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Copyright Infringement of a Musical Work:

Larrikin Music Publishing Pty Ltd v EMI Songs Australia Pty Limited [2010] FCA 29

Record company EMI has appealed against the Federal Court ruling that the Australian band Men at Work infringed the copyright in the song *Kookaburra sits in the old gum tree* (***Kookaburra***) in its song *Down Under*.

Background

Kookaburra was written and composed in 1934 by Ms Marion Sinclair for use in schools and the Girl Guides book. It is a short musical work consisting of only four bars. *Down Under* was written and composed in 1978 by Colin Hay and Ronald Strykert, members of Men at Work, and was first published in about 1979.

Larrikin became aware in 2007 of the resemblance between two bars of Kookaburra and the flute riff in the 1981 version of *Down Under*, after the resemblance was commented on during the ABC's *Spicks and Specks* program.

Copyright

Copyright is infringed where a person, without the licence of the copyright owner, reproduces a substantial part of the work. Reproduction of a copyright work involves two elements:

- resemblance to, and actual use of, the copyright work (that is, a sufficient degree of objective similarity between the two works); and
- whether the infringing part of the copyright work formed a substantial part of that work.

The original proceedings

Larrikin commenced proceedings alleging copyright infringement against Mr Hay and Mr Strykert and against EMI, the owner and licensee of the copyright of *Down Under*, in relation to the 1979 and 1981 recordings of *Down Under* which both contain a flute riff that is similar to *Kookaburra*. Larrikin had been successful in interim proceedings in establishing that it

was the owner of the copyright in *Kookaburra*.

The flute riff, performed by Greg Ham and embodying the four bars of *Kookaburra*, appeared in the 1979 recording. When it first appears in the 1981 recording, the flute riff contains only the second bar of *Kookaburra*; the flute riff is then heard at two further points. In each case, the flute riff is heard with other notes that were not originally part of *Kookaburra*.

The decision

Justice Jacobson followed the decision in *Francis Day & Hunter Ltd v Bron* in establishing a number of propositions:

- the copyright work must be the source from which the infringing work is derived;
- the question of objective similarity of musical works is not to be determined by a note-for-note comparison but is to be determined by the eye as well as by the ear; and
- the reproduction of the copyright work need not be identical to the original but the substance of that work must be taken.

Justice Jacobson found there was a sufficient degree of objective similarity between the bars of *Kookaburra* which are seen and heard in *Down Under* to amount to a reproduction. He based this view on an aural comparison of the musical elements, as well as a visual comparison of the notated songs, having taken into account the melody, key, tempo, harmony and structure of both musical works.

The clearest illustration of objective similarity is to be found in Mr Hay's admission of a causal connection between the two songs. Mr Hay acknowledged that for a short period of time in the early 2000s, he sometimes sang the words of *Kookaburra* while the flute riff was playing when he performed at concerts. Although Mr Hay denied being aware of the connection between the two songs at the time the music video was made for *Down Under* in 1981, he accepted that the flute riff was ¨a direct musical reference to *Kookaburra*¨.

Bolstering Larrikin's argument of objective similarity was Mr Ham's admission that he knew *Kookaburra* at the time of composing the flute riff and had incorporated the riff purposely to add some Australian flavour to the song.

Justice Jacobson determined that the portion of *Kookaburra* reproduced in *Down Under* constituted a substantial part of *Kookaburra*. In reaching this finding, Justice Jacobson referred to the judgments in *Ice TV Pty Ltd v Nine Network Australia Pty Ltd* as authority for the proposition that the determination of 'substantial part' should be qualitative rather than quantitative. His Honour relied on Mr Hay's frank admissions to sufficiently illustrate that the qualitative test had been met.

Larrikin submitted that it was entitled to as much as 60 per cent of the earnings of *Down Under*.

Qantas advertisements

Justice Jacobson was also asked to determine whether two Qantas advertisements, both containing an orchestral version of a part of *Down Under*, reproduced a substantial part of *Kookaburra*. The advertisements contained only the second bar of *Kookaburra*.

Justice Jacobson found that the part of *Kookaburra* reproduced satisfied the element of objective similarity. However, he found that the portion of work reproduced in the advertisements (one bar) did not constitute a substantial part of *Kookaburra*.

Trade practices claims

Larrikin made certain trade practices claims against the Australian Performing Rights Association (**APRA**), an organisation that collects and distributes licence fees for public performance and communication of its members' musical works, and against the Australasian Mechanical Copyright Owners Society (**AMCOS**), which collects and distributes mechanical royalties for the reproduction of its members' musical works, in relation to the following misrepresentations by the respondents:

- that the respondents were entitled to all amounts payable by APRA and AMCOS to the performers and publishers of Down Under; and
- that Down Under did not infringe the copyright in any other work.

APRA has managed the business of AMCOS since 1997. APRA relies on its members notifying APRA of any third party interests in a work in allocating income for the performance of that work.

Larrikin argued that the respondents failed to make correct notifications to APRA and AMCOS and misrepresented their entitlements in respect of *Down Under*. Justice Jacobson agreed with Larrikin, finding that the representations made were misleading and deceptive and, but for those representations, the two organisations would not have distributed all of the entitlements to the respondents.

Order

At the time of the judgment, Justice Jacobson was to consider the form of the orders with the parties.

The appeal

EMI filed appeal papers with the Federal Court in Sydney in late February seeking orders that Mr Hay and Mr Strykert did not breach the copyright of *Kookaburra*. EMI contends that:

- at best, the inclusion of the two bars of *Kookaburra* were a tribute to *Kookaburra*;
- Justice Jacobson erred in contending that *Down Under* took a substantial part of *Kookaburra*;
- insufficient weight was placed on the fact that the similarities between the two songs went unnoticed for almost three decades; and
- Justice Jacobson erred in finding that Ms Sinclair had not assigned the copyright in *Kookaburra* to the Girl Guides Association in 1934 in the course of entering the song competition.

Comment

Justice Jacobson found that there was a sufficient degree of similarity between *Kookaburra* and *Down Under*. His assessment of what constitutes a 'substantial part' highlights that courts should approach such an analysis on a qualitative, rather than quantitative, analysis. He did not assess the quantum of damages or royalties to be paid.

The date of appeal has not been set but we will keep you updated of any developments.

For further information please contact:

Nicole Stevens-Warton, Partner
Phone (direct) **+61 3 9608 2264**
Mobile **+61 403 478 346**
Email **n.stevens-warton@cornwalls.com.au**

Peter Apostolopoulos, Associate
Phone (direct) **+61 3 9608 2129**
Mobile **+61 418 577 051**
Email **p.apostolopoulos@cornwalls.com.au**