PiperAlderman

Article Information

Authors: Tim O'Callaghan, Travis Shueard, Matea Prce
Service: Copyright, Intellectual Property

AGL Energy Limited v Greenpeace Australia Pacific Limited [2021] FCA 625 – Fair dealing, parody or satire and potential pitfalls

Greenpeace Australia Pacific Limited (Greenpeace) has successfully defended a claim for copyright infringement against Australia's largest electricity generator, AGL Energy Limited (AGL), after using its logo in a campaign that described AGL as the nation's "biggest climate polluter".

Overview

Greenpeace has successfully defended a claim for copyright infringement against Australia's largest electricity generator, AGL, after using its logo in a campaign that described AGL as the nation's "biggest climate polluter".

In its decision,[1] the Federal Court provides some welcomed clarity regarding the circumstances in which the "fair dealing" defence for the purpose of "parody or satire" may be used in a claim for copyright infringement. The case also demonstrates the importance of understanding IP infringement generally, and the traps to be considered before alleging an infringement of your IP rights in court.

Charities and political protest groups in particular will be emboldened by this decision, as it confirms that using a corporate symbol in protest is permissible, provided it falls within the boundaries of s 41A of the *Copyright Act 1968* (Cth) (**the Act**).

Key Takeaways

- For copyright owners – copyright owners should remain confident that their ownership of copyright is still an effective method to prevent unauthorised use of a logo or other artistic work.

However, it is prudent for owners to have regard to whether or not certain conduct amounts to an infringement of IP rights and whether a more viable alternative would be to pursue action under the *Australian Consumer Law*, particularly where the infringing use is factually incorrect or misleading.

- For potential infringers of copyright – if you are intending to use a logo or other artistic work for the purposes of parody or satire, you should consider whether it is objectively clear to the average consumer that such use is both "fair" and one of "parody or satire" within the meaning of the Act.

It is important to consider the context in which you may be using third party IP in your advertising, campaigning or other promotional material and whether that third party is a direct competitor with your business. If Greenpeace was run a competitor to AGL, it is unlikely that it could have relied upon the fair dealing defence, as such use would be neither fair nor for the purpose of parody or satire (and more likely one in bad faith or otherwise for its own commercial exploitation or "work profit"). That Greenpeace was (famously) known as an international environmental protest group acted in its favour of falling within the exceptions of the Act.

- For businesses with IP rights generally – it is important to understand that different IP rights have different bases for defence. In this case, AGL also (unsuccessfully) made a claim against Greenpeace for trade mark infringement. It is not a necessarily a defence or permissible to use a trade mark for the purpose of parody or satire.

Background Facts

Greenpeace, the well known environmental activist group, commenced a significant advertising campaign against AGL in May 2021. The campaign parodied AGL and its logos in order to protest AGL's environmental practices; notably, AGL's initials were used to state "*Australia's Greatest Liability*", with other satirical taglines such as "G*enerating Pollution for Generations*" and "*Still Australia's Biggest Climate Polluter.*"

Procedural History

AGL leapt into action with urgent interlocutory proceedings to enjoin Greenpeace from using its trademarks in the protest campaign, alleging trade mark and copyright infringement. AGL submitted that it was not trying to silence Greenpeace but prevent it from using its registered trade marks and asserting an artistic work in which copyright subsisted.

Greenpeace denied that there was any infringement in copyright – the use of AGL's logo amounted to fair dealing pursuant to parody or satire under s 41A of the Act and was for political or protest purposes. The relevant section of the Act reads as follows:

"*A fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, does not constitute an infringement of the copyright in the work if it is for the purpose of parody or satire.*"

AGL denied this and argued that Greenpeace's motives were entirely in keeping for a commercial purpose. This was despite Greenpeace being a protest group.

Judgment/Decision

Copyright Infringement

Burley J, referring to earlier decisions[2] which have considered the interpretation of s 41A, held that the use of AGL's logo did not constitute copyright infringement.

In order for the use of a copyrighted work to fall within s 41A, the "*the impugned work is used 'to expose, denounce or deride vice', often in the context of a humorous or ridiculous juxtaposition.*"

It is worth noting that neither "*parody*" or "*satire*" are defined by the Act but previous decisions have considered "parody" to be of imitation,[3] whereas "satire" has been suggested to mean a form of criticism without imitation.[4]

His Honour determined that the use of AGL's logo was clearly intended to fall within the exception of parody or satire, although it was not all positive results for Greenpeace. Several of Greenpeace's advertisements which asked AGL to ditch coal or embrace renewable energy, such as "*Tell AGL's CEO to do the right thing and ditch coal for renewables*" did not fall within s 41A.

It is important to recognise that s 41A requires the use of a copyrighted work in parody or satire to also be considered "fair dealing". Elements that the Court considers when determining whether use constitutes "fair dealing" are set out in s 40(2) of the Act and include such factors as:

- the purpose and character of the dealing;
- the nature of the work or adaptation;
- the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price;
- the effect of the dealing on a potential market for the original work; and
- the amount and substantiality of the part taken, if only a part of the work is taken for the dealing.[5]

Burley J held that Greenpeace's use of the AGL logo constituted a fair dealing. In doing so, he considered that, among other things, the use of the logo was clearly indicated to originate from Greenpeace, there was a clear intention to criticise AGL and Greenpeace was obviously not a competitor to AGL or even a commercial organisation.

Burley J's reasoning is consistent with previous authorities of *Palmer* and *Pokemon*, which in turn also provide clarity over the impact that the "flagrancy" of the infringement will have upon any damages awarded against the infringer.

In *Palmer*, Mr Palmer sought to rely upon the fair dealing defence for the use of the Twisted Sisters song "*We're Not Gonna Take It*" in political advertisements for his political party, the "Palmer United Party". However, the Federal Court dismissed this defence, having regard to Mr Palmer's flagrant infringement, contemptuous and blatant disregard of the IP owner's rights by the infringer – Mr Palmer was fully aware that the song required licence for use, but disregarded this and used the song anyway.[6]

By contrast, in *Pokemon*, whilst there was a finding of copyright infringement by the Court, the damages awarded were $1 nominal damages.[7] This was because the Court did not regard the conduct of Redbubble (as the infringer) using various

copyrighted Pokemon artistic work as amounting to a flagrant disregard of Pokemon's IP rights.[8] This was in view of the reasonable and defensible IP policies Redbubble had in place, to prevent and mitigate instances of breaches of third party IP rights.[9]

Trade mark Infringement

AGL was similarly unsuccessful with its claims of trade mark infringement. Burley J held that there was no infringement of s 120 of the *Trade Marks Act 1995* (Cth), as Greenpeace did not use AGL's logo as a trade mark, and its use was only to identify that brand as the subject of criticism. There was no possibility that the average consumer would perceive Greenpeace to be promoting AGL goods or services.

Summary

The decision in *AGL v Greenpeace* should be considered in light of the previous decisions of the Federal Court in *Palmer*[10] and in *Pokemon*[11] in the context of "fair dealings", particularly where the Court retains broad discretionary powers to award additional damages. The significant sum of additional damages for copyright infringement awarded in the *Palmer* case should remain a significant deterrent for future infringers, where the Court made an example of Mr Palmer, showing that it will not tolerate flagrant infringements.

A strategy of risk mitigation, with appropriate processes and IP policies, is a worthwhile consideration for businesses who regularly deal with the IP of other businesses.

If you are concerned about the risk of copyright infringement our team can assist.

[1] [2021] FCA 625.

[2] *Universal Music Publishing Pty Ltd v Palmer* (No 2) [2021] FCA 434; *Pokemon Company International, Inc v Redbubble Ltd* [2017] FCA 1541.

[3] *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* [2001] FCA 108 (Conti J).

[4] *Pokemon Company International, Inc v Redbubble Ltd* [2017] FCA 1541 [68].

[5] *Copyright Act 1968* (Cth) s 40(2).

[6] *Universal Music Publishing Pty Ltd v Palmer (No 2)* [2021] FCA 434 [496].

[7] *Pokemon Company International, Inc v Redbubble Ltd* [2017] FCA 1541 [74].

[8] Ibid [76].

[9] Ibid.

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

[11] *Pokémon Company International, Inc v Redbubble Ltd* [2017] FCA 1541.