

What's Inside...

ARE YOU SENDING SPAM? 1

You or your business might be sending 'SPAM' without being aware of it. We outline a few common misconceptions regarding 'SPAM' as well as note some comments from the ACMA.

WELCOME 1

Bradley & Bray team announces new Wills, Estate Administration and Enduring Powers of Attorney solicitor, Hilary Somerville.

MEN AT WORK OR SIMPLY BLUDGING? 2

Plagiarism row between two iconic Australians.



WELCOME!

Please join us in welcoming Hilary Somerville to the Bradley & Bray team. Hilary is our new Wills, Estate Administration and Enduring Powers of Attorney Solicitor. She has a wide variety of experience as a legal practitioner and she looks forward to meeting both our new and current clients.

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The information in this newsletter is merely a guide and is not a full explanation of the law. This firm cannot take responsibility for any action readers take based on this information. When making decisions that could affect your legal rights, please contact us for professional advice.



MOVED ???

We would appreciate it if you could let us know so that you can continue to receive Bradley & Bray in Brief. Please advise us of your new address by sending us a letter; forwarding an email to info@bradleybray.com.au or simply giving us a call.

ARE YOU SENDING SPAM?

Many businesses send electronic messages, such as marketing emails, SMS/MMS (text/image-based text messages) or instant messaging, to their customers without realising that they are actually sending illegal spam.

There is a common misconception that an electronic message is only spam if it is sent to a large number of people and is designed to sell something to its recipients.

The Spam Act 2003 prohibits the sending of unsolicited commercial electronic messages with an Australian link.

The Australian Communications and Media Authority (ACMA) says that "a message has an Australian link if it originates or was commissioned in Australia, or originates overseas but was sent to an address accessed in Australia".

A commercial electronic message is defined as being one that:

- offers, advertises or promotes the supply of goods, services, land or business or investment opportunities
- advertises or promotes a supplier of goods, services, land or a provider of business or investment opportunities
- assists a person to dishonestly obtain property, commercial advantage or other gain from another person

There are three key requirements of the Spam Act: consent, identification and an unsubscribe facility. Without any of these requirements, even a single electronic message can be considered spam.

The recipient of an electronic message must have given the sender express consent or, under particular circumstances, consent may be inferred from their conduct or an existing business or other relationship.

The message must also accurately identify the sender and include details for the recipient to be able to contact them.

Thirdly, the message must feature a functional unsubscribe facility to allow the recipient to opt out of receiving any messages from the sender in future. An unsubscribe request must be honoured within five working days.

ACMA has the power, through the Telecommunications Act 1997, to search a business' premises and seize equipment where an inspector suspects on reasonable grounds that the Act has been breached, and to impose and enforce penalties.

Penalties for breaching the Act are up to \$1.1 million per day.

Only certain messages from some types of organisations, such as government bodies, charities, religious organisations, registered political parties and educational institutions, can be permitted.

WELCOME!

Welcome to another information filled issue of Bradley & Bray In Brief.

As always, any suggestions as to the content of our newsletter are welcome, feel free to contact Debbie with those suggestions at any time.

If you would like to receive our newsletter by email (in PDF format) or other information that we feel may be of interest to you from time to time, please send an email to Debbie on ddavis@bradleybray.com.au with a subject line of "newsletter", include your name and address and we will be happy to forward all future issues to you by email.

If you do not wish to receive the newsletter any longer, simply contact us and we will remove you from our mailing list. Should you receive your newsletter at the incorrect address or more than once, please let us know so that we can amend our records accordingly.

TWO AUSSIES CAUGHT IN PLAGIARISM DEBATE

Men at Work's hit song, 'Down Under', was brought under the microscope after ABC television program 'Spicks and Specks' raised similarities between the song and the classic Australian children's song, 'Kookaburra Sits In the Old Gum Tree'. A music publisher then sued the Men at Work songwriters and EMI Music Publishing Australia (EMI), seeking backdated royalties and a share of future profits.

Who owns 'Kookaburra Sits In the Old Gum Tree'?

Music publisher Larrikin Music began legal action in 2007 against EMI and the Men at Work songwriters, Colin Hay and Ron Strykert, claiming that it owned the copyright to the Kookaburra song upon which the 'Down Under' song owners allegedly infringed.

The Kookaburra song was written in 1934 by Marion Sinclair, a Melbourne music teacher who entered it in a Girl Guides competition. The respondents argued that Ms Sinclair handed over copyright to the Girl Guides Association of Victoria when she submitted the song to the competition and that Larrikin Music could never have owned the copyright.

Counsel for EMI David Catterns QC told the court that the competition details printed in a circular and official Girl Guides magazine 'Matilda' stated that all material entered would become property of the Girl Guides Association of Victoria.

However, counsel for Larrikin Music David Yates SC said that Girl Guides Victoria had never sought copyright and instead asked Ms Sinclair for permission to reproduce it in a 1970 campfire songbook.

Larrikin claimed that it had won a tender for the copyright from the South Australian Public Trustee in 1990 after Ms Sinclair died.

Larrikin's managing director, Norman Lurie, said that it was not

until nine years later that he was told that Ms Sinclair had actually signed over her copyright to the Libraries Board of South Australia a year before her death. Mr Lurie then bought the copyright from the board.

Are the two songs the same?

The part of 'Down Under' in question was the flute riff added to the song after it was first composed. It was alleged that two of the four bars of the Kookaburra song were reproduced in the 1979 and 1981 recordings of 'Down Under' as part of the riff.

An expert musicologist, Dr Andrew Ford, was brought into the case by the applicant to determine the extent of the similarities between the two songs.

While Dr Ford agreed that the harmony of 'Down Under' is different to the Kookaburra song, he believed that the melody of the flute riff does include the same melody as the first two bars of the Kookaburra song, although "it has a different feel".

Dr Ford also stated that he considers the first two bars of Ms Sinclair's song to be "the signature" of that work.

The respondents' expert witness, John Arminger, agreed with Dr Ford's proposition but there remained to be a debate as to whether this "signature" was sufficient to make those bars a substantial part of the work.

The judgment

Justice Jacobson of the Federal Court of Australia delivered judgment on 4 February this year.

"I have come to the view that the 1979 recording and the 1981 recording of 'Down Under' infringe Larrikin's copyright in 'Kookaburra' because both of those recordings reproduce a substantial part of 'Kookaburra'," Justice Jacobson said.

"I am also of the view that Larrikin is entitled to recover damages... for the infringements."

"Nevertheless, I would emphasise

that the findings I have made do not amount to a finding that the flute riff is a substantial part of 'Down Under' or that it is the 'hook' of the song."

The damages

Larrikin were seeking between 40 and 60 percent of royalties derived from 'Down Under'. Costs are yet to be determined.

Consequences of the case

Justice Jacobson also ruled that a Qantas advertisement which used a small similar section of the riff in question was not in breach of copyright laws, however Larrikin's solicitor Adam Simpson did not rule out further legal action.

"In the Qantas ad, there was a smaller part of the song and so the judge felt that wasn't enough to qualify as an infringement of copyright. But we'll be giving that some more thought," Mr Simpson said.

Music copyright lawyer Stephen Digby said he was surprised by the court's decision, saying that he thought this case would have been very hard for Larrikin to win. Mr Digby said that this judgment could clear the way for more cases to come forward.

PRETTY AS A PICTURE!

Ever wondered what that person on the end of the phone you are speaking with looks like? Well, now you can find out! We have recently upgraded our website and it includes photos of our staff members as well as information in relation to the various areas of law in which we practice.

You can also access the latest newsletter as well as some of our past newsletters.

You will find it all at:

www.bradleybray.com.au