

“Techno” version of music found not to “debase” the original

In *Schott Musik International GMBH & Co v Colossal Records of Australia Pty Ltd* (1997) 36 IPR 267, the Federal Court of Australia has found that “techno” versions of Carl Orff’s chorus “O Fortuna” from *Carmina Burana* do not “debase” the original music within the meaning of section 55 of the Australian Copyright Act.

Section 55 is part of the statutory licensing scheme for the recording of musical works. Under the scheme, it is generally not an infringement of copyright to record musical works in Australia if records of the work have been previously released, provided that notice is given to the copyright owners before the recording is made, and provided that a royalty is paid. An industry agreement administered by the Australasian Mechanical Copyright Owners' Society (AMCOS) has largely replaced the procedure set out in the Act insofar as the major record companies and music publishers are concerned. For other people recording music that has already been released, cover versions are usually made under licence from AMCOS rather than in reliance upon the statutory provisions. (The scheme still requires that the permission of the owner of copyright in any sound recording be obtained, if a previous recording of the work is being used.)

The statutory licence is not available under section 55 if the recording “debases the work”. Similarly, the AMCOS licence contains a provision prohibiting the person recording the work from making an adaptation which “debases” the original work.

Tamberlin J reviewed dictionary meanings of the word “debase” and the legislative background to section 55 in the United Kingdom and Australia. His Honour found that whether a work is “debased” depends upon the effect of the adaptation upon the copyright work itself, and not upon the effect of the adaptation upon the honour or reputation of the composer. His Honour therefore determined that section 55 was not concerned with rights akin to moral rights, but with the rights of the copyright owner, who may not be the creator of the work. (The current Act does not contain comprehensive provisions dealing with moral rights. However, the current government has indicated that it intends to introduce a moral rights scheme soon.)

Tamberlin J observed that the licensing scheme did not call for the adaptation to be substantially the same in style, instrumentation or performance as the copyright work, and that in evaluating whether a work is “debased”, a value judgement had to be made as to whether the value, integrity, esteem or quality of the work is significantly lowered. His Honour also noted that it is necessary to approach the question of debasement having due regard to the broad spectrum of tastes and values within the community, particularly as what may be a debasement to one section of the community may be an enhancement or “an alteration of neutral effect” to other sections.

In finding that the “techno” versions did not “debase” the work, Tamberlin J held that questions such as whether the original was “kitsch”, and whether the work (composed in 1936) was in conformity with the cultural principles of National Socialism were unimportant. His Honour also rejected considerations such as the prior use of “O Fortuna” in advertisements and films: “the fact that on a future hearing of the work a listener is plagued with visions of Nescafé coffee beans, Arnold Schwarzenegger or Michael Jackson does not necessarily mean that the work is to be regarded as already diminished or debased”.

Rather, Tamberlin J based his decision on considerations such as the lack of evidence of any widespread perception that the quality, rank or dignity of the work had been reduced. His Honour also found that there had been no reduction in the value of the copyright as a result of the “techno” versions – indeed his Honour noted that there was some evidence to suggest that sales of recordings of the original work had increased. His Honour also found that the “techno” versions of the work preserved substantial and essential elements of the original intact, and that the versions communicated “a powerful exuberance and rhythmic character quite consistent with the character of the work”.

An appeal has been filed against the decision.