where they are given a share of the net profits of the film, the Class Order requires that the contract include the following elements:

1. Personal or professional services are to be provided;
2. No money is to be paid to the producer by the cast or crew member for the profit share;
3. The right of the cast or crew member under its contract to terminate the contract or take action for default is independent of other crew members' contracts;
4. No other participation interest is given and the profit share does not relate to any other securities;
5. The contract is made before 31 December 1995.

If a contract is one with a script writer for the acquisition of the rights in a script, it will also be exempt from the prospectus provisions of the Corporations Law under this Class Order if the script has been written by the person receiving the profit share or an employee or officer of the company receiving the profit share. In other words, if a producer has commissioned a script from a script writer who is not an employee or officer of that producer's company and the producer wishes to assign the rights in the script to a second producer, the producer is not entitled to any profit share as part of the consideration for that assignment.

This is conistent with the rationale which prompted the ASC to grant the ruling. The ASC views cast and crew contracts and others as service contracts rather than investment contracts with the entitlement to the participation interest or profit share being an incidence of payment for those services.

However, where a participation interest is granted as part of the sale of an asset, to a party who is unrelated to the provision of services, no relief is available.

The Class Order has a sunset provision, 31 December 1995. The Order and related issues will be reviewed prior to that date.

Philip French of the ASC has acknowledged the valuable contribution of a number of industry bodies in formulating the Class Order.

[This article was held over from the Vol 13 No 3 issue of the Communications Law Bulletin].

Katherine Sainty is a solicitor with Allen Allen & Hemsley

"Music on Hold" copyright test case - future challenges

Anne Peters looks at a recent important test case which considered the copyright implications of playing music to telephone callers placed on hold

In this report Peters says the case highlights certain difficulties under copyright law, and suggests that the whole question of music on hold might be an appropriate area for consideration by the newly-formed Copyright Convergence Group.

The case

In *APRA Ltd v Telstra Corporation Ltd*, the Federal Court (Gummow J) decided that playing music to telephone callers placed on hold ("music on hold") does not constitute an infringement of copyright under the *Copyright Act 1968* (the "Act"). The parties to the case sought to test the consequences under the copyright law of a number of agreed factual situations.

The Court held that none of the exclusive copyright rights referred to below had been breached and that Telecom, and businesses using equipment connected to Telecom's telecommunications network, were therefore entitled to play music on hold without infringing copyright.

At the date of writing, appeal papers were due to go to the Federal Court registrar for settling in mid-February 1994. No date has yet been set for the appeal hearing. Accordingly, the decision should be treated with some caution at this stage.

Background to the Decision

The Australasian Performing Right Association Limited ("APRA") is the assignee of certain copyright rights in the majority of Australian lyrics and music and acts as a collecting agency for the payment of royalties to the relevant songwriters and publishers. APRA contended that Telstra Corporation Limited (trading as "Telecom"), which provided a music on hold service known as CustomNet, was:

- *by transmitting music on hold played by third parties, or by playing its own music on hold - performing the music (that is, the "work") in public and causing the work to be transmitted to subscribers to a diffusion service in breach of the Act; and*
- *by transmitting music on hold to mobile telephones - broadcasting the work in breach of the Act.*

APRA based its case on sections 31(1)(a)(iii)-(v) of the Act which provide that copyright, in relation to a literary or musical work, includes, respectively, the exclusive right to perform the work in public, to broadcast the work and to cause the work to be transmitted to subscribers to a diffusion service.

The Decision

The Court held as follows:

Performance of a work in public *(s31(1)(a)(iii))*

A public performance resulting from the emission of sounds from an apparatus which receives electromagnetic signals is deemed under the Act to be caused by the operation of the receiving apparatus, not the transmitting apparatus (refer s27(3) of the Act). The Court held that this clearly refers to the person who has control of the receiver (being the earpiece or speaker of a telephone). Accordingly, Telecom could not be said to have caused a public performance by playing music on hold.

Broadcasting a work *(s31(1)(a)(iv))*

Playing music on hold to callers who are using a mobile telephone network constitutes a transmission by wireless telegraphy (an element of the definition of "broadcast" in the Act). However, to be a broadcast within the meaning of the Act, the transmission must be "to the public". As a technical matter, each mobile telephone user, according to the Court, is properly to be viewed as receiving a separate transmission. In addition, the mobile telephone network service is essentially a service to facilitate confidential communication between two people.

The Court held that it would be a distortion of the broadcasting provisions of the Act to hold that if, during the course of this private communication, one party was to communicate a work to the other

party, this would amount to a broadcast by Telecom "to the public". It would be irrelevant who played the music which was transmitted to the mobile telephones.

(With respect, it is difficult to see how "confidentiality" has any bearing on the public/private distinction drawn in previous cases regarding the meaning of "public" - a communication could be a "public" communication (being between people in their public capacity), but be confidential.)

Causing a work to be distributed to subscribers to a diffusion service (s31(1)(a)(v))

A central feature of any "distribution" is a uni-directional flow of something from one to more than one. The service provided in this case had the primary function of facilitating communication between two people and could not be regarded as a service of distributing matter (such as music). Nor was music on hold a service transmitted to the premises of subscribers to the service, because nobody subscribes to receive music on hold.

Even if the provision of music on hold was a service of distributing matter, there was no agreement to provide such service. Therefore, Telecom had not caused music to be transmitted to subscribers to a diffusion service. The Court noted that the above principles applied equally to the transmission of recorded music as to the transmission of music derived from radio.

Comment on the Decision

In view of the increasing incidence of music on hold, the question of copyright infringement in relation to this activity is one of some importance. It is to be welcomed that this test case was instigated, however facts citing broader examples of instances of the provision of music on hold would have assisted in resolving certain issues otherwise highlighted by the case. The increasingly common use of "loudspeaking facilities" on certain telephones affords an example of one such issue.

It would appear to follow from the Court's reasoning, that if a calling party were to receive music on hold whilst waiting for the called party, and was in turn to place that music on hold onto the loudspeaker of their telephone, this might constitute the giving of a public performance by the calling party (as the person causing the operation of the receiving apparatus) under s27(3) of the Act.

One relevant issue would be whether there was a performance of the work in "public". In the context of telephone loudspeaker use, this could depend on a number of variables, for example:

- whether there happened to be other persons who were capable (or might be capable) of hearing that particular music on hold being played; and
- whether, if there were such persons so capable, whether they were hearing the music in their public or private capacity. The case law has consistently drawn the obvious, and rather unhelpful, conclusion that "public" means not "private, domestic or quasi-domestic".

It should be apparent that, as a practical matter, these variables are such as to make it very difficult both for copyright owners (and collecting societies) to monitor when there has been a public performance of a copyright work and for companies to ascertain with any degree of certainty their liability in respect of such "performances".

Furthermore, when one considers, as the Court mentioned, that music on hold comes unbidden to a calling party, it is difficult to characterise our loudspeaker example as a "public performance" (as popularly understood) or to accept that such a result could have been intended by the legislature.

It has been said (by G.Wei) that:

"(i)f the performance occurs as an adjunct to some commercial activity, then almost certainly the performance can be regarded as public ... The critical factor which the court will have regard to is the character of the audience. If it is a domestic or quasi-domestic audience, then it will be treated as a private performance. The question as to what is a domestic audience is not easy to answer. *Factors which will be looked at include the commercial nature of the performance, the effect of the performance on the value of the copyright, and the question as to whether the copyright owner has any legitimate expectation of reaching the audience in issue.*" (emphasis *added*)

As an example, suppose that a calling party rings a department store from their office about a personal charge account and places music on hold onto a telephone loudspeaker which in turn is heard by fellow employees. On one interpretation of the above passage, the fellow employees are there in their "public" capacity and thus there would be a public performance. Another interpretation would be that the "performance" was not commercial in nature and had little, if any, effect on the value of the copyright, and therefore was not a public performance under the Act.

Future Reforms

Although, for immediate purposes, it is not necessary to draw any final conclusions, the above example serves to illustrate that existing copyright law is not always readily adaptable to new forms of technology and new uses of copyright works. Any such uncertainty is undesirable and clearly serves only to increase the costs of securing corporate compliance.

We can expect that collecting societies (such as APRA) will continue to take an assertive stance in relation to collecting royalties for use of copyright works (the development of a blanket licence scheme by the Copyright Agency Limited for photocopying by large corporations is one such example). However, it may be more appropriate, no matter the outcome of the appeal in this case, for the newly-created Copyright Convergence Group to place on their agenda, the question of whether or not the balance of public interests is in favour of copyright owners having exclusive rights in relation to music on hold.

APRA Corporate Licence Scheme

In the context of a recent case, APRA agreed to grant to the Commonwealth Bank, a licence to perform in public any musical work in APRA's repertoire for a fee of 50 cents per full-time employee per annum, indexed annually in line with the CPI increase. The same terms are now offered generally by APRA to corporations who use music in the workplace under APRA's Corporate Licence Scheme.

This "blanket" licence eliminates the need to negotiate a performing licence fee on a song-by-song basis and, if applicable, the obligation to maintain accurate records of such public performances. It is still possible, of course, to negotiate a "per usage" licence with APRA. The Corporate Licence Scheme could also cover use of music on hold which might amount to a public performance (as referred to in the examples cited above).

Anne Peters is a solicitor with Freehill Hollingdale & Page