

Garware Plastics and Polyester Ltd. and Others etc. Vs Telelink and Others etc.

Court: Bombay High Court

Date of Decision: Jan. 31, 1989

Acts Referred: Copyright Act, 1957 " Section 13(1), 14(1), 2, 51

Citation: AIR 1989 Bom 331 : (1989) 2 BomCR 433 : (1989) 91 BOMLR 139

Hon'ble Judges: Sujata Manohar, J

Bench: Single Bench

Advocate: Anil Diwan, Ashok Desai, J.I. Mehta, P.M. Amin and Harish Mehta, instructed by Ramesh Makhiji and Co., M.O. Chinoy and B. Amin and Co., R.V. Paiwith, Shakuntala and A. Mudbidri, for the Appellant; A. Hidaytullah, D.J. Khambatta, instructed by Gagrath and Co., Harish Tacker, I.M. Chagla, J.D. Dwarkadas, S.B. Jaisinghani and J.P. Avasia, instructed by Federal and Rashmikant, for the Respondent

Judgement

1. The plaintiffs in Suit No. 87 of 1989 claim to be the Assignees of a copyright in relation to Cinematography Films listed in the plaint to be shown

on T.V. screen by means of video cassettes., discs and /or tapes of such films. This is popularity known as "Video Copyright". The suit is filed by

the plaintiffs in a representative capacity on behalf of persons who hold an assignment of video copyrights in respect of cinematography films.

2. The plaintiffs in suit No. 151 of 1989 are the producers of cinematography films , who have retained with themselves the video copyrights in

respect of such films. Some of these producers have granted the right of telecasting their films to the Government of India or Doordarshan but have

retained with themselves the right to telecast films, inter alia, by Cable T.V.

3. These two suits have been filed against various persons who obtained video cassettes of cinematograph films from the market and show video

films over a Cable. T.V. network which they have set up in various houses., apartments or localities for a fee which they call maintenance charges"

.Any person whose T.V. set is connected to such a Cable T.V. network can, by payment of certain charges have the benefit of viewing on his

home T.V. set video films shown by the defendants on their Cable.T.V. network .According to the plaintiffs in both these suits, by showing films

over the Cable T.V. network the defendants have committed breach of their copyright. The present Notices of Motion have been taken out by the

plaintiffs to restrain the defendants from communicating by way of exhibition or broadcasting over T.V. either by wire or by wireless diffusion by

means of Cable. T.V. network do dish antenna any film in which they do not possess video copyright..

4. Under S. 13(1) of the copyright Act , 1957 a copyright is recognized in respect, inter alia, of cinematography films. Under S. 2(f) of the said

Act , "" Cinematography film"" is defined to include the sound track, if any, and "cinematography" shall be construed as including any work

produced by any process analogous to cinematography. An Expiation, which is added by way of amendment in 1984, provides that for the

purposes of this clause, "video films" shall also be deemed to be work produced by a process analogous to cinematography. In otherwords,

video films are included in the definition of cinematography film". Therefore the Copyright Act , 1957 recognizes copyright in video films. S. 14

defines copyright. Under S. 14(1)(c), ""copyright in a cinematography film"" means the exclusive right to do or authorize the doing of any of the

following acts, namely: (I) to make a copy of the film: (ii) to cause the film, in so far as it consists if visual images, to be seen in public and, in so far

as it consists of sounds, to be heard in public : (iii) to make any record embodying the recording in any part of the sound track associated with the

film by utilizing such sound track: (iv) to communicate the film by broadcast.

5. Under S. 2(dd), ""broadcast"" is defined to means of wireless diffusion, whether in any one or more of the forms of signs, sounds or visual images:

or (ii) by wire and includes a re-broadcast. S. 2(ff) defines ""communication to the public "" as communication to the public in whatever manner,

including communication through satellite. (Italics mine).

6. Unless S. 51. Copyright in a work shall be deemed to be infringed, inter alia, when any person , without a license granted by the Copyright

under the Act , does anything the exclusive right to do which is by this Act conferred upon the owner of the copyright.

7. I have to consider whether by showing video films over Cable T.V.. network to various subscribers the defendants are broadcasting video films

to the public and thereby interning the copyright of the plaintiffs.

8. It is contended by the defendants that by means of a Cable T.V. network a film is shown only inside the private homes of various subscribers. It

may be wanted by the members of the subscribers household or his guests Such a viewing cannot be considered as broadcasting to the public.

There, is therefore , no breach of the plaintiff's copyright is video films.

9. There is no dispute that the defendants are showing cinematographer films over cable T.V. network. The only question is whether this amounts

to a broadcasts i.e., whether this amounts to a communication of the film to the public or not. Whether a communication is to the public or whether

it is a private communication depends essentially on the persons receiving the communication. It they can be characterized as the public or a

protein of the public , the communication is to the public. This test been applied in a number of cases decided by the English Courts under the

English Copyright Act, 1911. The language of the English Act of 1911 is somewhat different from the language of our Act . Hence decisions under

that Act have to be applied with some caution. Under S. 1(2) of the English Copyright Act . 1911 "copyright" is defined to mean " the sole right,

inter alia, "" to perform..... the work or any substantial part thereof in public"". Under the English Copyright Act 1911 cinematograph film was not

directly covered as the subject-matter of copyright. However , under sub-s, 2(d) of S. 1 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 was considered as a part of the copyright. In the case os any musical work broadcast over the radio, the English cases therefore had to

consider where the performance took place - whether in the studio, at the place of the listener or both. Then they had to consider whether the

performance was in public pr not. Under our Act there is a copyright in the cinematograph film itself. It is also nor necessary to consider \where the

performance of the film takes place. The right to broadcast the film is a part of the copyright. The decisions however, are relevant to the extent that

they deal with the distinction between a private and a public performance.

10. In Harms (Incorporated) , Limited and Chappell and Company, Limited v. Martans Club, Limited reported in (1927) 1 Ch 526, the plaintiffs

were the owners of the copyright in a musical play called "" Tip Toes"" . The defendants were the proprietors of a Club for dining and dancing,

which had a membership of 1800. At the Club of the defendants the musical play was performed by their orchestral band before an audience of

out 150 members and 50 guests, The question was whether the performance before the members of the club was a performance of the musical

play in public. The court held that tie was. In so deciding the court considered the nature of the right of the author who was protected under the

Copyright Act . It said that the purpose was to protect the author from any injury or loss of profit by reasons of any representation of his

composition in public which would have ordinarily fetched him financial gain. Therefore, the question was whether the members of the Club were

to be considered as persons who would, ordinarily, have seen the performance if it were to be held at a public place for a profit. The court held

that the audience was of this type. It considered the performance as in public. The Court distinguished such an audience from a private or domestic

audience which would consist of members of the family and members of the household. The court also considered the place where the

performance took place. And held that the club, which accepted members from the public and guests, cannot be considered as a place which was

equivalent to an enlarged family.

11. In the case of *Message v. British Broadcasting Company Ltd*, reported in (1927) 2 KB 543, the plaintiff who was a composer of a well-

known comic opera called "The Little Michus" gave to a theatrical producer the right to perform the opera. The theatrical producer in turn gave a

license to the BBC to broadcast the performance the plaintiff sued the BBC for an infringement of his copyright in the opera. One of the defenses

taken by the BBC was that the broadcast was not a performance in public within the meaning of the Copyright Act, 1911. It contended that the

performance was in the private studio of the BBC where public was not admitted. By mechanical and electrical devices the performance was

heard by the public who possessed radios. The court, however, negated the contention. It said that to broadcast an opera by wireless telephony

was to "perform" it "in public" within the meaning of the English Copyright Act, 1911. It said that whether a performance is in public or not must

depend upon the circumstance of each case, will not amount to an infringement of copyright. It said that by broadcasting the opera the defendants

clearly gave a public performance. "Instead of gathering the public in to a vast assembly room they set in motion certain ether waves knowing

that millions of receiving instruments in houses and flats were turned to the waves sent forth, and knowing and intending also that acoustic

representation of the opera would thereby be given to an enormous number of listeners." the decision was reversed by the Court of Appeal on

other grounds relating to the nature of the agreement between the plaintiff, the theatrical producer and the BBC. (*Vide* (1928) 1 KB 660)

12. In *Jennings v. Stephens* reported in (1936) 1 Ch 469, the performance by a dramatic society at a monthly meeting of the "Duston Women's

Institute without the consent of the owner of the copyright was considered. Audience could be considered as public or not, the Court said, "The

public" is a term of uncertain import: it must be limited in every case by the context in which it is used. Mere numbers cannot be the test. "What is

dearly intended is that some domestic or quasi-domestic entertainment may not come within the ambit of copyright. The Court held that the true

criterion for deciding this question was the character of the audience. If the audience partook of domesticity or quasi-domesticity, it would not be

considered as a part of the public. Otherwise it would be. There may be many cases in which there can be no doubt whether a particular

performance is in public or in private: for example, the concerts given at the Albert Hall are performance in public .
Music provided by a man for

the entertainment of his guests after dinner or at a reception is performed in private. In the latter case the entertainment forms part of the domestic

is performed in private. In the alters case the entertainment forms part of the provides it, and none the less cause of the presence of his guests.They

are for the time being members of his home circle.

13. The Court also spelt out a second criterion for deciding issue. It said that the expression "" in Public"" must be considered in relation to the

owner of the copyright may property be decried as the performing public or part of his public , then in performing the work before that audience,

he would be exercising the statutory right conferred upon him. Any one who, without his consent,performed the work before that audience would

be infringing his copyright. Applying this criterion, the court said that the performance before the Duston Women"s Institute was a performance in

public.

14. Similar criteria were applied in the case of Performance Right Society Ltd. V. Hawthorns Hotel Ltd, reported in (1933) 1 Ch 855 where

performance in the lounge of the hotel was considered as a performance in public.

15. In the case of Ernest Turner Electrical Instruments Ltd. v. Performance Right Society Ltd, reported in (1943) 1 Ch 167 the music which was

broadcast to employees during work was considered as performance in public, once again applying the same tests namely (1) the character of

audience whether it could be considered as purely domestic, (2) relationship between the owner of the copyright and the audience an(3) the impact

of the performance on the value of copyright or the loss of profit which would otherwise have accrued had to the owner if the same audience had

watched the performance on payment.

16. There are some cases where the English Courts have laid emphasis on the nature of the place where the performance took place. For example,

n Performing Right Society Ltd, v. Hammond"s Branford Brewery Co. Ltd. Reported in (1933) All ER Rep 270 the plaintiff if its had , interalia,

granted a license to the British Broadcasting Corporation to broadcast their works for domestic and private use only. The defendant company ,

who owned a hotel, used a receiving set and loudspeakers to reproduce the broadcast by the British Broadcasting Cooperation for customer"s in

their hotel by the hotel owners. This was considered as a performance in public. It should be noted that the BBC did not infinite the copyright by

broadcasting. The owner of the hotel, however, was held to have infringed the copyright by receiving the broadcast and relaying it over

loudspeakers to his customers.

17. Similarly in the case of performing Right Society Ltd. V. Camelo reported in (1936) 3 All ER 557 the music which was broadcast over the

radio was played through a loudspeaker in a private room adjoining a public restaurant in such a manner that the music was clearly audible to the

public in the restaurant. This arrangement was made by the owner of the restaurant was held to have arranged for the music to be performed in

public. He thereby infringed the copyright of the owner.

18. In Mellor, v. Australian Broadcasting Commission reported in 1940 AC 491 the appellants were publishers band music. In respect of musical

work published by them they circulated pamphlet which said that all their music was free for public performance. The was broadcast by the

Australian Broadcasting Cooperation. It was held that the consent given in the pamphlet included broadcasting of music by the Bands concerned

and therefore there was no infringement. There are, however, certain observations in the judgment of the defendants The Privy Council stated.

The original performance in the studio may be, and generally will be, a performance in private. In such a case the broadcast performance at the

receiving end., if in public and unlicensed, will be an infringement of copyright at that place..... If the broadcast is picked up only by listeners in

private it might be different to establish that there is a public performance : for each performance would be separate, and each would be private:

but it is not necessary to express an opinion on this point." (Italics mine) The Privy Council observed that it could not be doubted that a broadcast

to all and sundry listeners including hotels and other places of entertainment or refreshments., will amount to performance to members of the public.

The above quoted observations of the Privy council which are relied upon by the defendants here, are merely passing observations. The wording

of the pamphlet was held to cover a broadcast over the radio. Hence the Privy Council itself said that it was not expressing any opinion whether a

broadcast can be a private performance or not

19. Difficulties in interpretation have arisen as a result of the language used in the English Copyright Act . 1911 where the broadcast was not

directly protected. What was protected was performance of the work in public . The phrase "performance in public" is vaguely suggestive of the

place where the performance takes place. In the case of a theatrical production or a music recital the performance takes place, where the artists

perform. A broadcast, however, posed problems. Where does the performance take place?. Hence the above decision of the English Courts.

Under our Copyright Act , 1957 a broadcast to the public is expressly covered. There is no need, therefore, to consider where the "performance

takes place. Hence English decisions on this aspect are not relevant. Our Act covers broadcast and defines it as communication of such work to

the public either by wireless different or by wire. Therefore, the question whether the performance is in the studio or whether there is a separate

performance at places where the broadcast is received does not arise. It is also therefore. Not relevant whether this "performance"(i.e., reception

of the broadcast) is in a private room which requires determinations so whether such a broadcast is a communication to the public.

20. It should also be noted that in two of the three cases above the actual broadcast was authorized by the owner of the copyright . He sued the

party who was receiving the broadcast. In the Privy Council case the sole question was whether the permission by the author to perform in public

included a right to broadcast. The Court held that it did include this right. No such question arises here.

21. It defendants in the present case do not have any authorization from the owners of the copyright their films. Their sole defense is that showing

films to the members of their video network who pay them for watching these films, is not a broadcast because it does not amount to showing the

film to the public or a Section of the public.

22. From the authorities the principal criteria which emerge for determining the issue are(1) the character of audience and whether it can be

described as a private or domestic audience consisting of family members or members of the household, (2) whether the audience in relation to the

owner of the copyright can be so considered and (3) Whether permitting such performance would in any way whittle down the protection given to

the author of a copyright under the Copyright Act resulting in the owner being deprived of monetary gains out of the intellectual property.

23. Applying the test of the character of the audience watching these video films , can this audience be called a Section of the public or is this

audience a private or domestic audience of the defendants ? In the present case. It cannot be said that the audience which watches video films

shown by the defendants consists of family members and guests of the defendants. The video film may be watched by a large Section of the public

in the privacy of their homes. But this does not make it a private communication so as to take it out of the definition of "broadcast" under the

Copyright Act ,1957. A broadcast is heard in millions of private homes. It is nevertheless a broadcast to the public . For example, if the President

of India gives a Republic Day address over Doordarshan, it may be received by millions of viewers over their T.V. sets in their homes. But this

does not make it a private communication to the public . the President is not making a private broadcast to each viewer or listener. The audience

may be sitting in the privacy of their homes. But this makes no difference to the character of the audience, As Mc Cardie J. would have put it

Messenger v. British Broadcasting Company Ltd. 1927 (2) KB 543 (supra), instead of gathering the audience in a theatre, the defendants, by

modern technology, are showing the film to that audience in their homes. To hold that this is not communication to the public would be to ignore the

substance of the matter and the object and intent of the Copyright Act.

24. The viewers of a Cable T.V. network or those who receive such broadcast through a dish antenna to which their television sets are connected,

are either residents of apartments in a building which has such a network or they may be residents of a locality which is covered by this facility. A

number of houses - both private homes and public places - may avail of this facility. It is true that the network operates through the connection of a

cable to all these various apartments or houses. But this cannot in any way affect the character of the audience. The viewers are not members of

one family or their guests. They do not have even the homogeneity of a club members of one family or their guests. They do not have even the

homogeneity of a club membership. And even club members have been held to be members of the public. The viewers are residents in different

apartments or houses who are in no way connected with each other except by Cable! It may be that in some of the homes members of the

household will watch the film together. But this does not mean that the entire audience taken together are members of a common household or are

family members. They can only be viewed as a portion of public.

25. This becomes apparent if one applies the second test, namely, the nature of the relationship between the owner of the copyright and the

audience. The viewers cannot be considered as domestic viewers of the owner of the copyright i.e. the plaintiffs. They must be considered as

members of the public.

26. The last test which has been applied in such cases is the test of ascertaining the character of the audience in view of the purpose of the

Copyright Act . The Copyright Act is meant to protect the owner of the copyright against unauthorised performances of his work, thereby entitling

him to earn monetary gain from his intellectual property. The audience which watches such video films would have otherwise paid for watching the

film. In fact, the audience does pay the defendants for watching the film. The author of the copyright is, therefore, directly affected as he is deprived

of earnings from his intellectual property. What is more, an audience which pays for watching the film cannot be considered as a domestic audience

of the person broadcasting the film.

27. Thus, applying all the three criteria or in any view of the matter, the defendants, by showing the film over a video T.V. network, are

broadcasting the film or communicating it to a Section of the public. Mr. Chagla, learned counsel for the defendants, laid emphasis on the

observations of the Privy Council in the case of Mellor v. Australian Broadcasting Commission, 1940 AC 491 which have been referred to earlier

and submitted that a broadcast can be a private broadcast can be a private broadcast if it is received in a private home. But the same broadcast

becomes a public broadcast if received in a public place. In the first place, as I mentioned earlier, the observations on which he relies were only

passing observations of the Privy Council. The court expressly stated that it was not expressing any opinion on that issue. Hence the observations

were not even obiter dicta. The decision turned upon the wording of the permission which was containing in the pamphlet. Secondly the

observations were in the context of interpreting the phrase ""performance in public"" which is absent in our Act .

28. Mr. Chagla also relied upon a decision of the Canadian Court in Canadian Admiral Corporation Ltd. V. Reddiffusion Inc. reported in (1954)

Ex CR 382. That case dealt with a right to telecast the live football games to the played by a particular team in Montreal during the 1952 football

season and to televise films of the games to be played by that team away from Montreal . The first question which the Court was required to

decide was whether the live relay or a film of the football match can be considered as an original dramatic or artistic work protected by the

Canadian Copyright Act ,1927. It held in the negative. The Court, however, held that if the televised production consists of a series of

photographs, then, the photographs being within the definition of ""artistic work"" under the said Act , the plaintiffs would be entitled to the

protection of their right in respect of these photographs. This main aspect of the case is of no relevance here. The Canadian Court, however, relied

upon various decisions of the English Courts cited earlier and accepted the test laid down by those decisions as to the character of audience. It

held that since the telecast was to private homes, the performance in each house was a purely domestic performance and was not a performance in

public. This part of the ratio of the Canadian decisions is not applicable here because of the language of our Copyright Act , 1957. Our Copyright

Act protects broadcasts and defines them as ""communication to the public"". I may add that both England and Canada have made substantial

changes in their copyright law long since to cover radio, television and video broadcasts and other sophisticated forms of communication.

29. The only Indian case cited before me was the case of Video Master and etc. Vs. Union of India (UOI) and Others, . The Court considered

what was public exhibition of a cinematograph film under the Cinematograph Act , 1952. In the course of his argument one of the counsel

appearing cited some examples of private viewing which are reproduced in the judgment as examples cited by the lawyer. These illustrations do

not cover the case such as the present one where video films are shown through Cable T.V. network or by means of a dish antenna to the

subscribers to the network. Nor does the case deal with the provisions of the Copyright Act , 1957. It is, therefore, not relevant.

30. It was next submitted that any interim order should not be granted in favour of the plaintiffs because the title of the plaintiffs in both the suits

was not clear. Mr. Chagla drew my attention to the nature of the agreements which are annexed to the plaint in Suit No.87 of 1989. The first

agreement (Exh. A) assigns the video copyrights to the 1st plaintiff in respect of films mentioned in the agreement. This includes, under Cl. 7, a

right to exhibit and a right to reproduce the film and to distribute it for exhibition on video by playback equipment and Cable T.V. The other

agreements, however , have restricted the video copyright to home viewing . Mr. Chagla, therefore, contends that such agreements do not ;assign

to these plaintiffs copyright in video films shown over Cable T.V. network. The second suit, however, is by producers of films who have not

assigned their video copyright to any party. The plaintiffs in the two suits, between them, cover all owners of copyright in video films.

31. In a given case, whether in respect of a particular film, the copyright to show the film on Cable T.V. network has been assigned by the owner

of the copyright to anybody else or not, will depend upon the nature of the agreement which is arrived at. If there is no agreement assigning such a

right, the right will continue to remain with the producer of the film. Since the producers have also filed a suit in a representative capacity, it cannot

be said that there is any lacuna in the right to maintain the action.

32. It was next contended that looking to the conduct of the plaintiffs, no relief should be granted to them. It was submitted that at least one of the

defendants was showing such films on Cable T.V. since 1982 or 1983 and some of the other defendants started showing such films over Cable

TV network in 1987. It was submitted that there was considerable delay in bringing this action and hence no interim relief should be granted to the

plaintiffs have, however, pointed out that they did not have adequate evidence to show that the films in respect of which they had copyrights were

being shown over the Cable T.V. network. It was only when a magazine was published in December 1988 giving details of films being then shown

concrete evidence to establish a breach of their copyright . In any case, looking to the continuing nature of the wrong, this is a fit case for grant of

interim relief.

33. The balance of convenience is also in favour of the plaintiffs. By permitting the defendants to continue exhibition of such films over Cable T.V.

network without obtaining a license as provided

Under the Copyright Act , a valuable protection which is afforded to the owners of a copyright under the Act would be substantially whittled

down. In my view, a strong prima facie case has been made out by the plaintiffs for granting them interim relief.

Undoubtedly the business of the

defendants will be affected as a result. But the plaintiffs will be severely affected if their copyright in the films is not protected, while the defendants

can show the films after obtaining a licence under the Copyright Act .

34. There will, therefore, be an interim order restraining the defendants, their servants and agents from communicating or exhibiting or broadcasting

by means of what is commonly known as Cable T.V. or Dish Antenna such cinematograph films in respect of which the plaintiffs are the owners

and/or assignees of copyright without obtaining an assignment of the same from such owners or assignees or a licensee under the Copyright Act ,

1957.

35. Motions are made absolute accordingly.

36. Costs to be costs in the cause.

37. On the application of the defendants, operation of this order is stayed till 20-2-1989.

38. Defendants do give to the plaintiffs 48 hours" notice in case they move the Appeal Court.

39. Order accordingly.