



The Law Report

The Law Report: 31 May 2005 - Unrepresented Litigants who incur Unnecessary Costs; Remixable Films

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Damien Carrick: Hello, and welcome to the Law Report, I'm Damien Carrick. This evening: A case where ignorance is definitely not bliss—unrepresented litigants who find themselves saddled with unnecessary legal bills.

And later: [music: Avalanches]

Well, we all know about music sampling, but what happens if other art forms go down the same road? Take acting; if you're an actor how would you like to be remixed? Have your head popped on another body? Or your performance cut and sliced to give a totally new meaning and context? That's later.

But first, let's look at another type of expression: political expression. Today in federal parliament, ALP member, Anthony Albanese, tabled a petition signed by 1300 people in support of a Mr Stan Ghys.

During the last federal election, Stan Ghys, an IT professional who isn't aligned to any political party, took time off work and decided to conduct a one man campaign against what he regards as the deficiencies of the Howard government.

Stan Ghys: I made hundreds of t-shirts of various sizes and colours, appealing to as many people as I could. They had a heading that said, 'Don't vote for this type of government', and basically four subheadings with quotes out of the media. One was about GST, the other was about he children overboard, the other one was about people marching against the way, and the other one was about out petition trying to be delivered to George Bush in our own supposedly democratic parliament. Basically, my aim was to have walking billboards around Sydney with people who felt similarly to me prepared to have that spelled out in a peaceful, respectful way on a t-shirt.

Damien Carrick: Stan took his message and his t-shirts and went spruiking throughout Sydney's marginal seats, including Parramatta's main shopping mall. It was there, he says, he encountered problems.

Stan Ghys: When I was out there, I was approached by a person who said they were in control of security. Basically, I was stood over for about five minutes and then had them step aside, make a mobile phone call and call some rangers along. They then stood aside, turned to me and

said that someone had said that I'd been harassing them. I might say that in this particular place there are a lot of other political parties and they'd all witnessed what had happened and protested that there was no way I had been harassing anyone.

Damien Carrick: So you had this interaction with people from the council. What happened at that point?

Stan Ghys: It was quite a cordial conversation at the end of it. The person who claimed to be in charge of security actually turned out to be working for the local Liberal Party representative, and they were a local councillor. I decided to keep the peace; I left that evening and I came back again under a council permit two days later. I was distributing the t-shirts again, to be confronted by the same person who had claimed to be in control of security, with another person who had a large dog with him. They had their cameras raised ready to take a photo of me. From what I'm led to believe other people actually saw them take photos before I noticed. I walked up to them and calmly asked if they could respect my request for privacy. At that point the person with the dog jumped forward and violently poked me in the chest, pulled his dog forward and said, 'You scumbag, I'm going to sic my dog on to you.' A bystander then shouted in protest, and given that it was in a very public mall, the two people, who were both later confirmed to be working for the local Liberal Party representative and local councillors, departed. I then went home. Within two days I had graffiti on my car. Now, I might say that that graffiti was of a nature that I believed was physical intimidation, though it's very hard to prove.

Damien Carrick: Why do you say or imply that there's a connection between what had happened to you on one side of Sydney in a shopping mall, and the vandalising of your car at the other end of town, several days later?

Stan Ghys: There was a specific word that was used in that marginal seat, and that was written across my car. It took me some time thinking about it, but in applying for a council permit, I did supply my personal details and my home address and I am left wondering, whilst it's difficult to prove, whether someone accessed my files in that marginal seat.

Damien Carrick: But it could have been a coincidence, you'd acknowledge that possibility?

Stan Ghys: I'd acknowledge that possibility, certainly. Having established that these people were publicly elected officials and local councillors, I was concerned that such people in those positions would behave the way they had, so I decided to initiate an apprehended violence order, or an AVO. I decided that I wouldn't go through the police because they've got limited resources and really what I wanted to do was to demonstrate that I'm actually prepared to stand up for my rights and seek help wherever I can. So I went to a court to initiate that AVO.

Damien Carrick: So what happened?

Stan Ghys: I initiated the AVO—that involved going in to court to do so—then I went back to court for an initial mention where the accused appeared, and the magistrate then asked if would we like to have witnesses, and I said yes, I would, I'd like to continue with the process, and the magistrate scheduled a hearing so that it would have required a third visit. Now, there's an old saying that justice delayed is justice denied, and in fact what happened was that hearing ended up being so out that the election had been and gone, and one would ask, why would you continue with an AVO where... obviously I'm not going to keep distributing t-shirts after an election... where the risk seems to be diminished. In fact, continuing with the AVO may incite the other party who have their own reputations to protect etc. So I rang up the court a week in

advance of the actual hearing, in good faith, and said, 'What do I do?' They said, 'There's no problem, send us a fax,' and I believed that would be it. About three weeks later I got issued a notice of penalty for \$790, which is a considerable amount of money for myself, which was apparently for not having appeared in court, and was the court passing on the costs of a solicitor that the other party had employed. It appears in hindsight that the court having given me advice to send a fax, having not informed me about the risk of costs, did not actually advise the other party that the hearing wouldn't be proceeding. I might add that part of giving them the advanced notice was that if the hearing wasn't going to be proceeding, that the court would save their own resources.

Damien Carrick: So you're now up for about \$790, is it?

Stan Ghys: That's right, up for about \$790 and probably a couple of extra thousand dollars in costs fighting it since then.

Damien Carrick: Stan Ghys, who says the episode raises two important issues. First, there is no watertight protection of free speech under Australian law, no Bill of Rights. And second, even when you do everything you can to inform yourself, using the legal system can be expensive and sometimes land you in even hotter water.

Of course, every story has two sides. One of the councillors involved in the dispute was Parramatta City Councillor, Chiang Lim. He says Stan Ghys was wasting both his and the court's time and resources.

Chiang Lim: I think Mr Ghys has an overactive imagination. On the first evening he was actually the one who was harassing, in a loud voice and a very confronting manner, to the public in terms of pushing his agenda. Back then, as a member of the Parramatta city's safety and security taskforce, we would like to have a very peaceful way of expressing our views, a democratic and open process at that. When he returned on the next day, which was actually a Saturday, yes, it just so happened that a friend of mine, one of my fellow councillors was there, and he had a dog, yes, it's true but this dog...I don't know exactly the breed but it's one of the most docile breeds, and the dog's more afraid of human beings than the reverse. I don't believe that there was any such so-called attack. In fact, what I understand from (because this happened away from me) what I understand was that Mr Ghys, out of his enthusiasm on that Saturday morning, stepped on my friend's arthritic foot, and he just reacted in the same way of saying, 'Please, don't step on my foot.'

Damien Carrick: Stan Ghys says that his car was graffitied with a word which was used in an interaction which he'd had with you and your fellow councillor. Was there any connection between the graffiti and the incident?

Chiang Lim: First of all, I suspect that the graffiti did not exist, simply because he also said that it has been cleaned off. Now, if it was supposed to be admitted as evidence, why was it cleaned off so quickly before the court?

Damien Carrick: Councillor Lim fronted up to court to defend the apprehended violence order, and by bringing along his lawyer to represent him, incurred \$790 in legal costs. Not surprisingly, he'd like Stan Ghys to pipe down and pay up.

Chiang Lim: He was out there just to cause terrific mischief to everybody, including the court, and waste court's time, and also waste my time and my personal expense. It's really interesting

that he is now paying off his debt to me over a 24 month period of \$30 a month. It's interesting that he uses the court to his benefit, whereas I have to foot the whole bill of almost \$1000 in one go, yet he was able to use the system so he can pay off \$30...with no interest charged, for the duration when the entire debt is repaid. I think it's quite rich that he uses the court when it suits him, or he uses the defence of free speech when it suits him, but he uses it to his advantage and to his advantage only.

Damien Carrick: Councillor Chiang Lim. Cameron Murphy is the president for the NSW Council for Civil Liberties. He thinks Stan's experiences raise practical issues around access to justice.

Cameron Murphy: Well, I think this matter, certainly at the beginning, was about freedom of expression; he was simply trying to parade around and sell paraphernalia that was anti-government in its nature at the election, and there was a political message in that. I think that the situation though has developed to one which is also an important issue but is less about freedom of expression and is more about procedure and the problems that self-represented litigants face.

Damien Carrick: What are his legal options? What can he do if he wants to dispute or appeal this costs order? I think it's about \$700-800 worth.

Cameron Murphy: Well, the problem that he faces from here...I've looked at the matter on his behalf, I've had a barrister look at the matter. The problem with this case is that his only option really is to appeal the matter. The costs of filing an appeal are so prohibitive that they're likely to be more than the costs order that's been made against him. Then the prospects of the appeal...the matter's already out of time, so he'd have to argue that it should be heard out of time. If he loses on appeal then he may simply face a much larger costs order than is already made against him.

Damien Carrick: There was, last year, a really interesting case from WA involving a fisherman, which looked at issues of how far you need to go in terms of accessing information about what the law is or what a legal process is. Tell me about that case.

Cameron Murphy: In this case there was a fisherman who went to a government department. This is a brief summary—he tried to find out where he was allowed to fish after new regulations were passed, they couldn't provide him with regulations, they told him where the areas were that he could fish or not fish, he went to every length that was possible to try and find out what the law was. Unfortunately, the government printer hadn't printed copies of the regulations that could be provided at that stage, so he was relying on advice from government officials, and he did everything in his power to find out. He was subsequently found to be fishing in the wrong area, and was prosecuted. The case ended up in the high court, and the high court held that ignorance of the law was not a sufficient defence, even if you've done everything you can possible do to try and find out what the law is. As unfortunate as the situation is, ignorance is still not a sufficient defence. If the court allows someone to say, 'I shouldn't be convicted. My defence is I didn't know that that was the law,' then virtually every person charged with a criminal defence could rely on that defence and say, 'Well, I didn't know it was against the law to commit an armed robbery,' for example, and rely on that as a defence, at its extreme. So for a policy reason, I think the court must provide that as a base positioning.

Damien Carrick: Cameron Murphy, president of the NSW Council for Civil Liberties. One of the places that Stan Ghys went to for legal advice was the Redfern Legal Centre. The centre's principal solicitor is Elizabeth Morley. She says Stan's case isn't unique. Without proper legal

advice it's all too easy for self-represented litigants to incur costs. She's seen some pretty sad cases.

Elizabeth Morley: It was a woman who had been assaulted by a neighbour, and who sought an apprehended personal violence order against the neighbour. She'd attended a local court that heard the mention of it and then referred it in to the Downing Centre, which is the main local court in central Sydney. Our client, who had been the victim of abuse before and has some difficulties sometimes with dealing with the quantity of information in an intense situation, didn't register the change in venue, so she turned up at the first court on the right date, only to find that it wasn't there and she had to attend the second court. She tried to call the second court to say she was on her way but by the time she'd got to the second court, an order had already been made dismissing her application and visiting a costs order on her. In the particular circumstances we were unable to advise her to challenge that decision, and she ended up being re-victimised by having a costs order made against her, somewhere in the vicinity of \$1000.

Damien Carrick: So, a not insubstantial amount for somebody who's perhaps not a full-time worker.

Elizabeth Morley: In fact, the particular person was on social security. I think that this is meant to be a system of justice, and it's not actually achieving what it's there for if people don't actually get a fair access to it, to actually have it work for them.

Damien Carrick: Elizabeth Morley, principal solicitor with the Redfern Legal Centre in Sydney.

Now, let's shift our focus from political expression to artistic expression, and the brave new world of sampling and remixing. They say there's nothing new under the sun, and certainly anybody watching *Rage* on a Saturday morning will see old classics being rehashed for new audiences. Normally if an artist uses existing material, they have to pay the copyright owner. But some song writers and publishers have gladly handed over their rights to those creative remixers out there in the ether, as long as it's just for play and not for pay.

Around the world, over a million objects, including lyrics and music, photos and animations, have been labelled with the so-called creative commons badge.

Brian Fitzgerald: There's so much material out there that people can access. There's a tremendous example that can be seen on a site called opsound.org...there's a song called 'My Life', which someone put up and, through various iterations, people have just added to the song, so that now we have a very rich and multidimensional song that people have remixed and come out with a whole lot of different versions—'My Life', 'My Life Change', 'My Life Never Changes'—it goes on and on, and it's probably the classic example of what can be done. Now, just to give people an idea, what happens there is someone puts some content up online, and they will use one of the creative commons licences. So it's usually attribution, non-commercial, share alike, which means you can use the content so long as you attribute me, I don't want you to use it in a commercial way, and if you make some improvements share it back to the broader community.

Damien Carrick: That's Professor Brian Fitzgerald, head of school at QUT law school. More from him later. But the rage for remixing isn't confined to songs. It's now spilling out of audio and on to celluloid, and that has the actors union, the MEAA, up in arms.

Just a few weeks ago filmmaker Michela Ledwidge shot a short film that, when completed, will be the world's first purpose-designed remixable movie, and it will then be placed in the creative commons. That means everything, including the performances of the actors, will be remixable.

Michela Ledwidge: The idea of a remixable film is that traditionally you're not allowed to do anything with film properties apart from watch them from beginning to end, but in our case we're making a film that, in addition to just watching as a cinematic experience, it's also available to be ripped apart, sampled and reused, and in that sense open up to all the possibilities the sampling culture provides. And it's not completely as they see fit; there are certain constraints. For example, we're releasing the work under a free for non-commercial use license, which means that if people want to use a sample commercially, they'll have to come back to us and get permission.

Damien Carrick: The project sounds very interesting, but it's also been an extremely controversial project. There's been a big conflict between you and the MEAA, the actor's union. Tell me about that.

Michela Ledwidge: Because this is a bleeding edge project...the project bled in the respect that we had to break the ice around professional actors licensing their images to be reused. This is the first film in which our lead actors, who have representation, are members of MEAA and all of that, have basically agreed to allowing the sections of the work that contain their image to be part of the sampling side of the project, and that's quite historic. Now the responsibility for us is to make as good a film as possible so people will want to explore this dimension to it. But purely in legal terms, we had to get the contracts signed before any other production company, and that was painful because MEAA said, 'This is inappropriate for professional actors. Professional actors beware, you shouldn't go near this project,' and they actually went as far to say to the Australian Film Commission who put some funding in, 'This is actually another knife in the Australian film industry and it's going to result in dire circumstances.' That's really where the controversy came from. So for the sake of a ten minute film...we're talking about a 10-15 minute superhero origin story, which only has about 20 lines in it. We thought it was a huge overreaction and not very supportive of an Australian project.

Damien Carrick: But, as I understand the concerns of MEAA, an actor does live or die according to their professional reputation, and MEAA says that what you're doing...or perhaps, more accurately, the consequences of this type of project becoming the norm, risks undermining the reputations that actors so desperately need because the actor's performance can be revoiced, material can be reused to promote a particular world view or a political point, presumably you could put a different head on a different body, you know, all these kinds of things could undermine the actor's reputation or credibility.

Michela Ledwidge: The bottom line is everything you've said could happen, absolutely, but if you look at the history of the interactive entertainment industry, if you look at what happens online in sampling culture, all the things you're talking about already exist in terms of reuse of traditional film properties, and there is...over and above the fact that it's illegal to modify the work, there are always other ways in which defamatory use and stuff that prejudices the honour of the individuals involved can be dealt with. What MEAA is not acknowledging is that we're not giving the audience the right to ridicule and ruin the reputation of actors. We hold the ability as a production company in the license, which is a creative commons license, that this is only for fair use. There is a specific clause in there that says if we feel that certain reuse is prejudicing the honour of the work, it's not on. If you look at what people do with remixed work, remixing actors likenesses is probably the least likely thing that's could result from this film. What people

are interested in is reusable content. They're interested in the maths, the animation data, the 3D models, the scenery, wildlife shots, they've got far greater reuse value than an actor speaking a couple of lines from a particular script. So, in a sense, I totally take their point on board, but there's no evidence that... MEAA drew a line between actors and the rest of our team and said that actors exist in this specific space, that their reputation is more important than, say, the reputation of the cinematographer or the sound designer or the writer. They're only talking about the actor's licenses and I think that's an unfair distinction.

Damien Carrick: Filmmaker Michela Ledwidge. Simon Whipp is the national director of the Media Entertainment and Arts Alliance, the MEAA. He says remixable film amounts to a reduction of rights for actors.

Simon Whipp: Performers are concerned about how their performances are used. The performer's image and their performance is their stock in trade, it is how they are perceived by the public, it is their ability to obtain work in the future, and if the performer's performance is able to be mixed or altered in a way which may be derogatory or detrimental to the performer's reputation, there will be no restrictions on the ability of others to take excerpts of the film or, indeed, take the film as a whole and adapt and alter the performer's performance and use it for purposes which the performer does not know about and may not necessarily agree with. For example, we've discussed with the producer the ability of third-parties to take the performer's performance and use it in a campaign for the Green movement or a campaign for the Nazi Party, neither or which would be restricted under the license which the producer proposes to use. Now, I don't think that's something which we feel very comfortable about.

Damien Carrick: So you're saying that if the images are used to promote, say, the Green movement, and the actor is, two years down the track, negotiating with, say, a timber company, to be the public face of the timber company or in their ads, they could be compromised in their career opportunities available to them?

Simon Whipp: Look, there are two things... the answer to your question is yes. They may be compromised in their career development, either financially, so they may miss out on work which they otherwise may have been able to go for. So that that ad for the timber company in that scenario which you use is a classic case of that. But also it is how an actor's image is how they are perceived by their employers, and if the actor's image is used in ways which employers may consider to be inappropriate (for example, in a pro-Nazi ad) then it may affect their ability to be engaged in a whole host of ways—by theatre companies, by producers of film and television productions—if in the mind of the public the actor's image has been used in connection with things which maybe people don't feel comfortable about. We have to remember in this that performers are some of the lowest paid people in our society, with average incomes of \$10,500 per year.

Damien Carrick: Simon, Michela Ledwidge's project is a pilot. Don't you think this is a huge overreaction? I mean, surely the object of a pilot is to see what's possible, to see what the consequences are? Why not let it happen? Why not support the pilot to see what the consequences of this brave new world just might be?

Simon Whipp: Well, we know what the consequences will be. That is that a performer will be agreeing to things which they have never agreed to in the past, and opening the door to uses of their performance in ways which may have tremendously detrimental consequences in the future. We don't think it's a desirable thing for this door to be opened, and we may be considered to be technological troglodytes but frankly I don't think this is the way of the future. In our view,

there's no commercial business model which sustains this type of approach, and our view is it doesn't offer anything to performers.

Damien Carrick: Siman Whipp, national director of the MEAA. I put it to Brian Fitzgerald, an expert in internet law, that it may be more dangerous for actors to work on a project being made under a creative commons license than for other performers such as, say, musicians because an actor's image is their most important asset.

Brian Fitzgerald: I think most creators would say to you that part of their work...and it's hard to distinguish between different types of creators, but I understand the point you're making. Moral rights protection has certainly been a big part of this recent debate and it is important to point out that the base Australian creative commons license that has been drafted does actually protect the moral rights as defined in the Australian copyright legislation. So we need to also keep in mind that creative commons is not totally against moral rights protection. The original American license certainly has limited core terms on moral rights, but there is the 'no derivatives' option that people can choose which means that if you want to reutilise the content, you have to do it in a verbatim way, in a way that replicates it as you've found it. So the issue is a difficult one, and it's not as simple as saying that creative commons will not protect creative people. It's certainly an issue of making sure that the licenses that are there properly respect and understand what some of these issues are.

Damien Carrick: But I understand that we don't have moral rights legislation in Australia covering actors, so that form of protection might not necessarily apply in this case.

Brian Fitzgerald: No, an important point to note, though, about the creative commons licenses that have been drafted in Australia and in a number of places in Europe is that moral rights to attribution (which is a court term) and integrity are embedded in those licenses as core terms, not optional terms. Now, the moral rights relating to the visual aspect of performers is something that is not protected by the base license, but certainly you would think that the moral rights protection that exists in that license and potentially combined with a 'no derivatives' option that can be taken, could go a fair way to protecting the visual aspect of a performer's moral rights.

Damien Carrick: Do you have some sympathy for the MEAA in being very cautious about leaping into this world, or encouraging its members to leap into this world?

Brian Fitzgerald: We're certainly respectful of feedback that we get from people and key copyright players who have been in the industry for a long time, but we need to also encourage people to open their minds to new possibilities. The idea of remixable film in a remix culture is very exciting, but we certainly do understand the real concerns that MEAA has put forward about actors. One of the things that we would like to encourage though is, to some extent, a sentiment of experimentation, controlled as it may be, in various projects so that we can see what happens in terms of this new dimension of remixable film.

Damien Carrick: Professor Brian Fitzgerald from QUT, who's been heavily involved in the development of creative commons here in Australia.

That's it for The Law Report this week, I'm Damian Carrick. A big thank you to producer, Anita Barraud, and to technical producer, Brendan O'Neil.

Guests on this program:

Cameron Murphy,
President NSW Council for Civil Liberties

Simon Whipp,
National Director, MEAA

Stan Ghys,
Political activist and unrepresented litigant

Michela Ledwige
Film maker

Councillor Chiang Lim,
Parramatta City Council

Elizabeth Morley,
Principal Solicitor, Redfern Legal Centre

Professor Brian Fitzgerald,
Head, QUT Law School

Presenter: Damien Carrick

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