

Copyright Update

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

U04n04

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Author: Catherine Lee

For enquiries about reproduction or other uses of this publication, please contact:
Australian Copyright Council
PO Box 1986 Strawberry Hills NSW 2012
Tel: +61 2 9699 3247
Fax: +61 2 9698 3536
email: info@copyright.org.au

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 bod, through its Policy, Communication and Planning Division.

Copyright Update U04n04

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1: Recent cases

E4644 / Case

ARTISTIC WORKS; DESIGNS/COPYRIGHT OVERLAP; INFRINGEMENT; INJUNCTION; WORKS OF ARTISTIC CRAFTSMANSHIP

Australia

Swarbrick v Burge

2004

Swarbrick v Burge [2004] FCA 813

www.austlii.edu.au/au/cases/cth/federal_ct/2004/813.html

A naval architect/shipwright has obtained the continuation of an interim injunction against a rival company and its employees who were using hull and decking mouldings of a JS9000 yacht to create a further mould for a rival yacht.

Carr J held that the various items created in manufacturing the JS9000 yacht, including a “plug” in the shape of the yacht, deck and hull mouldings, and the yacht itself were both sculptures and works of artistic craftsmanship (owing to their aesthetic quality). As the items could be classified as works of artistic craftsmanship, they fell outside the scope of the defence to copyright infringement under s77 of the Copyright Act 1968 (Cth). His Honour also found that the naval architect owned copyright in the design drawings (as artistic works) and in the deck and hull moulds (as sculptures).

The Court found that the incomplete mould of the hull which the rival company had made was a substantial reproduction of the external features of the hull of the JS9000 yacht and consequently infringed the architect's copyright in the plug, hull mould, hull mouldings, design drawings and the yacht itself. Although the deck was not completed by the rival company, Carr J was satisfied on the evidence that, unless restrained, it would have also infringed copyright in the deck mould and deck mouldings.

This decision only concerns issue of liability, with the remaining issues relating to remedies and cross-claim yet to be heard. The interlocutory injunction granted by Carr J on 12 September 2003 will remain in force until a determination on the issue of relief.

E4645 / CaseNote

ACTUAL COPYING; HOUSE PLANS; TRADE PRACTICES

Australia

Dixon Projects Pty Ltd v Hallmark Homes Pty Ltd (2004) FCA 118

Andrew S Crowe

(2004) IPF 60

Dixon Projects Pty Ltd v Hallmark Homes Pty Ltd (2004) FCA 118 (20 February 2004) - Cooper J

In this case, Dixon Projects failed in its claim against Hallmark Homes for copyright infringement in house design called the “Grand Vista”. Cooper J accepted that Hallmark Homes’ “Montego” design had been independently authored without reference to the Grand Vista design. Dixon Projects also failed in its claim under the Trade Practices Act.

E4646 / CaseNote

CONTRACTS; EMPLOYEES; FIDUCIARY DUTY; OWNERSHIP; REMEDIES

Australia

Victoria University of Technology v Wilson & Ors (2004) VSC 33

Glenn C McGowan

(2004) IPF 67

Victoria University of Technology v Wilson & Ors (2004) VSC 33, (Nettle J, Supreme Court of Victoria, 18 February 2004)

This case concerns the ownership of an online business patent which was created by several academics during their employment at Victoria University of Technology. Nettle J held that unless the contract of employment expressly provided to the contrary, or the invention is a work which the employee was paid to perform, then it is unlikely that any invention made by the employee will belong to the employer. In this case, evidence established that it was never part of the activities of the School of Economics to invent Internet-based e-commerce systems, but rather confine their research to peer reviewed papers. His Honour also found that the academics had breached a number of terms of their employment contracts (for example the policies for mobile phones, emails and computer use) to develop the invention. However, the remedy for breach of contract was damages, not ownership of the invention or an account of profits.

E4647 / CaseNote

DESIGNS/COPYRIGHT OVERLAP; FASHION; INFRINGEMENT; INJUNCTION; SUBSTANTIAL SIMILARITY

Australia

Barry Bowden Investments Pty Ltd v XOXOXO Trading Pty Ltd

Glenn C McGowan

(2004) IPF 70

Barry Bowden Investments Pty Ltd v XOXOXO Trading Pty Ltd (12 January 2004) Heerey J

The Federal Court granted an interlocutory injunction restraining XOXOXO from making, importing or distributing certain garments which the Court found were "for all practical purposes identical in design, manufacture, structure and in most cases, the fabric" to dressmaking patterns in which the applicant claimed to own copyright. Heerey J held that the balance of convenience favoured granting the injunction because of the difficulty of quantifying the loss to the applicants if XOXOXO's conduct continued, compared to the ready ascertainability of calculating XOXOXO's loss from granting the injunction.

The author finds the result surprising for two reasons: the judge seemed to rely too much on the visual similarity between the garments to save the otherwise weak evidence from the applicant and the injunction restrained numerous unserved respondents.

E4648 / CaseNote

ARTISTIC WORKS; DESIGNS/COPYRIGHT OVERLAP; FASHION; INFRINGEMENT; LEGISLATIVE AMENDMENTS; WORKS OF ARTISTIC CRAFTSMANSHIP

Australia

Who's wearing the pants now?

Catherine Lee

(2004) Copyright World 16

This article discusses the decision in *Muscat v Le* in which a fashion designer was unsuccessful in her claim of copyright infringement against a retailer who copied, manufactured and sold the design for Ms Muscat's Mytiko style of pant without her approval. Ms Muscat was unsuccessful, amongst other things, due to the commercial exploitation of her design and lack of design registration. The author notes that Designs (Consequential Amendments) Act 2003 (Cth) was passed to provide some clarity to the controversial copyright/designs provisions in the Copyright Act 1968 (Cth). She observes that these amendments do not appear to assist fashion designers such as Ms Muscat in actions against individuals who copy their designs.

E4649 / Case

ARTISTIC WORKS; DAMAGES – FLAGRANCY; INFRINGEMENT; LICENCES

Australia

Flags 2000 Pty Ltd v Smith

(2004) IPR 191

The owner and the exclusive licensee of copyright in the Aboriginal flag have successfully sued Mr David Smith (trading as Flags and Poles) for copyright infringement.

Justice Goldberg in the Federal Court confirmed previous court decisions that Mr Harold Thomas is the owner of the copyright in the Aboriginal flag. There was evidence that Mr Smith had infringed copyright in the Aboriginal flag by reproducing it in a material form and selling it to members of the public without a licence from the exclusive licensee, Flags 2000.

The Court ordered that Mr Smith:

- * be permanently restrained from infringing copyright in the Aboriginal flag;
- * deliver up all infringing copies of the Aboriginal flag;
- * pay damages of \$1320 (including additional damages of \$1000); and
- * pay the applicant's costs, in part on an indemnity basis.

In determining the award of additional damages, the Court took into account Mr Smith's mistaken belief that he was not infringing copyright by selling copies of the flag to Aboriginal people. The Court noted that there was no evidence that Mr Smith continued to sell the flag to non-Aboriginal people after he was originally notified of his infringement.

The Court was of the view that despite the relatively low award of damages, it was appropriate to bring the case in the Federal Court having regard to the 'significance of the issue of a challenge to the copyright in the Aboriginal flag' and to the fact that a permanent injunction was granted.

E4650 / Case

CONTRACTS; DAMAGES – FLAGRANCY; PHOTOGRAPHS

Australia

FNH Investments Pty Ltd v Sullivan*(2004) IPR 204*

A Full Court of the Federal Court has dismissed an appeal by FNH Investments against an award of additional damages for flagrant copyright infringement. FNH Investments argued on appeal that additional damages could never be awarded under s115(4) of the Copyright Act if the copyright owner and infringing parties were contracting parties. This was on the basis that exemplary damages are, at best, only awarded in rare cases involving a breach of contract.

The Full Court held that no such limitation was imposed by the subsection. Further, their Honours stated that the limitation should not be implied into the subsection, since the Act was designed to provide copyright owners with a number of statutory remedies to protect the rights attaching to their works.

E4651 / Case

ARTISTIC WORKS; DESIGNS/COPYRIGHT OVERLAP; INFRINGEMENT; INJUNCTION; SCULPTURE

Australia

Swarbrick v Burge*(2004) IPR 129*

http://www.austlii.edu.au/au/cases/cth/federal_ct/2003/1176.html

In this case, a naval architect obtained an interim injunction against a rival company and its employees who were reverse engineering a mould of a yacht for future manufacture.

In late 2002, Mr Swarbrick had given a hull and decking mould of the JS9000 to his employee, Mr Rogers as a bonus. Mr Rogers and other employees resigned and joined a rival company to manufacture the JS9000 from this mould.

Mr Swarbrick claimed that the respondents' reproduction of the JS 9000 infringed his copyright. The respondents argued that the moulding for the JS9000 Yacht was a "corresponding design" which had been "applied industrially" but not registered under the Designs Act 1906 (Cth) and sought to rely upon the defence to infringement under s77 of the Copyright Act 1968 (Cth).

The Federal Court considered that it was strongly arguable that the defence under s77 would not apply on the grounds that the mould and the JS9000 yacht were "works of artistic craftsmanship". The Court also discussed Mr Swarbrick's intent to make an article possessing aesthetic quality. Intent of the creator and its result is an important factor in determining whether a work is of artistic craftsmanship.

Weighing up the balance of convenience to the parties, the Court award the interim injunction.

NB The injunction was continued in June 2004 after Carr J found that the respondents had infringed Mr Swarbrick's copyright. This decision is also reported in this edition of Updates.

E4652 / Case

DAMAGES; EMPLOYEES; INFRINGEMENT; PIRACY; SOUND RECORDING

Australia

Universal Music Australia Pty Ltd v Hendy Petroleum Pty Ltd*(2004) IPR 204*

In this case, several major music companies were successful in their action against a petrol station and a father and son who worked there for selling ten unauthorised copies of CDs. The respondents admitted that they had infringed copyright by selling the CDs in these circumstances, but argued that these infringements were of an innocent nature.

Raphael FM considered that the two employees were not “innocent infringers” and ordered damages for the cost of the CDs. This was on the basis that it was inherently unlikely that the father would purchase three or four copies of a particular CD to give to his son and that the evidence showed the father knew full well what he was doing and sought to make a commercial profit from selling the infringing copies. Raphael FM also ordered additional damages under s115(4) for flagrant infringement. However, his Honour determined that the conduct was at the lower end of the flagrancy scale, as the respondents were not burning new copies of the CDs and that their actions only concerned a small number of CDs.

E4653 / Case

ASSIGNMENT; CONTRACTS; LITERARY WORKS; TELEVISION PROGRAMS

Australia

Sumner v Beyond Properties*(2004) IPR 268*

This case concerns the validity of an assignment of copyright for a television show outline in light of alleged representations that the series would be produced. Much of the decision was concerned with the nature of any representations made prior to the agreement. Austin J found that there was no firm representation or commitment made by the defendants to produce the series and that there was no basis for implying a term to that effect into the agreement. Accordingly, the agreement was a valid assignment of copyright and not subject to any restriction.

E4654 / Case

ANTON PILLER ORDER; INTERNET; MUSIC; PEER-TO-PEER SHARING; PRACTICE AND PROCEDURE; SOUND RECORDING

Australia

Universal Music Australia Pty Ltd v Sharman License Holdings Ltd*(2004) IPR 299*

In this case, the Federal Court refused to set aside previous Anton Piller orders made by it against Sharman and associated companies in respect of alleged copyright infringements facilitated by their operation of the online file-sharing network Kazaa. Sharman sought to set the orders aside on the grounds that they were made without disclosure to the court of the concurrent proceedings in the United States where it had complied with a subpoena for the discovery and inspection of documents.

Wilcox J considered that the Anton Piller orders sought to protect transitory information, such as “snapshots” of changing data on the network, whereas the orders in the United States sought to protect static information. Therefore, his Honour held that non-disclosure of compliance in the proceedings in the United States was not material to the present case and did not affect the decision to grant the particular orders.

E4655 / Case

COLLECTING SOCIETIES; COPYRIGHT TRIBUNAL; PRACTICE AND PROCEDURE; ROYALTIES; TRANSMISSION RIGHT

Australia

Audio-Visual Copyright Society Ltd v Foxtel Management Pty Ltd*(2004) IPR 361*

Screenrights and several pay TV providers were involved in proceedings before the Copyright Tribunal concerning the remuneration payable by pay TV companies for retransmission of material from free-to-air broadcasts. At this interlocutory hearing, Lindgren P determined that the regulations for conduct in the Tribunal permitted a corporation to be summoned to appear, by its proper officer, before the Tribunal to give evidence of a limited nature (namely as to their possession or custody of materials and to produce documents and articles).

E4656 / Case

CRIMINAL LAW; DVD; PENALTIES; PIRACY

Australia

Chen v NSW Police Service*(2004) IPR 431*

In this case, Ms Chen appealed against the sentence imposed on her by a Local Court Magistrate for selling pirate DVDs at Penrith markets. Jacobson J found the penalty of a good year behaviour bond for 5 years and \$8000 fine was a proper one, given evidence of paperwork, business cards and volume of infringing material which suggested that Ms Chen was engaged in commercial activities. His Honour also held that the Magistrate was entitled to consider “deterrence” as a legitimate factor when determining the appropriate penalty.

E4657 / Case

ASSIGNMENT; COMMISSIONING; COMPUTER SOFTWARE; CONTRACTS; OWNERSHIP

Australia

Telephonic Communicators International Pty Ltd v Motor Solutions Australia Pty Ltdhttp://www.austlii.edu.au/au/cases/cth/federal_ct/2004/942.html

The Federal Court has dismissed a claim for copyright infringement against a company who was commissioned to create the E-call24.com product for a client (Telephonic Communicators) and which later sold a rewritten version of it (called PhoneWizard) to one of the client’s competitors. Selway J held that although there was evidence of actual duplication of code from the E-call24.com product, that evidence was insufficient to show that anything that was “essential” or “original” had been copied into the PhoneWizard product.

Telephonic Communicators was also unsuccessful in its claims based on breach of contract, passing off, misleading and deceptive conduct and breach of confidence.

E4658 / Case

ARTISTIC WORKS; DESIGNS/COPYRIGHT OVERLAP; FASHION; INFRINGEMENT; INJUNCTION; WORKS OF ARTISTIC CRAFTSMANSHIP

Australia

Muscat v Best Direction Pty Ltd*(2004) IPR 1*

In this case, the Federal Court granted Ms Muscat interlocutory injunctions to restrain 18 respondents from manufacturing, importing, selling or distributing Mytiko pants which may infringe copyright in the dressmaking patterns for the garments. Sundberg J held that there was a serious question to be tried on the issue of Ms Muscat's ownership of copyright in the patterns, whether copyright infringement had occurred and the applicability of the principles in *Muscat v Le* in this case. His Honour found that the balance of convenience favoured Ms Muscat because she was likely to suffer loss as a result of the respondent's activities, which would be almost impossible to quantify if she ultimately succeeded at trial.

E4659 / Case

ACTUAL COPYING; HOUSE PLANS; TRADE PRACTICES

Australia

Dixon Projects Pty Ltd v Hallmark Homes Pty Ltd*(2004) IPR 8*

Dixon Projects was unsuccessful in its action for copyright infringement in certain house plans against Hallmark Homes. Dixon Projects alleged that it owned copyright in the plans and drawings of a house design called the "Grand Vista" and that this copyright was infringed by Hallmark Homes' house known as the "Montego".

Cooper J held that reproduction does not occur when the author independently produces a substantially similar result without copying from another. To determine whether a architectural work has been independently developed, it is necessary to examine, by direct evidence or inference, how the architect prepared and drew the plan. His Honour accepted that Hallmark Homes' "Montego" design had been independently authored without reference to the Grand Vista design.

E4660 / CaseNote

BROADCAST; FAIR DEALING; INFRINGEMENT; SUBSTANTIAL PART; TELEVISION

Australia

Network Ten Pty Ltd v TCN Channel Nine Pty Ltd

Warwick Rothnie

[2004] ENT.L.R. N-37

In this case, Network Ten successfully appealed from a decision of the Full Court of the Federal Court, which had held that it infringed copyright by re-broadcasting excerpts of broadcasts from Channel Nine on its program "The Panel".

The High Court, by majority (McHugh ACJ, Gummow and Hayne JJ), adopted a purposive, rather than literal, approach to interpreting the legislation and held that each television program was a separate television broadcast. The case was remitted to the Full Court of the Federal Court for reconsideration of the issues concerning use of a substantial part of a television broadcast.

The author notes that having identified that the particular programs could be protected by copyright as television broadcasts, the majority expressly reserved for consideration whether individual segments of programs (such as on 60 Minutes) could be also be considered as a television broadcast and so protected by copyright.

E4661 / CaseNote

ARTISTIC WORKS; DESIGNS/COPYRIGHT OVERLAP; THREATS OF INFRINGEMENT PROCEEDINGS; WORKS OF ARTISTIC CRAFTSMANSHIP

Australia

Sheldon and Hammond Ltd v Metrokane Inc

Warwick Rothnie

[2004] ENT.L.R. N - 38

In this case, the Federal Court held that copyright did not protect prototypes of Metrokane's "Rabbit" corkscrew or the first manufacturing run as works of artistic craftsmanship because they lacked the required level of aesthetic appeal. However, his Honour stated that if the "Rabbit" corkscrew had been protected by copyright, he would have found that the "Pull-It" corkscrew as manufactured by rival company Sheldon and Hammond infringed that copyright.

The author notes that this case is another attempt to ascertain the meaning of "work of artistic craftsmanship". He also notes that after Conti J accepted that mass produced articles may qualify as works of artistic craftsmanship, it was difficult to understand why the "Rabbit" corkscrew, designed with the objective of making an existing product more attractive so as to command a higher commercial price, did not qualify for protection.

E4662 / Case

DAMAGES – FLAGRANCY; INFRINGEMENT; MUSIC; SOUND RECORDING

Australia

Universal Music Australia Pty Ltd v Miyamoto*[2004] FCA 982*

The Federal Court has ordered five disc jockeys, a record company and its director to pay a total of \$58,566 in damages and additional damages to several major record companies for copyright infringement in the preparation and distribution of unauthorised compilation CDs. The respondents were also ordered to pay \$90,000 in legal costs.

The DJs made 6 compilation CDs of various sound recordings as examples of their work, which they gave away or sold to audience members at their performances.

To calculate the amount of ordinary damages to be paid by each respondent pursuant to s116 of the Copyright Act, Justice Wilcox applied an approximate price of \$8.50 and multiplied this by the number of CDs distributed by each DJ and the record company.

In relation to additional damages under s115(4) of the Act, Justice Wilcox held that the DJs' conduct knowingly trampled on the record companies' rights for their own ultimate financial gain, either by sales of the compilation CDs or by increasing the DJs' popularity and career. His Honour ordered a payment of a total of \$40,500 in additional damages against the DJs, taking into account the financial positions and expressions of regret (or lack thereof) of the individual respondents.

E4663 / Case

ACTUAL COPYING; ARTISTIC WORKS; FONTS; SUBSTANTIAL SIMILARITY; TRADE MARK

Australia

Melbourne Chinese Press Pty Ltd v Australian Chinese Newspapers Pty Ltd*[2004] FCAFC 201 (10 August 2004)*<http://www.austlii.edu.au/au/cases/cth/FCAFC/2004/201.html>

The Full Court of the Federal Court has unanimously dismissed an appeal by Melbourne Chinese Press (MCP) against a finding at first instance that it infringed the trade mark and copyright in the newspaper masthead of rival Australian Chinese Newspapers (ACN).

Each masthead consisted of four Chinese characters, three of which were the same. ACN's logo was hand-drawn according to the Li Shu style of calligraphy. MCP's logo used the same font as ACN's, but was created using a font from a computer program rather than hand-drawn. There was evidence to the effect that MCP sought to "mimic" ACN's masthead, with a view to attracting ACN's patronage as a result of an initial mistaken or unintended purpose.

On the issue of copyright infringement, it was not disputed that ACN's masthead, comprising of four hand-drawn characters in the Li Shu style of calligraphy, was protected as an artistic work. The Full Court, agreeing with the judge at first instance, found that MCP's masthead was substantially similar to ACN's masthead and that using a computer program, rather than a calligraphy brush, to create the masthead did not preclude a finding of copyright infringement.

ACN's trade mark claim was also successful.

E4664 / CaseNote

CONTRACTS; EMPLOYEES; FIDUCIARY DUTY; OWNERSHIP; REMEDIES

Australia

Ownership of academic employee inventions

Ann Monotti

*[2004] EIPR N-129**Victoria University of Technology v Wilson (Supreme Court of Victoria, 18 February 2004)*

This case concerns the ownership of an invention which was created by several academics during their academic employment. Nettle J held that the academics had breached their fiduciary duty to the university through their development of the invention. However, his Honour also held that the remedy for any breach of fiduciary duties or employment contract was damages and not ownership of the invention or an account of profits. The author provides a list of eight brief conclusions from the case for universities and academics.

E4665 / Case

ARTISTIC WORKS; DESIGNS/COPYRIGHT OVERLAP; FASHION; INFRINGEMENT; WORKS OF ARTISTIC CRAFTSMANSHIP

Australia

Muscat v Le

(2004) 60 IPR 276

In this case, a fashion designer was unsuccessful in her claim of copyright infringement against a retailer who copied, manufactured and sold the design of a style of pant from the designer's collection. Although Finkelstein J found that the retailer had infringed copyright in the designs, he was able to rely on the defence provided by the copyright/design overlap provisions in ss 74-77 of the Copyright Act.

E4666 / Case

CONTRACTS; EMPLOYEES; FIDUCIARY DUTY; OWNERSHIP; REMEDIES

Australia

Victoria University of Technology v Wilson

(2004) 60 IPR 392

Victoria University of Technology v Wilson & Ors (2004) VSC 33, (Nettle J, Supreme Court of Victoria, 18 February 2004)

In this case, a university was unsuccessful in its claim to ownership of a business patent which was created by several academics during their academic employment. Although Nettle J held that the academics had breached their fiduciary duties and employment contracts with the university, the appropriate remedy was damages, not ownership of the patent or an account of profits from its exploitation.

E4667 / CaseNote

ANTI-CIRCUMVENTION DEVICES; MUSIC; PRIVATE COPYING; SOUND RECORDING; TECHNOLOGICAL MEASURES - PROTECTION OF

Belgium

Consistent ruling on copyright

(2004) *Copyright World* 6

This case concerns the unsuccessful attempt by consumer organisation, Test-Achats, to obtain an order that the right to make private copies existed under Belgian law. Test-Achats sought the order after major record companies started using technological protection measures on CDs release in Belgium.

E4668 / Case

COLLECTING SOCIETIES - MUSIC; INFRINGEMENT; INTERNET SERVICE PROVIDER; LEVIES

Canada

Society of Composers, Authors and Music Publishers of Canada v Canadian Association of Internet Providers<http://www.lexum.umontreal.ca/csc-ssc/en/rec/html/2004scc045.wpd.html>

The Supreme Court of Canada has unanimously held that Internet Service Providers (ISPs) are a mere “conduit” for copyright material and were not, for the purposes of the Canadian Copyright Act, liable for infringement of copyright in works downloaded from the Internet by their subscribers.

The Court also rejected the argument by the music collecting societies that ISPs located in Canada infringed copyright by communicating works to the public by a telecommunication (between the host server and the end users) and by authorising that communication.

Under section 2.4(1)(b) of the Canadian Copyright Act, a person does not “communicate” works if they only provide “the means of telecommunication”. In finding that the ISPs could rely on this protection, the Court observed that attributes of a “conduit” include the lack of actual knowledge of the infringing contents and the technical and economic impracticality of monitoring the traffic moving through an ISP’s server. In addition, the Court stated that an ISP’s knowledge that someone might use content-neutral technology to infringe copyright is not necessarily sufficient to establish a claim for authorising infringement, as authorisation requires proof that the ISP approves, sanctions or otherwise encourages the infringing conduct.

E4669 / CaseNote

AUTHORISATION; LITERARY WORKS; ORIGINALITY; RESEARCH AND STUDY

Canada

CCH Canada Ltd v Law Society of Upper Canada Supreme Court

William L Hayhurst

[2004] EIPR N-106

This is a summary of the decision of the Supreme Court in Canada which ruled that a law library did not infringe copyright by providing single copies of legal materials for use by members of the legal profession. The Court held that the headnotes, case summary, topical index and compilation of reported decisions were all original works which were protected by copyright. However, the Court held that the Law Society’s dealings with those works were for the purpose of research and therefore a fair dealing within the Copyright Act. The Court gave “research” a wide interpretation to ensure that user’s rights were not unduly restrained nor limited to non-commercial or private use situations. Further the Court held that the Law Society did not authorise copyright infringement by maintaining photocopiers in the library by posting a warning notice that it will not be responsible for any copies made which infringed copyright.

The author comments that the decision provided an opportunity for the Canadian Court to settle that there is no need for “creativity” (as required in the United States) before a work can be regarded as “original”.

E4670 / CaseNote

ABUSE OF RIGHTS; COMPETITION LAW; COMPULSORY LICENSING; DATABASE; INFRINGEMENT; MARKET POWER

European Council (EC)

Refusal by dominant undertaking to grant copyright licence

Kate Brimsted; Christopher Rees

[2004] EIPR N-133

IMS Health GmbH v NDC Health GmbH, European Court of Justice (29 April 2004)

As noted in previous editions of Updates, the European Court of Justice clarified the elements to be satisfied in determining whether a company has abused a dominant market position by refusing to licence a product to smaller competitors.

The authors suggest that avoid compulsory licensing situations, organisations with large market shares and valuable intellectual property should expand their goods and services to fill any perceived gaps in secondary markets so as to avoid exploitation by third parties.

E4671 / CaseNote

DEFAMATION; INTERNET; JURISDICTION; PUBLICATION; WEBSITE

European Union (EU)

Internet: Libel—jurisdiction

[2004] EIPR N-115

In this case, a UK judge refused to set aside an order granting permission for a US resident (boxing promoter Don King) to serve a claim on other US residents (Lennox Lewis, his attorney and several related companies) for defamation arising from the publication of statements on two US-based websites. Eady J considered that there was evidence that Mr King had a substantial reputation in England and Wales and therefore that England was the appropriate forum to determine issues arising from publication in England.

E4672 / CaseNote

IMPORTATION; MUSIC; PRIVATE COPYING; SOUND RECORDING

Finland

Importation of pirate music and software for private use

Lasse Laaksonen

[2004] ENT.L.R. N-51

KKO:2003:136 (22 December 2003)

This case concerns whether a purchaser of multiple copies of pirate CDs could argue that he was not liable for importation of infringing copies on the basis that they were for the private use of his family and friends. The Supreme Court of Finland held by majority that the number of CDs sought to be imported was “noticeably above what might ordinarily be held” to be normal for private purposes and consequently that it was the purchaser’s intention to distribute the CDs to the public, an act which infringed copyright.

The author notes that the case is important as the Court sought to define and restrict the scope of the private use exception in relation to pirate copies of copyright material.

E4673 / CaseNote

IDEA / EXPRESSION DICHOTOMY; LITERARY WORKS; ORIGINALITY; TELEVISION PROGRAMS

Germany

Protection of the format of a TV show

Karl Pilny

[2004] EIPR N-109

In this case, the Supreme Court of Germany held that the format of a TV show featuring little children performing with famous singers was not protected by copyright.

The author notes that until this case, the rejection of TV formats from copyright protection was mostly due to a lack of originality. Here, the TV stations had hoped that the courts would widen the economic protection provided by the Copyright Act to a previously unknown format. He also comments that it is difficult to follow the court's reasoning with respect to shows with an ongoing plot linked by elements of content (which are protected) and TV shows linked by elements of form (which are not protected).

E4674 / CaseNote

COLLECTING SOCIETIES - MUSIC; LEVIES; ROYALTIES

Ireland

High Court discounts club profits as measure of music royalty fees*(2004) 18 (8) WIPR 8**Carrickdale Hotel Ltd v Controller of Industrial and Commercial Property and Phonographic Performance (Ireland) Ltd (High Court of Ireland, 12 May 2004)*

In this case, the Irish High Court held that the profitability of a venue should not be considered as a factor in determining the appropriate royalty rate payable for use of music in on the premises. In particular, Justice Laffoy stated there was no evidence of an adequate nexus between the non-exclusive use of music in a nightclub, and revenue generated from other sources, such as admission, food and drink.

E4675 / CaseNote

DEFAMATION; INTERNET SERVICE PROVIDER; PEER-TO-PEER SHARING; PRIVACY; WEBSITE

Netherlands

Appeals Court upholds orders ISP to disclose subscriber ID*(2004) 18 (8) WIPR 9**Lycos Netherlands v Pesser (Appeals Court of Amsterdam, 24 June 2004)*

In this case, the Appeals Court of Amsterdam ordered Lycos, an ISP, to disclose personal data of one of its subscribers so that Pessers could proceed with a civil action against that particular subscriber for unlawful accusations of fraud. In particular, the subscriber published Pessers' name on a website hosted by Lycos and instructed visitors to email details of fraudulent activities Pessers may have committed. The Court determined that it would be against common interest if Pessers did not have the opportunity to confront the subscriber through Lycos.

The authors note that this decision may open the door for legal action against anonymous users of peer-to-peer file sharing networks.

E4676 / CaseNote

EDUCATIONAL INSTITUTIONS; EMPLOYEES; OWNERSHIP; SOFTWARE

United Kingdom

Cyprotex's appeal is dismissed*(2004) Copyright World 6*

The UK Court of Appeal dismissed an appeal by Cyprotex in relation to the copyright ownership of a software program which was created at the University of Sheffield with the assistance of a programmer from Cyprotex. Although this arrangement was different from that which the University had with other sponsors, the Research Agreement between the parties did not reflect this and consequently Cyprotex had no right to commercially exploit the program.

E4677 / CaseNote

ARTISTIC WORKS; IDEA / EXPRESSION DICHOTOMY; INFRINGEMENT

United Kingdom

Pipped at the post

Richard Plaistowe

*(2004) Copyright World 10**Ultra Marketing (UK) Ltd v Universal Components Ltd (12 March 2004)*

In this case, Mr Scott, a draughtsman, was unsuccessful in a claim of copyright infringement against a company who used ledges around sign frames. In rejecting the claim, Lewison J stated that Mr Scott's real complaint was not that someone had reproduced his drawing or design, but that someone had stolen his idea of using the ledges in this way. Therefore the complaint was outside the scope of copyright law.

E4678 / CaseNote

AUTHORSHIP; DRAMATIC WORK; OWNERSHIP

United Kingdom

Joint authorship refused*(2004) Copyright World 6*

In this case, a theatre director was unsuccessful in her claim for joint authorship in a play on the grounds that her work in rehearsals went beyond what was expected of her as director. The judge dismissed her claim that she had made an original contribution to the creation of the final play.

E4679 / CaseNote

ASSIGNMENT; CONTRACTS; IMPLIED TERMS; JURISDICTION; OWNERSHIP; TRADE MARK

United Kingdom

Eleventh hour action—Dr Martens defendants argue lack of jurisdiction

Gary Assim

(2004) Copyright World 11

R Griggs Ltd v Ross Evans (High Court of England and Wales) (24 March 2004)

This casenote discusses the second judgment in the dispute concerning copyright ownership in the Air-Wair-Dr Martens logo.

In the first judgment, Griggs, as manufacturer of Dr Martens boots, was declared copyright owner of the logo, even though this issue was not considered in the contractual arrangements between the advertising agency, or Mr Evans, the freelance designer engaged to design the work. In particular, the Court found that Mr Evans created the logo on implied terms that the copyright would belong to Griggs and that Raben Footwear, an Australian competitor, had notice of this equitable interest when Mr Evans sought to assign copyright in the logo to it.

On appeal, Mr Evans and Rabens argued that an English Court did not have jurisdiction to order Raben to assign the foreign copyrights to Griggs. Deputy Judge Peter Prescott disagreed. He decided that subject to foreign law extinguishing Griggs' interest, Raben, as purchaser for value with notice, owed a personal obligation to Griggs arising from the equitable fraud (ie the notice) which gave rise to an in personam claim which did not offend the sovereignty of a foreign court.

The author also discusses the impact on cross border deals involving intellectual property rights in other countries, had the decision been different.

E4680 / CaseNote

ACTUAL COPYING; ARTISTIC WORKS; AUTHORISING INFRINGEMENT

United Kingdom

Pineapple chunks—a prickly case of copyright infringement

Simon Clark; Gavin Llewellyn

(2004) Copyright World 14

Nouveau Fabrics Limited v Voyage Decoration Limited & Dunelm Soft Furnishings Limited (High Court of England and Wales) (28 April 2004)

In this case, the High Court found that two companies were liable for secondary copyright infringement by selling fabric with a design that infringed copyright.

Nouveau designed sold a fabric design which consisted of a stylised pineapple motif spread evenly across the fabric in a diamond pattern. In 2001, the managing director of Nouveau saw a similar "Luxor Pineapple" design being sold by retailer Dunelm. Further investigations revealed that the fabric was supplied by Voyage, who claimed that the design was created by an Italian company. The judge found that despite the lack of evidence of direct copying, the Italian company had access and opportunity to copy the design. On the issue of secondary liability, the Judge found that investigations and questions by Nouveau should have given Dunelm and Voyage reason to believe that an infringement had occurred.

United Kingdom

Kabushiki Kaisha Sony Computer Entertainment v Ball

2004

<http://www.bailii.org/ew/cases/EWHC/Ch/2004/1738.html>

This case concerns the effect of the United Kingdom's recent implementation of the European Union's Copyright Harmonisation Treaty on the issue of circumvention of copy protection measures. In summary proceedings, Justice Laddie has ruled that the sale, advertisement and possession for commercial purposes and use of mod chips on Sony's PlayStation 2 (PS2) games and consoles infringed the anti-circumvention provisions under the previous and newly amended s296 of the UK Copyright, Designs and Patents Act 1988 (the Act).

Under the previous s296, the issue was whether Mr Ball had knowledge that the mod chips could be used to make "articles" which were infringing copies. Justice Laddie rejected arguments that Mr Ball did not have the required knowledge, on the grounds that:

- * a reproduction in Random Access Memory (RAM) still produced an "article" for the purposes of the Act; and
- * Mr Ball had published information on how to use the mod chip on various websites which were accessible by UK citizens.

The issue under the amended s296 was whether the "sole intended purpose" of the mod chip was to remove or circumvent copy protection measures. Laddie J rejected Mr Ball's argument based on the fact that non-infringing uses of the Messiah2 were possible, on the grounds that:

- * there was no justification for allowing use of the mod chip to make back-up copies of original games or undo regional coding systems without Sony's permission; and
- * labeling on the PS2 games negated any licence that a user could run games purchased in the UK on consoles which were bought in other "foreign" geographical regions.

His Honour also noted that the new section introduced strict liability; Mr Ball could not escape liability by demonstrating that he lacked knowledge that the mod chips would be used to make infringing copies of Sony's copyright works.

This matter was only considered on a summary judgment basis and therefore issues of appropriate remedies were not discussed.

E4682 / CaseNote

ARTISTIC WORKS; DESIGNS/COPYRIGHT OVERLAP; FASHION; ORIGINALITY

United Kingdom

Copyright and unregistered designs—no "seamless whole" protection*(2004) Linklaters 15**Lambretta Clothing v Teddy Smith (15 July 2004)*

In this case, the majority of the Court of Appeal confirmed the decision of a lower court which held that Lambretta could not rely on copyright or unregistered design rights for the protection "surface decoration" of clothing, such as "colourways". Lambretta also unsuccessfully argued that copyright and design law were mutually exclusive, so that an original design must be protected by one or the other.

The author notes that the case highlights the different views on the treatment of surface decoration in designs and may be appealed further. She also suggests that designers should consider design registration as such regimes protect the colours and ornamentation of an article, without excluding surface decoration.

E4683 / CaseNote

ARTISTIC WORKS; DESIGNS/COPYRIGHT OVERLAP; FASHION; ORIGINALITY

United Kingdom

Court of Appeal ruling concerns design right under CDPA 1988

Nicola Tatchell

*(2004) 18 (8) WIPR 9**Lambretta Clothing Company Ltd v Teddy Smith (UK) and Next Retail plc (Court of Appeal, 15 July 2004)*

The facts and decision in this case have been previously reported in Updates.

The author observes that the decision was long awaited in the hope that the Court would clarify issues of surface decoration and the overlap between unregistered designs and copyright. She also notes that the case provides the Court of Appeal with authority for the proposition that surface decoration exception in the Act extends to 3D decoration.

E4684 / CaseNote

COMPETITION; DURATION; SOUND RECORDING

United States

Second Circuit asks New York Court for rulings on common law copyright*(2004) 18 (8) WIPR 11**Capitol Records, Inc v Naxos of America Inc (21 June 2004)*

In this case, the Second Circuit has referred a number of questions to the New York Court of Appeals. In particular, the Appeal Court has been asked to determine whether New York common law recognises copyright in sound recordings whose copyright has expired in their country of origin. It has also been asked to rule on whether an action for common law copyright infringement includes elements of unfair competition, and whether such an action could be defended by proving that the plaintiff's work has no current market and the defendant's use is a "new product".

E4685 / CaseNote

ARTISTIC WORKS; ORIGINALITY

United States

Facial features are protected*(2004) Copyright World 6*

In this case, Mattel commenced copyright infringement proceedings against Radio City Entertainment when it produced a doll based on its Rockettes Chorus Line. Mattel alleged that the Rockette Doll was copies from its famous Barbie doll. The US Court of Appeals held that standard face features such as eyes, nose and mouth could be protected, even though these features are “standard”. The Court expressed no view on whether the Rockette doll was copied from Barbie.

E4686 / CaseNote

FASHION; IDEA/EXPRESSION DICHOTOMY; INFRINGEMENT; ORIGINALITY; PROTECTION

United States

Illustrations of Uniform Styles Are Protectable, But Not the Clothing Itself*(2004) 18 (7) WIPR 16**Galiano v Harrah’s Operating Co. USDC ED La, No. Civ A 00-0071 (11 May 2004)*

In this case, a United States District Court held that Ms Galiano’s design drawings were protected by copyright, however the design features such as princess seams, asymmetrical closures and inverted pleats, were not. In particular, the Court held that Harrah’s did not infringe copyright when it purchased the particular garments. In doing so, Livaudais J rejected Ms Galiano’s argument that her design features were protected by copyright because they incorporated artistic expressions which could be conceptually separated from the utilitarian aspects of the garment.

E4687 / CaseNote

INFRINGEMENT; INTERNET SERVICE PROVIDER; PEER-TO-PEER SHARING; SAFE HARBOUR; WEBSITE

United States

Court Resurrects Infringement Suit Against AOL

Michael Gross

(2004) Authors Guild Bulletin 16

The US Supreme Court for the Ninth Circuit held that America Online (AOL) could be liable for contributory copyright infringement after unauthorised copies of entire books by author Harlan Ellison were placed on an AOL peer-to-peer network by a “superfan” of the author. Ellison settled with the fan and his ISP, but pursued claims of vicarious and contributory infringement against AOL.

On the issue of vicarious liability, the Court of Appeal held that Ellison had failed to provide conclusive evidence of a connection between AOL’s profit from subscriptions and the infringing activity on the peer-to-peer network. With regards to contributory liability, the Court remanded the case for trial on AOL’s liability arising from its possible knowledge and material contribution to the infringement.

E4688 / CaseNote

FILM; LITERARY WORKS; SUBSTANTIAL PART

United States

Appeals Court Raises the Bar for Copyright Infringement Plaintiffs

Carla Faraldo

*(2004) Authors Guild Bulletin 17**Murray Hill Publications Inc v Twentieth Century Fox Film Corp (19 March 2004)*

This casenote discusses the unsuccessful claim by Murray that Fox's 1996 movie "Jingle All the Way" infringed copyright in the screenplay "Could this be Christmas" which Murray purchased from a Detroit high school teacher. There were 24 similarities between Murray's screenplay and Fox's movie, 18 of which were created independently by Fox before it had seen Murray's treatment or screenplay of the work.

The Court held that where similarities in a plaintiff's and defendant's work exist before the defendant had access to the plaintiff's work, the similarities must be disregarded when determining whether infringement had occurred. In this case, the Court concluded that no reasonable jury could have found substantial similarity on the basis of the six minor elements and consequently found in favour of Fox.

E4689 / Case

INFRINGEMENT; INTERNET SERVICE PROVIDER; PEER-TO-PEER SHARING; SAFE HARBOUR; WEBSITE

United States

Ellison v Robertson*(2004) 60 IPR 502*

In this case, the US Supreme Court for the Ninth Circuit has held that America Online (AOL) may be liable for contributory copyright infringement arising from the unauthorised posting of works from author Harlan Ellison onto one of AOL's peer-to-peer news groups. The Court held that although AOL did not have actual knowledge of infringement prior to commencement, it was possible to find that AOL had reason to know that infringing copies were stored on its servers. Accordingly, the case was remanded for trial on AOL's liability on this issue.

E4690 / CaseNote

CONTRACTS; JURISDICTION; TRADE MARK

United States; United Kingdom

Jurisdiction and Governing Law: The Battle for Apple

Emma Malcolm

[2004] ENT.L.R. 191

This case concerns an unsuccessful application by Apple Computer Inc ("Computer") disputing the jurisdiction of an English court to hear a claim by Apple Corps (the music company founded by the Beatles) ("Corps") that Computer had broken, and intends to break, an agreement made between the two companies in October 1991 to regulate the use of their respective "Apple" trade marks. Justice Mann considered the events leading to the formation of the agreement and determined that Corps had an good arguable case that the agreement was made in London. Accordingly, Computer faces trial in England under English law.

The author discusses the conclusion by Mann J that an agreement may be made in two jurisdictions at the same time. She notes that litigation fought on a number of fronts is likely to increase as deals are made on faster and more sophisticated communication systems.

2: Recent Articles

E4691 / Article

GOVERNMENT; INTERNET SERVICE PROVIDER; SELF-REGULATION

Asia

Media self-regulation in Asia

Chester Yung

(2004) 9 MALR 155

This article analyses the models for media self-regulation as adopted in China, Singapore, Hong Kong and Japan by reference to the connection between ISPs and government. The author concludes that in China, Singapore and Hong Kong, the government is regulating itself. However, in Japan, he notes that “self-regulation” has resulted in a lack of regulation.

E4692 / Article

DECODERS / SMART CARDS; INFRINGEMENT; JURISDICTION; MORAL RIGHTS; PERFORMERS' RIGHTS

Australia

The Copyright Jurisdiction of The Federal Magistrates Court

Kurt Esser

(2004) IPF 46

This article discusses the jurisdiction of the Federal Magistrates to hear certain copyright cases. In particular, the author notes that the Magistrates Court is able to determine cases concerning civil remedies and defences for copyright infringement, broadcast decoding devices, moral rights and performer's rights. He concludes that it is too early to know whether the Federal Magistrates Court's less legalistic, more streamlined, flexible and mediation focus are well-suited to resolving copyright disputes. However, he states, that the signs are encouraging.

E4693 / Article

BROADCAST; DATABASES; INFORMATION - PROTECTION; ORIGINALITY; SUBSTANTIAL PART; TELEVISION PROGRAMS

Australia

Originality and Substantially in Copyright—Recent Developments

Glenn C McGowan

(2004) IPF 53

This article discusses whether the issues of originality (for the purposes of subsistence of copyright) and substantiality (for the purposes of copyright infringement) are heading towards a more limited interpretation in light of the decisions in Telstra Telephone Directories Case and the Panel Case. Indeed, the author concludes that the High Court might have taken a different approach on the special leave application in the Telstra Telephone Directories Case as a consequence of its reasoning in the Panel Case.

E4694 / Article

GOVERNMENT; LITERARY WORKS; PRIVILEGE

Australia

Parliamentary papers and their protection

Enid Campbell; Matthew Groves

(2004) 9 MALR 113

This article discusses the different forms of protection for parliamentary papers at Commonwealth and State /Territory levels in Australia. Under such legislation, protection against legal liability is given to those who publish documents by the authority of a House of Parliament. The authors consider whether legislation concerning parliamentary papers should be reformed as a result of the increase in number and variety of parliamentary papers. They also provide some observations on possible reform of this legislation, especially in light of the unsuccessful attempts to introduce significant changes in Victoria.

E4695 / Article

LICENCES; OPEN SOURCE

Australia

Free culture: cultivating the Creative Commons

Brian Fitzgerald; Ian Oi

(2004) 9 MALR 137

This article provides an overview of the Creative Commons Project in Australia. In particular, the authors outline the nature of the Creative Commons movement, the various licences available for users who submit material to the Creative Commons and the transposing of those licences into the Australian legal framework.

E4696 / Article

AUTHORISATION; LITERARY WORKS; ORIGINALITY; RESEARCH AND STUDY

Canada

Canada Defines "Originality" and Specifies the Limits of "Fair Dealing": CCH Canadian Ltd v Law Society of Upper Canada

James Tumbride

[2004] EIPR 318

This article discusses the decision of the Supreme Court in Canada which ruled that a law library did not infringe copyright by providing single copies of legal materials for use by members of the legal profession. The facts and decision in this case are reported in other extracts in this edition of Updates.

The author comments that the Court has provided more certainty to the issues pertaining to “originality”, “fair dealing” and “research” for commercial purposes.

E4697 / Article

COMMISSIONING; CONTRACTS; EMPLOYEES; OWNERSHIP

Canada

Editorial

Leslie Ellen Harris

(2004) 8 (2) Copyright & New Media Law Newsletter 1

This article discusses the rules for ownership of copyright works created in Canada and the United States. The author recommends that the parties to the creation of copyright work put their intentions into a written agreement to provide clarity and to avoid potential disappointment and economic loss.

E4698 / Article

HARMONISATION; LITERARY WORKS; PASSING OFF; TRADE MARK; TRADE NAME

Europe

Titles in Europe: Trade Names, Copyright Works or Title Marks?

Jan Klink

[2004] EIPR 291

This article concerns the different approaches to protecting titles three European countries. In particular, the author discusses the legislative provisions in the United Kingdom (where there is no right to a title, although there may be actions for passing off); France (where a court may protect a title as a copyright work) and Germany (where trade mark rights in a title can extend to anti-dilution protection). The author examines the strengths and weaknesses of these approaches and concludes that any European harmonisation in relation to protecting “titles” would be well advised to adequately consider each of these different aspects of a title.

E4699 / Article

COMPUTER SOFTWARE; DESIGNS; EC DIRECTIVE; PATENT

European Union

Choices, choices—strategies for protecting software in Europe

John Collins

(2004) Copyright World 16

This article reviews the progress of the proposed EU Directive on the Patentability of Computer Implemented Inventions and the clarity of the European Patent Office (EPO) on the patentability of software and business methods. The author also discusses other areas of intellectual property which might be relevant in protecting software, including copyright and registered design.

E4700 / Article

AUTHORS; COLLECTING SOCIETIES; EC DIRECTIVE; PERFORMERS; RENTAL RIGHT

European Union

Bringing entertainment home—DVD and video rental rights and equitable remuneration

Peter Coles; James Damon

(2004) Copyright World 19

This article concerns the law and current industry practice in relation to income generated from DVD rental. The authors examine the EU Directive on Rental Rights which recognised the rights of authors and performers to receive money from film rental. The manner in which the remuneration was calculated and collected was to be determined by the implementing country. The authors discuss how industry agreements have largely governed the practice in the absence of guidance from the Directive, and note that distribution agreements should be carefully drafted so that other rights owners are properly compensated.

E4701 / Article

CONTRACTS; ENFORCEMENT; LICENCES

General

Viral Contracts or Unenforceable Documents? Contractual Validity of Copyleft Licences

Andres Guadamuz Gonzalez

[2004] EIPR 331

This article analyses whether non-proprietary software licences (such as free software, “FS” , and Open Source Software, “OSS”) are legally enforceable. The author discusses the contractual validity of the FS licensing as compared to the OSS model. He also examines the validity of the General Public Licence (GPL) from the European perspective by reference to unfair contractual terms; passing obligations and rights onto third parties; copyright infringement and competition laws. The author concludes that although there are some unanswered questions, generally non-proprietary software licences appear to be valid, so long as the contractual chain between licensor and licensee is kept simple.

E4702 / Article

CONTRACTS; ENFORCEMENT; LEGISLATIVE AMENDMENTS; LICENCES

General

The Pluralistic, Evolutionary, Quasi-legal Role of the GNU General Public Licence in the Free/Libre/Open Source Software ("FLOSS")

Maureen O’Sullivan

[2004] EIPR 340

This article discusses the development and legality of FLOSS and other non-proprietary software. In particular, the author analyses the General Public Licence (GPL) clause by clause and examines some of the ambiguities and uncertainties that exist in the present drafting. She concludes that FLOSS has produced reliable programs and well devised rules for individuals which can be enforced when disobeyed. As corporations and governments start using FLOSS and other non-proprietary software, she also recommends that the usage rules would be most effective if they were incorporated into legislation.

E4703 / Article

ASSIGNMENT; FINANCIAL REPORTING; GOODWILL

General

Accounting and Intellectual Property (Part 1)*(2004) June WIPO Magazine 6*

This article analyses how companies can report their IP under current financial reporting standards. In particular, it discusses accounting goals, goodwill, trends in recognition of IP rights and the treatment of acquired and internally-generated rights.

E4704 / Article

CONTRACTS; FAIR DEALING; FAIR USE; HYPERLINKS; MULTIMEDIA; OWNERSHIP; PERFORMERS' RIGHTS; TRADE MARK

General

Copyright issues in e-learning

Robin Fry

(2004) 8 (2) Copyright & New Media Law Newsletter 3

In this article, the author outlines instances where permission may or may not be needed to use copyright material for developing e-learning programs. In particular, she discusses fair dealing/use provisions; use of trade marks, hyperlinks, and academic materials; copyright collecting societies; performers' rights and copyright ownership in the final multimedia product.

E4705 / Article

COMPLIANCE; INFRINGEMENT; LICENCES; PIRACY; SOFTWARE

International

Now is the time

David Eastwood

(2004) Copyright World 34

This article argues why software vendors need compliance programs. First, the author outlines the tension between the need for software companies to make sales to customers and the need to protect their intellectual property. Next he discusses how software companies have been often reluctant to introduce licence compliance programs. Finally, he discusses the benefits in establishing such programs, including additional purchases of software licences and support maintenance, as well as possible strategies for doing so.

E4706 / Article

COLLECTING SOCIETIES – REPROGRAPHIC; DIGITAL RIGHTS MANAGEMENT; DIGITAL TECHNOLOGY; INTERNET

International

Licensing elusive electrons

Peter Shepherd

(2004) Copyright World 12

This article outlines recent initiatives in the collective management of reproductive rights and speculates on the future of collective licensing in the digital era. The author commences with a discussion of the development and function of reproductive rights organisations (RRO) and digital rights management systems (DRMs). He concludes that improvements in technology may allow RROs to develop as effective legal intermediaries due to their extensive databases, existing commercial relationships and systems for paying copyright owners.

E4707 / Article

CONFIDENTIAL INFORMATION; CONTEMPT OF COURT; INFRINGEMENT; PRACTICE AND PROCEDURE; PRIVILEGE; SETTLEMENT

International

In confidence? The disclosure of settlement offers to the media

Simon Baggs

(2004) Copyright World 22

In this article, the author analyses the Civil Procedure Rules (CPR) and other areas of litigation in the United Kingdom in relation to the disclosure of settlement offers to the media in intellectual property cases. In particular, he examines the laws relating to confidential information, privilege and contempt to determine whether English case law supports a restriction of media coverage of settlement offers. In light of recent English decisions, he concludes that practitioners should ensure that confidentiality in settlement offers is maintained.

E4708 / Article

INDIGENOUS CULTURE; MORAL RIGHTS; OWNERSHIP; TRADITIONAL KNOWLEDGE

International

Intellectual Property Systems, Traditional Knowledge and the Legal Authority of Community

Johanna Gibson

[2004] EIPR 280

This article analyses the various sessions of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore and examines the potential for legal authority to vest in Indigenous or traditional “community”. In particular, the author discusses communal resources and intellectual property; how community commonly operates within traditional resources; and generalisation of rights and community. She concludes that the move towards a legal recognition of “communal”, as opposed to individual rights, represents an important mechanism for the protection of traditional knowledge.

E4709 / Article

COMMUNICATION TO THE PUBLIC; DIGITAL RIGHTS MANAGEMENT; EXCEPTIONS TO INFRINGEMENT; INTERNET SERVICE PROVIDER; LEGISLATIVE AMENDMENTS; RAM; REPRODUCTION; TECHNOLOGICAL MEASURES - PROTECTION OF

New Zealand

Digital Copyright Reform in New Zealand

John Smillie

[2004] *EIPR* 302

This article assesses the recommendations of the Ministry of Economic Development to amend the New Zealand Copyright Act (NZ) 1994 by taking into account advancements in digital technology on the Internet. In particular, the author considers the issues of the reproduction in Random Access Memory (RAM); the right to communicate copyright material to the public; liability of ISPs; technological protection measures; electronic rights management information; and exceptions to infringement. He concludes that the Ministry's basic policy position is sound, and its specific recommendations are, for the most part, carefully considered and well supported.

E4710 / Article

ARCHITECTS' PLANS; ARCHITECTURE; CONTRACTS; EMPLOYEES; LICENCES; MORAL RIGHTS; OWNERSHIP

United Kingdom

The best laid plans ...

Seema Sharma; Geoff Steward

(2004) *Copyright World* 19

This article concerns the complex copyright issues which arise in relation to architectural works. The authors commence with a discussion of the ownership of architectural copyright, infringement issues, licences and moral rights. They conclude that given such difficulties, an effective way to avoid problems is to consider the copyright position at the start of the relationship between the architect and the client, whether by adopting the Royal Institute of British Architects' Conditions of Engagement or by private agreement.

E4711 / Article

ENFORCEMENT; INJUNCTION

United States

The future police

Paul A Stewart

(2004) *Copyright World* 22

This article analyses the extraordinary role that injunctions are playing in copyright disputes. It commences with a discussion of the traditional role of injunctions to restrain infringement in a specific work. The author then discusses a line of US cases where injunctions have been used to protect works that have not been the subject of infringement actions, have not been infringed; may not be copyrightable; or do not exist yet. He then outlines some responses by the Courts to criticisms of granting such broad injunctions. Finally, the author suggests that Courts should only be allowed to grant these types of injunctions when a defendant has engaged in repeated copying of a plaintiff's work and when there is a threat of future infringement.

E4712 / Article

CRIMINAL LAW; ENFORCEMENT; PEER-TO-PEER SHARING; PIRACY

United States

Thieves beware—a global assault in the piracy war

John Ashcroft

(2004) Copyright World 34

In this article, US Attorney-General John Ashcroft discusses the launch of “Operation Fastlink” by the US Department of Justice and FBI. In April 2004, searches across 10 countries we conducted for individuals and organisations connected with the illegal online distribution group known as “warez”.

E4713 / Article

CONTRACTS; DIGITAL SIGNATURES; DIGITAL TECHNOLOGY; ELECTRONIC SIGNATURES

United States

Viable e-signature options

Jonathon Bick

(2004) 8 (2) Copyright & New Media Law Newsletter 7

This article discusses the nature and legislative treatment of e-signatures (where the person “signs” by typing her name into a box and clicking an “I accept” button) and digital signatures (where the person “signs” by pasting a digitised copy of a traditional signature into a signature box). The author then outlines a number of technological options to make e-signatures a more effective option.

E4714 / Article

FREE SPEECH; HUMAN RIGHTS; IDEA / EXPRESSION DICHOTOMY

United States, the Netherlands

Copyright and Freedom of Expression, Abuse of Rights and Standard Chicanery: American and Dutch Approaches

Herman Cohen Jehoram

[2004] EIPR 275

This article discusses the idealistic collision and legal separation between copyright and freedom of expression in the United States and the Netherlands. The author suggests the introduction of the private law of “abuse of copyright” to cover situations where the freedom of expression prevailed over the copyright in the material.

3: Recent developments and news

E4715 / News

ANTI-CIRCUMVENTION DEVICES; FREE TRADE; LEGISLATIVE AMENDMENTS; TECHNOLOGICAL MEASURES - CIRCUMVENTION

Australia

Officials Pledge Flexible Application of FTA Anti-Circumvention Provisions

(2004) 18 (7) WIPR 3

This news item discusses comments by AUSFTA negotiators at the Senate Hearings in May 2004 that Australia will have some flexibility in the application of the anti-circumvention provisions of the Agreement. The comments were made in response to concerns by consumer protection agencies and universities that the Agreement could frustrate legitimate uses of copyright material.

E4716 / News

DESIGNS/COPYRIGHT OVERLAP

Australia

New System for Registering Designs In Australia Enters Into Force

Chris Sgourakis

(2004) 18 (7) WIPR 3

This news item discusses the introduction of the Designs Act 2003, which commenced on 17 June 2004. In particular, the author discusses the criteria for registration; filing an application; examination; infringement; the copyright/designs overlap; and transitional provisions.

E4717 / News

CRIMINAL LAW; FILM; PIRACY; SOUND RECORDING

Australia

An Aussie First

(2004) *Copyright World* 6

This news item notes the criminal sentencing of a Brisbane man for importing, possessing and exposing for sale pirate DVDs. He was sentenced to 9 months imprisonment, a five-year good behaviour bond and a AUS\$1,500 fine. This is the first prison sentence ordered for offences under the Copyright Act in Australia.

E4718 / News

AUTHORSHIP; INTERNET; PHOTOGRAPHS; WIPO COPYRIGHT TREATY; WIPO PERFORMANCES AND PHONOGRAMS TREATY

Canada

Time for Reform

(2004) *Copyright World* 7

This news item outlines the recommendations by the Standing Committee on Canadian Heritage to reform Canadian copyright law. These proposed changes relate to recognition of authorship of photographers; ISP liability; and from the ratification the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty.

E4719 / News

AUTHORSHIP; DURATION; OWNERSHIP; PHOTOGRAPHS

Canada

It's a snap? A proposal to simplify copyright in photographs in Canada

Sheldon Burshtein

(2004) Copyright World 9

This article discusses proposals to simply Canadian copyright law as it relates to photographs. In particular, the author outlines the proposed amendments concerning issues of authorship, ownership and copyright duration. He concludes that the proposed amendments would bring copyright protection for photographs into line with most other types of works in Canada and provide more protection to photographers.

E4720 / News

EDUCATIONAL INSTITUTIONS; INTERNET SERVICE PROVIDER; LEGISLATIVE AMENDMENTS; LIBRARIES; OWNERSHIP; PHOTOGRAPHS; PRIVATE COPYING; WEBSITE; WIPO COPYRIGHT TREATY; WIPO PERFORMANCES AND PHONOGRAMS TREATY

Canada

Short-term copyright reform in Canada*(2004) 8 (2) Copyright & New Media Law Newsletter 5*

This news item outlines the Interim Report on Copyright Reform released in May 2004 by the Standing Committee on Canadian Heritage. The report focuses on six short-term copyright reform issues, namely private copying and ratification of the WIPO Internet Treaties; copyright ownership in photographs; ISP liability; use of Internet material for educational purposes; technology enhanced learning and interlibrary loans.

E4721 / News

COLLECTING SOCIETIES; EC DIRECTIVE; LEGISLATIVE AMENDMENTS

Europe

Collecting societies face Community legislation*(2004) Copyright World 7*

This news item outlines the recommendations by the European Commission for legislation on the collective management of rights, in particular collecting societies. The author notes that the recommendations arise from an extensive consultation on issues surrounding the management of copyright which was completed in 2002.

E4722 / News

HYPERLINKS; WEBSITE

Germany

Hyperlink case in German court*(2004) 8 (2) Copyright & New Media Law Newsletter 10*

This news item notes the German Supreme Court's decision that a hyperlink from a German newspaper leading to an article on an illegal Austrian gambling website was not, by itself, illegal.

E4723 / News

BLANK TAPES LEVY; COLLECTING SOCIETIES; LEGISLATIVE AMENDMENTS; ROYALTIES

Greece

Blank Tape Levy

Kriton Metaxopoulos

[2004] *ENT.L.R. N-52*

This news item discusses developments in relation to the blank tape levy under Greek law. In particular, the author outlines the original proposal for equitable remuneration to be paid to copyright owners; objections by powerful users of blank media which resulted in legislative amendments; objections to these amendments by Collective Management Organisations and revised amendments which responded to the issues raised by both sides.

E4724 / News

FREE TRADE; LEGISLATIVE AMENDMENTS; PROTECTION; TAXATION

International

Free Trade Agreement Signed; Lawmakers Predict Easy Approval

(2004) 18 (7) *WIPR* 9

This news item notes the signing of a free trade agreement between the United States and Morocco on 15 June 2004. In relation to copyright, the item notes that the agreement will reduce tariffs and increase protection for copyright works.

E4725 / News

BROADCAST; DEVELOPING NATIONS; DURATION; PIRACY; TREATIES; WIPO

International

Broadcasting: Committee Seeks Diplomatic Conference To Adopt Broadcasting Treaty

(2004) 18 (7) *WIPR* 20

This news item discusses the latest meeting of WIPO's Standing Committee on Copyright and Related Rights which recommended a diplomatic conference to adopt a global treaty on the protection of broadcast organisations. The article discusses the resistance by several developing countries to a diplomatic conference at this stage, as well as the scope and duration of rights to be granted under such a treaty.

E4726 / News

DURATION; EC DIRECTIVE; LITERARY WORKS; PUBLIC EXHIBITION RIGHT

Ireland

Joyce on display

(2004) *Copyright World* 7

This news item outlines new Irish legislation which clarifies that displaying copyright material in an exhibition does not infringe copyright. The amendments were in response to a dispute between the grandson of James Joyce and the organisers of a festival commemorating Joyce's novel *Ulysses*, as to the proposed display of the first published copy and various draft manuscripts.

E4727 / News

CRIMINAL LAW; MUSIC; PEER-TO-PEER SHARING; SOUND RECORDING

Italy

Tough measures

(2004) Copyright World 8

This news item notes recent amendments to Italian copyright legislation which introduce criminal penalties for individuals using illegal file sharing networks.

E4728 / News

AUTHORISATION; CRIMINAL LAW; PEER-TO-PEER SHARING; RESEARCH AND STUDY; SOFTWARE

Japan

Free Isamu Kaneko

(2004) Copyright World 7

This news item outlines the fund established to raise money for Mr Isamu Kaneko, a research associate at Tokyo University who was arrested for creating the file-sharing software, "Winny". Mr Kaneko argues that he created the software for research purposes, not to share unauthorised copyright material.

E4729 / News

LEGISLATIVE AMENDMENTS; MUSIC; PARALLEL IMPORTATION; SOUND RECORDING

Japan

Parallel Import Ban

(2004) Copyright World 8

This news item notes the endorsement by the a committee of the Japanese Lower House of amendments which prohibit parallel importation of sound recordings.

E4730 / News

ABUSE OF RIGHTS; LICENSING; MARKET POWER

Luxembourg

IP must bow to competition law

(2004) Copyright World 6

This news item outlines the decision of the European Court of Justice in *IMS Health v NDC Health*, where it was held that intellectual property owners with a dominant market position can be required to grant licences to rivals if certain conditions are met.

E4731 / News
EU DIRECTIVES

Luxembourg

Law Enacted to Implement Copyright Directive

Jacqueline Jones-Parry

(2004) 18 (7) WIPR 9

This news item outlines recent changes to the laws on copyright and related rights in Luxembourg. It provides details of the implementation of the EC Copyright Directive, the EC Database Directive and the EC Directive on Resale Rights.

E4732 / News
DIGITAL TECHNOLOGY; LEGISLATIVE AMENDMENTS

New Zealand

Copyright Reform—Digital Amendments

Andrew Brown

(2004) IPF 72

This news item notes the intention of the New Zealand Ministry of Economics to introduce legislation in mid-2004 which will amend the Copyright Act to reflect changes in digital technology.

E4733 / News
PHOTOGRAPHS; PRIVACY

New Zealand

Hosking v Runtig & Ors

Andrew Brown

(2004) IPF 72

Hosking v Runtig & Ors (25 March 2004)

The New Zealand Court of Appeal has confirmed the existence of a tort of breach of privacy. In this case, Mr Hosking sought an injunction against a magazine from publishing photos, taken in public, of his twin daughters. Although the case was dismissed unanimously on the facts, three of the five judges held that a tort of privacy exists.

The author notes that despite the narrow margin, the existence of a tort of breach of privacy is unlikely to be successfully changed in the near future due to the subsequent appointment of the majority judges to higher courts.

E4734 / News

ARTISTIC WORKS; DERIVATIVE WORKS; LITERARY WORKS; ORIGINALITY

Saudi Arabia

Implementing Regulations

(2004) Copyright World 8

This news item notes that the Implementation Regulations for the country's copyright law have been approved by the Minister of Culture and Information. The regulations will protect innovative original and derivative works in the literary, artistic or scientific domain.

E4735 / News

ANTI-CIRCUMVENTION DEVICES; COMPULSORY LICENSING; EXTENSION OF COPYRIGHT; FREE TRADE; LEGISLATIVE AMENDMENTS; TECHNOLOGICAL MEASURES - PROTECTION OF

Singapore

Legislation Complies With Singapore-United States FTA

Mavis Tan

(2004) 18 (7) WIPR 10

This news item discusses changes made to Intellectual Property legislation in Singapore as a result of its free trade agreement with the United States. In relation to copyright, the author discusses the extension of the copyright term and repeal of certain provisions concerning statutory licences. She notes that further amendments, such as those relating to anti-circumvention technologies, are expected by the end of the year.

E4736 / News

INFRINGEMENT; ONLINE FILE-SWAPPING; PIRACY; SEIZURE

United States

Online pirates targeted in raids

(2004) Copyright World 7

This news item discusses the activities of the US Department of Justice and FBI in relation to "Operation Fastlink". This Operation resulted in searches across 10 countries and was focused on individuals and organisations connected with the "warez-scene" who allegedly specialise in distributing material online.

E4737 / News

ENFORCEMENT; MUSIC; PIRACY; SEIZURE; SOUND RECORDING

United States

A successful year?

(2004) Copyright World 7

This news item discusses the Recording Industry Association of America (RIAA) annual piracy review which revealed a 40% increase in seizure of counterfeit Latin music products.

E4738 / News

FAIR USE; PIRACY; PRIVATE COPYING; TECHNOLOGICAL MEASURES - PROTECTION OF

United States

Recognising "fair use"

(2004) Copyright World 8

This news item discusses the Congressional hearings convened to discuss the proposed Digital Media Consumers Rights Act of 2003. Under this Bill, consumers would be allowed to circumvent technological protection measures on copyright material for fair use purposes. Further committee action on the Bill is expected this year.

4: Book reviews

E4739 / BookRev

LIBRARIES; LICENCES

Australia

The University of Western Australia Library Licensing Electronic Resource Principles

(2004) 8 (2) Copyright & New Media Law Newsletter 11

This article reviews two documents produced by the University of Western Australia Library (UWAL) on the issue of licensing electronic resources. The first document is titled "Principles for Licensing Electronic Resources" provides information on negotiating license agreements. To compliment this document, UWAL also has prepared a "Principles for Licensing Checklist" to quickly clarify which important issues have been included in the negotiations and licence.

E4740 / BookRev

COLLECTING SOCIETIES; ECONOMIC; INTERNATIONAL COMPARISONS

Canada; United States

"Institutions Administratives du Droit d'Auteur" (Copyright Administrative Institutions), edited by Ysolde Gendreau

Keith Wotherspoon

[2004] EIPR 324

This book contains a selection of papers in the role of copyright collecting societies which were presented at a conference at the University of Montreal in 2001. Topics covered by the papers include various aspects of the workings of the Copyright Board in Canada in its determination of royalty disputes, miscellaneous economic issues and an overview of the experiences in other countries. The reviewer comments that the book will be primarily of interest to lawyers and academics, both in Canada and overseas. He observes that the book's only drawback is that it leaves the reader to make conclusions development of the role copyright collecting societies, something which he notes is sometimes difficult to avoid given the book is a collection of papers.

E4741 / BookRev

CONFLICT OF LAWS; JURISDICTION

Netherlands

"Choice of Law in Copyright and Related Rights: Alternatives to the Lex Protectionis" by Mireille van Eechoud

David Rogers

[2004] EIPR 373

Kluwer Law International, 2003

This book considers the conflict rules applicable in international copyright disputes. Topics covered in the work include a general history of developments in relation to choice of law; how foreign nationals have been treated by the copyright laws of other countries; and pros and cons of international law principles (law of the country, origin or court) for determining the applicable law in a particular dispute.

The reviewer concludes that the work is a "worthy" treatment of the subject matter, however the academic approach and emphasis on Dutch legal theory will limit the interest in the work.

E4742 / BookRev

CIRCUMVENTION; COPYLEFT; DMCA; FAIR USE; LEGISLATIVE AMENDMENTS; OPEN SOURCE

United States

Copyright in Neverland—Lawrence Lessig’s “Free Culture”

Stephen Manes

(2004) Authors Guild Bulletin 8

Lawrence Lessig *“Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity”*

This review is highly critical of Lessig’s latest book “Free Culture”. In particular, the author argues that Lessig’s “rants” ignore how technology has made creators freer than ever to create and distribute original works and ignores the operation of fair use exceptions to copyright law. He also comments that the book proposes “a slew of sweeping copyright law changes that would consistently screw creators, reward infringers and put the United States at odds with international law”.

E4743 / BookRev

ACADEMIC AUTHORS; DIGITAL RIGHTS MANAGEMENT; EDUCATIONAL INSTITUTIONS; PEER-TO-PEER SHARING; PUBLISHING

United States

Conference: "Colleges, Code and Copyright"

(2004) 8 (2) Copyright & New Media Law Newsletter 11

This article provides a review of the “Colleges, Code and Copyright: The Impact of Digital Networks and Technological Controls on Copyright and the Dissemination of Information in Higher Education” Conference which was held in June 2004 at the Centre for Intellectual Property and Copyright, University of Maryland. Topics covered at the conference include, copyright and higher education; peer-to-peer file sharing; academic publishing; best practices for digital rights management systems; and strategies for dealing with copyright infringement.

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 Repr
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
World E-Commerce and IP Report	WECI

Bulletins & reports accompanying loose-leaf services

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