Brave new works?

Richard Horsley argues that the new performers' protection legislation has shed light on authors' copyright

The Copyright Amendment Act 1989 introduced a new Part XIA into the Copyright Act 1968, providing for "Performers' Protection". This Part protects performers from "unauthorised use" of their performances - that is, sound or video recording, or broadcasting of their performances without their authority.

The amendments avoided giving performers any rights in the nature of copyright, or indeed any property rights at all. This was a specific recommendation of the Copyright Law Review Committee, whose Report on Performers' Protection (May 1987) was the inspiration for the amendments.

However, some of the provisions of Part XIA may, incidentally to their purpose, have very great influence on basic concepts of copyright law - those of a "work" and of the "first author" of a work - in areas where the law has been unclear, or untested, or both. This flows from the fact that these amendments contain the first references in copyright law to "improvised works".

Improvised works

The references come in the definition of "performance", in section 248A, which provides:

(a) a performance (including an improvisation) of a dramatic work, or part of such a work, including a performance given with the use of puppets;

(b) a performance (including an improvisation) of a musical work or part of such a work;

(c) the reading, recitation or delivery of a literary work, or part of such a work, or the recitation or delivery of an improvised literary work.

What is a "work"?

It is well known that "literary", in the phrase "literary work" as used in copyright law, has a wider meaning than in other contexts. Only a lawyer would recognise a bus ticket, a football pools coupon and a standard classified death notice as literary works. In fact, the range of things which qualify can seem so wide that one doubts whether there are any principles of exclusion.

Well, there are, of course. But they are not onerous. The thing must be original; but only in the very limited sense that the work as an expression must originate from the author. There is no requirement that the ideas be original.

However, where the content or ideas - as opposed to their expression - are taken from some other identifiable source, there will usually also be a second requirement - the exercise of labour and skill by the author.

The third major requirement is that of substantiality. The lack of this frequently denies protection to such things as brand names (Exxon, for example), titles, slogans and advertisements.

A final requirement - more often given effect than formal recognition - is that the work be in writing. Thus Justice Petersen in the case of University of London v University Tutorial Press (1916) stated:

"In my view the words "literary work" cover work which is expressed in print or writing, irrespective of the question whether the quality or style is high".

'We are facing a brave new world where even the most trivial of utterances might be copyright literary works from the moment they are emitted'

However, such explicit statements are rare, probably because it has been difficult, until recently, to have any meaningful copyright disputes about literary works which have not been written down. The result has been that learned authors have debated among themselves the question of whether a lecture which has been tape recorded but has not been written down is, or is not, a literary work.

Well, that question is now resolved. From the Performers' Protection amendments, it is clear that a "literary work" can be improvised. If that is so, then the label "literary" does not refer to how the work is created; and the "work" need not be in writing - or, indeed, in any material form at all.

That problem being solved, another, of wider import, arises. If "literary" works are not bounded by the requirement for writing, what range of spoken utterances might qualify for the appellation? As hinted above, only the most trifling level of originality is required of copyright works; the exercise of labour and skill is only occasionally required; and, as to substantiality, although the word "Exxon" was not substantial enough to qualify, the trial judge made it clear that he was not ruling that a single word could never qualify as a "literary work" within the meaning of the Act. "Supercalifragilistickespeea-ladojus" springs to mind as a candidate.

Thus we are facing a brave new world where even the most trivial of utterances might be copyright literary works from the moment they are emitted. And after all, why not? Playwrights like Pinter are applauded the more boring and banal and - well - normal their dialogue becomes. Large tracts of a novel like Jack Kerouac's Vision of Cody appear to be taken verbatim from tape recordings of conversations between the author and Neal Cassady. Samuel Johnson's estate should have sued for a large slice of profits from Boswell's Life of Johnson, so much of it being made up of gobbets of Johnsonian conversation recorded nearly contemporaneously by the assiduous Boswell. In similar circumstances in America, the estate of Ernest Hemingway did sue! And lost.

Who is the author?

To turn again to the academics' bugbear, a lecture which has not been written down. Suppose a person delivers a lecture extempore; and suppose a person other than the lecturer or someone acting on behalf of the lecturer records his or her words by rapid writing. In these circumstances a literary work has clearly been created; but is the author of the work the person who framed the words or the person who first fixed them in to material form?

The case law on the question is unclear. The question may appear to have been resolved in favour of the person who put the work into material form in 1900, in the case of *Walter* v *Lane*, which involved the copyright in reports of the speeches of Lord Rosebery. The reports had been made by shorthand reporters employed by The Times. In the days before speechwriters, Lord Rosebery had delivered his speeches impromptu. Probably because of this, an en-

terprising publisher thought the public would be interested in a book of them, and set out to publish one, gleaning his material by lifting The Times' reports. When The Times' proprietors sued for breach of copyright, the book publisher claimed that there had been no such breach, as the reporters were not the authors of the speeches or their reports and therefore did not own any copyright in them. The House of Lords held that the reporters did own the copyright in their reports, as being created by their considerable skill in taking down rapid speech.

However, this decision dealt only with the copyright in the reports, not in the speeches themselves. The question next memorably arose in the case of *Cummins* v *Bond* (1927), in which it was common ground between the plaintiff and the defendant that the originator of the words in question was a spirit moving in another astral plane. The plaintiff was the medium to whom the spirit had communicated the works, and the defendant an associate of the plaintiff who had ordered and punctuated the works as transcribed by the plaintiff. The defendant claimed to be one of the authors of the works so produced and, as such, a part-owner of the copyright. He failed on this count. In the alternative the defendant claimed that neither of them owned the copyright as the true author of the works was another person. The judge declined to entertain this submission also:

"[I]t would almost seem as though the individual who has been dead and buried for some 1900 odd years and the plaintiff ought to be regarded as the joint authors and owners of the copyright, but inasmuch as I do not feel myself competent to make any declaration in his favour, and recognising as I do that I have no jurisdiction in the sphere in which he moves, I think I ought to confine myself when inquiring who is the author to individuals who were alive when the work first came into existence and to conditions which the legislature in 1911 may reasonably by presumed to have contemplated. So doing it seems to me that the authorship rests with the [plaintiff], to whose gift of extremely rapid writing coupled with a peculiar ability to reproduce in archaic English matter communicated to her in some unknown tongue we owe the production of these documents. ... I can only look upon the matter as a terrestrial one, and I propose to deal with it on that footing. In my opinion the plaintiff has made out her case, and the copyright rests with her."

The argument in favour of the author being the person who fixes the work in material form gains some support from subsection 22(1) of the Copyright Act:

"A reference in this Act to the time when, or the period during which, a literary, dramatic or musical work was made shall be read as a reference to the time when, or the period during which, as the case may be, the work was first reduced to writing or to some other material form."

This can be taken to indicate that the work simply does not exist until it has been reduced to writing or some other material form. However, its meaning may be more restricted. The Act refers in various places, for various purposes, to the time when a work was made. (Examples may be found in section 32). This subsection says what those references mean, and thereby defines the time when a work was made for the purposes of those sections. But nothing compels us to use the same test to determine when a work was made for any other purposes.

In 1977 a British government committee noted that the uncertainty in this area was unacceptable, and recommended that the law be amended to make it clear that in the above circumstances the lecturer, and not the shorthand writer or the sound recordist, would own the copyright in the work. This suggestion (which unfortunately did not address the ownership of works communicated by spirits) was not taken up by the UK government, nor has the problem been explicitly addressed in Australia.

Conclusion

However, the argument has now been all but decisively pushed in the direction of the author being the originator of the words, not the person who fixes them in material form - the lecturer, not the sound recordist; for from the recognition that improvised works exist it follows that works exist before they are fixed in material form. In that case the author must be the person who framed the words - or the music, or dramatic incidents.

It is to be hoped that these amendments have settled this question, however unintentionally. The purpose of copyright law is to encourage the creation of works, which will benefit society, by giving their authors an incentive to create. The incentive is the monopoly in their own productions which the Act gives to authors. The significant work in the creation of a speech, or a musical or dramatic work, which has been improvised and recorded, is surely with the artist or talker who generated the sounds and actions, not with the person who slavishly recorded them. Granted, some work goes into making the recording, especially if it is a recording of quality; but the recording engineer, or whoever has performed that function, has a copyright in this recording which is separate to the copyright in the work which he or she has embodied in the recording. There is no reason why he or she should be given the copyright in the work he or she has captured as well.

For these reasons, improvising artists have double cause for welcoming the Performers' Protection amendments to the Copyright Act. Incidentally to protecting their performances, the amendments are also securing their copyright in their improvised works.

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BRIAN WHITE
1933 - 1990

During the three years Brian White was President of the Federation of Australian Radio Broadcasters, there developed a little comic set piece, repeated each year at the industry's convention. Brian was of small stature, and each time he took the rostrum, with only his head visible, someone would call out "Stand up!" and Brian would always grin and say "I am standing up".

A slight thing, and perhaps altogether trivial to an outsider. You had to be there to feel the warmth and the camaraderie of the occasion. There was an essentially human quality about "Whitey" which was reflected in all his friendships and associations.

Someone said at his funeral that he was a stylish man, and so he was. But he was also without pretension. Whatever the circumstances, he was just himself. This is what came through in his programs and in his personal relationships. Listeners felt they knew this man who could conduct a hard news interview one minute and in the next, reveal some personal, whimsical side of his character. So it was with his friends and business associates. He was generous, compassionate and public-spirited.

Brian White was a pioneer of that school of radio journalism which substituted matter for manner and in so doing lifted the medium above the trivial and the transitory. He was a journalist's journalist.

I knew him and worked with him in various capacities for nearly 30 years. Listening a few days before his death I was moved to reflect how splendidly my friend had matured over that time.

By all criteria that matter, he was a very big man.

- Des Foster -