

'Love is in the air' case: a missed opportunity to enforce moral rights in Australia

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On 24 April 2020, the Federal Court of Australia handed down a decision in the case *Boomerang Investments Pty Ltd v Padgett (Liability)* [2020] FCA 535 which concerned the copying of substantial parts of the iconic Australian pop-hit classic 'Love is in the air' by the US band, Glass Candy, and by the French airline Air France, as part of their international marketing campaign. The case is interesting from different perspectives, but especially in the way it treats moral rights of authors. While the court rejects the infringement of the right of integrity by (strangely) referring to the principle of territoriality, it at the same time provides an interesting discussion on what a prejudice to honour might have meant in this case, which seems to go beyond a traditional reputation-based approach to moral rights in Australia.



Facts

According to the facts of the case, the famous hit 'Love is in the air' was created by Australian authors Mr Harry Vanda and Mr George Young in Sydney in 1977. The members of the US duo Glass Candy, Mr Padgett and Ms Monahan, used features of 'Love is in the air' in their song 'Warm in the winter' created in 2008. In addition, the Glass Candy duo composed and published 'France is in the Air' in 2014 for use in an international marketing campaign for the French national airline Air France that took place between 2015-2018. 'France is in the Air' features both 'France is in the Air' and 'Love is in the air' as sung lyrics.

The claimants in the case (the Australian authors Mr Vanda and Mr Young, Boomerang Investments, a successor-in-title to the original publishers, and Australian collective rights management societies APRA and AMCOS) decided not to pursue the case in the US, where the initial reproduction took place, nor Europe, probably due to high costs associated with foreign litigation. Instead, they sued the defendants (Mr Padgett, Ms Monahan, Air France and Kobalt, the Australian publisher of 'Warm in the winter') in Australia.

Keeping in mind the territorial application of Australian copyright laws, the copyright infringement claims were limited accordingly. The claimants argued that both 'Warm in the winter' and 'France is in the Air' copied substantial parts from the 'Love is in the air' song and infringed Australian copyright laws by: (1) making the songs available for streaming and downloading in Australia (especially via the YouTube, iTunes, Spotify and Google Play platforms and the IDIB website); and (2), in the case of the 'France is in the Air' song, by also playing it as 'on hold' music to customers on Air France's toll-free Australian line. The claimants also argued the infringement of their moral right of integrity.

Economic rights infringement

Perram J found that substantial parts of the 'Love is in the air' song were taken. However, he established that YouTube and other platforms did not infringe copyright, since they held blanket licenses from APRA and AMCOS to make Australian music available on their platforms. This led to the conclusion that the defendants had not authorised the infringement either. On the other hand, the court found that the IDIB website, in contrast to the platforms, could not rely on a blanket license and was infringing copyright. In addition, the court also found that, by playing 'France is in the Air' as 'on hold' music for customers, Air France had infringed the right of communication of the authors. The court also found that the infringement was flagrant, which allows claimants to request additional (statutory) damages.

Moral rights infringement: the issue of territoriality

The most interesting and controversial findings in the case were on the moral rights issue. The Australian Copyright Act 1968 grants several moral rights to authors, including a right of integrity. Under s 195A(2) of the Copyright Act, this is the right not to have the work subjected to 'derogatory treatment', which means the doing of anything 'that results in a material distortion of ... or a material alteration to' the work which is 'prejudicial to the author's honour or reputation' (ss 189 and 195A(a)). The claimants argued that their right of integrity was infringed when their song was altered and used by Glass Candy and Air France in their international marketing campaign.

Perram J rejected the moral rights infringement claim on the basis that it was barred by reason of s 195AX of the Copyright Act. This article provides that acts outside Australia cannot infringe authors' moral rights. The Copyright Act 1968 states that moral rights infringement can be found when the work that was subject to derogatory treatment is also communicated to the public in Australia (s 195A(3)(d)). However, according to Perram J, in order to find infringement of the public communication right, the initial derogatory treatment should take place in Australia. When the initial derogatory treatment takes place outside Australia, further communication in Australia does not constitute an infringement of moral rights as a result of s 195AX.

This is a very strange conclusion indeed. In the case of economic rights, each economic right is treated independently. Even though the initial unauthorised reproduction of the parts of 'Love is in the air' took place in the US, this did not preclude the finding of infringement of the public communication right when the work was communicated to Australian audiences (e.g. via the IDIB website or for customers on hold). Economic rights, like moral rights, are subject to the territoriality principle, even if this territoriality principle is not explicitly stated in the Act. The territoriality principle is recognized via international copyright treaties (see e.g. art 5(2) of the *Berne Convention*), of which Australia is a member. The explicit restatement of the territorial scope of moral rights under s 195AX thus does not add any new limitation if compared with economic rights. It is therefore unclear why the court adopted such a restrictive view towards moral rights, while adopting a broader approach in relation to the economic rights of authors.

Prejudice to the author's honour

On the other hand, after denying infringement of moral rights, Perram J continued analysing whether a moral rights infringement would have occurred, had it not been barred by s 195AX. Here he made another interesting finding. He suggested that the distortion of the work that occurred would probably not be prejudicial to the authors' reputation, but would be prejudicial to their honour instead. The reputation of the authors has arguably not been prejudiced, since listeners would merely see the use of the segments from 'Love is in the air' in the Air France marketing campaign as a commercial exploitation of a song. On the other hand, honour, which the judge defines as "personally held set of high-minded principles" had arguably been prejudiced. The court argued that the authors were very proud of their song and found it shocking to see it altered in this way, thus leading to the prejudice to their honour.

This analysis is interesting. First, there are few decisions where courts would try to meaningfully distinguish and define the concepts of reputation and honour. These concepts are often used as synonyms, as defining the concept of honour has been difficult, both for lawyers and academics (see e.g. this [article](#) by Tania Cheng-Davies). Second, keeping in mind the unclear meaning of honour, it is interesting to see that the court not only made an attempt to define it, but actually relied on it and found that a particular use prejudiced the authors' honour.

In Australia, similar to the UK, moral rights had for a long time been protected by defamation, passing off and other common law rules outside copyright law. They heavily rely on the concept of reputation. Moral rights were introduced in the Australian Copyright Act only in 2000, and there are still few cases that define the scope of these rights. It is therefore interesting and exciting to see the courts try to go beyond the traditional concepts of reputation and harm to reputation, and to extend moral rights by including the concept of honour in the discussion. If the infringement of moral rights had not been rejected based on s195AX, the establishment of the infringement of the right of integrity due to the damage to honour would certainly have been an exciting development in Australian copyright law.