

1958
 *Dec. 5, 8
 1959
 Mar. 25

COMPOSERS, AUTHORS AND
 PUBLISHERS ASSOCIATION OF
 CANADA, LIMITED (*Plaintiff*) . . } APPELLANT;

AND

SIEGEL DISTRIBUTING COM-
 PANY LIMITED, VASIL C. LEK-
 SOVSKY, PANDO C. PERELOFF
 and BORIS C. LEKSOVSKY,
 Administrator of the Estate of
 VASIL PENCHOFF, Deceased,
 PANDALIS CHRIS, TRAIKOS
 ALEXOPOLUS and WILLIAM
 MICHAIL (*Defendants*) } RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Copyrights—Infringements—Public performance of music—Whether coin-operated phonograph or “juke box” in restaurant a gramophone—The Copyright Act, R.S.C. 1952, c. 55, s. 50(7).

The plaintiff society instituted proceedings for infringement of copyright by public performance over loudspeakers of music played by an instrument owned by the defendant S Co. and placed in the restaurant of the other defendants under the terms of a rental agreement. The instrument was placed in the basement of the restaurant and had wire connections to the loudspeakers and selectors in the booths of the restaurant. The instrument operated automatically by electricity whenever a patron deposited a coin in any of the selectors. The sound volume was under a central control at a desk on the main floor. It was argued, *inter alia*, in defence, that as it was impossible to describe the system by which the performance was accomplished as a gramophone, the exoneration from the payment of fees under s. 50(7) of the *Copyright Act* was inapplicable. The Exchequer Court ruled that the performance was by means of a gramophone. The plaintiff appealed to this Court.

Held (Cartwright and Fauteux JJ. dissenting): The performance was by means of a gramophone and therefore no fees were payable under s. 50(7) of the Act.

Per Rand, Martland and Judson JJ. The question to be decided was not precisely whether the entire installation was a gramophone but rather whether the particular performance, the thing aimed at, was by means of a gramophone. When a patron deposited a coin and selected a musical number to be played, the music produced was a public performance by means of a gramophone. The view that the

*PRESENT: Rand, Cartwright, Fauteux, Martland and Judson JJ.

word "gramophone", as used in the statute, was limited to a single cabinet or equivalent embodiment with all the parts held together in a single compact unit could not be accepted. Neither did the multiplication of speakers remove the performance from being one by means of a gramophone. No determinative influence could be attributed to the several selectors, the placement of the record on the turn-table and its engagement by a needle, or in the central volume control.

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Per Cartwright and Fauteux JJ., *dissenting*: When a customer in the restaurant deposited a coin in a selector in one of the booths, the music which followed was produced by means, not merely of the mechanism situated in the basement, which might well be described as a gramophone, but by the totality of all the combined instrumentalities. The totality of these component parts was not a gramophone in the popular or commercial meaning of that word; consequently, the performance of the musical works was a performance not by means of a gramophone but by means of an entirety, not embodied within the meaning of that word, one of the component parts of which was a gramophone. It followed that the defendants were not entitled to the exoneration from the payment of fees.

APPEAL from a judgment of Cameron J. of the Exchequer Court of Canada¹, dismissing an action for infringement. Appeal dismissed, Cartwright and Fauteux JJ. dissenting.

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

G. W. Ford, Q.C., and *A. D. Rogers*, for the defendants, respondents.

The judgment of Rand, Martland and Judson JJ. was delivered by

RAND J.:—The question here is narrow but not free from difficulty. It arises out of a situation with the following features. A musical programme is given in about 30 booths of a restaurant by means of two speakers affixed to a table in each by which electric impulses produced by and carried to them by wires from an ordinary primary gramophone mechanism set up in the basement of the building are converted into sound; the entire system through a further device is set in motion by the deposit of a coin in a box in each booth and selection of records is made by means of pressing a button opposite the name of the composition desired from lists set out to the number of over 100 on panels in each booth. The sound volume is under a central control by an employee of the restaurant at a desk on the

¹ [1957] Ex. C.R. 266, 16 Fox Pat. C. 194, 27 C.P.R. 141.

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main floor. The record selector device, so operated, is, in the basement, integrated with the impulse producer mechanism. The records are held in a revolving circular frame and as that selected reaches a certain point it is moved to engage a spindle on a vertical turn table where contact with it is made by a stylus or needle. The multiple distribution of the electric impulses begins at a point beyond the basic apparatus and an amplifier from which they are carried on the wires to the speakers. The playing of a record takes place through all the speakers at the same time and is not controllable at the individual booths. In the ordinary gramophone corresponding wires are led to a speaker installed with the primary apparatus within, say, a cabinet, and the distribution to the booths and the speakers simply divides that stream of impulses into many streams by means of extended wires. That product, the impulses, can be so carried to any number of speakers desired; even within a cabinet there may be several, the combined effect of which is intended more faithfully to reproduce the total sound that was recorded on the disc. The question is this: can the music given out by these speakers severally or in their entirety be described as a performance by means of a gramophone?

Some further features of the mechanical organization are to be mentioned. The entire apparatus is owned by the respondent company; it is maintained in the restaurant premises under the terms of a so-called lease from the individual respondent owners of the restaurant of space sufficient for its installation. It remains under the general control of the owner and operation is effected by the patrons. The records with the selector panels are chosen, owned and furnished by the company. The electricity is supplied by the restaurant owners. The installation of wires and speakers to the booths is one that is properly called "custom-made", that is, accommodated to the particular premises. The revenue from the users is divided equally between the owner and the restaurant keepers.

If, instead of being carried to all of these speakers, the impulses had been led only to a speaker installed in a cabinet, that is, in fixed and rigid relation to the primary apparatus, it is not disputed that the entirety would be a

gramophone notwithstanding the incorporation in that unity of similar starting, selecting and volume-controlling devices. It is argued, however, that the system in its entirety is the means by which the performance is accomplished, and that, as it is impossible to describe it as a gramophone, the exoneration from the payment of fees for the performance of copyrighted music given by s. 50, subs. (7) of the *Copyright Act*, R.S.C. 1952, c. 32 is inapplicable. That subsection reads:

(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 contention is that that language can be satisfied only by a single compact machine or instrument made up as the earliest phonographs were, or within a cabinet, as most of the present day machines are marketed.

From such a primary and basic productive unit, an entirety with an identity which, from the beginning, has been preserved, within its own immediate, integrated and single structure containing the entire mechanism for receiving, converting and making audible what has been written on a record, extensions in distribution can go from one speaker separated by a few feet from the primary mechanism in the same room to speakers throughout a building or by possibility, a continent. Commencing with an admitted gramophone and passing to the next stage of an ordinary cabinet with its speaker in a separate unit sold with and the two treated by the trade as a single instrument, at what point in the further extensions of the impulses by means of wires and speakers are we to say that within the meaning of the subsection a gramophone

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has ceased to be the means of producing the performance: that, instead, the original means has become a system of music distribution or of record-playing devices which cannot be said to be a gramophone means?

I cannot accept the view that the word as used in the statute is limited to a single cabinet or equivalent embodiment with all the parts held together in a single compact unit. To take the example already given, the speaker set up separately in the same room as a complementary unit of an entirety and sold as one, how can that difference of a few feet of wire render what was a gramophone when rigidly fixed in all parts to be that no longer? On the other hand, there may be such a division of production, control and function in generating, distributing and producing the ultimate expression in sound, through severance in the stages in electric impulses and in air waves that we at once see the total system to be divisible into, first, the creation of potential sound in electrical form as a commodity and secondly, its sale and purchase for utilization by conversion into actual sound by owners of speaking devices. That was the nature of the organization in *Associated Broadcasting Company Limited v. Composers, Authors and Publishers Association of Canada*¹. There the primary generation and the distribution of electric product over wires of an independent telephone company was under one control, and its utilization by purchasers who consumed the energy by the process of speakers under another.

Equally I cannot see that the multiplication of speakers or sound outlets produced from and fed by one primary apparatus, the entirety being under a single operational control within the premises in which the performance is given, removes the performance from being one by means of a gramophone.

In the restaurant here there would have been no objection if any number of separate single unit gramophones had been placed around the booths to furnish music to the guests: the operation of each would have been a performance by means of a gramophone. They could have been synchronized to the same music and all of them switched on or off by the same act. Together their sound

¹ [1954] 3 All E.R. 708.

effects would be in a substantial unison and musical harmony; and the whole would be one generalized performance. In a scientific sense the product of each speaker is no doubt uniquely its own, and in that sense also there is a time difference, infinitesimal though it may be, in reaching the ears of a hearer; but, as the evidence shows, for practical purposes there was in this case no conflict in the sound vibrations within the ordinary range of hearing creating musical confusion and what was heard, though primarily that in the booth of the particular listener, was a composite product.

The essence of what the statute contemplates and its purpose are important here. It contemplates the use of gramophones for an object which, apart perhaps from a free or charitable entertainment, is subsidiary or incidental to a different main object for which there is at a particular time and place some degree of public, with the entire music instrumentalities within the premises and in their productive action under a unified arrangement, operation and control: a self-contained establishment. The object is not to promote the sale of gramophones and if a dozen of them, whether co-ordinated or not, can be placed at different points in the restaurant, I think it would defeat the purpose of the statute if their basic productive means could not be combined into one to supply the existing speakers or their equivalents: if that is so, we are in the situation presented here.

A great deal of emphasis was placed on the fact of the severed selectors, including the placement of the record on the turn table and the engagement with it of the stylus. But an examination of the functions involved shows this to be neutral to the determinative matter. In the first phonographs with a cylindrical record the operation and production of sound assumed certain acts to be done by the person making use of them: he had to wind up by hand the spring that furnished the power to rotate the cylinder, to place the record on the cylinder, and to move or press the button or switch that would put the machine in action. But these external human acts were not part of the action of a gramophone; they were anterior to its functioning; they were acts to be done in order that the invented instrument and the copyrighted record could be

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brought under an operation which produced a music or other sound result. The particular means by which the corresponding acts here were done were likewise collateral or subordinate accidentals. When the power shifted from hand or spring to electricity the machine did not cease to be a phonograph, nor when the record was changed from a cylinder form to that of a disc, nor when the change of record shifted from the hand to the mechanical action of an arm, nor when the starting mechanism evolved to the means of dropping a penny in a slot activating a mechanical shaft to bring about the same action. In all these auxiliary changes the essential phonograph remained and under its original name. This points up the fact that such a name connotes certain constitutive physical members co-ordinated in action with certain forces to produce an entirety of desired effect; and the changes in means that serve collateral or preparatory functions do not affect or involve the essence of the constituted device. Similarly with the volume control; its centralization furnishes an external act to be performed by one person affecting all speakers collectively instead of being affected severally by an individual for each speaker. Nothing in that touches any integral feature of the gramophone instrumentality itself.

Finally it should be emphasised that the question is not precisely, is the entire installation a gramophone? That was the form in which the appellants' case in *Associated Broadcasting Company* case was presented and considered, and the Committee had no difficulty in concluding that the link of the Bell Telephone Company's participation was sufficient in itself to negative the submission. The question is rather whether the particular performance, the thing aimed at, provided by the proprietor, is by means of a gramophone. There is a real if somewhat elusive difference between them: the latter tends slightly to the adjectival meaning of the word gramophone; is the music gram-ophonic? Whether we take the case as being a performance by each speaker or a single performance in a merged product, the significance to the question is the same. When, then, a patron in such a booth deposits a dime and selects a musical number to be played, in the presence of the management, control and self-containment specified, it

may properly be said that the music produced is a public performance by means of a gramophone. That being so, under the subsection no fees are payable.

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The appeal should, therefore, be dismissed with costs.

The judgment of Cartwright and Fauteux JJ. was delivered by

CARTWRIGHT J. (*dissenting*):—This is an appeal, brought pursuant to leave granted on March 12, 1958, from a judgment¹ of Cameron J. delivered on July 19, 1957, dismissing the appellant's action with costs.

The action was for a declaration (a) that the appellant is the owner of that part of the copyright in certain specified musical works which consists of the right to perform the same or any substantial part thereof in public throughout Canada, (b) a declaration that the respondents and each of them have infringed the said copyright, (c) an injunction restraining the respondents from infringing the appellant's copyright in the said musical works, (d) a similar injunction as to all musical works the sole right to perform which in public in Canada is the property of the appellant, (e) damages. The appellant also claims an accounting as to profits.

The relevant facts and the contentions of the parties are set out in the reasons of my brother Rand, which I have had the advantage of reading, and do not require repetition.

In my view when a customer in the restaurant, operated by the respondents other than Siegel Distributing Company Limited, deposited a coin in the box in one of the booths, the music which followed was produced by means not merely of the mechanism situated in the basement, which might well be described as a gramophone, but by the totality of all the combined instrumentalities which are described in detail in the reasons of my brother Rand. The question which we have to decide appears to me to be whether that totality is aptly described by the word "gramophone". I accept the statement of Viscount Simonds

¹ [1957] Ex. C.R. 266, 16 Fox Pat. C. 194, 27 C.P.R. 141.

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in *Associated Broadcasting Co. Limited v. C.A.P.A.C.*¹, that it does not appear that that word has acquired a scientific meaning other than its popular or commercial meaning.

Cartwright J. If it could be said that the playing of the music in the restaurant was by means of a gramophone the case of *Vigneux v. Canadian Performing Right Society Ltd.*² would be decisive in the respondents' favour, but that case is of no assistance in ascertaining the meaning of the word gramophone as it was assumed in all the courts that the mechanism there under consideration was a gramophone.

Associated Broadcasting Co. Ltd. v. C.A.P.A.C., *supra*, dealt with a mechanism and a method of operation differing in several respects from the one under consideration in the case at bar, but it states the principle that the decisive question is not whether the mechanism on an analysis of its functions is seen to do what a gramophone does, but whether regarded as an entirety it would in ordinary and commercial speech be described as a gramophone. On that question dictionaries are of little, if any, assistance and its solution must in reality depend on the view of the judges who are called upon to decide it, as to the meaning of the word.

I have reached the conclusion that the totality of component parts with which we are concerned is not a gramophone in the popular or commercial meaning of that word and that consequently the performance of the musical works referred to in the evidence was a performance not by means of a gramophone but by means of an entirety, not embraced within the meaning of that word, one of the component parts of which was a gramophone. It follows from this that the respondents are not entitled to the exoneration from the payment of fees given by s. 50(7) of the *Copyright Act*.

I would allow the appeal, set aside the judgment of Cameron J. and direct that judgment be entered against all the respondents for the relief claimed in paras. (a), (b), (c) and (d) of the prayer for relief contained in the statement

¹[1954] 3 All E.R. 708 at 711.

²[1945] A.C. 108, 1 All E.R. 432, 4 Fox Pat. C. 183, 4 C.P.R. 65, 2 D.L.R. 1.

of claim and for damages to be assessed by the Exchequer Court. The appellant is entitled to its costs in the Exchequer Court and in this Court.

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Appeal dismissed with costs, Cartwright and Fauteux JJ. dissenting.

Solicitors for the plaintiff, appellant: Manning, Mortimer, Mundell & Bruce, Toronto.

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Solicitors for the defendants, respondents: Rogers & Rowland, Toronto.
