CAMLA COMMUNICATIONS LAW BULLETIN

Communications & Media Law Association Incorporated

Volume 34, No 4. January 2016

Copyright in a Meme

Ryan Grant considers what copyright exists in a 'meme' and whether its author has any protection under Australian copyright laws.

Several press articles have made the somewhat obvious assertion that a meme will usually infringe a third party's copyright in the underlying image, unless there is a fair dealing defence.[1] However, little consideration has been given to whether the meme itself is provided with copyright protection. In this article, I look at whether the creator of the meme (a ***Meme Author***) can enforce copyright in an image meme, even if the meme infringes a third party's rights in the underlying image.

WHAT IS A MEME?

A meme, or more correctly in this context, an image meme, is typically an image distributed on social media where some short text is placed over a pre-existing image. The combination of the text with the image, or more importantly, the subject relationship between the text and image is used to make a joke or political statement.

Often, the Meme Author will not have a licence to use the underlying image. Other times, the Meme Author will have a licence because the Meme Author is the author of the image or the image is subject to a broad type of licence, such as some types of creative commons licences.

Memes have evolved from social media jokes to useful marketing tools. Greenpeace, Dos Equis and Blizzard have all used image memes to promote their causes or products. Further, a business that has a social media presence may well encounter its customers posting memes on their social media pages, possibly without permission of the Meme Author.

SUBSISTENCE OF COPYRIGHT

Type of work

The *Copyright Act 1968* (Cth) grants copyright in original literary, dramatic, musical or artistic works[2].

The term 'artistic work' is defined (exhaustively) as:

(a) a painting, sculpture, drawing, engraving or photograph, whether the work is of artistic quality or not;

(b) a building or a model of a building, whether the building or model is of artistic quality or not; or

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1 http://www.news.com.au/technology/online/why-creating-memes-is-illegal-in-australia/story-fnjwmwrh-1226758121774 and http://www.insidecounsel.com/2013/06/21/technology-internet-memes-pose-legal-questions.

2 Section 31 Copyright Act 1968.

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> (c) a work of artistic craftsmanship whether or not mentioned in paragraph (a) or (b).

The term 'literary work' is defined[3] to include (non exhaustively) *'a table, or compilation, expressed in words, figures or symbols'*. The term 'compilation' is not defined in the Act but has been the subject of judicial consideration.

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The courts have found that an edition of a newspaper is a single compilation work, including the articles, heading and layouts.[4] Further, a set of hard copy accounting forms (it was 1985) created to assist in the production of accounts for businesses was found by the Queensland Supreme Court to be a copyright work.[5] Comments from Thomas J in that case (at 231 and 232) are instructive in these circumstances:

> The columns, boxes and lines are in my view, drawings, and as such comprise an "artistic work" within the definition of that term. It follows that every document in issue in this case comprises in part a drawing which is capable of being an artistic work, and in part words which are allegedly capable of being a literary work. It is not necessary that components of a compilation be explicitly literary . . . For present purposes, it is enough to say that a compilation of forms which are themselves an integrated combination of words and drawings is a compilation for the purposes of the Copyright Act, and as such is within the definition of "literary work" under that Act... In my view there is no requirement that a compilation be of component works that are exclusively literary.

The Kalamazoo case has been followed by a number of courts, including a Full Federal Court decision involving a computer program that produced Material Safety Data Sheets (MSDS).[6] An MSDS contains a series of text fields, diagrams, images and symbols that detail statutory information that must be supplied with certain products. The first instance judge and the appeal Court had little trouble finding that the combination of the various elements meant that the MSDS was a 'literary work; under the Copyright Act.

Accordingly, an image meme, being the combination of an image and some text, and perhaps some other diagrammatical features is very likely to be a 'literary work' under the Copyright Act.

The next question is whether an image meme can be sufficiently original to attract copyright protection, particularly in circumstances where the Meme Author does not have a licence to use the underlying image.

ORIGINALITY

For a work to gain copyright protection, it must be an original work created by an author. Originality will require the examination of two, closely linked, issues. The first is whether the meme is just a copy of other material and the second is whether sufficient 'independent intellectual effort' and/or 'sufficient effort of a literary nature' has been exercised by the author.

An oft-cited case on originality is *Victoria Park Racing v Taylor*[7] which said at 511:

> No doubt the expression literary work" includes compilation. The definition section says so (sec. 35 (1)). But some original result must be produced. This does not mean that new or inventive ideas must be contributed. The work need show no literary or other skill or judgment. But it must originate with the author and be more than a copy of other material.

There was some debate in Australian law as to whether labour alone was sufficient to give rise to copyright. However, in the case of *IceTV v Nine*[8] the High Court stated at [33] that labour alone was not sufficient:

> Originality for this purpose requires that the literary work in question originated with the author and that it was not merely copied from another work. It is the author or joint authors who bring into existence the work protected by the Act. In that context, originality means that the creation (that is the production) of the work required some independent intellectual effort, but neither literary merit nor novelty or inventiveness as required in patent law.

Even if the Meme Author does not own copyright in the underlying image, the positioning of original text over a particular image to make a political statement or joke will usually to give rise to a copyright work. It is clear that it is not just a copy of the underlying image. It is the combination or subject relationship between

3 Section 10 Copyright Act 1968.
4 *Fairfax v Reed* (2010) 189 FCR 109.
5 *Kalamazoo (Aust) Pty Ltd v Compact Business Systems Pty Ltd* (1985) 5 IPR 213.
6 *Acohs v Ucorp* [2012] FCAFC 16.
7 *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479.
8 *IceTV Pty Limited v Nine Network Australia Pty Limited* [2009] HCA 14.

the original text and the image that requires the intellectual effort.

It is possible that, if the text is not original to the Meme Author and the image is not owned by the Meme Author, meaning the Meme Author simply brought the two items together, that the work is not sufficiently original, in that not sufficient independent intellectual effort has been brought to bear. However, given the low threshold for originality, such a situation would be in the vast minority.

PROTECTION OF A COMPILATION THAT INCLUDES INFRINGING MATERIAL

While covered to some extent above, I also specifically address below the question of whether a work that infringes another person's work can itself be the subject of copyright protection. A number of cases in Australia and the UK have found that compilations of entirely pirated works can attract their own copyright protection (including *Redwood Music Ltd v Chappell & Co Ltd* [1982] RPC 109). Drummond J in *A One Accessory Imports v Off Road Imports* (1996) 34 IPR 306 at 317 said:

Skill, judgment or labour expended in the process of copying a particular work or portion of a particular work, as distinct from selecting material to be copied into a compilation, cannot confer originality; but even if the effort involved in producing a compilation is mostly devoted to copying another work or works, a relatively small alteration or addition quantitatively may suffice to convert that which is copied from an earlier work into a new and original work in which copyright will subsist. Whether it does or not is a question of degree having regard to the quality, rather than the quantity of the addition.

Accordingly, very little additional intellectual effort needs to be put into the work over and above the potentially infringing underlying image for a meme to attract copyright protection.

INFRINGEMENT

The Meme Author as the owner of the copyright in the meme has the exclusive right, relevantly to online use, to make a reproduction or communicate the work to the public (including making it available online). If another user (***Defendant***) copies the entire meme and makes it available online, that user is likely infringing the Meme Author's copyright.

Obviously, if the Defendant only copies the underlying image, the Meme Author does not have an action against the Defendant as the Meme Author does not hold the copyright in the underlying image.

On proceedings for infringement, the fact that the work at suit is itself infringing another person's copyright can give rise to public policy considerations as to whether the Meme Author is entitled to relief, despite being able to prove infringement.[9] However '*the mere existence of an infringement of the copyright of a third party (especially an innocent, rather than deliberate infringement) was not sufficient to invoke this jurisdiction*.[10]

In the ZYX case from the United Kingdom, the facts showed that ZYX did not know that the work it had been assigned (a song) infringed a third party's copyright. Accordingly, the United Kingdom High Court found that ZYX was entitled to the relief sought, including damages and an injunction.

Conversely, in the separate judgment on relief arising out of the *A One Accessory case*[11] , the Australian Federal Court found that, while the respondent had infringed A One's copyright in a parts catalogue, because the parts catalogue at suit was in large proportion copied from a third party by A One, the Court refused to grant any equitable relief to A One because A One had '*unclean hands*'. Drummond J said at 562:

Adopting the approach in Moody v Cox and Hatt [1917] 2 Ch 71 at 87–8, I think that the dirt on the applicants' hands, constituted by their extensive copying of the works of others, is so closely related to the equity claimed in the form of an injunction to restrain Off Road's use of its own infringing catalogue as to justify denying the applicants relief under s 115(2) of the Copyright Act 1968 (Cth).

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As a result, A One was refused an injunction or declaration, leaving A One with a damages claim only.

Accordingly, a Meme Author will likely be successful against a person who posts the meme online, even if the underlying image infringes a third party copyright. However, depending on the particular qualities of the meme, including whether the author knew it was infringing and the inherent creativeness of the final meme, it is possible that the Meme Owner will not be able to seek injunctive or declaratory relief.

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9 *ZYX Music GMBH v King* (1995) 31 IPR 207; *Venus Adult Shops Pty Ltd v Fraserside Holdings Ltd* (2006) 238 ALR 534.
10 *ZYX Music GMBH v King* (1995) 31 IPR 207 at 215.
11 *A One Accessory Imports v Off Road Imports* (1996) 144 ALR 559