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New Decade Edition

Copyright in the 2010s The Decisions that Defined the Decade

Rebecca Dunn, partner, and **Natalie Zwar** and **Caitlin Meade**, lawyers, Gilbert + Tobin, discuss the evolution of copyright law in the 2010s and where copyright law is headed in this new decade.

Introduction

If the first decade of this century established and began to test new copyrights for the digital age, the second explored the scope and limits of the operation of those rights in the online environment.

In the 2000s we saw the introduction of the communication right and the codification of the law of authorisation (*Digital Agenda Act*¹), the first tests of enforcement of the communication right and the authorisation of infringements of that right (*Cooper*² and *Kazaa*³), consideration of the way copyright law can apply to the internet environment via hyperlinking and P2P (*Cooper* and *Kazaa*) and the way copyright subsistence and originality apply to digitally generated content (*IceTV*⁴).

In the 2010s each of those issues was further explored, with the Courts considering the limits of the operation of copyright law as it interacts with online business models and realities. In 2010 in particular there were multiple important copyright judgments, many of which went on to be appealed

to higher courts. These cases form the framework for the development of copyright law in the digital environment in the last decade and provide guidance as we enter the next.

Meanwhile, as the Courts grappled with the application of new technologies to the law, there were numerous enquiries into whether legislative amendments should be made to the *Copyright Act 1968* (Cth) (the **Act**) to accommodate the impact of those technologies on traditional and new business models. The majority of those enquiries resulted in recommendations which have not been implemented, leaving copyright law in the hands of the Courts for now as we head into the 2020s.

Case Law

Originality

At the close of the 2000s, the High Court of Australia delivered a landmark decision on originality in Part III works, in *IceTV*. The Court delivered two separate judgments, from French CJ, Crennan and Kiefel JJ on the one hand and Gummow, Hayne and Heydon JJ on the other.

Contents

Copyright in the 2010s - The Decisions that Defined the Decade	1
National Security and Tech: The New Decade	9
2020 CAMLA Young Lawyers Networking Event	14
A New Decade of Data Privacy	15
Profile: Associate Professor Jason Bosland	20
Defamation Law for a New Decade	23
A Decade of Contempt and the Media: Ensuring That Justice Must Be Seen to be Done	29
All Talk, No Cause of Action: Where to Next for an Australian Cause of Action for Serious Invasion of Privacy?	32
eSports - Is it a Sport, a Business or Both? A Look at the eSports Industry as it Enters a New Decade	36
Telecommunications - A Decade of Change	38



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1 *Copyright Amendment (Digital Agenda) Act 2000* (Cth).

2 *Universal Music Australia Pty Ltd v Cooper* [2005] FCA 972; *Cooper v Universal Music Australia Pty Ltd* [2006] FCAFC 187 (**Cooper**)

3 *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 222 FCR 465

4 *IceTV Pty Ltd v Nine Network Australia Pty Ltd* [2009] HCA 14 (*IceTV*).

Editors' Note

Dear readers,

Happy new year, happy new decade, and (most momentarily) happy new edition of the CLB!

We hope you are staying safe in these uncertain times.

We are pretty sure that the new decade has already used up its quota of horrible, and it's only March 2020. We hope that you are all keeping safe and sound, and that this edition helps to alleviate the isolation. Worst case, it may help to alleviate the toilet paper shortages.

This will pass. And before too long, we will be back together meeting at seminars and cocktail parties and being whatever the opposite is of socially distant ("antisocially intimate"?).

Speaking of the new decade, this new edition has a special 'new decade' theme. We have procured for you a range of thought leaders (and also Eli) to discuss the previous decade in relation to a specific body of law, and suggest an agenda for the new decade. For older CAMLA members, this might be a really nice stroll down memory lane as you reflect on a decade's worth of matters on which you worked, judgments you read, and fascinating CAMLA seminars you attended. For younger CAMLA members, this is a really great way to catch up on what was taking place before you joined the scene, and provide some helpful context for the matters you're thinking about and working on today. And if you're reading CLB, you're hopefully self-isolating responsibly and not converging on Bondi Beach.

We have our friends at Gilbert + Tobin, **Bec Dunn, Natalie Zwar and Caitlin Meade**, take us through copyright law. Everyone's favourite **Emma Johnsen**, of Marque Lawyers, walks us through eSports. Telco experts **Joel von Thien and Jono Selby**, from Clayton Utz, discuss telecommunications.

Minters' **Katherine Giles** describes the decade in contempt law, suppression orders and open justice. **Patrick Fair** of Patrick Fair Associates provides an overview of national security law as it relates to technology. **Maddie James and Jim Micallef** from Corrs tell us what's been (not) happening in the privacy tort space over the last decade, and what might yet be to come in the 20s. **Sophie Dawson** and **Phil Gwyn** from Bird & Bird summarise the previous decade in defamation law. And Baker McKenzie's **Eli Fisher** has a look at data privacy law.

But wait, you want more? CAMLA Young Lawyer, **Claire Roberts**, of counsel, profiles **Associate Professor Jason Bosland**, media law expert at Melbourne University to chat about his career and some of his thoughts on defamation and suppression orders across the decades.

CAMLA kept us in touch throughout the 2010s. In touch with the law. In touch with key industry developments. In touch with each other. Our confident prediction for the coming decade, especially these very strange, chaotic, WFH times, is that CAMLA will play an identical - if more important - role.

To that end, check out the ad within for the **webinar on Coronavirus, Contracts and Cancellations in the Tech-Media space**, hosted by Baker McKenzie's TMT team on **8 April 2020**. Please don't stockpile tickets. There's enough to go around.

We also report on the magnificent **CAMLA Young Lawyers networking event** at Clayton Utz.

There's a lot going on in our space, and the next edition - shortly to follow - will cover these developments. In the meantime, stay safe and look after each other. (And don't send in angry letters to the editor about whether, technically, the new decade starts on 1 January 2021. We're not interested.)

Ash and Eli

The judgments proceeded via very different reasoning but reached the same outcome, reversing the decision of the Full Federal Court and finding in IceTV's favour that its television guides did not infringe Nine's copyright in its own television guides. In doing so, the High Court reset the test for originality, essential for subsistence of copyright and relevant to whether a substantial part of a work has been infringed.

Despite the fact that copyright in the relevant works was admitted by IceTV at trial, each of the judgments of the High Court treated the individual parts of the work as lacking sufficient originality to be

protected by copyright. The French decision described such individual parts of the information in relation to a given program as "not a form of expression which requires any particular mental effort"⁵ whose arrangement in chronological order was "obvious and prosaic, and plainly lacks the requisite degree of originality"⁶. The Gummow judgment went further finding that final steps in the creation of the relevant works involved "extremely modest skill and labour"⁷ even though copyright had been admitted. Additionally, the Gummow judgment in particular took a fresh look at authorship, casting doubt on whether works will be protected by

copyright where detailed evidence of authorship cannot be provided, or where the number of authors, or steps involved to identify them, make gathering that evidence impractical or impossible.

Phone Directories

Against the backdrop of the *IceTV* case, one of the earliest copyright judgments delivered in the 2010s was the first instance decision in *Telstra Corporation Limited v Phone Directories Company Pty Ltd* [2010] FCA 44 (the **Phone Directories case**). The case was subsequently appealed to the Full Federal Court and the decision of the trial judge (Justice Gordon) upheld.⁸

5 *IceTV* at [42].

6 *IceTV* at [43].

7 *IceTV* at [168].

8 *Telstra Corporation Limited v Phone Directories Company Pty Ltd* [2010] FCAFC 149 (*Phone Directories Full Federal Court*).

The case concerned the question of whether copyright subsisted in Telstra's White and Yellow Pages telephone directories. Justice Gordon held that copyright did not subsist in the directories as they were not original works capable of protection under the Act. Telstra had not identified many of the authors of the directories, and even if they had been identified, the work done in creating the directories did not constitute "independent intellectual effort" or was not "sufficient effort of a literary nature". Further, the work was done prior to the directories taking material form and was therefore not relevant to the question of originality, and finally and importantly, the work was computer generated, rather than the result of human effort.⁹

On 15 December 2010, the Full Federal Court unanimously upheld Justice Gordon's decision. Applying *IceTV*, the Full Court held that to be original, a work must originate from a human author and be the result of "independent intellectual effort" which is directed to reducing the work to its material form.¹⁰ Telstra argued that its gathering/organising and ordering/arranging of the material contained in the directories constituted independent intellectual effort. The Full Court rejected this, finding that the gathering and ordering phase was not directed to the reduction to material form, and that the ordering and arranging phase was not undertaken by human authors but by a computerised process.¹¹ The Full Court did agree with Telstra's submission that in proving originality and subsistence, it is not necessary to identify by name each and every author of a work. Rather, it must be demonstrated that the work originated from a human author or authors.¹² In this instance, because of the role of computerised and automated

processes, that requirement was not met. The emphasis on human authorship leaves vulnerable computer-generated products and databases into which considerable effort is expended, but no human author can be identified. Whether or not such works should be protected will be a live issue into the next decade.

Telstra applied for special leave to appeal to the High Court, but leave was not granted.

Fairfax v Reed

Exploring the issue of originality in aggregated works further was the case of *Fairfax Media Publications Pty Ltd v Reed International Books Australia Pty Ltd* [2010] FCA 984 (**Fairfax v Reed**).

Reed (trading as "LexisNexis") provided a service known as ABIX, through which it provided abstracts of articles (usually comprised of the headline and by-line, together with a summary of the article written by a Reed employee) published in a range of Australian newspapers, including the *Australian Financial Review*. Relevantly, Reed did not publish the full articles. Fairfax filed proceedings against Reed for copyright infringement. The primary issue before the Court was whether or not the pleaded works were original literary works, including individual headlines.

Fairfax selected ten headlines for consideration and filed evidence of the skill and effort invested by sub-editors in their creation, as well as the purpose and value of a headline in "attracting readers to read the articles". Justice Bennett held that the headlines included in the case were not literary works, and found that "headlines generally are, like titles, simply too insubstantial and too short to qualify for copyright protection as literary works".¹³ Her Honour noted:¹⁴

There may well be writings of original words or phrases that simply do not reach the level of constituting a "work", regardless of literary merit. This is not just because they are short, as a deal of skill and effort can go into producing, for example, a line of exquisite poetry. It is because, on its face and in the absence of evidence justifying its description as a literary "work", the writing does not, qualitatively or quantitatively, justify that description. A headline is, generally, no more than a combination of common English words (Dicks v Yates at 88 per Jessel MR). It 'does not involve literary composition, and is not sufficiently substantial to justify a claim to protection' (Francis Day at 122-123); it does not, in the words of Jacobson J in Sullivan at [112], have 'the requisite degree of judgment, effort and skill to make it an original literary work in which copyright may subsist' for the purposes of the Act.

Justice Bennett's decision also continued the pattern started in *IceTV* and developed in the *Phone Directories* case in focusing on the need to define and prove the authorship of copyright works. In relation to the authorship of the headlines, Fairfax was unable to rely on the presumption in s 129(2) of the Act in respect of each of headlines as a basis for establishing their originality¹⁵ because the unidentified team of sub-editors who authored the headlines in question were in Fairfax's employ and the requisite enquiries to establish their identities had not been made.¹⁶

This issue also informed the separate question before the Court as to whether the combination of an article, its headline and associated by-line could also be considered a discrete original literary work. The

9 *Phone Directories* Federal Court at [162]-[166].

10 *Phone Directories* Full Federal Court at [101], [102].

11 *Phone Directories* Full Federal Court at [7], [119].

12 *Phone Directories* Full Federal Court at [127].

13 *Fairfax v Reed* at [36].

14 *Fairfax v Reed* at [45].

15 *Larrikin Music Publishing v EMI Songs Australia* (2010) 263 ALR 155 (**Larrikin Federal Court**) at [82], [84].

16 *Larrikin* Federal Court at [80]-[81].

issue in relation to this contended work was whether authorship could be adequately established, and in particular whether joint authorship could be established. Fairfax argued that the article, headline and by-line were an individual work authored by the journalist responsible for writing the article and an unidentified sub-editor responsible for editing the article and creating the headline. Justice Bennett found that the evidence did not establish joint authorship of the article/headline combinations, as the writing of the articles and writing of headlines were distinct and separate tasks with different authors.¹⁷

Substantial Part

Larrikin Music

February 2010 was also the month the Federal Court handed down its judgment in *Larrikin Music Publishing v EMI Songs Australia* (2010) 263 ALR 155, a highly publicised case concerning two widely revered Australian songs ‘Kookaburra Sits in the Old Gumtree’ and Men At Work’s ‘Down Under’. This concerned a claim of copyright infringement, misleading and deceptive conduct and unjust enrichment by Larrikin Music Publishing against the composers of Down Under, and EMI Songs Australia and EMI Publishing (EMI) as the owner and licensee of copyright in the musical work.

At first instance, Jacobsen J found an objective similarity between the melodies of Kookaburra and Down Under, considering the works both aurally and visually.¹⁸ In making this finding, the Federal Court applied the principle upheld in *IceTV* that substantiality focuses more on quality

than quantity.¹⁹ Larrikin Music failed on the claim of unjust enrichment²⁰ but succeeded on the claim of misleading and deceptive conduct under the Trade Practices Act, based on the finding that APRA AMCOS paid publisher and mechanical royalties to the Respondents as result of representations that they were wholly entitled to this income²¹. The fact that these representations to APRA AMCOS were continuing allowed Larrikin Music to circumvent the six-year statutory limit under the Act and claim loss and damage from May 2002 onwards.²²

The Respondents appealed to the Full Federal Court of Australia on a number of grounds including that Jacobsen J had become a sensitized listener and that the Federal Court gave undue weight to the similarities between Kookaburra and Down Under and overlooked the differences. In April 2011, Emmett, Jagot and Nicholas JJ dismissed the appeal by the Respondents, upholding the finding the Down Under infringed the Larrikin’s copyright in the musical work, Kookaburra.²³ Ultimately, the Full Federal Court found that the part reproduced was sufficiently significant to Kookaburra so as to constitute infringement and that “aural resemblance need not be resounding or obvious”²⁴ but would turn on the aural perception of the judge and the expert evidence.²⁵

More broadly, this decision fanned the flames of those advocating for fair use exceptions (discussed below) or reducing the duration of the copyright, given the death of Kookaburra’s composer Marion Sinclair 24 years earlier. As the Full Court remarked (per Jagot J):²⁶

“One may wonder whether the framers of the Statute of Anne and its descendants would have regarded the taking of the melody of Kookaburra in the impugned recordings as infringement, rather than as a fair use that did not in any way detract from the benefit given to Ms Sinclair for her intellectual effort in producing Kookaburra.”

Special leave to the High Court was refused.²⁷

Authorisation

Roadshow v iiNet

In *Roadshow v iiNet*, the bounds of the law of authorisation to sanction intermediaries were tested after first being applied to the internet environment in *Cooper* and *Kazaa* in the 2000s.

The film industry filed proceedings against an Australian ISP, iiNet, alleging it had authorised the infringements of its subscribers. At first instance, the Court found that the film industry had notified iiNet of instances where its subscribers (identified by IP address at certain times) were engaged in uploading or making available parts of films and television programs to other internet users via BitTorrent technology.

Justice Cowdroy found in favour of iiNet, introducing a concept new to the law of authorisation, namely “means of infringement”²⁸ He distinguished between the provision of access to the Internet (which his Honour regarded as the only relevant link between iiNet and the primary infringer, and therefore insufficiently proximate in nature) and the facilitation of the use of BitTorrent (which his Honour regarded as the true and proximate

¹⁷ Larrikin Federal Court at [101].

¹⁸ Larrikin Federal Court at [158].

¹⁹ Larrikin Federal Court at [42].

²⁰ Larrikin Federal Court at [336].

²¹ Larrikin Federal Court at [284].

²² Larrikin Federal Court at [297].

²³ *EMI Songs Australia Pty Limited v Larrikin Music Publishing Pty Limited* [2011] FCAFC 47 (Larrikin Full Federal Court).

²⁴ Larrikin Full Federal Court at [86].

²⁵ Larrikin Full Federal Court at [51].

²⁶ Larrikin Full Federal Court at [101].

²⁷ *EMI Songs Australia Pty Limited & Anor v Larrikin Music Publishing Pty Ltd* [2011] HCATrans 284.

²⁸ *Roadshow Films v iiNet* (2010) 263 ALR 300 [400] (iiNet Federal Court).

means of infringement and not one that iiNet was relevantly responsible for). After reaching this conclusion, Justice Cowdroy also considered the factors under s 101(A) of the Act, finding that iiNet did not have the “relevant” power to prevent and that was not obtaining a financial benefit, and so did not have the necessary relationship with the primary infringer to be considered as ‘authorising’ the infringement.²⁹

The film industry appealed to the Full Federal Court of Australia, with the matter heard by Emmett, Jagot and Nicholas JJ and judgment delivered on 24 February 2011. In a 2-1 split decision the Full Federal Court dismissed the appeal against the decision of the trial judge (Emmett and Nicholas JJ in the majority, Jagot J dissenting).³⁰ All three judges wrote separate judgments.

All three judges found that the trial judge had erred in his approach to both the legal test and the application of the law of authorisation.³¹ They found that iiNet had the power to prevent the acts of infringement by sending warnings, suspending or terminating user accounts³² and that such steps were reasonable.³³ The outcome of the appeal turned on how the majority approached a single issue, namely iiNet’s knowledge of the infringements at the time of receipt of the notifications of infringement from the film industry. The majority of the Court (Emmett and Nicholas JJ) found that it was not unreasonable for iiNet not to act in response to the notices because the film industry had not provided “unequivocal and cogent” evidence of infringement and had

not informed iiNet of the method of evidence collection prior to the filing of the proceeding³⁴ even though iiNet never intended to act on the notices.³⁵ Both judges ruled that the knowledge that iiNet acquired after the case was filed was irrelevant³⁶ overturning a contrary finding of the primary judge. This was despite criticisms of iiNet’s approach to the allegations of infringement which “demonstrated a dismissive and, indeed, contumelious attitude”.³⁷

The decision also provided judicial support for a graduated response approach in Australia. Emmett J provided a ‘roadmap’ of steps that would oblige iiNet to act on infringements,³⁸ and the process that would be expected of iiNet in communicating with its customers. Some of this reasoning was picked up in later enquiries and industry negotiations, though it did not result in the introduction of an industry code setting out a graduated response scheme (see further below).

In dissent, Jagot J found that iiNet had the relevant knowledge because the notices from the film industry “provided credible evidence of widespread infringements of copyright” by iiNet users. iiNet’s state of knowledge was “a product of iiNet’s adopted position from the outset that it was not obliged to ‘do squat’” in response to the notices “irrespective of the cogency of the information AFACT supplied”.³⁹

The film industry made a successful application for special leave to appeal to the High Court of Australia. The High Court’s judgment was delivered

on 20 April 2012.⁴⁰ In two judgments the High Court unanimously dismissed the appeal. In both judgments, the Court found that iiNet had not authorised the infringements of its users because it was reasonable for iiNet not to take steps to act in all of the circumstances (the judgments differed on the reasoning in relation to reasonableness, and reached the conclusions by reference to factors such as the nature of the internet and the BitTorrent system, the information that was provided to iiNet, its level of knowledge and the extent of its power to prevent). The majority judgment (French CJ, Crennan and Kiefel JJ) found that iiNet had only “indirect” power to prevent the infringements of its users, by terminating their contracts, and that the information in the notices from the film industry did not provide iiNet with a reasonable basis for sending warning notices to individual customers. The other judgment (Gummow and Hayne JJ) found that iiNet had limited control over the infringements and that the incomplete allegations notified to iiNet meant that it was not unreasonable for iiNet not to take action.⁴¹

The High Court identified the need for a legislative solution to the infringements, rather than by reliance on authorisation:⁴²

This final conclusion shows that the concept and the principles of the statutory tort of authorisation of copyright infringement are not readily suited to enforcing the rights of copyright owners in respect of widespread infringements occasioned by peer-to-peer file sharing, as occurs with the

29 iiNet Federal Court at [451].

30 *Roadshow Films Pty Limited v iiNet Limited* [2011] FCAFC 23 (**iiNet Full Federal Court**).

31 iiNet Full Federal Court, Emmett J [174]; Jagot J [401]; Nicholas J [694]-[700].

32 iiNet Full Federal Court, Emmett J [174]; Jagot J [426]; Nicholas J [720].

33 iiNet Full Federal Court, Emmett J [184]-[194]; Jagot J [408]-[415]; Nicholas J [748]-[749].

34 iiNet Full Federal Court, Emmett J [210]-[211].

35 iiNet Full Federal Court, Nicholas J [783]: “The fact that the respondent may not have acted on the AFACT notice even if they had contained additional information is besides the point”.

36 iiNet Full Federal Court, Emmett J [210]-[211]; Nicholas [765].

37 iiNet Full Federal Court, Emmett J [210].

38 iiNet Full Federal Court, Emmett J [210].

39 iiNet Full Federal Court, Jagot J [405].

40 *Roadshow Films Pty Ltd v iiNet Limited* [2012] HCA 16 (**iiNet High Court**).

41 iiNet High Court at [146].

42 iiNet High Court at [79].

BitTorrent system. The difficulties of enforcement which such infringements pose for copyright owners have been addressed elsewhere, in constitutional settings different from our own, by specially targeted legislative schemes, some of which incorporate co-operative industry protocols^[84], some of which require judicial involvement in the termination of internet accounts, and some of which provide for the sharing of enforcement costs between ISPs and copyright owners.

As will be seen below, despite numerous attempts, no such amendment to the law has been made in the 8 years since the High Court's decision in *iiNet*.

The Communication Right

In the latter half of the decade, the Courts explored the scope of the communication right, and in particular the territorial nexus with Australia necessary in order to establish infringement of that right. In *Pokémon Company International, Inc. v Redbubble Ltd* [2017] FCA 1541 (**Pokemon v Redbubble**), Pokemon filed proceedings against Redbubble, an online marketplace that enables print on demand services with particular designs.

The proceedings concerned designs for clothing and other merchandise displaying the Pokemon characters (as well as associated images on the Redbubble website). The designs were uploaded to the Redbubble website and customers could visit the website and choose to have clothing and other merchandise made on demand displaying the Pokemon images.

A major issue in the case was whether there had been infringement of the communication right by Redbubble. Redbubble conceded that the relevant works had been communicated to the public, in the sense that that they were made available online and

electronically transmitted, but argued that those acts were done by the artists who uploaded the works to Redbubble, rather than by Redbubble itself.⁴³

Section 22(6) of the Act provides that a communication is taken to have been made "by the person responsible for determining the content of the communication" and the issue was previously considered in different factual scenarios by the Courts in *Cooper* (in relation to the operation of a website containing hyperlinks) and *iiNet* (where users were communicating cinematograph films via BitTorrent). In this case it was considered in the context of an online marketplace which relied on the provision of content by disparate artists.

The Federal Court found that while Redbubble did not provide the content of the works that were communicated to the public (as the artists did), Redbubble was responsible for determining that content through its "processes, protocols and arrangements with the artists".⁴⁴ However, Pokémon could not prove they should be entitled to damages for lost sales because the merchandise sold was a 'mashup'. Consequently, Pokemon was only awarded \$1 nominal damages and no additional damages on the basis of policies in place that meant the infringement was not flagrant.

A similar case brought against Redbubble by the Hell's Angels Motorcycle Corporation (Australia) Pty Limited⁴⁵ failed because Hell's Angels could not establish copyright ownership.

Preliminary Discovery

Against the backdrop of the *iiNet* decision, which meant intermediary ISPs were not likely to be liable for authorisation of copyright infringement, the attention of some rights holders turned to primary

infringers. In 2014, the owners of the film "Dallas Buyers Club" commenced preliminary discovery proceedings against 6 Australian ISPs for the purpose of obtaining the details of customers associated with certain IP addresses that evidence established had been used to download and share copies of the film via BitTorrent. The application was strongly resisted by the ISPs.

The Federal Court held that Dallas Buyers had established the requisite elements to make out its application for preliminary discovery and ordered that the ISPs provide the details of the customers associated with the infringing IP addresses. The Court was satisfied that the evidence filed by Dallas Buyers established that there was a strong possibility that ISP customers were making available the film online via BitTorrent in infringement of the communication right.⁴⁶ However, Justice Perram placed a significant and unusual limitation on his orders in this regard. To prevent what was termed "speculative invoicing", Dallas Buyers was required to clear with the Federal Court any correspondence it proposed to send to the identified customers.⁴⁷

The Court's assessment of the proposed letters was particularly involved. Justice Perram concluded that certain types of demand were acceptable, but ruled out any licence fee damages and additional damages. The Court also required a written undertaking that Dallas Buyers would restrict its demands to those the Court had ruled as acceptable (limited to compensation for the price of the film and costs for the legal proceedings).⁴⁸ In addition, as Dallas Buyers was not an Australian company, the Court required that the undertaking be secured by the lodging of a \$600,000 bond.⁴⁹

This level of judicial oversight of what a successful preliminary

⁴³ *Pokemon v Redbubble* at [46].

⁴⁴ *Pokemon v Redbubble* at [48].

⁴⁵ *Hells Angels Motorcycle Corporation (Australia) Pty Limited v Redbubble Limited* [2019] FCA 355.

⁴⁶ *Dallas Buyers Club LLC and another v iiNet Ltd and others* (2015) 327 ALR 670 at 689

⁴⁷ *Dallas Buyers Club LLC and another v iiNet Ltd and others* (2015) 327 ALR 670 at 689

⁴⁸ *Dallas Buyers Club LLC and another v iiNet Ltd and others* (No 4) (2015) 327 ALR 702 at [34]

⁴⁹ *Dallas Buyers Club LLC and another v iiNet Ltd and others* (No 4) (2015) 327 ALR 702 at [35]

discovery applicant may do with information it obtains was unprecedented. Justice Perram also stated that his reasons should apply in all future applications where a rights holder seeks access to user details from an ISP via a preliminary discovery application and that applicants would need to put on evidence regarding the nature of the demands they propose to make to the infringing ISP customers.⁵⁰

Ultimately, the Dallas Buyers litigation was an attempt by a rights holder to seek access to documents to identify the individuals involved in copyright infringement, but that attempt was fundamentally frustrated when the Court pre-set limits on the damages that could be recovered (without proceedings even being issued against those individuals or any evidence of the scale of actions by the individual infringers) and imposed an unprecedented requirement that the copyright owner pay an extremely significant bond into Court.

Legislative Amendments and Review

Section 115A

While rights holders failed to hold intermediaries liable for authorisation of infringement by users (*iiNet*) and struggled to obtain preliminary discovery orders identifying infringers without costs prohibitive investment (*Dallas Buyers*), they and other stake holders continued to pursue a site blocking regime in Australia.

The Copyright Amendment (Online Infringement) Act 2015 (Cth) commenced as law on 27 June 2015 after being passed by Parliament with bipartisan support. It amended the Act by incorporating a new s 115A which empowered rights holders to seek injunctive relief to require a carriage service provider

(CSP) to take reasonable steps to disable access to certain online locations. The site blocking provision followed the introduction of similar provisions in the UK and Singapore.

In order to obtain an injunction under section 115A, a content owner must satisfy the Court that:

- a carriage service provider provides access to an online location outside Australia;
- the online location infringes, or facilitates an infringement of, the copyright; and
- the primary purpose or primary effect of the online location is to infringe, or to facilitate the infringement of, copyright (whether or not in Australia).

Further, the Court must also consider the list of matters in s115A(5) when determining whether to order an injunction. The list includes the flagrancy of the infringement, whether access to the online location has been blocked in other jurisdictions and whether disabling access is a proportionate response and in the public interest.

Since the introduction of s 115A a number of applications by rights holders have been successfully made requiring ISPs to block access to certain online locations.⁵¹

The introduction of the site blocking regime was a solution which sidestepped the issue of liability of intermediaries and even infringers, to create a no-fault regime designed to prevent and inhibit infringement online.

Short comment about extension to search engines?

Legislative Review

Over the past decade there have been multiple legislative reviews into various areas of copyright law. They include:

- Australian Law Reform Commission, *Copyright and the Digital Economy* (Report No. 122 November 2013);
- Australian Government (Cth), *Online Copyright Infringement Discussion Paper* (July 2014), which contributed to the introduction of section 115A and the attempted Industry Code Negotiations (facilitated by Communications Alliance);
- Senate Legal and Constitutional Affairs Legislation Committee, *Copyright Amendment (Online Infringement) Bill 2015* (11 June 2015);
- Productivity Commission, *Inquiry Report into Intellectual Property Arrangements* (Report No. 78, December 2016);
- Department of Communications and the Arts, *Review of Copyright Regulations 1969 and the Copyright Tribunal (Procedure) Regulations 1969* (September 2017);
- Department of Communication and the Arts, *Review of Copyright Online Infringement Amendment* (February 2018);
- Department of Communication and Arts, *Consultation on draft Copyright Amendment (Service Providers) Regulations 2018 to implement Safe Harbour Reforms* (June 2018);
- Bureau of Communications and Arts Research, *Review into the Code of Conduct for Copyright Collecting Societies* (Report, April 2019)⁷
- Australian Competition and Consumer Commission, *Digital Platforms Inquiry* (July 2019); and
- Department of Infrastructure, Transport, Regional Development and Communications, *Copyright Modernisation Review* (ongoing).

⁵⁰ *Dallas Buyers Club LLC and another v iiNet Ltd and others* (No 4) (2015) 327 ALR 702 at [36]

⁵¹ *Roadshow Films Pty Ltd v Telstra Corp Ltd* (2016) 122 IPR 81 (Solarmovie websites, The Pirate Bay websites, Torrentz websites, TorrentHound); *Universal Music Australia Pty Ltd v TPG Internet Pty Ltd* (2017) 126 IPR 219 (Kickass Torrents); *Australasian Performing Right Association Ltd v Telstra Corp Ltd* (2019) 369 ALR 529 (injunctions granted in relation to websites which allowed users to rip streamed content from YouTube); *Foxtel Management Pty Ltd v TPG Internet Pty Ltd* (2019) 148 IPR 432 (ShareMovies, SeriesOnline8, Movie4U, SeeHD, StreamDreams, MoviesOnline, WatchSoMuch, TorrentKen, SkyTorrents, Unblocked.lol, Unblocked.win, Unblockall, Unblocker and Myunblock).

Arising from these reviews and enquiries have been many recommendations about amendments to copyright law in Australia. Those include the introduction of a fair use exception (ALRC's Copyright and the Digital Economy, Productivity Commission's Inquiry into Intellectual Property Arrangements and being considered in the Copyright Modernisation Review), the introduction of an industry code to govern the steps ISPs should take in relation to infringement by users (Online Copyright Infringement Discussion Paper), the introduction of a site blocking regime (Online Copyright Infringement Discussion Paper) and the implementation of a mandatory takedown scheme (ACCC Digital Platform Inquiry). Of the many recommendations made the only significant legislative change to copyright law in the last decade has been the introduction of the site blocking regime described above. The remainder of the recommendations have either been taken on notice (such as fair use), stymied by lack of agreement by stakeholders (the industry code) or rejected by government (the takedown scheme).

The 2020s

Love is in the Air

The first significant copyright judgment of this new decade is likely to be the Federal Court's decision in the *Love is in the Air* case, which commenced in 2019.

This case was brought by the copyright owner of the iconic Australian disco song *Love is in the Air* Boomerang Investments Pty Ltd, written by Harry Vanda and the late George Young in 1977 (LIITA). Vanda & Young (by his personal representative) were co-applicants in the proceedings and APRA AMCOS were joined shortly before the hearing commenced as the Fourth and Fifth Applicants.

The First and Second Respondents are John Padgett and Lori Monahan, an electro pop duo known as Glass Candy. Between 2005-2011, John

Padgett composed the music and Lori Monahan wrote the lyrics for the song *Warm in the Winter* (WITW). The song is 6'45" long and the words "love/s in the air" feature in its lyrical content.

The Applicants alleged that WITW contains a reproduction of a substantial part of the literary and musical works that comprise LIITA and that Glass Candy streamed (communicated) and authorised the download (reproduction) of WITW by internet users in Australia.

The musical work allegation was that the music accompanying the words "love is in the air" had been copied (the hook). At the trial, the Applicants also alleged that WITW copied the entirety of the music corresponding to the words "love is in the air; everywhere I look around/ love is in the air, every sight and every sound" (the head). It was submitted that that hook and the head reproduced a substantial part of LIITA's musical work. Glass Candy's sub-publisher in Australia (Kobalt) was joined as the Third Respondent. The Applicants further alleged that a version of WITW titled *France is in the air* (FIITA) that was licensed to the fourth respondent, Air France for use in an international advertising campaign infringed LIITA for the same reasons and was streamed and played as music on hold in Australia.

The Court heard from two musicologists in the expert conclave which centred around the analysis of the hook and the head, and competing views about the originality of musical concepts found in both songs such as intervals, chord progressions, rhythmic definitions, tempo, metre and key.

Key issues the Court will determine include:

- if the evidence of independent creation of WITW is accepted;
- whether the hook and the head are original and whether they reproduce a substantial part of LIITA's musical work (on their own and as repeated and varied throughout the song);

- whether the literary work comprising the lyrics 'love is in the air' was infringed in WITW in circumstances where evidence of the ubiquity of the phrase, both pre- and post-LIITA, was led by the Respondents;
- whether Air France's evidence of independent creation of the phrase "France is in the air" and development of FIITA is accepted;
- having regard to the various arrangements between composers, copyright owners and APRA AMCOS, who owns the relevant parts of the copyright in musical and literary works and who has standing to sue in music copyright cases; and
- the scope of the communication right (ie who is determining the content of the communication per s 22(6)) and its territorial connexion to Australia).

A point of discussion at the hearing that may feature in the judgment is whether lyrics and music can be considered together for the purposes of assessing infringement of musical works, akin to the position in US where the definition of "musical work" explicitly includes "accompanying words":

The hearing concluded in June 2019 and judgment is pending.

Where to from here

The last decade explored the scope and limits of copyright on the internet, setting limits on the liability of intermediaries while confining what material can be protected by copyright, including confirming that human authorship is required for subsistence. In the next decade, as we see further development of works involving computer generated elements and the use of artificial intelligence, we can expect to see cases exploring the complexities of identifying that human element, and increased pressure in relation to the need to protect valuable works in this category, including potentially by way of a database right.