

THE PERFORMING RIGHT SOCIETY LIMITED v FRANCIS ANTHONY HICKEY trading as  
BAR-B-QUE DRIVE IN RESTAURANT (1979) Z.R. 66 (H.C.)

HIGH COURT

SAKALA, J.

8TH DECEMBER, 1978

1976/HP/1154

Flynote

Copyright - Infringement - Defence of mistake and innocence - Claims for injunction and damages.

Headnote

This was an application for injunction and claim for damages for infringement of copyright. The defendant played three musical records in public without obtaining a licence from the plaintiff who was the owner of the copyright. The court found that the infringement was for one day. The defence was that the performance was done innocently and under mistake.

**Held:**

- (i) Under s. 13 of the Copyright Act, copyright is infringed if an act is done falling within the copyright without licence of the person in whom copyright is vested. Infringement is actionable at the suit of the owner.
- (ii) If it is proved and admitted that the infringement was committed but that the defendant was not aware and had no reasonable grounds for suspecting that copyright subsisted in the work, the plaintiff shall not be entitled to any damages against the defendant but to an account of the profits in respect of the infringement whether any other relief is granted or not.
- (iii) On the evidence of the instant case, and taking into account the defence put up by the defendant, the plaintiff was not entitled to any damages but to an account of profits in respect of the infringement.
- (iv) Injunction granted and the plaintiff is entitled to profits.

[Editorial Note: The judge seems to have ignored that piece of evidence where the defendant said, that he had received several letters from the plaintiff's solicitors asking him to stop playing copyright music, but he did not know what they were asking. He had never in his life heard that there is copyright in music-see Halsbury's Laws of England, 4th ed, Vol. 9, para. 938; "defendant does not establish that he had no reasonable grounds for suspecting the existence of copyright by showing that he held an honest but erroneous view of the law."]

**Legislation referred to:**

Copyright Act, Cap. 701, s. 13.

Copyright Act, 1956 (England), s. 17, (2).

For the plaintiff: N. Mavrokefalos, D.H. Kemp & Co.

For the defendant: A.R. Lawrence, Solly Patel, Hamir & Lawrence.

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Judgment

**SAKALA, J.:** The plaintiff's claim is for an injunction to restrain the defendant whether by himself or by his servants or agents from infringing the plaintiff's copyright by communicating to the public or authorising or procuring communication to the public of the musical worlds "Kung Fu Fighting", "House of Exile", and "Money won't save you" or any other musical works the copyright of which vests in the plaintiff. The plaintiff also claims for damages.

In support of the claim, PW1 Ronald Clarence Chipumza an accountant with Lightfoot Advertising told the court that he is also the Zambian Agent for the Performing Right Society Limited, the plaintiff

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in this case. He testified that the objective of the plaintiff is to protect copyright of music writers, artists and composers. The society represents them and collects fees on behalf of its members which in the end is distributed to the members. In Zambia, the position of the plaintiff is to represent the copyright of the affiliated societies throughout the world. He testified that in early 1975, a search was conducted at the defendant's premises to determine the extent to which the copyright of the society members was being violated. He told the court that in September, a letter was sent to the defendant advising him that the plaintiff's copyright was being infringed. Another letter was sent in October 1975, reminding the defendant of the consequence of performing copyright music without the consent of the copyright owner. The witness further testified that he also wrote the defendant suggesting to him to take out the society's licence. But there was no reply to any of the letters. Further, the defendant made no attempt to arrange for a meeting. In the end the matter was referred to the plaintiff's solicitors. The witness further testified that he physically, on several occasions made searches at the defendant's premises. First of the occasions was on the 4th April 1975. He discovered that the Society's copyright was being infringed. The inspections were carried out, after the defendant failed to reply to the correspondence. At the time of the inspections, the songs that were being performed were "Kung Fu Fighting", "House of Exile", and "Money won't save you". These last two songs were composed by Jimmy Cliff while "Kung Fu Fighting" was by Carl Douglas. He testified that the copyright in these works subsists in the plaintiff. The witness also told the court that after the institution of the present proceedings, he carried out another search at the defendant's premises on the 11th July, 1978. It was again established that the copyright of the society was still being violated. He said about five searches in all were carried out by him personally. He said that other works of the plaintiff are still being infringed in addition to those specifically mentioned in the pleadings.

The witness further testified that the fees collected by the society on behalf of its members are calculated on the basis of the number of people who attend a dance. The calculation is K2.00 per fifty people per dance. He said on the five occasions, he inspected the defendant's premises, he observed that about fifty to sixty people were present on each occasion. The inspections were carried out on different days of the week. The royalty fees at K2.00 per fifty persons per dance amount to K2.00 per night.

In cross-examination, the witness said that in his letters to the defendant, the records "Kung Fu Fighting", "House of Exile", and "Money won't save you", were not mentioned. He also said there are several versions of "Kung Fu Fighting" by different artists. He said at the time he entered the defendant's premises for inspection, he paid K2.00 and apart from the three records he heard, there were many others playing. He did not approach the defendant and did not ask him not to play the records in question. He said it was possible that the defendant was not aware of the infringement of the copyright. He told the

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court that it was on the 26th April 1976, when he heard the three records being played. The witness said after the 11th November 1976, his lawyer advised him that the defendant had indicated that he will not play the three records again although he was not sure that the copyright was vested in the plaintiff. He said the writ of summons was issued on the 11th November 1976. He said it was possible that one could innocently play the records without knowing whose works they are.

In re-examination, he told the court that from the correspondence sent to the defendant, the defendant must have or ought to have been aware that he was infringing the plaintiff's copyright. This was prior to the institution of the proceedings. He said in addition a pamphlet was sent to the defendant. In answer to questions by court, the witness said the copyright of the records has nothing to do with the plaintiff but the musical works.

In defence, DW1 Francis Anthony Hickey testified that he is one of the proprietors of Bar - B-Que Drive-in Restaurant. He agreed that on the 26th April 1976, he caused to be heard in public three records namely, "Kung Fu Fighting", "House of Exile", and "Money won't save you". He said it is not his intention to carry on breaking the copyright. He said before then he received several letters from the plaintiff's solicitors asking him to stop playing copyright music. But he did not know what they were asking him. He has never in his life heard that there is copyright in music. He testified that he has bought records and played them. The letters he received did not mention any specific records and the pamphlet he received did not specify the music. He said he only realised that the letters referred to "Kung Fu Fighting", "House of Exile", and "Money won't save you" when he approached his lawyer who explained to him. Otherwise before then he had no idea. He said he does not intend to play these records until he obtains the licence from the rightful owner. He told the court that nobody approached him at his restaurant asking him to stop playing the records. He said he holds about one dance a week depending on the licence allocated to him by the police.

In cross-examination, he said on receipt of the various letters from the plaintiff, he asked his various friends who run discos and in their case, they did not know anything of copyright and as he was a beginner himself, he thought that these letters were some sort of a money making racket. He said he does not remember whether he read the pamphlet sent to him. He said he understood the word copyright to mean that you cannot manufacture the item in question.

At the end of this witness's evidence, both learned counsel made submissions. I have very carefully addressed my mind to the evidence in support of this claim and the defence thereto. I have also considered the submissions. According to the evidence and pleadings, it is not in dispute that the copyright of the musical works "Kung Fu Fighting" "House of Exile", and "Money won't save you" vests in the plaintiff. It is also not in dispute that the defendant is one of the proprietors of the Bar - B-Que Drive-in Restaurant. It is also not disputed that the defendant

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on or about the 26th April 1976, caused to be heard in public without a valid licence issued by the plaintiff and without the authority of the plaintiff the three musical works. It appears also not to be in dispute that the plaintiff is entitled to royalty fees in respect of the public performance of musical works the copyright of which is vested in them. It also appears not to be in dispute that several letters were written by the plaintiff drawing the attention of the defendant to the infringement of the copyright of the musical works of the plaintiff's members. From the various letters written no specific musical works was mentioned. It is not disputed that the three musical works cited have the origin in the UK one of the countries listed in the schedule to the Copyright Act, Cap. 701.

The contention by the plaintiff is that, they have lost royalty fees by reason of the defendant's

refusal and or negligence to take out the plaintiff's licence. As a result, they are claiming for an injunction to restrain the defendant by himself or its servants or agents from causing to be heard in public at the defendants' premises the said musical works or any other such work the copyright of which vests in the plaintiff or from authorising performance without a licence from the plaintiff. They also ask for damages for infringement of the copyright.

The defendant's contention is that, while it is conceded that he caused the sound recording of the three musical works on the 26th April 1976, he did not know that copyright existed in any of the said records. He was not aware at any time and had no reasonable grounds for suspecting that the plaintiff were the owners of the copyright in the said sound recording. It is further the contention of the defendant that they have no intention of causing the said sound recording to be heard again in his establishment without the licence of the right owner of the copyright.

It will be observed from the evidence and the documents available that the only musical works specifically pleaded and testified to are the three records, namely, "Kung Fu Fighting", "House of Exile" and "Money won't save you". The other musical works have not been named and this court does not know them. The repertoire allegedly sent to the defendant containing the other works the copyright of which is vested in the plaintiff was not produced to this court. In the circumstances, I cannot speculate or assume that the defendant infringed any other musical works of which the copyright vests in the plaintiff. It will also be observed from the bundle of agreed documents that in all the letters sent to the defendant, the three records were not mentioned. It will also be observed that nobody from the plaintiff's side specifically told the defendant the records whose copyright he was infringing. According to the evidence of PW1, he visited the defendant's premises five times. One of the visits was made on the 26th April 1976. He specifically said that on this day, he found the three records mentioned in the pleadings being played. His evidence is not clear as to what records were being played on the other four occasions when he visited the defendant's premises. The nature of the claim in this action in my view depends on the number of musical works infringed and the specific days of the infringement.

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In the circumstances, I do not think it would be competent for this court to assume that on the other four occasions, when PW1 visited the defendant's premises, it was the three records pleaded which were being played in the absence of any evidence direct or circumstantial.

It was also argued that the three works specifically mentioned in the pleadings were intended to show that the plaintiff was entitled to copyright and as such, it was found not only impracticable but impossible to have produced before the court the mountain of documentation to establish copyright of the entire repertoire of the plaintiff. This argument, in my view begs the question. The argument on behalf of the plaintiff as I understand it is that, they are not primarily concerned with the quantum of damages but royalty fees. They also seek for an injunction which must not only be in respect of the three musical works but all the other musical works. If royalty fees are based on a number of people per dance how does this court know that the dances at the defendant's premises involved only the musical works of the plaintiff? If the injunction has to be in respect of all other musical works of the plaintiff how does the court's order distinguish the plaintiff's musical works from the other works in particular, when there is a clear admission from the defendant that they only infringed three musical works on one day only and that they play other records other than the three. For my part, there was nothing impracticable or even impossible for the plaintiff to produce the repertoire and list the musical works of its members for which they are seeking damages, royalty fees and injunction. At the least, evidence of specific other works other than the three would have been adduced. As it is the only evidence before me relates to three musical works which have actually been pleaded. The statement of claim only pleads infringement of the copyright of these three works for only a day, namely, the 26th April, 1976. On a consideration of the totality of the evidence before me, I am satisfied and find as a fact

that the defendant infringed the copyright of the three musical works of the plaintiff for only one day as pleaded.

The defence is that, the performance was done innocently and under mistake. The submission on behalf of the defendant was that, in matters of copyright infringement it is a good defence that at the time of the infringement the defendant was not aware and had no reasonable grounds for suspecting that copyright subsisted. A further submission on behalf of the defendant is that, if the plaintiff suffered any damage, the damages should only relate to one day as pleaded. In the circumstances, counsel for the defendant urged that the damages should be either nominal or nil. It is conceded on behalf of the defendant in the submissions that the granting of an injunction cannot be opposed and was never at any stage objected to. The plaintiff's contention is that, regard being had to all the correspondence sent to the defendant, the defence of innocence must be rejected.

The law governing copyright of musical works and others in Zambia is contained in the Copyright Act, Cap. 701. I must confess that in my research, I have not come across any Zambian authority based on the

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Copyright Act. Even in the submissions, I was not referred to any local decided cases. Musical works under the Act is eligible for copyright. Infringement of copyright is specifically provided for in s. 13 of the Act. Section 13 (1) reads as follows:

"Copyright shall be infringed by any person who does, or causes any other person to do, an act falling within the copyright without the licence of the person in whom is vested either the whole of the copyright or, where there has been a partial assignment or partial testamentary disposition, the relevant portion of the copyright."

In the instant case, the defendant admits that on the 26th April 1976, he did perform or cause the performance of the three musical works without a licence.

Section 13 (2) of the Copyright Act states as follows:

"Subject to the provisions of this Act, infringements of copyright shall be actionable at the suit of the owner of the copyright; and in any action for such an infringement all such relief, by way of damages, injunction, accounts or otherwise, shall be available to the plaintiff as is available in any corresponding proceedings in respect of infringement of other proprietary rights."

The plaintiff claims in this action for an injunction, to restrain the defendant whether by himself or by his servants or agents from infringing the plaintiff's copyright by communicating to the public or authorising or procuring communication to the public of the musical works "Kung Fu Fighting", "House of Exile", and "Money won't save you", or any other musical works the copyright of which vests in the plaintiff. He also claims damages. Section 13 (3) provides a defence to infringements of copyright. The subsection reads as follows:

"Where in an action for infringement of copyright it is proved or admitted

- (a) that an infringement was committed; but
- (b) that at the time of the infringement the defendant was not aware, and had no reasonable grounds for suspecting, that copyright subsisted in the world or other subject-matter to which the action relates;

the plaintiff shall not be entitled under this section to any damages against the defendant in respect of the infringement, but shall be entitled to an account of profits in respect of the infringement whether any other relief is granted under this section or not."

In the instant proceedings, the infringement of the copyright of the three musical works for one day only is not only proved but also admitted to have been committed. The contention on behalf of the defendant is that, at the time of the infringement he was not aware and had no reasonable grounds for suspecting, that copyright subsisted in the three works. The evidence adduced by the plaintiff is that, the three musical works were

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never mentioned in their correspondence to the defendant. While there is evidence that PW1 visited the defendant's premises there is no evidence that he personally spoke to him on these infringements.

As already mentioned, the defence raised is one of innocence. Quite clearly s. 13 (3) of Cap. 701 provides a good defence of innocence of infringements of copyright. Although there is no decided authority in Zambia where this defence has been successfully pleaded, English decisions based on the English Copyright Act of 1956 (although the Act is not applicable to Zambia) have very strong persuasive value in particular, bearing in mind that the wording of s. 13 (3) of Cap. 701 is the same as s. 17 (2) of the English Copyright Act, 1956. The English section reads as follows:

"Where in an action for infringement of copyright it is proved or admitted

(a) that an infringement was committed, but  
(b) that at the time of the infringement the defendant was not aware, and had no reasonable grounds for suspecting, that copyright subsisted in the work or other subject-matter to which the action relates,

the plaintiff shall not be entitled under this section to any damages against the defendant in respect of the infringement, but shall be entitled to an account of profits in respect of the infringement whether any other relief is granted under this section or not."

Innocence as a defence under this section has been considered in a number of English cases reference to which will be found in Halsbury's Laws of England, 4th ed., Volume 9 at para 938, p. 602. Part of that paragraph reads as follows:

"In general, any invasion of a right of property gives a cause of action to the owner against the person responsible for the invasion, whether it is intentional or not. Consequently, innocence is no defence to an action for infringement of copyright or for the conversion or detention of any infringing copy or a plate. Where, however, it is proved or admitted in an action for infringement that an infringement was committed, but that at the time of the infringement the defendant was not aware and had no reasonable grounds for suspecting that copyright subsisted in the work or other subject matter to which the action relates, the plaintiff is not entitled to damages, but is entitled to an account of profits whether any other relief is granted or not."

On the evidence before me, I am satisfied and find as a fact that at the time of the defendant's admitted infringement, he was not aware and had no reasonable grounds for suspecting that copyright subsisted in the plaintiff's three musical works. This being the case, I hold that the plaintiff is not entitled to any damages against the defendant in respect of the infringement. The section on the other hand provides an alternative to damages in that the plaintiff is entitled to an

amount of profits in respect of the infringement whether any other relief is granted or not.

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On the defendant's admission of the infringement of the plaintiff's copyright of the three musical works on 26th April 1976, I hold that the plaintiff is entitled to the profits made on that day. As to quantum, I grant the parties liberty to apply in chambers. The defendant at least from evidence does not appear to object to the injunction being granted. In the circumstances, I grant the injunction as prayed in respect of the three musical works pleaded. I make no order as to costs.

Delivered in open court at Lusaka this 8th day of December 1978.

Injunction granted  
Order for profits

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