Steal This Headline!
Australian Court Finds No Copyright in Newspaper Headlines

The Internet has changed the way many consumers get their news, and a recent Australian copyright decision appears to be keeping pace with modern times. In *Fairfax Media Publications Pty Ltd v Reed International Books Australia Pty Ltd* [2010] FCA 984, the Federal Court of Australia dismissed a lawsuit by an Australian newspaper publisher against a news aggregator, holding that newspaper headlines – which the aggregator reproduced without alteration – are not protected by copyright.[1] The 60 page landmark opinion resolves a legal issue that has been lurking since the 1990s, when news aggregators began distributing summaries of articles drawn from a variety of online news sources.

The *Fairfax* decision has received wide attention in Australia, which does not have an equivalent of 37 CFR 202.1, excluding titles from copyright protection.[2] While the outcome is the result of legal reasoning and precedent, rather than legislative mandate, it highlights the importance of harmonizing intellectual property law across international boundaries, particularly in a world that has become increasingly dependent on the Internet for news and information.

The Allegations:

The defendant, Reed, provides a service known as "ABIX," which distributes abstracts of various newspaper and magazine articles to its subscribers.[3] Each abstract is generally accompanied by the original headline and by-line from the corresponding article. The plaintiff, Fairfax, which publishes the national newspaper, The Australian Financial Review ("AFR"), alleged that, by reproducing AFR's headlines, Reed had infringed on Fairfax's copyright in a number of works, including:

- The headlines themselves;
- The combination of the article, headline, and by-line;
- The article "compilation," consisting of all of the articles in an AFR edition; and
- The entire edition of the AFR.

The Court's Holding That Headlines Are Not Copyright Protected:

In rejecting Fairfax's claims, the court reasoned that headlines are generally "too insubstantial and too short to qualify for copyright protection as literary works." The court

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[1] http://www.austlii.edu.au/au/cases/cth/FCA/2010/984.html

[2] http://www.loc.gov/cgi-bin/formprocessor/copyright/cfr.pl?&urlmiddle=1.0.2.6.2.0.173.1&part=202&section=1&prev=&next=2

[3] http://www.lexisnexis.com.au/en-au/products/abix-news-summaries.page

further held that the article/headline combination was not entitled to copyright protection as a discrete work, because, in most cases, the articles and headlines are authored by different individuals who do not qualify as "joint authors" under Australia's copyright statute. Although the AFR's article compilations and editions were found to be protected, the reproduction of the headlines alone did not constitute the taking of a "substantial part" of the protected work.

The "Fair Dealing" Defense and the Use of Foreign Precedents:

Reed also prevailed on its "Fair Dealing" defense, which permits copying of a protected work for the purposes of reporting news. Even if the headlines were protected by copyright, according to the court, Reed's abstracts "are, in effect, news summaries" and Reed provided "sufficient acknowledgement" of the original works.

Unlike the United States, Australia does not have a generalized Fair Use defense. Instead, Australia's copyright statute contains a number of specific statutory defenses, including the "Fair Dealing" defense. Nevertheless, the Australian court borrowed part of the Second Circuit's "Fair Use" analysis in *American Geophysical Union v. Texaco*, 60 F.3d 913 (2d Cir. 1994), which held that the wholesale photocopying of certain scientific articles did not constitute fair use because, inter alia, the "purpose and character" of the use was not sufficiently "transformative."[4] Quoting *Texaco*, the Fairfax court held that Reed's "contribution of the abstracted article makes the use of the headline a 'transformative use' by 'adding something new, with a further purpose or character.'"

The citation to U.S. law by an Australian court is not uncommon, according to John Swinson, a partner at Mallesons Stephen Jaques, which represented Reed in the litigation. As Swinson explained, "we have a lot less case law" than some other countries, so Australian courts – even the High Court – frequently examine the way foreign courts have developed a particular area of law. As Swinson noted, "this particularly makes sense in an IP framework, which is international." As common law countries, Australia and the U.S. "have the same background and philosophical approach towards copyright law." So, even though there are differences between their respective copyright statutes, U.S. decisions can provide Australian courts with creative solutions to novel legal questions.

Indeed, Australian IP lawyers I met during a recent visit were knowledgeable about U.S. copyright and trademark law and open to borrowing concepts from our jurisprudence. While some American jurists may lean towards legal isolationism,[5] as time goes by, American courts may adopt a more expansive view towards the use of foreign precedents, particularly in the area of IP law where the benefits of global uniformity and consistency are clear. As Swinson

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[4] http://www.law.cornell.edu/copyright/cases/60_F3d_913.htm
[5] http://blogs.georgetown.edu/?id=13075

succinctly put it: "You may disagree about how a foreign court decides a case; but, it doesn't make sense to say 'I'm not even going to look at that decision.'" Justice Breyer would no doubt agree.[6]

Beyond the Headlines:

Interestingly, Fairfax did not allege that the abstracts themselves infringed Fairfax's copyright in its articles, nor did it assert any type of misappropriation claim akin to the "hot news" doctrine that has recently received media attention in the U.S. As Swinson explained, Reed's abstracts do not simply excerpt material from the articles but are created "from scratch" by professional journalists. Moreover, Australia has no equivalent to the "hot news" doctrine, so this argument was never raised during the case, according to Swinson.

A detailed discussion of the "hot news" doctrine is beyond the scope of this article. In brief, it is a very narrowly-applied form of misappropriation or unfair competition law that protects against the unauthorized taking of factual material that is – as the saying goes – "hot off the presses."

Originally published on Frankfurt Kurnit's Entertainment Law Matters Blog, Sept. 27, 2010 (www.entertainmentlawmatters.com)

[6] http://blogs.wsj.com/law/2010/04/02/i-can-read-what-i-want-says-breyer-on-international-law-debate/