against a statutory authority that it is uncertain whether he can sue that authority or whether he has to sue the Crown. In all circumstances, this may affect the question of costs, and in Victoria, if the claim is other than in contract, it may make it impossible to launch an action at all against a defendant worth "powder and shot".

L. MASEL.

COPYRIGHT: MUSIC AND THE LAW.

Introduction

The recent action of the Australasian Performing Right Association Limited in making royalty charges against factories reproducing "music while you work" broadcasts may direct attention to the anomalies that have for so long existed in our copyright laws. Designed to meet the needs of an age when entertainment was largely of the "home-grown" variety, this branch of our law is in urgent need of revision if it is adequately to meet modern social requirements.

Nature of Copyright Law

The primary object of modern copyright law is the protection of the financial interests of the author of a literary, musical or artistic work. Indirectly, the law also endeavours, within the copyright period, to prevent the issue of mutilated or inaccurate copies of the copyright work. As, however, copyright is freely assignable and is in fact assigned, very often for totally inadequate rewards, the law will in many cases fall far short of its objects.

The right of the author to profit from his creation has long been recognized and was, until supplanted by Statute, governed by rules of Common Law.[1] The earliest copyright Statutes were, however, passed for the protection not of the author but of the bookbinder. Peculiarly expressed, the Statute 25 *Hen. VIII c.* 15 is concerned with those

> "having no other faculty wherewith to get their living."

The principle behind this enactment was applied for the protection of authors as early as 1585, through the medium of a decree of the Star Chamber; but with the abolition of the Star Chamber in 1640, this form of protection temporarily disappeared.

The first true Copyright Act did not appear until 1709[2]. This Act had the effect of extinguishing the Common Law of copyright in so far as published works were concerned[3], and the matter is now probably governed entirely by Statute. In Australia, the relevant provisions are to be found in the *Copyright Act*, 1912-1935 (*Cwlth.*), which incorporates the *Imperial Copyright Act*, 1911. Victoria has also made her contribution to the copyright legislation; but, as by Commonwealth Constitution, s. 51 (xviii), the Parliament of the Commonwealth is given power

> "to make laws for the peace, order, and good government of the Commonwealth with respect to . . . Copyrights, patents of inventions and designs, and trade marks,"

1. *Donaldson v. Beckett*, (1774) 4 Burr. 2408.
2. 8 *Anne* c. 19.
3. *Donaldson v. Beckett, cit. supra.*

and as by the *Copyright Act*, 1912-1935 (*Cwlth.*) the Parliament of the Commonwealth has shewn an intention to cover the legislative field in this regard, it is probable that the Victorian *Copyright Act*, 1890, though unrepealed, is now of no effect.

Copyright in a Published Work

Copyright in a published work is :

> " the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever, to perform, or in the case of a lecture to deliver, the work or any substantial part thereof in public ; . . . and shall include the sole right
>
> " (*a*) to produce, reproduce, perform, or publish any translation of the work ;
>
> " (*b*) in the case of a dramatic work, to convert it into a novel or other non-dramatic work ;
>
> " (*c*) in the case of a novel or other non-dramatic work, to convert it into a dramatic work, by way of performance public or otherwise ;
>
> " (*d*) in the case of a literary, dramatic 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."[4]

A work is " published " within the meaning of the Act when copies have been issued to the public. The protection afforded works which have not been so published depends upon different rules of copyright law with which we are not here concerned.

Copyright will not arise under the Act, however, unless the work sought to be protected is an " original work."[5] " Original " in this sense does not mean " new ": a report of a speech has been held by the House of Lords to be the subject of a copyright[6], and a book of mathematical calculations independently worked out has been held to be protected notwithstanding that it is identical with an existing book of mathematical calculations.[7] The true basis of protection appears to be the expenditure of skill and labour upon the thing sought to be protected. For this reason, there is copyright in an arrangement of old music,[8] and in a pianoforte score of an orchestral work.[9]

Ownership of Copyright

The copyright enuring for the benefit of the author consists of two distinct rights :

(*a*) Right of copyright proper—the right to prevent the multiplication of copies of the piece itself ;

(*b*) Performing right—the right to prevent other persons from publicly presenting or performing the piece without the owner's consent.

Each of these rights is capable of separate assignment.

4. *Imperial Copyright Act*, 1911, s. 1 (2).
5. *Imperial Copyright Act*, 1911, s. 1 (1).
6. *Walter v. Lane*, [1900] A.C. 539.
7. *Baily v. Taylor*, (1829) 1 Russ. & M. 73.
8. *Austin v. Columbia Gramophone Co.*, (1923) 67 Sol. J. 790.
9. *Wood v. Boosey*, (1868) L.R. 3 Q.B. 223.

In addition to the author's copyright, manufacturers of music rolls and gramophone records have a separate copyright in their products. This copyright subsists for a period of fifty years from the date of the making of the roll or record[10].

Infringement of Copyright

In order for there to be an infringement of copyright in a published musical work, there must be a " performance in public."[11] " Performance " of a musical work is defined by the Act as :

> " any acoustic representation of a work . . . , including such a representation made by means of any mechanical instrument."[12]

It has been held by the Full Court of the Supreme Court of Victoria that a broadcasting company by broadcasting a musical work is guilty of a " performance " of the work ;[13] and this will be so even although the broadcasting company is the owner of the copyright *in the record* so broadcast under the *Imperial Copyright Act*, 1911, s. 19 (1).[14] On the same principle, the owner of a wireless receiving set who allows other persons to hear a musical broadcast gives a " performance " within the definition. Thus, where by means of a wireless receiving set and loud-speaker at a hotel music was made audible to visitors at the hotel, it was held by the Court of Appeal that the owners of the hotel had " performed " the musical works the subject of the broadcast.[15] In giving judgment, Lord Hanworth M. R. said :

> " An agreement was entered into . . . between the British Broadcasting Corporation and the plaintiffs for the purposes of enabling the Corporation to broadcast certain musical works. . . . Its effect was to enable the Corporation to broadcast these particular musical works for the benefit of those whom I may call their customers, but it did not enable the Corporation to authorize a further transmission or performance of these musical works other than for domestic or private use."[16]

The basis of this decision was that

> " the process of broadcasting would not have been sufficient to render the performance audible to those at the hotel unless there had been some further contrivances there for the purpose of rendering the sounds audible. It is not as if the guests at the hotel merely looked in at the window at a peepshow which was there for all and sundry to see ; but it was by the authority and at the instance of the proprietor of the hotel that steps were taken to render the sounds audible to the additional audience."[17]

The same decision was arrived at in the United States in *Buck v. Jewell La Salle Realty Co.*, where it was said :

10. *Imperial Copyright Act*, 1911, s. 19 (1).
11. *Imperial Copyright Act*, 1911, s. 1 (2).
12. *Imperial Copyright Act*, 1911, s. 35 (1).
13. *Chappell & Co. Ltd. v. Associated Radio Co. of Australia Ltd.*, (1925) V.L.R. 350.
14. *Australasian Performing Right Association Limited v.* 3 *DB Broadcasting Co. Pty. Ltd.*, (1929) V.L.R. 107.
15. *Performing Right Society v. Hammond's Brewery*, [1934] 1 Ch. 121.
16. *ibid.*, at 131-132.
17. *ibid.*, at 134, per Lord Hanworth, M.R.

> " There is no difference in substance between the case where a hotel engages an orchestra to furnish the music and that where, by means of the radio set and loud speakers . . . , it furnishes the same music for the same purpose."[18]

With due respect, it might be pointed out to the American Court that in its former case royalties would not be payable both by the hotel and by the orchestra it employs.

Notwithstanding that there is a " performance," there will be no infringement of copyright unless the performance is " public." The actual situation of the instrument through which the performance is effected is, however, immaterial. Thus, there will be a " public performance " within the meaning of the Act where the actual playing of the musical work occurs in a private room if the performance is in fact audible to persons outside the room. This was laid down by McCardie J. in *Messager v. B.B.C.*, in which case the defendant Corporation broadcast a comic opera from a studio in which there were present only officials, performers and " a few friends," but it was nevertheless held that the defendant Corporation, by reason of its broadcasting the work, was giving a " public performance."[19] The matter has been similarly decided in Australia ;[20] and the correctness of these decisions has been confirmed by the Privy Council.[21]

A test by which the place of performance may be ascertained was laid down by Clauson J. (now Clauson L.J.) :

> " When the wireless set reproduces the music within the area in which that wireless set stands, the performance which ensues seems to me to take place wherever that music is audible as music to a person hearing it as a musical piece."[22]

The question as to whether a performance is " in public " is considered by Halsbury :

> " The question whether a performance is in public is solely one of fact, but certain conditions and tests have been applied ; among them the question whether there has been any admission with or without payment, of any portion of the public to the injury of the author, that is to say, of the class of persons who would be likely to go to a performance if there was a performance at a public theatre for profit, or whether the performance was private and domestic, a matter of family and household concern only."[23]

The wide nature of a " public " performance is well exemplified by the facts in *Jennings v. Stephens* :[24]

> The Duston Women's Institute was a village institute holding monthly meetings of a social or educational nature for the purpose of encouraging music, drama and dancing. No charge was made for admission other than an annual subscription of two shillings which included membership of the Institute. At one of such meetings a

18. 283 U.S. 191, at 201.
19. *Messager v. B.B.C.*, [1927] 2 K.B. 543.
20. *Australasian Performing Right Association Ltd. v. 3 DB Broadcasting Co. Pty. Ltd., cit. sup.*
21. *Mellor v. A.B.C.*, [1940] A.C. 491.
22. *Performing Right Society v. Camelo*, [1936] 3 A.E.R. 557, at 559.
23. *Halsbury* (Hailsham Edition), VII., 572 ; para. 888.
24. [1936] 1 A.E.R. 409.

> play was performed by and for members of the Institute only, and no guests or other members of the public were in fact admitted.

Upon these facts, the Court of Appeal held that there was a "performance in public."

In addition to requiring the performance to be in public, the Act requires it to be of a "substantial part" of the work before there can be an infringement of copyright. Like the term "public performance," however, "substantial part" has been construed with some elasticity; and it has even been indicated that eight bars of a musical piece might constitute a "substantial part."[25]

Music in Factories

Until recently, there was no reported decision on the question of music in factories in relation to copyright law. On the older authorities dealing with infringement of copyright, it might have been thought that the decision of the Courts would have been in favour of the factory owner rather than the author. Thus, a course of lectures delivered by a university professor at a university has been held not to be delivered "in public,"[26] and the decision in *Duck v. Bates*[27] that a performance given to a portion of the workers in a hospital was not an infringement of any copyright in the works performed would seem to be directly in point. Further, it has been held not to be an infringement of copyright to reissue copies of a work which has already been lawfully produced. Thus, it is no infringement to cut out the designs from authorized reproductions in a book and to sell them separately mounted on cards;[28] and, by analogy, it would have appeared that the receiving of a wireless broadcast in a factory was at most no more an unauthorized reproduction than the cutting out of designs and selling them in a form other than that for which they had been licensed.

The matter of music in factories first arose in a reported case in 1943, when Bennett J. and, on appeal, Lord Greene M. R., Luxmoore & Goddard L.JJ., were unanimous in holding that the playing of music in factories constituted an infringement of copyright in the works played.[29] The subject matter of the decision in this case was a retransmission of a wireless broadcast by the usual means of factory amplification. The Court shewed considerable tenderness for what it supposed to be the interests of the author,[30] and it was clearly influenced by the fact that the audience was one which would ordinarily listen to music of the type reproduced in the factory:

> "The nature of the audience, when properly understood, . . . puts the matter beyond doubt. In each case the audience constitutes a substantial part of the working population of the district. It is an audience which is obviously fond of music."[31]

It would appear that the reasoning of the Court of Appeal in this case, if valid in England, is equally valid in Australia.

25. *Ricordi & Co. Ltd. v. Clayton & Waller Ltd.*, Macg. Cop. Cas. (1928-1930) 154.
26. *Caird v. Sime*, (1887) 12 App. Cas. 326.
27. (1884) 13 Q.B.D. 843.
28. *Frost & Reed v. Olive Series Publishing Co.*, (1908) 24 T.L.R. 649.
29. *Performing Right Society v. Gillette*, [1943] 1 A.E.R. 228; (on appeal) [1943] 1 A.E.R. 413.
30. See especially at 415 & 418.
31. *ibid.*, at 415, per Lord Greene, M.R.

The decision of the Court of Appeal in the case last cited[29] was based on the earlier Court of Appeal decision in *Jennings v. Stephens*.[32] With respect, it is submitted that both these cases proceed upon a too tender regard for the rights of the author. In the case of a wireless broadcast, the fees paid by the broadcasting company should be sufficient for the broadcast irrespective of how many or how few people listen to the particular programme. The mere fact that a saving is effected on the number of wireless receiving sets used should be regarded as immaterial. Further, as the law now stands, it would appear that if a householder switches on his private wireless set and the broadcast is overheard by a burglar outside the window, the householder is *strictum ius* liable for a "public performance." From the author's own point of view, the re-broadcasting of music in factories is an advantage rather than a disadvantage because :

(*a*) It increases his potential market ;

(*b*) A demand by factories for his work strengthens his position in bargaining with a broadcasting company.

The fact that probably the majority of authors assign their copyright on or in anticipation of publication of their works completes the anomaly, since the Court of Appeal is in fact protecting not the small author but a powerful corporation—a fact to which the Court's attention was apparently not directed in *Performing Right Society v. Gillette*[33] or in *Jennings v. Stephens*[34]. The anomalies revealed would appear to be but another example of the way in which our law is allowed to continue unchanged long after the social conditions for which it was designed have ceased to exist. Instances such as the present in which the law is out of touch with the needs and life of the community will, if allowed to continue, only further the tendency to bring the law into disrepute.

K. H. GIFFORD.

32. *cit. sup.*
33. *cit. sup.*
34 *cit. sup.*

CRIMINAL LAW : PROOF OF INTENT.

The appellant in *R. v. Steane*[1] had been convicted on an indictment which charged him under the *Defence (General) Regulations*, reg. 2A, with doing acts likely to assist the enemy with intent to assist the enemy. It was proved, and the appellant admitted, that he had broadcast certain matters for the German Broadcasting Service, and there was evidence from which a jury could infer that these broadcasts by the appellant were acts likely to assist the enemy.

The trial judge, in directing the jury, said : "A man is taken to intend the natural consequences of his acts. If, therefore, he does an act which is likely to assist the enemy, it must be assumed that he did it with the intention of assisting the enemy." The Court of Criminal Appeal held this to be a misdirection and quashed the conviction. In a judgment delivered by Lord Goddard C.J. the court reaffirmed the principle that where a particular intent is a necessary constituent of the offence charged

1. [1947] 1 All E.R. 813.