Privy Council Appeal No. 29 of 1939

Arthur John Mellor and others - - - - - *Appellants*

v.

Australian Broadcasting Commission - - - - *Respondent*

FROM

THE SUPREME COURT OF NEW SOUTH WALES IN ITS EQUITABLE JURISDICTION

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 22ND FEBRUARY, 1940

Present at the Hearing:

VISCOUNT MAUGHAM.
LORD PORTER.
SIR GEORGE RANKIN.

[*Delivered by* VISCOUNT MAUGHAM]

This is an appeal from a judgment of Mr. Justice Nicholas in the Supreme Court of New South Wales in its equitable jurisdiction. By the judgment which was delivered on the 10th December, 1937, the learned Judge dismissed the action which was brought by the appellants against the respondents and was founded on alleged infringements of copyright in Australia during the years 1932 and 1933.

By section 8 of the Australian Copyright Act, 1912 (No. 20 of 1912) it is provided that the British Copyright Act (the Copyright Act, 1911), should subject to any modifications provided by the Australian Act be in force in the Commonwealth and should be deemed to have been in force therein as from the 1st July, 1912. So far as affects the action and this appeal no modifications are material. The appellants carry on in partnership a business in England under the name of Wright & Round as publishers of band music, and they were at the material times owners of the sole right of performing in public within the Commonwealth a large number of musical works arranged for performance by brass and military bands. They publish each year a pamphlet described as a "Band Journal" which contains a statement of the terms or prices for purchase of the music of their pieces and long lists of these pieces and of the parts required for their performance by bands and soloists. It may be mentioned that some of the pieces are arrangements of well-known operas and other works and songs, and others are described as being original compositions. The pamphlet or journal also contains certain statements or guarantees as to the performance of the pieces which will be stated later. It will be found that this appeal depends on the meaning and effect of these statements.

The respondent is a corporation constituted under the Australian Broadcasting Commission Act, 1932, and is authorised by law to provide and broadcast throughout the Commonwealth from broadcasting stations known as National Broadcasting Stations adequate and comprehensive programmes and to take in the interests of the community all such measures as in its opinion are conducive to the full development of suitable broadcasting programmes.

There is no dispute about the facts. The respondents during the years in question were in the habit of engaging bands to play some of the copyright works of the appellants in studios, or sometimes in other places, with a view to the broadcasting of the performances. The bands or the members of the bands had purchased the pieces on the terms and with the guarantees set out in the appellants' pamphlets or journals. The respondents always approved the programmes of the bands before the performances.

The actual broadcasts by the bands were effected in the manner now usual in such cases. There was a microphone placed in position to receive the sounds and to transmit them to modulating and amplifying equipment belonging to the respondents in their control room. Thence the sounds were carried by land line to the respondents' transmitting station where after again passing through modulating and amplifying equipment there was a transmission by electromagnetic waves of a specific wave-length which were picked up by receiving sets in different parts of the Commonwealth.

It was admitted by counsel for the respondents that there were performances in public of the works in question for which the respondents were responsible if in the circumstances of the case there was no consent by the appellants to such performances. The respondents, however, maintain that such consent was in fact given by the circulation to bands and band organisations and music sellers throughout the Commonwealth of the annual pamphlets above mentioned. The pamphlets during the years in question contained (with an alteration of date for the year 1933) the following statements:—

> " PLEASE NOTE: All our music is FREE for Public Performance.
> To the Bands of the British Empire.
> Once more it is our privilege to offer you yet another issue, the 58th without a break of the world-famous Liverpool Journal. All we said of the 1931 Journal has been proved to be true by the record sales of it. Thousands of bands have played it, and have thereby justified our assertion that it would be found to be the goods. . . ."
>
> " The 1932 Journal will be found equal to any of its predecessors. We have chosen it with the greatest care, from an enormous stock of manuscript scores we have selected a Journal which is all good, and balanced to meet the needs of every band. . . ."
>
> " All our subscribers should note especially that all our music is ' Free for Public Performance ' anywhere. See our guarantees below, show them to your patrons, so that they may rest assured that none of our publications will bring them any trouble over ' performing fees.' We make ONE

price cover both the music and the performing rights thereof, and the extent of our sales proves that bandsmen appreciate the equity of our policy. . . ."

" Relying on a continuance of your esteemed patronage and soliciting the favour of early orders,

We remain,

Yours faithfully,

WRIGHT & ROUND."

" IMPORTANT GUARANTEES.

" WE GUARANTEE that every piece published in the L.J. can be played anywhere, by anyone without fear that any composer or society will pounce upon any Band for Performing Fees.

" WE HAVE PAID for the performing rights of every piece we issue, and no Band will buy L.J. Music and discover later that they must not play it at an engagement without paying fees to someone else.

" WE GUARANTEE, also, to supply music (in accordance with the terms of subscription) to the value of £3 12s. 6d. (20 parts) for each subscription of £1 17s. 6d.

" YOU WILL SEE THAT OUR PRICE INCLUDES NOT ONLY THE PRINTED MUSIC, BUT ALSO PERMISSION TO PLAY IT ANYWHERE, WITHOUT FURTHER PAYMENT. THIS FACT IS IMPORTANT TO YOUR BAND, AND TO EVERY BANDSMAN PERSONALLY."

Before considering the meaning and effect of the statements and the guarantee it is desirable to make some general observations. Musical copyright under the Act of 1911 is of a special character. Apart from the right to prevent the multiplication of copies of the piece of music—with which we are not concerned here—it comprises " the sole right to perform the work or any substantial part thereof in public . . . " and to make any record, perforated roll, cinematograph film or other contrivance by means of which the work may be mechanically performed . . . and to authorise any of such acts (section 1). " Performance " is declared (section 19) to mean " any acoustic representation of a work." The copyright is 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 (section 2). Nothing is said in the Act with regard to broadcasting, which is not surprising having regard to the facts that wireless signal communication was then in its infancy and broadcasting of music (and of speech) as now practised was unknown.

It is, however, clear and it is not in dispute that the acoustic representation of a musical work by means of wireless so that the musical work is heard many miles away from the transmitting studio or place of actual performance is a performance (public or private) of the work within the meaning of the Copyright Act. It is nothing to the purpose that what is heard is the result of various scientific instruments and appliances at the transmitting end, the transformation back into electric impulses at the receiving end, and the receiver or loud speaker which finally converts the electric signals into sounds. The Act is concerned with the protection of authors and is dealing with practical

matters. The listeners at the reception end conceive themselves as listening to the musical piece as played in the distant studio, and they do not doubt that they are listening to a performance of that piece.

Here it is necessary to remember that the sole right of the owner of the musical work is to perform it *in public,* and that anyone may perform the work in private. The original performance in the studio may be, and generally will be, a performance in private. In such a case the broadcasted performance at the receiving end, if in public and unlicensed, will be an infringement of copyright at that place (*Performing Right Society* v. *Hammond's Bradford Brewery Co.,* [1934] 1 Ch. 121). If there is merely a broadcast from the studio where the piece is performed in private, there is obviously no performance in public at all. A broadcast *per se* is not an *acoustic* representation of the work. If the broadcast is picked up only by listeners in private it might be difficult to establish that there is a public performance; for each performance would be separate and each would be private; but it is not necessary to express an opinion on this point. It cannot be doubted that a broadcast to all and sundry listeners in such a case as we are dealing with will include hotels and other places of entertainment or refreshment who, if not forbidden, will perform the piece to a number of members of the public; and it is clear that such a performance will be a public performance within the meaning of the Copyright Act by the owners or occupiers of those places; for their actions in connection with the receivers which have been installed there and which they control have caused the public performances to take place. Whether the studio performance is public or private, if the persons who are responsible for that performance are also responsible for the broadcasting of the piece, there is no doubt that they have facilitated the performance of the work in public by any listener who is in a position to use a loud speaker and thus to perform the piece in public. The question as to the position of the broadcasters in such a case, so far as regards infringement, is answered by the language of section 1 (2) of the Act. It is sufficient to show that they have " authorised " the performance in public of the works; and this will generally be established by proving that listeners with a licence were entitled to tune in their receivers and thus to perform the musical works in question in public as well as in private. The respondents, it may be added, did not attempt to limit the general right of the owners of receiving sets to private performances of these pieces; it was probably impracticable so to do. The respondents have admitted, as already stated, that there were performances in public for which they were responsible unless they can rely on the consent or licence contained in the pamphlets above referred to. The terms of these documents must now be considered.

The learned trial Judge has decided the question as to the true meaning of the pamphlets in favour of the respondents, holding that the language used in the

pamphlets was a consent to the public performance of the works by the respondents. Their Lordships have arrived at a similar conclusion. It is to be noted in the first place that the right to perform a musical piece by means of a broadcast is a right comprised in "the sole right . . . to perform the work . . . in public" conferred by section 1 (2) of the Act. (See also the 1st Schedule to the Act where "performing right" has an equally wide meaning.) The appellants are now seeking to split this right into two for the purposes of construing their guarantee, namely, the exclusive right to perform to an assembled audience and the exclusive right to perform by means of a broadcast. Yet the phrase "we have paid for the performing rights of every piece we issue" makes no separation between these two rights. Nor do the words at the beginning of the extracts from the pamphlets above set out, "all our music is free for public performance," make such a distinction. The sentences "all our subscribers should note especially that all our music is 'free for public performance' anywhere" and "we make one price cover both the music and the performing rights thereof" enforce the argument that the appellants are not retaining for themselves any performing rights as against the persons who subscribe for or buy the musical pieces published by the appellants. Taken as a whole the extracts above set forth seem to their Lordships to guarantee complete freedom from trouble as to copyrights to bands, who having bought the music published by the appellants, play the musical works in public. As the learned Judge remarked, the appellants "must have known that band performances were frequently broadcasted." If they desired to exclude such broadcasting —included as it is in the statutory "performing right"— it was for them to exclude it.

Their Lordships are therefore of opinion that the licence or consent given in the pamphlets included the broadcasting by bands with any necessary consequences of such broadcasting such as the use of receivers by persons entitled to use them. It follows that the respondents were entitled to engage bands to do these permitted things, and have not committed a breach of the appellants' performing rights by "authorising" the bands to do them.

For these reasons their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

(22543) Wt. 8075—41 110 3/40 P. St. G. 338

In The Privy Council.

ARTHUR JOHN MELLOR AND OTHERS

v.

AUSTRALIAN BROADCASTING COMMISSION

DELIVERED BY VISCOUNT MAUGHAM

Printed by HIS MAJESTY'S STATIONERY OFFICE PRESS,
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1940