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DISCOTHEQUES AND THE COPYRIGHT EXEMPTION FOR CHARITIES AND NEAR CHARITIES

Hubert Picarda QC[1]

Introduction

One of the charms of the law of charities arises from the fact that, as Lord Wilberforce once observed, it touches life at many points. It also touches the law at many points. Charity law, for example, has well-known overlaps with employment law, lottery law and landlord and tenant law. However, its interface with copyright law has, somewhat surprisingly, escaped the attention of all the charity law textbook writers.

Section 67 of the Copyright, Designs and Patents Act 1988 ("CDPA 1988") is well known to those in the sound recording world of compact discs, tapes and gramophone records. But to most charity lawyers it is *terra incognita*. This article is an attempt to remedy that ignorance.

The section confers on charities and certain other bodies which it is convenient, in shorthand terms, to call "near charities" a limited exemption from infringement of copyright in sound recordings. The exemption applies where the sound recording is played as part of the activities of, or for the benefit of, the organisation in question so long as two conditions are satisfied. One of these conditions relates to the constitution of the organisation itself, and the other to the destination of entry fees to the locale where the sound recording is played.

The organisation concerned must, in the first place, not be established or conducted for profit and must have as its main objects either charitable objects or

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[1] Hubert Picarda QC, BCL, MA (Oxon), 3 New Square, Lincoln's Inn, London WC2A 3RS. Tel: (0171) 405 5577 Fax: (0171) 404 3052. Managing Editor of this *Review*.

objects which are "otherwise concerned with the advancement of religion, education or social welfare".

Secondly, if the exemption is to apply, the proceeds of any charge for admission to the place where the recording is to be heard must be applied solely for the purposes of the organisation.

Relevance of the Exemption

The exemption has particular relevance when a charity as part of its activities runs a discotheque evening or a regular discotheque operation as a method of raising funds for the charity. Many, but by no means all, student unions are in fact charities[2] and run highly successful discotheques or discotheque evenings, the large profits generated by admission charges being ploughed back into the unions' general funds. Most charitable day centres, on the other hand, which play sound recordings as part of their therapeutic activities raise no special charge in respect of the music played and generate no "profit" whatever.

The main theme of this article is that this exemption, whose history is narrated in some detail, ought to be repealed, or, at the very least, radically amended. The preferable solution would, in the present writer's view, be wholesale repeal. But, in case that aim should prove to be unachievable, alternative proposals are put forward at the end of this article which represent what is considered to be the bare minimum required by way of amendment.

In order to appreciate the unsatisfactory features of section 67 it is necessary to look at its derivation as well as its application.

Historical Origin: Section 12 of the Copyright Act 1956

The section first appeared in its copyright manifestation in section 12(7) of the Copyright Act 1956 which is, at any rate in some of its terms, very similar to the terminology of the present section 67, albeit that there are some differences to be noted.

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2 *London Hospital Medical College v IRC* [1976] 1 WLR 613; *A-G v Ross* [1986] 1 WLR 252. See also the Attorney-General's guidelines on expenditure by students' unions, reproduced in [1983] Ch Com Rep 34-36; and see Jean Warburton 'Student Unions, Charities and Politics' (1986) 1 Trust Law & Practice 47 et seq.

Section 12(7) of the 1956 Act was designed to exempt two categories of case from the statutory provisions about infringement of copyright in sound recordings where the relevant act of infringement was the act of "causing the recording to be heard in public" which was restricted by section 12(5)(b) of the 1956 Act. The two categories had, as will be explained below, been the subject matter of discussion and recommendations in the Report of the Copyright Committee published in 1952.

Putting it summarily, the two categories of case singled out for this preferential treatment (one of which was later jettisoned) were (1) recordings performed without any special charge as part of the amenities of residential accommodation[3] and (2) recordings performed as part of the activities of, or for the benefit of, charitable and some near charitable organisations.[4] It is this latter category which has survived in the modern section 67. Piped music or "musak" in hotels and inns and blaring loudspeaker music in holiday camps are no longer outside the restrictions, for reasons which will be touched on in due course.

Section 12(7) of the 1956 Act was in the following terms:

> "(7) Where a sound recording is caused to be heard in public -
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> (a) at any premises where persons reside or sleep, as part of the amenities provided exclusively or mainly for residents or inmates therein, or,
>
> (b) as part of the activities of, or for the benefit of a club, society or other organisation which is not established or conducted for profit and whose objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare
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> the act of causing it to be so heard shall not constitute an infringement of the copyright in the recording.
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> Provided that this subsection shall not apply:
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> (i) in the case of such premises as are mentioned in paragraph (a) of this subsection, if a special charge is made for admission to the part of the premises where the recording is to be heard; or

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3 See Copyright Act 1956 s.12(7)(a) and proviso (i).

4 Ibid, s.12(7)(b) and proviso (ii).

(ii) in the case of such an organisation as is mentioned in paragraph (b) of this subsection, if a charge is made for admission to the place where the recording is to be heard and any of the proceeds of the charge are applied otherwise than for the purposes of the organisation."

The wording which is italicised in the extract just cited is repeated in the wording of section 67 of the 1988 Act, as will be seen in due course. And the sense of proviso (ii) is repeated, in slightly different language, as a condition in section 67.

Gregory Report

The 1956 copyright legislation was the consequence of the recommendations of the Report of the Committee on the Law of Copyright published in 1952,[5] often referred to as "the Gregory Report" after its Chairman, Sir Henry Gregory KCMG CB, the Principal Finance Officer and Second Secretary at the Board of Trade. That Committee had been set up in 1951 by the then President of the Board of Trade, the Rt Hon Harold Wilson, *inter alia* to make recommendations on what, if any, reforms should be made in copyright law.

The origin of the two exceptions, though not of the form in which they appeared, is to be found in that Report. The claims of the two categories to exemption were in fact discussed in the Gregory Report in reverse order; and it is perhaps not without interest that while recommendations were made for the relief of "Social Service" societies, no recommendations were made in respect of other mooted candidates for relief, such as hotels, public houses and other trading establishments.

The comments made by the Gregory Report on "Other possible candidates for relief" come just after the discussion of the "Relief for Social Service" societies. Paragraph 196 of the Gregory Report says this:

> "Outside of those of the Societies of the kind we have in mind, there are many activities carried on commercially, but in respect of which it is arguable whether or not the ancillary copyright should apply. Thus it is at least arguable that a wireless set or a gramophone played in the lounge of an entirely residential hotel ought not to be regarded as a performance

5 Cmd 8662 (1952).

> in public.[6] It has been suggested that a similar performance given in the bar of a public house, a cafe, or other trading establishment to which admission is not secured by payment, ought not to attract a fee. The provision of "music while you work" is another example. We have varying degrees of sympathy for a number of these propositions, but generally speaking we feel that the wireless or gramophone is either an ancillary attraction to a business run for profit or is an added amenity for which, directly or indirectly, those enjoying or providing it may not unreasonably be expected to pay. In such cases we doubt whether it would be possible to fix and maintain any dividing line between what should be exempted and what might attract a fee. We therefore make no recommendation in this field."

Given that fairly plain non-recommendation, it is surprising that a "residential" exemption was enacted and perhaps not surprising that, as the "holiday camp" case showed, the exemption managed to provoke both criticism, of which more will be said, and litigation in the shape of *Phonographic Performance Limited v Pontin's Ltd.*[7]

The policy behind section 12(7)(b) appears from the passage in the Gregory Report immediately preceding the passage just cited. In paragraph 194 of the Report is the following passage:

> " ...we are strongly of the opinion that most, if not all, of the activities of the branches of the kind of organisation represented by the National Council of Social Service, admission to which is restricted to members, ought not to attract a fee for the ancillary rights we are now considering, at least in respect of records and sound broadcasts. The Societies are not conducted for profit, but are bodies with objects of a religious, social or educational kind; their aim is not to provide entertainment but to contribute to the well-being of society, and the members are joined by this common bond. Apart from arranging meetings, some of the Societies have established residential hostels particularly the YWCA and YMCA - and it seems to us indefensible that in such places the residents should have to be treated as though they were "in public"."

It is to be observed that the particular method which the Committee recommended for achieving this objective was exemption by the certificate of a rule-making

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6 Such a performance is, strictly, a public performance and would be licensable, but for the exemption now contained in section 72 of CPDA 1988.

7 [1968] Ch 290.

authority. The Committee envisaged that, in addition to the rule-making authority prescribing the branch activities which the certificate would cover, "in any event the certificate should only be issued in respect of activities *to which members only are admitted, and without payment additional to the ordinary membership or other similar subscription.*"[8] They expressed the belief that a procedure of that kind would not be unjust to the owners of the ancillary copyright and would be no more than fair to these users of recorded music. Significantly, this was what they had to say about a solution based on some kind of statutory definition:[9]

> "We do not believe that a satisfactory solution of this particular part of the general problem is likely to be reached by a statutory definition. Such a definition would almost certainly produce anomalies in interpretation, would probably prove unfair to one side or the other, thereby perpetuating the bad feeling existing at present, and, in any case, could not be revised except by amending the Copyright Act."

The certification procedure on the other hand was perceived as having the advantage of flexibility because the code of rules would be easily amendable in response to the lessons of experience.

Again, despite the non-recommendation of (indeed the caution against) a statutory definition, Parliament, for reasons which are unclear and which have certainly never surfaced, decreed otherwise: *dis aliter visum.*[10] In 1955, the year in which the Rating and Valuation (Miscellaneous Provisions) Act 1955 came on to the statute book, a Copyright Bill was introduced into the House of Lords. Eventually, after a number of modifications introduced in both Houses, the provisions of the Copyright Act 1956 came into force on 1st June 1957, the Act having received the Royal Assent on Guy Fawkes Day 1956.

The relevance of this mention of the Rating and Valuation (Miscellaneous Provisions) Act 1955 is twofold. First, some of the language of definition in

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8 See paragraph 194 (emphasis added).

9 Ibid.

10 Virgil *Aeneid* 2.428 ("To the gods it seemed otherwise", i.e. they had other plans). The half-line parethensis was a comment on the death of the Trojan Rhipeus. As the justest of all the Trojans and the most dedicated upholder of principle he might, in justice, have survived:

> "... *cadit et Rhipeus justissimus unus*
> *qui fuit in Teucris et servantissimus aequi*
> *(dis aliter visum).*" (ibid 426-428)

section 12(7) of the Copyright Act 1956 is lifted straight from the almost contemporaneous rating statute. And, secondly, that very wording in the rating statute was subjected to considerable criticism, found wanting and eventually replaced. But the wording survives in the latest version of the Copyright Act, a point to which it will be necessary to revert.

Whitford Report

The question of the perpetuation of the exceptions provided for by section 12(7) engaged the attention of the Committee to Consider the Law on Copyright and Designs under the Chairmanship of Mr Justice Whitford ("the Whitford Committee"). The Whitford Committee was set up in 1973 and its report ("the Whitford Report") was presented to Parliament in March 1977 by the then Secretary of State for Trade.[11] In point of fact, the Whitford Report in paragraphs 374 to 379 considered, in detail, both the exceptions and the case for and against their retention.

In paragraph 375 of the Whitford Report, the Committee rehearsed the recommendations of the Gregory Committee concerning the exception in section 12(7) which they summarised as follows:

> "375. This exception follows recommendations of the Gregory Committee (paragraph 194 of their report) for "social service" societies, non-profit making bodies with aims of a religious, social or educational kind. The Gregory Committee proposed a provision under which an application would have to be made for a certificate of exemption, and were against a solution by way of statutory definition. Nonetheless it was a solution by way of statutory definition which resulted. The Gregory Committee made no recommendation in favour of places where people "reside or sleep", or in favour of clubs generally. The Gregory Committee report contains a most careful and comprehensive review of the subject of performing and performers' rights, which they were in favour of retaining."

From this summary it is fairly apparent that the Whitford Committee were somewhat surprised that the statutory solutions were so out of kilter with the recommendations of the Gregory Committee.

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[11] Report of the Committee to consider the Law on Copyright and Designs (1977 Cmnd 6732).

Whitford Report Urges Repeal of the Exemptions

But perhaps the most significant part of the Whitford Report is that in which the Committee criticises the very existence of the statutory exemptions in section 12(7) and identifies the lack of any convincing and sound rationale for those exemptions. The key passage is in paragraph 376 of the Whitford Report:

> "376. There seems to us little reason why any enterprise run for profit (hotels, inns and holiday camps for instance) should not pay a proper licence fee in respect of the public performance of records. An exception in favour of "social service" societies seems only to be justifiable on the basis that record makers ought to be prepared to make a voluntary contribution to their facilities. While there may be much to be said for the view that record makers should make a voluntary contribution, it is less easy to justify compulsory forfeiture of a right which it is otherwise accepted ought to be maintained. The institutions which benefit from exceptions of this kind are, by definition, worthy institutions. In so far as these institutions are supported by public funds, it is arguable that those funds should be increased to such an extent as may be necessary to pay for licences for public performance. In this way society as a whole, rather than individual members of society, will contribute towards the facility. So far as voluntary institutions are concerned it is tempting to give them something for nothing at somebody else's expense. But where is the line to be drawn? No one suggests that such institutions should have a free supply of, for example, musical scores and instruments by which they can be performed, or the free services of a live performer. We do not doubt that many record copyright owners may be prepared to forego royalty in favour of particular institutions but we are of the opinion that it should left to them to decide."

The description of the exemption in section 12(7) as the "compulsory forfeiture of a right which it is otherwise accepted ought to be maintained" is an arresting and, it is suggested, an accurate one.

The Whitford Report then proceeds to discuss the decision in *Phonographic Performance Ltd v Pontin's Ltd*[12] which held on the facts that the playing of records over loudspeakers at a holiday camp was within the exemption as the camp was "premises where persons reside or sleep" and that the number of day visitors admitted on payment of a special fee did not take the case outside the exemption. The Committee then in fact recommended the abolition of section 12(7) in its entirety with these words (see paragraph 379):

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12 [1968] Ch 290.

> "We take the view that the exception in favour of premises where persons reside or sleep is unwarranted and sometimes unjust. Although some consideration should be shown for "social service" organisations, we think it is undesirable that this should be done by way of a statutory exception covering all cases. We therefore recommend that Section 12(7) of the Copyright Act 1956 should be deleted. It will then be up to "social service" organisations to negotiate special rates applicable to them, it being remembered that the Performing Right Tribunal has powers to fix rates appropriate in particular circumstances."

This recommendation of root and branch repeal of section 12(7) was repeated in paragraph 418 of the same Report.

It took some little time for the Conservative Government of 1979 to start to act on the Whitford Report. In 1981 a Green Paper entitled "Reform of the Law relating to Copyright, Designs and Performers' Protection"[13] was published. In it the Government set out its acceptance of the Whitford Committee's recommendation as to the deletion of section 12(7)(a), but said not a word on the recommendation that section 12(7)(b) should be deleted.[14] There was then a lull in the progress of copyright reform. Five years after the appearance of the Government's Green Paper, a White Paper "Intellectual Property and Innovation" (1986) saw the light of day. In paragraph 13.2 of that White Paper the Government re-iterated its view that there was no justification for retaining the exception contained in section 12(7)(a) of the 1956 Act, and said that it would be abolished. The Whitford Committee's recommendation is not here referred to, and the White Paper does not explain why the Whitford Committee's recommendation to abolish section 12(7) in its entirety was not being followed.

Debates on the Copyright, Designs and Patents Bill

When section 67 of the Copyright, Designs and Patents Act 1988, then clause 60 of the Bill of that name, was being debated in the House of Lords Lord Jenkin proposed an amendment. The gist of the amendment was that where payment was made for the provision of the sound recording or the apparatus required to play it, the rights of the copyright owner of the record should be brought into line with the rights of the copyright owner of the music. Lord Beaverbrook, for the Government, spoke against this amendment. He described the objectives of the exception as aimed at removing copyright liability in respect of sound recordings

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13 (1981, Cmnd 8302).

14 See (1981, Cmnd 8302) Chapter 5, paragraphs 2 and 3.

when the purposes of the organisation and the social events it promotes are of a particular kind. This was an oblique reference to the sort of social policy considerations which were mooted in the Gregory Report as quoted earlier in this article. He added that the exception was long-standing, operating to the benefit of clubs and societies without seriously damaging the interests of the record industry. In the event Lord Jenkin withdrew his amendment.[15] It is however to be noted that the Whitford Committee's criticism of the exception, the grounds of that criticism and, finally, the recommendation of the repeal of section 12(7)(b) were not mentioned in the course of the debate.

For the sake of completeness it should be added that when section 67 was debated in Standing Committee E on 24th May 1988 nothing was said that in any way added to the understanding of why the exception needed to be continued.[16] Yet continued it was, despite the fact that the Whitford Committee, rightly in this writer's view, identified the exception as "unwarranted and sometimes unjust" and ripe for repeal. Later in this article attention will be drawn to the injustices wreaked by the exception and to its anomalous character viewed from the standpoint of charity law.

Section 67 of the 1988 Act

Section 67 of the CDPA 1988 has, to use the metaphors of architecture, rebuilt the structure of section 12(7)(b) and proviso (ii) to section 12(7) of the 1956 Act in a different style but with some of the same features. It reads as follows:

> "(1) It is not an infringement of the copyright in a sound recording to play it as part of the activities of, or for the benefit of, a club, society or other organisation if the following conditions are met.
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> (2) The conditions are:
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> (a) that the organisation is not established or conducted for profit and its main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare, and
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> (b) that the proceeds of any charge for admission to the place where the recording is to be heard are applied solely for the purposes of the organisation."

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15 Hansard, HL vol 490, col 1188/1189.

16 See Hansard, 24th May 1988, col 345-346.

Comparing this provision with section 12(7)(b) of the 1956 Act, one notes that section 67(1) does not refer to the sound recording being "caused to be heard in public". But that is because playing a record in most, if not all, cases which can be envisaged as falling within the section would amount to the act of playing the sound recording in public. And that would be an infringement of the copyright in the sound recording by virtue of section 16(1)(c) and section 19(3) of the 1988 Act, unless done with the consent of the copyright owner or in circumstances bringing it within one of the exceptions contained in Chapter III of the 1988 Act.

Three particular points of similarity between section 12(7)(b) of the 1956 Act and section 67 of the CDPA 1988 deserve to be emphasised.

First, both provisions confer the exception where the sound recording is "caused to be heard" (section 12(7)) or "played" (Section 67) "as part of the activities of, or for the benefit of" the favoured organisation.

Secondly, the favoured organisations are in both provisions the same: the organisation in question must be "a club society or other organisation"..."not established or conducted for profit and whose main objects are charitable *or are otherwise concerned with the advancement of religion education or social welfare*".[17] Organisations falling into the latter category are *ex hypothesi* not charitable but are "near charities" as they are sometimes called. This category of near charities is discussed in the next section.

Thirdly, in both sections, the exception does not apply if any of the proceeds of any charge for admission are used otherwise than for the purposes of the organisation (section 12(7)(b) proviso (ii))[18] or if the condition that the proceeds of any charge for admission shall be applied solely for the purposes of the organisation is breached (section 67).

What is curious about the copyright exception in section 67 is not only that it favours charities (a favouritism which was incisively criticised by the Whitford Committee) but that other bodies qualify for the exception too. The favouritism shown towards charities is peculiar because normally the only concessions in favour of charity are at public and not private expense. Here charities are benefited at the expense of the owners of copyright in sound recordings, in other

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17 Emphasis added.

18 Proviso (ii) might, for example, prevent an organisation from benefiting from the exception if part of the charge for admission, say to a discotheque, is applied for the profit of a third party such as the discotheque organiser or a disc jockey.

words out of private purses and not from the public purse. Even more bizarre is the notion that such a concession should go beyond charity and benefit, again at the expense of private interests, bodies which fall short of being charitable.

"Near Charities" in Rating Law

The only other occasion when bodies in this latter category have been singled out for concessionary treatment along with charities[19] has been in a rating context, where, of course, the relevant purse is that of the local authority. That concessionary treatment for rating purposes began with the Rating and Valuation (Miscellaneous Provisions) Act 1955.

The wording of section 67 of the 1988 Act when it refers to "a club, society or other organisation which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare" is echoing the language of section 8(1)(a) of the Rating and Valuation (Miscellaneous Provisions) Act 1955. That rating law provision was replaced by a succession of differently worded provisions starting with section 11 of the Rating and Valuation Act 1961, and continuing through section 40 of the General Rate Act 1967 and ending with section 47 of the Local Government and Finance Act 1988 which made yet further changes.

Section 8 of the 1955 Act (subjected in its day to considerable criticism) granted various reductions in the rates chargeable in respect of any hereditament to which the section applied. Subsection (1)(a) lists as one of the hereditaments to which the section applied:

> "any hereditament occupied for the purposes of *an organisation (whether corporate or unincorporate) which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare*".[20]

Accordingly, in this case too, the qualifying organisation must be one (a) which is not established or conducted for profit and (b) whose main objects are charitable

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19 See also in the context of fundraising and public charitable collections the provisions in the Charities Act 1992. These impose a special regime on fundraisers for institutions established for charitable benevolent and philanthropic purposes ("charitable institutions") and another special regime on those appeals made for charitable, benevolent and philanthropic purposes (Charitable appeals"): CA 1992 ss.58(1) and 65(1) and Parts II and III respectively.

20 Emphasis added.

or "otherwise concerned with the advancement of religion, education or social welfare." In its current state the equivalent rating provision providing for discretionary relief is section 47 of the Local Government and Finance Act 1988.

This last mentioned provision covers a "hereditament... all or part of which is occupied for the purposes of one or more institutions or other organisations none of which is established or conducted for profit and each of whose main objects are charitable or are otherwise philanthropic or religious or concerned with education, social welfare, science, literature or the fine arts."

This 1988 version excludes organisations established or conducted for profit, but following the version produced in the Rating and Valuation Act 1961 has dropped the reference to advancement of the three purposes of religion education and social welfare. Instead it divides the "near charity" purposes into those which are "otherwise philanthropic or religious" and those which are "[otherwise] *concerned with* education, social welfare, science, literature or the fine arts." (emphasis added). This innovation came in as a result of the recommendations of the Committee, chaired by Sir Fred Pritchard, which produced in 1959 a report entitled "Report of the Committee on the Rating of Charities and Similar Organisations".[21] Be that as it may, the concern of this article is with the earlier now obsolete provision in the Rating and Valuation (Miscellaneous Provisions) Act 1955.

Criticisms of the Rating and Valuation (Miscellaneous Provisions) Act 1955

The most substantial criticism levelled against section 8(1)(a) of the 1955 Act is to be found in two articles by DWM Waters published in 1959.[22] As it happens, Mr Waters also gave evidence, no doubt based on his critical evaluations of section 8(1)(a), to the Pritchard Committee. Subsequently he discussed the Pritchard Report itself in a Note in (1960) 23 MLR 68-72.

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21 (1959 Cmnd 831).

22 (1959) 23 Conveyancer 365 et seq; and (1959) Current Legal Problems 115 et seq. Professor Donovan Waters BCL MA (Oxon) PhD (Lond) (as he now is) was appointed Gale Professor of Law at McGill University in 1967, and then in 1977 Professor of Law at Victoria University British Columbia. In 1959 he was a Barrister of Lincoln's Inn and Lecturer in Law at University College London. After gaining his PhD in 1963 he went on to publish his 1963 doctoral thesis as *The Constructive Trust* (1964) and wrote *Law of Trusts in Canada* (1st edition 1974; 2nd edition 1984).

The criticisms made by Waters, principally in his article "The Rating of Charitable and Similar Organisations"[23] are as follows:

(1) the wording "whose main objects are" is too obscure and it is none too clear how different "main" is from "substantive".[24]

(2) are "main" objects to be deduced from the constitution or from the activities of the organisation?[25]

(3) "otherwise concerned with" has given rise to difficulty but may indicate that a lesser amount of public benefit may be allowable in quasi-charitable or near charitable trusts.[26]

(4) the "advancement" of social welfare may give rise to a different test of public benefit from that which applies under the Recreational Charities Act 1958 and this is likely to lead to confusion.[27]

Waters argued that the faults of this paragraph (viz paragraph (a) of section 8(1)) were enough to argue against its permanent retention. In the event the changes enacted after the Pritchard Committee's Report were two-fold. First, the new legislation dropped the word "advancement" which, with its charity connotations, posed questions about the nouns which followed it (namely religion, education and social welfare). Secondly, it enlarged the quasi-charity list to include philanthropic or religious objects and science, literature and the fine arts. Otherwise the expression "main objects" remains and so does the phrase "otherwise concerned with".

The use of a formula devised for a different statute and its retention long after that formula has been discarded from its original context, because of drafting deficiencies, is difficult to justify. But that difficulty is compounded when the retention flies in the face of a clear recommendation to do away with the very exemption containing the defective formula.

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23 (1959) Current Legal Problems 115.

24 Ibid at 134.

25 Ibid at 135.

26 Ibid at 136.

27 Ibid at 136-137.

Section 67 is a complete anomaly as far as charity law is concerned. Charities, in the absence of some concessionary agreement, rank no better and no worse than any other customers in the market. They pay the market price for goods and services needed to carry on the charitable activities in question. Thus a charity which publishes and distributes religious literature pays its contract printers whatever is the going rate. And if the publication is of a book the copyright in which is vested in a third party, the charity will pay the copyright royalties to the copyright owner.[28] Again, those supplying lighting or sound equipment to be used in a charitable students' union disco will be paid the normal price for their goods. Quite why those having copyright interests in sound recordings should be singled out for discriminatory treatment is, on the face of it, rather perplexing. An unauthorised live performance of music in which copyright exists at a students' union fundraising ball would, on the contrary, constitute an infringement. There seems no rhyme or reason to it.

The surviving exemption allows organisations within its purview to profit at the expense of copyright holders, in some cases hugely. The profits generated by the discotheque activities of student unions are a case in point. Some, but by no means all, student unions are charities. Those which are not charitable, may arguably rank as near charities capable of finding refuge within the ambit of the exemption conferred by section 67 of the CDPA 1988 so long as they are not being "conducted for profit" within the meaning of that section and the proceeds of any charge for admission are applied solely for the purposes of the organisation in question.[29] The basis on which most student unions are charities is that they provide "those physical cultural and social outlets that are needed or are at any rate desirable if the art of teaching is to be efficiently performed".[30] The need for students who are away from home, some for the first time, and who are stressed by examination pressures, to unwind through appropriate social outlets is self-evident.

Almost all student unions, whether at universities or teaching hospitals, run disco activities the proceeds of which are ploughed back into union facilities. Those profits from performances of records may arguably, and depending on the facts, incur no liability for infringement of copyright, because the performances are either part of the activities of the organisation in question (for the entertainment of those whose education or whose social welfare is being advanced) or are for the

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28 See *Re Newsom* 1971 N 423 (14th March 1973) unreported but noted in Picarda *Law and Practice Relating to Charities* (2nd edition) 102 and 214.

29 CDPA 1988, s.67(2)(b).

30 See *London Hospital v IRC* [1976] 1 WLR 613 at 623H-624A.

benefit of the organisation, which would include performances given to outsiders where the proceeds of the performances are applied for the purposes of the organisation.[31] However, to achieve exemption the union in question would have to satisfy the condition that it was not conducted for profit. To the extent that considerable profits are generated, this may prove a stumbling block to a claim to the benefit of the exemption. This is a matter which is discussed in the next section.

In neither case is there a restriction that the activities should be "activities to which only members are admitted and without payment additional to the ordinary membership or other similar subscription" as originally recommended by the Gregory Report paragraph 194. And the aim of student discotheques is plainly that of entertainment, contrary again to what was the policy of the statutory predecessor of section 67, as set out in paragraph 194 of the Gregory Report.

Conducted for Profit

What, then, if the discotheque activities represent an important part of the activities of the union and a major generator of income? It is possible that a court may be persuaded that the union in question either has a main activity which is predominantly commercial rather than charitable or, more likely, is on a true view of the matter, being conducted for profit and so fails at the first hurdle.

This latter point is a separate question from the question whether the profits in fact made from a trade carried on by a charity are or are not exempt from tax. Exemption from tax depends on the trading being incidental to the carrying on of the charitable purpose and on the profits being applicable and applied to the charitable purpose.

Again, whether an organisation is being conducted for profit is separate from the question whether the trading carried on by the charity or near charity is such a dominant element in the activities of the organisation as to make that organisation one which is not exclusively charitable, or, in the case of a quasi-charitable organisation, one which is not mainly dedicated to the quasi-charitable purposes. So far as charitable organisations are concerned, the Commission has pointed out that this is a question of fact.[32] So too, for sure, is the question whether a particular organisation is "conducted for profit". But whatever the answers to

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31 Copinger and Skone James on *Copyright* (13th edition) para 10-105.

32 See [1980] Ch Com Rep paras 6-9 reproduced in Picarda *Law and Practice Relating to Charities* (2nd ed 1995) 1049-1050 ("each case must be considered on its own facts").

these questions, and whether or not the exemption applies, the point of principle identified by the Whitford Report remains.

Scale of Student Union Discotheque Activities

The scale of these student union disco (or "club") activities needs to be put in perspective. It can be appreciated from the following extracts, which have been culled from various student magazines and supplements. The Students' Union industry has a consumer base whose spending power is valued at £1.6 billion. NUS Services Limited ("NUSSL"), which is actually owned by the Students' Unions themselves, administers a purchasing consortium on behalf of its members with a turnover of £60 million.[33] And, according to figures emanating from NUSSL itself, it was estimated that in 1995 students would be spending £8.9 billion on goods and services and that the top 100 Student Unions would enjoy a collective turnover of £131 million.[34]

This "big money" phenomenon is exemplified by the Sutra (dance night) activities of the University of West England Students' Union which pull in 1300 customers every Wednesday night, necessitating the use of a mainstream corporate venue capable of accommodating 1900 persons.

The Students' Union at Liverpool University, for its part, spent £75,000 on the latest state of the art lighting and sound systems.

No less than fifteen universities have had installations carried out by Marque Audio; and PA Installations have completed over 40 top quality sound and lighting projects with 34 universities over the past eleven years, the first of which was at Cardiff University. The biggest contract in the student world, according to "Students' Union Showcase Keeps On Growing", an article on the NUSSL 1996 Trade Fair,[35] is the £2.5 million project for the Students' Union at Coventry University. It is spread over four floors and comprises a bistro, a multi-purpose dance-club and a major night club. The sound and lighting budget alone is worth £250,000.

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33 'Company Profile of the NUSSL' *Disco Mirror and Licensed Design*: *Student Supplement,* May 1995.

34 'No More Nelson Mandela'? *Disco Mirror and Licensed Design*: *Student Supplement,* May 1995.

35 *Disco Mirror and Licensed Design*, *Student Suppplement*, May 1996.

In an article entitled "Educating the mainstream?"[36] in Student Supplement the powerful movement to produce top quality student discos is chronicled. The introductory blurb gives the flavour of what is to follow:

> "Once upon a time, there were Student Unions, and there were discotheques, and never the twain would meet. But ever since PA Installations and Thomas Parry created their seminal scheme for Cardiff University, SU's have used increasingly large budgets to create venues which not only equal commercial nightclubs in terms of style and specification, but in many cases outdo them. Indeed, as the mainstream has moved in favour of out-of-town locations, Student Unions are beginning to take over run down city centre venues and bring them up to scratch with the highest standards of interior design, not to mention state-of-the-art lighting and sound technology. Over the next few pages we take a look at some of the more recent examples of this burgeoning genre."

The article then deals with the case-histories of inner city venues developed by the Student Unions of the Universities of Cardiff, Huddersfield, Liverpool, Bournemouth, Stirling, Buckingham and of the City University. What quite clearly emerges is the considerable commitment of capital to an activity which is run very commercially indeed. Moreover, so successful are some of these student venues that the success of some mainstream venues is threatened.

All of this material underlines the very considerable oddity of the notion that it is desirable to exempt these organisations, with their very considerable resources, from paying royalties on the performance of sound recordings.

Critique of the Exemption

The exemption thus appears to be anomalous, discredited and indefensible. There seems, moreover, to be little virtue in paring the exemption down to cover only registered charities, excluding by that method the non-charitable "near charities". This would not deal with the mischief of cash-rich students' unions (quite a few of which are charities) claiming the benefit of an exemption meant for deserving charities of compassion.

The undesirable half-way house of limiting the exemption to charities could, however, be achieved by simply excising the words "or are otherwise concerned with the advancement of religion, education or social welfare". But that solution has little to commend it. The main criticism of the section is that its whole

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36 *Disco Mirror and Licensed Design, Student Supplement*, May 1996.

rationale is unjustifiable: that is the burden of the Whitford Committee's call for complete repeal of the previous (and equally objectionable) version of the section.

Alternative Compromise Amendment

One compromise solution would be to amend paragraph (a) of subsection (2) of section 67 by specifying that the main objects in question are to be deduced from its activities as well as from its constitution and to replace paragraph (b) of subsection (2) of section 67 by a provision, or by several provisions, designed to prevent money raising operations in connection with the performance of sound recordings. The following could be imposed as conditions in subsection (2):

> "(a) that the organisation is not established or conducted for profit and its main objects as deduced from its activities as well as from its constitution are charitable or are otherwise concerned with the advancement of religion, education or social welfare, and
>
> (b) that the activities mentioned in subsection (1) are activities to which members only are admitted and without payment additional to ordinary membership or other similar subscription, and
>
> (c) that no special or other charge is made for or, is referable directly or indirectly to, admission to the place where the sound recording is to be heard, and
>
> (d) that no sound recordings are performed with a view to, or with the effect of, generating profit or fundraising for the organisation."

This alternative compromise provision avoids singling out a particular type of charity, such as a student union, for exclusion from the benefit of the exemption and makes the matter turn on the profits being generated by the performance of the sound recording.

Wholesale Repeal Preferable

Nevertheless, the enactment of such an alternative provision, or an adapted version of it, ought in any event to be regarded as definitely second best to an outright repeal of section 67.

To sum up, section 67, despite the predictable lobbying for its retention (no doubt orchestrated by the organisations making handsome profits from the absence of any

of having to make royalty payments), is more than ripe for repeal. It confers on the charities and similar "near charitable" organisations within its ambit a totally unjustified and unjustifiable perk, as the Whitford Report tellingly pointed out. It should, in a word, have on those grounds been jettisoned years ago, as the Whitford Report, again, recommended.