BETWEEN:

CANADIAN PERFORMING RIGHT SOCIETY LIMITED ..... } PLAINTIFF.

AND

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

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Copyright—Infringement action—The Copyright Amendment Act, 1931, 21-22 Geo. V, c. 8, Secs. 10, 10A and 10B—An Act to amend The Copyright Amendment Act, 1931, 1 Edw. VIII, c. 28, s. 2—An Act to amend The Copyright Amendment Act, 1931, and the Copyright Act, 2 Geo. VI, c. 27, Secs. 1 and 4—Copyright Appeal Board—Copyright in musical composition—Injunction—"Owner or user" of a gramophone giving public performances.

Plaintiff owns the exclusive right to the public performance of a musical composition known as "Star Dust". This musical composition was played or performed on a gramophone in a public restaurant belonging to the defendant, Rae Restaurants, Limited, such gramophone having been placed there by the other defendants under an arrangement whereby they placed the gramophone, with records to be played, in the restaurant, for the use of which they charged a fee. The defendants were not licensed by the plaintiff to perform such musical composition, nor was such public performance made with the consent of any authorized person. Plaintiff is such a society or company as is referred to in 21-22 Geo. V, c. 8, s. 10. Plaintiff seeks an injunction to restrain defendants from infringing its copyright in the musical composition "Star Dust".

Held: That defendants do not fall within the class of persons protected by ss. 6 (*a*) of s. 10B of the Copyright Act as enacted by 2 Geo. VI, c. 27, s. 4.

2. That defendants are not the "owner or user" of a gramophone giving public performances in the sense contemplated by the Copyright Act.

ACTION by plaintiff praying for an injunction restraining defendants from infringing plaintiff's copyright in a certain musical composition.

The action was tried before the Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

O. M. Biggar, K.C. and *Christopher Robinson* for plaintiff.

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S. Rogers, K.C. and *J. C. Osborne* for defendants.

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

THE PRESIDENT now (July 21, 1942) delivered the following judgment:

The plaintiff is a company incorporated under the laws of the Dominion of Canada, and having its principal office in the City of Toronto, Province of Ontario. It is a company which carries on in Canada the business of acquiring copyrights of dramatico-musical or musical works or performing rights therein, and deals with or in the issue or grant of licences for the performance in Canada of dramatico-musical or musical works in which copyrights subsist. It is such a society or company as is referred to in Sec. 10 of Chap. 8 of the Statutes of Canada for the year 1931, The Copyright Amendment Act, 1931, as amended by Sec. 2 of Chap. 28 of the Statutes of Canada for the year 1936, and Sections 1 and 4 of Chap. 27 of the Statutes of Canada for the year 1938. The Copyright Amendment Act, 1931, as amended, is to be read and construed with, and as part of, the Copyright Act.

The defendants Raymond Vigneux, Arthur F. Vigneux and Maria Anna Chauvin carry on business under the firm name and style of Vigneux Brothers at 273 Wyandotte Street West, in the City of Windsor, in the Province of Ontario, and the defendant, Rae Restaurants Limited, carries on business on the Lake Shore Boulevard near the City of Toronto, in the said Province. The business carried on by the defendants Vigneux Brothers consists in the installation and servicing of electrically operated devices adapted, upon the insertion of a coin therein, to make audible a series of sounds corresponding to markings on one or other of a number of discs or records with which the device is equipped by the said defendants.

The said devices are installed by the said defendants in the premises of persons operating restaurants, cafes and other places frequented by the public in order that the said persons and members of the public may, by the insertion of coins in the said devices, obtain the public performance of musical compositions recorded on the discs supplied as aforesaid, which the said defendants from time to time

replace with records of fresh compositions. Installations of the said devices in the places aforesaid by the said defendants are made with the intention that the said persons in control of the said places should afford members of the public access to the said devices, and under agreements with the said persons pursuant to which the sums represented by the coins inserted in the said devices from time to time are divided between the defendants and the person operating the said place. Pursuant to such an agreement the said defendants installed a device of the kind described in the premises of the defendant, Rae Restaurants Limited, and among the records supplied by the defendants Vigneux Brothers for use in the said device there was included one of a musical composition known as "Star Dust", of the exclusive right to the public performance of which the plaintiff is the owner.

By a series of assignments the plaintiff is the owner of the copyright in the said musical composition called "Star Dust", the lyrics being by one Parish and the music by one Carmichael. This musical composition was, on a certain date mentioned in the pleadings, played or performed on a gramophone in a public restaurant belonging to the defendant Rae Restaurants, Ltd., such gramophone being placed there by the other defendant Vigneux Bros. under an arrangement arrived at between them and as presently to be explained, and neither of the said defendants was licensed by the plaintiff to perform such musical composition, nor was such public performance made with the consent of any authorized person. The arrangement was that Vigneux Bros. would place the gramophone with the records to be played, in the restaurant, for the use of which Vigneux Bros. charged the other defendant the sum of $10 a week. The gramophone might be operated by anyone, and was operated chiefly by the patrons of the restaurant, by inserting therein a five, ten or twenty-five cent coin, according as the patron might desire to hear one, two or five musical compositions on the records in the gramophone. Each week two representatives of Vigneux Bros. came to the restaurant, one to open or unlock the gramophone in the presence of some one representing the restaurant owner, and to take therefrom the money deposited in it by the patrons of the

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restaurant during the past week as described, from which $10 would be paid over to Vigneux Bros., and the balance to the restaurant; the other person would make arrangement for the particular records to be placed in the gramophone for use during the succeeding week. These receipts amounted to between $30 and $40 per week, which meant a revenue to the owner of the restaurant of from $20 to $30 a week, or at the rate of $1,000 to $1,500 a year, and a revenue of $520 a year to Vigneux Bros.

I now turn to certain provisions of the Copyright Amendment Act, 1931, as amended in 1936 and in 1938, by the Statutes already mentioned. These amendments to the Copyright Amendment Act, 1931, had largely to do with societies or companies, such as the plaintiff society, and copyright in musical works acquired by such societies and companies. Sec. 10 of the Copyright Amendment Act, 1931, as amended in 1936 and in 1938 now reads as follows:

10. (1) Each society, association or company which carries on in Canada the business of acquiring copyrights of dramatico-musical or musical works or performing rights therein, and which deals with or in the issue or grant of licences for the performance in Canada of dramatico-musical or musical works in which copyright subsists, shall, from time to time, file with the Minister at the Copyright Office lists of all dramatico-musical and musical works, in current use in respect of which such society, association or company has authority to issue or grant performing licences or to collect fees, charges or royalties for or in respect of the performance of its works in Canada.

(2) Each such society, association or company shall, on or before the first day of November, one thousand nine hundred and thirty-six, and, thereafter, on or before the first day of November in each and every year, file, with the Minister at the Copyright Office statements of all fees, charges or royalties which such society, association or company proposes during the next ensuing calendar year to collect in compensation for the issue or grant of licences for or in respect of the performance of its works in Canada.

(3) If any such society, association or company shall refuse or neglect to file with the Minister at the Copyright Office the statement or statements prescribed by the last preceding subsection hereof, no action or other proceeding to enforce any civil or summary remedy for infringement of the performing right in any dramatico-musical or musical work claimed by any such association, society or company shall be commenced or continued, unless the consent of the Minister is given in writing.

The above provisions signify that any society acquiring the performing rights in any musical works was required to file with the Minister, the Secretary of State, a statement of the fees, charges or royalties it proposed to collect

during the next calendar year in compensation for the grant of licences in respect of the performances of its works in Canada. For refusal or neglect to file such statement any such society was prohibited by sub-s. (3) of sec. 10 from commencing or continuing any action or other proceeding to enforce any civil or summary remedy for infringement of the performing right in any musical work claimed by any such society, unless the consent of the Minister was given in writing.

Then follows sec. 10A which provides that after receipt of the statements prescribed by sub-s. 2 of sec. 10 the Minister is required to publish them in the *Canada Gazette* and to notify any person having any objection to the proposals contained in the said statements that he must lodge with the Minister particulars of his objection within a prescribed time. As soon as practicable after the date fixed in the said notice the Minister is required to refer the statements and any objections received in response to the notice to a Board to be known as the Copyright Appeal Board.

Then, the earlier sub-sections of sec. 10B provide for the creation of the Copyright Appeal Board, and other matters pertaining to the functions of the Board, but those subsections require no comment. Then follow sub-sections 6, 6 (*a*), 7, 8 and 9, which had better be recited in full because they are of importance in this controversy, and they are as follows:—

(6) As soon as practicable after the Minister shall have referred to the Copyright Appeal Board the statements of proposed fees, charges, or royalties as herein provided and the objections, if any, received, in respect thereto, the Board shall proceed to consider the statements and the objections, if any, and may itself, notwithstanding that no objection has been lodged, take notice of any matter which in its opinion is one for objection The Board shall, in respect of every objection, advise the society, association or company concerned of the nature of the objection and shall afford it an opportunity of replying thereto.

(6) (*a*) In respect of public performances by means of any radio receiving set or gramophone in any place other than a theatre which is ordinarily and regularly used for entertainments to which an admission charge is made, no fees, charges or royalties shall be collectable from the owner or user of the radio receiving set or gramophone, but the Copyright Appeal Board shall, so far as possible, provide for the collection in advance from radio broadcasting stations or gramophone manufacturers, as the case may be, of fees, charges and royalties appropriate to the new conditions produced by the provisions of this subsection and shall fix the amount of the same. In so doing the Board shall take into account all

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expenses of collection and other outlays, if any, saved or savable by, for or on behalf of the owner of the copyright or performing right concerned or his agents, in consequence of the provisions of this subsection.

(7) Upon the conclusion of its consideration, the Copyright Appeal Board shall make such alterations in the statements as it may think fit and shall transmit the statements thus altered or revised or unchanged to the Minister certified as the approved statements. The Minister shall thereupon as soon as practicable after the receipt of such statements so certified publish them in the *Canada Gazette* and furnish the society, association or company concerned with a copy of them.

(8) The statements of fees, charges or royalties so certified as approved by the Copyright Appeal Board shall be the fees, charges or royalties which the society, association or company concerned may respectively lawfully sue for or collect in respect of the issue or grant by it of licences for the performance of all or any of its works in Canada during the ensuing calendar year in respect of which the statements were filed as aforesaid.

(9) No such society, association or company shall have any right of action or any right to enforce any civil or summary remedy for infringement of the performing right in any dramatico-musical or musical work claimed by any such society, association or company against any person who has tendered or paid to such society, association or company the fees, charges or royalties which have been approved as aforesaid

Now it is to be pointed out that ss. 6 (*a*) of sec. 10B was enacted by Chap. 27 of the Statutes of Canada for the year 1938, all the other subsections of that section having been enacted in 1936, two years earlier. The importance of ss. 6 (*a*) here lies in the fact that it purports to enact that in respect of public performances of musical works by means of any gramophone in any place other than a theatre ordinarily and regularly used for entertainments to which an admission fee is charged, no fees or royalties shall be collectable from the owner or user of the gramophone, but the Copyright Appeal Board "shall, so far as possible", provide for the collection in advance from gramophone manufacturers, of fees or royalties appropriate to the new conditions produced by the enactment of ss. 6 (*a*). Thereafter the plaintiff society filed no statement of the fees or royalties it proposed to collect from the "owner or user" of gramophones by means of which musical works were publicly performed, but it did, I understand, following the enactment of ss. 6 (*a*) include in its next annual statement filed with the Minister, the fees or royalties it proposed to collect from gramophone manufacturers, in consequence of the enactment of ss. 6 (*a*). The Copyright Appeal Board for what it deemed practical reasons, was unable to approve and certify the fees so proposed by the plaintiff society, or

any other fees, to be collected from gramophone manufacturers for the purpose mentioned, with the result that no fee, royalty or compensation was made available to or collectable by the plaintiff society in respect of public performances of its musical works by means of any gramophone as was the case prior to the enactment of ss. 6 (*a*). Subsection 6 (*a*) did not make it imperative upon the Board to provide for the collection of the fees therein mentioned, from gramophone manufacturers, because it is therein stated that this was to be done only "so far as possible". But in any event the Copyright Appeal Board did not approve of any fees to be collected in respect of public performances of musical works by means of any gramophone, and consequently the plaintiff society since then has not been in receipt of any fee for any public performances of its musical works, except as mentioned in ss. 6 (*a*). It is to be observed also that ss. (9) of sec. 10B states that no society shall have any right of action for infringement of the performing right in any musical work owned by it against any person who had tendered or paid to such society the fees which had been approved and certified under section 10B. But in the case under discussion no fees were approved in respect of public performances by means of a gramophone, as already explained, and none was ever tendered the plaintiff society by any of the defendants herein, Sub-s. (9) of sec. 10B was enacted prior to the enactment of ss. 6 (*a*) of that section, and it would seem therefore that sub-s. (9) would not apply to the state of facts in this case where no fees had been approved and certified.

It is perhaps proper first to enquire what was the purpose intended to be accomplished by amending sec. 10B by adding ss. 6 (*a*) thereto. Mr. Biggar suggested that ss. 6 (*a*) was designed to eliminate the numerous complaints registered against the demand for the payment of fees or royalties by performing right societies upon numerous owners of small businesses, who used gramophones in a small way to improve the amenities of their business premises, and for the amusement of their patrons. There is a sound basis for that suggestion. There is no doubt but that the fee or royalty that this numerous class could pay would be relatively small, and the cost of collecting

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the same by any performing right society would be relatively high. Sub-s. 6 (*a*) proposed that instead of collecting a royalty from this numerous class engaged in business in a small way a fee be collected in advance from gramophone manufacturers presumably for the benefit of the owners of any musical works performed by means of such gramophones. I am satisfied that the idea prompting the enactment of ss. 6 (*a*) was to obviate the collection of any fees or royalties from the user of gramophones, by which means were performed musical works which were the subject of copyright, in the cases where the user was in a small and rather inconsequential way, and where any direct or incidental profit from such user was small, if any at all. Again, this may be inferred from the concluding words of ss. 6 (*a*) because the Copyright Appeal Board in fixing the amount to be collected from gramophone manufacturers, if any, was directed to take into consideration "all expenses of collection and other outlays, if any, saved or savable by or on behalf of the owner of the copyright or performing right concerned or his agents, in consequence of the provisions of this subsection". And no doubt there would be a great saving in the cost of the collection of the fees and royalties suggested by ss. 6 (*a*), from a few gramophone manufacturers, as compared with the cost of the collection of any fees or royalties likely to be approved and certified by the Copyright Appeal Board and payable by this numerous class of "owners or users" which I have suggested, and who would be widely scattered about the country. That it was for the relief of that numerous class ss. 6 (*a*) was enacted seems to me to be fairly plain, and I think that may fairly be assumed from the language of the subsection itself.

The question then arises, and Mr. Biggar raised and discussed it, does ss. 6 (*a*) apply to the facts developed in this case and was it intended that it should? Was ss. 6 (*a*) designed to protect persons, such as the defendants in this case, from an action for an injunction restraining them from the public performance of the plaintiff's musical works, in the manner and by the means I have described without being duly licensed therefor? That is all the plaintiff seeks by this action. This is not an action for compensation or damages for infringement of copyright,

or for the collection of fees or royalties, for the use of the plaintiff's copyright in musical works; it is simply a question as to whether or not the plaintiff in the facts in this case, and the statute, is entitled to an injunction restraining the defendants from infringing its copyright in a certain musical work for profit, without licence or authorization. That seems to me to be the neat point for decision, and when it is stated it does not seem to be one that permits of any extended discussion. The conclusion which I have reached is that the defendants do not fall within the class protected by ss. 6 (*a*) of sec. 10B. They are not I think the "owner or user" of a gramophone giving public performances in the sense contemplated by that statutory provision. They are virtually partners in a distinct class of business, in a venture of publicly performing musical works purely for profit, for a fee in the form of a coin or coins deposited in the gramophone by the person desiring the performance of certain musical works, and presumably for the gratification of that person. The whole scheme is entirely one for profit making, something apart from the restaurant business itself, or the ownership of the gramophone, one contributes the gramophone and the records and services the same, and the other contributes the premises, and they invite such of the public as desire the performance of musical works to deposit a certain coin in the gramophone, and this automatically causes the gramophone to perform musical works for the person who has paid a fee in the form of coins of a certain denomination. This is not I think what was contemplated by ss. 6 (*a*) of sec. 10B. In the case before me it would seem inequitable and unjust if the defendants could do as they are doing, with impunity, using the plaintiff's copyright without licence or compensation, something which is entirely against the whole purpose and spirit of the Copyright Act, something which might affect the interests not only of Canadian subjects but those of foreign countries, under the provisions of the Berne Convention. Moreover, sec. 10B does not purport to take from the owner of a musical work the right to restrain infringement of his copyright where no licence has been granted, or where no definite provision has been made for compensation to the owner for the right to perform his musical work. Sec. 17

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of the Copyright Act does not seem to provide any defence for the defendants here and it is to be noted that by the very statute which enacted ss. 6 (*a*) of sec. 10B there was added to the list of performances which shall not constitute infringement of copyright. And further, it is, I think, a well settled principle of law that a legal right in property, such as copyright in a musical work, can be taken away only by express language, which is not, I think, to be found in any provision of the statute here relevant, and if the defendants can do what they are doing with impunity it means they are able to divert the plaintiff's property to their own use and profit.

I have come to the conclusion that the plaintiff is entitled to the injunction asked for. Should the defendants give a notice of appeal from this judgment within the time prescribed, and pursue the same promptly, there will be a stay of proceeding herein until the determination of such appeal. The plaintiff will have its costs of the action.

Judgment accordingly.