CHAMOMILE, COPYRIGHT AND COMMON USE – WHEN IS PUBLICLY AVAILABLE NOT PUBLIC DOMAIN?

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Back in 2014, our Senior Associate Leanne Jezercic published "Common Use is No Excuse" (available here), an article in which she dispelled some common misconceptions that abound in the creative industries about copyright law. In particular, Leanne discussed that a piece of property being publicly available doesn't mean that it is in the public domain.

It has long been the case in Australia that an image is protected under copyright law from the moment it is created and the advent of the internet did not change that. The fact that a work has been published online and is available in the "public domain" or is apparently "commonly used" or not attributed to an author does not mean that the copyright owner has relinquished their copyright, or their ability to dictate how it is treated and, if they wish, demand a license for use or publication of their work.

Following on from Leanne's article, we have an update from a recent case that underlines the above point and is directly related to creative industries, so provides an indication as to how a court might calculate costs for copyright infringement of the nature discussed above.

The Chamomile Case

In *Briner v The Happy Herb Company & Ors [2017] FCCA 1854*, a US based photographer sought declaratory and injunctive relief, as well as damages and costs, for the copyright infringement of his photograph depicting a chamomile herb by The Happy Herb Company. The Happy Herb Company had published the photograph on its website without seeking consent or paying a license fee to the photographer, who had not sold the image to anyone and so remained the copyright owner as well as the author.

The photographer had attempted to procure a license fee (see below) from The Happy Herb Company but this was rejected, which led to the matter proceeding to be heard in Court. In Court the photographer argued that he should be awarded the reasonably modest sum of USD$1,180 (approximately AUD$1,500), based on (a) the standard license fee for the use of his work, as compared to the cost of a licence for an image obtained from a stock image library like Getty Images; and (b) the fact that the photograph was used in a corporate/commercial capacity, making the fee higher. Note the second point here in particular; the cost of using a photograph in a corporate or commercial capacity is generally always higher than use in a personal capacity.

In addition, the photographer also argued that the photograph was not properly attributed to him, which is his moral right as the author under Australian copyright law. The Happy Herb Company argued that the use of the photograph was only to illustrate general information about a chamomile herb and any photograph of the herb would have been sufficient to use. In other words, you could argue that the Happy Herb Company was essentially relying on a version of the 'all publicly accessible images are public domain' argument.

The Decision

Predictably, the Federal Circuit Court found for the photographer and determined that his copyright in the photograph was infringed. In essence, the Court confirmed that just because an image is available online does not mean it is treated any differently in terms of copyright ownership. However, interestingly, the court found that the photographer had no claim for damages in respect to the breach of his moral rights, as when the photograph was placed on the website The Happy Herb Company was not able to determine who the copyright holder was, and thus could not have properly attributed the author. The court also considered the

fact that The Happy Herb Company acted quickly and removed the photograph from use as soon as they became aware of the infringement claim and viewed this positively. All up, the total awarded to the photographer by the Court was AU$500 for the copyright infringement and additional damages of AU$1,000.

Conclusion

While the amount awarded to the copyright holder in the above case is not necessarily significant, it does indicate the Court's willingness to take action against infringers of copyright in the online space. Further, the above amounts should not be considered reflective of the amounts at risk for every photograph, video, song or other piece of intellectual property used in breach of copyright; for example, other material may be licensed at much higher rates, and this will be considered by the Court when making its determination. Furthermore, if an infringer was to use multiple third party materials at once (for example, many third party images used on social media without consent), the amounts can add up and also show a pattern of continued disregard for copyright laws, making the Court more willing to impose a much higher damages amount. In addition, companies need to consider the reputational damage and the cost to the company (and potentially, their client) defending such use in Court, which will likely end up being much higher than the damages awarded.

Remember, just because third party copyright material appears in common online searches, is shown in a meme, or is virally shared amongst social media users, this does not automatically make it public domain material, or 'fair game'. While we tend to see that copyright owners do not usually take action against individual non-commercial users, they are unlikely to show the same restraint in respect to a brand using their copyright protected work without consent, and most importantly, without due payment.

Contact us

If you would like more information about this case, or anything related to Australian copyright law, please get in touch with either of our team below. Alternatively, you or your client may have a need for a quick roundtable discussion or Q&A session with your team about IP matters like the above. If so, we are happy to help – just get in touch at your convenience.

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