

A Whiter Shade of Pale

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Jurisdiction

UK

Related Cases

Fisher v Brooker and another [\[2009\] All ER \(D\) 338 \(Jul\)](#), [2009] UKHL 41
Abstract

The House of Lords ruled that Matthew Fisher, a former organist in the band Procul Harum, was not barred from collecting future royalties for the song "A whiter Shade of Pale", even though he waited 38 years to stake his claim. Neil Hodge reports
Analysis

The dispute centred on the famous 8-bar organ solo at the beginning of the hit song which was released in 1967.

At trial, the judge held that Fisher had written the distinctive organ melody and was entitled to a 40% share of the musical copyright. He concluded that Fisher had granted an implied licence to the defendants to exploit his share, which had been terminated when the claim was issued.

The Court of Appeal disagreed. It held that it was "unconscionable" for Fisher to benefit because of the "inexcusable delay" in making the claim.

On 30 July 2009, the House of Lords reinstated the High Court's decision. As a co-owner of the copyright, Fisher was entitled to a statutory right of property. That right could not be undermined by the passage of time. There is no principle of "adverse possession".

Kieron Kelly, an associate in the intellectual property group at Nabarro, says that "the decision potentially paves the way for musicians to claim royalties for individual contributions to old hit songs, but only in limited circumstances."

"Here, Fisher was able to establish that he created the work 38 years later. It will often be difficult to prove authorship so long after the event, but the decision might well encourage claims. Contributions would also need to be memorable to secure such a high share," he says.

Keith Arrowsmith, a partner in city firm, Sprecher Grier Halberstam, says that the copyright position becomes complicated because some sectors prefer to engage with workers on a project by project basis that does not engender long term commitments or arrangements. Others now engage in projects that require many

more specialist members of a team, over longer periods. As a result, committee-created material is always going to be harder to manage.

"The selling point for intellectual property is its ability to be 'sliced and dice'" in a number of different ways," says Arrowsmith. "With the music industry exploiting their assets using publishing agreements, recording deals, merchandising licenses, and digital right management (not to mention restricting deals to types of media, territory and time span) each IP protected asset can be subject to complex competing contractual arrangements. Perhaps it is time to consider the US copyright registration system to add transparency and certainty to the arrangements," he says.

"If Matthew Fisher had been an employee, then the issue would not have arisen," he adds. "Similarly, if the band members had formalised their working relationship, and kept better records of who contributed to the creation of the material, the position would have been simpler."

Arrowsmith says that there is a growing body of material – books, film and music – that is being kept in limbo because of the chance of an absent creator claiming a royalty. These so called "orphan works" are increasing in number as we get better in preserving older works, but fail to keep proper ownership details, he says.

Peter Rawlinson from Wake Smith & Tofields in the Company commercial team, says that for the benefit of all parties it is important to avoid uncertainty and ensure that appropriate written assignments are negotiated with performers to ensure arrangements of music that may have been improvised or adapted are dealt with appropriately.

"The risk is that without appropriate agreements the new copyright works created through the improvisation or adaptation of music during rehearsals or recording sessions may not be covered by previous agreements," he says.

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