The Mozambique Rule and IP Rights in New Zealand

In a recently reported judgment, McKenzie J of the High Court of New Zealand has held that the New Zealand courts can exercise jurisdiction over claims for the infringement of foreign copyright, at least where the defendant is served within the jurisdiction and where the existence and validity of the foreign copyright is undisputed.

The case, *KK Sony Computer Entertainment v Van Veen* (2006) 71 IPR 179, concerned the sale and distribution in New Zealand, Hong Kong and the UK of a computer program which enabled the user to circumvent the embedded copy protection in Sony PlayStation 2 computer games. The plaintiff alleged breaches of the New Zealand, Hong Kong and UK copyright statutes, and the defendant entered a statement of defence in which he admitted the facts that would make him liable under each of those statutes. Beyond entering that statement, the defendant did not otherwise appear.

McKenzie J entered judgment for the plaintiff. His Honour declined to follow previous New Zealand and Australian authority on the point, and instead applied the English Court of Appeal decision in *Pearce v Ove Arup Partnership Ltd* [1999] 1 All ER 769. His Honour drew a distinction between cases in which the plaintiff's title or rights were in dispute (in which the *Mozambique* rule would apply), and those cases in which the title or rights were undisputed (in which the court would be free to exercise jurisdiction).

His Honour then characterised the copyright infringement as a "wrong", and then asked whether the double actionability rule in *Phillips v Eyre* precluded the court from entering judgment for the plaintiffs. The problem was that the infringements of UK and Hong Kong copyright "do not constitute a wrong against New Zealand copyright, since New Zealand copyright is territorial in effect." The solution, again, was to be found in *Pearce v Ove Arup*: one simply "effect[s] a notional transfer to New Zealand, for consideration under New Zealand law, of both the infringing act, and the intellectual property right infringed."

The decision is a curious one in some respects. On the proffered reasoning, what

difference did it make that the defendant was resident in New Zealand? And if all jurisdictional complexities could be resolved by a "notional transfer", why should the court's jurisdiction be limited to those cases in which the existence of the IP right is undisputed? Cross-border infringement of IP rights is a real and topical problem: whether *Sony v Van Veen* (or, more importantly, *Pearce v Ove Arup*) offers a satisfactory response lies very much in the eye of the beholder.