

Article

INTELLECTUAL PROPERTY

Music to Artists' Ears: Palmer to Pay Up Big for "Flagrant" Copyright Infringement

By Sandy Donaldson & Jack Davis

On 30 April 2021, Justice Katzmann of the Federal Court of Australia handed down her judgment in the matter of *Universal Music Publishing Pty Ltd v Clive Frederick Palmer* [2021] FCA 434.

For those who missed the news reports, the heated social media exchanges, and the United Australia Party's (**UAP**) numerous press releases, these proceedings concern the unauthorised use of Twisted Sister's glam rock classic, *We're Not Gonna Take It* (**WNGTI**), by Clive Palmer's UAP leading up to the 2019 Federal Election. Specifically, the UAP recorded a brief 11 second knock-off of the Twisted Sister song for use in its extensive television advertising campaign, altering the lyrics from the well-known hook of the original to:

"Australia ain't gonna cop it

No, Australia's not gonna cop it

Aussies not gonna cop it, anymore"

The UAP knock-off, *Aussies Not Gonna Cop It* (**ANGCI**), was used in 12 separate television advertisements, each featuring the same 11 seconds of audio with slightly different visual accompaniments. Despite the estimated \$12,000,000 expended by the UAP on this part of its campaign, Mr Palmer and the UAP did not pay, nor consult, the original writer, Dee Snyder,

nor the current copyright holder for the UAP's use of the song, Songs of Universal Inc (**Songs of Universal**).

Universal Music Productions Pty Ltd and Songs of Universal (together, **Universal**) issued proceedings against Mr Palmer in March 2020 for copyright infringement. Universal sought relief in the form of a declaration that ANGCI was a reproduction of a substantial part of WNGTI and that Clive Palmer had accordingly infringed Universal's copyright, a permanent injunction on further reproduction of WNGTI by the UAP, and damages pursuant to section 115 of the *Copyright Act 1968* (Cth) (**Copyright Act**).

Without undertaking too deep an analysis of Her Honour's lengthy judgment, Her Honour found that:

1. ANGCI was a reproduction of a substantial part of the lyrics and music of WNGTI;
2. Mr Palmer had not paid Universal for its use and appropriation of WNGTI, nor sought Universal's consent, so the reproduction was unauthorised;
3. None of Mr Palmer's defences (which ranged from unlikely to incredible) had been made out on the evidence before the Court;
4. Mr Palmer had accordingly infringed Universal's copyright in respect of WNGTI.

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Her Honour granted each of the orders sought by Universal, making declarations that ANGCI was a reproduction of a substantial part of the literary work (lyrics) and the musical work of WNGTI and an infringement of Universal's copyright, and granting an injunction prohibiting any further reproduction of ANGCI, and awarding Universal \$500,000 in damages pursuant to section 115(2) of the Copyright Act.

But Her Honour didn't stop there.

Section 115(4) of the Copyright Act allows the Court to award "**additional damages**" for copyright infringements where it considers that it is proper to do so. An award of additional damages is largely discretionary, however, the Copyright Act does list certain matters to which the Court must have regard in considering whether to award such damages and, if so, how to assess their amount. Those matters include, relevantly, the "**flagrancy**" of the infringement, the need for deterrence, and the defendant's conduct after being put on notice of the infringement.

Her Honour listed no less than eight matters that she considered material to her assessment of section 115(4) damages. These ranged from Mr Palmer's failure to adequately discharge his disclosure obligations throughout the proceedings, to the fact that Mr Palmer "**taunted, mocked and derided Mr Snider in both mainstream and social media**" following the allegations of copyright infringement. Her Honour was satisfied that Mr Palmer had acted in "flagrant disregard" for Universal's rights, having particular regard to the evidence of Universal, which showed that Mr Palmer was clearly aware of Universal's ownership of the copyright of WNGTI.

Her Honour proceeded to award Universal a further \$1,000,000 in additional damages pursuant to section 115(4), on the basis that section 115(2) damages of \$500,000 alone would not be sufficient to punish and deter. Integral to this award was Mr Palmer's claim in cross-examination "**not to care about having to pay out \$180,000 to Universal, since he deals in billions of dollars.**"

In order to understand the significance of this award, it is necessary to compare some recent awards of section 115(4) damages that the Courts have made.

In *Deckers Outdoor Corporation Inc v Farley & Ors (No 5)* (2009) 262 ALR 53, Justice Tracey awarded the applicant damages of \$3,000,000, together with \$3,500,000 in section 115(4) damages for a copyright infringement that His Honour described as "one of the worst of its kind to come before the court." The key consideration in His Honour's assessment of additional damages was the continued manufacture by the fourth respondent of counterfeit UGG Boots for a period of at least four years following the applicant's initial complaint, notwithstanding numerous court orders and injunctions to restrain the manufacture.

In *Australian Performing Rights Association v Dion* [2016] FCCA 2330, Judge Street awarded the applicant \$400,000 in additional damages for the respondent's failure to pay licencing fees to APRA prior to holding a music festival. Although the compensatory damages were previously fixed by the Court at \$35,000, the applicant brought a subsequent application for additional costs. His Honour considered that a significant award of additional damages was necessary to ensure future deterrence of similar conduct, which included a failure to pay the prior compensatory damages imposed by the Court, the significant benefit obtained as a result of the infringement, and the flagrant disregard for the rights and interests of the copyright owners.

In *Leica Geosystems Pty Ltd v Koudstaal (No 3)* (2014) 109 IPR 1, Justice Collier awarded additional damages of \$50,000 in addition to nominal compensatory damages of \$1. Although the applicant, in that case, was unable to show that it had suffered any material damage as a result of the respondent's infringement of its copyright, His Honour considered that an award of additional damages was appropriate because the respondent "**completely disregarded the rights of the applicants, which rights he has conceded.**" The fact that compensatory damages were nominal did not affect His Honour's assessment of such an award.

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What is clear from the small number of cases surveyed above is that awards of additional damages vary considerably according to the Court's perception of the seriousness of the infringement and often bear little relation to the compensatory damages awarded. There is no requirement that the additional damages be proportionate to the remedial damages awarded.

Justice Katzmann's significant award of additional damages against Mr Palmer was a reflection of Her Honour's contempt for Mr Palmer's actions and his blatant disregard for Universal's rights. The combined award of \$1,500,000 in compensatory and additional damages will undoubtedly hit harder than the original licence fee quoted by Universal of \$150,000. Mr Palmer has since appealed Justice Katzmann's decision, but the precedent that Her Honour has set should act as a deterrent for others who, like Mr Palmer, would sooner spend their money on litigation than on fairly compensating musicians, artists, and writers for the use of their works. Although, whether it deters Mr Palmer remains to be seen, given (as has been widely reported) that he once listed "*litigation*" as one of his hobbies in *Who's Who*.

If you have serious concerns about a person's use of your copyrighted material, please reach out to one of our experts to discuss the options at your disposal.



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