

The Legal Status of Viral Sea Shanties

By Miriam Zanker, Lachlan Sadler and Jodie Goonawardena – Davies Collison Cave

Of all the ways for 2021 to start, few would have predicted that one of the first viral trends of the new year would be sea shanties; songs that were once sung on sailing vessels as a way of livening up repetitive busywork.

Late last year, Nathan Evans shared a video of himself on the social media platform TikTok singing a sea shanty called *Soon May the Wellerman Come*, and the video was quickly transformed into a viral hit, with various versions of the video clocking up millions of views and other artists layering their own vocals and instrumentation over the original recording.

As well as providing a welcome distraction from many other more sombre events going on around the world, the sudden rise of sea shanties in popular discourse, particularly in the context of the countless videos being uploaded to TikTok, raises some interesting questions regarding copyright law and licences granted to social media platforms.

Copyright in sea shanties

The first thing to note is that historical sea shanties, which generally trace their origins to the 19th century, are very unlikely to still be protected by copyright. There are three independent “works” which may be protected by copyright in relation to a sea shanty: the lyrics, the sheet music (as an embodiment of the melody and any instrumentation), and any recording of the performance of the sea shanty itself. However any such protection in relation to historical sea shanties is likely to have now expired. (Under Australian law, there are differing rules about copyright duration, depending on the type of works, when the works were created, and when the author died. If the works were published before 1955 or the author died before that date,

the work is likely to now be out of copyright.)

Any sea shanty written in the 19th century is therefore likely to be in the public domain, meaning that it is no longer protected by copyright and the exclusive rights which previously vested in the copyright owner (such as the right to reproduce the work or to perform the work) can now be exercised by anyone. *Soon May the Wellerman Come*, for example, which concerns whaling, is understood to have originated in around 1870 by an unknown author. For literary works with unknown authors first published prior to 1955, copyright lasted for only 50 years after creation. This means that the literary works comprising the lyrics to the *Soon May the Wellerman Come* sea shanty are now in the public domain under Australian copyright law.

That means that any musicians performing their own original version of the song, whether on TikTok or elsewhere, may be off the hook for copyright infringement.

Layered recordings under copyright law

But what about TikTok users who ‘layer’ their own music over other users’ videos?

The short answer is that, absent a licence from the author of the original video, this could constitute an infringement of copyright. This is because, while the lyrics and any sheet music to any sea shanties are likely to be in the public domain, a rendition of a sea shanty, such as the original video uploaded by Nathan Evans, is nevertheless likely to be protected separately under copyright law as a sound recording (in the case of the audio) and a film (in the case of the combination of the moving images and audio). Others are free to perform their own rendition of the sea shanty, but they would not

ordinarily be entitled to reproduce or communicate to the public Nathan Evans’ original video, without first obtaining permission.

There are exceptions to this rule under various copyright regimes around the world. America, for example, has a relatively robust ‘fair use’ doctrine, which permits ‘derivative works’, being works based upon pre-existing works that have been recast or transformed in some way. This exception has been held to apply to ‘reaction videos’ on YouTube, and may therefore also cover layered TikTok videos, provided that the added element is sufficient to ‘transform’ the work.

Australian law has no such fair use doctrine, and layered new vocals on a previous work are unlikely to come within our more limited fair dealing laws (although there is an argument that, say, layering a video of Kermit the Frog singing a sea shanty on top of previous videos, as some creative TikTok users have done, might be protected as parody or satire).

Layered recordings under TikTok’s Terms of Service

If left to the position under copyright legislation alone, it’s safe to say that TikTok sea shanty remix artists would at least be in murky waters in terms of copyright infringement under Australian law, if they had not sought permission from the copyright owner. However, this is where TikTok’s Terms of Service come into play.

Under TikTok’s Terms of Service, users who upload videos to the social media platform retain their copyright and any other intellectual property rights in the material. However, the Terms of Service also provide that users grant to TikTok an “unconditional, irrevocable, non-exclusive, royalty-free, fully transferable (including sub-licensable), perpetual worldwide licence to use, modify, adapt,

reproduce, make derivative works of, publish and/or transmit, and/or distribute” any content uploaded to the service. Effectively, this means that TikTok receives a licence to do essentially whatever it wants with the content, without paying royalties to the original uploader.

The Terms of Service also explicitly provide that other users of the platform receive a similar licence which enables them to “view, access, use, download, modify, adapt, reproduce, make derivative works of, publish, and/or transmit” videos uploaded to the platform in “any format and on any platform”, for the purpose of generating their own content for “non-commercial purposes”. This is an acknowledgement of the ‘remix culture’ that permeates TikTok and internet culture in general, whereby users take material uploaded by others and use it to create new content, either by remixing it, adding new material, or simply reacting to it.

Therefore, anyone who uploads a video to TikTok grants a licence to other users of the platform to use their work to create their own content, whether on TikTok or another platform. As such, even if an artist wished to prevent other users from building upon their original video, it is unlikely that they would be able to do so without challenging the legality of TikTok’s Terms of Use, which is a whole other kettle of fish.

An important limitation is that this licence only applies to non-commercial purposes. The situation would be much fishier if a musician took a TikTok video and used it to generate income, even if they were doing so based on an addition to the original content. This would be unlikely to fall within the licence granted by TikTok’s Terms of Use, and may also not be considered ‘fair’ under fair use and fair dealing exceptions, given the commercial nature of the activity. TikTok, on the other hand, under the Terms of

Service, is free to commercialise the video without seeking permission from the original uploader.

Moral rights in sea shanties

Under Australian law, authors of copyright works are also granted certain moral rights, including the right to be attributed as the author of the work and to prevent use of the work that is “derogatory” towards the author’s reputation. Republishing a video (such as the original sea shanty video by Nathan Evans) without crediting the author may be a violation of these rights.

Once again however, TikTok’s Terms of Service seem to have the answer, providing that users of its platform “hereby waive and agree never to assert any and all moral rights” in relation to content they upload to the service. While Australian copyright law does not explicitly contemplate the waiver of moral rights, it does provide that an artist can authorise conduct that would otherwise be an infringement of their moral rights. Therefore, while the legality of such a broad waiver of rights has not been tested in the courts, the prevailing view is that a clause such as this could be effective in preventing an author from enforcing their moral rights.

Therefore, even if another TikTok user republishes a sea shanty video without crediting the original musician, the original artist is unlikely to be in a position to rely upon his or her moral rights against the uploader or TikTok.

The final note

The sea shanty craze is an interesting microcosm of some of the broader intellectual property issues facing internet remix culture and social media platforms in particular. The interplay between copyright law and TikTok’s Terms of Service can have significant consequences, and it is important that users of social media services understand the far-reaching licences that they grant to other users, and the social media platform itself, when they upload content to TikTok.

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