Foxtel-3, Networks-0

Jane Forster of law firm Clayton Utz explains the Federal Court's recent decision.

On 20 October, the Federal Court dismissed proceedings commenced by the free-to-air television networks to prevent retransmission by Foxtel of the networks' free-to-air broadcasts.

The proceedings consisted of three main claims: that Foxtel would be in breach of the *Broadcsting Services Act*; that Foxtel would be in breach of the *Copyright Act*; that Foxtel would infringe the networks' trade marks.

The BSA

The networks claimed that Foxtel would be in breach of the licensing provisions of the *Broadcasting Services Act* which require that a commercial television broadcasting service must not be provided except by a person who has a licence to provide that service.

Foxtel relied on section 212 of the *Broadcasting Services Act* which provides a statutory defence to the offence of broadcasting without a licence when a 'service' 'does no more than', inter alia, retransmit programs transmitted by a commercial broadcasting licensee within the licence area or, with the permission of the Australian Broadcasting Authority, outside the licence area and provided the person carrying out the retransmission is not a licensee.

The networks argued that this defence would not protect Foxtel because the service Foxtel is providing does a lot more than simply retransmit broadcast programs.

Justice Davies held that the word 'service' in section 212 refers to the output of one channel, not the entirety of services which a cable television operator such as Foxtel might provide over a number of channels. Provided Foxtel used separate channels to retransmit the broadcasts of each network, the retransmissions would remain within the protection provided by the statutory defence.

Justice Davies also held that section 212 is not concerned with the techniques by which retransmission occurs. He used as the relevant test, whether a subscriber would be able to ascertain any difference between the receipt of the free-to-air broadcasts by aerial or through a cable. The networks failed to persuade him that there was a perceptible difference.

The Copyright Act

Next, the networks argued that retransmission by Foxtel would breach the copyright in each of their respective broadcasts. This argument required the Court to find that the definition in section 199 (4) of the *Copyright Act* with respect to broadcasts made by licensees under the *Broadcasting Act, 1942* did not apply to broadcasts by licensees under the *Broadcasting Services Act*. Unsurprisingly, the Court rejected this overly technical argument.

Justice Davies found in favour of Foxtel by relying on the *Acts Interpretation Act* which requires that a repealed Act is superceded by its replacement Act - in this case the *Broadcasting Services Act*.

Trade Mark Infringement

The third leg of the action brought by the commercial networks was an allegation that the retransmission of their broadcasts would infringe their respective trademarks. The argument is that the registered trade marks owned by each of the commercial networks would be infringed by the retransmission by Foxtel of the various networks' logos and marks which can be seen on screen before and after commercial breaks and, in the case of some networks, during programs.

Foxtel's defence to this claim was that it is providing a secondhand service. Justice Davies agreed and held that there would be no trade mark infringement, trade marks being regarded primarily as badges of origin, not of control. Subscribers to Foxtel, he said, would draw an inference only that the programs are programs of the proprietors of the marks, the relevant networks. The subscribers would not draw an inference that Foxtel has authority to use them. ❑

AT THE recent Screen Producers Association of Australia conference, president Steve Vizard made the following comments about the cable retransmission issue:

'The decision on retransmission is a bad decision. It strikes a discordant note for anyone in the business of producing copyright material. If the cable operators are considering retransmitting the free-to-air signal as a community service, it is a remarkable and generous act for a commercial business to make. No, the truth is that if any billion dollar commercial interest is sufficiently keen on this decision to defend it in court, it's not because they are earnestly committed to social service, and to this particular social service. It is because there is a strong commercial reason for them to do it.

It is a frightening and ominous precedent.'