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Intellectual Property Law update

Men at Work's Down Under infringes copyright in Kookaburra

Larrikin Music Publishing Pty Ltd v EMI Songs Australia Pty Ltd (Federal Court of Australia, 4 February 2010)

Justice Jacobson of the Federal Court has ruled that the 1981 hit song, *Down Under* by Men at Work, infringed copyright in the well known Australian folk song, *Kookaburra*, written in 1934. The offending parts of *Down Under* are contained in the flute riff which reproduces (without vocals) the first part of *Kookaburra* with the words "Kookaburra sits on an old gum tree. Merry, merry king of the bush is he." In deciding that there was copyright infringement, Justice Jacobson found there was a resemblance or objective similarity between *Kookaburra* and the flute riff in *Down Under*, and that *Down Under* reproduced a substantial part of *Kookaburra*.

In some respects it is difficult to understand Justice Jacobson's finding that there was a resemblance between the songs. Whilst there is little doubt that parts of the flute riff in *Down Under* have the same melody as the first part of *Kookaburra*, it is not easy to identify the connection between the songs. The reason for this is that the part taken from *Kookaburra* is separated into 2 parts in *Down Under*, with other music interposed between those parts. Also, the opening part of the flute riff is not based on *Kookaburra*. The result is that the flute riff in *Down Under* sounds different from *Kookaburra*.

The reference to *Kookaburra* in *Down Under* was first recognised in public in 2007 on the ABC quiz show, *Spicks and Specks*. The contestants were asked by host Adam Hills to identify the Australian nursery rhyme which the flute riff in *Down Under* was based on. One of the contestants identified that it was *Kookaburra* but only after Adam Hills revealed which part of the flute riff referenced the nursery rhyme.

The owners of *Down Under* argued before Justice Jacobson that the difficulty in making the connection between *Down Under* and *Kookaburra*, and the fact that the connection did not receive public recognition until 2007, leads to the conclusion that there is no objective similarity and therefore no copyright infringement. That argument appeared to have some merit but was not accepted by Justice Jacobson, although it may yet be tested again if the decision is appealed by the *Down Under* parties.

If the decision is not successfully appealed, the owners of copyright in *Kookaburra* will be entitled to a percentage of profits from *Down Under*. That battle appears to be far from settled, with the owners of *Kookaburra* seeking 40% – 60% of the profits from *Down Under* and the *Down Under* parties arguing that percentage is grossly overstated.

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