Talkin 'bout law's generations: pop culture, intellectual property and the interpretation of case

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Abstract
This article takes a very different path through which to explore the challenges affecting and shaping innovation and communications law. It reports on a facet of an empirical pilot study into generational differences in legal interpretation that revealed the porosity and friability of doctrine. The article focuses on one facet of the study apposite to this special issue: a fleeting reference by Finkelstein J to icons of pop culture in an otherwise unremarkable passing off I misleading and deceptive conduct case - Hansen v Bickfords - involving the marketing of an energy drink. As the responses of lawyer and law student participants to these references show, the courts and legal interpreters draw on a reserve of tacit knowledge through which their reading and the interpretation of the law is filtered. The explicit reference in a judgment to such tacit knowledge (in the form of the pop cultural) allows us to glimpse the ways in which technocratic law is read through a range of filters that are presumed to form no part of the process of legal interpretation, revealing just how generationally inflected legal interpretation is, showing how much haphazard, everyday misconceptions and trivialities can actively shape the understanding and deployment of law by its practitioners.

Keywords
pop, interpretation, generations, law, bout, talkin, property, intellectual, culture, case

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Talkin’ bout law’s generations: pop culture, intellectual property, and the interpretation of case law

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Tempis Fugit

It is perhaps axiomatic to assume that the challenges and threats posed by communications and intellectual property technologies are best solved by a technocratic law that addresses a technological problem with a technological solution. This is the standard response of law to the perils and shock of the new, and, in a Weberian sense, is law in its most rational mode. It assume that any legislative intervention will be resolved where necessary using standard interpretative techniques which will filter out any inappropriate personal responses to the matter at hand through the adoption of the appropriately applied tests and techniques imbricated into the law in a formal sense. Intellectual property law is not different from any other area of law in this respect.

In contrast to this type of formal account of the conduct of law and its actors, the research reported and performed in this article reveals that our ability to read, encounter and interpret law is not quite as straightforward and is far more inflected than we would like to believe as a raft of critical theories have presumed for some time. Communications and intellectual property law is not immune from (and is perhaps even more affected by) the unconscious and subconscious deployment of interpretative filters that inflect our ability to read and interpret the law (and not just the facts), ironically, by cannibalistically drawing on its own subjects - popular culture. The field covered by communications and intellectual

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property law is suffused with popular culture, but it is not popular culture as the subject matter of the law that is under consideration here. Instead, by drawing on the generational markers of the pop cultural, the legal actor is shown to filter the technocratic language of the law through a purple haze,\(^2\) under the influence of smoke on the water,\(^3\) while wearing a raspberry beret,\(^4\) and walking on sunshine.\(^5\) In short, the interpreter’s generational \textit{mise-en-scène} will subvert the technocratic in the most unexpected and unintended ways – the generational tics and inflections that unwittingly destabilise or embellish the most innocent of law’s textual intentionalities.

This article thus takes a very different path through which to explore the challenges affecting and shaping innovation and communications law, the subject of the special issue of this journal. I report on a facet of an empirical pilot study into generational differences in legal interpretation that revealed the porosity and friability of doctrine.\(^6\) I focus here on one facet of the study apposite to this special issue: a fleeting reference by Finkelstein J to icons of pop culture in an otherwise unremarkable passing off/misleading and deceptive conduct case - \textit{Hansen v Bickfords} - involving the marketing of an energy drink.\(^7\) As the responses of participants to these references show (this is discussed in depth later in this article), the courts and legal interpreters draw on a reserve of tacit knowledge through which their reading and the interpretation of the law is filtered. The explicit reference in a judgment to such tacit knowledge (in the form of the

\(^2\) The Jimi Hendrix Experience 1967

\(^3\) Deep Purple 1972

\(^4\) Prince and the Revolution 1985

\(^5\) Katrina and the Waves 1983


\(^7\) Hansen Beverage Company v Bickfords (Australia) Pty Ltd [2008] 251 ALR 1.
pop cultural) allows us to glimpse the ways in which technocratic law is read through a range of filters that are presumed to form no part of the process of legal interpretation. The study as a whole shows just how generationally inflected legal interpretation is, showing how much haphazard, everyday misconceptions and trivialities can actively shape the understanding and deployment of law by its practitioners. The example explored here, drawn from the panoply of intellectual property law, provides an intimate case study through which to see how dramatically the interpretative capacities of the law can be tripped up by something as seemingly irrelevant as references to popular culture. Harmless references by Finkelstein J to *Breakfast at Tiffany’s*, James Bond’s Aston Martin, and Janis Joplin revealed three things: firstly that lawyers are not immune from drawing on popular culture and making meaning using it, second, deploying that meaning in order to construe and interpret the textual intentionalities of the judgment, and thirdly that the intended use of those references cannot be vouchsafed. Indeed, it will be seen that even very recent cases such as this 2008 decision will be read differently across a generational divide, and the results of this study show that without guidance, we cannot fully grasp the repository that makes up case law outside of our own generationally grounded time and place. In short, we read the past, not with the clarity of hindsight, but through a purple haze, in which we insist on creating new readings, all the while presuming we read the texts concerned without drawing on any heuristic devices through which to shape and filter those texts. This study shows how easily the sharpest of legal texts will be filled with the textual reorderings grounded within the most unlikely of devices: pop culture.

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**Talkin’ ‘bout whose generations?**

The Australian TV comedy quiz show, *Talkin’ ‘bout generation* (emphasis added), pits the knowledge of three different teams of generations against each other. The format was devised in Australia by Granada Australia, and broadcast through the commercial Channel 10.\(^9\) First broadcast in 2009, the show is a blend of parlour game and trivial pursuit which in turn draws on the legacies of a Frankfurt school inspired cultural studies. The program pits Baby Boomers, Gen X and Gen Y against each other in a series of tasks which test the pop cultural (and more general) knowledge held by the different generations. The program exposes the speed with which knowledge, language and meaning is lost and misinterpreted across and between generations, how difficult it is to acquire knowledge before or after formative periods in time, and how marked and profound differences in knowledge exist between the different generations.

This empirical study - *Talkin’ ‘bout law’s generations* (‘the project’) – in part reported here,\(^10\) takes its cue from its namesake, and explores if social, political, historical and linguistic knowledge, including pop culture, is drawn upon by different generations of legal interpreters as part of the process of reading legal texts, and in particular what happens to the process of reasoning when this non-legal knowledge is lost. The program and its theoretical antecedents has been used as a springboard for this study; if generational differences are as marked as the TV program suggests, what would this mean for *law’s* ‘generations’? If you as reader do not know the television program, then the references made here are rendered meaningless – *QED* perhaps - but if you know the program but don’t reference the title through the 1965 hit, *My Generation* by *The Who* (the refrain

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\(^10\) University of Wollongong Human Research Ethics Approval HE10/206, *Talkin’ ‘bout law’s generations: an empirical and jurisprudential investigation into the reading of legal cases by different generations of lawyers*, approval 10 June 2010. All results are held on file with the author. The surveys have no identifying information about individuals and interviews are anonymised.
‘talkin’ ‘bout my generation’ is reprised throughout the song) along with the sedimentations of 1960s drug culture and intergenerational angst, then the wider import of the program’s own touchstones are lost, and are read in part by some, more completely by others, or are simply lost on others.

The late 20th and early 21st centuries have been saturated with commentary and discussion about generational differences, which, while drawing on sociological, statistical and demographic analysis, has also been played out in the realm of popular culture, focussing particularly on so-called Baby Boomers, Gen X and Gen Y. This study takes as a given the classificatory groupings of the generation, and uses the broad notion that people who grew up in a particular time and place will share certain forms of tacit knowledge and will not share other forms of knowledge. It consciously draws upon the idea of the generation within popular culture, rather than pretending to engage with or interrogate the contested and problematic concept of the generation and its sub-grouping of cohorts, as a device through which to interrogate the practices and processes of legal interpretation which are presumed to be interpreted and construed time out of mind, unchanged across decades and centuries. The concept of the ‘generation’ (or more correctly, the cohorts) was modified in this study by one key respect: secondary schooling and legal education.

In popular culture, these differences have become the stuff of regular commentary, at one extreme taking the form of outright generational blame and

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13 Leiboff, above n 6, 148 at n 8.
intergenerational hostility. Yet law has barely considered whether generational differences affect it and its practices, so this work builds on the existing broad literature into the influence that, among other things, race, gender and ethnicity have had on the processes of legal interpretation. On the other hand, a literature exploring how ordinary and everyday knowledge flows into the cultural mind of lawyers has demonstrated how experiential blind spots affect and influence the processes of legal interpretation. Lawyers are clearly influenced by popular culture to the extent that the cultural form of law is conceived of as constitutive of law itself. Moreover, lawyers (from law students to the judiciary) draw on idealised television or film lawyers through which to frame their own concepts of legal behaviour. As a proto-measure of generational difference, for example, television lawyers are not generationally diffuse: while *Rumpole of the Bailey* is well known to older groups of lawyers, younger groups are not familiar with this fictional, televised barrister, while *CSI* or *24* is well known with younger groups of lawyers and though accessible to older generations of lawyers, those older lawyers are less ‘taken’ with these programs.

*How could they not know that?*

Compelling or perhaps most relevant for communications and intellectual property law is, whether it is aware of it or not, these areas of law contain some of


16 Moran, above n 15.

the most recognisable cultural markers contained within case law in any area of law, precisely because of the subject matter of consideration of these areas of law. Popular culture references (of any era) act as something like a radioactive isotope, or carbon dating technique that can be used to track generations and the knowledge and discourses they share. Pop culture is unique in that it is simply absorbed into the consciousness of the individual, ‘the soundtrack to our lives’, and is not easily transmitted across generations. In short, it is embodied. But as well as pop culture, the educational experiences of the associated generation – the canons of literature, the school play, the generationally transmitted songs and experiences received from parents and grandparents – are also absorbed and habituated within a generation. They are not transmitted beyond a generational grouping save in exceptional instances where extra-generational transmission occurs. Holders of primary, absorbed knowledges acquired through habituation also hold shared reference points that function as a discursive shorthand. While aspects of this knowledge can be acquired later in life, such learning is always secondary and cannot replicate the primary experience of ‘being there’. In short, we embody and then deploy pictorial, visual, imaginary images of the world through which to read and experience the world around us. Events can only be

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true shared and only fully comprehensible to those with whom experiences are shared.22

In law, we acquire another level of the disposition of habituation – the ability to read and interpret the law using rules, doctrines and devices which are shared by ‘us’ and not by others. Yet none of us can read the texts of law uniformly unless we shared the learning of law in a particular time and place – or a habituation into a particular milieu.

Thus the findings of this project sit against the backdrop of a set of markers that suggest that generational difference does affect how certain types of legal interpretation occurs. The general findings of the project as well as the specific instance reported here reveal that differences in the kinds of knowledges held between generations and the heuristics deployed by them when knowledge was not held by an individual or where a different interpretation is constructed about the same cultural markers indicate that the texts of law are far from safe, sound and secure. Rather they are contested, unstable, and thoroughly and surprisingly combative. In order to explore quite how the seemingly trivial allusions or reference points provoked such extraordinary responses, a brief overview of the project will be traced.

Australian and UK courts will occasionally directly reference the cultural as a practice to illuminate their reasoning – from Gilbert and Sullivan to Dickens to the Homeric.23 More often than not, these reference points will be treated as otiose or a slip of the judicial pen. Elms argues that cases are replete with references from classical allusion and other forms of non-legal references which are used


amplify or explain the reasoning or principles adopted in judgments, in order to make judgments clearer, or to elucidate an aspect of the reasoning.\textsuperscript{24} The results of the project here suggest these conclusions are illusory at best. For lawyers of a particular time and place, the classics were habituated, these conclusions may make perfect sense, but for lawyers of another generation, such allusions are meaningless. Scholarship such as Elms' presumes the existence of \textit{shared} cultural, social, historical and linguistic discourses amongst its members and that 'proper' allusion is confined to the classics, themselves a marker of Bourdieusian distinction.\textsuperscript{25} Within this account of a ‘proper’ culture for lawyers, pop culture does not exist, forming instead a ghostly and perhaps ghastly vector, failing to meet the expectation of the limits of lawyering. The Homeric yes, Marilyn Manson, definitely not, James Bond – just.

This study revealed something very different amongst its lawyer participants. Most were dismissive of the use of classical or canonical allusions of any kind, with interviewees of most age groups (but not all) suggesting that the courts were obfuscating at best, or showing off at worst. None holding a negative response accepted or agreed with the view that the allusions were designed to improve understanding of the principle or point being expounded in the legal text. Interviewees who understood allusions did not share these negative responses – indeed, they were oblivious to the possibility that the courts were ‘showing off’. ‘Distinction’ is grounded in familiarity, natural for those habituated and acculturated, but not for those who were ‘newcomers’.\textsuperscript{26}


\textsuperscript{26} Simon Gunn, ‘Translating Bourdieu: Cultural Capital and the English Middle Class in Historical Perspective’ (2005) 56 \textit{British Journal of Sociology} 49, 60-61.
These responses suggest that an assumed knowledge forms the backdrop to shaping and structuring the sedimentary layer on which judgments are formed, as a kind of unconscious, careless (or carefree) heuristic. While Balkin has argued that this kind of heuristic forms a cultural software that renders and reshapes meanings at an ideological level, my aim here is far less elevated and much more low-brow. When the courts refer to Mrs Malaprop in a contract case, or Janis Joplin, the Mikado, Audrey Hepburn, or the Book of Common Prayer, even James Bond, and from Dickens to even more Dickens, it marks the judge who uses the reference and marks the lawyer who understands the reference. However, the results of this study have confirmed that it is not vouchsafed that all generations of lawyers will share or understand why these references are made.

The project revealed, unexpectedly, that even the most recent cases will be read differently by different generations of lawyers, and that meanings intended by the court in their use of non-legal knowledge, such as references to Janis Joplin, James Bond, and Audrey Hepburn (in the case under consideration in this article), are and will be read according to the cultural markers and reference points of that generation to the exclusion of the intention of the court—as Roland Barthes’ ‘death of the author’ reveals. When the courts, in connection with popular and high culture references, say, ‘That is a well-known extract’ or ‘Everyone knows that’ or ‘No one has any difficulty in understanding’, this study showed that nothing could be further from the truth. Responses are generationally grounded but as this study also shows, this is not a singular process applicable to one or other generation rather it is something that happens

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28 Leiboff, above n 6, 155-156.

29 Leiboff and Thomas, above n 21.

to all of us.\textsuperscript{31} Even when uniformities of knowledge do exist, discourses will still be subject to reinscriptions and re-creations. As Costas Douzinas points out: ‘the past is always caught in the forgetfulness of memory and the impurities of the archive … Memory amends as it repeats and every repetition is always repetitive and original according to the law of iteration.’\textsuperscript{32} The past is indeed always a foreign country.\textsuperscript{33}

\textit{Talkin’ ‘bout law’s generations: the project}

As noted earlier, this project is not about intellectual property and communications law. Instead it was designed to explore the possibility of an intergenerational interpretative dissonance in the interpretation of case law. The point of the project was to find out how non-legal discourse is deployed by legal actors as part of the process of interpreting law – and the consequences this has intra and intergenerationally.

The study was designed in 2009, conducted during 2010, and continued to be analysed during 2011 and into 2012. It involved 90 participants, all of whom were legally trained, including a range of practitioners, and law students who had completed at least one year of law studies. All participants undertook a quiz-style survey, comprising 40 questions, before a smaller cohort of 45 was selected to be interviewed. The survey results created a data set which was used to identify what knowledge was held by different generational groupings, and if any differences existed between those generational groupings. The interviews, made up of 12 questions, drew on this data to seek interviewee responses about any differences between generational groupings; in addition, interviewees were asked to read an extract of a case and the reading of the case formed part of the

\textsuperscript{31} This finding is consonant with the findings of Daenekindt and Roose, above n 22.


\textsuperscript{33} David Lowenthal, \textit{The Past is a Foreign Country} (Cambridge University Press, 1996).
interview discussion. Interviewees were provided with a copy of an extract of the case a week before the interview. One case from a pool of six was given to each interviewee, distributed across the generational divide. The cases were chosen because they each represent a particular generational ‘moment’; for example, because they used archaic language, made reference to specific events, or contained generationally specific knowledge or ambivalent or contested linguistic, theoretical, political and historical material vital to understanding the reasoning or principles developed in the relevant case.

In the quiz phase of the project, information was sought about participant’s education, their interests, their background (optional only), their attitude towards legal thinking and employment experience. The quiz proper was grounded in a series of general knowledge benchmarking questions and extracts from cases where the judgment contained very specific references to or historical knowledge. One of these benchmark questions, which involves a song the subject of a copyright case (but not the case itself), will be discussed later in this article. The quiz questions were structured to find out what knowledge was shared between and across generations of lawyers, and to find out what beliefs are shared across generations and not about individuals; the views of individuals obtained during the interview phase are subject to discussion.

As well as a series of general knowledge questions designed to benchmark generational knowledge and the deployment of interpretative markers by participants, created with particular case reference in mind, the quiz drew on a bank of cases which used generationally specific cultural references, either through contemporary judgements or in certain instances, older judgments. Except in three instances, none of the questions sought to find out what law was known by participants. It should be stressed that excerpts from cases were, in the main, designed to exclude any reference to or about the legal principle under consideration. The intention was not to get the participants to interpret the law, though some chose to find a legal interpretative pathway through the bare
cultural references disclosed. All the extracts, however, were chosen because the courts drew upon pop culture references or because understanding the reasoning used by the court requires particular historical or linguistic knowledge.\textsuperscript{34}

A number of intellectual property cases, mostly copyright, were included in the mix of cases that made up the quiz, and one was used in the interview. The cases were drawn from Australian and UK decisions, along with generalist questions and instances from a range of other areas of law, including contract, property, crime and migration law. The examples came from cases decided over the last 300 years (all of which are still extant in the sense that they are all still cited) and across the millennia for general knowledge. Except for \textit{Hansen v Bickfords},\textsuperscript{35} the cases used will not be discussed in this article, but it was expected that certain cases and questions about the cases would be problematic for all generations, some would be problematic for some generations only, and that different generations would read some of the questions differently because of different knowledge bases.

In broad terms, the project discovered that the reading of popular culture, historical, literary, and language references contained within the reasoning component of judgments is generationally fragmented, and that the conventional patterns of legal analysis will be displaced by generationally-grounded interpretations of that text when knowledge is not held by an individual. The generational character is highlighted by the results of ‘outlier’ individuals within a generation whose knowledge matched that of the text’s creator, and hence that of a (usually) older generation. In some of the case extracts, judges prefaced these non-legal references with phrases such as ‘everyone knows that’, or ‘that is a well known extract’, or ‘no one misunderstands’. The results instead revealed that many participants did not know what was meant at all.

\textsuperscript{34} Leiboff, above n 6, 155-156, 162.

\textsuperscript{35} Above n 7.
Curiously, it was not expected that a 2008 case like *Hansen v Bickfords* would provide any cultural slippage at all, but as will be seen, the case provoked an extraordinarily rich and diverse set of readings across the generational divide. So while the project assumed there would be a loss of knowledge across generations and across time (which it did find), it was also found that that *contemporary* cultural reference points were interpreted differently between generations because of the differences in tacit knowledge deployed by them. More significantly, the findings showed that the reference points held by the courts were not necessarily shared by legal interpreters, who, for the most part, would interpret the reasoning of the court through their own generationally held interpretative framework. The closer the reader was generationally to the decision, the more likely it was that they would interpret the case uniformly or as intended by the court, while the more distant the generational grouping, the more likely it was that they would impose personally derived readings on the case. The project revealed that all generations do this to some extent or other, but the youngest age group was more likely to be sure that their imposed knowledge was correct.

While the survey provided base data, it was during the interview phase of the project that these generational differences could be teased out in more detail. No correlations were made with the quiz completed by the participant, but certain information was sought again, such as age group. As well as dealing with any questions the interviewee might have had, the interview was devoted to exploring what interviewees thought about why the courts use the examples they did, and how they would have reacted if they had to deal with the examples in a practical situation. They were given scope to respond to the court’s use of the examples; but rather than being merely perplexed or surprised about the use of examples outside of their control, more than half the participants were scathing about the judicial use of references outside of their own knowledge base. One of the youngest interviewees, when shown the results of the second of these two
examples retorted: ‘Why would he use an example when he knew that I wouldn’t know that?’ As follow up, it was suggested in the interview that the judge had not seen the results of the pilot study so he wouldn’t have known that the participant might not have understood the reference.)

As expected, this irritation coalesced in the younger age groups, but it surprisingly also surfaced in participants born in the first part of the 1950s, who had children in the youngest age groups in the study. Their irritation appeared to be on behalf of the younger age groups. A Gen X - Y interviewee asked: ‘Why did you ask questions I didn’t know the answer to?’ An older Baby Boomer insisted that any future quiz be changed so that everyone would be able to answer the questions, but expressed horror and disbelief that others, especially members of the younger age groups, did not know things he took for granted. A Gen X participant remonstrated that the quiz ‘only used archaic cases’ even though most of the cases were identified as having been decided in the 20th and early 21st century. The judges had used words or references understood by their own or a contiguous older generation. Overall, members of the same or a contiguous generational grouping would be more likely to understand the same references; conversely, new references were less likely to be shared by older generations and more likely to be shared by younger generations.

On the other hand, some of the younger age groups were abashed about their lack of knowledge and what this might mean for their ability to find out how to interpret cases from the past. However, most chose to interpret that which they did not know or did not understand through the prism of their own experiences and their own knowledge base. Of all of the participants, it was those whose own experience stretched across the generational divide through agetheir connection with an earlier form of legal training combined with a continued link to the present with older grandchildren who were most able to nimbly shift across the generational divide and interpret the cultural reference points used in the study most adeptly.
As the project disclosed, when a more expanded extract from a case was provided to participants at interview phase, most participants chose not to read the complete text provided, instead skimming over ‘irrelevancies’ to find the principle or ratio in the case. Because they were given a week to read the extract before the interview, a number of participants accessed the full case or found a case note about the case in order to locate the legal principle, so that they could ‘correctly’ discuss the case in the interview. In the interview, participants were taken to the extract in depth and asked about particular passages in order to find out why they had skimmed over this aspect of the extract or to ask why the courts had used the references. As well as provoking the hostile result noted above – judicial showing off or judicial obfuscation – interviewees, particularly those who took the view that these factors were irrelevant or unimportant, expressed their own strong interpretative preferences that had much to do with their own experiences, knowledge and partiality.

*Quiz partiality?*

Of course, a quiz and study of this kind is always open to the possibility that the quiz will bear the trace of their designer and their interests, and it is acknowledged that choices made in the design of the quiz and the use of the extracts may be partial. The general questions and cases were chosen however to represent a range of areas of law, and the general questions, though seemingly unrelated to the cases, were constructed as a back story, as it were, to the case extracts, or because they drew upon accepted principles in law. Participants were instructed that it would be unlikely that they could answer more than one third of the questions, to leave questions they did not know and not attempt to answer them, and to not try to interpret questions they did not know – that they would either know or they would not know. Curiously, many participants ignored this direction, and rather than treat the quiz as a ‘pub-quiz’ as they were also directed, chose to treat the questions as an exam. Participants personalised
the quiz as a marker of their abilities, and this goes some way towards explaining the hostility towards the use of cultural references by the courts. It also helps explain how the law and its assumed technocratic rigours is subverted by the seemingly irrelevant of heuristics, as will be shown through the results of two aspects of the project – a benchmarking question and the responses to Finkelstein J's remarks in *Hansen v Bickfords*.

**Daisy**

As mentioned earlier, one of the benchmark questions concerned a song the subject of a copyright case (but not the case itself). The case, a 'copyright fossil' concerning the possibility of a dramatic copyright in the performance and staging of a song, was the subject of an 1895 decision in *Fuller v Blackpool Winter Gardens*. It was held that no such copyright would be granted over the performance of the very popular song 'Daisy Bell' sung by Katie Lawrence, whose husband, George Fuller, brought the action. The case is still cited for the principles it contains but the song itself, the subject of a literary work and musical work, was merely mentioned by its title within the text of the judgment. *Daisy Bell* is to most contemporary eyes meaningless, an old and unknown song. But a curiosity about the name, and its closeness in title to a song I always knew as 'Daisy', took me to look up the song, and found that it was the same song. But as I discovered, the song I knew was only the chorus, and my assumptions, that the song was from the 1920s or 1930s, was clearly wrong. The song, written by the Englishman Harry Dacre in 1892, became an extremely popular music hall song – a pop song of its generation on both sides of the Atlantic and around the English speaking world. Americans assume it is an American song due to its popularity. My own mistake came from my own personal association with the song, sung to me by my father who was born in that era; I created a history for

36 [1895] 2 Q.B. 429

the song based on my own experience. As will be seen shortly, I am not the only person of my generational grouping who made the same mistake for exactly the same reasons. The song (or more particularly the chorus), like *Happy Birthday*, continues to be passed on across the generations, time out of mind. However, it has other cultural resonances. It became the first song sung on a computer, the IBM 7094, in 1961, inspiring the scene in Kubrick’s 1968 film *2001: A Space Odyssey* in which HAL 9000 sings the song as it is deactivated.\(^{38}\) That a mistake about the song could ever have been made seems, in adulthood, absurd, as the song is clearly cadenced as a music hall song of the late 19\(^{th}\) century.

But as the benchmarking showed, its timelessness and the close personal associations through which it is transmitted was a commonplace amongst project participants. They were asked to read the following words, which are the chorus of *Daisy Bell*:

Daisy, Daisy, give me your answer, do,
I'm half crazy all for the love of you.
It won't be a stylish marriage -
I can't afford a carriage,
But you'd look sweet upon the seat
Of a bicycle built for two.\(^{39}\)

Participants were asked if the words meant anything to them, as well as how they knew the words, and when they would identify the decade when the words were made public (having been given a series of identifying eras replicated in the table below). The words were unadorned and made no reference to the existence of a song, and they did not identify a title. Participants identified titles in certain


\(^{39}\) I wish to acknowledge the participants at the *Third Annual Conference on Innovation and Communications Law*, Melbourne 2011, who sang along, music hall style, when asked. That a proportion of the participants clearly knew the song, while others were mystified and excluded, replicated the findings of the study.
instances, generally plumping for *Daisy* or *Daisy, Daisy*. For the purposes of this article, the decade identified by participants and the self-identification of who knew the words will be considered here in statistical form:

<table>
<thead>
<tr>
<th>Year</th>
<th>Builders + Older Baby Boomers</th>
<th>Generation Jones</th>
<th>Generation X</th>
<th>Mid Point</th>
<th>Generation Y</th>
</tr>
</thead>
<tbody>
<tr>
<td>Who knew?</td>
<td>86%</td>
<td>77%</td>
<td>45%</td>
<td>30%</td>
<td>34%</td>
</tr>
<tr>
<td>1890</td>
<td>17%</td>
<td>25%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1900</td>
<td></td>
<td></td>
<td></td>
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<td></td>
</tr>
<tr>
<td>1910</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>33%</td>
</tr>
<tr>
<td>1920</td>
<td>33%</td>
<td>25%</td>
<td>33%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1930</td>
<td>33%</td>
<td>12.5%</td>
<td></td>
<td>100%</td>
<td></td>
</tr>
<tr>
<td>1940</td>
<td>17%</td>
<td>25%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1950</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>50%</td>
</tr>
<tr>
<td>1960</td>
<td></td>
<td></td>
<td>12.5%</td>
<td>33%</td>
<td>100%</td>
</tr>
<tr>
<td>1970</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>50%</td>
</tr>
</tbody>
</table>

As the table shows, the oldest generational groupings were most likely to identify that they could recognise the words, and the slippage across the generational divide is clearly visible. Yet those who identified the words did not all identify a decade, especially in the youngest age group. Identification is strongest in the two oldest generational groupings (the combined group and Generation Jones) is telling, as is the ability of a good proportion of these groups to correctly identify the song’s decade. Even more telling is that the majority of these age groups shared my own generational (Generation Jones) reading of the song’s era. There is a conundrum about the identification of the song in the two youngest generational groupings; while some did know Daisy Bell, most thought this was some other song that had the word ‘daisy’ in the lyrics. The shifting of the

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40 These two age groups have been reported as a combined group because of the small numbers of the sample in the Builders group (1925 – 1945).
decade to the 1960s and beyond is emblematic of the tendency to associate with a constructed time frame from the past as well as having misidentified the song. Curiously, Generation X is clearly acting as a pivot generation; while fewer than half could identify the words, those who did split across the generational divide, clearly showing how interpretative ‘brightlines’ are formed and then lost. In interview (and self-identified in the quiz) those who knew the song correctly identified that their parents had sung the song to them, and this, like me, contributed to our incorrectly identifying the song’s decade. For the record, none of the sample could identify the song’s association with the copyright action.

This benchmarking question showed quite clearly how different generational groupings create meanings about texts with which partial or incomplete knowledge is held. It is necessary to extrapolate, but longitudinally, it seems likely that the older the generational grouping and thus closeness to the song’s own point of creation would have seen the results skew closer to the correct decade. But as the responses to Finkelstein J’s remarks in *Hansen v Bickfords* show, interpretative closure cannot be vouchsafed even within when dealing with contemporary cultural reference points amongst and between generational groupings.

**Of Aston Martin, Mercedes-Benz, and Tiffany’s**

In 2006, Bickfords, an Australian drink company, adopted the get up, moniker and ingredients of *Monster Energy*, an energy drink sold by the US company, Hansen. Hansen distributed *Monster Energy* throughout a number of markets around the world. Directed towards a young male demographic (18 – 30 age bracket), the Hansen product had not been sold in Australia when Bickfords began marketing the drink. Hansen, unsurprisingly, sought an injunction and damages against Bickfords relying on passing off and s 52 of the then *Trade

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41 *Hansen Beverage Company v Bickfords (Australia) Pty Ltd* [2008] 251 ALR 1.
Practices Act 1974 (Cth).\textsuperscript{42} What was at issue was whether Hansen had a sufficient reputation in Australia in its energy drink mark to found an action in either area of law.

The law of passing off protects those with a reputation from others pretending or ‘passing off’ their own products in such a way as to suggest that they have an association with the well known product. Section 52, as it was, is used as an alternate statutory protection of reputation, expressed in terms of corporations not engaging in misleading or deceptive conduct in trade or commerce.

The product similarities went without saying. Though Hansen had not registered its ‘mark’ in 2004 when Bickfords began to investigate producing an energy drink, Hansen had used indirect marketing, including sponsorships and the use of the mark on products of interest to the target market in Australia before it began marketing its products in Australia. Hansen wanted to popularise \textit{Monster Energy} in Australia, and become known in Australia prior to the launch of the energy drink.

Because it had not yet began selling the product, a line of case law potentially sat against Hansen, and at first instance, Middleton J held that the incidental or indirect marketing used by Hansen’s was insufficient to constitute a reputation of a standard needed to protect its product, because an insufficient number of people in the target market knew about Hansen’s product. On appeal, the Full Federal Court (Tamberlin, Finkelstein and Siopis JJ) held that Middleton J’s approach to establishing reputation in Australia was incorrect, by focussing on a defined and confined group for the purposes of interpreting s 52.

Tamberlin J (Siopsis J agreeing) determined that the appropriate test should be ‘whether or not insignificant number of persons in the Australian community, in

\textsuperscript{42} Now the \textit{Competition and Consumer Act 2010} (Cth).
fact or by inference, have been misled or are likely to be misled, even in those persons are mostly or exclusively extreme sports enthusiasts'. 43 It was with respect to the analysis and construction of indirect advertising and its value to a market that Finkelstein J directed his judgment:

When the case is reheard 44 I think the judge is also required to give greater weight than he was prepared to give to the indirect marketing campaign undertaken by Hansen to establish its reputation. It is quite clear that the judge was wary of indirect advertising 45 … [but the] judge’s caution is, I think, misplaced. 46 The most obvious form of advertising, and the easiest form of advertising to understand, is the direct message. But the advertising industry has now moved away from primarily relying on direct advertising. The belief is, and the belief is likely to be correct, that indirect communication sometimes expresses a point with more impact … an advertisement will have effect although the consumer is not aware someone is trying to communicate a message. 47 There are numerous studies that show that this type of indirect advertisement is far more effective at eliciting a consumer recall response than a direct television commercial. 48

James Bond, Janis Joplin, Audrey Hepburn

43 Hansen Beverage Company v Bickfords (Australia) Pty Ltd [2008] 251 ALR 1, 48.

44 The case was settled after the Full Federal Court decision and was not heard again at first instance.

45 Hansen Beverage Company v Bickfords (Australia) Pty Ltd [2008] 251 ALR 1, 60.

46 Ibid, 61.


48 Ibid, 63.
Finkelstein J’s concluding tag line in this passage that is relevant here, due to its pop cultural reference points and the range of interpretations made of those reference points in this study:

In my opinion the judge was entitled to infer that the indirect brand advertising employed by Hansen (and, for that matter, Bickfords) can establish reputation as well as, if not better than, direct advertising. After all, everyone knows that James Bond drives an Aston Martin, Janis Joplin wanted to own a Mercedes Benz and Audrey Hepburn had breakfast at Tiffany’s.49 (emphasis added)

Everyone knows?

Perhaps everyone does not know. This last extract was included in the quiz phase of the project, which was at that point supplemented by a series of questions (contained in the table below), with respect to the pop culture references used by Finkelstein J. While nearly everyone could identify something about these references, how they were interpreted and how they were deployed was far from uniform, and was fundamentally contested. More particularly, Finkelstein J’s interpretative gesture in relation to that interpretation coloured the perception of the point that Finkelstein J made and it is this that identifies a generationally grounded aporetic misreading of these reference points.

The phrase ‘everyone knows’, though capable of being read as a rhetorical tic, expects and demands a response or reaction, that the reader either knows or is excluded from the references used to underscore reasoning about the ability of indirect images to reach into the consciousness of the public. In other words, whether Finkelstein J prefaced his examples with a phrase like ‘everyone knows’, the point is that he would expect everyone to know and to share the cultural

49 Ibid, 64.
reference points he made. But it must also be pointed out that, as Douzinas reminded us at the outset, that the archive of memory is also open to reinterpretation. For Finkelstein J’s use of these reference points is perhaps clouded in a purple haze that says as much about the judge as individual as it says about the different generational interpretations and inflections that come from the use of pop culture reference points.

Finkelstein J’s use of these references needs to be clarified in this respect: they are the ‘new’ classical allusions designed to illuminate and clarify a point about the value and capture of ‘indirect’ marketing. In other words, one did not have to ‘directly market’ Tiffany’s, Mercedes Benz or Aston Martins if associated with Audrey Hepburn, James Bond, or Janis Joplin (or so he thought). The association with the popular culture icon will do the job sufficiently, and is as effective, if not more effective, than any paid advertising. His images are borne of a particular moment of pop culture, and as the study revealed, not shared by other lawyers. It is particularly significant that his assumption and presumption of unpaid associations between the icon and the object, as it were, were not shared by other lawyers. The result is that the law was interpreted very differently because these examples were read with very different cultural reference points in play.

Thus while James Bond, a fictitious character created by the British author Ian Fleming in a series of books written during the 1950s and 1960s, drove an Aston Martin in the early and more recent film adaptations of the spy stories, the James Bond of the books drove a Bentley as well as an Aston Martin, and in some of the later films beginning in the 1980s that he started to drive a BMW. And for those of us oblivious to James Bond’s motoring habits, the reference to James Bond is meaningful, but his choice of vehicle another thing entirely. And while the actor Audrey Hepburn appeared in the 1961 film Breakfast at Tiffany’s,

50 Douzinas, above n 31.
adapted from Truman Capote’s 1958 novella of the same name, it was not she who had ‘breakfast’, but the character, Holly Golightly who would visit Tiffany & Co and have breakfast outside the famous store. Tiffany’s is, of course, a Fifth Avenue jewellery store in New York City (and now elsewhere around the world) but not a breakfast establishment. And while Janis Joplin did indeed sing about wanting a Mercedes Benz (and a colour tv) as her friends all had Porsches (as indeed did she) in her last recording before she died from a drug overdose in 1970, the singer and the song is largely unknown by younger generations who at best associate the song with ads for the car maker.

The use and deployment of the references by Finkelstein J is already contested and not capable of sustaining a stable interpretative gesture even before exploration of what the participants in the project ‘did’ with these examples. Indeed, older participants were quick to ‘correct’ references to the Aston Martin if they knew the Ian Fleming books (hence the unusual pattern of results in Question 2 in the bank of questions below) while younger participants were irritated that the judge discounted their own image of a James Bond car, which was more likely to be a BMW. This age group were less likely to associate the character with an Aston Martin. In the table below, the ‘correct’ responses of the different generational groupings are set out below, some of which are surprising, especially the mid-point grouping which did not follow the pattern of its contiguous generational groupings.

*Bond, James Bond*

It became apparent in the quiz (in part, at least), and more strongly in the interviews that of all three examples, James Bond was the most vividly held by participants of all the pop cultural artefacts and icons used by Finkelstein J.\(^5\)

However this was due to a methodological error on my part in constructing the quiz, as I had not factored in the possibility that each generation would identify with their ‘own’ James Bond. Thus for the younger participants James Bond was not Sean Connery or Roger Moore and he did not drive an Aston Martin, rather James Bond was Daniel Craig or Pierce Brosnan. In short, the reference to the Aston Martin was treated as an error by the judge, who had incorrectly referred to a very different car from the ‘right’ James Bond car. For younger participants the ‘correct’ James Bond car was the BMW, or for others, the readoption of the Aston Martin in the most recent of the James Bond movies formed the touchstone rather than the adoption of the cars in the earlier films of the 1960s.

A set of self identifying references to the first question on the list marks out the generational differences most clearly. Quiz respondents self-identified a reference to Ian Fleming (the creator of James Bond) to explain who James Bond (inserted into Question 1 below in brackets*) along generational lines, in contradistinction to the more widely held film version of the character.

<table>
<thead>
<tr>
<th>Hansen v Bickfords</th>
<th>Builders + Older Baby Boomers</th>
<th>Generation Jones</th>
<th>Generation X</th>
<th>Mid Point</th>
<th>Generation Y</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Who is James Bond?</td>
<td>100% (57%)*</td>
<td>100% (46%)*</td>
<td>100% (9.1%)*</td>
<td>90% (10%)*</td>
<td>70.9% (7.7%)*</td>
</tr>
<tr>
<td>2 How do we know he drives an Aston Martin?</td>
<td>86.7%</td>
<td>76.9%</td>
<td>90.9%</td>
<td>90%</td>
<td>74.4%</td>
</tr>
<tr>
<td>3 Who is Janis Joplin?</td>
<td>86%</td>
<td>92%</td>
<td>81%</td>
<td>90%</td>
<td>51.5%</td>
</tr>
<tr>
<td>4 How do we know she wanted to own a Mercedes Benz?</td>
<td>71.4%</td>
<td>72%</td>
<td>54%</td>
<td>80%</td>
<td>25.6%</td>
</tr>
<tr>
<td>5 Who is Audrey Hepburn?</td>
<td>100%</td>
<td>92.3%</td>
<td>100%</td>
<td>90%</td>
<td>79.5%</td>
</tr>
<tr>
<td>6 How do we know she had breakfast at Tiffany’s?</td>
<td>86.7%</td>
<td>84.6%</td>
<td>100%</td>
<td>90%</td>
<td>66.7%</td>
</tr>
</tbody>
</table>

52 These two age groups have been reported as a combined group because of the small numbers of the sample in the Builders group (1925 – 1945).
So in the interview phase of the project, some of these reference points were explored more fully. Most of the younger participants were not aware of Truman Capote’s novella or that the Aston Martin was not always one of James Bond’s cars. However there was one particular interview that provided an extraordinary insight into the effect that these different references points would have on the interpretation of the law itself. For while some interviewees took the view that these reference were mere throw away lines that were not even *obiter*, or perhaps an illustration of the reasoning used by the judge, others considered that this was simply a judge ‘showing off’, while others had no idea why a judge would make an observation like this.

This interview was with a participant in the Generation Y age group. One question asked in the quiz and followed through in the interviews was a point of inconsistency found in Finkelstein J’s three examples. While the inconsistency I had had in mind was the reference to the actor Audrey Hepburn rather than the character Holly Golightly, this Gen Y participant plumped for Janis Joplin because ‘she did not get paid’. I have to admit to being surprised and more than a little perplexed about this reply, because I really did not know what ‘payment’ could possibly have been made to the others, knowing as I did that neither Truman Capote nor Ian Fleming would have taken payment to mention either the Aston Martin or Tiffany’s in their books. I was also perplexed because this did not strike me to be Finkelstein J’s purpose or intention either, that these signifiers were not open but closed, even though they were located within a judgment about indirect marketing.

Of course this interpolation on my part was not that of the participant. Infact, the interviewee had assumed that the ‘others’ had been paid to product place. Given that in their more recent iterations, the James Bond franchises were the epitome of product placement, the participant would not have known otherwise in relation to the books and earlier films. Thus Finkelstein J was taken to refer to paid product placement. On this the participant may not have been wrong but if
Finkelstein J did not consider any of these instances as examples of paid product; they were highly effective forms of marketing despite their non-commercial purposes. This only highlighted the value of indirect marketing of a kind considered in the case.

For someone who had only known a world where overt paid product placement existed, it would be impossible to read and interpret the texts of this judgment without presuming the existence of some kind of commercial relationship between the creators of these iconic cultural references; such is the effect of brand saturation in the late 20th and early 21st century. To return to a world where products would or could be used in a film or book without payment is inconceivable and so those of us who remember when overt product placement was introduced in the 1980s (in contradistinction to other less overt modes of placement from magazine content to the more overly ‘sponsored’ program) will end up reading these cultural references very differently.

**Tempis Fugit (2)**

Finkelstein J’s comments in *Hansen v Bickfords* are one of those unusual instances where a case will make overt and explicit references to cultural markers in order to frame and order the heuristics used in the reasoning. Such is the significance of these seemingly random, throw away remarks. They replicate the adoption of a thought process, the litmus that tells us just why the reasoning about indirect marketing was so strongly held in this judgment. These references were clearly behind the fairly strident response he made in his judgment to the misreading of the potency of indirect brand advertising. That the remarks in this 2008 decision are not capable of being interpreted uniformly demonstrate just how porous and friable the texts of law are, and how captive they are to the

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reading brought to bear by the legal interpreter who superimposes and interposes a reading of the text designed to clarify. Thus generational tics and inflections will subvert or embellish the most innocent of textual intentionalities in ways not factored into the practices of reading and interpreting the law.