

# Authorship, Anthems & Authorisation



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# *Telstra v PDC* [2010] FCA 44

- The Applicants have not and cannot identify who provided the necessary authorial contribution to each work.
- Even if the authors were capable of being identified, much of the contribution:
  - was not “independent intellectual effort” or “sufficient effort of a literary nature”; or
  - was anterior to the work first taking its material form; and
- The works were not original.

# Three Main Issues

- Authorship;
- Originality; and
- The s 128 statutory presumption.

## *Tele-Direct v ABI*, 154 DLR (4<sup>th</sup>) 328

- Décary J:
  - The use of the word “copyright” in the English version of the Act has obscured the fact that what the Act fundamentally seeks to protect is “le droit d’auteur”. While not defined in the Act, the word “author” conveys a sense of creativity and ingenuity.

# Authorship

- Identification of the author(s) of compilations;
- Joint authorship of compilations;
- Computer-generated works.

# Gordon J's approach

- Confusion of two concepts:
  - Determining the identity of the author(s);
  - Determining whether or not the work results from an ascertainable authorial contribution.
- The fatal flaw:
  - All Part III works must originate from authors;
  - Authors are natural persons;
  - There can be no copyright without identifying an author or authors.

# *Sands & McDougall v Robinson* (1917)

## ■ Isaacs J

- The scheme of protection ... is this: All literary works are protected if “original”. That is the only condition ... The protection is called “copyright”, and the *owner* of the copyright, whoever he may be, is the person who can enforce it. The “owner of the copyright” is then designated. *Prima facie* it is the “author”, who is referred to, not as an additional condition of copyright, but as the owner of the copyright **already fully declared**. The word “original” connotes the “authorship”, and the author is the first person considered. But the author may not be even the first owner... [*emphasis added*].

# *Waterlow v Rose* [1995]

- Slade LJ
  - A compilation is a literary work of a character all its own, and the ascertainment of authorship may raise very real difficulties. There is, I think, a real possibility ... that a compilation while entitled to copyright protection, may have no identifiable author...

# Joint authorship

- Gordon J at [333]
  - The issue is whether the Applicants, on the basis of joint authorship in the directories, have been able to identify the joint authors. This is essential for copyright to subsist in the Works. Manifestly, they have not.

# *Cala Homes v Alfred McAlpine*

- Laddie J
  - What is protected by copyright in a drawing or a literary work is more than just the skill of making marks on paper or some other medium. It is both the words or lines and the skill and effort involved in creating, selecting or gathering together the detailed concepts, data or emotions which those words or lines have fixed in some tangible form which is protected.

# Originality

- The originality threshold.
- The relevance of anterior skill & judgment.

# Was *Desktop* binding?

- *IceTV* cannot be binding on originality for purpose of subsistence as statements on subsistence are *obiter*.
- Potentially important differences between reasoning of plurality judgments in *IceTV*.
- Insofar as Gummow judgment requires identification of authors as condition of subsistence, it is wrong.

# Problems with “creativity”?

- More uncertain & subjective than “industriousness” standard.
- Can easily become “novelty” standard.

# Gordon J on “creativity”

- At [341]
- The evidence established that the “system” by which the directories are produced is designed to limit originality, not provide for it.

# S. 128

- Where, in an action brought by virtue of this Part in relation to a ... work, the last preceding section does not apply, but it is established:
  - (a) that the work was first published in Australia & was so published during the period of 70 years that ended immediately before the commencement of the calendar year in which the action was brought; &
  - (b) that a name purporting to be that of the publisher appeared on copies of the work as first published;
- then, unless the contrary is established, copyright shall be presumed to subsist in the work & the person whose name so appeared shall be presumed to have been the owner of that copyright at the time of publication.