1956
May 23, 24, 25, 28 & 29
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July 19

COMPOSERS, AUTHORS AND PUBLISHERS ASSOCIATION OF CANADA, LIMITED ..... PLAINTIFF;

AND

SIEGEL DISTRIBUTING COMPANY LIMITED, VASIL C. LEKSOVSKY, PANDO C. PERELOFF AND BORIS C. LEKSOVSKY, administrators of the estate of VASIL PENCHOFF, deceased, PANDALIS CHRIS, TRAIKOS ALEXOPOLUS AND WILLIAM MICHAIL ..... DEFENDANTS.

Copyright—Infringement action—The Copyright Act R.S.C. 1952, c. 55, s. 50, s-s. 7—Copyright in musical composition—"Gramophone"—"Hideaway Phonograph"—"Owner or user" of a gramophone giving public performances.

The action is for infringement of copyright owned by the plaintiff, a Performing Rights Society, in certain musical works and which consists of the sole right to perform the same or any substantial part thereof in public throughout Canada. Permission to perform such musical works was never received from the plaintiff by any of the defendants, nor have they at any time paid or tendered any sum on account of fees for the right to perform such works in public in Canada.

S. 50, ss. 7 of the *Copyright Act* R.S.C. 1952, c. 55 states: "In respect of public performances by means of any radio receiving set or gramophone in any place other than a theatre that is ordinarily and regularly used for entertainment 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 . . ."

The musical works referred to were performed in public over loudspeakers at the Superior Tea Room, a restaurant in the City of Toronto, Ontario, operated by the individual defendants, such loudspeakers being installed, maintained, actuated and supplied with music by the defendant company with the authorization of the individual defendants and without the consent of the plaintiff.

Defendant company installed what is known as a Wurlitzer Hideaway phonograph in the basement of the restaurant premises. This consisted of a ventilated cabinet made by Wurlitzer of about the same dimensions as the Wurlitzer 1800 which is placed where it is on view to patrons of restaurants and other places. It contained a chassis on which were mounted operating parts of the phonograph, except the selectors and loudspeakers which were placed in the booths in the restaurant above and which were connected to the Hideaway by means of a cable and a number of wires leading therefrom. By placing a suitable coin in the coin receptacle a restaurant patron, by pressing the proper selector buttons could place a "call" for the playing of such record or records as he had chosen. Each selector is provided with a soundbox containing two loudspeakers and in the restaurant also there is a remote volume control situated behind the counter which enables any member of the staff to increase or decrease the level of the sound heard at the various soundboxes but not to cut it off completely.

Plaintiff contends that Hideaway and the totality of the equipment placed in Superior Tea Room do not constitute a gramophone but are really a loudspeaker or sound system.

Held: That the public performance of the musical works mentioned was by means of a gramophone and the defendant company is the owner of the gramophone and as such is entitled to the benefit of the exempting provision of ss. 7 of s. 50 of the *Copyright Act*.

2. That the other defendants, the partners who own the restaurant, neither gave nor authorized the public performance of the musical works mentioned and consequently have not infringed the plaintiff's rights; had they been proved to be the "users" of the gramophone they would have been entitled to the benefit of the exempting provision of ss. 7 of s. 50 of the *Copyright Act*.

ACTION by plaintiff praying for an injunction restraining defendants from infringing plaintiff's copyright in certain musical compositions.

The action was tried before the Honourable Mr. Justice Cameron at Toronto.

H. E. Manning, Q.C. for plaintiff.

Gordon W. Ford, Q.C. for defendants.

CAMERON J.:—This is an action for infringement of copyright. The plaintiff is a company incorporated under *The Companies Act* of Canada, having its head office at Toronto. It carries on in Canada the business of acquiring copyrights of musical works or of performing rights therein and deals with or in the issue or grant of licences for the performance in Canada of such works in which copyright subsists. It is therefore a Performing Rights Society and as such is subject to the provisions of sections 48 to 51 of *The Copyright Act*, R.S.C. 1952, c. 55.

The defendant, Siegel Distributing Company Limited, is an incorporated company having its head office at Toronto and will be referred to hereinafter as "the defendant company". The defendants Leksovsky and Pereloff reside in Toronto and are the administrators of the estate of Vasil Penchoff, deceased; the defendants Chris, Alexopolus and Michail also reside in Toronto. The defendants Leksovsky, Pereloff, Chris, Alexopolus and Michail carry on business as partners in the business of operating a restaurant at 253 and 255 Yonge Street, Toronto, under the name of "Superior Tea Room". The said defendants are hereinafter collectively referred to as "the Partners".

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It is established that at all material times the plaintiff was the owner of that part of the copyright in the musical works "Beer Barrel Polka", "Papa Loves Mambo", "As Time Goes By", and "Nobody's Sweetheart", which consists of the sole right to perform the same or any substantial part thereof in public throughout Canada. It is alleged that on the 12th of March, 1955, the defendants and each of them infringed the plaintiff's copyright by performing or causing or authorizing to be performed in public at the Superior Tea Room by loudspeakers installed, maintained, actuated and supplied with music by the defendant company, with the authorization of the defendant partners, each of the specified musical works or a substantial part thereof, without the consent of the plaintiff.

It is established that none of the defendants has ever received permission from the plaintiff to perform any musical works, the sole right to perform which in public in Canada is the property of the plaintiff; and that none of the defendants has at any time paid or tendered any sum on account of fees for the right to perform such works in public in Canada.

The evidence also establishes that the above-named musical works were performed over loudspeakers at the Superior Tea Room on March 12, 1955. It is not now disputed by any of the defendants that in the circumstances disclosed such a performance was a performance in public. Counsel for the defendants formally admitted at the trial that on the facts disclosed the defendant company had authorized the performances in question. The defendant partners, however, allege that they had no control over and did not perform or authorize the performance in public of any of the named works.

The main defence of all the defendants, however, is that the public performance of the musical works was by means of a gramophone and that as a result the owners or users of such gramophone are not liable, in the circumstances, to the payment of any fees, charges, or royalties in respect thereof. They rely on subsection (7) of section 50 of *The Copyright Act*, which is as follows:

(7) In respect of public performances by means of any radio receiving set or gramophone in any place other than a theatre that 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 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 savable 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.

The Superior Tea Room is a public restaurant and is a place "other than a theatre that is ordinarily and regularly used for entertainments to which an admission charge is made". It is clear, also, that the public performances in question were not performances by means of any radio receiving set. It is in evidence, also, that neither for the year in question, nor for any year since 1938, when the provisions of section 50(7) were first enacted, has the Copyright Appeal Board provided for "the collection in advance from gramophone manufacturers of fees, charges and royalties appropriate to the new conditions produced by the provisions of this subsection" or fixed the amount of the same. It may be noted, however, that in the case of *Vigneux et al. v. Canadian Performing Rights Society, Ltd.* (the predecessor of the plaintiff company) (1), the Judicial Committee of the Privy Council expressed its agreement with the view of Sir Lyman Duff, C.J.C., in the same case in the Supreme Court of Canada (2) that what he termed the statutory licence (or, in other words, the statutory right to perform) which the subsection confers, is in no way conditional on payment of the charges which the subsection enacts are to be payable by broadcasting stations or gramophone manufacturers.

The primary question for determination, therefore, is whether or not the performances in question were by means of a "gramophone". Counsel for both parties agreed that no distinction can be drawn between the words "gramophone" and "phonograph" and that they are used interchangeably, the latter word being now more commonly in use. It becomes necessary at once to consider in detail the nature of the device by means of which the performances were given and the respective roles of the defendant company and the defendant partners therein. It is to be noted particularly that in this part of my judgment, where the

(1) [1945] A.C. 108. (2) [1943] S.C.R. 348.

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words "gramophone" or "phonograph" are used, such user does not involve a conclusion on my part that the devices referred to were in fact a "gramophone" or a "phonograph"; in such user I am merely employing the language of the witnesses unless otherwise stated.

Albert Siegel, the president and chief shareholder of the defendant company, stated that his company was the distributor for the Rudolph Wurlitzer Company (an American manufacturer) of phonographs and auxiliary equipment; that as such distributors it imports and sells the Wurlitzer floor model phonograph, of which the "Wurlitzer 1800", shown on pages 1 and 3 of Exhibit 2, is an example. As will be there seen, that device is a coin-operated phonograph with the selector device attached to the face of the instrument. It is electrically operated and is entirely self-contained. The company also imports and sells the "Wurlitzer Hideaway", which is the device here in question and which will be described later in detail.

By a contract dated November 19, 1954 (Exhibit 1), and called a Lease Agreement, between Milton's Automatic Phonographs (admittedly one of the trade names under which the defendant company carried on business) as lessee and Superior Tea Rooms as lessor, it was agreed in part as follows:

> WITNESSETH that in consideration of the rents, covenants and agreements hereinafter respectively reserved and contained, the Lessor does hereby lease unto the Lessee for such a period as the Lessor, or his successor, shall be operating the hereinafter described premises, not exceeding five years from and after this date; such space or spaces (as shall be designated by the Lessee) in the main room of Lessor's Restaurant located at 253 Yonge St., sufficient for the purpose of installing, maintaining and operating Commercial Music & Equipment for hire by the public during such times as said place is open to the public at the rental payable by the lessee to the Lessor weekly of 50% per cent of all monies paid by the public for the use of said Commercial Music & Equipment.
>
> IT IS FURTHER AGREED that the Lessor will not during this lease permit any similar competing device to be installed in said premises; that the Lessee or its agents may enter said premises at any and all reasonable times to service and change said device. All expenses of installing, maintaining and operating said device, except the electricity consumed in the operation thereof shall be paid by the Lessee.

It is stipulated in writing (Exhibit 17) that that agreement, entered into by the defendant partners as owners and operators of the Superior Tea Room, was at all material times in full force and effect and binding on the defendant partners.

Pursuant to its contract, the defendant company installed "the Commercial Music and Equipment" in the premises of the Superior Tea Room. Instead of placing a Wurlitzer 1800 in the restaurant proper, it was decided to install a Wurlitzer Hideaway phonograph in the basement in order to conserve space in the restaurant; not being there exposed to the public view, it did not require the eye appeal of the Wurlitzer 1800. It consisted of a "ventilated" cabinet made by Wurlitzer, having about the same dimensions as the Wurlitzer 1800; it contained a chassis on which were mounted the operating parts of the phonograph, except the selectors and loudspeakers which were placed in the booths in the restaurant above and which were connected to the Hideaway by means of a cable and a number of wires leading therefrom. The cabinet is shown as a black rectangle on Exhibit 3—a cross-section of the basement and restaurant. In each of the 30 booths in the restaurant, there was placed a "selector" (sometimes referred to as a callbox or a wallbox) similar to that illustrated at the top of the last page of Exhibit 2, a number of such selectors being shown as black squares on Exhibit 4, a floor plan of the restaurant. As will be seen, the selector includes a number of title strips giving the names of the 104 musical works available. After placing a suitable coin in the coin receptacle a restaurant patron, by pressing the proper selector buttons, could place a "call" for the playing of such record or records as he had chosen. In each booth there is a soundbox beneath the table containing two loudspeakers—a total of 60 in all. In the restaurant also, there is a remote volume control situated behind the counter; this enables any member of the staff to increase or decrease the level of the sound heard at the various soundboxes, but not to cut it off completely.

Unfortunately, no illustration of the Hideaway phonograph was produced at the trial. In view of the uncontradicted evidence that the main operative parts of the Hideaway were similar to (and indeed interchangeable with) those of the Wurlitzer 1800 phonograph, my task in describing the Hideaway device will be simplified by describing the mechanism of the Wurlitzer 1800 and thereafter pointing out the differences stressed by counsel for the plaintiff.

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As I have said, the Wurlitzer 1800 phonograph is illustrated and to some extent described in the manufacturer's literature, Exhibit 2. It is shown on page 3 in colour and as it would appear in a restaurant. The selector panel with the title strips, selector buttons and coin receptacle, is located at the front and forms part of the phonograph itself; it is connected by electric wires to the record changer.

Inside the cabinet, mounted on a chassis, are the following:

(a) A Carousel record changer (shown on page 6) operated by an electric motor. It contains a record carrier capable of holding 52 double-sided gramophone records, each with a playmeter which indicates how frequently the record has been played. The changer is so equipped as to store "calls" from the selectors and thereafter to place the record so chosen on the turntable in the numerical order in which the records are held in the record carrier.

(b) An electrically operated turntable on which the gramophone record is placed for playing.

(c) A stylus or needle which when placed in position follows the groove in the record and is held by

(d) A playing head which has a magnetic pickup, i.e. a coil within a magnetic field;

(e) Electrical connecting wires from the coil in the playing head to

(f) A number of audio-amplifiers, with electric wires leading to

(g) A number of loudspeakers.

As described in Exhibit 2, the Wurlitzer 1800 is a coin-operated automatic phonograph, the power being supplied by electricity. In the form shown on page 3, it is entirely self-contained. It may, however, be operated with remote control equipment as shown on page 8. In such a case the selector and the loudspeakers (placed either in the corners or on the wall) are external to the cabinet and connected by electric wiring to the operating parts.

The Wurlitzer 1800 so shown and which is self-contained in one unit, operates as follows: The patron deposits a coin; then, after making his selection of the musical work which he wishes to hear, he presses the appropriate selector button. That call activates the record changer and, if no other

record is being played, his chosen record is carried to the turntable. The stylus or needle then engages the grooves of the record and the pickup converts the resulting vibrations into electrical impulses which by wires are carried to the audio amplifiers and thence to the loudspeakers where they are converted into sound.

In the Shorter Oxford English Dictionary, 2nd Edition 1936, the word "gramophone" is defined as "An instrument for recording and reproducing vocal, instrumental and other sounds; esp. a reproducing instrument consisting essentially of a revolving turn-table capable of carrying disks on which are impressed, in a spiral track, wave-forms corresp. to sound vibrations, to reproduce which a stylus, attached to an acoustic device or electric system, travels along the track".

The Encyclopaedia Britannica, 14th Ed., vol. 10, at p. 616, contains the following definition of "gramophone": "An instrument for reproducing sound . . . by transmitting to the air the mechanical vibrations of a stylus in contact with a sinuous groove in a moving record. In a wider sense the term might be applied to any instrument for the recording or subsequent reproduction of sound."

Now I have no hesitation whatever in reaching the conclusion that the self-contained Wurlitzer 1800, as shown on page 3 of Exhibit 2, is a "gramophone" within the meaning of that word as found in subsection (7) of section 50 of *The Copyright Act* (*supra*). It clearly falls within the definitions just referred to. Counsel for the plaintiff was somewhat unwilling to concede the point but made no submission that it was not. I accept the evidence of Mr. Siegel, president of the defendant company, that since 1934 coin-operated automatic phonographs similar to, if not identical with the Wurlitzer 1800, have been on the market and in general use in Canada and that they were referred to in the trade as "phonographs" although youngsters referred to them as "juke boxes". The Wurlitzer 1800 no doubt contains modifications of and improvements on the original models but the operations are essentially the same. Boyd, a witness for the plaintiff, admitted that he had seen "the electrically coin-operated phonograph or gramophone in restaurants" for seven or eight years. Mr. Kerridge, a witness for the plaintiff and a teacher in the Electronics

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Department of Ryerson Institute of Technology, agreed that the Wurlitzer 1800 came within his definition of a "phonograph".

Moreover, it is clear that in the *Vigneux* case, to which I have referred above, the device in question was an electrically operated gramophone operated by the insertion of a coin and that the same type of device as in that case continued to be available with its modifications in design and a larger number of selections. Mr. Matheson, an officer of the plaintiff company, agreed that such was the case (p. 40 ff.).

Mr. Ford, counsel for the defendants, submits that it was decided in the *Vigneux* case that a coin-operated automatic phonograph is a "gramophone" within the meaning of that word in subsection (7) of section 50. It becomes necessary, therefore, to refer briefly to that case. The plaintiff, Canadian Performing Rights Society (the predecessor of the plaintiff in the instant case) sought an injunction to restrain the defendants, Vigneux Brothers and Rae Restaurants, Ltd., from performing the musical work "Stardust" in which it had the sole performing rights in Canada. The case was heard by Maclean J., the late president of this Court. In his judgment (1), he stated that the business of Vigneux Brothers consisted in the installation and servicing of electrically operated devices, adapted, upon the insertion of a coin therein, to make audible a series of sounds corresponding to markings on one or other of a number of discs or records with which the device was equipped. Such a device was installed by them in the restaurant of the defendant, Rae Brothers, pursuant to an agreement by which the latter paid Vigneux Brothers a fixed weekly payment of $10.00, retaining for their own use the balance of receipts from the use of the device by the restaurant patrons. Maclean J. held that the defendants did not fall within the class of persons protected by subsection 6(*a*) of section 10B of *The Copyright Act* as enacted by 2 George VI, c. 27, s. 4, which is identical with subsection (7) of section 50 of *The Copyright Act,* R.S.C. 1952, c. 55. He held that the defendants were not the "owners or users" of a gramophone giving public performances in the sense contemplated by the Act, and excluded them from the pro-

(1) [1942] Ex. C.R. 129.

tected class of "owner or user" of a gramophone on the ground that they were virtually "partners in a venture of publicly performing musical works primarily for profit". He also stated that "Section 10B does not purport to take from the owner of a musical work the right to restrain infringement of his copyright when no license has been granted or when no definite provision has been made for compensation to the owner for the right to perform his musical work". That statement seems to refer to the fact that the Copyright Appeal Board had made no provision for the collection of fees from gramophone manufacturers.

In numerous places throughout his judgment, Maclean J. referred to the device there in question as a gramophone. I have read that judgment in full as well as those of the Supreme Court of Canada (1) and of the Judicial Committee of the Privy Council (2), and it seems to have been conceded throughout that the device used was in fact a gramophone. The sole question was whether or not the defendants, as "owners or users" of the gramophone, were in the circumstances entitled to the benefit of the exempting subsection.

Mr. C. R. Matheson, an official of and a witness for the plaintiff in the instant case and who was also a witness for the plaintiff in the *Vigneux* case, was asked by Mr. Ford, counsel for the defendants, if he had not stated in the *Vigneux* case that the device there was "a gramophone which operated by inserting a coin in a slot; an automatic gramophone". In reply he said that he could not remember. I have read the Case on Appeal in the Supreme Court of Canada, handed to me by counsel for the plaintiff, and it shows on page 14 thereof that he had so stated. In any event, he admits that in Exhibit 7—a letter written by him to the defendant company on March 14, 1955—his reference to a "gramophone" in the *Vigneux* case was to an electrically operated gramophone operated by the insertion of a coin and manufactured by Wurlitzer. Further, he admitted in cross-examination that the same type of machine as in the *Vigneux* case continued to be and is still available, subject to modifications as to design and having a larger number of selections.

(1) [1943] S.C.R. 348. (2) [1945] A.C. 108.

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It is significant, I think, that none of the plaintiff's witnesses attempted to draw any distinction between the essential parts of the gramophone referred to in the *Vigneux* case and the Wurlitzer 1800.

For these reasons, I am of the opinion that the self-contained Wurlitzer 1800 was a gramophone within the meaning of that word in subsection (7) of section 50.

It remains to be stated that an appeal in *Vigneux's* case to the Supreme Court of Canada was dismissed (1). The defendant's appeal to the Judicial Committee of the Privy council was allowed (2) and it was

Held, that the effect of sub-s. 6(*a*) of s. 10B is to enact that a person who gives a public performance by means of any radio receiving set or gramophone in any place (other than a theatre as defined) need not pay anything for the right to do so. The exoneration of such owners or users in the specified circumstances is absolute, unqualified and unconditional, and such a public performance is a lawful act and no infringement of copyright. Further, the statutory right to perform conferred by the sub-section is in no way conditional on payment of the charges which the sub-section enacts are to be payable by broadcasting stations or gramophone manufacturers.

Accordingly, where an electrically operated gramophone, owned by the first appellants and rented to the second appellants, in whose restaurant it was placed, performed, on the insertion of a coin by a customer, a musical selection the copyright in which was owned by the respondent performing right society, the second appellants, as users of the gramophone, came within the provisions of the sub-section, while the first appellants had no need to claim to be protected by it, since they neither gave nor authorized the public performance of the record, having no control over the use of the machine in the restaurant.

Mr. Manning, counsel for the plaintiff, submits that even if the Wurlitzer 1800 is found to be a gramophone, the Hideaway and the totality of the equipment placed in Superior Tea Rooms are so different that they do not constitute a gramophone. He refers to it as a loudspeaker or sound system. There are five things which he submits distinguish the instrumentalities here from an ordinary gramophone.

(1) His first point is the appearance of the Hideaway cabinet and its location in the basement. He says that the "housing" or cabinet of the Hideaway differs in appearance from that of an ordinary gramophone in that it is "ventilated" so that the working parts are more open to inspection. The evidence is that it was a standard Hide-

(1) [1943] S.C.R. 348. (2) [1945] A.C. 108.

away manufactured by Wurlitzer and installed in the same form as it was received. In my opinion, these distinctions are of no importance in deciding the question. A gramophone does not cease to be a gramophone merely because of the appearance of the cabinet, which is a non-essential part; it is intended only for the purpose of housing the operating mechanism in a more or less attractive manner. Similarly, its location in the basement where it would not be seen by the public does not change its nature. An old gramophone placed out of sight in an attic or in a cupboard does not thereby cease to be a gramophone.

(2) The second point is that the Hideaway was equipped with a small test speaker which enabled the serviceman of the defendant corporation to test the operation of the instrument in the basement without the necessity of going to the restaurant above. It is operated by a switch and produces a low tone just sufficient for the serviceman to hear. It is placed there purely for his convenience. There is no such test speaker in the Wurlitzer 1800; it is apparent that it would not there be required as the serviceman in checking that gramophone would be able to hear the music through the ordinary loudspeakers. The evidence is that the number of loudspeakers in a gramophone varies greatly. I am quite unable to see how the addition of another loudspeaker within the cabinet, although designed for a special purpose and operated by a switch, can be said to change the nature of the device into something that is not a gramophone.

(3) The third matter referred to is the remote volume control placed behind the cashier's desk in the restaurant and by means of which an employee of the restaurant may raise or lower the tone volume. The evidence is that there was a remote volume control in the Hideaway itself when purchased, but for the sake of convenience another one, also purchased from Wurlitzer, was installed in the restaurant. I think it may be assumed that in most cases gramophones are equipped with a volume control. On page 7 of Exhibit 2 the Wurlitzer 1800 specifications include volume, dual tone and fade control. This alleged point of difference is therefore based mainly on the fact that the control is "remote"

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and not contained within the cabinet itself. This point can therefore be considered at the same time as the remaining points.

(4) and (5) Points 4 and 5, which I will consider together, are based on the submission that a gramophone is a self-contained unit with all its parts contained within one framework or cabinet. It is submitted, therefore, that the instrumentalities here used could not be considered a "gramophone" inasmuch as (a) the selector boxes and the loudspeakers, as well as the remote volume control, and (b) the electrical wiring leading from the Hideaway to the selectors and loudspeakers and from the remote volume control to the speakers, were not contained within the gramophone itself. It is on this submission that the plaintiff mainly relies.

It is submitted that the word "gramophone" when it is used by itself in subsection (7) of section 50, must be given the same meaning as when it is used in the expression "gramophone manufacturers". Counsel refers to the case of *Composers, Authors and Publishers Association of Canada, Ltd. v. Associated Broadcasting Co. Ltd., et al.* (1) where in the Court of Appeal of Ontario, Roach J.A., in delivering the judgment of the Court, said at page 343:

> It is obvious, therefore, that the word "gramophone" as it appears in s. 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.

Now I am unable to find in that judgment any statement which suggests that in order to be a gramophone the instrumentalities must be self-contained; the judgment speaks of "completed units". The evidence is that the Wurlitzer Company does manufacture and sell the entirety of the devices here used. The Siegel Company purchased the Hideaway, the selector boxes and the remote volume control

(1) [1952] O.R. 322.

from that company and could have purchased from it the loudspeakers and electrical wiring but, for reasons of its own, bought them in Canada.

Several definitions of gramophone have been cited above and I can find nothing therein to suggest that a gramophone must be entirely self-contained. Moreover, there is a substantial body of evidence that record playing devices operated by remote control have been known for many years as phonographs. Mr. Kerridge, whom I have mentioned above, stated that he had been aware for some years that the Wurlitzer Company manufactured the Wurlitzer 1800 but that it and other companies also "manufactured and sold a phonograph mechanism for operation by remote control such as the unit with which we are dealing in this action"; by that he meant that such manufacturers were also advertising and selling "phonographs operated by coin selectors" in which parts such as selectors and speakers were separate from the machine itself. Further he agreed that this device is popularly known and sold as a "phonograph". While endeavouring throughout to adhere to his original opinion that a phonograph must be self-contained, he admitted that the purpose, operation and end result of the remote control devices, namely, the loudspeakers and the selector boxes, were the same as in the Wurlitzer 1800. He agreed, also, that while the length of electrical wire used was greater by reason of the remote control devices being at some distance from the Hideaway, it was a matter of degree only as there were similar but shorter electrical wires in the Wurlitzer 1800. Finally, he agreed that the unit as so installed could popularly be called a phonograph and that "the public interpretation of the apparatus, or whatever you call it, could be considered a phonograph".

The evidence of the witnesses Lowe and Evans was of little assistance to the plaintiff. Mr. Lowe since 1947 has been the general manager of the plaintiff company and prior to that date was engaged in business in various parts of Canada in selling at retail sheet music, records and "small goods" such as mouth organs, violins, record playing devices and radios. While he was aware that prior to 1938 coin-operated phonographs somewhat similar to the Wurlitzer 1800 (or an earlier model thereof) were in the market and in public use, his business did not include the selling of such

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articles. He stated, however, that his own experience indicated that they were not sold as gramophones but as juke boxes. However, as he had not seen any literature relating to them and had not dealt with them in his business, he finally admitted that he could not say how they were sold and that he "could not help from the trade standpoint". He did add, however, that he had known of "juke boxes" in which the loudspeakers were separate from the cabinet and attached to the wall or ceiling, as early as 1940 or 1941.

Mr. G. L. Evans had been in the radio department of Robert Simpson and Company from 1922 to 1940 and since that time had had experience in buying and selling radios and phonographs, but none in buying or selling coin-operated gramophones. He said that when a gramophone was sold it was sold as a complete unit and packaged in one parcel. If a customer required a separate loudspeaker for remote control, it was purchased separately and shipped in a separate parcel, together with the necessary electric wiring. He agreed that from some time prior to 1938 there had been "juke boxes" similar in style and appearance to that of the Wurlitzer 1800 shown on page 3 of Exhibit 2, in popular use. I think that as he had no experience in buying and selling coin-operated devices, his opinion as to the name given to them in the trade is of no assistance.

Mr. Siegel, the president and principal shareholder of the defendant company, stated that since 1944 his company has been distributor for the Wurlitzer Company of phonographs and auxiliary equipment. It sells the floor model phonographs and sells Hideaway phonographs as well as installing them in restaurants under arrangements similar to that made with the Superior Tea Room. From about 1938 to 1944, Mr. Siegel was in the same type of business, operating on his own account. Prior to 1938 he was engaged in the business of selling sheet music. He has therefore had a lengthy and intimate experience with coin-operated phonographs. He states that such phonographs with selector devices have been on the market in Canada continually since 1934 with later models becoming more elaborate. He says that one such phonograph operated by remote control was in use as early as 1934 or 1935 and that by 1938 the use

of selector boxes, or wall boxes, was quite popular in Canada. He says they were called phonographs although children referred to them as juke boxes.

J. R. Hrdlicka, service manager of the phonograph department of the Rudolph Wurlitzer Company of North Tonawanda, New York Division, gave evidence on behalf of the defendants. He has been employed by that company for 28 years in various capacities, but mainly as service manager of radios and phonographs in various plants and stores. He says that his company first manufactured the coin-operated commercial phonograph in 1934 and that by 1936 or 1937 they manufactured them with remote selector wall boxes, although their competitors had introduced this device at an earlier date. They were made for domestic sales in the United States, as well as for export. This witness, however, had no personal knowledge as to their use in Canada; and while they were made by the phonograph department of his company and he called them "phonographs", he did not know the name used for them in Canada.

I am unable to discover any real or essential difference between the totality of the devices installed in the Superior Tea Room and those which would have been in use had the Wurlitzer 1800 been placed in the restaurant with its selector boxes and loudspeakers in the various stalls. As I have stated above, the self-contained Wurlitzer 1800 is, in my opinion, a phonograph or gramophone. In my view, it is still a gramophone when the single selector panel is replaced by a number of panels throughout the restaurant for more convenient use by the patrons or by adding further loudspeakers in the booths or on the walls so as to provide a better and more complete reception throughout the restaurant. It seems to me that if the owner of an ordinary coin-operated phonograph, situated in his living-room, desired to have recorded music in his dining-room and for that purpose placed a loudspeaker therein and connected it by means of electric wiring to the gramophone itself, the performance which he would hear in the dining-room would be a performance "by means of a gramophone". How else could it be described? The same result would follow if he proceeded still further and for his own convenience moved the selector panel into the dining-room. The witness Ker-

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ridge in cross-examination said that "In the light of my definition I would have to consider it (i.e., the installation just referred to) a 'phonograph' ". His definition of a phonograph was "a complete device for producing sounds from records or discs through amplifiers so that they can be audibly heard by whoever was there". Finally, he agreed that the installation in the Superior Tea Room could technically be called a "phonograph" within that definition.

Reference must again be made to the case of the *Composers, Authors and Publishers Association of Canada, Ltd. v. Associated Broadcasting Co. Ltd. et al.* (*supra*) on which counsel for the plaintiff relies. For the sake of brevity, I will hereinafter refer to it as the *A.B.C.* case. The facts are set out in the judgment of the Court of Appeal of Ontario to which I have referred above, and need not be restated in full. It is sufficient to summarize them as follows: The defendant A.B.C. supplied music to its subscribers (of whom there were about 180 in all, including the other defendants) by means of records played in a central control-room of the company, whence the impulses were transmitted by wires owned and operated by the Bell Telephone Company, to the premises of the subscribers, and reproduced there by means of amplifiers and loudspeakers, installed in the premises. The individual subscriber by the operation of a switch could shut off the sound without interfering with the use thereof by the others. By the contract between A.B.C. and the subscribers, A.B.C. agreed to supply to the subscriber "Music by Muzak Program Service" to the localities therein described, between the opening and closing of the subscribers' establishments. As part of the Muzak Service, A.B.C. agreed to install and keep in operating condition for the reception of Muzak programs in the subscriber's premises, certain equipment specified in the contract, presumably the amplifiers and loudspeakers.

At the trial, Schroeder J. (now J.A.) held that notwithstanding the separation of the instrumentalities by which the performance was effected, the performance of the music was a "performance by means of a gramophone", and the plaintiff's action was dismissed. In the Court of Appeal,

that judgment was reversed and it was held that such performance by the equipment referred to was not "a performance by means of a gramophone". Roach J.A., speaking for the Court, said (1):

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 a 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.

Here we 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 the control of neither (although A.B.C. is entitled to the use of it), but is actually in the control of the Bell Telephone Company. To call the sum-total of that equipment a gramophone, to my mind, is to distort the meaning of the word.

To my mind it is inconceivable that Parliament, by this legislation, intended that it should apply to equipment of which one end 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 under the control of a second person, and the wires by which they are connected spread across the whole width of the Dominion and be in the 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.

It will be seen at once that the facts in the *A.B.C.* case differ greatly from those in the instant case. Here the equipment was entirely controlled by one party, namely, the corporate defendant, save for the possible user of the volume control. That defendant owned all the equipment and exercised complete control thereover. The Hideaway in the basement was kept locked at all times and only the serviceman of the defendant corporation had access thereto. The records were owned, installed and from time to time changed by the serviceman and any necessary repairs or adjustments to the equipment were made by him. The other defendants had nothing to do with any of these matters. No use was made of telephone wires; the equipment was all in one location, namely, that leased by the partners to the corporate defendant.

(1) [1952] O.R. 322 at 340.

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In view of the special facts in the *A.B.C.* case and which differ so materially from those in the instant case, I am unable to reach the conclusion that it is in any way applicable to the case at bar. It remains to be stated that an appeal in that case to the Judicial Committee of the Privy Council was dismissed (1) and it was held:

> The popular or commercial meaning of "gramophone" did not embrace a mechanism which included an undefined length of electrical wiring laid by an independent authority under powers given by Parliament; accordingly, a public performance by means of the equipment or mechanism used was not a public performance by means of a gramophone within the meaning of s. 10B(6)(*a*).

For the reasons which I have endeavoured to state, I have reached the conclusion that the performance here in question was by means of a gramophone.

It remains to consider whether the defendants, or any of them, come within the provisions of subsection (7). In regard to the defendant company, there seems no doubt in law that it is the owner of the gramophone and as such can claim to be protected by the subsection, as it has done.

What is the position of the partners? At the trial much was said on the question as to whether or not in the named circumstances they had "authorized" the performance. That question would doubtless be of greater importance had I found that the performance was not by means of a gramophone. If, in fact, the partners "authorized" the performance *by means of a gramophone,* they were doing that which they were entitled to do without in any way infringing the rights of the plaintiff and without rendering themselves liable to pay to the plaintiff any fees, charges or royalties.

In the *A.B.C.* case, Roach J.A. considered the words "owners or users" of gramophones and at page 339 he said:

> Now, it surely is perfectly plain that the Legislature had in 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.

I am in full agreement with the opinion so expressed. It is clear, I think, that if the partners performed or authorized to be performed in public the musical works in question, they would be liable to payment of fees or royalties to the plaintiff were it not for the exempting provisions of the subsection.

(1) [1954] 3 All E.R. 708.

Then he continued:

> 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 ofr the public performance of musical works contained in the records. Those persons would be "the owners or users" of a gramophone.

It follows that if the partners had, as owners or otherwise, the control over records and a gramophone therein referred to, they would be the "owners or users" of a gramophone and therefore entitled to the benefit of the exempting provisions of the subsection on the facts established.

In *Vigneux's* case, the following statement appears at page 122 of the judgment of the Judicial Committee of the Privy Council:

> It remains to consider whether Raes and Vigneux, or either and which of them, come within the provisions of the sub-section. In their Lordships' opinion Raes do, as being the users of the gramophone by means of which a public performance of "Star Dust" was given in a place other than a theatre as defined. From another point of view it may be said that the customer, who is no party to these proceedings, was the user. But the point is immaterial, since their Lordships feel no doubt that Raes, who hired the instrument and had it placed in their restaurant in order to attract customers, who enjoyed a combination of food and music, used the instrument as a means whereby public performances of "Star Dust" and other musical compositions were given. In regard to Vigneux, no doubt in law they are the owners of the gramophone. As such they might if necessary, claim to be protected by the sub-section, but in their case no such claim is necessary, because, as their Lordships think, they neither gave the public performance of "Star Dust," nor did they authorize it. They had no control over the use of the machine; they had no voice as to whether at any particular time it was to be available to the restaurant customers or not. The only part which they played in the matter was, in the ordinary course of their business, to hire out to Raes one of their machines and supply it with records, at a weekly rental of ten dollars.

It will be noticed that in that case Raes had hired the instrument from Vigneux and that presumably, as Vigneux was found to have no control over the use of the machine, such control must have been in Raes. In the instant case the partners, in my opinion, are in practically the same position as was Vigneux. They had not hired the equipment but had leased a portion of their property to the defendant company, with full knowledge, of course, that the equipment in question would be placed there. They neither had nor exercised any control whatever over the

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use of the machine or the choice of records available for use. There is no evidence that any of them performed the musical works in question by placing a coin in the selector boxes. It cannot therefore be found that they either performed or authorized the performance of the musical works.

For the reasons given, my conclusion must be that the public performance of the musical works mentioned was by means of a gramophone; that the defendant company which admittedly authorized the performance, was, as "owner" of the gramophone, entitled to the benefit of the exempting provisions of subsection (7) of section 50 of the Act. I further find that the partners—the other defendants—neither gave nor authorized the public performance of the musical works and that consequently they have not infringed the plaintiff's rights. It is clear, however, that if the partners had been found to be "users" of the gramophone, they too would have been entitled to the benefit of the exempting provisions of subsection (7).

In the result, the plaintiff's action, as against all defendants, will be dismissed with costs.

Judgment accordingly.