

SELECTION: THIS LAND IS WHOSE LAND (THIS LAND IS YOUR
LAND) Tune only

COMPOSER:

TO BE USED ON THE SAME SIDE AS:

COME UP TO CANADA
GERDA
THE PARLIAMENT GAME
MONTCALM'S RETREAT

1967
LUDLOW
MUSIC INC.
v.
CANINT
MUSIC CORP.
LTD. AND
ARC SOUND
LTD.
Jackett P.

The words of the "new lyrics" referred to in the letter written on behalf of the defendant on March 7 reads as follows:

First came the Norsemen, extremely coarse men;
Mostly unshavian, all Scandinavian,
They wandered inland and called it Vinland,
This land that's made for you and me.....

This land is your land, this land is my land,
This far-from-Norway, just-won't-try-land;
The average Viking has no great liking,
This land that's made for you and me.

The early French had great persistence,
Despite the Indians' combined resistance;
With righteous feeling, they started stealing,
This land that's made for you and me.....

This land is your land, this land is my land,
This voyageur and fleur-de-he-land;
So populate it, then separate it,
This land is made for you and me.

Then came the English and assorted henchmen,
Who started fighting with all those Frenchmen;
All through this bother, they told each other,
This land is made for you and me.....

This land is your land, this land is my land,
This Rule Britannia, steak-and-kidney-pie-land;
This land of Tory, and Hope and Glory,
This land that's made for you and me.

While French and English were busy crying,
U.S. investors were quietly buying;
We didn't spot it until they'd got it,
This land that's meant for you and me.

This land ain't your land, this land ain't my land,
This All-Canadian, pie-in-the-sky-land;
Though we bemoan it, we'll never own it,
This land that's made for you and me;
and me; and me; and me.....

1967
 LUDLOW
 MUSIC INC.
 v.
 CANINT
 MUSIC CORP.
 LTD. AND
 ARC SOUND
 LTD.
 Jackett P.
 —

Beginning at some time of which no evidence appears in the record,¹ the defendant made records containing *inter alia* the “new lyrics”, sung to the tune of the plaintiff’s copyrighted song. Such records were first delivered to purchasers on March 20, 1967.

On March 22, 1967, the Statement of Claim herein was filed in this Court and this application was filed on March 25. At 3:30 p.m. on March 30, 1967, the day on which the defendant gave this Court an undertaking to refrain from such distribution pending disposition of this application, slightly over 11,000 of such records had been “shipped out” by the defendant. The defendant has 7,660 such records in its possession and firm orders for more than 12,600 of them. Unless enjoined from doing so, it intends to continue the production and distribution of such records.

On March 31, 1967, a further letter was written for the defendant to the plaintiff reading:

The letter of February 15, 1967 written by CANINT was premature and should be ignored.

It has come to my attention that our Notice of Intent to Use (March 7, 1967) re the above omitted notification of the earliest date at which time the then proposed records would be delivered to a purchaser. The enclosed Notice of Intent to Use is therefore submitted.

The Notice of Intent referred to therein bears date March 31, 1967 and reads:

You are hereby notified that we intend to reproduce on phonograph records the following song on which we understand you own or control the copyright. Kindly prove ownership including photostat copies of assignment contracts and/or songwriter’s contracts plus U.S. or Berne Convention Country copyright number and date of first registration.

We will pay statutory royalties according to the Canadian Copyright Act (1952) or as follows, if you send a mechanical license agreement *for world use* at the rates listed below:

L.P.’s retailing at \$1.98 or less—1c each

L.P.’s retailing at above \$1.98 to \$2.98—1-1/2c each

L.P.’s retailing at above \$2.98—2c

¹ According to the letter of February 15, 1967 from Canint Music Corp. Ltd., such records had already been made then.

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MUSIC INC.
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CANINT
MUSIC CORP.
LTD. AND
ARC SOUND
LTD.
Jackett P.

FIRST INTENDED USE IN RESPECT OF THIS NOTICE OF INTENT TO USE IS TUESDAY, APRIL 11th, 1967.

As I have already indicated, the defendant, in effect, concedes, subject to the objections as to the plaintiff's material with which I have already dealt, that, unless it is entitled, by virtue of section 19, to use, make and sell records of performances in which its "new lyrics" are sung to the tune of *This Land is Your Land*, it would be an infringement of the plaintiff's copyright for it to make and sell in the future the records that it was making and selling before it gave its undertaking to this Court. The contention that it has such a right by virtue of section 19 is based on the view that the plaintiff has one copyright in the *words* of its song and another copyright in the *tune* of its song, that what the defendant has been doing in no way constitutes a use of the *words* of the song, and that the use of the *tune* of the plaintiff's song as the defendant has been using it is authorized, in effect, by section 19. This position seems to be tenable only on the view that the words of a song do constitute one work for copyright purposes and that the tune is another work for copyright purposes. If the song is a single work for copyright purposes, it can hardly be said that, having regard to subsection (2) of section 19, subsection (1) of section 19 can be regarded as authorizing the taking of the tune separately from the words.

The plaintiff's main basis for rejecting this position is that it has a copyright in a single musical work being the words of its song set to its tune.¹

¹Presumably the plaintiff takes the alternative position as well that, even if it has separate copyrights in the words and tune respectively, the "new lyrics" are a substantial taking of the words of the plaintiff's song and contain such alterations and omissions as to invoke subsection (2) of section 19 so as to take the new lyrics out of the statutory authority that might otherwise be contained in subsection (1). If this contention had to be dealt with, it would be necessary to decide, in accordance with the type of reasoning to be found in *Joy Music, Ltd. v. Sunday Pictorial Newspapers (1920), Ltd.*, (1960) 1 A.E.R. 703, whether the "new lyrics" are a new composition or a mere adaptation of the plaintiff's words.

1967
 LUDLOW
 MUSIC INC.
 v.
 CANINT
 MUSIC CORP.
 LTD. AND
 ARC SOUND
 LTD.
 Jackett P.

In the absence of authority, there is no doubt in my mind that, according to the ordinary use of English words by ordinary people, a song is a musical work and the words of a song (considered apart from the tune of the song) do not constitute a musical work. Similarly, the tune of a song (considered apart from the words of the song) is not a song. I am of the view that the situation is the same under the *Copyright Act*. A song, in my understanding of the meaning of the word, consists of words so uttered as to convey to the listener not only the words, but a tune. So considered, I have no doubt that a song is a "combination of melody and harmony, or either of them", within the meaning of those words in the definition of "musical work" in section 2(p) of the *Copyright Act*, which reads 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;

and that, when it is printed, it is a "musical work" within the meaning of that expression as used in the Act.

When melody or harmony or both is communicated to the listener's ears by noises made only by musical instruments, it is a musical work "without words". A song is, however, melody or harmony or both communicated to the listener's ear by noises in the form of words made by a human voice and is therefore a musical work "with words". Section 2(v)¹ recognizes that at least for the purposes of our *Copyright Act*, a musical work may be "with or without words". [I do not have to consider what the copyright situation is where different persons compose the words and the tune, respectively. It may be, depending on the circumstances, that such persons are joint composers of the song and own the copyright jointly, or that one has a copyright in the words (which would then not be a musical work) and that the other has the copyright in the tune (which

¹ 2(v) "every original literary, dramatic, musical and artistic work" includes every original production in the literary, scientific or artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets, and other writings, lectures, dramatic or dramatico-musical works, musical works or compositions with or without words, illustrations, sketches, and plastic works relative to geography, topography, architecture or science.

would be an independent musical work). On the other hand, it may be that each would have a copyright in his part of the single work, namely, the song.]

It follows that, in my view, the plaintiff has copyright in the song *This Land is Your Land*—being the words of the song and the tune of the song considered as a single work—and that section 19 does not authorize the defendant to make records by means of which the tune of the song may be reproduced with words that are substantially different from the words of the song. I have in mind particularly subsection (2) of section 19. On the considerations that have been put before me, therefore, I am of the view that the plaintiff will probably obtain judgment in the action and that the defendant's position is not fairly arguable.

On that view of the matter, upon a proper exercise of judicial discretion, I am of the view, without considering the question of balance of convenience, that an interlocutory injunction should be granted as requested. If, on the other hand, it transpires that the plaintiff cannot establish "Woody" Guthrie's United States citizenship as of the time of the making of the work, then, it would appear that the matter will become one that is fairly arguable and consideration will have to be given to the balance of convenience. The order will therefore contain a term that it is subject to the right of the defendant to apply to have it rescinded, in the event that the plaintiff does not file satisfactory evidence of "Woody" Guthrie's United States citizenship as of the time when he composed the work, within twenty-five days from this date. On such an application the question of the adequacy of the proof of citizenship and of balance of convenience may be raised. The order will also contain a term that the defendant may apply to have it rescinded upon showing that the plaintiff is not proceeding with all reasonable expedition to bring the action to a conclusion on the basis of the substantive differences between the parties.

Having come to the above conclusion, I do not have to make any finding in connection with the question as to whether either of the notices given by the defendant to the plaintiff satisfy the requirements of paragraph (b) of section 19(1). In my view, as I see the matter at the present time, I should have to hold that the notice of March 7 was not a "prescribed notice", because it did not contain one of

1967
 LUDLOW
 MUSIC INC.
 v.
 CANINT
 MUSIC CORP.
 LTD. AND
 ARC SOUND
 LTD.
 —
 Jackett P.
 —

1967
 LUDLOW
 MUSIC INC.
 v.
 CANINT
 MUSIC CORP.
 LTD. AND
 ARC SOUND
 LTD.
 Jackett P.

the five particulars specified by section 21(2) of the *Copyright Rules*, and that the notice of March 31 does not avail the defendant, even for the future, because section 22 of the *Rules* requires that "the notice described in rule 21 shall be sent" not less than 10 days before "any contrivances on which the work is reproduced" are delivered to a purchaser. In my view, this latter provision makes it clear that the statutory authority conferred by section 19 is not available for the future to a person who has been infringing in the past. After all, section 19 is a somewhat unusual cutting down of the copyright and must be applied strictly. Section 19 makes it a condition to the section applying that the person making the contrivances "has given the prescribed notice of his intention to make the contrivances" and the notice prescribed is a notice sent to the owner of the copyright containing prescribed information not less than 10 days before "any" contrivances on which the work is reproduced" are delivered to a purchaser. In this case no notice containing the prescribed information was given before "any contrivances on which the work is reproduced" were delivered to a purchaser.

In addition to the terms I have already referred to, it will be a condition to the issuing of the restraining order that the plaintiff undertake to abide by any order that the Court may make respecting damages that the defendant may sustain by reason of the order. Compare *Novello v. James*,¹ and *Vieweger Construction Co. Ltd. v. Rush & Tompkins Construction Ltd.*²

Costs of the application in the cause.

By way of postscript, it might be well if I set out more explicitly the view concerning the factor of balance of convenience upon which I have proceeded in reaching the above conclusions.

In the first place, I should say that I have not had occasion in the past, or time on this occasion, to review the decisions on this question, and I shall be prepared to reconsider the view I am about to express upon full argument on a subsequent occasion if it becomes relevant to do so.

My view is that, in a case such as this, if there were a fairly arguable question as to whether the plaintiff or defendant owned the copyright, the question as to whether

¹ (1854) 43 E.R. 1111.

² [1965] S.C.R. 195.

matters ought to be kept in *statu quo*, or whether one party or the other should be allowed to exercise the copyright, would have to be decided on a balance of convenience. It does not follow as a matter of course from the fact that there is a fairly arguable question that the Court should refuse an injunction. Compare *Ollendorf v. Black*.¹ See, on the other hand, *McNeill v. Williams*.² So, here, if the plaintiff cannot establish Guthrie's United States citizenship, there will be a fairly arguable question on the interpretation of section 4(1) as to whether the plaintiff owns the copyright or the work is in the public domain, in which case the question as to balance of convenience will arise. On the other hand, where, on an application of this kind it appears to the Court, as it does in this case, that the plaintiff is very probably the owner of the copyright and it is quite improbable that the defendant has any right to use the copyrighted work, then it seems sufficiently probable that the plaintiff is entitled to relief that it ought to have an interlocutory restraining order regardless of the balance of convenience. The reason for this latter conclusion is simply that, as I view the matter, a person who has no fairly arguable right to use property should not be able to put himself in a position where the Court will aid him in using the property as against the person who is apparently the owner by embarking on an enterprise that involves such a use of the property that he will lose money or fail to make an anticipated profit if he is not permitted to use the property. In effect, as it seems to me, it is a proper exercise of judicial discretion to protect property rights against encroachment that has no apparent justification, and, in particular, to protect copyright against what appears to be piracy. Compare *Mawman v. Tegg*³ and cases annotated in the digest of that case in 28 E. & E. Digest (2nd ed.) at page 749. The decision in *Saunders v. Smith*⁴ would seem to be distinguishable as there was there conduct by the plaintiffs by which they had in effect acquiesced in the use of their copyrighted work, or might be taken to have done so. On the other hand, in *Grafton v. Watson*⁵ the Court of Appeal held that, where the owner of an industrial design

1967
 LUDLOW
 MUSIC INC.
 v.
 CANINT
 MUSIC CORP.
 LTD. AND
 ARC SOUND
 LTD.
 ———
 Jackett P.

¹ (1850) 64 E.R. 801.

² (1847) 11 Jur. 344, digested in 28 E. & E. Dig. 381 (1st ed.)

³ (1826) 38 E.R. 380.

⁴ (1838) 40 E.R. 1100

⁵ (1884) 51 L.T. 141

1967
LUDLOW
MUSIC INC.
v.
CANINT
MUSIC CORP.
LTD. AND
ARC SOUND
LTD.
Jackett P.
—

established a *prima facie* case of copying, the balance of convenience required that an interlocutory injunction be granted. While different considerations arise in an industrial design case, having regard to the plaintiff's contention here that what the defendant proposes to do will irreparably damage the value of its song, the decision may have some hearing if the question later arises for decision here. See generally, with reference to the exercise of discretion as to whether interlocutory injunctions should be granted in copyright cases, the cases digested in 13 E. & E. Dig. (2nd ed.) at page 130 *et seq.*