FAIR WHEELING AND DEALING

Does Channel 7's multi million dollar payment for exclusive Olympic broadcast rights in Australia guarantee it absolute exclusivity? Geoff Dilworth examines how the fair dealing provisions of the Copyright Act allow some legitimate erosion of exclusive rights by competitors.

FAIR DEALING – AN OVERVIEW

Under sections 40-43 of the *Copyright Act 1968* ('Act') there are four categories of fair dealing, namely research and study; criticism or review; reporting of news; and the giving of professional advice.

Why have these fair dealing sections in the Act? One view expressed in relation to the fair use provisions of the United States *Copyright Act* was: -

> *"Its origins lie in judge made attempts to moderate the harsh or inequitable impact of the copyright law on sometimes unforeseen circumstances. Fair use permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."*

The Australian Copyright Council expresses it thus: -

> *"The Fair Dealing defences.... have traditionally been formulated to ensure that the advancement of knowledge and the creation of new works is not stifled by excessive fetters on the ability of creators to draw on the work of those that preceded them."*

The concept of fair dealing is not simply a creature of statute and existed well before the introduction of the Act: -

> *"It is perhaps as old as copyright protection itself. The modern statutes merely codify the concept which has evolved through a large and wide ranging body of case law."*

In order to place fair dealing in the context of copyright infringement, it is useful to consider some infringement basics. If copyright subsists in a published news article, then an unauthorised reproduction of the literary work (or a substantial part of it) will amount to an actionable infringement. Another element of infringement is that the infringer must have copied, either directly or indirectly, the original article of publication. Copyright is not like patent law which bestows monopoly rights. If it were possible to reproduce the article without copying the original article, that is by independent mental and physical process, then there of course will be no infringement. An example would be if two journalists obtained independently of each other the same interview from the same source and the result was similar in its expression.

IS IT NEWS AND IS IT FAIR?

If your purpose is news reporting and your treatment of the copyright owner's product is fair then you, the infringing journalist or publisher, will be able to use the copyright owner's product with impunity provided in the case of news reporting in a newspaper, magazine or periodical it is sufficiently acknowledged.

In Beloff v Pressdram Limited the plaintiff journalist was asked whether what she had written was news and she replied: -

> *"It is news in the sense that everything I write is news. The fact of my writing this article is news; and of my writing any other article in the Observer is news."*

The interesting aspect of this examination by the court is that it is not the "Maudling-Hoffman" affair which was being examined for its newsworthiness but the fact that the Observer's political correspondent had written about the affair that made it news. Mr Foot of Private Eye in evidence said: -

> *"It was a very significant development that the political correspondent (of the Observer Newspaper) had written a large article on this... Such an article is not far off editorial comment and is therefore very important."*

The plaintiff's counsel conceded that the fact that the Observer had published an article on the affair was important. The judge acknowledged that the plaintiff also conceded that the article in Private Eye was for the purposes of reporting current events within the meaning of the legislation.

Ungoed Thomas J also noted that it seemed that it was common practice in the press to receive and use leaked confidential information, and this practice did in fact occur at the Observer itself. Nevertheless, the judge was of the view that the leaking of the memorandum and its publication were clearly unjustifiable and in his view constituted a dealing which was not fair within the statute.

Whilst one could view the judge's finding as somewhat authoritative, that is, that the publication of leaked information is prima facie an unfair dealing, the judge was also of the view that this case was essentially: -

> *"an action for breach of confidence under the guise of an action for infringement of copyright - an action springing from breach of confidence but framed in breach of copyright."*

The reason for the judge's comments could be because of his view, as confirmed by the plaintiff's counsel, that the case would never have been brought to court except that the memorandum published by Private Eye disclosed a confidential source of the Observer.

In Commonwealth of Australia v John Fairfax and Sons Limited, Mason J followed Beloff in finding that the publication of leaked government documents, which could not without the leak have been published at all, was not a "fair dealing" of previously unpublished works.

In Associated Newspapers v News Group the defendant newspaper had merely presented the correspondence to the

public and there had been little or no criticism or review. This case involved the Daily Mail Newspaper, which had obtained exclusive rights to a series of letters between the late Duke and Duchess of Windsor. A series of these letters was printed in the newspaper. The defendants, who were the owners of the rival Sun Newspaper, printed one of the letters and a portion of another letter in the Sun.

In Fairfax and Associated Newspapers, the publication of the verbatim quotations of the government documents and the royal love letters respectively was held not to be a fair dealing for the purposes of criticism and review. Yet there is an argument, based on free speech principles, that it is the verbatim quotations themselves that are intrinsically newsworthy under the news reporting category.

In Associated Newspapers, Walton J stated that the media is not prevented by copyright restrictions from publishing information or facts about an event in the so called public interest. His Honour said the media are simply not able to publish using the precise words which somebody else has used. This of course is the classic application of the idea/expression dichotomy to the complaint that copyright restricts free speech. Whilst it is true that news per se, like information, facts and ideas, is not able to be protected or restricted by copyright, it is here that the dividing line between ideas and their expression becomes blurred when examining the verbatim comments of political figures.

Walton J then went on to examine whether what the Sun printed could be labelled "reporting current events" within the meaning of the UK legislation. It is clear that the Australian equivalent of the relevant section is not restricted to current events and is therefore able to be read more widely. Walton J stressed the word "current" and stated that whilst the death of the duchess was a current event, the actual content of the letters was not. Apparently the content of the letters made it clear that the duchess wanted them to be published but again the judge did not see this as a current event. His Honour did give some examples of where non-current events might come within the section, but only if the historical material was reasonably necessary to deal with current events. In Beloff, Ungoed-Thomas J by contrast appeared to accept that "current events" and "news" were synonymous.

On the question of fairness, Walton J followed traditional lines in finding that it is not a fair dealing for a trade rival to take copyright material and use it for their own benefit.

Dealing with the amount of the copyright material used, His Honour noted that a substantial portion of the letters was reproduced, but stated that the whole of the letters could well have been reproduced as an illustration of a theme other than the mere content of the letters. He gave as an example an article commenting on the instruction in grammar given to monarchs of the House of Windsor.

This view is certainly a little less restrictive than that of Whitford J in the earlier case of IPT Publications and others v Time Out Ltd and others where it was held that:-

> *"The Defendants could not avail themselves of the defence of fair dealing either under Section 6 (2) (criticism or review) or under Section 6 (3) (reporting of current events) of the Act. These defences were intended to protect reviewers or commentators who wished to quote part of the copyrighted work to illustrate such review or comment..."*

Whitford J went on to observe that:-

> *"Once it is established that the whole or a substantial part of the copyrighted work has been produced the defences under Section 6 (2 and 3) are unlikely to succeed."*

In Express Newspapers PLC v News (UK) Limited a journalist from the Daily Express (owned by the plaintiff) obtained an interview with a Miss Pamela Bourdes on an airline flight. Miss Bourdes was in 1989 enjoying notoriety for her alleged liaisons with public figures. The Daily Express published the "exclusive interview" and on the same day "Today" (owned by the defendant) published an article based on the Daily Express story and reciting verbatim the comments by Miss Bourdes in the Daily Express story. The defendant counterclaimed against the Plaintiff arising out of a quite separate story alleging that the defendant had done to the plaintiff just what the plaintiff had alleged the defendant had done in the Pamela Bourdes incident. The court held that a party could not plead two inconsistent cases and by way of obiter dicta the judge said that the case was more to do with journalistic ethics rather than a genuine commercial dispute.

In De Garis and Moore v Neville Jeffress Pidler Pty Limited (The Journalist's Case) the plaintiff alleged that the defendant's news clipping service had infringed their copyright in articles published in daily newspapers. The copyright material reproduced by the defendant was clipped then photocopied from the plaintiff's newspapers and the input by Neville Jeffress Pidler was fairly limited. Beaumont J in the Federal Court had no difficulty in holding that section 41 of the Act did not apply.

Importantly, His Honour held that "news reporting" under the Act was not confined to current events and was to be interpreted by means of a dictionary definition.

With respect to fairness generally, Beaumont J held that reasonable proportions of the copyright material only could be taken. As the defendant took the whole of the plaintiff's work without commentary, it was not fair.

COMMERCIAL PURPOSE - NO FAIR USE?

In The Journalist's Case the court considered the commercial purpose of the news clipping service and cited recent U.S. cases as authority for the preposition that a commercial purpose militates quite strongly against a finding of fair use. In the authoritative 1994 decision of the U.S. Supreme Court in Universal City Studios v Sony, it was held that copying onto a video tape cassette for commercial purposes was presumptively unfair. This view was in the course of finding that home video taping for time-shift purposes was a private non commercial activity.

However, the view that commerciality taints any fair use has recently come under attack by the U.S. Supreme Court in Campbell v Acuff-Rose Music Inc where the court examined in detail the fair use provisions in the U.S. *Copyright Act*.

Fair use in the United States is governed by section 107 of the US Act. The purposes are similar to those in Australia and include criticism, comment and news reporting. Section 107 sets out certain factors which shall be considered, namely:-

1. purpose and character of use (including whether of a commercial nature);
2. nature of copyright work;
3. relative amount used; and
4. effect upon potential market.

These factors correspond almost identically with section 40 (2) (a) to (e) of the Australian Act.

The claim in Accuff-Rose was brought by the composers of the song "Oh Pretty Woman" against 2 live crew, a rap group, who produced a parody of the song entitled "Pretty Woman". The Court of Appeals had relied upon the Sony decision and found that the commercial nature of the parody meant that it was not fair within section 107. However, on appeal, the Supreme Court said that by "...giving dispositive weight to the commercial nature of the parody the Court of Appeals erred" and further stated:-

> *"The Court of Appeal's elevation of one sentence from Sony to a per se rule runs as much counter to Sony itself as to the long common law tradition of fair use adjudication".*

WORLD CUP SOCCER

Whilst the U.S. Supreme Court in Sony in 1994 upheld the presumption of no fair use where commercial gain was a motive, in the United Kingdom in an earlier case the same commercial factor was examined. In British Broadcasting Corporation v British Satellite Broadcasting Limited the issue involved unauthorised use of copyright material by trade rivals in the news reporting industry. The BBC paid just under 1 million pounds for the exclusive right to broadcast the 1990 World Cup football tournament played in Italy. BSB in its sportsdesk program played excerpts taken from the BBC broadcasts. The excerpts varied in length and were played within 24 hours of the game. The excerpts concentrated on goals scored and near misses and were played by way of an introduction and also in slow motion.

There was no doubt as to the copyright in the BBC broadcast or that BSB infringed BBC's broadcasts in this manner. BSB relied on the fair dealing provisions in the United Kingdom Copyright Act, namely section 30(2) which referred to "reporting current events" (not the reporting of news as in the Australian equivalent). The BBC relied on Beloff and Johnstone v Bernard Jones Publications Limited as authority for the proposition that the dealing must be fair for the approved purpose, namely reporting current events, and not for any other purpose. The BBC submitted that the other purpose of BSB was to compete with the BBC for a sports audience and to build up a sports audience more quickly using BBC material. Scott J conceded that BSB was endeavouring to produce programs that would be attractive to viewers and went on to say:-

> *"But if a program is a genuine reporting of current events, it is, in my opinion, absurd to say that an endeavour to make the program more attractive is an oblique motive ...."*

and

> *"... the fact that the other broadcaster is a commercial rival of the copyright owner does not "ipso facto" take the case outside fair dealing. It is a factor, and perhaps in some cases a very weighty factor, to be taken into account into considering whether there has been fair dealing, but it is no more than a factor."*

Scott J had no difficulty in finding that the BBC's programs were current events for the purposes of section 30(2):-

> *"The Sportsdesk program seemed to me to be genuine news reports, albeit confined to news of a sporting character."*

Whilst there are few Australian cases on this point, it is reasonable to assume that an Australian court would take a similar view given the similar legislative provisions in both statutes and the wider definition of 'news' in the Australian Act.

FIRST PUBLICATION RIGHTS

The copyright holder's right to first publication is considered to be a factor in fair dealing decisions both in the U.K. and in the U.S.. In Harper and Rowe v Nation Enterprises the U.S. Supreme Court held 6:3 that the Nation magazine had not dealt fairly with the unpublished written memoirs of former president Gerald Ford. Ford had contracted with Harper and Rowe to publish his memoirs and Harper and Rowe had contracted with Time Magazine for the pre publication of excerpts of the book. Nation Magazine had obtained an unauthorised copy of the book and hurriedly prepared a summary of the book consisting of verbatim quotes which it freely admitted was designed to "scoop" the Time article. The memoirs were politically of interest as they contained former President Ford's account of Watergate and his pardon of former President Richard Nixon. The majority believed that the right to first publication was essentially a commercial right in that the right lies primarily in exclusivity. The court went further and said:-

> *"The obvious benefit to author and public alike of assuring authors the leisure to develop free of expropriation outweighs any short term "news value" to be gained from premature publication of the author's expression."*

Under the "purpose" factor of section 107 of the U.S. Act the majority believed that the news value in the Nation article was the fact that it was scooped:-

> *"(Nation) .... actively sought to exploit the headline value of its infringement, making a "news event" out of it's unauthorised first publication of a noted figure's copyrighted expression."*

The majority in Nation stressed the commerciality of the infringement in that:-

> *"The user (Nation) stands to profit from exploitation of the copyrighted material without paying the customary price".*

Nation was decided by the Supreme Court after Sony and before Accuff-Rose. As a

result of the latter decision, the factor of commerciality may not be as much a determining factor as it was for the Supreme Court in both the Sony and Nation cases.

In Nation, the U.S. Supreme Court found that the investment of money and resources into creating a work should not be forfeited by pre-emption of the right to first publication. Lloyd and Mayeda comment that this majority view hints that the decision may have been different if there was a possibility of the information not being released to the public in the near future.

Mason J in Fairfax held that a dealing with an unpublished work under section 41 of the Act was an important factor in deciding whether such dealing was fair. The statement by the majority in Nation certainly followed that same reasoning. Subsequent cases in the United States also support the same argument, but in New Era Publications International v Henry Holt and Co the judge said:-

> *"... I do not think that Harper and Rowe ... leads to the inevitable conclusion that all copying from unpublished work is per se infringement."*

Indeed this issue is important to the media as well as to historians and biographers who argue that they should be able to use such unpublished material belonging to public figures as a fair dealing. The argument is that the media should not have to pay those public figures for the use of the previously unpublished material. The argument is presumably strongest in the United States where the First Amendment is a factor. In Nation the court held that there was no reason to expand the fair use doctrine to what amounted to a public figure exception to copyright.

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Kenny's pal is missing

ASTRA has had the unpleasant task of explaining the disappearance of Cartman to his pal, Kenny and to his mates at the Comedy Channel.

Cartman's disappearance seems to have followed a rather big night at the CAMLA Dinner held at the Australian Museum. Nobody was keeping a close eye on Cartman's behaviour and during the final rounds of trivia, it appears that he left the premises arm-in-arm with an unidentified new-found "friend".

Cartman may well have presented himself as an available long-term companion, however his true friends at the Comedy Channel are most upset and unamused by his disappearance and seek your assistance in convincing Cartman to return to his real home.

If anyone knows the whereabouts of Cartman could they please contact Debra Richards or Emma McDonald at ASTRA on 9200 1494 or 0407 389 639. We are only concerned for his safe return. He will be grounded for disappearing, but his "friend" will only be thanked for being a responsible adult.