

Update

Media & Communications

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Royalty payable determined in “Down Under” case

In *Larrikin Music Publishing Pty Ltd v EMI Songs Australia Pty Ltd* (No 2) [2010] FCA 29, the Federal Court of Australia held that the quotation of two out of four bars of the round “Kookaburra sits in the old gum tree” (**Kookaburra**) in Men at Work’s song “Down Under” infringes the copyright in Kookaburra as it reproduces a substantial part of Kookaburra.

On 6 July 2010, in *Larrikin Music Publishing Pty Ltd v EMI Songs Australia Pty Ltd* (No 2) [2010] FCA 698, the Federal Court determined the quantum of damages payable by EMI. Justice Jacobson’s decision did not involve a determination of damages for copyright infringement, but rather damages under section 82 of the *Trade Practices Act 1974* (Cth) for misrepresentations made to collecting societies, the Australasian Performing Rights Association (**APRA**) and the Australasian Mechanical Copyright Owners Society (**AMCOS**). The misrepresentations were that the performance and mechanical reproduction of Down Under did not infringe copyright in any other work and that the composers and recording companies were entitled to the entire publisher’s and writer’s share of the income from Down Under.

Accordingly, the Court had to make an assessment of the percentage interest and any other entitlement Larrikin might have to APRA and AMCOS income. Justice Jacobson held that the appropriate percentage was to be determined by considering the hypothetical bargain that would have been struck between a copyright owner and potential licensee. This primarily involved a weighing of the qualitative and quantitative contribution of the bars of Kookaburra to Down Under, looked at as a whole.

The Federal Court held that taking a balanced view, the musical significance of the relevant bars from Kookaburra is a relatively small component of the musical elements which give Down Under its significant musical quality overall. The Court placed considerable emphasis on the difficulty in detecting the similarity of the flute riff in Down Under and the bars in Kookaburra and

the fact that the resemblance between the two works was not identified for over 20 years and was only made apparent to Larrikin by a third party.

1. Jacobson J also considered the following factors: the significance and contribution of Kookaburra to the theme and “Australian flavour” of Down Under;
2. the significance of Men at Work’s front man Colin Hay singing the words of Kookaburra in some public performances of Down Under;
3. the visual associations with Kookaburra found in the Down Under music video; and
4. expert evidence of “normal” rates of royalty payments for comparable samples in the music industry presented by each party.

Each of these considerations was found to point to the percentage interest payable being at the lowest end of the spectrum. Accordingly, the Court held that the publisher and writers of Down Under would be required to pay Larrikin 5% of their APRA and AMCOS income earned since 2002. Justice Jacobson found that the figure of 5% was an appropriate judicial remedy as figures of between 25%-50% initially put forward by Larrikin were “excessive, overreaching and unrealistic”.

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