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# Australian Band Men At Work to Pay for Copyright Infringement

**Keywords**

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*By Jack Korba*

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*This piece was originally featured as a blog post at [www.ipbrief.net](http://www.ipbrief.net). The AU Intellectual Property Brief provides daily content on hot issues, breaking news, and trends within intellectual property law worldwide.*

An Australian judge has ordered the band Men At Work to pay for copyright infringement of a 1930s Australian nursery rhyme in connection with their 1980s hit “Down Under.” The judge determined that the flute riff in “Down Under” was substantially copied from the song “Kookaburra Sits in the Old Gum Tree,” which was composed in 1934. The penalty assessed was 5 percent of their royalty fees made from the song. This amount was significantly less than the 60 percent demanded from Larrikin Music, copyright holders of the song. The company bought the rights to the song back in 1990 for \$6,000.

According to Men At Work’s Colin Hay, the group never sought to obtain the rights to use the song because they had “unconsciously” used it in writing “Down Under.” In determining the royalty award, the parties agreed that the award should be determined based on a hypothetical bargain that would have been struck between a willing licensor and willing licensee. However, the parties disagreed over whether the award should be based on a 1982 bargain or 2002 bargain.

While siding with the plaintiffs and choosing the 2002 bargain, Justice Peter Jacobsen stated that the timing had little to do with the actual award. He rationalized that the flute riff is hard to detect, which would have given the licensor little bargaining power. Furthermore, the similarity was not even recognized by a principal of Larrikin until 2007 when the resemblance was noticed in a television program. Even so, the award is estimated

to be in the hundreds of thousands of dollars. Men At Work’s recording company EMI plans to appeal the decision.

For more on this story see “Court slaps EMI Men At Work for copying children’s song” by Mike Cherney at <http://blogs.forbes.com/docket/2010/07/06/court-slaps-emi-men-at-work-for-copying-from-childrens-song/>.

