

*Copyright - Infringement - U.K. Copyright Act -  
whether defendant infringes plaintiff's copyright -  
Judgment for plaintiff & injunction granted*

*Case referred to (see p6 (end))*

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA  
IN COMMON LAW

SUIT NO. C.L. P. 053/86

BETWEEN  
A N D  
PERFORMING RIGHTS SOCIETY  
HARBOUR VIEW CINEMA COMPANY  
PLAINTIFF  
DEFENDANT

Norman Wright for Plaintiff.

Clark Cousins instructed by Rattray, Patterson and Rattray for the Defendant.

Heard: 16th, 22nd, 23/11/89 & 12/1289.

*LEGAL DEFENDANT*  
*INTER PRETATION*

RECKORD, J.

*REMEDIES*

The plaintiff is a company incorporated under the Laws of England and carries on business as a Performing Rights Protection Society in Jamaica.

The purpose of the Society is to administer that part of copyright known as performing rights on behalf of composers and publishers of music. The Society administers these rights as owners of the performing rights assigned to it. Due to its wide operations virtually the whole of the worlds repertoire of copyright music is controlled by the Society including, it is alleged, the words and music in the sound track of the films: "Wild Geese II, "A passage to India", "The Killing Fields."

Any member of the public wishing to publicly use the Sound Track in these films must apply to the Society for a licence so to do. The Society charges a fee for such licence for the benefits of the authors and composers.

Section 1(2) of the Copyright Act 1911 (U.K.), is as follows:

" For the purposes of this Act,  
"Copyright" means the sole right  
to produce or reproduce the work  
or any substantial part thereof in  
a material form whatsoever, to perform,  
or in the case of a lecture to deliver,  
the work or any substantial part thereof  
in public; if the work is unpublished,  
to publish the work or any substantial  
part thereof; and shall include the sole  
right - (a)....(b)....(c).... (d) in the  
case of literary, dramatic work,

or musical work, to make any record, perforated roll, cinematograph film or other contrivance by means of which the work may be mechanically performed or delivered, and to authorise any such acts as aforesaid."

Section 2 (1) of the Act provides:

" Copyright in a work shall also be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act, conferred on the owner of the copyright provided that ...."

Section 2(3) provides:

"Copyright in a work shall also be deemed to be infringed by any person who for his private profit permits a theatre or other place of entertainment to be used for the performance in public of the work without the consent of the owner of the copyright, unless he was not aware, and had no reasonable ground for suspecting that the performance would be an infringement of copyright."

Section 35(1):-

"Performance" means any acoustic representation of a work and any visual representation of any dramatic action in a work, including such a representation made by means of any mechanical instrument."

It is the plaintiff's case that from as far back as the 19/4/64, the defendant, who carried on a business of public entertainment, recognising the plaintiff's rights, had applied for and was granted a licence by the plaintiff to use the society's repertoire. For upwards of twenty years the defendant dutifully paid the fee charged and enjoyed the Society's repertoire. However, by letter dated 25th day of May, 1984, from the defendant's Attorneys-at-law, this long standing agreement was terminated by the defendant with effect from the 5th of July, 1984.

To avoid any conflict, the plaintiff by letter on the 28/6/84, forbade the defendant from making use of its repertoire after the 5/7/84. Notwithstanding this warning, the plaintiff complains that the defendant has infringed its rights by the public performance of the words and music of the said three films and others without obtaining any licence and will, unless restrained by the court continue to do so.

Mr. Donald Scott, the Society's agent in Jamaica testified as to having attended the public showing of the named films at the defendant's premises and of having recognizing the society's repertoire in these films being played throughout the films.

He calculated the loss the plaintiff suffered since 1984 on the basis of a formula fixed by the Society i.e. 3% of one full house per week, times price per seat, times 52. For the period 1984 to 1989 based @ \$10.00 per seat - his society lost \$24,055.00 for each year and for the year 1989 to 1990 at \$15.00 per seat. The society lost \$36,082.80.

At the end of the plaintiff's case the defendant, through his Attorney elected not <sup>to</sup> call any witnesses and relied on the submissions made on its behalf.

Mr. Clark Cousins for the defendant submitted that of the three films complained of only three musical works were identified by the plaintiff in the film 'Killing Fields'. None on 'Wild Geese II' and only one on the 'Passage to India.'

In the deeds of assignments only the musical works of four (4) of the signatories were identified as authors - No legal Nexus was established between the other signatories and the music heard by plaintiff's witnesses. It was his submission that the plaintiff failed to establish any unauthorised publication <sup>of</sup> substantial parts of of any of the musical works identified. Further that the plaintiff failed to prove that any of the works was first published in a country to which the Copyright Act applied or if it was first published in a country to which the Act did not apply, that it was simultaneously published in a country which the Act did apply. Failure to prove these was fatal.

Mr. Wright for the plaintiff submitted that the notarially assigned deeds tendered by the plaintiff established that all the workks in the sound track of each film were composed by the assignors and had been assigned to the plaintiff in each case.

The agent for the plaintiff had attended the performances and heard the music from the sound track of each film some of which he was able to identify by personal knowledge. It was his submission that Section 6(3) of the Act provided two presumptions (i) the works presumed to be copyright and (ii) the Plaintiff presumed to be the owners, and that no evidence had been called to rebut them. Mr. Scott, the agent had seen the names of the composers in the credit section of the film and this was sufficient evidence that the plaintiff had established ownership beyond question. Further from the evidence of this witness, it was established that there were performances in the public of the copyright works. The defendant had knowingly infringed the plaintiff's copyright and had done so for his private profit in a place of public entertainment. In so doing the plaintiff had suffered damages and he asked the Court to accept that the appropriate measure of damage was the licence fee that ought to have been paid during the relevant period as decided in the case of Claude Rowe T/A Central Theatre vs. the Performing Right Society Limited - S.C.C.A No. 65/80. Here, the question of liability having been admitted, the sole question was what damages was the plaintiff entitled to for the unauthorised reproduction of music for which the plaintiff held copyright.

Mr. Wright also asked the Court to award a realistic rate of interest of 15% per annum for the period 1984 to 1989 and 18% per annum for 1989 to 1990 as defendant ought not to benefit from his tort by being in a position to earn interest on the monies due and later to pay therefrom any damages awarded.

#### F I N D I N G S

I find that the appropriate proclamation extending this U.K. Act to Jamaica with effect from the 1st of July, 1912, was made on the 30th day of May, 1912, and published in the Jamaica Gazette dated 6th of June, 1912.

Having regard to the evidence of the two witnesses for the plaintiff, I find that the plaintiff is the owner by assignment of all the musical works the sound track of the cinematographic films entitled:-

- (1) The killing Fields
- (2) Wild Geese 11
- (3) A passage to India.

See the assignment Exhibits 1, 11, 111.

Mr. Scott had attended the performances and from his personal knowledge had identified musical works of some of the assignors from two of the films. That some of the musical works were performed in their entirety and that substantial parts of others were performed in public by the defendant in the Harbour View Cinema premises, a place of public entertainment, on the dates complained of.

In particular, the witness Bernard Loustan - Lalanne identified Roy Budd, the composer of the musical works in the film 'Wild Geese 11', as a member of the Performing Right Society, who had assigned his rights to the Society. He also identified the composers of the Musical Works in the films "A passage to India", "Killing Fields" to be members of the Performing Right Societys who had assigned their rights to the Society.

On the dates complained of the defendant company performed the said musical works without the consent of the plaintiff, thereby infringing the plaintiff's copyright.

The said defendant was aware and had reasonable grounds for suspecting that the said performances would be an infringement of the plaintiff's copyright - See exhibit 7 & 8 (copies of letters from plaintiff to defendant.) For over 20 years this defendant had acknowledged the Society to be owners of copyright for a vast number of musical works in films which were performed from time to time over that period in its cinema.

In 1984, the defendant for reasons best known to itself, refused to pay any further fees and despite entreaties by the plaintiff, persisted in infringing the plaintiff's copyright.

In refusing to award costs to the defendant, Appellant in the 'Central Theatre' case, the Court of Appeal had this to say:-

".....the appellant did not deserve to have his costs paid him because it was his wholly unreasonable attitude in which he persisted for years that necessitated the bringing of the action in which no court of justice could on any basis find in his favour."

In that case the defendant had continued showing films with musical works in which the Performing Right Society had copyright. Despite protests from the Society, the infringements continued hence the bringing of that action.

The facts there are not dissimilar to those in the instant case. Accordingly, on these findings there shall be judgement for the plaintiff. On the question of damages, I am guided by the Court of Appeal in the 'Central Theatre' case. There the Court said:-

" A party who willfully makes use of another's copyright material for profit ought not to be in a better position than his competitor who respects the rights of the copyright holder and pays the appropriate licence fee. The depreciation in value of the copyright might very well be the economic loss to the owner whose works are being infringed and who is unable to obtain any financial benefit therefrom whether in the form of a licence fee or otherwise.

On this basis we accepted the licence fee which the appellant would in reality have been obliged to pay the respondent as the appropriate basis for assessing the damages....."

Damages is therefore assessed as claimed in the statement claim as amended in the sum of \$156,358.80 being \$120,276.00 for the period 1984 to 1989, and \$36,082.80 for the period 1989 to 1990 with interest at the rate of 10% per annum.

Injunction granted as prayed.

Costs to the Plaintiff to be agreed or taxed

Execution stayed for six(6) weeks.

*Case referred to*  
*Clanac Rone T/A Central Theatre vs. the Performing Right*  
*Society Limited S.C.C.A No 65/80.*