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In so doing, the Court of Appeal emphasised differences between the New Zealand and English settings. These differences included matters such as the distinctive New Zealand electoral system which enables each voter to vote on an equal nationwide basis for a desired party, as opposed to the English (and Australian) constituency by constituency basis;[70] the more extensive and in fact common release of Cabinet and ministerial documents under freedom of information legislation in New Zealand;[71] the Bill of Rights in New Zealand which emphasises the protection of public processes, particularly political processes, but unlike the more widely focused *Human Rights Act 1998* (UK) does not expressly protect the right to privacy;[72] and the express requirement in the *Human Rights Act 1998* (UK) for courts to consider the extent to which the public interest is served by publication of journalistic matter.[73] Other relevant matters arise from New Zealand being a smaller and newer country, including the closer relationship between New Zealanders and their government.[74] New Zealand's dailies are also not nationwide, have smaller circulation, are less likely to be politically aligned and have not exhibited the excesses of their English counterparts.[75]

Accordingly, the Court of Appeal restated its previous position that the nature of New Zealand democracy meant that there was a qualified privilege for statements concerning the actions and qualities of those currently or formerly elected to Parliament and those with aspirations to such office so far as those actions or qualities directly affect their capacity (including their ability and willingness) to meet their public responsibilities.[76] To this the Court added something that had not concerned it in its previous decision: that the privilege may be lost where the occasion is misused, such as where the defendant is motivated by ill will.[77] ●

70 [2000] NZCA 95, [26].

71 Ibid, [27].

72 Ibid, [28]-[29].

73 Ibid, [30].

74 Ibid, [32]-[33].

75 Ibid, [34]-[35].

76 Ibid, [10]. In a sense this defence is narrower than that in both England and Australia since it does not extend to foreign politicians or ex-politicians: ibid, [33].

77 Ibid, [42]-[49].

media & arts law review

The Demidenko affair: copyright law, plagiarism and ridicule

Matthew Rimmer[1]

This article provides an account of one of Australia's great literary hoaxes — the Demidenko affair. In particular, it focuses upon the accusations that Helen Darville plagiarised a number of historical and literary texts in her novel *The Hand that Signed the Paper*. This article considers how the dispute was interpreted in three different contexts — the literary community, the legal system, and the media. Part 1 examines how writers, publishers, and editors understood the controversy in terms of the aesthetics and ethics of plagiarism. Part 2 details how lawyers framed the discussion in light of economic rights and moral rights under copyright law. Part 3 deals with the media attention upon the personalities and politics of the scandal. The conclusion charts the competition between these various communities over who should resolve the dispute.

Introduction

The Demidenko affair was a literary hoax that attracted wide public attention in Australia, because it touched on a number of social tensions and anxieties. It raised matters of history and fiction, authenticity and identity, plagiarism and copyright law. The Demidenko affair did not result in a judicial decision, let alone a reported case. It could easily be dismissed as just some legal posturing outside the courts. Yet, the Demidenko affair is important because it highlights the lived experience of copyright law. As Rosemary Coombe noted, 'the interpretive life of the law may be found in rumours and myths about rights and obligations, local conventions of textual appropriation, cease-and-desist letters, and

1 PhD Candidate, Faculty of Law, University of NSW. The author wishes to thank his supervisor Dr Kathy Bowrey, Associate Professor Jill McKeough, Dr Christine Parker and the anonymous peer reviewer for their helpful comments on earlier drafts of this essay, and is indebted to his informants David Marr and Beth Spencer for wider discussions on copyright law and literary works.

injunctions threatened and settled without hearings in disputes rarely addressed at trial on their legal merits'.[2] The Demidenko affair demonstrates that matters of plagiarism are only formally dealt with by the courts as a matter of last resort. They are usually resolved within a number of different contexts — the literary community, the legal system and the media.

Helen Darville was the author of the novel *The Hand That Signed The Paper* and the winner of the Vogel Award and the Miles Franklin award.[3] She was a transgressive writer in a number of respects. Helen Darville blurred the boundaries between fact and fiction. She faced allegations that her book *The Hand that Signed the Paper* was a racist and anti-Semitic text. Helen Darville also challenged notions of individual authorship and Romantic creativity. She was an elusive, shifting, protean figure with multiple personae. She wrote the book *The Hand that Signed the Paper* under an assumed name and an assumed Ukrainian identity, that of 'Helen Demidenko'. Helen Darville was also a transgressive writer in terms of originality. She engaged in the appropriation of texts from a number of different historical and fictional sources. As a result, Helen Darville was exposed to allegations of plagiarism, copyright infringement and inauthenticity.

Helen Darville was accused of plagiarising a number of historical texts in the creation of *The Hand that Signed the Paper*. In particular, she used an incident from a collection of oral histories in *The Black Deeds of the Kremlin*, in which a Ukrainian witness tells of a girl who begged for bread in a queue in the 1933 famine:

> At last she reached the storekeeper. This man must have been some newly arrived stranger who either could not, or would not speak Ukrainian. He began to berate her, said she was too lazy to work on the farm, and hit her outstretched hand with the blunt edge of a knife blade. The girl fell down and lost a crumb of bread she was holding in the other hand. Then the storekeeper stepped closer, kicked the girl and roared: 'Get up! Go home, and get to work!' The girl groaned, stretched out and died. Some in the queue began to weep.[4]

In *The Hand that Signed the Paper*, Helen Darville writes about a character called Vitaly who accompanies his cousin Lara to a bread queue:

> Finally she got to the storekeeper, a Russian colonist. She begged at him. He said she was too lazy to work on the farm. He yelled at her, and hit her hand with the knife. Luckily it was blunt. Lara fell down and lost the crumb of bread she had in one hand. Then the storekeeper came out from behind the stall and kicked her and kicked her, all the while yelling at her to get up, go home, and work. People in the queue started to cry ...[5]

In addition, Helen Darville was also accused of having plagiarised much from Martin Gilbert's *The Holocaust*, a historical study of the atrocities committed against European Jewry during World War Two, and Deborah Dwork's *Children of the Star*.

Helen Darville was also condemned for using a number of literary texts. She incurred the wrath of the feminist writer, poet, and journalist Robin Morgan for using a passage concerning a guilty death camp guard from her book *The Demon Lover*:

> 'I don't like what I — what we — what happens. I-I-.' My son is almost his age. I can't help reaching out to touch his hand, lightly, his gangly adolescent hand that rests on the butt of his Galil rifle. His dark eyes fill. 'I-we do ... bad things, lady,' he whispers, 'bad things. And we're — I'm scared. I'm scared all the time.'[6]

2 R Coombe, 'Critical Cultural Legal Studies' (1998) 10 *Yale Journal of Law and the Humanities* 463, 473.

3 H Darville, *The Hand that Signed the Paper* (1994).

4 J Jost, G Totaro and C Tyshing, *The Demidenko File* (1996) 251.

5 Darville, above n 3, 91.

In *The Hand that Signed the Paper*, Helen Darville appeared to have closely copied the form and content of this expression:

> ... He had an automatic rifle across his knees. His gangly, adolescent hand rested on the butt ... 'I don't like what I ... what happens ... what we do —' He looked up; his dark brown eyes filled. 'I ... we ... do bad things, Pani. Bad things, and I'm scared all the time.'[7]

Helen Darville was also criticised for lifting the book's first line from Thomas Keneally's *Gossip from the Forest*. She was also accused of using imagery from Graham Greene's *The Power and the Glory*, Toni Morrison's *The Bluest Eye*, Patrick White's 'Down At The Dump', and a Robert Lowell poem 'For The Union Dead'. There were also allegations that the author was guilty of plagiarism in her occasional journalism.

In this paper, I would like to use the notion of interpretative communities to help understand the competing interpretations of the Demidenko affair by writers, lawyers, and journalists. Stanley Fish first popularised this concept.[8] He defined 'interpretative communities' as 'made up of those who share interpretative strategies not for reading (in the conventional sense) but for writing texts, for constituting their properties and assigning their intention'.[9] Stanley Fish argued that this concept explained the stability of interpretation among different readers (they belong to the same community) and the variety of interpretation in the career of a single reader (they belong to different communities). He submitted that this idea explained how disagreements could be debated in a principled way, because of the stability in the make-up of groups and therefore in the opposing positions they make possible. However, the concept of interpretative communities has been criticised by radicals and conservatives alike.[10] There are a number of deficiencies and weaknesses in relation to its account of interpretation, community and authority. It must be recognised that the abstract concept of interpretative communities is of limited explanatory power. It is useful in structuring and organising the various discourses in the Demidenko affair.[11] Yet it will not account for all the unruly facts in the dispute. It is thus important that the idea of interpretative communities is grounded in a social and historical context.[12]

In the Demidenko affair, a number of interpretative communities can be identified in the debate over the copying of literary works by Helen Darville. They operated within a number of institutions: the legal system, the literary industry and the media. This article argues that the acts of appropriation by Helen Darville were interpreted differently according to the norms and standards of these communities. Part 1 analyses how writers, publishers, and critics were concerned with the aesthetics and ethics of plagiarism.

6 R Morgan, *The Demon Lover: On The Sexuality of Terrorism* (1989) 270.

7 Darville, above n 3, 114.

8 S Fish, *Is There a Text in This Class?: The Authority Of Interpretative Communities* (1980).

9 S Fish, *Doing What Comes Naturally* (1989) 141.

10 A Goldsmith, 'Is There Any Backbone In This Fish? Interpretative Communities, Social Criticism, And Transgressive Legal Practice' (1998) 23 (2) *Law And Social Inquiry* 373.

11 The concept of interpretative communities has also been applied by Andrew Fieldsend in his doctoral thesis on Maori cultural property (1998) and Louise Harmon in her essay on Jeff Koons and copyright law: L Harmon 'Law, Art, And The Killing Jar' (1994) 79 *Iowa Law Review* 367, 409.

12 For alternative theories to interpretative communities, see Pierre Bourdieu's sociology of fields, and Michel Foucault's archaeology of discourse: P Bourdieu, 'The Force Of Law: Toward A Sociology Of The Juridicial Field' (1987) 3 *The Hastings Law Journal* 805; and M Dean, *Critical And Effective Histories: Foucault's Methods And Historical Sociology* (1994).

Part 2 investigates how the lawyers acting for Helen Darville interpreted the case in terms of copyright infringement of economic rights and moral rights of authors. Part 3 shows that journalists and reporters investigated the politics of the appropriation by Helen Darville. The interpretative communities did have internal divisions and conflicts. There were disagreements within the groups over the Demidenko affair, but they were conducted according to the standards and norms of those groups. The interpretative communities were also engaged in external disagreements with one another. There was a struggle between the groups over which had the authority to judge and sanction Helen Darville for her acts of appropriation.

Part 1: the literary community

The Demidenko affair was not without precedents in the literary community of Australia. It should be placed in the historical context of a tradition of literary hoaxes. The Ern Malley affair was an important antecedent.[13] Two Australian poets, Harold Stewart and James McAuley, submitted a series of poems to a magazine called *Angry Penguins* under the fictional authorship of Ern Malley. They sought to debunk the esoteric and arcane nature of literary modernism. The deception attracted great publicity in the media, and resulted in Max Harris, the editor of the *Angry Penguins*, being prosecuted on the grounds that some of the works were obscene. The Demidenko affair had some similarities. Helen Darville wrote the book *The Hand that Signed the Paper* under the fictitious persona of Helen Demidenko. She sought to challenge notions of identity, authenticity and multiculturalism. However, the publisher Michael Heyward noted that the Ern Malley deception was a cunningly crafted literary hoax.[14] He did not think that the stories told by Helen Darville had the same coherence. In a later hoax, Leon Carmen, a white male, wrote the book *My Own Sweet Time* under the name of Wanda Koolmatrie and published the work with the Aboriginal press, Magabala Books.[15] His tendentious point was that white writers were disadvantaged in Australia. The literary hoaxes speak to the fictional and protean nature of Australian national identity. They attracted public attention because they touched upon social anxieties and tensions about culture, race and nationhood. The controversies also raised important questions about the aesthetics and ethics of appropriation in the literary community of Australia.

Aesthetics

The community of writers, publishers and critics judged *The Hand that Signed the Paper* on the basis that the act of appropriation was a matter of aesthetics and ethics, rather than a question of law. David McCooey articulated this sentiment:

> If literature appears to appropriate from experience too wilfully, with too much abandon, we should remember that appropriation (though not without moral and legal imperatives) is pre-eminently an imaginative act and so requires that it satisfied itself before it satisfies any other jurisdiction.[16]

This kind of argument represents an attempt by the literary community to retain authority over this domain. The Demidenko affair was the catalyst for a fierce debate in the literary community about the differences between 'plagiarism', 'influence' and 'appropriation'. The community of writers, publishers, and critics interpreted, understood and explained the conduct of Helen Darville in light of their communal traditions and their concomitant prejudices.

First, the critics of Helen Darville accused her of plagiarism because of a belief that she had transgressed

13 M Heyward, *The Ern Malley Affair* (1993).

14 Jost, Totaro and Tyshing, above n 4, 257.

15 A Stevenson and A Hubble, 'Great White Hoax' *The Daily Telegraph* (Sydney) 13 March 1997, 1 and 8.

16 D McCooey, 'Thirteen Ways' (1998) 3 (5) *The Australian's Review of Books* 14, 31.

the Romantic ideals of individual authorship and private possession. In a distressed letter, Robin Morgan memorably described the feeling of violation at finding herself the subject of plagiarism: 'It feels as if your brain has been burgled'.[17] She also described Helen Darville as a thief, a pirate and a kleptomaniac. Scholars have noted that 'plagiarism' is 'one of the pathologies of Romantic authorship that deserves much more critical attention than it has received'.[18] It involves the imitation or theft of literary texts without the disclosure or acknowledgment of the sources. As Hillel Schwartz observes, 'Plagiarists hope that their thefts will be taken for inventions; they make their name by standing on the shoulders buried in the sand'.[19] Plagiarism also has pejorative connotations. It is a term of opprobrium and reproach. Ian McEwan points out a strong connection between Romantic aesthetics and morality:

> In our literary tradition, with its powerful emphasis on the uniqueness of the individual imagination, to be a plagiarist is to be fundamentally dishonest, it is to claim as uniquely yours what is uniquely someone else's and is a tacit admission that your own imagination is defective, insufficient to sustain its own particular hold on the world.[20]

In her moral outrage and indignation, Robin Morgan sounds like a legalist of the highest order, speaking in terms of theft, burglary, and dishonesty. Her harsh and uncompromising rhetoric seems inflated and excessive given her familiarity with the literary practices of modernism and postmodernism.

Second, the defenders of Helen Darville submitted that the strategies in *The Hand that Signed the Paper* were acceptable and permissible for a work that followed in the tradition of modernism. They argued that the author was not guilty of 'plagiarism', but rather of receiving and assimilating 'influences'. The modernism of the early 20th century challenged Romanticism and its understanding of originality, creativity, and cultural agency. Ezra Pound's exhortation to 'make it new' was not an order to create newness out of nothing.[21] It instead encouraged the creation of imaginative work through the means of reinventing past traditions and styles. However, Luke Slattery raised doubts that Helen Darville's techniques were 'absolutely normal' — in terms of the self-conscious novelistic tradition of modernism:

> If you brush over the prototypical works of modernism, you can see how far Darville is from this territory. T.S. Eliot's *Four Quartets* and Ezra Pound's *Cantos* are a living mulch of literary antecedents: the Old and New Testaments; the Greeks; Dante; the troubadour poets; Shakespeare; Browning; the French Symbolists. But they make all this obvious to the reader, perhaps too obvious. To many readers, the result is oblique, archival, obscure.[22]

Furthermore, it is inconsistent and imprecise to claim that *The Hand that Signed the Paper* is simultaneously a modernist work and a postmodern text. There is a sharp break and rupture between the two aesthetic movements. In many respects, modernism stands in opposition and conflict to postmodernism. This suggests that there is some confusion about the exact nature of *The Hand that Signed the Paper*.

Thirdly, Andrew Riemer acted as an apologist for Helen Darville and claimed that the adoption of an ethnic identity and appropriation of other people's work could be understood and explained as a product of postmodernism:

17 R Morgan, 'Dear Helen, Just Give Me Back My Words' *The Sydney Morning Herald* (Sydney) 23 March 1996, 11.

18 M Woodmansee and P Jaszi, 'The Law Of Texts: Copyright In The Academy' (1995) 57 (7) *College English* 769, 784.

19 H Schwartz, *The Culture of the Copy: Striking Likenesses, Unreasonable Facsimiles* (1996) 315.

20 A Kernan, *The Death of Literature* (1990) 121.

21 R Hughes, *Culture of Complaint: The Fraying of America* (1993) 110.

22 L Slattery, 'Our Multicultural Cringe' *The Australian* (Sydney) 13 September 1995, 17.

> Only with the rise of capitalist concepts of individual or private property did the notion of intellectual property begin to emerge, as reflected in the passing of the first copyright legislation in England in 1709. Such notions have no validity, many literary and cultural theorists would claim, in the postmodern world.
>
> Partly for that reason, much contemporary writing, especially fiction, engages in highly sophisticated and specialised acts of plagiarism. The theoretical justification for what is, in many instances, no more than modishness is related to the almost universal scepticism about the capacity of language to reflect reality which left its mark on the structure of *The Hand that Signed the Paper*, especially where the absence of an authoritative narrating voice is concerned. The theory holds that because language cannot capture or describe anything beyond itself, anything said or written can only refer to or be 'about' something else that has been or might be said or written. Accordingly texts — novels, plays, narrative and descriptive verse — are not 'about' anything except other texts, other writing.[23]

Andrew Riemer claimed that texts such as *The Hand that Signed The Paper* are 'intertextual' because they are composed of a mosaic of quotations and citations. He argued that the pejorative term, 'plagiarism', and even the neutral phrase, 'influence' were redundant in a postmodern age, in which pastiche is the norm. He preferred the euphemism 'appropriation' to describe the act of copying. However, Andrew Riemer conceded that Helen Darville's pilferings are far removed from the sophistication of postmodern writers. The problem is that *The Hand that Signed the Paper* does not have the high degree of self-consciousness and reflexivity present in a genuine postmodern novel.[24] It is far removed from the playful re-invention of history found in books like Peter Carey's *Jack Maggs*,[25] Kate Grenville's *Joan Makes History*,[26] and Roger McDonald's *Mr Darwin's Shooter*.[27] Instead, the novel *The Hand that Signed the Paper* belongs to a tradition of plain, humdrum, historical realism.

It is curious that Andrew Riemer should defend Helen Darville in terms of modernism and postmodernism given that he left his position at the Department of English at the University of Sydney because of his distaste for such fashionable theories. In his memoirs, *Sandstone Gothic*, the critic expresses a deep antipathy towards the purveyors of literary theory, from Matthew Arnold and F R Leavis, to Jacques Derrida, Michel Foucault and Jacques Lacan.[28] He is particularly scathing about Australian academics' infatuation with postmodernism and deconstruction.[29] Andrew Riemer departed the University of Sydney because he was upset that the syllabus no longer concentrated on the 'canon' of English literature. He took up practical criticism, wrote book reviews for *The Sydney Morning Herald*, and published memoirs about being a Jewish migrant to Australia.[30] His advocacy on behalf of the author carried authority because of his literary training and Jewish heritage. Still it seems strange that Andrew Riemer should fall back upon the academic theories that he left behind to defend Helen Darville. Perhaps he did not care if the principles of postmodernism and deconstruction were discredited in the rhetorical battle over the Demidenko affair.

Ethics

Even if she was not subject to legal penalties for copyright infringement, Helen Darville was still open

23 A Riemer, *The Demidenko Debate* (1996) 211.

24 Slattery, above n 22.

25 P Carey, *Jack Maggs* (1997).

26 K Grenville, *Joan Makes History* (1988).

27 R McDonald, *Mr Darwin's Shooter* (1998).

28 A Riemer, *Sandstone Gothic: Confessions of an Accidental Academic* (1998).

29 Ibid, 207.

30 A Riemer, *Inside Outside* (1992); A Riemer, *The Habsburg Cafe* (1993); A Riemer, *America With Subtitles* (1995) and A Riemer, above n 28.

to a range of non-legal sanctions for plagiarism. There were a number of remedies that were available to the literary community. Helen Darville could have been required to offer an apology to the writers concerned. She could have had *The Hand that Signed the Paper* withdrawn from print by the publishers, and lost the prizes and awards that were given for the book. However, nothing of this sort was done. There was a lack of consensus about the ethical standards and norms that should apply in a given case, and the consequences that should flow from their breach. There was no independent arbiter of such matters. There was little redress against parties who refuse to be held accountable to the standards of the literary community. The Demidenko affair demonstrated the limits of ethical standards in resolving disputes about plagiarism.

First, the dispute could have been resolved in terms of inter-personal ethics. In the Demidenko affair, Peter Goldsworthy preached a philosophy of reconciliation:

> What then should be our punishment of her?... The temporary trashing of a reputation seems sufficient, and it can only be rehabilitated by the writing of another book, which takes either thick skin or tremendous survival instinct. We give jobs to released prisoners. From literary coventry we must allow some hope of redemption.[31]

However, Helen Darville refused to apologise to the authors concerned because she did not accept that she had made any improper use of her sources or other published works.[32] It put the onus on the aggrieved authors to offer absolution. Robin Morgan did not feel flattered by the plagiarism of her work of non-fiction, *The Demon Lover*. She found the conduct of the unrepentant Helen Darville unconscionable and reprehensible. By contrast, Thomas Keneally was prepared to forgive Helen Darville for borrowing from his novel, *Gossip from the Forest*. The author perhaps recalled his own unhappy experience. Thomas Keneally was accused of having made extensive and unacknowledged use of material from Bill Strutton's book, *Island Of Terrible Friends*, in his historical novel *Season in Purgatory*.[33] He reached an out of court settlement with Bill Strutton and agreed to share part of the royalties from *Season in Purgatory*. By forgiving Helen Darville, Thomas Keneally is in effect asking for forgiveness and compassion towards those accused of plagiarism.

Secondly, the *Hand that Signed the Paper* could have been withdrawn from publication because it copied work without the permission of the owners. In response to the airing of allegations of plagiarism, the publishing house, Allen and Unwin, placed a moratorium on republishing the novel under the authorship of Helen Darville.[34] However, it lifted the moratorium after the lawyers acting for Helen Darville released their opinion that the allegations of plagiarism were unsustainable. In the end, the niceties of literary ethics were outweighed by commercial considerations. Allen and Unwin decided to publish a new edition with certain changes.[35] The book was no longer authored by Helen Demidenko, but by Helen Darville. It was also significant that acknowledgment was now made to historical material drawn from *The Holocaust* and *The Black Deeds of the Kremlin*. Such concessions were designed to mollify the authors who were aggrieved by the use of their work. The publishing house, Allen and Unwin, was not prepared to withdraw publication of *The Hand that Signed the Paper* because of its investment in the book.

Thirdly, the Miles Franklin Award bestowed upon Helen Darville could have been revoked because of her use of copyright work without the permission of the authors. The trustees, judges, and administrators

31 P Goldsworthy, 'The Dewogging Of Helen Demidenko' in *Navel Gazing* (1998) 26, 41.

32 N Tavuchis, *Mea Culpa: A Sociology of Apology and Reconciliation* (1991).

33 P Pierce, *Australian Melodramas: Thomas Keneally's Fiction* (1995).

34 Jost, Totaro and Tyshing, above n 4, 250.

35 R Manne, *The Culture of Forgetting: Helen Demidenko and the Holocaust* (1996) 112.

of the Miles Franklin Award held that there were no grounds, legal or otherwise, to support a charge of plagiarism against *The Hand that Signed the Paper*. One of the judges, Dame Leonie Kramer, denied that Helen Darville was guilty of any breach of literary ethics: 'It's a very complicated issue, plagiarism, but I don't feel it applied to that book'.[36] However, the judges of the Miles Franklin award were criticised for this clemency. In particular, Robin Morgan was outraged that Helen Darville's conduct did not have ethical consequences:

> What to do? Perhaps revoke the prize(s) and award them to the runners-up, thereby encouraging genuine young talent and affirming authentic multiculturalism? Simultaneously send a message about personal and literary ethics to writers, readers, publishers and prize contestants? By doing so, silence any gleeful, opportunistic, right-wing champions of monoculturalism? What an obvious solution! But no. The literati retreat to defensiveness, contradict themselves in trying to justify their actions, flail at the press (petulantly blaming the media for bestowing attention originally sought by all parties concerned), and strain to exonerate an awardee from behaviour some might charitably term psychotic.[37]

Robin Morgan cannot comprehend the failure of the judges of the Vogel Award and the Miles Franklin Award to revoke the prizes that were awarded to Helen Darville. The Demidenko affair cast doubts upon the legitimacy of aesthetic values and the credibility of ethical standards in the literary community. As a consequence, the literary community abdicated authority to resolve the dispute, because they failed to take any action. As a result, the Demidenko debate passed beyond the confines of the cultural sphere and was left to be resolved in the legal system and the media.

Summary

The supporters of Helen Darville claimed that the allegations of plagiarism were unsustainable, because there was no infringement of the copyright in a literary work. The publisher at Allen and Unwin, Patrick Gallagher, argued that plagiarism could not be separated from ownership, copyright and financial gain:

> As for plagiarism, it's generally considered that there has to be a breach of copyright for charges of plagiarism to be justified, and both our lawyers and those of the author confirmed that there had been none. Careless use of sources yes — though one can only wonder how many first novels would stand up to the intense scrutiny that *The Hand that Signed the Paper* was subjected to without similar omissions coming to notice.[38]

The publisher could not see the difference between literary ethics and copyright law. This somewhat blinkered view was not accidental. It was in the interest of Helen Darville and her supporters to confuse plagiarism with copyright infringement — it meant that her accusers had to meet a much higher standard of proof. It is important to recognise that plagiarism cannot be equated with copyright infringement because one term derives its meaning from a literary tradition, and the other phrase has precise legal significance that carries with it civil and criminal sanctions.

Part 2: legal relations

In the Demidenko affair, Helen Darville and her publisher Allen and Unwin sought legal advice as to whether the writer had violated copyright law. The author engaged Andrew Greenwood, a Queensland partner of the law firm Minter Ellison. This solicitor practised in the areas of intellectual property, trade

36 Jost, Totaro and Tyshing, above n 4, 297-298.

37 R Morgan, above n 17.

38 Manne, above n 35, 111.

practices law, and information technology. He also acted as a director of Stanwell Power Corporation Ltd, a director of the National Institute for Law at Griffith University, an adjunct Professor of Law in the School of Law at the University of Queensland, and the chair of the Queensland Writers' Centre. Allen and Unwin retained Peter Banki, a partner of the boutique intellectual property firm Banki, Palombi, Haddock and Fiora. His previous experience included working as a solicitor at the law firm Philips Fox, overseeing the management of the Australian Copyright Council and chairing the Copyright Law Reform Committee. In response to the allegations of plagiarism, the lawyers released the opinion that Helen Darville was not guilty of copyright infringement in respect of historical and fictional texts in *The Hand that Signed the Paper*.[39] They also claimed there was no obligation upon the writer to acknowledge the sources of her work. It is important to evaluate the strengths and weakness of this legal opinion. It is also worth considering the diverse range of alternative interpretations that could be made of copyright law.

History

In its legal opinion, Minter Ellison made the declaration that

> ... the use of historical prime source material describing historical events, incorporated in the novel, in the context of the development of the plot and features of the fictional characters in the novel does not constitute an infringement of the copyright in the prime source material nor does it constitute a plagiarism of the historical records.[40]

The first problem is that this legal opinion relies upon a number of judicial precedents from the United Kingdom which rest upon untested assertions. In *Ravenscroft v Herbert and New English Library Ltd*, Justice Brightman found that the degree of use which would amount to an infringement of copyright is different in the case of a historical work than in the case of a work of fiction.[41] His Honour held that there was a greater freedom to copy in the case of the historical work because of the superior need to increase the sum total of human experience and understanding:

> I am inclined to accept that a historical work is not to be judged by precisely the same standards as a work of fiction. The purpose of a novel is usually to interest the reader and to contribute to his enjoyment of his leisure. A historical work may well have that purpose, but the author of a serious and original historical work may properly be assumed by his readers to have another purpose as well, namely to add to the knowledge possessed by the reader and perhaps in the process to increase the sum total of human experience and understanding. The author of a historical work must, I think, have attributed to him an intention that the information thereby imparted may be used by the reader, because knowledge would become sterile if it could not be applied. Therefore, it seems to me reasonable to suppose that the law of copyright will allow a wider use to be made of a historical work than of a novel so that knowledge can be built upon knowledge.[42]

However, this distinction between fact and fiction was unstable and shaky because of deficiencies in the definitions of history and literature. Justice Brightman classified history as a continuous methodical record of public events which served to enlighten its readers. He defined literature as a form of entertainment and amusement for a class of leisured readers. Both these definitions omitted the

39 Jost, Totaro and Tyshing, above n 4, 267.

40 Ibid, 267.

41 *Ravenscroft v Herbert and New English Library Ltd* [1980] 7 RPC 193.

42 Ibid, 207.

spectrum of propositions and modulations involved in any understanding of reality. There is no guarantee that the Australian courts would follow the reasoning of these British authorities given the radical developments since then in the scholarly opinion of history and literature.

The second problem is that Minter Ellison tended to overstate the ratio of the British authorities to defend their client. In *Ravenscroft v Herbert and New English Library Ltd*, Justice Brightman held that the question of whether there had been substantial copying depended upon the volume of the material taken, bearing in mind that quality was more important than quantity.[43] His Honour emphasised that the author has no copyright in ideas or facts, only in the original expression of such ideas or facts. Finally, Justice Brightman admonished 'that an author is not entitled, under the guise of producing an original work, to reproduce the arguments and illustrations of another author so as to appropriate to himself the literary labours of that author'.[44] Although it is true that greater liberties are allowed with the use of historical materials, arguing that one relied upon common historical sources is not an incontestable defence to a charge of copyright infringement. It is important to stress that Helen Darville was drawing upon the original expression of historical events, not just historical facts or ideas. It would be open to a court to find that Helen Darville adopted the work of the historians in order to give her novel authenticity and legitimacy with the least possible labour to herself.

The third problem is that, whatever rules have been in place, a consistent theme from the facts of the cases is that the courts may use their discretion to punish those actors who defy the authority of the law to determine the issue. This is apparent in *Harman NV v Osborne*, a case involving an action for copyright infringement against a film called *The Charge of the Light Brigade* based on a screenplay written by John Osborne, a well known playwright and director. Justice Goff took umbrage at the failure of the playwright to appear before the court, and offer a personal explanation for the sources of his creative work: 'For this purpose, and at this stage, in my judgment the lack of explanation by John Osborne how or when he worked and how long it took him, is of fundamental importance'.[45] His Honour found it remarkable that the playwright left it to his solicitor, who did not know what happened, to compile a list of sources, and then say that they had identified many but not all of the sources which they had used. The miscalculation of the playwright and his legal advisers does not seem to be one of legal rules and principles, but one of tact and diplomacy. It is debatable whether Helen Darville would have similarly affronted the courts. Her failure to acknowledge the sources of her creative work could have affected the outcome of any court case. However, much would have depended upon the behaviour of her lawyers.

Fiction

In its legal opinion, Minter Ellison emphasised that 'there is no suggestion that the author has transposed large sections of text, pages of text or block paragraphs of text'.[46] It furthermore released advice from a literary expert that 'in terms of the use of phrases or images that draw upon previous works in the genre, the techniques employed by the author are "absolutely normal" in the kind of self-conscious novelistic traditions in which the author works, according to expert advice'.[47] However, it was most peculiar that this literary expert lent their authority to the statement of the law firm, but preferred to remain anonymous about their identity.

The first point is that Minter Ellison makes a strong case that Helen Darville is not guilty of copyright infringement because she did not take a substantial part of other fictional work. Andrew Greenwood was

43 *Ravenscroft v Herbert and New English Library Ltd* [1980] 7 RPC 193.

44 Ibid, 207.

45 *Harman NV v Osborne* [1967] 1 WLR 723.

46 Jost, Totaro and Tyshing, above n 4, 267.

47 Ibid.

at pains to emphasise that the quantity of the material taken was minimal: 'It's about 89 words in 157 pages and I don't accept for a moment that that amounts to plagiarism'.[48] He glossed over the quality of the material taken, although that factor is more important in law. In the acknowledgments to *The Hand that Signed the Paper*, Helen Darville, and her publisher, Allen and Unwin, conspicuously thanked J M Dent for permission to quote copyright material from the poem 'The Hand that Signed the Paper' by Dylan Thomas, published in *Dylan Thomas Collected Poems* (1997).[49] The author drew upon the lines for the title and the skyhook to her book. It seems that the author, Helen Darville, and her publisher, Allen and Unwin, felt the need to acknowledge this source because it was such an obvious borrowing. It is interesting, too, that permission was sought for only eight lines from a poem. This is a stark contrast to the legal argument of Minter Ellison that the takings from works of history and fiction were too small and insignificant to be a substantial reproduction. This variance in treatment cannot be explained away by mere differences in genre. Helen Darville was also less forthcoming about other poetic sources and inspirations that were found in the body of the text.[50]

The second problem is that case law does not support the contention of the literary expert that the appropriation of images and words from other sources is legally permissible. The Australian courts have been reluctant to find that self-conscious forms of artistic expression, such as parody, are protected under the doctrine of fair dealing. In *AGL Sydney Ltd v Shortland County Council*, the Federal Court emphasised that 'the statute grants no exemption, in terms, in the case of works of parody or burlesque'.[51] There is a move afoot to simplify the *Copyright Act 1968* (Cth) with the adoption of a single fair dealing provision, along the lines of the American fair use doctrine.[52] The United States courts have found that parody, like other forms of criticism, can be protected under fair use. In *Campbell v Acuff-Rose*, the Supreme Court of the United States held that the question of fair use turned on whether the second work 'adds something new, with a further purpose of different character, altering the first with new expression, meaning or message; it asks, in other words, whether and to what extent, the new work is "transformative"'.[53] However, even under this progressive approach, it would be doubtful that Helen Darville could be able to raise the defence of fair use. Her work seems to be a pastiche of other work, rather than a self-conscious parody. It lacks the satirical purpose and the humourous intent that is normally associated with parody.

Finally, Helen Darville and her supporters have said in public forums that her actions could be excused because it was unconscious copying.[54] This undermined the argument that was advanced by her lawyers that she was part of a self-conscious novelistic tradition — surely one cannot be at one and the same time conscious and unconscious of the sources drawn upon for literary inspiration. The courts do not accept the view that unconscious copying is a venial sin, because of a fear that it would be the last resort of a plagiarist or a pirate. In *Francis Day and Hunter Ltd v Bron*, Lord Justice Willmer held that subconscious copying is a psychological possibility, and it is capable of amounting to an infringement of the plaintiff's copyright.[55] In order to establish liability on this ground, it must be shown that the author of the offending work was familiar with the work alleged to be copied. There must be a causal link between the defendant's work and the plaintiff's work, since independent creation does not infringe copyright. If there is a substantial degree of objective similarity, there will be a presumption that there is a causal

48 Ibid, 264.

49 Darville, above n 3, viii.

50 Riemer, above n 23, 208.

51 *AGL Sydney Ltd* v *Shortland County Council* (1989) 17 IPR 99, 105.

52 Copyright Law Review Committee, *Simplification Of The Copyright Act 1968: Part 1. Exceptions To The Exclusive Rights Of Copyright Owners* (1998).

53 *Campbell v Acuff-Rose* (1994) 127 L Ed 500.

54 Jost, Totaro and Tyshing, above n 4, 290.

55 *Francis Day And Hunter Ltd v Bron* [1963] Ch 587.

connection. Evidence of unconscious copying affords some evidence to rebut the inference of a causal connection from objective similarity, but it is not conclusive. It would be difficult for Helen Darville in this case to rebut the objective similarity that exists between her novel and the fictional works which she happened to use. Her claim to the author Brian Matthews that she 'had occasional trouble with her intermittent capacity for uncontrollable photographic recall of unattributed material' does not seem a credible one.[56]

Acknowledgments

In its legal opinion, Minter Ellison defended Helen Darville with the argument: 'There is no obligation or literary practice of footnoting or formally acknowledging the use of historical sources in the novel genre (as opposed to academic or scholarly work)'.[57] Furthermore, Peter Banki argued that, even under a system of moral rights, Helen Darville would not have infringed the law, because her failure to attribute the sources of her work were reasonable in all of the circumstances.[58] It is worth evaluating whether such claims about attribution can be substantiated.

At present, there is no law expressly requiring recognition or attribution of authorship. However, the Federal Government has sought to remedy this situation with the introduction of a new scheme of moral rights. Division 6 of Pt IX of the *Copyright Act 1968*, proposed by the Copyright Amendment (Moral Rights) Bill 1999 (Cth), provides that the right of attribution of authorship or the right of integrity of authorship is infringed where an unattributed, falsely attributed or derogatorily treated work is reproduced in material form, published, performed, transmitted or adapted. Section 195AR exonerates a failure to attribute authorship where this is reasonable. Section 195AS permits derogatory treatment which, in all the circumstances, is reasonable. Matters to be taken into account include the nature of the work, industry practice and whether the work was made in the course of employment. Additionally, in relation to the failure to attribute a work, it is relevant whether any difficulty or expense would be incurred as a result of identifying an author.

The claim that there is no obligation or literary practice of footnoting or formally acknowledging the use of historical sources in the novel genre is questionable. It is commonplace for writers to acknowledge the historical sources of their literary work, even ones working in a tradition of self-conscious novels. One of Helen Darville's contemporaries, Beth Spencer, was concerned about the lack of attribution:

> Thus the problem for me, for instance, with Helen Darville's appropriations was not that she used someone else's words (I think pastiche as a form is fine; it can be effective and interesting if done well) but that she didn't acknowledge this. If she had, of course, then her own lack of personal experience and, hence, personal authority would have also automatically been acknowledged and made obvious, and this would have altered the whole way the book was experienced. It would have been a different book, with a different history (and vice versa). Well, anyway, while Darville's lawyers may be able to sleep soundly with the conviction that her appropriations (while admittedly 'bad form') are not actionable (that is, not a clear violation of the *Copyright Act*), I'm afraid I still have the occasional watery nightmare.[59]

Furthermore, the tactical stance taken by Helen Darville's lawyers is different to the behaviour of her publishers. In response to authors outraged that their words had been used without acknowledgment,

56 B Matthews, 'My Demidenko Story' *The Age* (Melbourne) 3 October 1995, 13.

57 Jost, Totaro and Tyshing, above n 4, 267.

58 P Banki, 'Copyright And Plagiarism' Australian Society of Authors Seminar, 23 March 1996.

59 B Spencer, 'I'd Like To Have Permission To Be Post-Modern, But I'm Not Sure Who To Ask' *Jacket*, Number 1, http://www.jacket.zip.com.au/jacket01/spencer.

Allen and Unwin offered that, if the book is reprinted again, it would include a line in the front matter acknowledging the sources of the material without implying this was done with their permission. This offer supports the view that it is indeed industry practice to acknowledge sources. A strong argument could be made that, contrary to what Peter Banki might contend, there would have been a clear infringement of the moral right of attribution.

There would also be an issue whether this appropriation of historical materials would amount to derogatory treatment. 'Derogatory treatment' is defined in s 195AJ of the Copyright Amendment (Moral Rights) Bill 1999 (Cth) as 'the doing of anything, in relation to the work, that results in a material distortion of, the mutilation of, or a material alteration to the work itself that is prejudicial to the author's honour and reputation'. The recent decision in *Schott Musik v Colossal Records* considered the meaning of debasement.[60] Justice Hill comments that 'a rearrangement of a work to incorporate within it notes associating the work with say a terrorist or racist body would constitute a debasement of the original'.[61] It is arguable that Helen Darville offended the honour and reputation of the original authors of the historical works by taking their historical material and using it in a new context which was arguably offensive and demeaning. Robert Manne noted that 'from a literary point of view what was interesting about Helen Demidenko's borrowing was how often an imaginative slackness or simple carelessness had robbed her original source of freshness, precision or power'.[62] Robin Morgan lamented, 'It's been distressing to find my name even mentioned in the unsavoury context this author and book seem to foster: crypto-fascist politics, ethno-stereotyping, greed, media hype, an embroidery of lies, and multiple plagiarisms.'[63] A strong case could be made that Helen Darville debased the literary and political qualities of the original work, and this was unreasonable in all of the circumstances.

Summary

The courts can afford to be self-conscious about copyright law because they have the power to find laws, interpret statutes, and contextualise relevant precedents. It is possible that a judge could interpret the flux and the indeterminacy of the case law in such a way as to find that Helen Darville was guilty of copyright infringement, especially if she did not show sufficient respect for the law. However, the courts remained aloof from the Demidenko affair — out of obligation, not choice. They could only adjudicate in relation to a legal process started by lawyers on behalf of their clients. This controversy highlighted that, although the courts have considerable latitude in decision making, they have limited opportunity to exercise this power.

The Demidenko affair illustrated that lawyers play an instrumental role as gatekeepers to the courts. Andrew Greenwood and Peter Banki were strong, effective advocates who used their legal knowledge and expertise to defend Helen Darville from claims of copyright infringement. They provided the realistic advice that it would be difficult for a legal action to succeed against their client. However, the case for Helen Darville was not invincible or impregnable. There were a number of flaws and weaknesses in her legal defence. Yet these issues did not come to light in the Demidenko affair. The problem was that the legal debate was one sided. There was no advocate available to act on behalf of the aggrieved authors.

As a result, Robin Morgan was dissuaded from bringing a legal action for copyright infringement against Helen Darville and her publishing house. She was discouraged by the lack of consensus among the writers whose work had appeared in *The Hand that Signed the Paper*. Robin Morgan also doubted that her concerns could be satisfied by any legal remedies that would be available to her. 'I don't want revenge

60 *Schott Musik International GBH & Co v Colossal Records Of Australia Pty Ltd* (1997) 38 IPR 1.

61 Ibid, 12.

62 Manne, above n 35, 109.

63 Morgan, above n 17.

or money, I want my own writing "rescued" from this mess.'[64] Instead of taking the risks of a legal action, she pursued her grievances in the public domain of the mass media.

Part 3: the media

It is significant that the debate over plagiarism in the Demidenko affair was settled not in the courts or in the literary community, but in the alternative forum of the media. It has become common for aggrieved authors to publicise allegations of plagiarism in the press. Not enough attention has been paid to this new phenomenon. The journalistic expose of Helen Darville is not an isolated example. The media performed a role in airing allegations of plagiarism concerning the British author Graham Swift and the art critic Robert Hughes.[65] It played a significant part in a number of cases about fabrication of indigenous identity and culture by white writers, such as Marlo Morgan and Leon Carmen.[66] It has also more controversially raised questions about the authenticity of black writers such as Mudrooroo and Roberta Sykes.[67] There is a need to discuss and analyse the standards and norms at work in the interpretative community of the media.

In the Demidenko affair, the media was less interested in the legalities of copyright infringement or the aesthetics of influence than in the politics of appropriation. As Mark Davis remarked, 'Most fascinating is the way the book enabled a certain community of critics, columnists and journalists to go over some agendas that were firmly in place long before *The Hand that Signed the Paper* stumbled onstage.'[68] The media was narrow in its focus upon contemporary politics and current affairs in the Demindenko affair. As McKenzie Wark observed, culture is rarely news in itself:

> Culture is in some respects the antithesis of news. It's about an endless, almost infinite series of little acts of making sense of things, be they books or songs or everyday gestures, through which people learn and practice and sometimes modify the structures of feeling through which they engage with the world ... It's certainly not the sort of hard edged thing from which a keen reporter makes news.[69]

However, he qualifies the general rule that culture is not newsworthy:

> Big, well, promoted events or personalities with packs of publicists working the fax machines on their behalf are of course often news, but they are news because they are well known, not because there is anything in the cultural material involved that matters all that much.[70]

Thus a book may become consequential if it becomes the focus for a cult of personality, or a political conflict and dispute around the author. The Demidenko affair satisfied both of these conditions, and

64 Ibid.

65 On Graham Swift, see A Julius, 'A New Definition For The Rights Of Writers' *The Sydney Morning Herald* (Sydney) 13 March 1997, 13. On Robert Hughes, see L Slattery, '"Cannibal" Eats His Own Words' *The Australian* (Sydney) 7 November 1998, 28.

66 On Marlo Morgan, see L Behrendt, 'In Your Dreams: Cultural Appropriation, Popular Culture And Colonialism' (1998) 14 (1) *Law/Text/Culture* 256. On Leon Carmen, see A Stevenson and A Hubble above n 15.

67 On Mudrooroo, see Mudrooroo, 'Tell Them You're Indian' in G Cowlishaw, and B Morris (eds), *Race Matters: Indigenous Australians and 'Our' Society* (1997) 259. On Roberta Sykes, see J Marsh, 'You Fella Snake, Dr Sykes? Prove It' *The Sydney Morning Herald* (Sydney) 17 October 1998, 17.

68 M Davis, *Gangland: Cultural Elites And The New Generationalism* (1997) 214.

69 M Wark, *Virtual Republic: Australia's Culture Wars In The 1990's* (1997) 120.

70 Ibid.

passed into the public sphere. It attained far more attention than the conduct of Helen Darville warranted or deserved.

There is an economy of celebrity at work in the media. The creative artist has also become a performing artist to some extent. Malcolm Bradbury comments that we live in age in which the author is hyped and promoted, studied and celebrated:

> In the commonsense world, authors commonsensically exist, in inordinate numbers. We may not think of them as highly as popstars or politicians, nor reward them with honours as we do our civil servants. But they have visibility, a certain fame; they are there ... The reader takes the name on the spine of a book as a real sign, the name of a true person — true in a special way, of course, capable of wisdom, genius, moral insight, the qualities both of the magus and the celebrity. Like most people in the public eye the name is an image, a mystery, and becomes the stuff of news, illusion, gossip, scandal and vicarious public involvement.[71]

The media was interested in Helen Darville, because she sought fame and celebrity through the mechanics of publicity. She marketed herself as a young writer of Ukrainian origins telling a family story. However, the critics of Helen Darville argued that she had adopted an ethnic persona and mixed fact and fiction in order to give authenticity and legitimacy to her claims about the Holocaust. They said that *The Hand that Signed the Paper* was racist and anti-Semitic, because it perpetuated the myth that there was a casual connection between the Ukrainian famine and the part of the Nazi Holocaust that took place in the Ukraine. The supporters of Helen Darville claimed that she was the victim of political correctness and multiculturalism. They held that the expression of some prejudices and views should not be suppressed just because they are offensive and hurtful to some groups. This political conflict and dispute heightened and intensified the attention that Helen Darville attracted in the press.

Publicity

It is quicker, cheaper, and easier to pursue a claim of plagiarism in the media than to go through the courts or even wait for the professional judgment of one's peers. In an interview, the journalist and biographer David Marr commented that in most cases publicity is the most effective way of dealing with cases of plagiarism:

> I think, though, in those cases, the most effective way of dealing with them is publicity. There would be no point in going through the courts, I imagine ... You do not go into those things to earn money. You just want to see that it does not happen again. The best way of making sure that it does not happen again is to ... say look this is what happened, reveal it, and that's that.[72]

It is important to recognise that, just as there is unequal access to the legal system, there is also unequal access to the media. Journalists are particularly good at using this instrument, because they have privileged access to newspapers, television and radio. However, it is not as useful for other members of the public. It is worth considering the efficacy of the media as an alternative forum for resolving disputes over copying.

The allegations of plagiarism represented an attack upon the reputation and good name of the author, Helen Darville. As Jonathan Sutherland has remarked, 'Probably the most wounding insult one can level at a self-respecting author is "plagiarist", suggestive as it is of underhand theft and impotence'.[73] Such ridicule can be terribly effective. As Andrew Riemer acknowledged, 'Helen Demidenko's future as a figure

71 M Bradbury, *No,Not Bloomsbury* (1987) 311-312.

72 M Rimmer, interview with David Marr, 2 November 1998.

of fun, a grotesque creature in a contemporary mythology, seems assured'.[74] However, there is a danger that such an attack could have the unintended effect of enhancing the reputation of the author by giving them the opportunity of martyrdom. By going public about the plagiarism, the critics of Helen Darville redeployed issues of substance, character and reputation into the wider discursive domain of the media. They set off a vicious and punitive debate over the character of the author. It gave Helen Darville the opportunity for displays of pride and disdain towards her critics.[75]

The accusations of plagiarism were also an attempt to hurt the market for a work and the sales that it would generate for the publisher. It would be interesting to find out whether the sales of *The Hand that Signed the Paper* were affected by its notoriety. There is at least circumstantial evidence to suggest that many readers were discouraged from buying the book on the account of its disrepute. They did not want Helen Darville to profit from her sins. However, there seems to have been a counter-trend as well. There was a fear in the Demidenko case that the sales of *The Hand That Signed The Paper* would be enhanced by the sensationalism and the scandal that surrounded the book. The publicity that raged about the novel ensured that it reached beyond the niche market of a literary audience to a mass market of consumers. By October 1995, *The Hand that Signed the Paper* was reputed to have sold some 30,000 copies.[76] Furthermore, there were a number of spin-off books designed to profit from the Helen Demidenko affair. Robin Morgan worried that she did not 'intend to become embroiled further in the distasteful growth industry of Darvilliana now blighting Australian letters'.[77] However, it is debatable whether this foray into public relations was successful, as the Helen Darville phenomena thrived on such negative publicity.

Accountability

In the absence of authoritative judgments from the law or literature, the charge of plagiarism against Helen Darville was prosecuted in the public forum of the media. This proved to be an effective means of attacking the reputation of the author, and the sales of *The Hand that Signed the Paper*, and the hopes of advances and future royalties. However, there was a concern about the standards and norms that were being used to judge plagiarism in the community of the media. Luke Slattery raised important questions about the role of the media in such cases of plagiarism:

> Have we, perhaps, become a culture of truffle-sniffers — keen to root out such scandals for our public delectation? Have we, as a result, become over-sensitised to the appropriation of original work? Is our frame of reference in these cases too simplistic and inflexible?[78]

However, Luke Slattery failed to answer the questions that he raised about the role of the media, even though they were both appropriate and pertinent. It seems that such issues of accountability were critical in the Demidenko affair and will be of increasing importance if parties continue to seek to resolve matters in the media, not the courts.

In a rare interview, Helen Darville reflected that she was vilified by the media because, as a young woman, she was the wrong age and the wrong gender. She complained that the responses of the journalists were extraordinarily vicious: 'The Australian mass media will turn on any perceived "high

73 A Kernan, *The Death Of Literature* (1990) 120.

74 Riemer, above n 23, 259.

75 Tavuchis, above n 32, 54.

76 Manne, above n 35, 112.

77 Morgan, above n 17.

78 Slattery, above n 65.

achiever" and grind them into mincemeat given half a chance'.[79] The publisher at Allen and Unwin, Patrick Gallagher, remained bitter about the role of the journalists in the controversy:

> Any literary debate, however bitter, can usually be justified in terms of the importance of the issues involved. But what has been truly ugly about this debate has been the unholy alliance between the more strident critics and those fearless investigative journalists of the tabloid variety — not that they are employed purely by tabloid media. The joy to them has been a photogenic young quarry who has kept playing into their hands by behaving foolishly, and then whipping them into a lather of frustration by refusing to allow herself to be caught and impaled, bleeding, on their pens in front of their cameras.[80]

There are, of course, limits to attacks upon reputation. The law of defamation helps set boundaries of what criticism is acceptable of art and literature.[81] Helen Darville could have brought an action if she thought her reputation was harmed by the accusations of plagiarism that were published in the media. She would need to establish that the material lowered the estimation in which she was held, or exposed her to hatred, ridicule and contempt, or caused people to shun or avoid her. It would be difficult, though, to dispute that the journalists were engaged in fair comment on a matter in the public interest. Moreover, Helen Darville cannot be cast entirely in the role of the innocent victim. She, too, was accused of libel after she criticised Wongar, an Australian writer of a Serbian background who assumed an Aboriginal identity.[82]

In relation to the charges of plagiarism, Helen Darville and her supporters accused the media of hypocrisy and double standards. Andrew Riemer said that 'similar accusations may be levelled at several journalists, except that nothing much happens to them when they are caught out'.[83] It is true that unattributed quotation, paraphrasing and stealing are some of the occupational hazards of journalism. However, the profession has sought to outlaw plagiarism. In 1997, the Media, Entertainment and Arts Alliance released a new draft code of ethics, which warned journalists that plagiarism was plagiarism, and that fair attribution was always required. This standard is couched in much more stringent terms than is the case in law or literature. There is no equivalent to the exceptions to copyright infringement such as fair dealing. There is no alternative tradition of aesthetics under which copying might be permissible. Furthermore, it is wrong to suggest that there are no sanctions against this conduct. Ethical panels can warn, reprimand and fine members of the union for breaching the code of conduct, and can expel or suspend members from the association.[84] Editors can sanction journalists and contributors for unethical conduct. In the past, plagiarism has been a ground for termination of employment. Commentators are also keen to reveal instances of plagiarism in the media. Indeed it shows that journalists are not immune from being punished through publicity.

Finally, Helen Darville sought to reinvent herself as a journalist in the hope that she could redeem her reputation in the media. She became a columnist for the *Courier Mail*, the very Brisbane newspaper which had exposed the fictive nature of her identity. However, her career was short-lived. In her second column, 'When I Am An Evil Overlord', Helen Darville reproduced an article by Dr Peter Anspach from the University of Oklahoma without permission. She was sacked for plagiarism by the editor of the *Courier Mail*, Chris Mitchell. In a statement from her lawyers, Helen Darville said 'if these lines are not part of

79 M Westbury, 'Lies, Damned Lies, And Media: An Interview With Helen Darville' *Loud* (Adelaide) 21 October 1997, <http://www.loud.org.au/noise>.

80 Jost, Totaro and Tyshing, above n 4, 286-7.

81 A Kenyon, 'Defamation, Artistic Criticism And Fair Comment' (1996) 18 *Sydney Law Review* 152.

82 Manne, above n 35, 53-7.

83 Riemer, above n 23, 210.

84 M Armstrong, D Lindsay and R Watterson, *Media Law in Australia* (1995) 210-1.

free and public domain material as I thought I apologise for any error on my part in using material posted on the net'.[85] However, such evasions are unconvincing. Helen Darville ignored the fact that the website featured a clear copyright notice. She also overlooked the developments in copyright law being wrought by the 'Digital Agenda' reforms.[86] Since being dismissed as a columnist for the *Courier Mail*, Helen Darville has engaged in occasional freelance work. She was commissioned by a fashion magazine called *Australian Style* to conduct an interview with David Irving, the revisionist historian who has also been accused of anti-Semitism because of his attempts to cast doubt upon the existence of the Holocaust.[87] Helen Darville has also maintained her own personal website so that she can directly communicate her point of view to the public, without the mediation of the mass media.

Summary

The Demidenko affair has important ramifications for the nature and function of the legal system in the age of mass communications. It is apparent that parties will use the instrument of publicity in disputes over appropriation as an alternative, or in addition, to legal action. As a consequence, legal practitioners will have to become more media savvy in copyright disputes and start combining legal advocacy with public relations. They would also be wise to form ties and links with editors, journalists, and columnists in the mass media. The courts in Australia will increasingly have to decide how to respond to such media spectacles. They face two possible alternatives — the courts can try to reassert their authority, and control the representations of the law in the media, or else they can accept the presence of the media in the legal system, and follow the lead of the United States in allowing greater public coverage of courtroom cases.

Conclusion

The Demidenko affair was interpreted and understood in radically different ways in three contexts — the literary society, the legal system, and the media. There was a struggle between the groups over which had the authority to judge and sanction Helen Darville for her acts of appropriation. The literary community claimed that the conduct of Helen Darville was a matter of aesthetics and ethics. However, there were doubts over the legitimacy of such cultural standards and norms. The legal profession asserted that appropriation should be understood in terms of economic rights and moral rights under copyright law. However, this point of view did not gain sway because the legal opinion of the advocates was not validated by the authority of a court. Finally, the media was decisive in its interpretation of the Demidenko affair in terms of personal and political reputation. However, there were misgivings about the accountability of the media. Such concerns must be taken seriously given that publicity is being used as an alternative, or a supplement, to litigation. In future, greater attention needs to be paid to the competition between the literary society, the legal system and the media over who determines the meaning of appropriation.[88] ●

85 C Pybus, 'Helen Darville aka Helen Demidenko — Update' *Australian Humanities Review*, February 1997 <http://www.lib.latrobe.edu.au/AHR/copyright.html>.

86 House Of Representatives Standing Committee On Legal And Constitutional Affairs, *Advisory Report On The Copyright Amendment (Digital Agenda) Bill* 1999 (1999).

87 Helen Darville interviewed David Irving just before he lost his defamation case against Penguin Books and Deborah Lipstadt: *Irving v Penguin Books and Lipstadt* (Unreported, Justice Gray, 11 April 2000), <http://www.courtservice.govuk/judgments/qb_irving.htm>.

88 K Bowrey, 'Who's Writing Copyright's History?' (1996) 6 *European Intellectual Property Report* 322.

media & arts law review

The very special case of broadcasting spectrum planning

A review of the Productivity Commission's broadcasting spectrum planning and allocation recommendations in Productivity Commission, *Broadcasting* (Report No 11, 2000)

Giles Tanner[1]

Digitalisation is revolutionising the way we use the radiofrequency spectrum. In the area of broadcasting regulation, it challenges the status quo for both industry and regulators. The Productivity Commission's review of the *Broadcasting Services Act 1992* (Cth) took place at the same time as the Australian Government was legislating to introduce digital television. Some of the Commission's recommendations on spectrum planning and allocation are in effect a critique of policy directions taken by Government. To the extent Government has failed to adopt the Commission's recommendations, the review considers what can most usefully be salvaged from the Commission's recommendations on broadcasting planning and allocation.

Introduction

The radiofrequency spectrum is a public resource we will hear much more of in the years to come. The 'spectrum' in question is all types of electromagnetic radiation arranged in order of frequency. The analogy is with the spectrum of visible light, itself a form of electromagnetic radiation. The radiofrequency spectrum is, if you like, the 'rainbow' of the entire range of radio frequencies.

The ability of transmitters to occupy tightly defined channels within the radiofrequency spectrum, and the ability of receivers to distinguish between emissions on these various channels, creates a natural regulatory role for governments and supranational agencies. Spectrum use must be co-ordinated to maximise its economic and social value. At its simplest, this can be compared to the convention of all vehicles driving on the left. Television stations, which transmit powerful signals able to be received by cheap aerials across large areas, would otherwise interfere with each other or drown out services that rely

1 General Manager of the Australian Broadcasting Authority. The views expressed are his own and do not necessarily reflect the views of the ABA.