James d'Apice: Copyright law: a brief sketch

Copyright law stands firm even as the world around it changes. The New Media, and the Oldest Media, are at the forefront of the copyright challenge intellectual property lawyers face today.

We discussed defamation in March, and we considered how the New Media is creating new venues for our (and our clients') rights to be put at risk. Today we will consider similar issues in the context of the Federal Court's decision in *iiNet*.

We will also discuss the tension developing between white law and Indigenous law. There is no copyright protection available for a style, an idea, or a spirituality; and even if there was, that protection would manifest personally (whether to a natural person or otherwise) and be finite. Later we will look at what this means for traditional Indigenous culture.

Note that we will be leaving *Larrikin Music Publishing Pty Ltd v EMI Songs Australia Pty Limited* [2010] FCA 29 (4 February 2010) aside. That case concerns the definition of "substantial part", and is of no particular use in today's brief sketch.

Copyright: the basics

The law of copyright is designed to protect the right of an author[3] to control how his, her or its work is used; or how a "substantial part" of it is used. It is an assignable right. In Australia it materialises instantly on completion of a work (unlike in many other jurisdictions where registration is required). It relates to works that require creativity to produce. Copyright can be distinguished from patent law that requires an "inventive step" to be protected; design, a regime in place to protect the visual appearance and form of commercial products; and trade mark law, that protects a consumer's ability to differentiate one merchant from another.

Note that a defendant can infringe a plaintiff's copyright by authorising another party's infringement.[4]

What is a work?

The types of material that may be the subject of copyright protection include Part III Works[5] which are literary works, musical works, artistic works, and dramatic works. Copyright protection is also available for "other material" considered in Part IV of the *Copyright Act 1968* ("**the Act**"): sound recordings, films, broadcasts and published editions.

Material can only be protected by copyright if it has been reduced to material form.[6] Note that the RAM of a computer can satisfy the test of "material form".[7] Software, in the form of source code, can be subject to copyright. The interface that results from that source code cannot.[8]

Material form

In order to be protected by the *Copyright Act 1968*, a work must be reduced to a "material form".[9] There is no copyright in an idea. Copyright attaches to the expression of an idea.

Duration of copyright

The term that copyright protection endures in a work is now the creator's life plus seventy years.[100]If a work is anonymous, pseudononymous, or produced by a corporation, the copyright protection period is seventy years from the date the work is first published.[11] Note that some older works – made before the 2004 amendments to the 1968 legislation – may be subject to a different protected period.

You can't copyright an idea: Dreamworks and Pixar

As we've mentioned, the law is designed to protect the expression of an idea, not the idea itself. This commercial and legal necessity can lead to outcomes that are, nonetheless,

irksome. Littered throughout our cultural history are examples where the fact that no copyright protection is afforded to an idea somehow feels Not Quite Fair.

In the mid-1990s, animation kingpins Pixar entered into a partnership with Disney to create the wildly successful, game-changing *Toy Story*. It was the first time a mainstream film had used computer animation for its entirety. *Toy Story* also served as the calm before the storm that was the rivalry between Pixar and computer animation studio Dreamworks.

In 1998, Pixar released *A Bug's Life*. The same year, Dreamworks released *Antz*.

In 2001, Pixar released *Monsters Inc*. In 2001, Dreamworks released *Shrek* (I've printed this in black and white, but it's interesting to note that the green that dominates bothof these posters is near identical).

In 2003, Pixar released *Finding Nemo*. In 2004 Dreamworks released *Shark Tale* (here, the colours are strikingly similar too).

From an intellectual property lawyer's perspective, the interesting thing to note is that the similarity of each idea, the coincidental release date of each, and the similar marketing imagery cannot form the subject of an action for copyright infringement. Copyright affords no protection to persons whose *ideas* are copied (note that, arguably, an action in passing off could be contemplated by the parties).

Moral rights

Moral rights are analogous those rights protected by copyright law. They concern the original author's right for his or her work to be treated in a certain way. These rights cannot be assigned. However, an author can contract out of them.[12]

Moral rights can be boiled down to:

- The right of attribution; and
- The right of integrity.

The right of attribution is straightforward. An author is entitled to be known as the author of a work. He or she is entitled to prevent others from claiming to be author of the work. He or she can prevent false attribution of works to him or herself. The author can prevent unauthorised altered versions being attributed to him or her.[13]

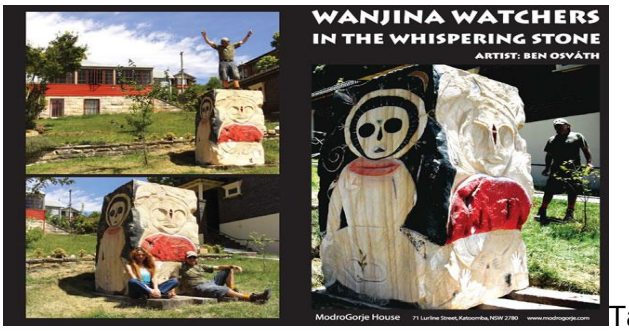
The right of integrity prevents derogatory treatment of a work either through the way the work is presented or through changes made to it. In *Schott Musik International v Colossal Records* (1997) 38 IPR 1, the Federal Court considered the case of Carl Off's *Carmina Burana* and the use of the *O Fortuna* chorus in the 1996 dance song *Excalibur*. The Appellants claimed *Excalibur* debased the song and was a violation of Off's moral rights (which interestingly, the Appellants, Respondents, and court agreed could be asserted by the owners of the copyright and Off's descendants). Hill J came to the conclusion:

> *the test to be adopted is whether it is a consequence of the adaptation (taking into account that the adaptation differs from the original) that a reasonable person will be led to think less of the work.*[14]

In *Schott Musik*, his honour dismissed the Appellants' moral rights claim. The adaptation did not debase the original. Among his honour's findings of fact was that *Carmina Burana* had never been critically lauded and was essentially 1930s disposable pop music. He found that a dance remix was not an adaptation of a type that would lead a reasonable person to think less of the original.

Copyright, Moral Rights, Community Rights and the Indigenous Perspective

In the Blue Mountains lives a woman named Vesna Tenodi. She owns and runs a business named Modrogorje Wellness and Art Centre. A few years ago she commissioned a sculptor to create a sculpture called *Wandjina Watchers in the Whispering Stone*. It was completed this year. The sculpture depicts wandjinas, Koori creation spirits sacred to the people of the Kimberley. Ms Tenodi says the wandjinas communicate with her. On 5 March 2010, she unveiled *Wandjina Watchers* to the world.



Taken from http://modrogorje.com/news.html accessed on 5 July 2010

The response from the Indigenous population has been furious. They say that the sculpture should not have been erected without the permission of the Indigenous population of the Kimberley; that Tenodi has used traditional knowledge without permission. Indigenous law demands that certain Dreaming symbols cannot be reproduced without the permission of the elders of the community to whom the symbols belong.

In response, Tenodi says:

> *If they're unhappy, I don't know why, because in my mind this is a non-issue. There is no copyright on prehistoric imagery, and no-one can prohibit any artist to explore design, or to express themselves or to be influenced or inspired, and this happens all the time… it does belong to the world, and to claim ownership, any individual or group or nation to claim ownership of those is simply ludicrous…*
>
> *So I don't understand how could anyone claim a symbol, an image, an idea, or this is my understanding, that intellectual property law does not allow anyone to copyright an idea, and how can you claim ownership of God, and wandjinas are gods.*[15]

Donny Woolagoodja is a traditional elder from the Kimberley. After the sculpture was unveiled, he visited the Modrogorje Wellness and Art Centre. When interviewed by the ABC he made the following comments:

> *Well I thought it was very wrong to do something that somebody put...did not belong to her. You know, it was our Dreaming, and - very angry about. It's not her image and people that use our images, they don't really know all about it.*
>
> *Well I mean it's not belong to her, it's not her Dreaming. It belongs to us. Our ancestors had it before any western people came to Australia. It's not hers to use. It's like I'm going using somebody's things in their property and you just can't do that anymore. I can't do that to somebody else's image.*
>
> *Well a lot of people misuse our images; it's not right and like they come and talk to the right people and get a permission for using it.*[16]

The issue is clear. At the moment, white law does not recognise the rights claimed by Indigenous people and Ms Tenodi's legal argument holds. No one person owns the wandjina idea. No one person can own an idea. Nor is there an appropriate corporate body in whom the ownership right could or should reside. And even if those stumbling blocks were overcome, the copyright protection would be finite: seventy years. The issue is similar for any moral rights action an Indigenous person may contemplate. Without an author/creator to point to – a party in whom the moral rights can reside – any action for breach of moral rights must fail.

The tourism industry is pretty cavalier with its white law Get Out of Jail Free Card. Indigenous artists' works have been reproduced with colours altered. Non-Indigenous artists make works in Indigenous style. Non-Indigenous writers have interviewed members of the Indigenous community, learned their stories and gone on to publish children's books about what they learnt. There have been complaints by the Indigenous community to the ACCC under s51 of the *Trade Practices Act*; where claims of "these tea towels were made by Indigenous Australians" are misleading and/or deceptive.[17]

Clearly the divide between white law and Indigenous law is pronounced. At the moment, we have no legal means to recognise and protect the laws and cultural works of our Indigenous community.

The World Intellectual Property Organisation ("**WIPO**") has attempted to come at some sort of solution to these issues. There are provisions currently being drafted that may add some teeth to the assertions of the world's indigenous cultures in their search for protection for their traditions, but for the moment, the WIPO provisions remain in draft form and have not yet been considered by the UN.[18]

Copyright and the internet

We live in a new economy, and a new society. While cut and paste culture has seen plagiarism, clumsy journalism, and poor research increase exponentially, it is the threat of lost revenue that drives much of the litigation going on at the coalface of online copyright law.

On 4 February 2010, the Federal Court handed down their judgment in *Roadshow Films Pty Ltd v iiNet Limited* (No. 3) [2010] FCA 24 (4 February 2010). In this matter, Roadshow Films, and thirty-three other big movie distributors, brought an action against iiNet, an internet service provider ("**ISP**"). The action was for infringement of copyright. The Plantiffs/Applicants submitted that, by allowing its users to download pirated movies from websites like bitTorrent, iiNet had authorised each of the copyright infringements committed by its users.

The movie distributors were unsuccessful. The action failed.

Cowdroy J found that the provision of an internet service was merely a pre-condition to the infringement of a copyright, much like the ownership of a computer or an electricity connection. He found that the means of sharing (and infringing) was actually the bitTorrent website. In this way he distinguished the facts here from the *Kazaa* judgment,[19] *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd (with Corrigendum dated 22 September 2005)* [2005] FCA 1242 (5 September 2005) ("**Kazaa**").

In *Kazaa*, the Federal Court considered an action brought by thirty Plaintiffs/Applicants who were music distributors. The Defendant/Respondent operated a website called Kazaa that facilitated the sharing of copyright protected music "peer-to-peer", so members of Kazaa could exchange copyright protected songs for free with other members. Cowdroy J distinguished the facts of *Kazaa* from those of iiNet by explaining that iiNet was one step further removed from the copyright infringement than Kazaa. [20] Kazaa was the immediate

host of a copyright infringing community with the power – and, the court found, the legal obligation – to monitor the way its clients were using its site. *iiNet* simply provided access to the internet. Their responsibility was not sufficiently similar for Cowdroy J to find in favour of the movie distributors.

As practitioners, it's interesting to reflect on the way the iiNet proceedings played out. Roadshow commenced the action, and then invited other distributors to join the action; that's not so unusual. More unusual is their selection of defendant; for two reasons. Firstly, *iiNet* is not the largest ISP in Australia so – if damages were awarded – it would be unlikely to be able to foot the bill for the millions/billions of dollars of copyright infringement committed by its members.

Secondly, the selection of an ISP – any ISP – as a defendant is odd. Reflecting on the facts, it would be considerably easier to attribute the copyright infringement to bitTorrent than to iiNet (as the music distributors successfully did in *Kazaa*). So why not the same treatment here? There was evidence that the Plaintffs/Applicants sifted through the 450 ISPs in Australia, made a shortlist of 150, and then pursued one: iiNet.[21] The selection of iiNet in particular seems arbitrary, but the initial choice to pursue an ISP put at significant risk the likelihood of any action succeeding.

While there may be several reasons to pursue an ISP, one looms large: if the court in *iiNet* decided in favour of the movie distributors, the ramifications of the judgment around the world would be profound. There has been no litigation of this type that has succeeded anywhere; indeed, none has been attempted. Australia was the chosen jurisdiction. This paper suggests that by gambling on suing an ISP (in this case an ISP who may not be able to fund mega-litigation[22]) rather than the (arguably) "free-hit" of suing the infringing websites directly, the movie industry was:

- Acknowledging that litigating against websites is difficult. Many infringing websites are extremely small, bring with them jurisdictional issues, and form part of an industry that is highly durable to litigation; and, as a result
- Commencing action in pursuit of a "landmark" judgment against a richer, more stable, more easily identified class of Defendant that could be form the basis for arguments in various courts around the world.

A brave new world is staring some dinosaurs in the face. It's an issue that may increasingly confront intellectual property practitioners.

Conclusion

Broadly, the tenets of copyright law are well settled. Among them: you can't copyright an idea, and if you are responsible for an arena where infringements happen, you are responsible the infringements. The court's finding in *iiNet* tracks our cultural development and shows that the sands are shifting away from traditional copyright owners. The wandjina controversy highlights the inability of white law to work alongside Indigenous law and culture.