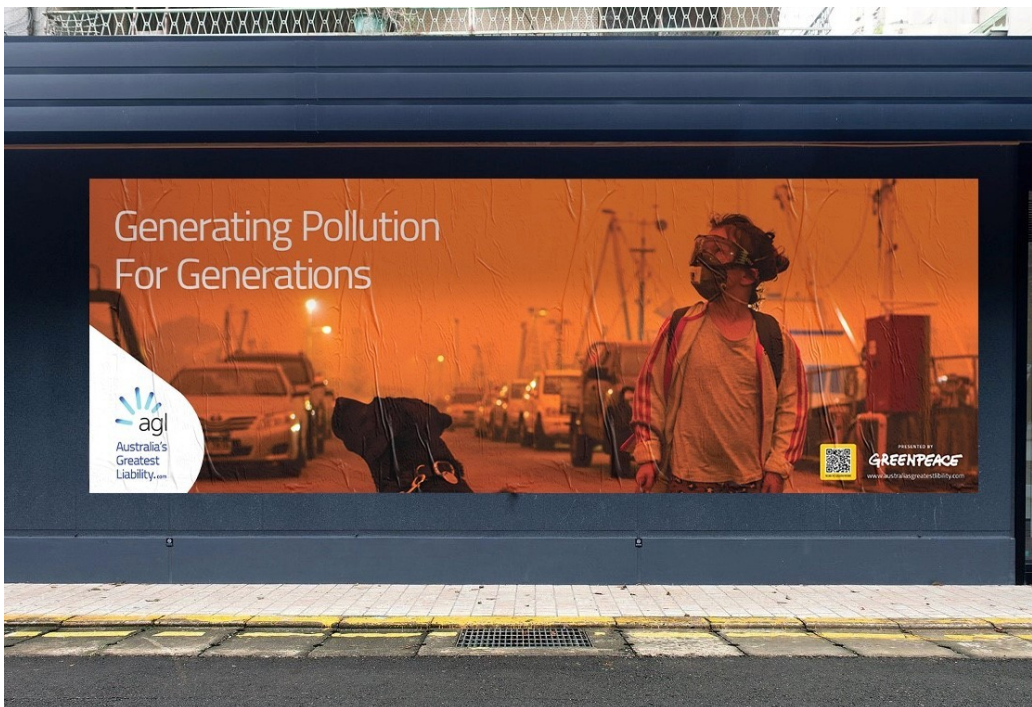


Environmental Advocate Wins Battle Against “Australia’s Greatest Liability”

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by Case Collard



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Greenpeace, the well-known environmental campaign organization, recently prevailed over an electricity giant in the Australian case *AGL Energy Limited v. Greenpeace Australia Pacific Limited*. Australia’s parody and satire law is similar to the US and this case presents an interesting application of these standards.

The dispute began in May 2021 when AGL Energy Ltd. (“AGL”) became the focus of efforts by Greenpeace Australia Pacific Ltd. (“Greenpeace”) to stop AGL’s harmful environmental practices.

AGL powers around one-third of Australian households, mostly through the use of coal-fired power stations. In recent years, AGL has promoted itself as an “environmentally-

friendly” company. Greenpeace labeled this marketing as “green-washing” of the company and in response, Greenpeace launched its own campaign to highlight AGL’s record as a major polluter and lobby for them to divest from coal-fired power.

As part of its campaign, Greenpeace produced a report entitled “Coal-face: Exposing AGL as Australia’s biggest climate polluter.” The campaign also produced social media posts, billboards, posters, and placards. The report and the other campaign materials all used AGL’s logo accompanied by a slogan that played on AGL’s initials, “AGL-Australia’s Greatest Liability.”

AGL brought claims of copyright and trademark infringement in the Federal Court of Australia for the use of its logo in the campaign. Greenpeace prevailed on both claims.

Justice Stephen Burley considered whether the use of the logo by Greenpeace was an infringement of (1) AGL’s copyright or (2) AGL’s registered trademark.

Copyright claim

Greenpeace did not dispute that AGL owns copyright of the logo, however Greenpeace successfully argued it was not in breach of AGL’s copyright because the use fell within the defense of fair dealing for the purpose of parody or satire. Greenpeace also relied in part on the defense of fair dealing for the purpose of criticism or review; however, this was unsuccessful.

Section 41A of the Copyright Act 1968 provides:

41A Fair dealing for purpose of parody or satire

A fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, does not constitute an infringement of the copyright in the work if it is for the purpose of parody or satire.

The Court held that § 41A provides an important exception to copyright infringement to promote free speech and critique.

For Greenpeace to establish the defense, it had to prove that the use was a “fair dealing” that drew the audience’s attention to an object of ridicule or criticism through irony, humor, or sarcasm.

AGL argued that Greenpeace intended for its use of the logo to create change, rather than parody or satire, but Justice Burley upheld existing Australian authority in finding that as long as satire was one of the purposes, the existence of another purpose for the use did not prevent Greenpeace from establishing the defense.

The Court held that use of the logo in advertisements, street posters, and website fell squarely within the meaning of parody or satire. Justice Burley stated that by modifying the logo, “the ridicule potent in the message [was] likely to be perceived.” He noted that

the modification to AGL's logo was "darkly humorous" and the combined effect of the logo and message was "ridiculous" and that the messages in the social media posts and photographs called attention to the fact that AGL was not the creator of the work.

AGL also argued that Greenpeace used the logo to brand the company as toxic, which would not fall within fair dealing. But the Court ruled that copyright protects an owner's interest in his or her work but it does not protect brand reputation.

Ultimately, although the Court generally accepted Greenpeace's defense, some of the social media posts and placards that did not involve the clearly satirical tagline "Australia's Greatest Liability" did not contain a sufficient element of parody or satire and therefore an injunction was granted in AGL's favor in respect of this limited number of works.



Trademark claim

The Court held that the use of the logo did not constitute trademark infringement because the logo had not been "used" by Greenpeace as a trademark. The Court agreed with Greenpeace's characterization of its use, and therefore AGL's case did not proceed beyond the first hurdle. The Court considered that the general population would not readily perceive that Greenpeace was attempting to promote any goods or services by using the logo.

What does this decision mean for your logo?

The Court dismissed the claims for infringement of trademark and breach of copyright and did not award AGL monetary damages, only granting injunctive relief for the limited number of photographs and social media posts that did not fall within the parody or satire

exception as described above. As a result, Greenpeace can use the logo along with the slogan in its campaign.

This case sets an important precedent in Australia. It provides a model for other environmental and activist organizations to launch campaigns that satirize and parody large corporations with less fear of losing an IP litigation for the use of corporate logos. However, this case does highlight that activist organizations must be careful when creating their marketing materials to ensure that their satirical messaging is adjacent to the logo to ensure the general perception of the materials is satirical. It was relevant in this case that the slogan “Australian’s Greatest Liability” appeared next to the AGL logo, and that Greenpeace’s own logo was also prominently displayed on the materials.

This Australian decision aligns with U.S. cases like *SunTrust Bank v. Houghton Mifflin Co.*, in which the Court determined that a parody of *Gone With the Wind* was entitled to the fair use defense for copyright infringement. 286 F.3d 1257 (11th Cir. 2001). The derivative work used major plot lines and characters from the original book as a way to criticize the writing’s depiction of slavery in the United States. Like the use of AGL’s logo in the Greenpeace campaign, the use of the original work in *SunTrust Bank* was necessary for the critical message to be understood.

This post was written with generous contributions and analysis from local counsel in Australia, Shelley Einfeld and Imogen Wurf, of the law firm of Maddocks.

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