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RAYMOND VIGNEUX, ARTHUR P. VIGNEUX AND MARIA ANNA CHAUVIN, CARRYING ON BUSINESS UNDER THE FIRM NAME AND STYLE OF VIGNEUX BROTHERS, AND THE SAID VIGNEUX BROTHERS, AND RAE RESTAURANTS, LIMITED (DEFENDANTS) ..... } APPELLANTS;

AND

CANADIAN PERFORMING RIGHT SOCIETY, LIMITED (PLAINTIFF).. } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Copyright—Musical work performed on coin-operated gramophone placed in restaurant under arrangement between owner of gramophone and owner of restaurant—Injunction asked by owner of public performing right in the musical work—Copyright Amendment Act, 1931 (Dom., 1931, c. 8) and amendments—Effect or application of subs. 6 (a) of s. 10 B—Copyright Act (1921, c. 24; R.S.C. 1927, c. 32).

Defendants V. Bros. carried on the business of installing in restaurants, etc., and looking after, electrically operated phonographs, with disc records, so arranged that a musical work could be performed by depositing a coin in the machine. They installed such a machine (with records, which were changed from time to time) in the restaurant of defendant R. Co., under arrangement that V. Bros. received $10 per week and, subject to that, the receipts from performances went to R. Co. Plaintiff society owned the public performing right in a musical work "Star Dust", which was performed by said machine in said restaurant, and sought to restrain defendants from public performance thereof.

Under *The Copyright Amendment Act, 1931* (Dom., 1931, c. 8) as amended, a society, etc., carrying on a business such as plaintiff's (dealing in performing rights) must file at the copyright office lists of musical works in current use in respect of which it has the right to grant performing licenses, and file statements of all fees, charges or royalties which it proposes during the next ensuing year to collect, in respect of performance of its works in Canada; and in case of neglect to file such statements, action to enforce any remedy for infringement is forbidden, without written consent of the Minister. After certain proceedings, such statements are considered by the Copyright Appeal Board and, with any alterations made therein by the Board, are certified by it as approved. The statements so approved are to be the fees which the society may sue for or collect in respect of the issue or grant by it of licenses for performance during the ensuing year, and it shall have no right of action for infringement against any person who has tendered or paid the approved fees. By subs. 6 (*a*) of s. 10 B, in respect of public performance by gramophone (in any place other than a theatre which

*PRESENT:—Duff C.J. and Rinfret, Davis, Kerwin and Taschereau JJ.

is ordinarily and regularly used for entertainments to which an admission charge is made), no fees, etc., are collectable from the owner or user of the gramophone, but the Board shall, "so far as possible", provide for the collection in advance from gramophone manufacturers of appropriate fees, etc., and shall fix the amount of the same.

Plaintiff had filed a statement of fees, etc., which it proposed to collect for grant of licenses, including license for public performance of "Star Dust", and by the kind of machine in question; but the Board had not, under said subs. 6 (*a*), provided for the collection in advance from gramophone manufacturers of fees, etc., covering such a performance; and defendants had paid no fee, charge or royalty.

Held, per Rinfret, Kerwin and Taschereau JJ. (the majority of the Court): Plaintiff was entitled to an injunction. The absence of provision by the Board for collection from the gramophone manufacturers under said subs. 6 (*a*) did not justify defendants in giving the public performance complained of. Subs. 6 (*a*) forms part of the *Copyright Act* (R.S.C. 1927, c. 32) and stands to be construed in the light of all the provisions of that Act. As no fee, charge or royalty had been paid by or for defendants, they had acquired no right to such performance. It was to no purpose to argue that, though plaintiff had complied with the Act, the Board had not, so far, provided for collection from the gramophone manufacturers. In the circumstances, plaintiff's rights, and remedy by injunction against infringement thereof, under general provisions of the *Copyright Act,* remained unaffected.

A license from a copyright owner permitting the manufacture of phonograph records does not by itself entitle the purchaser of a record from the licensee to use it for the giving of public performances.

Per the Chief Justice and Davis J.: As to public performances coming under said subs. 6 (*a*), it is clear from the statutory provisions that owners or users of gramophones have a statutory license for which no fees, charges or royalties are to be exacted from them; their statutory license is not in any way conditional upon the actual payment of fees prescribed by the Board and payable by gramophone manufacturers. Further, a supposed statutory intention that such owners or users, who are relieved from payment of charges, should be exposed to proceedings by owners of performing rights, and might be obliged, for permission to perform, to pay any charge demanded, would be a result quite incompatible with the policy of the legislation. (It was pointed out that a public performing right is a statutory right resting upon the enactments of the *Copyright Act, 1921,* which in effect came into force in 1924, and with which, and as part of which, are to be read and construed the provisions of *The Copyright Amendment Act, 1931,* and its amendments; and that the legislative adoption of the plan embodied in the latter Act and its amendments is a recognition of the fact that dealers in performing rights, which rights are the creature of statute, are engaged in a trade which is affected with a public interest and may, therefore, be properly subjected to public regulation). But said subs. 6 (*a*) has no application to performances by means of the instruments supplied by V. Bros. and operated under the terms of the mutual arrangements

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between them and the restaurant keepers. Subs. 6 (*a*) should be construed and applied in the light of the objects which Parliament had in view, which, as disclosed by the legislation itself, do not embrace the protection of those engaged in such a business as that of V. Bros.; and the restaurant keepers stood in the same case with V. Bros. from this point of view. Therefore defendants are liable to pay the statutory charges determined under the Act, independently of subs. 6 (*a*); and cannot be enjoined in respect of such performances if such charges are paid or tendered.

APPEAL by the defendants from the judgment of Maclean J., late President of the Exchequer Court of Canada (1). The defendants Vigneux Brothers carried on the business of installing in restaurants, etc., and looking after, electrically operated phonographs, with disc records, so arranged that one, two or five musical compositions could be performed by deposit of a coin (five cents, ten cents, or twenty-five cents) in the machine. They installed such a machine (with disc records, which were changed from time to time) in the restaurant of the defendant Rae Restaurants, Ltd., under the arrangement that Vigneux Brothers received $10 per week and, subject to that, the receipts from performances went to Rae Restaurants, Ltd. The Plaintiff owned the public performing right in a musical work "Star Dust", which was performed by said machine in said restaurant, and claimed an injunction restraining the defenants from public performance thereof. Maclean J. held that the plaintiff was entitled to the injunction claimed. The formal judgment in the Exchequer Court (which followed the wording of the claim in the statement of claim) ordered and adjudged

that the defendants and each of them, their and each of their servants and agents, are hereby restrained from publicly performing or authorizing the public performance of the musical composition known as "Star Dust" * * * and from installing or permitting the installation at any place of a device adapted publicly to perform such composition.

Leave to appeal to the Supreme Court of Canada was granted to the defendants by a Judge of this Court.

Samuel Rogers K.C. and *Walter M. Roland* for the appellants.

O. M. Biggar K.C. and *Christopher Robinson* for the respondent.

(1) [1942] Ex. C.R. 129; 2 Fox Pat. C. 179; [1942] 3 D.L.R. 449.

The judgment of the Chief Justice and Davis J. was delivered by

THE CHIEF JUSTICE.—The *Copyright Act* was enacted in the year 1921 and it may almost be described as having given legal effect to a code of copyright law. The Act provides that rights existing on the 1st of July, 1924, of the kinds specified in the first column of the first Schedule of the Act, shall be converted into the rights defined oppositely in the second column of the Schedule. The Schedule is in these words:—

FIRST SCHEDULE

Existing Rights

Existing Right	Substituted Right
(*a*) *In the case of Works other than Dramatic and Musical Works.*	
Copyright.	Copyright as defined by this Act.
(*b*) *In the case of Musical and Dramatic Works.*	
Both copyright and performing right..	Copyright as defined by this Act.
Copyright, but not performing right...	Copyright as defined by this Act, except the sole right to perform the work or any substantial part thereof in public.
Performing right, but not copyright....	The sole right to perform the work in public, but none of the other rights comprised in copyright as defined by this Act.

For the purposes of this Schedule the following expressions, where used in the first column thereof, have the following meanings:—

"Copyright" in the case of a work which according to the law in force immediately before the commencement of this Act has not been published before that date and statutory copyright wherein depends on publication, includes the right at common law (if any) to restrain publication or other dealing with the work;

"Performing right" in the case of a work which has not been performed in public before the commencement of this Act, includes the right at common law (if any) to restrain the performance thereof in public.

I have reproduced the Schedule because I think it is important to realize that the rights included in copyright are rights dependent upon statutory enactments which in effect came into force in the year 1924. The right with which we are more particularly concerned is that which is given by section 3, "the sole right * * * to perform * * * the work or any substantial part thereof in public." At common law the author of a musical or dramatic work had the right to prevent its performance

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in public so long as it remained unpublished, but the right disappeared upon publication. This, of course, was unfair, but the Statute of Anne did not help the author and it was not until about one hundred years ago that the authors of musical works obtained some statutory relief. By the English *Copyright Act* of 1911 the law was put upon its present footing and the sole right of public performance was vested in copyright owners generally. The right is not limited to the cases of musical and dramatic works; in this respect the Canadian Act of 1921 follows the English Act. The right is a statutory right resting upon the enactments of the statute of 1921, which in effect came into force in 1924 and, as we shall see, the statutory provisions, which it is our duty now to consider, are provisions which must be read and construed as part of the enactments of the *Copyright Act* of 1921.

Seven years after the Act of 1921 came into force the legislature realized that in respect of performing rights a radical change in the statute was necessary. Societies, associations and companies had become active in the business of acquiring such rights, and the respondents in this case admittedly have more or less successfully endeavoured to get control of the public performing rights in the vast majority of popular musical and dramatico-musical compositions which are commonly performed in public. The legislature evidently became aware of the necessity of regulating the exercise of the power acquired by such societies (I shall refer to them as dealers in performing rights) to control the public performance of such musical and dramatico-musical works. Legislation was enacted first in 1931, which was subsequently amended in 1936 and in 1938. It is necessary to call attention to section 3 of the statute of 1938:—

> *The Copyright Amendment Act, 1931,* as amended by chapter twenty-eight of the statutes of 1936 and by this Act, shall be read and construed with, and as part of, the *Copyright Act.*

The plan which the legislature adopted was this: Associations (dealers in performing rights, that is to say) are to file at the copyright office lists of all dramatico-musical and musical works in current use in respect of which the dealer has the right to grant licenses or to charge fees for performances, and to file statements on or before the first of November in each year of all charges or royalties which

such dealer proposed during the next ensuing calendar year to collect in compensation for the issue or grant of licenses in respect of the performance of such works.

There was set up a Copyright Appeal Board whose duty it is to consider these proposed charges and to make such alterations in the statements as may seem just and transmit the statements so altered or revised, or unaltered, as the case may be, to the Minister certified as approved statements. The statements so certified are published in the *Canada Gazette;* and the fees, charges or royalties so certified are the fees, charges or royalties which the performing rights dealer may collect in respect of the issue of licenses during the ensuing calendar year. The Act provides that no dealer shall have any right of action or have any right to enforce any civil or summary remedy for the infringement of the performing rights in any of its works against any person who has tendered or paid to such dealer the fees, charges or royalties that have been approved.

Under this plan the dealer in performing rights has his sole right to perform any particular musical composition in public qualified by a statutory license vested in everybody who pays or tenders to the dealer a fee, charge or royalty which has been fixed by the Copyright Appeal Board and notified in the *Canada Gazette.* That seems like a revolutionary change, but it is evident that the legislature realized in 1931 that this business in which the dealers were engaged is a business affected with a public interest; and it was felt to be unfair and unjust that these dealers should possess the power so to control such performing rights as to enable them to exact from people purchasing gramophone records and sheets of music and radio receiving sets such tolls as it might please them to exact. It is of the first importance, in my opinion, to take notice of this recognition by the legislature of the fact that these dealers in performing rights, which rights are the creature of statute, are engaged in a trade which is affected with a public interest and may, therefore, conformably to a universally accepted canon, be properly subjected to public regulation. It is not out of place here to call attention to an observation of Lord Justice Lindley in *Hanfstaengl* v. *Empire Palace* (1):—

(1) [1894] 3 Ch. 109, at 128.

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> Copyright, like patent right, is a monopoly restraining the public from doing that which, apart from the monopoly, it would be perfectly lawful for them to do. The monopoly is itself right and just, and is granted for the purpose of preventing persons from unfairly availing themselves of the work of others, whether that work be scientific, literary, or artistic. The protection of authors, whether of inventions, works of art, or of literary compositions, is the object to be attained by all patent and copyright laws. The Acts are to be construed with reference to this purpose. On the other hand, care must always be taken not to allow them to be made instruments of oppression and extortion.

This passage expresses the *raison d'être* of the enactments under consideration.

It was considered, however, that under the plan as originally devised, the purchasers of gramophone records and the possessors of wireless receiving sets were still placed in a position in which they ought not to be placed. The decisions as to the meaning of " public performance " had made it unsafe for the owner of a gramophone or of gramophone records who carried on, for example, a tea shop, to use the gramophone for playing the records in her shop, or to permit her customers to use it. She might be entitled to do so, or she might not. The answer to the question would depend upon a variety of considerations, whether, for example, the gramophone manufacturer possessed authority to authorize the public performance of the records, whether she had derived such authority through the purchase of records, and so on; and these considerations, of course, she would be quite incapable herself of passing upon. The legislature, no doubt, thought that a law which made it necessary for the purchasers of gramophone records to consult a lawyer to ascertain whether or not they could safely play their records in such circumstances, was not satisfactory and was not in harmony with the general spirit of the copyright law, as explained by Lindley L.J.; and, accordingly, special provision was made dealing with the owners of gramophones and wireless receiving sets and the use of these instruments in places " other than a theatre which is ordinarily and regularly used for entertainments to which an admission charge is made". It was declared (subsection 6 (*a*)) explicitly that such persons should not be called upon to pay any fee, charge or royalty in such circumstances and the duty was imposed upon the Copyright Appeal Board to make provision for fees, charges

and royalties appropriate to this situation. I confess I find no difficulty whatever in reading the language of this enactment. It declares in unqualified terms that no fee, charge or royalty is to be exacted from the owner of a gramophone record or radio receiving set in the circumstances specified, and compensation is provided in the duty imposed upon the Board to make such provision as appears to be appropriate and possible in the circumstances.

It is plain that neither subsection 3 of section 10 nor subsection 9 of section 10B has any application to the owners of receiving sets, or the owners of gramophone records, making use of them in the conditions contemplated by subsection 6 (*a*). As no fee, charge or royalty is to be collectable from them, it follows by necessary implication that they are excluded from the lists required by subsection 2 of section 10 and that generally the provisions of sections 10 and 10B (except subsection 6 (*a*) itself) have no application to them. The Copyright Appeal Board has no authority to approve any fees, charges or royalties to be exacted from them in cases where the rule of the subsection prevails.

The result is that in respect of such fees, charges and royalties which, apart from subsection 6 (*a*), would be exigible from the owners of records and receiving sets, the dealer gets the benefit of the provisions of subsection 6 (*a*) which invests the Copyright Appeal Board with the authority and the duty to make provision, so far as may be possible, for substituted charges which are to be collected from the radio broadcasting stations or gramophone manufacturers and which are to be appropriate to the conditions created by the enactments of subsection 6 (*a*); these conditions are, it is perhaps needless to repeat, that in respect of the places defined no fees, charges or royalties shall be collectable from the owner or user of a radio receiving set or gramophone in respect of a public performance by means of such an instrument.

A clear duty is imposed upon the Copyright Appeal Board. It is discretionary in the sense that the Board must determine how far it is possible to make provision for the collection in advance from broadcasting stations and gramophone manufacturers of charges which ought to be paid in respect of such public performances. If it is not possible to make such provision, that is the end of the matter. But there is no discretion vested in the Board

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in respect of the exaction of fees, charges or royalties from the owners of gramophones or receiving sets; that is settled by the statute which in the plainest terms forbids it. There is no discretion vested in the Board as to the obligations of the broadcasting stations and the gramophone manufacturers. Their obligation is to pay the fees, charges and royalties for which the Board finds it possible to make provision. As regards the owners of the performing rights, the benefit they receive from the statute is their right to receive and to be paid by the broadcasting stations and gramophone manufacturers such fees, charges and royalties as the Board finds it possible to provide for. This right is given to them in consideration of the statutory license for public performance by these instruments to the owners and users of gramophones and radio receiving sets in the conditions defined by subsection 6 (*a*) which is implicit in these provisions.

Subsection 6 (*a*) imposes no obligation, either expressly or by implication, upon these licensees in respect of compensation to the owners of the performing rights, and I think it is not contemplated by these enactments that their statutory licenses shall in any way be conditional upon the actual payment of fees prescribed by the Board and payable by gramophone manufacturers or broadcasting stations.

In the judgment appealed from, the view is expressed that the statutory rights of the owner of the performing rights can only be taken away by expressed words; but the legislation of 1931, 1936 and 1938 must be read as part of the *Copyright Act,* as we have seen. The public performing rights of the copyright owner are, again as we have seen, the creature of statute and his rights are such as appear from an examination of the legislation as a whole, of the years 1921, 1931, 1936 and 1938, all of which must be read and construed as the enactment of a single statute.

It is impossible, I think, to suppose an intention on the part of the legislature that these two classes of persons, who are relieved from the payment of charges, should be exposed to the unrestrained mercies of the dealers in the circumstances specified. It was to protect people from these mercies that the plan was originally conceived and designed. Consider their position under the judgment

appealed from. The owner of a receiving set may use his receiving set for broadcasting music in a public hall, or theatre, where a charge for admission is usually made and the fee he is obliged to pay is fixed under the statute; but if he attempts to use it in the circumstances specified in subsection 6 (*a*), if he attempts to use it in a small tea room, he is exposed to proceedings and may be obliged to pay any charge the dealers may demand. This is a result quite incompatible with the policy of the legislation.

I am, therefore, quite unable to agree with the learned President of the Exchequer Court in respect of one of the grounds of his judgment. There remains, however, another and distinct ground upon which he gave judgment for the respondents, which has to be considered: that is, whether or not these appellants, carrying on, as the learned President has said, a business of publicly performing musical compositions and dramatico-musical compositions by means of gramophones and under arrangements in the nature of a partnership with restaurant keepers, are within the protection of subsection 6 (*a*). This is a point which, after the most careful consideration, I have come to the conclusion must be decided in the sense in which the learned President has passed upon it. Subsection 6 (*a*) ought to be construed and applied in the light of the object the legislature had in view. I do not think the objects of the legislation, as disclosed by the legislation itself, embrace the protection of people engaged in the business in which the appellants are engaged. The restaurant keepers stand, I think, in the same case with Vigneux Brothers from this point of view. This is what the learned President says:—

> The question then arises, and Mr. Biggar raised and discussed it, does s.s. 6 (*a*) apply to the facts developed in this case and was it intended that it should? Was s.s. 6 (*a*) designed to protect persons, such as the defendants in this case, from an action for an injunction restraining them from the public performance of the plaintiff's musical works, in the manner and by the means I have described without being duly licensed therefor? That is all the plaintiff seeks by this action. This is not an action for compensation or damages for infringement of copyright, or for the collection of fees or royalties, for the use of the plaintiff's copyright in musical works; it is simply a question as to whether or not the plaintiff in the facts in this case, and the statute, is entitled to an injunction restraining the defendants from infringing its copyright in a certain musical work for profit, without license or authorization. That seems to me to be the neat point for decision, and when it is stated it does not seem to be one that permits of any extended discussion. The conclusion which I have reached is that the defendants do not fall

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within the class protected by s.s. 6 (*a*) of s. 10B. They are not I think the "owner or user" of a gramophone giving public performances in the sense contemplated by that statutory provision. They are virtually partners in a distinct class of business, in a venture of publicly performing musical works purely for profit, for a fee in the form of a coin or coins deposited in the gramophone by the person desiring the performance of certain musical works, and presumably for the gratification of that person. The whole scheme is entirely one for profit making, something apart from the restaurant business itself, or the ownership of the gramophone, one contributes the gramophone and the records and services the same, and the other contributes the premises, and they invite such of the public as desire the performance of musical works to deposit a certain coin in the gramophone, and this automatically causes the gramophone to perform musical works for the person who has paid a fee in the form of coins of a certain denomination.

I agree, I repeat, with this conclusion of the learned President in which he accepted the argument advanced by counsel for the respondents. Subsection 6 (*a*) having no application to these performances by the instruments supplied by the appellants, Vigneux Brothers, under their arrangements with the restaurant keepers, the appellants are under an obligation to pay the fees fixed in accordance with the provisions of the statute other than subsection 6 (*a*); and, so long as such fees are paid or tendered, the appellants are not liable to be enjoined. The precise form of the order should be settled after counsel have spoken to the point.

The respondents should have the costs of the appeal.

The judgment of Rinfret, Kerwin and Taschereau JJ. was delivered by

RINFRET J.—Under the firm name of Vigneux Brothers, the appellants Raymond Vigneux, Arthur P. Vigneux and Maria Anna Chauvin carry on the business of distributing and servicing electrically operated phonographs of the kind popularly known as "juke-boxes". These juke-boxes are installed in restaurants and like places of popular resort. They contain phonograph disc records so arranged that one or more musical compositions, up to five, can be selected for performance by anyone who deposits a coin in the machine, one record being performed on the deposit of five cents, and two or five on the deposit of ten cents or twenty-five cents.

Different arrangements are made by Vigneux Brothers with the restaurant keepers, or with operators of places

of public resort, in which these juke-boxes are installed. In some cases, Vigneux Brothers and the operator each receive a pre-determined share of the amount of money found from time to time in the box as a result of the deposit of the money made in it. In others, the operator agrees to pay a fixed sum to Vigneux Brothers, irrespective of the amount found deposited; subject to Vigneux Brothers' claim, the operator takes the whole of the amount found in the box.

The latter was the form of arrangement in effect during 1941 between Vigneux Brothers and their co-appellant, Rae Restaurants Limited, which operated a restaurant known as Rae's Wonder Bar on Lakeside Boulevard, in the city of Toronto.

Whichever of the two alternative arrangements may be in force, Vigneux Brothers supplied, not only the box, but the records required for its use. The boxes are locked, and only Vigneux Brothers' employees have keys to them. The employees are sent around weekly from box to box; they open the box; they reverse some of the records in it; they substitute new ones for others, no doubt using their discretion as to this, but deferring probably to suggestions of the operator of the place where the box is installed. The money found in the box is counted and a settlement is then and there made with the operator of the place.

In the case of the box operated at Rae's Wonder Bar, the weekly receipts from the box varied between $36 and $50. Of this, Rae's restaurants have agreed to pay $10 to Vigneux Brothers; and they were entitled to retain the balance, which was immediately handed to them by Vigneux Brothers' employees.

For the purpose of the present appeal, it is understood that we may assume that the respondent Canadian Performing Right Society Limited is the assignee of the copyright in a musical composition known as "Star Dust". There was some question raised before us, as well as before the Exchequer Court, as to whether the respondent had established title to the performing right and the copyright in the selection "Star Dust"; but, at bar, counsel for the appellants stated that they wanted the present case to be treated as a test case and that the question of title should be disregarded.

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Evidence was given that, between eleven o'clock p.m. and midnight, on May 29th, 1941, an employee of the respondent, accompanied by his brother, went to Rae's Wonder Bar, that the restaurant had accommodation for about 120 persons, that it was a place of public resort, that about 25 patrons were present at the time; and that, as a result of the deposit of a coin in the juke-box by one of these patrons, the composition "Star Dust" was performed, the performance lasting for about 2½ minutes. It was upon this performance that the action was founded.

There is no contest either as to the fact of this performance, and we are to assume that the respondent had, in general, an exclusive right to permit the public performance of the composition.

The respondent claimed an injunction restraining the defendants and each of them, their servants and agents, from publicly performing or authorizing the public performance of the musical composition aforesaid, and from installing or permitting the installation in any place of a device for performing such composition.

The two defences relied upon are: (*a*) that by means of these machines, the appellants are free to perform copyright compositions as they please, by virtue of a provision inserted by sec. 4, ch. 27, of the Statutes of Canada, 1938, in sec. 10B of *The Copyright Amendment Act, 1931,* as amended by section 2 of ch. 28 of the Statutes of Canada of 1936; and (*b*) that a license granted by Mills Music Inc. to the Victor Talking Machine Company to make records such as that which was used for the performance in question conferred upon all purchasers of these records a right to give such public performance of the record compositions as they saw fit.

The learned President of the Exchequer Court arrived at the conclusion that the venture in which the appellants were engaged was something entirely contrary to the whole purpose and spirit of the *Copyright Act;* that section 10B of the Act does not purport to take from the owner of a musical work the right to restrain infringement of his copyright where no license has been granted, or where no definite provision has been made for compensation to the owner; and that consequently the appellants should be restrained, as prayed for.

There are, therefore, two questions for the decision of this Court:—

(*a*) Whether a license from the copyright owner permitting the manufacture of phonograph records entitles the purchaser of a record from a licensee to use it for the giving of public performances;

(*b*) Whether section 10B of *The Copyright Amendment Act 1931*, as amended, justifies the appellants, under the circumstances, in giving such public performances as that in question.

Dealing first with question (*a*), section 19 (1) of the *Copyright Act* makes special provision for the making of " records, perforated rolls, or other contrivances, by means of which sounds may be reproduced and by means of which the work may be mechanically performed ".

Under subsection 2 of section 19, the royalty to be paid is 2 cents for each playing surface of each such record and 2 cents for each such perforated roll or other contrivance.

The authors and composers of the selection " Star Dust " assigned the copyright thereof to Mills Music Inc., which is registered as the first owner of the copyright under the provisions of the *Copyright Act*. Mills Music Inc. granted to Victor Talking Machine Company of Canada the right and license to mechanically reproduce the said copyrighted musical work and manufacture and sell talking machine records derived therefrom. It was under this license that the record in question was made as one of the 100,000 a year in respect of which royalty at the rate of 2 cents was paid. The legend on the record in question indicated that it was " not licensed for radio broadcast ". There was nothing on the record purporting to confer any right to give public performances by means of it, and even if there had been, this would not bind the copyright owner.

Nothing in section 19 of the Act (which deals specifically with these records) or, indeed, in any other part of the Act, can be invoked by the appellants to justify their contention that the license granted the Victor Talking Machine Company to make the record " Star Dust " conferred upon them, as purchasers thereof, a right to give a public performance of the recorded composition, except if such right can be found in section 10B of the Act as it stood after the amendments of 1938.

The decision of the case, therefore, resolves itself into an interpretation of section 10B.

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By that section, the Copyright Appeal Board is constituted. The Board is given the power to make certain rules and provisions. The Minister of the Crown named by the Governor in Council to administer the Act refers to the Board the statements of proposed fees, charges or royalties which each society, association or company carrying on, in Canada, the business of acquiring copyright of musical works or performing rights therein must file with the Minister at the Copyright Office.

The Board is to consider these statements and the objections, if any, received in respect thereto; and, upon the conclusion of its consideration, it is to make such alteration in the statements as it may think fit, and then transmit the statements, revised or unchanged, to the Minister, certified as the approved statements. The latter are then published in the *Canada Gazette;* and the fees, charges or royalties which the society, association or company concerned may lawfully sue for or collect in respect of the issue or grant by it of licenses for the performance of its works in Canada during the ensuing calendar year are the fees, charges or royalties which have thus been approved and certified. Subsection 9 of section 10B enacts that no such society, association or company shall have any right of action or any right to enforce any civil or summary remedy for infringement of the performing right in any musical work claimed by any such society, association or company against any person who has tendered or paid to such society, association or company the fees, charges or royalties which have been approved as aforesaid.

But special consideration must be given to the effect of subsection 6 (*a*) of section 10B, upon which the appellants rely.

It reads thus:—

> 6. (*a*) In respect of public performances by means of any radio receiving set or gramophone in any place other than a theatre which 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

saveable 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.

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It appears that the respondent has complied with the requirement of filing with the Minister, at the Copyright Office, a statement of the fees, charges or royalties which it proposed to collect in compensation for the issue or grant of a license in respect particularly of the performance of "Star Dust" in Canada and of the juke-box in question; but that, so far, the Copyright Appeal Board has not exercised its power, given to it by subsection 6 (*a*), of providing for the collection in advance, from the gramophone manufacturers, of fees, charges and royalties covering the public performance of that composition in the appellants' juke-box.

Accordingly, the appellants could pay, and have paid, no such fee, charge or royalty.

In my opinion, the absence of the Board's ruling and approval in the premises cannot be invoked by the appellants as a justification for giving such public performance as that in question.

Under the *Copyright Act*, "musical work" means any combination of melody and harmony or either of them, printed, reduced to writing, or otherwise graphically produced or reproduced; "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; and "plate" includes, amongst other things, any matrix or other appliance by which records, perforated rolls, or other contrivances for the acoustic representation of the work are or are intended to be made (section 2).

For the purpose of the Act (section 3), "copyright" means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever, to perform * * * the work or any substantial part thereof in public. In particular, in the case of a musical work, "copyright" includes the right to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered; to communicate such work by radio communication; "and to authorize any such acts as aforesaid".

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Under section 17 of the Act, copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by the Act conferred on the owner of the copyright.

There are exceptions to that general rule, but they are not material in the premises.

Section 20 of the Act expressly defines the remedies for infringement of the copyright, as the grant of an injunction, damages, accounts, etc.

Subsection 6 (*a*) of section 10B forms part of the *Copyright Act* and stands to be construed in the light of all the provisions of the Act.

The copyright holder is under no obligation to allow the public performance of any work or to grant a license for that purpose. He has all the rights of the ordinary owner; and, subject to any special provision of the *Copyright Act* expressly stating otherwise, he may protect his ownership, or any infringement thereof, by means of an injunction.

This being the case, the meaning of the sections of the *Copyright Act* to which reference has already been made is that, so as to prevent the owner of the copyright of a work to withhold the performance in public of that work, a society, association or company carrying on in Canada the business of acquiring copyright of musical works or performing rights therein is compelled to file at the Copyright Office a statement of the fees, charges or royalties which it proposes to ask in compensation for the issue or grant of licenses in respect of the performance of its work.

When once these fees, charges or royalties have been approved and certified by the Copyright Appeal Board, any person who has tendered or paid to such society, association or company the fees, charges or royalties which have been aproved is entitled publicly to perform the musical work thus made the subject of the fee, charge or royalty; and the society, association or company holding the copyright is deprived of any right of action or any right to enforce any civil or summary remedy on the ground of infringement of the performing right. This is equivalent to saying that whoever pays the approved fee, charge or royalty acquires the right to perform and, thereby, makes no infringement of the copyright or the performing right.

In the case, as here, of the public performance by means of a gramophone in a restaurant, subsection 6 (*a*) enacts that the fees, charges or royalties to which the society, association or company holding the copyright is entitled shall not be collectable from the owner or user of the gramophone (or, in the present instance, from Vigneux Brothers, the owners of the gramophone or juke-box, and from Rae Restaurants Ltd., the user thereof); but such fees, charges or royalties are collectable in advance from the gramophone manufacturers. When once those fees, charges or royalties have been paid by the gramophone manufacturers, the owner or user of the gramophone may publicly perform the musical work; and no fees, charges or royalties shall be collectable from such owner or user of the gramophone.

The rights, however, of the copyright holder remain unaffected in so far as they are sought to be enforced against a person who has not paid the appropriate fee (or, in this case, where the appropriate fee has not been paid by the gramophone manufacturer), provided, at least, that the conditions imposed by section 10 (2 and 3) have been complied with; and that is to say: that the society has filed at the Copyright Office its statement of fees. In the circumstances, the respondent has filed such statement; and it is to no purpose to argue that, although the respondent has complied with the necessary requirements of the Act, the Copyright Appeal Board has not, so far, provided for the collection in advance from the gramophone manufacturers.

The fact is that the respondent has complied with the Act; that no fee, charge or royalty has been paid by the appellants or for them; that the appellants, therefore, have not acquired the performing right of which the respondent is the sole owner; and there is no reason why he should not, in the present case, have asked for an injunction against infringement. Such a right could not have been taken away except by express language, which is not to be found in the legislation invoked by the appellants, and which, on the contrary, in my view, is really implied in the sections of the *Copyright Act* which have been referred to.

I think, however, that the formal order of the learned President should be modified by limiting the injunction

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to the public performance, or the authorization of the public performance of the musical composition known as "Star Dust" in the statement of claim referred to, copyright of which was registered on the 12th November, 1934, as Number 6/32087; and there should be no injunction restraining the installation itself of the gramophones of Vigneux Brothers, which, of course, may be used for the performance of other musical works in respect of which can be raised no such objections as exist here.

Subject to the above modification, the appeal should be dismissed with costs.

Appeal dismissed with costs, subject to modification of the formal order in the Court below.

Solicitors for the appellants: *Rogers & Rowland.*

Solicitors for the respondent: *Smart & Biggar.*