

CATCHWORDS

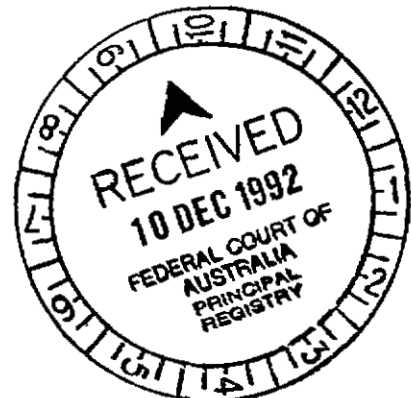
COPYRIGHT - musical work - performing right - construction of para 31(1)(a)(iii) of Copyright Act 1968 - natural and ordinary meaning - whether grant of "monopoly" - significance of pre-1968 decisions.

Copyright Act 1905
Copyright Act 1912
Copyright Act 1968
Copyright Act 1911 (Imp)

Harms (Incorporated) Limited v Martans Club Limited [1927] 1 Ch 526
Jennings v Stephens [1936] Ch 469
Ernest Turner Electrical Instruments Limited v Performing Right Society Limited [1943] Ch 167, considered

AUSTRALASIAN PERFORMING RIGHT ASSOCIATION LIMITED v COMMONWEALTH BANK OF AUSTRALIA
No. B 698 of 1992

CORAM: GUMMOW J
PLACE: SYDNEY
DATE : 10 DECEMBER 1992



IN THE FEDERAL COURT OF AUSTRALIA)

NEW SOUTH WALES DISTRICT REGISTRY)

GENERAL DIVISION)

No. B 698 of 1992

BETWEEN: AUSTRALASIAN PERFORMING
RIGHT ASSOCIATION LIMITED
Applicant

AND: COMMONWEALTH BANK OF
AUSTRALIA
Respondent

CORAM: GUMMOW J

PLACE: SYDNEY

DATE: 10 DECEMBER 1992

MINUTE OF ORDERS

THE COURT:

1. Declares that on 22 October 1991, at its premises at 328-330 Bronte Road, Waverley, the respondent, without the licence of the applicant, performed in public the musical work entitled "Scratch Beat".
2. Orders that the application otherwise be dismissed.
3. Orders that the respondent pay the costs of the applicant.

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REASONS FOR JUDGMENT

Introduction

This proceeding was commenced on 21 September 1992. There has been a significant degree of co-operation between the parties which has secured an early final hearing. The issue between the parties concerns the public performance right for musical works. There is no issue concerning the law of copyright in sound recordings. This case turns upon the interpretation of sub-paragraph 31(1)(a)(iii) of the Copyright Act 1968 ("the 1968 Act"). This provides: -

"31(1) For the purposes of this Act, unless the contrary intention appears, copyright, in relation to a work, is the exclusive right:

(a) in the case of a literary, dramatic or musical work, to do all or any of the following acts:

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- (i) to reproduce the work in a material form;
- (ii) to publish the work;
- (iii) to perform the work in public;
- (iv) to broadcast the work;
- (v) to cause the work to be transmitted to subscribers to a diffusion service;
- (vi) to make an adaptation of the work;
- (vii) to do, in relation to a work that is an adaptation of the first-mentioned work, any of the acts specified in relation to the first-mentioned work in subparagraphs (i) to (v), inclusive

. . . .

(2) The generality of subparagraph (1)(a)(i) is not affected by subparagraph (1)(a)(vi)."

[Emphasis supplied].

This reference to performance is to be read as including a reference to any mode of visual or aural presentation, including the exhibition of a cinematograph film (s. 27). A cinematograph film includes the aggregate of the sounds embodied in a sound-track associated with the visual images (sub-s. 10(1)). Section 36 of the 1968 Act provides that the copyright in, inter alia, a musical work is infringed by a person who, not being the owner of the copyright, and without the licence of the owner of the copyright, does in Australia

or authorizes the doing in Australia of "any act comprised in the copyright." That expression is to be read as referring to any act the owner of the copyright has the exclusive right to do: s. 13. By this means s. 31 is linked to s. 36. Performance in public of a substantial part of a musical work will infringe: s. 14.

Nothing directly turns upon it for the purposes of this case, but it should be noted that a person who causes a musical work "to be performed in public at a place of public entertainment" commits an offence if that person knows or ought reasonably to know that copyright subsists in the work and that the performance constitutes an infringement of the copyright; the phrase "place of public entertainment" includes any premises that are occupied principally for purposes other than public entertainment but are from time to time made available for hire for such purposes: sub-s. 132(5), (9), sub-s. 133(3).

The Facts

Copyright under the 1968 Act subsists, as an original published musical work, in the music for the piece entitled "Scratch Beat". The applicant is the owner of the copyright in that work in respect of its public performance.

The respondent operates the premises known as "Commonwealth Bank of Australia, Waverley Branch" at 328-330 Bronte Road, Waverley in the State of New South Wales. The

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applicant alleges that without the licence of the applicant the respondent, on 22 October 1991, performed the work in public at the Bronte Road premises. The respondent disputes that what occurred amounted to any performance of the work in public within the meaning of s. 31 of the 1968 Act. No question arises of substantiality under s. 14. --

On 22 October 1991 a video cassette entitled "Coast to Coast Number 50" was played at the Waverley Branch, at 9.00am. At this time the Branch was closed to customers of the respondent.

The monitor was operated by an employee of the respondent and the video was played in the presence of 11 employees, each of whom was employed at the Waverley Branch as a bank officer and received a salary from the respondent. The sound was audible to each of those employees, but to no one else. No invitation was given to anyone other than the 11 employees to watch the video. There was no exchange of money involved in playing the video, that is to say the respondent did not pay its employees to watch the video nor did they pay their employer for the privilege of doing so. There was no coercion or compulsion on the employees to watch the video and each did so voluntarily.

The monitor was operated by an employee of the respondent and the video was played continuously without interruption from beginning to end. The television screen was seen only by

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the 11 employees and was not visible to members of the public. The screen and the employees were placed behind the counters over which the public was dealt with when the branch was open for business.

The video plays for about 14 minutes. On two occasions the sound of the musical work in question may plainly be heard. The first occasion lasts for about 20 seconds and the other for about 5 seconds.

The video deals with various matters the respondent wishes to draw to the attention of its staff at branches across the country. It is one of a series, as is indicated by the title "Coast to Coast Number 50". Details are shown of a new corporate garb for male and female staff, designed by Carla Zampatti. The staff members who are shown on the video and who converse with the presenter appear to be aged under 30. The effect of the music which is heard is to enliven what intrinsically is unexciting subject matter. There is a "sneak peek" at the "1991 Report Staff Notebook", an explanation of the Autopay electronic funds transfer facility, and information concerning "Network", the new monthly staff journal. Finally, as a service quality "tip", staff are encouraged to call the customer by name so as to encourage a favourable attitude of customer to banker. Thus the playing of the tape served the commercial or business purpose of the respondent, in particular, the conveying of information to its staff.

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The applicant contends, and the respondent denies, that on the occasion I have described there was an invasion of the exclusive right of the applicant to perform the work in public. The applicant seeks declaratory relief. Given the circumstances of the case and the standing of the respondent, no injunctive relief is sought.

Counsel for the respondent stressed what were said to be a number of relevant facts in its favour. They included (i) the limited number of persons in the audience (only 11), (ii) the exclusion of other persons, (iii) the "sequestered" place of the performance, (iv) the subsistence of an employer-employee relationship between the respondent and the audience such that the performance related to the essential characteristic of the audience as employees, and (v) what was said to be the "entirely esoteric" material depicted on the video. As will become apparent, counsel for the applicant submitted that, properly considered, fact (iv) assisted the applicant's case.

Natural and Ordinary Meaning

In detailed, and helpful, written submissions and in oral submissions, counsel for the respondent stressed that the natural and ordinary meaning should be given to the phrase "to perform the work in public" and in particular to "in public". However, such a natural and ordinary meaning did not immediately appear in the consideration of the question during

argument. The second edition of The Oxford English Dictionary gives for "in public":

"In a place, situation, condition, or state open to public view or access; openly, publicly: opposed to in private . . ."

In the same work it is said that in general and in most senses "public" is "the opposite of private". A "public address system" is defined as a system comprising means enabling "speech or music to be projected to an assembly of people".

Further, a statute of the complexity of the 1968 Act, which also has a long history behind it, attracts the application of what was said by Mason J in K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd (1985) 157 CLR 309 at 315: -

"Problems of legal interpretation are not solved satisfactorily by ritual incantations which emphasise the clarity of meaning which words have when viewed in isolation, divorced from their context. The modern approach to interpretation insists that the context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise."

See also Isherwood v Butler Pollnow Pty Ltd (1986) 6 NSWLR 363 at 387, per McHugh JA, Australasian Temperance and General Mutual Life Assurance Society Ltd v Howe (1922) 31 CLR 290 at 304, per Isaacs J.

In construing the provisions of the 1968 Act, the High Court and House of Lords have had regard to what might be called general concepts of copyright law which involve looking beyond the universe of legal norms created by that statute. Several examples follow. In Computer Edge Pty Ltd v Apple Computer Inc (1985) 161 CLR 171 of 181 and at 201-2, Gibbs CJ and Brennan J respectively had regard, in construing the 1968 Act, to a line of decisions commencing in the 19th century to the effect that in the case of a literary work copyright does not exist in ideas or information but in the particular form of expression in which the ideas or information are conveyed.

Further, it has been said that copyright in a work is a negative right, "a power to prevent the making of a physical thing by copying": Pacific Film Laboratories Pty Ltd v Federal Commissioner of Taxation (1970) 121 CLR 154 at 167 per Windeyer J. In the same passage his Honour said of the Copyright Act 1911 (Imp) ("the 1911 Act") that it was a novelty, in applying both to published and unpublished works and in many other of its provisions, but that it repeated earlier enactments and echoed pronouncements which throw light on "basic concepts" reflected in the legislation. One such concept was the necessity to distinguish between copyright as incorporeal property and property in the material thing which is the subject of the copyright.

Again, in LB (Plastics) Limited v Swish Products Limited [1979] RPC 551 at 619, Lord Wilberforce described the basis of

copyright protection as being "that one man must not be permitted to appropriate the result of another's labour."

Avel Pty Ltd v Multicoin Amusements Pty Ltd (1990) 171 CLR 88 concerned a phrase which appears in the same section of the 1968 Act as that with which this litigation is concerned. The question was the meaning of the exclusive right given by sub-para. 31(1)(a)(ii) "to publish the work". The High Court held that those words should be read as meaning to make public that which has not previously been made public in the copyright territory. Mason CJ, Deane and Gaudron JJ (at 93) said that the interpretation they gave, which, put broadly, involved reading "to publish the work" as "to first publish the work" was the result partly of the content of other provisions of the statute and also of the application of "general concepts of copyright law" and "considerations of policy". Their Honours referred to a passage in the speech of Lord Wilberforce in Infabrics Ltd v Jaytex Ltd [1982] AC 1 at 15-17. There (at 16) his Lordship in referring to the United Kingdom legislation said: -

"All through the history of copyright, under the common law, and through the legislation over 280 years, there has been the well known contrast between unpublished works and published works. The distinction lies at the roots of the law. The Act of 1911 was drafted wholly in line with these traditional concepts. . . . The question is whether the Act of 1956 has changed this. As with all other

questions, the complexity and obscurity of the Act makes any answer difficult and a certain answer impossible. It is at least permissible to start from the point that (a) it is unlikely that the law as to and the distinction between published and unpublished works would have been changed without some clear indication . . ."

In my view, the expression, crucial in the present litigation, "to perform the work in public", is to be construed in the context of the 1968 Act as a whole, the history of the copyright legislation, general concepts of copyright law, and the pre-1968 case law; cf the remarks to similar effect by Rath J in Rank Film Production Ltd v Dodds (1983) 76 FLR 351 at 358.

Monopoly Rights

Counsel for the respondent also relied upon the proposition that statutes conferring monopoly rights are, prima facie, to be strictly rather than generously construed; see, for example, the remarks of Lord Stott at first instance in The Performing Right Society Limited v Rangers FC Supporters Club [1975] RPC 626 at 633, a decision which (at 632) was reversed on appeal. However, it is important to bear in mind that, put broadly, the law as to copyright in works is concerned with monopoly rights of a particular kind, and with protection against copying directly and indirectly (as explained in Frank M Winstone (Merchants) Ltd v Plix Products

Ltd [1985] 1 NZLR 376). Under the patent and design law injunctive relief (if not also damages) may be rewarded against an unwitting infringer who has worked independently.

In Harms (Incorporated) Limited v Martans Club Limited [1927] 1 Ch 526 the Court of Appeal was concerned with the provision in sub-s. 1(2) of the 1911 Act which conferred the sole right "to perform . . . the work or any substantial part thereof in public . . ." Sargant LJ (at 534-5) said (in a passage with which I respectfully agree) that an aim of the 1911 Act was "the protection of authors of musical works or composers". (Nevertheless the rights of composers were subjected to the compulsory mechanical royalty provisions in favour of the makers of sound recordings; see the Report of the Copyright Tribunal into the Royalty Payable in Respect of Records Generally 1979, Appendix E. These provisions are now found principally in ss. 54 - 64 of the 1968 Act.) His Lordship continued: -

"Under the ordinary principles of a grant, which apply, I think, quite as much to a statutory grant as to a private grant, the grant is to be construed in favour of the grantee, and accordingly the composer becomes entitled to a right which is not to be lightly defeated or affected by the acts of others in derogation of that grant. The word "monopoly" has been used, but I think all suggestions that lie in the word "monopoly" adverse to the principle of monopoly, are singularly wanting

in the case of the protection of the property of authors and composers. I suppose there is no property which juristically speaking is more entirely the property of an individual than work which has been the direct result of the labour and the talent or genius of the author or composer who has given it to the world; and the copyright which is given to him is not in derogation of the right of any other person to perform something similar which has come from the brains and intelligence of that person, but it is merely the right to prevent other people from copying and appropriating that which is the true property and true invention of the original author or composer."

(Different considerations may apply to the characterization of what may be called entrepreneurial copyrights in sound recordings, cinematograph films and television and sound broadcasts for which provision now is made in the 1968 Act; see Zines "Revision of Copyright Law" (1963) 37 ALJ 247 at 254-5).

The United States

Before turning to the 1968 Act and its predecessors, I should refer briefly to the position in the United States, so as to indicate the different course which has been taken in the phrasing of its legislation. The first comprehensive federal legislation was contained in The Copyright Act of 1909, 17 USC §1. Among the exclusive rights which it

conferred was, in respect of a musical work, to "perform it in public for profit". The United States was not a member of the Berne Convention on Copyright of 1886 ("the Berne Convention").

The course of decisions construing the 1909 Act was described as follows in the opinion of the Supreme Court in Twentieth Century Music Corporation v Aiken 422 US 151 at 157-160 (1975): -

"When this statutory provision was enacted in 1909, its purpose was to prohibit unauthorized performances of copyrighted musical compositions in such public places as concert halls, theaters, restaurants and cabarets. See HR Rep No 2222, 60th Cong 2d Sess (1909). An orchestra or individual instrumentalist or singer who performs a copyrighted musical composition in such a public place without a licence is thus clearly an infringer under the statute. The entrepreneur who sponsors such a public performance for profit is also an infringer - direct or contributory . . . But it was never contemplated that the members of the audience who heard the composition would themselves also be simultaneously "performing" and thus also guilty of infringement. This much is common ground.

With the advent of commercial radio, a broadcast musical composition could be heard instantaneously

by an enormous audience of distant and separate persons operating their radio receiving sets to reconvert the broadcast to audible form. Although Congress did not revise this statutory language, copyright law was quick to adapt to prevent the exploitation of protected works through the new electronic technology. In short, it was soon established in the federal courts that the broadcast of a copyrighted musical composition by a commercial radio station was a public performance of that composition for profit - and thus an infringement of the copyright if not licensed. In one of the earliest cases so holding, the Court of Appeals for the Sixth Circuit said [Jerome H Remick and Co v American Automobile Accessories Co 5 F 2d 411 at 411-12]:

A performance, in our judgment, is no less public because the listeners are unable to communicate with one another, or are not assembled within an inclosure, or gathered together in some open stadium or park or other public place. Nor can a performance, in our judgment, be deemed private because each listener may enjoy it alone in the privacy of his home. . . . The artist is consciously addressing a great, though unseen and widely scattered, audience, and is therefore participating in a public performance."

The immediate decision in Aiken's case supra was to answer in the negative the question whether reception of a radio broadcast in a fast-service food shop in Pittsburgh of a radio broadcast of a copyrighted musical composition constituted copyright infringement when the copyright owner had licensed the broadcaster to perform the composition publicly for profit.

The greatest difficulty with the 1909 Act was encountered with the "for profit" limitation, an expression not found in the British legislation; see the paper by Mr B Varmer "Limitations on Performing Rights" contained in vol 2 of "Studies on Copyright" compiled and edited by The Copyright Society of the United States of America, 1963, p. 837 at 841-847.

The present United States statute, The Copyright Act of 1976 confers (s. 106), in the case of musical works the exclusive right "to perform the copyrighted work publicly". It will be apparent that in the present legislation that there is no requirement that the performance be "for profit". To perform a work "publicly" means (s. 101): -

"To perform . . . it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered."

In The House Report on the Copyright Act of 1976 it was said (p. 64) that one of the principal purposes of the new definition

". . . was to make clear that contrary to the decision in Metro-Goldwyn-Mayer Distributing Corp v Wyatt 21 CO Bull 203 (D Md 1932), performances in "semipublic" places such as clubs, lodges, factories, summer camps and schools are "public performances" subject to copyright control. The term "a family" in this context would include an individual living alone, so that a gathering confined to the individual's social acquaintances would normally be regarded as private. Routine meetings of businesses and governmental personnel would be excluded because they do not represent the gathering of a "substantial number of persons."

In Australia, there is not in the 1968 Act, nor was there in its predecessor, any definition of "perform in public", although ss. 28 and 46 of the 1968 Act, to which I later refer, and perhaps also ss. 132 and 133, may be of some help in construing the phrase as it appears in s. 31.

The Berne Convention

The United Kingdom legislation predating the 1911 Act, like 1909 United States Law, was not drawn to give effect to the Berne Convention. The effect of the earlier law was

summarised as follows by Lord Hanworth MR in Harms (Incorporated) v Martans Club Limited supra at 530-531: -

"The actual terms of the Copyright Act, 1911, differ from those under which copyright in musical compositions had been secured to their authors previously by 3 and 4 Will 4, c 15, s. 1, [the Dramatic Copyright Act, 1833 (Imp)] the author of a dramatic composition was given the sole liberty of representing it at any place of dramatic entertainment, and by s. 2 penalties were imposed upon anyone who offended against the right of the author. By 5 and 6 Vict c 45 [the Copyright Act, 1842 Imp, s. 20] the privileges given in copyright by 3 and 4 Will 4 c 15, were extended to musical compositions, and the sole liberty of representing any dramatic or musical composition was to be the property of the author."

Cases such as Duck v Bates (1883) 12 QBD 79, 53 LJQB (NS) 338, primarily were concerned with the meaning with the phrase "place of dramatic entertainment" in the then current legislation. As the Master of the Rolls pointed out, the 1911 Act was drawn in different terms. Rath J made the same point in Rank Film Production Ltd v Dodds supra at 355.

In this country, the phrase "the exclusive right to perform [a musical work] in public" appeared in federal statute law in sub-s. 14(1) of the Copyright Act 1905 ("the 1905 Act"). As I have indicated, one of the "sole rights"

given by sub-s. 1(2) the 1911 Act was that "to perform . . . the work or any substantial part thereof in public." With the coming into operation in Australia of the 1911 Act the operation of 1905 Act was repealed by s. 4 of the Copyright Act 1912 ("the 1912 Act").

As Lord Wilberforce recognised, with reference to the publication right given in the 1911 Act, these provisions, including s. 14 of the 1905 Act, were derived from the Berne Convention; see Infabrics Ltd v Jaytex Ltd supra at 16. Article 11 of the Berne Convention (Brussels Text 1948) states that the authors of musical works should enjoy the exclusive right of authorizing "the public presentation and public performance of their works." Of this provision a learned commentator has written that: -

"One matter on which neither the text nor the records of the Convention provide, if any, express assistance, is the meaning of the requirement that the author's rights under article 11 extend only to public performance and communications. The opposite to "public" is "private", and it therefore follows that performances and communications of a private character are excluded from the scope of article 11. The dividing line between "public" and "private" is not always easy to draw, and the Convention contains no specific guidance in this regard. However, the following general principle can be derived from a study of the structure of the Convention. Article

11 deals with one of the author's pecuniary rights, that is, one of the ways in which he can exploit his work. Accordingly, the right of public performance must refer to the author's capacity to authorize performances of his work before his "public", that is, those who are willing to pay for the benefit of hearing or seeing the work performed. This therefore will exclude only performances in the immediate family circle. This, in fact, seems to be the approach taken in most national laws, although some contain further exclusions in respect of performances of a charitable or purely gratuitous character. In the absence clear conventional guidelines, the precise demarcation between "public" and "private" remains a matter for determination by national legislation, subject to the implied qualification that this line should not be set in such a way as to prejudice the author's right to exploit his work by means of public performance."

(Ricketson "The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986", 1987, para. 8.71.)

The Gregory Committee

I have been referred to a number of decisions construing the performance right given by the 1911 Act. It is apparent from the Report of the Copyright Law Review Committee, 1959 ("the Spicer Report"), para. 62, that the Spicer committee

favoured the adoption of provisions in sub-s. 2(5) of the Copyright Act 1956 (UK) ("the 1956 Act"), which, in turn, followed upon the recommendations of the Gregory Committee which reported in 1952.

The Gregory Committee, (paras. 125, 178) accepted what it regarded as the effect of the decisions upon the 1911 Act and the 1956 Act was drawn accordingly. In para 125 of its report, the Gregory Committee referred to Harms (Incorporated) v Martans Club Limited supra, Performing Right Society Limited v Hawthorns Hotel (Bournemouth) Limited [1933] Ch 855, Performing Right Society Limited v Hammond's Bradford Brewery Company Limited [1934] Ch 121, Jennings v Stephens [1936] Ch 469 and, inferentially, to Ernest Turner Limited v Performing Right Society Limited [1943] Ch 167. The committee said: -

"The Copyright Act [of 1911] contains no definition of what is meant by a "public performance", and guidance on this point can only be obtained by consideration of the decisions of the Courts given in particular circumstances. So far as we can see, the Courts have generally interpreted the term "performance in public" as a term in contradistinction to a performance which takes place within the domestic circle. Thus in the case of Harms (Incorporated) v Martans Club Limited and in the case of Jennings v Stephens, it was held in the first case that a performance of music by a dance band at a club and in the second that a dramatic

performance given at a Village Women's Institute to members only and in which all the performers were members of a neighbouring Institute both constituted performances in public. It follows from the cases of the Performing Right Society Limited v Hawthorn's Hotel Limited, and of the Performing Right Society Limited v Hammond's Bradford Brewery Co Limited, that music provided in a hotel, restaurant or similar place, even in the lounge of a residential hotel, constitutes "performance in public." In a further case" [ie Ernest Turner] "it has been decided that performances of music given at a factory to workers during working hours were performances in public. A consideration of these cases inevitably leads to the conclusion that many performances taking place on what many persons might regard as a private occasion, eg the dramatic performance at the Women's Institute . . . to which only members were admitted, and for which no entrance fee was charged, are, in the interpretation of the Copyright Act, regarded as taking place in public. In considering this question, therefore, it seems to us wise to assume that unless a performance takes places in a purely domestic setting the probability is that it will be regarded by the Courts as taking place in public."

[Emphasis supplied].

In Australasian Performing Right Association Ltd v Canterbury-Bankstown League Club Ltd (1964) 5 FLR 415 at 422, after an extensive discussion of the English cases upon the 1911 Act, Ferguson J said that it was established conclusively by them that "a performance given to members of the public is a performance in public, unless it is shown to be domestic or quasi-domestic in character."

Further, in the second reading speech upon the Copyright Bill 1968 the Attorney-General (the Hon N H Bowen QC) said that the Bill was "largely based" on the Spicer Report and incorporated the effect of judicial decisions on the relevant provisions of the 1911 Act (Hansard, House of Representatives, 16 May 1968, pp. 1528-1529); cf Sola Optical Australia Proprietary Limited v Mills (1987) 163 CLR 628 at 637. Hence the case law upon the 1911 Act is important in construing the 1968 Act.

The Case Law

I have already mentioned some of the decisions to which reference was made in argument. Others included Mellor v Australian Broadcasting Commission [1940] AC 491 at 500-501, Performing Right Society Limited v Harlequin Record Shops Ltd [1979] 2 All ER 828, and the unreported South African decision, Southern African Music Rights Organisation Limited v Svenmill Fabrics (Proprietary) Limited (Supreme Court of South Africa, 4 November 1982, unrep).

After discussing many of these decisions, in their work "The Modern Law of Copyright", 1980, Laddie Prescott and Vitoria say (para. 7.46): -

"In general it may be said that the courts tend to give as wide a meaning to "in public" as reasonably possible as a means of ensuring that the copyright owner is compensated for unlicensed use of his copyright."

In similar vein, Professor Cornish describes the decisions as emphasising "the primacy of the owner's entitlement to an economic return from his proprietary rights": "Intellectual Property: Patents, Copyright, Trademarks and Allied Rights" 2nd edition, 1989, p. 300.

A thorough discussion of the English decisions is provided by Mr George Wei in his work "The Law of Copyright in Singapore", 1989, pp. 120-123. After observing (at 120) that: -

"If the performance occurs as an adjunct to some commercial activity, then almost certainly the performance can be regarded as public"

the learned author later continues (at 123): -

"As can be seen from the above decisions, a broad range of performances is caught by the concept of public performance. These will include playing music in hotels, record shops, waiting rooms, offices and workplaces. The critical factor which the court will have regard to is the character of

the audience. If it is a domestic or quasi-domestic audience, then it will be treated as a private performance. The question as to what is a domestic audience is not easy to answer. Factors which will be looked at include the commercial nature of the performance, the effect of the performance on the value of the copyright, and the question as to whether the copyright owner has any legitimate expectation of reaching the audience in issue."

Two decisions of the English Court of Appeal upon the 1911 Act are of particular importance in construing the 1968 Act in its application to the facts of the present case. They are Jennings v Stephens supra and Ernest Turner Limited v Performing Right Society Limited supra.

I turn to the first of these authorities.

Duston was a village on the outskirts of Northampton with a population of about 2,000. The number of the adult female population did not appear. The Duston Women's Institute had a membership of 109. It met in village hall once a month. At the relevant time there were in England and Wales 5,000 Women's Institutes whose general function was the holding monthly meetings of a social or educational nature, in particular to encourage music, drama and dancing. The litigation in Jennings v Stephens arose from the performance before 62 members of the Duston Women's Institute at a regular

monthly meeting of a play entitled "The Rest Cure" of which the plaintiff was the authoress. The Court of Appeal held that the performance was in public within the meaning of the 1911 Act.

Two members of the Court of Appeal, Lord Wright MR and Romer LJ, [1936] Ch at 476, 481 stressed the difficulty in defining with precision the meaning of the words "in public", saying that it was perhaps or probably impossible to do so. Their Lordships' judgments must be read from that starting point.

Counsel for the plaintiff (who was the appellant) submitted ([1936] Ch at 471-2) that in the 1911 Act, in the phrase "performance in public", "public" meant "all that is not private and domestic"; therefore it was only if the performance was "domestic" in character that it would not be an infringement; here the audience was a collection of members of the Institute and thus comprised a "section of the public bound together by ties of a public nature." What is said in the judgments should be read as responsive to those submissions.

Before this Court counsel for the respondent criticised as illogical the assumption apparent in the above that between them the 2 classes of "public" and "private and domestic" exhausted the relevant logical universe. "Public" might be the antithesis of "private" and the two might be antonyms,

like good and bad or black or white. But it did not follow that the class of "non-black" was synonymous with "white" or that the class of "non-public" was identical with "private or domestic". Thus, counsel submitted, whilst it might be logical to say that a domestic performance was not a public performance, it did not follow that all non-domestic performances must be public performances. Accordingly, even if it be conceded that the performance of the video at the respondent's premises on 22 October 1991 was not a private or domestic performance it did not follow, counsel for the respondent submitted, that the performance was in public within the meaning of the statute. Yet, it was submitted, an assumption of this character underpinned much of the reasoning of at least 2 members of the Court of Appeal in Jennings v Stephens. Therefore, so it was said, any reliance upon this authority in construing the 1968 Act rested upon a shaky foundation.

The force of counsel's argument, in an abstract sense, may be conceded. However, it is to be remembered that the task of the Court of Appeal was to construe the expression in the 1911 Act "the sole right to . . . perform . . . the work or any substantial part thereof in public" not merely in the light of the Court's own sense of language and logic, but, as Greene LJ pointed out (at 485), "with such assistance as may be obtained from the whole context of the Act."

Counsel for the applicant submitted that in such a process of interpretation it legitimately would be open (i) to look to the character of the audience and to the nature of the tie or ties which linked the persons comprising that body and (ii) to conclude that a performance before an audience would be "in public" unless the performance formed part of the domestic or private, and not the public, lives of the persons concerned. Counsel for the applicant submitted that this is what flowed from Jennings v Stephens and certain of the later cases. He conceded that in Jennings v Stephens both the Master of the Rolls and Romer LJ were concerned to distinguish Duck v Bates which, in truth, was a decision upon another statute. But, he submitted, that did not detract from the overall result as he contended it to be, and as it had been accepted by the Gregory Committee.

I turn then to consider the judgments in Jennings v Stephens.

In Jennings v Stephens Lord Wright MR referred (at 479) to the earlier decisions as having adopted "the antithesis . . . between performances in public and performances domestic or quasi-domestic." This, his Lordship said, did not necessarily depend, either separately or in combination, upon the presence or absence of visitors, the payment of a performance fee, the charging of admission, nor the number of the audience. Rather the "true criterion" seemed to be "the character of the audience". Here, there was no qualification

for membership of the Women's Institute other than an annual subscription of 2 shillings and residence in the village. But "mere residence in the same village in different homes cannot be regarded as constituting a domestic or quasi-domestic audience." And (at 480) it was "the duty of the Court to protect the rights of authors, composers and lecturers, according to a fair construction of the statute."

Romer LJ (at 481-2) said that whilst the words "in public" were probably incapable of precise definition it could safely be asserted that they meant "not in private". His Lordship then conceded that this did not carry the matter much further without some definition of the words "in private". However, a material difference lay in the distinction between a performance which formed part of the domestic or home life of the members of the audience and that which formed part of their "non-domestic or outside life." Thus the question whether a performance was given in public or private depended "solely upon the character of the audience." His Lordship then concluded, as to the facts of the instant case (at 484): -

"As a matter of fact it is plain that any respectable woman residing in Duston who desired to join the institute would have been elected as a matter of course. There is no instance on record of one being rejected. The members were in no way bound to one another by any domestic or quasi-domestic tie. The monthly meeting formed part not

of their domestic, that is of the private life of a member, but of her outside, that is to say, of her public life . . . If performances given before these institutes are private performances the result to the owner of the copyright in the works performed would be serious."

Whilst the Master of the Rolls and Romer LJ thus approached the case broadly in a similar manner, the third member of the Court of Appeal, Greene LJ took a rather different course. In the Canterbury-Bankstown League Club Case supra at 422 it was said that the view which commended itself to Greene LJ was "of prime importance" and a "primary consideration". His Lordship's reasoning was criticised before me by counsel for the respondent as containing an element of circularity, and I agree. The difficulty lies in fixing the limit of the statutory right by reference to what the plaintiff could or would have done to enjoy that right had it existed to the extent she claimed. His Lordship said (at 485): -

"The question may therefore be usefully approached by inquiring whether or not the act complained of as an infringement would, if done by the owner of the copyright himself, have been an exercise by him of the statutory right conferred upon him. In other words, the expression "in public" must be considered in relation to the owner of the copyright. If the audience considered in relation to the owner of the

copyright may properly be described as the owner's "public" or part of his "public", then in performing the work before that audience he would in my opinion be exercising the statutory right conferred upon him; and anyone who without his consent performed the work before that audience would be infringing his copyright."

Later (at 487-8) his Lordship said: -

"It cannot, I think, be doubted that if the plaintiff had herself authorized a performance by actors not connected with a Women's Institute before that audience she would have been exercising her statutory right of authorizing the performance of her play in public . . . Once it is appreciated that the wrong of infringement is defined by reference to the statutory right of the owner of the copyright, and that accordingly the question of what the words "in public" means is to be examined primarily in the light of the relationship of the audience to the owner of the copyright and not in the light of the relationship of the audience to the performers, the difficulties in the present case appear to me to be removed. I must not be understood as meaning that the relationship of the performers to the audience is in all cases an irrelevant consideration. It may very well be that in some cases the nature of that relationship is important in deciding the question whether the performance, if authorized by the owner

of the copyright, would have been a performance "in public".

His Lordship then (at 488) gave as an example a performance before a gathering of relations or friends of the author as not being a performance "in public" even though members of that audience consisted of the "play-going public".

The various criteria employed by their Lordships in Jennings v Stephens would place in some doubt a performance before a class by a teacher or student in the course of educational instruction. This would be so, although on what the respondent would have it was the natural and ordinary meaning of the legislation, the performance was not an infringement. However, informed as it was as to the course of decision on the 1911 Act, the Parliament put the matter beyond doubt in s. 28 of the 1968 Act. In doing so it acted upon paras 144-149 of the Spicer Report. So far as is relevant, s. 28 provides that for the purposes of the statute a performance of a musical work in class or otherwise in the presence of an audience by a teacher or student in the course of giving or receiving educational instruction (not being instruction for profit) shall, for the purposes of the statute, be deemed not to be a performance in public. This is subject to the condition that the audience be limited to persons who are taking part in the instruction or who are otherwise directly connected with the place where the instruction is given. The presence in the audience of parents or guardians of students

receiving instruction takes the occasion out of the protection of s. 28; see sub-s. 28(3).

I should refer also to s. 46 of the 1968 Act. This is contained in Division 4 of Part III and is headed "Acts not Constituting Infringements of Copyright in Literary, Dramatic and Musical Works". Its enactment followed the recommendation in paras 67-70 of the Spicer Report. Section 46 states: -

"46 Where a literary, dramatic or musical work, or an adaptation of such a work, is performed in public, by the operation of a wireless telegraphy apparatus or by the use of a record, at premises where persons reside or sleep, as part of the amenities provided exclusively for residents or inmates of the premises or for those residents or inmates and their guests, the performance does not constitute an infringement of the copyright in the work."

[Emphasis supplied].

The other decision calling for particular attention is Ernest Turner Electrical Instruments Limited v Performing Right Society Limited *supra*. In truth the report, [1943] Ch 167, is of 2 appeals which were heard together. The background to the litigation, the "Music While You Work" scheme introduced by the British Broadcasting Corporation shortly after the outbreak of the war in September 1939, is detailed in McFarlane, "Copyright: the Development and

Exercise of the Performing Right", 1980, pp 122-3. In an effort to curb boredom among their factory workers and to raise productivity and efficiency for the war effort, the employers relayed to their workers by means of amplifiers and loud speakers programs of music broadcast by the British Broadcasting Corporation and also gramophone records played at the factories themselves. There were some 600 employees in each factory. It is clear from the facts in one of the cases (at 168-9) that all strangers were excluded from the factory and every visitor was met and escorted to the person whom it was his business to see. It was clear also that the audience was united by their work, not by their desire to hear a performance, the performances being given in the working hours of the employees as part of their working conditions and with a view to improving their productivity.

Counsel for the Performing Right Society was not called on. Counsel for one of the appellants, Gillette Industries Limited, had submitted that (at 170-1) the circumstance of paramount importance was that the audience was made up entirely of members of a community organised for purposes of work and not for entertainment of any description. As to that Lord Greene MR said (at 173-4): -

"It seems impossible to regard everything that takes place inside the factory with regard to this music as a purely domestic concern of those taking part in it, whether as performer or audience."

His Lordship also said that in discovering the "real nature" of the audience it was relevant to consider what the result would be if performances of this kind were given in other factories throughout the country. One result would be that employers would be getting the advantage of the work, taste and skill of composers in obtaining increased or improved output. Another would be that the "value of the statutory monopoly" would largely be destroyed "by depriving the owners of copyright and exclusive right to sell their goods to the public." His Lordship concluded that looking at the matter in that way he was confirmed in his view that the audience in the case of each factory must be regarded as a section of the public.

The reasoning of the Master of the Rolls thus in part, though not wholly, depended upon a regard of the extent to which "the value of the statutory monopoly" otherwise would be "whittled down". Luxmoore LJ and Goddard LJ (at 175, 176) also stressed the adverse effect of a contrary decision upon the value of the performing right, Goddard LJ saying that the protection of the statute "would be largely illusory". Again, counsel for the respondent pointed to the element of circularity in this reasoning, the task before the Court of Appeal being the delineation of the boundary of the performing right.

But, as is also apparent, from what I have said in discussing these two cases, the reasoning which led to results

in favour of the owners of the relevant performing rights was not so confined as to be vitiated by such circularity. In any event, the effect of the decisions was accepted when the 1968 Act was enacted.

In Performing Right Society Limited v Harlequin Record Shops Limited *supra*, a case under the 1956 Act, Browne-Wilkinson J, perhaps detecting the circularity involved, treated with disfavour the proposition that the most important question in considering whether a performance was or was not in public was whether the performance injured the composer or interfered with his proprietary rights. Rather, in his Lordship's view (one which I would, with respect, share) it was necessary to have regard to the character of the audience. In that case the defenders were proprietors of a chain of record shops in which a loud speaker system had been installed for the playing of records almost all the time the shops were open. His Lordship concluded that: -

"[A] performance given to an audience consisting of the persons present in a shop in which the public at large are permitted, and indeed encouraged, to enter without payment or invitation with a view to increasing the shop owner's profit can only properly be described as a performance in public."

This passage was adopted in Australasian Performing Right Association Ltd v Tolbush Pty Ltd (1985) 82 FLR 52 at 55.

Conclusion

The phrase in para 31(1)(a)(iii) of the 1968 Act is "to perform the work in public" not before "members of the public" or "a public audience" or "the general public". Running through the authorities I have discussed is the notion that for the purposes of this performing right a performance will be "in public" if it is not "in private", and the perception of an antithesis between performances which are in public and those which are "domestic" or "private" in character. In determining whether a performance answers the latter description, the nature of the audience is important. In coming together to form the audience for the performance were the persons concerned bound together by a domestic or private tie or by an aspect of their public life? Their "public life" would include their presence at their place of employment for the supply of a performance to assist the commercial purposes of their employer.

Looked at in that way, the reasoning in the authorities supports the proposition in Mr Wei's work, to which I have already referred, that if a performance occurs as an adjunct to a commercial activity the performance is likely to be regarded as public, indeed, in the learned author's view "almost certainly" so. When the facts of the present case are then considered against this background, the answer appears.

The judgments to which I have referred do not purport to expound the meaning of the statutory phrase by which the

performing right is conferred, with a precision sufficient to point clearly to a result once the facts have been found in any given case. What the Courts have been endeavouring to do is to give the statutory grant a reasonable construction in favour of the grantee, given the general considerations underpinning copyright law. I referred to this aspect of the matter earlier in these reasons.

It is true that some of the reasoning by which the English Courts decided several of the leading cases on the performing right under the 1911 Act may be open to criticism. But the broad effect of those decisions, as perceived by the Gregory Committee, was not gainsaid in the legislation which followed. Indeed, it was accepted in the 1968 Act and, in particular instances, qualified; I have referred to ss. 28 and 46.

In the present case, the audience was confined to membership of a class which excluded customers of the respondent and the general public, the numbers present were quite small in one sense, and no fee was paid by the audience. Nor, on the evidence, was the use of the musical work in the video of such a character as to diminish its interest to the audience (and value to the applicant) in the same sense as discussed in Harms supra at 530, 538. There the work was from a musical play which had been produced in the United States but not in England and the activities of the defendant were apt to speed up the process whereby the freshness of the work

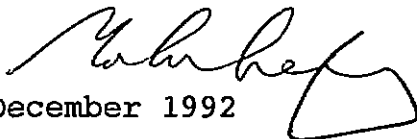
would wear off and its value to the copyright owner would be diminished.

However, these matters, taken together, or in combination, are not decisive of the question of whether the performance in this case was in public, in the statutory sense. The occasion of the performance was the imparting of information by the employer to its employees and the musical work was used to facilitate that process. The audience was brought together by the commercial purposes of the respondent and their public lives as employees. These are the most significant facts which, consistently with the pre-1968 case law, support the characterization of the performance of the work as one "in public" within the meaning of para 31(1)(a)(iii) of the 1968 Act.

The applicant should have the declaratory relief it seeks, and its costs.

I certify that this and the preceding thirty-seven (37) pages are a true copy of the Reasons for Judgment herein of the Honourable Mr Justice Gummow.

Associate:



Date: 10 December 1992

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Date of Hearing:

9 November 1992

Date of Judgment:

10 December 1992