New Zealand Judge finds news monitoring business to be "parasitic"

Paul Sumpter reports on a recent decision involving TVNZ and Newsmonitor Services Limited

One of the classic conundrums of intellectual property law is the demarcation between the monopoly rights given to creators and the right of the general public to benefit from the fruits of their labour. In some quarters the recent New Zealand case between *Television New Zealand -v- Newsmonitor Services Limited ("Newsmonitor")* is being heralded as a victory for the creators (in this case TVNZ). Certainly, the case represents to the television industry what *De Garis -v- Neville Jeffress Pidler* meant to the newspaper industry.

But in many respects the *Newsmonitor* findings were predictable and the decision perhaps more accurately illustrates the extent to which copyright law can be misunderstood and/or ignored (and the dangers of doing so). However the case may indirectly give much needed impetus to the long-heralded reform of the *New Zealand Copyright Act 1962*, a piece of legislation having very important ramifications for those in the media and communications industry.

The action

Newsmonitor's business consisted of taping broadcasts of television and radio news and current affairs programs and providing transcripts of program portions specified by fee paying clients. TVNZ was seeking a permanent injunction and damages for alleged copyright infringement, although the case proceeded on the question of liability only and the argument was confined to the scripts of sixteen specimen programs for which TVNZ sought a declaration that Newsmonitor had infringed copyright.

TVNZ claimed it possessed copyright in its scripts ("literary works"), programs ("dramatic works"), video tapes ("cinematographic films") and the actual broadcasts.

The decision

The television company scored four out of five, failing only to convince the Judge that the news and current affairs program scripts qualified as unpublished, original "dramatic works". This was because the Judge - citing the leading Australian academic Dr Sam Ricketson - held that the scripts were not essentially intended to be performed or represented but rather simply read or narrated. (It is faintly ironical that TVNZ had itself some years back successfully, and unsurprisingly, defended itself against a claim by the English talent quest presenter, Hughie Green, who tried to claim that his unscripted ideas for his show *"Opportunity Knocks"* comprised a "dramatic work".)

Whilst TVNZ's interesting argument on dramatic works lost out, Justice Blanchard had little difficulty in concluding that the reporters' field scripts and final scripts used in the presentation of the news programmes were "literary works". This was despite the fact that substantial portions of a typical news broadcast consisted of video tapes of someone speaking either to a reporter or addressing one or more third parties such as an audience.

But a long line of copyright cases have emphasised that there is a very low threshold for an item to qualify as original and therefore enjoy the fruits of copyright protection. One well known case from the turn of the century was specifically referred to, *Walter -v- Lane*, when the English House of Lords effectively decided that the mere reporting of words of another gives rise to a reporters' copyright so long as there is a modicum of skill and judgement used in composing the reports.

The Judge also found that TVNZ possessed copyright in the video tapes of the scripts (which qualified as cinematograph films) and in the broadcasts as such. He went on to decide that Newsmonitor had infringed the copyrights, though not before discussing and dismissing a number of interesting defences.

Public Interest

Newsmonitors' initial counter attack was based on public interest. Its lawyers argued that TVNZ's claim was contrary to provisions in the *New Zealand Bill of Rights Act* to do with freedom of expression. Indeed this line has been echoed subsequent to the release of the decision by one New Zealand Member of Parliament who, in a press release, has trumpeted that the case represents "an ominous development, and one at which Parliament should have a close look at an early opportunity. If public broadcasters start claiming they own those rights [free speech], and control who can disseminate news once it has been publicly broadcast, then will every person's rights be at risk?".

Blanchard J, pointed out that there was no "statutory monopoly" in the information broadcast by TVNZ and that anyone was free to summarise the contents of programmes and to disseminate these summaries to customers. Newsmonitor's rejoinder to this no doubt would be that the essence of its business is in obtaining the news verbatim. However the judgment was clear and conformed to a familiar pattern - news gathering services cannot be allowed to reap where they have not sown, at least not without paying a fee.

An interesting side note to this part of the argument is the issue of government censorship by means of the *Copyright Act*. Not so long ago in New Zealand there was a considerable houha that the Crown's copyright legislation, parliamentary material and judgments, provided the opportunity for the deliberate suppression of publication of the law for political ends or at least enabled strict control for revenue based objectives. Indeed a then MP, Mr Doug Graham, put forward a private members bill to rectify the perceived problems. The bill had as its basic principle the unrestricted right of access for all of the laws in New Zealand. The bill did not proceed. Graham is the present New Zealand Minister of Justice.

Fair Dealing

In its defence to the claim for copyright in the broadcasts Newsmonitor relied upon the "fair dealing" provisions which are common to most copyright laws throughout the western world. They have all been difficult to interpret. As in the Australian *De Garis* case the defence advanced the argument that Newsmonitor's service was fair use of material for "research or private study". But the New Zealand judge decided that Newsmonitor itself was doing no research or study but appropriating the

material for commercial profit (though Newsmonitor's customers were acquiring the transcripts for the purposes for research or private study).

Interestingly, the Judge also decided however that Newsmonitor's habit of taping all programmes in their entirety from which they selected transcripts on order for clients was a "fair dealing" because the tapes were not used for any other purpose and were then destroyed once the extracts had been made.

Although Blanchard J did not therefore need to deal with the question of what is "fair" in terms of a fair dealing defence, he did review the 16 individual extracts in this light. The defendant here put forward again a vigorous "public policy" submission that "fair dealing" should be interpreted rather liberally because the copyright material pertained to news and current affairs and there was a public interest in the dissemination of this material (which Newsmonitor but not TVNZ was willing to make available). Justice Blanchard however remarked:

"A news monitoring business is parasitic. Why should it have a free ride on a broadcaster which has put considerable amounts of time and money into producing the news and current affairs programmes which are the source for the transcripts".

Other Issues

There was also the question of what constituted a "work" - the whole programme or each news item or segment? On this important though academic question, in choosing the complete programme the Judge was able to find that ten of the sixteen items were "fair dealings" for the purpose of research or private study.

A defence which was successful in relation to one item, concerned the exception in the *New Zealand Copyright Act* where something is copied for the "purposes of a judicial proceeding". The Judge gave a fairly generous interpretation to this provision to permit material to be copied for the purpose of legal advice. This exception may not however be as broad as it seems.

One final point worthy of mention is the claim made by TVNZ that a "private purposes" exemption in relation to broadcasts in the New Zealand Act did not apply to the other types of copyright so that a broadcaster such as TVNZ who also happened to own the copyright in literary, dramatic or cinematographic works contained in the broadcast was able to claim infringement even in relation to private taping. The "absurd" result, as the Judge put it, would have meant that New Zealanders could not lawfully make a tape of a rugby test match by time recording it for private viewing. Clearly this would be beyond the pale and the Judge interpreted the *Copyright Act* provisions accordingly. But the question may not be closed.

Comment

The case has therefore clarified some matters of copyright for the media industry and will no doubt be welcomed on both sides of the Tasman by broadcasters who have had difficulties with monitoring organisations.

On the other hand, if those whose feathers have now been ruffled choose to raise the cry of reform (as a New Zealand MP has already done) this may be a very beneficial spin-off. Despite periodic lobbying and reports issued by the New Zealand Justice Department in 1985 and 1989 nothing has yet emerged in the shape of concrete proposals. Australians have at least embarked upon piecemeal reform. The technological changes that have occurred since the 1960's have exposed considerable chasms in copyright law. There are many examples some of which should be of far greater concern to TVNZ than news scripts - such as the question of cable TV and satellite broadcasts. Indeed, if I were a TVNZ executive I would be lobbying the New Zealand Government fast right now. But that is another story...

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Indigenous media is a priority, and not just a luxury

In this, the second of a two part article based on her 1993 Boyer Lecture, Dot West outlines the mechanisms for establishing a national Indigenous Media service

Out of the Silent Land

In early 1984 the Federal Government formed a special task force to advise on Aboriginal broadcasting and telecommunications policies. The Task Force report, *"Out of the Silent Land"*, was released later that year and in 1985 the government endorsed over fifty of its recommendations. *"Out of the Silent Land"* addressed the lack of telecommunications and electronic media available to Aboriginal people living in remote Australia and at the same time stated that city based broadcasting was being catered for through the Public broadcasting sector. Sadly this report did not go far enough to cater to the growing needs of Indigenous Media and the eight years since the report was written were stifling for many groups.

The report also highlighted the need to offset the impact of western television and radio in remote communities, which was brought about by the launch of AUSSAT's first generation of satellites. In the year of the bicentennial some 85 remote Aboriginal and Torres Strait Islander communities were given, through the Department for Aboriginal Affairs, a facility called BRACS, Broadcasting for Remote Aboriginal Communities Scheme. The package included a satellite dish and decoder along with some basic equipment which allowed the community to interrupt the radio or television signal and broadcast their own programs within a 5km radius.

Brilliant idea, fantastic plan, but what was forgotten were three very important factors for the system's success: consultation, training and on-going funding. In many of the 85 communities who received BRACS, there was no consultation by the Department of Aboriginal Affairs about whether they wanted the equipment or not. It was just delivered and installed. Many of these communities say that they were given only a half hour course in how to operate the equipment. About a year later the bureaucrats got it together enough to realise training programs were necessary to teach the community members how to interrupt the incoming signal and to make and present their own community based programs. But in most cases it wasn't until two years after the installation of BRACS that people received this training.

In the meantime the communities had become accustomed to the daily soapies and the general infiltration of western culture. As an Aboriginal person you start to wonder about the motivation behind BRACS and the governments' failure to meet the challenge it supposedly set itself: to allow remote