

IN THE HIGH COURT OF JUSTICE—CHANCERY DIVISION

Before: Judge Paul Baker, Q.C.

WILLIAMSON MUSIC LTD. AND OTHERS v. THE PEARSON
PARTNERSHIP LTD. AND ANOTHER

29 July 1986

*Copyright infringement—Interlocutory injunction—Music and Lyrics—Parody
—Parody of song used as advertisement—Whether infringement
—Interlocutory relief granted.*

Copyright Act 1956, sections 2 and 49.

In a copyright infringement action which concerned the music and lyrics of the song 'There is Nothin' Like a Dame' from the Rodgers and Hammerstein musical 'South Pacific', the plaintiffs were the exclusive licencees in the United Kingdom of the copyrights in this musical. Other plaintiffs were trustees of the estate of the late Richard Rodgers and Oscar Hammerstein.

The first defendants were an advertising agency having among their clients the second defendants, a bus company. The first defendants had created a form of television advertisement for the second defendants which made use of words and music which the plaintiffs claimed infringed the copyrights in the abovementioned song. The plaintiffs moved for appropriate interlocutory relief after this advertising had been seen on television.

On the basis of metrical, alliterative and harmonic similarities, the plaintiffs alleged that the defendants' song infringed their copyrights. The defendants admitted that the lyrics and music had deliberately been created so as to parody the Rodgers and Hammerstein number but asserted that in the result there had been no infringement whatever.

The words of the songs in issue are set out in the judgment which follows. At the hearing of the motion the subsistence and ownership of the relevant copyrights were not in issue.

Held, (1) The correct test in assessing whether the parody amounted to an infringement was whether it made use of a substantial part of the expression of the original work. Applying this test to the alleged infringement of literary copyright, there was no serious question to be tried. On the other hand, this could not be said of the issue relating to the musical copyright.

(2) The balance of convenience was in the plaintiffs' favour and interlocutory relief would be granted.

Authorities referred to in the judgment:

- American Cyanamid Co. v. Ethicon Ltd.* [1975] A.C. 396.
Antocks Lairn Ltd. v. P Bloohn Ltd. [1972] R.P.C. 219.
Austin v. Columbia Gramophone Co. Ltd. (1917–1923) Macg. Cop. Cas. 398.
Berlin v. E.C. Publications Inc. 329 Fed. 2d 541.
Chappell & Co. Ltd. v. D.C. Thomson & Co. Ltd. (1928–1935) Macg. Cop. Cas. 467.
Francis, Day & Hunter Ltd. v. Bron [1963] Ch. 587.
Francis, Day & Hunter Ltd. v. Feldman & Co. [1914] 2 Ch. 728.
Glyn v. Weston Feature Film Co. [1916] 1 Ch. 261.
Joy Music Ltd. v. Sunday Pictorial Newspapers (1920) Ltd. [1960] 2 Q.B. 60.
Schweppes Ltd. v. Wellingtons Ltd. [1984] F.S.R. 210.

The case is reported only on the issue of whether within the principles of the *American Cyanamid* case there was a serious issue to be tried.

The other plaintiffs were Dorothy Rodgers, Lawrence Buttenweiser, William Hammerstein, Dorothy Hammerstein, and Philip Zimet. The second defendant was National Express Ltd.

Nicholas Pumfrey, instructed by *Joynson-Hicks & Co.*, appeared for the plaintiffs. *Peter Prescott*, instructed by *Lewis Silkin*, appeared for the defendants.

JUDGE PAUL BAKER, Q.C.: The late Richard Rodgers and the late Oscar Hammerstein II were the composer and author respectively of the music and words of a number of very successful musical plays produced and shown on stage and screen on both sides of the Atlantic. Individual songs from the plays have become very well known through broadcasting and record sales.

One such play was *South Pacific*, first produced in 1949. It included a song entitled "There is Nothin' Like a Dame," which has retained its popularity ever since. Its theme is the plight of sailors stationed in some tropical land in the Pacific who find themselves in idyllic surroundings save that they lack acceptable female company. It includes the following verse:

"We got sunlight on the sand,
 We got moonlight on the sea
 We got mangoes and bananas
 We can pick right off the tree
 We got volley ball and ping pong
 And a lot of dandy games
 What ain't we got?
 We ain't got dames!"

and the chorus:

"There is nothin' like a dame

Nothin' in the world
There is nothin' you can name
That is anythin' like a dame".

On 5 May 1986, at around 9 p.m., there appeared for the first time a television advertisement on Channel 4 and on Thames Television (that is the television channel which covers the London area). This advertisement advertised the Rapide Coach Service, a service of express coaches between London and other places in the United Kingdom. The advertisement lasted for thirty seconds and showed the interior and exterior of the coach in motion together with a number of people and animated figures and it was accompanied by a song extolling the services provided on the coach. The following are the words of the verse:

"We got coffee, we got tea,
We've got toilets if need be
We've got films on vi-de-o,
so there's lots for you to see
We've got seats so you can lay back,
Just like they do in planes
And best of all
Rapide's got Elaine!"

There there is the chorus:

"You've just got to meet Elaine,
She's a real swell girl
You would have to be insane
To choose anyone but Rapide's Elaine".

It was immediately noticed by Mr. Ian Davage, the manager of the licensing division of the Mechanical Copyright Protection Society who thought it sounded like 'There is nothin' like a Dame". On the next day, 6 May, he informed Chappell Music Library who publish the song in the United Kingdom.

In this action the plaintiffs complain that the copyrights in "There is Nothin' Like a Dame" have been infringed and by this motion seek an interlocutory injunction to restrain the further showing of the advertisement until trial. It has already been shown on 71 occasions but not since 13 June. That was a matter of policy on the part of the defendants and not because of any sort of undertaking or restraint imposed on them by the court.

It is accepted for the purposes of this motion that the plaintiffs between them own the copyrights in the words and music of the song and that the copyrights are subsisting. The first plaintiffs are the exclusive licencees of the Rodgers and Hammerstein copyrights in this country, that is to say, Williamson Music Limited. The second and third plaintiffs are the trustees of the estate of Richard Rodgers, who died in 1979, and the remaining plaintiffs are the trustees of the estate of Oscar Hammerstein, who died in 1960.

I have heard an orchestrated version of the song, taken, I am told, from the film sound track of *South Pacific*. There is some suggestion in

the defendants' evidence that the plaintiffs might not have the copyright in the orchestration, but it was not pursued in argument and I shall proceed on the basis that the plaintiffs, or some of them, are the owners of that copyright also if it be separate.

In the third codicil to his will, Richard Rodgers stated that the artistic integrity and reputation of the musical compositions and lyrics written by him and the manner in which they would be performed or presented after his death was of great importance to him. He went on to direct his trustees, in effect, that the artistic integrity and reputation were not to be sacrificed to commercial success.

I must now turn to the arrangements for the exploitation of the copyrights. By a series of agreements, the last and current one being dated 1 July 1985 (that is the fourth exhibit to Miss Harris's affidavit for the plaintiffs), the first plaintiff appointed Chappell International Music Publishers Limited (who are well known music publishers in this country) to manage and exploit those Rodgers and Hammerstein copyrights. The agreement was subject to the restriction that Chappell had to obtain Williamson's consent to all synchronisation licences (that is licences for the use of the songs with other productions) other than those which Chappell rejected out of hand.

In evidence on behalf of the plaintiff Miss Harris, who is a solicitor and Chappell's legal and business affairs adviser, states at the end of paragraph 8 of her affidavit:

"It is well known throughout the advertising industry that Chappell are the managers of the copyright in and publishers of Rodgers and Hammerstein's songs in the United Kingdom and that Chappell's policy is not to licence the use of Rodgers & Hammerstein music and lyrics for advertisements of this nature".

Then in paragraph 16 of her affidavit, Miss Harris says this:

"I am informed by Jonathan Simon, Director of Chappell and verily believe that it has always been Williamson's policy that permission will not in any circumstances be granted for the making of parodies of either the words or the music of Rodgers and Hammerstein compositions. Furthermore I am informed by Jonathan Simon and verily believe that permission is never granted for the reproduction or adaptation of either the words or the music of Rodgers and Hammerstein compositions for the making of commercial advertisements to be shown in the United Kingdom".

Mr. Prescott, for the defendants, has challenged this statement on the strength of a letter, which is exhibited to Miss Harris's affidavit as exhibit 19. It is a letter dated 27 March 1986 written by Chappell's Copyright Controller to Messrs. Michael Freeman & Co., when they applied for some sort of licence. The writer says:

"We confirm that the Rodgers and Hammerstein Estates do not permit us to authorise the use of their works in television advertisements.

Should, however, your client wish us to approach the Rodgers and Hammerstein office with a firm proposal stating exact nature of the usage, and the campaign, with a copy of the proposed musical setting we shall be pleased to seek their opinion on this specific usage.

As to the musical work which your client has commissioned, we do not feel it is incumbent on us to give an opinion as to its originality or possible infringement of 'My Favourite Things'—which is another well-known song from another show of Rodgers and Hammerstein—"but should be pleased to submit it to the Rodgers and Hammerstein office for their consideration."

I am unable to read into this the sort of encouragement that Mr. Prescott would seek to extract from it. I have no reason to doubt that the policy is as Miss Harris has stated and that permission, if sought, would not have been granted at any price.

The first defendants are an advertising agency, having among their clients the second defendants. Up to this year the second defendants, National Express Limited, were the marketing arm of the National Bus Company, which is a conglomeration of sixty or so bus companies or coach companies operating long distance coaches. In 1980 they introduced the Rapide services and I take from Mr. Rendall's affidavit the following description of that: "These services, too, are run using coaches supplied by individual NBC operators, but these are decked out in the special Rapide livery and are high specification vehicles featuring reclining seats, toilets, refreshment facilities, video, etc." Missing out the next sentence, he goes on:

"With the deregulation of bus services due in October of this year, however, and the end of the NBC as a state owned enterprise and its very likely fragmentation, there clearly had to be a change in our *modus operandi*, and with effect from 27 April National Express has had a completely new, arm's length relationship with the NBC by which we guarantee to each NBC operator that it will receive a minimum revenue per mile on routes for which it supplies coaches to us. This means that National Express is now trading solely in its own right: it must show that it can stand on its own two feet and meet its new contractual commitments by competing effectively in the market place against all comers including the London Liner Express Coach Service set up last March by London Transport and the West Midlands Passenger Transport Executive".

Mr. Rendall goes on, in paragraph 5:

"It was in view of these circumstances that we at National Express decided to launch a major television advertising campaign this Spring which was designed not just to sell seats on National Express coaches and in particular the Rapide service, but to change public attitudes to coach travel generally".

To that end, in January of this year, the second defendants, National Express Limited, instructed the first defendants, The Pearson Partnership Limited, who are an advertising agency, to prepare a suitable advertisement. It took seven weeks to develop and cost some £60,000, not taking into account the time of the agency staff. The words, it seems, were devised by the agency staff and were given to a Mr. Denis King to compose suitable music to accompany them. Mr. King is a professional composer, very experienced in this and other forms of musical composition. In paragraph 25 of his affidavit, Mr. King told me this:

"In this instance I was told by the first defendants that a parody of 'There is Nothin' Like a Dame' was wanted and was engaged to set the words to

music. For my part, I was not altogether happy with this idea because although a parody of words is fairly easy to do, it is not so easy to make a recognisable parody of a tune, within the space of a few seconds of TV time, unless the tune is highly original or unusual".

Those instructions to Mr. King were confirmed by the defendants' solicitors in a letter of 20 May 1986, which is exhibit 16 to Miss Harris's affidavit. It is in the pre-action correspondence between the respective solicitors. The defendants' solicitors state this in the letter:

"Although our clients would be the first to admit that the soundtrack to the advertisement in question features an affectionate parody of the song to which you refer, they cannot accept that it constitutes an infringement of your clients' rights, such as they may be".

Thus the defendants went into this knowingly. Their case is that what they have produced is not an infringement of either copyright, that is to say, the literary or musical copyright, and so sure are they of this that they have argued that the plaintiffs have no real prospect of succeeding at the trial; there is no serious question to be tried. Thus, they say, the plaintiffs do not get over the first hurdle posed by Lord Diplock in *American Cyanamid Co. v. Ethicon Ltd.* [1975] A.C. 396. This has involved some consideration of the relevant law which I must now consider, though before I do so I must say that I am most indebted to both counsel in this case for their careful and interesting submissions on this specialised branch of the law.

The statutory provision is well known. Under section 2(1) of the Copyright Act 1956, subject to certain conditions which are satisfied in this case, copyright subsists in every original literary, dramatic or musical work. Under section 2(5) it deals with acts which are restricted acts, acts which would be infringements. Section 2(5) reads:

"The acts restricted by the copyright in a literary, dramatic or musical work are—

- (a) reproducing the work in any material form;
- (b) publishing the work;
- (c) performing the work in public;
- (d) broadcasting the work;
- (e) causing the work to be transmitted to subscribers to a diffusion service;
- (f) making any adaptation of the work;
- (g) doing, in relation to an adaptation of the work, any of the acts specified in relation to the work in paragraphs (a) to (e) of this subsection".

Then in section 2(6) it has a definition of "adaptation". I think I need only read subsection (b), which says: "In this Act 'adaptation' . . . (b) in relation to a musical work, means an arrangement or transcription of the work".

Then I also should notice that in section 49, which is headed "Supplementary provisions as to interpretation," it states that:

"any reference in this Act to the doing of an act in relation to a work or other subject matter shall be taken to include a reference to the doing of that act in relation to a substantial part thereof".

The first issue to which I should address myself is the question as to how far a parody is an infringement of copyright. Mr. Prescott observed in the course of his submissions that it is hard to see how a parody could ever be an infringement and this has been canvassed, to some extent, in the authorities. Before I look into them, I call attention to two features of parody or burlesque. First of all, it is to be observed that the parodist of the successful parody does himself do a lot of original work in parodying the first work and so can be said to create a new and original work. Of course it has necessarily to conjure up the old or it would fail as a parody, but it is commonplace in this branch of the law that copyright resides not in ideas, but in the expression of them. So the parodist may take an idea and from it a completely new and original work may be created. Another element of this is that the parodist may be indulging in literary criticism or a review of the original work. This latter point, however, does not arise in the present case, because that was not the purpose of the compilers of the advertisement, so I need not deal with any sort of defence under section 6 of the Copyright Act, that is, the fair dealing exception.

I said that there were a number of authorities and I was referred, among others, to an American authority, which I propose to take first. It is the case of *Irving Berlin v. E.C. Publications Inc.*, which was heard by the United States Court of Appeals, Second Circuit, in 1964, 329 Fed. 2d 541. Irving Berlin is a well known composer of songs and it seems that in this case the defendants had created and published 25 parodies of his songs. The judgment was given by Judge Kaufman of the Court of Appeals. I propose just to read two passages from his judgment, where he dealt with two precedent cases where a parody was alleged, in one of which the copyright owners had succeeded and in the other of which they had failed. Of those two cases, and I need not refer to them further, Judge Kaufman says:

“The distinction between the two situations, Judge Carter reasoned, turned on the relative significance or ‘substantiality’—in terms of both quality and quantity—of the material taken from the original motion pictures. In both cases, the court recognised in painstaking and scholarly opinions the historic importance and social value of parody and burlesque; in both, it conceded that the parodist must be permitted sufficient latitude to cause his reader or viewer to ‘recall or conjure up’ the original work if the parody is to be successful. But in Benny’s case, the court concluded this licence had been grossly exceeded.”

I note from there the reference to quality and quantity of the material taken and in terms of substantiality.

Judge Kaufman concluded his judgment in which he rejected the claim for copyright in relation to all the 25 parodies in these terms:

“For, as a general proposition, we believe that parody and satire are deserving of substantial freedom—both as entertainment and as a form of social and literary criticism”.

He makes reference to *Don Quixote* and Swift's *Gulliver's Travels* and goes on:

"At the very least, where, as here, it is clear that the parody has neither the intent nor the effect of fulfilling the demand for the original, and where the parodist does not appropriate a greater amount of the original work than is necessary to 'recall or conjure up' the object of his satire, a finding of infringement would be improper".

That is of great interest although the U.S. law on copyright is in material respects different from that here but I notice that, although the parodist is treated generously in the proceedings in the United States, he does not in fact have a licence to appropriate the other person's work.

I suppose in England the high water mark of any liberty allowed to parodies was the judgment of Younger J., as he then was, in *Glyn v. Weston Feature Film Company* [1916] 1 Ch. 261. A number of points came up in this case which are not relevant to the issues I have to decide, and I will not take time reading through the facts, beguiling as they are. The passage I had in mind came after the learned judge had concluded that there was no substantial taking by the film *Pimple's Three Weeks* of the work of Eleanor Glyn of her novel *Three Weeks*, so that the case was disposed of on that ground. What followed were some helpful observations although they are obiter. At page 268, Younger J. says:

"Making all allowance for the fact that prior to the Act of 1911 literary copyright did not include the acting right, it certainly is remarkable that no case can be found in the books in which a burlesque even of a play has been treated as an infringement of copyright, although burlesque, frequently more distinguished than the thing burlesqued, is as old as Aristophanes, to take Mr. Hartree's example".

Then he refers to certain authorities. He says why the older order had to go and then he says:

"Most probably, however, the reason is to be found involved in such observations as those of Lindley L.J. in *Hansfstaengl v. Empire Palace*, or in such a decision as that of the Court of Appeal in *Francis, Day & Hunter v. Feldman & Co.*, or in the principle that no infringement of the plaintiff's rights takes place where a defendant has bestowed such mental labour upon what he has taken and has subjected it to such revision and alteration as to produce an original result".

He goes on to deal with another case, which perhaps qualifies that, later on in the same paragraph, because he says:

"If, in considering whether such a literary work as a novel has been infringed by such a thing as a cinematograph film, the true enquiry is, as I think it must be, whether, keeping in view the idea and general effect created by a perusal of the novel, such a degree of similarity is attained as would lead one to say that the film is a reproduction of incidents described in the novel or of a substantial part thereof, then in my opinion the answer in the present case must be in the negative".

That case is perhaps the high water mark but there is something on the same lines in *Joy Music Limited v. Sunday Pictorial Newspapers*

(1920) *Limited* [1960] 2 Q.B. 60, a decision of McNair J. This had arisen out of a feature article in the *Sunday Pictorial* which was reporting the activities of H.R.H. The Duke of Edinburgh, which activities had caused raised eyebrows in some quarters. At the time there was, and still is for all I know, a form of music known as rock-and-roll and one of the then popular songs had the line: "Rock-a-Billy, Rock-a-Billy, Rock-a-Billy, Rock". It went on with that three times and ended up with some slight variation. The *Sunday Pictorial* adapted that to: "Rock-a-Philip, Rock-a-Philip, Rock-a-Philip, Rock". That was the chorus. The verses were totally different.

The complaint was that the newspaper version was an infringement of the literary copyright in the original song. There was no question of music in this case—the infringers had not used music at all. It might be said that there was no copyright as it is difficult to see how the original lines were an original literary work. They are more gibberish than anything else, but that may be too fastidious a view. That, however, is not quite the way that the learned judge disposed of the case. He found against the claim for copyright and disposed of it on these lines (at page 70):

"If one had to direct a jury on this question"

—that is to say, whether a parody is an infringement—

"one would clearly tell them of the various tests that have been suggested as guiding tests, and it would be proper to emphasise to them this test which Younger J. suggested as to whether the defendant had bestowed such mental labour on what he had taken and subjected it to such revision and alteration as to produce an original work. I cannot help thinking that a jury with that direction would have said that, although it is clear that the article in the *Sunday Pictorial* had its origin in 'Rock-a-Billy', it was produced by sufficient independent new work by Paul Boyle to be in itself, not a reproduction of the original 'Rock-a-Billy', but a new original work derived from 'Rock-a-Billy'. And, that being my conclusion of fact, quite shortly I say that I am not satisfied that the article in the *Sunday Pictorial* does reproduce a substantial part of the words of the 'Rock-a-Billy' song of which the plaintiffs have the copyright".

In a case of artistic copyright, Falconer J. made some comments on that decision of McNair J. The case is *Schweppes Limited and Others v. Wellingtons Limited* [1984] F.S.R. 210, and the article in question was the bottle of Schweppes tonic water with a distinctive label. That is a soft drink. The defendants were manufacturers of something known as a tonic bubble bath, which they put in a similar bottle with a very similar label, except that it had the name "Schlurppes" on it instead of "Schweppes". The design was something very similar, but it being for a totally different market there was no question of passing off. One of the points in resisting the claim for copyright infringement which was made by the defendants was that it was a parody. The learned judge deals with that in this way:

“What is said, and it has been said forcibly by Mr. Tager, is that this bottle is in the nature of a parody; the article itself is meant to be sold, no doubt, as a joke, and to have the characteristics of a caricature”.

Then he goes on to point out that Mr. Tager relied on the decision of McNair J. in *Joy Music Limited* and he referred especially to what the headnote in that case said, which was:

“that in considering whether a parody of a literary work constituted an infringement of the copyright in that work the main test to be applied was whether the writer had bestowed such mental labour upon the material he had taken and had subjected it to such revision and alteration as to produce an original work”.

Falconer J. goes on:

“and of course it is on that proposition that Mr. Tager argues that there is a defence in this particular case to infringement. Put in that form, with all due respect, I do not think that a correct statement of the law. The sole test is whether the defendant's work has reproduced a substantial part of the plaintiff's *ex hypothesi* copyright work. The fact that the defendant in reproducing his work may have himself employed labour and produced something original, or some part of his work which is original, is beside the point if none the less the resulting defendant's work reproduces without the licence of the plaintiff a substantial part of the plaintiff's work. The test every time in my judgment is, as the statute makes perfectly plain: ‘Has there been a reproduction in the defendant's work of a substantial part of the plaintiff's work?’”

When considering any question of parody, I accept that test of Falconer J., that the test every time is, as the statute makes perfectly plain: “Has there been a reproduction in the defendant's work of a substantial part of the plaintiff's work?”

I was also referred by Mr. Pumfrey, in order to assist me on the test, to another case of artistic copyright, though not a case of a parody, and this was *Antocks Lairn Limited v. I. Bloohn Limited*, a decision of Graham J., reported in [1972] R.P.C. 219. This was in respect of the copying of some designs of chairs. There is a dictum of the learned judge at page 222, line 22, upon which Mr. Pumfrey placed some reliance, which reads:

“The defendants none the less contend that their chairs do not infringe the copyright in the plaintiffs' relevant drawings because they do not reproduce such drawings exactly. If ‘exactly’ is used, as the defendants use it, in effect in the mathematical sense their contention is correct, but this is, in my judgment, irrelevant because it does not express the proper test of infringement. There is infringement if either the whole of the subject of copyright is reproduced or if a substantial part of such subject is reproduced, a question of fact (see section 49(1)) and, in determining whether there is reproduction, the court is entitled *inter alia* to take into account whether the alleged infringement comes so near the original as to suggest the latter to the mind of the people seeing it. In the latter event, if it is also shown or can properly be inferred that the defendant has directly or indirectly appropriated the result of the plaintiffs' labours in producing the work in which he is entitled to copyright, infringement is clearly established”.

The important words there are: “in determining whether there is reproduction, the court is entitled *inter alia* to take into account whether the alleged infringement comes so near the original as to suggest the latter to the mind of the people seeing it”. I do not wish to say anything about the validity of that test in judging of alleged infringement of artistic copyright but, in relation to the matter before me, I am bound to say that it is not quite so helpful as the test of *Falconer J.* It may go too far in relation to literary copyright and the question of parodies, and so forth.

What I have to consider is whether the parody, on the one hand, conjures up the idea of the original work and no more than the idea or, on the other hand, whether it uses a substantial part of the expression of the original work. I was referred to two further authorities, one of which has been mentioned already, where there was no infringement. In *Francis, Day & Hunter Ltd. v. Feldman & Co.* [1914] 2 Ch. 728 (but perhaps more fully reported in (1914) 111 L.T. 521), there were what were called “reply songs”. It was a very short judgment. There was another point in the case about publication but on the question of infringement their Lordships held, reversing the decision of the learned judge, that there had been no colourable imitation of the song and, therefore, there was no infringement of the plaintiffs’ copyright. I do not really get any assistance out of that case. I do notice with regard to the wording that quite different language was used although the same idea was present in the two songs. Nor do I get much assistance from *Chappell & Co. Ltd. v. D.C. Thomson & Co. Ltd.* (1928–1935) Macg. Cop. Cas. 467.

Coming to this case and applying the test of substantiality to the alleged infringement of the literary copyright I am unable to say that there is a serious question to be tried. Mr. Pumfrey stressed the importance of the words “We got”, repeated several times, the only common expression in the two versions. It is not, in my judgment, a substantial part of the original—certainly not quantitatively, but nor is it qualitatively. In themselves the words would not be copyright as a literary work. The most the words do when combined with the other words in the new version is to conjure up the original: the idea of it, not the substance of it.

On this part of the case I have found the report of Professor Christopher Ricks, who is King Edward VII Professor of English Literature in the University of Cambridge, to be most helpful and especially his remarks on plot and syntax. The most revealing section of Professor Ricks’ report though, to my mind, is his remarks in paragraph 6, where he comments on the points made in the report of Mr. Harry Rabinowitz on which the plaintiffs rely, and which will shortly be mentioned. The interest of it, to my mind, is in this, that it exhibits a different approach to the words by a Professor of English and a Musicologist. That brings me to the question concerning the musical

copyright. It is, to me, much the more difficult and by the amount of evidence and investigation devoted to it, seen by the parties to be so.

The general test of infringement of a musical work is the same as for literary copyright, though more difficult of application owing to the more complicated nature of the subject matter. I was taken through the long judgment of Astbury J. in *Austin v. Columbia Gramophone Company Limited* (1917–1923) Macg. Cop. Cas. 398, but I think it will be sufficient for present purposes if I quote a passage from the headnote, which reads:

“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”.

This is not to say that a comparative analysis of the two pieces of music is out of place, as appears from the other case on infringement of musical copyright to which I was referred, *Francis, Day & Hunter Limited v. Bron* [1963] Ch. 587. That case was concerned with the first eight bars of two songs. It was common ground that those eight bars of themselves constituted a substantial part of the whole of the respective tunes. It was held, following an aural test, that the alleged infringing tune was similar to the first eight bars of the copyright work though it was held, and this is a matter that does not concern me in this case, that there had been any conscious or unconscious copying. The similarity was a coincidence.

I may say that the music of the two tunes is set out in the law report and Mr. King played the two tunes to the court. One could see the similarity between them, as the Court of Appeal found when the same tunes were played to them.

Willmer L.J. has this to say (at page 608) about the test of infringement in relation to musical works. He called attention to the fact that they were in different times, that one was in 3/4 time and the alleged infringing tune was in 4/4 time and he goes on:

“There are a number of other differences between the two works which were the subject of a good deal of evidence by musical experts on both sides. But when the two songs were played to us, it was immediately apparent to me at any rate, that the effect on the ear was one of noticeable similarity. This is a matter which is not without importance, for, as was pointed out by Astbury J. in *Austin v. Columbia Gramophone Company Limited* ‘infringement of copyright in music is not a question of note for note comparison’, but falls to be determined ‘by the ear as well as by the eye’”.

Wilberforce J.—he was the trial judge—“included in his judgment a detailed analysis of the musical structure of the two songs”.

Willmer L.J. then goes on to summarise the learned judge’s findings (and they are very extensive findings) on the analysis of the two songs. He then continues (at page 610):

“Having stated these various points of similarity and difference (which I wholly accept) the judge expressed the view that, in relation to the aural appeal of the sentence as a whole, there is an undoubted degree of

similarity between the two songs, the only question being what adjective to put before the word 'degree'. He expressed his conclusion as follows: 'On the whole I think Mr. Palmer's word "definite" or "considerable" is the right weight to put upon the degree of similarity; it is such that an ordinary reasonably experienced listener might think that perhaps one had come from the other'. With that conclusion I entirely agree".

I think that is the only assistance which I get from the authorities in judging of the alleged infringement of a musical work.

I now come to the evidence in this case. It consists of two main categories. In the first place there are reports on the technical musical elements. For the plaintiffs, as already mentioned, I have a report from the well known conductor and composer Harry Rabinowitz. For the defendants I have the long and full affidavit of the composer of the music used in the advertisement, to which I have already referred. I have found both these expositions very illuminating. The second category of evidence consists of a survey conducted for the defendants in Birmingham.

I now turn to the evidence of Mr. Rabinowitz and of Mr. King. Mr. King states, as a prelude to his exposition,

"Although musical analysis can be helpful for teaching or comparison purposes, it is a truism to say that music is appreciated by the ear; and at the end of the day all that matters about a piece of music is the aural effect it produces on the listener. Theoretical analysis has its place, but when all is said and done it is an imperfect attempt to describe in words or symbols something which even the untutored listener senses intuitively, if he has a good ear. I would be quite content for my piece to be judged by a person with a good musical ear and an untechnical knowledge of this sort of music, with no expert evidence at all on either side".

I agree with that general approach and indeed, as we have just seen, it is one which is encouraged by the authorities.

During the course of this case I have had the two songs played to me several times. I can detect some similarity in the basic structure of the two pieces but by no stretch could the one be said to be a slavish copy of the other. A good deal of original work has been contributed by Mr. King but the test is whether a substantial portion has been taken, not whether a substantial change or addition has been effected.

I should here say something about my understanding of the relationship between the words and the music. It is, I think, misleading to think of them in mutually exclusive compartments. The words by themselves are or may be the subject of literary copyright. But those same words when sung are to me part of the music. After all one gets enjoyment from hearing a song sung in a language with which one is totally unfamiliar. The enjoyment could well be diminished if the vocal line were replaced by another instrument, e.g., the piano or a flute. I should say, although I do not wish to take up time by going into it in any detail, that I do not myself see anything in section 8(5) of the Copyright Act which depends upon the absolute division between the words and the music.

It is in the light of this that I turn to the report of Mr. Rabinowitz. He begins by noting three similarities between the lyrics of the advertisement and those of "There is Nothin' Like a Dame". These are criticised by Professor Ricks, as I have already mentioned, on linguistic grounds but, to my mind, Mr. Rabinowitz is making musical points when he says, for example, referring to the alliterative qualities of "Dame" and "Elaine", that it is more a question of those words being assonantal, as Professor Ricks allows and is what I think Mr. Rabinowitz really means by "alliterative" in this sense.

On the more formal musical elements, Mr. Rabinowitz makes three points. I turn to page 3 of his report, where he says:

"These several points underline the fact that the advertisement jingle could never have come into being without the existence of the original 'There is Nothin' Like a Dame' and whoever shaped the jingle leaned very heavily on the rhythmic patterns, melodic shapes and the overall structure of two sections of 'There is Nothin' Like a Dame'".

That is one point he makes. Then the second point he makes is that:

"Overall the harmony of the advertisement is strongly dependent on that of 'There is Nothin' Like a Dame'".

Then the third point he makes is that:

"There is a very striking similarity in the use of alternating solo voices and chorus. In bars one to seventeen of the original different characters are given different parts with all the chorus joining in at bar fifteen. Exactly the same happens in the advertisement. The chorus is sung by everyone. At the end of the advertisement there is a repeat of the melody at bars A to D (in its altered form—see below), and very strikingly this is whistled and in my view is an imitation of what happens on page 39 of the sheet music of the original song where I have circled it".

In his very full and careful affidavit, which he illustrated with musical examples played to the court on an electronic piano. Mr. King subjects both tunes to a close analysis and criticises some of Mr. Rabinowitz's remarks. I would not take issue with Mr. King on his technical exposition—indeed I am not competent to do so—but I do not find that he disposes of Mr. Rabinowitz's points, for example, by showing that Mr. Rabinowitz erred in detail in his transcription of the harmonies or that the original composer Richard Rodgers used commonplace sequences of chords. I have in mind such remarks as this in his affidavit, at page 14, where he says: "This sequence"—and he has gone through a sequence of chords which I will not read out—

"is very nearly the simplest and most obvious that could possibly have been chosen; no musician would claim it was the invention of Richard Rodgers and I believe Rodgers himself would have been the last man to put forward such a claim; and in so far as it introduces minor sophistications by way of variety, I have not used these in 'National Express Rapide'".

Then at the bottom of page 15, he says:

"The position may be summarised by saying that the two chord progressions are obviously different, and that if one nevertheless deliberately ignores the

differences there is not much left which is common to both, and what little remains is commonplace and certainly not originated by Richard Rodgers”.

I am unpersuaded by those criticisms. As I say, I do not dispute what Mr. King has told me on the musical analysis, but it does seem to overlook one essential matter, which is that what lifts a work of art from the ordinary is the way that the commonplace elements are assembled. As Mr. Pumfrey said, you look at it as a whole and ask not how the effect is produced, but what is the effect.

From my hearing of the tunes and a consideration of these two reports, it seems to me that even allowing for the undoubted original contribution of Mr. King, it could be arguable that a substantial part of “There is Nothin’ Like a Dame” is present in the advertisement. Therefore, I am unable to say, in relation to musical copyright, that there is no serious question to be tried. I am reinforced in that view by the fact that, on the very day that the advertisement was first broadcast, it was noticed as a possible infringement by the Mechanical Recording Society that I have mentioned and also by what happened on the survey.

The survey was conducted in the Odeon Theatre at New Street, Birmingham, on Saturday 10 June 1986. Mr. King produced a piano version of his music, which was recorded on tape and which I have heard. A number of people—over 130 in all—picked randomly from the street were invited one by one to listen to the tape and then asked to say whether they could identify it and whether it reminded them of any other tune. I should mention that the television advertisement has not been shown in the Birmingham area. No communication between the participants was allowed. The result, as one might expect, was that the majority were unable to give a positive answer to either question, but five of the persons interviewed said they thought it was “There is Nothin’ Like a Dame” and four others said that the tune reminded them of it. The test was, by all accounts, a severe one. A piano version was played once only, whereas a television advertisement is normally played repetitively and includes the words. I find these results a significant reinforcement of the view I had come to that there is a serious question to be tried.

The learned judge then considered the balance of convenience.

I am not satisfied at all that any harm will fall on the National Express if they are prevented from running their advertisement for the short space of time that it will take for this trial to come on. Although I found this an extremely difficult case, at the conclusion I have come to the view that I must make an order; but having regard to the high reputation of the defendants, both of them and the open manner in which they have acted, I would be prepared to consider undertakings in this case if offered.

*Plaintiffs’ costs in cause
Order for speedy trial*