

Copyright Update

- summaries of recent cases
- summaries of recent articles
- recent developments & news
- book reviews

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U03n06

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Australian Copyright Council: role and objectives

The Australian Copyright Council is a non-profit organisation, founded in 1968.

Copyright is the legal basis on which most creators earn their income. It provides reward and stimulus for creative activity, and encourages respect for the economic and cultural value of creative work. Without copyright, writers, composers and many other creators could not work professionally.

The Copyright Council's objectives are to:

- assist creators and other copyright owners to exercise their rights effectively;
- raise awareness in the community generally about the importance of copyright;
- research and identify areas of copyright law which are inadequate or unfair;
- seek changes to law and practice to enhance the effectiveness and fairness of copyright;
- foster co-operation amongst bodies representing creators and owners of copyright.



The Australian Copyright Council has been assisted by the Commonwealth Government through the Australia Council, its arts funding and advisory body.

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International

Intellectual Property: A Power Tool for Economic Growth (by Kamal Idris) E4330

United Kingdom

Intellectual Property Law by Lionel Bently and Brad Sherman OUP 2001 E4331

1: Recent cases

E4231 / CaseNote

DISCOVERY; ENFORCEMENT; MUSIC; PEER-TO-PEER SHARING

Australia

Sony Music Entertainment (Australia) Ltd & others v University of Tasmania & others [2003] FCA 532 (30 May 2003)

William Caelli; Adrian McCullagh

(2003) 53 Computers & Law 16

Sony Music Entertainment (Australia) Limited & others v University of Tasmania and others [2003] FCA 532 (30 May 2003)

The authors discuss the decision of the Federal Court to grant preliminary discovery to the Australian music industry for data on university servers which may provide evidence of copyright piracy. In particular they note that the Court did not discuss the accuracy of the Encase program proposed to conduct discovery or identification of infringing files. They comment that this expansive discovery order has effectively condoned the music industry conducting a fishing expedition for evidence in possession of a third party.

E4232 / CaseNote

TECHNOLOGICAL PROTECTION

Australia

Full Federal Court rules that PlayStation "mod-chipping" infringes copyright law

Sue Gilchrist; Sarah Strasser

(2003) 53 Computers & Law 23

Kabushiki Kaisha Sony Computer Entertainment v Stevens [2003] FCAFC 157

A note on the Full Federal Court's decision in the Sony v Stevens case. The Full Federal Court overturned a first instance ruling to hold that Sony's Boot ROM chip and access code software was a "technological protection measure" as it inhibited copyright infringement by making it impossible to play unauthorised copies of Sony's computer games on its consoles. The authors comment that this decision is unlikely to be limited to Sony Playstation Technology and may extend to other systems using regional coding such as DVD technology. The authors also note the ACCC's disapproval of the decision.

E4233 / CaseNote

TECHNOLOGICAL PROTECTION

Australia

Circumvention considered

Miriam Stiel

(2003) 133 Copyright World 10

Kabushiki Kaisha Sony Computer Entertainment & Ors v Stevens

A comment on the case in which the Full Federal Court considered the meaning of “technological protection measure” in the Copyright Act. The author notes that the definition of a “technological protection measure” and the effect of the decision are currently being considered in the Federal Government’s review of the Copyright Amendment (Digital Agenda) Act 2000.

E4234 / CaseNote

COMPILATIONS; DATABASES

Australia

Desktop Marketing Systems Pty Ltd v Telstra Corp Ltd

(2003) 97 Copyright & Designs Bulletin 3

A note on the High Court’s decision refusing Desktop’s application for special leave to appeal against the Full Federal Court’s decision that Telstra’s telephone directories were “original” literary works for copyright purposes and that Desktop had infringed the copyright. The decision was based on the fact that the work was created through the industrious collection of information.

E4235 / CaseNote

CRIMINAL LAW; DVD; EVIDENCE; PIRACY

Australia

Chen v NSW Police Service

(2003) 97 Copyright & Designs Bulletin 12

Ms Chen appealed against her sentence of a good year behaviour bond for 5 years and \$8000 fine for selling pirate DVDs at Penrith markets. Jacobson J found the penalty imposed to be a proper one, given evidence of paperwork, business cards and volume of infringing material which suggested that Ms Chen was conducting a commercial enterprise.

Australia

Kabushiki Kaisha Sony Computer Entertainment v Stevens

(2003) 97 Copyright & Designs Bulletin 7

A summary of the Full Federal Court's decision in the Sony v Stevens case. Sony was successful in its action on appeal against Mr Stevens for his supply and installation of "mod chips" that enabled owners of Sony PlayStations to play unauthorised copies of Sony's computer games by circumventing access codes and Boot ROMs in the PlayStation consoles.

At first instance, Sackville J had held that the access codes and Boot ROMs in the PlayStation console were not technological protection measures (TPMs) as they only "deterred or discouraged" rather than "preventing or inhibiting" infringement of copyright. On appeal, the Full Court unanimously held that a broader definition should be adopted. The Full Court held that, for the device to constitute a TPM, it was sufficient for Sony's device to prevent infringement by making the resulting unauthorised copy useless, even though the device did not actually prevent an infringement from taking place.

Sony also argued that its devices prevented copyright infringement by inhibiting an internal reproduction of either the RAM or the cinematographic film on the RAM. The majority of French and Lindgren JJ held that Sackville J's rejection of these arguments at first instance was correct. Finkelstein J dissented on this point.

The matter was remitted to Sackville J for determination of damages or an account of profits pursuant to s116D of the Copyright Act.

Australia

Universal Music Australia Pty Ltd v Australian Competition and Consumer Commission

(2003) 97 Copyright & Designs Bulletin 10

A summary of the Full Federal Court's decision in this case. After the amendments to legislation on parallel importation of sound recordings in Australia, Universal and Warner refused to supply certain retailers who had exercised their right to import CDs. The ACCC commenced proceedings asserting that Universal and Warner had contravened competition law under sections 45-47 of the Trade Practices Act (TPA).

At first instance, Hill J found that both Universal and Warner had misused their market power and engaged in exclusive dealing conduct. His Honour imposed monetary penalties and costs orders on both companies as well as on certain of their executives who had been knowingly involved in the contraventions of the Trade Practices Act.

Universal and Warner and their executives appealed against Hill J's findings in relation to abuse of market power and exclusive dealing. The ACCC appealed on the severity of the penalties imposed.

The Full Court allowed the appeal against the contravention of section 46 of the TPA. This was because the High Court decision of Boral Masonry Ltd v ACCC (2003) 195 ALR 609, which was handed down after the judgment at first instance, had clarified the meaning of "substantial" for the purposes of section 46. On this basis, the Full Court held that Universal and Warner did not have a substantial degree of market power immediately prior to the introduction of the parallel importation amendments.

The Full Court dismissed the companies' appeal in relation to section 47 of the TPA.

In relation to penalties, the Full Court increased the fine to \$1 million per company (even though the contravention of section 46 of the TPA was not sustained) but kept the penalties on the executives the same (except reducing one penalty on the basis of a factual error).

E4238 / CaseNote

ARTISTIC WORKS; INJUNCTION; REPRODUCTION; SUBSTANTIAL SIMILARITY; TRADE MARK

Australia

Australian Chinese Newspapers Pty Ltd v Melbourne Chinese Press Pty Ltd*(2003) 98 Copyright & Designs Bulletin 3*

A summary of a case concerning copyright and trade marks in Chinese characters used in the masthead of competing publishers and distributors of Chinese language newspapers in Australia. The applicant's four character logo was registered as a trade mark and has been used on the paper since 22 October 1996. The respondent's logo contained three of the four characters in the applicant's masthead.

On the issue of copyright infringement, the Federal Court (Conti J) found that the applicant's masthead was an "artistic work" for the purposes of the Copyright Act. The respondents, by digital manipulation, had reproduced a substantial part of the applicant's artistic work (using three of the four characters) to create a visual impression of objective similarity between the logos. In relation to trademarks, Conti J found that the respondent's logo was at least deceptively similar to the applicant's trade mark.

The applicant was granted an injunction (to take effect in 30 days) against the respondents using the infringing logo.

E4239 / CaseNote

ADVERTISING; IDEA / EXPRESSION DICHOTOMY; INFRINGEMENT; INJUNCTION; SUBSTANTIAL PART; TRADE PRACTICES

Australia

Telstra Corp Ltd v Royal & Sun Alliance Insurance Australia*(2003) 98 Copyright & Designs Bulletin 4*

A summary of a case in which Telstra unsuccessfully claimed that Royal & Sun Alliance Insurance (RSA) had infringed its copyright by making and broadcasting an advertisement which similar contained elements to Telstra's successful "Mr Goggomobile" advertisements of the 1990s.

Telstra's Mr Goggomobile advertisements featured Mr Goggomobile (played by Tommy Dysart), an unusual motor vehicle, the use of the telephone to help resolve a problem and a humour narrative technique. RSA acquired Shannons, an insurance agency specialising in insuring vintage and classic cars. The agency wished to capitalise on the awareness of the Mr Goggomobile campaign by using Mr Goggomobile (again played by Dysart) trying to obtain insurance for his car over the phone. No one had heard of his make of car until he called Shannons.

The Federal Court (Merkel J) held that RSA had not infringed Telstra's copyright, on the basis that copyright does not subsist in mere ideas, concepts or themes for advertisements, and Shannon's advertisement fell short of a substantial reproduction of Telstra's script for its advertisement.

However, the Court held in favour of Telstra in relation to its claim that RSA's actions represented an affiliation with Telstra that RSA did not have, and therefore constituted misleading and deceptive conduct. On this basis, the Court awarded an injunction restraining RSA from continuing to broadcast the advertisement. At a subsequent hearing, the Court ordered RSA to pay 60% of Telstra's costs for the proceedings.

E4240 / CaseNote

DESIGNS; DIRECTORS' LIABILITY; INFRINGEMENT; KNOWLEDGE — SECONDARY INFRINGEMENT

Australia

Review Australia Pty Ltd v Redberry Enterprise Pty Ltd*(2003) 98 Copyright & Designs Bulletin 8*

A summary of a case concerning a claim of copyright infringement in certain dress making patterns and sample garments. Review Australia was unsuccessful in its action to join individual directors of Redberry Enterprises and Xoxoxo Trading to its action against the companies. Heerey J denied the motion on the basis that Review Australia had failed to establish an arguable case of actual or constructive knowledge by the individual directors. His Honour added that the fact that an individual was a director of a company was of itself insufficient to show actual or constructive knowledge of copyright infringement.

The author notes that an additional reason for denying the motion was that Review Australia's solicitors had threatened to join the directors at an unsuccessful mediation 9 months before this motion to join was filed.

E4241 / CaseNote

COMPILATION; COSTS; INFRINGEMENT; INTERLOCUTORY; MANUFACTURE; PROCEDURE; SOUND RECORDING

Australia

Universal Music Australia Pty Ltd v Miyamoto*(2003) 98 Copyright & Designs Bulletin 9*

A summary of a case in which ten music companies successfully sought a declaration of copyright infringement against DJs (who remixed sound recordings in which the music companies were exclusive licensees) and other individuals (who sold CDs containing the remixed tracks). Lindgren J held that copyright infringement had occurred, on the basis that the CDs contained substantial reproductions of the sound recordings and that the CDs were manufactured and then offered for sale.

The question of costs was adjourned due to the complexity of the lump sum award sought by the applicants.

Prior to delivering judgment in this case, solicitors for two respondents filed motion that judgment against his clients not be delivered and that leave be given out of time to file an appearance and defence. Lindgren J declined to delay judgment but directed that orders against these two respondents not be entered until further notice.

E4242 / CaseNote

DAMAGES; INFRINGEMENT; PIRACY; SELLING; SOUND RECORDING

Australia

Universal Music Australia Pty Ltd v Hendy Petroleum*(2003) 98 Copyright & Designs Bulletin 12*

A summary of a case in which several major music companies took action against a petrol station and two of its employees, for selling ten unauthorised copies of sound recordings in which the companies were exclusive licensees. The respondents admitted that they had infringed copyright by selling the CDs in these circumstances.

Raphael FM ordered damages of \$299.90, on the basis of evidence that the CDs were sold for \$29.99 each. This amount was awarded against the two employees because they were not “innocent infringers” for the purposes of the Copyright Act. In relation to additional damages under s115(4) for flagrant infringement, Raphael considered that the respondents did not try to hide their infringements and were fully aware of their activities but that they were not burning new copies of the CDs and that their actions only concerned a small number of CDs. After a comparison of damages awarded in recent decisions, his Worship determined that the conduct was at the lower end of the flagrancy scale and awarded additional damages of \$17,500.

The decision confirmed the jurisdiction of the Federal Magistrates Court in respect of civil actions arising out of Part V of the Copyright Act (Remedies and Defences).

E4243 / CaseNote

DISCOVERY; INFRINGEMENT; PEER-TO-PEER SHARING; PROCEDURE; SOUND RECORDING; WEBSITE

Australia

Sony Music Entertainment (Australia) Ltd v University of Tasmania*(2003) 97 Copyright & Designs Bulletin 13*

A summary of interlocutory proceedings in which several music companies sought discovery and inspection orders against three Australian universities in relation to data on the universities’ computer networks. The music companies argued that the computer networks could provide evidence of copyright infringement in sound recordings in which the music companies were exclusive licensees. The Federal Court granted the discovery order subject to confidentiality undertakings by Mr Thackery, the forensic investigator nominated by the music companies to conduct the discovery.

The recording companies sought a wide scope of orders to allow inspection of records by the recording companies, their legal representatives and Mr Thackery. The universities sought to narrow the scope by conducting the searches themselves and limiting discovery to websites and files which fell within nominated categories. The Court (Tamberlin J) noted that CD-ROM’s were records of information and therefore could be considered “documents”; and that the Court could order discovery even though the documents to be discovered may contain a wide range of other information. His Honour rejected many of the universities’ proposed restrictions and granted orders which limited the discovery to persons for the purpose of a music company commencing proceedings against that person for copyright infringement in the sound recording.

After these orders were made, the University of Sydney submitted that its back-up copies of files had been overwritten and therefore did not come within the description of files required by the order. On 29 July 2003, Tamberlin J determined that the order should be interpreted to mean that deleted and overwritten information should be tested to see whether any useful information could be recovered. Costs for this application were awarded to the music companies.

Following this order, the record companies sought an order that they receive information from the University of Sydney relating to dates on which the back up tapes were deleted or overwritten, the dates when the University became aware of the overwriting of the backup tapes and the steps taken to determine what information had been deleted or overwritten. On 4 September 2003, Tamberlin determined that no ground had been made out to justify an order requiring such information to be provided by the University of Sydney. Accordingly, that application was dismissed with costs.

E4244 / CaseNote

DISCOVERY; INFRINGEMENT; MUSIC; PIRACY; PRIVACY; SOUND RECORDINGS

Australia

MP3s, Copyright, Discovery and Privacy: Copyfight between the Music Industry and Universities

Catherine Lee

[2003] ENT.L.R. 218

Sony Music Entertainment (Australia) Ltd v University of Tasmania [2003] FCA 532, [2003] FCA 724

This article discusses the action between several music companies and three Australian universities in relation to the universities providing information to the music companies which may contain evidence of copyright infringement occurring on the university networks. The matter came before Tamberlin J in the Federal Court who allowed the record companies claim for discovery subject to a claim of privilege by the university and confidentiality undertakings by the forensic analyst conducting the discovery.

The author comments that the case illustrates how the universities exercise minimal control over their networks and questions whether more control is necessary given that universities aim for an environment of intellectual freedom and creative exploitation.

E4245 / CaseNote

ARBITRATION; ARTISTIC WORKS; CONTRACTS

Canada

Desputeaux v Editions Chouette (1987) Inc Supreme Court of Canada (2 March 2003)

Paul Tackaberry

[2003] ENT.L.R. N-75

A note on a case in which the Supreme Court of Canada held that an arbitrator's mandate included not only what was set out in the arbitration agreement, but everything else which is closely related to it, such as a co-authorship issue in copyright disputes.

The case arose from a dispute concerning the rights assigned by Ms Desputeaux and Ms L'Heureux to the publisher Les Editions Chouettes for the character "Calliou" in children's books. After a disagreement with Ms Desputeaux, Les Editions Chouettes sought a declaration of their rights under the contract. The matter was referred to an arbitrator who found in favour of the company. Ms Desputeaux went to court, arguing that certain aspects of the dispute could not be determined by arbitration. The matter eventually came before the Supreme Court who found in favour of Les Editions.

The author states that the case highlights the Court's support for arbitration agreements and that players should welcome the certainty in the area created by the decision.

E4246 / CaseNote

AUTHORISATION; INTERNET SERVICE PROVIDER; MUSIC; PEER-TO-PEER SHARING

Canada

Canadian Assoc of Internet Providers, Canadian Cable TV Assoc v Society of Composers, Authors and Music Publishers of Canada

Paul Tackaberry

[2003] ENT.L.R. N-76

A note on a case concerning ISP liability for users who transmit unauthorised digital music files. The Federal Court of Appeal in Canada held that:

- * ISPs are not liable for this type of infringing conduct by their users except when caching;
- * the jurisdiction of the Canadian Copyright Board only extends to Canadians who access websites stored overseas; and
- * ISPs do not authorise the communication of music by their users unless the ISP has been notified to remove the infringing conduct and then fails to do so.

The author notes that the Supreme Court of Canada granted leave to hear an appeal on this decision in March 2003.

E4247 / CaseNote

PUBLIC INTEREST

Canada

Posting of Confidential Documents Improper Despite Public-Policy Issues

Jean-Francois Nadon

(2003) 3 (8) WECI 7

Fraser Health Authority v Hospital Employees' Union et al, British Columbia Supreme Court, 2003 BCSC 807

A summary of a case in which a Canadian court held that tender documents were protected by copyright and that any public interest in the documents was overridden by the public interest in maintaining copyright protection. In this case the Hospital Employees' Union had attempted to publish on its web site tender documents that had been sent to the Fraser Health Authority for the contracting out of security services.

E4248 / CaseNote

BERNE CONVENTION; FORMALITIES; OWNERSHIP; REGISTRATION

Colombia

Colombian court underlines need for local registration

Daniel Pena

(2003) 133 Copyright World 7

Microsoft Corporation and Adobe Systems Incorporated v Promociones Industriales SA ProIndustrial SA and Carlos Vicente Antonio Vargas Lopez

A summary of a case in which Microsoft and Adobe unsuccessfully took action against a software pirate. Their action failed because they did not register their ownership of copyright in accordance with Colombian Copyright law.

The author notes that the judgment has been queried as it compels programmers to register assignments and agreements in relation to the software, a requirement which contradicts the Berne Convention's aim of protecting copyright without registration or other formalities.

E4249 / CaseNote

ARTISTIC WORKS; ECONOMIC RIGHTS; INFRINGEMENT; MORAL RIGHTS; REPRODUCTION

Europe

Copyright and the Reproduction of Artistic Works

Simon Stokes

[2003] EIPR 486

Theberge v Galerie d'Art du Petit Champlain Inc

A note on a case in which an artist alleged that the defendant gallery had infringed his copyright by using an ink conversion process to completely transfer his artistic works from posters to canvas, giving the appearance of new original paintings. Sometimes the plaintiff's signature disappeared in the process. As the image was entirely removed from the poster, there was no increase in the total number of reproductions of the plaintiff's work.

By a narrow majority, the Supreme Court of Canada held in favour of the defendant. According to the majority, the plaintiff was asserting a moral right to control the use of authorised copies of the work, in the guise of an economic right. As the case involved the mechanical transfer of the lawfully acquired poster to a canvas, no reproduction of the original work took place. Therefore the plaintiff's remedies related to moral rights rather than copyright. The minority adopted a broader notion of "reproduction" and took the view that there was no requirement to establish that there was an increase in the total number of copies of the work.

The author comments that from a UK perspective the decision was correct, but notes the challenging nature of the arguments advanced by the dissenting minority.

E4250 / CaseNote

PRIVATE COPYING; RENTAL RIGHT; SOUND RECORDINGS

Israel

The Municipality of Holon v N.M.C. Music Ltd et al. Israel Supreme Court

Karen Elburg

[2003] ENT.L.R. N-81

(Israel Supreme Court, Levine J, unpublished Civil Appeal 326/00)

A summary of a case in which Israel's Supreme Court considered the extent to which recording producers may prevent the lending of its sound recordings by a municipal library, where the library allowed users to borrow CDs on payment of a subscription fee.

The Copyright Ordinance provides that it would be an infringement of copyright to lend or rent for commercial purposes a CD which contains a work or a substantial part of a work. Reversing earlier findings by the District Court, Levine J held that the actions of a public lending library were not for commercial purposes. His Honour also stated that the respondents are compensated for home recordings through other provisions of the Ordinance.

E4251 / CaseNote

INTERACTIVE MEDIA; INTERNET; JURISDICTION

United Kingdom

New York rules

Rajen Akalu

(2003) 131 Copyright World 11

Thomas Publishing Company v Industrial Quick Search Inc, Federal District Court for the Southern District of NY

A summary of a case in which a New York Court has held that an interactive website which was accessible in New York subjected a defendant to that court's jurisdiction.

The plaintiffs published a comprehensive directory of companies. The defendant, an independent sales manager based outside New York, had used the plaintiff's material to solicit business. The plaintiff commenced proceedings in New York alleging that the defendant's website infringed its copyright and trade mark rights.

The author comments that the case provides an insight into judicial treatment of the Internet and issues of personal jurisdiction. He further comments that the case makes clear that defendants engaging in Internet transactions with an effect in a particular jurisdiction cannot avoid liability in that jurisdiction simply by staying physically outside that jurisdiction.

United Kingdom

The Easyinternetcafe Decision

Kevin Garnett

[2003] EIPR 426

A note on a case concerning easyInternetcafe, which ran Internet Cafes in the United Kingdom. Upon payment of a fee, customers could access the Internet and download music files at the cafe. On payment of a further fee, the cafe staff would copy the downloaded files onto a CD-R provided by the cafe. The cafe staff did not know the content of the files.

The music company plaintiffs sued the cafe for copyright infringement in their sound recordings. The cafe relied on two defences: first that it had not done the copying; and second on a “time-shifting” defence under the UK Copyright Designs and Patents Act.

The court rejected the argument that the cafe employees were merely carrying out the instructions of the customer without any knowledge of what was being copied, since knowledge is not an element in infringement by making an unauthorised copy. The Court also rejected the argument concerning time-shifting, on the grounds that the cafe was copying not for the purpose of private and domestic use but to make a profit. The author discusses this exception, as well as other arguments that could have been brought by the music company plaintiffs.

United Kingdom

Copyright and design right: mutually exclusive, but not necessarily one or the other

(2003) 30 *Linklaters* 14

Lambretta Clothing v Teddy Smith (23 May 2003)

A summary of a case in which a UK court held that there was no protection under copyright or unregistered design rights for elements of clothing which fall within the description of “surface decoration”. The court held that there was no design right in either the shape of the Lambretta tracksuit top (because it was not original) or its “colourways” (because they were surface decoration). The judge rejected the argument that copyright and design law were mutually exclusive and that a design must be protected by copyright if it is not protected by design law.

The author notes that the judge acknowledged that it was difficult to reconcile different approaches within copyright law and design law with respect to surface decoration.

Lambretta has filed an appeal which is scheduled to be heard in April 2004.

E4254 / CaseNote

EC DIRECTIVE; INFRINGEMENT; PEER-TO-PEER SHARING; SOUND RECORDINGS; TIME SHIFTING

United Kingdom

Infringement: As easy as A, B, CD...?

David Harmsworth

(2003) 131 *Copyright World* 12

Sony Music Entertainment (UK) Ltd and others v easyInternet Cafe Ltd, English High Court, Chancery Division (28 January 2003)

A note on the easyInternetcafe case. The easyInternetcafe offered a service in which customers, for a fee, could download material from the Internet and burn it onto a CD. The cafe's policy was not to check the contents of its customer's files to be burned. Sony and other music companies alleged that customers were making unauthorised downloads of its music recordings from peer-to-peer networks which the Cafe then copied for them. It argued that both the customer and the Cafe were infringing copyright.

As noted elsewhere in this edition of Update, the cafe unsuccessfully argued that copying by its staff was involuntary and therefore not actionable; or that the service was covered by the "time shifting" provisions of section 70 of the UK Copyright Designs and Patents Act.

The author comments that the case left open the question whether the "time shifting" provisions could apply to someone who downloaded a sound recording from the Internet in the privacy of their own home without the commercial elements that were fatal to the Cafe's defence. He analyses the legislative intent of the section and possible interpretations of it. He also refers to the impact on the section by the UK's implementation of the EC Copyright Directive.

E4255 / CaseNote

ASSIGNMENT; CUBA; GOVERNMENT; JURISDICTION; MUSIC

United Kingdom

World music, national copyright

James Gill; Justin Watts

(2003) 133 *Copyright World* 12

Peer International v Termidor Music Publishers (Editora Music third party) English Court of Appeal (30 July 2003)

A summary of a case concerning the validity of assignments of copyright in musical works by two Cuban musicians to a UK company. The assignments were not registered according to Cuban copyright law.

The court found that the assignments were valid, despite not being registered, for two reasons. First, according to Cuban law, failure to register an assignment does not invalidate it but denies the assignee any legal benefits until it has been registered. Second, the issue of registration only related to Cuban copyright law and could not impinge on the transfer of UK copyright. The defendants also claimed that the assignments were invalid due to a failure to register it with the Cuban Musical Rights Institute pursuant to Cuban law. The Court rejected this argument on the basis that UK courts will not recognise acts of foreign governments which affect property situated in the UK.

E4256 / CaseNote

INCIDENTAL USE; INFRINGEMENT; TRADE MARK; VISUAL ART

United Kingdom

Copyright -- Just What is the Meaning of "Incidental"?

James Hennigan

[2003] ENT.L.R. 215

Football Association Premier League Ltd v Panini Ltd

In this case, the UK Court held that the inclusion of club and Premier League logos on footballer's uniforms featured on collectable stickers by Panini was not "incidental" within section 31 of the Copyright, Designs and Patents Act 1988 (UK).

The author comments that the Premier League argued copyright infringement in the circumstances rather than trade mark infringement because of the Football Association's loss in its 1997 trade mark infringement case against a producer of collectible cards containing footballers in English uniforms with the three lions trade mark.

E4257 / CaseNote

DEFAMATION; INTERNET; INTERNET LINKS

United States

Internet Jurisdiction Case

Mark Stephens

[2003] EIPR N-142

www.court.state.nd.us/COURT/OPINIONS/20020200.htm

This casenote discusses the North Dakota Supreme Court's decision affirming a \$3 million libel judgment against a Minnesota resident who allegedly posted defamatory postings about a North Dakota professor on her website. As the site directly targeted the State, the court affirmed the assertion of jurisdiction and the jury award.

E4258 / CaseNote

DMCA; MUSIC; PEER-TO-PEER SHARING; PRIVACY; SUBPOENA

United States

Court Sends Message to File-Sharing Infringers: You Cannot Hide

Michael Gross

(2003) Summer Authors Guild Bulletin 12

Re: Verizon Internet Services, Inc (US District Court, District of Columbia)

In this case, the Recording Industry Association of America (RIAA) served a subpoena on Verizon pursuant to the Digital Millennium Copyright Act (DMCA) to compel Verizon to reveal the identity of a subscriber who had allegedly made more than 600 copyright protected songs available to other users on the Internet. The relevant provision in the DMCA allows a copyright owner to subpoena an ISP to identify a customer who had used the ISP to infringe copyright in the material.

The US District Court held that the RIAA had properly exercised its rights under the DMCA. Verizon appealed on the basis that it was exempt from liability due to the “safe harbour” provisions in the DMCA. The Court held that an ISP is protected from liability so long as it complies with statutory criteria for assisting copyright owners to identify relevant subscribers. As the RIAA had satisfied the requirements for issuing a subpoena, Verizon must comply with it and provide the requested information.

The author notes that Verizon has appealed this decision. The author also mentions RIAA lawsuits against four college students for creating file sharing networks on their campuses, which were settled out of court.

E4259 / CaseNote

ARTISTIC WORKS; COMMUNICATION TO THE PUBLIC; FAIR DEALING; FAIR USE; INTERNET LINKS; REPRODUCTION

United States

Copyright in 'Thumbnail' Images

Anthony Selleck

(2003) 22 (2) CLB 5

Kelly v Arriba Soft Corporation (United States Court of Appeal for the Ninth Circuit)

A note on a case in which the US Court of Appeal (Ninth Circuit) held that the unauthorised creation and use of “thumbnail images” from original online images by the operator of an Internet search engine did not infringe copyright in those images. Whilst the thumbnail images were prima facie infringements, the court held that they were “fair use” under United States law. The Court remanded the question of copyright infringement by linking to the original images.

The author notes that, unlike the US “fair use” defence, Australian law provides only limited “fair dealing” exceptions to infringement and that the creation and use of a thumbnail in these circumstances would infringe the copyright owner’s rights to reproduce and communicate to the public.

E4260 / CaseNote
SOFTWARE; SUBPOENA

United States

Court Quashes RIAA's DMCA Subpoenas Against Universities

(2003) 3 (8) WECI 12

Massachusetts Institute of Technology v Recording Industry Association of America, USDC Mass., 1:03-MC10209-JLT, August 7, 2003; Boston College v Recording Industry Association of America, USDC Mass., 1:03-MC-10210-JLT, August 7, 2003

A case note on the quashing of subpoenas issued by RIAA as they failed to meet the civil procedure rules that do not allow subpoenas issued in Washington DC to be served in Massachusetts. The subpoenas are an attempt by RIAA to enforce the rights of copyright owners and signal its intention to prosecute serial infringers.

E4261 / CaseNote
MUSIC; PEER-TO-PEER SHARING

United States

Court Rules Aimster Did Not Prove Sufficient Non-Infringing Purposes

(2003) 3 (8) WECI 9

Aimster Copyright Litigation, 7th Cir., No. 02-4125, June 30, 2003

A summary of a decision by the US Supreme Court (Seventh Circuit) upholding a US District Court ruling that Aimster (a distributor of file-sharing software) was liable for contributory copyright infringement. The Court held that Aimster had not proved that its software had sufficient non-infringing purposes: the fact that non-infringing uses were possible was not sufficient. The Court held that Aimster's tutorial on how to use the software was an invitation to infringe copyright, as it used an example sharing copyrighted music.

Aimster had relied upon *Sony v Universal City Studios*, in which Sony had provided evidence of non-infringing purposes for Betamax machines to support its claim not to be a contributory infringer. The Court rejected the argument that Aimster could not know what files were being copied due to encryption in its software, as ignorance would not be a defence under copyright law.

2: Recent Articles

E4262 / Article

INTELLECTUAL PROPERTY

Asia-Pacific

Cargo cults and intellectual property in the South Pacific

Miranda Forsyth

(2003) 14 AIPJ 193

The author contends that the nations of the South Pacific should develop a system of intellectual property protection that addresses the needs of the region and not copy systems based on western models. The author discusses some of the alternatives that may protect indigenous intellectual property including: sui generis protection, contract, and education. The author further argues that before colonisation there were indigenous legal systems protecting traditional knowledge that needs to be developed alongside Western models.

E4263 / Article

CANADA; CRIMINAL LAW; ECONOMIC RATIONALE; GOVERNMENT REPORT; HONG KONG; LEGISLATIVE AMENDMENTS; PIRACY; UNITED STATES

Australia

Culpable Copying: The Criminal Offence Provisions of the Copyright Act 1968

Darren Spading

(2003) 54 IPF 38

This article discusses the “criminalisation” of copyright law. The author examines the history of copyright penalties and enforcement measures, rationale of copyright protection, offences and penalties under the Copyright Act 1968, problems of infringement and piracy (applying the offence provisions), the Commonwealth Government’s report “Cracking Down on Copyrights: Enforcement of Copyright in Australia” and compares the Australian approach with that taken in Hong Kong, Canada and the United States. He concludes that copyright law is being turned away from its conventional past as the protector of economic interests and remodelled as an enforcer of functions of criminal law.

E4264 / Article

ENFORCEMENT; INTERNET; JURISDICTION

Australia

Beyond Gutnick: Enforcement of foreign defamation judgements in Australia

Sophie Dawson; Aaron Kloczko

(2003) 52 Computers & Law 1

In light of the High Court decision in *Dow Jones v Gutnick*, the authors consider both the Foreign Judgments Act 1991 and the common law in relation to the enforcement of foreign judgments in Australia. This position is then contrasted with enforcements of foreign judgments in the United States. The authors comment that Australian courts appear more likely than US Courts to enforce foreign defamation judgments. They also state that the reluctance of US Courts to enforce such judgments protects US-based publishers and places other at a competitive disadvantage in attracting foreign media investment.

E4265 / Article

AUTHORISING INFRINGEMENT; INTERNET; INTERNET SERVICE PROVIDER

Australia

Copyright Crack Down - The Implications for Australian Internet Service Providers under a Free Trade Agreement between Australia and the United States

Sydney Birchall

(2003) 52 Computers & Law 25

This article discusses ISP liability in Australia and in the US. The author also discusses the implication of harmonising Australian copyright law with that of the United States in light of the Free Trade Agreement negotiations. He comments on the negative effects of such harmonisation, including abuse by copyright holders in respect of take down notices and privacy as well as onerous compliance obligations on ISPs.

E4266 / Article

DIGITAL AGENDA; INTERNET SERVICE PROVIDER; LEGISLATIVE AMENDMENTS; LIBRARIES; TECHNOLOGICAL MEASURES - CIRCUMVENTION

Australia

Review of Digital Agenda Copyright Reforms

Michael Argy

(2003) 53 Computers & Law 24

The author provides an overview of reforms to the “Copyright Digital Agenda” Act and the review of this legislation. He also analyses possible contentious issues in the review such as ISP liability, circumvention of technological protection measures and corporate libraries.

E4267 / Article

“BALANCE” BETWEEN OWNERS AND USERS; DIGITAL AGENDA; DMCA; FAIR DEALING; LEGISLATIVE AMENDMENTS; PEER-TO-PEER SHARING

Australia

Copyright Online: A short note on the proliferation of content distribution technologies online, its implications for the law and suggestions for the future

Abhishek Singh

(2003) 53 Computers & Law 28

The author compares copyright in the online environment and physical space in light of the balance between copyright creators and users. He analyses statutory and case law developments in relation to protecting content on line and concludes that a redesign of of copyright law can again strike the appropriate balance between “those who give us the fruits of their imagination, and those who seek to enjoy those fruits”.

E4268 / Article

LEGISLATIVE AMENDMENTS; PARALLEL IMPORTATION; SOFTWARE

Australia

Australia's new rules permitting parallel importation of software An analysis of their effect and the extent to which software licences can make them ineffective

Derek Neve

(2003) 14 AIPJ 167

The article discusses the recent amendments to copyright law which allow for the parallel importation of software. It commences with a consideration of international and Australian law on parallel imports. The author discusses common computer software licences and examines legal and practical problems with the new law in Australia. He argues that the new law as drafted extends generally accepted international standards and could be denied its intended effect, should copyright owners use restrictive licences.

E4269 / Article

ARTISTIC WORKS; DESIGNS; REPRODUCTION; SUBSTANTIAL PART

Australia

Copyright – Flattery or Infringement?

Lionel Docker

(2003) 21 Copy Repr 1

This article discusses two decisions involving the issue of substantial reproduction of a work. In *Cummins v Vella* the Full Federal Court held that use of very similar style, colour, technique and subject matter of a painting did not constitute copyright infringement in the original artwork. In *Henley Arch v Tamawood*, the Federal Court held that use of an number of objective similarities in a house plan to be a substantial reproduction of the work. The author argues that as a matter of precedent and practicality the Courts should adopt a truly objective approach in assessing whether a substantial part of the work has been reproduced. He further argues that for policy purposes, the courts should take care to ensure that they are not allowing a plaintiff to establish a monopoly in features in the home design market (where there is little scope for variation).

E4270 / Article

CLRC; DIGITAL AGENDA; FAIR DEALING; INDIGENOUS CULTURE; LEGISLATIVE AMENDMENTS; NEW TECHNOLOGY

Australia

Conference Report: Copyright's 'Unfinished Business'

Mary Wyburn

(2003) 21 Copy Repr 11

This article discusses the papers presented at the conference "Copyright L'amour: Unfinished business" in February 2003. Specific reference is made to the papers "Indigenous Issues" by Justice von Doussa, "Fair dealing and freedom of expression in the UK" by Robert Burrell, "The future of copyright in Europe" by Anselm Kamperman, "New media, new copyright" by Tom O'Regan, "Copyright Reform: government policy objectives" by Kylie Bowne, "Copyright reform: Digital Agenda Review" by Barton Hoyle, "Copyright and contract: the CLRC approach" by Warwick Rothnie and "Copyright and Contract: Issues to Consider" by Libby Baulch.

E4271 / Article

INFRINGEMENT; PEER-TO-PEER SHARING; PRIVATE COPYING; PUBLIC PERFORMANCE; SOUND RECORDING

Australia

Hang the DJ?

Ant Horn

(2003) *Art + Law* 4

Universal Music Australia Pty Ltd v Miyamoto [2003] FCA 812 (18 July 2003)

The author discusses the case in which the Federal Court held that DJs had infringed copyright by producing mix tapes of sound recordings and selling them without permission of the plaintiff copyright owners. The DJs had earlier admitted to reproducing and selling the tapes.

The author discusses copying sound recordings for personal use and playing them in public. He also notes recent actions by the RIAA and the Australian music industry in relation to bringing actions against individuals who share digital music files on peer-to-peer networks.

E4272 / Article

INDIGENOUS CULTURE; INDIGENOUS PEOPLE; PROTOCOLS

Australia

Indigenous Protocols

Robin Ayres

(2003) *Art + Law* 6

The article discusses two sets of protocols for dealing with Indigenous culture and art. One set, “Respect, Acknowledge, Listen: Practical Protocols for working with Indigenous Community of Western Sydney”, is published by Community Cultural Development NSW. The other set is published by the Australia Council.

E4273 / Article

DEFAMATION; PHOTOGRAPHS; PRIVACY; TRADE MARK; TRADE PRACTICES

Australia

Privacy (or lack of) in Photographs

Liz Kazi

(2003) *Art + Law* 9

The article discusses possible methods of protecting privacy in one’s image—such as copyright, defamation, trade marks, trade practices and passing off.

E4274 / Article

CIRCUMVENTION; DIGITAL RIGHTS MANAGEMENT; EXTENSION OF COPYRIGHT; FREE TRADE; INTERNET SERVICE PROVIDER; LIBRARY; PENALTIES

Australia

Copyright and that trade agreement: what the united States wants from us

Colette Ormonde

(2003) 24 InCite 7

This article discusses the possible impact of copyright proposals in the Free Trade Agreement with the United States, from the perspective of libraries and librarians. Areas under consideration include extending the term of copyright protection, prohibiting devices to circumvent otherwise lawful use of information, ISP liability for breaches of copyright, statutory penalties for copyright breaches, prohibitions or reductions on temporary copying and caching as well as introduction of digital rights management systems. The author comments that Australian librarians and library users “will not win anything from the trade negotiations with the United States”.

E4275 / Article

MUSIC

Australia

MPEG-21 Will be a Key Tool in International Digital Rights Management

Scot Morris

(2003) December APRAP 13

An article containing news items on three international developments on music and copyright issues.

One item concerns the co-operation between APRA and CISAC in developing international numbering system for musical and audio-visual works. The author also notes the work of CISAC in developing the Music Industry Integrated Identifier Project which allow digital transactions to include an identifier.

CISAC is to be responsible for a new MPEG format allowing all digital uses to be tracked.

The author also notes that the 44th World Congress is to take place in Seoul, Korea in October 2004.

E4276 / Article

MUSIC

Australia

Member News

Sally Howland

(2003) December APRAP 14

A news item noting that APRA is introducing more frequent payments to members.

E4277 / Article

COPYRIGHT LAW; PUBLIC INTEREST

Australia - United Kingdom

A public interest defence to copyright infringement?

DFC Thomas

(2003) 14 AIPJ 225

This article examines the United Kingdom common law “public interest” defence to copyright infringement. The author notes that the defence is unavailable in Australia and comments that its introduction would be inconsistent with the idea/expression distinction. The author concludes that Australian courts can take the public interest into consideration when considering the fair dealing provisions and the idea/expression distinction, and when considering remedies under section 115(2) of the Copyright Act.

E4278 / Article

COMPUTER SOFTWARE; CONTRACTS

Australia - United States

The formation and enforceability of shrinkwrap, clickwrap and browsewrap- A comparative analysis

Stephen Lewis

(2003) 14 AIPJ 208

The article examines some topical issues on the development and enforceability of end-user licenses in the United States and Australia. The author notes that Australian courts will enforce an end-user licence if the terms are clear and the user’s agreement to be bound by the terms is clear and apparent. The author argues that Australia should not introduce a uniform commercial contract code but should clarify the issue in some other way.

E4279 / Article

BERNE CONVENTION; DEVELOPING NATIONS; IMPLEMENTATION; TRIPS AGREEMENT

Belize

From Berne to Belize

Alhaji Tejan-Cole

(2003) 131 Copyright World 17

The Revision of the Berne Convention in 1971 added an Appendix containing Special Provisions Regarding Developing Countries which offered exemptions designed to encourage development. The author notes that these provisions have been described as “minimal concessions with a lot of strings attached to them” and that most developing countries (including Belize) have opted to fully implement the provisions of the Convention rather than subjecting themselves to the provisions in the Appendix. However, the author comments that another reason for reluctance to make use of the Appendix may be provisions in the TRIPS agreement requiring developing nations to comply with most of the provisions of the Berne Convention.

E4280 / Article

WEBLOG; WEBSITE

Europe

Blawgs The kat's whiskers?

Jeremy Phillips

(2003) 133 Copyright World 34

The author discusses the use of weblogs (“blogs”) by lawyers and notes that these sites are the focus of lively discussion among US lawyers. He calls for European lawyers to become more involved, and notes the launch of his own IP weblog at the website www.ipkat.com.

E4281 / Article

EC DIRECTIVE; ENFORCEMENT; LEGISLATIVE AMENDMENTS; PIRACY; PROCEDURE

European Council (EC)

Procedures and Remedies for Enforcing IPRS: the European Commission's Proposed Directive

William R Cornish; Josef Drexler; Reto Hilty; Annette Kur

[2003] EIPR 447

The authors discuss the European Commission’s proposed Directive “to harmonise procedures and remedies for intellectual property infringement in the national laws of EU Member States”. According to the authors, the Commission is proposing certain “super-TRIPs” refinements which will only apply to the national IP laws on procedure and remedies. Examples of “super-TRIPs” requirements include double licence fees as a regular measure of damages, a right to be informed of third party participation in infringing activities and seizure of all infringing products (even if in the possession of private parties).

The authors express concerns relating to the effectiveness and desirability of introducing Community principles into national procedural laws which generally are not specifically related to IP in their effect. They also express doubts about whether the proposed Directive would comply with European law principles of subsidiarity and proportionality.

E4282 / Article

COMPETITION POLICY; EUROPEAN UNION (EU); LICENSING; UNITED STATES

European Union; United States

Intellectual Property and Competition: Does the Essential Facilities Doctrine Shed Any New Light?

Gregory V. S. McCurdy

[2003] EIPR 472

This article discusses the “essential facilities” doctrine in competition law whereby a plaintiff asserts that a defendant’s refusal to license certain IP rights on reasonable terms unlawfully impedes in the plaintiff’s ability to compete in a downstream market. The author examines cases decided in the United States where plaintiffs have unsuccessfully sought to use the doctrine to retaliate against a defendant’s exercise of its IP rights. He also briefly discusses the development of the doctrine in EU decisions and suggests that the EU may be adopting a similarly narrow interpretation of the doctrine to that of the United States.

E4283 / Article

IDEA / EXPRESSION DICHOTOMY; INJUNCTION; LITERARY WORKS

India

The battle for Bollywood

Simmy Flame; Ranjan Narula

(2003) 133 Copyright World 14

This article discusses the actions by Barbara Taylor Bradford for copyright infringement in her series "A Woman of Substance" by the producers of the Indian television serial "Karishma: the Miracles of Destiny". After several hearings before Indian courts, the author was successful in delaying the screening of the serial for almost two months, but the serial was screened from 21 July 2003 after her attempt to gain a permanent injunction failed. The Court of Appeal upheld the decision to refuse a permanent injunction, but gave Mrs Taylor Bradford the option of taking the matter to trial.

The authors comment that Indian courts have traditionally accepted that the Bollywood practice of using successful films and television programs as "inspiration" for their own versions constitutes the use of ideas rather than infringement of copyright. They add that this and other recent cases raise the likelihood that this practice may come under further scrutiny in the future.

E4284 / Article

DMCA; FAIR USE; INTERNET; MUSIC

India

"Sing a Song for Sixpence". The Coming of Age of Copyright Law in the Light of New Developments in the Music Industry

Shwetasree Majumder

[2003] ENT.L.R. 193

The author discusses music piracy and version recordings in relation to Indian copyright law. Reference is also made to the fair use exception to copyright infringement in musical works and sound recordings.

E4285 / Article

LICENSING

International

IP Licensing: Reaping the Benefits*(2003) May-June WIPO Magazine 10*

The article examines the main advantages and disadvantages of licensing technology related IP, from the perspective of both the licensee and the licensor. The types of licences covered include patents, patentable inventions, trade secrets, know-how, confidential information, copyright, circuit layouts and trade marks.

E4286 / Article

INDIGENOUS CULTURE; TRADITIONAL KNOWLEDGE; WIPO

International

Traditional Knowledge and Intellectual Property: New Prospects and New Directions*(2003) May-June WIPO Magazine 16*

This article introduces the work of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore in relation to the protection of Traditional Knowledge. It discusses Traditional Knowledge and the IP system, together with the new issues raised by ancient traditions and living cultures. The article also discusses Traditional Knowledge in the global marketplace and challenges faced by WIPO when developing a policy for the protection of Traditional Knowledge.

E4287 / Article

FREE SPEECH; HUMAN RIGHTS; PROCEDURE; UNITED NATIONS

International

UN Communication Process and Free Speech

Kate Fitzgerald; Paul Reidy

*(2003) 22 (2) CLB 1**Dow Jones & Company, Inc v Gutnick*

The authors discuss the complaint lodged by journalist Mr William Alpert to the United Nations Human Rights Committee, in which he alleged that the High Court's decision in *Dow Jones v Gutnick* infringes his right to freedom of expression. This is the first complaint against Australia alleging a violation of the right of freedom of expression guaranteed by Article 19 of the International Covenant on Civil and Political Rights.

The authors also discuss decisions made under Article 19 against other countries, and the procedures involved for making a complaint to the Committee.

E4288 / Article

COPYRIGHT

International

Copyright and Licensing Job Positions

Lesley Ellen Harris

(2003) 7 (2) Copyright & New Media Law Newsletter 6

This article is an interview with various people in copyright or intellectual property positions. The interviewer provides an overview of the roles and work performed by people in these positions.

E4289 / Article

COPYRIGHT LAW

International

Not Just the Stuff of Legend*(2003) 7 (2) Copyright & New Media Law Newsletter 3*

A news item reporting the announcement of a review of the Canadian Copyright Act.

E4290 / Article

ASSIGNMENT; DURATION; EU TREATY; INFRINGEMENT; NEIGHBOURING RIGHTS

Russia

Intellectual Property and E-commerce in Russia

David Griston

(2003) 17 (10) WIPR 19

The author examines the main types of intellectual property recognised and protected by Russian law. In respect of copyright, the author discusses the concept of copyright, rights of the author which may or may not be assigned, neighbouring rights, performers' rights and the time period for protection.

The author notes that protection under international treaties in Russia is granted only for works published after Russia joined those conventions. The author also discusses other forms of protection which creators may use when their works are not covered by copyright in these circumstances.

E4291 / Article

DIGITAL RIGHTS MANAGEMENT; EC DIRECTIVE; MORAL RIGHTS; REPRODUCTION; SOFTWARE; TECHNOLOGICAL MEASURES - CIRCUMVENTION; TRIPS AGREEMENT; WTO

Russia

No soft option

Igor Motsnyi

(2003) 131 Copyright World 14

This article discusses the most significant features of the new regime of software protection in Russia after international treaties such as TRIPS and the WIP Copyright Treaty.

The author notes that one of the most important changes was to grant software programmers moral rights, including a controversial right to withdraw programs that have been made available to the public. The author also notes that the law did not change the definition of the reproduction right, but states that it is understood that the definition includes making of a temporary copy in the computer memory. This provides an ambiguous relationship with the EC Directive, under which a temporary reproduction is a prohibited act.

Finally, the author comments that Russia's new software law fails to reflect the WIPO Copyright Treaty requirements for digital rights management and anti-circumvention of technological protection measures. If Russia accedes to the WTO, these issues will have to be considered in for coming amendments to the Act.

E4292 / Article

CONTRACTS — NEGOTIATING; FILM; MUSIC

United Kingdom

Have We Got a Deal?

Alexander Ross

[2003] ENT.L.R. 164

Pretty Pictures v Quixote Films Limited [2003] EWHC 311 QB, Confetti Records and Others v Warner Music UK Ltd (trading as East West Records) [2003] EWHC 1274 Ch

This article discusses two cases in the entertainment industry in which the issue arose as to whether the negotiations between the parties had resulted in a binding contract between them. The author then considers contract principles to be drawn from these two cases such as use of "subject to contract", oral contracts, interim agreements as well as offer and acceptance.

E4293 / Article

FORMAT; LIBEL; MEDIA; MEDIATION

United Kingdom

Mediation Point: What is the Future for ADR in the Media?

Sean McTernan

[2003] ENT.L.R. 173

This article reviews recent developments and trends concerning mediation and its uses with the media industry in the UK. The author discusses present views of the media industry on mediation, as well as the pressure on advisors and clients to mediate disputes. In particular, the author examines libel and format rights disputes in relation to a general discussion of the use of alternative dispute resolution.

E4294 / Article

DATABASE; EC DIRECTIVE; INFORMATION - PROTECTION

United Kingdom

Copyright? Wrong!

Nick Fieldhouse

*(2003) 133 Copyright World 22**British Horseracing Board v William Hill*

This article discusses the EC Database Directive of 1996 and the creation of a new sui generis right for databases, which defines permitted and infringing acts in relation to the use of databases (rather than in terms of rights of reproduction or publication as used for copyright works).

The author discusses the UK case of *British Horseracing Board v William Hill* in which the Court held that the use of the actual information in the database was infringing use, not the form that the extracted data appeared. He concludes that the case illustrates the use of database rights to create monopolies in information and highlights concerns for the interaction between copyright and database rights. The case has been referred to the ECJ for clarification.

E4295 / Article

PERSONALITY RIGHTS

United Kingdom

Derivative Aspects of Character and Perceived Attributes in Persona as Forms of Intellectual Property (Part 1)

Gary Scanlan

[2003] ENT.L.R. 200

In Part 1 of a two part series, this article considers whether an individual's "personality" can be protected through intellectual property laws, including by copyright. The author discusses the elements of "personality" as created by individuals and existing from actions or perceptions of the public. In particular, he refers to the characteristics of John Wayne and James Bond, as created by Ian Fleming and played by Sean Connery and Pierce Brosnan. He also begins an examination of why intellectual property law should consider protection of "personality" rights, a theme which the author notes will be fully explored in Part 2 of the series.

E4296 / Article

CONTRACT; MUSIC; PARTNERSHIP; SOUND RECORDING

United Kingdom

A Concise Guide to Band Partnership Issues

Daniel Whittington

[2003] ENT.L.R. 206

This article discusses the need for a partnership agreement between band members and the contents of such an agreement. The author discusses in detail the legal issues associated with the band name, equality of partners in decision making, hiring and firing of members, appointment of professional advisors, profits and expenses as well as ownership of recordings and works.

E4297 / Article

AUTHORISING INFRINGEMENT; INFRINGEMENT; PEER-TO-PEER SHARING

United States

Share tactics

Matthew Dick

*(2003) 131 Copyright World 21**MGM Studios Inc et al v Grokster Ltd et al*

This article discusses the US court decision involving the Grokster and Morpheus peer-to-peer networks. The author notes that software manufacturers were able to structure their networks to avoid being liable for indirect copyright infringement in the same way as the Napster network in 2001. The main point of difference between the two cases identified by the Court was the degree of control exercised by the particular network. In the Napster case, the file swapping could not take place without the Napster infrastructure. However, Grokster and Morpheus networks had no control over the use of their software once it was in the public domain.

The author notes that the music industry intends to appeal the case and commence action against individuals who use peer-to-peer networks. He also discusses how the case might have been decided under UK law.

E4298 / Article

AUTHORS; DIRECTORS; SCREENWRITERS

United States

Book to Screen: Selling to Hollywood*(2003) Summer Authors Guild Bulletin 15*

The Authors Guild Foundation and the Stanford Alumni in Entertainment hosted a panel discussion called "Book to Screen" in February 2003. This article is a transcript of the discussion between the panellists novelist Susan Trott, screenwriter Lori Gottlieb, agent Jillian Manus and screenwriter/director Jonathon Parker.

E4299 / Article

CONFLICT OF LAWS; CONSTITUTIONAL RIGHTS; MORAL RIGHTS; MUSIC

United States

Moral rights, Legal wrongs

John Beck

*(2003) 133 Copyright World 17**Monroig v RMM Records & Video Corp. 196 F.R.D. 214 (D.PR.2000)*

This article discusses the case of *Monroig v RMM Records & Video Corp.*, in which the author of a musical work was awarded \$6 million in damages by a Puerto Rican court as compensation for a moral rights infringement arising from the defendant's alteration of the lyrics to a song.

The author compares the broad grant of moral rights in Puerto Rico, and the decision in this case, with the situation in the US states which have enacted moral rights legislation in addition to the narrow protection offered by the Lanham Act, Copyright Act and Visual Artists Rights Act. He discusses several hypothetical situations to illustrate possible conflicts between moral rights legislation adopted by some states, the Copyright Act and US Constitution.

E4300 / Article

DISPUTE RESOLUTION

United States

The might of mediation

James Pooly

*(2003) 133 Copyright World 20**ESS Technology, Inc v MediaTek Inc, No. C02-04705 CRB/MEC (Northern District of California)*

This article discusses the benefits of resolving a dispute by mediation in the context of a particular case. ESS, a large global supplier of DVD control chips, alleged copyright infringement against a Taiwanese competitor for using its source code to make a cheaper version of the software. Rather than risk damaging business relationships, ESS did not bring an action against local distributors and sellers of DVD players.

The parties resolved the matter through mediation which avoided an injunction to MediaTek yet provided ESS with satisfactory compensation. In return for payment of \$45 million and continuing royalties of \$90 million, ESS granted MediaTek a non-exclusive licence to use the ESS interface and certain software. The author notes that the case is significant for the way that ESS was able to recover damages from a foreign infringer without disrupting domestic business relationships.

E4301 / Article

COPYRIGHT "BALANCE"

United States

Editorial

Lesley Ellen Harris

(2003) 7 (2) Copyright & New Media Law Newsletter 1

An editorial piece that discusses the copyright balance and the development of technological devices that have made copyright infringement easier. The author notes that suing individuals for copyright infringement can be difficult, and argues that as a result education plays a vital role, by informing copyright users of what will constitute an infringement.

WIPO

Weaving a protective web

Jacqueline Nunan

(2003) 133 Copyright World 9

This article reports on the WIPO Standing Committee on Copyright and Related Rights in relation to broadcasters. The author notes that the Committee has made progress by identifying the beneficiaries of protection under the proposed treaty and the scope of rights to be given to such beneficiaries. She also provides details of a seminar on webcasting, which took place in addition to the main conference.

3: Recent developments and news

E4303 / News

DIGITAL RIGHTS MANAGEMENT; GOVERNMENT

Australia

DRM guide

(2003) *133 Copyright World* 7

This news item notes DCITA's publication of an online Digital Rights Management Guide to assist multimedia creators and developers to secure and exploit the use of their intellectual property on the Internet.

E4304 / News

ABORIGINAL ART; LEGISLATIVE AMENDMENTS; RESELL ROYALTY; VISUAL ARTISTS

Australia

Resale Royalty Update

Chris Sexton

(2003) *Art + Law* 10

The article discusses the ALP's announcement that it is drafting a Private Member's Bill implementing a resale royalty right for visual artists.

E4305 / News

BROADBAND

Australia

National Broadband Strategy

(2003) *October Communications Newsletter DATA* 14

This article discusses the major features of the National Broadband Strategy to improve access to broadband services in regional areas. These include the Higher Band Width Incentive Scheme support for demand aggregation strategies in regional Australia and funding to accelerate the rollout of broadband into regional Australia.

E4306 / News

DIGITAL RIGHTS MANAGEMENT

Australia

Digital Rights Management Guide

(2003) *October Communications Newsletter DATA* 8

This article discusses the launch of the Guide to Digital Rights Management by the Department of Communications, IT and the Arts to help creators protect and exploit their intellectual property in the digital environment.

E4307 / News

INTERNET; LEGISLATION

Australia

Making law more accessible

Malcolm Gillies

(2003) 24 InCite 18

This news item discusses the Federal Parliaments new Instruments Bill which is designed to make Australia's laws and regulations more accessible and user friendly. If enacted, the Bill will establish an electronic Federal Registrar of Legislative Instruments to enable people to find information for their legal requirements in one location. The website is <http://frli.law.gov.au>.

E4308 / News

LICENCE FEES; OPEN SOURCE; SOFTWARE

Brazil

Copyright

Javier Gamboa

(2003) 54 IPF 109

In June 2003, the Government of Brazil launched the program "Free Software Brazil" to save public costs due to payment of software licences and to encourage the development of free software applications. The first stage involves the replacement of the Windows operating system with the Linux operating system for all computer servers used by public entities. The author notes the considerable debate that has been generated by those for and against the measure.

E4309 / News

COPYRIGHT

Canada

Review of Canadian Copyright Act

Tony Roda

(2003) 7 (2) Copyright & New Media Law Newsletter 11

The article provides an overview on the current piracy issues facing intellectual property industries. The author chronicles the increasing moves to enforce intellectual property laws by the House Judiciary Committee targeting student piracy, and proposed extra funding by the House Committee on International Relations for education in countries not in the Organisation for Economic Co-operation and Development. The author comments that there must be proactive enforcement of intellectual property laws to send a clear message to pirates, to reduce piracy to a level that does not impact upon a creator's livelihood.

E4310 / News

CHILE; DMCA; ENFORCEMENT; EXTENSION OF COPYRIGHT; FREE TRADE; INTERNET SERVICE PROVIDER; TECHNOLOGICAL MEASURES - PROTECTION OF; TRIPS AGREEMENT

Chile

TRIPs-Plus Standards in the Free Trade Agreement Signed Between Chile and the US

Javier Gamboa

(2003) 54 IPF 109

After 14 negotiating rounds and almost 3 years of bilateral negotiations, a Free Trade Agreement has been signed between Chile and the United States. The author notes that the Agreement includes a far reaching intellectual property chapter which goes well beyond the TRIPS standards.

The main copyright features in the intellectual property chapter are:

- * extension of the term of copyright from life of the author plus 50 years to life of the author plus 70 years;
- * prohibition of circumvention of effective technological protection measures (following the complex structure of the Digital Millennium Copyright Act in the US); and
- * provision of legal incentives for ISPs to cooperate with copyright owners in deterring the unauthorised storage and transmission of copyright materials.

E4311 / News

DUE PROCESS; EVIDENCE; INFRINGEMENT; LEGISLATIVE AMENDMENTS

Denmark

Bill to secure evidence in infringement cases

Niels M Andersen

[2003] ENT.L.R. N-83

This news item outlines the main features of the proposed Danish bill for securing by the sheriff of evidence in connection with the infringement of intellectual property rights.

The author notes that the bill is supported from Danish authorities, the judiciary and commercial organisations. The General Council of the Danish Bar and Law Society has expressed concerns in relation to the due process protection in the bill.

E4312 / News

INTERNET

France

Copyright Advisory Board Accepts Plan To Increase Spying on Internet Users

(2003) 3 (8) WECI 14

The French Superior Council for Artistic and Literary Intellectual Property has announced its support of moves for better access to the details of Internet users, in an attempt to curb infringements of copyright. Legislation is currently before Parliament and is expected to be passed late in 2003.

E4313 / News

COMMUNICATION TO THE PUBLIC; EC DIRECTIVE; LEGISLATIVE AMENDMENTS; PRIVATE COPYING

Germany

Copyright in the information society

(2003) 30 Linklaters 7

The author notes that the new Copyright Act implementing the EC Copyright Directive came into force on 13 September 2003. The author notes that the main features of the Act are:

- * introduction of the right of making works available to the public;
- * provisions in favour of disabled persons as well as science and teaching; and
- * extension of the existing right to make private copies to making digital private copies.

The author comments that the Act missed an opportunity to resolve controversial questions of German copyright law (such as electronic press reviews and treatment of archives).

E4314 / News

INFRINGEMENT; INTERNET LINKS; REPRODUCTION

Germany

Deep-Linking compatible with copyright and competition law

(2003) 30 Linklaters 8

An item reporting a decision by the German Federal Supreme Court that the Internet search engine “paperboy.de” (which provided deep links to newspaper articles) had not infringed copyright. This was on the basis that setting up a deep link was not an action reserved to the copyright holder or the creator of the database.

The author comments that the court’s decision supports Internet functionality and that any detriment that a claimant might suffer should be tolerated in the public interest.

E4315 / News

CIRCUMVENTION; COMMUNICATION TO THE PUBLIC; DIGITAL RIGHTS MANAGEMENT; DISABILITY; EC DIRECTIVE; PRIVATE COPYING; TECHNOLOGICAL MEASURES - PROTECTION OF

Germany

New Law Implements Directive on Copyright in the Information Society

Ian Karet

(2003) 17 (11) WIPR 7

This article discusses the implementation of the Directive on Copyright and Related Rights in the Information Society by Germany. The new legislation came into force on 13 September 2003. Its main effects are to introduce the right of making works available to the public, provisions in favour of disabled persons, science and teaching and the extension of the right to make private copies to include digital files (limited by the prohibition of anti-circumvention of technological protection measures and digital rights management).

E4316 / News

COLLECTING SOCIETIES – PERFORMANCE RIGHTS

India

Performing rights—power of the Indian Performing Rights Society to collect payments

Ameet Datta

[2003] ENT.L.R. N-85

This case concerns Indian Performing Rights Society (IPRS) disputes with the Federation of Hotels and Restaurants of India (FHRAI) and two hotels in the Southern state of Kerala in relation to the payment of revised copyright tariffs under the amendments to the Copyright Act 1957. Both cases are pending determination.

E4317 / News

WIPO

International

WIPO Committee to Consider Broadcast Treaty at Next Meeting*(2003) 3 (8) WECI 18*

A news item on WIPO's Standing Committee on Copyright and Related Rights (SCCR) meeting in June 2003. The SCCR agreed to decide on whether a diplomatic conference should be organised to consider and draft a global treaty on the rights of broadcast organisations. Issues to be considered include whether retransmission by cable is to be protected and whether Webcasting organisations should be covered.

E4318 / News

CRIMINAL PROCEEDINGS; DE-MINIMUS; PHOTOGRAPHS; PUBLISHERS

Israel

Criminal action for infringement

Shai Kagan; Neil Wilkof

*[2003] ENT.L.R. N-87**Alon Nir v Ma'ase A'Her (Jerusalem Magistrates Court, 15 July 2003)*

The Jerusalem Magistrate's Court rejected a claim by a magazine publisher that the criminal action against it for copyright infringement due to unauthorised use of a photographer's photograph should be dismissed on the basis of the so called de minimis defence, that not every harm to a protected social value warrants criminal liability.

The Court found that the increased abuse of intellectual property rights justified the imposition of a criminal penalty where the law allows it. It also found that since the magazine was fully aware that it was using the photographs without consent, its actions could not be characterised as de minimis.

E4319 / News

EU DIRECTIVE; FAIR USE; ITALY; LEVIES; PRIVATE COPYING; TECHNOLOGICAL MEASURES - CIRCUMVENTION

Italy

Copyright Directive

Jacqueline Rowland-Rouse

(2003) 54 IPF 103

Italy has implemented the EU Directive on Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society by the introduction of a number of new articles or amendments to Italian Copyright Act.

The Italian legislature did not incorporate all of the exemptions set out in article 5 of the Directive (most of which were optional) since some were already covered by the legislation and it had opted out of the others. A private copying right was introduced to allow reproduction of phonograms and audio-visual works for non-profit and non-commercial purposes. There will be an increase in the fees payable on recording devices to grant right holders fair compensation for the fair use exception.

The author notes that public negotiations will continue in relation to provisions requiring rights holders to institute special measures allowing the proper exercise of the fair use exceptions.

E4320 / News

COPYRIGHT

Korea

Korean Online Copyright Suits Increase

(2003) 7 (2) Copyright & New Media Law Newsletter 11

A news item reporting that the number of lawsuits for copyright infringement in Korea is increasing.

E4321 / News

COMMUNICATION TO THE PUBLIC; DAMAGES; ENFORCEMENT; FAIR USE; INFRINGEMENT; LEGISLATIVE AMENDMENTS; REPRODUCTION

Taiwan

Copyright Amendments Strengthen Protection of Digital Works

Cathy C W Ting

(2003) 17 (10) WIPR 10

The Taiwanese legislature has enacted amendments to Copyright Law to strengthen the protection of copyright, the public interest in response to the development of digital and Internet technologies and to impose heavier penalties for infringement of copyright. These laws took effect from 11 July 2003.

Amendments included changes to definitions to cover digital and online use of material and increases in the maximum compensation for copyright infringement. In addition, amendments introduced a right of distribution to copyright holders, and a right to seek remuneration for the public performance of a recorded work.

E4322 / News

COMMUNICATION TO THE PUBLIC; GOVERNMENT; LICENCES

United Kingdom

Licensed for eGovernment

(2003) 133 Copyright World 7

This news item concerns the introduction by Copyright Licensing Agency Limited (UK) of a new public sector licence which allows licensees to scan unlimited extracts from a range of UK books, journals and magazines and distribute them via email.

E4323 / News

LICENCES; SOFTWARE

United Kingdom

Wisdom of all fonts

(2003) 133 Copyright World 8

This news item discusses the partnership between UK font publishers and Federation against Software Theft (FAST) to prevent the illegal use of unlicensed fonts.

E4324 / News

COMMUNICATION TO THE PUBLIC; EC DIRECTIVE; INJUNCTION; INTERNET SERVICE PROVIDER; LEGISLATIVE AMENDMENTS; PRIVATE COPYING; RESEARCH AND STUDY; TECHNOLOGICAL MEASURES - PROTECTION OF

United Kingdom

UK Implements Directive on Copyright in the Information Society

Trevor Cook

(2003) 17 (11) WIPR 12

This article discusses the proposed UK Regulations designed to implement the EC Copyright Directive. Issues discussed include the right to communicate to the public, rights of copyright owners to obtain injunctions for infringing conduct by third parties, limiting the exceptions to infringement for “research”, “time-shifting”, anti-circumvention provisions, and limited exceptions for research into cryptography.

E4325 / News

DURATION; EXTENSION OF COPYRIGHT; LEGISLATIVE AMENDMENTS

United States

Public domain defended

(2003) 133 Copyright World 7

This news item discusses the proposed bill for a Domain Enhancement Act 2003, which attempts to limit the scope of the Copyright Term Extension Act 1998 by ensuring that works enter the public domain 50 years after the date of their publication unless the copyright owner files a request for full copyright protection with the Copyright Office.

E4326 / News

MUSIC; NAPSTER; PEER-TO-PEER SHARING

United States

This time it's legal

(2003) 133 Copyright World 8

This news item reports the proposed relaunch of Napster before the end of 2003 as a legitimate subscription service for online music customers.

E4327 / News

PEER-TO-PEER SHARING

United States

University Students Settle File Swapping Law Suits

(2003) 7 (2) Copyright & New Media Law Newsletter 11

A news item on the settlement of several actions against students who were operating peer to peer sites. The students are to pay damages to the Recording Industry Association of America.

E4328 / News

SOFTWARE

United States

Study Shows Drop in Software Piracy, Ranks 10 Most Improved States

(2003) 3 (8) WECI 18

A news item on the release of a report by the Business Software Alliance (BSA) which shows a decrease in software piracy in the United States. The President of BSA has welcomed the decrease and stated that it is hoped that a continuing education programme will further reduce piracy.

4: Book reviews

E4329 / BookRev

CHINA; HONG KONG; INDIA; INDONESIA; JAPAN; KOREA; MACAU; MALAYSIA; SINGAPORE; TAIWAN; THAILAND; THE PHILIPPINES; VIETNAM

Asia

Intellectual Property Law in Asia edited by Christopher Heath (Kluwer Law International, London 2003)

Isis Ebrahim

(2003) 21 Copy Repr 24

This book consists of chapters written by various authors on different Asian jurisdictions, including China, Taiwan, Hong Kong, Japan, Korea, Vietnam, Singapore, Malaysia, Thailand, the Philippines, Macau, Indonesia and India. The reviewer draws attention to certain material covered in these chapters including the development of traditional knowledge protection in Thailand and how accession to international treaties was often the impetuous for countries such as China, Taiwan, Korea and India to overhaul their domestic IP laws.

The reviewer concludes that the text is an excellent resource tool for those researching Asian IP law.

E4330 / BookRev

ECONOMIC; PATENT; TRADE MARK

International

Intellectual Property: A Power Tool for Economic Growth (by Kamal Idris)

Isis Ebrahim

(2003) 21 Copy Repr 26

This book discusses intellectual property in terms of its being a valuable commodity capable of economic exploitation by countries who wish to capitalise on it. The chapters cover the principal areas of IP law—patents, trade marks and copyright as well as a discussion on traditional knowledge. Where possible, practical examples are given to demonstrate the “success stories” of commercial IP exploitation in a particular area.

The reviewer concludes that the text is engaging and accessible for readers interested in the economic benefits of IP.

E4331 / BookRev

AUTHORSHIP; COMPULSORY LICENSING; DROIT DE SUITE; EQUITABLE REMUNERATION; EUROPEAN UNION (EU); EXPLOITATION; INFRINGEMENT; MATERIAL FORM; MORAL RIGHTS; ORIGINALITY; RESTRAINT OF TRADE; SUBSTANTIAL PART; UNITED KINGDOM

United Kingdom

Intellectual Property Law by Lionel Bently and Brad Sherman OUP 2001

Helen Dakin

(2003) 21 Copy Repr 28

This text covers intellectual property in the UK and the European Union. It is divided into six parts which deal with copyright, patents, designs, trade marks and passing off, confidential information as well as litigation and remedies. Each part commences with an introductory chapter outlining the background, rationale and significant historical developments in that particular area. The copyright part begins with a discussion of the basic issues in copyright protection such as various categories of works, originality, material form, authorship, nature of copyright rights and the duration of copyright right. There are also chapters on infringement, moral rights and exploitation of copyright.

The reviewer concludes that the book is a valuable resource for those interested in IP law but could be improved with increased attention to digital technology and Internet issues as they relate to copyright.

5: Journals and case reports surveyed

Reports of cases

Australian Intellectual Property Cases	AIPC
Intellectual Property Reports	IPR

Journals

Australia

Art + Law	
Australian Intellectual Property Journal	AIPJ
Australian Intellectual Property Law Bulletin	IPLB
Communications Law Bulletin	CLB
Communications Update	
Computers and Law	
Copyright Reporter	Copy Reprtr
Intellectual Property Forum	IPF
Media & Arts Law Review	MALR

International

Authors Guild Bulletin	
Copyright & New Media Law Newsletter	
Copyright World	
Entertainment Law Review	ENT.LR
European Intellectual Property Review	EIPR
Industrial Property and Copyright	IPC
International Media Law	IML
International Review of Industrial Property and Copyright Law	IIC
Journal of the Copyright Society of the USA	J. Copr. Soc'y
Music & Copyright	
Revue Internationale du Droit d'Auteur	RIDA
World Intellectual Property Report	WIPR

Bulletins & reports accompanying loose-leaf services

Australian Intellectual Property News (CCH)	
Copyright Law Bulletin (Butterworths)	