

CASE NOTE

CUMMINS V VELLA

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[73] This decision of the Full Federal Court is the first Australian reported decision involving one visual artist suing another for breach of copyright.² It will be of interest to arts lawyers because it sets forth a clear test to apply when considering whether the work of one artist is infringed by another. The case reaffirms the classical copyright law principle that copyright does not give monopolies over ideas and concepts but protects only the form in which ideas are expressed. It is submitted that in a context where artists everywhere are routinely inspired by the work of other artists and where all artworks are to some extent derivative of other artworks, this decision strikes a healthy balance. It will not have an undue chilling effect on artistic expression but still affords artists and their works the copyright protection that artists need to exploit their works and earn a living.

Facts

Dean Vella is an artist with an established reputation. His work is characterised by the use of a limited range of bright primary colours applied with an ‘impasto’ technique. The effect he seeks to achieve is to build the depth dimension of the subject by the application of the paint. His work is done in a ‘naïf’ style. The regular subjects of his work include irises and daisies. Vella has been successful in selling his work in Australia and overseas over the past 10 years.

Greg Cummins was working as a plasterer but, after he saw Vella’s work, he was inspired to begin an arts career. Cummins began producing paintings which were in many ways very similar to Vella’s: he painted in the same style; he used similar colours; he used a variant impasto technique he developed himself; and, he used similar subject matter and compositions.

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² [2002] FCAFC 218 (unreported, Heerey, Mansfield and Hely JJ, 16 July 2002).

Dean Vella sued Greg Cummins for copyright infringement alleging that 39 of Cummins' works had substantially reproduced 27 of his works. Vella was successful at trial³ but the judgment in his favour was overturned on appeal.

Appeal decision

The appeal judgment discloses two principal reasons for overturning the decision of the trial judge. First, the Court found that the trial judge had failed [74] even to attempt a proper comparison of the allegedly infringing works with the works they were said to infringe (except in two cases). Second, the Court held that the judge failed to apply the distinction between legitimately using a style and technique and illegitimately copying the form of another artistic work.

The appeal court found that although the trial judge said '[t]he court undertakes a visual comparison of the two designs, noting the similarities and the differences'⁴, the judge did not then apply this approach. The trial judge never explained precisely the way in which Cummins' works reproduced Vella's works and instead made a finding of copyright infringement on the basis of similarities in style and technique which were not of themselves sufficient to warrant the finding.

Imitating the technique, style, colours and subject matter used by another artist or in another artwork is not sufficient to amount to copyright infringement without more. The court reasoned that if this were not so, Dean Vella would gain a monopoly in naïf impasto paintings of irises and daisies and other artists would not be able to paint pictures within this genre. Because Vella had not shown that Cummins had done anything more than copy Vella's style, no infringement of copyright was made out.

The Court set out (at [34]) the correct approach the judge should have applied to determine whether one work infringed the copyright in another:

³ *Vella v Cummins & Ors* [2001] QSC 246 (unreported, Jones J, 18 June 2001).

⁴ *Ibid* [15].

In respect of each instance of alleged infringement of a Vella painting by a Cummins painting the Court had to decide whether (a) the latter was a copy of the former, that is to say there was (i) sufficient objective similarity to amount to the latter being a reproduction or adaptation of the former and (ii) the former was in fact the source of the latter and, if so (b) whether the copy was of a substantial part of the Vella work.

It seems the Court was not satisfied that part (a)(i) of this test had been applied properly by the trial judge. This was because the judge had placed too much emphasis on the similar stylistic features rather than a close comparison of the works' form. The Court noted that, given the 'restricted visual language' used by each artist in this case, small differences between the works would be sufficient 'to show non-reproduction and thus non-infringement'.

The Court also noted that subject matter of an artistic work is a relevant consideration when trying to distinguish between a legitimate use of style and illegitimate copying. Where the subject matter of a work is abstract or solely the creation of a person's imagination, minor differences between two works will count for less and it will be easier to show reproduction than it would with a drawing or painting of something that already exists, like the Sydney Harbour Bridge or a human hand.

Copyright does not normally pass upon sale of an artwork

There is one aspect of the appeal court's judgment which will be of concern to artists and their lawyers. In its judgment, the Court said (at [41]):

Mr Vella produced very many works of similar style and subject matter. Each of these works would presumably be the subject of copyright *which would pass to purchasers*, thus entitling them to reproduce copies and restrain others (including Mr Vella himself) from doing so [emphasis added].

The apparent meaning of this statement is that when Mr Vella's works were purchased, the copyright in those works (the subsistence of which the Court was

prepared to presume) would pass to the purchaser of the works and the purchaser, as copyright owner, would then be able to restrain others, including Mr Vella, from reproducing the work they had purchased.

This statement is contrary to the legal position which is usually accepted. Specifically, it is generally understood that the copyright in a work does not pass to the purchaser of the work when the work is [75] sold unless expressly agreed. Additionally, the assignment of any copyright will only be effective if it is in writing signed by the copyright owner: s 196(3) *Copyright Act 1968* (Cth).

The Court continued its reasons for judgment as follows:

There would be more than 150 similar copyright Vella paintings of daisies and more than 200 copyright Vella paintings of irises. One would not expect to find very great differences sufficient to show non-reproduction and thus non-infringement. Unless that were so, there would be a statutory monopoly in naïf impasto style paintings of daisies and irises for Mr Vella's lifetime and 50 years thereafter.

These inferences support the Court's ultimate finding that Mr Cummins had not infringed Mr Vella's copyright by painting pictures which were, on his own admission, 'strongly similar' to the works of Mr Vella. That is to say, the Court applied its unusual statement in relation to the passing of copyright on sale of an artwork to assist it in arriving at the conclusion that Cummins did not infringe Vella's copyright.

Although the Court's reasoning in this regard may be considered unfortunate, it is submitted that it has not materially affected the outcome of the case or the judgment's precedential value because the Court's decision has separate and firmer foundations. In particular, the failure of the respondent to establish properly that Mr Cummins had done anything more than paint in the same style as Mr Cummins seems sufficient to justify the judgment in favour of the appellant.

Conclusion

This decision affirms the principle that there is no copyright in a style. Artists are entitled to use similar styles, concepts and techniques to other artists but not to reproduce the actual specific works of those other artists or substantial parts of those works.