



T-1283-88

B E T W E E N:

RENÉ GRIGNON,

plaintiff,

A N D:

JEAN-ALAIN ROUSSEL,
COMMUNICATIONS TALBECOR INC,

defendants,

A N D:

SOCIETY FOR REPRODUCTION RIGHTS OF AUTHORS, COMPOSERS AND
PUBLISHERS IN CANADA (S.R.R.A.C.P.C.) INC.,
and
PERFORMING RIGHTS ORGANIZATION OF CANADA INC. (P.R.O.),

mis-en-cause.

REASONS FOR JUDGMENT

DENAULT J.

Is the music for the song "Tous les juke-box" contained in the Martine St-Clair long-playing record marketed in March 1988 an original composition, the creation of which must be attributed to the plaintiff René Grignon, or to the defendant Jean-Alain Roussel, who claims to be its author? That essentially is the issue in the case at bar and the question to be answered in this action for a

permanent injunction and damages brought by the plaintiff against the defendant for the infringement of his copyright.

PLEADINGS

A brief summary of the facts as alleged in the pleadings is necessary. According to the plaintiff, around August 1986 he composed a musical work known as "Chanson numéro 7" which he distributed to certain librettists and people in the artistic world in Montréal, hoping that a song would be eventually made from it. As is usual in such circles, the plaintiff on February 9, 1987 sent himself an envelope containing a cassette recording of his work to establish its authenticity. No one seemed interested in his work. In March 1988, the singer Martine St-Clair brought out a long-playing record containing a song called "Tous les juke-box" in which the melody of the refrain was strangely similar to that of the plaintiff; however, the cassette container indicated that the music was by the defendant Jean-Alain Roussel. Luc Plamondon had written the words. The plaintiff, frustrated, had his musical work recorded in April 1988 and eventually brought the instant action for an injunction and damages for breach of his copyright.

The defendant, for his part, claimed that his work is an original composition completely different from "Chanson numéro 7" which the plaintiff claims to have composed. He added that he had no access to the plaintiff's work at any time when he composed "Tous les juke-box" and that in any case his work was made public before the plaintiff's. In his defence he alleged he composed an initial version of this work in early 1986 and a new version in 1987 which was submitted to various librettists including Luc Plamondon, who eventually wrote the words for the song later sung by Martine St-Clair. Finally, he submitted that existing and earlier compositions had used a similar theme and accordingly the music for the plaintiff's work already existed in popular music.

The action was brought against the defendant, alleging that without the express or tacit consent of the plaintiff he unlawfully appropriated the plaintiff's copyright, and against the defendant Communications Talbecor Inc., presumably the producer of the work. The initial action was against three other publishing houses but the plaintiff later withdrew his action against each of them. The trial, held in Montréal, lasted for five days during which the parties submitted largely contradictory evidence. For various reasons for which the parties gave the Court no explanation, seven witnesses were heard out of court and the transcript of the examination of these individuals was filed at the trial. The presiding judge accordingly did not have, as is usual, an opportunity to see the witnesses and if necessary question them; the evidentiary force of this testimony is thereby diminished. Six expert witnesses also filed reports and testified in court, five of them for the plaintiff.

COPYRIGHT IN CANADA

Before proceeding to a detailed analysis of the evidence, the rules governing copyright in Canada must be briefly summarized. Under our law, from the time an author conceives an original literary, dramatic, musical or artistic work and gives it some material form, an ownership title is automatically conferred upon him. It follows from this rule that, first, no one may claim copyright to an idea: it must have taken material form of some kind if it is to be protected by copyright. Second, the work created must be original or at least be of an innovative nature: no one may copy an existing work. The law provides that a work may be registered, but it should be noted that unlike industrial designs and patents of inventions which the law requires be registered if the author is to claim ownership title to them, in matters of copyright registration does not create, only declares the right. In short, the registration of a work is not necessary to provide copyright protection for its author. The practical significance

of registration lies primarily in the fact that, in the absence of proof to the contrary, the person registered is deemed to hold the right claimed by him. Rather than helping to establish authorship, registration helps to establish that a person holds a copyright and facilitates proof of the holding of copyright in court. Section 53(2) of the Copyright Act (R.S.C. 1985, c. C-42) indicates the limits of what is conferred by registration of a copyright:

A certificate of registration of copyright in a work is evidence that copyright subsists in the work and that the person registered is the owner of the copyright.

Can the plaintiff, whose work was registered after distribution of the work of the defendant, who is also disputing its originality, benefit from the presumption created by s. 53 and so more readily establish that he is the holder of a right? The point is of some importance with respect to the burden of proof in establishing copyright. I consider that the late registration of the plaintiff's work cannot in the case at bar give him the benefit of this presumption against the present defendants, since his work was registered subsequent to the publication of "Tous les juke-box" for which the defendant is claiming to have written the music.

However, as I indicated earlier, since registration has no effect on the actual existence of a copyright the plaintiff can claim his right of ownership despite the absence of registration. In any action brought by a plaintiff for infringement of his right, if the defendant challenges the existence of the copyright the plaintiff's work is deemed to be protected by copyright and, until proof to the contrary is provided, the plaintiff is deemed to be

the owner of the copyright. These are the provisions of s. 34(3)¹ of the Act.

Further, where any question of this kind is at issue, if a name appearing to be that of the author of the work is indicated the person whose name is so indicated is presumed to be the author of the work unless the contrary is proved (34(4)).²

To succeed in such an action a plaintiff must show the following: (1) that he has a copyright in the musical work, (2) that it is an original work, and (3) that the defendant unfairly copied it, that is, he had access to the plaintiff's work before composing his own, and that a substantial part of both works is very similar.

PLAINTIFF'S COPYRIGHT

As I indicated earlier, until the contrary is shown the plaintiff benefits from a presumption that his work is protected by copyright and that he is the author of that right. In fact, it is not easy to see in the case at bar whether the defendant is disputing the plaintiff's right of ownership in "Chanson numéro 7". There was more argument as to the facts than questions of law and the debate dealt more with the originality of the plaintiff's work,

¹ 34.(3) In any action for infringement of copyright in any work in which the defendant puts at issue either the existence of the copyright or the title of the plaintiff thereto,
 (a) the work shall, unless the contrary is proved, be presumed to be a work in which copyright subsists; and
 (b) the author of the work shall, unless the contrary is proved, be presumed to be the owner of the copyright.

² 34.(4) Where any question referred to in subsection (2) is at issue, and no grant of the copyright or of an interest in the copyright, either by assignment or licence, has been registered under this Act,
 (a) if a name purporting to be that of the author of the work is printed or otherwise indicated thereon in the usual manner, the person whose name is so printed or indicated shall, unless the contrary is proved, be presumed to be the author of the work . . .

its resemblance to that of the defendant and the latter's plagiarism than with the plaintiff's right of ownership. Nevertheless, the Court must look more closely and determine whether the plaintiff is the owner of this right.

In his testimony, the plaintiff showed that he composed this musical piece in early 1986; he filed the manuscript (P-1). He intended it for Céline Dion for whom he had already composed certain musical pieces, one of which was used and was a success ("Fais ce que tu voudras"). In view of the number of his compositions, he had formed the habit of numbering them and, according to the plaintiff, the work at issue was titled "Chanson numéro 7". The plaintiff sent a cassette to René Angelil, Céline Dion's manager, but the song was not used. Soon after, especially between November 1986 and April 1987, he sent copies to other people in the business (P-21), including one to Luc Plamondon, a well-known librettist, whom he would have liked to be associated with.

According to his testimony, as responses were slow in arriving he thought it best, as is usual in the business, to send himself a cassette reproducing his work - introduction, couplets and refrain - and a letter dated February 9, 1987. This package, in a duly sealed envelope, was sent the same day and the plaintiff kept the envelope in a secure place until the trial, when it was opened; it contained a cassette (P-2C) and a handwritten letter from the plaintiff indicating he had composed the song "Luc" in November 1986. Clearly surprised by the unexpected title given to his work and its date of composition, the plaintiff quickly pointed out that the work first intended for Céline Dion had been composed in August 1986 but, as it met with a refusal, he renamed it "Luc" in honour of Luc Plamondon, to whom he sent it in November 1986. There is no reason for the Court to doubt the sincerity and the truth of these statements by the plaintiff in this connection, especially as they were mentioned in his testimony even before the

envelope was opened revealing that the date of composition of the song was different. Moreover, Francyne Gingras who was working for René Angelil formally admitted she received the cassette of "Chanson numéro 7" before leaving her job to go into hospital in August 1986. The cassette contained in this package was played in court and, though it contains an introduction, a couplet and the refrain, whereas cassette P-1A only reproduces alternately the refrain of the two disputed works, it is obviously the same musical piece. We will return below to the differences between these two interpretations of the same work by the plaintiff.

The defendant did not dispute this evidence. Instead, he said in his testimony that he had the idea for his own musical work in 1983 and put it on a cassette in 1986, but he introduced no evidence to rebut that of the plaintiff regarding the latter's composition. The parties were not acquainted with each other and the defence did not show that at any time the plaintiff was exposed to the defendant's work.

I accordingly consider that the musical work composed by the plaintiff in August 1986 and referred to interchangeably as "Chanson numéro 7" and "Luc" is the work of the plaintiff and he owns the copyright.

ORIGINALITY OF WORK

Is the plaintiff's musical work an original one? Before commencing analysis of this point as such, it is important to see who has the burden of establishing this essential factor. In principle, the plaintiff must present evidence of the essential components of his action. Some decisions of the Court³ and one

³ Bluecrest Music Inc. v. Kanoosa Records Inc. (1975), 17 C.P.R. (2d) 149 (F.C.), reversed in part, [1980] 1 S.C.R. 357.

writer, citing mostly U.S. precedents,⁴ indicate that a plaintiff in an action for copyright infringement has a prima facie right to a presumption of originality under s. 53(2) of the Act. According to this interpretation, "when copyright is presumed to subsist, then necessarily originality is, as well, presumed". In my opinion, s. 53(2) does not say this. Even if it were the case, which I do not accept, this interpretation would only apply when the work is registered, which in the U.S. cases is a prerequisite to the bringing of an action. In the case at bar, as I said earlier, registration of the plaintiff's musical work could not be set up against the defendant because it was made late, and it is therefore for the plaintiff to prove that his work was original. At the very most his copyright, which I consider he has, gives him a rebuttable presumption of fact (juris tantum). The defendant can then attempt to show that the plaintiff had access to identical or similar earlier works which served as his inspiration or which he copied. The parties may make use of the opinions of expert witnesses to establish whether a work is original.

In the case at bar the plaintiff said he began working on this work in July 1986 and completed it in early August. To establish that the work was not original, counsel for the defendant cross-examined the plaintiff at length, first, on his musical knowledge as a composer, and then on his knowledge of other works like his own, but without much success. Thus, the plaintiff denied he knew the song "Born to run", the theme of which the defendant alleged was similar to "Chanson numéro 7", and the film from which it is taken.

⁴ See the precedents cited in "The song you write may not be your own! Proving musical copyright infringement: A review of Gondos v. Hardy, Gondos v. Toth", Carolyn Crowe, Intellectual Property Journal, 1984-1985, vol. 1, p. 29.

Several expert witnesses testified, but none was asked specifically to give an opinion on the originality of the plaintiff's work. The research of the expert witnesses for the plaintiff consisted of making a comparative study of "Chanson numéro 7", first with "Tous les juke-box" and then with two songs by Piot, presumably written in 1972, "Malicieux flirteurs" and "Mélodie en bleu". In connection with the latter two songs, I note that no evidence was presented by the defendant that the plaintiff was familiar with these melodies. In their reports the five expert witnesses for the plaintiff unanimously concluded that these two Piot pieces were not comparable to "Chanson numéro 7". The similarities between this song and "Melodie en bleu" were so slim that they seemed clearly irrelevant. On "Malicieux flirteurs", Sylvain Lelièvre indicated in his report that "while a vague similarity in the first notes may mislead an amateur ear, what follows is completely dissimilar".

The expert witness for the defendant, Luc Beaugrand, also did not give an opinion on the originality of the plaintiff's work, and unlike the other expert witnesses concerned himself instead with demonstrating the dissimilarities between "Chanson numéro 7" and "Tous les juke-box", a point to which we will return below. Considered strictly from the standpoint of originality, he expressed no opinion, merely comparing the "style and homogeneity" of the two works. While he regarded "Chanson numéro 7" as a "stale and hackneyed type which incorporates various components borrowed from several musical styles", he thought "Tous les juke-box" was a "well-framed composition, knowledgeable and not naive". After hearing the refrain of these two musical works in turn (P-1A), I consider that the statement of this expert witness is, judging by the measures of the refrain, exaggerated to say the least. In defence of this witness, however, it should be said that unlike the others he made an overall study of the two musical works, including introduction, couplet and refrain, not just the first eight measures of the refrain. Analysing all the components of

these two musical works rather than a part of the refrain may have favourably influenced this witness.

The witness also made a comparative study of the plaintiff's work with that of a number of others (B-14), undoubtedly to show that the plaintiff's work was "not new". The witness made a comparative analysis of the first eight measures of the melody of the following songs, for which records or cassettes were produced: "Un souvenir heureux" from a Diane Dufresne 45 (D-15), "Bella Vita" by David L. Jonathan (D-16), "That night" by Shiffrin (D-17), "C'est joli la mer" from an LP by Jacqueline Boyer, "Parlez-moi d'amour" (D-18), "Un souvenir heureux" on a record by Fernand Gignac, "Les grands thèmes" (D-21), and "Mélodie en bleu" by Piot (D-22). The witness Allan Katz also produced the soundtrack of "Leaving in the rain" by Baker (D-2), which in French became "Pour une histoire d'un soir" on the LP "À l'état pur" by Marie-Denise Pelletier (D-3). It is important to note that apart from "Born to run", no effort was made to have René Grignon identify any of these melodies or to determine whether he knew of them or had already heard them.

In his text Canadian Law of Copyright and Industrial Designs,⁵ Fox set out the rules followed by the courts in dealing with the originality of a work:

Subject Matter - Originality: In order to be entitled to copyright there must, of course, be originality in the music.²³ Mere variations from or additions to a musical work such as could be made by a fairly good musician, the same old tune being preserved, cannot be the subject of copyright.²⁴ A musical piece to be original need not be an absolutely new production; a new arrangement of an old piece may be copyrighted provided it is more than a mere copy with variations;²⁵ the same test is to be applied as in the case of patents, that it must indicate exercise of inventive genius as distinguished from mere mechanical skill or change.²⁶ But originality in the realm of popular

⁵ Harold G. Fox, The Canadian Law of Copyright and Industrial Designs, 1967, Carswell, 2nd ed., pp. 148-149.

music lies within a very narrow scope. Popular songs are built upon a rather simple accepted pattern, and similarity of tone succession, which is to a certain degree inevitable in all musical compositions because of the limits of the chromatic scale, is more likely to appear within this narrow pattern. Slight variation in the use of rhythm or harmony - of accent and tempo - may achieve originality.²⁷

A musical composition is original if it is the spontaneous, unsuggested result of the author's imagination,²⁸ and slight variations may achieve originality.²⁹ But there must be sufficient originality to make it a new work rather than a copy of an old work with minor changes; it must be the result of some original or creative work. Thus, the translation of a Russian song into English and then changing the music to adapt it to the English syllables, with no change in the original harmony, does not constitute proper subject matter for a musical work.³⁰

Re-Arrangement, Selection and Adaptation: Copyright may be based upon the re-arrangement of existing music,³¹ and it is clear that there can be copyright in a selection of common, ordinary, well-known musical materials.³² An accompaniment written around an old air has been held to form a new and original work.³³ Thus, a person who writes words to an old air and procures an accompaniment and publishes them together, is entitled to the copyright in the whole work.³⁴ A new adaptation such as a piano arrangement for the orchestral score of an opera, or vice versa, is entitled to copyright.³⁵

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23. Tubb et ux. v. Laidler, [1911] Macg. Cop. Cas. 1.
 24. Cooper v. James (1914), 213 Fed. Rep. 871.
 25. See Robertson v. Lewis, The Times, June 1, 1960; Nom Music Inc. v. Kaslin (1965), 343 F. 2d. 198.
 26. Arnstein v. Edward B. Marks Music Corp. (1935), 27 USPQ 127, (1936), 28 USPQ 426.
 27. Hirsch v. Paramount Pictures Inc. (1937), 17 F. Supp. 816, 32 USPQ 233.
 28. Robertson v. Lewis, The Times, June 1, 1960.
 29. Hirsch v. Paramount Pictures Inc. (1937), 32 USPQ 233.
 30. Norden v. Oliver Ditson Co. Inc. (1936), 28 USPQ 183, Nom Music Inc. v. Kaslin (1965), 343 F. 2d 198. 145 USPQ 237.
 31. Cf. Convention, Art. 2(2) post at p. 738; Italian Book Co. Inc. v. Rossi (1938), 27 F. 2d. 1014.
 32. Austin v. Columbia Graphophone Co. Ltd. [1923] Macg. Cop. Cas. 398.
 33. Leader v. Purday (1849), 7 C.B. 4, 18 L.J.C.P. 97.
 34. Leader v. Purday (1849), 7 C.B. 4, 18 L.J.C.P. 97; Lover v. Davidson (1856), 1 C.B. N.S. 182.
 35. Edmunds v. Stern (1918), 248 F. 897.

In light of these rules, I consider that in the case at bar, even if the plaintiff used an air already known to the defendant or his expert witness, the defence did not establish that the plaintiff knew of these works or even that "Chanson numéro 7" was comparable to them. On the contrary, the evidence disclosed that the plaintiff demonstrated creativity and originality in composing this musical work. Even assuming that he used a known melody, which was not proven, and a harmonic structure and rhythm that has nothing new in it, the arrangement of these components produced an original work of which he is the author.

As the Court has found that the plaintiff owns a copyright to an original musical work, it remains to determine (1) whether the defendant's work, which he also regards as original, bears sufficient objective similarity to that of the plaintiff to be the subject of an order by the Court, and (2) whether it can be shown that the plaintiff's work was the basis for that of the defendant. That is the test applied by the courts in determining whether a plaintiff can obtain compensation for the infringement of his copyright. In Gondos v. Hardy⁶ and in Verge v. Imperial Oil,⁷ the judges adopted what was said by Lord Diplock in Francis, Day & Hunter Ltd. et al. v. Bron (trading as Delman Publishing Co.) et al.:⁸

First, as to the law . . . it is well established that to constitute infringement of copyright in any literary, dramatic or musical work there must be present two elements: First, there must be sufficient objective similarity between the infringing work and the copyright work or a substantial part thereof, for the former to be properly described, not necessarily as identical with, but as a reproduction or adaptation of the latter; secondly, the copyright work must be the source from which the infringing work is derived . . . But, while the copyright work must be

⁶ (1982) 38 O.R. (2d) 555.

⁷ T-3527-71.

⁸ [1963] 2 All E.R. 16, at 27.

the source from which the infringing work is derived, it need not be the direct source . . . there must be a causal connection between the copyright work and the infringing work. To borrow an expression once fashionable in the law of negligence, the copyright work must be shown to be a causa sine qua non of the infringing work.

First, we will consider the first test: a sufficient objective similarity in a substantial part of the disputed works such that, though not identical to the plaintiff's work, the defendant's can only be a reproduction or adaptation of it. The question of the resemblance between "Chanson numéro 7" by the plaintiff and "Tous les juke-box" by the defendant was the subject of quite an elaborate proof which we will now consider. We will then see, if necessary, whether the plaintiff's work was the basis for that of the defendant, or in other words whether at the time he composed his musical work the defendant had access to the plaintiff's work and whether there was a cause-and-effect relationship between the two.

RESEMBLANCE BETWEEN THE TWO WORKS

Is there such a striking resemblance between the two musical works that the defendant's constitutes an infringement of the plaintiff's copyright?

It is worth setting out the first eight measures of the two disputed works, as to their harmonic lines, in accordance with the expert testimony of Jacques Faubert [A] for the plaintiff and Luc Beaugrand [B] for the defendant (D-14).

[A] *CHANSON NUMÉRO 7*

D⁷ G^m C F B^b E^b A^b D^b

TOUS LES JUKES-BOXS

D⁷ G^m C F D^m E^b C D⁷

[B] *CHANSON NUMÉRO 7*

D⁷ G^m C F B^b E^b A^b D⁷

TOUS LES JUKES-BOXS

D⁷ G^m C F D^m E^b C D⁷

N.B.: I have added the typed letters to the handwritten chords for the sake of clarity.

Comparing the harmonic chords attributed by each of the expert witnesses to the third measure of "Tous les juke-box" does not produce the same result. The difference is significant. In his testimony the expert witness Beaugrand objected to the expert witness Faubert attributing to the third measure of the defendant's work a chord of C minor (C^m), when he said it was a chord of E flat over G (E^b/G). He concluded from this that only four out of eight chords were similar, unlike the expert witness Faubert who on this point said six out of eight were similar. Faubert, heard in rebuttal, maintained that it was C minor. As both transcribed these melodies from hearing the cassette, the question was not settled and it is not for me to decide. In any case, I do not place much importance on this "objection" made by the expert witness Beaugrand to Faubert, in view of the comments I will make below on this report.

The Copyright Act defines a musical work as:

Any combination of melody and harmony, or
either of them, printed, reduced to writing or
otherwise graphically produced or reproduced
. . . .

There is no doubt in this regard that the plaintiff's work was both written (P-1) and reproduced on cassette (P-2C) and is a musical work.

Essentially, the plaintiff alleged that the defendant copied the first eight measures of his refrain and argued that, in his opinion, they were the most important part of the work, the part which in a song written for an audience would make the latter respond to the melody. Further, in the instant case the parties admitted that for all practical purposes the remainder of the works is different and is not the subject of their dispute. According to the plaintiff and his expert witnesses, it is often the attractive part, commonly referred to as "the hook", which

identifies a song, sets it apart and sometimes makes it a popular and commercial success. The plaintiff argued that a substantial part of the two works is similar, and asked the Court to apply in this regard a qualitative rather than quantitative test. This in any case is the test recognized by the courts: while in Canadian Performing Rights Society v. Canadian National Exhibition,⁹ the Court found there was an infringement of copyright by a defendant who had copied between five (according to the defendant) and thirty-two measures (according to the plaintiff) of a work, in Hawkes & Son (London) Ltd. v. Paramount Film Service Ltd.,¹⁰ the test of duration was applied (20 seconds in 4-minute work). It is also important to note that, as Fox says with reference to several cases:¹¹

The question of infringement is not, however, to be decided by note for note comparison, but whether the substance of the original work is taken or not. This falls to be determined by the ear as well as by the eye.

To show the similarity between the two works, counsel for the plaintiff filed cassette P-1A on which the introductory measures of the refrains are heard in turn, repeated twice. The similarity is clearly noticeable. He also relied on the testimony of five expert witnesses, and the Court will now consider their reports and testimony.

EXPERT WITNESSES

Of the five expert witnesses heard for the plaintiff only one, Jacques Faubert, has extensive academic training in the classic sense. The others are not completely without qualifications, far from it, but they have made their mark mainly in Quebec musical

⁹ (1934) 4 D.L.R. 154.

¹⁰ [1934] Ch. 593, 50 T.L.R. 316, at 363.

¹¹ Fox, op. cit., p. 376.

circles as author-composers or arrangers. In this regard, the Court considered that they had the necessary competence to express an opinion on the resemblance between these two musical works. All the expert witnesses expressed their opinions freely in their reports, some even going so far as to characterize one work as plagiarizing the other. It was not their function to express such an opinion: that is the duty of the Court. Their function was limited to informing the Court on points of resemblance or dissimilarity between the various musical aspects of the works, namely their rhythm, harmony, melody and arrangements, and to mention, if necessary, a general impression of similarity or lack of it between the two disputed works.

I do not feel it is necessary to review in detail the reports of the expert witnesses Robert Léger, Serge Laporte, Sylvain Lelièvre and Frédéric Weber. They all concluded that aural comparison of the two works left an impression of melodic, harmonic and rhythmic identity. I have serious reservations about Frédéric Weber's report, as unlike the others his analysis lacked coherence and was essentially a political argument in favour of revising the Copyright Act.

From a melodic standpoint, the expert witnesses found disturbing points of similarity between the two works, one of them (Serge Laporte) pointing out that "The two songs have the same delivery and the same 'hooks' (strong points) and the same 'falls' for the entire melody. The fact that the chords are slightly different in Roussel's song is not conclusive, as it is easy for an experienced composer to substitute one chord for another in a given cadence (for example, a final cadence)" (P-5). Sylvain Lelièvre noted something which in his opinion is even more significant than the similarities observable on reading the sheet of music. He pointed out that "The special features of the two works (in commercial language, the 'hook') consist of the systematic anticipation of the harmonic resolution by the melodic

resolution . . . here, the hook in my opinion consists of this anticipation, at least in the first five measures" (P-6). He felt this aspect was as important as the melodic similarities.

From the harmonic standpoint, the expert witnesses Léger, Laporte and Lelièvre unanimously considered that the two refrains possessed a well-known harmonic structure, known as the "cycle of fifths". "Vivaldi among others abused it", Robert Léger said, and he added that "Slight substitutions (D minor for D flat and C minor for A flat) do not on hearing in any way affect the similarity of the two series of chords" (P-4). In Sylvain Lelièvre's opinion, the slight modifications to the chords to be found in "Tous les juke-box" are in fact "substitution chords". "The use of substitution chords", he writes in his report (P-6) "is generally more typical of an arranger's approach - and widely used by such people - as their function in popular music is just that, adapting the outlines of an original work to the specific requirements of a given market".

From the standpoint of rhythm, the experts considered that this was very similar in both works and that "The rhythmic motives played by the drums, bass and keyboards depend on the same pulse but are not identical" (Robert Léger, P-4). The tempo is the same "apart from a few notches of the metronome" for both songs, namely 124 per quarter-note. Finally, as to arrangements, style and sound in general, the expert witnesses were unanimously of the opinion that these two works, in the Eurobeat style, very much in the fashion of the late 1980s, clearly had the same style and sound. As Robert Léger indicated: "The two works have a similar colouring for the unpractised ear (apart from the similarities already mentioned), but the details of arrangement are different".

The expert witness Jacques Faubert, also heard for the plaintiff, has very impressive academic training and in his report and at the hearing demonstrated wide-ranging musical knowledge.

Unlike the other expert witnesses for the plaintiff who did not spend a large number of hours preparing their reports, he made a painstaking analysis from a different point of view. He holds the first prize of the Paris Conservatoire national supérieur de musique in musical analysis and fugue and has made many comparative studies, though this was his first experience - and a first for the others as well - in the field of song writing; he has in fact written a thesis showing the influence of Claude Debussy (Pelléas et Mélisande) on Béla Bartok (Bluebeard's Castle). He teaches the writing of music at the Montréal Conservatoire de musique and is very active in choral music circles.

In his report and at the hearing, this witness took pains to isolate and compare the melodic lines, harmonic realizations, rhythmic organization and the nature of the arrangements. For each of these aspects, he isolated the main points in each of the two works and rated them according to similarity. Thus, he assessed melodic similarity at 6 out of 7, harmonic similarity at 7 out of 8, similarity of rhythmic organization at 5.5 out of 7 and similarity of the nature of the arrangements at 6 out of 7. His conclusion was an overall assessment of 24.5 out of 29, or 84.5%, representing the degree of similarity between the two refrains which he had analysed. Finally, he made the following comment: "This result forces me to rule out chance from the hypotheses that could justify such a strong resemblance". This method of analysis is certainly of great interest and may at times prove very effective. However, rigorous though it may be, I consider that it cannot be used by itself for purposes of comparing a popular song. Moreover, it clearly cannot be used by itself as a basis for assessment and, as the witness admitted, replace the test of hearing. In the final analysis, it is for the judge - so much the better if he has a musical ear and knowledge - to decide whether according to his own assessment, experience and judgment an impression of similarity is created by the disputed musical works.

Though the expert witness for the defendant, Luc Beaugrand, did not have the academic training of the previous expert, he had a very impressive musical history. He is a composer, instrumentalist (UZEB) and teacher of piano harmony at McGill University and of jazz improvisation at the University of Montréal and other colleges. As I indicated earlier, this witness took a different approach to his analysis because he felt that, like a living organism, a musical work is a whole which must be analysed as a whole. In terms of musical appreciation, I agree; but in the case at bar, the plaintiff is arguing that in legal terms the defendant infringed his copyright by copying what he considered to be a substantial part of his work: this is what the witnesses, experts and the Court must examine. This expert witness did compare the "Chanson numéro 7" with "Tous les juke-box" in terms of form, that is the number of measures in the introduction, couplet, refrain and interlude, arriving at the conclusion that there is no similarity, but I would say at once in this regard that in my opinion he considerably exceeded his instructions or else did not understand them. Additionally, in analysing the style of the two musical works he referred to material borrowed from several musical styles and concluded that "Chanson numéro 7" is "a stale and hackneyed type". He used the same procedure to analyse the melodic phrase and arrangement. In short, though his report is of some value in deciding whether the work is original, it is not very helpful in determining the resemblance between the two works in the part which is the subject of the dispute, namely the first eight measures of the refrain.

I had occasion several times during the trial and the deliberation to hear not only the refrain but the complete musical works of "Chanson numéro 7", "Tous les juke-box" and others which counsel sought to establish were the inspiration for the first work. This was a test of hearing. Certainly it is a subjective test, but it is the one that must ultimately be used in such a matter, just as and still more in trade mark cases, to determine

the similarity of works after expert evidence has established an objective resemblance. Writing imposes natural limits on the reproduction of what is perceived on hearing a musical work; it is not possible to accurately reproduce by words the impression made on the ear by hearing alternately the first measures of the refrain of these two works: it is striking. In the case at bar, I have no hesitation in concluding that in melodic, harmonic and rhythmic terms, the first eight measures of "Chanson numéro 7" and "Tous les juke-box" have such a striking resemblance that one can only be a copy of the other, with minor differences resulting from arrangements or substitution chords. I also consider that this resemblance applies to a significant part of the work, not in quantitative but in qualitative terms, in that it concerns the first measures of the refrain which are the "hook" that the ear retains for the purpose of identifying a piece.

DEFENDANT'S ACCESS TO PLAINTIFF'S WORK

A defendant cannot be found to have infringed a copyright unless it is proven that he in some way has access to the plaintiff's work and that there is a cause-and-effect relationship between these two works. These are decisive points in a case of this kind and the plaintiff must present evidence of them or have his action dismissed, as the resemblance between two works can be the result of chance or pure coincidence. The plaintiff must thus show that the defendant has had access either to the written score of the work or to the sound reproduction on cassette or some other means of reproduction.

In the case at bar, as we saw, the plaintiff's evidence was that when he received a refusal from Céline Dion and her manager René Angelil, to whom he had sent a cassette of his "Chanson numéro 7", the plaintiff made other copies which he began distributing from November 1986 onwards to artists or their managers, nine in all, the names being given in Exhibit P-2D. For various reasons

some of these cassettes did not reach their destinations. Thus, the one sent to Disques Star for the attention of Martine St-Clair in November 1986 did not reach her on account of the breach of the contract between the artist and her producers and the parting of the ways that resulted. Martine St-Clair indeed categorically denied receiving this cassette. The same was true of the one sent to Luc Plamondon at the same time: as he regularly received a large number of cassettes from budding or established musicians, he had adopted the practice of returning the packages without even opening them. He also categorically denied receiving this cassette. The publisher and producer of the singer Belgazou, Jehan Valiquet, received a cassette from the plaintiff which he passed on to Belgazou. She tried to put words to this music but the project went no further. He did not think he had made a copy of this cassette and subsequently sent it to the defendant.

In 1987 Allan Katz, now a lawyer, was manager of the singer Marie-Denise Pelletier. He brought out an initial LP in 1986 and in spring 1987 was working on the production of a second LP. The plaintiff's evidence in fact identified Marie-Denise Pelletier, her promoter Pierre Tremblay and her manager Allan Katz as a group of persons to whom the plaintiff sent a cassette of his "Chanson numéro 7" in March 1987. Allan Katz testified that in 1986 attempts were made to bring out an initial LP in conjunction with the defendant Roussel, who was to look after arrangements and provide the recording studio. The parties did not come to an agreement. The record was produced, but without the defendant's participation. In spring 1987 a second LP was prepared, "À l'état pur", and they were then looking for musical pieces that would suit this artist. In preparation for this second record, the witness went to Jean-Alain Roussel's studio in St-Charles-sur-Richelieu with a number of cassettes including recordings by Mark Baker and, inter alia, the "Chanson numéro 7" of René Grignon, whose cassette had been given to him by Marie-Denise Pelletier or her promoter Pierre Tremblay. According to the witness, the singer had insisted

that Grignon's "Chanson numéro 7" be shown to Jean-Alain Roussel: he kept his promise and played "Chanson numéro 7" for Jean-Alain Roussel, although he said this song did not suit this artist at that stage in her career. At the meeting with the defendant in his studio at St-Charles-sur-Richelieu, several cassettes were listened to including one by Mark Baker, "Leaving in the rain", which was eventually used by Marie-Denise Pelletier, who made the song "Pour une histoire d'un soir" from it. These two performances were filed at the trial (D-2 and D-3), but according to the witness they bore no resemblance to the plaintiff's "Chanson numéro 7". When he left the defendant, Allan Katz left the cassettes with him, including the plaintiff's, and did not get them back - the witness was vague as to the date - until one or perhaps two or three weeks later. The witness did not recall having identified René Grignon at the audition as the author of "Chanson numéro 7", but he stated categorically that he had played the cassette for the defendant. The parties could not agree on the co-production project and it was ultimately dropped. In cross-examination, counsel for the defendant made a lengthy attempt to confuse this witness, who established that the defendant had directly had access to the plaintiff's musical work even before the defendant began working with Martine St-Clair, in summer 1987, on the arrangement of a song which was to become "Tous les juke-box". Counsel made much of the witness's inaccuracies as to the date of the events, the musical pieces he played for the defendant and in particular Baker's "Leaving in the rain", which Marie-Denise Pelletier eventually sang in its French version "Pour une histoire d'un soir". Though not a musician, the witness saw no similarity between "Leaving in the rain" and "Chanson numéro 7", but admitted that it was a similar air. Much was also made of a telephone call the plaintiff allegedly made to the witness in spring 1990, when he was trying to determine whether the defendant had had an opportunity to hear "Chanson numéro 7": at that time Allan Katz allegedly confirmed having played "Chanson numéro 7" for Jean-Alain Roussel.

At the time of his testimony, the defendant Roussel did not deny these visits by Allan Katz to his studio or that Katz had played for him various musical interpretations, including Baker which he specially liked. However, he did not recall having heard the "Chanson numéro 7" played nor that Allan Katz left his cassettes with him when he departed. After the Martine St-Clair LP came out in March 1988, in view of the reaction to the song "Tous les juke-box" the defendant in a telephone conversation about the matter tried to remind her that he had composed this melody before her. She squarely denied this. There was the same reaction by Michel Nault, Martine St-Clair's brother and her manager at the time, to whom the defendant also alleged he had composed the melody before his sister, seven and then sixteen months earlier. The witness believed nothing of this and soon afterwards all connection with the defendant was severed.

It is apparent that the witness Katz's memory was not accurate about certain details of these meetings with the defendant, but he was quite clear on the important points. Thus, he quite definitely recalled that this meeting took place in spring 1987, that he had the defendant listen to this melody and left the cassette containing the recording with him. In view of this affirmative testimony by Allan Katz on the important points, the defendant's vague testimony and the fact that his counsel was unable to shake Allan Katz's testimony, the Court concludes that evidence was presented that in March 1987 the defendant heard "Chanson numéro 7" played and had this cassette in his possession for some time.

There is one final point to consider: was there a causal link between the two works? - or on the contrary, can these two refrains have been independently created by each of the two artists, such that the similarity between the works is the result of pure coincidence? I cannot on the evidence accept the second alternative. First, the plaintiff positively established the

circumstances surrounding the creation of his work and the Court considers that this was an original work. The Court also considers there was a striking resemblance in an important part of the parties' works. Additionally, the defendant did try to show without success that creation of the music for "Tous les juke-box" antedated "Chanson numéro 7". On the contrary, the evidence showed that the defendant Roussel had access to the plaintiff's work not long before creating "Tous les juke-box" in summer 1987. In my opinion, this direct and circumstantial evidences together with the striking resemblance of these melodies, proven by experts and noticeable by the least attentive ear, cannot be the result of coincidence or chance. On the contrary, I consider this is a flagrant case of violation by the defendant of the plaintiff's copyright.

CONCLUSIONS SOUGHT

In his statement of claim, the plaintiff asked the Court to issue a permanent injunction ordering the termination of any reproduction, publication, production, manufacture, distribution or public performance of the song "Tous les juke-box" and the Martine St-Clair LP, so long as this song is on it. He also asked the Court to make an order directing the defendants to prepare and preserve a detailed statement of the copies sold of the Martine St-Clair LP, to render an account of all LPs manufactured and sold and to pay the plaintiff \$0.50 for each LP sold. It was further requested that the mis-en-cause S.R.R.A.C.P.C. and P.R.O. (now "S.O.C.A.M.") prepare and provide the plaintiff with a complete statement of the income produced by the collection of fees for reproduction, synchronisation and public performance of this song and pay him all income resulting therefrom. Finally, the plaintiff claimed damages of \$50,000, with interest and costs on a solicitor/client basis.

In view of the conclusions at which the Court has arrived on the merits of the case, the question of the damages and relief requested becomes of great importance. Unfortunately, counsel barely mentioned it. At the trial, only representatives of the Canadian society of music authors, composers and publishers (S.O.C.A.M.), resulting from the merger of the Performing Rights Organisation of Canada (P.R.O.) and C.A.P.A.C., and the Society for reproduction rights of authors, composers and publishers in Canada (S.R.R.A.C.P.C.) testified. According to the representative of S.O.C.A.M., which is responsible for collecting public performance fees for musical works played on television and radio and in theatres, bars, restaurants and any public place, the fees relating to the musical part of the work amounted at the time of the trial to \$3,455.11. Distribution was frozen because of the proceedings at bar. The part payable to the librettist Luc Plamondon was however paid to him. The plaintiff is entitled to this amount. S.R.R.A.C.P.C. is responsible for collecting fees for mechanical reproduction, mainly records sold and audiovisual material. At the time of the trial the money collected and immediately receivable amounted to \$2,969.12, which corresponded to all the fees. The evidence did not indicate which part was applicable to the musical composition.

Counsel for the plaintiff did not make any particular submission during the argument on all the questions of law and fact relating to requirement of a procedure for issuing a permanent injunction, and barely touched on the concept of damages, though he suggested that the claim for \$50,000 damages, as worded in the conclusions of the statement of the claim, was for exemplary damages. Counsel for the defendant did not deal with these matters.

These questions of the permanent injunction and damages raise definite problems which counsel for the parties passed over in silence, failed to deal with or left to the Court to dispose of.

It is not fair to the two parties for these matters to remain in suspense, especially as they involved third parties whose interests may be seriously affected. In this connection, I take the liberty of formulating certain questions which were not answered: (1) does the plaintiff really have an interest in obtaining a permanent injunction prohibiting the distribution of a song when the economic value of that distribution, subject to a strict time limit, is constantly decreasing; (2) if an injunction should be granted, what becomes of the rights of the singer and librettist of "Tous les juke-box", who are innocent victims of this dispute between the parties, and in particular of other librettists or composers of the music of other songs on the Martine St-Clair LP, if the distributions were interrupted? (3) do the circumstances of the case, in fact and in law, justify an order to pay exemplary damages? In short, it seems to me that in the absence of an agreement between the parties these and other related questions should be the subject of a new hearing before the Court. As such, therefore, I agree to retain jurisdiction of the matter. If there is an agreement between the parties in this regard, counsel for the parties may submit a draft judgment on this part of the conclusions, and if there is no agreement may submit an application for a hearing.

Additionally, the Court intends to issue forthwith a judgment that "Chanson numéro 7" is a protected musical work owned by the plaintiff and that his rights were infringed by the defendants in the song "Tous les juke-box". It is also appropriate to order the defendants forthwith to prepare and conserve a detailed statement of the copies sold of the Martine St-Clair LP, and to render an account of all LPs manufactured and sold. It is not appropriate in the case at the bar for the Court to rule at this time on the question of interest, and it reserves the right to dispose of it

subsequently if there is no agreement between the parties. The plaintiff shall be entitled to costs on a solicitor/client basis.

PIERRE DENAULT

J.F.C.C.

OTTAWA, June 28, 1991

Certified true translation

T.V. Helwig

T.V. Helwig

FEDERAL COURT OF CANADA

TRIAL DIVISION

Names of counsel and solicitors of record

Court file No.: T-1283-88

Style of cause: René Grignon
- and -
Jean-Alain Roussel et al.

Place of hearing: Montréal, Québec

Date of hearing: May 6, 1991

Reasons for judgment of the Court by: Denault J.

Dated: June 28, 1991

APPEARANCES:

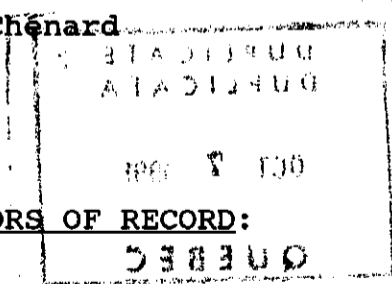
Gabriel Lapointe for the plaintiff
Josée D'Août

Daniel Chénard for the defendant

SOLICITORS OF RECORD:

Lapointe, Schachter, Champagne & Talbot for the plaintiff
Montréal, Quebec

Chénard, Gagnon for the defendant
Vieux-Montréal, Quebec





T-1283-88

B E T W E E N:

RENÉ GRIGNON,

plaintiff,

A N D:

JEAN-ALAIN ROUSSEL,
COMMUNICATIONS TALBECOR INC.,

defendants,

A N D:

SOCIETY FOR REPRODUCTION RIGHTS OF AUTHORS, COMPOSERS AND
PUBLISHERS IN CANADA (S.R.R.A.C.P.C.) INC.,
and
PERFORMING RIGHTS ORGANIZATION OF CANADA INC. (P.R.O.),

mis-en-cause.

J U D G M E N T

DENAULT J.

THE COURT:

- ALLOWS the plaintiff's action;
- FINDS that "Chanson numéro 7" is a musical work protected by the Copyright Act and the plaintiff holds the rights to it;

- FINDS that the plaintiff's copyright to this work was infringed by the defendants Jean-Alain Roussel and Communications Talbecor Inc., by publishing the song "Tous les juke-box" in the long-playing record "Martine St-Clair";
- ORDERS the defendants to prepare and conserve a detailed statement of copies sold of the long-playing record "Martine St-Clair" and to allow the plaintiff and his representatives to examine the same and make copies thereof, within sixty days of the judgment to be rendered, and on the expiry of each sixty-day period thereafter;
- ORDERS the defendants to render an account of all long-playing records manufactured and sold of the record "Martine St-Clair", reproducing the work "Tous les juke-box", within sixty days of the judgment to be rendered, and on the expiry of each sixty-day period thereafter;
- ORDERS the mis-en-cause S.O.C.A.M., in right of P.R.O., to pay the plaintiff the sum of \$3,455.00;
- ORDERS the mis-en-cause S.R.R.A.C.P.C. to pay the plaintiff the part relating to the composer of the sum of \$2,969.12 held by it;
- ORDERS the mis-en-cause to prepare and submit to the plaintiff a full accounting for the income generated by the collection of fees for reproduction, synchronization and public performance of the song "Tous les juke-box" within sixty days of the judgment to be rendered, and on the expiry of each sixty-day period thereafter;

- ORDERS the defendants to pay the plaintiff costs on a solicitor/client basis up to the date of this judgment;
- RESERVES the rights of the parties, in the absence of agreement between them, to be heard on the question of issuing a permanent injunction, exemplary damages and interest.

PIERRE DENAULT

J.F.C.C.

OTTAWA, June 28, 1991.

Certified true translation

T.V. Helwig

T.V. Helwig

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