

AUSTRALIAN RESPONSE
ALAI 2011 – Dublin Congress (30 June- 1 July 2011)

Questionnaire-Boundaries and Interfaces

1. The subject Matter of Protection – Works

1.1 How do your legislators or caselaw define a literary work? In particular, how is speech protected? Is ex tempore speech a literary work and what are the conditions for protection?

A ‘literary work’ is defined inclusively, rather than exhaustively, in s 10(1) of the *Copyright Act 1968* (Cth) as including:

- ‘(a) a table or compilation, expressed in words, figures or symbols; and
- (b) computer program or compilation of computer programs.’

A ‘computer program’ is defined in the same section as meaning ‘a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result.’

Generally, a ‘literary work’ should convey information (whether by way of instruction or for pleasure) by means of text, figures or symbols (*Elwood Clothing Ltd v Cotton on Clothing Pty Ltd* (2008) 76 IPR 83; [2008] FCA 447 affirmed on appeal 80 IPR 566, especially at [46], holding that designs on t-shirts and swing tags (see Appendix) were artistic works, not literary works). There also appears to be a requirement of sufficient substantiality (see 1.2 below).

Caselaw establishes that a literary work does not have to meet any requirement of literary merit (*University of London Press Ltd v University Tutorial Ltd* [1016] 2 Ch 601), so the term encompasses utilitarian material, such as a business letter, instruction manual, examination paper or accounting form, as well as a novel or poem. Recent caselaw emphasises the need for a literary work to be created by a human author; it does not include computer-generated material (for example regional telephone directories created from a central database utilising carefully designed computer software that extracts and arranges the entries required for each directory: *Telstra Corporation Ltd v Phone Directories Company Pty Ltd* [2010] FCAFC 149).

Ex tempore speech is capable of falling within the definition of literary work. However, protection as a copyright work (subsistence) would also require other elements to be established, that is originality, material form and connecting factor (s 32). Originality is not defined in the Copyright Act but essentially means that the work emanates from the author and has not been copied. It is the originality of the expression in a material form that is seen as the key feature of originality (*IceTV v Nine Network Australia* (2009) 239 CLR 458). Material form would require the ex tempore speech to be captured in some form (‘... any form (whether visible or not) of storage of the work ... or a substantial part of the work ... (whether or not the work ... or a substantial part of the work ... can be reproduced)’; s 10(1)). A literary work may also take the form of sounds embodied in an article or thing (for example when a sound recording is made of the speech). When this occurs, under s 22(2) the literary work is ‘deemed to have been reduced to a material form and to have been so reduced at the time when those sounds were embodied in the article or thing.’ The necessary connecting factor is satisfied if the author is a qualified person (Australian citizen or resident: s 32(4)) at the time of making or first publication or Australia is the place of first publication. Protection is also available under the regulations relating to works of international origin granted recognition under treaties to which Australia is a party (s 184), notably the *Berne Convention for the Protection of Literary and Artistic Works* (Australia has been a signatory to this in its own right since 1928) and the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (Australia has been a member of the WTO since 1995).

If the ex tempore speech is first captured in a material form through the efforts of a third party, depending on the facts, issues of authorship and ownership may arise. For example, Australian

caselaw refers to the English case of *Walter v Lane* [1900] AC 539, in the context of originality. The case involved verbatim reports made of the speeches of Lord Rosebery, a former British prime minister. The speeches were taken down in shorthand by reporters and edited transcripts published. The question of authorship was contested by the reporters and the newspaper to which they had assigned rights; Lord Rosebery was not involved in the litigation. There was a finding in favour of authorship in the reporters. However, it is unlikely the same finding of authorship would apply to reporters using modern recording devices (Ricketson and Creswell [7.190]). Where the ex tempore speech is first captured by a third party in a sound recording, cinematograph film or broadcast, there may be issues arising from the additional copyright ownership of these other types of copyright material. The work will still be separately protected as a literary work but the rights of the owner of the other subject matter (sound recording, film, broadcast) will also need to be taken into account if this is the only source of the ex tempore material. The owners of the sound recording, film and broadcast copyrights would also have to take into account the rights of the owner of the literary work copyright, if they sought to exploit their material in ways implicating the exclusive rights in the literary work.

1.2 For short works – headlines in a newspaper, phrases (including slogans), book titles, for example; are these covered by statute? Does case-law provide guidance on protection? Is this issue dealt with by de minimis rules?

In Australia it has been considered that single words, phrases and book titles are not generally protected as a literary work (as opposed to being part of a larger copyright work such as a book or poem). English authorities were relied upon for this position, for example *Exxon Corporation v Exxon Insurance Consultants International Ltd* [1982] 1 Ch 119, *Francis Day and Hunter Ltd v Twentieth Century Fox Corp Ltd* [1940] AC 112 and *Sinanide v La Maison Kosmeo* (1928) 44 TLR 674. The Australian commentary on this matter refers to various grounds for the failure of such material to attract copyright protection: lack of originality, lack of capacity of the material to inform or instruct and a de minimis principle (the material is too insubstantial) (see for example Ricketson and Creswell [7.220]). However, despite these findings in particular cases, no court appears to have gone so far as to state that such material will never attract copyright protection.

This issue has been of considerable recent interest in Australia.

In *Elwood Clothing Pty Ltd v Cotton On Clothing Pty Ltd* (2008) 80 IPR 566, a case about a t-shirt design comprising a layout of numbers and text, the Full Federal Court held that the designs did not amount to a literary work as their meaning was obscure and subservient to the artistic elements (Ricketson and Creswell, Digest).

The case of *Victoria v Pacific Technologies (Australia) Pty Ltd (No 2)* [2009] FCA 737, concerned the phrase ‘Help-Help-Driver-in-Danger-Call-Police-Ph.000’ The words were used in a taxi driver duress alarm system enabling display of the message on the outside of the vehicle. The system was the subject of an Australian patent application. The dispute arose when a reference was brought by the patent applicant to the Copyright Tribunal of Australia, in relation to the use of the phrase by the State of Victoria. The tribunal application was adjourned to allow Victoria to seek the Federal Court’s determination of whether the phrase constituted a literary work under the Copyright Act. The phrase was held to be too insubstantial to constitute a literary work; it did nothing more than ‘state an idea.’ Relying on *Autodesk Ink v Dyason* (1922) 22 IPR 163, the court considered that in respect of the phrase, the expression was ‘inseparable from its function’ and therefore formed ‘part of the idea’ and was not protectable under copyright law.

In *Primary Health Care Ltd v Commissioner of Taxation* [2010] FCA 419 the material in question was medical records comprising various entries (as to medical conditions, medications and data relating to blood pressure etc) made over time by different doctors relating to the patients of a medical practice. The question of whether there was copyright in the medical records was a preliminary issue raised in the context of the sale of the medical practices and related tax deductions. Except for one

instance where there was an identified author and a ‘continuous narrative showing independent intellectual effort expended in expression,’ the Federal Court was unable to find the records constituted literary works. The court limited its findings in respect of literary work copyright to the patient records before it and stated this finding did not imply ‘that copyright can never subsist in medical or dental records.’

The most recent Australian authority on this issue is *Fairfax Media Publications Pty Ltd v Reed International Books Australia Pty Ltd* [2010] FCA 984. The Federal Court held that newspaper headlines from the Fairfax press, copied and used in conjunction with abstracts made of the associated articles by Reed International, did not amount to literary works as they were too insubstantial to qualify for this category of copyright work. The court saw each headline functioning as the title of each article. Justice Bennett in the Federal court went further to support her finding that the headlines did not constitute literary works, by relying on the public interest:

‘The need to identify a work by its name is a reason for the exclusion of titles from copyright protection in the public interest. A proper citation of a newspaper article requires not only reference to the name of the newspaper but also reproduction of the headline... If titles were subject to copyright protection, conventional bibliographic references to an article would infringe.

... In my view, to afford published headlines, as a class, copyright protection as literary works would tip the balance too far against the interest of the public in the freedom to refer or be referred to articles by their headlines.’

However, like many courts before it, the Federal Court stated that it was not going so far as to find that no title would ever constitute a literary work. A further claim by Fairfax that a newspaper article in combination with its heading, constituted a single literary work with joint authorship in the article’s author and the newspaper sub-editor who supplied the heading, was rejected on the basis that there was insufficient evidence brought by Fairfax to support this contention. Rather the evidence pointed to the creation of the articles and headlines as distinct and separate tasks undertaken by different authors. This was to be contrasted with the collaborative creation of the compilations of articles in an issue of the newspaper (articles and their headlines but not other material such as photographs and advertisements) and the particular issue of the newspaper itself, which were both potentially compilations and works of joint authorship but not infringed by the uses made of the headlines by Reed International.

The above discussion is limited to protection of these types of material under the category of literary work. There is also potential copyright protection for a single word or phrase in stylised form, if it constitutes an artistic work, for example a drawing. An example of this is a graphic bar in an advertising brochure with the words ‘Opera in the Outback’ discussed in *Lott v JBW & Friends Pty Ltd* (2000) 76 SASR 105; [2000] AIPC 91-538.

There is also potential protection for such material outside copyright law but still within the intellectual property law sphere. In Australia, under certain conditions, single words, titles or phrases may attract protection under trade mark law, the tort of passing off and under trade practices and consumer legislation (note: from 1 January 2011, instead of the *Trade Practices Act 1974* (Cth), see now the *Competition and Consumer Act 2010* (Cth), under a new national framework for consumer protection (the Australian Consumer Law)).

1.3. How does your legislation define an artistic work? A closed and defined list of works? Open-ended definitions for greater flexibility?

The Copyright Act s 10(1) contains an exhaustive definition of ‘artistic work’, providing that this means:

- ‘(a) a painting, sculpture, drawing, engraving or photograph, whether the work is of artistic quality or not;
- (b) a building or 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 paragraphs (a) or (b)

but does not include a circuit layout within the meaning of the *Circuit Layouts Act 1989*.

‘[B]uilding’ is further defined in s 10(1) as including ‘a structure of any kind’, ‘drawing’ as including ‘a diagram, map, chart or plan,’ ‘engraving’ as including ‘an etching, lithograph, product of photogravure, wood-cut, print or similar work, not being a photograph’, ‘photograph’ as meaning ‘a product of photography or of a process similar to photography, other than an article or thing in which visual images forming part of a cinematograph film have been embodied, and includes a product of xerography’ and ‘sculpture’ as including ‘a cast or model made for the purposes of sculpture.’

While the definition of artistic work provides a closed (exhaustive) list of the types of artistic works, there is some flexibility within each of the three paragraphs. So for instance, a painting has been held to include a Chinese calligraphy logo used as the masthead for a Chinese newspaper (*Melbourne Chinese Press Pty Ltd v Australian Chinese Newspapers Pty Ltd* (2004) 63 IPR 38) and a stylised representation of the letter R was held to be a drawing (*Roland Corporation v Lorenzo & Sons Pty Ltd* (1992) 22 IPR 245). The term ‘drawing’ encompasses an extensive range of technical drawings, for example of boats, houses and the parts of a solar hot water system.

‘[W]ork of artistic craftsmanship’, however, receives no definition in the Copyright Act. This category, referred to in paragraph (c) of the definition of artistic work, also stands in contrast to the other two paragraphs which do not require the artistic work to be of artistic quality. While the definition of artistic work formerly provided that works of artistic craftsmanship were constituted by works other than those appearing in paragraphs (a) and (b), an amendment in 2003 now provides that it may include the works in those earlier paragraphs. The early cases distinguished the two elements of the term (‘artistic’ and ‘craftsmanship’) and determined the question of aesthetic quality on the basis of the intention of the author. However, the term is now regarded as a composite phrase to be construed as a whole: *Burge v Swarbrick* (2007) 232 CLR 336. The High Court has applied an objective test to determine whether the material is a work of artistic craftsmanship (*Burge v Swarbrick*). Evidence of the creator’s intention is admissible but it is to be treated with caution (*Burge v Swarbrick*). More critical is the scope for design choices within functional constraints that are available to the author of the alleged work.

Items potentially protected under this category include tapestry and glassware, but instances where claimants have been successful are few and far between, as these have typically involved three-dimensional articles very close to the dividing line between utility and art. One particular instance, however, where protection was afforded under this category was a case involving machine-knitted fabric with a multi-coloured design and complex stitch structure creating three-dimensional effects (*Coogi Australia Pty Ltd v Hysport International Pty Ltd* (1998) 41 IPR 593).

1.4 Have court decisions provided any rulings on the availability of copyright protection for contemporary forms or types of artistic expression e.g. surveillance art, installations, collage, performance art, conceptual art?

If the concept of performance art extends to large public spectacles, then the case of *Nine Network Australia Pty Ltd v Australian Broadcasting Corp* [1999] FCA 1864 is worth mentioning. It was an interlocutory application concerning a dispute over the planned broadcast of the 2000 New Year’s Eve fireworks in Sydney. The case involved questions (undecided) about the potential for protection of the fireworks display, comprising a script of the order of the fireworks, the music timed to accompany the fireworks, illumination of lights on the Sydney Harbour Bridge and the operation of barges carrying lanterns, as a dramatic work.

As discussed below, in the case of *Telstra Corporation Ltd v Phone Directories Company Pty Ltd* [2010] FCAFC 149, the court denied copyright protection to local telephone directories (white and yellow pages publications) essentially on the ground that the works were created not by human authors using independent intellectual effort to express the work in a material form but were generated

by computer software. The implication from the case is that computer-generated art, where the material is essentially created by the software and is not under the control of the artist using the software merely as a tool to facilitate the creation of the work, will not attract copyright protection. A contrast can be made with a case like *Elwood Clothing Pty Ltd v Cotton On Clothing Pty Ltd* (2008) 80 IPR 566, where a t-shirt designer used a computer program (Paintbox) to create the design, rather than traditional implements like a paintbrush or pencil.

Although not included within the Copyright Act itself, and in contrast to it, the resale royalty legislation recently introduced in Australia does take account of contemporary forms of artistic expression. Section 7(1) of the *Resale Royalty Right for Visual Artists Act 2009* (Cth) defines an artwork as follows:

- (1) An artwork is an original work of visual art that is either:
 - (a) created by the artist or artists; or
 - (b) produced under the authority of the artist or artists.
- (2) Works of visual art include, but are not limited to, the following:
 - (a) artists' books;
 - (b) batiks;
 - (c) carvings;
 - (d) ceramics;
 - (e) collages;
 - (f) digital artworks;
 - (g) drawings;
 - (h) engravings;
 - (i) fine art jewellery;
 - (j) glassware;
 - (k) installations;
 - (l) lithographs;
 - (m) multimedia artworks;
 - (n) paintings;
 - (o) photographs;
 - (p) pictures;
 - (q) prints;
 - (r) sculptures;
 - (s) tapestries;
 - (t) video artworks;
 - (u) weavings;
 - (v) any other things prescribed by the regulations.'

The explanatory memorandum to the bill states that the list 'reflects the examples listed in the EU [resale royalty] Directive but also covers other forms of original visual arts or crafts ...' The explanatory memorandum also states that the definition 'would also capture new media art forms such as digital and video art, and would be expected to cover new forms of visual artistic expression as they evolve in the future' (Explanatory Memorandum, Clause 7). Section 9 expressly excludes from the operation of the resale royalty legislation the commercial resale of:

- (a) a building, or a drawing, plan or model of a building; or
- (b) a circuit layout within the meaning of the *Circuit Layouts Act 1989*; or
- (c) a manuscript (in whatever form) of a literary, dramatic or musical work.'

1.5. Are there any judicial decisions/academic opinions on other forms of expression, whether protected or not (e.g. perfumes)?

Australian commentary on other forms of expression includes:

- McDonald I 'Current and Emerging Copyright Issues for the Visual Arts' (2001) 19(2) *Copyright Reporter* 32-60
- Gilchrist K 'Art and the Blindness of Copyright: Recognising Contemporary Art Practices in Anglo-Australian Copyright Law (2004) 22(2) *Copyright Reporter* 37-58.

1.6 Is there case-law [and commentary] related to the protection of sporting events (soccer game, marathon race, ice skating competition, etc)? What is the basis of the protection? (dramatic or choreographic work, other?)

In 1937, an Australian case, *Victoria Park Racing and Recreation Grounds Company Ltd v Taylor* (1937) 58 CLR 479, held that the organiser of horse races held at a race course, was unable to obtain an injunction to prevent radio broadcasts of race commentary that originated from an observation platform erected on land adjacent to the racecourse, by relying on intellectual property law. The High Court was unable to find any property right in a 'spectacle' under the then established categories of intellectual property law. Australian law did not at that time, and still does not, provide for a general right against unfair competition.

Furthermore, an expert committee (the Spicer Committee) in 1959 rejected the notion that there should be copyright protection for spectacles or public events, although in line with the proposal of the 1952 Gregory Committee in the UK, it recommended that there should be separate copyright protection for broadcasters in their transmissions (this is to be found in Part IV of the Copyright Act). '[A] performance of a sporting activity' is specifically excluded from the performances in which performer's protection or performer's moral rights may be protected (s 248A(2)(c) which flows through into the moral rights provisions by reason of the definition of 'performance' in s 189).

Although a sporting event per se is not protected by copyright, copyright may subsist in a range of material generated at the event. Images of the event captured by way of photography, film or television broadcast will be protected as part of those copyright works and other subject matter. Sounds of the event, recorded by way of sound recording or radio broadcast, will similarly fall within the protection given to these types of copyright material. Written commentary reporting on the sports events will generally be protected as a literary work.

The issue of copyright in aspects of sporting events has been raised in Australia recently in two areas.

One has involved interlocutory applications relating to the inclusion in subscription television broadcasts of excerpts from broadcasts of sports events. In *Thoroughvision Pty Ltd v Sky Channel Pty* [2005] FCA 1527, excerpts (mostly race finishes) were taken from the earlier free-to-air broadcast of certain horse races. The free-to-air broadcasts had been licensed by the organisers of the races. Another case involved the use of excerpts from broadcasts of National Rugby League football matches by a subscription cable organisation in circumstances where another company had been exclusively licensed for internet communication and mobile phone (*Telstra Corporation Pty Ltd v Premier Media Group Pty Ltd* [2007] FCA 568). The cases were not about protecting the sporting event as such. They raised issues arising from the licensing of the event, such as how much of a broadcast constitutes a substantial part for infringement purposes, the operation of 'long established conventions' in the television industry permitting some reuse of another television organisation's broadcasts as part of news reporting and whether the free fair dealing provisions in the Copyright Act in relation to the reporting of news, apply to excuse the use. However, as these were interlocutory applications, the issues were not fully canvassed.

The other context in which copyright in aspects of sports events has been an issue, is the attempt to use contract terms to limit the subsequent use of copyright material created by journalists (print, internet and photo) accredited to attend and report on the event. So, for instance, in 2008 the Australian Football League (AFL) in its accreditation agreement with journalists, sought to limit the supply by journalists to third parties of photographic images of AFL events (to ensure they were not on-sold to non-news reporting agencies). Cricket Australia (CA) had in the previous year, offered some media organisations an accreditation contract that included a term providing for all intellectual property rights in images taken at match venues to be owned by CA. A Senate inquiry was prompted by these events and it reported in 2009 (Senate Standing Committee on Environment, Communications and the Arts, *The Reporting of Sports News and the Emergence of Digital Media*

Report (2009)). The committee recommended industry participants come to negotiated arrangements to ensure the protection of the public interest in journalists, including those reporting on the new digital platforms, having access in order to report on sports news. This was preferable to an industry code of practice being imposed on them through the framework for industry codes under the *Trade Practices Act 1974* (Cth) (now the *Competition and Consumer Act 2010* (Cth)). A number of key media and sports organisations subsequently adopted a voluntary code of practice (*Code of Practice for Sports News Reporting (Text, photography and data)*), commencing 30 March 2010: Media release by Senator Stephen Conroy, Minister for Broadband, Communications and the Digital Economy, 30 March 2010).

There is legislative protection in Australia for certain aspects of particular international sporting events such as the Olympic Games and the Commonwealth Games, but not for the events as such. So for instance, the *Olympic Insignia Protection Act 1987* (Cth) grants copyright and design law protection to the Olympic symbol (the five interlocking rings) in favour of the Australian Olympic Committee and protects certain other artistic works and designs and the Olympic motto ('citius, altius, fortius'). More targeted legislation has applied to particular Olympic and Commonwealth Games staged in Australia, for example by the *Sydney 2000 Games (Indicia & Images) Protection Act 1996* (Cth) and the *Olympic Arrangements Act 2000* (NSW) and the *Melbourne 2006 Commonwealth Games (Indicia and Images) Protection Act 2005* (Cth). This latter form of protection comes under the rubric of ambush marketing. It is intended to limit advertisers who do not support the event by way of official sponsorship, seeking to falsely claim association with it.

2. Creativity – the Originality Standard

2.1 How does your legislation [and caselaw] set out the requisite originality standard?

For copyright to subsist, a literary, dramatic, musical or artistic work must be an original work (s 32). There is no express requirement for originality in relation to subject matter other than works, that is a sound recording, cinematograph film, television or sound broadcast or published edition (ss 89-92).

Originality is not defined in the Copyright Act but essentially means that the work emanates from the author and has not been copied. There is no requirement for inventiveness of the idea expressed in the copyright work (*University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601). Until recent times, it was generally considered that Australian law had a relatively low threshold for originality, amounting to what some referred to as 'sweat of the brow.' This was particularly so in relation to factual compilations such as telephone directories (*Desktop Marketing Systems Pty Ltd v Telstra Corp Ltd* (2002) 55 IPR 1).

In *IceTV v Nine Network Australia* (2009) 239 CLR 458, the High Court indicated its readiness to reassess the issue of originality. The case involved the reproduction of television programme title and time information from weekly television programme schedules, in an electronic programme guide. The parties had not contested originality for subsistence purposes and so the case was primarily concerned with infringement but the court nevertheless addressed the issue of originality in relation to what constituted the reproduction of a 'substantial part' of the protected work for the purposes of infringement. Unfortunately there were two groups of judges in that case, providing slightly different approaches to the issue. Some of the judges saw the originality of the expression in a material form as the key feature of originality.

More recently, the Full Federal Court, in *Telstra Corporation Ltd v Phone Directories Company Pty Ltd* [2010] FCAFC 149, has denied copyright protection to regional telephone directories (white and yellow pages publications) essentially on the ground that the works were created not by human authors but were generated by computer software. In three separate judgments the various members of the court referred to the requirement that a literary work be created by a human author who contributes some intellectual effort directed at expressing the work in a material form. The court's discussion indicated the test for originality remained the long established test, of a work emanating

from the author and not being copied from another. However, the court considered that following the High Court decision in the *IceTV* case, mere sweat of the brow compilations would not satisfy this test. Evidence of time and effort expended in making the compilation (sweat of the brow) would still be relevant in establishing the second part of the test, that is, that the work had not been copied from another but it would not be sufficient alone to satisfy the need for the work to have emanated from an author, in the sense of intellectual effort having been directed at expressing the work in a material form.

In both the *IceTV* and *Phone Directories* cases the courts have referred to legislative reform as one possible response to the consequence that these kinds of fact-based productions may no longer receive protection as original literary works, citing overseas approaches, such as in the European database directive (*Directive 96/9/EC of the European Parliament and of the Council on the Legal Protection of Databases*), and the British provisions relating to computer-generated works (*Copyright, Designs and Patents Act 1988* (UK) s 9(3)).

2.2 Does the legislation or case-law suggest a different test of originality is imposed for different kinds of work?

The originality requirement is the same for all categories of work. Originality is not expressly required for subject matter other than works.

2.3 For compilations / collections is the standard identical to that provided for in relation to works? [For common law jurisdictions there are significant differences on the standard e.g. IceTV (Aust) CCH (Canada). How has "sweat of the brow" been treated in recent case-law?]

Until recently, Australia was considered to be a jurisdiction where 'sweat of the brow' originality was sufficient for literary work compilations. This is no longer so. Evidence of sweat of the brow may help to establish the work was not copied, but for originality to be established the work must emanate from the author, that is, independent intellectual effort must be used in expressing the work in a material form. See the cases discussed in 2.1 above.

2.4 Does your legislation/case law recognise copyright protection for collections such as television listings, yellow pages/white pages telephone directories? If yes, what is protected (headings, content, or both?) If not, why is protection denied (e.g. spin-off theory, competition law considerations)?

A 'compilation' falls within the definition of literary work in s 10(1) of the Copyright Act and is potentially protected by copyright. However, in order to constitute an 'original literary work' there must be a human author and computer-generated compilations will not be protected (*Telstra Corporation Ltd v Phone Directories Company Pty Ltd*).

Where such works are protected, it is the elements of compilation that will be protected, that is the selection and arrangement of material, rather than the material itself. In the absence of sufficient originality in the expression of these elements, there will be no protection, as, for example, where simple alphabetical ordering has been adopted.

In *Fairfax Media Publications Pty Ltd v Reed International Books Australia Pty Ltd* [2010] FCA 984 the Federal Court held that certain newspaper headlines from the Fairfax press, copied and used in conjunction with abstracts made of the associated articles by Reed International, did not amount to literary works, as they were too insubstantial to qualify for this category of copyright work. It did not find that all titles or headlines are incapable of constituting a literary work. A claim that each newspaper article in combination with its heading, constituted a single literary work with joint authorship in the article's author and the newspaper sub-editor who supplied the heading, was rejected on the basis that there was insufficient evidence brought by Fairfax to support this contention. Rather the evidence pointed to the creation of the articles and headlines as distinct and separate tasks undertaken by different authors. The court contrasted the collaborative creation of the compilations of

articles in an issue of the newspaper (articles and their headlines but not other material such as photographs and advertisements) and the particular issue of the newspaper itself and considered that each of these were potentially protectable as compilations and works of joint authorship.

3. Achieving Access for the visually impaired

3.1 Does your national legislation provide exceptions or limitations in favour of the visually impaired? For wider categories of disabled persons? On what condition: is there a remuneration right or right to compensation?

The Copyright Act includes statutory licences for the benefit of institutions assisting persons with a print disability (Part VB, Division 3, ss 135ZN-135ZQ) and for institutions assisting persons with an intellectual disability (Part VB, Division 4, ss 135ZR-135ZT). The statutory licences provide that under certain conditions (including record keeping or a sampling system, the marking of the copy with title, author and publisher details) ‘sound recordings, Braille versions, large-print versions, photographic and electronic versions of copyright works’ may be made and communicated where this would otherwise amount to an infringement (Copyright Agency Ltd Information sheets ‘Statutory licence for institutions assisting people with a print disability’, ‘Statutory licence for institutions assisting people with an intellectual disability’, March 2009). Remuneration is payable under the licences. ‘Person with a print disability’ is defined in s 10 to mean:

- ‘(a) a person without sight; or
- (b) a person whose sight is severely impaired; or
- (c) a person unable to hold or manipulate books or to focus or move his or her eyes; or
- (d) a person with a perceptual disability.’

The declared collecting society for these licences is the Copyright Agency Ltd (‘CAL’). An example of uses made under the licence includes that by the Vision Australia Information and Library Service (VAIS) (Sullivan, *J Study on Copyright Limitations and Exceptions for the Visually Impaired*, for the World Intellectual Property Organisation (WIPO) Standing Committee on Copyright and Related Rights, SCCR/15/7, February 20, 2007, p 93-94).

Another form of remunerated statutory licence, under s 47A, allows the making of a sound broadcast of, or of an adaptation of, a published literary or dramatic work, if the broadcast is made by a person with a print disability radio licence and it is made under the licence.

There are also free use exceptions.

Pursuant to a combination of subsections (1) and (4) of s 200AB, copyright in a work or other subject matter is not infringed ‘by a use of’ the work or other subject matter where: the use is made by ‘a person with a disability that causes difficulty in reading, viewing or hearing the work or other subject-matter in a particular form or someone else [for example a friend, relative, a librarian], the use is ‘made for the purpose of the person obtaining a reproduction or copy of the work or other subject-matter in another form, or with a feature, that reduces the difficulty’, the use is ‘not made partly for the purpose of obtaining a commercial advantage or profit’, the circumstances of the use ‘amount to a special case’, the use ‘does not conflict with a normal exploitation of the work or other subject-matter’ and the use ‘does not unreasonably prejudice the legitimate interests of the owner of the copyright.’ An important limitation on the operation of the section appears in subsection (6):

- ‘Subsection (1) does not apply if, because of another provision of this Act;
- (a) the use is not an infringement of copyright; or
- (b) the use would not be an infringement of copyright assuming the conditions or requirements of that other provision were met.’

One of the two examples used to illustrate the operation of subsection (6) refers to the making of a Braille version of a published work by a body administering an institution assisting persons with a print disability under the statutory licence. This conduct, provided certain conditions were met, would mean there was no infringement (s 135ZP(2)), so s 200AB would not apply.

Section 200AA provides that the making of a record of a sound broadcast is not an infringement of the broadcast copyright if it is made 'by, or on behalf of, the body administering an institution assisting persons with an intellectual disability' and it is used 'only for the purpose' of that assistance.

3.2 What kind of works are or would be subject to limitations or exceptions? Literary works only? Works and performances fixed in sound recording? Will the visually impaired or other beneficiaries of the exceptions or limitations obtain copies of covered works directly, or only via libraries or other institutions?

The works and other subject matter covered by the licences and free exceptions vary: see above in 3.1.

3.3 Are the exceptions and limitations confined to the reproduction of the work? If making available or adaptation is possible, on what conditions?

What can be done varies according to the particular licence or exception, but generally both reproduction and communication of the copy so made are permissible under the statutory licences. See in 3.1 above.

3.4 Has your Government expressed a view on support for international initiatives (e.g. World Blind Council Treaty)?

The Federal Government has conducted stakeholder consultations in relation to the World Blind Union Proposal for a WIPO treaty for improved access for blind, visually impaired and other reading disabled persons (see for example Australian Copyright Council's 'Response to the Attorney-General's Department stakeholder consultation', November 2009). The report authors are not aware of any published statement by the Australian Government about its position on international initiatives in this area.

3.5 On an extra-legal basis, are there any market initiatives, or business practices, that your national group are aware of?

The report authors are not aware of any such initiatives or business practices.

4. Access to the Internet as a Human Right

4.1 Does your legislation/constitution/case-law define access to the Internet as a specific [or human] right?

There is no Australian legislation or case law defining access to the Internet as a human right.

4.2 Are there any specific restrictions or limitations on this right [Europe: it is not necessary to refer to ECHR but any national decisions or rulings on ECHR should be mentioned]?

Not applicable.

5. Orphan Works

5.1 Are there extant legislative provisions allowing access/use in relation to orphan works? What kinds of work are involved? Performances?

There is no specific framework provided in the Copyright Act in relation to orphan works.

There are some provisions that would apply in certain circumstances where a copyright owner is unknown or cannot be located (See McDonald, 'Some Thoughts on Orphan Works'). These include:

Section 52: The section provides a procedure by which unpublished works kept in libraries and archives may be published by way of incorporation into a new literary, dramatic or musical work. The author must have been dead for more than 50 years (s 51), a prescribed notice of the intended publication must be given and the identity of the author must not have been known to the publisher immediately before the publication. Subsequent broadcast, electronic transmission (for a fee), public performance and the making of a record of the published work are provided for under s 52(3).

Sections 54-61: The statutory licence (remunerated) for cover versions of commercially released music (music and lyrics) can be used where the copyright owner or an address for service in Australia is unknown. There is provision for public notice to be given and royalty moneys to be held in a bank account for a minimum period.

Section 219: Under this provision there is a statutory licence (remunerated) permitting reproduction for sale of works published before 1 May 1969. The reproduction must occur after the expiration of 25 years from the death of the author or 30 years if the works were in copyright at the time of commencement of the *Copyright Act 1911*. Regulations provide for public notice to be given in cases where the name and address of the copyright owner or his or her agent is unknown and in such cases, for account to be kept of copies sold.

Apart from these specific sections, other limitations and exceptions under the Copyright Act may apply. McDonald notes, '[n]early all exceptions to copyright infringement apply to orphan works.' The Australian Digital Alliance has recently argued in favour of the use of s 200AB in relation to orphan works. The section permits free use of works or other subject-matter 'for certain purposes' falling outside established exceptions and complying with the Berne Convention three step test (discussed in part above under 3) (Dawes, M 'Setting the Orphans Free' (2010) 18(4) *Australian Law Librarian*, 289).

5.2 On what conditions? Is there a remuneration right or right to compensation? Is there a court or administrative procedure to be satisfied prior to use?

See 5.1 above.

5.3 Are there proposals for the introduction of, or changes to, orphan works provisions?

The issue of orphan works is under consideration by the Australian Government but no new initiatives have been announced.

6. Graduated Response Laws or Agreements

6.1 Within the specific context of p2p filesharing of audio-visual works and sound recordings, does your national law contain laws (or proposed laws) providing for a graduated response "solution"? On what conditions? Three strikes, etc.?

Australian copyright legislation does not make provision for a graduated response/three strikes solution to p2p file sharing of audio-visual works and sound recordings.

There are limits on remedies available against carriage service providers (notice and takedown, safe harbour provisions), introduced in 2004 as part of the *Australia-United States Free Trade Agreement* (Part V, Division 2AA, ss 116A-116AJ). There is no current industry code of practice covering this area.

The Federal Court in *Roadshow Films Pty Ltd v iiNet Ltd* (No 3) (2010) 83 IPR 289 considered (obiter) that the legislation leaves the form of a repeat infringer policy up to the particular internet service provider to determine but bearing in mind that the category of activity of the carriage service provider would affect the nature of the policy. The categories of activity (A-D) range from

transmission, caching, and hosting to information location, with the legislation providing more detailed guidance in relation to the required response of the carriage service provider for some categories (B-D). In the *Roadshow* Case the court found there was a repeat infringer policy in a combination of website information, subscriber contract terms and oral evidence from the internet service provider's chief executive officer. The case is currently on appeal to the Full Federal Court.

Outside the safe harbour provisions, reliance is placed by copyright owners on the law of authorisation of copyright infringement.

There are no current proposals to introduce graduated response provisions. However, it is likely that interest groups and government are awaiting the outcome of the Full Court appeal in the iiNet litigation (an unsuccessful copyright infringement claim brought against an internet service provider by a group of film companies: *Roadshow Films Pty Ltd v iiNet Ltd* (No 3)).

Meanwhile, the government has announced its intention to conduct a Convergence Review during 2011 (reporting in the first quarter of 2012). The review will look at developments in communications and media technologies, investigating whether the regulatory framework in Australia is impeding 'continued technological change and innovation' and whether it is ensuring 'the ongoing protection of Australian content and cultural values, the adequate refection of community standards and expectations and the safeguarding of privacy and other citizens' rights' (Terms of Reference for the Convergence Review, Preamble, available at <http://www.dbcde.gov.au/convergence>). Initial public consultation on the review's terms of reference took place in December 2010 and January 2011. While the focus of the review is on telecommunications policy and regulation, the Background Paper and Draft Terms of Reference recognise the review will touch on areas of intersection with copyright law. Several copyright interests made submissions on the draft terms of reference and topic areas highlighted in these include the protection of online copyright material and the obligations of internet intermediaries. Matters relevant to part 1.6 above (the protection of sporting events and the fair dealing exception for reporting news) were also raised by some submissions as potential issues for the review.

6.2 Do such proposals include an educational aspect – enhancing awareness of intellectual property protection, as well as measures to (1) make Internet access more secure in order to prevent illegal activity; (2) – favour availability of legal services?

Not applicable.

6.3 Is there a court procedure and/ or administrative agency that oversees the proceedings or authorises interruption or termination of internet access?

Not applicable.

6.4 Is it possible to assess the effectiveness of the implementation of these measures, both as a matter of stemming piracy, and with respect to the development of legal services?

Not applicable.

6.5 Is there any case-law on the possible (own initiative) use of blocking or filtering technology by an ISP, as distinct from situations where an ISP is required by a court or administrative agency to terminate subscribers access (i.e. injunctive relief)?

The court orders made in the Kazaa litigation (*Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242) permitted the Kazaa network to continue to operate but required the system to be modified so as to include filtering mechanisms. Kazaa was given two months in which to implement filtering but an extension of time was later granted. Rather than implement filtering, Kazaa decided instead to block access to Australian users.

Filtering has been considered in the context of liability for authorisation of infringement of copyright. In *Roadshow Films Pty Ltd v iiNet Ltd* (No 3) the Federal Court referred to the two ways in which the concept of reasonable steps taken to prevent the infringement had been used and the issue of filtering in that context. One way was to argue that lack of filtering, as a reasonable step to prevent infringement, was part of the evidence of authorisation and the other was to see evidence of lack of filtering used to counter a defence of reasonable steps, the onus of proof in the two circumstances depending upon how the parties were using reasonable steps and lack of filtering.

6.6 Are there private agreements among copyright owners and internet service providers that function similarly to “3-strikes” laws?

The report authors are not aware of any private agreements in Australia between copyright owners and internet service providers functioning similarly to 3 strikes laws.

7. Private Agreements and User Generated Content (UGC)

7.1 Are there private agreements among copyright owners and hosts of UGC content sites regarding the filtering of content posted to the sites? Are there inter-industry statements of “best practices” regarding filtering? Have government authorities in your country undertaken initiatives to encourage the adoption of such accords?

The report authors are not aware of any private agreements.

Since 2007 the Federal Government has been moving to introduce a ‘cyber-safety plan.’ The plan includes a legislative requirement for internet service providers (ISPs) to use ISP-level filtering to block overseas hosted material on a list of Refused Classification-rated material maintained by the Federal communications regulator, the Australian Communications and Media Authority (ACMA), and funding for a range of cyber-safety education and awareness programmes. Implementation of the plan has been delayed until the completion of a review of the Refused Classification category under the National Classification Scheme by Federal, State and Territory Ministers (Department of Broadband, Communications and the Digital Economy, ‘Internet Service Provider (ISP) filtering’ at www.dbcde.gov.au). In June 2010 the Internet Industry Association launched a voluntary code of practice (the *icode*) intended to provide a ‘consistent approach’ for ISPs in dealing with cybersecurity (<http://www.iaa.net.au>).

7.2 How is the filtering to be accomplished?

See 7.1.

7.3 Have there been any cases concerning such agreements or “best practices”?

The report authors are not aware of any such cases.

7.4 Outside the existence of such accords, have courts themselves imposed remedies requiring measures such as “take down, stay down”?

The report authors are not aware of such action by the Australian courts.

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Appendix

(images reproduced from *Elwood Clothing Pty Ltd (ACN 079 393 696) v Cotton On Clothing Pty Ltd (ACN 052 130 462)* [2008] FCA 447 at <http://www.austlii.edu.au/au/cases/cth/FCA/2008/447.html>)



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