

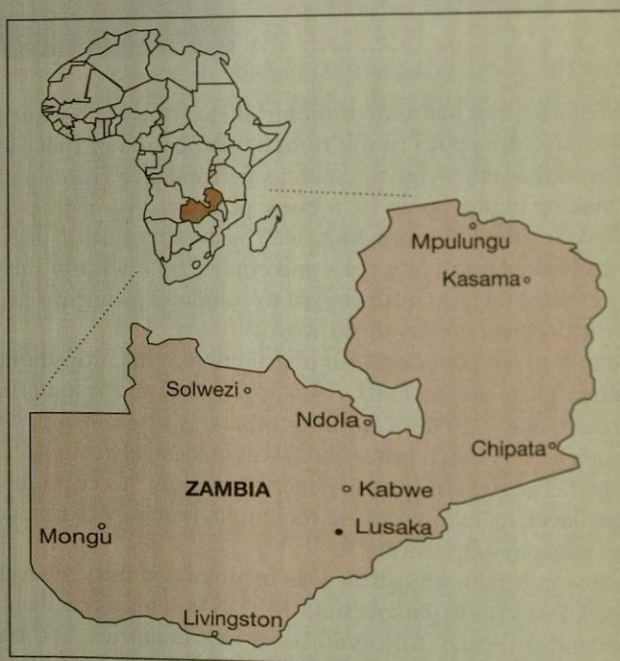
shop, over loudspeakers to workers in a factory, and to members of a dance club.¹⁷ A private performance would be a reading of a book to one's family or to a small group of close friends. The difference between public and private performances is examined in Case 9-1.

CASE 9-1 Performing Right Society, Limited v. Hickey

Zambia, High Court at Lusaka, 1978
Zambia Law Reports, vol. 1979, p. 66 (1979)

MAP 9.1

Zambia (1978)



Opinion of the Court—Judge Sakala

The plaintiff's claim is for an injunction to restrain the defendant—whether by himself or by his servants or agents—from authorizing 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. The plaintiff also claims for damages.

In support of the claim, 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 in this case. He testified that the objective of the plaintiff is to protect the copyright of musical writers, artists, and composers. The Society represents them and collects fees on behalf of its members, which in the end [are] 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 copyrighted music without the consent of the copyright owner.

¹⁷See Stig Strömholm, "Copyright—Comparison of Laws," *International Encyclopedia of Comparative Law*, vol. 14, chap. 3, p. 57.

The witness further testified that he also wrote the defendant suggesting to him to take out the society's license. But there was no reply to any of these 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 these occasions was on the 4th of 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 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 of 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. . . .

In defense, Francis Anthony Hickey testified that he is one of the proprietors of Bar-B-Que Drive-in Restaurant. He agreed that on the 26th of 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 that 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 copyrighted music, but he did not know what they were asking him. He has never in his life heard that there is a 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 realized that the letters referred to "Kung Fu Fighting," "House of Exile," and "Money Won't Save You" when he approached his lawyer, who explained [the letters] to him. Otherwise, before then, he had no idea. He said he does not intend to play these records until he obtains a license 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 license allocated to him by the police.

In cross-examination, he said [that] 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.

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

. . . The defense 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 defense that at the time of the infringement that 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 damages, the damages should only relate to the one day as pleaded. In the circumstances, counsel for the defendant urged that the damages should either be 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 with regard to all the correspondence sent to the defendant, the defense of innocence must be rejected. The law governing copyright of musical works and other works in Zambia is contained in the *Copyright Act*, Chapter 701. I must confess that, in my research, I have not come across any Zambian authority based on the *Copyright Act*. Even in the submissions, I was not referred to any local decided cases. Musical works under the Act are eligible for copyright. Infringement of copyright is specifically provided for in §13 of the Act. Section 13 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 license 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 of April, 1976, he did perform or cause the performance of the three musical works without a license.

... Section 13(3) provides a defense 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 work or other subject matter to which the Section 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.

As already mentioned, the defense raised is one of innocence. Quite clearly, §13(3) of Chapter 701 provides a good defense of innocence of infringements of copyright. Although there is no decided authority in Zambia, ... English decisions based on the English *Copyright Act of 1956* ... have very strong persuasive value ... bearing in mind that the wording of §13(3) of Chapter 701 is the same as §17(2) of the English *Copyright Act of 1956*. ... Innocence as a defense under this Section has been considered in a number of English cases, reference to which will be found in *Halsbury's Laws of England*.¹⁸ 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 defense 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. On the defendant's admission of the infringement of the plaintiff's copyright of the three musical works on April 26th, 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 the evidence, does not appear to object to the injunction being granted. In the circumstances, I grant the injunction in respect of the three works pleaded.

Casepoint

The defendant admitted that he played records of copyrighted music during a public disco at his establishment in Zambia. Thus, a *performance* was done, without permission of the copyright owner, which constituted an infringement of the song composer's rights. The judge decided that the defendant did not fully understand copyright at that time, so did not award damages but did hold him liable for the profits made that day at the disco. In addition, the court entered an injunction prohibiting any further such infringement by the defendant.

¹⁸4th ed., vol. 9 at paragraph 938, p. 602.