

## Authorization area

### Instant case

The notion of authorization extends beyond the authority given to an agent. The word “authorize” should be “understood in its ordinary dictionary sense of ‘sanction, approve, and countenance.’”<sup>1</sup>

“[A] person who has under his control the means by which an infringement of copyright may be committed . . . 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 authorize any infringement that resulted from its use.”<sup>2</sup>

In the instant case, the infringer was not an employee of the accused; the infringer was an independent contractor to the accused; the accused did not sell or hire the infringer the means of infringing; the accused had the power to prevent the infringement; the accused did not take reasonable steps to avoid the infringement; the accused knew, or had reason to anticipate or suspect, that the infringing act was to be, or was likely to be, done; and the specific infringement was not causally related to an incitement to infringe on the part of the accused.

In my opinion—following *Mellor v. Australian Broadcasting Commission*—the accused authorized the infringement.

In *Mellor v. Australian Broadcasting Commission*,<sup>3</sup> a 1940 decision of the Judicial Committee of the Privy Council, Mellor and others held the sole right to perform in public in Australia musical works arranged for performance by brass and military bands. They published and distributed advertising pamphlets which included a statement that all of their sheet music was “‘Free for Public Performance’ anywhere . . . We have paid for the performing rights of every piece we issue.”<sup>4</sup> The ABC engaged bands to play some of this music, and broadcast the bands’ performances on radio.

The Privy Council held that the ABC had authorized the bands to perform the musical works within the meaning of s. 1(2) of the Copyright Act 1911 (UK) which was in force in Australia by virtue of the *Copyright Act 1912* (Cth). However, the ABC had not infringed the plaintiffs’ sole right to authorize public performance because the statements made in the pamphlets amounted to consent.

There are several significant similarities between the instant case and *Mellor v. ABC*: the infringer was not an employee of the accused; the infringer was an independent contractor to the accused; the accused did not sell or hire the infringer the means of infringing; the accused had the power to prevent the infringement; the accused did not take reasonable steps to avoid the infringement; and the accused knew, or had reason to anticipate or suspect, that the infringing act was to be, or was likely to be, done.

However, the instant case is not on all fours with *Mellor v. ABC*. In that case the specific infringement was causally related to an incitement to infringe on the part of the accused.

Nevertheless, I believe that *Mellor v. ABC* should be followed.

If *RCA Corporation v. John Fairfax and Sons Ltd* is followed then the accused did not authorize the infringement.

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<sup>1</sup>*Falcon v. Famous Players Film Co.* [1926] 2 KB 474 at 491 per Bankes LJ.

<sup>2</sup>*University of New South Wales v. Moorhouse* (1975) 133 CLR 1 at 13 per Gibbs J.

<sup>3</sup>[1940] AC 491.

<sup>4</sup>*ibid.* at 498–9.

In *RCA Corporation v. John Fairfax and Sons Ltd*,<sup>5</sup> a 1981 decision of the Supreme Court of New South Wales, the Fairfax newspaper the *Sun-Herald* carried an article which pointed out that, using cassette tapes and good quality taping equipment, the same album can be taped by many people. It also discussed how the advent of FM radio had made it easy for people to tape new album and single releases without buying the discs: “Why spend nearly \$10 on the new David Bowie album when you can tape it from 2JJJ?”<sup>6</sup>

Kearney J held that “authorization involves some element of causation—and hence the necessity for some relationship creating a link or connection however tenuous between the authorizer and the infringer.”<sup>7</sup> There was no such link, so Fairfax had not authorized any infringement within the meaning of s. 13(2) of the *Copyright Act 1968* (Cth).

There are several similarities between the instant case and *RCA v. Fairfax*: the infringer was not an employee of the accused; the accused did not sell or hire the infringer the means of infringing; the accused did not take reasonable steps to avoid the infringement; the accused knew, or had reason to anticipate or suspect, that the infringing act was to be, or was likely to be, done; and the specific infringement was not causally related to an incitement to infringe on the part of the accused.

However, there are two very significant differences between the instant case and *RCA v. Fairfax*. In that case the infringer was not an independent contractor to the accused; and the accused did not have the power to prevent the infringement.

Despite the fact that *RCA v. Fairfax* is a decision of the Supreme Court of New South Wales (and better authority than a case decided by the Judicial Committee of the Privy Council—like *Mellor v. ABC*), there is nothing in *RCA v. Fairfax* to warrant any change in my conclusion.

If *Australasian Performing Right Association Ltd v. Miles* is followed then the accused is liable (directly or vicariously) for the infringement.

In *Australasian Performing Right Association Ltd v. Miles*,<sup>8</sup> a 1961 decision of the Supreme Court of New South Wales, the Dee Why RSL Club engaged a band to play at a dance held at the club. During the dance the band played *I’ve Got a Lovely Bunch of Coconuts*, the copyright in which was owned by the Australasian Performing Right Association.

Jacobs J held that the members of the band were servants of the club, because “the club through its officers was exercising a control over the work performed in such a way as to show that there was an authority to command the orchestra in its performance.”<sup>9</sup> So the members of the club, through the band, performed the musical work and infringed the copyright under s. 2(1) of the Copyright Act 1911 (UK) which was in force in Australia by virtue of the *Copyright Act 1912* (Cth).

There are several similarities between the instant case and *APRA v. Miles*: the accused did not sell or hire the infringer the means of infringing; the accused had the power to prevent the infringement; the accused did not take reasonable steps to avoid the infringement; and the accused knew, or had reason to anticipate or suspect, that the infringing act was to be, or was likely to be, done.

However, there are several significant differences between the instant case and *APRA v. Miles*. In that case the infringer was an employee of the accused; the infringer was not an independent contractor to the accused; and the specific infringement was causally related to an incitement to infringe on the part of the accused.

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<sup>5</sup>[1981] 1 NSWLR 251.

<sup>6</sup>ibid. at 252.

<sup>7</sup>ibid. at 259.

<sup>8</sup>[1962] NSWLR 405.

<sup>9</sup>ibid. at 407.

Despite the fact that *APRA v. Miles* is a decision of the Supreme Court of New South Wales (and better authority than a case decided by the Judicial Committee of the Privy Council—like *Mellor v. ABC*), there is nothing in *APRA v. Miles* to warrant any change in my conclusion.

## Hypothetical 1

Consider the instant case changed so that the following is true: the specific infringement was causally related to an incitement to infringe on the part of the accused.

If that were so then I would be more strongly of the opinion that—following *Mellor v. Australian Broadcasting Commission*—the accused authorized the infringement.

Details of *Mellor v. ABC* are summarized above. The hypothetical case is on all fours with *Mellor v. ABC*.

If *RCA Corporation v. John Fairfax and Sons Ltd* is followed then the accused did not authorize the infringement.

Details of *RCA v. Fairfax* are summarized above. There are several similarities between the hypothetical case and *RCA v. Fairfax*: the infringer was not an employee of the accused; the accused did not sell or hire the infringer the means of infringing; the accused did not take reasonable steps to avoid the infringement; and the accused knew, or had reason to anticipate or suspect, that the infringing act was to be, or was likely to be, done.

However, there are several significant differences between the hypothetical case and *RCA v. Fairfax*. In that case the infringer was not an independent contractor to the accused; the accused did not have the power to prevent the infringement; and the specific infringement was not causally related to an incitement to infringe on the part of the accused.

Despite the fact that *RCA v. Fairfax* is a decision of the Supreme Court of New South Wales (and better authority than a case decided by the Judicial Committee of the Privy Council—like *Mellor v. ABC*), there is nothing in *RCA v. Fairfax* to warrant any change in my conclusion.

If *Australasian Performing Right Association Ltd v. Miles* is followed then the accused is liable (directly or vicariously) for the infringement.

Details of *APRA v. Miles* are summarized above. There are several similarities between the hypothetical case and *APRA v. Miles*: the accused did not sell or hire the infringer the means of infringing; the accused had the power to prevent the infringement; the accused did not take reasonable steps to avoid the infringement; the accused knew, or had reason to anticipate or suspect, that the infringing act was to be, or was likely to be, done; and the specific infringement was causally related to an incitement to infringe on the part of the accused.

However, there are two very significant differences between the hypothetical case and *APRA v. Miles*. In that case the infringer was an employee of the accused; and the infringer was not an independent contractor to the accused.

Despite the fact that *APRA v. Miles* is a decision of the Supreme Court of New South Wales (and better authority than a case decided by the Judicial Committee of the Privy Council—like *Mellor v. ABC*), there is nothing in *APRA v. Miles* to warrant any change in my conclusion.

## Hypothetical 2

Consider the instant case changed so that the following is true: the accused did not know, and had no reason to anticipate or suspect, that the infringing act was to be, or was likely to be, done.

If that were so then my opinion would be that—following *Performing Right Society Ltd v. Cyril Theatrical Syndicate Ltd*—the accused did not authorize the infringement.

In *Performing Right Society Ltd v. Cyril Theatrical Syndicate Ltd*,<sup>10</sup> a 1923 decision of the English Court of Appeal, the syndicate was the lessee of a theatre. The managing-director of the syndicate produced a play at that theatre, and engaged a band to perform at the theatre under the direction of a bandmaster. In the absence of the managing-director, and without his knowledge, the band performed works the copyright in which was owned by the Performing Right Society.

Bankes, Scrutton and Atkin LJJ held that the managing-director had not authorized the infringing performances, within the meaning of s. 1(2) of the Copyright Act 1911 (UK), because the infringement occurred without his knowledge and he had no reason to anticipate or suspect that the band was likely to give performances which would breach copyright.

The hypothetical case is on all fours with *PRS v. Cyril*.

If *Mellor v. Australian Broadcasting Commission* is followed then the accused authorized the infringement.

Details of *Mellor v. ABC* are summarized above. There are several similarities between the hypothetical case and *Mellor v. ABC*: the infringer was not an employee of the accused; the infringer was an independent contractor to the accused; the accused did not sell or hire the infringer the means of infringing; the accused had the power to prevent the infringement; and the accused did not take reasonable steps to avoid the infringement.

However, there are two very significant differences between the hypothetical case and *Mellor v. ABC*. In that case the accused knew, or had reason to anticipate or suspect, that the infringing act was to be, or was likely to be, done; and the specific infringement was causally related to an incitement to infringe on the part of the accused.

Despite the fact that *Mellor v. ABC* is a decision of the Judicial Committee of the Privy Council (and better authority than a case decided by the English Court of Appeal—like *PRS v. Cyril*), there is nothing in *Mellor v. ABC* to warrant any change in my conclusion.

If *Australasian Performing Right Association Ltd v. Miles* is followed then the accused is liable (directly or vicariously) for the infringement.

Details of *APRA v. Miles* are summarized above. There are several similarities between the hypothetical case and *APRA v. Miles*: the accused did not sell or hire the infringer the means of infringing; the accused had the power to prevent the infringement; and the accused did not take reasonable steps to avoid the infringement.

However, there are several significant differences between the hypothetical case and *APRA v. Miles*. In that case the infringer was an employee of the accused; the infringer was not an independent contractor to the accused; the accused knew, or had reason to anticipate or suspect, that the infringing act was to be, or was likely to be, done; and the specific infringement was causally related to an incitement to infringe on the part of the accused.

Despite the fact that *APRA v. Miles* is a decision of the Supreme Court of New South Wales (and better authority than a case decided by the English Court of Appeal—like *PRS v. Cyril*), there is nothing in *APRA v. Miles* to warrant any change in my conclusion.

### Hypothetical 3

Consider the instant case changed so that the following is true: the infringer was an employee of the accused; and the infringer was not an independent contractor to the accused.

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<sup>10</sup>[1924] 1 KB 1.

If that were so then my opinion would be that—following *Australasian Performing Right Association Ltd v. Miles*—the accused is liable (directly or vicariously) for the infringement.

Details of *APRA v. Miles* are summarized above. There are several significant similarities between the hypothetical case and *APRA v. Miles*: the infringer was an employee of the accused; the infringer was not an independent contractor to the accused; the accused did not sell or hire the infringer the means of infringing; the accused had the power to prevent the infringement; the accused did not take reasonable steps to avoid the infringement; and the accused knew, or had reason to anticipate or suspect, that the infringing act was to be, or was likely to be, done.

However, the hypothetical case is not on all fours with *APRA v. Miles*. In that case the specific infringement was causally related to an incitement to infringe on the part of the accused.

Nevertheless, I believe that *APRA v. Miles* should be followed.

If *University of New South Wales v. Moorhouse* is followed then the accused authorized the infringement.

In *University of New South Wales v. Moorhouse*,<sup>11</sup> a 1975 decision of three judges of the High Court of Australia, a graduate of the University used a photocopy machine in the University library to make two copies of a story from a library copy of a book of short stories.

McTiernan ACJ, Gibbs and Jacobs JJ held that the University had authorized the infringement within the meaning of s. 36(1) of the *Copyright Act 1968* (Cth); it had the power to prevent infringements, but had not taken reasonable steps to prevent them.<sup>12</sup> Gibbs J's statement about what constitutes authorization of an infringement is quoted above.

There are several similarities between the hypothetical case and *UNSW v. Moorhouse*: the infringer was not an independent contractor to the accused; the accused had the power to prevent the infringement; the accused did not take reasonable steps to avoid the infringement; the accused knew, or had reason to anticipate or suspect, that the infringing act was to be, or was likely to be, done; and the specific infringement was not causally related to an incitement to infringe on the part of the accused.

However, there are two very significant differences between the hypothetical case and *UNSW v. Moorhouse*. In that case the infringer was not an employee of the accused; and the accused sold or hired the infringer the means of infringing.

Despite the fact that *UNSW v. Moorhouse* is a decision of three judges of the High Court of Australia (and better authority than a case decided by the Supreme Court of New South Wales—like *APRA v. Miles*), there is nothing in *UNSW v. Moorhouse* to warrant any change in my conclusion.

If *RCA Corporation v. John Fairfax and Sons Ltd* is followed then the accused did not authorize the infringement.

Details of *RCA v. Fairfax* are summarized above. There are several similarities between the hypothetical case and *RCA v. Fairfax*: the infringer was not an independent contractor to the accused; the accused did not sell or hire the infringer the means of infringing; the accused did not take reasonable steps to avoid the infringement; the accused knew, or had reason to anticipate or suspect, that the infringing act was to be, or was likely to be, done; and the specific infringement was not causally related to an incitement to infringe on the part of the accused.

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<sup>11</sup>(1975) 133 CLR 1.

<sup>12</sup>The *Copyright Act* was amended in 1980 to ameliorate the effect of *UNSW v. Moorhouse* as far as photocopying in educational institutions is concerned.

However, there are two very significant differences between the hypothetical case and *RCA v. Fairfax*. In that case the infringer was not an employee of the accused; and the accused did not have the power to prevent the infringement.

Despite the fact that *RCA v. Fairfax* and *APRA v. Miles* are both decisions of the Supreme Court of New South Wales, there is nothing in *RCA v. Fairfax* to warrant any change in my conclusion.