



1951
April 24, 25
26 & 27
1952
Feb. 2

BETWEEN :

COMPOSERS, AUTHORS AND
PUBLISHERS ASSOCIATION OF
CANADA, LIMITED

PLAINTIFF;

AND

KIWANIS CLUB OF WEST
TORONTO

DEFENDANT.

Copyright—Infringement action—Copyright Act R.S.C. 1927, c. 32 s. 3(1), 17—“Public performance of any musical work in furtherance of a religious, educational or charitable object”—“In furtherance of” means to promote, to advance or to assist—Defendant a fraternal organization—Receipts from dance at which musical works alleged to have been infringed were performed expended by defendant on charitable, religious or educational objects.

The action is for infringement of copyright in two musical works owned by the plaintiff, a company incorporated under the Dominion Companies Act. Plaintiff alleges that an orchestra under contract with the defendant provided music for public dances held by the defendant at premises in Toronto, Ontario, known as Casa Loma, and at a public dance at such place conducted under the auspices of the defendant the orchestra played these two musical works.

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S. 17 of the Copyright Act, R.S.C. 1927, c. 32 provides *inter alia* "that no church, college or school and no religious, charitable or fraternal organization shall be held liable to pay any compensation to the owner of any musical work or to any person claiming through him by reason of the public performance of any musical work in furtherance of a religious, educational or charitable object".

Defendant is a service club incorporated without share capital under the Companies Act of the Province of Ontario. Its Letters Patent set forth its purposes and objects *inter alia* as ". . . (g) To carry on charitable and relief work of all kinds and to receive and collect gifts and donations for that purpose; . . .".

By an agreement with the Corporation of the City of Toronto for the use and occupation of Casa Loma as a tourist attraction and entertainment centre defendant was obligated to maintain the premises and expend any surplus funds from receipts derived by defendant from its operation "entirely for the benefit of under-privileged, needy and crippled children, other charities and war service work" and in operating the premises "shall do so always with the object of raising money for such children, charities and/or war service work".

Defendant performed fully its obligations entered into under the contract with the City of Toronto and the net revenue earned from the venture was used for no other purposes than those set forth in the agreement.

Held: That "in furtherance of" in s. 17 of the Copyright Act means to advance or to assist or to promote and to come within the exempting proviso it is not necessary that the function at which the musical work is publicly performed should itself be of a religious, educational or charitable nature.

2. That on the date when the musical works, copyright in which is claimed to have been infringed, were performed, they were performed in the furtherance of a charitable object and the entire proceeds of the Casa Loma project, including the proceeds from the dances in question, were expended almost entirely on charitable objects and those not so specifically expended were directed to religious or educational objects.
3. That defendant is a fraternal organization since it is a body of men associated by some common interest not only fraternizing or uniting as brothers but by those activities which have been undertaken they exemplify towards the needy and underprivileged the care and solicitude which one would expect of a brother.

ACTION for infringement of copyright in musical works.

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

H. E. Manning, K.C. and Jos. A. Falconer for plaintiff.

Harold G. Fox, K.C. and G. M. Ferguson for defendant.

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

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CAMERON J. now (February 2, 1952) delivered the following judgment:

The plaintiff herein is a company incorporated under the Companies Act of the Dominion of Canada, having its head office at Toronto. The evidence establishes that the plaintiff at all material times was the owner of that part of the copyright in the musical works known as "Sleepy Lagoon" and "Summertime" which consists of the sole right to perform the said musical works or any substantial part thereof in public throughout Canada.

The defendant is a corporation incorporated under the Companies Act of the Province of Ontario, also having its head office at Toronto. It has the use and occupation of the premises in Toronto known as "Casa Loma," and in connection with its activities it holds public dances there. Music for the dances was provided by a professional orchestra under contract with the defendant. It is alleged and proven that on December 15 and December 16, 1950, an orchestra under the leadership of Benny Louis, at public dances at Casa Loma played the musical works "Sleepy Lagoon" and "Summertime," respectively, and that the said dances were conducted under the auspices of the defendant. As a result thereof, the plaintiff alleges that the defendant has infringed its copyright in the said works and, among other things, it now claims damages and an injunction.

The right of the plaintiff in the said works falls within section 3(1) of the Copyright Act, R.S.C. 1927, c. 32, as amended:

For the purposes of this Act, "copyright" means the sole right . . . to perform . . . the work or any substantial part thereof in public; . . . and to authorize any such acts as aforesaid.

By section 17 of the Act as amended:

17. 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 do which is by this Act conferred on the owner of the copyright:

Provided that the following acts shall not constitute an infringement of copyright:

Then follow seven specified acts which do not constitute infringement, and the following:

Further provided that no church, college, or school and no religious, charitable or fraternal organization shall be held liable to pay any

compensation to the owner of any musical work or to any person claiming through him by reason of the public performance of any musical work in furtherance of a religious, educational or charitable object.

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It is upon this last mentioned proviso that the defendant relies insofar as the infringement proceedings are concerned. It alleges that it is a fraternal and/or charitable organization and that the public performance of the works in question was in furtherance of a charitable object.

Cameron J.

It is of some interest to note the history of the legislation in regard to the exemptions provided for organizations of this sort. Such exemption was first provided by section 6 of c. 8, Statutes of 1931, and thereby the following subsection was added to section 17(1) of the Act.

(vii) The performance of any musical work by any church, college or school, or by any religious, charitable or fraternal organization, provided such performance is given without private profit for religious, educational or charitable purposes.

By c. 28, Statutes of 1936, that subsection was repealed and the following substituted therefor:

(vii) The performance of any musical work by any church, college or school, or by any religious, charitable or fraternal organization, provided such performance is given without private profit for religious, educational or charitable purposes; provided, further, that such performance shall be deemed to be given without private profit if the only fees which are paid are paid to individual performers and that no fees or commissions are paid to any promoter, producer or contractor for services in promoting or producing the performance.

By c. 27, Statutes of 1938, the last mentioned subsection was repealed and the "further proviso" as above was added to section 17(1) in the form which I have set out above.

The facts are not seriously in dispute. The defendant is a service club and a member of the well-known "International Kiwanis" Clubs. It was incorporated without share capital in 1932 and the Letters Patent (Ex. 1) set forth its purposes and objects as follows:

(a) To give primacy to the human and spiritual rather than to the material values of life; (b) To encourage the daily living of the golden rule in all human relationships; (c) To promote the adoption and the application of higher social, business and professional standards; (d) To develop, by precept and example, a more intelligent, aggressive and serviceable citizenship; (e) To provide through Kiwanis Clubs a practical means to form enduring friendships, to render altruistic service and to build better communities; (f) To co-operate in creating and maintaining that sound public opinion and high idealism which make possible the increase of righteousness, justice, patriotism and goodwill; (g) To carry on charitable and relief work of all kinds and to receive and collect gifts

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and donations for that purpose; (h) To raise money by holding or conducting concerts, entertainments, contests and sales; (i) To do all such acts and exercise all such powers as may be considered advisable for promoting and advancing the objects for which such Club has been organized; (j) To establish, maintain and operate camps, hostels, relief centres and other like institutions; (k) To invest and deal with the moneys of the Corporation not immediately required for the purposes of the Corporation in such manner as, from time to time, may be determined; (l) To do all such other things as are incidental or conducive to the attainment of the above objects; and (m) For the purposes aforesaid, to acquire the assets of West Toronto Kiwanis Club, an unincorporated association;

In order to carry out its objects and particularly its charitable and relief work (clause (g)), funds had to be provided or raised. Someone conceived the idea that the Club might successfully and profitably operate the very large, palatial residence known as "Casa Loma" by charging a fee to tourists and others who might wish to inspect it, and by conducting dances, concerts and the like. The property at that time was in a somewhat dilapidated condition, had been taken over by the Corporation of the City of Toronto for unpaid taxes and was apparently unsaleable. Accordingly, arrangements were entered into with the owner, by which the defendant became entitled to the use and occupation thereof. In the year 1950, the defendant was in possession under an agreement with the City of Toronto, dated January 2, 1942 (Ex. 10), as amended by subsequent agreements, Exhibits 11, 12 and 13. As so amended, the agreement provided for the use and occupation of Casa Loma and the tunnel, stables and grounds used in connection therewith, for a period of twenty-five years from January 1, 1942. The agreement strictly limited the purposes for which the premises could be used, and shortly were as follows: (a) to conduct tours of inspection of the premises under the supervision of the Club; (b) to operate tearooms and to carry on dancing under the supervision of the Club; persons using the Club for such purposes to pay the regular admission fee, in addition to any other charges prescribed by the Club for such attendance; (c) to sell Casa Loma booklets; (d) to grant permission to hold bridge parties, teas and picnics, the stated admission fee to be charged to individuals in addition to any other charge; (e) to hold all meetings and functions of the Club in the said building and to use the said building for the general purposes of the Club, all without charge to

the persons attending such meetings and/or functions and/or using the said building for such general purposes of the admission fee per person for entry to the said building; (f) to hold under the supervision of the Club bazaars, fairs, amusements and musicales without any charge or for a fixed charge; (g) to hold under the supervision of the Club broadcasts, meetings, concerts, weddings, exhibitions or other functions without any charge or for a fixed charge.

The Club was required to charge an admission fee of not less than twenty-five cents and not more than fifty cents for all tourists and visitors entering Casa Loma, with somewhat lower charges for children. Those attending the dances paid the regular admission fee, plus an additional charge.

By clause 3, the Club was required to pay to the city annually 25 per cent of the annual gross receipts from the admission fees with the proviso that if the attendance fell below a certain number, the percentage payable to the city would be reduced to not below 15 per cent. By clause 17, as amended, the city was entitled to be paid 15 per cent of the annual gross receipts from fixed charges made in connection with certain specified functions.

Clause 6 provided that the city should be at no expense for preparation of the building, tunnel or stables, or for renovations or repairs or for any other purpose whatsoever. It may be noted here that by reason of the dilapidated condition of the building and by reason of the use to which the building was to be put, the Club necessarily expended certain sums in repairing windows, installing a new furnace, in laying some new floors and in interior decorations, and in supplying new amenities, as well as certain kitchen equipment and furniture.

By clause 7 the Club was required at its own expense to make all repairs to the building, tunnel and stables and pay for all maintenance thereof, including therein water, sanitary facilities, heat and lighting. By clause 10 the Club was required to keep the lawns and gardens in an attractive condition and to keep the buildings clean and in good order. By the amendment of July 6, 1943 (Ex. 11), the city undertook the costs of repairs to and the renovation of the exterior masonry work of the buildings and stables, the Club undertaking to erect and maintain fences necessary for public safety.

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The most important part of that agreement, so far as this case is concerned, is clause 5, which has remained unchanged since January 2, 1942. It is as follows:

5. That the annual gross receipts derived by the Club from the total operation of the Premises less the percentage to be paid to the City as above and hereinafter provided and less the costs to the Club for necessary repairs, improvements, equipment, actual maintenance, supervision and management of the Premises shall be used and expended by the Club entirely for the benefit of under-privileged, needy and crippled children, other charities and war service work and for no other purpose whatsoever and that the Club in using and operating the Premises for the purposes set forth in paragraph number one hereof shall do so always with the object of raising money for such children, charities and/or war service work.

In accordance with the agreements, the defendant operated this project—and it had many others—by a special group of its members called the “Casa Loma Committee.” The Committee employed and paid a full-time manager, guides, and other necessary help. Its main revenue therefrom was derived from the admission fees charged to tourists and others. Over a period of years it conducted dances to which the public were invited and at which the music was provided by a paid orchestra. All the income and expenditures in connection with the project were handled by the Committee and after payment of all the expenses and the percentage due the City of Toronto, the amount remaining was paid into a special trust fund. It was out of the latter that the charitable disbursements were made. In any year when the full amount of income in the special trust fund was not used, it was accumulated as a reserve.

Ex. 15 is the audited statement of the defendant’s affairs for the year ending December 31, 1950. The Casa Loma income and expenditures are shown at p. 6. The total income was \$180,890.72, of which \$73,994.15 was from “General gate admission,” and \$36,253.60 was from “Dance revenue.” The residue is made up of smaller amounts from sales of refreshments, tobacco and souvenirs, and of revenue from “checking, guides, luncheon catering and miscellaneous items.” The expenditures show that \$19,596.33 was paid to the City of Toronto, \$25,358.42 was paid out for orchestras and entertainment; and after allowing for the stated amounts for costs of items which were

sold, and for catering, wages, operating expenses, advertising and publicity and administrative expense, the year's operation showed an excess of income over expenditure of \$43,887.62.

P. 5 of Ex. 15 provides the details of the income and expenditures of the Casa Loma trust fund. To the \$43,887.62 derived from the year's operations there were added "interest earned" of \$3,901.37 and sundry income of \$97.48—a total of \$47,916.47. The item of "earned income" is derived from investments in bonds of a total face value of \$130,000 (p. 4) and called the "trust fund," these investments being made up almost entirely of accumulations of unexpended net revenue from the Casa Loma project over a number of years. The details of the expenditure from the trust fund are shown on p. 5 and will be referred to later. For the year, all the income was expended except \$1,719.23. The trust fund account is operated quite separately from the general funds of the defendant and no part of the income from the former is transferred to the latter except one item of \$1,500 which will be referred to later.

On this set of facts, two questions must be answered: (1) Were the dances conducted at Casa Loma under the supervision of the Club on December 15 and December 16, 1950, and at which "Summertime" and "Sleepy Lagoon" were performed by the paid orchestra in public, so conducted in furtherance of a charitable object? and (2) Was the defendant at the time a charitable or fraternal organization? It is only if both these questions are answered in the affirmative that the defendant can be relieved of the charge of infringement.

In the sense in which it is here used, I interpret the phrase "in furtherance of" to be equivalent to "to advance," or "to assist," or "to promote." To come within the exempting proviso, it is not necessary that the function at which the musical work is publicly performed should itself be of a religious, educational or charitable nature. It is sufficient if it be held in furtherance of or to promote, advance or assist in any one of these objects. By its agreement with the city, the defendant was required to use its net revenue entirely for the benefit of underprivileged children, needy, and crippled children, other charities and

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war service work. In the year 1950 there was, of course, no "war service work," and the other specified uses were undoubtedly charitable objects. I think it can be inferred that the city was quite satisfied that the defendant had lived up to its agreement in every detail inasmuch as it has not sought to take advantage of clause 18 of the agreement which provides for termination thereof upon breach by the defendant of any of its covenants. The declared aim or object of the Casa Loma project was to secure funds for the charitable purposes mentioned, and it was so limited in the agreement, and one of the Club officers who was a party to the arrangements entered into with the City of Toronto stated that such object constituted the sole motive of the defendant in embarking on the project. An examination of the use to which the net revenue was put satisfies me that that object was fully carried out and the net revenue used for no other purposes.

In 1950, the net income from the Casa Loma operations of that year, available for the use of the Committee, was approximately 25 per cent of the total income (p. 6 of Ex. 15). I do not think it necessary to consider in detail the expenditures listed on that page and which, as to operating expenses and administrative expenses, are detailed on p. 7. It is sufficient to say that after examining them in the light of the evidence adduced, I am satisfied that they were all properly incurred in connection with the project itself and were necessarily disbursed either to meet the requirements of the agreement with the city, or directly in connection with the operation of the project. The payment to the city was, of course, in the nature of a rental. The mere fact that salaries and wages were paid to the employees or to the members of the orchestra is here of no concern. The phrases, "without private profit," or "without motive of gain" do not appear in the "further proviso" now under consideration as they did or do appear in other parts of section 17(1). In the opinion of the accountant of the defendant corporation, they were all properly chargeable to the operation itself.

Moreover, none of the moneys so expended were paid to the defendant (save as to one item which I shall presently mention) or to any of its members. It is contended, however, that the defendant and some of the members did

receive some indirect benefits from the agreements. It is true that for a few years the weekly luncheons of the Club, and the Committee meetings, were held at Casa Loma and that no rental was charged therefor. The members paid for their meals, however, and I gather from the evidence that the luncheons and committee meetings took place there so as to further the interests of the members in the main project carried on by the defendant. It is true, also, that by the agreement members of the defendant club could enter the building without payment of the admission fee, that they and their wives and children, with escorts, could attend the dances free of charge. But these privileges were used very rarely; when members attended the dances—there may have been six or seven on occasions—they ordinarily did so to supervise what was going on as they were required to do by the agreement. These matters are of such minor importance that in my opinion they do not in any way affect the question as to whether or not the public performances were in furtherance of a charitable object.

I turn now to a consideration of the manner in which the net income was disbursed and which, in my opinion, will be helpful in determining not only whether the musical works were performed in furtherance of a religious, educational or charitable object, but also whether the defendant was a fraternal or charitable organization. The details are shown on p. 5 of Ex. 15 and were further elaborated in evidence.

Administrative costs are shown at \$1,500. It is explained that this is an annual charge made to the fund and which year in and year out approximates the proportion of the overall administrative costs, which is referable to the Casa Loma project and the trust fund. The assistant secretary's salary of \$1,970 is not her full salary but that proportion thereof which fairly represents the proportion of her time which is spent on the project and the trust fund, and it is shown that but a very small part of her time is occupied with the general work of the Club. I see no reason to question these items as properly chargeable to the costs of operation of the project and the trust fund. Contingent liability insurance of \$22.08 and unemployment insurance of \$22.92, and sundries of \$445 are also referable to the project.

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Under the heading of "Underprivileged Children," \$3,290.21 was expended for children's aid and Christmas baskets to assist poor children, one of the defendant's committees having ascertained the names of needy children and families from the Neighbourhood Workers' Association, personally investigated each case and supplied free of charge such things as food, clothing, wheel chairs and orthopaedic shoes, the work and distribution thereof being done voluntarily by the committee. For "National Kids' Day," the expenditure was \$231.51; it was made for such things as entertainment and refreshments for the sick and crippled children in hospital, and for games for young children of the same sort as are provided by the Y.M.C.A. Under the heading of "Boys' Work," \$737.89 was expended on equipment and entertainment for boy scouts in need of assistance; and \$50 on youths' probation. The latter amount was given to certain officials of the Juvenile Court to assist in the rehabilitation of poor and needy first offenders.

On "Girls' Work" \$4,868.01 was expended. The greatest part was used for underprivileged girls, sixty-two girls having been sent to the summer camp sponsored by the Y.W.C.A., and twenty-three girls to Bolton Camp. Sports equipment was purchased and provided free of charge, and in addition to the sports activities educational classes were held in dramatics, dancing and music.

The defendant operated a summer camp called "Camp Westowanis" to which are sent underprivileged boys and girls. A revenue of \$1,716.81 was received from those who could pay part or all of the expenses, but the Club expended a net amount of \$3,781.77 in connection with its operation. All the disbursements I have so far referred to would seem to fall within the category of a "charitable object" except the instructions in sports, dramatics, dancing and music, which are of an educational nature.

\$1,286.40 was paid out under the heading of "Agriculture." In conjunction with the Ontario Agricultural Representative of the County of Peel, the Club sponsored work of an educational character among junior farmers in the district. To encourage them to be better farmers, they sponsored calf clubs, potato clubs, grain clubs, gardening and cooking activities, and gave prizes therefor and an

annual banquet to the Junior Farmers' Association. A substantial number of trees were planted with the assistance of the Club members to encourage the interest of the young farmers in reforestation, but very little cash was actually laid out on that project.

Under the heading of "Vocational Guidance," \$1,251.86 was expended. In this work the Club's committee worked closely with the principals of seven collegiate institutes in West Toronto. Twenty-four special night courses were conducted by it at the Technical School. On the recommendation of the principals, four students received financial assistance to enable them to finish courses which they would otherwise have had to discontinue. The vice-chairman of the committee spent time every evening throughout the winter in conducting these classes. Scholarships of \$25 each were given for vocational guidance papers on the recommendation of the principal. Expert advice was received from the Social Service Department of the University of Toronto and books on vocational guidance were purchased and supplied gratis to the libraries of the collegiates. All this work is of an educational character as is the item of \$705.55 for "school proficiency awards" expended on the recommendation of the school principals involved.

For the "Key Club" \$267.33 was expended. It was to assist in the operations of a group of High School students having similar aims as the Kiwanis Club itself.

Under the heading of "Public Affairs" \$608.62 was paid out. In co-operation with other clubs, the defendant participated in a province-wide courtesy and safe driving campaign. Contributions in money or kind were made to aged people's homes and to hospitals, and busses were provided for disabled veterans. Such expenditures, I think, would be of an educational or charitable nature. Then follows an expenditure of \$1,293.28 on "Spiritual Aims," and on the evidence of Mr. Oaten it is clear that the amount so disbursed was in furtherance of a religious object. \$1,000 of that sum was expended to assist in the furnishing of a church in need of assistance.

One of the main concerns of the defendant was to assist in the operation of the High Park Y.M.C.A. which it constructed at a cost of some \$30,000 and turned over to the

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"Y" for one dollar, some years ago. In 1950, it expended \$7,789 in support of that work, the largest part of which was in sponsoring the Ki-Y sports supervised by the Y.M.C.A. Practically all the necessary sports equipment was provided, as well as other costs of operation and in these activities 24,000 boys participated. In connection with the Y.M.C.A. itself, \$560 was expended for necessary decorations and \$402.49 was charged to depreciation for the building itself. In addition, \$2,900.50 was expended on the George Syme project which is entirely carried out by the defendant. It is a scheme to organize and supervise the sports activities of a very large number of young people in a depressed area and to keep them off the streets. Of the total amount, \$2,400 was used in payment of the salary of a Y.M.C.A. supervisor working exclusively on that scheme, and the balance was for necessary sports equipment. On the evidence, I am satisfied that these outlays related exclusively to charitable objects.

\$100 was expended on the Kiwanis Music Festival conducted by all the Kiwanis Clubs in the city. Competitions are held in all fields of music and the amount contributed was used to provide two small scholarships, presumably to assist in the further musical education of the successful competitors. Under the heading of "Music Appreciation," \$487.05 was paid out to renovate musical instruments which the members of the defendant club collected, and these were then turned over to be used by musical students who could not afford to purchase them. These two items, I think, are of an educational nature.

"Sundry Projects" accounted for \$11,434.98. This included donations to such organizations as the St. John's Ambulance Society, Canadian Red Cross, Canadian National Institute for the Blind, Winnipeg Flood Relief (\$2,500), the Queen Elizabeth Hospital and the Humber Memorial Hospital, Toronto Community Chest (\$1,500), the Y.M.C.A. World Service (\$1,500), the United Nations Children's Relief Fund, the Boy Scouts (\$1,000), the Red Shield Appeal of the Salvation Army, the John Howard Society to assist in the rehabilitation of released prisoners, Dr. Barnardo's Home, a grant of \$25 to assist a needy girl injured in a fire and to assist her to become self-supporting. All these expenditures are clearly of a charitable nature.

In addition, a small sum (\$10) was paid for a membership in the Art Gallery of Toronto, and other small sums were expended for films to show the activities of the Club among underprivileged children and to advertise the Casa Loma project so as to secure more revenue therefrom. The "Sundry Projects" also include an item of \$2,250 paid to the Neighbourhood Workers' Association to assist it in the operation of Bolton Camp—a charitable project. This particular disbursement was made to enable the Association to procure additional ground for its camp area. Finally, there is an item of \$180 for emergency relief which is made up of small contributions to assist distressed persons whose homes had been destroyed, or the like.

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The sole purpose of the defendant Club in carrying on the Casa Loma project was to raise funds for the purpose of carrying on its charitable activities; by its agreement with the city the proceeds could not be used for any other purpose; the dances were held as part of the general project to raise funds for the same purpose, and the musical works referred to were publicly performed at those dances. On the evidence, I have no hesitation in reaching the conclusion that on December 15 and 16, 1950, when the musical works were so performed, they were so performed in the furtherance of a charitable object, and that the proceeds of the whole Casa Loma project in 1950 (including the proceeds from the dances in question) were expended almost entirely on charitable objects. The few that were not specifically directed to charitable objects were directed to religious or educational objects.

If, for example, a local branch of the Red Cross Society—which I think would undoubtedly fall within the category of "charitable organization"—decided to raise funds with which to further its work by conducting a public dance at which the orchestra played copyrighted musical works: and if in connection therewith it paid the orchestra, hall rent and other necessary outgoings, and devoted the net proceeds to its ordinary work—then, I think that the public performance of such musical works would be in furtherance of a charitable object. Essentially, the position here is the same and I can see no difference between the object of the Red Cross Society in so doing and the object of the defendant in conducting its dances for the purposes I have set out.

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I find, therefore, that the first question must be answered in the affirmative.

I have not overlooked the argument of counsel for the respondent regarding the sum of \$130,000 shown as investments in the "trust funds," which as I have said is made up very largely of sums accumulated over the years from the Casa Loma project and not used in the year in which they were received. It is suggested that under the contract with the City of Toronto, the full amount of the profits from the project should have been expended annually on charitable objects and that it is possible that the defendant may direct part or all of this accumulated fund to non-charitable objects. As I read the contract, there is no requirement that the annual profits must be spent on charitable objects in the year in which they are earned. Nevertheless, they are bound to be so expended in time and there is little doubt that they will be so used. They are held "in trust" and while there is no specific declaration of trust, the term no doubt refers to the obligation of the defendant to the City of Toronto to use the fund for the specified purposes only. It has not been shown that they have at any time been used for other purposes. I have no doubt whatever that the surplus was built up so that the defendant would have funds on hand to continue its charitable objects in years in which its operating income might be less than it needed to carry on its charitable work.

But, for the relevant year (1950), as I have shown, the defendant expended on such purposes more than its net profits from that year's operations. In *Commissioners of Inland Revenue v. Yorkshire Agricultural Society*, (1) Atkin, L.J., in considering whether the Society was established for charitable purposes only, emphasized the necessity of viewing the situation at the relevant time (the taxation year in question) and at p. 632 ff said:

It was said, this is a voluntary Society, there are no rules and by-laws limiting its activities, and therefore at any moment it may devote its funds to a non-charitable purpose. It might, it is said, distribute its funds amongst its members or in relief of its members and that would not be a charitable purpose, and therefore it is to be deemed to be not a Society formed for a charitable purpose. I think, with respect, that that is a non sequitur. The question you have to consider is whether at the relevant time you are dealing with the income of a society established

(1) (1928) 1 K.B. 611.

for charitable purposes only, and in respect of that income also you have to consider whether the income is applied in fact to charitable purposes only . . . But if it does so (i.e., by adding objects which are non-charitable), then it appears to me that the Society will cease to be a society established for a charitable purpose, and its funds will presumably not be devoted to charitable purposes only. But until it does so it appears to me that the question is the same, whether it was established for a charitable purpose and whether it is still operating in that sphere.

I turn now to the second question as to whether, as alleged, the defendant is a fraternal organization. I note at once that the exemption is applicable to a church, college, school, and to a religious, charitable and fraternal organization. A "fraternal organization" is not defined, but if it is to be judged by its associates, it would seem to be an organization which in some way is devoted to public service and which endeavours in one way or another to bring about better conditions in those fields which are generally recognized as being for the public good. It seems to me that Parliament, while recognizing the rights of owners of musical works, desired to cut down those rights in a limited way by lessening the costs of the public performance of musical works where the performance was in furtherance of a religious, educational or charitable object, thereby possibly increasing the amount of money which would be available to carry out such objects. To limit the obvious difficulties which would be encountered in determining whether the performance was in furtherance of a religious, educational or charitable object, the exemption was made applicable to the named organizations only, which, by their very nature, might be assumed to have such objects, or one or more of them, as their main object. If that were the sole test, then on the evidence I would find that the defendant is a fraternal organization.

In the Shorter Oxford English Dictionary, 3rd Ed., I find the following definitions:

- "Fraternal"—Of or pertaining to brothers or a brother; brotherhood.
- "Fraternity"—A body of men associated by some common interest; a company—guild.
- "Fraternization"—The action of fraternizing or uniting as brothers, *fraternal association*.

As I have said, the defendant is a service club, a member of the well-known "International Kiwanis" Club, and was first organized in 1921. It has a membership of about 110 men, all carefully selected because of their interest in

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the aims and objects of the Club itself. Weekly luncheons are held and there is usually a speaker who may address the members on matters of wide interest or on the work being carried out by the Club itself.

The work of the Club is carried out by its various committees, composed of members of the Club. Under "Club Administration" it has the following committees: Kiwanis Education, Membership, Public Relations, Records, Financial; and under the heading "Club Meetings" the following: Program and Entertainment, Inter-Club Relations and Advisory Board.

There are two main groups of committees carrying out the objects of the Club, namely: "Youth Service" and "Community Service." Under the former there are the following committees dealing with underprivileged children—Children's Aid and Youth Probation, Vocational Guidance and Proficiency Awards, Boys' Work (including Boy Scouts and Cubs), Girls' Work, Camp, Y.M.C.A. (High Park Branch, Perth-Royce Branch, and George Syme Branch).

Under "Community Service" there are the following committees: Agriculture and Horticulture, Business Standards and Public Affairs, Support of Churches in their spiritual aims, Music Appreciation and Kiwanis Music Festival, and Casa Loma.

Under the heading "Special Committees" there are: Club Extension and Emergency Committees.

It seems to me that the general aims and objects of the Club are concisely stated in clauses (e) and (g) of the "Purposes and Objects" set forth in the Letters Patent, as follows:

- (e) To provide through Kiwanis Clubs a practical means to form enduring friendships, to render altruistic service and to build better communities;
- (g) To carry on charitable and relief work of all kinds and to receive and collect gifts and donations for that purpose.

"Enduring friendships" are created and stimulated by membership in the Club, by regular attendance at the luncheons, by participation in the work of the various committees, and by upholding and practising together the "objects of Kiwanis" (set forth on the opening page of Ex. A). While it may be described as a "luncheon club,"

the luncheon is by no means an end in itself. It is merely a means of bringing the members together so that their interest in the main objects of the Club may be fostered and increased. Each member takes an active interest in the welfare work carried on by the Club, not only by attending the luncheons and committee meetings, but in rendering actual assistance in the projects themselves—the Y.M.C.A., the summer camps for underprivileged children, vocational guidance, and the other activities I have mentioned. The evidence establishes to my complete satisfaction that the defendant is a body of men associated by some common interest and is therefore a fraternal organization. Its members not only fraternize or unite as brothers, but by those activities which I have mentioned they exemplify towards the needy and underprivileged the care and solicitude which one would expect of a brother.

My conclusion, therefore, is that the defendant is a fraternal organization and it therefore becomes unnecessary to consider whether it is also a charitable organization, although there is much to indicate that in the Casa Loma project its aims and objects were entirely charitable, using that word in its broad sense. The defendant has brought itself within the exemption and the plaintiff's claim for infringement and for ancillary relief based on infringement must fail.

One other matter may be referred to. The plaintiff led evidence to indicate that for some two or three years prior to 1950 it had issued an annual license to the defendant for orchestra music at Casa Loma, and that the defendant had paid the annual charges in respect thereof. It was submitted in argument that thereby the defendant had impliedly recognized the rights of the plaintiff and that it was therefore liable to continue the payment of the licence fee for 1950. The evidence did not establish that any contract had been entered into by the defendant by which it was bound to pay any sum to the defendant for the year 1950, and this claim also fails.

The plaintiff's action will therefore be dismissed with costs to be taxed.

Judgment accordingly.

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