COPYRIGHT CASES

1922–3

BY

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Austin *v.* Columbia Graphophone Company, Ltd.

(The *Times*, July 4, 5, 6, 7, 11, 12, 13, 14, 18, 20, 25.)

MUSICAL WORK—ARRANGEMENT OF OLD AIRS—COPYRIGHT IN IDEAS—METHODS AND DEVICES—INFRINGEMENT—NOTE FOR NOTE COMPARISON.

Chancery Division.

Mr. Justice Astbury.

1923, July 24.

Under the Copyright Act, 1911, *copyright is no longer restricted to particular forms of expression.*

Although no copyright exists in ideas, there may be copyright in a combination of ideas, methods, and devices, used and expressed in and going to form part of a new and original work. There may be copyright in the selection of common well-known musical devices and their application to the making of a new musical arrangement of an old air.

Infringement of copyright in music is not a question of note for note comparison, but of whether the substance of the original copyright work is taken or not. It falls to be determined by the ear as well as by the eye.

Copyright in music is infringed if there has been any real annexation by a subsequent composer of the work and labour and skill and taste of his predecessor.

Contrivances by means of which substantial parts of a musical work may be mechanically performed may be infringing copies of such work, and the owner of the copyright may thus be entitled to damages for

conversion on the basis that the infringing contrivances were his property unlawfully converted by the defendant to his, the defendant's, own use.

In this action Mr. Frederic Austin complained that the Columbia Graphophone Company had infringed his copyright in the music of the opera "Polly," as produced at the Kingsway Theatre, by making and selling certain disc records by means of which selections from the music might be mechanically reproduced. The opera "Polly" was written by John Gay as a sequel to "The Beggar's Opera," and was first published in 1729 in a volume containing the opera in ordinary prose form interspersed with lyrics, and with an appendix in which a number of simple airs were printed with an added bass. These airs were mostly folk-songs and other popular airs then current, and no music was composed by Gay. The added bass was the work of a Dr. Pepusch. The opera was practically unknown to the theatre-going public in this country until it was produced by the Milbourne Syndicate, Ltd., at the Kingsway Theatre on December 30, 1922. For this production Mr. Clifford Bax reconstructed the book and altered many of the lyrics, and in many cases substituted new lyrics for the old. Mr. Austin arranged and composed the music to fit Mr. Bax's reconstructed book. For this purpose Mr. Austin selected fifty out of a total of seventy-one airs in Gay's appendix and worked them up, altering, extending, and adding to them so as to fit Mr. Bax's lyrics. Many of the airs were thus adapted to an entirely different setting and musical structure from that in which they were used by Gay. For instance, Air 69 in Gay called "Buff Coat" is set for a lyric beginning "Why that languish! Ah, he's dead; he's lost for ever." This lyric is in the nature of an elegy, and the air is marked to be played slow and in conjunction with the words is obviously intended to produce the

effect of a lament. Mr. Austin uses this air in conjunction with an entirely new lyric written by Mr. Bax, beginning, "Drink, laugh, sing, boys, for the soldier has no fellow." It is a lively, rollicking, drinking song, and Mr. Austin composed his music accordingly. The original bass of Dr. Pépusch has a slow and sustained movement. Mr. Austin, on the contrary, uses accented chords with rests and marks it "allegro robusto." Air 9 in Gay called "Red House" is set to a song "I will have my humours," which is sung as a solo by Mr. Ducat. Mr. Bax has altered the words and character of the song and made it into a duet with answering phrases to be sung by Mr. Ducat and Polly. Mr. Austin's music conforms to the alteration. It is arranged for a baritone and soprano with antiphonal passages and a bagpipe scheme of harmony which is not to be found in Gay's appendix. And so on throughout the whole of the music, although Mr. Austin takes the melody from Gay's airs he alters the structure of the music and his whole scheme of harmony is a departure from Dr. Pepusch's setting of the same airs and produces a different effect to the ear. The production at the Kingsway Theatre proved an immediate success, and became one of the most popular musical entertainments of the day. In fact it was and is the only successful version of "Polly" ever produced in this country. In these circumstances certain gramophone companies desired to produce the best airs from the plaintiff's music in the form of gramophone records. In January the defendant company applied to Messrs. Boosey, who were then publishing a vocal score of the plaintiff's music, for permission to make orchestral parts of selections from the opera. Messrs. Boosey replied that the matter was entirely in Mr. Austin's hands, that Mr. Austin was in touch with the Gramophone Company, but that that was no reason why the defendants should not be getting ready. Then the defendants approached Mr. Austin and his

permission was obtained to make an orchestral selection on condition that it was not put on the market before the Gramophone Company's records. Meanwhile Mr. Ketelbey, who is the musical director of the defendant company, went to the Kingsway Theatre and picked out twenty tunes which he thought were most likely to suit the public taste and to become popular. He obtained a copy of Mr. Austin's vocal score of these tunes and orchestrated them for the purpose of enabling them to be played by a band for making the desired records. Mr. Austin was shown this orchestral score, and after making certain alterations he agreed to the score being used for the purpose of making gramophone records. On February 7 Mr. Austin wrote to the defendant company informing them that he had made an agreement with the Gramophone Company which bound him not to give permission to any one else to make any band parts of his music for the purpose of making gramophone records until such time as that company should have manufactured and publicly offered their records for sale, and that consequently the most he could do for the defendants was to let them know the date of release of the Gramophone Company's records. The defendants thereupon decided to produce records of "Polly" without Mr. Austin's consent and if possible place them on the market before the issue of the Gramophone Company's authorised records. For this purpose they sent Mr. Ketelbey to the British Museum to copy from the old edition of Gay the airs which Mr. Ketelbey had already selected as suitable for reproduction. The object of this visit was firstly to find out whether the originals of the twenty airs were in fact in Gay, and, secondly, to copy these airs direct from Gay's appendix in the hope of thus avoiding any copying from Mr. Austin's music. Mr. Ketelbey paid two visits of short duration to the British Museum. He memorised parts at all events of Gay's appendix. He took with him Mr.

Austin's vocal score of his opera and he discovered two things: First that one of the airs from the opera that he and the defendants desired to reproduce was not in Gay at all, and that it was a new and original piece of music by Mr. Austin. That, therefore, had to be omitted. He dis-discovered, secondly, that another of these twenty selected airs, although based upon the air in Gay, had been so altered as to the air itself by Mr. Austin that a reproduction of that air as found in Gay would not apparently enable the public to recognise it as the air in Mr. Austin's opera. The two visits to the British Museum paid by Mr. Ketelbey were on February 12 and 14. Between February 16 and 22 Mr. Ketelbey prepared his orchestral score. In that score he omitted the tune of which Mr. Austin was the sole author, and he also omitted the tune the air of which Mr. Austin had substantially altered from the air in Gay, and in the place of the latter he substituted another air from Gay's appendix. On February 23 the defendants' records were made, and on March 3 the defendants wrote to various sellers of gramophone records "Herewith Advance List of new Columbia Records, special issues of selections from 'Polly' (arranged by Albert W. Ketelbey), and selections from 'The Cousin from Nowhere,' the successful musical play produced in London on Saturday last. No samples are being furnished. Kindly let us have your orders by return as stock is now ready." The defendants also issued for the purpose of advertising their records a poster printed in red and black, and illustrated by a drawing of a female figure designed to represent the character of Polly, dressed in the costume in which she appears in "The Beggar's Opera" as produced with Mr. Austin's music at the Lyric Theatre, Hammersmith, and in the first Act of "Polly" as produced at the Kingsway Theatre. At the trial expert evidence was called on both sides. Mr. Austin was supported by Mr. Newman, a well-known musical critic, Sir Hugh Allen,

Professor of Music at Oxford and a director of the Royal College of Music, and Mr. Geoffrey Shaw, H.M. Inspector of Training Colleges and Schools of Music. The purport of the evidence called for the plaintiff was that the plaintiff had recast the general character of the music and made it into a new and independent work of art, and that his music was appropriate to the lyrics of Mr. Bax, and the business on the stage to which it was set, and was wholly unsuited in most instances to Gay's opera and lyrics. They were of opinion that Mr. Ketelbey in writing his score from Gay's airs had adopted Mr. Austin's treatment of these and had taken the structure and other important characteristics of Mr. Austin's music, and that Mr. Ketelbey's music produced to the ear an effect similar to that produced by Mr. Austin's music. They did not think it possible that two musicians working independently on the music as found in Gay's appendix could have produced results with so many similarities in treatment and musical effect. In cross-examination Sir Hugh Allen was asked whether his evidence did not amount to this, that the defendants had harmonised the tunes in the plaintiff's manner with some resemblances and imitations of the plaintiff's effects, and to that Sir Hugh Allen agreed. A statement was similarly elicited from Mr. Shaw to the effect that the defendants had edited Gay's tunes in Mr. Austin's manner with a great many reminiscences or imitations of Mr. Austin's effects. These two answers obtained in cross-examination were based on what was really the defendants' case, namely, that so long as Mr. Austin's actual notes and bars were not copied, and as Gay's airs simpliciter were not copyright, the defendants were at liberty to orchestrate, lengthen, quicken, introduce imitative and chorus effects, and generally dress up the tune in the same way as the plaintiff. The plaintiff's case on the other hand was that he had made and was the author of a new and original work, in which the combination and

selection of Gay's airs, with many musical, orchestral, and other methods and devices which he had selected and adopted and worked up into a new and original whole was his property, which no one else might without his consent produce or reproduce in whole or as to any substantial part in any material form directly or by way of colourable imitation.

The defendants called as their expert witnesses Mr. Ketelbey, Mr. Hubert Bath, of the Gaiety Theatre, a distinguished composer and the author of an independent version of "Polly," produced at Chelsea some months after the production of the Kingsway version, Sir Frederick Bridge, Emeritus Organist of Westminster Abbey, Sir Frederick Cowen, the well-known composer and conductor, Sir Dan Godfrey, the well-known band conductor, Mr. Hamilton Harty, composer and conductor of the Halle Orchestra in Manchester, and Mr. Clutsam, a musical composer of considerable position and the arranger of Schubert's music for the recent production in London of "Lilac Time." The evidence of all these distinguished musicians was directed in the main to explaining that the various musical devices used by the plaintiff were in themselves devices commonly known in the art. They were, moreover, of opinion that the devices used were so common and obvious that any two competent musicians setting out to adapt Gay's airs to the requirements of a modern opera would produce substantially the same result with the same musical effects. In his judgment the learned judge said that he did not accept Mr. Ketelbey's view, that he did not try to reproduce the plaintiff's version of the tune. Unless he got sufficiently near to enable the defendants' records to be sold as records of what the public wanted his work would have been useless. He believed that he did attempt to reproduce the plaintiff's version, supplying his own orchestration and not copying the plaintiff's notes to any great extent, but

otherwise treating the selected airs in a manner sufficiently resembling the plaintiff's treatment to suit the defendants' requirements. The learned judge said that the contention that the various resemblances were due merely to coincidence, and would occur as a whole in another independent version of Gay was one which he was entirely unable to accept or believe. Commenting on Mr. Bath's evidence, the learned judge said that in his opinion this gentleman was disposed to exaggerate in a way which made him feel uncomfortable. His evidence was really based on two theories: one coincidence, and the other that any one else would have dressed up Gay's airs in Mr. Austin's clothes, neither of which, having regard to the evidence called for the plaintiff and to common sense, was he able to accept. With regard to Sir Frederick Bridge, the learned judge said that he was a breezy and amusing witness, who, when he came into the witness-box to give evidence, had not, he thought, really addressed his mind to the problem which he, the learned judge, had to solve. As the result of his examination and cross-examination he had come to the conclusion that his evidence told more in favour of the plaintiff than the defendants. After giving evidence Sir Frederick Bridge, apparently believing that he had not quite produced the effect that was hoped, wrote a letter to Sir Duncan Kerly, the defendants' counsel, and the learned judge allowed this letter to be read as part of Sir Duncan's argument. In his judgment the learned judge quoted and commented on it as follows: "I allowed Sir Duncan Kerly to read this letter as part of his, Sir Duncan's, argument. It is a letter written when the writer was *functus officio* as a witness, and is a sort of posthumous judgment, as it were, upon the case, and I will read it, relying on the fiction that it is part of Sir Duncan's argument. Sir Frederick says: 'The result of this case will be of importance to English music. Among recent developments in English music

there has been an increasing interest shown in the music of those past periods, when England was prominent, if not pre-eminent, in Europe. Music which has been forgotten for centuries has been rediscovered by research, arranged by the researchers for modern requirements and performed. The fewer the obstacles placed in the way of the free use and adaptation of this music, the more readily will it be assimilated by present-day musicians, and be available to build up English music on the foundations of the great periods of the past.' If I may respectfully say so, I agree with that, subject to the qualification that if musicians doing original work in this direction are sufficiently protected by law, there is nothing to complain of in this passage. The letter proceeds: 'The arrangement of an old air must obviously be more difficult to copyright than a piece of entirely original music, for the old air itself is common property, and without the air there could be no arrangement. The question which now appears to have arisen for decision is how far can the arrangement be protected without establishing a copyright in the air itself. To the sensitive ears of the majority of musicians of the same period an air apart from the melody naturally suggests certain ideas of treatment and devices. These ideas and devices are, if it may be said, practically part of the air; they are not original, but are commonplaces drawn from the common musical stock.' I would add to that, 'But they may go to make up a meritorious, new, and original work.' Then the letter proceeds: 'It is of the use of commonplaces of this kind that complaint is made in this case. If judgment is given for the plaintiff, it would seem dangerous for a composer to arrange an air which has been arranged before, and suicidal if he has seen or heard the previous arrangement.' This is Sir Frederick Bridge's view: I do not share it. Then Sir Frederick Bridge proceeds: 'The need is for a guiding rule. The principle that there is only copyright

in a sequence of notes is a rough and ready rule which may not be perfect in its application to all cases, but it is intelligible and clear. Any other principle will certainly be very difficult for the musician to apply, and almost impossible for a lawyer, himself probably inexpert, to interpret.' I will add to that that difficulty is no reason for not doing one's best to apply the law to each case as it arises." With regard to Sir Frederick Cowen's evidence, the learned judge's comment was that except that he was less hilarious than Sir Frederick Bridge, and had not given judgment after leaving the box, he, the learned judge, thought that the same remarks applied to his evidence. The learned judge thought that Mr. Hamilton Harty was an extremely interesting witness. Of his evidence he said, "This witness expressed such extreme views that it is difficult to quite explain the effect he had upon my mind, sitting as I am in this respect as a juryman very ignorant of the mysteries of melody and harmonisation. He did not, in my judgment, in the least answer or effectively deal with the case and evidence of the plaintiff, but seemed to me to be, when giving his testimony, in a sort of musical dreamland, where facts, realities, and such-like prosaic and commonplace things were hardly considered as meriting serious treatment. I am sure, however, he gave his evidence in perfect good faith." Of Mr. Clutsam's evidence the learned judge said, "I am sorry to say that I find it difficult to take this gentleman's evidence seriously. It did not seem to me to ring true, and I certainly am not disposed to minimise the effect of the plaintiff's evidence because of anything that he has said."

After summing up the evidence the learned judge continued:

"The question which I have to determine is, *inter alia*, Is the defendants' work a new and original work based on Gay; and, secondly, does it escape the meshes of the law

of copyright as now existing in this country? The defendants' experts did not really set out to compare the plaintiff's and defendants' productions of the selected airs with the original Gay, and to find out what points of copying or resemblance there were where each departed from the original work. They so misdirected themselves as to make their real task well-nigh impossible. The defendants welcomed a poster sketch for their advertisements which did not give an impression of Polly differing from, but one resembling, the Kingsway lady. Although no copyright exists in ideas, there is copyright, and can be copyright in a combination of ideas, methods, and devices used and expressed in and going to form part of a new and original work, based though it be on old airs and made up of musical devices all in themselves old and in common use independently of the particular context and combination in which they are found. This is particularly so when one finds a defendant's work based largely on the plaintiff's. The matter cannot be determined, as the law now stands, by whether the actual notes are taken, and this is exemplified by two pieces of music handed to Sir Frederick Cowen in cross-examination. They were both well known; they were both works of well-known musicians, and the witness was handed up in each case a second document, in which not one single note of the original was taken. He had no difficulty in seeing, admitting, and stating that the second document in each case was a deliberate copy of the first.

"The law now depends upon the Copyright Act of 1911, which states in sec. 1 (1): 'Subject to the provisions of this Act, copyright shall subsist throughout the parts of His Majesty's dominions to which this Act extends for the term hereinafter mentioned in every original literary, dramatic, musical, and artistic work,' and in sub-sec. (2): 'For the purposes of this Act, "copyright" means the sole right to produce or reproduce the work or any substantial

part thereof in any material form whatsoever, to perform, or in the case of a lecture to deliver, the work or any substantial part thereof in public; if the work is unpublished, to publish the work or any substantial part thereof; and shall include the sole right . . . in the case of a literary, dramatic, or musical work, to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered.' In sec. 2, sub-sec. (1), it is enacted that 'Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright,' subject to exceptions which are irrelevant in this case. In sec. 35 (1) it is enacted that '"Infringing," when applied to a copy of a work in which copyright subsists, means any copy, including any colourable imitation, made, or imported in contravention of the provisions of this Act.' Now, I imagine that music must be treated by the ear as well as by the eye. In *D'Almaine* v. *Boosey*, reported in 1 Younge & Collyer, at page 288, the Chief Baron said, on pages 301 and 302: 'But, in the first place, piracy may be of part of an air as well as of the whole; and, in the second place, admitting that the opera consists of the whole score, yet if the plaintiffs were entitled to the whole, *à fortiori* they were entitled to publish the melodies which form a part. Again, it is said that the present publication is adapted for dancing only, and that some degree of art is needed for the purpose of so adapting it; and that but a small part of the merit belongs to the original composer. That is a nice question. It is a nice question what shall be deemed such a modification of an original work as shall absorb the merit of the original in the new composition.' No doubt such a modification may be allowed in some cases, as in that of an abridgment or a digest. Such publications are in their