisions for controlling the tariffs of the Respondent, Roach, J.A., further quoted at length the explanation given by Sir Lyman Duff (at pp. 354 and 355) of the reasons for enacting subsection (6) (*a*) :— pp. 258–259.

> " It was considered, however, that under the plan as originally " devised, the purchasers of *gramophone records* and the possessors of " wireless receiving sets were still placed in a position in which they " ought not to be placed. The decisions as to the meaning of " ' public performance ' had made it unsafe for the owner of a " gramophone or of gramophone records who carried on, for example, " a tea shop, to use the gramophone *for playing the records* in her " shop, or to permit her customers to use it. She might be entitled " to do so, or she might not. The answer to the question would " depend upon a variety of considerations, whether, for example, " the gramophone manufacturer possessed authority to authorize " the public performance of the records, whether she had derived " such authority through the purchase of records, and so on ; and

" these considerations, of course, she would be quite incapable " herself of passing upon. The legislature, no doubt, thought that " a law which made it necessary for the purchasers of gramophone " records to consult a lawyer to ascertain whether or not they could " safely play their records in such circumstances, was not satisfactory " and was not in harmony with the general spirit of the copyright " law, as explained by Lindley, L.J." (referred to earlier in the judgment) " and, accordingly, special provision was made dealing " with owners of gramophones and wireless receiving sets and the " use of these instruments in places ' other than a theatre which is " ' ordinarily and regularly used for entertainments to which an " ' admission charge is made.' It was declared (subsection (6) (*a*)) " explicitly that such persons should not be called upon to pay any " fee, charge or royalty in such circumstances and the duty was " imposed upon the Copyright Appeal Board to make provision for " fees, charges and royalties appropriate to this situation. I " confess I find no difficulty whatever in reading the language of " this enactment. It declares in unqualified terms that no fee, " charge or royalty is to be exacted from the owner of a gramophone " record [sic] or radio receiving set in the circumstances specified, " and compensation is provided in the duty imposed upon the Board " to make such provision as appears to be appropriate and possible " in the circumstances."

18. On this phase of the matter Roach, J.A., concluded, as the Respondent submits correctly :—

" Now, it surely is perfectly plain that the Legislature had in
p. 260. " mind, and was legislating to protect, by exonerating from the " payment of fees, the persons who, without such legislation, would " be liable for the payment of fees to the performing rights societies. " Who were those persons? They were not those who merely " owned a gramophone. Possession of a gramophone without any " records would mean nothing. They were the persons who had " control, either as owners or otherwise, of records, and also a " gramophone over which they also had control either as owners or " otherwise, and who might use the gramophone and thereby use " the records for the public performance of musical works contained " in the records. Those persons would be ' the owners or users ' " of gramophones."

19. Roach, J.A., also said :—

" I cannot conceive of any person using a gramophone unless " he has control of, not only the gramophone, the whole if 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
p. 260. " 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 performance. " The subscribers have no physical control over the records and no " say in their selection."

Apart from the observation that performance in the studio of A B C would not be a public performance, as to which argument is here unnecessary, the Respondent relies upon the foregoing statement.

20. In the respectful submission of the Respondent, Roach, J.A., correctly epitomized the whole problem and its solution in the single sentence :—

" To my mind it is inconceivable that Parliament by this " legislation, intended that it should apply to equipment one end p. 260.
" of which might stand on the shore of the Atlantic and be under " the control of one person, and the other stand on the Pacific " coast and be in control of a second person, and the wires by which " they are connected spread across the whole width of the Dominion " and be in control of still a third person, and, in addition to that, " to have it apply to that sum total of equipment plus an offshoot " that might lead as far north and as far south as there are telephone " wires."

21. As the Respondent submits correctly, Roach, J.A., further said :—

" 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 pp. 261–262.
" broadcasting station."

* * * * *

" 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 programme 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."

p. 262.

22. The Respondent relies upon the observations of Roach, J.A., that :—

> " 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 '."

23. The Respondent submits that this appeal should be dismissed for the following among other

REASONS

(1) BECAUSE in its ordinary and natural meaning the word " gramophone " and the synomous word " phonograph " do not extend to instruments of the character utilized by the Appellants in producing the sounds in question in this action.

(2) BECAUSE the only instrument the user and owner of which is entitled to be relieved from liability for copyright infringement is an instrument known as a " gramophone," or its synonym " phonograph," made by a gramophone manufacturer and dealt with under that name.

(3) BECAUSE the exempting section in question contemplated compensation to the copyright owner by appropriate fee to be paid by the manufacturer of the gramophone, and there was in the circumstances in question in this action no single manufacturer of the aggregate of the apparatus involved.

(4) BECAUSE opinion evidence is not receivable to identify something as a gramophone which is not in the ordinary and natural use of words known as a gramophone.

(5) BECAUSE things known as gramophones or phonographs are merely a class or species of a genus of sound reproducing apparatus and are not themselves a genus comprehending things operating on the same principles or employing the same devices but distinguished in commerce by other names.

(6) BECAUSE dictionary definitions of gramophones and phonographs err in failing to provide all the indicia to distinguish such instruments from other instruments producing comparable results, but used for other purposes than those for which gramophones and phonographs are used and known by other names.

(7) BECAUSE no single one of the Appellants was the owner or user of a gramophone.

(8) BECAUSE the apparatus under the control of the Appellant A B C in its control room was not a gramophone.

(9) BECAUSE the purpose and object of the legislation in question in this appeal was to protect only persons owning or using unitary objects known and sold to the public as gramophones or phonographs.

(10) BECAUSE, even if, for purposes of argument, it be conceded that the apparatus in the control room of the
10 Appellant A B C was a gramophone, the performances giving rise to the Respondent's cause of action were not performances by means of such apparatus, but simultaneous performances at remote locations by means of instruments which were not gramophones.

(11) BECAUSE the exempting section in question contemplates as the owner or user of a gramophone solely a person who himself uses gramophone records for the purpose of giving performances by means of such a gramophone.

F. E. SKONE JAMES.

No. 21 of 1953.

In the Privy Council.

ON APPEAL

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Case for the Respondent

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