

THE DIRECTOR OF PUBLIC PROSECUTIONS

-v-

NOEL IRWIN

JUDGMENT OF MR. JUSTICE BARRON DELIVERED THE 25th DAY OF October
1984.

The defendant was charged on the 5th of May, 1983 at Middleton in the County of Cork in that he did by way of trade offer or expose for sale or hire a video cassette tape namely "One of our Dinosaurs is Missing", copyright of which was vested in Walt Disney Productions knowing the same to be an infringing copy of the said work contrary to Section 27 (1) (b) of the Copyright Act 1963. He was also charged with the same offence in relation to a second tape named "Spaceman and King Arthur".

A video cassette tape comes within the definition of a cinematograph film for the purposes of the Copyright Act 1963. Section 18 (10) provides:-

"In this Act - "cinematograph film" means any sequence of visual images recorded on material of any description (whether translucent or not) so as to be capable, by use of that material - (a) of being shown as a moving picture, or (b) of being recorded on other material (whether translucent or not) by the use of which it can be shown."

Copyright in a cinematograph film by virtue of Section 18 (1) subsists where either the maker of the film was a qualified person for the whole or a substantial part of the period during which the film was being made or where the first publication of the film took place in the State. A qualified person is defined by

Section 7 (5) as being in the case of an individual a person who is an Irish citizen or is domiciled or resident within the State, and in the case of a body corporate as being a body incorporated under the laws of the State. In relation to cinematograph films the protection afforded by the Copyright Act 1963 to works first published in the State has by the Copyright (Foreign Countries) Order 1978 as and from the 9th of May, 1978 been extended to apply to works first published whether before or after the making of the Order in any country of the Berne Union or of the Universal Copyright Convention in like manner as if the works or other subject-matter were first published within the State. The works in question having been first published in such a foreign country had by virtue of that Order the copyright protection granted by that Order as and from the 9th of May, 1978.

The defendant was charged under Section 27 (1). It is an essential proof that the defendant knew that the copy he was offering for hire was an infringing copy. An infringing copy is defined by Section 24 (4) (c) as meaning in relation to a cinematograph film a copy of the film being an article the making of which constituted an infringement of the copyright in the film.

It could not be established by the complainant when the copies were made. In relation to "Spaceman and King Arthur" it was established that the film had been made since the 9th of May 1978, but in relation to "One of our Dinosaurs is Missing" this proof was not available. It was contended by the defendant that accordingly there was no proof that the tape of this film was an infringing copy as it might have been made before the Statutory Instrument came into force and so there was no proof that copyright subsisted in the film when the copy was made. The District Justice accepted this

submission. He convicted the defendant on the charge relating to "Spaceman and King Arthur" but acquitted in relation to "One of our Dinosaurs is Missing". He now seeks the opinion of this Court as to whether or not his latter determination was correct.

The only real issue before the District Justice was whether the copy had to have been made without the consent of the copyright owner or whether it was sufficient to establish that it was being offered for hire without such consent. Having regard to the definition of "infringing copy," it is clear that the former contention is correct and that the District Justice correctly ruled on the submissions before him.

His determination is based upon the assumption that those granted protection by virtue of the Copyright (Foreign Countries) Order 1978 had no protection in relation to their works prior to that date. That is not so, foreign authors of whom the maker of the cinematograph film in question was one were protected by Statutory Instruments made under the provisions of the Industrial and Commercial Property (Protection) Act, 1927 and such Orders were kept in force by the Copyright Act 1963: see paragraph 35 (3) of the transitional provisions contained in the First Schedule thereto. This provision was so construed by the Supreme Court in Performing Right Society Limited -v- Marlin Communal Aerials Limited, an unreported judgment delivered on the 17th of December, 1975. It was held, however, that the protection afforded was in respect of copyright recognised by the 1927 Act and did not extend to copyright of a kind first protected by the 1963 Act.

In the present case then the tape in question could still be an infringing copy if the copyright infringed was a copyright protected by the provisions of the 1927 Act. Copyright is dealt with in

Part VI of that Act. Section 117 defines "dramatic work" as including any cinematograph production where the arrangement or the combination of incidents represented give the work an original character. Under Section 154 (2) copyright means the sole right to produce or re-produce the work or any substantial part thereof in any material form whatsoever and includes, inter alia, in relation to a dramatic work, the right to make any record, perforated roll, cinematograph film or other contrivance by means of which the work may be mechanically performed or delivered.

It can be seen from these provisions that a cinematograph production which was regarded as having an original character was treated as a dramatic work. In such case, only the owner of the copyright in such work had the right to make a cinematograph film of the work. The sole right was also given to such owner to make any contrivance ejusdem generis with a record, perforated roll or film by which the work might be mechanically performed or delivered. Technology has advanced very considerably in this field since 1927 and this is reflected in the wider definition of "cinematograph film" in the Copyright Act 1963. While technology was in its infancy in 1927 and video cassette tapes were unknown, evidence might still establish that a video cassette tape would be a contrivance of the sort indicated by Section 154 (2) of the Industrial and Commercial (Property Protection) Act 1927. However, even if it could be so established it seems to me that it would be a matter of doubt as to whether or not it could be contended that such a tape should have protection under that Act.

This is a criminal prosecution and it should not succeed if there was any doubt as to whether or not an offence might have been committed. Further, no submission based upon the 1927 Act was made

- 5 -

in the District Court. For both these reasons, it would not be proper for the defendant to be convicted in relation to "One of our Dinosaurs is Missing,". In my opinion the determination of the District Justice was correct.

Henry Harrison
25/10/34