



Telstra v APRA ramifications yet to be appreciated

The technology-based rights debate raised in Telstra's action against the Australasian Performing Rights Association Limited (APRA) was addressed in a recent seminar hosted by the Communications Law Centre and CAMLA

In the fall-out after any High Court case it is always interesting to hear the views of the people affected in a practical way by the decision. In the case of *Telstra v APRA*, the decision cast some light over the scope of two of the exclusive rights in section 31 of the Copyright Act 1968. What it did not do was answer practical questions concerning how the owners of these rights will be paid for the use of their copyright on services such as the Internet and whether the providers of access to these services will be liable to pay.

At the joint CLC and CAMLA seminar, David Andrews, solicitor for Telstra in the APRA case, Stephanie Faulkner, legal counsel at APRA, and Michael Ward, vice-president corporate relations at OzEmail, focused on these questions.

In the APRA case, the High Court dismissed an appeal by Telstra against a decision that its provision of "music on hold" was a breach of copyright in the musical works used to provide the hold music. The court unanimously found that Telstra had broadcast the works to the public, and a majority of the court (Dawson, Gaudron and Kirby JJ) found that Telstra had caused the works to be transmitted to subscribers to a diffusion service.

Section 31 of the Copyright Act 1968 defines the exclusive rights in a musical work as including the rights to broadcast the work and to cause the work to be transmitted to subscribers to a diffusion service. The High Court's analysis of the scope of

these two rights is critical to determining the role of copyright law when a copyright owner's original work is transmitted via the Internet without his or her permission.

David Andrews provided a critique of the court's reasoning in the APRA case and many of the points he made were clearly illustrated in a practical way by the comments of the two industry participants at the APRA seminar.

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In relation to the issue of the broadcast right, he referred to the joint judgment of Dawson and Gaudron JJ in which they relied on the second reading speech of the 1986 Amendment Bill to develop the "commercial setting analysis" needed to decide the broadcast issue in favour of APRA. This analysis, when combined with the fact that businesses were prepared to pay for the "music on hold" facility, allowed the judges to broaden the notion of the copyright owner's public.

Andrews criticised this approach saying that the detriment suffered by the copyright owner was inappropriately tied to the commercial setting. A similar point was made by Michael Ward. He argued that the court ignored what a customer would be willing to pay for and instead focused

on what the businesses that use the copyright work can afford to pay the copyright owner. That is, the High Court sought to maximise the copyright owner's total royalties.

The second issue considered by the High Court was whether or not Telstra had caused the work to be transmitted to subscribers to a diffusion service. Participants at the seminar agreed that this aspect of the High Court's judgment was problematic for a variety of reasons, not the least of which was what Andrews described as the "leap of faith" the High Court took in reaching the decision that a telephone service and a music on hold service are one and the same. The participants tended to leave this aspect of the judgement to one side suggesting that it has little relevance to the current digital environment.

With respect to the liability of the carriers and ISPs, it appears that the High Court's decision was driven by a desire to protect copyright owners by direct collection from businesses that can afford to pay. The case did not deal with the ramifications of passing the cost of using copyright onto profitable businesses or the likelihood that those businesses will in turn pass that cost onto the end user of the copyright work.

Similarly, the case did not address the role and liability of ISPs. This is an important issue given the argument that by providing end users with access to a copyright work an ISP is commercially depriving the copyright owner and is performing a role that is similar to Telstra's role in



providing the "music on hold" service. Stephanie Faulkner and Michael Ward focused on the importance of these issues in the context of the new digital technologies.

Faulkner made it clear that liability should be extended to ISPs and bulletin board operators on the same basis as the APRA case. She argued that the infringement of copyright would occur on the delivery of the content and, due to the role played by the ISP in delivering that content, the ISP should be liable for infringing the copyright owner's exclusive rights. She acknowledged that certain difficulties existed in determining how liability would be attributed to ISPs.

Michael Ward argued that this approach in the context of the Internet was completely inappropriate. He made the point that the Internet was based on a totally unique philosophy - "share and enjoy".

According to Ward, the court's reasoning in relation to the commercial character of the broadcast of "music on hold" could not be applied to the Internet because, as a direct result of the philosophy, an ISP has no way of knowing whether the copyright owner has consciously sought to provide "free" access to his or her work. He illustrated this point with the example of David Bowie.com where David Bowie (the copyright owner) elected to publish his work on the Internet and willingly sacrificed his music royalties as a result. Ward argued that, in such a case, ISPs have no control over publication and should not be held liable to account for providing access to the work.

Another interesting point was raised by discussion of relevant Canadian legislation. The Canadian government has sought to make ISPs liable for certain activities on the Internet. Ward suggested a possible reaction to an ISP's potential exposure to civil liability would be to "move your business to the U.S. and set up a

1800 phone number". His answer was another example of the "share and enjoy" philosophy and clearly illustrates the possibility that if the Internet is not uniformly regulated so that ISPs' obligations are reasonably uniform on a global scale, ISPs may seek to operate in those jurisdictions where their liability is limited. This issue is critical to determining how to regulate the use of a copyright in Australia.

Although the APRA case has established a broader set of instances in which copyright owners may expect payment, the question of how that payment should be collected has not been resolved. Faulkner argued that blanket licensing with collective administrators was appropriate in the digital environment. Ward said that technology existed that could monitor the number of times a site was accessed and could easily be adapted so that royalties could be more accurately distributed to a copyright owner, rather than relying on traditional sampling methodology. Faulkner also suggested that the technology could be linked to a credit card to facilitate more rapid collection.

"Should ISPs or collecting agencies track who is accessing copyright works on the Internet?"

The ability to monitor use raises issues of privacy and whether ISPs or collecting agencies should track who is accessing copyright works on the Internet. Collective administration may allow privacy to be maintained. This issue requires the same balancing of interests as the APRA case. It may be that a regime favouring copyright owners would severely restrict what is available for "fair use" and the equivalent digital action of lending someone a book or CD will require the payment of royalties.

Whilst the APRA decision engendered a great deal of debate, all participants recognised that the life of the decision is directly linked to the proposed "Transmission Right" and "Right of Making Available to the Public" proposals contained in the Commonwealth Government's discussion paper "Copyright Reform and the Digital Agenda", July 1997.

The proposed rights are to replace the broadcast right and diffusion right which were the subject of the APRA case. The court's reasoning on these points, in particular as to the operation of sections 26 and 31(1)(a)(v) of the Copyright Act, may become redundant. It is to be hoped that in aiming for technology-neutral rights the Act will become more straightforward in its application.

Whilst the rights may change, the key concept of "to the public" is to be kept and its scope is to remain undefined in the Act. The discussion paper adopted the approach of the Full Federal Court in the APRA proceedings matter, an approach that was further clarified by the High Court. The APRA case will therefore have continuing relevance on this point.

The issue of the liability of carriers and ISPs is considered by the discussion paper, but no recommendations are made. The paper assumes that carriers will not be liable in circumstances where they only provide infrastructure.

ISPs are not considered to be in breach of the new rights where they do not determine the content of the material accessed by their networks but will be subject to the current law on authorisation. The true ramifications of the APRA decision will therefore not be known until its interaction with the new legislation can be determined.

By Andrew Windybank and Michael Legg, solicitors at Mallesons Stephen Jaques