



## HIGH COURT OF AUSTRALIA

28 March 2012

### PHONOGRAPHIC PERFORMANCE COMPANY OF AUSTRALIA LIMITED & ORS v COMMONWEALTH OF AUSTRALIA & ORS

[2012] HCA 8

Today the High Court dismissed a challenge to the validity of compulsory licensing provisions under ss 109 and 152 of the *Copyright Act 1968* (Cth) ("the 1968 Act"). The Court held unanimously that those provisions are not invalid by reason of s 51(xxxi) of the Constitution, which empowers the Commonwealth Parliament to make laws with respect to "the acquisition of property on just terms".

Prior to the 1968 Act, the *Copyright Act 1911* (Imp) ("the 1911 Act") was in force in Australia, with such modifications as were made by the *Copyright Act 1912* (Cth) ("the 1912 Act"), as amended from time to time. An owner of a copyright in a record protected under the 1911 Act had the exclusive right to perform the record in public, and a correlative exclusive right to license or authorise a radio broadcaster to broadcast the record. Neither the 1911 Act nor the 1912 Act provided for a compulsory license scheme under which a broadcaster could broadcast a sound recording without the consent of the owner.

The 1968 Act commenced operation on 1 May 1969. The effect of transitional provisions contained in the 1968 Act was that pre-1969 recordings which were copyright protected under the 1911 Act were taken to be sound recordings in which copyright subsisted under Pt IV of the 1968 Act. Section 109 of the 1968 Act operates to qualify the exclusive right under the 1968 Act of an owner of copyright to communicate a published sound recording to the public. It provides that copyright in a published sound recording is not infringed by a broadcaster, even in the absence of authorisation by the "owner" of the copyright, if there is either an order by the Copyright Tribunal ("the Tribunal") under s 152 of the 1968 Act in force, or an undertaking given to pay the owner such amounts as may be determined under that section. Section 152 imposes a "cap" on the amount that the Tribunal may require a broadcaster to pay for what is in substance a compulsory license.

The first plaintiff carries on business as a copyright collecting society. It acts in the interests of the owners and exclusive licensees and controllers of copyright in sound recordings which presently subsist under Pt IV of the 1968 Act. In these proceedings the first plaintiff acted on behalf of the second to fifth plaintiffs in respect of sound recording copyrights in published sound recordings which were made before the commencement of the 1968 Act. The sixth plaintiff is also the holder of relevant sound recording copyrights.

The plaintiffs brought proceedings in the original jurisdiction of the High Court challenging the validity of the cap created by ss 109 and 152 of the 1968 Act. The plaintiffs submitted that, by fixing a cap on the amount which the Tribunal may determine for the compulsory licence of the pre-1969 recordings, ss 109 and 152 effected an acquisition of the property in the pre-1969 recordings on other than just terms, contrary to s 51(xxxi) of the Constitution. However the

plaintiffs did not assert that the 1968 Act is invalid because it brought to an end the operation of the copyright system under the 1911 Act without the provision of just terms, or that the compulsory licensing system established by the 1968 Act is wholly invalid.

The High Court held unanimously that the 1968 Act excluded further operation of the 1911 Act and denied subsistence of copyright otherwise than by virtue of the 1968 Act. Sections 109 and 152 therefore did not operate to qualify the copyright of the plaintiffs under the 1911 Act and so did not constitute an acquisition of the property in the pre-1969 recordings.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*