

# Of Brand and Law

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## Introduction

The following treatise is a postmodern deconstruction of corporate identity (brand) in the context of the Australian *Copyright Act*.<sup>2</sup> This approach is founded on the view that deconstruction is “a practice that raises important philosophical issues for legal thinkers.”<sup>3</sup> Indeed “deconstruction awakes us from our dogmatic slumber, and reminds us that our ‘truth’ is only an interpretation.”<sup>4</sup> So, with this in mind, the following analysis aims to tease out “hidden antinomies in our language and thought”<sup>5</sup> and propose an alternative ‘truth’ concerning brand and copyright.

The teasing out within this paper will define brand, discuss the communication theory behind brand creation, explore philosophical and legal causation, examine the “metaphysics of presence”<sup>6</sup>, compare and contrast the expressions of brand and music, and investigate the relationship between brand and the *Copyright Act*.

## What is Brand?

If you ask someone in marketing to define brand their answer may portray an entity that is omnipotent and ambiguous. To discover some attempts at definition a quick Google<sup>7</sup> will suffice.

1. “In marketing, a brand is the symbolic embodiment of all the information connected with a product or service.”<sup>8</sup>

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<sup>2</sup> *Copyright Act 1968* (Cth)

<sup>3</sup> Balkin, Jack, *Deconstructive Practice and Legal Theory*, Originally published at 96 Yale L.J. 743 (1987), <http://www.yale.edu/lawweb/jbalkin/articles/decprac1.htm> - 060912

<sup>4</sup> Ibid

<sup>5</sup> Ibid

<sup>6</sup> Derrida, Jacques, *Of Grammatology*, translated by Gayatri Chakravorty Spivak (Baltimore : The Johns Hopkins University Press, 1974), see also “logocentrism”, 49

<sup>7</sup> [www.google.com.au](http://www.google.com.au) – internet search engine

<sup>8</sup> <http://en.wikipedia.org/wiki/Brand> - 060821

2. It is “used to uniquely identify a producer’s goods and services and differentiate them from competitors.”<sup>9</sup>
3. “A brand infers meaning behind a company, such as quality or reliability...”<sup>10</sup>
4. “A brand is an identity... created with words, logos, graphics, and other marketing communications tools.”<sup>11</sup>

It seems all these definitions reveal brand as a form of identity. We will therefore examine the concept of identity in due course. However, before we get there, it is first necessary to introduce the methodology behind the examination.

## Semiotics

Semiotics suggests that identity is created through signs.<sup>12</sup> So, what follows is an introduction to the concept of identity through the examination of semiotics. First, we will look at some semiotic terms and their definitions. Second, we will deconstruct an advertising communication. Third, we will reverse the deconstructive process to show how semiotics is used in brand creation. Fourth, we will examine brand creation through an actual case study. Fifth, we will intersperse the above with interpretations worthy of legal pondering.

You may note from the above that we are about to deconstruct an advertisement, yet construct a brand. They are different. They are, nevertheless, connected. That means under semiotic theory they are both texts, with the former being tributary and informing the latter. By way of analogy; if we deconstruct a house we find ourselves in the possession of bricks, timber, and tiles... Being in possession of these building ‘units’ we are empowered to construct a garage, shed, or pergola... In other words deconstruction allows us to isolate raw materials<sup>13</sup> with which we can then build according to our needs. So, if we can deconstruct an advertisement we can identify the units with which we can then construct a brand. In semiotics this process of building, or authoring, new from old is known as bricolage. We shall later see how this bricolage process relates to brand,

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<sup>9</sup> [www.mplans.com/gm/index.cfm](http://www.mplans.com/gm/index.cfm) - 060821. Compare this definition with s41 of the *Trade Marks Act 1995* (Cth). In “*Of Brand and Law - Part 2*”, deconstruction will encompass this Act.

<sup>10</sup> [www.repeatseat.com/company/glossary.asp](http://www.repeatseat.com/company/glossary.asp) - 060821

<sup>11</sup> [www.z2z.com/site01/itglos01.html](http://www.z2z.com/site01/itglos01.html) - 060821. “Identity” is examined more comprehensively below. Compare this definition with *Copyright Act 1968* (Cth) s10(1), “literary work includes: (a) a table, or compilation, expressed in words, figures or symbols.”

<sup>12</sup> Van Osselaer, Pierre, *Image Returns*, a semiotics seminar developed by Catalyst Ventures Pty Ltd, of which the author is a Director

<sup>13</sup> Chandler, Daniel, *Semiotics for Beginners*, <http://www.aber.ac.uk/media/Documents/S4B> - 060821, meaningful units of information

and how both relate to copyright law. For the moment, though, we will turn our attention to the literary theory behind authoring.<sup>14</sup>

## Key Terms<sup>15</sup>

Due to the methodology employed in this paper an introduction to key terms may be of use. Below is a list of terms which will aid a reader unfamiliar with deconstructive practice.

### **Derrida, Jacques** (July 15, 1930 – October 8, 2004)

Derrida was an Algerian-born French philosopher whose philosophical practices regarding the interpretation of texts is sometimes known as deconstruction. The work of Derrida has been applied mainly to problems of literary criticism. However, Derrida is above all interested in the relationships between what we want to say and the signs we use to express our meaning.

### **Deconstruction**

Deconstruction sees all writing as a complex historical, cultural process rooted in the relations of texts to each other and in the institutions and conventions of writing. This perspective recognises that human knowledge is not as controllable or as cogent as Western thought suggests. Furthermore, deconstruction emphasises that language operates in subtle and often contradictory ways, so that certainty will always elude us.

“Lawyers should be interested in deconstructive techniques for at least three reasons. First, deconstruction provides a method for critiquing existing legal doctrines; in particular, a deconstructive reading can show how arguments offered to support a particular rule undermine themselves, and instead, support an opposite rule. Second, deconstructive techniques can show how doctrinal arguments are informed by and disguise ideological thinking. This can be of value not only to the lawyer who seeks to reform existing institutions, but also to

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<sup>14</sup> Compare with:

(1) *Copyright Act 1968* (Cth), s32 and s35(2) - the author of an original work is the owner of any copyright subsisting in the work.

(2) Nygh, Peter & Butt, Peter (eds), *Butterworths Australian Legal Dictionary* (North Ryde : Butterworths, 1997), 97 – Author: “The generic term for the human creator of an original work; the person who originates or gives existence to something: *Sands & McDougall Pty Ltd v Robinson* (1917) 23 CLR 49. The term may include a person who adapts or translates a work, or who compiles material so as to create a work which is not a mere copy of a previous work: *Tree v Bowkett* (1896) 74 LT 77. However, it does not include a mere copyist or a person who merely makes suggestions or contributes ideas: *Walter v Lane* [1900] AC 539; *Shepherd v Conquest* (1856) 17 CB 427.”

<sup>15</sup> Much of the material regarding semiotics is adapted from “*Image Returns*”; a semiotics seminar developed by Catalyst Ventures Pty Ltd, of which the author is a Director. I reproduce the material here with the kind permission of my Co-Director, and the original author, Dr Pierre Van Osselaer.

the legal philosopher and the legal historian. Third, deconstructive techniques offer both a new kind of interpretive strategy and a critique of conventional interpretations of legal texts.”<sup>16</sup>

## **Semiotics**

Semiotics is the science of signs.<sup>17</sup> This science was first identified by Saussure when he coined the term *sémiologie* in 1894, but in 1897 Peirce was the first to use the word *semiotic*.<sup>18</sup> As we shall see “signs can be those of the English language, of a musical tradition, of visual imagery, or those of any other form of communication.”<sup>19</sup> In fact all communication requires an intermediary that we call a ‘sign’, and semiotics provides the means by which ‘signs’ may be analysed.

## **Text**

Most broadly, this term is used to refer to anything which can be “read for meaning.”<sup>20</sup> To most semioticians a ‘text’ is any system of signs (such as words, images, sounds, gestures).

## **Bricolage**<sup>21</sup>

Bricolage was a word used by Lévi-Strauss<sup>22</sup> to describe the method by which we compile a bric-a-brac collage. That is to say bricolage is a method for constructing something new from items that exist elsewhere; items that are essentially at hand. In the context of communication, bricolage is defined as “adopting and adapting signs from other texts”<sup>23</sup> to create new meaning.

## **Identity**<sup>24</sup>

Identity is a continuation of being that is created through bricolage. In other words, although communication is an appropriation of pre-existing material,

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<sup>16</sup> Balkin, Jack, *Deconstructive Practice and Legal Theory*, Originally published at 96 Yale L.J. 743 (1987), <http://www.yale.edu/lawweb/jbalkin/articles/decprac1.htm> - 060912

<sup>17</sup> Chandler, Daniel, *Semiotics for Beginners*, <http://www.aber.ac.uk/media/Documents/S4B> - 060821

<sup>18</sup> Ibid

<sup>19</sup> Van Osselaer, Pierre, *Image Returns*, a semiotics seminar developed by Catalyst Ventures Pty Ltd, of which the author is a Director

<sup>20</sup> Chandler, Daniel, *Semiotics for Beginners*, <http://www.aber.ac.uk/media/Documents/S4B> - 060821

<sup>21</sup> Compare with *Copyright Act 1968* (Cth), s10(1) the definition of “literary work” as a “compilation” (below). *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 All ER 465 - “putting together a number of items or components from various sources in an original way.” *Feist Publications Inc v Rural Telephone Service Co Inc* (1991) 20 IPR 129 - in a literary compilation it is the “arrangement” of the paradigmatic choices that creates the originality protected by the *Copyright Act*.

<sup>22</sup> Chandler, Daniel, *Semiotics for Beginners*, <http://www.aber.ac.uk/media/Documents/S4B> - 060821

<sup>23</sup> Van Osselaer, Pierre, *Image Returns*, a semiotics seminar developed by Catalyst Ventures Pty Ltd, of which the author is a Director

<sup>24</sup> Ibid

a unique selection-combination affords the composed communication its own identity.

## **Narrative**

When we analyse the phrase ‘a picture paints a thousand words’ we realise that a great many of those words do not describe the image but instead describe the story of the image. To put it another way, the ‘thousand words’ is a narrative that flows from the “sequence of unfolding events”<sup>25</sup> within the picture. Therefore, a narrative is the story behind a number of identities compiled through the process of bricolage.

## **Narrative Composition**

The narrative is composed by the reader when they accept some of the latent meaning of the components of the text.<sup>26</sup> So, the story is actually constructed by the reader via an interpretation of familiar signs. This prior knowledge and reassembly of signs enables the reader to construct a new narrative from the ‘current text’. In the context of brand authoring, because it is essential that a target audience ‘feels’ for the brand, we must suggest a narrative that these readers can own. This is achieved when the brand author includes, in the story of the brand, signs that evoke myths with which the target audience is familiar.

## **Sign**

A sign is interpreted as referring to something else. In particular, a sign refers to the possibility of meaning that emerges in the context of its text. Signs are manifested in “physical forms”<sup>27</sup> such as words, images, sounds, acts, or objects.<sup>28</sup> In themselves they do not have meaning; they merely adopt meaning through usage.

The use of signs reveals 2 components:<sup>29</sup>

1. the physical; and
2. that to which the physical refers.

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<sup>25</sup> Ibid

<sup>26</sup> Ibid

<sup>27</sup> Chandler, Daniel, *Semiotics for Beginners*, <http://www.aber.ac.uk/media/Documents/S4B> - 060821

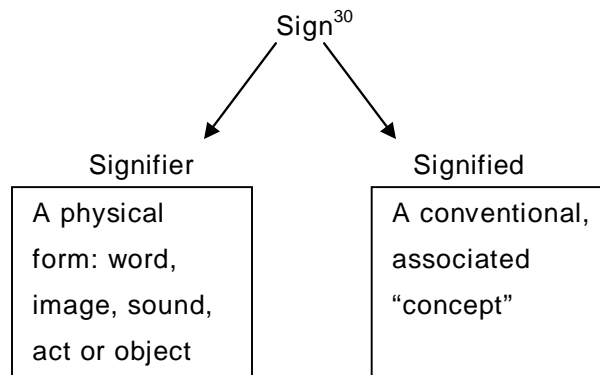
<sup>28</sup> Compare with:

(1) *Trade Marks Act 1995* (Cth), s6 – “sign includes the following or any combination of the following, namely, any letter, word, name, signature, numeral, device, brand, heading, label, ticket, aspect of packaging, shape, colour, sound or scent.” In “*Of Brand and Law - Part 2*”, deconstruction will encompass this Act.

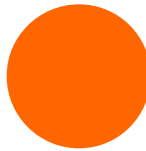
(2) *Copyright Act 1968* (Cth), s10(1) - “literary work includes: (a) a table, or compilation, expressed in words, figures or symbols.”

<sup>29</sup> Chandler, Daniel, *Semiotics for Beginners*, <http://www.aber.ac.uk/media/Documents/S4B> - 060821, Diadic from Saussure, Triadic from Peirce

Schematically these elements are shown as:



Let us look at an example of a sign:



What does it mean?

Orange sphere = sun  
= wheel  
= ball  
= egg yolk  
= energy  
= ...

In fact the orange sphere equals each of the above because a signifier can have more than one signified. So, to derive a single meaning we need to look at context.

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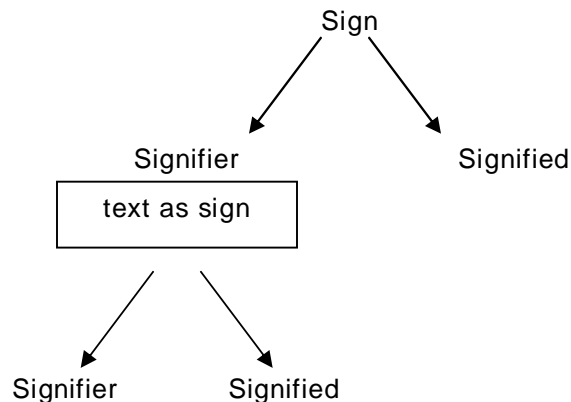
<sup>30</sup> Van Osselaer, Pierre, *Image Returns*, a semiotics seminar developed by Catalyst Ventures Pty Ltd, of which the author is a Director

Imagine a 210cm tall African/American male, standing in a gymnasium, wearing shorts and a singlet, holding an 'orange sphere'. How many people would interpret our sign as an egg yolk? Most of us would recognise the male as a basketball player, and the 'orange sphere', interpreted as a basketball, would be one of the signs leading us to this conclusion. Here we have a paradox in our construction of meaning. The 'orange sphere' is interpreted through the presence of the man, and the man is interpreted through the presence of the 'orange sphere'. This reliance on self-referencing is of interest when examining any event and its relationship to the law. That is, do we interpret the event through the law, or do we interpret the law through the event?

The 'orange sphere' example tells us that the meaning of a sign is a function of its narrative context. Not everyone would share the basketball player image. The 'orange sphere' may not equate to basketball in the language or culture of a different reader. The narrative of the game of basketball may also be absent from the interpretive powers of some readers. So, we can see that a sign does not carry a universal meaning. However, because it is always the reader who interprets the sign, knowledge of the reader's language and culture enables an author to govern the signified.

### Mythology

We established that the 'orange sphere' acquires a specific meaning from its context. But what matters here is that the context itself is also a sign. That means the encompassing text has its own signifier and signified. This point is exemplified below in the form of a photograph within a print advertisement. The photograph is a sign, and it is in the context of an advertisement, which is also a sign. This relationship extrapolates our diagram<sup>31</sup> thus:




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<sup>31</sup> Ibid

So, the medium is also a message. In semiotics this shift from signifier to sign is referred to as mythology and it represents another layer of meaning. Indeed, in a general sense, what we understand as myth “cannot eventuate if the message itself does not subvert the direct meaning of its signs.”<sup>32</sup> However, in our examination of brand what does this mean?

A brand advertises identity because it states that it is an advertisement. It can only suggest a message about an organisation if it says to the reader: ‘I want to convey a corporate identity to you.’ So, the brand actually has a value above and beyond a mere description of the organisation; its mythological value guides the narrative of the brand. The same is true of the *Copyright Act*; it too guides the narrative of copyright law.

### **The narrative sequence**

Above we showed, by way of reference to an ‘orange sphere’, that the narrative is a composition. We will now see that this composition holds its elements in sequence. So, contrary to the sign (diagrams above), where the sign was signifier and signified at the same time, the actual story does not occur all at once; it takes time. That is, we (the readers) take time to unravel it.

In order to unravel, and therefore author a narrative, we must somehow combine signs.

S1 + S2 + S3 + S4 + S5 ...

Let us now look at how signs are assembled in a particular sequence which allows a chain of events to emerge from the text. An example, in the form of a Waterman pen advertisement, will help. (We could look at any text but this one is particularly relevant because it refers to both communication and identity.)

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<sup>32</sup> Ibid





lorsque tu entraîs au fac de droit,  
 je partais sauver les baleines bleues.  
 Quand tu faisais ta première plaidoirie,  
 je descendais le Fleuve Amazone.  
 Puis il y eut ton cabinet international,  
 et ma mission scientifique.  
 Pour notre anniversaire, tu m'as offert  
 ce Waterman et je me suis rappelé  
 combien nous étions semblables.



*Un stylo permet d'écrire. Un Waterman de s'exprimer. Ouvrages de précision, d'écriture soignée et de minutieux réglages, aux finitions élégantes réalisées de métaux précieux, aux plumes en or 18 carats, les stylos Waterman, depuis plus d'un siècle, cultivent cette nuance. Style de grande classe, aux lignes fines et nervosées, le Gentleman est la marque du bon goût. Il existe en différents modèles, en version porte-plume, stylo-bille, porte-mine et roller.*

**WATERMAN**  
 PARIS

Immediately we recognise this as a print advertisement with some obvious elements:

- a photograph;
- a bit of handwriting;
- a pen;
- a product description (in print, not in handwriting);
- a brand name;
- ...

Significantly, we have already engaged in a form of recognition: brand identification. We recognised segments that compose the advertisement and accept mythological suggestions.

### **Segmental Analysis**

Segmental analysis is a method that unites the reader with the text. The reader is not simply a passive spectator but an active decoder. What is more, segmental analysis is a recursive methodology, in the sense that the reader identifies elements of the text, and then identifies elements of the elements, and so on. For instance, we identified the photograph as an element of the advertisement. Now we turn our attention to the elements of the photograph.

- two boys;
- a playing field;
- buildings;
- some trees;
- creased paper, from folding and unfolding;
- ...

We could continue this recursion indefinitely.<sup>33</sup>

- advertisement
  - photograph
    - boys
      - uniforms
        - blazers
          - wool
            - ...

Nothing prevents us from analysing each of the boys, or the buildings, or any other element of the photograph, handwriting, pen, or advertisement. We simply break down each text; signs into sub-signs, sub-signs into further sub-signs, and so on. Which begs the question: 'Where does the process stop?'<sup>34</sup> It could be argued that the process stops when the reader chooses to stop it. That is, when the reader understands the text to a level of their satisfaction. This level of understanding is interesting because it is unique to the reader, not the text. So, whether the text is brand or law, interpretation and understanding are not universal.

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<sup>33</sup> Derrida, Jacques, *Of Grammatology*, translated by Gayatri Chakravorty Spivak (Baltimore : The Johns Hopkins University Press, 1974), 281

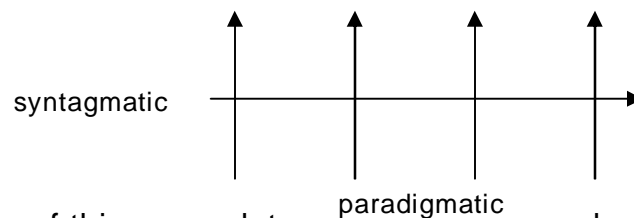
<sup>34</sup> <http://en.wikipedia.org/wiki/Derrida> - 061030, "... linguist Noam Chomsky has expressed the view that Derrida's work, is essentially pointless because his writings are deliberately "obsured" with "pretentious rhetoric" to hide the simplicity of the ideas within...Chomsky has indicated that he may simply be incapable of understanding Derrida."

## Difference and identity

If, in our Waterman advertisement, we take the element of the boy on the left, we notice one sock is lower than the other, he holds a ball, his clothes are frumpled... There is a consistency at the level of his presentation which is mirrored in the presentation of the boy on the right. The boy on the right however is different: his socks are aligned, his hands are behind his back, his attire is neat. Unlike his disheveled companion the boy on the right does not 'belong' on the playing field. And yet both are boys and, for the most part, extremely similar. Indeed the handwriting informs us that the boys are actually twins. So, this information allows us to comprehend the boys as very much alike even though other information enables us to comprehend them as really quite different. This antithesis is at the core of the issue of identity. That is to say, identity is defined through what is similar and what is different. The same can apply to the law; if something is similar to that which is legal, it too could be identified as legal.

## Paradigm<sup>35</sup> and syntagm<sup>36</sup>

We compose texts by assembling elements in a particular order; the narrative sequence. That is, we select elements and we compile them in a certain way. We call the axis of selection the paradigmatic and the axis of composition the syntagmatic.

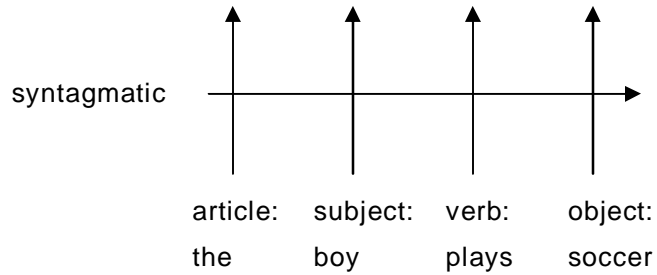


For the purpose of this paper, let us look at a simple example: 'the boy plays soccer'. Taking each word in turn we see the result of a selection from within a paradigm: article, subject, verb, object.

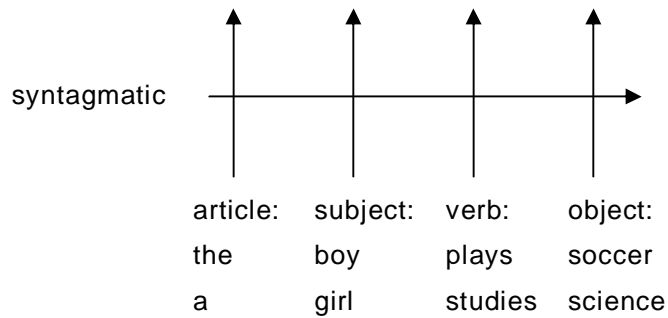
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<sup>35</sup> Chandler, Daniel, *Semiotics for Beginners*, [http://www.aber.ac.uk/media/Documents/S4B - 060821](http://www.aber.ac.uk/media/Documents/S4B-060821), "A paradigm is a set of associated signifiers which are all members of some defining category, but in which each signifier is significantly different. In natural language there are grammatical paradigms such as verbs or nouns. In a given context, one member of the paradigm set is structurally replaceable with another. The use of one signifier rather than another from the same paradigm set shapes the preferred meaning of a text."

<sup>36</sup> Ibid, "A syntagm is an orderly combination of interacting signifiers which forms a meaningful whole (sometimes called a 'chain'). In language, a sentence, for instance, is a syntagm of words. Syntagmatic relations are the various ways in which constituent units within the same text may be structurally related to each other. Syntagms are created by the linking of signifiers from paradigm sets which are chosen on the basis of whether they are conventionally regarded as appropriate or may be required by some syntactic rule system (e.g. grammar)."



But we could easily replace a chosen element with a different element from the same paradigm:



Through paradigmatic choice we could therefore compose:

- 'the boy plays soccer';
- 'the girl plays soccer';
- 'a boy plays soccer';
- 'a girl studies soccer';
- 'a girl studies science';
- ...

The structure of the composition is the same even though the elements are not. Interestingly though we can notice that the selection of each element happens at a specific time while the composition of the elements happens across time.

In our example we use the English language as our text. In English the syntagmatic axis is closely associated to grammar, the rules of which operate across time. 'Soccer the plays boy' lacks a logical narrative. It is not grammatically/syntagmatically correct. The combination of the syntagmatic and the paradigmatic provides us with the authoring permutations we need.<sup>37</sup>

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<sup>37</sup> Some paradigmatic shifts will not be appropriate: 'the photograph plays soccer'. Nor will some syntagmatic arrangements: "soccer the plays boy".

Authoring a text according to the rules of English is a specific case of applying semiotic rules. However, regardless of whether the text is English, photography, brand, music, or any other form of expression,<sup>38</sup> we need to maintain some form of logic in our selection of elements and how we arrange them. Indeed the ability of the author to respect a semiotic logic is what helps a reader to make sense of the text.

### **Conceptual Matrix**

In the text above we considered the fact that narrative involves:

- signs which are composed of signifier and signified;
- authoring decisions that reinforce similarity or create difference; and
- language rules that can be paradigmatic or syntagmatic.

Each one of these involves a kind of ‘either/or’ dichotomy. Yet, the two sides of an apparent opposition can only exist because of what is actually their interaction; there is a reciprocal definition of inclusion/exclusion at work. In this we find that meaning itself, as was the case with identity, is defined by what something is, and equally by what something is not. This concept is also fundamental to law. Is ‘it’ inside or outside? Does ‘it’ belong or not? Is ‘it’ legal or not?

We will revisit the operation of dichotomies when we discuss identity and the ‘inversion of hierarchies’, below. For now, let us reverse our semiotic deconstruction to author a corporate identity. Doing this establishes semiotic know-how as an authoring skill worthy of legal consideration.

## **Brand Authoring**

It is salient to acknowledge that the commercial reality of brand development means nothing exists until it is ‘caused’ (commissioned) by the client. This process is worthy of examination. However, the focus of this paper is the authoring causation that takes place after commissioning. We will take a closer look at authoring causation later. Let us now examine the chronological, mechanical, and semiotic means by which a brand comes into existence. A case study will assist.<sup>39</sup>

### **Case study**

#### **Scenario**

Glenn, a director of a newly formed company,<sup>40</sup> contacted Catalyst, a company which develops brands, with the aim of hiring the firm to develop their corporate identity. Glenn had already decided upon the name “HostTel” because it described the services<sup>41</sup> offered by the company, and

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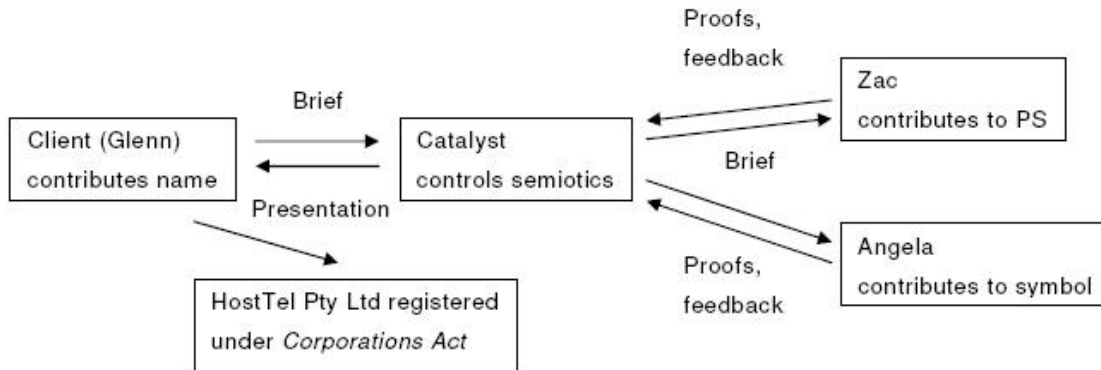
<sup>38</sup> See ‘arche-writing’ below.

<sup>39</sup> I owe a debt of gratitude to Glenn Sumich, HostTel

<sup>40</sup> For the sake of this paper we will consider HostTel as a Pty Ltd company registered in accordance with the *Corporations Act 2001* (Cth), ss117, 118, 119

<sup>41</sup> HostTel specialises in Voiceover Internet Protocol (VoIP).

because of the availability of appropriate internet domain names.<sup>42</sup> Glenn briefed Catalyst, which in turn gave a brief to a graphic designer (Angela) and a copywriter (Zac). Angela and Zac operate as freelancers contracted by Catalyst on a project-by-project basis. In this case study, Angela contributed to the brand symbol and Zac contributed to the brand positioning statement. However, Catalyst controls the creation of symbol and positioning statement by applying semiotic know-how.



### Brief

HostTel specialises in Voiceover Internet Protocol (VoIP), a telephony system that utilises computers, and their internet connections, to enable voice communications. In other words, HostTel turns your computer into a phone.

### Process

Based on the brief, plus discussions and personal research, Angela and Zac submitted proofs to Catalyst of what they considered to be appropriate representations of HostTel. Catalyst interpreted these representations using semiotic methodologies and provided feedback to Angela and Zac. The feedback prompted changes and re-submissions. The following evolution shows the effect of semiotics when applied as the governing methodology for brand authoring.

### Symbol evolution



<sup>42</sup> Names, among other identifiers, are increasingly beholden to the internet. In the case of names, they are reliant upon the availability of an appropriate domain such as: .com, .com.au., .net, .net.au, .org, and even .tv.



Above is but a sample. The end result is an expression that says to the reader: 'I am a brand and I want to convey a corporate identity to you.' In other words, the name, symbol, and positioning statement adopt a mythological value which guides the brand narrative.

### **HostTel semiotics**

A segmental analysis of the HostTel brand reveals what readers are guided to interpret about the organisation. The analysis proves the necessity for

semiotic know-how when making syntagmatic and paradigmatic choices in brand authoring. Interestingly a segmental analysis can only occur if there are segments to analyse. This is a significant point in light of our later examination of the *Copyright Act*, as it evidences brand as a compilation.

### **Name**

We may well accept; “That which we call a rose, by any other word would smell as sweet.”<sup>43</sup> But would the “other word” infer “meaning... such as quality or reliability”?<sup>44</sup> That is to say, while Shakespeare understands smell as a constant reality, we understand brand as a governable communication. So, where brand is concerned, the purpose of a name is not to delineate reality, but rather to direct perception.

With that in mind, HostTel is a compound of “Host” and “Tel”. “Host” means “one who lodges or entertains another,”<sup>45</sup> and it is also common computer parlance referring to the storage of data, particularly that involved with the internet.<sup>46</sup> “Tel” comes from the Greek prefix “tele” meaning “at a distance.”<sup>47</sup> This prefix is widely recognisable in “tele-gram”, “tele-phone”, and “tele-communications.” Indeed, it could be argued that the meaning of “tele” is so closely linked to communications (eg: Telstra) that it has in fact evolved into, and supplanted that word. It has, at the least, adopted a semblance of its meaning; a meaning which involves the “exchange of information.”<sup>48</sup>

From the above we see HostTel as an organisation that enables guests to utilise the internet to exchange communications; an apt description of Voice over Internet Protocol.

### **Positioning Statement Communication**

Communication is the process of exchanging ideas and information, whether by speech, signals, writing, or behavior.<sup>49</sup>

### **Innovation**

Innovation is the act of introducing something new.<sup>50</sup>

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<sup>43</sup> Shakespeare, W, “The Most Excellent and Lamentable Tragedy of Romeo and Juliet” in Bryant, JA Jr (ed), *The Tragedy of Romeo and Juliet* (New American Library : New York, 1964), 75

<sup>44</sup> [www.repeatseat.com/company/glossary.asp](http://www.repeatseat.com/company/glossary.asp) - 060821

<sup>45</sup> Fowler, F G & Fowler, H W (compiled), *The Pocket Oxford Dictionary*, 5<sup>th</sup> ed (London : Oxford University Press, 1969), 392

<sup>46</sup> “... web hosting is renting space on the internet. It is the place where your website (your online presence) resides. Web hosting options range from simple, such as an email only account right through to the more involved business server accounts.” <http://www.gethosting.com.au/> - 060923

<sup>47</sup> Fowler, F G & Fowler, H W (compiled), *The Pocket Oxford Dictionary*, 5<sup>th</sup> ed (London : Oxford University Press, 1969), 874

<sup>48</sup> Id, 160

<sup>49</sup> Ibid

<sup>50</sup> Id, 415



## **Communication Innovation**

The positioning statement is not a sentence. It therefore has an inherent ambiguity. The words stand alone, and they relate to each other. HostTel is involved in communication; HostTel is involved in innovation. Together “communication innovation” is a succinct means to contextualise the company, while allowing room for the imagination of the reader.

## **Colours<sup>51</sup>**

A complementary colour scheme is one made of two colours that are opposite each other on the colour wheel. This is a classic scheme with the best results coming from the opposition of a warm colour against a cool colour. This juxtaposition is intrinsically high contrast.

Using blue as the dominant colour enables the complementary orange to highlight important elements. The result creates dominance with contrast, which draws maximum attention.

### **Blue**

Blue is the colour of the sky and the sea. It symbolises trust, loyalty, wisdom, confidence, intelligence, faith, truth, and heaven. Blue is considered beneficial to the mind and body. It slows human metabolism and produces a calming effect. Blue is strongly associated with tranquility and calmness. In heraldry, blue is used to symbolise piety and sincerity.

Blue is also linked to consciousness and intellect. Blue is often used by corporations to suggest precision, when promoting high-tech products. In addition dark blue is associated with depth, expertise, and stability.

### **Orange**

Orange is an emotionally warm colour. It combines the energy of red and the happiness of yellow. It is associated with joy, sunshine, and the tropics. Orange represents enthusiasm, fascination, happiness, creativity, determination, attraction, success, encouragement, and stimulation. To the human eye, orange is a very hot colour, so it gives the sensation of heat.

Orange increases oxygen supply to the brain, produces an invigorating effect, and stimulates mental activity. It is highly accepted among young people. As a citrus colour, orange is associated with healthy food and stimulates appetite. In heraldry, orange is symbolic of strength and endurance.

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<sup>51</sup> QSX Software Group, <http://www.color-wheel-pro.com/color-meaning.html> - 060426

Orange has very high visibility, so it is an ideal choice to catch attention and highlight the most important elements of a design.

## **Shapes<sup>52</sup>**

### **Sphere**

A sphere is the balance between centrifugal and centripetal forces; those drawing together and those forcing apart. This balance creates the perfect shape. Each point on the surface is equidistant from the centre. The surface of a sphere is an infinite plane of absolute symmetry. A sphere is both simple and complex. It is both solid and hollow. It has latent energy, and ultimate potential. It is one and it is all.

A sphere is an infinitely dimensional shape. It shows north, south, east, west, and every conceivable dimension in between. These dimensions link to the representation of movement. A sphere can move in any direction with equal ease. A sphere also represents celestial bodies; the Earth, the planets and the sun.

### **Circle**

A circle has similar qualities to a sphere, but it also represents perpetuity. A circle has no beginning and no end. The circle is often considered sacred and spiritual; Stonehenge, the zodiac, the Dharma wheel. The circle represents cosmic order and perfection.

## **Font<sup>53</sup>**

### **Avant Garde**

The Avant Garde font was created in the late 1960s for a new magazine, fittingly called Avant Garde. The magazine was conceived by the forward-thinking publisher and editor Ralph Ginzburg. Herb Lubalin, the magazine's art director developed the font to fully capture the radical presence that Ginzburg sought.

Avant Garde is a geometric sans serif font; meaning the basic shapes are constructed from circles and straight lines, much like the work from the 1920s German Bauhaus movement. Still strong and modern, the Avant Garde font has large, open counters and tall x-heights. It is reader friendly, and works well for short texts and headlines.

The use of Avant Garde for the logotype and positioning statement of HostTel reinforces the image of the company as being forward-thinking, structured, and strong.

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<sup>52</sup> <http://www.crossroad.to/Books/symbols1.html>, <http://www.symbols.com> - 060426

<sup>53</sup> Monotype Imaging, <http://www.fonts.com/FindFonts/RecentReleases/2005/ITC+Avant+Garde+Gothic.htm> - 060426

## HostTel overview

The HostTel compilation is greater than the sum of its parts because design and construction create relationships between and beyond the segments. Individually;

- The name describes HostTel as an organisation that enables guests to utilise the internet to exchange communications.
- The symbol portrays energy around which intelligence and truth revolve in perpetuity.
- The positioning statement is a succinct means to contextualise the company, while allowing room for the imagination of the reader.
- The font reinforces the image of the company as being forward-thinking, structured, and strong.

As a compilation the HostTel brand signifies stimulation and stability, flair and precision. There are connotations of dynamism and eternity. It is solid, yet flexible. The HostTel identity is friendly and powerful.

## Brand Creation

It appears that by applying semiotic theory to brand authoring we can create an identity that signifies a desired meaning. However, the process of creating the identity requires clarification.

The HostTel brand was created by Glenn (name), Angela (symbol), Zac (positioning statement), and Catalyst (semiotics). However, we know all contributions were controlled by semiotic theory. So, a significant difference emerges between a mere contribution to the brand and the actual ability to author it. This can be seen as a difference between manufacturing and know-how.<sup>54</sup>

It is interesting to note that graphic design is generally manufactured through the use of a machine; a computer. In our case study, Angela used an Apple Macintosh and software including Adobe Illustrator, Freehand, Photoshop, and Acrobat. The skills of Angela are not necessarily semiotic.

The evolution of the HostTel symbol (above), combined with our segmental analysis of the end result, demonstrate that semiotic know-how is crucial to effective brand authoring. That said; naming, graphic designing, and copywriting are also necessary elements for the creation of brand. Therefore we need a better understanding of necessary elements, and a better understanding of creation.

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<sup>54</sup> Heidegger, Martin, *The Question Concerning Technology : and Other Essays* translated by William Lovitt (New York : Garland, 1977)

# Causation

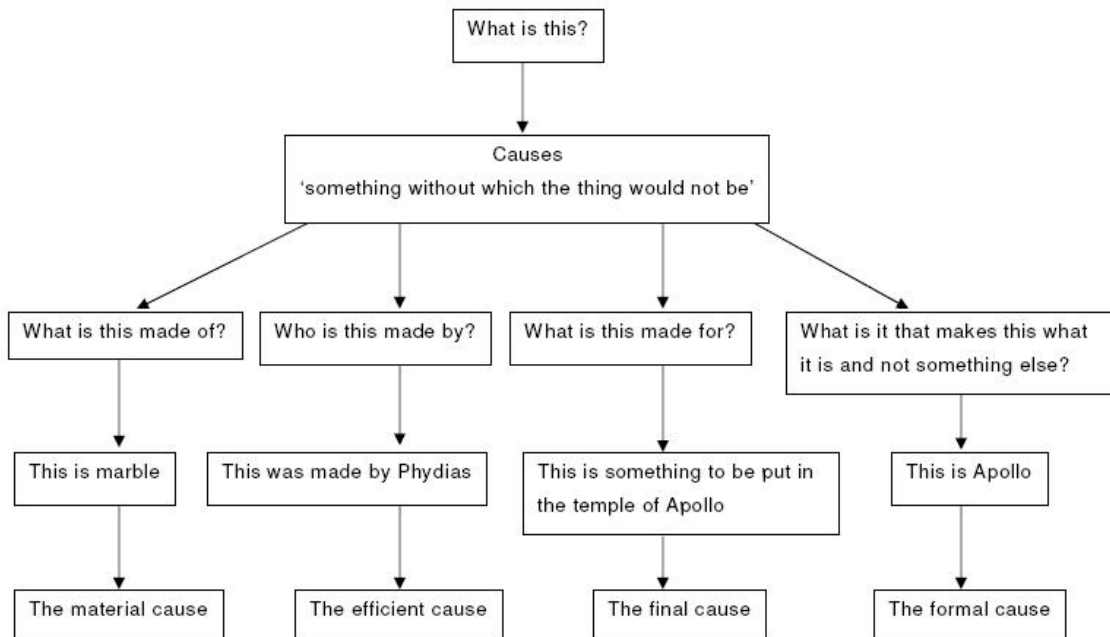
## Philosophical

### Plato

Plato wrote “without a cause nothing can be created...”<sup>55</sup> So, when we speak of creation we are really speaking about causation. That being the case, let us take a closer look at causation.

### Aristotle

According to Aristotle, the question of causation equates to the question: “What is this?”<sup>56</sup> To this question, Aristotle answers in 4 parts.



The Australian *Copyright Act*<sup>57</sup> informs us that the answer to “Who is this made by?” is also the answer to “Who owns the copyright?”<sup>58</sup> However, “Who is this made by?” may be a question that is more complex than it first appears.

<sup>55</sup> Plato, *Timeas*, in Menno, Hulswit, *A Short History of 'Causation'* (an abridged version of the first chapter of “*From Cause to Causation. A Peircean Perspective*” (Dordrecht : Kluwer Publishers, 2002)) <http://www.library.utoronto.ca/see/SEED/Vol4-3/Hulswit.htm> - 060907

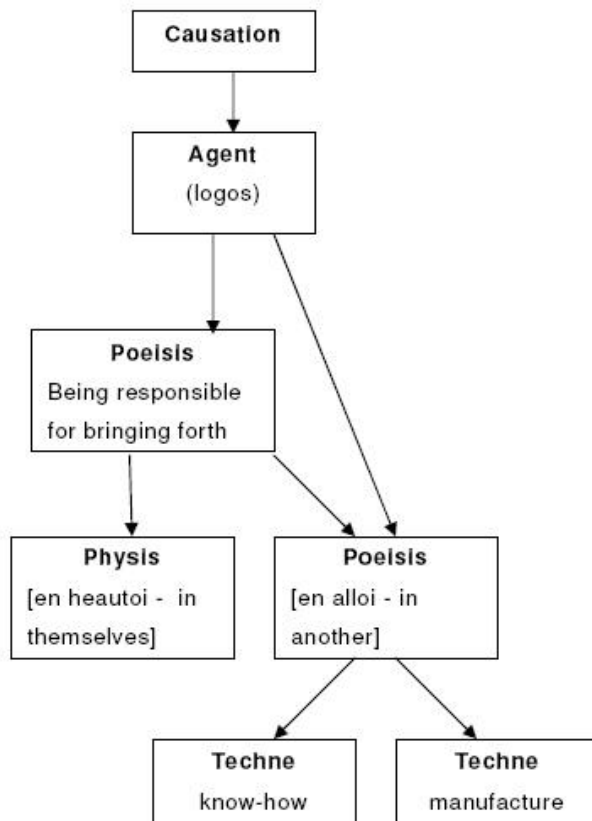
<sup>56</sup> Menno, Hulswit, *A Short History of 'Causation'* (an abridged version of the first chapter of “*From Cause to Causation. A Peircean Perspective*” (Dordrecht : Kluwer Publishers, 2002)) <http://www.library.utoronto.ca/see/SEED/Vol4-3/Hulswit.htm> - 060907

<sup>57</sup> *Copyright Act 1968* (Cth)

<sup>58</sup> *Id.*, ss 32, 35(2) - The author of an original work owns the copyright in the work.

## Martin Heidegger

In our case study, we separated computer operating from semiotic authoring, according to Heidegger's model of causation.<sup>59</sup>



In his essay "The Question Concerning Technology"<sup>60</sup> Heidegger discusses the way in which a silver chalice comes to be. Through an etymological study, Heidegger suggests that a silversmith is responsible for 'revealing' the chalice.<sup>61</sup> He further suggests that this revealing from the silver has a mechanical and an intellectual component. Heidegger goes on to state that of these the decisive revealing is not in the "making and manipulating nor in the using of means."<sup>62</sup> What Heidegger appears to be saying is that the true creator of the chalice is the individual with the know-how, not the one with the machine. This view enables us to suggest that the true author of a brand is the semiotician, not the computer operator; an important distinction

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<sup>59</sup> Heidegger, Martin, *The Question Concerning Technology : and Other Essays* translated by William Lovitt (New York : Garland, 1977)

<sup>60</sup> Ibid

<sup>61</sup> CriticaLink, Department of English, University of Hawai'i at Manoa  
*Martin Heidegger: "The Question Concerning Technology", Guide to the Argument*  
<http://www2.hawaii.edu/~zuern/demo/heidegger/> - 090628

<sup>62</sup> Menno, Hulswit, *A Short History of 'Causation'* (an abridged version of the first chapter of "From Cause to Causation. A Peircean Perspective" (Dordrecht : Kluwer Publishers, 2002))  
<http://www.library.utoronto.ca/see/SEED/Vol4-3/Hulswit.htm> - 060907

for the purpose of copyright assignment.<sup>63</sup> This distinction is sound. However, semiotician and computer operator are both necessary. In other words, as is the scenario in our case study, causation may occur through multiple factors. That being so, it is advisable to consider a model that acknowledges multiple causation.

### **John Stuart Mill**

Mill defined cause as “the concurrence of antecedents, on which [a given phenomenon] is invariably and unconditionally consequent.”<sup>64</sup> He also suggested that what we tend to nominate as the cause was in fact merely one factor to which we choose to defer. So, when identifying a cause in the chain of events, Mill suggests we tend to choose “(a) the last condition to be fulfilled before the effect takes place, or (b) the condition whose role in the affair is ‘superficially the most conspicuous’.”<sup>65</sup>

Mill is quick to point out the error of nominating the “last” or “most conspicuous” condition as the cause. For Mill, the cause of an event “is the sum total of all the conditions”<sup>66</sup> because, while “each of the conditions alone is necessary...no one of them alone is sufficient.”

The relationship between necessary and sufficient causes brings us to a legal theory of causation.<sup>67</sup> As we will see, within this theory Mason CJ opposes Mill and suggests liability rests only with the necessary, not the sufficient.

### **Legal<sup>68</sup>**

Causation in fact and causation at law may generally be associated with the receipt of damages more than with the creation of brand. We are nevertheless interested in looking at legal causation in this paper because it shows how the concept of causation is already defined and enforced by the law. After we have looked at legal causation, we will bridge our understanding to examine brand, music and the *Copyright Act*.

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<sup>63</sup> *Copyright Act 1968* (Cth), s196

<sup>64</sup> Menno, Hulswit, *A Short History of ‘Causation’* (an abridged version of the first chapter of “*From Cause to Causation. A Peircean Perspective*” (Dordrecht : Kluwer Publishers, 2002))  
<http://www.library.utoronto.ca/see/SEED/Vol4-3/Hulswit.htm> - 060907

<sup>65</sup> Ibid

<sup>66</sup> Ibid

<sup>67</sup> Tort and contract law, although some elements are similar to those found in criminal law. See: *R v Hallett* [1969] SASR 141, *Royall v R* (1991) 172 CLR 378: accused was cause of consequences, *Muhandi v R* [1957] Crim LR 814: causation through agency, *R v Evans (No 2)* [1976] VR523: not sole cause or dismissed as trivial.

<sup>68</sup> This paper concentrates on the issue of legal causation under Common Law however reference is made to the recommendations of the Ipp Report (September 2002) and the enactment of such in the *Civil Liability Act 2002* (WA), ss 5C, 5D, 5AK.

### **Causation in fact: 'But for'**

In order to receive damages, plaintiffs must show a sufficient causal connection between breach and loss.<sup>69</sup> They must also show 'but for' the defendant's action, or lack thereof, the loss would not have occurred.<sup>70</sup> The 'but for' test is not the exclusive test because policy and value judgements, practical common sense, and experience must also be taken into account.<sup>71</sup> The 'but for' test is nevertheless satisfied if the breach is a cause of the loss or damage.<sup>72</sup> In this light, the 'but for' test may be regarded as only good for excluding a cause. However, the test must be satisfied before the defendant can be found liable for any loss suffered by a plaintiff. The mere fact that the 'but for' test is satisfied does not mean the defendant is liable for the loss.<sup>73</sup> And we must remember that there may be more than 1 cause.

### **Multiple sufficient causes**

In *March v M H Stramare* Mason CJ specifically contradicts the view of causation propounded by Mill.

“The law does not accept John Stuart Mill's definition of cause as the sum of the conditions which are jointly sufficient to produce it. Thus, at law, a person may be responsible... when his or her... conduct is one of a number of conditions sufficient to produce (the effect).”<sup>74</sup>

Thus, at law, liability rests with a necessary condition regardless of the fact that the condition alone is not sufficient. Furthermore, in this instance, a plaintiff does not have to prove the defendant's behaviour was the main cause, only that it was a cause or a material contribution.<sup>75</sup>

Regardless of whether philosophical or legal causation is applied to our case study there are 4 separate causes of the HostTel brand. The initial response of common law would be to analyse this through the filter of remoteness.

### **Causation at law: Remoteness**

Determining causation at law involves assessing whether the damage was not too remote.<sup>76</sup> The original remoteness test ruled in all direct

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<sup>69</sup> *Wilsher v Essex Area Health Authority AHA* [1986] 3 All ER 801

<sup>70</sup> *National Insurance Co of NZ Ltd v Espagne* (1961) 105 CLR 569, *Reg Glass Pty Ltd v Rivers Locking Systems* (1968) 120 CLR 516

<sup>71</sup> *March v M H Stramare Pty Ltd* (1991) 171 CLR 506, *Chappel v Hart* (1998) 195 CLR 232

<sup>72</sup> *Alexander Cambridge Credit* (1987) 9 NSWLR 310

<sup>73</sup> *Kavanagh v Akhtar* (1998) 45 NSWLR 588

<sup>74</sup> *March v M H Stramare Pty Ltd* (1991) 171 CLR 506, Mason CJ at 509

<sup>75</sup> *Western Australia v Watson* [1990] WAR 248 - This contribution is shown to be material if it is not negligible.

<sup>76</sup> *March v Stramare* (1991) 171 CLR 506

consequences whether foreseeable or not.<sup>77</sup> This was considered too broad, so courts now consider that the injury or damage suffered was not too remote if it was foreseeable to a reasonable person in the position of the defendant as a possible consequence of the defendant's negligence, as long as it is not far fetched or fanciful.<sup>78</sup> It is only necessary that the kind (not the extent<sup>79</sup>) of the injury or damage suffered by the plaintiff was reasonably foreseeable as a possible consequence of the defendant's negligence.<sup>80</sup> In addition something remote is beyond the reasonable contemplation of the parties,<sup>81</sup> and remote can be characterised according to policies for limiting liability.<sup>82</sup>

### **Legal causation of brand**

In our case study 'but for' the actions of Glenn, Angela, Zac, and Catalyst the HostTel brand would not have resulted. In addition the material contributions of the 4 separate parties were not too remote. Their contributions were foreseeable to a reasonable person in the position of the client as a possible, not far fetched or fanciful, consequence of brand creation. Furthermore, the kind, if not the extent, of the creative teamwork commissioned by the client was reasonably foreseeable as a possible consequence of contracting the work. Creative teamwork was not beyond the reasonable contemplation of the parties.

It appears that the only way in which the multiple causes of brand can be considered by law as too remote is due to a policy consideration. If this is the case it begs the question: "On what is the policy based?"

### **Apportioning causation**

If there is, in law, a policy for limiting recognition for brand causation it certainly cannot be based on the inability to separate causes. Indeed the law is no stranger to mathematical apportionment where damages are concerned. For instance, in common law, where a plaintiff's damage is caused by the defendant's act combined with some other act, where such combination is indivisible, the defendant is liable for the whole loss. In cases where such combination is divisible the defendant is only liable for the proportion attributable to him/her.<sup>83</sup>

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<sup>77</sup> *Re Polemis and Furness Withy and Co Ltd* [1921] 3 KB 560

<sup>78</sup> *Chapman v Hearse* (1961) 106 CLR 112, *Caterson v Commissioner for Railways (NSW)* (1973) 128 CLR 99, *Wyong Shire Council v Shirt* (1980) 146 CLR 40, *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 194 ALR 337

<sup>79</sup> *Hughes v Lord Advocate* [1963] AC 837, *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383

<sup>80</sup> *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd (Wagon Mound No 1)* [1961] AC 388, *Overseas Tankship (UK) Ltd v The Miller Steamship Co (Wagon Mound No 2)* [1967] 1 AC 617

<sup>81</sup> *Hungerford v Walker* (1989) 171 CLR 125

<sup>82</sup> *Rowe v McCartney* [1976] 2 NSWLR 72

<sup>83</sup> *Performance Cars v Abraham* (1962) 1 QB 33, *Mahony v J Kruschich (demolitions) Pty Ltd v Anor* (1985) 156 CLR 522, *ICI Australia Operations Pty Ltd v Walsh* (1977) Aust Torts reports 81-452



The Ipp Report<sup>84</sup> recommended the legislative adoption of this common law proportionality to add clarity to otherwise problematic cases.<sup>85</sup> The recommendation was accepted and the result is evidenced in nationwide legislation such as Part 1F, *Civil Liability Act 2002* (WA).<sup>86</sup>

### **Australian Performing Rights Association (APRA)**

In certain endeavours the law is no stranger to mathematical apportionment for creative endeavours. For instance there is obviously no policy to limit the recognition of multiple causes where music authoring is concerned.

According to the fact sheet “Working with cowriters”<sup>87</sup> published by APRA<sup>88</sup> there are at least 3 distinct forms of multiple causation for musical compositions. First: “If two people collaborate on a song and one person does the lyrics and the other person does the music... the person who did the lyrics owns the copyright in the lyrics and the person who did the music owns the copyright in the music.”<sup>89</sup> APRA refers to this as a “collective work.”<sup>90</sup>

Second, in a more complex collaboration known as a “joint work”<sup>91</sup> APRA recognises that it is possible for “a number of people”<sup>92</sup> to write a song, perhaps even “by accident rather than on purpose.”<sup>93</sup> APRA also recognises that in such circumstances it is “hard to separate the bit”<sup>94</sup> each individual contributed; the result being “the people involved become co-owners of the copyright in the music or lyrics or both.”<sup>95</sup> APRA goes on to suggest that: “If there’s no written agreement, the law generally assumes that ownership is split equally – so 50/50 between two writers, in thirds between three writers and so on.”<sup>96</sup> What is more, the contributors “can

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<sup>84</sup> *Review of the Law of Negligence Final Report* (Commonwealth of Australia, September 2002). The chair of the “Panel of Eminent Persons” who authored the report was the Hon David Ipp (Judge of the New South Wales Court of Appeal). The other members were Professors Peter Cane and Don Sheldon, and Mr Ian Macintosh.

<sup>85</sup> Tilbury, Michael, et al, *Remedies Commentary and Materials*, 4<sup>th</sup> ed (Pyrmont : Lawbook Company, 2004), 265

<sup>86</sup> *Civil Liability Act 2002* (WA), s 5AK - Proportionate liability for apportionable claims  
(1) In any proceedings involving an apportionable claim (a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of the damage or loss claimed that the court considers just having regard to the extent of the defendant’s responsibility for the damage or loss; and (b) the court may give judgment against the defendant for not more than that amount.

<sup>87</sup> [www.apra.com.au/writers/downloads/WC\\_working\\_with\\_cowriters.pdf](http://www.apra.com.au/writers/downloads/WC_working_with_cowriters.pdf) - 060928

<sup>88</sup> See also Australasian Mechanical Copyright Owners’ Society (AMCOS) – “a music copyright collection society that represents music publishers and writers from around the world for rights in the reproduction (copying) of their music.” In [www.apra.com.au/general/aboutUs.asp](http://www.apra.com.au/general/aboutUs.asp) - 061002

<sup>89</sup> [www.apra.com.au/writers/downloads/WC\\_working\\_with\\_cowriters.pdf](http://www.apra.com.au/writers/downloads/WC_working_with_cowriters.pdf) - 060928

<sup>90</sup> Ibid

<sup>91</sup> Ibid

<sup>92</sup> Ibid

<sup>93</sup> Ibid

<sup>94</sup> Ibid

<sup>95</sup> Ibid

<sup>96</sup> Ibid

agree to whatever split (they) like.”<sup>97</sup> This is financially important as it means that “APRA will split any performing right royalties according to the proportions set out when the work is first registered.”<sup>98</sup> This first registration with APRA is incongruously malleable though, for the contributors, by agreement, “can change the proportion down the track.”<sup>99</sup> This implies that causation is more negotiable than factual. Imagine the ramifications<sup>100</sup> to our justice system if all multiple causation matters could be altered “down the track.”<sup>101</sup>

The third form of multiple causation for musical compositions is where the original authors of a musical piece “appoint an arranger, translator or a producer” and offer them “a share in the resulting arrangement, translation or production.”<sup>102</sup>

If we translate the 3 scenarios of multiple music causation back to our brand case study we can conclude that the composer of the brand name, the contributor of the symbol, the writer of the positioning statement, and the producer of the overall brand should be able to claim copyright ownership by proportionate division, or by negotiated agreement. At least that would be the case were it not for the fact that the law appears to differentiate between the authoring of music and the authoring of brand.

## Inversion of Hierarchies

A Derridean perspective of the legal differentiation between music and brand may suggest such treatment is based on the “metaphysics of presence.”<sup>103</sup> Such a perspective would state that “the history of Western civilization” is a history of privileging “speech over writing”<sup>104</sup>, which equates to “presence over absence.”<sup>105</sup> This perspective is understandable in the face of assertions like “writing is nothing but the representation of speech.”<sup>106</sup> For the deconstructionist such an assertion merely represents the craving of western civilisation for “immediate access to meaning.”<sup>107</sup> It also represents an hierarchical opposition in need of address.

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<sup>97</sup> Ibid

<sup>98</sup> Ibid

<sup>99</sup> Ibid

<sup>100</sup> *Civil Liability Act 2002* (WA), s 4A allows certain liability to be “excluded, modified or restricted” by contracting parties.

<sup>101</sup> [www.apra.com.au/writers/downloads/WC\\_working\\_with\\_cowriters.pdf](http://www.apra.com.au/writers/downloads/WC_working_with_cowriters.pdf) - 060928

<sup>102</sup> Ibid

<sup>103</sup> Derrida, Jacques, *Of Grammatology*, translated by Gayatri Chakravorty Spivak (Baltimore : The Johns Hopkins University Press, 1974), see also “logocentrism”, 49

<sup>104</sup> Balkin, Jack, *Deconstructive Practice and Legal Theory*, Originally published at 96 Yale L.J. 743 (1987), <http://www.yale.edu/lawweb/jbalkin/articles/decprac1.htm> - 060912

<sup>105</sup> [http://en.wikipedia.org/wiki/Metaphysics\\_of\\_presence](http://en.wikipedia.org/wiki/Metaphysics_of_presence)

<sup>106</sup> Rousseau, Jean-Jacques, *Fragment inédit d'un essai sur les langues* in Derrida, Jacques, *Of Grammatology*, translated by Gayatri Chakravorty Spivak (Baltimore : The Johns Hopkins University Press, 1974), 27

<sup>107</sup> [http://en.wikipedia.org/wiki/Metaphysics\\_of\\_presence](http://en.wikipedia.org/wiki/Metaphysics_of_presence) - 060912

“For Derrida, hierarchies of thought are everywhere. They can be found in the following assertions: A is the rule and B is the exception; A is the general case and B is the special case; A is simple and B is complex; A is normal and B is abnormal; A is self-supporting and B is parasitic upon it; A is present and B is absent; A is immediately perceived and B is inferred; A is central and B is peripheral; A is true and B is false; A is natural and B is artificial.”<sup>108</sup>

Deconstructionists address these oppositions through a process of inversion. That is to say, the challenge is to show that “the property we ascribe to A is true of B and the property we ascribe to B is true of A.”<sup>109</sup> In our current scenario that means our challenge is to show that the privilege of music over brand is illusory. The aim of the inversion therefore is to facilitate an “intellectual discovery” that wrenches us from our “accustomed modes of thought.”<sup>110</sup>

### **Causation**

We have already witnessed one accustomed mode of thought under the heading ‘causation’. In that section we saw Mill espouse the presence/absence perspective by stating that when identifying a cause in the chain of events we are accustomed to choose “(a) the last condition to be fulfilled before the effect takes place, or (b) the condition whose role in the affair is ‘superficially the most conspicuous’.”<sup>111</sup> What Mill identified was the inclination of empiricists like Hume<sup>112</sup> who favour (a) and (b) because they are accustomed to only grasp “immediately perceived sense data”<sup>113</sup> which offer “immediate access to meaning.”<sup>114</sup>

While Mill was critical of those erring on the side of superficially conspicuous causation, Derrida was equally critical of empiricists in the context of “Western conceptions of philosophy”. Derrida suggests that “what is most apparent to our consciousness--what is most simple, basic, or immediate--is most real, true, foundational, or important.”<sup>115</sup> So, to the deconstructionist, causation, identity, meaning, reality, truth, law, and other such foundational concepts are all erroneously calculated because we are

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<sup>108</sup> Balkin, Jack, *Deconstructive Practice and Legal Theory*, Originally published at 96 Yale L.J. 743 (1987), <http://www.yale.edu/lawweb/jbalkin/articles/decprac1.htm> - 060912

<sup>109</sup> Ibid

<sup>110</sup> Ibid

<sup>111</sup> Menno, Hulswit, *A Short History of ‘Causation’* (an abridged version of the first chapter of “*From Cause to Causation. A Peircean Perspective*” (Dordrecht : Kluwer Publishers, 2002)) <http://www.library.utoronto.ca/see/SEED/Vol4-3/Hulswit.htm> - 060907

<sup>112</sup> Balkin, Jack, *Deconstructive Practice and Legal Theory*, Originally published at 96 Yale L.J. 743 (1987), <http://www.yale.edu/lawweb/jbalkin/articles/decprac1.htm> - 060912

<sup>113</sup> Ibid

<sup>114</sup> [http://en.wikipedia.org/wiki/Metaphysics\\_of\\_presence](http://en.wikipedia.org/wiki/Metaphysics_of_presence)

<sup>115</sup> Balkin, Jack, *Deconstructive Practice and Legal Theory*, Originally published at 96 Yale L.J. 743 (1987), <http://www.yale.edu/lawweb/jbalkin/articles/decprac1.htm> - 060912

too willing, eager, and accustomed to accept “immediately perceived sense data.”<sup>116</sup>

## **Identity**

Identity is another example of a foundational concept that we have already touched upon. Under the ‘Waterman twins’ we inverted the hierarchical opposition between identity and difference. Let us now revisit that example and look at the process in more detail.

In the ‘Waterman twins’ example we established that the identity of one twin is comprised of the characteristics he shares with his sibling and, of equal importance, the characteristics that differentiate him from that sibling. So, the identity of one twin is comprised of having one sock lower than the other, holding a ball, and wearing frumpled clothes. His identity is also comprised of not having his socks aligned, not having his hands behind his back, and not wearing neat attire. Our example shows that being unique is comprised of identity opposed to difference, and difference opposed to identity

Our conclusion from the ‘Waterman twins’ is that identity depends upon difference, just as difference depends upon identity; they are mutually dependent.<sup>117</sup> Identity cannot exist without difference, and difference cannot exist without identity.<sup>118</sup> There is a deconstructionist term for this.

## **‘Differance’ and Trace**

If identity cannot exist without difference and difference cannot exist without identity, neither can be foundational. “Each is continually calling upon the other for its foundation, even as it is constantly differentiating itself from the other.”<sup>119</sup> This is called “differance.”<sup>120</sup>

“Trace”<sup>121</sup> is a term interwoven with differance. It essentially equates to defining one concept by acknowledging what that concept is not. The absence therefore becomes an integral part of the presence; it supports the definition. So, in our example we are stating that to comprehend identity we must understand difference. Or in Derridean parlance identity maintains an element, or trace, of difference.

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<sup>116</sup> Ibid

<sup>117</sup> Ibid

<sup>118</sup> Ibid

<sup>119</sup> Ibid. Differance simultaneously indicates that (1) the terms of an oppositional hierarchy are differentiated from each other (which is what determines them); (2) each term in the hierarchy defers the other (in the sense of making the other term wait for the first term), and (3) each term in the hierarchy defers to the other (in the sense of being fundamentally dependent upon the other).

<sup>120</sup> Derrida, Jacques, *Of Grammatology*, translated by Gayatri Chakravorty Spivak (Baltimore : The Johns Hopkins University Press, 1974), 62

<sup>121</sup> Ibid

If we accept that the concept of identity is mutually dependent upon its opposite through difference and trace we may conclude that all foundational concepts bear the same relationship. We may then suppose that the “history of ideas (is really just the history of) favored conceptions held in opposition to disfavored conceptions.”<sup>122</sup> This supposition should be of particular interest to the legal scholar considering “legal doctrines are based upon a group of foundational concepts and principles.”<sup>123</sup>

### **Ungrounding**

The inversion of hierarchies serves to prove that the reasons for privileging a foundational concept over its opposition could also be used to privilege the opposition over the foundational concept. This “ungrounding” reveals foundational concepts to be nothing more than favoured concepts; there is nothing about them that is foundational, “self-sufficient or self-explanatory.”<sup>124</sup> So, it would appear that favouring one concept over another, such as favouring automatic copyright protection for music over brand, is more reliant on convenience or emotions than on logic.

### **Speech over writing**

In “Of Grammatology”<sup>125</sup> “Derrida finds in the texts of several writers, including Rousseau, Saussure, and Levi-Strauss, a consistent valuing of speech over writing as a form of communication.”<sup>126</sup> We have briefly touched upon the reason behind this; the favouring of presence over absence. Now let us look further at why speech is privileged over writing.

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<sup>122</sup> Balkin, Jack, *Deconstructive Practice and Legal Theory*, Originally published at 96 Yale L.J. 743 (1987), <http://www.yale.edu/lawweb/jbalkin/articles/decprac1.htm> - 060912

<sup>123</sup> Ibid

<sup>124</sup> Ibid

<sup>125</sup> Derrida, Jacques, *Of Grammatology*, translated by Gayatri Chakravorty Spivak (Baltimore: The Johns Hopkins University Press, 1974)

<sup>126</sup> Balkin, Jack, *Deconstructive Practice and Legal Theory*, Originally published at 96 Yale L.J. 743 (1987), <http://www.yale.edu/lawweb/jbalkin/articles/decprac1.htm> - 060912

Privileging		
Speech Over Writing		Inversion
Speech	Writing	Speech
Speech is connected more closely to the immediate thoughts of the communicator	Writing is a substitute, representing and recording speech	Speech is a substitute representing thought
Speech is immediate unambiguous, and sincere	Writing is distant, ambiguous, and potentially misleading	Speech can be as unclear and ambiguous as writing
Speech is interactive and can be interrupted, clarified	Writing is passive and cannot be questioned	Speech can be recorded and beyond interaction
Speaker is present	Writer is absent	Speaker may be absent

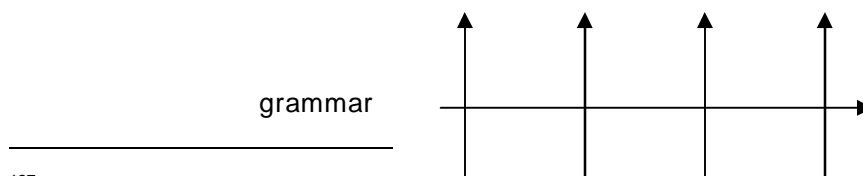
The table above<sup>127</sup> “shows that speech, as a signifier of thought, shares all of the properties that we had associated with writing.”<sup>128</sup> To put it another way, speech and writing both represent expressions known as “arche-writing.”<sup>129</sup> Speech and writing share communications qualities; they are equivalent.

## Brandmusic

If, as far as identification is concerned, speech and writing are equivalent, it may be proposed that brand and music are equivalent. We shall now prove the latter through the processes employed by Derrida to reveal the equivalence between speech and writing. First we will revisit the workings of paradigm and syntagm; second we will return to the matter of causation; third we will show that brand and music are both forms of writing; and lastly we will examine the existence of legal privileging.

### Paradigm and Syntagm

If we revisit our exploration of paradigm and syntagm we return to the understanding of composing texts by selecting and assembling elements, across time, according to certain rules. For the text of English this was schematically represented as:



<sup>127</sup> Ibid

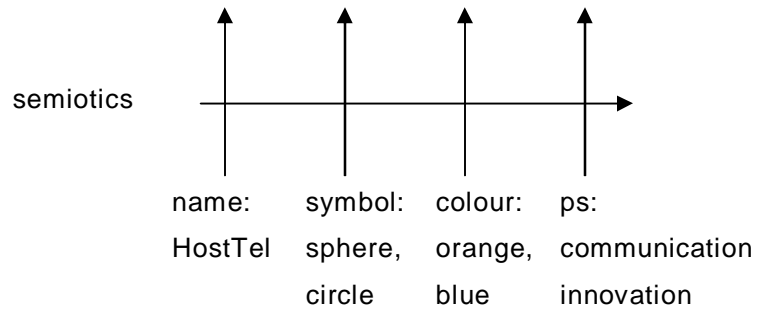
<sup>128</sup> Ibid

<sup>129</sup> Derrida, Jacques, *Of Grammatology*, translated by Gayatri Chakravorty Spivak (Baltimore: The Johns Hopkins University Press, 1974), 60

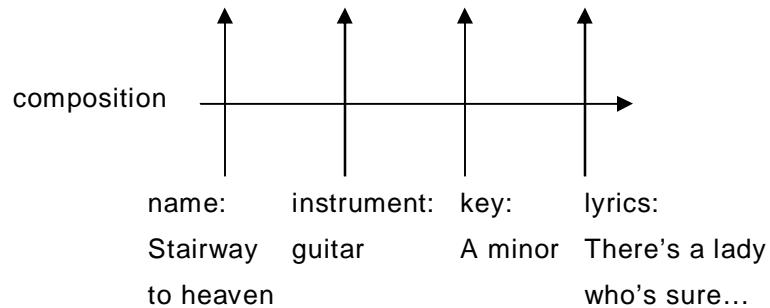
For the text of brand it more like this:

article: subject: verb: object:  
the boy plays soccer

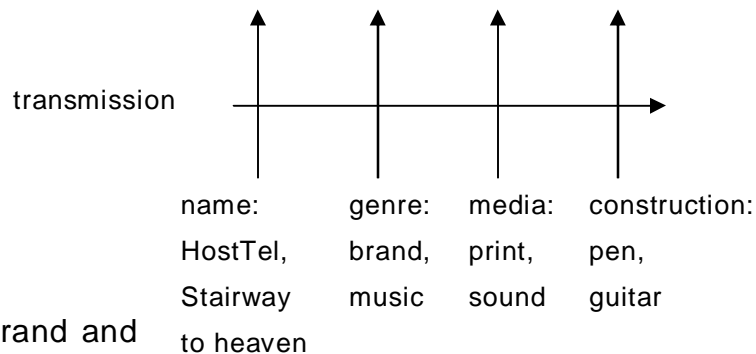
would look



For the text of music it may look like this:



These schemata view brand and music as separate identities. However, in our discussion, we are suggesting that they are, in essence, one and the same. To represent this schematically we may refer to the texts of brand and music as being transmitted choices from the paradigm of genre, and show them as follows:



By viewing brand and above we can see transmitted across

music as that they are both communications time possessing interchangeable

paradigmatic choices. In other words, as we did with the 'Waterman twins', we can select different elements from each paradigm without breaking the rules governing the transmission of communications.

When we did this with the 'Waterman twins' we saw the following possibilities:

- 'the boy plays soccer';
- 'the girl plays soccer';
- 'a boy plays soccer';
- 'a girl studies soccer';
- 'a girl studies science';
- ...

If we transpose paradigmatic choices now with brand and music we can see how plausible it is to create:

- HostTel as music, constructed with a pen and transmitted in sound;  
and
- Stairway to heaven<sup>130</sup> as a brand, constructed with a guitar and transmitted on paper;
- ...

The above suggests that brand can manifest itself as a jingle, and a song can manifest itself as a written manuscript. These points will be examined more closely when we later establish brand, music, speech, and writing as all being forms of arche-writing. For now let us return to the matter of causation.

## **Causation**

### **Aristotle**

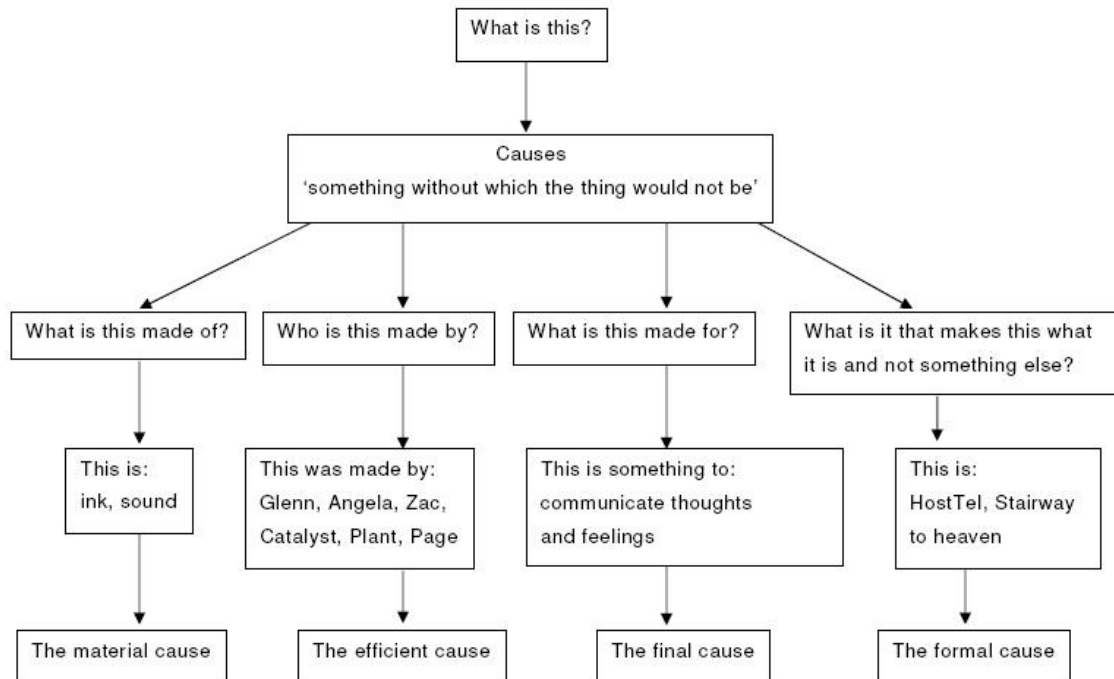
We know from Plato that "without a cause nothing can be created..."<sup>131</sup> That means, causation is equally responsible for the bringing about of both brand and music. We can show the equality of this relationship through employing the causation model of Aristotle.

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<sup>130</sup> Plant/Page, *Stairway to heaven*, [REDACTED] (Led Zeppelin IV), Atlantic Records 1971

<sup>131</sup> Plato, *Timeas*, in Menno, Hulswit, *A Short History of 'Causation'* (an abridged version of the first chapter of "From Cause to Causation. A Peircean Perspective" (Dordrecht : Kluwer Publishers, 2002)) <http://www.library.utoronto.ca/see/SEED/Vol4-3/Hulswit.htm> - 060907

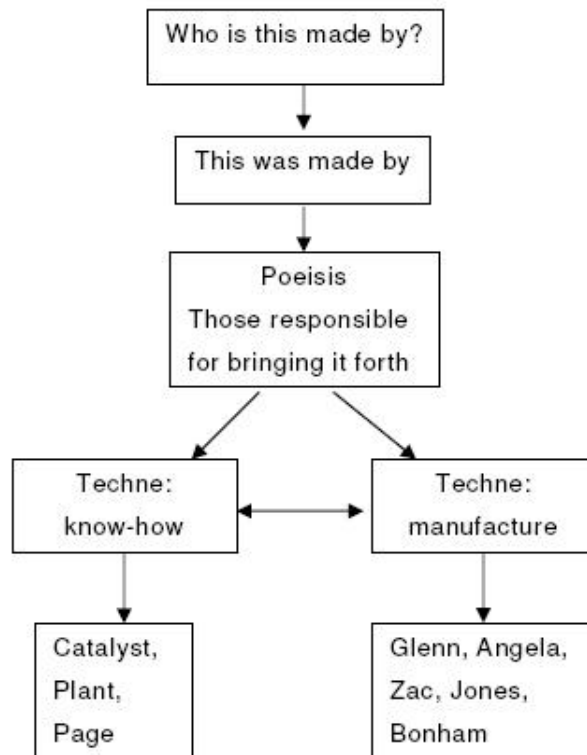




In this model we again see paradigmatic choices. So, just as above, we could transpose options to show brand as sound caused by Glenn, Angela, Zac, and Catalyst, for communicating an essence of HostTel.

### **Martin Heidegger**

If we now isolate the 'efficient cause' and extrapolate that through the eyes of Heidegger the result may look like this:



By transposing variables in this model we can see how plausible it is for the creative know-how of Robert Plant to employ the manufacturing skills of Angela to bring forth the album symbols for Led Zeppelin IV.<sup>132</sup>

### John Stuart Mill

We could further extrapolate Heidegger's perspective by encompassing the view of Mill. That is to say we could define causation as "the sum total of all the conditions"<sup>133</sup> bringing about the event. For the causation of 'Stairway to heaven' those conditions would include: the other band members (John Paul Jones and John Bonham), "Headley Grange, Hampshire; The Rolling Stones Mobile Studio; Island Studios, London; Sunset Sound, Los Angeles; Olympic Studios, London."<sup>134</sup> What is more, the conditions should include all things connected with music, recording, the English language, genetics... In fact the Ipp Report specifically states: "Every event has an infinite number of necessary conditions, and there is an important sense in which all necessary conditions are of equal salience."<sup>135</sup> However, as far as

<sup>132</sup> Plant/Page, *Stairway to heaven*, [REDACTED] (Led Zeppelin IV), Atlantic Records 1971

<sup>133</sup> Menno, Hulswit, *A Short History of 'Causation'* (an abridged version of the first chapter of "From Cause to Causation. A Peircean Perspective" (Dordrecht : Kluwer Publishers, 2002))

<http://www.library.utoronto.ca/see/SEED/Vol4-3/Hulswit.htm> - 060907

<sup>134</sup> [http://en.wikipedia.org/wiki/Led\\_Zeppelin\\_IV](http://en.wikipedia.org/wiki/Led_Zeppelin_IV) - 061008

<sup>135</sup> *Review of the Law of Negligence Final Report* (Commonwealth of Australia, September 2002), 7.41, 114

legal causation is concerned, this “interconnectedness of all things”<sup>136</sup> was specifically rejected by Mason CJ in *Stramare*.<sup>137</sup>

### ‘But for’ multiple causes

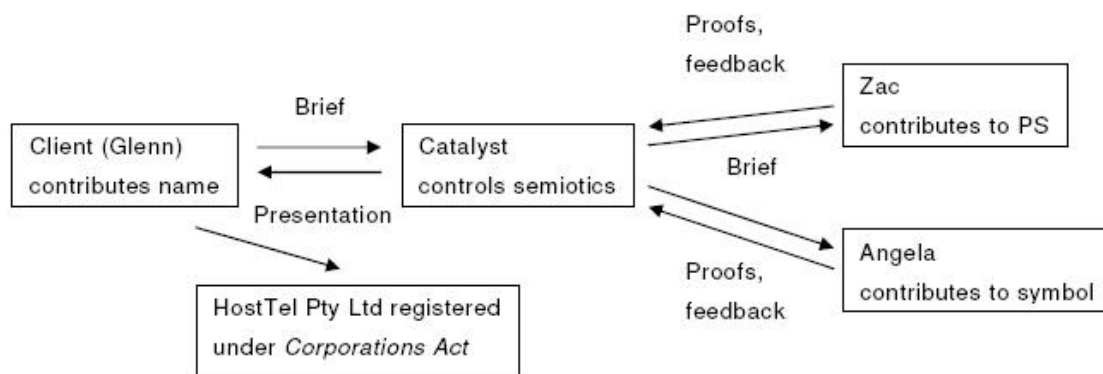
We have thus far seen, from examination of our case study, that regardless of whether we apply causation by Mill or Mason CJ the result is the same; ‘but for’ multiple causes the HostTel brand would not come to be. The same is true of ‘Stairway to heaven’. In the latter Robert Plant wrote the lyrics and Jimmy Page composed the music.

Transposition of paradigmatic choices here reveals the possibility of Robert Plant writing the positioning statement for HostTel, or Jimmy Page composing the music for a company jingle.

### Remoteness

The material contributions of the separate parties to the HostTel brand are not too remote. Judged by the same parameters the material contributions of Plant and Page to the causation of ‘Stairway to heaven’ are not too remote. What is more, their contributions to ‘Stairway to heaven’ are automatically protected by copyright law even though they may have been made “by accident rather than on purpose.”<sup>138</sup> “You know, you’re jamming with a few friends, one thing leads to another and before you know it, a new song is born.”<sup>139</sup>

If the serendipitous accidents of musical causation are protected by law it may be considered incongruous that the professional deliberations of brand causation are not. This is especially the case if we classify the proof/feedback exchange between brand causators as “jamming”.



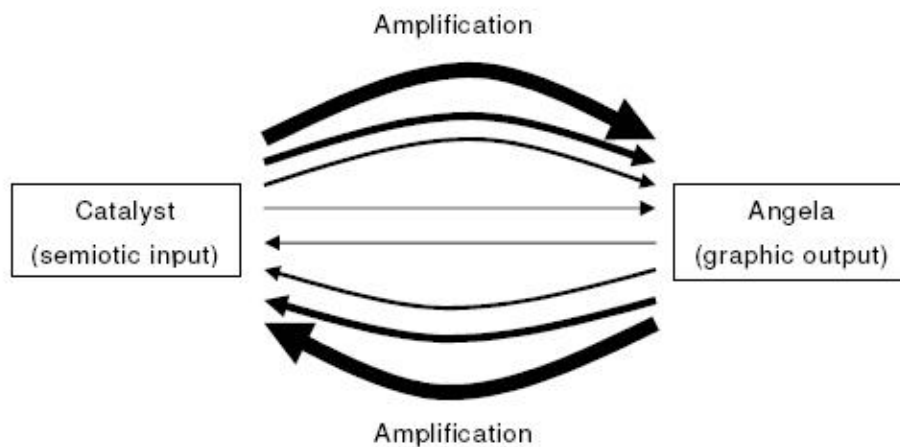
<sup>136</sup> Institute for Cultural Partnerships, 3211 North Front Street, Harrisburg, PA 17110-1342, [www.culturalpartnerships.org/community/buddhism.asp](http://www.culturalpartnerships.org/community/buddhism.asp) - 061008

<sup>137</sup> *March v M H Stramare Pty Ltd* (1991) 171 CLR 506, Mason CJ at 509

<sup>138</sup> [www.apra.com.au/writers/downloads/WC\\_working\\_with\\_cowriters.pdf](http://www.apra.com.au/writers/downloads/WC_working_with_cowriters.pdf) - 060928

<sup>139</sup> *Ibid*

Another term usually associated with musical causation, but also found in brand causation is ‘feedback’. If we examine the notion of “feedback”, in its musical sense, we can see that it is a loop between a microphone and a speaker; a signal is received by the microphone, amplified, and passed out of the speaker. The sound from the speaker is then re-received by the microphone, amplified further, and passed out of the speaker again.<sup>140</sup> In this musical sense, “feedback” is a new sound caused by the recursive process of input, amplification, and output. In a brand sense, ‘feedback’ can cause a new identity through semiotic input, graphic output, and mutual amplification.



So, whether through feedback or accident, it appears that multiple material contributions in brand and music are not too remote to be acknowledged as philosophical and legal causes.

### Apportionment

We have already seen that the common law and legislation are no strangers to apportionment of causation.<sup>141</sup> We have also seen that APRA acknowledges at least 3 distinct multiple causations. Therefore, there appears to be no reason why the multiple causators of a brand should not receive the same acknowledgements and rewards as the multiple causators of music.

### Arche-writing

Derrida showed us that speech is privileged over writing. He also showed us that this is illogical as both are forms of arche-writing. The term arche-

<sup>140</sup> [http://en.wikipedia.org/wiki/Audio\\_feedback](http://en.wikipedia.org/wiki/Audio_feedback) - 060928

<sup>141</sup> *Performance Cars v Abraham* (1962) 1 QB 33, *Mahony v J Kruschich (demolitions) Pty Ltd v Anor* (1985) 156 CLR 522, *ICI Australia Operations Pty Ltd v Walsh* (1977) Aust Torts reports 81-452, *Civil Liability Act (WA) 2002*, s 5AK

writing deliberately draws upon the Greek word “arche” meaning “the first principle of the world.”<sup>142</sup> So, what Derrida refers to as arche-writing is the first principle of language. As such the principle is neither oral nor written; it is “an inscription of truth in the soul.”<sup>143</sup> That means “speech and writing are expressions of one and the same language.”<sup>144</sup> This language is referred to as arche-writing, and, while it does not exist in itself, “its possibility is anterior to all expressions.”<sup>145</sup>

We know that brand and music are expressions, communications, transmissions. They are therefore forms of the same language: arche-writing. That means, if it is illogical to privilege speech over writing, it is also illogical to privilege music over brand.

Privileging		
Music Over Brand		Inversion
Music	Brand	Music
Music is audio	Brand is visual	Reading music is visual
Music is immediate	Brand is distant	Music manuscript is distant
Music is entertainment	Brand is business	Music can be business
Music is interactive	Brand is passive	Recorded music is passive
Musician is present	Brand designer is absent	Recorded musician is absent
Music is speech	Brand is writing	Music and Brand are arche-writing

## Legal Privileging

Regardless of whether we examine brand and music through philosophical or legal causation the identities of the 2 expressions are based on paradigmatic choices. These choices, as we have seen, are so interchangeable that to privilege one over another is nonsensical. Yet, it happens.

To see where it happens we need look no further than the *Copyright Act*. Let us now deconstruct this legislation to show that there is a privileging of

<sup>142</sup> <http://en.wikipedia.org/wiki/Arche> - 061009

<sup>143</sup> Derrida, Jacques, “*Plato’s Pharmacy*” in Coward, Harold G, “*Speech Versus Writing*” In *Derrida and Bhattacharya*, Philosophy East and West, Vol. 41, No. 2 (1991), pp. 141-162 at [http://ccbs.ntu.edu.tw/FULLTEXT/JR-PHIL/ew95321.htm#\[22\]](http://ccbs.ntu.edu.tw/FULLTEXT/JR-PHIL/ew95321.htm#[22]) - 061008

<sup>144</sup> Coward, Harold G, “*Speech Versus Writing*” In *Derrida and Bhattacharya*, Philosophy East and West, Vol. 41, No. 2 (1991), pp. 141-162 at [http://ccbs.ntu.edu.tw/FULLTEXT/JR-PHIL/ew95321.htm#\[22\]](http://ccbs.ntu.edu.tw/FULLTEXT/JR-PHIL/ew95321.htm#[22]) - 061008

<sup>145</sup> Ibid

music over brand and that this discriminatory hierarchy is unfounded and unjust.

## Copyright Act 1968 (Cth)

Before we begin the inversion of the *Copyright Act* let us first establish some relevant elements of the legislation.

In Australia, copyright for published and unpublished works<sup>146</sup> “does not subsist otherwise than by virtue of this Act.”<sup>147</sup> The Act applies to all original literary, dramatic, musical and artistic works,<sup>148</sup> and the author of such a “work is the owner of any copyright subsisting in the work.”<sup>149</sup>

Owners of copyright possess intangible and incorporeal<sup>150</sup> “personal property”<sup>151</sup> that is “transmissible by assignment.”<sup>152</sup> They possess the right to copy a particular form of expression. That is to say they may not own the medium of the work itself, but they do own their<sup>153</sup> original expression materialised<sup>154</sup> upon it.<sup>155</sup>

## Inversion - Original work

For a work to be considered original under the *Copyright Act* it must not be merely a “copy from a prior work”<sup>156</sup> of the author.<sup>157</sup> Furthermore, originality lies in the manner in which the ideas are expressed, not in the ideas behind the work.<sup>158</sup> This means the manner of expression creates an identity for the ideas.

We know that identity relies on what is present and what is absent. We also know that presence and absence are paradigmatic choices in a syntagmatic transmission or expression of ideas. Further still we know arche-writing is “anterior to all expressions.”<sup>159</sup>

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<sup>146</sup> *Copyright Act 1968 (Cth)*, s32

<sup>147</sup> *Id.*, s8

<sup>148</sup> *Id.*, s32. For a definition of literary, dramatic, and artistic work see s10(1).

<sup>149</sup> *Id.*, s35(2)

<sup>150</sup> *Pacific Film Laboratories Pty Ltd v Cmr of Taxation* (1970) 121 CLR 154

<sup>151</sup> *Copyright Act 1968 (Cth)*, s196

<sup>152</sup> *Ibid.*

<sup>153</sup> *Ibid.* Copyright is personal property and, subject to this section, is transmissible by assignment, by will and by devolution by operation of law.

<sup>154</sup> *Id.*, s22(1)

<sup>155</sup> A concept first expressed in *Millar v Taylor* (1769) 4 Burr 2303 and later restated in *Pacific Film Laboratories Pty Ltd v Cmr of Taxation* (1970) 121 CLR 154

<sup>156</sup> Nygh, Peter & Butt, Peter (eds), *Butterworths Australian Legal Dictionary* (North Ryde : Butterworths, 1997), 828

<sup>157</sup> *Computer Edge Pty Ltd v Apple Computer Inc* (1986) 161 CLR 171 in Nygh, Peter & Butt, Peter (eds), *Butterworths Australian Legal Dictionary* (North Ryde : Butterworths, 1997), 828

<sup>158</sup> *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479 in Nygh, Peter & Butt, Peter (eds), *Butterworths Australian Legal Dictionary* (North Ryde : Butterworths, 1997),

<sup>159</sup> Coward, Harold G, “Speech Versus Writing” In *Derrida and Bhartrhari*, Philosophy East and West, Vol. 41, No. 2 (1991), pp. 141-162 at [http://ccbs.ntu.edu.tw/FULLTEXT/JR-PHIL/ew95321.htm#\[22\]](http://ccbs.ntu.edu.tw/FULLTEXT/JR-PHIL/ew95321.htm#[22]) - 061008

It is therefore safe to conclude that originality applies to all ideas regardless of whether the manner in which these ideas are expressed manifests in the genre of brand or the genre of music.

### **Inversion - Literary work**

The *Copyright Act* protects original literary works. The *Act* informs us that a literary work includes:

“(a) a table, or compilation, expressed in words, figures or symbols.”<sup>160</sup>

These works can be defined as intending to convey information<sup>161</sup> regardless of their literary merit.<sup>162</sup>

We know from our examination of semiotics, causation, and our case study that brand is a bricolage expressed in words, figures, and/or symbols, and is carefully crafted to convey information. Our studies also revealed how the know-how of a semiotician, plus the manufacturing skills of a copywriter and graphic designer, combined to cause a brand to come into being. In addition we saw these multiple causes recognised by philosophy and law. So, it is logical to summarise brand creation as the “putting together (of) a number of items or components from various sources in an original way.”<sup>163</sup> In other words, brand is a literary compilation covered by the *Copyright Act*.

If original literary works are protected by the *Copyright Act* it stands to reason that brand is protected by the *Copyright Act*. That is the case regardless of whether the individual components of the brand are “literary, original, or protected by copyright.”<sup>164</sup> After all, in a literary compilation it is the “arrangement”<sup>165</sup> of the paradigmatic choices that creates the originality protected by the *Act*.

### **Inversion - Artistic works**

The *Copyright Act* protects original artistic works. The *Act* itself informs us that an artistic work means:

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<sup>160</sup> *Copyright Act 1968* (Cth), s10(1)

<sup>161</sup> *Computer Edge Pty Ltd v Apple Computer Inc* (1986) 161 CLR 171; *Kalamazoo (Aust) Pty Ltd v Compact Business Systems Pty Ltd* [1990] 1 Qd R 231 in Nygh, Peter & Butt, Peter (eds), *Butterworths Australian Legal Dictionary* (North Ryde : Butterworths, 1997), 828

<sup>162</sup> *Computer Edge Pty Ltd v Apple Computer Inc* (1986) 161 CLR 171 in Nygh, Peter & Butt, Peter (eds), *Butterworths Australian Legal Dictionary* (North Ryde : Butterworths, 1997), 699

<sup>163</sup> *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 All ER 465 in Nygh, Peter & Butt, Peter (eds), *Butterworths Australian Legal Dictionary* (North Ryde : Butterworths, 1997), 233

<sup>164</sup> *Ladbroke (Football) Ltd v William Hill (Football) Ltd; Kalamazoo (Aust) Pty Ltd v Compact Business Systems Pty Ltd* [1990] 1 Qd R 231 in Nygh, Peter & Butt, Peter (eds), *Butterworths Australian Legal Dictionary* (North Ryde : Butterworths, 1997), 233

<sup>165</sup> *Feist Publications Inc v Rural Telephone Service Co Inc* (1991) 20 IPR 129 in Nygh, Peter & Butt, Peter (eds), *Butterworths Australian Legal Dictionary* (North Ryde : Butterworths, 1997), 233

“(a) a painting, sculpture, drawing, engraving or photograph, whether the work is of artistic quality or not;

(b) a building or a model of a building, whether the building or model is of artistic quality or not; or

(c) a work of artistic craftsmanship whether or not mentioned in paragraph (a) or (b).”<sup>166</sup>

If we accept all expressions as arche-writing, there are only paradigmatic choices separating the communications of painting, sculpture, drawing, engraving, photography, brand, and music. Therefore, brand may be categorised as an artistic work. It can also be categorised as a “work of artistic craftsmanship.”<sup>167</sup>

Through our examination of causation and our case study we have seen evidence that brand is “a crafted item displaying a degree of manual skill on the part of the maker or designer.”<sup>168</sup> The evidence of craft is manifest in semiotic know-how and the display of manual skill is manifest in the manufacturing. In addition, we can judge brand as being artistic<sup>169</sup> “on an objective basis or by taking into account the intention of the maker.”<sup>170</sup>

On an objective basis “Courts will treat an item as a work of artistic craftsmanship if a substantial<sup>171</sup> section of the public genuinely admires or values the item for its appearance, even though others may think the item meaningless, common or vulgar.”<sup>172</sup>

It could be argued that the commercial success of an organisation is directly related to the admiration and value of its brand by a substantial section of the public (consumers). What is more, as the visual identity of the organisation, a brand must be aesthetically<sup>173</sup> pleasing to ensure that

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<sup>166</sup> *Copyright Act 1968* (Cth), s10(1)

<sup>167</sup> *Id.* artistic works (c)

<sup>168</sup> Nygh, Peter & Butt, Peter (eds), *Butterworths Australian Legal Dictionary* (North Ryde : Butterworths, 1997), 1274

<sup>169</sup> *Ibid*

<sup>170</sup> *Komesaroff v Mickle* (1986) 7 IPR 295; *Cuisenaire v Reed* [1963] VR 719 in Nygh, Peter & Butt, Peter (eds), *Butterworths Australian Legal Dictionary* (North Ryde : Butterworths, 1997), 1274

<sup>171</sup> Substantial: Large, weighty or big: *Palser v Grinling* [1948] AC 291; *Re Queensland Co-op Milling Assn Ltd and Defiance Holdings Ltd* (1976) 8 ALR 481 (‘substantial public benefit’). In a relative sense, considerable: *Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd* (1982) 44 ALR 557 (‘substantially lessening competition’); *Dowling v Dalgety Australia Ltd* (1992) 34 FCR 109 (‘substantial degree of power’). Greater rather than less: *Dandy Power Equipment Pty Ltd v Mercury Marine Pty Ltd* (1982) 44 ALR 173 (‘substantially lessening competition’) in Nygh, Peter & Butt, Peter (eds), *Butterworths Australian Legal Dictionary* (North Ryde : Butterworths, 1997), 1128

<sup>172</sup> *George Hensher Ltd v Restawhile Upholstery (lanacs) Ltd* [1976] AC 64 in Nygh, Peter & Butt, Peter (eds), *Butterworths Australian Legal Dictionary* (North Ryde : Butterworths, 1997), 1274

<sup>173</sup> *Cuisenaire v Reed* [1963] VR 719; *Amalgamated Mining Services Pty Ltd v Warman International Ltd* (1992) 111 ALR 269 in Nygh, Peter & Butt, Peter (eds), *Butterworths Australian*



consumers admire, value, and enter into financial transactions with it. On these objective grounds, Courts should recognise brand as “work of artistic craftsmanship.”<sup>174</sup>

The same recognition would apply if Courts accounted for “the intention of the maker(s).”<sup>175</sup> As a case in point, it would be highly unlikely for brand causators to testify that their work was not intentionally artistic. So, from an objective and subjective perspective, the *Copyright Act* encompasses brand as “a work of artistic craftsmanship.”<sup>176</sup>

### **Inversion - Author**

We know from the *Copyright Act* that the author of an original work<sup>177</sup> is the “owner of any copyright subsisting in the work.”<sup>178</sup> What we do not know is the definition of author.

The *Copyright Act* does inform us that the name(s) “under which a work was published”<sup>179</sup> shall be read as, and, “unless the contrary is established”, presumed to be,<sup>180</sup> the name(s) of the author(s).<sup>181</sup> However, the only actual definition of author in the *Copyright Act* applies “in relation to a photograph.”<sup>182</sup> So, to comprehend the meaning of ‘author’ we must look beyond the *Act*.<sup>183</sup>

A legal dictionary defines author as:

“The generic term for the human creator of an original work;  
the person who originates or gives existence to something:  
*Sands & McDougall Pty Ltd v Robinson* (1917) 23 CLR 49.

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*Legal Dictionary* (North Ryde : Butterworths, 1997), 1274 – in a “work of artistic craftsmanship” there is a requirement that “artistic” relates to aesthetic

<sup>174</sup> *Copyright Act 1968* (Cth), s10(1), artistic works (c)

<sup>175</sup> *Komesaroff v Mickle* (1986) 7 IPR 295; *Cuisenaire v Reed* [1963] VR 719 in Nygh, Peter & Butt, Peter (eds), *Butterworths Australian Legal Dictionary* (North Ryde : Butterworths, 1997), 1274

<sup>176</sup> *Copyright Act 1968* (Cth), s10(1)

<sup>177</sup> *Id*, s32

<sup>178</sup> *Id*, s35(2)

<sup>179</sup> *Id*, s20

<sup>180</sup> *Id*, s127

<sup>181</sup> *Id*, s10(1) – “work of joint authorship means a work that has been produced by the collaboration of two or more authors and in which the contribution of each author is not separate from the contribution of the other author or the contributions of the other authors.”

s78 – “Subject to this Division, a reference in this Act to the author of a work shall, unless otherwise expressly provided by this Act, be read, in relation to a work of joint authorship, as a reference to all the authors of the work.”

s127(2) – “Where a work is alleged to be a work of joint authorship, the last preceding subsection applies in relation to each person alleged to be one of the authors of the work as if references in that subsection to the author were references to one of the authors.”

<sup>182</sup> *Id*, s10(1)

<sup>183</sup> *Acts Interpretation Act 1901* (Cth), 15AB Use of extrinsic material in the interpretation of an Act, (1) Subject to subsection (3), in the interpretation of a provision of an Act, if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material.

The term may include a person who adapts or translates a work, or who compiles material so as to create a work which is not a mere copy of a previous work: *Tree v Bowkett* (1896) 74 LT 77. However, it does not include a mere copyist or a person who merely makes suggestions or contributes ideas: *Walter v Lane* [1900] AC 539; *Shepherd v Conquest* (1856) 17 CB 427.”<sup>184</sup>

If we examine this definition we can isolate 3 points of interest. First is the word “creator”.<sup>185</sup> We understand this as meaning ‘causator’ whether in the singular or plural. Second is the phrase “a person... who compiles.”<sup>186</sup> We already know a brand is a literary “compilation, expressed in words, figures or symbols.”<sup>187</sup> We now know from the above that the person “who compiles”<sup>188</sup> is the legal author. That being the case, whoever “compiles”<sup>189</sup> the brand must be considered the author of the brand. This view is supported by our third point of interest which is the phrase “a person who merely makes suggestions or contributes ideas.”<sup>190</sup> This point recognises the Heidegger model of causation in that it appears to separate the real know-how from the contribution of mere suggestions. Point 3 therefore rejects manufacturing contributors, meaning the *Copyright Act* only acknowledges authors as those with know-how, those who work with signs and symbols to construct the narrative.

If we consider brand in light of our examination above we can conclude that the *Copyright Act* recognises<sup>191</sup> Catalyst as the author of the HostTel brand because Catalyst is the compiler of this original literary work.

### **Inversion - Materialised**

We know from the *Copyright Act* that the author of an original work<sup>192</sup> possesses personal property<sup>193</sup> from the time when “the work was first reduced to writing or to some other material form.”<sup>194</sup>

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<sup>184</sup> Nygh, Peter & Butt, Peter (eds), *Butterworths Australian Legal Dictionary* (North Ryde : Butterworths, 1997), 97

<sup>185</sup> Ibid

<sup>186</sup> Ibid

<sup>187</sup> *Copyright Act 1968* (Cth), s10(1)

<sup>188</sup> Nygh, Peter & Butt, Peter (eds), *Butterworths Australian Legal Dictionary* (North Ryde : Butterworths, 1997), 97

<sup>189</sup> Ibid

<sup>190</sup> Ibid

<sup>191</sup> In this context, Catalyst should be read as an individual, not as a Pty Ltd company. *Convention Establishing the World Intellectual Property Organisation*, 1967 Para 8, Article 2 - intellectual property includes: rights relating to literary, artistic and scientific works, performances and performing artists, photographs and broadcasts, inventions in all fields of human endeavour... *Copyright Act 1968* (Cth), 32(1) implies author must be human; “qualified person.”

<sup>192</sup> *Copyright Act 1968* (Cth), s32

<sup>193</sup> Id, s196

<sup>194</sup> Id, s22(1)

The *Act* itself tell us that “writing means a mode of representing or reproducing words, figures or symbols in a visible form.”<sup>195</sup> The *Act* also tells us that “material form... includes any form (whether visible or not) of storage of the work.”<sup>196</sup>

We have already concluded that brand is a literary work because it is composed of “words, figures or symbols.”<sup>197</sup> That conclusion also means brand is writing when these “words, figures or symbols”<sup>198</sup> appear in a “visible form.”<sup>199</sup> Brand may nevertheless be stored on the hard drive of a computer. So, the *Copyright Act* indicates that the semiotician possesses personal property from the time a brand is first visible or stored on a computer.

When considering “writing”<sup>200</sup> and “material form”<sup>201</sup> it is interesting to note that the *Copyright Act* includes a definition of manuscript. The definition suggests a manuscript is a document<sup>202</sup> of any form that embodies the “literary, dramatic or musical work.”<sup>203</sup> This is interesting because it acknowledges that literary and musical works can both be embodied in the same form. In other words the *Copyright Act* seems to acknowledge the Derridean perspective of arche-writing “anterior to all expressions.”<sup>204</sup>

## Conclusion

By teasing out “the hidden antinomies in our language and thought”<sup>205</sup> we have identified issues regarding brand and the law. The major issue is one of identity. That is to say, the identity of brand is theoretically recognised by the *Copyright Act*, but yet to be established through case law. Our deconstruction of the *Act* shows us that copyright subsists<sup>206</sup> in brand because brand is an original literary compilation and crafted<sup>207</sup> artistic work,<sup>208</sup> materialised<sup>209</sup> by an author.<sup>210</sup> As a consequence there is no need to persist with the current fragmentation of brand whereby certain parts are

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<sup>195</sup> *Id.*, s10(1)

<sup>196</sup> *Ibid*

<sup>197</sup> *Ibid*

<sup>198</sup> *Ibid*

<sup>199</sup> *Ibid*

<sup>200</sup> *Id.*, s22(1)

<sup>201</sup> *Ibid*

<sup>202</sup> For definition of document see *Evidence Act 1995* (Cth), Dictionary Part 1

<sup>203</sup> *Copyright Act 1968* (Cth), s10(1)

<sup>204</sup> Coward, Harold G, “*Speech Versus Writing*” In *Derrida and Bhartrhari*, Philosophy East and West, Vol. 41, No. 2 (1991), pp. 141-162 at [http://ccbs.ntu.edu.tw/FULLTEXT/JR-PHIL/ew95321.htm#\[22\]](http://ccbs.ntu.edu.tw/FULLTEXT/JR-PHIL/ew95321.htm#[22]) - 061008

<sup>205</sup> Balkin, Jack, *Deconstructive Practice and Legal Theory*, Originally published at 96 Yale L.J. 743 (1987), <http://www.yale.edu/lawweb/jbalkin/articles/decprac1.htm> - 060912

<sup>206</sup> *Id.*, s8

<sup>207</sup> *Copyright Act 1968* (Cth), s10(1)

<sup>208</sup> *Id.*, s32. For a definition of literary, dramatic, and artistic work see s10(1).

<sup>209</sup> *Id.*, s22(1)

<sup>210</sup> Nygh, Peter & Butt, Peter (eds), *Butterworths Australian Legal Dictionary* (North Ryde : Butterworths, 1997), 97

automatically covered by copyright, while others, for a price, may be registered as trade marks.<sup>211</sup> This fragmentation is unwarranted and unjust given our understanding of signs, bricolage, narrative, arch-writing, and identity.

In the context of brand and the *Copyright Act* it is hoped that this paper stimulates debate. What is more, it is hoped that this paper helps semioticians and the like to be recognised as authors. This point is critical because of the necessity for authors to assign<sup>212</sup> copyright to organisations serious about their brand management.

Interbrand,<sup>213</sup> the first company to ever publicly put a value on a brand, suggests a brand is typically amongst a corporation's most valuable assets.<sup>214</sup> They further state "assessing a brand's value is critical to marketing investments and allows management to plan and assess the impact of their strategies."<sup>215</sup> Based on the perspectives of Interbrand it is easy to foresee a time when fighting to establish and protect a corporate identity is considered a business must. At that time, and I suspect it may be soon, perhaps a Board of Directors may launch a case to establish the fact that brands developed by their highly paid, professional creatives are protected by the *Copyright Act*. After all, such protection is automatic for the accidental 'noise' of unemployed garage bands. Certainly, for this author, it is hard to comprehend a policy that condones this inequity.

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<sup>211</sup> *Of Brand and Law - Part II* deals with the *Trade Marks Act 1995* (Cth)

<sup>212</sup> *Copyright Act 1968* (Cth), s196

<sup>213</sup> [www.interbrand.com/home.asp](http://www.interbrand.com/home.asp) - 061023

<sup>214</sup> [www.interbrand.com/services.asp?services=1002](http://www.interbrand.com/services.asp?services=1002) - 061023

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