C.A.C. No. 121549

NOVA SCOTIA COURT OF APPEAL
Cite as: R. v. J.P.M., 1996 NSCA 108

Freeman, Roscoe and Flinn, JJ.A.

BETWEEN:		
J. P. M.	Appellant	Kevin A. Burke, Q.C. for the Appellant
- and -		
HER MAJESTY THE QUEEN	Respondent	David M. Meadows for the Respondent
		Appeal Heard: March 22, 1996
		Judgment Delivered: March 29, 1996

THE COURT: The appeal is dismissed as per reasons for judgment of Roscoe, J.A.; Freeman and Flinn, JJ.A., concurring.

ROSCOE, J.A.:

This is an appeal by a young offender from convictions entered by Judge Atton on three counts of distributing infringing copies of computer software contrary to s. 42(1)(c) of the **Copyright Act**, R.S. 1985, c.C-42, which is as follows:

42. (1) Every person who knowingly

. . .

(c) distributes infringing copies of any work in which copyright subsists either for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright,

. . .

is guilty of an offence and liable

. . .

(d) on conviction on indictment, to a fine not exceeding one million dollars or to imprisonment for a term not exceeding five years or to both.

Other provisions of the **Copyright Act** relevant to this matter are:

2. In this Act,

. . .

"literary work" includes tables, compilations, translations and computer programs;

. . .

"telecommunication" means any transmission of signs, signals, writing, images or sounds or intelligence of any nature by wire, radio, visual, optical or other electromagnetic system;

. . .

3. (1) For the purposes of this Act, "copyright" means the sole right to produce or reproduce the work or any substantial part thereof ... and includes the sole right

(a) to produce, reproduce, perform or publish any translation of the work,

. . .

(f) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication,

27. (1) 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 that, by this Act, only the owner of the copyright has the right to do.

The three counts related to three different computer programs namely, ***QEMM*** Version 7.00, ***WordPerfect*** Version 6.0 for DOS and ***Microsoft MS-DOS 6***. It was not disputed that the three programs were protected by the **Copyright Act**. Representatives of the owners of the three copyrights testified that no consent was given to the appellant to reproduce, copy or distribute their programs.

The sentences imposed on the appellant by Judge Atton consisted of a total of 18 months probation and 150 hours of community service.

The evidence disclosed that the appellant, aged 17 at the time covered by the charges in 1993, was the operator of a computer bulletin board, which allowed other computer users to connect to his computer system by modem and leave messages, collect and send e-mail, play computer games, and either upload or download shareware or non-copyrighted computer programs. Judge Atton's critical findings of fact respecting the system and the appellant's role as operator of it are as follows:

> . . . As operator of the system Mr. M. was the person who organized the files and determined the areas in which each would be stored. He also monitored and reviewed the operation of the system and granted access to various areas of the bulletin board to callers. As he became more familiar with callers he would upgrade their access allowing them further entry to different areas. It appears that the most restricted area was area 20 or Hacker's Delight. This also appears to be the only area which contained commercial copyrighted protected programs. Access to this area was restricted to persons to whom Mr. M. had granted priority known as special. This allowed those persons access to commercial programs and the ability to download or copy them even though they were copyright protected. There were 16 such accesses granted, according to the evidence, by Mr. M. There was evidence that on at least three

> occasions that this downloading was done during a time period in question, and in documents filed there's also evidence that this was done on other occasions by other persons other than the ones that were witnesses. What Mr. M. had done was through his bulletin board made available for distribution and assisted in the distribution of the copyright programs without license from commercial producers and copyright owners of those materials. He also, on occasion personally downloaded or distributed the programs to computers belonging to third parties at a separate location. These activities were clearly in contravention of the licensing agreement, and I'm satisfied, the copyrights of the producers of the materials in which were made known to purchasers of the legal copies when purchased. This action was clearly prejudicial to the owners of the copyright in that they were deprived of control over their product which they required to ensure quality and also interferes with a legitimate commercial distribution and sale of the product for profit . . .

On the issue of the appellant's ***mens rea***, Judge Atton said:

> . . . Mr. M., in his evidence, admitted to knowledge of all the elements of the offence. He admitted doing what the Crown over a period of two and a half days had to call witnesses to allege that he did. And further he admitted to knowledge of the licensing agreement and of the copyright. The only apparent defence offered is that he doesn't think that he was breaking the license agreement or doing anything wrong. Mr. M. is an extremely knowledgeable young man in the areas of computers, computer systems and software. He can assemble and modify computer hardware and operate computer software systems such as that with which he ran his bulletin board. It is asking far too much of the Court or any other - any other person aware of the evidence, I feel, to suggest that this knowledgeable young man did not know or understand that what he was doing was illegal. It is significant that the copyright commercial programs were kept by him in a separate restricted area identified as Hacker's Delight available only to persons granted special status and were not - where any caller would become aware of them without Mr. M's permission."

The appellant raises the following ground of appeal: "Did the learned trial judge err in concluding that the Crown had proven its case beyond a reasonable doubt?" Specifically, it is submitted by the appellant that the Crown did not prove that

the appellant "distributed" the copyrighted material, that the appellant had the requisite knowledge, or that the distribution was to an extent that it prejudicially affected the owners of the copyrights.

The appellant refers to the definition of "distribute" in **Black's Law Dictionary** and argues that the appellant did not distribute the copyrighted material by placing it in a restricted area of the bulletin board in a "scrambled" format. The definitions of "distribute" and "distribution" relied on are:

a) to deal or divide out in proportion or in shares

b) the giving out or division among a number, sharing or parcelling out, allotting, dispensing, apportioning

Since computer programs are expressly protected by the **Act** as literary works, and the owners of the copyrights have the sole right to communicate the work to the public by telecommunication, there can be no doubt that the appellant created infringing copies of the software by placing them on the bulletin board in such a way that they were available to be used and copied by the 16 "special" users.

It is also clear that when he accessed his computer by modem from his friends' homes and downloaded the programs onto their computers, he was "distributing" the infringing copies.

Furthermore, by controlling the means and manner by which the users of the bulletin board accessed area 20, and providing the software to assist in the downloading by modem by those users, the appellant was also distributing, that is giving out, or sharing the infringing copies. Although it is suggested that the programs

were "scrambled" so that they could not be copied or downloaded by the callers, the evidence accepted by the trial judge was that they were "packaged" or "compressed" for efficient storage and "ease of transmission".

The second and third points raised concern the findings of the trial judge regarding the knowledge of the appellant and the extent to which the owners of the copyrights were prejudiced. These are both questions of fact upon which there was evidence presented. The sufficiency of that evidence is a matter for the trial judge. (**R. v. Kent** (1994), 92 C.C.C. (3d) 344 (S.C.C.)). There is no error on the part of the trial judge in law or in its application to the facts. After carefully reviewing the evidence it cannot be said that the verdict was unreasonable or not supported by the evidence and accordingly the appeal should be dismissed.

Roscoe, J.A.

Concurred in:

Freeman, J.A.

Flinn, J.A.