
Toronto 1966 Mar. 15-18
Ottawa Mar. 25

BETWEEN:

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

AND

CTV TELEVISION NETWORK LTD., SPENCER W. CALDWELL and THE BELL TELEPHONE COMPANY OF CANADA ..... DEFENDANTS.

Copyright—Infringement—Performance of musical work on television—Network transmission by micro-wave—Whether "communication" of "work"—Copyright Act, s. 3(1)(f).

Procedure—Counsel restricting case in opening—Alternative basis advanced in argument following hearing—Whether permissible.

In May 1963 the defendant CTV network, employing the defendant Bell Telephone Co. facilities, transmitted by micro-wave from its Toronto studio to local stations in Canada for broadcast to their listeners certain musical works in which plaintiff held copyright. Plaintiff had authorized the local stations to make use of its copyright but contended that the micro-wave transmission to the local stations was an infringement by defendants of plaintiff's copyright under s. 3(1)(*f*) of the *Copyright Act*.

Held, dismissing the action, the micro-wave transmission did not effect a "communication" of a musical "work" to the local stations as required by s. 3(1)(*f*): (1) the fundamental electrical signal received by the local stations was not a musical "work"; and (2) there was no "communication" of a musical work until the ultimate listener's receiving set reproduced the musical work as originally performed.

Held also, plaintiff's counsel in his opening address having restricted plaintiff's case for infringement as indicated above, and the case having proceeded on that basis, plaintiff could not seek to rest its case on an alternative basis in argument at the conclusion of the hearing.

Semble, it was not an infringement of plaintiff's copyright for CTV to authorize or cause the local stations to use plaintiff's copyright which plaintiff itself had authorized them to use.

ACTION for infringement of copyright.

G. W. Ford, Q.C. and *J. V. Mills, Q.C.* for plaintiff

W. Z. Estey, Q.C. for defendants CTV Television Network Ltd. and Spencer W. Caldwell.

A. S. Pattillo, Q.C and *James W. Garrow* for defendant Bell Telephone Co. of Canada.

JACKETT P.:—This is an action under the *Copyright Act*, R.S.C. 1952, chapter 55, for infringement of copyright rights in musical works.

The plaintiff's claim is that the defendants[1] have infringed its copyright rights. Its claim depends upon the application of section 3(1) of the *Copyright Act*, the relevant portion of which reads as follows:

> 3.(1) For the purposes of this Act, "copyright" means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever, to perform, or in the case of a lecture to deliver, the work or any substantial part thereof in public; if the work is unpublished, to publish the work or any substantial part thereof; and includes the sole right
>
> (*f*) in case of any literary, dramatic, musical or artistic work, to communicate such work by radio communication;
>
> and to authorize any such acts as aforesaid.

This should be read with paragraphs (*p*) and (*q*) of section 2, which read as follows:

> (*p*) "musical work" means any combination of melody and harmony, or either of them, printed, reduced to writing, or otherwise graphically produced or reproduced;

[1] At the opening of trial judgment was given dismissing the action as against the personal defendant. Any reference to the defendants is therefore a reference to the two corporate defendants.

1966

COMPOSERS, AUTHORS AND PUBLISHERS ASSOC. OF CANADA LTD v. CTV TELEVISION NETWORK LTD. et al.

Jackett P.

(q) "performance" means any acoustic representation of a work or any visual representation of any dramatic action in a work, including a representation made by means of any mechanical instrument or by radio communication;

The plaintiff's claim[1] relates to the broadcasting by certain independent television broadcasting stations of music in relation to which the plaintiff had copyright rights. Such broadcasts were authorized by the plaintiff and there is no suggestion that such local stations infringed the plaintiff's rights. The plaintiff's claim is rather that the defendants infringed the plaintiff's copyright rights when the defendants did certain things for the sole purpose of enabling the local stations to make the broadcasts that were authorized by the plaintiff.

The plaintiff at all relevant times, owned that part of the copyright in a large number of musical works that consisted of the sole right to do the acts described in paragraph (*f*) of section 3(1) of the *Copyright Act* and to authorize any such acts. The defendant CTV Television Network Ltd. (hereinafter referred to as "CTV") is a company whose business, while it has been described as that of operating a private commercial network in Canada, was, for present purposes, that of acquiring "television programmes" and arranging for them to be broadcast in Canada by independently operated local television broadcasting stations. The Bell Telephone Company of Canada (hereinafter referred to as "Bell"), under arrangement with CTV, provided facilities whereby local television stations could be put in a position to broadcast such programmes.

By way of further background, while it is not material to what has to be decided, it may assist in appreciating the relevant facts to say that in the ordinary course of events,

[1] The trial proceeded upon the basis that there is to be an adjudication by the Court, as between the plaintiff and each of the defendants, as to whether there had been at least one act of infringement of the plaintiff's copyright rights in certain musical works by certain things done by the defendant on May 1, 1963 or May 5, 1963, and that, if such adjudication should be in favour of the plaintiff, there is to be a reference to determine the further acts of infringement, if any, that had been committed by the defendant as alleged by the statement of claim, and the damages or profits to which the plaintiff is entitled by virtue of all such acts of infringement. It further proceeded on the basis that, if it is found that there was no act of infringement on May 1, 1963 or May 5, 1963, the action must fail. The plaintiff made no attempt to establish any other act of infringement at the trial.

(a) CTV paid the producer of a programme, who might be a United States television network, for the right, and the necessary record or other means, to broadcast it in Canada,

(b) one or more advertisers paid CTV to arrange for the programme to be broadcast in Canada in conjunction with their advertising matter, and

(c) CTV paid local television broadcasting stations with which it had standing agreements (hereinafter referred to as "affiliated stations") for broadcasting the programme.

CTV was, therefore, in effect, a middleman between the producer of television programmes and the independently operated local television broadcasting stations who had a need for such programmes. It obtained advertising to be broadcast with such programmes and it made the necessary arrangements for the programmes to be "delivered" to the local broadcasting station.

On May 1, 1963, each of the affiliated stations broadcast a programme containing music in which the plaintiff owned copyright rights. Similarly, on May 5, 1963, each of the affiliated stations broadcast a programme containing music in which the plaintiff owned copyright rights. On both occasions, the plaintiff, as owner of the copyright rights in such music, had duly authorized the broadcasts.

Leaving aside the possibility of "live" broadcasts, the evidence shows that, in accordance with the ordinary practice in the television business, a local affiliated station could have been enabled to make such broadcasts

(a) by the use of a record or tape, which would have had to be delivered to the station physically,

(b) by the use of a "land" wire or cable, which would have conveyed to the station the same means of broadcasting the music as it would have got from the record or tape, or

(c) by the use of a combination of "land" wire or cable and a facility known as "micro-wave", which combination would also have conveyed to the station the same means of broadcasting the music as it would have got from the record or tape.

1966

COMPOSERS, AUTHORS AND PUBLISHERS ASSOC. OF CANADA LTD. v. CTV TELEVISION NETWORK LTD. et al.

Jackett P.

Any one of these was an ordinary method commonly used in the television business to put a local television station in a position to broadcast a programme containing music. In fact, all three of them are used or have been used in enabling stations affiliated with CTV to broadcast programmes supplied to them by CTV. The plaintiff, in argument, admitted that there would be no infringement of its copyright rights in the doing of what is involved in either of the first two methods that I have described. It contended, however, that there would be such infringement in doing what is involved in the third method that I have described because that method involves transmission of the means necessary to broadcast the music by micro-wave and transmission by micro-wave is transmission by radio.

The plaintiff's contention[1] is that what was done in Canada by the defendants to enable a local affiliated station to broadcast one of the musical works in question was,

[1]The plaintiff rested this contention very largely on evidence of Mr. Frederick Gall, a consulting engineer in the field of telecommunications who gave evidence to the effect that, to an engineer in this field, "radio communication" involves five stages: (*a*) a *source* of information or intelligence (voice, music, picture, signal, etc.); (*b*) a *transmitter*, being a device that converts the information or intelligence received to a signal in which form it is to be transmitted; (*c*) a *channel*, being a passage through the atmosphere; (*d*) a *receiver*, being a device for receiving the signal and converting it back to the form in which the information or intelligence was received from the source; and (*e*) the *destination*, being the recipient to whom it is desired to convey the original information or intelligence. The plaintiff's case was that the "source" was the apparatus in CTV's premises in Toronto, the "destination" was the apparatus in the affiliated station, and the "intelligence" communicated from the source to the destination was the fundamental electrical signal. While Mr. Gall's analysis of communication by radio communication from a technical point of view is an aid in considering the effect of paragraph (*f*) of section 3(1) of the *Copyright Act*, I cannot accept this evidence as being evidence by which the Court may be guided in interpreting paragraph (*f*). The word "radio" is probably a word from the world of the engineers but Parliament has defined it in the *Radio Act*, R.S.C. 1952, chapter 233, section 2(1)(i), which reads as follows:

> (i) "radio" means radiotelegraph, radiotelephone and any other form of radioelectric communication including the wireless transmission of writing, signs, signals, pictures and sounds of all kinds by means of Hertzian waves;

and I think that it can be assumed that Parliament is using the word "radio" in the *Copyright Act* with the meaning which is given to the word by the statute specially enacted to regulate "radio". (Compare *Canadian Admiral Corporation Ltd. v. Rediffusion Inc.*, [1954] Ex. C.R. 382, per

when the third method to which I have referred was adopted, in effect, to "communicate" such musical "work" by "radio communication" within the meaning of those words in paragraph (*f*) of section 3(1) of the *Copyright Act*. In my view this contention is invalid because

(*a*) What was done by the defendants to enable the local station to broadcast was not the transmission of a musical "work" within the definition of such a work as found in section 2(*p*) of the *Copyright Act*, and

(*b*) the defendants, in doing what they did to enable the local station to broadcast, did not "communicate" a musical work within the meaning of the word "communicate" in section 3(1)(*f*) of the *Copyright Act*.[2]

To understand the reasons for my conclusion, it is necessary to explain, in so far as it is relevant for present purposes, what was involved when the third method to which I have referred was adopted to enable a local affiliated station to broadcast music.

To make that explanation understandable, I must first state certain basic facts:

(1) It is possible, by use of appropriate apparatus, to make a "record" of a musical performance.

(2) It is possible, by use of such record and appropriate apparatus,

(*a*) to produce sounds which are a replica of the musical performance of which the record was made (hereinafter referred to as the "original musical performance"), or

---

Cameron J. at page 410; and *In re The Regulation and Control of Radio Communication in Canada*, [1932] A.C. 304 at page 310). The word "communicate" is, however, an ordinary English word and its effect in the statute must be determined by the Court as a question of law. In any event, it is clear that, according to Mr. Gall's evidence, what is, in accordance with the technical concept, communicated by radio to the local station is the fundamental electrical signal *and not the musical work* or any performance of it in an audible state.

[2] In view of my conclusion on these two grounds, it is not necessary to deal with a further argument by the defendants that it is implicit in paragraph (*f*) of section 3(1) that it extends to broadcasting by radio or communication by radio to the public.

1966

COMPOSERS, AUTHORS AND PUBLISHERS ASSOC. OF CANADA LTD. *v.* CTV TELEVISION NETWORK LTD. *et al.*

Jackett P.

(*b*) to impress on an electric current what is described as a "fundamental electrical signal".[1]

(3) The fundamental electrical signal may be used at some point to which the electric current on which it is impressed runs along a wire or cable

[1]Neither the fundamental electrical signal nor the micro-wave signal are perceptible by the senses of seeing or hearing. They are quite different in kind from light waves or sound waves. At no time or place during the transmission of either signal can it be said that the musical work exists, or an audible performance of it, even in a concealed form. The micro-wave signal can be used, with appropriate apparatus, to produce a replica of the original fundamental electrical signal and that signal can be used as a sort of pattern or mold, with appropriate apparatus, to produce a replica of the original music. A similar situation was found in *Chappell & Co. Ltd. v. Associated Radio Co. of Australia Ltd.*, (1925) V.L.R. 350, by Cussen J., at page 357:

> "The object, as in the case of the gramophone and the ordinary telephone with a continuous metallic connection, is not to convey atmospheric disturbances directly, as in speaking or acoustic tubes and other early contrivances, but to reproduce at the place of audition atmospheric disturbances similar to those occurring at the place of sonation."

A similar situation was also found in *Buck v. Jewell-LaSalle Realty Company*, (1931) 283 U.S. 191, per Mr. Justice Brandeis at pages 199 to 201:

"We are satisfied that the reception of a radio broadcast and its translation into audible sound is not a mere audition of the original program. It is essentially a reproduction. As to the general theory of radio transmission there is no disagreement. All sounds consist of waves of relatively low frequencies which ordinarily pass through the air and are locally audible. Thus music played at a distant broadcasting studio is not directly heard at the receiving set. In the microphone of the radio transmitter the sound waves are used to modulate electrical currents of relatively high frequencies which are broadcast through an entirely different medium, conventionally known as the "ether." These radio waves are not audible. In the receiving set they are rectified; that is, converted into direct currents which actuate the loudspeaker to produce again in the air sound waves of audible frequencies. The modulation of the radio waves in the transmitting apparatus, by the audible sound waves is comparable to the manner in which the wax phonograph record is impressed by these same waves through the medium of a recording stylus. The transmitted radio waves require a receiving set for their detection and translation into audible sound waves, just as the record requires another mechanism for the reproduction of the recorded composition. In neither case is the original program heard; and, in the former, complicated electrical instrumentalities are necessary for its adequate reception and distribution. Reproduction in both cases amounts to a performance."

See also *Performing Right Society Ltd. v. Hammond's Bradford Brewery Co.*, [1934] 1 Ch. 121; *Canadian Performing Right Society v. Ford Hotel*, [1935] 2 D.L.R. 391; and *Canadian Admiral Corporation Ltd. v. Rediffusion Inc.*, [1954] Ex. C.R. 382, at pages 402 *et seq.*

(a) to produce, by means of appropriate apparatus, a replica of the original musical performance, or

(b) to produce, by means of appropriate apparatus, a new signal being an effect upon the character of a very high frequency wave known as a Hertzian or electro-magnetic wave, which may be transmitted from point to point through the atmosphere (this transmission is described as micro-wave transmission and the signal may be referred to as the micro-wave signal).[1]

(4) The micro-wave signal so produced may be used, at the point to which it is transmitted, by means of appropriate apparatus, to produce a replica of the original fundamental electrical signal.

(5) The replica of the original fundamental electrical signal may, by the use of appropriate apparatus (a broadcasting station and a receiving set) be used to produce sounds (at the point where the receiving set is) that are a replica of the original musical performance.[2]

What happened on May 1, 1963 and on May 5, 1963, involved many different combinations of steps. It is, however, as I understand it, common ground that the plaintiff cannot succeed in its contention unless that contention is valid when applied to the following series of steps selected from the various combinations of steps that actually happened:

1. A musical work in which the plaintiff had Canadian copyright rights was performed in the United States and a record was made of the performance.

2. That record was sent to CTV's studio in Toronto, Canada, where it was used to impress on an electric current in wires belonging to Bell a fundamental electrical signal which was transmitted along such wires to Bell's premises in Toronto.

3. In Bell's premises in Toronto, the fundamental electrical signal was used to create a micro-wave signal,

[1]See footnote at page 878.

[2]With reference to the nature of the reproduction of a musical performance by a private receiving set, see *Mellor v. Australian Broadcasting Commission,* [1940] A. C. 491, per Viscount Maugham at page 500.

1966

COMPOSERS, AUTHORS AND PUBLISHERS ASSOC. OF CANADA LTD. v. CTV TELEVISION NETWORK LTD. *et al.*

Jackett P.

which was transmitted to Winnipeg by Hertzian waves by means of a micro-wave facility belonging to Bell.

4. At Bell's micro-wave station in Winnipeg, the micro-wave signal was used to create a replica of the original fundamental electrical signal, which was transmitted to the affiliated station in Winnipeg on an electric current in a land cable.

5. The replica of the fundamental electrical signal was used by the local station to broadcast to private receiving sets in such a way that a private receiving set that was tuned to the station could, by the application of its apparatus to a replica of the original fundamental electrical signal, create a replica of the United States performance of the musical work.

On these facts, I assume, for the purposes of this case, that there was, within paragraph (*f*) of section 3(1) of the *Copyright Act*, a communication by radio communication of the musical work in question to the persons listening to the private receiving sets.[1] This is, I believe, common ground as far as this case is concerned. The plaintiff contends, however, that there was in addition a "communication" of the musical "work" by "radio communication" completed when the replica of the fundamental electrical signal reached the local broadcasting station.

I reject this contention because what had been done in Canada up until the time the fundamental electrical signal reached the local station involved no transmission, much less communication, of the musical "work". Strictly speaking, nothing had been transmitted from Toronto to the local broadcasting station in Winnipeg. What had happened was that, as a result of electrical apparatus and

[1] I express this view subject to reconsideration on some subsequent occasion inasmuch as it is not necessary for the determination of this case and as there are very considerable difficulties in the application of the word "communicate" to the definition of "musical work" (section 2(*p*)) as sheet music, etc. The word "performance" (section 2(*q*)) is the word used in the statute for the acoustic representation of music as shown on the sheet music. Here there is, strictly speaking, no communication of the musical work (i.e., the sheet music), but a number of performances of the musical work (possibly all in private) as a result of a broadcast of signals by radio transmission.

phenomena, there had been created in Winnipeg a fundamental electrical signal that was an exact replica of the one in Toronto and it was that replica that had been delivered by wire to the local station in Winnipeg. Even if that be notionally regarded as a transmission of the original fundamental electrical signal, from Toronto to Winnipeg, the signal is not the musical work, whether the musical work be thought of as the written or other graphic representation of the melody and harmony, as the statute defines it, (compare section 2(*p*) of the *Copyright Act, supra*) or the audible "performance" of them. The signal is merely an electrical phenomenon whereby suitable apparatus can be made to produce an acoustic representation of the musical work or, in other words, to perform the work.

My second reason for rejecting the plaintiff's contention that there had been communication of the musical work by radio communication when the fundamental signal reached the local broadcasting station is that, even if, in one manner of speaking, it may not be inappropriate to regard the whole process as one of communicating the musical work by radio communication to the viewers of television sets, in my view there was no "communication" of the musical work, within the appropriate sense or senses[1] of the word, when all that had happened was that an electrical current having a signal "impressed" on it had reached the electrical apparatus of the local broadcasting station. Nothing that can be thought of as a musical work had, at that time, been communicated to anyone. Indeed, nothing that can be thought of as a musical work had been communicated to anyone until the receiving set created a replica of the programme originally performed in the United States. Just as "a message to be transmitted must have a recipient as well as a transmitter" and such a message "may fall on deaf ears, but at least it falls on ears",[2] so a

[1] The only senses of the word "communicate", as defined by the Shorter Oxford English Dictionary, that could have any application, are: "1. *trans.* to give to another as a partaker; to impart, confer, transmit....2. *spec.* to impart (information, etc.); to inform a person of....3. to give, bestow." Each of these senses involves causing information or something comparable to reach, or be imparted to, another person.

[2] *Cf. In re Regulation and Control of Radio Communication in Canada,* [1932] A.C. 304, per Viscount Dunedin at page 316.

1966

COMPOSERS, AUTHORS AND PUBLISHERS ASSOC. OF CANADA LTD. v. CTV TELEVISION NETWORK LTD. *et al.*

Jackett P.

musical work is not communicated unless it has a recipient upon whose ears it falls.[1]

Having reached the conclusion that there was no infringement completed when the fundamental electrical signal reached the local affiliated station, it is not necessary to decide whether any such infringement, if there had been one, was committed by CTV or Bell, or both. Indeed, not having been able to find any infringement in what was done, I find it difficult if not impossible to adjudicate as to who would have been guilty of the infringement, if there had been one.

Although it was quite clear to me that the plaintiff, by statements made by its counsel during his opening address, restricted its case on infringement to that with which I have now dealt, during argument, after all parties had put in their evidence, counsel for the plaintiff submitted that the plaintiff had an alternative basis for its claim against CTV for infringement. I am of opinion that, having set the scene for the trial of the action on the single basis, and the case having been tried on that basis, it was not open to the plaintiff to seek to rest its case on an alternative basis at the conclusion of the hearing. As counsel for CTV pointed out, in strenuously resisting the position so taken by the plaintiff, he had relied upon the position taken by the plaintiff at the beginning of the trial both with reference to cross-examination of witnesses and in determining what evidence to adduce. The plaintiff should not be permitted to change ground in such manner unless he has made an

[1] It is important to bear in mind that the object of the *Copyright Act* is the benefit of authors, whether the works were musical or of some other kind, and that the subject matter with which the Act deals is "of a very practical and human kind" and that "it involves really nothing more than the advantages that works of the various sorts....derive from the senses of sight or hearing possessed by the public as a whole." *Cf. Performing Rights Society Ltd. v. Hammond's Bradford Brewery Co*, [*1934*] 1 Ch. 121 at pages 127-8 per Maugham J, whose judgment was approved by the Court of Appeal. Radio transmission of a microwave signal may be part of the process of communication of a musical work by radio communication; it is not, however, taken by itself, communication of the musical work. Put another way, "Copyright is....only a negative right to prevent the appropriation of the labours of an author by another". See *Canadian Admiral Corporation Ltd. v. Redifusion Inc.*, [1954] Ex. C.R. 382, per Cameron J. at page 390. Radio transmission of a micro-wave signal can in no sense be regarded as being, in itself, the appropriation of the labours of the composer of the music that is the subject matter of the transmission.

application for, and obtained, an order for a new trial on proper terms. No such application was made.

In any event, I am of opinion that the plaintiff's alternative basis for supporting its claim of infringement by CTV would not have advanced its case. As I understood counsel for the plaintiff at the opening of his argument, he was putting the alternative ground on CTV's having *authorized* the broadcasts by the affiliated stations. At the end of his argument, he shifted his ground, as it seemed to me, to putting it that CTV had *caused* the broadcasts by the affiliated stations. Whichever it is, it seems to me to be a position that is remarkable for its lack of merit. The plaintiff authorized the affiliated stations to make use of its copyright rights. In my opinion, it was no infringement of the plaintiff's copyright rights for CTV to cause, or "authorize" the affiliated stations to make a use of the subject matter of the plaintiff's copyright rights that the plaintiff itself had authorized them to make. It cannot be a *tort* merely to authorize or cause a person to do something that that person has a right to do.

The action against each defendant is dismissed with costs.

All parties agreed before the conclusion of the trial that they had complete confidence in the professional integrity of Mr. Frederick Gall, a consulting engineer in the field of telecommunication, who gave evidence for the plaintiff, and that, if the Court should decide to make use of his services after the trial, he could be consulted as though he had been appointed under section 40 of the *Exchequer Court Act* as an assessor to assist the Court in the hearing of the cause. I have consulted Mr. Gall during the course of the preparation of these reasons for judgment and I desire to acknowledge his very real assistance in helping me reach my conclusion. In saying that, I do not wish to be taken, as indicating that Mr. Gall shares my views as to the result or as to any particular statement in these reasons. The conclusions are, as they must be, entirely my own.