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Posen, Executor and Trustee of the Last Will and Testament of
Glenn Gould, deceased et al. v. Stoddart
Publishing Co. Limited et al.

Posen, Executor and Trustee of the Last Will and Testament of
Glenn Gould, deceased v. Stoddart
Publishing Co. Limited et al.* **

[Indexed as: Gould Estate v. Stoddart Publishing Co.]

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39 O.R. (3d) 545
[1998] O.J. No. 1894
Docket Nos. C25822 and C25823

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Court of Appeal for Ontario
Finlayson, Krever and Weiler JJ.A.
May 6, 1998

*Vous trouverez traduction française de la décision ...
39 O.R. (3d) 555.

**Application for leave to appeal to the Supreme Court of
Canada dismissed with costs January 7, 1999 (Cory, Major and
Binnie JJ.). S.C.C. File No. 26782. S.C.C. Bulletin, 1999, p.
28.

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Intellectual property -- Copyright -- Photographs
-- Interviews -- Appropriation of personality -- Celebrity
consenting without limitation to being photographed and being
interviewed for magazine article -- Photographer later
publishing book including photographs from interviews -- Estate
of celebrity suing photographer and book publisher for breach
of contract, misappropriation of personality, and breach of
copyright -- Subject of photographs and of interviews having no
proprietary interest unless he or she had obtained an interest
by express contract or implied agreement with author -- Action
dismissed.

In the spring of 1956, WH, the agent of Glenn Gould, a world
famous pianist, approached JC, a photographer and journalist,
to inquire whether JC would be interested in interviewing and
photographing Gould for a magazine story. After consulting with
his editors, JC agreed, and he and Gould met on several
occasions at a variety of locations where JC took approximately
400 photographs, made notes, and tape recorded the interviews.
Years later, after Gould's death, SPC Ltd. published without
the consent of Gould's estate a book by JC entitled "Glenn

Gould: Some Portraits of the Artist as a Young Man". The book included photographs from the interviews accompanied by captions and a narrative written by JC. In two actions, Gould's estate and Glenn Gould Ltd., which owned the rights to the use of Gould's name, sued the publisher and the executors of JC's estate. They claimed that the publication of the book was a breach of contract, a tortious misappropriation of Gould's personality, and a breach of copyright. In two motions for summary judgment, their actions were dismissed. Gould's estate and Glenn Gould Ltd. appealed.

Held, the appeals should be dismissed.

The motions judge approached the case as an issue of misappropriation of personality, but the case could be decided on the basis of conventional principles related to copyright, and in accordance with those principles, the disposition of the motions and the dismissal of the actions was correct and the appeals should be dismissed.

Gould consented to the photographs being taken and to the interviews by JC. There was no contract between them, and on the record there was no evidence that Gould or his agent imposed any limitation on the consent. There was no suggestion that the material was to be used only once or that the material was to be delivered up to Gould. It was conceded that JC was the owner of the copyright, and he was the owner of the copyright in the captions and narrative by virtue of being the author. It was evident from the record that Gould did not have a copyright with respect to his oral utterances or in the written material derived from them. The determination that JC owned the unrestricted copyright in the photographs and in the written material in the book was decisive. The subject of photographs and written material has no proprietary interest unless he or she had obtained an interest by express contract or implied agreement with the author. Once Gould consented without restriction to be the subject-matter of a journalistic piece, he could not assert any proprietary interest in the final product nor could he complain about any further reproduction of the photographs nor limit the author of the journalistic piece from writing further material about him.
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Cases referred to

Falwell v. Penthouse International Ltd., 215 U.S.P.Q. 975 (1981, Vir. Dist. Ct.); Pollard v. Photographic Co. (1888), 40 Ch. D. 345, 58 L.J. Ch. 251, 60 L.T. 418, 32 W.R. 266, 5 T.L.R. 157; Pro Arts Inc. v. Campus Crafts Holdings Ltd. (1980), 20 O.R. (2d) 422, 50 C.P.R. (2d) 230, 110 D.L.R. (3d) 366, 50 C.P.R. (2d) 230 (H.C.J.)

Statutes referred to

Copyright Act, R.S.C. 1985, c. C-42, ss. 5(1), 13(2)

Authorities referred to

Fox, *The Canadian Law of Copyright and Industrial Designs*, 2nd ed. (1967), p. 238
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APPEAL from two summary judgments of Lederman J. ((1996), 30 O.R. (3d) 520, 31 C.C.L.T. (2d) 224, 15 E.T.R. (2d) 167, 74 C.P.R. (3d) 206 (Gen. Div.)) dismissing actions for, amongst other things, tortious misappropriation of personality.
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H. Lorne Morphy, Q.C., and David P. Chernos, for appellants.
Geoffrey D.E. Adair, Q.C., for respondents.
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The judgment of the court was delivered by

FINLAYSON J.A.: -- This is an appeal from two summary judgments [reported (1996), 30 O.R. (3d) 520, 31 C.C.L.T. (2d) 224 (Gen. Div.)] of the Honourable Mr. Justice Lederman dismissing Action No. 95-CQ-62384 (the "photograph action") and the other dismissing Action No. 95-CU-92931 (the "words action"). The motions judge held that there was no basis in law for either action.

The two actions concern a book entitled "Glenn Gould: Some Portraits of the Artist as a Young Man" that was published by the respondent Stoddart Publishing Co. Limited ("Stoddart") in 1995 without the consent of or compensation to the appellants, the Estate of Glenn Gould and Glenn Gould Limited. The book contains photographs of the late Glenn Gould taken by the late Jock Carroll with captions and an accompanying narrative written by Carroll. The narrative is based on notes and audio tape recordings of interviews of Gould by Carroll in the spring of 1956 during an extended photo-opportunity agreed to by Gould. The photographs were taken and the interviews conducted for the purposes of an article that Carroll was to write and submit to Weekend Magazine for publication. The article headed "I Don't Think I'm At All Eccentric" was in fact published. It contains nine photographs of Gould and a narrative that contains many quotations attributed to Gould.

At issue in this appeal is whether the respondent Carroll was entitled, for his own exclusive benefit, to later exploit commercially the photographs he took of Gould in 1956 and to use his notes and tapes of his interviews at that time to write other articles on Gould notwithstanding that such later use of the photographs and interviews had never been discussed with or agreed to by Gould or his successors or assigns.

The appellants submit that the respondents' use of the

photographs and what the appellants describe as "transcriptions" in the book in 1995 for a purpose different from that ever discussed with or agreed to by Gould constitute:

- (a) a breach of contract;
- (b) a tortious misappropriation of Gould's personality; and
- (c) a breach of copyright.

The principal focus of the motions judge was on the second basis of the claim, misappropriation of personality. As the appellants accurately observe, he did not make any express finding whether there was a contract in this case, much less a breach of it. While the motions judge did not accept the conclusions urged upon him by the appellants, he adopted the appellants' approach to the case and addressed the claims as if the issue was whether there had been an invasion of Gould's privacy and an unauthorized appropriation of his personality. I agree with the motions judge's ultimate disposition and accordingly would dismiss the appeal, but my view of the issues differs from his in that I would decide the case on the basis of conventional principles relating to copyright. In my opinion, it is not necessary to decide the issues in this case on the basis of the relatively new development in tort of appropriation of personality when this case so clearly sounds in intellectual property. Put shortly, the motions judge addressed Gould's right to preserve his privacy and exploit commercially his own fame, whereas I would address the proprietary rights Carroll had in the photographs and other material created by Carroll in 1956 and again in 1995.

The Facts

The late Glenn Gould was a world-famous concert and recording pianist who died in 1982. Stephen Posen is the executor of Gould's estate. Glenn Gould Limited is the owner of the rights to the use of the name Glenn Gould pursuant to an assignment of those rights from Gould in 1961. In 1956, the late Jock Carroll was a freelance writer associated with Weekend Magazine as a writer and photographer. Carroll died on August 4, 1995.

In the early spring of 1956, Gould's agent, Walter Homburger, approached Carroll to enquire whether Carroll would be interested in interviewing Gould and taking photographs of him for a story in Weekend Magazine. Carroll, after consultation with his editor at Weekend Magazine, agreed.

Gould and Carroll met on several occasions for interviews and picture taking. Initial meetings took place at Massey Hall, Homburger's office, Gould's home and along the boardwalk in Toronto's Beaches. Gould had already planned a private trip to Nassau and invited Carroll to travel with him in order to continue with the interviews and photo-taking opportunities.

Carroll accepted the invitation and paid his own expenses for which he was reimbursed by Weekend Magazine. During these occasions, Carroll took approximately 400 photographs of Gould and made notes and audio tape recordings of numerous interviews. Carroll retained all the photographs, notes and tape recordings.

There were three persons involved in the arrangements that were made leading up to the article in Weekend Magazine: Gould, Carroll and Homburger. Only Homburger is still alive. He deposes in an affidavit prepared for these proceedings that:

I am aware of no agreement between Glenn Gould and Jock Carroll which extended beyond Gould's implied consent to the use of the interview and photographs for the Weekend Magazine article.

In cross-examination on this affidavit, Homburger stressed that he was not privy to any conversations between Gould and Carroll and has no knowledge of their content. His position can best be illustrated by the following excerpts:

Q. So you had no knowledge and couldn't have any knowledge as to the purpose for which the interview notes were created and the photographs were taken? You did not know that then?

A. Well the only thing I knew was that I was promoting Glenn Gould.

Q. All right.

A. And, as such, Jock Carroll, I knowing that he was working as a freelancer for Weekend Magazine, I assumed all along that, for my promotion, that it might result in an article for Weekend Magazine.

Q. But as you say, he was also a freelancer so who knows where a story or photographs might appear in the course of his freelance work? Fair enough?

A. Yes, but I was particularly only interested in Weekend Magazine.

Q. That's what you were interested in?

A. That's what I was interested in, nothing else.

Carroll prepared an affidavit in these proceedings. He died shortly thereafter and was not cross-examined on it. However, what he said about the arrangements in question is relatively non-controversial. The substance of it is that there had been no discussion at any time with Gould or Homburger as to what use he might make of the photographs that he took. He also stated that upon leaving Weekend Magazine, he received from it

a conveyance to him of title to all literary and photographic work that he had created during the course of his employment at Weekend Magazine. He also stated that "various of the photographs" that he took of Gould appeared in books and magazines between 1956 and the date of Gould's death in 1982 without objection from Gould or anyone on his behalf.

The book that is the subject of these actions comprises 96 pages of which 17 consist of an introduction by Carroll about the circumstances surrounding his first meeting with Gould and an account of the interview and photo-taking sessions that followed. Carroll expressed his perceptions of Gould and narrated some humorous anecdotes about him and the Nassau trip. The two appear to have gotten along very well and become friends, at least for a time. Carroll commented on certain characteristics of Gould, not all of which he approved. The commentary contains express quotations from Gould that are illustrative of Carroll's perception of Gould and add colour and content to what amounts to a profile of his subject.

The major part of the book in terms of volume is the remaining 79 pages which consist of photographs, one to a page. Some are posed, others are taken while Gould is playing the piano; others while he is walking, musing, steering a boat or when he is simply caught in a moment of relaxation. Each photograph has a caption written by Carroll.

Analysis

As I stated at the outset, the motions judge did not deal specifically with whether a contract existed between Gould and Carroll or Weekend Magazine. While the appellants maintain that there was a contract between Carroll and his employer Weekend Magazine on the one hand and Gould on the other, it is difficult to determine from the record before the motions judge just what it was that constituted the contract. There is nothing to contradict Carroll's statement in his narrative in the book about Gould or in his later affidavit made for the purposes of these actions that it was Gould's agent Homburger who approached Carroll and suggested that Gould would make a good subject for a Weekend Magazine article. Homburger wanted to generate some publicity for Gould who was struggling financially in his music career and suggested the interview and photo session to Carroll who he knew worked for this magazine. While Homburger hoped that this association with Carroll would result in a favourable article in Weekend Magazine, there was no undertaking by Carroll or Weekend Magazine that any article would be forthcoming. There was no request for pre-publication screening of the anticipated article and, apart from Gould's request of Carroll that he not disclose his financial position, his eating disorder and his difficulty in dealing with people (which requests were honoured in the article in Weekend Magazine), there were no express conditions imposed on Carroll as to what he was to write about or which pictures Weekend

Magazine would publish. The informality of the arrangements is best illustrated by Carroll's account in the text of the book of how on their arrival in Nassau, Gould secluded himself in his room for several days and did not appear to feel he was under any obligation to accommodate Carroll in the interview and photo-opportunity sessions. Carroll, for his part, did not seem to feel that Gould had such an obligation.

In response to the case presented to him, the motions judge concentrated on misappropriation of personality as the principal ground of legal entitlement relied upon by the appellants. He commenced his analysis on this issue with the statement [at p. 523]:

If Gould has a proprietary right to his personality, then the onus is on the defendants to show that Carroll had permission to appropriate that right by publishing the photographs of Gould. The onus should not be on the holder of the right to prove that he had placed restrictions on the exploitation of his own property.

My focus is upon copyright and, on the facts of this case, I would not impose such an onus on Carroll. Gould clearly consented to the photographs being taken and to the continuing interviews by Carroll. There was no contract between them, express or implied. The only issue is whether Gould or his agent imposed any limitation on that consent. On this record there was none. Indeed, it is common to all the evidence that there was no discussion whatsoever of any conditions to the consent. While all parties expected that an article in Weekend Magazine would come of this association, there was no suggestion by anyone that the material obtained from it was limited to this one article. At no time was any suggestion made that Carroll was to deliver up to Gould the negatives of his film, the audio tapes or his notes.

It is conceded that in 1995 Carroll was the owner of the copyright in all 400 of the photographs taken in 1956 and, for reasons that I will develop, it is clear that he also owned the copyright in the captions under the photographs and the accompanying text in the impugned book. Accordingly, prior to entering into publishing arrangements with the respondent Stoddart Publishing, Carroll had exclusive proprietary rights in the photographs and he became the exclusive owner of the copyright in the text and captions to the photographs by virtue of being the author. In these circumstances, it would appear to me that the onus is upon Gould and those who now represent him to show that the copyright in all the photographs, tape recordings and notes was retained by Gould or, at the very least, that Carroll's copyrights expired once the article in question was published in Weekend Magazine. As I have discussed above, there is no evidence on the record that Gould or his agent placed any limitation on his consent given in 1956.

Despite the concession with respect to copyright in the photographs, I find it necessary to refer briefly to the subject because it places in context the suggestion that there was an implied restriction placed by Gould on the use that Carroll could make of the photographs. Under the Copyright Act, R.S.C. 1985, c. C-42, copyright subsists in a photograph for 50 years from the end of the year of the first making of the original negative (or photograph if there is no negative) from which the photograph was directly or indirectly derived. The owner of the original negative, or photograph as the case may be, is deemed to be the author and the first owner of the copyright: see s. 10(2). Today it is taken for granted that photography is an art, although the proof of a truly "artistic" character is no longer required for copyright protection. The technical labour involved in producing a photograph is sufficient to accord it copyright protection: see *Pro Arts Inc. v. Campus Crafts Holdings Ltd.* (1980), 20 O.R. (2d) 422, 50 C.P.R. (2d) 230 (H.C.J.).

The appellants relied strongly on the case of *Pollard v. Photographic Co.* (1888), 40 Ch. D. 345, 58 L.J. Ch. 251, for the proposition that where the plaintiff attended at the premises of a professional photographer and had photographs taken of herself and her family for which she paid a stated charge, the photographer was not entitled to use a copy of one of the photographs of the female plaintiff in the form of a Christmas card. In holding for the plaintiff and granting an injunction, North J. held that where the defendant was paid to take the negative for the particular purpose of supplying copies to the plaintiff, there was an implied contract not to use the negative for any other purpose, and he could be restrained from using the negative for any object that was obnoxious to the plaintiff who had employed him.

Pollard is distinguishable on a number of grounds on its facts, but I emphasize that North J. concluded that while neither party had a statutory copyright in the photographs because there was no registration, the right to register was in the plaintiff. This was because she had commissioned the photographs and had paid for them. The law relating to commissioning photographs is now well settled in Canada by s. 13(2) of the Copyright Act, which reads:

13(2) Where, in the case of an engraving, photograph or portrait, the plate or other original was ordered by some other person and was made for valuable consideration in pursuance of that order, in the absence of any agreement to the contrary, the person by whom the plate or other original was ordered shall be the first owner of the copyright.

I think it is evident from the facts of this case that in no sense can Gould be said to have commissioned the photographs of himself. Carroll was not a photographer for hire in the usual commercial sense and in any event there was no valuable

consideration flowing from Gould to him or Weekend Magazine for the picture taking sessions. It is also clear that he did not seek Gould out. As appears from Carroll's narrative in the book in question, while Gould was well known in music circles in 1956, Carroll had never heard of him prior to being "buttonholed" by Homburger on Gould's behalf.

The motions judge did address the issue of copyright with respect to the oral conversations that occurred between Gould and Carroll. The appellants submitted that what they described as "transcriptions" of these conversations in the text of the book in question was the subject of copyright and that copyright had been retained by Gould. The motions judge did not agree. In rejecting this submission, he referred to a number of authorities and set out an extended quotation from *Falwell v. Penthouse International Ltd.*, 215 U.S.P.Q. 975 (1981, Vir. Dist. Ct.) at p. 977. The court in *Falwell* held that the Reverend Jerry Falwell had no copyright in unstructured remarks that he made in an interview with members of the media. Such a claim presupposed that every utterance he made was a valuable property right. Relying upon this authority, the motions judge concluded [at p. 530]:

Here too, the nature of the interview, conducted in informal settings -- at an empty Massey Hall, at the home of Gould's mother and on vacation in the Bahamas -- was such that it was intended to be casual, to catch the spontaneity of Gould when he was relaxing. The conversation between the two men was the kind that Gould would have with a friend. Indeed Gould and Carroll remained friends for a short while afterwards. Gould was not delivering a structured lecture or dictating to Carroll. Rather, Carroll engaged Gould in easygoing conversation out of which emerged comments which provided insights into Gould's character and personal life. Gould was making offhand comments that he knew could find their way into the public domain. This is not the kind of disclosure which the Copyright Act intended to protect.

I agree with this conclusion, but I question its limits. It is evident from this record that Gould did not have a copyright with respect to his oral utterances or in the "transcriptions" of them, to use the appellants' phrase. To the contrary, Carroll as the author of the text and captions in the book was the owner of the copyright in the very written material the appellants are attempting to suppress.

Once it is established that Carroll owned the unrestricted copyright in the photographs and the written material in the book, there is nothing else to decide. Section 5(1) of the Copyright Act provides that "copyright shall subsist in Canada, for the term hereafter mentioned, in every original literary, dramatic, musical and artistic work". Carroll created the portraits that are the artistic subject-matter of the book in question and he was the author of the captions and text that

supported and explained them. When this book was published, Carroll had obtained an assignment of whatever rights Weekend Magazine enjoyed as publisher of the original article in 1956. Accordingly, it was Carroll, and Carroll alone who was the owner of all relevant copyright and he was the only person entitled to publish the book sought to be suppressed.

In Fox, *The Canadian Law of Copyright and Industrial Designs*, 2nd ed. (1967), the author states at p. 238:

The sole right to publish, to produce or to reproduce a work is in the owner of the copyright, and he is the only person who can authorize others to do the things that the Act gives to him the sole right to do. Subject to certain exceptions, the Copyright Act provides that the author of a work shall be the first owner of the copyright therein. The Act treats as owner of copyright only the author of the work, an assignee of the copyright from the author, the employer of the author or the assignee of such employer, under certain circumstances.

(Footnotes omitted)

It is to be noted that there is no reference in this authoritative statement to the subject-matter of any photograph or article of prose. The owner of the negatives is the author and owner of the copyright in the photographs and the author of the written material in the book is the owner of the copyright in that written material. The subject of the photographs and the written materials has no proprietary interest whatsoever unless he or she had obtained an interest by express contract or implied agreement with the author. Looked at in this light, the concept of appropriation of personality has no application. Once Gould consented, without restriction, to be the subject-matter of a journalistic piece, he cannot assert any proprietary interest in the final product nor can he complain about any further reproduction of the photographs nor limit the author of the journalistic piece from writing further about him.

As must be evident from my approach to this case, I am not persuaded that I should analyze the facts of this case in the context of a claim for misappropriation of personality. I am satisfied that it can be disposed of on conventional intellectual property lines and there is no necessity to explore any balance between privacy rights and the public's interest in a prominent Canadian. However, I cannot leave the matter without commenting on the efforts of the appellants to seek the moral high ground by asserting that Carroll was exploiting the artistic genius of another at no cost to himself. This misdescribes the legal issues. We are not concerned about Gould's musical or artistic works but with Carroll's literary and artistic work. The book of portraits is Carroll's creation, not Gould's. He was and now his heirs are the owners of

this literary and artistic creation and it is his estate that is entitled to protection from the appellants who contributed nothing to the book. Not only did the appellants not create the book, they were incapable of doing so. Carroll had the photographs, the tapes and his notes of his interviews with Gould. He was the only person who could have reached back in his memory and recreated the scenes where he first met Gould. The results are captivating. The book provides a compelling insight into the character of a musical genius. In protecting Carroll's artistic creation, the law permits the public to benefit from an insight into Gould's early years to which it would otherwise be denied.

For these reasons, I would dismiss the appeal with costs.

Appeal dismissed.

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