

# Love is in the Air (and s 31 of the Copyright Act)

A case note on *Boomerang Investments Pty Ltd v Padgett* [2020] FCA 535

**Kosta Hountalas**, Solicitor, Herbert Smith Freehills, comments on the *Love is in the air* judgment and the relationship of lyrics to a musical work.

## Introduction

It is not every day that Australian copyright law is subject to exciting new precedent (or, for that matter, the inimitable, instructive and always entertaining reasoning of Perram J). The recent Federal Court copyright tussle of *Boomerang Investments & Ors v Padgett & Ors*<sup>1</sup> involved a number of copyright and moral rights infringement claims under the *Copyright Act 1968* (Cth) (**Copyright Act**) in respect of the classic Australian tune by John Paul Young, *Love is in the Air*. This case note summarises some of Perram J's findings, particularly in relation to the work in suit and the specific allegations of infringement. His Honour's analysis of the role of lyrics, in particular, will interest copyright practitioners and rights managers alike. A short summary of his Honour's subsequent reasons in *Boomerang Investments Pty Ltd v Padgett (Reasons Revision Application)* [2020] FCA 882 (**Reasons Revision Application**) also looks at the unsuccessful attempt by the Applicants to have his Honour's substantive reasons varied to rectify what the Applicants claimed to be a misapprehension of fact.

## Factual background

*Love is in the Air* was composed by Johannes van den Berg (better known as Harry Vanda) and the late George Young in 1977, the most well-known performance of which was sung by John Paul Young (**Love**). The alleged infringing musical works were the song *Warm in the Winter* by

US band Glass Candy (**Warm**) and an adaptation of *Warm* written by Glass Candy for Air France (**France**).

The roles of the parties to the proceedings can be summarised as follows:

### Applicants

- (a) Boomerang Investments Pty Ltd (**Boomerang**) is the party that instigated the infringement claims in relation to *Warm* and *France*, having derived certain title to certain aspects of the copyright in *Love* from J Albert & Sons Pty Limited (**Alberts**) (the original publishers of *Love*).
- (b) The Australasian Performing Right Association (**APRA**) and the Australasian Mechanical Copyright Owners Society Ltd (**AMCOS**) are collecting societies to which certain rights in *Love* had been assigned or licensed, respectively. They were joined to the proceedings in response to submissions made by the Respondents that certain of the exclusive rights under which the claims were brought, and standing to sue, were in fact held by those collecting societies rather than Boomerang.<sup>2</sup>
- (c) Mr Vanda and Mr Young (by his representatives) are the authors of *Love* who alleged that changing the lyric from "love is in the air" to "France is in the air" was prejudicial to their honour or reputation<sup>3</sup> (the **Moral Rights Claim**).

### Respondents

- (d) John Padgett and Lori Monahan are the two current members of Glass Candy and the composers of both *Warm* and *France*. Padgett and Monahan were alleged to have either been responsible for, or had authorised, the streaming and downloading of *Warm* from digital platforms such as Spotify and YouTube, and downloads from 'italiansdoitbetter.com' (**IDIB Website**) and 'italiansdoitbetter.bigcartel.com' (**Big Cartel Website**). Air France was similarly alleged to have authorised the infringement of *Love* by including *France* in online advertisements that were streamed from YouTube (collectively, the **Online Platform Claims**).<sup>4</sup>
- (e) Kobalt Music Publishing Australia Pty Ltd (**Kobalt**) is the relevant Australian subsidiary of US music publisher, Kobalt Services America, Inc, to which Padgett and Monahan licensed the copyright in *Warm* via Padgett's personal publishing company, Italians Do It Better, Inc. Kobalt was alleged to have authorised the infringements listed above at paragraph (d).<sup>5</sup>
- (f) Air France is the party who used *France* as part of a marketing campaign called 'France is in the Air', and was alleged to have authorised the streaming of *France* as part of its commercials on YouTube, as well as playing *France* as its phone customer service 'on hold' music (the **Music-on-hold Claim**).

<sup>1</sup> [2020] FCA 535 (**Boomerang**).

<sup>2</sup> *Ibid*, [26].

<sup>3</sup> *Ibid*, [394].

<sup>4</sup> The Air France infringement claims are largely outside the scope of this case note. See *Boomerang*, [221]-[269] for Perram J's analysis of *France* and the musical work in *Love*.

<sup>5</sup> See *Boomerang*, [381]-[392]. Whilst outside the scope of this case note, the case against Kobalt failed because Kobalt's collection of Australian royalties in respect of *Warm* was not enough to make it liable for secondary infringement, and Perram J ultimately found that Kobalt was not the owner or licensee of the relevant rights.

The main complexity in this case arises from the way the copyright in *Love* had been split and assigned to different parties, often multiple times since the work was created. Relevantly and pursuant to s 196(2) of the Copyright Act, copyright may be assigned and such an assignment may be limited in any way, which includes the assignment of a particular exclusive right to one person, whilst assigning another right to another person. For example, in the case of a musical work, the reproduction right in s 31(1)(a)(i) could be assigned to one person and the public performance right in s 31(1)(a)(iii) assigned to another person.

The operation of s 196(2)(a) is such that this delineation of assignable rights is not limited to the categories of rights in the Copyright Act. The assignor can essentially ‘carve up’ these rights into even thinner slices. For example, in relation to the reproduction right in a musical work, the copyright owner may wish to assign the digital reproduction of a musical work (eg for purchasable downloads of the musical work) to one person, whilst assigning the physical reproduction (eg making copies of CDs containing the musical work) to another person.

Due to the ‘carve up’ of the rights in *Love*, the Applicants had to lead extensive evidence on their standing to sue in respect of certain rights in *Love*. This was a particular issue for the Music-on-hold Claim. As discussed below, this claim involved the assignment of a particular right which existed as a standalone right at the time but was subsequently subsumed by the communication right by way of amendments to the Copyright Act.

## Issues

In considering whether France was an infringing work, the judge focused on the following issues:

- (a) whether the sung lyric in France, ‘France is in the air’ (that is, including its accompanying music) is objectively similar to the sung lyric and music accompanying ‘love is in the air’ in *Love*;
- (b) whether the sung lyric in France is causally connected to *Love*; and
- (c) whether the part taken in France is a substantial part of *Love*.

### Objective similarity and causal connection

Perram J was ultimately satisfied that there was a causal connection<sup>6</sup> and so this section focuses on objective similarity and substantiality.

The most prominent lyrics in *Love* are ‘*love is in the air*’. As well as being the title to the song, these words are sung in three aural variations:

- (a) each ‘*love is in the air*’ in the verses to *Love* (**H1**);<sup>7</sup>
- (b) the first ‘*love is in the air*’ in each chorus (**H2**);<sup>8</sup> and
- (c) the second ‘*love is in the air*’ in each chorus (**H3**).<sup>9</sup>

The infringement allegations with respect to objective similarity were two-fold. Firstly, the Applicants alleged that certain parts of *Warm*<sup>10</sup> were objectively similar to H1, H2 and H3. These were effectively the sung lines of ‘*love is in the air*’ in *Love* and ‘*love’s in the air*’ in *Warm*. The second allegation was in relation to a longer portion of the verses in *Love*,<sup>11</sup> which was alleged to have been taken and reproduced in *Warm*.<sup>12</sup> Perram J ultimately rejected the Applicants’ second allegation on the basis that these longer portions sounded entirely different.<sup>13</sup>

His Honour similarly rejected the Applicants’ claims in respect of H2 and H3, but accepted that the sung line ‘*love’s in the air*’ in *Warm* was objectively similar to H1.<sup>14</sup>

### Originality and substantiality

At the heart of the dispute on substantiality was whether, or to what extent, the relevant sung words may be taken into account as part of the musical work, rather than being solely assessed as a literary work.<sup>15</sup> This was a crucial issue for both parties as Perram J was not satisfied that the line ‘*love is in the air*’ was sufficiently original to be considered a substantial part of the literary work in *Love*.<sup>16</sup> Even though there was no doubt that the lyrics of *Love* as a whole were an original literary work, given that the infringement claims were grounded in only a substantial part of *Love*, it was that substantial part (ie ‘*love is in the air*’) that needed to be sufficiently original for copyright to subsist. Perram J considered that obvious, commonplace or prosaic statements were not sufficiently original to be considered a substantial part, for the purpose of assessing infringement,<sup>17</sup> and ultimately held that the line ‘*love is in the air*’ was not an original literary work.<sup>18</sup>

His Honour went on to consider whether the sound of the words ‘*love is in the air*’ when sung should be taken into account when analysing copyright in the musical work of *Love*. Instead of only focusing on the lyrics as a literary work and the accompanying music as a musical work, his Honour accepted that the sung lyrics were to be considered as part of the musical work.<sup>19</sup> In other words, the human voice was to be considered an instrument

6 Perram J considered the causal connection in significant detail, which included a comprehensive review of submissions containing evidence that spanned over 15 years (see *Boomerang*, [110]–[193]).

7 See <https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2020/2020fca0535/83>, 0:00–0:02, 0:08–0:10.

8 See <https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2020/2020fca0535/87>, 0:00–0:03.

9 See <https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2020/2020fca0535/87>, 0:04–0:07.

10 See <https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2020/2020fca0535/95>, 0:00–0:03, 0:07–0:10.

11 See <https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2020/2020fca0535/83>, which is the entire relevant portion of *Love*.

12 See <https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2020/2020fca0535/95>, which is the entire relevant portion of *Warm*.

13 *Boomerang*, [109].

14 *Ibid*, [104].

15 *Boomerang*, [65].

16 *Ibid*, [216].

17 *IceTV Pty Limited v Nine Network Australia Pty Limited* (2009) 239 CLR 458, [43].

18 *Boomerang*, [216].

19 *Ibid*, [72].

capable of producing music, whilst simultaneously being a 'device for communicating information by means of symbols conveyed phonically'.<sup>20</sup>

It could be argued that such a conclusion is unsurprisingly practical – sung lyrics almost always have a discernible melody that, if played on a piano for example, would constitute a musical work. However, there was no authority in Australia to bind the Court in this case one way or another.<sup>21</sup> In the United Kingdom, the introduction of the *Copyright, Designs and Patents Act 1988* (UK) (**CDP Act**) brought with it a statutory carve-out to the definition of musical work, by excluding 'any words or action intended to be sung, spoken or performed with the music'.<sup>22</sup> On the other hand, §102(a)(2) of the US Copyright Act<sup>23</sup> explicitly includes 'any accompanying words' in the category of musical works.

Submissions from both the Applicants and Glass Candy on the proper construction of the Copyright Act and its history were not enough to persuade Perram J either way,<sup>24</sup> however his Honour considered the following passage by Judge Baker QC in *Williamson Music Ltd v Pearson Partnership (Williamson)* to be instructive:<sup>25</sup>

I should here say something about my understanding of the relationship between the words and the music. It is, I think, misleading to think of them in mutually exclusive compartments. The words by themselves are or may be the subject of literary copyright. But those same words when sung are to me part of the music. After all one gets enjoyment from hearing a song sung in a language with which one is totally unfamiliar. The enjoyment could well be

diminished if the vocal line were replaced by another instrument, e.g., the piano or a flute [...].<sup>26</sup>

However, his Honour also considered Blackburne J's cautionary comments in *Hayes v Phonogram Limited*.<sup>27</sup> In that case, Blackburne J, addressing submissions to his Honour on the correct application of *Williamson*, held that:

[...] one must beware of confusing the way in which the work is performed with the work itself. In the case of a song where the words take the form of rap lyrics, the fact that the performer expresses the lyrics in a particular manner, giving emphasis to their rhythmic or alliterative qualities in some distinctive manner, does not mean that the words become part of the musical work. Equally, the fact that the musical component of a song reflects the meaning and mood conveyed by the words of the song does not mean that the words somehow become a part of the musical work.<sup>28</sup>

Drawing on Blackburne J's statement, Perram J observed that the question before him was not whether 'love's in the air' sung by Ms Monahan is objectively similar to 'love is in the air' sung by John Paul Young, but rather whether the relevant portion of Warm including the melody of the sung lyrics is objectively similar to the corresponding portion of Love.<sup>29</sup>

The net result of this analysis was that Perram J was prepared to take the relevant sung lyrics into account as comprising the musical work, as distinct from the literary work, when identifying the work in suit. This was the first time in Australia that a court has made such a distinction.

## Online Platform Claims

Once it had been established that Warm (and therefore France) had been copied from Love, the focus of enquiry turned to the alleged acts of infringement. As a starting point, Perram J held that Padgett and Monahan were not responsible for the actions of the online platforms, as these sites were operated by their owners, and not Padgett or Monahan.<sup>30</sup> On the other hand, Padgett had made Warm available on the IDIB Website and Big Cartel Website and accordingly, Perram J held that Boomerang and AMCOS have a case against Glass Candy for facilitating the download of Warm from those websites because neither IDIB or Padgett had permission from Boomerang or AMCOS.

As to online music platforms such as Spotify and YouTube, they are parties to blanket licence agreements with collecting societies, which, through the communication right granted by APRA and the reproduction right granted by AMCOS, authorise the licensee, *inter alia*, to make songs available for streaming or download. However, these grants of licence need to be viewed alongside s 14 of the Copyright Act. That is, a reference to infringement by doing an act comprised in the copyright of a work<sup>31</sup> includes, by s 14, a reference to the doing of such an act in relation to a substantial part of the work.<sup>32</sup> The fact that online music platforms such as Spotify and YouTube were authorised to do an act comprised in the copyright of Love (insofar as such an act involved streaming or downloading) meant they were duly authorised to do such acts in respect of a substantial part of Love.

As Perram J accepted that certain parts of Warm were copies of a

20 Ibid, [66]–[67].

21 Ibid, [73].

22 CDP Act, s 3(1).

23 Title 17 of the United States Code, Copyright Act of 1976.

24 *Boomerang*, [73].

25 Ibid, [74].

26 [1987] FSR 97, [109].

27 [2002] EWHC 2062 (Ch) (*Hayes*).

28 Ibid, [60].

29 *Boomerang*, [76].

30 Ibid, [30].

31 CRA, s 36(1).

32 *Boomerang*, [17].

substantial part of Love, his Honour held that a licence authorising certain acts in respect of Love would permit those acts in respect of Warm,<sup>33</sup> and stated that:

[i]n each case this is because the online music service had permission from APRA to communicate a substantial part of Love or from AMCOS to make a copy of a substantial part of Love. Since the Applicants' case is that Warm infringes because it contains a substantial part of Love the case, insofar as it concerns online music services who hold APRA and AMCOS licences, cannot succeed.<sup>34</sup>

As his Honour had earlier noted, '[t]o put it in a way which will offend purists but hopefully illustrate the problem at hand, proving that selling Warm to the public is really the same as selling a little bit of Love is pointless against a vendor who has the right to sell both.'<sup>35</sup>

As the online platforms' primary infringement liability could not be established, it followed that Glass Candy could not be held liable for authorising such infringement, as there can be no secondary liability without primary liability.<sup>36</sup>

The case in relation to France effectively followed suit. The allegation was that the Air France commercial that contained France was made available for streaming by Air France via its YouTube channel. However, as was the case with Warm, YouTube had permission from the Applicants to make Love available to stream.<sup>37</sup>

### Music-on-hold Claim

This particular claim appears to have arisen from the fact that Air France does not operate flights to or from Australia, and nor does it have a

physical presence in Australia.<sup>38</sup> The act of infringement was said to have occurred when persons in Australia called Air France's customer service line and were put on hold, at which point France was being played as the 'on-hold' music from the country France.<sup>39</sup>

A key part of Perram J's analysis of this allegation involved an interrogation of the history of the rights in Love. In respect of the Music-on-hold Claim, the relevant right was the right to transmit works to the subscribers of a 'diffusion service' (**Diffusion Service Right**), which has been held by the High Court of Australia to be the relevant right required to play music on hold.<sup>40</sup> However, the inclusion of the Diffusion Service Right in the relevant assignment of the rights in Love to APRA was complicated by the fact the Diffusion Service Right no longer exists as a separate right in the Copyright Act, having been subsumed into the 'communication right' created by the *Copyright Amendment (Digital Agenda) Act 2000* (Cth) (**Amendment Act**).

Perram J's finding in relation to the Diffusion Service Right was that in 1972, Mr Vanda and Mr Young each entered into agreements with APRA whereby they assigned certain rights to APRA in any works they might compose in the future (**1972 APRA Assignment**).<sup>41</sup> These rights were defined as 'Performing Rights' and relevantly included the Diffusion Service Right.<sup>42</sup> Despite the repeal of the Diffusion Service Right in 2001 pursuant to the Amendment Act, the transitional provisions of that act provide as follows:

A licence, contract or arrangement (including an assignment of copyright) that was in force immediately before

the commencing day continues to have effect on and after that day in so far as it relates to the broadcasting right or cable transmission right in a work or other subject-matter, but subject to any contrary intention, as if the Copyright Act had not been amended by this Act, and the Copyright Act applies in relation to the licence, contract or arrangement accordingly.<sup>43</sup>

The net result in respect of the Diffusion Service Right in Love was that it was assigned to APRA in 1977 when Love was composed, pursuant to the 1972 APRA Assignment, which included rights in musical works composed in the future. As such, APRA had standing to sue for the Music-on-hold Claim and was entitled to an injunction restraining Air France from playing France as its on-hold music.

### Moral Rights Claim

Mr Vanda and the estate of George Young submitted that France 'involved the material distortion of or material alteration to Love' by substituting the lyrics 'love is in the air' for 'France is in the air', and that such substitution was prejudicial to their honour or reputation.<sup>44</sup> The Moral Rights Claim ultimately failed by virtue of s 195AX of the Act, which provides that '[i]t is not an infringement of an author's moral right in respect of a work to do, or omit to do, something outside Australia.' Perram J concluded that, whilst France had been copied from Love, the copying did not occur in Australia. His Honour went on, however, to set out what his reasons would have been, were he wrong on the application of s 195AX.<sup>45</sup> Ultimately, had the claim not failed the territorial limitation of s 195AX, Perram J would have accepted the moral rights claim in respect of France.<sup>46</sup>

33 Ibid, [374]-[376].

34 Ibid, [374].

35 Ibid, [18].

36 Ibid, [30].

37 Ibid, [21].

38 Ibid, [22].

39 See *Boomerang*, [278]-[305] for Perram J's analysis of the rights ownership in Love, which, except for the Moral Rights Claim, was relevant to each of the Applicants' infringement claims.

40 *Telstra Corporation Limited v Australasian Performing Right Association Limited* (1997) 191 CLR 140.

41 *Boomerang*, [281].

42 Ibid.

43 Amendment Act, Sch 2, cl 3. However, see *Boomerang*, [281]-[284] for Perram J's hypothetical question which, although unnecessary to decide in this instance, may have required determination if the 1972 APRA Assignment had not explicitly included the Diffusion Service Right.

44 *Boomerang*, [394].

45 Ibid, [400]-[411].

46 Ibid, [410].

## The Reasons Revision Application

In a subsequent directions hearing where Perram J was to hear the parties on short minutes of order giving effect to his Honour's substantive reasons for judgment, counsel for the Applicants indicated that they would submit an application to have his Honour's substantive reasons varied to rectify what the Applicants claimed to be a misapprehension of fact. At the *Reasons Revision Application* hearing, the Applicants' submissions (which were limited to the Online Platform claims involving YouTube, iTunes, Spotify, Apple Music, Google Play and Soundcloud) were two-fold:

- (a) Firstly, the Applicants submitted that Perram J had overlooked certain exclusion clauses in the APRA and AMCOS blanket licenses that each of the online platforms was party to. Specifically, the Applicants claimed that the effect of these clauses was such that these blanket licences did not grant the right to reproduce or communicate a substantial part of Love 'with words that [were] not approved or normally associated with' Love or which were 'in association with new or substituted lyrics [...] unless the making of the new or substituted lyrics [was] authorised by the copyright owner'.<sup>47</sup>
- (b) Secondly, if their first submission was rejected, the Applicants alternatively sought to have their case re-opened.

His Honour stated that he had not considered the exclusion clauses in the APRA and AMCOS blanket licences because the arguments based on them were not being put to him. The exclusion clauses were raised in the context of determining which of the Applicants held the relevant rights, and therefore had standing to sue.<sup>48</sup> His Honour was not, however, directed to

the exclusion clauses for the purpose of deciding the Online Platform Claims. According to his Honour, the Applicants had their chance to raise this argument, which should have been in reply to Glass Candy's submissions (which were subsequently adopted by Air France and Kobalt) that the APRA and AMCOS blanket licenses precluded a finding of primary infringement against the online platforms, which in turn precluded a finding of secondary infringement, or authorisation, against Glass Candy. His Honour held that:

[t]o have dealt with the argument now sought to be raised by the Applicants would have involved the Court in (a) formulating an argument for the Applicants which they had not formulated for themselves; and (b) reaching my own views about that argument without hearing from the Respondents (with the ever-present risk of self-persuasion). The first step would have involved a departure from the adversarial mode of trial which is foundational to civil procedure. The second would have involved me in a breach of the rules of procedural fairness.<sup>49</sup>

The Applicants' alternative submission that their case ought to be re-opened was similarly rejected by Perram J. His Honour reasoned that:

- (a) if the Applicants' case were to be re-opened, the Respondents would need to be afforded the opportunity to be heard on that case;<sup>50</sup> and
- (b) there was no doubt that this specific issue was squarely before the Court during the substantive hearing, and the Applicants did not seek to rebut the Respondents' submissions in this respect. His Honour considered that it would be unfair to now permit the matter to be re-visited.<sup>51</sup>

The Reasons Revision Application was therefore refused.

## Concluding comments

The significance of this case lies in two key findings by Perram J.

First, in considering whether there is infringement of a musical work, you cannot treat the lyrics as something separate. In the case of songs, the lyrics can be relevant to an assessment of reproduction of a musical work. Although Perram J cautiously explained that the sung lyrics would still need to be viewed as just one part of the entire musical work, rights holders now may have a clearer way of assessing whether their musical work has been copied by the way a song is sung. His Honour's reference to Blackburne J's passage in *Hayes* suggests that this may not be the case in a song with rap lyrics, for example, where an emphasis on the lyrics' 'rhythmic or alliterative qualities in some distinct manner, does not mean that the words become part of the musical work'.<sup>52</sup> In any event, it will be interesting to see where courts will draw the line between lyrics that form part of the musical work and lyrics that do not.

Secondly, in considering whether a claim can be made for infringement in a musical work, the arrangements between an alleged infringer and music collecting societies will be relevant. In particular, at least as the licences from APRA and AMCOS were construed in this case, the licences may well permit an online platform to communicate infringing works. It follows that if a person authorises an online music platform to make such a musical work available for stream or download, that person will also not be liable – for without a primary contravention, no infringing act is authorised.

As at the date of publication two subsequent decisions have been handed down (on costs<sup>53</sup> and the scope of the injunction issued against Air France<sup>54</sup>), and a much-anticipated decision on damages, including damages for what was held to be flagrant infringements, is pending.

47 *Reasons Revision Application*, [4].

48 *Boomerang*, [320]. This particular contention was that a 2005 assignment deed from Alberts to APRA had not effectively assigned the right to sue in respect of copies of Love which infringed copyright.

49 *Reasons Revision Application*, [9].

50 *Ibid*, [11].

51 *Ibid*, [12].

52 *Hayes*, [60].

53 *Boomerang Investments Pty Ltd v Padgett (Costs of the Liability Phase)* [2021] FCA 385.

54 *Boomerang Investments Pty Ltd v Padgett (Scope of Injunction)* [2020] FCA 1413.