

signal processing techniques. These techniques include MIMO (multiple input, multiple output), space-time coding, multi-carrier CDMA (code division multiple access), OFDM (orthogonal frequency division multiple access), adaptive radio links and SDR (software defined radio). These techniques are at the limits of modern communications science. Without them 4G cannot exist as the data rates would not come within the bandwidth restrictions. CWC is heavily involved in research for these techniques, and establishing a multi-million euro 4G lab to investigate key enabling technologies.

Ultra Wideband is a radio technology suitable for ad-hoc networks. It utilises a bandwidth of as much as 7.5 GHz (between 3.1 GHz and 10.6 GHz). This is 1500 times the bandwidth of 3G systems. The potential data rates are enormous. CWC recently measured data rates of up to 3Gb/s over short distances. Ultra Wideband also offers the ability to trade very high data rates over short distance systems, for lower data rates over longer distance systems.

CWC is completely funded by research

projects and is involved in 22 projects this year. With a budget of 5 million euros for this year, CWC has 90 staff, mostly PhD students, post-doc academics and professors. There is a significant number of foreign academics and students, from places such as China, US, Sweden, Sudan, Romania, Serbia, Spain, Japan, Brazil and Italy.

CWC projects include military research for the development of things such as communications systems for fighter jets and ships. CWC also conducts research projects with Finnish companies like Nokia and Elektrobit. TEKES, the Finnish government funding body, provides 60% of research and development funding for such projects on the condition that a minimum of 2 other companies put up the balance of 40%. The results of the research and development are jointly owned by the companies and the university.

CWC is also involved in joint research projects with other European universities and companies that are generously supported through EU funding. The project model is collaborative research involving a

number of competitor companies rather than individual competitive research. For example, CWC is involved in a project called PULSERS which augments 802.11 technology (such as WiFi and Bluetooth) with Ultra Wideband technology. The project partners include companies such as IBM Switzerland, Phillips UK, ST Microelectronics Switzerland, Motorola France and Telefonica Spain, and universities from Rome, Dresden, Karlsruhe and Finland. The project's budget is 45 million euros, with the EU providing roughly 50%.

Further abroad, the CWC also has a number of projects with companies in countries such as the USA and Israel, and universities including Yokohama and Osaka in Japan and MIT in the United States.

Yes, it is cold here. Today it reached -12 degrees Celsius!

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The Plot Thickens Formats, Sequels and Spinoffs After Goggomobil

Therese Catanzariti Oppermann reviews the recent Telstra Corporation Ltd v Royal & Sun Alliance Insurance Australia Limited decision.

The film and television industry trades in intangible rights. Format rights and the right to produce sequels, prequels, spin-offs and remakes are notorious smoke and mirrors. Demands are made, deals negotiated, letters exchanged, contracts executed, money paid. If anyone asks any questions someone might mutter something about Jaws,¹ whilst others might mumble in reply about a New Zealand clap-o-meter.² The recent matter of *Telstra Corporation Ltd v Royal & Sun Alliance Insurance Australia Limited* [2003] FCA 786 (*Goggomobil*) offers rare insight into this area of law.

AUSTRALIAN PRACTICE

Investors in Australian film often require the producer to assign to them the "ancillary rights" in the film, and to provide the investors a chain of title opinion letter from a lawyer confirming that the producer owns the ancillary rights. The ancillary rights include the right to produce or authorise the production of sequels, prequels, spin-offs and remakes.

Investors maintain that the revenue generated by formats, as well as sequel, spin-off and remake rights are a product of their investment in the initial film. The investors reason that the assignment

of such rights to them serves to protect their right to share in the further revenue.

GOGGOMOBIL CASE BACKGROUND

In the *Goggomobil* case, the Federal Court was asked to consider whether certain advertisements for Royal and Sun Alliance trading as Shannons Insurance (*Shannons*) infringed Telstra's rights in a Telstra Yellow Pages (*Yellow Pages*) television advertisement. *Shannons'* advertisements were created by Wilson and Everard (*Wilson*) and aired on both television and radio. Telstra alleged that

Shannons appropriated the format, story and character that appeared in the Yellow Pages advertisement.

Telstra's claim was in copyright and passing off. Copyright offers a number of advantages for protecting format rights, and the right to produce sequels, prequels, remakes and spin-offs:

- Copyright is discrete personal property and may be assigned, licensed or transmitted by will.³ In contrast, passing off requires reputation which is difficult to define, and may only be assigned as part of the assignment of a business as a going concern.
- Copyright arises on creation and continues for a statutorily defined period. However, passing off depends on promotion and trading, which may take significant time and effort to develop and maintain.
- A series of international treaties such as the *Berne Convention* and the *WTO TRIPS Agreement* protect copyright, making it conducive to trans-national transactions. In contrast, passing off is protected by piecemeal national laws, and depends on the laws of the particular jurisdiction.
- The *Copyright Act* provides a number of statutory evidentiary presumptions about authorship, ownership and year of creation.⁴ Passing off does not offer such presumptions and the claimant bears the evidentiary burden.

Despite such advantages, Merkel J rejected Telstra's copyright claim, but accepted Telstra's passing off claim. However, close analysis of the judgment reveals that the case may be able to be distinguished as it turned on a few key facts.

Telstra's Advertisement

Telstra's Yellow Pages advertisement ("**Yellow Pages Advertisement**") featured a character with a thick Scottish accent who owns a rare and distinctive car called a Goggomobil. After trying unsuccessfully to fix the car in the driveway, the character goes to the house and searches the Yellow Pages. He rings a number of people,

who apparently do not know what he is talking about. The character grows increasingly frustrated and resorts to spelling the name of the car - G-O-G-G-O - in his Scottish accent. Finally, the character finds someone who knows what he is talking about. The advertisement fades to the Yellow Pages logo.

Shannons

Shannons, a specialist in insurance for vintage, veteran or classic motor vehicles, engaged Wilson to create an advertising campaign.

Yellow Pages was approached to reproduce parts of the Yellow Pages Advertisement. Yellow Pages asserted copyright subsisted in their advertisement, and refused permission. Shannons instructed Wilson to create a script that did not reproduce the Yellow Pages Advertisement.

Shannon's Advertisement

The first Shannons advertisement (**First Shannons Advertisement**) featured the same actor playing the same character, with the same make of car, albeit a different model and different colour. The character is in the driveway, not the house, and makes calls from his mobile rather than from a landline. There is no Yellow Pages in sight. However, he is again forced to call a number of places and spell the name of the car before finally calling someone who knows what he is talking about.

Shannons' marketing consultant informed Telstra that they had rescripted Shannons' advertisement to avoid any reproduction of the Telstra advertisement. Telstra replied that the advertisement conveyed an association with, endorsement or affiliation by Telstra.

Shannons made some minor changes to the script⁵, and further changes were made during production.

Shannons then produced a second advertisement (**Second Shannons Advertisement**) which featured the same actor playing the same character and the same make of car, albeit a different model and different colour. This time the voice-over and the character engage in a dialogue about Shannons' insurance policy. The

character speaks with a Scottish accent but does not make any phone calls and does not say or spell the car name. However, he does pronounce the "O" in the phone number the same way as he pronounced "O" in Goggomobil.

Shannons also produced four radio advertisements (**Shannons Radio Advertisements**) in the form of a dialogue between a voice and the character providing information about Shannons' insurance policy. Again, the character does not say the car name or spell out the car name, but he does pronounce the O's in the phone number in the same distinctive way and all involved the use of a telephone.

COPYRIGHT ANALYSIS

In Australia, copyright and other subject matter are protected by the *Copyright Act 1968 (Cth)* (**Copyright Act**).

The *Copyright Act* deems that copyright in a cinematograph film is infringed if a person who is not the owner of copyright does or authorises the doing of any act comprised in the copyright without the copyright owner's licence,^{6,7} including making a copy of the film, causing the film to be seen in public or communicating the film to the public.

However, Telstra did not claim infringement of copyright in the cinematograph film which was the Yellow Pages Advertisement itself. Instead, Telstra contended that Shannons had infringed copyright in the Yellow Pages Advertisement's script ("**Yellow Pages Script**") as a literary work

Literary work

Even though a film may not infringe copyright in the original film, the film may infringe copyright in the literary work i.e., the script of the original film. However, Telstra faced significant difficulties in making out its claim. The Yellow Pages Script that it relied on was the synopsis of the Yellow Pages Advertisement and key features of the Yellow Pages Advertisement did not appear in the script as they were improvised in the course of production. In short, the Yellow Pages Script differed markedly from the Yellow Pages Advertisement.

It appears that Telstra did not rely on Yellow Pages Advertisement's shooting script. While it may not have been written down in words, it still had material form, as it was fixated in the Yellow Pages Advertisement itself.

Ultimately, Merkel J assumed without deciding that the synopsis reflected the original script, and assumed copyright subsisted in the Yellow Pages Script.

Merkel J's analysis suggests that scriptwriters who favour vague outlines, advertising agencies who use concept documents, and directors who workshop the script during rehearsal or allow improvisation during production,⁸ may limit copyright protection.

Dramatic work

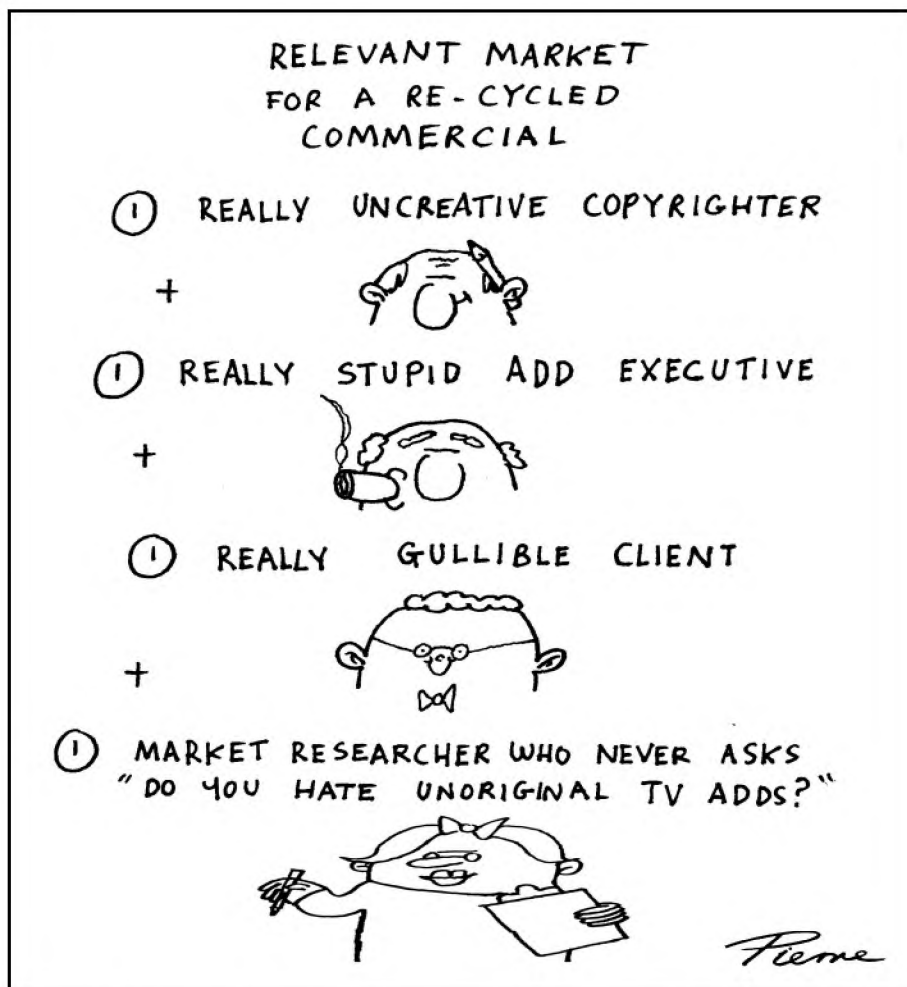
Telstra also argued that Shannons infringed copyright in Telstra's dramatic work. Dramatic work is defined to include a scenario or script for a cinematograph film.⁹

Usually, the claimant is relying on the script as the dramatic work, however, Telstra asserted that the Yellow Pages Advertisement was the dramatic work and did not rely on the Yellow Pages Script as the dramatic work. Telstra argued that the definition of dramatic work is inclusive and is not limited to scripts, but could include a series of dramatic events making up the story.

Structuralism and literary theory describe the story as the dramatic structure, the skeleton of the action, the roles and functions of the particular characters. The plot is the way that the story is told, the arrangement of the scenes.¹⁰

Merkel J analysed the advertisement and said that the series of dramatic events included.

- oil leaking from a yellow Goggomobil sitting on a jack in the enthusiast's driveway;
- the enthusiast's wife looking concerned as he flicks through a publication to find the phone number of someone who can help him repair his Goggomobil;



- the enthusiast's frustration at not being able to find someone who understands what a Goggomobil is;
- the need for the enthusiast to slowly repeat the word "Goggomobil" and later to spell it out slowly to try to communicate his problem;
- the enthusiast's elation when he finds a supplier who not only knows what the Goggomobil is but who can differentiate between particular models of Goggomobils;
- the happiness of the enthusiast with the outcome.

Merkel's analysis suggests that the elements of the copyright work are events rather than words, and the arrangement of the events is the plot. If Telstra was successful, it would have heralded the beginning of some form of protection of format rights and remake rights.

However, Merkel J said this claim had significant difficulties, as it was premised on the proposition that copyright can subsist notwithstanding

that the work has not been reduced to material form.¹¹ It may be that Telstra's submission did not go that far – the dramatic work could have been fixed in the film itself, which was a distinct copyright from the dramatic work.

Infringement

Even if copyright subsists in the script of the original film, or in the series of dramatic events, the issue is to what extent that script or the series of dramatic events is infringed when someone takes the format of the original, or produces a sequel, prequel, remake or spin-off of the original.

Copyright in a literary work and in a dramatic work is the exclusive right to:

- reproduce the work in a material form,
- publish the work,
- perform the work in public,
- communicate the work to the public,
- make an adaptation of the work, or
- do any of the foregoing in relation to adaptation of the work.¹²

Importantly, “reproduction in material form” is not the same thing as “making a copy”. A reproduction in material form is reproduction in any form of storage (whether visible or not) from which the work or adaptation, or a substantial part of the work or adaptation, can be reproduced.¹³

Unlike a cinematograph film, copyright in a literary work or a dramatic work may be infringed even if it is not an exact facsimile copy. A dramatic work is deemed to have been reproduced in material form if:

- a cinematograph film is made of the dramatic work, and the copy of the film is deemed to be the reproduction;¹⁴
- it has been converted into or from a digital or other electronic machine-readable form.¹⁵

In addition, it is not necessary to reproduce the complete dramatic work to infringe copyright in the dramatic work – it is sufficient if a *substantial part* of the work has been reproduced.¹⁶

There is no definition of substantial part in the *Copyright Act*. It is a question of fact to be determined having regard to all the circumstances.¹⁷ The phrase “substantial part” refers to the quality of what is taken, rather than the quantity,¹⁸ the essential or material features of a work.¹⁹ In *Autodesk Inc v Dyason (No 2)*, Mason CJ considered that the essential or material features of the work could be ascertained by considering the originality of the part allegedly taken.²⁰ Copyright is not limited to the precise words, and may extend to the situations and incidents and the way in which ideas are presented.²¹ There may be no copyright in an idea. However, there comes a point where an unprotectible idea becomes so detailed and expressed that it becomes protectible.

When considering the idea-expression dichotomy in *Zeccola v Universal City Studios Inc*²² the Full Federal Court noted that copyright subsists in the combination of situations, events and scenes which constitute the particular working out or expression of the idea or theme and not in the idea or theme itself, observing that;

“Originality lies in the association, grouping and arrangement of those incidents and characters in such a manner that presents a new concept or a novel arrangement of those events and characters.”

The Court also recognised that while numerous factors such as sequences and dialogue are to be considered, they are to be looked at “*only as part of a process of forming an overall impression as to the originality*” of the subject matter when determining “*the extent of similarity or dissimilarity and whether or not there was copying.*”²³

In *Telstra*, Merkel J cited *Zeccola* and repeated that copyright does not protect ideas or concepts but only the form in which they are expressed, and noted that it was not sufficient for *Telstra* to establish that Shannons reproduced the ideas, concepts or themes of the Yellow Pages Script or the series of dramatic events in the Yellow Pages Advertisement.

Telstra only alleged that First Shannons Advertisement infringed *Telstra*’s copyright. Merkel J said compared *Telstra*’s copyright works to the Shannons First Advertisement and concluded:

- The Yellow Pages Script bore little resemblance to First Shannons Advertisement and that Shannons’ copying in First Shannons Advertisement related to the concepts or themes employed in the Yellow Pages Script rather than the *expression* of the concept or themes.
- While there was a significant resemblance in the concept or theme of *Telstra*’s series of dramatic events in the Yellow Pages Advertisement and First Shannons Advertisement, these resemblances related to the ideas and concepts rather than their expression, and were not sufficient to constitute the reproduction. The dialogue and setting or structure were not substantially the same, thus falling well short of substantial reproduction.

Merkel J’s analysis suggests that even if Merkel J accepted that copyright would subsist in a series of dramatic

events, a film would only infringe such copyright if it was a faithful reproduction of the story and the plot of the series of dramatic events. Therefore, a film that faithfully followed the format’s events and sequence of events or a remake may infringe, but a sequel or spin-off which only takes some of the characters or some of the events, or which plays the events out in a different sequence, may not infringe.

Merkel J noted that First Shannons Advertisement “conjured up” or “evoked” the Yellow Pages Advertisement and its ideas and concepts, without reproducing it. This suggests that a sequel or spin-off which merely includes some of the characters or some of the events of the original, or a film which is “inspired by” another may not infringe copyright.

PASSING OFF ANALYSIS

Passing off protects the business and goodwill of a person. It does not protect the goods and services themselves.²⁴

To bring an action in passing off, the claimant must establish:

- reputation in the relevant market in the relevant indicia;
- another person’s use of the relevant indicia constitutes a misrepresentation that the other’s product is the original, or is otherwise associated, connected or endorsed by the claimant;
- damage or a likelihood of damage to the claimant’s reputation, business or goodwill.²⁵

Reputation

The claimant may have a reputation even if the relevant market is not aware of the particular person. It is sufficient that the relevant market associate the particular product with a particular source.²⁶ The claimant must demonstrate that it had a reputation in the relevant market in the relevant indicia.

In *Telstra*, Merkel J considered the history of the Yellow Pages Advertisement, including its extensive televising for 6 years, reference to the Yellow Pages Advertisement in a

marketing textbook, and expert evidence about the advertisement's success and popularity. Merkel J also considered Shannons' own market research including Shannons' focus group reports which stated that the focus groups recognised the Yellow Pages Advertisement as an *"historic, outstanding, iconic, talked about and much loved Yellow Pages [television commercial]"* and Wilson's report which referred to the Yellow Pages Advertisement as *"immensely popular and ..one of the best remembered on Australian TV"*.

Merkel J held that Telstra's indicia of reputation were the character and the car in a problem solving context.

Misrepresentation

The claimant must prove that another's use of the relevant indicia constitutes a misrepresentation that the other's product or service is the original, or is otherwise associated, connected or endorsed by the claimant. The suggestion may be vague and imprecise – it is sufficient if some form of association or connection is conveyed notwithstanding that the precise form of the association or connection may not be articulated or identified.²⁷

However, it is not sufficient to prove that a person has merely misappropriated a person's reputation. Passing off requires a misrepresentation. Thus, not every use of a person's indicia of reputation will be passing off. It is not passing off:

- to engage in ambush marketing – for example, if a person merely uses the occasion of an event to advertise a product or service and does not represent that they are associated with the event;²⁸
- if the use of the indicia of reputation is qualified, for example if there are effective disclaimers;²⁹
- if the indicia of reputation has been parodied or so corrupted, so it is clear that there is no association or connection between the owner and the person using the indicia of reputation.

If it is inherently unlikely. For example, in the *Tabasco* case,³⁰ Lehane J

considered that it was unlikely that a person seeking an exhibition design service in Australia would wonder whether a company called "Tabasco Design" based in Ultimo had a commercial connection of some sort with the US based maker of the spicy and hot sauce called "Tabasco".

In *Telstra*, Merkel J said that the issue was whether Shannons' advertisements represented that Telstra is in some way associated or connected with Shannons, its advertisements or products. Merkel J said that the only substantial case of misrepresentation was the First Shannons Advertisement.

Merkel J referred to a type of advertising called "secondary" or "suggestive" brand advertising³¹ which he described as advertising which conjures up a brand without referring to it, where images are so established and well-known that they create an impression of association or connection to a primary brand notwithstanding that the name of the brand does not appear, so that the image gives a ready impression of association or connection with the primary brand³².

Merkel J went on to suggest that if the indicia of reputation are secondary brands, then any use of the indicia may represent an association or connection, and may be passing off. In particular, he said;³³

"The adoption of such characters, symbols or images by another advertiser will usually raise the question of whether that advertiser is representing it, or its goods or services, have an affiliation, association or connection they do not have"

Merkel J then considered Shannons' market research which stated that the focus group participants associated the character and the car in a problem solving context with Telstra to determine that Telstra's indicia of reputation were a secondary brand. Merkel J held that the overall impression created by showing First Shannons Advertisement upon a significant portion of ordinary and reasonable members of the relevant class of the public was that Telstra was in some way

associated or connected with First Shannons Advertisement or locating the services offered in the advertisement.

However, Merkel J's judgment does not mean that it is sufficient to establish that the indicia of reputation are secondary brands. Merkel J makes it clear that whether the use of the character and the car to solve a problem would result in secondary or suggestive brand advertising that would constitute a misrepresentation *depended on the manner and context in which that subject matter was employed.*³⁴ Merkel J noted:

- The *combination* of the character, car and the problem solving context in the First Advertisement was passing off. However, when the problem solving context was removed in Second Shannons Advertisement and the Shannons Radio Advertisements it was no longer passing off. The combination was critical.
- Shannons had deliberately retained all of the features of the Telstra advertisement that made the Telstra advertisement famous, popular and instantly recognisable, because Shannons needed to do this to achieve its objective of instant recognition and response. There was no parody or corruption of the original.
- There was no express disclaimer. Merkel J said that even the appearance of the Shannons logo was not inconsistent with the advertisement being a co-branded advertisement, with the advertisement also being a Telstra advertisement or one with which Telstra was associated or connected. Merkel J pointed out that Telstra's customers are all businesses so there would be nothing anomalous about Telstra advertising its services together with one of its customers.

Merkel J's analysis suggests that faithful reproduction of a format, or a faithful remake may constitute passing off. In addition, a sequel or spin-off which takes a key combination of characters, context and pivotal events may also constitute passing off.

However, the analysis also indicates that a number of things may not constitute passing off in particular:

- a more original sequel or spin-off which takes characters and places them in a different context, or only takes some characters, or some scenarios, may not constitute passing off;
- a format, remake, sequel or spin-off which is a parody or corruption of the original, or which features prominent disclaimers may not necessarily constitute passing off;
- the mere use of a character outside its context may not constitute passing off. Indeed, Merkel J held that the Shannons Second Advertisement and the Shannons Radio advertisements which featured the character did not constitute passing off and accepted that Telstra did not have proprietary rights or goodwill in the character. This is a significant departure from recent Australian cases³⁵ involving fictional characters where the courts held that using the character constituted passing off, notwithstanding that it was placed in a different context.

Relevant market

The definition of the relevant market is one key way of distinguishing *Telstra* from cases involving format rights, and the right to produce sequels, prequels, spin-offs, and remakes.

The relevant market is the customers or prospective customers of the product or service.³⁶ In *Telstra*, the relevant market was the viewing public. Merkel J noted that the Shannons' advertisement targeted motor enthusiasts, but was shown on commercial television to a large segment of the viewing public over a number of timeslots and in the course of a variety of programs.

In contrast, the relevant market for formats, sequels, spin-offs and remakes is not the general public. The relevant market are agents, film packagers, film financiers and investors, film and television producers, sales agents,

distributors, and broadcasters. These are the creator's customers and potential customers, with whom the creator will deal and to whom they will try and sell their rights.

Merkel J accepted that the result may have been different if it was a different market. In particular, Merkel J said that Shannons' most compelling argument is the absence of Telstra branding and the presence of Shannons' branding. Merkel J said although it may be contended that the viewing public consisted solely of persons who had insured with Shannons or were aware of its specialised products who might have regarded it as a clever use of the Yellow Pages advertisement in an advertisement by Shannons insurance, such an argument is predicated upon the role of Shannons as a "special" vehicle insurer.³⁷

The producer's relevant market is a more sophisticated market than the general public. The relevant market is much more likely to be alive to disclaimers and rights management issues.

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1 *Zeccola v Universal City Studios Inc* (1982) 46 ALR 189

2 *Green v Broadcasting Corporation of New Zealand* [1988] 2 NZLR 490

3 s196 Copyright Act

4 Part V, Division 4 of the *Copyright Act* – Proof of Facts in Civil Actions

5 Changes included spelling of Goggomobil, saying "Two G's, no E" rather than spelling out, and stopping after saying the first G a number of times.

6 s101 Copyright Act

7 s86 Copyright Act

8 consider for example the British director Mike Leigh ("Secrets and Lies") and the Australian director Bill Bennett ("Kiss or Kill") who rely on improvisation during production

9 s10 "dramatic work" *Copyright Act*

10 Rebikoff, S "Restructuring Test for Copyright Infringement in Relation to Literary and Dramatic Plots" (2001) 25 MULR 340

11 This would be a brave submission - copyright started as a publisher's prerogative and material form is a cornerstone of copyright law - see Finkelstein J's decision at first instance in *Telstra v Desktop Marketing Pty Ltd* (2001) 181 ALR 134. There would also be significant practical evidentiary difficulties if copyright subsisted in

dramatic work without material form – the court would have no definitive copy of the work to compare the infringing work to.

12 s31(1) *Copyright Act*

13 s10 "material form" *Copyright Act*

14 s21(1) *Copyright Act*

15 s21(1A) *Copyright Act*

16 s14(1)(b) *Copyright Act*

17 *Blackie & Sons Ltd v The Lothian Book Publishing Co Pty Ltd* (1921) 29 CLR 396

18 *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273

19 *Autodesk Inc v Dyason* [No.2] (1993) 176 CLR 300 at 305

20 *ibid*

21 *Corelli v Gray* (1913) 30 TLR 116 at 117. per MR Cozens-Hardy; Rees v Melville (1914) MacG Cop Cas 168, 174 (Swinfen Eady LJ)

22 *Zeccola* supra n2

23 *ibid*

24 *ConAgra Inc v McCain Foods (Aust) Pty Ltd* (1992) 23 IPR 193 per Lockhart J

25 *ConAgra* supra n46

26 *William Edge & Sons v William Nicholls & Sons Pty Ltd* [1911] AC 693

27 *Mark Foys Pty Ltd v TVSN (Pacific) Ltd* (2000) 104 FCR 61

28 *South Australian Brewing Company Pty Ltd v Carlton & United Breweries Ltd* [2001] FCA 994 (unreported, 13/7/2001, Mansfield J), see also Kendall C and Curthoys J "Running rings around the sponsors: *The Sydney Olympics and Ambush Marketing*" (2000) 11 AIPJ 5

29 *Twentieth Century Fox Film Corporation v South Australia Brewing Co Ltd* (1996) 66 FCR 451

30 *McIlhenny Co v Blue Yonder Holdings Pty Ltd* 1997 39 IPR 187 ; see further McCabe B "When Trading Off Reputation of Others is Not Misleading or Deceptive" (1998) 6 TPLJ 51

31 see analysis of "secondary branding" in *Anheuser-Busch Inc v Budejovicky Budvar* (2002) 56 IPR 182 (Budweiser beer), *Arsenal Football Club v Reed* (2001) 54 IPR 623 (Arsenal soccer emblem)

32 para 57

33 para 57

34 para 69 and 74

35 *Pacific Dunlop Pty Ltd v Hogan* (Crocodile Dundee) (1989) 23 FCR 553, *Twentieth Century Fox v South Australian Brewing* (Duff Beer) (1996) 66 FCR 451, *Childrens Television Workshop v Woolworths* (Sesame Street) (1981) NSWLR 273, see also Morgan "Mmmmm Beeeer - Character Merchandising in Australia & Duff Beer Case" (1997) 10 IPLB

36 *ConAgra* supra n43

37 para 77