

A Whiter Shade of Bach: Implications for Copyright and Publishing Law

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In 1977, *A Whiter Shade of Pale*, a song by Procol Harum, was declared at the BRIT Awards to have been the best pop single of the previous 25 years (jointly with *Bohemian Rhapsody*). The music was composed by Procol Harum's founder, Gary Brooker. Or so it was thought until recently. The song was first recorded in April 1967. During rehearsals for this recording, band member Matthew Fisher added an organ solo, and an organ melody which features throughout most of the work. It is no secret that much of this organ music is based on well-known melodies composed by J S Bach more than 200 years earlier.

In 2005, some 38 years after the song was first recorded, Matthew Fisher commenced legal proceedings in the English High Court, in which he claimed a share of the musical copyright in *A Whiter Shade of Pale*. The High Court (Blackburne J) found that Matthew Fisher did not assign his interest in the work, but there was an implied licence to publish it. Mr Justice Blackburne made an order declaring that Mr Fisher was a co-author and joint owner, with a share of 40%. He also declared that the defendants' implied licence to publish the work was revoked on 31 May 2005.

The defendants appealed this decision. The Court of Appeal (by a majority of two to one) decided that it was "unconscionable" for Mr Fisher to revoke the implied licence after 38 years, and that he had delayed so long in making his claim that the court declined to order that he was entitled to a 40% share of royalties.

A further appeal was made to the House of Lords. Lord Neuberger gave the lead judgment in a unanimous decision. He pointed out that six main issues had been raised in the lower courts, which can be summarised as:

1. *Is a fair trial possible after 38 years?*

The High Court and Court of Appeal agreed that a fair trial was possible. Although not appealed to the House of Lords, Lord Neuberger agreed with the lower courts.

Unlike the position in some countries, there is no general time-bar (limitation period) for bringing copyright claims in the English courts. In the House of Lords, Lord Hope (a Scottish judge) discussed the position that would have obtained if the claim had been brought under Scots law, and ventured the opinion that Scots law would similarly not have time-barred the claim, although it might be argued that section 8 of the Prescription and Limitation (Scotland) Act 1973 required any action of this kind to be brought within a 20 year period.

2. *Does a short instrumental introduction, added during rehearsals, make you a joint author of a musical copyright work?*

The High Court concluded that, on the facts of this case, Mr Fisher was a joint author and joint owner, with a 40% share. The Court of Appeal did not overturn this part of the High Court decision, and no further appeal was made on this point to the House of Lords.

3. *Did the circumstances of composition and recording amount to an implied assignment of copyright?*

The High Court rejected the defendants' claim that there was an implied assignment. The Court of Appeal left this point open. The defendants appealed this point to the House of Lords.

In the House of Lords, Lord Neuberger rejected the claim of implied assignment. In effect, the defendants were arguing for an implied contract, for which it would be necessary to show, inter alia, that it was obvious to Mr Fisher that his interest was being assigned; or that the commercial relationship between the parties could not sensibly have functioned without such an assignment. It was for the party making this claim to establish the relevant factual foundation for his case. Here, the defendants had failed to do so.

After discussing some other difficulties in the defendants' case on this point (including the youth and inexperience of the musicians, who were relying on the publisher to produce whatever documentation was necessary – a theme that appears in other cases concerning young pop musicians, eg *John v James* [1991] FSR 397, although this case was not cited), Lord Neuberger commented that an outright free assignment was more than was necessary to give business efficacy (a requirement for implied contractual terms); all that was necessary was a licence. Lord Neuberger also felt that some kind of reasonable payment provision would probably have been appropriate in any assignment, but in view of the other problems that the defendants' argument faced, it was inappropriate to explore this aspect.

4. *Did the recording contract remove Mr Fisher's copyright interest?*

In May 1967, Mr Fisher and other members of the band entered into a recording contract with Essex Music Limited, under which they granted Essex certain rights to exploit any recording made by them during a defined period. It was common ground that this contract covered the original recording of *A Whiter Shade of Pale*.

The High Court held that this contract did not transfer Mr Fisher's copyright interest in the work. The Court of Appeal left this point open. The defendants appealed the point to the House of Lords.

In the House of Lords, Lord Neuberger considered that the recording contract might well have operated as a licence to exploit the first recording, but he agreed with the trial judge that it did not operate as an assignment. Lord Neuberger considered that the terms of the recording contract "may have the effect of depriving Mr Fisher of any royalties ...[on] the first recording. However, even if that is right, it in no way impinges on the issue before your Lordship's House, namely whether the three declarations granted by the judge should be affirmed."

5. *Was the copyright interest lost through estoppel, laches or acquiescence?*

The High Court rejected the defendants' argument that Mr Fisher had lost his copyright interest through excessive delay (ie applying the legal principles of estoppel, laches and/or acquiescence). The Court of Appeal accepted that Mr Justice Blackburne was entitled to take this view and that they could not interfere.

Somewhat confusingly, the Court of Appeal applied the principles of laches and acquiescence to certain other aspects of the case, when they decided that it was unconscionable of Mr Fisher to revoke the implied licence and when they decided that they would not declare that Mr Fisher was entitled to a share of royalties.

The defendants appealed the delay point to the House of Lords. The House of Lords was unimpressed by the Court of Appeal's attempts to use equitable principles to deny Mr Fisher a declaration that he held a 40% ownership interest and had the right to revoke the implied licence. Lords Neuberger and Walker emphasised that equitable principles would apply to any attempt to obtain an injunction to restrain infringement, but not to these other points.

Lord Neuberger considered the relevant legal principles for laches and estoppel, and the alleged delays, in some detail. In summary, he considered that for these principles to apply in the present case, it was necessary for the defendants to have relied upon Mr Fisher's delay and acted to their detriment. However, the defendants had benefitted from Mr Fisher's failure to assert his claims, in that they received a larger proportion of the revenue generated from sales of the recordings.

6. Can you claim past royalties when you have taken no action to assert your copyright interest?

It was common ground that Mr Fisher was time-barred, under the Statute of Limitations, from claiming royalties dating back more than 6 years from the date on which he commenced legal proceedings. His only possible claims, therefore, were for the period dating back to May 1999, and for future royalties.

In the High Court, the judge held rejected the claim for 6 years past royalties, on the basis that "[f]or so long as Mr Fisher chose not to make ...his claim [and] allowed the [collecting] societies to account to the [respondents] ...he must be taken to have gratuitously licensed the exploitation of his copyright". The judge held that this licence was revoked when letter before action was sent prior to the current proceedings, in May 2005. This point was not appealed to the Court of Appeal.

Other issues

7. Could the publisher's rights under the recording contract be assigned?

The original publisher, Essex, had assigned the recording contract to one of the defendants, Onward, in 1993. The recording contract was stated to be for "personal services". Baroness Hale pointed out that, as a matter of general contract law such contracts may not be assignable without the other parties' consent. However, this point had not been raised in the High Court or Court of Appeal, and Lord Neuberger considered it inappropriate to determine the point at a late stage in the House of Lords.

8. Was Matthew Fisher able to assign his copyright when under the age of consent?

Baroness Hale also pointed out that it had been stated earlier in the case that Matthew Fisher was aged 20 at the time of the original recording, although it was stated before the House of Lords that he was 21. Baroness Hale considered what the implications would have been if Mr Fisher had been

an “infant” (in legal terms) at the time any implied assignment was alleged to have been made. (In 1970, the age of consent was reduced from 21 to 18 years.)

Baroness Hale pointed out that infants may make binding contracts of personal service which are to their overall benefit, even if some terms are to their disadvantage. The recording contract was a contract of personal service.

Baroness Hale also referred to Lord Denning’s dissenting judgment in *Chaplin v Leslie Frewin (Publishers) Ltd* [1965] 3 All ER 764 at 769-770, where he observed that if someone under the age of 21 disposes of his property by deed or in writing, he may avoid the transaction at any time before he comes of full age or within a reasonable time thereafter. Lord Denning cited cases dating back to the eighteenth century in support of his view. However, the majority of the Court of Appeal in that case held that if the copyright were assigned as part of a beneficial contract to supply services, it was binding on the infant and could not be avoided. The majority also expressed the view that even if the contract had been voidable, the IP had been transferred and could not be recovered. Some commentators have preferred Lord Denning’s view of the law in that case.

As Baroness Hale, pointed out, these points were not argued before the House of Lords, and it turned out that Mr Fisher was, in fact, 21 when the recording was made. However, she thought Lord Denning, and Lord Mansfield in an earlier case, would have been astonished by the idea that an infant could make an implied and gratuitous assignment of his copyright, and that this would have been an additional reason for rejecting the defendants’ argument.

Concluding remarks

It is extremely rare for cases on copyright royalties to reach the House of Lords. It is very interesting to see their Lordships grappling (or, in a few cases, declining to grapple) with fundamental questions of copyright and publishing law, some of which seem to have been overlooked in the High Court and Court of Appeal.

Whilst this case involves no radical development of the law, it is useful to get confirmation from the House of Lords on some familiar legal principles. The points that I found most interesting can be briefly summarised as follows:

- a) **Implied assignments of IP:** That it is difficult to persuade a court that an assignment of IP should be implied into a contract for services, particularly where a licence may be sufficient for business efficacy. This point often comes up where software or other works are commissioned, in the absence of a written contract addressing IP issues. Also, that the court may look even more critically where an implied assignment is alleged and the assignment is “gratuitous” ie without a payment.
- b) **Equitable principles and ownership rights:** That equitable principles should not be used to prevent a party asserting an ownership interest in IP, or from claiming damages (as distinct from an injunction) for infringement of IP rights.
- c) **Unenforceable contracts with minors:** That implying enforceable IP terms in contracts with minors/infants (now under the age of 18) or with inexperienced, young adult musicians may be difficult. There is already a line of authority in the latter area (eg *Panayiotou v Sony Music* [1994] EMLR 229).

- d) **Rejection of enforceable contracts with minors:** That minors/infants who assign their IP may be entitled to reject the assignment within a reasonable period of reaching the age of 18, or at least that there is an argument to this effect that could be brought, based on Lord Denning's dissenting judgment in *Chaplin v Leslie Frewen (Publishers) Ltd* and the ancient cases that he cited in that judgment.

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