

**HOUSE OF LORDS**

Date: 12/05/1988

**CBS Songs Limited (suing on their own behalf and on behalf of the other members of the Mechanical Rights Society Limited) and others (Appellants)**

v.

**Amstrad Consumer Electronics plc and others (Respondents)**

Lord Keith of Kinkel

Lord Templeman

Lord Griffiths

Lord Oliver of Aylmerton

Lord Jauncey of Tullichettle

**JUDGMENT**

**Die Jovis 12° Maii 1988**

Upon Report from the Appellate Committee to whom was referred the Cause CBS Songs Limited (suing on their own behalf and on behalf of the other members of the Mechanical Rights Society Limited) and others against Amstrad Consumer Electronics plc and others, That the Committee had heard Counsel on Tuesday the 15th, Wednesday the 16th, Thursday the 17th, Monday the 21st, Tuesday the 22nd and Wednesday the 23rd days of March last upon the Petition and Appeal of CBS Songs Limited, whose Registered Office is at 17-19 Soho Square, London W1, EMI Records Limited, whose Registered Office is at Blythe Road, Hayes, Middlesex, and Chrysalis Records Limited, whose Registered Office is at 15 Jermyn Street, London W1, praying that the matter of the Order set forth in the Schedule thereto, namely an Order of Her Majesty's Court of Appeal of the 10th day of April 1987, might be reviewed before Her Majesty the Queen in Her Court of Parliament and that the said Order might be reversed, varied or altered or that the Petitioners might have such other relief in the premises as to Her Majesty the Queen in Her Court of Parliament might seem meet; as upon the Cases of Amstrad Consumer Electronics plc and of Dixons Limited lodged in answer to the said Appeal; and due consideration had this day of what was offered on either side in this Cause:

It is Ordered and Adjudged, by the Lords Spiritual and Temporal in the Court of Parliament of Her Majesty the Queen assembled, That the said Order of Her Majesty's Court of Appeal (Civil Division) of the 10th day of April 1987 complained of in the said Appeal be, and the same is hereby, Affirmed and that the said Petition and Appeal be, and the same is hereby, dismissed this House: And it is further Ordered, That the Appellants do pay or cause to be paid to the said Respondents the Costs incurred by them in respect of the said Appeal, the amount thereof to be certified by the Clerk of the Parliaments if not agreed between the parties.

Cler: Asst. Parliamentor:

## **LORD KEITH OF KINKEL**

My Lords,

I have had the opportunity of considering in draft the speech to be delivered by my noble and learned friend Lord Templeman. I agree with it, and for the reasons stated by him would dismiss the appeal.

## **LORD TEMPLEMAN**

My Lords,

During the past half-century there have been continuous improvements in sciences and techniques concerned with the transmission, reception, recording and reproduction of sounds and signals. These developments were required for serious purposes such as war, espionage, safety and communications. The benefits of advances made for serious purposes have been employed for purposes of leisure and pleasure and have spawned two flourishing industries, the electronic equipment industry and the entertainment industry. The electronic equipment industry manufactures and sells sophisticated machines which enable individual members of the public to transmit, receive, record and reproduce sounds and signals in their own homes. The entertainment industry transmits and records entertainment on an enormous scale. Each industry is dependent on the other. Without the public demand for entertainment, the electronic equipment industry would not be able to sell its machines to the public. Without the facilities provided by the electronic equipment industry, the entertainment industry could not provide entertainment in the home, and could not, for example, maintain orchestras which fill the air with 20th century cacophony or make gratifying profit from a recording of a group without a voice singing a song without a tune. Although the two industries are interdependent and flourish to their mutual satisfaction there is one area in which their interests conflict. It is in the interests of the electronic equipment industry to put on the market every facility which is likely to induce customers to purchase new machines made by the industry. It is in the interests of the entertainment industry to maintain a monopoly in the reproduction of entertainment. Facilities for recording and reproducing incorporated in machines sold to the public by the electronic equipment industry are capable of being utilised by members of the public to copy the published works of the entertainment industry, thus reducing the public demand for the original works and recordings of the entertainment industry itself. The electronic equipment industry invents and markets new and improved facilities which enable records to be made and copied. The public make use of those facilities to copy the recordings issued by recording companies and thus infringe the copyrights of the recording companies and of the composers, lyricists and others engaged in the entertainment industry. Hence arises the conflict between the electronic equipment industry and the entertainment industry which has resulted in these present proceedings.

This appeal is the climax of a conflict between the makers of records and the makers of recording equipment. The appellants, The British Phonographic Industry Ltd. ("B.P.I."), represent the makers of records while the respondents, Amstrad Consumer Electronics Plc. and Dixons Ltd., represent the makers and sellers respectively of recording equipment. B.P.I. argue that it is unlawful for Amstrad to make recording equipment which will be used by members of the public to copy records in which copyright subsists. In the alternative, B.P.I. argue that Amstrad must not advertise their equipment in such a way as to encourage

copying. Amstrad and Dixons argue that they may lawfully make and sell to the public any recording equipment which ingenuity may devise and may lawfully advertise the advantages of such equipment.

By the Copyright Act 1956:

"1(1) . . . 'copyright' in relation to a work . . . means the exclusive right, by virtue and subject to the provisions of this Act, to do, and to authorise other persons to do ... in relation to that work . . . those acts which, in the relevant provision of this Act, are designated as the acts restricted by the copyright in a work of that description. (2) . . . the copyright in a work is infringed by any person who, not being the owner of the copyright, and without the licence of the owner thereof, does, or authorises another person to do, any of the said acts in relation to the work ... to which the relevant provision of this Act extends. 2 ... (2) Where an original literary, dramatic or musical work has been published, then, subject to the provisions of this Act, copyright shall subsist in the work .... (3) . . . copyright subsisting in a work by virtue of this section shall continue to subsist until the end of the period of 50 years from the end of the calendar year in which the author died, and shall then expire: ... (5) The acts restricted by the copyright in a literary, dramatic or musical work are - (a) reproducing the work in any material form; ... (c) performing the work in public; (d) broadcasting the work; . . . 4(1) . . . the author of a work shall be entitled to any copyright subsisting in the work .... 12(2) . . . copyright shall subsist ... in every sound recording .... (3) Copyright subsisting in a sound recording . . . shall continue to subsist until the end of the period of fifty years from the end of the calendar year in which the recording is first published, and shall then expire. (4) . . . the maker of a sound recording shall be entitled to any copyright subsisting in the recording .... (5) The acts restricted by the copyright in a sound recording are the following, whether a record embodying the recording is utilised directly or indirectly in doing them, that is to say, - (a) making a record embodying the recording; (b) causing the recording to be heard in public; (c) broadcasting the recording . . . . "

By section 48 "reproduction" includes a reproduction in the form of a record and "record" means any disc, tape, perforated roll or other device in which sounds are embodied so as to be capable (with or without the aid of some other instrument) of being automatically reproduced there from.

Thus a sound recording of a performance of a song with words may involve three or more separate copyrights, each with different periods of duration of not less than 50 years. There is copyright in the composer in respect of his musical work, copyright in the lyricist in respect of his literary work and copyright in the recording company in respect of its sound recording. In the case of Beethoven and Bach and other copyright owners who died more than 50 years ago, the musical works copyright will no longer subsist. In the case of recordings published more than 50 years ago the recording copyright will no longer subsist. But every tape or other copy of a sound recording of a song with words will infringe any subsisting copyrights in the works recorded and in the sound recording.

B.P.I. represent the various owners of copyrights in musical and literary works and in sound recordings. Amstrad make and Dixons sell equipment which makes it possible for sound recordings to be copied on to tape. Any purchaser of Amstrad's equipment who makes use of the equipment for the purpose of copying a sound recording infringes any and all of the subsisting copyrights in the relevant works recorded and in the sound recording.

There are broadly two types of infringers who concern B.P.I. First there are "pirates" who make large numbers of copies of a sound recording for the purposes of sale. Pirates do not generally employ the equipment which Amstrad sell to the public but use different equipment which enables the mass production of infringing copies at low cost. The infringing copies are then sold in competition with the original sound recording which has been produced at great expense. With some difficulty but with marked success in this country, B.P.I. and other owners of copyright are able to detect infringing copies offered for sale, to identify pirates by means of Anton Piller orders and then to obtain the remedies of injunction, confiscation and damages.

The second types of infringers are "home copiers," that is to say, members of the public who, by using Amstrad or other machines which are capable of making copies of sound recordings, can copy on to a blank tape for an expenditure of less than £1 an original recording priced at £5 or £10. A home copier makes a copy for his own private use and is thus to be distinguished from a pirate who makes infringing copies for sale. The infringements of a home copier are almost impossible to detect and a successful action for infringement against one copier would have little deterrent effect. The sales of sound recordings in 1984 were estimated at 40 million, and the sales of blank tapes at 70 million or thereabouts. Blank tapes may be employed for purposes which do not infringe copyright but on average for every authorised copy of a record there will now be two infringing copies.

Home copiers are entitled to make copies of sound broadcasts but may, nevertheless, infringe copyright in the works broadcast. By section 14 of the Act of 1956:

"(1) Copyright shall subsist ... - (a) in every television broadcast made by the British Broadcasting Corporation ... or by the Independent Television Authority . . . and (b) in every sound broadcast made by the Corporation or the Authority . . . . (2) . . . the Corporation or the Authority, as the case may be, shall be entitled to any copyright subsisting in a television broadcast or sound broadcast made by them; and any such copyright shall continue to subsist until the end of the period of 50 years from the end of the calendar year in which the broadcast is made, and shall then expire. ... (4) The acts restricted by the copyright in a television broadcast or sound broadcast are - ... (b) in the case of a sound broadcast, or of a television broadcast in so far as it consists of sounds, making, otherwise than for private purposes, a sound recording of it or a record embodying such a recording; ... (5) The restrictions imposed ... in relation to a television broadcast or sound broadcast . . . shall apply whether the act in question is done by the reception of the broadcast or by making use of any record, print, negative, tape or other article on which the broadcast has been recorded. ... (7) For the purposes of subsection (4) of this section ... a sound recording or a record embodying a recording shall be taken to be made otherwise than for private purposes if it is made for the purposes of the doing by any person of any of the following acts, that is to say, - (a) the sale or letting for hire of any copy . . . of any record embodying the recording; (b) broadcasting the . . . recording . . . ; (c) causing the . . . recording to be . . . heard in public"

Thus, where a live broadcast is made, the home copier may lawfully record the broadcast on tape for his own "private purposes." But by section 16(6) copyright in a sound recording or broadcast shall be in addition to, and independent of, any copyright subsisting in the musical or literary work recorded or broadcast. It appears, therefore, that a home copier may lawfully record on tape a live broadcast of a Schubert song but cannot lawfully record on tape a live broadcast of a Beatle song without infringing the Beatles' copyright. A home copier who is

recording a live concert of the works of Bach and Walton must be careful to switch off his machine during the performance of Walton's work. It appears also that an authorised broadcast of a sound recording cannot be recorded on tape by a home copier without infringing the copyright in the sound recording and any subsisting copyrights in the work recorded.

By section 17 of the Act of 1956:

(1) . . . infringements of copyright shall be actionable at the suit of the owner of the copyright; and in any action for such an infringement all such relief, by way of damages, injunction, accounts or otherwise, shall be available to the plaintiff as is available in any corresponding proceedings in respect of infringements of other proprietary rights."

By section 17(3) if the court is satisfied that effective relief would not otherwise be available to the plaintiff, the court, having regard in addition to all other material considerations to the flagrancy of the infringement, and any benefit shown to have accrued to the defendant by reason of the infringement, may award additional damages.

By section 18:

"(1) . . . the owner of any copyright shall be entitled to all such rights and remedies, in respect of the conversion or detention by any person of any infringing copy, or of any plate used or intended to be used for making infringing copies, as he would be entitled to if he were the owner of every such copy or plate and had been the owner thereof since the time when it was made: ..."

Section 21 creates certain copyright offences punishable with fines and imprisonment. These crimes are concerned with pirates and others dealing with infringing copies by way of sale, hire or trade but B.P.I. contend in the present proceedings that every home copier commits a criminal offence under section 21(3) which is in the following terms:

"Any person who, at a time when copyright subsists in a work, makes or has in his possession a plate, knowing that it is to be used for making infringing copies of the work, shall be guilty of an offence under this subsection."

By section 18(3):

"'plate' includes any stereotype, stone, block, mould, matrix, transfer, negative or other appliance."

The argument is that when a home copier borrows a record intending to use it for making infringing copies, the record which has been borrowed becomes "a plate." I do not accept that a record can become a plate and I do not agree that a home copier commits a criminal offence. By the Performers' Protection Acts 1958 to 1972 it is an offence knowingly to make a record of a performance of literary, dramatic, musical or artistic work without the consent in writing of the performers, but it is a defence to prove that the record was made for private and domestic use only.

Under and by virtue of section 17 of the Copyright Act 1956, a home copier is liable in civil proceedings to pay damages for infringement, and to be restrained by injunction against further infringement and his unlawful copy may be confiscated by a copyright owner. For at least a decade, members of the public, including home copiers, have been able to buy from a

variety of manufacturers and retailers listening and recording equipment housed in a compact console. The listening facilities are enhanced by high fidelity speakers and extend to sound broadcasting, the playing of a record from a disc held on a turntable and the playing of a record from a recorded tape housed in a cassette and held in a cassette deck incorporated in the console. The recording facilities may include the power to record on a blank tape, housed in a cassette held in the cassette deck, any sound broadcast, disc record or taped record. These recording facilities may be used for lawful or unlawful purposes. A live broadcast may be heard and lawfully recorded and copied by means of the console by a home copier for his own use. Live recordings may be lawfully made on blank tape and may be copied with the permission of the recorder. Records with no subsisting copyright may be copied. But there is nothing to prevent the recording facilities of the console being used to copy on to a blank tape commercial records and commercial tapes in infringement of copyright. It is statistically certain that most but not all consoles are used for the purpose of home copying in breach of copyright.

There is competition between the manufacturers of consoles to improve the facilities offered by their models. About 1982 the company, AIWA, improved the recording facilities of their products by increasing the speed by which recorded tape could be copied on to a blank tape by a factor of four. Other manufacturers, including Amstrad, Sanyo, Philips and Sharp, increased the speed of tape-to-tape recording by a factor of two. B.P.I. persuaded AIWA to reduce its unique high speed to the speed offered by other manufacturers. Amstrad then provoked B.P.I. by hypocritical and disingenuous forms of advertising. An Amstrad model, as advertised, consisted of

"a remote control operated hi-fi system (supplied with speakers) comprising . . . two functional cassette machines with hi-speed dubbing facility, BSR belt-driven turntable, stereo amplifier . . . and tuner sections. This elegant 'flush-look' system is internally connected and fitted in its own rack and comes with a smoked glass door and lid for dust protection and castors for manoeuvrability."

Translated into plain speech, the model enabled the purchaser to receive broadcast transmissions, to play disc records, to play taped records and, on blank tape, to record broadcasts, disc records and taped records. The advertisement boasted that the model

"now features 'hi-speed dubbing' enabling you to make duplicate recordings from one cassette to another, record direct from any source and then make a copy and you can even make a copy of your favourite cassette."

A record on tape could be copied on to blank tape at twice the speed of play-back. An asterisk drew attention to the following footnote:

"The recording and playback of certain material may only be possible by permission. Please refer to the Copyright Act 1956, the Performers' Protection Acts 1958-1972."

The consoles which incorporated a twin cassette deck at twice play-back speed and which were advertised by Amstrad and sold by Dixons were models SM-104, T5-87 and TS-39. B.P.I. wrote to Amstrad asserting that

"the sale to the public of any machine offering a double-headed copying facility encourages, incites or otherwise facilitates the copying of pre-recorded and other cassettes containing copyright sound recordings and musical works."

B.P.I. also asserted that Amstrad's advertisement which had appeared on TV was an "encouragement to break the law." After some correspondence, Amstrad issued proceedings and by their statement of claim dated 2 November 1984 sought a declaration that by advertising and offering their models for sale they were not acting unlawfully. CBS Songs Ltd., suing on its own behalf and on behalf of the other members of The Mechanical Rights Society Ltd., and EMI Records Ltd. and Chrysalis Records Ltd., suing on their own behalf and on behalf of the other members of B.P.I., also issued a writ and by their amended statement of claim dated 16 November 1984 claimed against Amstrad and Dixons:

"An injunction to restrain the defendants . . . from parting with possession of models SM-104, TS-87 and TS-39 cassette reproducing machines (or any like machine) without taking such precautions as are necessary reasonably to ensure that copyrights in sound recordings or musical works owned or exclusively licensed to the plaintiffs or a member of the British Phonographic Industry Ltd. or the Mechanical Rights Society Ltd. are not infringed by the use of such machines."

Since the plaintiffs were suing in a representative capacity the appellants are referred to in this speech as "B.P.I."

B.P.I. also claimed an inquiry as to damages or an account of profits. In the course of interlocutory proceedings Whitford J. ordered Amstrad to produce all returned guarantee cards from customers who had purchased Amstrad's impugned models. Amstrad produced 25,000 guarantee cards. B.P.I. selected 1,600 for further investigation and ultimately called three representative witnesses. The first had not seen Amstrad's advertisement, the second knew before he saw the advertisement that home copying was unlawful, and the third had seen the advertisement but also knew that home copying was unlawful

On 17 June 1985 Whitford J. [1986] F.S.R. 159 dismissed Amstrad's action claiming a declaration that their actions were lawful. The judge held that Amstrad were authorising infringement, were joint tortfeasors, and might be guilty of negligence and of inciting, procuring, aiding or abetting infringement contrary to law or equity. The Court of Appeal (Lawton, Slade and Glidewell L.J.J.) [1986] F.S.R. 159, 201' disagreed, but on 29 October 1985 declined to make a declaration in favour of Amstrad on the grounds that Amstrad's advertisement might amount to an incitement to a home copier to commit a criminal offence under section 21(3) of the Act of 1956. On 8 May 1986, Whitford J. heard and dismissed a summons by Amstrad to strike out B.P.I.'s action for an injunction and damages on the grounds that the statement of claim did not disclose a cause of action. On 25 February 1987, the Court of Appeal (Fox and Nicholls L.J.J., Sir Denys Buckley dissenting) [1988] Ch. 61; [1987] R.P.C. 429, 447 struck out B.P.I.'s action. B.P.I. now appeal to this House and, in brief, contend that the decision of Whitford J. in both actions should be upheld. In the course of argument, Mr. Kentridge, counsel for B.P.I., acting on instructions from B.P.I., amplified the reliefs which B.P.I. seek. B.P.I. ask for an injunction which would prevent Amstrad from selling machines with a copying facility. That relief, if available against all manufacturers, would appear to be the only form of relief which would eliminate home copying. In the alternative, B.P.I. seek an injunction which would prevent Amstrad from selling machines with a high-speed copying facility. This might reduce home copying. If an injunction restraining manufacture and sale is not considered to be appropriate, B.P.I. seek an injunction which will restrain Amstrad from extolling the advantages of double-speed taping and will compel Amstrad to give due notice to a purchaser that copying of copyright

material is unlawful. It is doubtful whether this would effect any material reduction in home copying. My Lords, the only relevant rights vested in B.P.I. by the Act of 1956 are the exclusive rights to reproduce and to authorise others to reproduce B.P.I.'s records, and the only relevant remedy conferred on B.P.I. by the Act is the remedy of injunction to restrain an infringement by a person who reproduces or authorises another person to reproduce B.P.I.'s records. There is nothing express or implied in the Act which inhibits the invention, manufacture, sale or advertisement of electronic equipment capable of lawful or unlawful reproduction. B.P.I.'s initial submissions are that Amstrad "authorised" infringement and that Amstrad are joint infringers together with any person who uses an Amstrad machine for the purpose of making an infringing reproduction of a recording in which copyright subsists.

Section 1(1) of the Act of 1956 confers on the copyright owners in a record the "exclusive right ... to authorise other persons" to copy the record. B.P.I. submit that by selling a model which incorporates a double-speed twin-tape recorder Amstrad "authorise" the purchaser of the model to copy a record in which copyright subsists and therefore Amstrad infringe the exclusive right of the copyright owner. My Lords, twin-tape recorders, fast or slow, and single-tape recorders, in addition to their recording and playing functions, are capable of copying on to blank tape, directly or indirectly, records which are broadcast, records on discs and records on tape. Blank tapes are capable of being employed for recording or copying. Copying may be lawful or unlawful. Every tape recorder confers on the operator who acquires a blank tape the facility of copying; the double-speed twin-tape recorder provides a modern and efficient facility for continuous playing and continuous recording and for copying. No manufacturer and no machine confers on the purchaser authority to copy unlawfully. The purchaser or other operator of the recorder determines whether he shall copy and what he shall copy. By selling the recorder Amstrad may facilitate copying in breach of copyright but do not authorise it.

B.P.I.'s next submission is that Amstrad by their advertisement authorise the purchaser of an Amstrad model to copy records in which copyright subsists. Amstrad's advertisement drew attention to the advantages of their models and to the fact that the recorder incorporated in the model could be employed in the copying of modern records. But the advertisement did not authorise the unlawful copying of records; on the contrary, the footnote warned that some copying required permission and made it clear that Amstrad had no authority to grant that permission. If Amstrad had considered the interests of copyright owners, Amstrad could have declined to incorporate double-tape double-speed recorders in Amstrad's models or could have advertised the illegality of home copying. If Amstrad had deprived themselves of the advantages of offering improved recording facilities, other manufacturers would have reaped the benefit. The effect of double-tape double-speed recorders on the incidence of home copying is altogether speculative. If Amstrad had advertised the illegality of home copying the effect would have been minimal. Amstrad's advertisement was deplorable because Amstrad thereby flouted the rights of copyright owners. Amstrad's advertisement was cynical because Amstrad advertised the increased efficiency of a facility capable of being employed to break the law. But the operator of an Amstrad tape recording facility, like all other operators, can alone decide whether to record or play and what material is to be recorded. The Amstrad advertisement is open to severe criticism but no purchaser of an Amstrad model could reasonably deduce from the facilities incorporated in the model or from Amstrad's advertisement that Amstrad possessed or purported to possess the authority to grant any required permission for a record to be copied.

In *Monckton v. Pathe Freres Pathephone Ltd.* [1914] 1 K.B. 395, Buckley L.J. said, at p. 403: "The seller of a record authorises, I conceive, the use of the record, and such use will be a performance of the musical work." In that case a performance of the musical work by the use of the record was bound to be an infringing use and the record was sold for that purpose. In *Evans v. Hulton* (1924) 131 L.T. 534, Tomlin J. said, at p. 535 that:

"where a man sold the rights in relation to a manuscript to another with a view to its production, and it was in fact produced, both the English language and common sense required him to hold that this man had 'authorised' the printing and publication."

The object of the sale, namely publication, was bound to infringe. In *Falcon v. Famous Players Film Co.* [1926] 2 K.B. 474, the defendants hired to a cinema a film based on the plaintiff's play. It was held that the defendants infringed the plaintiff's exclusive right conferred by the Copyright Act 1911 to authorise a performance of the play. Here again, the hirer sold the use which was only capable of being an infringing use. Bankes L.J., at p. 491, following *Monckton v. Pathe Freres Pathephone Ltd.* and *Evans v. Hulton*, accepted that for the purpose of the Act of 1911 the expression "authorise" meant "sanction, approve, and countenance." Atkin L.J. said, at p. 499:

"to 'authorise' means to grant or purport to grant to a third person the right to do the act complained of, whether the intention is that the grantee shall do the act on his own account, or only on account of the grantor; . . .

In the present case, Amstrad did not sanction, approve or countenance an infringing use of their model and I respectfully agree with Atkin L.J. and with Lawton L.J. in the present case [1986] F.5.R. 159, 207 that in the context of the Copyright Act an authorisation means a grant or purported grant, which may be express or implied, of the right to do the act complained of. Amstrad conferred on the purchaser the power to copy but did not grant or purport to grant the right to copy.

In *Moorhouse v. University of New South Wales* [1976] R.P.C. 151 in the High Court of Australia where the facilities of a library included a photocopying machine, Gibbs J. said, at p. 159:

"a person who has under his control the means by which an infringement of copyright may be committed - such as a photocopying machine - and who makes it available to other persons, knowing, or having reason to suspect, that it is likely to be used for the purpose of committing an infringement, and omitting to take reasonable steps to limit its use to legitimate purposes, would authorise any infringement that resulted from its use."

Whatever may be said about this proposition, Amstrad have no control over the use of their models once they are sold. In this country the duties of some libraries are defined by the Copyright (Libraries) Regulations 1957 (S.I. 1957 No. 868) made under section 15 of the Act of 1956.

In *C.B.S. Inc. v. Ames Records & Tapes Ltd.* [1982] Ch. 91, Whitford J. held that a record library which lent out records and simultaneously offered blank tapes for sale at a discount did not authorise the infringement of copyright in the records. He said, at p. 106 :

"Any ordinary person would, I think, assume that an authorisation can only come from somebody having or purporting to have authority and that an act is not authorised by

somebody who merely enables or possibly assists or even encourages another to do that act, but does not purport to have any authority which he can grant to justify the doing of the act."

This precisely describes Amstrad.

In *RCA Corporation v. John Fairfax & Sons Ltd.* [1982] R.P.C. 91 in the High Court of Australia, Kearney J., at p. 100, approved a passage in Laddie, Prescott & Vitoria, *The Modern Law of Copyright* (1980), para. 12.9, p. 403, in these terms:

"a person may be said to authorise another to commit an infringement if the one has some form of control over the other at the time of infringement or, if he has no such control, is responsible for placing in the other's hands materials which by their nature are almost inevitably to be used for the purpose of infringement."

This proposition seems to me to be stated much too widely.

As Whitford J. pointed out in the *Ames* case, at p. 107:

"you can home tape from bought records, borrowed records, borrowed from friends or public libraries, from the playing of records over the radio, and indeed, at no expense, from records which can be obtained for trial periods on introductory offers from many record clubs who advertise in the papers, who are prepared to let you have up to three or four records for a limited period of trial, free of any charge whatsoever."

These borrowed records together with all recording machines and blank tapes could be said to be "materials which by their nature are almost inevitably to be used for the purpose of an infringement." But lenders and sellers do not authorise infringing use.

For these reasons, which are to be found also in the judgments of the Court of Appeal, at pp. 207, 210 and 217, I am satisfied that Amstrad did not authorise infringement.

B.P.I. next submitted that Amstrad were joint infringers; they became joint infringers if and as soon as a purchaser decided to copy a record in which copyright subsisted; Amstrad could become joint infringers not only with the immediate purchaser of an Amstrad model but also with anyone else who at any time in the future used the model to copy records. My Lords, Amstrad sell models which include facilities for receiving and recording broadcasts, disc records and taped records. All these facilities are lawful although the recording device is capable of being used for unlawful purposes. Once a model is sold Amstrad have no control over or interest in its use. In these circumstances the allegation that Amstrad is a joint infringer is untenable. In *Townsend v. Haworth* decided in 1875 but reported in 1879 in 48 L.J.Ch., at p. 770n, the defendant sold chemicals to be used by the purchaser in infringement of patent and agreed to indemnify the purchaser if the patent should prove to be valid. Mellish L.J. said, at p. 773:

"Selling materials for the purpose of infringing a patent to the man who is going to infringe it, even although the party who sells it knows that he is going to infringe it and indemnifies him, does not by itself make the person who so sells an infringer. He must be a party with the man who so infringes and actually infringe."

Mr. Kentridge on behalf of B.P.I. relied on the decision in *Innes v. Short and Beal* (1898) 15 R.P.C 449. In that case the defendant Short sold powdered zinc and gave instructions to a purchaser to enable the purchaser to infringe a process patent. Bigham J. said, at p. 452:

"There is no reason whatever why Mr. Short should not sell powdered zinc, and he will not be in the wrong, though he may know or expect the people who buy it from him are going to use it in such a way it will amount to an infringement of Mr. Innes' patent rights. But he must not ask the people to use it in that way, and he must not ask the people to use it in that way in order to induce them to buy his powdered zinc from him."

Assuming that decision to be correct, it does not assist B.P.I. because in the present case Amstrad did not ask anyone to use an Amstrad model in a way which would amount to an infringement.

In *Dunlop Pneumatic Tyre Co. Ltd. v. David Moseley & Sons Ltd.* (1903) 21 R.P.C. 53; (1904) 21 R.P.C. 274, the defendant sold tyre covers which were an essential feature of a combination patent for tyres and rims. The tyre covers were adapted for use in the manner described in the patent, but not necessarily solely for use in that manner. Swinfen Eady 3, said, at p. 60, that most of the "covers would probably ultimately be used in one or other of" the patented method but that

"those are not exhaustive of the purposes to which the covers may be put, and that they would be useful for other purposes in connection with other tyres . . . ."

Swinfen Eady X, upheld by the Court of Appeal, decided that the defendants did not infringe.

In *The Kursk* [1924] P. 140 where the question was whether the navigators of two ships had committed two separate torts or one tort in which they were both tortfeasors, Scrutton L.J., at p. 156, adopted the passage in *Clerk & Lindsell on Torts* 7th ed. (1921) p. 59, to the effect that:

"Persons are said to be joint tortfeasors when their respective shares in the commission of the tort are done in furtherance of a common design."

In the present case there is no common design between Amstrad and anybody else to infringe copyright.

In *Rotocrop International Ltd v. Gembourne Ltd.* [1982] F.S.R. 241, Graham J. held, perhaps surprisingly, that there was novelty in a patent for a compost bin with removable panels and, less surprisingly, that a rival manufacturer who made and sold infringing bins in parts with assembly instructions was a joint tortfeasor with his customers. In that case, as in *Innes v. Short and Beal*, the vendor and the purchaser had a common design to carry out an infringing act.

In *Belegging-en Exploitiemaatschappij Lavender B.V. v. Witten Industrial Diamonds Ltd.* [1979] F.S.R. 59, the defendants were alleged to have sold diamond grit for the sole purpose of making grinding tools in which it was to be embedded in a resin bond as part of a grinding material patented by the plaintiffs. Buckley L.J. held, at p. 66, that the defendants could not be infringers unless they

"sold the grits in circumstances which in some way made them participants in their subsequent embodiment in resin bonded grinding wheels, or that they induced someone so to embody them . . . ."

My Lords, joint infringers are two or more persons who act in concert with one another pursuant to a common design in the infringement. In the present case there was no common design, Amstrad sold a machine and the purchaser or the operator of the machine decided the purpose for which the machine should from time to time be used. The machine was capable of being used for lawful or unlawful purposes. All recording machines and many other machines are capable of being used for unlawful purposes but manufacturers and retailers are not joint infringers if purchasers choose to break the law. Since Amstrad did not make or authorise other persons to make a record embodying a recording in which copyright subsisted, Amstrad did not entrench upon the exclusive rights granted by the Act of 1956 to copyright owners and Amstrad were not in breach of the duties imposed by the Act.

B.P.I. submit, however, that if the Act of 1956 is defective to protect them, they are entitled to the protection of the common law. As a foundation for this submission B.P.I. seek to elevate the quality of the rights granted by the Act. They point out that in section 17(1) of the Act the owner of copyright in any action for infringement is entitled to all such relief as is available in any corresponding proceedings in respect of infringements of other proprietary rights; that copyright is an example of intellectual property; and that in *Macmillan & Co. Ltd. v. K. and J. Cooper* (1923) L.R. 51 Ind.App. 109, Lord Atkinson said, at p. 118, that an infringer of copyright disobeyed the injunction "thou shalt not steal." My Lords, these considerations cannot enhance the rights of owners of copyright or extend the ambit of infringement. The rights of B.P.I. are derived from statute and not from the Ten Commandments. Those rights are defined by Parliament, not by the clergy or the judiciary. The rights of B.P.I. conferred by the Act of 1956 are in no way superior or inferior to any other legal rights; if B.P.I. prove that upon the true construction of the Act Amstrad and Dixons have infringed the rights conferred on B.P.I. by the Act, the court will grant appropriate and effective reliefs and remedies. But the court will not invent additional rights or impose fresh burdens.

On behalf of B.P.I. it was submitted that even if Amstrad did not authorise infringement and were not themselves infringers, nevertheless the activities of Amstrad in the sale and advertisement of Amstrad's models constitute a common law tort. The suggested torts were three in number, namely, incitement to commit a tort, incitement to commit a criminal offence and negligence.

B.P.I. base their submission on incitement on a passage in *Lumley v. Gye* (1853) 2 E. & B. 216, where Erle J. said, at p. 232:

"It is clear that the procurement of the violation of a right is a cause of action in all instances where the violation is an actionable wrong, as in violation of a right to property, whether real or personal, or to personal security: he who procures the wrong is a joint wrongdoer, and may be sued, either alone or jointly with the agent, in the appropriate action for the wrong complained of."

In *Lumley v. Gye* an opera singer and the defendant theatre owner were joint wrongdoers. They had a common design that the opera singer should break her contract with the plaintiff theatre owner, refuse to sing in the plaintiff's theatre and instead sing in the defendant's theatre. The plaintiff's cause of action against the opera singer lay in contract, and the

plaintiff's cause of action against the defendant lay in tort. But both the opera singer and the defendant were joint wrongdoers participating in an unlawful common design.

B.P.I. referred to *Belegging-en Exploitatiemaatschappij Lavender B.V. v. Witten Industrial Diamonds Ltd.*, where Buckley L.J. said at p. 66:

"The plaintiffs do not only assert infringement by the defendants. They also say that the defendants have procured, counselled and/or aided other persons to infringe. This may perhaps amount to an allegation of indirect infringement by the defendants themselves, but I am inclined to think that it is a claim in respect of a distinct, suggested tort of procuring infringement by others (based upon the principle enunciated by Erle J. in *Lumley v. Gye*, 2 E. & B. 216, 231)

My Lords, I accept that a defendant who procures a breach of copyright is liable jointly and severally with the infringer for the damages suffered by the plaintiff as a result of the infringement. The defendant is a joint infringer; he intends and procures and shares a common design that infringement shall take place. A defendant may procure an infringement by inducement, incitement or persuasion. But in the present case Amstrad do not procure infringement by offering for sale a machine which may be used for lawful or unlawful copying and they do not procure infringement by advertising the attractions of their machine to any purchaser who may decide to copy unlawfully. Amstrad are not concerned to procure and cannot procure unlawful copying. The purchaser will not make unlawful copies because he has been induced or incited or persuaded to do so by Amstrad. The purchaser will make unlawful copies for his own use because he chooses to do so. Amstrad's advertisements may persuade the purchaser to buy an Amstrad machine but will not influence the purchaser's later decision to infringe copyright. Buckley L.J. observed in *Belegging-en Exploitatiemaatschappij Lavender B.V. v. Witten Industrial Diamonds Ltd.*, at p.65, that "facilitating the doing of an act is obviously different from procuring the doing of an act." Sales and advertisements to the public generally of a machine which may be used for lawful or unlawful purposes, including infringement of copyright, cannot be said to "procure" all breaches of copyright thereafter by members of the public who use the machine. Generally speaking, inducement, incitement or persuasion to infringe must be by a defendant to an individual infringer and must indentifiably procure a particular infringement in order to make the defendant liable as a joint infringer.

The next tort suggested by B.P.I. was incitement to commit a criminal offence. In *Invicta Plastics Ltd. v. Clare* [1976] R.T.R. 251, the defendant company manufactured, advertised and sold a device to give warning of police radar speed traps. The device necessarily involved the unlawful use of apparatus for wireless telegraphy without a licence which would never have been granted. The defendants were convicted of incitement. In the present case it is submitted that Amstrad by the sale and advertisement of their models committed the tort of inciting the purchasers to commit a criminal offence. By section 21(3) of the Act of 1956 it is an offence for any person to have in his possession a "plate" knowing that it is to be used for making infringing copies. By section 18(3) "plate" includes any stereotype, stone, block, mould, matrix, transfer negative or other appliance. It is said that when a purchaser of an Amstrad model has in his possession a record in which copyright subsists that record becomes a "plate" and the purchaser commits an offence under section 21(3) as soon as he forms the intention of copying that record.

There are two answers to this submission. First, as a matter of construction a record is not a plate but the product of the master recording which is a plate and from which the record is derived. Secondly, it is a mistake to compare crime and tort. If three persons are incited by a fourth to break into a house and cause damage each will be guilty of a crime and will receive separate punishment. The inciter will be guilty of the criminal offence of inciting others to commit crime. The other three will be guilty of the crime of breaking in. If the damage caused amounts to £5,000 then in a civil action the three who caused the damage will be jointly and severally liable for £5,000 and no more. The inciter will also be jointly and severally liable for the damage if he procures the commission of the tort and is a joint tortfeasor.

Finally B.P.I. submit that Amstrad committed the tort of negligence, that Amstrad owes to all owners of copyright a duty to take care not to cause or permit purchasers to infringe copyright or alternatively that Amstrad owes a duty to take care not to facilitate by the sale of their models or by their advertisement the infringement of copyright. My Lords, it is always easy to draft a proposition which is tailor-made to produce the desired result. Since *Anns v. Merton London Borough Council* [1978] A.C. 728 put the floodgates on the jar, a fashionable plaintiff alleges negligence. The pleading assumes that we are all neighbours now, Pharisees and Samaritans alike, that foreseeability is a reflection of hindsight and that for every mischance in an accident-prone world someone solvent must be liable in damages. In *Governors of the Peabody Donation Fund v. Sir Lindsay Parkinson & Co. Ltd.* [1985] A.C. 210 the plaintiffs were the authors of their own misfortune but sought to make the local authority liable for the consequences. In *Yuen Kun-Yeu v. Attorney-General of Hong Kong* [1987] 3 W.L.R. 776 the plaintiff chose to invest in a deposit-taking company which went into liquidation; the plaintiff sought to recover his deposit from the commissioner charged with the public duty of registering deposit-taking companies. In *Rowling v. Takaro Properties Ltd.* [1988] 1 All E.R. 163 a claim for damages in negligence was made against a minister of the Crown for declining in good faith to exercise in favour of the plaintiff a statutory discretion vested in the minister in the public interest. In *Hill v. Chief Constable of West Yorkshire* [1987] 2 W.L.R. 1126 damages against a police force were sought on behalf of the victim of a criminal. In the present proceedings damages and an injunction for negligence are sought against Amstrad for a breach of statutory duty which Amstrad did not commit and in which Amstrad did not participate. The rights of B.P.I are to be found in the Act of 1956 and nowhere else. Under and by virtue of that Act Amstrad owed a duty not to infringe copyright and not to authorise an infringement of copyright. They did not owe a duty to prevent or discourage or warn against infringement.

B.P.I. complain and the Court of Appeal agreed that the law is in an unsatisfactory state, as indeed it is. The present position is infuriating from the point of view of B.P.I. because they conceive that if the use of 50 million blank tapes could be prevented, there would be a sale of roughly 30 million more records. This may not be so. If the home copier were denied recording machines or blank tapes he would not necessarily wish to buy or might not be able to afford to buy a popular record which in the space of a month might only remain a permanent reminder of a transient attraction. It is possible that if the public could not obtain recording machines or blank tapes enthusiasm for records would decline and be replaced by other enthusiasms. For present purposes however, it must be assumed that the profits of the recording industry would be greatly increased if the home copying of records involving breach of copyright could be prevented or if home copiers were required to pay, directly or indirectly, a licence fee for copying.

From the point of view of society the present position is lamentable. Millions of breaches of the law must be committed by home copiers every year. Some home copiers may break the law in ignorance, despite extensive publicity and warning notices on records, tapes and films. Some home copiers may break the law because they estimate that the chances of detection are nonexistent. Some home copiers may consider that the entertainment and recording industry already exhibit all the characteristics of undesirable monopoly - lavish expenses, extravagant earnings and exorbitant profits - and that the blank tape is the only restraint on further increases in the prices of records. Whatever the reason for home copying, the beat of Sergeant Pepper and the soaring sounds of the Miserere from unlawful copies are more powerful than law-abiding instincts or twinges of conscience. A law which is treated with such contempt should be amended or repealed

In these proceedings the court is being asked to forbid the sale to the public of all or some selected types of tape recorder or to ensure that advertisements for tape recorders shall be censored by the court on behalf of copyright owners. The court has no power to make such orders and judges are not qualified to decide whether a restraint should be placed on the manufacture of electronic equipment or on the contents of advertising. No one is to blame for the present situation. Copyright law could not envisage and now cannot cope with mass-production techniques and inventions which create a vast market for the works of a copyright owner but also provide opportunities for his rights to be infringed. Parliament could place limitations on the manufacture or sale of certain types of tape recorder and could prescribe notices and warnings to be included in advertisements. Parliament might take the view that any such restraints and prescriptions would constitute an unwarrantable interference with the development of the electronic industry and be ineffective.

Parliament could legalise home copying just as the copying of sound broadcasts was expressly authorised for "private purposes." The Whitford Committee appointed to consider the Law on Copyright and Designs reported in March 1977 (Cmnd. 6732) and made a number of important comments and recommendations. Some of those comments and recommendations illustrate the grievances of the recording industry, the impossibility of coping with home copying and the uselessness and unfairness of singling out double-speed twin-tape recorders or any other type of recorder for condemnation. The Whitford Report included the following paragraphs:

"292. It is generally accepted that the use of tape recording equipment, particularly in the home, is resulting in the wide-spread infringement of rights in musical and other works, as well as in sound recordings .... the practical problems of policing acts of infringement which take place in private render it impossible for copyright owners to exercise their rights.

"293. . . . Whereas in the 1940s and early 1950s tape recording was little used outside professional circles, advances in technology have made the tape recorder almost standard equipment in the home and in schools. . . .

"294. [A survey in 1975] showed that 45 per cent, of homes have access to a recording facility and that 20 per cent. of persons over 16 have used recording equipment at some time or other to record from commercial records or tapes. [A sample survey in 1972] showed that . . . two-thirds of the persons recording took recordings off radio at least occasionally, and over half copied borrowed recordings."

"301. The German Copyright Act of 1965 imposed a levy on a wide range of recording equipment in return for a blanket licence to make recording in single copies for personal use."

"308. The possibility of imposing a levy on blank tape, either as an alternative to or as an addition to a levy on equipment, was considered by a number of bodies and almost universally rejected as being unsatisfactory. Although in theory such a levy should reflect, more accurately, actual usage for recording, it would involve a much larger operation and, in view of the smaller values of tapes compared with equipment and the fact that tape can be re-used, might be less productive of revenue."

"322. It is our view that, for private recording, the only satisfactory solution is the introduction of a levy on the sale price of recording equipment. A major problem in the case of private recording, which no other system seems able to overcome, is that of policing; we feel the levy approach will effectively meet this difficulty. . . ."

Since 1977 when the Whitford Committee reported, a levy on blank tapes has met with more favourable consideration. In face of the difficulties inherent in the problem generated by the mass-production of electronic equipment capable of infringing copyright Parliament has not yet determined on any course of action. These proceedings will have served a useful purpose if they remind Parliament of the grievances of the recording companies and other owners of copyright and if at the same time they draw the attention of Parliament to the fact that home copying cannot be prevented, is widely practised and brings the law into disrepute. As the law now stands I would dismiss the appeal of B.P.I.

**LORD GRIFFITHS**

My Lords,

I have had the opportunity of considering in draft the speech to be delivered by my noble and learned friend Lord Templeman. I agree with it, and for the reasons stated by him would dismiss the appeal

**LORD OLIVER OF AYLWERTON**

My Lords,

I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Templeman. I agree with it and would dismiss the appeal for the reasons which he has given.

**LORD JAUNCEY OF TULLICHETTLE**

My Lords,

I have had the opportunity of considering in draft the speech to be delivered by my noble and learned friend Lord Templeman. I agree with it, and for the reasons stated by him would dismiss the appeal