

Oxford International Intellectual Property Moot 2018

Instructions

The 2018 moot concerns the case *Arbus v Harris* [2017] HCE 99. A copy of this case is included in the pages that follow, along with relevant provisions of the Copyright Act 1993.

At first instance in the High Court of Erewhon, Madam Justice Davies found in favour of the defendant. She held that:

- i. Of the three possible copyright works claimed by the claimant, only one – the Firing Software – fell within the categories of work set out in s. 2 of the Copyright Act 1993.
- ii. The Firing Software was authored by Mr Buckman. The claimant did not own copyright in the Firing Software, either as author or otherwise. Had copyright subsisted in the claimed dramatic works – the Cockatoo Performance and the Fireworks Display – these would have been authored by the claimant.
- iii. Had infringement been a live issue, the likely conclusion would have been that the defendant infringed copyright in the Cockatoo Performance, Fireworks Display and Firing Software.
- iv. The Cockatoo Performance was not a “performance” as defined in s. 100 of the Copyright Act 1993, thus preventing an action under the performers’ rights provisions.

The claimant was granted leave to appeal from this judgment. By order, without issuing an opinion, a unanimous bench of the Court of Appeal upheld the decision of the High Court. The claimant has been granted leave to bring a further appeal to the Supreme Court of Erewhon. This appeal will relate **only** to the following matters:

1. whether the Cockatoo Performance and the Fireworks Display each constitute a dramatic work; **AND**
2. the identity of the author(s) of the Firing Software; **AND**
3. whether, through producing her own fireworks display, the defendant reproduced in a material form the Firing Software; **AND**
4. whether the Cockatoo Performance falls within the definition of performance in s. 100 of the Copyright Act 1993.

It is your task to prepare written and (for teams that are invited to the Oral Proceedings) oral submissions for this appeal. Some points to consider:

- a. Each written submission must cover all issues on appeal, ie, make submissions on all four matters that are live before the Supreme Court.
- b. Whilst you are encouraged, within the grounds of appeal, to present arguments and authorities not mentioned by Madam Justice Davies, you should not seek to introduce entirely new causes of action, or to press arguments that have been conceded or were never ventilated in the original proceedings. To illustrate, it is not permissible to argue that the Fireworks Display might be protected as an artistic work.
- c. Not all aspects of Madam Justice Davies' judgment are being considered in the Supreme Court, such as her conclusion regarding authorship of the Fireworks Display and Cockatoo Performance (were those to be original dramatic works), and the lack of any assignment of rights from Mr Buckman to Mr Arbus. **Please keep your submissions to the four appeal issues stated above.** It is not necessary to make any substantive submissions in relation to remedies, or any contribution that might need to be made by Mr Arbus to Mr Buckman if they are joint authors of the Firing Software.
- d. The opinion of Madam Justice Davies includes reference to a number of cases. For the purposes of the written submissions, it is expected that you will deal with all of these items, and you risk missing out on credit if you omit analysis of them. However, these references are **not** intended to constitute your sole authorities for the moot, and indeed you are expected to rely on other primary and secondary materials. The emphasis you give to any particular authority (including those cited by Madam Justice Davies) is up to you, although the Panel will not look favourably upon strong reliance on an unduly narrow spectrum of authorities.
- e. Although the moot is held in Europe, this is an international competition and you are not limited in the jurisdictions from which you use authority. You may therefore use authorities from around the world. Obviously, however, it needs to be clear why any given authority is relevant to the legal issues in dispute.
- f. Erewhon is **not** a member of the European Union. It is a signatory to the Berne Convention, the TRIPS Agreement and the WIPO Performances and Phonograms Treaty.
- g. Requirements for your written submissions are contained in §14 of the Rules. The following is some additional guidance:
 - i. You do not need to include such things as a table of contents, statement of jurisdiction, statement of facts, index of authorities, etc. Submissions should focus on the substantive matters raised in the appeal.

- ii. When marking your submissions, the Panel will be instructed not to give extra credit for court headings and other flourishes that merely give the submissions the superficial “look” of an official court document. Credit may be awarded for a presentation style that facilitates the arguments being made (for instance, in the content and number of headings, the use of a logical paragraph numbering system, and so forth). You should not, therefore, be worried about purely stylistic matters when constructing your submissions.
- iii. The word count includes all the text in the footnotes. It is recommended that footnotes are used primarily for citation purposes, and that you minimise the amount of substantive text that appears in the footnotes.
- iv. There is no prescribed style guide for the submissions. Teams should, however: (i) maintain consistency of style throughout each submission; (ii) include full citations for sources on which they rely (at least the first time any given source is cited); and (iii) ensure that whenever they *quote* from a source, or otherwise use that source for a specific point, a pinpoint reference is included to the relevant page number and/or paragraph.

Any requests for clarifications of or corrections to the moot problem should be directed to the Moot Secretary at [moot@oiprc.ox.ac.uk] by **midday on Wednesday 1 November 2017 (Oxford time)**. Requests should note the paragraph number to which they relate, and explain why the requested clarification or correction is expected to have legal significance for the problem. Requests will be treated as confidential. If any clarifications or corrections are deemed necessary by the Organising Committee (“OC”), these will be released on the moot website by **Friday 10 November 2017**. The OC will not respond individually to any requests for clarifications or corrections, nor will it respond to requests that are seeking assistance with substantive aspects of the moot.

Your submissions must be received by the Moot Secretary (at the email address above) by **3.00pm on Monday 11 December 2017, Oxford time**; see further §15-§16 of the Rules. As noted there, within their written submissions, teams must identify themselves **only** by use of the anonymous identifier given to them in advance by the Moot Secretary. To apply for this identifier, you should email the Moot Secretary at [moot@oiprc.ox.ac.uk] **well before** the submission deadline.

The registration process will not open until *after* invitations have been issued to compete at the oral rounds. These invitations will be issued in mid-late January 2018. **Only those teams who are invited to the oral rounds will need to register and pay the registration fee.**

To keep apprised of announcements and news in relation to the moot (**#OxIPMoot**), please follow us on Twitter: **@OxIPMoot**.

Before:

THE HONOURABLE MADAM JUSTICE DAVIES

Between:

Dale Arbus

- and -

Julia Harris

Madam Justice Davies:

Factual background

[1] The claimant, Mr Dale Arbus, is a pyrotechnician. In late 2016, he was engaged by the Erewhonian Animal Sanctuary (“**Sanctuary**”) to provide fireworks for the Sanctuary’s March Equinox Festival (“**Festival**”), which took place on the Sanctuary’s main campus over three days from 18 to 20 March 2017. Mr Arbus was tasked with designing a presentation that would take place each evening at 8.00pm. The Sanctuary requested that Mr Arbus use “low noise” pyrotechnics in order to minimise any disturbance to nearby animals. It otherwise left creative decision-making about the display to Mr Arbus.

[2] The presentation developed by Mr Arbus was highly innovative, to say the least. When he is not busy with pyrotechnics, Mr Arbus’s main hobby is breeding and training Erewhonian cockatoos. In physical appearance these birds resemble the sulphur-crested cockatoo, although the Erewhonian cockatoo’s white body is contrasted with a pink crest and a pink wash under its wings, rather than yellow markings. Erewhonian cockatoos, like many other parrots, can learn to talk, dance and perform tricks. Over the last few years, Mr Arbus has been training three cockatoos, named Graeme, Brian and Tanya, to perform an “avian countdown” to launch his fireworks displays. This countdown was presented publicly for the first time at the Festival. Mr Arbus’s presentation therefore had two elements: the introductory countdown performance by the cockatoos (“**Cockatoo Performance**”) followed by the pyrotechnics (“**Fireworks Display**”). I will set out a short description of each element of the presentation.

[3] The Cockatoo Performance commenced with Graeme, Brian and Tanya flying in formation over the crowd, executing a number of loops and figures-of-eight. They then returned to a long perch erected on the stage, at which point they danced to a short remix of the song “Sexy and I Know It” by LMFAO. Mr Arbus’s evidence is that the birds have been taught to associate certain moves with certain parts of the track; for instance, they are meant to bob their heads and strut during the line “I’m sexy and I know it”, and shake their tails during the line “Wiggle, wiggle, wiggle, wiggle, wiggle, yeah”. After about a minute of dancing, the music faded and the birds assembled at the far end of the perch, behind an oversized microphone. As the cockatoos counted backwards from ten to one, each number was projected on to a screen behind them. On the word “one”, the lighting to the stage was cut, and the fireworks began. No human was present on stage with the birds, although some commands were given offstage by Mr Arbus using a clicker and hand signals. The numbers were flashed behind the birds in case of any counting errors or issues with the microphone. Mr Arbus’s evidence, which I accept, is that a great deal of time went into training the birds to fly in formation, perform dance moves, and chant the countdown in unison.

[4] The Fireworks Display lasted for just over ten minutes. Mr Arbus’s evidence regarding the development of this display is as follows. He started by producing some very rough notes regarding the patterns and visual effects to be created, including some ideas for which fireworks would be used, approximately where they would be placed, and in what order they would be set off. He decided to use electronic detonation – ie, detonation via a firing panel onto which is programmed the running sequence for the explosions – because it would permit a more complex and integrated presentation, eg, by allowing numerous fireworks to be ignited simultaneously over a wide area, and by allowing the fireworks to be timed precisely to music (in this case a mix of pop songs and classical music). The programming for the Fireworks Display was undertaken from scratch by Mr Kurt Buckman, a friend of Mr Arbus. I accept Mr Arbus’s evidence that he was present when the coding was being undertaken by Mr Buckman, with his role being to give Mr Buckman oral instructions about the sequences and timings to be embodied in the software.

[5] The defendant, Dr Julia Harris, was a visitor at the Festival on 19 March 2017. Dr Harris, whose day job is as a dentist, has a side business as a pyrotechnician. She videoed Mr Arbus’s entire presentation – ie, the Cockatoo Performance and the Fireworks Display – using the camera in her smartphone. She uploaded part of the video, being the Cockatoo Performance, to a website she uses to promote her pyrotechnics business. The caption next to the video said: *“Warning: cuteness overload. Here are cockatoos dancing and COUNTING DOWN the start of the fireworks at the March Equinox Festival at the Erewhonian Animal Sanctuary.”* On 8 July 2017, Dr Harris was responsible for a fireworks display that, it is said, copied part of the Fireworks Display created by Mr Arbus (“**Harris Display**”). Dr Harris also recorded this display on her smartphone and uploaded the recording to her website. It was

Mr Arbus's later discovery of this recording, along with the recording of the Cockatoo Performance, that prompted these proceedings.

[6] Mr Arbus's complaint against Dr Harris is grounded in copyright and performers' rights; I will deal with each of these in turn. He seeks declaratory and injunctive relief, as well as monetary compensation in the form of damages or an account of profits. He does not bring any claim in contract (ie, by reference to the terms and conditions of entry to the Festival) because: (i) he was not a party to the relevant contract, which was between the Sanctuary and Dr Harris; and (ii) that contract did not contain any express terms dealing with filming or photography. Nor is there any suggestion that the Sanctuary owns rights in any works created under the agreement with Mr Arbus. Both parties accept that Mr Arbus was an independent contractor, and that his agreement with the Sanctuary stated expressly that all intellectual property rights remained with Mr Arbus.

[7] Mr Arbus used a number of musical works in his presentation, all of which were cleared by him through the appropriate channels. His claims do not extend to the use of any of these works by Dr Harris.

Copyright claims

Identification of the works

[8] Mr Arbus submits that there are three protected works: (1) the Cockatoo Performance as an original dramatic work; (2) the Fireworks Display as an original dramatic work; and (3) the computer program for the electronic firing panel ("**Firing Software**") as an original literary work. Section 1 of the Copyright Act 1993 states the term "literary work" includes computer programs. The defendant accepts that the Firing Software is a literary work, instead arguing that the claimant does not own any copyright in that software given the authorship arrangements. I will return to that point shortly. Mr Arbus did not argue that the Cockatoo Performance and Fireworks Display constituted a single integrated dramatic work, although I am not sure that this would have changed my analysis.

[9] I have formed the view that neither the Cockatoo Performance nor the Fireworks Display is a dramatic work. Amongst many difficulties, the fundamental problem is that each work lacks certainty and does not have "sufficient unity to be capable of performance": *Green v Broadcasting Corporation of New Zealand* [1989] RPC 700, 702. In relation to the Cockatoo Performance, Mr Arbus accepted in cross examination that there is only so much control he can exert over the cockatoos, and that there will be variation in their execution of the routine. For instance, sometimes the formation flyover will comprise three giant loops, at other times five smaller ones. The birds will sometimes execute the "wrong" dance steps, or stop dancing completely, or make errors in the countdown. This is unsurprising, given each cockatoo is an animal with his or her own free will. Ultimately, however, it is fatal for any copyright action, as the claimed dramatic work comprises three general ideas:

(i) a formation flyover; (ii) some dancing; and (iii) the vocalisation of numbers. Mr Arbus clearly exerted much effort in training the birds to perform these tasks, and had a plan regarding how the performance should be executed. However, with such divergence and unpredictability in any given performance, no dramatic work can subsist.

[10] In relation to the Fireworks Display, my analysis has been greatly assisted by the observations of Hill J in *Nine Network Australia Pty Ltd v Australian Broadcasting Corporation* [1999] FCA 1864, (2000) 48 IPR 333. In that case, Channel Nine applied for an interlocutory injunction restraining the ABC from broadcasting, inter alia, the fireworks at New Year's celebrations in Sydney on 31 December 1999. In refusing to grant this relief, Hill J described the claimed dramatic work originating from the fireworks schedule as the "weakest copyright case" for Channel Nine: 337, at [18]. "The question really is whether the setting off of the fireworks spectacular, ephemeral as it is, is a 'dramatic work' in the ordinary sense of those words": 337, at [20]. I accept that the fireworks show produced by Mr Arbus was the product of careful planning and intellectual effort (also satisfying Erehon's originality standard, which requires the exercise of skill and judgment). It was creative and had an effect on the emotions of those present. However, it would stretch the statutory language to breaking point if the term "dramatic work" were extended to *any* non-static, visual presentation, and I am not prepared to adopt such a course.

Authorship

[11] Should I be wrong in my conclusions above, I am of the view that the author of each dramatic work – the Cockatoo Performance and the Fireworks Display – is Mr Arbus. This was not disputed by the defendant in written or oral submissions.

[12] The situation is more complicated for the Firing Software. There are three possibilities in relation to authorship of that work: (i) Mr Arbus alone, on the basis that Mr Buckman was a mere scribe, writing in computer language the series of actions conceived by Mr Arbus; (ii) Mr Buckman alone, because Mr Arbus did not contribute to the expression of that work but only the ideas therein (ie, the sequence of fireworks); or (iii) Mr Arbus and Mr Buckman as joint authors. The first option is clearly unsound as Mr Buckman did work of a very different kind to a mere amanuensis; he used skill and judgment in writing the Firing Software, thus making an authorial contribution. The key question is therefore whether Mr Arbus was a joint author. In support of this contention, counsel for the claimant pointed me to *Heptulla v Orient Longman* [1989] FSR 598, a decision of the High Court at Delhi. In that case it was stated that:

A literary work consists of matter or material which is expressed in a language and is written down; both the subject matter and the language are important. It is difficult to comprehend, or to accept, that when two people agree to produce a work where one provides the material, on his own, and the other expresses the same in a language which is presentable to the public then the

entire credit for such an undertaking or literary work should go to the person who has transcribed the thoughts of another. To me it appears that if there is intellectual contribution by two or more persons, pursuant to a pre-concerted joint design, to the composition of a literary work then those persons have to be regarded as joint authors. (at 609)

[13] After much consideration, I have come to the conclusion that Mr Buckman was the sole author of the Firing Software. Although I may have been prepared to accept that joint authorship can arise where a literary work is physically put into a material form by only one person, the actions of the other person must nevertheless approximate penmanship for him or her to also be an author – a threshold not met by Mr Arbus. Nor was Mr Arbus able to rely on an assignment, or the statutory rules in relation to employee-created works, to demonstrate that he owns rights in the Firing Software. The arrangements between Mr Arbus and Mr Buckman were in the nature of one friend helping out another friend. No payment was made to Mr Buckman by Mr Arbus, nor a written record kept of what Mr Buckman agreed to do. Mr Arbus therefore enjoys a bare licence to use the Firing Software for his own fireworks displays, but does not have the necessary rights to bring enforcement actions against third parties. Sadly for Mr Arbus, it appears that he will not be able to rectify this situation any time soon, Mr Buckman having disappeared on a “gap year” travelling the world, following some unfortunate events related to his former employment as an account manager at Pellit & Son, a chemical company.

[14] This is enough to dispose of the claimant’s action, there either being no copyright work or no copyright work owned by Mr Arbus. Given the parties made extensive submissions on infringement, I will set out some of the considerations that would have been relevant had this been a live issue.

Infringement

[15] Mr Arbus claims that Dr Harris infringed copyright by: (i) making a video of the entire Cockatoo Performance and Fireworks Display; (ii) uploading the video of the Cockatoo Performance to her website; and (iii) producing her own fireworks display – the Harris Display – which copied part of Mr Arbus’s Fireworks Display.

[16] If, contrary to my conclusions above, the Cockatoo Performance and Fireworks Display constituted dramatic works, copyright in each would have been infringed by the video made on Dr Harris’s mobile telephone, and copyright in the Cockatoo Performance infringed by making that recording available online. I interpolate, here, that the ubiquity of smartphone technology makes it likely that many others who attended the Festival also filmed all or part of Mr Arbus’s presentation, exposing a potentially enormous class of people to liability for copyright infringement. Expanding the subject matter of copyright may therefore create problems elsewhere in the system, for instance in relation to limits on freedom of panorama (which in Erewhon does not extend to dramatic works). In this case, Dr Harris did not seek to invoke any exceptions to infringement.

[17] The Harris Display is less straightforward. Dr Harris developed a six minute presentation that largely followed the sequence and fireworks effects of the first four minutes of Mr Arbus's Fireworks Display (or at least, the version that took place on 19 March 2017). Dr Harris admitted that she used the recording on her phone to help design the Harris Display, explaining that she often uses existing fireworks presentations as inspiration or source material, thus helping her learn new techniques and develop her craft. Dr Harris produced a written script but did not use electronic detonation. She used slightly slower timings than those used by Mr Arbus, did not play any accompanying music, and used pyrotechnics (many of which were not low noise) from different suppliers to those used by Mr Arbus. The Harris Display was presented on 8 July 2017 at a corporate event for which Dr Harris was hired to provide pyrotechnics.

[18] Had I been required to form a concluded view on the Harris Display, it would have been difficult to avoid the conclusion that the similarity between the two works was high, and the amount taken quantitatively and qualitatively significant. I would therefore have held that Dr Harris reproduced in a material form, and indeed performed in public, a substantial part of Mr Arbus's Fireworks Display.

[19] A further question was whether any of the acts of Dr Harris infringed copyright in the Firing Software. The Erehonian reproduction right is broad and technology neutral, countenancing that a copyright work can be "reproduced in a material form" by a work that takes a different form. But just how far should this extend? Counsel for the claimant pointed me to dicta in *Sandman v Panasonic UK Limited* [1998] FSR 651, 657, in which Pumfrey J was open to the submission that literary copyright in a circuit diagram could be infringed by a circuit made according to that diagram if, on the facts, "it still contains all the literary content of the literary work, albeit in a form which would require analysis for it to be extracted." Counsel for the defendant, on the other hand, directed me to a number of authorities which have rejected the contention that copyright in a literary work, being a set of instructions, is infringed by a work that copies the *product* of those instructions rather than the instructions themselves: eg, *Nova Productions Ltd v Mazooma Games Ltd* [2006] EWHC 24 (Ch), [2006] RPC 14; appeal dismissed [2007] EWCA Civ 219, [2007] RPC 25. Counsel for the defendant submitted that no software was used or developed by Dr Harris – who did not even have access to the Firing Software – and that it would be an unprincipled extension of the concept of non-literal copying if the functions of the Firing Software were protected as part of the literary work.

[20] I have thought carefully about the arguments presented by both sides. I should start by saying that if I am wrong about the authorship of the Firing Software – ie, if Mr Arbus and Mr Buckman are co-authors because acts approximating penmanship are not required – then consistency within the copyright system would seem to demand that the scope of the reproduction right must countenance the relevant "skill and labour" supplied by Mr Arbus, which went to determining the *functions* of the computer program (ie, devising the particular dramatic presentation that the

Firing Software was intended to create). As such, if Mr Arbus is a co-author, then Dr Harris infringed copyright in the Firing Software through the creation of the Harris Display, and Mr Arbus has standing to bring an action against her without joining Mr Buckman as Erewhonian law does not require all co-authors to be parties to enforcement proceedings.

[21] What if I am correct about the legal test for authorship, but – say – Mr Arbus had standing to enforce copyright in the Firing Software, for instance because he was granted an assignment from Mr Buckman? Even here, I would be inclined to the view that Dr Harris’s actions involved a reproduction of the Firing Software in a material form. This is not a case in which a general idea has been copied – Dr Harris copied *the* dramatic presentation that was embodied in the relevant code. Some of the cases have used a baking analogy, stating that there is no infringement of the literary copyright in a recipe if a person makes the cake described in that recipe. However, this case does not involve a series of instructions which, when followed, result cumulatively in a final product. Each exploded firework *is* the literary work described in the Firing Software. The presentation is described in detail, and is not the “mere idea” for a work. I do not believe that this particular case implicates the idea/expression dichotomy.

[22] Given that there are no copyright works in which Mr Arbus owns copyright, I do not need to form a concluded view on infringement. However, as set out above, I believe there is strength in the argument that Dr Harris’s conduct in creating the Harris Display infringed the Firing Software and not just the Fireworks Display.

Performers’ rights

[23] In addition to his claims in copyright, Mr Arbus alleges that by recording the Cockatoo Performance and uploading that footage to her business website, Dr Harris acted contrary to performers’ protections in ss. 101 and 102 of the Copyright Act. He identifies himself as the relevant performer, rather than advancing the (untenable) submission that Graeme, Brian and Tanya are the beneficiaries of such protections. The success of Mr Arbus’s claim would seem to turn on two matters: (i) whether there is a “performance” as defined in s. 100; and (ii) whether Dr Harris’s recording was made without consent.

[24] Mr Arbus argues that there is one or both of: (i) a “dramatic performance” per paragraph (a) of the definition of “performance”; and (ii) a “performance of a variety act or similar presentation” per paragraph (d). I am open to the view that some animal acts can be “variety acts” for the purposes of Part II of the Copyright Act: see *Heythrop Zoological Gardens Limited (t/a Amazing Animals) v Captive Animals Protection Society* [2016] EWHC 1370 (Ch) esp. at [32]-[33]. The difficulty for Mr Arbus is that the definition of “performance” also includes the words “given by one or more individuals”. In *Heythrop*, Birss J accepted there was an arguable case that performers’ rights subsisted in a show where a trainer entered a cage with two lions and caused the lions to perform tricks. Although audience attention might be

focused on the lions, “the overall show involves both the human and the animal working together. It cannot be said that this is merely a performance by animals”: at [40]. These words are crucial – even if performers’ rights subsist in the show described by Birss J (a matter on which he did not need to reach a concluded view), in the case before me, any interventions by Mr Arbus were done offstage. In short, Mr Arbus did not “give” the performance, even if he helped direct the performance as it took place, and had undertaken substantial training to equip Graeme, Brian and Tanya with the skills to formation fly, dance and speak.

[25] Given my conclusion above, the question of consent does not arise. However, had performers’ rights subsisted, I would not have accepted Dr Harris’s suggestion that the absence of an express prohibition on filming constituted consent for audience members to record Mr Arbus’s presentation.

Madam Justice Davies made orders dismissing all claims against the defendant. The claimant was granted leave to appeal to the Court of Appeal.

Oxford International Intellectual Property Moot 2018

Copyright Act 1993 – extracts

Part I COPYRIGHT

Section 1 Interpretations

“Adaptation”:

(a) in relation to a literary work, other than a computer program ..., or in relation to a dramatic work, means:

(i) a translation of the work;

(ii) a version of a dramatic work in which it is converted into a non-dramatic work or, as the case may be, of a non-dramatic work in which it is converted into a dramatic work;

(iii) a version of the work in which the story or action is conveyed wholly or mainly by means of pictures in a form suitable for reproduction in a book, or in a newspaper, magazine or similar periodical;

(b) in relation to a computer program, means a version of the work (whether or not in the language, code or notation in which the work was originally expressed) not being a reproduction of the work;

...

...

“Dramatic work” includes a work of dance or mime.

...

“Literary work” includes ... (b) a computer program ...

...

“Material form” includes any form of storage, whether visible or not ...

...

“Work of joint authorship” means a work produced by the collaboration of two or more authors in which the contribution of each author is not distinct from that of the other author or authors.

...

Section 2 Subject matter of copyright

(1) Subject to this Part, copyright subsists in the following types of work:

(a) original literary, dramatic, musical and artistic works;

(b) sound recordings, films and broadcasts; and

(c) the typographical arrangement of published editions.

(2) Copyright does not subsist in a literary, dramatic, musical or artistic work unless and until it is recorded in writing or some other material form; and references in this Part to the time at which such a work is made are to the time at which it is so recorded.

(3) It is immaterial for the purposes of subsection (2) whether the work is recorded by or with the permission of the author.

Section 5 Authorship

(1) In this Part, “author”, in relation to a work, means the person who creates it.

(2) A reference in this Part to the author of a work shall, unless otherwise expressly provided by this Part, be read, in relation to a work of joint authorship, as a reference to all the authors of the work.

Section 6 Ownership

(1) Subject to this section, the author of a copyright work is the first owner of any copyright subsisting by virtue of this Act.

...

Section 9 Exclusive rights

(1) Copyright, in relation to a literary, dramatic or musical work, is the exclusive right:

- (a) to reproduce the work in a material form;
- (b) to publish the work;
- (c) to perform the work in public;
- (d) to communicate the work to the public;
- (e) to make an adaptation of the work;
- (f) 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 (a) to (e), inclusive;

...

Section 10 Infringement of copyright

(1) Subject to this Act, the copyright in a copyright 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 Erewhon, or authorises the doing in Erewhon of, any act comprised in the copyright.

(2) References in this Part to the doing of an act comprised in the copyright in a work are to the doing of it:

- (a) in relation to the work as a whole or any substantial part of it; and ^[11]_[SEP]
- (b) either directly or indirectly.

...^[11]_[SEP]

Part II RIGHTS IN PERFORMANCES

Section 100 Interpretations

(1) In this Part:

...

“performance” means:

- (a) a dramatic performance (which includes dance and mime);^[11]_[SEP]
- (b) a musical performance;
- (c) a reading or recitation of a literary work; or

(d) a performance of a variety act or any similar presentation, ^[L]_[SEP] which is, or so far as it is, a live performance given by one or more individuals.

...

“recording”, in relation to a performance, means a film or sound recording:

- (a) made directly from the live performance;
- (b) made from a broadcast of the performance; or
- (c) made, directly or indirectly, from another recording of the performance.

...

Section 101 Consent required for recording of live performance

A performer’s rights are infringed by a person who, without his consent:

- (a) makes a recording of the whole or any substantial part of a qualifying performance directly from the live performance,
- (b) broadcasts live the whole or any substantial part of a qualifying performance, ^[L]_[SEP]
- (c) makes a recording of the whole or any substantial part of a qualifying ^[L]_[SEP] performance directly from a broadcast of the live performance.

...

Section 102 Infringement of performer's rights by use of recording made without consent

A performer’s rights are infringed by a person who, without his consent:

- (a) shows or plays in public the whole or any substantial part of a qualifying performance, or
- (b) communicates to the public the whole or any substantial part of a qualifying performance,

by means of a recording which was, and which that person knows or has reason to believe was, made without the performer's consent.

Oxford International Intellectual Property Moot 2018

Cases cited by Madam Justice Davies

Green v Broadcasting Corporation of New Zealand [1989] RPC 700

Nine Network Australia Pty Ltd v Australian Broadcasting Corporation [1999] FCA 1864, (1999) 48 IPR 333

Heptulla v Orient Longman [1989] FSR 598

Sandman v Panasonic UK Limited [1998] FSR 651

Nova Productions Ltd v Mazooma Games Ltd [2006] EWHC 24 (Ch), [2006] RPC 14; appeal dismissed [2007] EWCA Civ 219, [2007] RPC 25