

Larrikin Music Publishing Pty Ltd v  
EMI Songs Australia Pty Limited  
[2010] FCA 29: Clash of the 'Icons'

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'I come from a land down under,

...where lawyers rule and judges blunder...'

Phil of Murray Bridge

[www.adelaidenow.com](http://www.adelaidenow.com)

4 February 2010

# Kookaburra

- Composed by Marion Sinclair, a Melbourne music teacher, in 1934
- Entered into a competition conducted by the Girl Guides Association of Victoria
- Q if entry into the competition constituted an assignment of copyright to Girl Guides
- Throughout her life Ms Sinclair donated proceeds from the sales of publications of the rounds to the Girl Guides and granted permission to use Kookaburra to various publishers
- Ms Sinclair died in February 1988

# The Girl Guides competition

- Rules:

‘all matter entered to become the property of the Guide Association’

Q if this amounted to an assignment of copyright?

**Dear Marion,**

**I should have written to you weeks ago to express to you the thanks of Lady Chauvel and the Executive Committee for the gift of your three Rounds to the Association. We now have to thank you further for having these Rounds printed, and for your donation of the proceeds to the Guide House Fund. We do think it is ever so good of you to have made such a delightful contribution.**

**I collected the enclosed Rounds from the Centenary Committee, I thought you would be interested to see Dr Floyd's opinion, you may have been told of it, but I just want to be certain.**

**Victorian Girl Guides, 2 October 1934.**

# Marion Sinclair's estate:

- Donated her personal writings, including musical compositions, to the State Library of South Australia
- Public Trustee appointed as sole executor and trustee with instructions to sell and convert into money to be held on trust equally for the Animal Welfare League of South Australia and the Helping Hand Centre

# Ownership of 'Kookaburra'

- During 1989, Public Trustee invited tenders for the purchase of copyright in 'Kookaburra'
- 21 March Deed of Assignment, assigning copyright to Larrikin for \$6,100
- Further Deed of Assignment dated 14 March 2000
- Has earned 'hundreds of thousands' in royalties for Larrikin

*Larrikin Music Publishing Pty Ltd v EMI Songs  
Australia Pty Limited [2009] FCA 799*

- Held as between the parties to the proceedings that copyright in Kookaburra owned by Larrikin

# Infringement by Down Under

- 2007 'Spicks and Specks' ABC TV

# Kookaburra

**KOOKABURRA**  
Round in 4 Parts. *M. Sinclair*

Koo-ka-bur-ra sits on an old gum tree--  
Mer-ry mer-ry king of the Bush is he--  
Laugh Koo-ka-bur-ra Laugh, Koo-ka-bur-ra  
Gay your life must be.

# 'DownUnder'

- Men at Work
- Down Under composed by Ron Strykert and Colin Hay in 1978
- Flute riff added by Greg Ham after he joined the band in 1979
- 1981 recording
- 'unofficial Australian anthem'



# Reproduction:

- Objective similarity
- Causal connection (not disputed)
- Key issues:
  - Was there a sufficient degree of objective similarity between the flute riff in Down Under and the two bars of Kookaburra?
  - Whether the bars of Kookaburra which are reproduced are a substantial part of that work?

# Substantial part:

- To be determined more by the quality rather than the quantity of what is copied, *IceTV*
- Q of objective similarity of musical works not to be determined by a note by note comparison but by the eye as well as the ear
- Modern authorities also direct attention to the degree of originality in the expression of the part of the work that is reproduced, *IceTV*

- Held there was a sufficient degree of objective similarity between the bars of Kookaburra which are seen and heard in Down Under to amount to a reproduction of a substantial part of Kookaburra
- Based upon aural comparison of the musical elements as well as visual comparison of notated songs, with particular assistance of the experts

# The aural comparison

Down Under



Kookaburra



- Judge appeared to place significant weight upon Colin Hay's admission of a causal connection between the melodies and fact he sang the relevant bars of Kookaburra when performing Down Under at live concerts
- Failure to call Greg Ham: appropriate to draw and inference that Ham deliberately included the lines to inject some 'Australian flavour' into the song

# The aural comparison

- ‘There is force in the submission made by Mr Catterns that I have become sensitised to the similarity between the melodies so as to be able to hear the objective similarity between them. However, I do not consider that this overcomes the force of the expert evidence and the conclusion which seems to follow almost inevitably from the frank admissions made by Mr Hay.’

# Damages:

- To be assessed
- Case now being appealed
- Emphasised that the findings do not amount to a finding that the flute riff is a substantial part of Down Under or that it is the hook of that song
- Larrikin claim 40-60%

- Could the case have been argued differently?
- Recording/ arrangement as distinct from musical composition

# Statement by Colin Hay, 4 Feb 2010

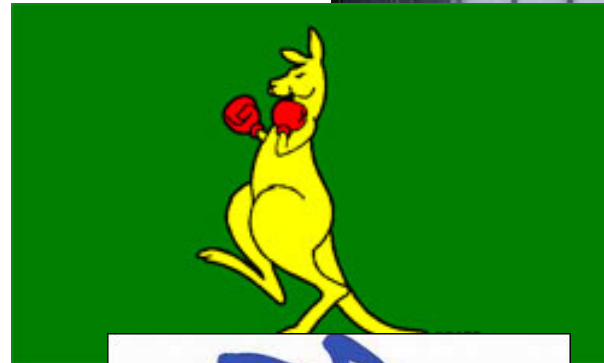
‘It is indeed true, that Greg Ham (not a writer of the song) unconsciously referenced two bars of Kookaburra on the flute, during live shows after he joined the band in 1979, and it did end up in the Men at Work recording. What’s interesting to me, is that Mr Lurie is making a claim to share in the copyright of a song, namely Down Under, which was created and existed for at least a year before Men At Work recorded it. I stand by my claim that the two appropriated bars of Kookaburra were always part of the Men At Work “arrangement”, of the already existing work and not the “composition”.

# Statement by Colin Hay, 4 Feb 2010(2):

- Not recognised for over 20 years?
- ‘It was inadvertent, naive, unconscious, and by the time Men At work recorded the song, it had become unrecognisable. It is also unrecognisable for many reasons. Kookaburra is written as a round in a major key, and the Men At Work version of Down Under is played with a raggae influence “feel” in a minor key. This difference alone creates a completely different listening experience. The two bars in question had become part of a four flute part, thereby unconsciously creating a new musical “sentence” harmonically, and in so doing, completely changed the musical context of the line in question, and became part of the instrumentation of Men At Work’s arrangement of Down Under.’

# Kookaburra as musical icon

- Common belief that Kookaburra is a 'traditional' ie out of copyright tune
- Globally popular
- Children's' song
- Campfire song/ association with guiding movement



# Outcomes of the case?

- Appeal
- Public opinion
- Copyright law:
- Transformative use