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 June 16, 17  
 & 18  
 1954  
 May 21

BETWEEN:

CANADIAN ADMIRAL CORPORATION } PLAINTIFF,  
 LTD. .... }

AND

REDIFFUSION, INC., ..... DEFENDANT.

*Copyright—Action for infringement of copyright—Live telecasts and film telecasts of football games—Whether copyright subsists in such telecasts—The Copyright Act, R.S.C. 1927, c. 32, ss. 2(b)(d)(g)(n)(p)(q)(r)(u), 3(1)(e)(f), 4, 9, 17, 20(3), 36, 40(4) and 45—Copyright purely statutory—Nature of copyright—Meaning of “original” in the law of copyright—Protection afforded only to a series of photographs—Rediffusion by defendant of film telecasts a “performance” of plaintiff’s work—Whether performance was “in public”—Character of the audience—Right to communicate a “work” by radio communication.*

Having acquired from the Montreal football club, “The Alouettes”, the exclusive right (a) to telecast the football games to be played by the team in Montreal during the 1952 football season and (b) to televise films of the games to be played by the team away from Montreal, plaintiff entered into an agreement with the Canadian Broadcasting Corporation whereby the latter (a) agreed to furnish its personnel, facilities and equipment to telecast over its Montreal station CBFT the games played in Montreal and its facilities and station time to telecast films provided by plaintiff of the games played out of Montreal, and (b) assigned and transferred to plaintiff all of its right, title and interest in the copyright in the live telecast productions of the games. By a further agreement with Dow Breweries, the owner of the rights to make movie films of the league games to be played by “The Alouettes” away from Montreal in 1952, plaintiff acquired (a) all the owner’s rights to televise over station CBFT films of such games including those received through the ether, by wire service or rediffusion, and (b) whatever copyright Dow Breweries had in the films. Plaintiff then registered in the Copyright Office the telecast productions of the games played in Montreal and the cinematograph films of those played out of Montreal. Four of the home games and

films of the four out of town games were televised over station CBFT and on each occasion the programmes were picked out of the ether by defendant, whose business consists in part in maintaining an antenna in or near Montreal which enables its subscribers to receive *by wire* in their homes telecast programmes emitted by station CBFT, and were distributed to them and to its sales and showroom in Montreal. The action is one for infringement of copyright in both the live and film telecasts, defendant denying that copyright subsists in any of the telecasts sponsored by plaintiff and that if copyright did exist therein, no infringement resulted from its operations.

1954  
 CANADIAN  
 ADMIRAL  
 CORPORATION  
 LTD.  
 v.  
 REDIFFUSION,  
 INC.

*Held:* That no matter how "piratical" the taking by one person of the work of another may appear to be, such taking cannot be an infringement of the rights of the latter unless copyright exists in that "work" under the provisions of section 3 of The Copyright Act. Copyright is, in fact, only a negative right to prevent the appropriation of the labours of an author by another.

2. That for copyright to subsist in a "work" it must be expressed to some extent at least in some material form, capable of identification and having a more or less permanent endurance. All the works included in the definitions of "artistic work" and "literary work" in s. 2(b) and (n) of The Copyright Act, R.S.C. 1927, c. 32 have a material existence; "musical works" by s. 2(p) must be printed, reduced to writing or otherwise graphically produced or reproduced. Likewise, in regard to "dramatic works" there is the requirement that the scenic arrangements or acting form must be fixed in writing or otherwise. "Cinematographic productions" which are also dramatic works are obviously "fixed otherwise", since they involve the making of films. Here, neither the producer nor any of his assistants, while producing the live telecasting of the games played in Montreal had *fixed* anything in writing or otherwise, or had anything whatever to do with the scenic arrangements of the acting form of the players participating in the football match. By the very nature of the spectacle, nothing of that sort could have been planned in advance or fixed in writing or in any other manner whatsoever. The live telecasts (or live radio broadcasts) of a football game as described in the evidence do not fall within the opening words of s. 2(u) of the Act—"every original literary, dramatic, musical and artistic work . . ."
3. That neither the process nor result of telecasting is analogous in any way to that of photography or cinematography. Even if the "work" was found to be a cinematographic production, it would not be a dramatic work within the meaning of s. 2(g) of the Act inasmuch as the arrangement or acting form, or the combination of incidents represented, do not give the work an original character.
4. That the image produced on the receiving set in the case of live telecasts is not a photograph as that word is ordinarily understood. A photograph is something concrete, something in a material form that cannot only be seen but handled and involves the creation of a negative. The image is not an artistic work under s. 2(b) of the Act.
5. That to be "original" a work must originate from the author; it must be the product of his labour and skill and it must be the expression of his thoughts. *University of London Press Ltd. v. University*

1954  
 CANADIAN  
 ADMIRAL  
 CORPORATION  
 LTD.  
 v.  
 REDIFFUSION,  
 INC.

*Tutorial Press Ltd.* [1916] 2 Ch. 601 referred to. There is no copyright in mere conception or ideas and here the producer had nothing to do with the arrangements of the pictures shown. *Frank Smythson v. Cramp and Sons Ltd.* [1944] A.C. 329 referred to. All that he did was to choose the particular play in the game—a play in which he took no part whatsoever—and by means of the equipment provided communicate that play so that it could be seen by any one within the range of the telecast who desired to see it and had the necessary equipment for its reception. In the picture so seen there was no expression of his thoughts, but merely a view of what was seen by thousands of others at the playing field.

6. That the live telecasting of sporting events such as those here in question cannot create a work in which copyright can subsist.
7. That the *film* telecasts of the games having been made from cinematograph films were cinematographic productions. Such a production is a “dramatic work” only if the arrangement or acting form or the combination of incidents represented has given the work an original character. In the absence of evidence here as to how the films were made or even that was any degree of selection, but assuming that their preparation and presentation were similar to those of the live telecasts, it cannot be said that they were given “an original” character by their author. However, if the production consists of a series of photographs—as it does here—it is protected as a photograph; and photographs are within the definition of “artistic work” in s. 2(b) of the Act. The plaintiff here is entitled only to the protection afforded to an artistic work.
8. That the principles laid down in the cases of *Performing Right Society Ltd. v. Hammond's Bradford Brewery Co.* [1934] 1 Ch. 121; *Performing Right Society v. Gillett Industries Ltd.* [1943] 1 A.E.R. 228 and 413; and in Canada in the case of *Canadian Performing Right Society v. Ford Hotel* [1935] 2 D.L.R. 391, which had to do with acoustic representations, are of equal application to a visual representation which is also included in the definition of “performance” in s. 2(q) of the Act (Canada). The rediffusion of the film telecasts by defendant by means of the process described in the evidence constitute a “performance” of plaintiff’s work.
9. That mere performance however, is not enough; in order to find that plaintiff’s right was infringed, the Court must find that the performance was “in public”. The test to be applied is “What is the character of the audience?” Here there is no evidence whatever except that the telecasts of the films in the homes and apartments of the subscribers of defendant were seen by them, presumably only the householders. The character of the audience was therefore a purely domestic one and the performance in each case was not a performance “in public”.
10. That the situation, however, is different in regard to defendant’s sales and showroom in Montreal. It was open to the public and on various occasions members of that public saw there film telecasts of plaintiff’s broadcast on Station CBFT. There was nothing there of a domestic or quasi-domestic nature and it was a performance “in public” and an infringement by defendant of plaintiff’s right in the cinematograph films.

11. That defendant has not infringed plaintiff's copyright by communicating the work *by radio communication*. Radio is a communication of messages by means of electro-magnetic or Herzian waves through the ether. Here defendant communicated the work by use of co-axial cables to its subscribers and to its show and sales room in Montreal. The communication was not *by radio*.

1954  
CANADIAN  
ADMIRAL  
CORPORATION  
LTD.  
v.  
REDIFFUSION,  
INC.

ACTION for infringement of copyright taken under the provisions of The Copyright Act, R.S.C. 1927, c. 32, as amended.

The action was tried before the Honourable Mr. Justice Cameron at Ottawa.

*J. J. Robinette, Q.C., Samuel Rogers, Q.C. and J. M. Godfrey* for plaintiff.

*Phillipe Brais, Q.C., H. Gerin-Lajoie, Q.C. and E. Gordon Gowling, Q.C.* for defendant.

The facts and questions of law raised are stated in the reasons for judgment.

CAMERON J. now (May 21, 1954) delivered the following judgment:

This is an action for infringement of copyright, taken under the provisions of The Copyright Act, R.S.C. 1927, c. 32, as amended. In its Statement of Claim, the plaintiff also claimed an injunction and damages under the Unfair Competition Act, but at the opening of the trial these claims were dropped. By its Statement of Defence, the defendant in para. 22 alleged that for the reasons therein stated; the plaintiff had deprived itself of any right to relief in the action, but, at the trial, that paragraph, by consent, was struck out.

At the trial there was filed an agreement (Exhibit 5) in which, for the purposes of this action, the parties agreed on a substantial number of matters; there is little dispute as to the remaining facts.

The plaintiff is a company incorporated under the Dominion Companies Act, having its principal place of business at the Township of Toronto, in Ontario. It is engaged in the manufacture of television receiving sets, some of which are sold by dealers throughout the Province of Quebec. For the purpose of advertising its wares, the plaintiff decided to sponsor the telecast of the football

1954  
 CANADIAN  
 ADMIRAL  
 CORPORATION  
 LTD.  
 v.  
 REDIFFUSION,  
 INC.  
 Cameron J.

games to be played in the Autumn of 1952 by the Montreal Football Club Inc., which operates a rugby football team called "The Alouettes" in the Inter-Provincial Football Union.

Accordingly, the plaintiff entered into an agreement with that football club (which I shall hereafter refer to as "The Alouettes") on August, 1952 (Exhibit 1) and thereby, for the consideration mentioned, it was agreed that the plaintiff should have (a) the exclusive right to *live* telecasts of the six football games to be played by the Alouettes in Montreal; and (b) an option to purchase the exclusive right to televise films in Montreal of the six games to be played by the Alouettes away from Montreal. The parties hereto have agreed that that agreement was duly executed and delivered by the parties thereto, that it was carried out according to its tenor, and that the option was taken up.

By an agreement dated August 27, 1952, between the Canadian Broadcasting Corporation and the plaintiff, the former for the consideration specified (a) agreed to furnish the personnel and all the facilities and equipment necessary to produce and telecast from Delorimier Stadium, Montreal over its television station CBFT Montreal the football games to be played by the Alouettes in Montreal during the 1952 season; (b) assigned and transferred to the plaintiff exclusively all of its right, title and interest in the copyright and any other property rights in the *live* telecast productions of the said games; and (c) agreed to supply the necessary facilities and the station time to telecast *films* provided by the plaintiff of the six games to be played by the Alouettes away from Montreal, such facilities to be available on the dates specified, namely, six days after the games were actually played. It was also agreed that the Broadcasting Corporation would not make available such telecast productions and film telecasts by direct wire to any other person, firm or corporation.

Dow Brewery Ltd. had acquired certain rights entitling it to make movie films of the league games to be played by the Alouettes away from Montreal in 1952. By an agreement dated September 11, 1952 (Exhibit 3) Dow transferred and assigned to the plaintiff exclusively, all its rights

to televise over station CBFT or to distribute by wire service within the Province of Quebec, films or any part thereof of such games, such films, however, not to be televised by the plaintiff until the Friday following the dates when the games were played. The plaintiff was authorized to obtain from Dow's supplier one black-and-white copy of the film of each such game. By a supplementary agreement between the said parties dated October 17, 1952 (Exhibit 3) it was agreed that the rights granted to the plaintiff by the agreement of September 12 should include "the exclusive right to distribute and perform the television broadcasts of such films after receiving the same through the ether, *by wire service or rediffusion*".

1954  
CANADIAN  
ADMIRAL  
CORPORATION  
LTD.  
v.  
REDIFFUSION,  
INC.  
Cameron J.

The agreement between the plaintiff and the Broadcasting Corporation was duly carried out. The plaintiff sponsored the live telecast over station CBFT of the first four games played at Montreal. The plaintiff also obtained from Dow a cinematographic film of each of the first four games played by the Alouettes away from Montreal, furnished them to the Broadcasting Corporation, and telecasts thereof, without the assistance of a commentator, took place over station CBFT on the agreed dates. It is established that prior to the first of the four live telecasts and again prior to the first of the four film telecasts, the plaintiff, in writing, notified the defendant or its solicitors, of the rights which the plaintiff had acquired and forbade the defendant to rediffuse any of such telecasts. The defendant's solicitors, in each case, replied that their client could not agree that the relaying of the telecast programmes over their rediffusion circuits, in any way infringed the legal rights of the plaintiff.

By the agreement filed at the trial (Exhibit 5) it is admitted that the effect of the two agreements between the plaintiff and Dow Breweries was to vest in the plaintiff whatever copyright the latter had in the films of the games played by the Alouettes away from Montreal; that such cinematographic films were produced for valuable consideration by Briston Films Ltd. for Dow, and were taken by employees of Briston Films Ltd.; and that the plaintiff by virtue of its agreement with Dow was entitled to and

1954  
 CANADIAN  
 ADMIRAL  
 CORPORATION  
 LTD.  
 v.  
 REDIFFUSION,  
 INC.  
 Cameron J.

did obtain a black-and-white film of each of such games from Briston Films Ltd. to be used for telecast over station CBFT.

It is alleged that the defendant took each of the said telecasts off the ether and rediffused the same to its various subscribers and to its showroom and sales office at 1650 Berri Street, Montreal, and that thereby the defendant has infringed the copyright of the plaintiff in both the live and film telecasts. On October 24 these proceedings were commenced, the plaintiff claiming an injunction and damages, which by amendment at the trial it fixed at \$600.00.

On October 18, 1952, the plaintiff registered the telecast productions of the games played at Montreal and the cinematograph films reproducing the four games played out of Montreal in the Copyright office, all as unpublished artistic works; certified copies thereof are filed as Exhibit 4.

The defendant is a company incorporated under the Quebec Companies Act having its principal place of business at Montreal. It admits that its business consists in part in providing and maintaining equipment including an antenna in or near Montreal, which enables its subscribers to receive in private, *by wire*, in their homes and on their own and sole volition, and by wire only insofar as the defendant is concerned, telecast programmes emitted by the CBFT television transmitter. It alleges that its premises at 1650 Berri Street are used by it for private business purposes to demonstrate its services to potential subscribers, as is customary in all similar trades, and that for that purpose it there received the television programmes emitted by station CBFT. It denies that copyright subsists in any of the telecasts so sponsored by the plaintiff, and that if copyright did exist therein, no infringement resulted from the defendant's operations.

In the agreement filed (Exhibit 5) the defendant admitted that the four home games of the Alouettes were televised and that the films of the four out of town games were televised over station CBFT and that on each occasion the programmes were picked up from the ether by it and distributed by wire to its various subscribers and to its sales and showroom at Berri Street; that the said programmes were seen by members of the public on a terminal

unit at the Berri Street room, except on four stated Sundays when the room was closed; and were also seen on terminal units in the homes of their subscribers, after having been picked up by the defendant's equipment and distributed by wire to such subscribers. It is also admitted that there were "over 100" such subscribers to the defendant's services.

1954  
 CANADIAN  
 ADMIRAL  
 CORPORATION  
 LTD.  
 v.  
 REDIFFUSION,  
 INC.  
 Cameron J.

Such copyright as the plaintiff may have must be found in the provisions of The Copyright Act (s. 45). It is provided by s. 20(3) thereof that in an infringement action, when the defendant puts in issue either the existence of copyright, or the title of the plaintiff therein (and both are here in issue), that the work shall, unless the contrary is proved, be presumed to be a work in which copyright subsists; and that the author of the work shall, unless the contrary is proved, be presumed to be the owner of the copyright. By s. 36 of the Act, it is provided that every register of copyrights shall be *prima facie* evidence of the particulars entered therein and that the certificates of registration of copyright in a work shall be *prima facie* evidence that copyright subsists in the work and that the person registered is the owner of the work.

Copyright subsists in Canada in every original literary, dramatic, musical and artistic work, subject to certain limitations (s. 4). The copyright claimed is said to be in either an artistic or in a dramatic work, or both, those terms being defined in s. 2 of the Act as follows:

2. In this Act, unless the context otherwise requires,
  - (b) "artistic work" includes works of painting, drawing, sculpture and artistic craftsmanship, and architectural works of art and engravings and photographs;
  - (g) "dramatic work" includes any piece for recitation, choreographic work or entertainment in dumb show, the scenic arrangement or acting form of which is fixed in writing or otherwise, and any cinematograph production where the arrangement or acting form or the combination of incidents represented give the work an original character;
  - (u) "every original literary, dramatic, musical and artistic work" shall include every original production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets, and other writings, lectures, dramatic or dramatico-musical works, musical works or compositions with or without words, illustrations, sketches, and plastic works relative to geography, topography, architecture or science.



1954  
 CANADIAN  
 ADMIRAL  
 CORPORATION  
 LTD.  
 v.  
 REDIFFUSION,  
 INC.  
 Cameron J.

S. 2 also defines "cinematograph" and "photograph" as follows:

- (d) "cinematograph" includes any work produced by any process analogous to cinematography;
- (7) "photograph" includes photo-lithograph and any work produced by any process analogous to photography.

Then s. 3(1) defines "copyright", those parts thereof which are here relevant being as follows:

3. (1) For the purposes of this Act, "copyright" means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever, to perform or in the case of a lecture to deliver, the work or any substantial part thereof in public; if the work is unpublished, to publish the work or any substantial part thereof; and shall include the sole right

(e) In the case of any literary, dramatic, musical or artistic work, to reproduce, adapt and publicly present such work by cinematograph; provided that the author has given such work an original character; and provided also that if such original character is absent the cinematographic production shall be protected as a photograph;

(f) In case of any literary, dramatic, musical or artistic work, to communicate such work by radio communication,

and to authorize any such acts as aforesaid.

Then s. 45 makes it clear that no person is entitled to copyright otherwise than under and in accordance with the provisions of the Act. The right is therefore purely statutory. Then s. 3 defines "copyright" as the sole right to do or to authorize the acts there specified in relation to the "work". S. 17(1) provides that 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 which is by the Act conferred on the owner of the copyright. Sub-s. (2) and (3) of s. 17 constitute certain other acts as infringements of copyright, but are not here of importance. It follows, therefore, that no matter how "piratical" the taking by one person of the work of another may appear to be, such taking cannot be an infringement of the rights of the latter unless copyright exists in that "work" under the provisions of s. 3. Copyright is, in fact, only a negative right to prevent the appropriation of the labours of an author by another. I mention these matters inasmuch as the conclusions which I may reach will of necessity depend on an interpretation of the provisions of the Act—an interpretation which will to some extent be quite technical.

From what has been stated above, it will be noted that the telecasts by or on behalf of the plaintiff of the games played at Montreal were *live* telecasts; and by that I mean that no films were taken, the image as seen by the camera being transmitted through the ether to the receiving set, where it was again made visible by the operation of that set. On the other hand, films were made of the games played out of Montreal and the telecast of the films is referred to as "film telecasts." In considering whether copyright subsists, it is necessary, therefore, to draw a distinction between the two categories. I shall first consider the question as to whether there is copyright in the "live" telecasts.

1954  
 CANADIAN  
 ADMIRAL  
 CORPORATION  
 LTD.  
 v.  
 REDIFFUSION,  
 INC.  
 Cameron J.

It is a principle of copyright that it must be an original production and that production may be in any mode or form of expression (s. 2(u)). It is not contended that there is copyright in any spectacle itself, such as a football match or a procession (*Sports & General Press Agency Ltd. v. Our Dogs Publishing Co.* (1)). The submission is that the originality is to be found in the conception, selection and arrangement of the production which in this case, goes on the air. Thus, while there is no copyright in any news event as such, it is said that there is copyright in the particular and original form in which that news event is reported in a newspaper.

The live telecasting of the games played in Montreal was planned and carried out under the supervision of the witness Renaud, who is a television producer in the employ of the Canadian Broadcasting Corporation. He was formerly a sports writer and had a somewhat limited training in television production. He was in charge of these particular productions and all those engaged in the telecast were also employed by the Broadcasting Corporation.

He described the operation as follows: Before the commencement of each game he gave instructions to the three cameramen, placing them at what he considered to be strategic spots in the field; one was to take long shots and the others "close-ups" of the players. The producer sat in a mobile unit or miniature control room situated outside the park and he was in telephone communication with the cameramen, who acted under his orders. During the game,

(1) [1916] 2 K.B. 880.

1954  
 CANADIAN  
 ADMIRAL  
 CORPORATION  
 LTD.  
 v.  
 REDIFFUSION,  
 INC.  
 Cameron J.

the "pictures" taken by the cameramen are passed by wire to the mobile unit, all three appearing on separate monitors or small screens there. The producer watches the three monitors and selects the one which he desires to send over the air, instructing the technical producer (who is in the same mobile unit) to proceed accordingly. From time to time the producer instructs the cameramen to change from long shots to close-ups, and vice versa, according to what the producer desires, and they act only on his instructions. There is also a commentator whose duty it is to provide a running oral description of the game as it is shown on the actual telecast sent over the air and whose broadcast is concurrent with the telecast. The latter has a full view of the field and is provided with an "out-put monitor" in which he sees the picture that is being shown to the public on their receiving sets. He is under the control of the production manager who instructs him from time to time through the floor manager, with whom he is in direct communication. Mr. Renaud pointed out that his experience as a sports writer was of great help to him in selecting particular pictures to be telecast and in anticipating likely plays which he could instruct the cameramen to prepare for and "take".

The course taken by the live telecast picture was therefore as follows: It came first through the cameras on the field to the mobile unit, then was transmitted by microwaves (or, in some cases, partly with the use of coaxial cables) to the transmitter in Station CBFT, from where it was transmitted through the ether to the television receiving sets, by the operation of which it was then shown as a picture on the screen. As I have said, no films were taken of these games and when the telecasting was completed, there was no record of any sort remaining.

It will be seen, therefore, that the "telecast productions" of these games taken as a whole consisted of broadcasts by radio of the observations made by the commentator and the telecasting or broadcasting of pictures by electro-magnetic waves through the ether. Counsel for the plaintiff submitted that there was copyright in both the radio broadcast and the television broadcast, whether considered separately or as a combination. I am of the opinion, however, that it is not necessary to give consideration specifically to the

radio broadcast—the observations made by the commentator—although for the reasons which I shall endeavour to set out in regard to the live telecasts of the pictures, I think it would be found that there was no copyright in such oral broadcasts.

1954  
 CANADIAN  
 ADMIRAL  
 CORPORATION  
 LTD.  
 v.  
 REDIFFUSION,  
 INC.  
 Cameron J.

The plaintiff does claim a declaration of ownership in the live “telecast productions”—a term which may be broad enough to include the oral broadcasts as well as the telecast of pictures. There is no evidence, however, that such oral broadcasts were heard by any of the subscribers of the defendant in their homes or by any member of the public in the Berri Street showrooms, and it is now admitted, also, that the film broadcasts were without oral commentary—that they were made from silent films. Moreover, para. 15 of the agreement (Exhibit 5) provides that, “Telecast and/or ‘telecasting’ for the purposes of this agreement mean the broadcasting of *pictures* by electro-magnetic waves through the ether.” The other admissions in Exhibit 5 that the programs of the home games were *televised* and as so *televised* were picked up from the ether by the defendant and distributed by wire to its various subscribers and to the sales and showrooms of Berri Street on the dates specified, that members of the public *saw* the programs in Berri Street and that the programs were *seen* on terminal units in the homes of defendant’s subscribers, clearly limit such admissions to what was *seen*—that is, the telecast of pictures.

The first submission on this point is that the live telecasts (or live radio broadcasts) of a football game, as described by the witness Renaud, is a “work”, and falls within the opening words of s. 2(u)—“Every original literary, dramatic, musical and artistic work shall include every original production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression.” It is not contended that it is either a literary or musical work. It is said that the total work done by Renaud and his fellow employees was to create a visual expression for the public—a dramatic or artistic work—and that the requirement of originality is satisfied by the process of conception, selection and arrangement as described by Renaud. In my view, it is not within the definition of “artistic work” (s.2(b)), except possibly to the extent that

1954  
 CANADIAN  
 ADMIRAL  
 CORPORATION  
 LTD.  
 v.  
 REDIFFUSION,  
 INC.  
 Cameron J.

it may be considered as a "photograph"; and as I shall be giving consideration to that question in disposing of the next submission of the appellant, I shall for the moment confine my inquiry to ascertaining whether this "work" is a "dramatic work".

S.2(g) (*supra*) defines "dramatic work" and one of the requirements is that "the scenic arrangements or acting form of the work is fixed in writing or otherwise". In Copinger and James' work on Law of Copyright, 8th Ed., it is said at p. 24:

The "making" of a work is *prima facie* the production of a material thing—a manuscript, a picture or negative, and, in the case of a lecture or speech, of the literary work which is the subject-matter of copyright from which the lecture or speech was delivered.

In the same work the author, in discussing the "nature of copyright", states at p. 2:

When, however, any material has embodied those ideas, then the ideas, through that corporeity, can be recognized as a species of property by the common law. The claim is not to ideas, but to the order of words, and this order has a marked identity and a permanent endurance.

I have given careful consideration to the terms of The Copyright Act and more particularly to the provisions of s. 2 and 3, and the conclusion seems inescapable—at least to me—that for copyright to subsist in a "work" it must be expressed to some extent at least in some material form, capable of identification and having a more or less permanent endurance. All the works included in the definitions of "artistic work" and "literary work" (s. 2(b) and (n)) have a material existence; "musical works" by s. 2(p) must be printed, reduced to writing or otherwise graphically produced or reproduced. Likewise, in regard to "dramatic works" there is the requirement which I have noted, namely, that the scenic arrangements or acting form must be fixed in writing or otherwise. "Cinematographic production" which are also dramatic works are obviously "fixed otherwise", since, as will be noted later, they involve the making of films.

Now on this point it is not necessary to consider to what extent the scenic arrangement or acting form must be *fixed* in writing or otherwise. It is sufficient to say that in the present case neither Renaud nor any of his associates had fixed anything in writing or otherwise, or had anything

whatever to do with the scenic arrangements of the acting form of the players participating in the football match. By the very nature of the spectacle, nothing of that sort could have been planned in advance or fixed in writing or in any other manner whatsoever. Renaud stated that very clearly at the conclusion of his cross-examination when in referring to the live telecasts of the football matches, he said: "It is an 'ad lib' production, because you can't prepare it, you can't control your subject at all; you have no authority over a football player."

1954  
 CANADIAN  
 ADMIRAL  
 CORPORATION  
 LTD.  
 v.  
 REDIFFUSION,  
 INC.  
 Cameron J.

In commenting on s. 35 of the English Copyright Act, 1911, Russell-Clarke in his work on Copyright and Industrial Designs (1951), said in reference to these words, at p. 39:

Writing is the method mentioned in the definition, and is the most obvious method, as by this means the nature of the work can be readily ascertained by a series of directions to be followed by those taking part. Another possible method of fixing would be by photographic means, or by a series of verbal directions embodied in some form of record. Mere spoken words, however, such as oral directions by a stage manager or producer, not reduced to a definite ascertainable form, which can be referred to at any time, cannot be sufficient to create a copyright. Quite apart from the above statutory requirements as to fixing created by the words of the definition, from a practical point of view, the law will not intervene to protect something which is not definite and ascertainable.

As authority for that proposition, the author relies on the case of *Tate v. Thomas* (1).

For these reasons, I think that the plaintiff must fail on this point.

Alternatively, counsel for the plaintiff submits that quite apart from the matters which I have just discussed, the live telecast production is a work in which copyright subsists inasmuch as it is a production by a process analogous to cinematography or photography.

The submission is that it is a "dramatic work" as being a cinematograph production (s. 2(g)) and that if it is not a cinematograph production inasmuch as no films were made, it was nevertheless a work produced by a process analogous to cinematography; and finally, that if it lacked the original character which s. 2(g) and s. 3(e) require of a cinematograph production, it is entitled to protection as a photograph or as a work produced by a process analogous

1954  
 CANADIAN  
 ADMIRAL  
 CORPORATION  
 LTD.  
 v.  
 REDIFFUSION,  
 INC.  
 Cameron J.

to photography (s. 2(r)) and therefore qualifies as an artistic work under s. 2(b)—“photographs” being specifically mentioned in that definition. It is said that by the television process a picture is created which may be observed visually and the scene is translated into a picture; that similarly in photography or cinematography the scene is translated into a picture and from a practical point of view the results are the same to a viewer.

In my opinion, however, the process which produces a photograph or cinematograph film by photography is in no way analogous to the process by which telecasting produces pictures or images on the screen where it is projected. In an ordinary camera, light from the scene to be photographed is focused by means of a lens on a sensitive emulsified surface of a film or plate. A change is produced in the emulsion by the impact of the light, a latent image is created in the emulsion which can be developed by the proper chemicals into a reproduction of the scene in negative form; and by reprinting from the negative a positive picture is produced. Cinematograph films are produced in much the same way. The result in each case is a negative and photograph, or a series of negatives and photographs, in material form having a more or less permanent endurance.

The function of a television camera is quite different, namely, to convert a picture—which is light—into an electrical signal which can be transmitted or radiated as electromagnetic waves (Herzian waves) through the ether. The process of television, including the action of the television camera and the television receiving set, was described by the witness Douglas as follows:

The scene to be televised, which consists of light and dark areas . . . is focused by means of a lens on a sensitive surface in the television camera, the pick-up tube. This sensitive surface emits electrons; it has the effect of an emissive surface in that light and dark causes the electrons to be emitted therefrom. These electrons emitted correspond to the picture information and are electrically focussed by a target in the tube. This target is scanned, which means that we look at a small portion of it at a time and the information, the electrical signal, produced there is transmitted by means of wires and cables in much the same way as the sound or the electrical signal from the microphone in sound broadcasting, which is applied to a transmitter and broadcast, in the case of the North American standards, by amplitude modulation . . .

Then, referring to the reception by the receiving set, he said:

Briefly again the antenna intercepts a small portion of the broadcast signal, the voltage there is amplified in the television receiver, is passed to a detector, the electrical signal corresponding to the camera pick-up tube output is recovered and this electrical signal is applied to control the beam intensity of the cathode ray tube or television picture tube. This electron beam is made to scan the picture tube screen in step with the camera scanning of the picture and the picture is reproduced on the television screen because the electrons in this beam excite the fluorescent material in the screen.

The picture tube is a means of converting this electrical energy back into a pictorial form which the eye can see. The electrons in the scanning beam excite the phosphor, permitting the light in proportion to the amount of the signal striking it.

Then he described the manner in which the image on the screen was created, as follows:

It is a change in the state of the atoms of this fluorescent material. I suppose the electrons in the orbit of the atom move from one level to another, and in the process of moving back to where they were in the first place, emit energy in the form of light. By the way, these phosphors have different decaying times so that you could have a picture which is persistent for several minutes, if necessary, by the choice of materials in the phosphor on this picture tube.

The televised image or picture as seen by the viewer lasts for but a small fraction of a second. It may be, as stated by Douglas, that it is possible to prolong the time by a change in the materials, but that, of course, is not normally done in television. The original image vanishes without trace when succeeded by the following picture or when the receiving set is turned off and nothing whatever remains.

These facts alone are sufficient to warrant the conclusion which I have reached, namely, that neither the process nor result of telecasting is analogous in any way to that of photography or cinematography.

Even if I am wrong in that conclusion and the "work" was found to be a cinematograph production, it would not be a dramatic work within the meaning of s. 2(g) inasmuch as the arrangement or acting form, or the combination of incidents represented, do not give the work an original character.

Before considering the question as to what is meant by "original" in the law of copyright, I think I should state my conclusion as to whether the image produced on the receiving set in the case of the live telecasts was a photograph and

1954  
 CANADIAN  
 ADMIRAL  
 CORPORATION  
 LTD.  
 v.  
 REDIFFUSION,  
 INC.  
 Cameron J.



1954  
 CANADIAN  
 ADMIRAL  
 CORPORATION  
 LTD.  
 v.  
 REDIFFUSION,  
 INC.  
 Cameron J.

therefore an artistic work under s. 2(b), particularly as special considerations may be applicable to the word "original" as applied to films. In my opinion, it is not a photograph as that word is ordinarily understood. It is defined in the Act as including "photo-lithograph and any work produced by any process analogous to photography". In the Shorter Oxford English Dictionary, "photograph" is defined as "a picture, likeness, or facsimile obtained by photography", and that, I think, is the generally accepted meaning of the word. Then "photography" is defined in the same dictionary as "the process or art of producing pictures by means of the chemical action of light on a sensitive film on a basis of paper, glass, metal, etc." In my view, a photograph is something concrete, something in a material form that cannot only be seen but handled, and involves the creation of a negative. That view of the matter is strengthened by a consideration of the provisions of s. 9 of the Act which provides for the terms of copyright in "photographs" in these words:

The term for which copyright shall subsist in photographs shall be fifty years from the making of the original *negative* from which the photograph was directly or indirectly derived, and the person who was owner of such *negative* at the time when such *negative* was made shall be deemed to be the author of the photograph so derived . . .

The question of what is meant by "original" in the law of copyright is one which has frequently given rise to considerable difficulty. The meaning of the word was discussed in a judgment of Petersen, J. in the case of *University of London Press Ltd. v. University Tutorial Press Ltd.* (1), and has been frequently cited with approval in many cases. At p. 608 he said.

The word "original" does not in this connection mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought, and in the case of "literary work" with the expression of thought in print or writing. But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work—that it should originate from the author.

For a work to be "original" it must originate from the author; it must be the product of his labour and skill and it must be the expression of his thoughts. Thus, if an artist

(1) [1916] 2 Ch. 601.

were to sketch a particular view, the painting is the result of his labours and skill and is an expression of his thoughts. On the other hand, a mere amanuensis who does no more than take down what is dictated to him does not exercise labour or skill of the required character—that is no expression of his thoughts therein and he is not entitled to copyright. See *Donaghue v. Allied Newspapers Ltd.* (1).

1954  
 CANADIAN  
 ADMIRAL  
 CORPORATION  
 LTD.  
 v.  
 REDIFFUSION,  
 INC.  
 Cameron J.

In the present case, how has Renaud—whom I shall consider as the author—expressed his thoughts? If he has expressed them at all it could only be in the quickly fading image seen on the television receiving set. It could not be in the equipment he used or in the planning or placing of the photographers or anything of that sort.

Counsel for the plaintiff says that the originality is to be found in the conception, arrangement and selection of the pictures to be shown. There is no copyright in mere conception or ideas and Renaud had nothing to do with the arrangements of the pictures shown. All that he did in my opinion was to choose the particular play in the game—a play in which he took no part whatsoever—and by means of the equipment provided communicate that play so that it could be seen by any one within the range of the telecast who desired to see it and had the necessary equipment for its reception. In the picture so seen there was no expression of his thoughts, but merely a view of what was seen by thousands of others at the playing field.

In *Frank Smythson v. Cramp & Sons Ltd.* (2), it was held that a selection of a number of well-known tables including a calendar, a list of postal rates and lighting-up times, etc., and their arrangement at the beginning of a diary, was not an “original” compilation in which copyright could exist. Lord Macmillan, after pointing out that the ground was cleared by the admission that no claim was made to copyright in any one of the seven tables, or to their order, but only to the selection of the tables, continued:

Now I do not doubt that, as the annals of literature show, a high degree of skill and knowledge may be displayed, and much labour and judgment expended in gathering from the wide fields of non-copyright material at the disposal of the public specialized collections of extracts designed to meet particular needs or particular tastes, but it must always be a question of degree. Not every compilation can claim to be original literary work, even in the pedestrian sense attributed to these words by

(1) [1938] Ch. 106.

(2) [1944] A. C. 329.

1954  
 {  
 CANADIAN  
 ADMIRAL  
 CORPORATION  
 LTD.  
 v.  
 REDIFFUSION,  
 INC.  
 Cameron J.  
 —

the law . . . In my opinion the respondents in selecting the seven tables in question for inclusion in their diary, did not bring into existence a copyright work.

Mere selection is not enough to create copyright. Supposing, for example, that A says to a friend B who is ill, "I have access to a book which cannot be brought to you. I will, however, cut out pages or copy pages therein which I think might be of special interest to you and bring them to you so that you can see them." That would perhaps be a selection but it could not be imagined that A, who had done nothing except to make the selection, should be thought to have copyright in that selection. It would not be an expression of his thoughts. That, in my opinion, is quite similar to what happened in the instant case.

In Copinger & James, 8th Ed., the authors comment as follows on p. 159:

It is understood that methods of television at present in use do not necessarily involve any record on film or otherwise of the work performed, so that there is not necessarily any exercise of the right to make mechanical contrivances, though, if any record is preserved, an exercise of the right will be involved.

Television cannot be an infringement of copyright unless there is a copyright work involved. Consequently television of sporting events cannot, it is thought, involve any infringement; television, in these circumstances, amounts to no more than providing the public with an electrical telescope and would appear neither to create nor to infringe any right in which copyright can subsist.

No authority is stated for the propositions so advanced, but for the reasons which I have stated I am in agreement with the author that the live telecasting of sporting events such as those now under consideration, cannot create a work in which copyright can subsist.

I must find, therefore, that the plaintiff had no copyright in any of the live telecasts here in question.

I turn now to the film telecasts and must first consider whether and to what extent copyright subsists therein. They were made, as I have stated, from cinematograph films and were therefore cinematograph productions. By s. 2(g), such a production is a "dramatic work" only if the arrangement or acting form or the combination of incidents represented has given the work an original character. Now there is no evidence before me as to how these films were prepared or even that there was any degree of selection. Assuming, however, that they were prepared

in the same manner as Renaud prepared and presented the live telecasts—and I cannot assume anything more than that—I would have to find that they had not been given “an original character” and for the same reasons as I have stated in regard to the live telecasts. The concluding part of s. 3(e), however, provides that if the author has not given the cinematographic production an original character, it shall be protected as a photograph; and photographs, as I have said, are within the definition of “artistic work” (s. 2(b)).

1954  
 CANADIAN  
 ADMIRAL  
 CORPORATION  
 LTD.  
 v.  
 REDIFFUSION,  
 INC.  
 Cameron J.

The matter is discussed in Copinger and James at p. 221 where the authors state:

Turning now to the protection which is accorded to the film itself, we do not find the Act to be very clear upon the point. The difficulty arises from the fact that the film may be regarded from two points of view: it consists of a series of photographs, and from this point of view it is an “artistic work” (*Pathé Freres v. Bancroft* (1933)); but where scenes are arranged for the purpose of being filmed there may be copyright in these arrangements as a dramatic work, for dramatic work is defined (s. 35(1)) as including “any cinematograph production where the arrangement or acting form, or the combination of incidents represented give the work an original character”. It seems fairly clear that the cinematographing of a series of events in real life is not a “production” within the meaning of the definition since there is no acting form or arrangement. Even where the work is a “production” it must have an original character; this would seem to be so apart from the definition since copyright only subsists in original dramatic works, but the effect of the definition is no doubt to point out where the originality in a cinematograph production must subsist.

I must reach the conclusion, therefore, that the plaintiff is not entitled to the protection afforded to a cinematograph production but only to the same protection as a series of photographs—an artistic work. I turn now to the question as to whether the defendant has infringed the plaintiff’s right therein.

As I have said, the plaintiff alleges that the defendant took its telecasts off the ether and “rediffused” the same to its subscribers and to its showrooms and sales office. It becomes necessary to describe in some detail just what the defendant does in this regard in order to understand what is meant by the process referred to as “rediffusion”. I should note here that in addition to picking up the telecasts from Station CBFT, the defendant also initiates certain television programs of its own, all of which are also transmitted through co-axial cables to the “terminal units”

1954  
 CANADIAN  
 ADMIRAL  
 CORPORATION,  
 LTD.  
 v.  
 REDIFFUSION,  
 INC.  
 Cameron J.

(that is the name given by the defendant to the receiving sets which are leased to its subscribers) in the homes of its subscribers.

Exhibit 8 is a diagram of the defendant's studio setup. By means of an antenna which it provides and maintains, the defendant picks up from the ether the telecasts from Station CBFT which are then passed to a group of television receivers. These receivers are said to be a modification of the ordinary R.C.A. receivers, the modification enabling the video signal—which is the television picture information—to be transmitted through wires to the rest of the equipment. It then passes to a line clamp amplifier, the purpose of which is to clean up the signal within certain limits. The composite video signal is then passed to a selector switch bank and there it is possible to bring in other picture sources if desired. The output is then fed to a wired wireless transmitter which imposes the rediffusion signal on the outgoing coaxial cable, together with such other programs as may have been added. The rediffusion signals are transmitted on a number of different frequencies (lower than those of the Station CBFT) so that they can be separated out again at the terminal unit. By means of the cable, the signals are conveyed to the subscribers' terminal units. These units include the same type of picture tube as is used in ordinary standard television receivers. There the process of amplification and detection, and the production of the image or picture, are much the same as in the ordinary television receiver. The defendant supplies radio and television programs to its subscribers by means of the equipment which I have described and leases to the subscribers a loudspeaker and a complete terminal unit "to give full Rediffusion service". Exhibit 10 is a sample of the contract entered into with its subscribers.

The defendant says that in so rediffusing the telecasts of the plaintiff, there was no performance by them and that the only performance which took place was the one by Station CBFT at the football stadium. They say that all that happened afterwards was merely an extension of the audience for that performance and a continuation of that performance. It follows, the defendants say, that the listeners saw the original performance put out by or on

behalf of the plaintiff and that therefore nothing they did could constitute an infringement of the plaintiffs copyright.

Much the same submission were advanced and rejected in the case of *Performing Right Society, Ltd. v. Hammond's Bradford Brewery Co.* (1). That was a case under The Copyright Act, 1911 (England), involving a consideration of the terms of s. 35(1) defining "performance", which is identical to the definition of that word found in s. 2(q) of our Act, which is as follows:

2. In this Act, unless the context otherwise requires

(q) "performance" means any acoustic representation of a work or any visual representation of any dramatic action in a work, including a representation made by means of any mechanical instrument or by radio communication;

The headnote in that case is as follows:

On October 1, 1932, three songs of which the copyright was vested in the plaintiffs were performed with their consent at a cinema and the performance was broadcast by the British Broadcasting Corporation. By an agreement dated February 8, 1932, the plaintiffs had licensed the Corporation to broadcast songs from time to time in their repertoire, but the licence authorized and covered "the audition or reception of copyright musical works by means of broadcasting for domestic and private use only". By means of a receiving set and loud-speaker at a hotel belonging to the defendants the songs were made audible to visitors to the hotel. It was admitted that if what the defendants had done amounted to a performance, it was a performance to the public.

*Held*, by the Court of Appeal (affirming the decision of Maugham J.), that by rendering the songs audible through their receiving set, the defendants had given or authorized a "performance" within s. 35, sub-s. 1, of the Copyright Act, 1911; that, as the licence to the Corporation did not authorize the reception of the songs by means of broadcasting otherwise than for domestic and private use, the performance, being admittedly a performance to the public, was given without the plaintiffs' consent; and therefore that the performance constituted an infringement of the plaintiffs' copyright.

Lord Hanworth, M. R., after referring to the applicable sections of the Act, said at p. 133:

Bearing those sections in mind, what did the defendants do? By the use of what I have called an installation, they made this performance at Hammersmith audible to a larger number of persons than would otherwise have heard it and to persons outside the domestic circle of the George Hotel. It was at the instance of the management that steps were taken to provide this entertainment. It appears to me that that act on the part of the management constituted on their part either a performance or the authorization of a performance.

Maugham J. said in his judgment that the process employed was "a reproduction and is not similar to the mere step of making distant sounds audible by some magnifying device. The sounds are produced

(1) [1934] 1 Ch. 121.

1954  
 CANADIAN  
 ADMIRAL  
 CORPORATION  
 LTD.  
 v.  
 REDIFFUSION,  
 INC.  
 Cameron J.

by an instrument under the direct control of the hotel proprietor", and it seems to me, as it did to Maugham J., that the act done at the volition of the hotel proprietor constituted an invasion of the rights of performance, or authorization of performance, which are granted to the owner of a copyright by s. 1, and is by virtue of s. 2 to be deemed to be an infringement unless consent can be proved. That it was a performance seems clear, because it was an acoustic representation of a work.

In the same case, Lawrence L. J. said at p. 137:

I find it impossible to escape from the conclusion that the owner of a receiving set who puts it into operation causes an acoustic representation of a musical work which is being broadcast to be given at the place where the receiving set is installed and is therefore himself performing or authorizing the performance of the musical work within the meaning of the Copyright Act, 1911.

On the same page Romer L. J., as he then was, said:

In my opinion a man performs a musical composition when he causes it to be heard.

That decision was referred to and followed in *Performing Right Society v. Gillett Industries, Ltd.* (1); and in Canada in the case of *Canadian Performing Right Society v. Ford Hotel* (2).

The cases cited had to do with acoustic representations, but the principles there laid down on this point are in my opinion of equal application to a visual representation which is also included in the definition of "performance". I have no hesitation, therefore, in reaching the conclusion that the rediffusion of the film telecasts in question by the defendant in the manner which I have described constituted a "performance" of the plaintiff's work.

That, however, does not conclude the matter; mere performance is not enough; in order to find that the defendant infringed the plaintiff's right, I must find that the performance was "in public". The Act does not define "in public" and it would be undesirable for me to attempt to do so except to state that I regard it as the antithesis of "in private". Each case must depend on its own particular facts.

I have read the cases referred to by counsel and it seems to me that the test to be applied is, "What is the character of the audience?"

(1) [1943] 1 A.E.R. 228 and 413. (2) [1935] 2 D.L.R. 391.

In *Duck v. Bates* (1), a dramatic representation was given to the nurses and attendants of Guy's Hospital, together with the medical men and students and some of their families. Brett, M.R. and Bowen, L. J. held that the performance was a domestic or quasi-domestic and not a public performance, possibly because the audience was composed in the main of nurses who lived together at the hospital. Bowen, L. J. said in the course of his judgment:

Some domestic or quasi-domestic entertainments may not come within the Act. Suppose a club of persons united for the purposes of good fellowship gave a dramatic entertainment to its members; I do not say that the entertainment will necessarily fall within the prohibition of the statute.

In *Harms Inc. and Chappell & Co. v. Martan's Club* (2), there was a performance at the Embassy Club at which club members and some guests were present. It was held that the plaintiff's copyright was infringed. In that case Sargant L. J. said at p. 537:

There has been an invitation to the members of the public capable of becoming members of the Club upon the terms of getting in return for their subscription the performance of music, so that you do really get an invitation to the public, and an invitation to the public to listen at a price or at a payment, though the payment is an annual one. Beyond that, there is, of course this, that the members of the public who have become members of the Club by passing through the not very severe test which is imposed, have also the privilege of bringing in other members of the public upon whom no test is imposed, who happen to be their friends and are invited on any particular evening.

In *Performing Right Society Ltd. v. Hawthorn's Hotel (Bournemouth) Ltd.* (3), an orchestral trio played in the lounge of the defendant's hotel, there being present several guests of the hotel, among others. Bennett, J. held that the performance by the hotel orchestra was a performance "in public" because it was open to any members of the public who cared to be guests of the hotel either by sleeping or dining there.

Again, the question was fully considered by the Court of Appeal in *Jennings v. Stephens* (4), which reversed Crossman, J. (5). Romer, L. J. in discussing the general question as to whether a performance was "in public", said at p. 416 ff.:

No one, for instance, can doubt that the concerts given at the Albert Hall are, in general, performances "in public", or that music provided by

(1) (1884) 13 Q.B.D. 843.

(3) [1933] 1 Ch. 856.

(2) [1927] 1 Ch. 526.

(4) [1936] 1 All E. R. 409.

(5) [1935] 1 Ch. 703.



1954  
 CANADIAN  
 ADMIRAL  
 CORPORATION  
 LTD.  
 v.  
 REDIFFUSION,  
 INC.  
 Cameron J.

a man for the entertainment of his guests after dinner or at a reception is performed "in private"; and I think that the meaning of the two phrases can best be ascertained by considering what is the essential difference between the two performances. The difference material for the present purpose lies, it seems to me, in this. In the latter case the entertainment forms part of the domestic or home life of the person who provides it, and none the less because of the presence of his guests. They are for the time being members of his home circle. In the former case, however, the entertainment is in no sense part of the domestic or home life of the members of the audience. It forms part of what may be called in contradistinction their non-domestic or outside life. In the one case the audience are present in their capacity as members of the particular home circle. In the other they are present in their capacity as members of the music-loving section of the public. The home circle may, of course, in some cases be a large one. The section of the public forming the audience may in some cases be a small one. But this can make no difference, though it may sometimes be difficult to decide whether a particular collection of persons can properly be regarded as constituting a domestic circle. In *Duck v. Bates*, (1884) 13 Q. B. D. 843, the Court of Appeal seem to have regarded the nurses and medical staff of Guy's Hospital as forming a domestic circle, and a dramatic entertainment given before them and their guests as a private performance. Bennett, J., on the other hand, in *Performing Right Society v. Hawthorn's Hotel*, (1933) 1 Ch. 855, treated, and in my opinion rightly treated, a musical entertainment given to the residents in an hotel, to which any respectable member of the public could obtain admission merely by payment, as a performance in public. Nor, with all deference to those who think otherwise, can I agree that it makes any difference whether the actual performers are paid for their services or give them gratuitously, or whether the performers are strangers or members of the domestic circle. The performers at what is unquestionably a private performance are frequently paid. The performers at what is unquestionably a public performance frequently give their services for nothing. Nor can an entertainment that is private when given by the members of the home circle cease to be private when given by strangers.

I also find some difficulty in seeing why it is material to consider the nature of and the place where the entertainment is given. A private entertainment may be given in a public room. A public entertainment may be given in a private house. The question whether an entertainment is given in public or in private depends, in my opinion, solely upon the character of the audience. Suppose, for instance, that a number of people who are interested in the drama, band themselves together in a society or club for the purpose of providing by means of their subscription the performance before themselves from time to time of dramatic works. This would be something entirely outside their domestic lives, and they would, in my opinion, attend the performances merely as members of the public, and none the less because the section of the public which they represent may be limited by election, the social status of the members, or their capacity to pay a large subscription. I should regard any dramatic performance given before that society as a performance in public . . .

The teaching staff and pupils of a boarding school might, on the other hand, properly be regarded during the school term as forming a domestic circle, and a dramatic performance given before them might well be held to be a private performance, even though the parents or other

relations of the pupils were present as guests. I cannot, indeed, think that a performance which would otherwise have been a performance in private could be turned into a performance in public by the mere presence of some guests. Guests were present at the entertainment that was the subject matter of the inquiry in *Duck v. Bates* (supra), to which I have already referred—a case which it must be confessed was somewhat near the line. It is easy to imagine other cases in which it is difficult to say whether they fall on the private or public side of the line. But the present case seems to me quite plainly to fall upon the public side.

1951  
 CANADIAN  
 ADMIRAL  
 CORPORATION  
 LTD.  
 v.  
 REDIFFUSION,  
 INC.  
 Cameron J.

The matter was again considered in *Performing Right Society, Ltd. v. Gillett Industries, Ltd.* (1). There the defendants installed in their factory a number of loud-speakers from which broadcast music was heard in various departments of the factory and about six hundred workers heard the broadcast, but all strangers were excluded from the factory. At the trial, Bennett, J. pointed out the difficulty of obtaining from the authorities any real principle which could be said to govern every case and to lay down any general rule for defining what is meant by performance in public. He distinguished the case from *Duck v. Bates* (supra), holding that the performance of the music by the defendant could not be said to be for domestic purposes, and followed *Jennings v. Stephens* (supra). On appeal, Lord Greene, M. R. affirmed the judgment of Bennett, J., basing his judgment on the authority of the Court of Appeal in *Jennings v. Stephens*, citing with approval the words of Lord Wright, M. R. that, "The true criterion seems to be the character of the audience". In that case, the Master of the Rolls stated:

The owner of the copyright is entitled to be paid for the use of his property unless and until the Legislature otherwise determines, and he is entitled to be paid for it even if the use that is made of it is a use which concerns the public welfare to a very considerable extent . . . When the Legislature under The Copyright Act conferred upon the owner of copyright a monopoly, it no doubt intended that the monopoly should be a real and not an illusory right of property, and it is, therefore, in my opinion, important to consider whether a particular performance, the character of which is in question, is of a kind calculated to whittle down that monopoly to any substantial extent.

I think it may be said with some truth that the more recent cases have indicated a tendency to extend somewhat the protection afforded to the owners of copyright, since the case of *Duck v. Bates*. In none of these cases, however, can I find a suggestion that a performance in a private home

(1) [1943] 1 All E. R. 228 and 413.

1954  
 CANADIAN  
 ADMIRAL  
 CORPORATION  
 LTD.  
 v.  
 REDIFFUSION,  
 INC.  
 Cameron J.

where the performance is given, heard or seen by only members of the immediate household, could be considered as a performance in public.

As to the character of the audience in homes and apartments to which the telecasts of the live films were "rediffused" by the defendant, there is no evidence whatever except that they were seen by the defendant's subscribers, presumably only the householders. The character of the audience was therefore a purely domestic one and the performance in each case was not a performance in public. Counsel for the plaintiff, however, submits that even if one such "view" in the privacy of the owner's home does not constitute a performance in public, that in cases where a large number of people, each having a terminal unit in his home, performs the work by operating the terminal units, that such would constitute a performance in public. He says that from the point of view of the owner, a large number of such performances would constitute an interference with the owner's right of making copies of his work and might cause him to lose part of his potential market. I am unable to agree with that submission. I cannot see that even a large number of private performances, solely because of their numbers, can become public performances. The character of the individual audiences remains exactly the same; each is private and domestic, and therefore not "in public". Moreover, in telecasting the films, I think the plaintiff desired to have the telecasts seen by as many people as were within range and possessed the necessary receiving equipment in order that they might be informed of its product; so that I do not think that what was done by the defendant in so far as the private homes and apartments are concerned, interfered with his potential market in any way. It was stated and not denied that the films, including the commercial announcements of the plaintiff, were rediffused as a whole.

I find, therefore, that the performances in the homes and apartments of the subscribers of the defendant company were not performances "in public".

The situation, however, is quite different in regard to the defendant's Berri Street showroom. The evidence is that the showroom was operated by the defendant for the purpose of demonstrating and selling its services which

included the leasing of its terminal units. The showroom was open to the public, and members of the public there on various occasions saw the film telecasts of the plaintiff broadcast on Station CBFT. There was nothing there of a domestic or quasi-domestic nature and in my opinion it was a performance in public and an infringement of the copyright of the plaintiff in the cinematograph films. It was suggested by counsel for the defendant that a finding to that effect might seriously interfere with the operations of store salesmen of any type of television receiving sets, and that may be so. If, however, the plaintiff has established its right to copyright, it is entitled to the protection afforded by the Act for such right and to restrain the defendant from infringing that right no matter what the consequences to others might be.

My conclusion on this point, therefore, as regards the showing of the film telecasts by the defendant in its Berri Street showroom, is that there was an infringement by the defendant of the plaintiff's copyright in such cinematograph films.

One more matter, however, remains for consideration. The plaintiff submits that the defendant has also infringed its copyright by communicating the work by radio communication (s. 3(f)). Essentially, the right of copyright is an exclusive right to make copies of the work and that may be done not only by production or reproduction, but also by presentation in various ways, including presentation by cinematography (s. 3 (e)). A further right is given by s. 3(f), namely, to communicate the work by *radio* communication, and here it is alleged that by rediffusing the telecasts the defendant communicated the work by radio. Under the subsection, of course, it makes no difference whether the performance be in public or in private. It is the sole right to communicate *by radio* which is given to the owner of copyright.

I am unable to agree that the defendant did anything of the sort. Earlier herein I stated that the monopoly conferred on the owner of copyright is purely a statutory one and the right is as defined therein and not otherwise. Here the right is to communicate a work *by radio communication*.

1954  
 CANADIAN  
 ADMIRAL  
 CORPORATION  
 LTD.  
 v.  
 REDIFFUSION  
 INC.  
 Cameron J.

1954  
 CANADIAN  
 ADMIRAL  
 CORPORATION  
 LTD.  
 v.  
 REDIFFUSION  
 INC.  
 Cameron J.

Now radio is a communication of messages by means of electro-magnetic or Herzian waves through the ether. It is perhaps not necessary to decide whether the term "radio" is broad enough to include "telecasts", although the latter does transmit pictures through the ether by use of electro-magnetic waves also. But in this case the defendant communicated the work not by the use of electro-magnetic waves, but by the use of co-axial cables to its subscribers and to its Berri Street showroom. It is true that it picked up the telecasts of the plaintiff from the ether and that the pictures were seen on the terminal units. But the communication by the defendant was not, in my opinion, *by radio*.

I think that there is no question that the title to the copyright in the cinematograph films was in the plaintiff. The films were made by Briston on the order of Dow for valuable consideration, and there being no agreement between Briston and Dow to the contrary, Dow was the first owner. As I have stated above, the parties have agreed that such copyright as Dow had therein became vested in the plaintiff.

In the Statement of Defence, the defendant alleged that the registrations made by the plaintiff in the copyright office on October 18, 1952, both of the telecast productions of the games played at Montreal (i.e. the live telecasts) and of the cinematograph films, reproducing the games played away from Montreal, were improperly registered, lacking subject-matter of copyright and were invalid; they asked that the registrations be expunged from the Register of Copyright.

By s. 40(4) power is given to this Court to order the rectification of the Register by the expunging of any entry wrongly made in or remaining on the Register. Inasmuch as I have found that the live telecast productions of the football games lacked subject-matter of copyright, the defendant is entitled to an order that the registrations in regard thereto be expunged from the Register. In view of my finding that copyright subsisted in the cinematograph films, the registrations in regard thereto will remain.

The plaintiff claimed damages in the sum of \$600.00 for infringement of its copyright, both in the live and film telecasts. Damages have not been proven and would be difficult of ascertainment with any degree of certainty. The parties are desirous of having the damages fixed rather than to have the question referred to the Registrar. Taking all relevant matters into consideration, I fix the damages for infringement at \$300.00. The plaintiff is also entitled to an injunction in respect of the infringed matter.

1954  
 CANADIAN  
 ADMIRAL  
 CORPORATION  
 LTD.  
 v.  
 REDIFFUSION  
 INC.  
 Cameron J.

There will therefore be judgment as follows:

(a) A declaration that the plaintiff is the owner with respect to the televising over Station CBFT, Montreal, or the distribution by wire service within the territorial limits of the Province of Quebec (including the distribution and performance after receiving the same through the ether by wire service and rediffusion), of the copyright in the films referred to in the Statement of Claim, and that the defendant has infringed such copyright by reproducing the said films and/or television pictures by performing and/or presenting the said works in public in its Berri Street showroom and sales office, without the consent of the plaintiff;

(b) That the plaintiff is entitled to damages from the defendant for infringement of the plaintiff's copyright therein in the sum of \$300.00;

(c) An injunction restraining the reproduction, presentation or performance by the defendant, its officers, servants and agents, in public by rediffusion of the telecast programs by means of films of the football games played during the regular 1952 Big Four season by the Alouettes away from Montreal;

(d) That the registrations made by the plaintiff in the copyright office on October 18, 1952, of the telecast productions of football games played by the Montreal Alouettes at Delorimier Stadium on August 27, September 28, October 5 and October 12, 1952, and registered as Serial Nos. 99150-1-2-3 in Register of Copyright No. 27, be expunged from the Register, such rectification of the Register to be as and from October 18, 1952.

The plaintiff is also entitled to its costs after taxation.

*Judgment accordingly.*