

COPYRIGHT AND MUSIC: *UNIVERSAL MUSIC PUBLISHING PTY LTD V PALMER*

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I INTRODUCTION

Businessman and former politician, Clive Palmer, is someone who is not a stranger to legal proceedings, some of which have involved the Yabulu refinery in Townsville owned by his company, Queensland Nickel. The year 2021 saw the Federal Court hand down decisions in two other cases involving Palmer. One was his unsuccessful attempt to sue West Australian Premier, Mark McGowan, for defamation¹, the other involved Universal Music Publishing Pty Ltd's claim that Palmer had breached its copyright in the song 'We're not Gonna Take It' by using it in an advertising campaign during the 2019 Federal election. This casenote will examine the decision in *Universal Music Publishing Pty Ltd v Palmer (No 2)*² where the issues were whether there had been a breach of copyright and if so, what damages should be awarded. To provide the necessary background the paper will, first, provide an overview of the relevant Australian copyright law.

II THE RELEVANT AUSTRALIAN COPYRIGHT LAW

Copyright is the right to reproduce or copy something, so copyright law is concerned with preventing anyone other than the owner of the copyright from infringing the owner's economic or moral rights over the thing covered. In Australia that protection is provided by the *Copyright Act 1968* (Cth) which protects both 'original literary, dramatic, musical and artistic works' and 'subject matter other than works'. For 'works' the Act protects the copyright owner's 'exclusive economic rights' as they are set out in s 31(1). It provides, inter alia, that the owner has the exclusive right:

- (i) to reproduce the work;
- (ii) to publish the work;
- (iii) to perform the work in public;
- (iv) to communicate the work to the public; and
- (v) to make an adaptation of the work.

With songs, copyright exists in both the lyrics (as a 'literary work') and the score (as a musical work). The relevant section for copyright infringement of 'works' is s 36 which states (inter alia) that:

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¹ *Palmer v McGowan* [2021] FCA 430.

² [2021] FCA 434.

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- (1) Subject to this Act, the copyright in a literary, dramatic, musical or artistic work is infringed by a person who, not being the owner of the copyright, and without the licence of the owner of the copyright, does in Australia, or authorizes the doing in Australia of, any act comprised in the copyright.

Defences are available under the Act, with s 40, for example, allowing for fair dealing for the purposes of research or study and s 41A allowing fair dealing for the purpose of parody or satire. It was the latter defence that Palmer argued in *Universal Music*.

Part V of the Act provides for remedies, with s 115(1) stating that the owner of a copyright may bring an action for infringement. Under s 115(2) then provides that the relief a court may grant includes an injunction and either damages or an account of profits and, if the court is satisfied that it is proper to do so, s 115(4) allows for the awarding of additional damages. Whether they will be awarded depends on (i) the flagrancy of the infringement; (ia) the need to deter similar infringements of copyright; (ib) the conduct of the defendant, and (iv) ‘all other relevant matters.’

III *UNIVERSAL MUSIC PUBLISHING PTY LTD V PALMER*

A *Background Facts*

During the 2019 Federal Election Palmer’s United Australia Party (UAP) featured a song, *Aussies Are Not Going to Cop It* in its advertising campaign. It had been taken from a song, *We’re Not Gonna Take It* [‘WNGTI’] which Daniel Snider, lead singer of the band, Twisted Sister, had written in 1984.³ In 2015 Snider had assigned the copyright in all his songs over to Songs of Universal Inc though he retained an interest in the performing rights. This meant that Universal was required to seek Snider’s ‘approval for the synchronisation of his songs with visual material, such as in advertising or film.’⁴

In October 2018 Palmer asked David Wright ‘to approach Universal to negotiate a licence to use in advertisements for the UAP a “re-recorded version” of the Twisted Sister track with possible lyric changes.’⁵ Wright was then the director of Creative Division Pty Ltd and had been ‘engaged by the UAP to provide production services for its advertising campaign.’⁶ A licence fee of \$150 000 for an eight month period was quoted by Selina Meuross of Universal. Palmer, however, ‘balked at paying’ this fee, and made a counter offer of \$35 000. That was rejected by Universal ‘and negotiations broke down.’⁷ Wright had, in the meantime, developed some preliminary videos that had incorporated the song. These were sent to Universal with a request that the term of any contract be 12 months to cover the potential scenario of the election being called late. Meuross responded by stating

³ Ibid, [1].

⁴ Ibid, [60].

⁵ Ibid, [66].

⁶ Ibid, [39].

⁷ Ibid, [77].

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the fee would now need to be \$160 000 to cover the extra time, and that Snider would have to approve the final version of the video.⁸ However, on 16 November 2018, ‘with apparent indifference to the want of a licence, Mr Palmer authorised the creation of the UAP recording.’⁹

Universal then commenced proceedings for copyright infringement. They were set down for a five-day hearing, commencing 19 October 2020 but, on 7 October 2020 Palmer ‘filed an interlocutory application seeking orders that the trial be vacated.’¹⁰

B *Interlocutory Judgment*

The claim in the application was that, due to Covid-19 restrictions, interstate witnesses would not be able to appear in person, the court having to rely, as it had for much of the year, on a virtual hearing. Palmer argued that he would be ‘disadvantaged if Universal’s lawyers and some of their witnesses were able to appear in person’, as they were Sydney-based, while he ‘and all of his witnesses could not.’¹¹ Palmer also argued that there was ‘a real possibility’ the New South Wales and Queensland border would be reopened within the month.¹² The application was to vacate the trial which would have allowed Palmer and his witnesses to appear in person. Universal pointed out there was ‘currently no legal restriction on any of Mr Palmer’s witnesses from entering NSW for the purpose of attending Court.’¹³ They would, however, be required to go into 14 days quarantine on their return to Queensland. The Court was ‘informed that Mr Palmer was not willing to pay that price.’¹⁴

Justice Katzmann acknowledged that, since Universal was seeking additional damages, Palmer’s credit ‘was likely to be an issue in the proceedings from the outset.’¹⁵ This then raised the issue of the fairness of the cross-examination undertaken with the aid of technology. Katzmann J stated that while she had been ‘initially skeptical about the effectiveness of cross-examination in this way, my skepticism proved to be unjustified’ Her Honour elaborated by stating that:

My experience was that changes in facial expressions, reactions, bodily movements and gestures are much easier to discern when the witnesses are pinned to the screen directly in front of me than is normally the case when witnesses give evidence from the witness box some distance from the bench.¹⁶

⁸ *Ibid*, [87].

⁹ *Ibid*, [105].

¹⁰ *Universal Music Publishing Pty Ltd v Palmer* [2020] FCA 1472.

¹¹ *Ibid*, [10].

¹² *Ibid*, [11].

¹³ *Ibid*, [26].

¹⁴ *Ibid*.

¹⁵ *Ibid*, [27].

¹⁶ *Ibid*, [32].

Palmer's application was therefore refused and the trial proceeded as scheduled with Justice Katzmann stating that, if it was vacated, it was unlikely to be heard until the following September.¹⁷

C Trial Judgment

1 The Copyright Infringement Issue

As Justice Katzmann pointed out in her judgment at the conclusion of the trial, '[t]he substantive issue in this case is whether, by authorising the creation or the recording and its synchronisation with the video advertisements, Mr Palmer had infringed the copyright in WNGTI.'¹⁸ Palmer's argument was 'that his dealings were fair.' This was because the recording 'did not use all the music and words' of the song; the parts used had 'limited originality; and, Palmer 'did not intentionally breach copyright.'¹⁹ Palmer raised s 41A of the *Copyright Act 1968* (Cth) as a defence, though he 'eschewed reliance on parody [and] rested his case on satire.'²⁰

Justice Katzmann accepted 'that all the parts of WNGTI used by Palmer were not entirely original.' This was because even Sinder acknowledged that, in the introduction to the song, he had inadvertently used the melody from the carol, *O Come All Ye Faithful*. Palmer also argued that he 'did not take the whole of the copyright work.' It was held, however, that by using the chorus, Palmer had taken 'the most prominent feature of both the literary and the musical works.'²¹ Katzmann J also stated that she was 'not persuaded that Mr Palmer did not intentionally breach Universal's copyright', saying:

The contemporaneous documents suggest otherwise and, although in this proceeding Mr Palmer insisted WNGTI was not an original work and Universal had no legal rights to the song, he proved himself to be an unreliable witness – so unreliable in fact that, absent independent corroboration, I concluded that it would be dangerous to rely on his word. I am not satisfied that Mr Palmer genuinely believed that WNGTI was not an original work or that Universal had no legal rights to the song²²... Mr Palmer's use of WNGTI was opportunistic. He saw political and personal advantage in both its notoriety or popularity and the message it conveyed and he thought that he could get away with it merely by altering some of the words. He was wrong.²³

Justice Katzmann then rejected Palmer's defence that copyright was not infringed because the use constituted fair dealing for the purpose of satire, stating that, while the 'videos were

¹⁷ Ibid, [38].

¹⁸ *Universal Music Publishing Pty Ltd v Palmer (No 2)* [2021] FCA 434.

¹⁹ Ibid, [313].

²⁰ Ibid, [314].

²¹ Ibid, [326].

²² Ibid, [327].

²³ Ibid, [329].

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certainly critical ... they were not satirical, nor do they use satirical devices,²⁴ and that the ‘overwhelming majority of these videos could not conceivably be said to have a satirical purpose’²⁵

With the failure of Palmer’s defence the next issue was what damages would be awarded under s 115(2), and whether additional damages should be awarded under s 114(4).

2 *The Damages Issue*

It was submitted by Universal that the damages to be awarded under s 115(2) ‘should be calculated based on a reasonable licence fee that would have been charged for the infringing use.’²⁶ Palmer, however, argued that ‘since damages are intended to compensate an applicant for the loss caused to it by the respondent’s wrongdoing’, it was illogical to award damages based on a reasonable licence fee when no licence would have been agreed.²⁷ In accessing these arguments Justice Katzmann raised the question of whether the user principle was applicable. Her Honour referred to *Winnebago Industries Inc v Knott Investments Pty Ltd (No 4)*²⁸ where Justice Yates had stated that ‘[t]he plaintiff may not have suffered actual loss from the use, and the wrongdoer may not have derived actual benefit. Nevertheless, under this principle, the defendant is obliged to pay a reasonable sum for the wrongful use.’²⁹ Justice Kratzman also noted that this user principle had only recently been discussed in *Lewis v The Australian Capital Territory*.³⁰ In that case Justice Edelman had stated that ‘[i]n seeking to rectify the wrongful act, the user fee ... usually focuses upon both the reasonable value of the wrongful acts to the defendant and their reasonable price to the claimant.’³¹ Justice Kratzman then held that:

It does not matter whether Universal would have licensed WNGTI to Mr Palmer or whether Mr Palmer would have entered into a license agreement. Either way, Universal is not limited to nominal damages. Rather, damages should be assessed by reference to a notional licence fee.³²

The next question was what that notional or hypothetical fee should be. Testimonial evidence from Karina Masters, Universal’s Senior Vice-President (Legal and Business Affairs), was that ‘music licensing for political purposes ... was “very rare.”’³³ She also stated that ‘changing the lyrics can jeopardise the integrity of the original song and therefore its future commercial value [and] in her experience changing the lyrics always

²⁴ *Ibid*, [337].

²⁵ *Ibid*, [351].

²⁶ *Ibid*, [358].

²⁷ *Ibid*, [359].

²⁸ [2015] FCA 1327.

²⁹ *Ibid*, [13] cited in *Universal Music Publishing* (n 18) [368].

³⁰ (2020) 381 ALR 375.

³¹ *Ibid*, [148] cited in *Universal Music Publishing* (n 18) [395].

³² *Universal Music Publishing* (n 18) [396].

³³ *Ibid*, [404].

increased the licence fee, sometimes to a significant degree.³⁴ While Universal had quoted \$150 000 as a licence fee when Palmer, through his agent David Wright, had contacted it, Masters stated that if she had ‘been aware of all the relevant information’ a reasonable fee for an eight month campaign would have been \$1m.³⁵ Andrew Jenkins, Universal’s President of the Australia and Asia-Pacific Region, expressed a similar view, stating that ‘a reasonable licence fee would be “at least” \$1m.’³⁶

Justice Katzmann rejected Palmer’s argument that in using a reasonable licence fee to calculate the damages ‘the best evidence is the price Universal quoted in the negotiations with Mr Wright, namely \$150 000 or \$160 000.’³⁷ Instead, her Honour took into consideration that, due to its enduring popularity, the song remained ‘a valuable commodity for Universal’ and that ‘the value to Mr Palmer of the use of the copyright works was considerable.’³⁸ The notional licence fee, and therefore the damages payable under s 115(2), was assessed at \$500 000.³⁹

Justice Katzmann also held the case was one that ‘calls for a substantial award of additional damages.’⁴⁰ This was because of Palmer’s ‘flagrant disregard of Universal’s rights’, her Honour stating she did ‘not accept that Mr Palmer honestly believed at any time that his use of the copyright works was lawful.’⁴¹ She also held that Palmer’s ‘behaviour after receiving Universal’s cease and desist letter was contemptuous.’ This was because he had ‘conducted what Universal justifiably described as “a ferocious counterattack”, both directly and through the UAP, with the apparent object of deterring Universal from enforcing their rights.’ Justice Katzmann also held that Palmer had given false evidence ‘including concocting a story to exculpate himself. That, she said, indicated that ‘the need for both punishment and deterrence is high.’⁴² Additional damages of \$ 1 000 000 were therefore awarded.⁴³

Universal also sought an injunction which Justice Katzmann granted, stating that ‘if unrestrained by an injunction, there is a real risk that Mr Palmer would again infringe Song’s copyright in the literary and musical works.’⁴⁴ Her Honour also specifically noted

³⁴ *Ibid*, [407].

³⁵ *Ibid*, [420].

³⁶ *Ibid*, [434].

³⁷ *Ibid*, [452].

³⁸ *Ibid*, [469]–[470].

³⁹ *Ibid*, [479].

⁴⁰ *Ibid*, [495].

⁴¹ *Ibid*, [496].

⁴² *Ibid*, [498].

⁴³ *Ibid*, [525].

⁴⁴ *Ibid*, [530].

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in granting the order that '[a] claimant who establishes infringement of copyright is normally entitled to a permanent injunction to restrain further infringements.'⁴⁵

III DISCUSSION

The high profile case *EMI Songs Australia Pty Ltd v Larrikin Music Publishing Pty Ltd*⁴⁶ involved the Australian band, Men at Work, using the melody from *Kookaburra Sits Under the Old Gum Tree* in their well-known song, *Down Under*. It was held that the four bars of Kookaburra had 'been borrowed for the flute riff.'⁴⁷ While it formed a small part of *Down Under*, (only five bars out of 93), 'the issue of substantiality [was] to be determined by reference to *Kookaburra*, not *Down Under*.'⁴⁸ Because the riff used formed a substantial part of *Kookaburra*⁴⁹ royalties of five percent were awarded.⁵⁰ This case therefore involved the unauthorised use of part of a song by other artists in another musical work. The infringement in *Universal Music* was different in that it involved someone not involved in the music industry intentionally infringing the copyright in both the literary and musical works for their own benefit. It was stated by Justice Katzmann that '[t]here could be no doubt that Mr Palmer intended to, and did, derive a political benefit from the unauthorised use of the copyright works.'⁵¹ Her Honour also pointed out that Palmer had avoided paying a licence fee, and that 'in itself is a benefit.'⁵²

The *Universal Music* case also raised issues regarding originality as it was one in which there had been the inadvertent use of another melody. This, however, involved an old carol that was long out of copyright, and more importantly, it was only used in the introduction to WNGTI when it had been another part of song, the chorus, which had been used by Palmer in his advertising campaign. Palmer had also tried to argue that his idea for *Aussies Are Not Going To Take It* had been generated by watching the film, *Network*. This was rejected by Justice Katzmann who pointed out that the words used were different from those which Palmer had in his song.

Once it had been established that copyright had been infringed, it was then a question of what quantum of damages should be awarded, the case highlighting how both s 115(2) damages and s 115(4) additional damages are assessed. For s 115(2) damages are assessed by estimating what a notional or hypothetical licence fee would have been. Justice

⁴⁵ *Ibid*, [530]. This was an interesting outcome because, ordinarily, a court will not issue an injunction unless it believes that there is a real risk of further infringements occurring – an application of the maxim 'equity does nothing in vain'

⁴⁶ (2011) 191 FCR 444.

⁴⁷ *Ibid*, [226].

⁴⁸ *Ibid*.

⁴⁹ *Ibid*, [267].

⁵⁰ *Larrikin Music Publishing Pty Ltd v EMI Songs Australia Pty Ltd* (2010) 263 ALR 155, [339]. Note that it was five per cent of all royalties received by Men at Work since 2002, there being statute of limitation issues for the period before that date.

⁵¹ *Universal Music Publishing* (n 18) [500].

⁵² *Ibid*, [502].

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Katzmann settled on a fee of \$500 000, rejecting Palmer’s argument that it should only be the quoted fee of \$150 000, though her Honour accepted that this was only an estimate, one that had been made without full knowledge of what Palmer wished to do with WNGTI. The assessment of the additional damages was based on the fact that the flagrant infringement of the copyright meant that the damages awarded needed to act as a deterrent with this contributing to the figure of \$1 000 000.

In *Uren v Fairfax Media*⁵³ Justice Windeyer discussed the difference between aggravated and exemplary damages, stating that:

[A]ggravated damages are given to compensate the plaintiff when the harm done to him by a wrongful act was aggravated by the manner in which the act was done; exemplary damages on the other hand, are intended to punish the defendant and presumably to serve one or more of the objects of punishment – moral retribution or deterrence.⁵⁴

His Honour further stated that there must ‘be evidence of some positive misconduct to justify a verdict for exemplary damages’ with this involving a ‘conscious wrong-doing in contumelious disregard of another’s rights.’⁵⁵ Justice Kratzmann made it clear in *Universal Music* that Palmer had been involved in positive misconduct, describing his behavior as ‘contumelious.’ Thus, the award of additional damages in this case was made on much the same basis as an award of exemplary damages would have been under the common law.

IV CONCLUSION

Universal Music involved a blatant infringement of copyright with damages for a notional licence fee needing to be awarded. The flagrant disregard for the copyright meant that additional damages were also needed to be awarded to satisfy the merits of the case and to act as a future deterrent. While damages are a means by which a court may compensate an owner of copyright for breaches of their rights, permanent injunctions are the only way that further infringements can be prevented, which is why one was also awarded in this case.

⁵³ (1966) 117 CLR 118.

⁵⁴ *Ibid*, 149.

⁵⁵ *Ibid*, 154.