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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 65/80

BEFORE: THE HON. MR. JUSTICE ROWE, J.A.  
THE HON. MR. JUSTICE CAMPBELL, J.A. (AG.)  
THE HON. MR. JUSTICE WRIGHT, J.A. (AG.)

BETWEEN: CLAUDE ROSE - DEFENDANT/APPELLANT  
T/A CENTRAL THEATRE

A N D : THE PERFORMING RIGHT - PLAINTIFF/RESPONDENT  
SOCIETY LIMITED

Mr. Hugh Small for appellant.

Mr. Norman Wright for respondent.

March 29, 30, 31; July 9, 1982

WRIGHT, J.A. (AG.):

On 31st March, 1982, we gave judgment whereby the appeal was allowed in part, the judgment varied by substituting the sum of \$2,776.00 for the amounts awarded, made no order as to costs and promised to put our reasons for judgment in writing. This judgment is in pursuance of this promise.

It can do no harm to confess that the case is not without interest to the Court for the reason that it is the first of its kind to come before the Court and yet the judgment will not run full range because the question of liability does not fall for determination. The defendant/appellant's liability was so potent that Mr. Small for me admitted it. The point at issue is the measure by which the damages ought to be assessed. On this issue the parties are poles apart and before us the contentions for the respective bases were not lacking in vigour.

Circumscribed though this exercise be, by reason of the exclusion of the question of liability, it is necessary in order to place the matter in its proper perspective, to deal somewhat fully with the evidence.

The plaintiff/respondent (hereinafter referred to as the Society) is a company incorporated under the Laws of England and carries on business as a performing right protection society in Jamaica. As such it is the owner by assignments of the sole right of public performance in a large number of musical works (the Society's Repertoire) said to number in excess of 3,000,000 including all words and music incorporated in the sound tracks of the cinematographic films entitled:

1. "Fear is the Key."
2. "A Countess from Hong Kong."
3. "The Black Windmill."

The Society claims, and this has not been disputed, that in Jamaica it controls not less than 90% of the musical rights in the films shown. This means that they are entitled to, and do, charge a fee for the public performance of the vast majority of films in Jamaica. This is how the Society protects and benefits the authors and composers whose works are assigned to the Society. To publicly perform any of the material in the Society's Repertoire without the appropriate licence is to render oneself liable to action.

This is what the evidence shows that the defendant/appellant did. At the material times he operated a cinema called the Central Theatre at Porus in Manchester. He was supplied films by Mr. Pat Wood of Dragon Film Distributors. But the distributors, unless they are also responsible for public performances, are not liable to the Society for the fees chargeable for such public performances. But untenable though this view was shown to be it struck the appellant's fancy, namely, that the distributors ought to be responsible for any licence to use, at the appellant's cinema, the films they distribute.

It was all by chance that Mr. D.S. Scott, the Society's representative in Jamaica for twenty-five years on passing through Porus on a day in October, 1974, observed the imposing Central Theatre and noticed the billings. From what he saw he appreciated that his Society's copyright was being infringed. He identified the offender (the appellant) and thereafter did all he could be expected to do to secure

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from him compliance with the requirement for a licence. In very polite terms he wrote to the appellant on the 16th October, 1974, thus:

" DS/EW

16th October, 1974.

Mr. C.B. Rose,  
Central Theatre,  
Ponsonby,  
Manchester.

Dear Sir,

We understand that you are the operator of the above cinema where music is performed by sound film apparatus and record player for the entertainment of your patrons. All sound films now contain at least background music and all such showings constitute public performances within the meaning of the Copyright Act 1911, which came into force in Jamaica on the 1st July, 1912. We therefore desire to bring to your notice the objects of this Society, which has been established to exercise and enforce the rights and remedies of its members under the said Act in respect of the public performance of copyright music.

The members consist of the composers authors and publishers of musical works, who are entitled to the benefit of the copyright in such works, and all royalties collected, less the bare operating expenses, are distributed among them.

The Society not only controls these performing rights, but also the repertoires of the Societies of other countries with which it is affiliated, comprising in all an extensive repertoire of approximately two million musical works. These works may not be performed in public, except at premises licensed by this Society. The persons responsible for so doing will render themselves liable to legal proceedings under the Copyright Act for infringement of the performing rights controlled by this Society.

We take this opportunity of enclosing the following: Leaflet 'Music in Public', which gives further particulars of the Society and leaflet 'M' dealing with performance by mechanical means, such as sound film apparatus, amplified gramophone etc.

We would therefore point out the necessity of your obtaining this Society's licence covering the public performance of copyright music at your cinema. We shall be pleased to advise the terms on which our licence may be obtained if you will complete and return the enclosed application form 'C.A.', giving particulars of the full evening prices of admission for adults, less Entertainment Tax, if any. Please note that no arbitrary seating for children should be included in your application.

" If you so desire, you may check with your film distribution agency or with any other cinema operator in Jamaica who can no doubt advise you as to your liability to obtain this Society's licence and pay the appropriate copyright royalties thereunder covering the public performance of music at your theatre.

Your kind attention to this matter will be much appreciated.

Yours faithfully,  
PERFORMING RIGHT SOCIETY LTD.

/s/ D.S. SCOTT  
Agent for Jamaica

Encls: "

Even if this was the appellant's first venture in ignorance into the film world the Society through its representative Mr. Scott indeed sought to smooth out for him what threatened to be storm-tossed waters. But if the Society was seeking to avoid a quarrel then the letter was addressed to the wrong person. For the appellant was to demonstrate that like Gallio he "cared nought for any of those things." Accordingly on 3rd December, 1974, Mr. Scott sent a reminder that there had been no reply to his letter dated 16th October, 1974. The last paragraph of this reminder reads:

"If you are still in any doubt about this matter we suggest you consult your Attorney, who can no doubt advise you as to your liability to this Society under the Copyright Act 1911, which was proclaimed in Jamaica on the 30th May 1912, the necessary notice appeared in the Jamaica Gazette of the 6th June 1912, and it came into force on the 1st July 1912."

Still, no reply was received. This was brought to the appellant's attention by Mr. Scott's letter of 22nd January, 1975. But Mr. Rose was not disturbed.

By the 8th November, 1976 when Mr. Rose's attitude had crystallized beyond all doubt into suicidal obduracy Mr. Scott wrote again. He referred to a telephone conversation with Mr. Rose on 8th December, 1975 and in an effort to put the matter beyond all doubt he sent Mr. Rose the 1965 Amendment to the Copyright Act as well as copies of two judgments by the Supreme Court of Jamaica in favour of the Society, cautioning him against indulging <sup>in</sup> the same folly which had

caused to the detriment of one Mr. McMillan who had ill-advisedly abided by his attorney's advice.

Mr. Rose was unflappable. Indeed, he was as obstinate as the Society was persistent. The Society's final letter on this aspect of the matter bears date 17th December, 1976 in which it was charged that on 26th November, 1976 without the Society's licence or permission there had been public performance of the sound films -

"Fear is the Key" (feature).

"A Countess from Hong Kong" (trailer).

This charge could be made to stick because, following upon the Daily Gleaner advertisement of the fare for Central Theatre for that day, Mr. Scott and his assistant had dutifully attended the show, paid their charges and made notes.

Legal action was threatened but the olive branch to settle amicably was still held out. That letter met with the same disdain as did the previous four. But even so legal action did not commence until 13th April, 1977 when the writ was filed claiming an injunction and damages.

The endorsement to the writ reads:

"The Plaintiff's Claim is against the Defendant for:-

1. An injunction to restrain the Defendant, his servants or agents from infringing the Plaintiff's copyright by performing and/or authorising or permitting the performance in public of the following musical works:

(1) Fear is the Key;

(2) A Countess from Hong Kong.

or any other musical works in the Society's Repertoire during the subsistence of the respective periods of the Plaintiff's ownership of the performing right therein without leave of the Plaintiff.

2. An injunction to restrain the Defendant, his servants or agents from permitting Central Theatre situate at Porus in the Parish of Manchester or any other place of public entertainment to be used for the performance in public of the said or any other musical works in the Society's Repertoire during the subsistence of the respective periods of the

"Para. 9           The Defendant denies that the Plaintiff has suffered any loss and damage by reason of his, the Defendant's wrongful acts and further say if the Plaintiff has suffered any loss and damage at all this was not as a result of any act or omission by the said Defendant.

"    10           The Defendant denies that the Plaintiff is entitled to any of the relief claimed in paragraphs 10 (1) - (4) of the statement of claim."

An irrepressible comment is that this pleading does not betray much acquaintance with either the facts or the law.

The Copyright Act 1911 was an imperial Act passed for the purpose of amending and consolidating the Law relating to Copyright in the British dominions. Section 1(1) reads:

"(1) Subject to the provisions of this Act, copyright shall subsist throughout the parts of His Majesty's dominions to which the Act extends for the term hereinafter mentioned in every original literary dramatic musical and artistic work, if ....."

Section 25(1) states:

"This Act, except such of the provisions thereof as are expressly restricted to the United Kingdom, shall extend throughout His Majesty's dominions: Provided that it shall not extend to a self-governing dominion, unless declared by the Legislature of that dominion to be in force therein either without any modifications or additions, or with such modifications and additions relating exclusively to procedure and remedies or necessary to adapt this Act to the circumstances of the dominion, as may be enacted by such Legislature."

Section 37(2) of the Act, so far as is relevant reads:

"(2) This Act shall come into operation -

(a) .....

(b) .....

(c) .....

(d) in any other British possession to which this Act extends, on the proclamation thereof within the possession by the Governor. "

The appropriate proclamation extending the Act to Jamaica with effect from the 1st day of July, 1912 was made on the 30th day of May, 1912 and published in the Jamaica Gazette dated the 6th of

Theatre at May Pen and that he had reason to believe that the appellant was infringing the Society's copyright there. He also disclosed that subsequent to November 26, 1976 he paid another visit to Central Theatre and saw being shown a work of Roy Budd which has been assigned to the Society - "The Black Windmill". He also supplied evidence of the manner in which the Society calculated the licence fee charged the operator of a cinema. This is based on a percentage (1% - 3%) of one full house per week x price per seat x 52.

In the case of Central Theatre, the licence fee, charged at 3% works out at \$694.00 per year and for the Crown Theatre at \$1,594.00.

Obviously in order to aggravate damages Mr. Scott gave evidence that the Society has suffered damages beyond the fees not paid by the appellant. Because of the Society's inability to get the appellant to observe the propriety of obtaining the licences, which the appellant made known to one Mr. Pat Wong the holder of five licences from the Society, Mr. Wong had ceased paying his licence fees on the basis that if the Society cannot collect from the appellant then neither should he pay.

In his evidence the appellant testified that he believed up to then that the Society had no case against him and by way of defeating the amount calculated for the licence fee he gave figures representing his profits which he claimed could not justify the licence fees. But unfortunately for him the licence fee is not calculated on the basis of profits and is payable in advance. Further, although paragraph 8 of his defence admitted paragraphs 8 and 9 of the Statement of Claim which pleaded that in all six letters had been sent to him, he denied receiving six letters. He admitted receiving only two but said he paid no attention to them apart from speaking to the Film Distributor who supplied him films. He did not reply. He denied receiving the copies of the judgments which had been sent him for his guidance. Even the two letters which he admitted receiving he did not understand to be saying he should not show the films without a licence because he would be infringing copyright. He also objected to the inclusion of the Crown

Theatre for the Court's consideration on the basis that that theatre was not mentioned in the suit.

The learned trial judge granted the injunction as prayed and using the basis for calculating the licence fees employed by the Society awarded damages, making due allowance for periods of closure, in respect of both the Central and Crown Theatres as follows:

Central	-	October 1974 - October 1979	= \$3,470.00
		October 1979 - October 1980	= $\frac{1,482.00}{4,952.00}$
		Less Closure	= $\frac{232.00}{\$4,720.00}$
Crown	-		$\frac{\$4,782.00}{\$9,502.00}$
		Total Loss	

In addition the learned trial judge yielding to the plea of the plaintiff's attorney to show disapproval of defendant's behaviour which was aggravated by his telling Wong that the case had been thrown out, awarded a further sum of \$1,000.00 stated to be "General Damages." The judgment reads:

"Judgment for Plaintiff \$10,520.00.  
Injunction granted as prayed. Central and any other premises. Costs to be agreed or taxed."

Unfortunately the formal judgment drawn up and filed did not reflect the judgment as awarded. It reads, inter alia -

- "(i) .....
- (ii) .....
- (iii) That the Defendant pay to the Plaintiff by way of Special Damages the sum of \$4,720.00 in respect of infringement of the Central Theatre;
- (iv) That the Defendant pay to the Plaintiff by way of Special Damages the sum of \$4,782.00 in respect of infringement at the Crown Theatre;
- (v) That the Defendant pay to the Plaintiff the sum of \$1000.00 by way of General Damages."

The particularisation of the judgment may well reflect Counsel's elation at his victory over a most difficult adversary but it provided the basis for the grounds of appeal. The original grounds of appeal filed were abandoned in favour of the following for which leave was sought and granted:



- "1. The learned trial judge erred in law in making any award for Special Damages having regard to the fact that the Plaintiff's claim made no specific claim for Special Damages.
2. The learned trial judge erred in law awarding to the Plaintiff the sum of \$9,502.00 for Special Damages having regard to the evidence led at the trial, and he mis-directed himself on the principles of law which were applicable to the assessment of Special Damages for a breach of copyright.
3. The learned trial judge erred in law in making an award for Special Damages with respect to the alleged or other breaches of the Plaintiff's copyright with regard to which there was no claim before the Court for damages.
4. The learned trial judge erred in law in holding that upon the evidence given at the trial the Plaintiff was entitled to an award of Special Damages in respect to the infringement (sic) of the Plaintiff's copyright in the musical works of:
  - a) Fear is the Key, and
  - b) A Countess from Hong Kong
 in the sum of \$9,502.00.
5. The learned trial judge erred in law in making any award for Special Damages for any alleged infringement (sic) of any of the Plaintiff's copyrights other than (sic) that proven by the Plaintiff in respect of the musical works of:
  - a) Fear is the Key; and
  - b) A Countess from Hong Kong
 having regard to the fact that the Plaintiff did not claim nor was awarded an order for an account upon which the Court could have assessed any damages for any infringements (sic) other than (sic) those specifically pleaded and claimed.
6. The learned trial judge mis-directed himself in relation to the law relating to the award of General Damages and erred in making the award of \$1,000.00 for General Damages."

To put the issues in proper perspective the grounds may conveniently be compressed thus:

- Grounds 1 - 4: The learned trial judge erred in law in awarding any amount as special damages, no special damages having been pleaded.
- Ground 5: (as pleaded).
- Ground 6: (as pleaded).

As mentioned before these grounds derive from the unfortunate misrepresentation of the judgment actually delivered by the learned trial judge. The strict rule is that Special Damages must be specifically pleaded and proved and in the absence of compliance any purported award of Special Damages could not be sustained.

Mr. Wright accepted responsibility for the error appearing in the formal judgment filed by him <sup>but</sup> that did not deter Mr. Small from arguing that the method of mathematical calculation was suggestive of the preciseness with which Special Damages are calculated and accordingly the damages awarded were in fact in the nature of Special Damages and were so regarded.

It will be observed that there is no contention about the injunction which was granted as prayed. Accordingly, the Crown Theatre is caught by its provisions. Before us it was readily conceded that on the evidence adduced the plaintiff was entitled to the injunction.

It may be convenient at this point to dispose of two questions which need not absorb much attention:

1. Ought any damages to have been awarded with respect to any infringement at the Crown Theatre?
2. Was it proper to have awarded the sum of \$1,000.00 or any other sum which can only be regarded as aggravated damages?

The answer to question 1 is in the negative. Although the correspondence put in evidence deals also with the Crown Theatre which came into existence subsequent to the filing of the writ no action was ever taken relevant thereto either by way of an amendment or, more appropriately, by a subsequent writ which could then be consolidated and tried with the previous writ. Accordingly, while the infringement at this theatre was relevant to the consideration of the application for the injunction, since this clearly demonstrated that not even the pending writ could advise caution, - it was otherwise as regards the assessment of damages claimed by the plaintiff. It follows that the award of \$4,782.00 in respect of this infringement could not be supported and we disallowed it.



"copies. The measure of damages is different. In the latter case the measure is the value of the copies, which by force of the statute are deemed to be the property of the plaintiff, from the mere fact of being brought into existence; whereas in the other case the measure of damages is the depreciation caused by the infringement to the value of the copyright as a chose in action."

However, Lord Wright was concerned with showing the distinction between the measure of damages under Section 6 of the Copyright Act for infringement as distinct from the measure of damages which should be awarded for conversion of the infringed copies under Section 7 of the Act. He was not then concerned with setting out the mathematical methodology by which the depreciation in value ought to be arrived at. Consequently, it has been held that in cases where the infringement consists in the making and sale of infringed material, the depreciation of the copyright should be ascertained on the basis of the loss in trade to the copyright holder whose market has been invaded and his sales thereby reduced.

It was contended that in the circumstances of the case it would have been proper for the learned trial judge to have ordered an inquiry to ascertain the actual extent of the infringement over the period in question and so afford a correct basis for determining the quantum of damages; and since this was not done the damages could only be nominal and should not exceed \$50.00 per film. Support was sought from such cases as John Lane, The Bodley Head Ltd. vs. Associated Newspapers Ltd. (1936) 1 All E.R. 379 (in which an award of £5 was made for one day's publication); Performing Rights Society Ltd. vs. London Theatre of Varieties Ltd. (1922) 1 K.B. 539 (20/- awarded); and see Fonning Film Services Ltd. vs. Wolverhampton Cinemas Ltd. (1914) 3 K.B. 1171. This assumes, quite erroneously, that nominal damages are necessarily small.

This stance was further bolstered by the submission that what is involved is the mere playing of a musical work for a short period and that such infringement ought not to attract more than nominal damages.

However, reference to the exhibits tendered at the trial reveals that the film score of the film "A Countess from Hong Kong" consists of thirty-two works of Charles Spencer Chaplin which are played throughout the whole performance. This is not as transitory an infringement as is submitted.

An obstacle in the path of the appellant's contention being sustained is the fact that damages have in fact been awarded on the basis of the licence fee chargeable where permission had not been granted for the public performance of works in which copyright exists. It was sought to distinguish such cases on the basis that they relate to different subject-matters which by nature have a permanence which does not exist in the musical sounds involved in the instant case. These cases were dealt with under two heads, viz. (a) architectural drawings and (b) patents.

(A) Architectural drawings:

Under this head the case cited and discussed was Stovin-Bradford v. Volpoint Properties Ltd. and Another (1971) 3 W.L.R. 256. In this case the Court of Appeal upheld an award of £500 nominal damages for the unauthorised use of an architect's drawings as being a fair assessment in the circumstances of that case. The principle applied was that the damages should be assessed on the basis of what would be fair remuneration to the architect for a licence to use the whole of his copyright plans and drawings for the purpose for which they had been used (only a part of the plans and drawings had been used).

(B) Patents:

The case dealt with under this head was General Tire and Rubber Co. vs. Firestone Tyre and Rubber Co. (1975) 2 All E.R. 173 - the head-note of which reads in part:

"Loss sustained through infringement was not to be assessed on any hypothetical basis in which there was an abstract licensor and licensee as distinct from the parties actually involved and damages were therefore assessed on the basis of the amount which Firestone would in reality have been obliged to pay General Tire for a licence and not the amount which they should or might have paid."

The distinction sought to be drawn here is that with a patent the very idea is involved whereas copyright deals with the expression.

For the respondent Mr. Wright's submission amounts to this: that the distinction between copyright and patent is without the claimed significance for the purpose of assessing damages for the infringement of either. Both are classifiable as intellectual property for the simple reason that, in contradistinction to the product of physical labour, they are the products of the intellect. The difference lies in the method of administering protection of this wide area of property.

We accept these submissions. A party who wilfully makes use of another's copyright material for profit ought not to be in a better position than his competitor who respects the rights of the copyright holder and pays the appropriate licence fee. The depreciation in value of the copyright might very well be the economic loss to the owner whose works are being infringed and who is unable to obtain any financial benefit therefrom whether in the form of a licence fee or otherwise.

On this basis we accepted the licence fee which the appellant would in reality have been obliged to pay the respondent as the appropriate basis for assessing the damages and awarded such fees for a period of four years up to October 1977 at \$694.00 per year yielding a total of \$2,776.00.

On the question of costs we took the view that although the appeal was allowed in part resulting in very substantial reduction in the damages awarded at the trial, the appellant did not deserve to have his costs paid him because it was his wholly unreasonable attitude in which he persisted for years that necessitated the bringing of the action in which no court of justice could on any basis find in his favour.