1967
*Dec. 8, 11, 12
1968
Apr. 1

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

AND

CTV TELEVISION NETWORK LIMITED and THE BELL TELEPHONE COMPANY OF CANADA (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Copyright—Infringement—Television broadcasting—Television network supplying musical programs to affiliated stations by microwave—Whether radio communication of musical works—Copyright Act, R.S.C. 1952, c. 55, ss. 2(p), (q), 3(1)(f).

In the operation of its television network, the defendant CTV obtains television programs recorded on video tape and supplies them to private affiliated television stations by using, in most cases, the microwave facilities of the other defendant, the Bell Telephone Co. Basing its claim on s. 3(1)(*f*) of the *Copyright Act*, R.S.C. 1952, c. 55, the plaintiff complained that the defendants had infringed the *Copyright Act* in some seven named musical works by "communicating the same by radio communication throughout Canada, or by causing or authorizing the said musical works to be communicated by radio communication throughout Canada, without the licence or authority of the plaintiff". The Exchequer Court dismissed the action and held that there was no infringement for the reason that there was no transmission or communication of the musical works, and that since the affiliated stations were authorized by licence from the plaintiff to make use of the subject matter of the copyright it could not be an infringement for the defendant CTV to authorize the affiliated stations to do it. The plaintiff appealed to this Court.

Held: The appeal should be dismissed.

The plaintiff's contention that the defendants had infringed s. 3(1)(*f*) of the *Copyright Act* by communicating the named musical works by radio communication could not be supported on the literal meaning of the statute because, in view of the statutory definitions, what was communicated was not "the works" but "a performance of the works". Nor could the action be supported on the construction of the enactment in the light of the intention revealed by the whole Act. This provision was obviously inspired by para. 1 of Article 11 *bis* of the Rome Convention which is set out in a schedule referred to in the Act (s. 53). That article clearly contemplates only public performances by radio broadcasting ("communication...au public

*PRESENT: Cartwright C.J. and Martland, Judson, Ritchie and Pigeon JJ.

par la radiodiffusion"). "Radiocommunication" in the statute was an obvious error carried from the English translation of the Convention which is in French only.

The action could not be supported on the contention that CTV "authorized" the television broadcasts because it only provided the means of doing that which CAPAC had authorized the affiliated stations to do.

Droit d'auteur—Violation—Télévision—Réseau de télévision fournissant par micro-ondes des programmes de musique à des stations affiliées—Y a-t-il transmission radiophonique d'une œuvre musicale—Loi sur le droit d'auteur, S.R.C. 1952, c. 55, arts. 2(p), (q), 3(1)(f).

Dans l'exploitation de son réseau de télévision, la défenderesse CTV obtient des programmes de télévision enregistrés sur ruban magnétique et les fournit à des stations privées de télévision qui lui sont affiliées. Dans la plupart des cas, ces programmes sont transmis au moyen de micro-ondes par l'autre défenderesse, la Bell Telephone Co. of Canada. Se basant sur l'art. 3(1)(*f*) de la *Loi sur le droit d'auteur*, S.R.C. 1952, c. 55, la demanderesse se plaint que les défenderesses ont violé la *Loi sur le droit d'auteur* à l'égard de sept œuvres musicales «en transmettant ces œuvres au moyen de la radiophonie à travers le Canada ou, en occasionnant ou autorisant la transmission de ces œuvres par radiophonie à travers le Canada, sans s'être procuré une licence ou la permission de la demanderesse». La Cour de l'Échiquier a rejeté l'action et a conclu qu'il n'y avait pas eu violation parce qu'il n'y avait pas eu de transmission des œuvres musicales, et que, puisque les stations affiliées avaient une licence de la demanderesse pour reproduire ces œuvres, la défenderesse CTV ne pouvait pas être coupable de violation de droit lorsqu'elle avait autorisé les stations affiliées à les reproduire. La demanderesse en appella à cette Cour.

Arrêt: L'appel doit être rejeté.

La prétention de la demanderesse que les défenderesses ont enfreint l'art. 3(1)(*f*) de la *Loi sur le droit d'auteur* en transmettant les œuvres musicales au moyen de la radiophonie ne peut être admise au sens littéral du statut parce que suivant les définitions statutaires, ce qui a été transmis n'était pas «l'œuvre» mais «une représentation de l'œuvre». L'action ne peut pas non plus être maintenue en se basant sur l'interprétation de la disposition en regard de l'ensemble de la loi. Cette disposition est évidemment inspirée du para. 1 de l'article 11 (bis) de la Convention de Rome reproduite dans l'annexe visée à l'article 53 de la loi. Il est clair que cet article ne vise que la représentation publique par la radio («communication...au public par la radiodiffusion»). «Radiophonie» dans la loi est une erreur évidente provenant de la traduction incorrecte de «radiodiffusion» par «radiocommunication» au lieu de «radiobroadcasting». La convention est en français seulement.

La prétention que CTV aurait enfreint les droits de CAPAC en autorisant les émissions de télévision ne peut pas être admise. C'est que CTV n'a pas fait autre chose que fournir un moyen de faire ce que CAPAC avait précédemment autorisé les stations affiliées à faire.

1968

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

APPEL d'un jugement du Président Jackett de la Cour de l'Échiquier du Canada[1], en matière de contrefaçon de droit d'auteur. Appel rejeté.

APPEAL from a judgment of Jackett P. of the Exchequer Court of Canada[1], in an action for infringement of copyright. Appeal dismissed.

B. J. MacKinnon, Q.C., and *J. E. Sexton*, for the plaintiff, appellant.

W. Z. Estey, Q.C., and *F. E. Armstrong*, for the defendant, respondent, CTV Television Network Ltd.

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

The judgment of the Court was delivered by

PIGEON J.:—The plaintiff appellant, Composers, Authors and Publishers Association of Canada Ltd. (hereinafter called "CAPAC") is a performing rights society contemplated in ss. 48 to 51 of the *Copyright Act*, R.S.C. 1952, c. 55 (hereinafter called the "Act"). In accordance with those provisions it has filed statements of fees which have been approved by the Copyright Appeal Board and published in the *Canada Gazette*. In those statements Tariff No. 3 entitled "Television Broadcasting" sets the fee payable for a general licence by an operator of television station other than the Canadian Broadcasting Corporation at 1½ per cent of the gross amount paid for the use of the operator's services or facilities.

Defendant CTV Television Network Ltd. (hereinafter called "CTV") has, since October 1, 1961, been operating a private television network in the following way. It acquires, or maybe produces, television programs recorded on videotape. It contracts with advertisers for payment in consideration of the addition of commercials. It also contracts with private affiliated television stations for having the programs broadcast at a proper time in consideration of stipulated payments. The programs are supplied to the affiliated stations in some cases by shipping a copy of the

---

[1] [1966] Ex. C.R. 872, 33 Fox Pat. C. 69, 48 C.P.R. 246, 57 D.L.R. (2d) 5.

videotape but, in most cases, by using facilities provided by the defendant The Bell Telephone Company of Canada (hereinafter called "Bell"). These facilities over short distances include cable only but, over long distances, the transmission is effected mostly by microwave.

It is obvious that CTV's gross revenue from the operations above described must be very substantially larger than the amount that it pays to the affiliated stations, seeing that this revenue has to cover the cost of the programs and the cost of transmission to the affiliated stations in addition to what is paid for broadcasting same and also provide for general expenses and profit. CAPAC has been trying to obtain a 1½ per cent fee on the larger amount. With that end in view, it has filed in November 1962 a tariff providing under the heading of "Television Broadcasting", in addition to the general licence above mentioned, for a general licence to CTV "for all network television broadcast". The fee for such licence is 1½ per cent of the gross amount paid to CTV for the use of the network less the amount in turn paid by CTV to its affiliated stations.

CTV objected to the tariff and, after it was approved, refused to take a licence. Thereupon CAPAC brought action in May 1963 alleging in substance the facts above recited and complaining of infringement of copyright in some seven named musical works by "communicating the same by radio communication throughout Canada, or by causing or authorizing the said musical works to be communicated by radio communication throughout Canada, without the licence or authority of the Plaintiff".

It is admitted that CAPAC is the owner of the copyright in the musical works in question. It is also admitted that these "musical numbers" as they are called in the admission were included in the programs transmitted for broadcasting to the affiliated network stations and effectively broadcast by them. It is also admitted that the transmission in several cases was effected by means of cable and microwave facilities of Bell. The question is was this an infringement of CAPAC's copyright?

In the Exchequer Court[1] it was held that there was no infringement for the reason that there was no transmission nor communication of the musical "works" from CTV to

[1] [1966] Ex. C.R. 872, 33 Fox Pat. C. 69, 48 C.P.R. 246, 57 D.L.R. (2d) 5.

1968

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

Pigeon J.

the affiliated stations and that the latter being authorized by licence from CAPAC to make use of the subject matter of the copyright, it could not be an infringement for CTV to authorize them to do it. As the learned President put it, "it cannot be a tort merely to authorize or cause a person to do something that that person has a right to do".

CAPAC's claim is based essentially on sub-para. (*f*) and the concluding words of subs. (1) of s. 3 of the Act, whereby it is enacted that "copyright" 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.

In considering this provision, it is essential to note the following definitions in s. 2 of the Act:

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

In the light of the above definitions, it is obvious that what was done on the occasion described in the action is not the communication of the "musical works". Leaving aside any technical considerations respecting the nature of the signals transmitted from CTV to the affiliated stations, these signals did not communicate the "musical works" as defined in the Act, that is graphic reproductions of melody and harmony. What was communicated was not the "works" but "a performance of the works". Thus, on a literal construction of the Act, CAPAC's case fails in so far as it rests on sub-para. (*f*).

The next question is: Should the enactment be read otherwise than literally? Counsel for CAPAC has drawn attention to the French version of the Act in which sub-para. (*f*) reads as follows:

> *f*) s'il s'agit d'une œuvre littéraire, dramatique, musicale ou artistique, de transmettre cette œuvre au moyen de la radiophonie. Le droit d'auteur comprend aussi le droit exclusif d'autoriser les actes mentionnés ci-dessus.

In this connection, the following facts should be noted. Section 53 of the Act refers to the Rome Convention which is set out in the Third Schedule. From this it appears that the Convention is in French only: the Schedule annexed

to the English version is expressly stated to be a translation. The history of the legislation further shows that sub-para. (*f*) as well as s. 53 and the Third Schedule were all added to the Act by the *Copyright Amendment Act* 1931, 21-22 Geo. V, c. 8. This makes it obvious that sub-para. (*f*) was inspired by para. 1 of Article 11*bis* of the Convention, which is in the following terms:

(1) Les auteurs d'œuvres littéraires et artistiques jouissent du droit exclusif d'autoriser la communication de leurs œuvres au public par la radiodiffusion.

In the Schedule this is translated as follows:

(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing the communication of their works to the public by radiocommunication.

It will be noted that where the Convention speaks of "radiodiffusion" *i.e.* radio broadcasting, the unfortunate translation reads "radiocommunication". The error in translation of the Convention was obviously carried into the statute intended to implement it, and, as happened in the case of the Hague Rules annexed to the *Water Carriage of Goods Act,* the English text was translated into French.

It is apparent that the above cited article of the Convention contemplates public performances by radio broadcasting. Such is the clear meaning of "la communication de leurs œuvres au public par la radiodiffusion" (communication of their works to the public by radio broadcasting). In the Convention "œuvres" (works) is not defined, therefore, as applied to musical works, it is properly taken in the primary sense of the composition itself, not its graphic representation as in the Act. Also, while "communication" does not usually mean "a performance" it is apt to include performances in its meaning along with other modes of representation applicable to other kinds of artistic or literary works that are not "performed".

It must be noted that in the Convention it is doubly indicated by "au public" and by "radiodiffusion" that public performances or communications only are aimed at. This is consonant with the general definition of "copyright" which, as stated in subs. 1 of s. 3 of the Act, applies to any reproduction of the work but, as respect performances, applies

1968

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

Pigeon J.

only to those that are "in public". Is it to be inferred that Parliament intended to depart from this principle in enacting subs. 2(*f*) simply because the words "to the public" are not found in it? Of course, if the provision was clear, if it could be applied literally to give this result, effect would have to be given to the intention. However, as previously noted, the material part of the provision does not read "to communicate a performance of such work by radio communication" but "to communicate such work by radio communication". In view of the statutory definitions of "musical work" and of "performance" the insertion of the word "performance" in the enactment is a very substantial departure from the text as written. Bearing in mind that the reproduction of a work as distinguished from a performance thereof is always within the definition of "copyright" while a performance is outside the scope of the definition if not in public, it is only through the insertion of the word "performance" without the words "in public" that a departure from principle would be effected.

On the assumption that the provision is not clear and that it must not be applied literally, it is not at all obvious that it must be read as suggested to give effect to CAPAC's contention. Once it is ascertained that interpretation has to be resorted to, the intention must be gathered from the statute as a whole and this certainly includes the Schedule that is referred to in the body of the Act and is printed with it. Upon such consideration it becomes apparent that sub-para. (*f*) is intended to achieve the result contemplated in paragraph 1 of article 11*bis*. Bearing in mind that the Rome Convention is in French no other conclusion is possible but that the intent is to provide that copyright includes the exclusive right of public performance or representation by radio broadcasting ("communication au public par la radiodiffusion").

The contention advanced by CAPAC would have the anomalous result that the extent of the copyright with respect to the communication or transmission of performances of musical works, would depend on the means employed for such communication or transmission. If it was by physical delivery of magnetic tape or by transmission of an electrical signal by cable, there would be no monopoly in favour of the owner of the copyright in the works per-

formed. However, such monopoly would exist if the transmission was by microwave, although such transmission would be as private as in the other cases.

I therefore come to the conclusion on the first point, that CAPAC's contention cannot be supported either on the literal meaning of the statute or on construction in the light of the intention revealed by the whole Act, including the Schedule.

As to the second point, it seems to me that the trial judge has effectively disposed of it. The authorization to make use of the copyright by performing the works through television broadcasts was given by CAPAC to the affiliated stations and it cannot be said to proceed from CTV. CTV effectively provided the means of doing that which CAPAC had authorized. In this connection it must be observed that the licences contemplated in ss. 48 and following of the *Copyright Act* are throughout described as performing licences or licences in respect of the "performance" of works.

It may well be that if CAPAC cannot collect fees from CTV under its tariff, it is because under the authority of legal provisions respecting fees for performances it is seeking to recover such fees from someone who does not effect performances. It may be significant in this respect that CAPAC is claiming infringement not by performance, but by radio communication of the work or by authorizing such communication.

CAPAC has pressed at the hearing the argument that if the law was not applied as it contends, it would be deprived of the economic advantage that the Act and the tariff were intended to provide to it. If such an argument could be considered, it would have to be observed that nothing in the Act appears to restrict the *quantum* and the modalities of the fees to be required under an approved tariff. If by reason of the setting-up of the CTV network the fee prescribed in the tariff applicable to television broadcasting stations has become inadequate, this is a matter for the Copyright Appeal Board on the submission of an appropriate tariff at which time it may have to be considered whether some special treatment should be provided to avoid a duplicate fee on the cost of programs recorded in the United States. It has not been shown that the Board could not approve a

1968

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

Pigeon J.

tariff under which, if it appeared proper and just, the fee payable for a licence in respect of network broadcasts would be higher than the present 1½ per cent.

I conclude that the appeal fails and must be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the plaintiff, appellant: John V. Mills, Toronto.

Solicitors for the defendant, respondent, CTV Television Network Ltd.: Robertson, Lane, Perrett, Frankish & Estey, Toronto.

Solicitors for the defendant, respondent, Bell Telephone Co. of Canada: Blake, Cassels & Graydon, Toronto.