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Morly Investments Pty Ltd (imprint: The High Street Publishing Company) ("Claimant") v. The Walt Disney Company, et al ("Respondents") – Request for review by the Register of Copyrights – 15 June 2024 (Australian Eastern Standard Time)

The Claimant has been advised as at 13 June 2024 at 09.08am GMT-04:00 that the Copyright Claims Board (**CCB**) has denied its request (**CCB Denial**, Dkt 152) to reconsider a final determination made on 13 May 2024 at 02:42pm GMT-04:00 (**Final Determination**, Dkt 147).

This is the Claimant's formal request for review by the Register of Copyrights, and the request is accompanied by the appropriate filing fee.

The Register is asked to decide that the CCB "abused its discretion" by denying reconsideration as the CCB had no reasonable basis to reject the Claimant's request for reconsideration for the following reasons (and the Final Determination, Dkt 147, if left uncorrected, will always contain material errors and technical mistakes for those reasons):

There has been more than one clear error of law or fact material to the outcome or technical mistake:

1. The Authorised Representative (Lim) is not the Claimant and is not an agent, employee or authorised signatory for the Claimant, and the significant volume of documents lodged by the Claimant as part of this claim will attest to that. The Authorised Representative has only been appointed to the role of Authorised Representative in relation to this claim on and from the time the claim was originally lodged (Dkt 1, Dkt 5).

   There has been an erroneous conflation of the Authorised Representative, and her very partial "knowledge" (Dkt 52), with the Claimant and its knowledge by both the CCB and the Respondents (see, for example, Respondents' Party Statement, Dkt 145 where "Claimant" is used largely exclusively by the Respondents when referring to actions or knowledge of the Author). U.S. case law is unlikely to hold that a company has the knowledge of any non-officeholder, non-agent, non-employee, non-authorised signatory, passive member in that company where that company, or that member, has not engaged in any criminal or other wrongdoing. The Claimant company's sole director and company secretary is an individual called Michael Liu (who has held those positions since February 2015). To hold that the Claimant had all of the knowledge of the Authorised Representative from 2015 until the current day is erroneous at law and in fact – there can be no reliance on 'respondeat superior' (which appears to be what the CCB is arguing in its Final Determination at p. 5: "*Based on these facts, the discovery rule would lead to the same result as the incident of injury rule because Claimant became aware of the alleged infringements as soon as or shortly after they commenced*") in a case where the Claimant has done no wrong, and its Authorised Representative in this case (for a limited-time and scope of authority) is **not** an agent, an employee, an authorised signatory, or an officeholder. As per the CCB Handbook under 'Representation' (https://ccb.gov/handbook/Representation.pdf), the Authorised Representative was never noted as an 'employee' of the Claimant. Further, the Authorised Representative does not have a controlling stake in the Claimant – she does not hold more than 50% in the voting rights of the Claimant (Dkt 149) and therefore does not 'control' the Claimant or its actions.

While the CCB has noted correctly (CCB Denial at p.1, Dkt 152) that the Authorised Representative "Lim registered for eCCB as an "owner, officer, partner, or member" of Morly, and her representation of Morly was based on that status", the 2015/2016 knowledge of a passive "member" cannot be imputed to an entirely separate corporate entity, whose controlling mind and officeholders are an entirely separate individual/natural person.

2. As in any legal action involving the Respondents throughout the world, it is incumbent on them to seek adequate discovery and use due care to do appropriate due diligence in relation to any claimant in an action against them. The Claimant should not be punished for Disney failing to do so in this instance. The Respondents have been aware, since the claim was served on them and throughout the extensive discovery process for this claim, that the Claimant was a corporate entity and should have "solicited the evidence from Morly earlier" (CCB Denial at page 1, Dkt 152). Such evidence of corporate structure should therefore not "be disregarded as a basis for reconsideration". (CCB Denial at page 1, Dkt 152). The onus is not on the Claimant to do the Respondents' due diligence for them.

3. The Claimant was wholly unaware of the breaches set out in the Disney-generated document entitled 'Mercy and Exile E-Book Quantities Sold – June 2015 – Dec 2022' (Dkt 92, reproduced here as **Annexure A**) until the point that Disney provided this document to the Claimant **on or around 25 May 2023** and the Claimant lodged it on the eCCB as Dkt 92. The Authorised Representative was unaware of any breaches by Disney/unauthorised distributions of the Works arising from Disney's actions or omissions beyond her email to HCUK and HCA dated Friday, 29 January 2016 12:27 PM (Dkt 52) until the Author discovered breaches by Disney/unauthorised distributions of the Works arising from Disney's actions or omissions in **March 2022** (Dkts 53 – 55).

   Starz Entertainment, LLC v. MGM Domestic Television Distribution, LLC, 39 F.4th 1236, 1237 (9th Cir. 2022) (***Starz***) has been incorrectly applied by the CCB in this case, which stated in the Final Determination (Dkt 147 at pp. 4 – 5):

   > *Claimant's evidence shows that Lim was aware of allegedly infringing sales, both before and soon after the Disney Rights Reversion … Based on these facts, the discovery rule would lead to the same result as the incident of injury rule because Claimant became aware of the alleged infringements as soon as or shortly after they commenced*.

   For the reasons noted at Paragraph 1 above, the Claimant was wholly unaware of <u>all</u> of the infringements set out in Dkt 92 (see Annexure A) until that document was provided by the Respondents to the Claimant on or around 25 May 2023, and the Authorised Representative was wholly unaware of any infringements/unauthorised distributions of the Works arising from Disney's actions or omissions <u>after</u> her email of complaint to HCUK and HCA dated Friday, 29 January 2016 12:27 PM (Dkt 52). ie any infringements noted in Annexure A (Dkt 92) beyond that date of 29 January 2016 were wholly outside the Authorised Representative's actual or reasonable knowledge and no claim could have accrued in relation to any of them.

   As noted in the (now affirmed) District Court *Starz* decision (at 510 F. Supp. 3d 878 (C.D. Cal. 2021)):

the statute of limitations does not prohibit recovery of damages incurred more than three years prior to the filing of suit if the copyright plaintiff was unaware of the infringement, and that lack of knowledge was reasonable under the circumstances.

And further:

The duty of diligence does not create a duty to continuously monitor a licensor to ensure compliance with its obligations, absent any reason to otherwise suspect a breach. The law does not inject such paranoia into the licensor-licensee relationship. See Design Basics, LLC v. Chelsea Lumber Co. , 977 F. Supp. 2d 714, 725 (E.D. Mich. 2013) ("[I]t would be unreasonably burdensome to impose on a copyright owner a 'never ending obligation to discover whether anyone to whom he ever supplied his [copyrighted material] would copy it.' ") (quoting MacLean Assoc., Inc. v. WM. M. Mercer–Meidinger–Hansen, Inc. , 952 F.2d 769, 780 (3d Cir. 1991)).

For either the Author or Claimant to have continuously 'tracked' or monitored the breaches evidenced in Annexure A (Dkt 92) is wholly unreasonable on the basis of *Starz* and *Nealy* and those cases do not require a claimant to do that. In 2015 – 2016, neither the Claimant nor the Authorised Representative would have been aware of the e-book distributors (or "institutional partner[s]", Final Determination, Dkt 147 at p. 5) affiliated with/controlled by Disney in order to do that, and based on Disney's own contractual representation (extracted below) reproduced in the Final Determination (at p. 3, Dkt 147) neither the Claimant nor the Authorised Representative should have been put on notice to continuously monitor the Respondents for continuing infringements given the Respondents' scale, sophistication, resources and contractual control of its e-book business partners:

If the above proposal is acceptable to you, please sign where indicated below and return this letter to us. This letter shall be deemed validly delivered, and effective for all purposes, upon exchanging fully-executed facsimile or PDF transmission copies of the letter. For the avoidance of doubt, upon full execution of this letter the Agreement is terminated, all rights in Book #1, Book #2, Book #3 and Book #4 revert to you and we are subject to all termination obligations (and any other applicable terms) in accordance with the Agreement. We shall have three months from your signature of this letter to sell off any remaining stock of the print copies of Books #1 and #2 and then we are responsible for pulping any remaining stock. Upon full execution of this letter, we also will immediately make a request to all distributors of the eBook versions of Books #1 and #2 to withdraw these eBooks from sale.

To expect the Claimant and Authorised Representative to seek to catch Disney out across e-book channels each of them had not heard of in 2016 (eg Hoopla, Overdrive), or did not know were business partners of the Respondents, until the document reproduced as Annexure A was provided by the Respondents on or around 25 May 2023 (Dkt 92) is plainly unreasonable, a misapplication of the *Starz* case, a failure to apply the *Nealy* case appropriately, and too high a standard for any pro se claimant in a CCB action.

The final *Starz* decision (at p.17) is therefore applicable in this case:

We hold that the discovery rule for accrual allows copyright holders to recover damages for all infringing acts that occurred before they knew or reasonably should have known of the infringing incidents and that the three-year limitations period runs from the date the claim accrued, i.e., from the date when the copyright holder knew or should have known of the infringement. Applying a separate damages bar based on a three-year "lookback period" that is "explicitly dissociated" from the Copyright Act's statute of limitations in § 507(b) would eviscerate the discovery rule. There is no reason for a discovery rule if damages for infringing acts of which the copyright owner reasonably becomes aware years later are unavailable.

4. The Claimant has experienced a lack of procedural fairness in this case. As noted in the CCB Handbook under "About the Copyright Claims Board" (https://ccb.gov/handbook/Introduction.pdf) regarding non-"smaller claims" cases:

"Decisions in the CCB are made by three Copyright Claims Officers, who have extensive experience in copyright law, litigation, and alternative dispute resolution."

The CCB Handbook also provides at p.3 of https://ccb.gov/handbook/Smaller-Claims.pdf:

Managing a Proceeding	All three Copyright Claims Officers will hear the case. At least two conferences will be held, including one before and one after discovery. Otherwise, the Officers will only be involved during the information exchange process if asked by the parties.
Making a Determination	All three Officers consider the evidence involved in the claim and make a **final determination**.

However, with no prior notice or reasons given to the Claimant, the Final Determination states (at FN 1, Dkt 147) and in the CCB Denial (at FN 1, Dkt 152) "Copyright Claims Officer McCabe did not participate in this [determination/decision]."

Further, in multiple places in the Final Determination, the CCB uses language (regarding a pro se, non-U.S. Claimant, which has not had the benefit of a U.S.-qualified legal representative throughout this proceeding) including:

- "Claimant also does not appear to challenge Disney's assertion." (at p.4, Dkt 147)
- "Claimant does not assert that it was unaware of the acts of infringement that allegedly took place more than three years prior to the claim" (at p. 4, Dkt 147)
- "Claimant does not challenge the figures offered by Disney, apart from asserting that it cannot verify whether the figures are accurate." (at p. 5, Dkt 147)

And in the CCB Denial (Dkt 152) at p.2:

Before the Final Determination, Morly did not deny that the statute of limitations barred any recovery for earlier alleged infringements. Disney argued the issue in its written testimony.

> *Dkt. 145 at 1 & 8-9. Morly's reply testimony quoted part of that argument, but did not substantively address it.*

The Claimant was not aware it had to substantively address the statute of limitations issue given that *Nealy* had not yet been decided at the point Disney provided its written testimony. ie the law was not yet settled.

The above statements of the CCB run contrary to the "Representation" chapter in the CCB Handbook, which states at p. 2 (**emphasis added**):

> *As noted above, you can represent yourself before the CCB. This is sometimes called appearing "pro se." **CCB proceedings are designed so people can navigate them without lawyers** … You may have a lawyer represent you in your CCB proceeding, but you aren't required to.*

And at p.4 (**emphasis added**):

> *Unlike in federal or state courts, **businesses and organizations**—such as corporations, limited liability companies, partnerships, and unincorporated associations—**don't need to have a lawyer to appear in CCB proceedings.***

In the CCB Handbook chapter entitled "Presenting Your Case" (https://ccb.gov/handbook/Presenting-Your-Case.pdf), at p.10 (**emphasis added**):

> ***Tips for Preparing Written Testimony***
>
> *This section provides some tips for preparing written testimony. These are not requirements, and **you won't be penalized if you do not follow them.** However, these tips may help you put together a more persuasive and stronger case.*

Based on the CCB's statements extracted above, the Claimant *has* been "penalized" in preparing its written testimony on the basis that the Claimant and the Authorised Representative are not professional United States-qualified litigation lawyers with U.S. case law at their fingertips, but Australian-domiciled entities.

Having come to an erroneous decision on the "Statute of limitations" issue (Final Determination, Dkt 147 at p.5 and CCB Denial, Dkt 152 at p. 2) the CCB has therefore come to an erroneous decision in relation to the Respondents' negligent tortious liability for the acts or omissions of its employees after the Disney Rights Reversion occurred and for the acts of its e-book business partners. The CCB itself notes at p.7 of the Final Determination (Dkt 147):

> *At a minimum, one or more persons at Disney, presumably Disney personnel responsible for accounting for royalties received from Hoopla, must have been aware of those sales, although they would not necessarily have been aware that those sales were unauthorized or, indeed, known anything about the Disney Rights Reversion. It is certainly arguable, based on the evidence in the record, that Disney had knowledge of the infringing activities.*

The Respondents would have had similar knowledge of all infringing activities set out in Annexure A (Dkt 92) for every e-book business partner and if 'respondeat superior' is to be applied to the Claimant in this case, it should also be applied to the Respondents.

5. The Final Determination sets a dangerous precedent for other small, pro se claimants in the Claimant's position and shows a lax and overly generous attitude towards huge, well-resourced multi-national corporations that would not be shown to a small private company in the Claimant's position. The Claimant notes that it has managed to maintain good records across a period of greater than 10 years (see, for example, Dkt 39 dated 8 March 2010 and all of the Claimant's filings at Dkts 38 - 94). While the CCB has accepted the following at face value (Final Determination, Dkt 147 at p. 3):

> *Email exchanges between Disney and HCUK from June 24 to 25, 2015, relate that Exile had already been removed from all accounts* **[it was not, see Annexure A, Dkt 92]** *and that Mercy had been removed from all but BN.com and Google Play* **[it was not see Annexure A, Dkt 92]**, *noting that the latter two distributors' processes were more "manual," which could be the reason for their delay. Respondents' Exhibit 1 (Dkt. 140), at 1-2. Disney explains that because the notices were sent approximately eight years ago in 2015, it no longer has copies of them. Respondents' Party Statement, at 5 n. 10.*

While the Respondents are apparently able to generate circa 10 years' of sales and royalty data at will (Dkt 92, reproduced here as **Annexure A** and Respondents' Exhibits 3 – 48), they are conveniently unable to locate intra-group and external emails, no doubt backed up on cloud servers and group systems, for the same period, and the CCB accepted this.

The Final Determination in this case condones shoddy record keeping practices and far larger companies winning CCB claims simply through actual or potential negligence, recklessness, lack of diligence, size and/or effluxion of time. The Claimant was able to maintain good records for more than 10 years but Disney, with all of its manifold resources, could not. The Respondents will have system backups available but they simply did not bother to look for them or reconstruct them, and the CCB found this acceptable.

In summary, from the Claimant's perspective, the 'discovery rule' applies to every act of infringement set out in Annexure A. (Dkt 92) from June 2015 to December 2022 and the Final Determination must go beyond consideration of Hoopla to the actions and omissions of the Respondents and every other ebook distributor noted in Annexure A.

The Claimant did not need to assert it was unaware of the acts of infringement *because it simply wasn't aware of them, and could not reasonably be aware of them*. The Claimant could not know or reasonably know that an infringement occurred at any stage after the Disney Rights Reversion because the Claimant and the Authorised Representative are separate entities at law and in fact. The date the claim accrued was either the date the claim was lodged with the CCB or the date that Dkt 92/Annexure A was provided by the Respondents to the Claimant.

For the above reasons, the CCB abused its discretion in denying the Claimant's request for reconsideration and the Claimant requests that the Register of Copyrights remand the proceeding back to the CCB for an amended final determination.

Annexure A (Dkt 92)

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Account Number (Multiple Items)

Mercy and Exile E-Book Quantities Sold - June 2015 - Dec 2022

Sum of Quantity	Column Labels														
	Mercy #1									Mercy #2 Exile					
Row Labels	3M	Amazon	Apple	Barnes & Noble	Google	Hoopla	Kobo	Overdrive	Mercy #1 Total	Amazon	Barnes & Noble	Hoopla	Overdrive	Mercy #2 Exile Total	Grand Total
2015		**(12)**	**(3)**	**(3)**	**(1)**		**(1)**	**(1)**	**(21)**	-	**(2)**			**(2)**	**(23)**
Jun		(1)	-	(1)					(2)	-	(1)			(1)	(3)
Jul		(2)							(2)						(2)
Aug		(2)	(1)					(1)	(4)						(4)
Sep		(2)	(2)	(1)					(5)						(5)
Oct		(3)	-						(3)						(3)
Nov		(1)			(1)		(1)		(3)		(1)			(1)	(4)
Dec		(1)		(1)	-		-		(2)						(2)
2016	**(1)**	**(3)**	**(1)**	**(2)**	**(1)**	**(17)**		**(2)**	**(27)**	**(2)**	**(3)**	**(9)**	**(3)**	**(17)**	**(44)**
Jan		(1)		(1)					(2)						(2)
Feb		(1)	(1)						(2)						(2)
Mar		-	-	(1)	(1)			(2)	(4)						(4)
Apr		(1)						-	(1)						(1)
May		-							-						-
Jun	(1)					(1)			(2)						(2)
Jul										(2)	(2)		(1)	(5)	(5)
Aug	(1)					(2)			(3)	-	(1)	(3)	-	(4)	(7)
Sep	1					(2)			(1)			(3)		(3)	(4)
Oct						(4)			(4)			(2)	(1)	(3)	(7)
Nov						(5)			(5)			(1)	-	(1)	(6)
Dec						(3)			(3)				(1)	(1)	(4)
2017			**(1)**			**(10)**		**1**	**(10)**				**(5)**	**(5)**	**(15)**
Jan						(1)			(1)				-	-	(1)
Feb						(1)			(1)				(1)	(1)	(2)
Mar						(2)			(2)				-	-	(2)
Apr			(1)			(1)		1	(1)				(1)	(1)	(2)
May			-			(1)			(1)				-	-	(1)
Jun			-						-						-
Jul						(1)			(1)						(1)
Aug						(1)			(1)				(1)	(1)	(2)
Sep													-	-	-
Oct						(1)			(1)						(1)
Nov						(1)			(1)				(1)	(1)	(2)
Dec													(1)	(1)	(1)
2018						**(10)**			**(10)**			**(1)**	**(1)**	**(2)**	**(12)**
Jan													(1)	(1)	(1)
Feb													-	-	-
Apr						(2)			(2)						(2)
May						(5)			(5)						(5)
Jun												(1)		(1)	(1)
Aug						(1)			(1)						(1)
Nov						(1)			(1)						(1)
Dec						(1)			(1)						(1)
2019						**(4)**			**(4)**						**(4)**
Jan						-			-						-
Feb						(1)			(1)						(1)
Mar						(2)			(2)						(2)
Apr						-			-						-
Oct						(1)			(1)						(1)
2020						**(5)**			**(5)**						**(5)**
May						(2)			(2)						(2)
Jun						-			-						-
Aug						(1)			(1)						(1)
Sep						(1)			(1)						(1)
Oct						-			-						-
Nov						(1)			(1)						(1)
2021						**(5)**			**(5)**						**(5)**
Feb						(1)			(1)						(1)
Mar						(1)			(1)						(1)
Apr						(1)			(1)						(1)
May						-			-						-
Jun						(1)			(1)						(1)
Jul						-			-						-
Oct						(1)			(1)						(1)
Nov						-			-						-
2022						**(2)**			**(2)**						**(2)**
Jan						(1)			(1)						(1)
Feb						-			-						-
Mar						(1)			(1)						(1)
Apr						-			-						-
Grand Total	**(1)**	**(15)**	**(5)**	**(5)**	**(2)**	**(53)**	**(1)**	**(2)**	**(84)**	**(2)**	**(5)**	**(10)**	**(9)**	**(26)**	**(110)**

Proof of Delivery

I hereby certify that on Friday, June 14, 2024, I provided a true and correct copy of the 15.6.24 Request for review by the Register of Copyrights to the following:

Disney-Hyperion Books, represented by Shani Thome, served via ESERVICE at shani.thome@disney.com

Disney Publishing Worldwide, represented by Shani Thome, served via ESERVICE at shani.thome@disney.com

The Walt Disney Company, represented by Shani Thome, served via ESERVICE at shani.thome@disney.com

Signed: /s/ Rebecca Lim