Casenote: The *Panel* Decision and the Substantial Problem of Television Broadcast Copyright

Brendan Plant and Niranjan Arasaratnam review the High Court's recent decision in the *'Panel'* case, and provide some comment on its implications for industry.

The High Court[1] has overturned the decision of the Full Federal Court,[2] which held that the owner of the copyright in a television broadcast had the exclusive right to reproduce *any* of the images and accompanying audio broadcast.

On one hand, the High Court's decision will be welcomed by broadcasters, editors, producers and others within the television and movie industries because, by narrowing the scope of the broadcast right, the threshold for infringement seems to have been raised.

However, while the majority of the High Court found that television programs and individual advertisements both answer the description of a 'television broadcast' for the purpose of the *Copyright Act 1968* (Cth) (the *Act*), it left open the question of whether a particular segment of a program may also constitute 'a television broadcast'. It also gave no guidance on how a 'substantial part' of a television broadcast is to be determined for the purpose of infringement.

BACKGROUND

Channel Nine commenced copyright infringement proceedings in the Federal Court against Network Ten under the Act for broadcasting short excerpts of Channel Nine programs on its television show, *The Panel*. Network Ten defended the action on the basis that it had not re-broadcast a substantial part of Nine's broadcasts or, if it had, that its broadcast of the segments constituted 'fair dealing' under the Act.

THE TRIAL JUDGE

At first instance,[3] Justice Conti considered two main issues: first, the scope of the copyright granted to television broadcasts as 'Other Subject Matter' under Part IV of the Act; and, second, the application of the fair dealing defence.

Justice Conti held that, in order to infringe television broadcast copyright, it was necessary to copy or re-broadcast a 'substantial part' of that subject matter. In relation to television broadcasts, the subject matter was a program or, in certain cases, a segment of a program with a self-contained theme. His Honour treated television advertisements as discrete television broadcasts worthy of protection.

Justice Conti concluded that Network Ten had not infringed copyright in Channel Nine's programs because the excerpts taken were not substantial in terms of quality or quantity and were not taken for a commercial purpose. Although not strictly necessary given his findings on the scope of the copyright, Justice Conti proceeded to address the availability of fair dealing defences in these circumstances. His Honour considered that 11 out of the 20 broadcasts were fair dealings for the purpose of criticism and review or for the purpose of reporting news.

THE FULL FEDERAL COURT

The Full Court of the Federal Court disagreed with Justice Conti's decision, finding unanimously that Network Ten had infringed the copyright Channel Nine held in its television broadcasts. The Full Court held that making videos of another channel's television footage and re-broadcasting *any* of the actual images and sounds of that broadcast is an infringement of copyright. The Court also held that there was no requirement that the visual images must constitute a *substantial part* of the original broadcast.

In reaching this conclusion, the Court drew a distinction between a cinematograph film and a television broadcast. The definition of cinematograph film in the Act is an 'aggregate of visual images... capable... of being shown as a moving picture'. In contrast, the Full Court considered a television broadcast to be a sequence of still images with accompanying sounds. Therefore, the Court held that copyright can subsist in each and every still image that is transmitted or capable of being observed as a separate image on a television screen.

Having found that Network Ten's actions had infringed Channel Nine's copyright, the Full Court went on to consider the fair dealing defences argued by Ten. Although the Court broadly agreed on the principles that emerged from authorities involving the application of the fair dealing defences,[4] the three Full Court judges (Justices Hely, Sundberg and Finkelstein) reached different conclusions as to whether or not the fair dealing defences were available to Ten in relation to some of the re-broadcast segments.

Network Ten appealed to the High Court, arguing that the Full Federal Court had misinterpreted the term 'a television broadcast' in the Act.

HIGH COURT: MAJORITY DECISION

The High Court, by a three to two majority, overturned the Full Federal Court's decision. The High Court held that a single image appearing on a television screen with accompanying audio does not constitute a television broadcast. The majority found that, in this case, the 'television broadcasts' were the 20 separate Channel Nine programs from which the excerpts shown by Ten had been taken. The Court described these as broadcasts "put out to the public, the object of the activity of broadcasting, as discrete periods of broadcasting identified and promoted by a title... which would attract the attention of the public".[5]

In coming to this conclusion, the majority criticised the Full Court's approach for giving an artificial meaning to the terms of the Act and for privileging the rights of television broadcasters over those of other copyright holders. The majority's interpretation of the Act drew on the historical and legislative context surrounding the first grant of broadcast copyright in both Australia and the United Kingdom and pointed to the use of the term 'program' in other legislation applicable to the broadcasting industry.

The High Court agreed with Justice Conti that television advertisements are discrete television broadcasts. However, the Court declined to decide whether an individual segment within a television program qualifies as 'a television broadcast' in which copyright subsists. Indeed, the Court's interpretation of 'a television broadcast' remains, by its own admission, imprecise; the majority noted that "there can be no absolute precision as to what in any of an infinite possibility of circumstances will constitute a television broadcast".[6] However, the majority indicated that it would not necessarily consider separate segments, items or 'stories' within a prime-time news broadcast as separate 'television broadcasts' in which copyright subsists.

The High Court remitted the case to the Full Federal Court for redetermination of whether, in light of its findings on the scope of the television broadcast copyright, the excerpts shown by Ten were substantial parts of Channel Nine's programs contrary to Justice Conti's findings.

MINORITY DECISIONS

In separate judgments, Justices Kirby and Callinan both agreed with the Full Federal Court's broad construction of 'a television broadcast' as each single visual image and the accompanying sound broadcast. Both minority judgments gave priority to the text of the legislation over the ancillary materials, and maintained that the wording of the Act established the limits to a purposive approach to statutory construction favoured by the majority.

Furthermore, the minority focused closely on the nature of the interests to be protected by the broadcast copyright. Referring to the well-known test that 'what is worth copying is *prima facie* worth protecting', Justices Kirby and Callinan argued that, in the highly competitive and commercialised broadcasting industry, broadcasters have a strong interest in re-broadcasting snippets of footage from their competitors and that the broadcast copyright should protect against this conduct.

The minority judges recognised that their broad interpretation of broadcast copyright gave a stronger degree of protection to broadcasters than other copyright holders. While Justice Kirby was almost apologetic that his analysis led to such a result, Justice Callinan reasoned that the broadcast copyright was intended to be a unique form of copyright, and that a greater level of protection was justified in the competitive and 'nakedly commercial context' of broadcasting, in which 'expansive infrastructures, fees, techniques and resources are required'.[7]

COMMENTS

The High Court's decision in *The Panel* case may be welcomed for having addressed some of the key criticisms directed at the Full Federal Court judgment.[8] In particular, by raising the infringement threshold, the High Court has ensured that television broadcasters are no longer privileged with a greater degree of copyright protection than other copyright holders, including the producers of other Part IV subject matter (most notably films) and the creators of a broadcast's underlying works. Furthermore, the High Court decision reaffirms the utility of the substantial part test within the television broadcast copyright regime, thus restoring a key mechanism by which the courts have traditionally sought to resolve copyright law's fundamental tension between the private interest in protection and the public interest in access.

But for those in the broadcasting industries, the High Court's decision does not offer any real comfort beyond confirming that broadcast copyright subsists in discrete television programs and advertisements. Indeed, by its reliance on an unresolved definition of 'television broadcast', the High Court has allowed an unfortunate degree of uncertainty to survive in relation to the subject matter of this form of copyright. For broadcasters wishing to reproduce parts of television programs for their own use, any uncertainty as to whether their actions might be in breach of the *Copyright Act* is compounded by the subjectivity involved in the court's determination of whether the use constitutes fair dealing. As the history of *The Panel* case itself reveals, the courts have assessed the fair dealing defence in a highly erratic fashion. It seems unlikely that broadcasters will risk using excerpts of other broadcasters' programming on such an unreliable and uncertain basis, especially when consideration is given to the high costs involved in the television industry.

On this view, interests beyond the broadcasting industry may be concerned that the uncertainty produced by the High Court's decision will exert an unfortunate stifling effect on the televised public domain, as various forms of comment and criticism which make use of other broadcasters' content may disappear from our TV screens.[9]

The Panel case currently awaits reconsideration by the Full Federal Court, which will determine the application of the substantial part test and the availability of the fair dealing defence in light of the High Court's findings. Given that the substantial part test is underdeveloped in the context of Part IV of the Act, there remains the distinct possibility that there will be another series of appeals before the matter is ultimately resolved.

Brendan Plant is a Law Graduate in the Sydney office of Allens Arthur Robinson, and Niranjan Arasaratnam is a partner in the firm's Hong Kong office.

1 Network Ten Pty Limited v TCN Channel Nine Pty Limited [2004] HCA 14.

2 TCN Channel Nine Pty Ltd v Network Ten Pty Ltd (2002) 118 FCR 417.

3 TCN Channel Nine Pty Ltd v Network Ten Pty Ltd (2001) 108 FCR 235.

4 See eg Nine Network Australia Pty Ltd v Australian Broadcasting Corporation (1999) 48 IPR 333 at 340, Time Warner Entertainment Co Ltd v Channel 4 Television Corporation PLC (1993) 28 IPR 459 at 468 and Ashdown v Telegraph Group Ltd [2001] EWCA Civ 1142 at par 61.

5 Above, n 1 at [75].

6 Ibid.

7 Above, n 1 at [155].

8 See, for example, Michael Handler, 'The Panel Case and Television Broadcast Copyright' (2003) 25 SydLR 390.

9 See Melissa de Zwart, 'Seriously entertaining: The Panel and the future of fair dealing' (2003) 8 Media & Arts LR 1.

Knowledge Cycles of Digital Television in Australia

In this edited version of her paper presented at the Communications Research Forum 2003, Cate Dowd looks at the development of Australian digital television and some future directions.

Information about Australia's digital television infrastructure and a limited knowledge of reception systems may have impacted on the knowledge base for early-development decisions. The *timely reach* of information for knowledge formation remains important to the progress of digital television. The shortfalls of implementation suggest a need for a model that represents digital television as an evolving enterprise of diverse agents and complex transactions.

The base for a theoretical model might include 'knowledge cycles and communicative transactions'[1] as a means of understanding digital television as a form of major technological change. It might include ideas, motivation and agents for change as an extension of conventional information analysis and design. An 'eco-techno' system model[2] would represent *technological* change as an ecology beyond static architectures, entities and agents. Such a model might assist understanding and direct policy in a time of review, which otherwise appears likely to be marked by a *commodity* approach.

The sale of Australia's national transmission network in the early stages of developments led to a broken contract for transmission services, due to claims of unprofitable investments by the international company involved. The operational plans for Australia's transmission infrastructure also remain entangled in access issues for detailed information.

Understanding the early *communicative* transactions for change is as important as the identification of financial transactions. Important questions have been raised by the approaches so far. First, how can transmission infrastructure be reinstated as a public asset? Secondly, will the Australian Government succumb to international corporate interests with the anticipated sale of spectrum for broadcasting?

The technical knowledge of digital television involves many entities that stand against legislative requirements for broadcasters, including a quota for HDTV content that occupies the whole bandwidth of a digital channel. The potential of a channel is actually more sophisticated than this reduction, suggesting that policy needs to be informed by deeper knowledge of the technologies, beyond market models produced by a *productivity* agent of a government. The motivation behind change, via text agents, could also be reviewed and include reflections on the phenomena of technological convergence.

The agents of change for digital television include major technical standards that have been designed as open and evolutionary standards. Australian broadcasters, content developers, consumers and manufacturers are all influenced by the cycles of knowledge in the development process. The Multimedia Home Platform standard for the set-top box (commonly referred to as the MHP) will ultimately involve transactions with other agents for functionality, such as metadata standards. These entities need to be represented in a model of transactions with other distribution systems, such as mobile phones as a set of digital systems.

THE EMERGENCE OF DIGITAL TELEVISION IN AUSTRALIA

The digital transmission systems and standards for reception devices developed by the DBV[3] based in Geneva are major areas of development for Australian digital television. These entities involve complex and dynamic transactions across organisations and