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BOOSEY v WHIGHT.

[1898 B. 4658.]

[CHANCERY DIVISION]

[1899] 1 Ch 836

HEARING-DATES: 15, 16, 21, 22, February 19 April 1899

19 April 1899

CATCHWORDS:

Copyright - Music - Infringement - "Sheet of Music" - Perforated Roll of Paper for Use in Mechanical Organ - Copyright Act, 1842 (5 & 6 Vict. c. 45), ss. 2, 15.

HEADNOTE:

The defendants sold for use in a mechanical wind instrument called an "AEolian" perforated rolls of paper which represented the instrumental music of certain songs in the music of which the plaintiffs had the copyright. The rolls were inserted in the instrument, and were unrolled by its action, and the passage of air through the slots in the rolls into the pipes of the instrument produced musical sounds the pitch and duration of which were determined by the position and length of the slots. The instrument also contained stops, swells, and pedals, whereby variations of time and expression could be effected at the will of the performer; and in the margin of some of the rolls there appeared directions as to time and expression which were also to be found in the plaintiffs' songs:-

Held, that the paper rolls, so far as they contained perforations, were part of the instrument, and were not sheets of music within the Copyright Act, 1842; but held, that the addition of the directions as to time and expression was an infringement of the plaintiffs' copyright.

INTRODUCTION:

THIS was the trial of an action by Messrs. Boosey & Co., who were the proprietors of the copyright in the words and music of three songs known as "My Lady's Bower," "The Better Land," and "The Holy City," for an injunction to restrain the defendants, their servants and agents, from infringing the copyright of the music in the songs in question, and for delivery to the plaintiffs of all copies of the said songs, an account of profits, and damages.

The alleged infringement consisted in the sale by the defendants of perforated sheets of paper for use in an instrument called the "AEolian," which externally bore a considerable resemblance to a piano, but was a wind instrument worked mechanically, but furnished with stops, swells, and pedals, by means of which changes in time and expression were effected. It contained forty-six pipes and reeds, each of which sounded a particular note. These sheets were made in the form of rolls, and when placed in the instrument were unrolled by its action. They were so prepared that whenever a perforation passed under a particular pipe and reed the appropriate note was sounded. The perforations were made in straight lines parallel to the edges of the rolls, so that all perforations in the same line gave the same note. The perforations were of different lengths, so that if the same time was kept, as would be the case if the machine was left to itself, the length of the perforation indicated the duration of the note. At the beginning of each roll was printed a statement as to the key in which the piece of music was written, the object of this being to enable a person desirous of so doing to obtain the vocal music to which the instrumental music was an accompaniment. The rolls contained no indications of any change of key which might occur. There were, however, printed on some of them, though not on all, certain words which were found in the sheets of music published by the plaintiffs, such as andante, moderato, piano, crescendo, indicating the pace and expression at and with which the music ought to be played. These words were visible to the player,

and were intended for his guidance. If one of these rolls were introduced into the instrument, the music would in ordinary course be produced at the same pace and with the same degree of loudness; these were altered by the use of the stops; and the skill of the player mainly consisted in availing himself of these aids so as to produce the best effect.

The evidence was principally directed to the question how far these perforated sheets could be read as music, as to which there was some difference of opinion. The result of the evidence is sufficiently stated in the judgment.

COUNSEL:

Butcher, Q.C., and Scrutton, for the plaintiffs. The perforated sheets of which the plaintiffs complain as infringing their copyright are sheets of music within the Copyright Act, 1842. They are not the less records of music because the music is recorded by means of perforations instead of by the ordinary notation. The notes of the music can be written out in the ordinary notation from the perforations. The material sections of the Act are ss. 2 and 15. By s. 2 "book" includes a sheet of music, and "copyright" is defined as "the sole and exclusive liberty of printing and otherwise multiplying copies" of anything which by the Act is the subject-matter of copyright. Sect. 15, which provides a remedy for infringement of copyright in terms refers to printing only, but it does not limit the operation of s. 2. Thus copies may be multiplied by lithography: Novello v. Sudlow n(1) ; by typewriting, Warne & Co. v. Seebohm n(2) ; by shorthand, Nicols v. Pitman n(3) ; and, it is submitted, by the system of notation employed for the blind.

The symbols matter little in themselves; the question in each case is whether the defendants are multiplying copies: Bach v. Longman n(4) ; D'Almaine v. Boosey. n(5) It may be said that these sheets of music are intended as parts of a machine, as in Hollinrake v. Truswell n(6) ; but it is not necessary that the copy should be primarily intended to be used for the same purpose as the original, if it is capable of being so used: Nicols v. Pitman. n(7) That case shews, also, that multiplying a copy cannot be restricted to something which any uninstructed person would recognise as a facsimile. It would be a curious anomaly in the Act if the defendants could be restrained, as we submit they could, by s. 20 from performing the protected music and could, nevertheless, manufacture and sell these records of the music. The object of the Legislature was to prevent one man from appropriating another's labour without paying for it, and the Act will be so construed as to promote fair and honest dealing between man and man: Maple & Co. v. Junior Army and Navy Stores. n(8)

Moulton, Q.C., Edward Cutler, Q.C., T. Terrell, Q.C., and Eustace Smith, for the defendants. It is said that the intention of the Legislature was that no one should use another man's labour without paying for it, and that as the defendants have taken these musical compositions they must pay tribute; but that does not follow: Hanfstaengl v. Empire Palace n(9) ; Dicks v. Brooks n(10) ; Davis v. Comitti n(11) ;

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n(1) (1852) 12 C. B. 177.

n(2) (1888) 39 Ch. D. 73.

n(3) (1884) 26 Ch. D. 374.

n(4) (1777) 2 Cowp. 623.

n(5) (1835) 1 Y. & C. Ex. 288.

n(6) [1894] 3 Ch. 420.

n(7) 26 Ch. D. 374, 382.

n(8) (1882) 21 Ch. D. 369, 378.

n(9) [1894] 2 Ch. 1.

n(10) (1880) 15 Ch. D. 22.

n(11) (1885) 54 L. J. (Ch.) 419.

Hollinrake v. Truswell n(1) ; and see Scott v. Stanford. n(2) The question is not whether the defendants have used the plaintiffs' work, but whether they have used it in such a way as that they must pay tribute. The Act must be construed without any preconceived notion that it must have been intended to extend over such and such a field. The intention of the Legislature can be inferred only from the language used, taken, no doubt, in connection with the surrounding circumstances. There is no connection between performance and the reproduction of copies. This case is wholly outside the Act of 1842. The Legislature did not intend to deal with the mechanical reproduction of the music, and the language of the Copyright Act of 1882 is at least as inappropriate to mechanical music as the language of the earlier Act. There is no distinction between the barrel of a musical-box or hurdy-gurdy and this flexible guide to the notes. Whenever you have a mechanical method of producing music, there must be some mechanical record by means of which it is produced. Beyond that, given any such record, any one having a knowledge of the machine in which the record is intended to be used can always invert the process and decipher what the music is which the record will cause to be produced. These two propositions are true of every mechanical method of producing music. They are certainly true of a musical-box or a barrel-organ. The record is in every such case only meant for causation. These rolls are not intended to be used and read as records of symbols. It may be that if you have a record which is intended to be read, and is capable of being read as music, and at the same time can be used for mechanical production, that would be an infringement. But this is only another form of mechanical reproduction of music. The rolls are intended merely for causation and not for indication of the music. It cannot be successfully contended that the Legislature intended to include in the words "sheet of music" the barrel of a musical-box or barrel-organ. The case of the mechanical reproduction of music was deliberately omitted from the operation of the statute, it may be for the reason that composers would possibly be benefited by the mechanical reproduction of their works. An ordinary sheet of music contains conventional symbols which appeal to an intelligence. These rolls are strictly part of a machine, and cannot be brought within the scope of the Copyright Acts. The Legislature only meant to include what at the date of the Act of 1842 was known as a sheet of music.

With reference to the marks of expression, they are not material. They are merely directions to the player how to manipulate the machine. The mere addition of the marks of expression to that which is not in its essence a sheet of music is not sufficient to bring it within the operation of the Act. From 1842 down to the present time no attempt has been made by the owners of copyright to interfere with the automatic or mechanical reproduction of music.

Butcher, Q.C., in reply. The ordinary and normal use of a sheet of music is for the purpose of a record by means of which, coupled with human or mechanical agency, the music can be reproduced. These rolls constitute such records. It is immaterial whether the agency which intervenes between the symbols and the sound is human or mechanical. The express exclusion of mechanical music from the operation of the Berne Convention leads to the inference that such music would be included in the Copyright Acts in the absence of an express provision to the contrary. The protection of the Act of 1842 extends to every record which is capable of being translated into sound; it is not necessary that it should appeal directly to the human intelligence. But, assuming that to be necessary, that requirement is fulfilled here by the existence in these rolls of the directions as to time and expressions. Those words form part of the copyright in the music of the songs.

Cur. adv. vult.

April 19.

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n(1) [1894] 3 Ch. 420.

n(2) (1867) L. R. 3 Eq. 718.

PANEL: STIRLING J

JUDGMENTBY-1: STIRLING J

JUDGMENT-1:

STIRLING J: This is an action by the proprietors of the copyright in the music of three songs, known as "My Lady's Bower," "The Better Land," and "The Holy City," to restrain an alleged infringement. No question is raised as to the plaintiffs' title to the copyright, or to their right to sue for infringement. The sole question in the action is whether the copyright has or has not been infringed. [His Lordship stated the facts as above, and continued as follows:-]

It was admitted by the defendants' counsel that it is quite possible to prepare a key by which the notes corresponding to the perforations can be copied down, and, in fact, such a key has been prepared and applied to one of the pieces of music in question. No witness was called who professed to be able to read these rolls in the same way as an ordinary sheet of music, and, indeed, all that is said by Mr. Boosey, one of the plaintiffs, was that "any person acquainted with the perforation of the sheets sold by the defendants could write out the music in the ordinary notation therefrom." The defendants' witnesses said that these rolls conveyed no idea of music to them; but they were accustomed to the ordinary notation, and all, or most of them, admitted on cross-examination that they must say the same thing of music written in the tonic-sol-fa notation, or in that used by the blind. I think it is possible that, with considerable trouble, a person might so far master the scheme according to which the perforations are made as to be able to read the notes thereby denoted, but this is not shewn in any case to have been done. The result of the evidence appears to me to be that, if a person did qualify himself to read these rolls, the information thereby conveyed to the mind of the reader would, to a substantial degree, be the same as that afforded by a sheet of music in the ordinary notation, but would be in various ways less complete. It also appears to me that for this purpose the rolls constitute an extremely cumbrous system of writing music, hardly available without the use of some mechanism which at present does not exist. Upon the whole, I think it is highly improbable that any one would ever go to the trouble of acquiring the art of reading these rolls.

No question arises as to the right of performance of these pieces under s. 20 of the Copyright Act of 1842. What is in dispute is, whether the sale of these rolls constitutes an infringement of the copyright vested in the plaintiffs under the earlier part of the Act. This turns on the construction of s. 2, by which the word "book" is to be construed to mean and include (amongst other things) every sheet of music separately published, and the word "copyright" is to be construed to mean "the sole and exclusive liberty of printing or otherwise multiplying copies of any subject" to which the word is applied in the Act, including, therefore, a sheet of music. The contention of the plaintiffs is that the rolls are copies of a substantial part of what is found in the sheets published by them, though expressed in a somewhat unusual and difficult form of notation, and consequently that the sole and exclusive liberty of multiplying copies is infringed, just as the publication in shorthand of an ordinary piece of letterpress would be an infringement of the copyright therein: see Nicols v. Pitman. n(1) For the defendants it is urged that the rolls really form parts of machines for the production of musical sounds, and that the Legislature in passing the Copyright Act shewed no intention of interfering with such mechanism. In my opinion the latter view is in the main to be preferred. It was decided in Bach v. Longman n(2) that the copyright conferred by the statute 8 Anne, c. 19, on the authors of printed books extended to printed music. This decision has been embodied in s. 2 of the Act of 1842, as quoted above. The copyright conferred by that Act appears to me to be the exclusive liberty of multiplying copies of something in the nature of a book. The rolls, so far as they contain perforations, are, in fact, used simply as parts of a machine for the production of musical sounds, not for the purpose of a book. They are used as a means of appealing to the mind directly through the ear; not, as in the case of a book, through the eye of an ordinary reader, or through the sense of touch in the case of a blind person. Some mechanical instruments for the production of musical effects, as, for example, the musical-box and the barrel-organ, seem to have been well known in the last century, long prior to the passing of the Act of 1842. It was admitted by Mr. Scrutton in his able argument for the plaintiffs that, if the construction sought to be placed by them on the Act be sound, the cylinder of a musical-box is a sheet of music within the statute. If this had been within the contemplation of the Legislature, I cannot but think that the framers of the Act, who were careful to point out what the word "book" was to mean and include, would have been no less careful to explain that the term "sheet of music" was to mean and include something which would not fall within the ordinary acceptation of the words.

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n(1) 26 Ch. D. 374.

n(2) 2 Cowp. 623.

There is no decision in this country precisely in point. In Hollinrake v. Truswell n(1) it was held that a cardboard pattern sleeve, containing on it scales, figures, and verbal directions for adapting it to sleeves of any dimensions, was an instrument or tool incapable of copyright under the Act of 1842, though possibly the subject-matter of a patent. In the statutes relating to copyright in paintings and engravings, limitations of various kinds have been placed on the meaning of the word "copy": see Dicks v. Brooks n(2) ; Hanfstaengl v. Empire Palace n(3) ; and Hanfstaengl v. Baines & Co. n(4)

In my judgment the Act of 1842, fairly construed, does not prevent the defendants from making or selling these rolls, so far as they contain perforations. I think, however, that in adding to them words taken from the plaintiffs' music sheets, for the purpose of indicating to the player on the instrument the pace and expression at and with which the music ought to be played, the defendants have gone beyond their rights, and that there ought to be an injunction to restrain them from so doing. Under all the circumstances I propose to make no order as to costs.

SOLICITORS:

Solicitors: Wilkinson, Howlett & Wilkinson; Maples, Teesdale & Co.

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n(1) [1894] 3 Ch. 420.

n(2) 15 Ch. D. 22.

n(3) [1894] 2 Ch. 1.

n(4) [1895] A. C. 20.

H. B. H.

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