

FREUDENTHAL v. HEBREW PUB. CO.**et al.**

District Court, S. D. New York.

April 2, 1942.

Action by Joseph Freudenthal, doing business under the firm name and style of Transcontinental Music Company, against Hebrew Publishing Company and another, to restrain infringement of a copyright of a musical composition and for damages.

Judgment for plaintiff.

Leonard Zissu, of New York City, for plaintiff.

Philip Wittenberg, of New York City, for defendants.

BRIGHT, District Judge.

This action is brought to restrain an infringement of a copyright of a musical composition and for damages. The complaint is framed in two causes of action. Both allege that between January 1, 1934, and May 16, 1939, Sh. Shalom and Moshe Rappaport, citizens of Palestine, created, composed and wrote, respectively, the text and music of a musical composition entitled Hora Haemek Hu Chalom, that on May 16, 1939, plaintiff received from the Register of Copyrights a certificate of registration for the composition. The first cause of action alleges an infringement of the copyright by the publication and sale of a book entitled "Manginoth Shirenynu", which contained virtually a complete copy of the text and music. The second cause of action alleges such infringement by the de-

defendants in the publication and sale of a book entitled "Shirenynu", which contained virtually a complete copy of the text of said musical composition.

[1] Plaintiff, in order to recover, has the burden of proving (1) that he is the proprietor of a valid copyright, which includes proof (a) that the work was original, (b) that he had taken the necessary steps to comply with the statute as to registering, (c) that the work had not been published before securing the copyright, and (d) that he has title to the copyright; and (2) that the defendants have infringed. *Amdur Copyright Law and Practice*, pp. 1053, 1054; *Davies v. Bowes*, D.C., 209 F. 53-55, affirmed 2 Cir., 219 F. 178.

[2-4] There was offered and received in evidence the certificate of registration, which shows, upon its face, that it was issued to the plaintiff Transcontinental Music Co. of New York, N. Y., for a musical composition entitled, Hora, poem by Sh. Shalom and music by Moshe Rappaport of Palestine, voice and piano, Hebrew and English texts; that there was publication on May 16, 1939, and the copies required by the statute were received May 19, 1939. The copyright is entered in "Class E, pub. No. 77,305". The certificate is prima facie evidence that plaintiff is the proprietor and has title to the copyright, *Fred Fisher, Inc., v. Dillingham*, D. C., 298 F. 145-148. *Gerlach-Barklow Co. v. Morris & Bendien*, 2 Cir., 23 F.2d 159-161. *M. Whitmark & Sons v. Calloway*, D.C., 22 F.2d 412; that plaintiff had taken the necessary steps to comply with the Copyright Law, 17 U.S.C.A. § 1 et seq., as to registering and has a valid copyright, *Berlin v. Evans*, D.C., 300 F. 677-679; and that the persons named therein were the authors, *Vitaphone Corp. v. Hutchinson Amusement Co.*, D.C., 28 F.Supp. 526-529; *Gerlach-Barklow Co. v. Morris & Bendien*, supra, *Reed v. Carusi*, 20 Fed. Cas. page 431, No. 11,642. The certificate carries with it a presumption of regularity, *Pizzano v. Knowles & Co.*, D.C., 37 F.Supp. 118, *Callaghan v. Myers*, 128 U.S. 617-655, 9 S.Ct. 177, 32 L.Ed. 547. The complaint alleges that the musical composition was original and had not previously been published. Plaintiff has given proof through himself and the witnesses Cohen, Rothenberg, Yasser and Binder, that the composition was an original one and had never before been published. In view of

the pleading and proof, the burden was upon the defendants to show otherwise and they have not met that burden.

[5-7] The second essential is whether or not the defendants have infringed. It was admitted upon the trial that the plaintiff's song was the same as that published by the defendants. A comparison of both shows that the lyrics and the text are identical. There can be no question but that there was a copying, and, therefore, an infringement. It is difficult to suppose that "such parallelism could be the result of coincidence only". *Fred Fisher, Inc., v. Dillingham*, supra [298 F. 147]. Even if the defendants did not knowingly copy plaintiff's composition, that would be no defense. *Hein v. Harris*, 2 Cir., 183 F. 107. Substantial identity creates a presumption of unlawful copying which must be overcome by the defendants. *Encyclopedia Britannica Co. v. American Newspaper Association*, C.C., 130 F. 460-464, affirmed 3 Cir., 134 F. 831.

[8-10] Defendants do not claim authorship nor that their work emanated from any authorship independent of the authors of plaintiff's song. They prove that the song was heard in the latter part of 1936 and in 1937 and was used in some of the schools in this vicinity. The mere fact that it was heard prior to the time specified in plaintiff's bill of particulars, is not decisive or a real defense. There is no showing but that the infringed article was a copying of the very song now claimed by the plaintiff. *Italian Book Co. v. Rossi*, D.C., 27 F.2d 1014. A copying from memory would be an infringement. *Edwards & Deutsch Lithographing Co. v. Boorman*, 7 Cir., 15 F.2d 35-37, certiorari denied 273 U.S. 738, 47 S.Ct. 247, 71 L.Ed. 867. Even under the defendants' theory there was no prior publication which would exclude plaintiff from the benefit of his copyright. *American Tobacco Co. v. Werckmeister*, 207 U.S. 284-299, 28 S.Ct. 72, 52 L.Ed. 208, 12 Ann.Cas. 595. The possession of the manuscript by the plaintiff is evidence of his ownership and is sufficient as against the defendants who have no rights in the premises. Since the creators and authors of the musical composition did not take out any copyright, there was no need of a formal assignment from them. *Houghton Mifflin Co. v. Stackpole Sons, Inc.*, 2 Cir., 104 F.2d 306-311, certiorari denied 308 U.S. 597, 60 S.Ct. 131, 84 L.Ed. 499.

Plaintiff is, therefore, granted a decree for injunction and damages, which are fixed at \$250, together with costs and \$250 attorney's fee.

Proposed findings may be presented by plaintiff's attorney, through the clerk, upon three days notice to defendant's attorney, who may file such objections as he may have to the same.

GOLDBOSS v. REIMANN et al.

District Court, S. D. New York.

March 5, 1942.

Action by Beatrice H. Goldboss (nee Beatrice Hoffman), a shareholder of Quar-

terly Income Shares, Incorporated, suing on behalf of herself and all other owners and holders of shares of stock of the said Quarterly Income Shares, Incorporated, similarly situated, against Edwin J. Reimann, Lawrence W. Schmidt, and others, to require the defendants to account with reference to their acts and doings as officers, directors, and otherwise, in the receipt of money paid by the corporation as fees, salaries, commissions, or other compensation. On defendants' motion under Federal Rules of Civil Procedure.

Judgment in accordance with opinion.

Sabath, Perlman, Goodman & Rein, of Chicago, Ill., and Samuel L. Chess, of New York City (Samuel L. Chess, and Robert Ratner both of New York City, of counsel), for plaintiff.

Root, Clark, Buckner & Ballantine, of New York City (Arthur A. Ballantine, of New York City, of counsel), for defendants.

BRIGHT, District Judge.

The defendants Lawrence W. Schmidt, Ross Beason, Bernard E. Lawson, Maryland Sponsors, Inc., Administrative and Research Corporation (New York), American Depositor Corporation and Quarterly Income Shares, Inc., the only defendants who have been served and appear herein, move (1) under Rule 12(f) of the Rules of Civil Procedure, 28 U.S.C.A., following section 723c, for an order striking out certain portions of the amended complaint, and (2) for summary judgment pursuant to Rule 56(b) upon the ground that there is no genuine issue as to any material fact, that the amended complaint fails to state a claim upon which relief can be granted, that the stockholders, including plaintiff, have authorized, ratified and acquiesced in the execution and performance of the contracts challenged, and that the six year statute of limitations is a complete defense to the plaintiff's claim.

The plaintiff counters that the court refuse the application for summary judgment or direct a continuance of the application in order to permit her, pursuant to Rule 56(f), to take the testimony of the defendants or others in order to present facts essential to justify her position.

The action is brought by the plaintiff, a shareholder of the defendant Quarterly Income Shares, Inc., in her own behalf and in behalf of the corporation and all other shareholders, to require the defendants to