

Associated Broadcasting Company Limited
and others - - - - - *Appellants*

v.

Composers, Authors and Publishers Association
of Canada Limited - - - - - *Respondents*

FROM

THE COURT OF APPEAL FOR ONTARIO

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 1ST DECEMBER, 1954

Present at the Hearing :

VISCOUNT SIMONDS
LORD OAKSEY
LORD REID
LORD TUCKER
LORD SOMERVELL OF HARROW

[*Delivered by* VISCOUNT SIMONDS]

The short question in this appeal, which is brought by special leave from an Order of the Court of Appeal for Ontario, is whether the appellants have infringed the copyright in certain musical works which, so far as concerns the sole right to perform those works in public throughout Canada, is vested in the respondents, The Composers, Authors and Publishers Association of Canada Limited. The answer to this question turns on the true meaning and effect of Section 10B (6) (a) of The Copyright Amendment Act, Chapter 27 of the Statutes of Canada, 1938, Section 4, which is in these terms:—

“ In respect of public performance 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.”

It is not disputed either that copyright subsists in the works in question or that it is vested in the respondents or that they have been performed in public. The performances were in fact given in certain premises in Toronto occupied by the appellants Reibstein, Dennis and Westminster Hotel Limited respectively. None of these premises was a “ theatre which

is ordinarily and regularly used for entertainments to which an admission charge is made". No fees were therefore collectable from the appellants or any of them if within the meaning of the section the performances were given by means of any radio receiving set or gramophone, or, more specifically, by means of any gramophone as it is not alleged that they were given by means of any radio receiving set.

It is necessary then to consider in some detail what are the means by which the performance is given and their Lordships find an accurate and sufficiently comprehensive account of this in the judgment of the Court of Appeal for Ontario which they substantially adopt.

The equipment (to use a neutral word) which in this case is alleged to constitute a gramophone can best be described by reference to a drawing which was filed as an Exhibit in the case. A verbal description of its component parts as shown and numbered on that drawing is as follows:

Part No. 1 is an electric motor.

No. 2 is a turn-table.

No. 2a is a spindle of the motor operating the turn-table.

No. 3 is a stylus or needle.

No. 4 is a playing head holding the needle and having a magnetic pick-up; that is, a coil in a magnetic field.

No. 5 is a suspension arm.

No. 6 are electrical connecting wires from the coil in the playing head leading to an amplifier which is No. 7.

No. 7a are electrical connecting wires.

No. 8 is a loudspeaker connected with the amplifier (No. 9) by electrical wires.

No. 9 is an amplifier.

The instrumentalities numbered 1 to 7 inclusive are located in the studio of the appellants the Associated Broadcasting Company Ltd. hereinafter called A.B.C. and are under the sole control of A.B.C., its servants or agents.

Instrumentalities numbered 9 and 8 are located in the premises of each of the other appellants and are under their control. They are owned by A.B.C. and were installed in the premises of the other appellants by A.B.C. pursuant to its contract with those other appellants.

Instrumentalities numbered 7a are wires of the Bell Telephone Company of Canada running between the building in which A.B.C. has its studio and the buildings in which the other appellants carry on their respective businesses.

That drawing is not quite complete. Inserted between No. 7 and No. 7a is a step transformer. This is made necessary by the fact that in order to prevent electrical induction interfering with parallel wires of the Bell Telephone system serving other customers only a low current is transmitted over the wires shown as the 7a on the drawing.

The drawing shows only one turn-table. In fact there are four turn-tables connected by gears so that the operator in the studio of A.B.C. may disengage one turn-table and engage another without any appreciable interruption of the programme.

The equipment in the premises of each of the appellants other than A.B.C. may be disconnected from the balance of the equipment by the operation of a switch, not shown in the drawing, so that at any given time, one or more subscribers and the patrons in his or their premises may be hearing a musical programme originating in the studio of A.B.C. and other subscribers and their patrons may not. If all the subscribers

leave the instrumentalities which are located in their premises connected with the balance of the system, they all hear the same programme. By throwing out that switch, any subscriber may use parts numbered 8 and 9 together with microphones to make more audible programmes originating in his own premises.

The contracts between A.B.C. and the other appellants are all similar in form. They are headed "Arrangement for 'Music by Muzak' service".

By these contracts A.B.C. agrees to supply to the subscriber "Music by Muzak" programme service to the localities therein described between the opening and closing hours of the subscribers' establishment. As part of the Muzak Service A.B.C. agrees to instal and keep in operating condition for the reception of Muzak Programmes in the subscribers' premises certain equipment specified in the contract.

This system is operated as follows:—An employee of A.B.C. places a record or disc on turn-table No. 2. That turn-table is then made to revolve by the power of the motor No. 1. The stylus or needle No. 3 is placed in contact with the sinuous groove in the record and transmits to the playing head, No. 4, sound waves identical with those which impressed the record when it was made. Those sound waves are converted into electrical impulses in the playing head by the action of the magnetic coil and are carried along the wires No. 6 to the amplifier No. 7.

At that point, all the operations in the studio of A.B.C. end. The electrical impulses leave the amplifier No. 7 and are transmitted over the Bell Telephone wires to the premises of the subscriber. The step transformer—not shown in the sketch—increases the force of those electrical impulses and they are carried to the No. 9 and thence to the loud speaker No. 8 where they are transmitted back into sound vibrations and emitted into the air as an acoustic reproduction of the musical work contained in the record.

It is claimed, and so the learned Trial Judge found, that a public performance by means of this equipment, mechanism, or sum total of instrumentalities is a public performance by means of a gramophone within the meaning of the section. The argument in favour of this claim is neatly summed up in the appellants' case by saying that "the component parts or means 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". It appears to their Lordships however that the short answer to this argument, and therefore to the appellants' case, is that it begs a question, what is the meaning of the word "gramophone" in the section, by assuming that whatever mechanism upon an analysis of its functions is seen to do what a gramophone does is therefore properly called a gramophone. It was, as their Lordships understood the argument, conceded that each one of the several components of the mechanism that has been described was an essential part of the gramophone. Therefore, to take a crucial test, the wires under the control of the Bell Telephone Company, which were laid under Parliamentary authority and might have extended for any distance, were a part of the gramophone. Their Lordships agree with the learned Judges of the Court of Appeal in thinking that this is nothing less than to distort the meaning of the word "gramophone". It does not appear that that word has acquired a scientific meaning other than its popular or commercial meaning, and in the latter meaning it clearly does not embrace a mechanism which (to take the same test) includes an undefined length of wiring laid, perhaps under or over public streets, under the powers given by Parliament not by the manufacturer or user of the mechanism, but by an independent authority.

This concludes the case and their Lordships do not think it necessary to examine the arguments which were based on the use in the section of the words "owner", "user" or "manufacturer" in connection with "gramophone" though they appear to support the view they have taken. Nor can they derive any assistance from an examination of the section in the light of the alleged policy of the Act. It is no doubt proper and useful to be informed of the state of the law and of the development of the industry at the time when the relevant section of the Copyright Act was enacted, but, to whatever conclusion such an examination might lead, their Lordships find it impossible to ascribe to the familiar word "gramophone" a meaning which, now as then, it is incapable of bearing.

Their Lordships will therefore humbly advise Her Majesty that this appeal should be dismissed. The appellants must pay the costs of the appeal.

In the Privy Council

ASSOCIATED BROADCASTING COMPANY
LIMITED AND OTHERS

v.

COMPOSERS, AUTHORS AND PUBLISHERS
ASSOCIATION OF CANADA LIMITED

DELIVERED BY VISCOUNT SIMONDS

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