Australian
Intellectual Property Law
Bulletin

Interview with Colin D Golvan QC

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You have been practising in intellectual property law as a Barrister for nearly 30 years, and you have been involved in a number of leading cases. What initially drew you to this area of law?

My entry into this area of law was through copyright. My background was in writing and journalism before I began my legal career so copyright was a natural fit and I was fortunate to start with Philips Fox and Masel when the firm was establishing an intellectual property section.

You have been involved in numerous cases which centre on Indigenous artwork. Can you tell me why you are so passionate about this area of law?

For me, Indigenous arts and culture provides an important way to understand the unique country in which we are living. I have had many memorable encounters with Aboriginal arts and artists. Once this kind of close engagement with Aboriginal arts and culture is experienced, you can't shake it.

From a legal perspective, my connections with Indigenous arts have provided me with some special insights into the way in which traditional societies protect rights in work. I have come to learn that in Aboriginal law and culture there are some complex ways in which rights in certain images are protected based on clan rights.

The Australia Council for the Arts has provided guidelines in relation to the use of Indigenous Australian cultural IP. In your experience, what are some of the key issues that people need to be aware of — particularly copyright lawyers?

The issue of unauthorised reproduction is, of course, important, as is the issue of the cultural sensitivity attaching to some works. There is a need in both public display and reproduction to approach both those issues with care and respect. Some objects have spiritual significance, and in some cases contain secret or sacred content. This is very precious to the people creating the works, transcending personal expression.

There is a tension between our perspective on the protection of rights in artworks as personal rights under copyright and the nature of communal rights in artworks as understood by traditional artists and their communities. The Indigenous approach doesn't really have much regard for private rights in the cultural context, and is focused on collective protection and ensuring respect for the art work. There has been a challenge for lawyers in this area to try to make the legal outcome of the cases relevant to the people whose art was being protected.

In particular, we have sought to argue for a form of collective protection using concepts of fiduciary duty to assert that an artist is a manager of an art work on behalf of his/her community as beneficiary. Regard has also been had to the principles of equitable ownership of copyright as claimed on behalf of communities. Thus, we have sought to argue that the interests of community members as beneficiaries have also been harmed by the unauthorised reproduction of artworks important to communities.

Is there a need for reform?

The need for reform has been spoken about, especially as a matter of principle. At the same time I have held the view that, from a practical view, copyright has been effective in achieving protection through the flexible remedies available under the Copyright Act.

Interestingly, WIPO (World Intellectual Property Organization) studies have shown that many Indigenous cultures have their own traditional concepts of protecting artworks from unauthorised reproduction. This reflects the underpinnings of copyright in Western law, being the need to ensure that the rights of authors of artistic and other works are protected as part of the way in which a civil society organises itself.

Recently, Archibald Prize winner Del Kathryn Barton was under fire for incorporating Aboriginal design elements in her artwork without referencing Indigenous culture. Because copyright law does not prohibit a person from using someone else's style or technique, what is your view on this matter?

We are dealing with a very sensitive but vitally important culture. It is important to understand that this

culture has faced enormous challenges in the past and has only in relatively recent times been growing in confidence.

From an artistic point of view, we should be doing everything in our power to foster the building of that new confidence. If this means leaving the essence of the art form to the people who initiated it, then my view is to leave it with them.

What advice would you give to Australian Indigenous students, and other students who are looking to study intellectual property law?

Over recent years there have been quite a number of Indigenous students studying law, which has been an important development in the advancement of Indigenous opportunity.

I encourage Indigenous students to study intellectual property law because it is so important in the protection of the cultural and economic rights of their communities. Terri Janke, an Indigenous solicitor in Sydney, has shown the way in this regard. Terri has been very successful in her intellectual property law practice. She is one of Australia's leading Indigenous solicitors and has made a wonderful career in the area of Indigenous intellectual property. She is a great role model for Indigenous law students and lawyers generally.

What is the future for the practice of intellectual property law?

Intellectual property law practice has enormous potential, particularly due to the critical shifts we are seeing in our economy towards innovation-based commerce, which has underlying it the protections afforded by intellectual property laws. If you think about the way key aspects of our society function — the way we engage with the internet and communication services, telephones, tablet devices, TV, films, media — all of these encompass intellectual property as a key basis for legal protection.

Innovation of course requires finance, and we need to have a better understanding of the value of intellectual property. The business of valuing intellectual property properly is an important exercise both for legal practitioners as well as for accountants and business advisors. It is something we have not done wonderfully well to date, and I think if you look at, say, Silicon Valley you would find an acceptance of the asset value of copyright which would be much more advanced than the approach we adopt here. You have got to have a capital base to develop the innovation economy, and capital means that people understand the value of copyright and related rights in a balance sheet sense. I do not think we do that well at the moment. We could do better.

We are fortunate to be part of the fastest growing economic region in the world, and that's going to be reflected in an increase in intellectual property engagement in our region. For instance, if you think about the emergence of China as an inventive society, not just a manufacturer, it will need to focus increasingly on having a stable and reliable intellectual property system. We can bring real skills to that table.

Our intellectual property system is highly regarded internationally. Leading companies are happy to bring their important patent cases to Australia for determination which reflects well on the reliability and integrity of our court system.

I think we have some work to do in engaging with the region with the kind of intellectual property learning and experience we can contribute. We should also be more active in the international arbitration sector which has a very strong presence in Hong Kong and Singapore. Australian practitioners have not played a very prominent role in this area, and have tended to be bounced off the scene by key lawyers from the United Kingdom and the United States. I think we need to assert a bit of regional muscle here and become more active and more engaged in intellectual property mediation and arbitration activity, which is very significant in our region.

What are some of personal challenges you face practising as a barrister?

That is a question which warrants a range of responses. One of the greatest challenges is the challenge of the work itself — the need to grapple with the complex factual and legal content, and then to advocate for a carefully formulated position. It is never anything but challenging.

The law, of course, is developing at a rapid pace with changes to legislation and policy and many rulings to master, in particular from the Federal Court. In that regard, I have been greatly assisted by solicitors and junior barristers, working in a collegiate environment, which is a very rewarding way to work.

The bar is enormously competitive. There are a lot of very clever people there, and it is an open market. I think the obvious answer to that challenge is to develop a sense of your own strengths and work to those strengths.

Also, I think a good barrister must be a very astute listener and observer of what is going on at all moments in a trial. I have always admired those highly skilled barristers who can change course at a moment's notice when something unexpected has happened. It is always a safe bet in trials to expect the unexpected.

What cases stand out for you?

I have been fortunate to have been involved in some very interesting cases but a real standout for me would be *John Bulun Bulun v R & T Textiles Pty Ltd*.[1] In that case we advanced an argument on behalf of an Indigenous community about collective rights in copyright through principles like fiduciary duties and equitable ownership of copyright. We had a very interesting exchange with the trial judge, Justice John Von Doussa, who was willing to explore this relatively uncharted terrain and made significant findings recognising the collective rights case.

Another noteworthy case was *Elwood Clothing Pty Ltd v Cotton On Clothing Pty Ltd*,[2] which on appeal reversed the judgment at trial. This case looked at the issue of the nature of copyright in the layout of an artistic work and incidentally we used the work of the Australian artist Rosalie Gascoigne as a point of reference for how layout can be very important in understanding visual arts. The appeal was concerned with a different way of seeing things than had occurred at trial.

I would also like to mention the series of house plan cases — namely *Barrett Property Group Pty Ltd v Dennis Family Homes Pty Ltd (No 2)*,[3] *Barrett Property Group Pty Ltd v Metricon Homes Pty Ltd (Metricon* case*)*[4] and *Barrett Property Group Pty Ltd v Carlisle Homes Pty Ltd*.[5] In these cases, we were arguing that a particular facet of a display home plan constituted a substantial part of a work. Those cases also involved a bit of an excursion into the realm of visual perception (rather than the customary verbal or literal perception), as only a part of the plan was sought to be protected and that part took on something of a life of its own, becoming known in the various judgments (through to a special leave application in the *Metricon* case) as "the Alfresco quadrant".

The final case I will mention is *Phone Directories Co Australia Pty Ltd v Telstra Corp Ltd*,[6] concerning copyright and databases. We were looking at the question of whether there can be copyright protection in the White Pages directory listings. Ultimately, the argument turned on whether the directory listings were made by a human or machine author, with only the former being capable of protection. The trial judge agreed that the work was made by a computer, and thus could not be protected under copyright – a conclusion which survived appeal and ultimately a special leave application to the High Court.

What are your views on some of the key issues outlined by the Productivity Commission's review of the intellectual property regime?

I have, in particular, looked at the recommendations to abolish the restrictions on parallel importation and to introduce a defence of fair use in copyright in place of the fair dealing defence.

I share the publishers' and authors' perspective on the problems of removing the restrictions on parallel importation. It will significantly inhibit the ability of Australian authors to transact in rights in different copyright territories — undermining their capacity to obtain advances on royalties with every rights sale.

Advances are a key part of the earnings of many Australian authors. Australia's leading copyright owners will invariably be required to transact on a one-off basis with a publisher in the United States or the United Kingdom, with the work being absorbed into an international publishing program and the offering of Australian editions as a secondary consideration. There are significant risks to the integrity of our Australian literary culture, as well as the prospect of the loss of jobs and know-how in our domestic publishing market, when key publishing decisions concerning the Australian market are coming from London or New York.

I am also concerned that the open-ended nature of the fair use defence will significantly harm the important work being done by collecting agencies, in particular Copyright Agency Limited (CAL), in its dealings with tertiary and other educational institutions. For many authors, CAL payments are a key part of their earnings from writing.

I am worried about the emphasis that is given in this "consumer" driven report to the interests of consumers above everything else. I think it is a mistake especially when it comes to issues of the creation of culture. There are no ready substitutes for the small body of often poorly remunerated authors who create the works that shape our culture, unlike substitutes in the ordinary economy for the purchase of bananas or toothpaste. To me, the report is inadequate in dealing with the significant national interest in the development of culture and ensuring that our creators are able to earn proper payment.

From a legal perspective, we also have a whole jurisprudence about fair dealing which has been extensively reviewed by the High Court. Fair use would

create a significant (and, from an economic perspective, inefficient) new regime of inquiry. It could potentially lead to a lot of new case law and a lot of unresolved issues, and therefore there is a kind of false economy around the idea of legislating in this area in the hope of making copyright works more available for use.

I do not see what the advantage is in these proposed reforms. The present system is well understood and works well. I do not see that there is an imbalance requiring correction in addressing the interests of creators and users of copyright works.

Lastly, if you wanted to change any aspect of copyright law, what would it be?

I think I would not change anything. Generally, I have expressed my concerns about an overly consumer-focused approach in the Productivity Commission's report.

There is a real tension in practice in the Federal Court between its work in the pro-competition/anti-monopolies sphere and the protection of intellectual property monopolies generally.

There are some judges who, I think, feel that intellectual property monopolies are excessive and who try to read them down, and there are others who do not. You can see this tension is reflected in the Productivity Commission report itself.

There is going to be a tension between the pro-competition economist's view and this amorphous thing called the protection of culture through the monopoly of copyright, or the promotion of a culture of inventiveness, for example, through the monopoly of the patent system. The resolution of this tension is not easy to interpret, but ultimately defines what I see as the key issue in the debate over coming years in the area of law reform in intellectual property generally, as well as copyright in particular.

photo of Colin D Golvan QC — BA (Hons), LLB, LLM

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Footnotes

1. *John Bulun Bulun v R & T Textiles Pty Ltd* [1998] FCA 1082.
2. *Elwood Clothing Pty Ltd v Cotton On Clothing Pty Ltd* (2008) 172 FCR 580; (2008) 80 IPR 566; [2008] FCAFC 197; BC200811583.
3. *Barrett Property Group Pty Ltd v Dennis Family Homes Pty Ltd (No 2)* (2011) 193 FCR 479; [2011] FCA 276; BC201101488.
4. *Barrett Property Group Pty Ltd v Metricon Homes Pty Ltd* (2007) 74 IPR 52; [2007] FCA 1509; BC200708447.
5. *Barrett Property Group Pty Ltd v Carlisle Homes Pty Ltd (No 2)* [2008] FCA 930; BC200804974.
6. *Phone Directories Co Australia Pty Ltd v Telstra Corp Ltd* (2014) 106 IPR 281; [2014] FCA 373; BC201402874.