

Music on Hold: The Case of Copyright and the Telephone

Telstra Corporation Ltd v Australasian Performing Rights Association Ltd

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The High Court will shortly be considering the decision of the Full Federal Court in *Telstra Corporation Ltd v Australasian Performing Rights Association Ltd*¹ that Telstra is liable, in respect of the playing of 'music on hold', for breaching the exclusive right of copyright owners to cause musical works under copyright to be transmitted to subscribers to a diffusion service and to broadcast the works to the public. The case is an important one. Judge-made changes to the carefully balanced regulatory regimes governing the primary telecommunications carriers, through the burden of civil liability for infringement of a private right, are unavoidably events of public significance. The fact that public telecommunications networks are a vital element of the nation's infrastructure and an important strategic resource in the national economy alone ensures that a judgment involving the potential strict liability of a general telecommunications carrier for copyright infringements taking place over its network will be of considerable interest and concern. That interest and concern will also inevitably be heightened by the 'convergence' context of the case, that is, the integrating of transmission technologies and the blurring of traditional sector boundaries between carriers and content-providers which is proceeding apace in Australia and throughout the developed world.

1. *The Case*

Like all test cases, this one was designed by one or both of the parties to the action to force a rule out of the legal system where the rule did not exist before or at least did not exist clearly enough to meet the needs of the parties. Both parties here collaborated in putting the case together and bringing it on.² The plaintiff is APRA, an active, assertive and highly litigious collecting society whose members assign to it the performing rights in their musical works in exchange for the society's work in both collecting royalties from those users of the works whom it licenses and distributing those royalties to the members.³ The relevant performing rights for the purposes of this case are the

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1 (1995) 31 IPR 289.

2 *Australasian Performing Right Association Ltd v Telstra Corporation Ltd* (1993) 27 IPR 357 at 358 per Gummow J.

3 Where the relevant copyright in musical works performed in Australia is owned by overseas collecting societies, APRA also collects those royalties and pays them to the overseas societies. Indeed, a very large percentage of the total amount taken in by way of royalty payments by APRA is sent overseas: *Australasian Performing Right Association Ltd v Australian Broadcasting Corporation* (1985) 5 IPR 449 at 453.

broadcasting and diffusion rights. The defendant is Telstra, one of the general telecommunications carriers of Australia and the holder of a general telecommunications licence under the *Telecommunications Act* 1991 (Cth).

The source of the music which is the cause of the trouble between the parties here is either broadcast music from a radio or recorded music from a CD player or tape recorder. This music is then provided, through the use of the appropriate equipment, by third persons,⁴ (subscribers to Telstra) to persons who call them and have to be placed on hold while they wait for their call to be attended to. The music is intended to keep the callers in reasonably good humour while they wait. No "third persons" are parties to this action. The focus of APRA is on Telstra. The music on hold is transmitted by Telstra through the general (wired) telecommunications network or through the mobile (wireless) telecommunications network.

Section 31 of the *Copyright Act* 1968 (Cth) provides for the exclusive right of the copyright owner in a musical work to "cause the work to be transmitted to subscribers to a diffusion service" and "to broadcast the work". The Full Federal Court found Telstra liable on the basis of its transmissions of music on hold through the network for infringement of both of those exclusive rights,⁵ despite Telstra's role as a passive carrier with little or no control over the content of what is transmitted. The music transmitted through the wired network infringed the copyright owners' diffusion rights, and that transmitted to individually held mobile telephones infringed the copyright owners' broadcast rights. The only allowed exception to this widely cast net of liability was held to lie in those circumstances where the particular music on hold involved the retransmission of a radio broadcast, that is, music which has already been broadcast, received by a radio and then retransmitted over the telecommunications network. The legal basis for this specific exception for radio music retransmitted through the network is the deemed licence to diffuse authorised sound broadcasts given by subsection 199(4) of the *Copyright Act* 1968. Burchett J considered that "royalties paid for so wide a dissemination as an authorised broadcast ... should be considered to cover also any extension of that broadcast to the subscribers of a diffusion service".⁶

2. Issues and Arguments

A. Statutory Interpretation

Where, as here, the case involves issues of statutory construction, the struggle in the courtroom is towards legislative intent, towards a clear determination of the intention of statutory provisions according to the words chosen by parliament. What do the words mean? What are they intended to mean? The familiar and reassuring rhetoric of legalistic decision making requires for its persuasive

4 Telstra itself in effect acts as a third party when callers to Telstra service centers are placed on hold and listen to music on hold. Telstra also provides a special music on hold service, Custom Net, to certain customers. Nothing of consequence in the case turns on these two restricted situations.

5 Commentary in this note will be restricted to the issue of liability for breach of the diffusion right.

6 Above n1 at 321.

power, perhaps especially when that decision involves statutory interpretation, a strong sense of initial complete judicial impartiality between the interpretive possibilities urged by the parties. That is to say, there should be no interpretive bias towards one of the contending forces, no submerged interpretive premise to distort an even-handed choice among contending meanings.⁷ It is therefore surprising, at least to me, to find the following passage in the judgment of Burchett J in the Federal Court:

If what W.R. Cornish in his *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, 2nd ed, 1989 at 300, called "the primacy of the owner's entitlement to an economic return from his proprietary rights" is, as the cases suggest, to be a guide in the interpretation of the *Copyright Act*, it seems to me that a transmission may be "to the public" if it is intended for a section of the public ...⁸

The proposition that the copyright owner's entitlement to economic return is a guide to the interpretation of the *Copyright Act* should be treated with distinct reserve. There is no statement in the *Copyright Act* itself to support it. And it would certainly not appear to be a proposition that Professor Cornish would himself endorse. The line quoted from the Cornish text in fact occurs in a passage in that book which has nothing to do with any proposed general interpretive principle of copyright law or the *Copyright Act*. Indeed, Professor Cornish's view, as evidenced in that text, of copyright law and all other regimes of intellectual property monopoly regulation is that a balance needs to be struck by the legislature between the public interest in economic and cultural development and the private property interests of the specific intellectual property owners, a balance that is "broadly appropriate to the economic needs of the country and to the prevailing sense of what is just".⁹ The public interest is not necessarily coextensive with the interests of copyright owners. This is of course particularly so where, as is the case in Australia, the majority of copyright royalties are paid to copyright owners located overseas and the country is a net importer, by a very large margin, of copyright material.¹⁰ And there is nothing especially sacrosanct about the private rights of the copyright owner in the law of copyright. That law has been recognised as an instrument of public policy at least since the rejection of a natural rights theory of perpetual copyright by the House of Lords in the founding case of *Donaldson v Beckett*.¹¹ A

7 This is not to deny or criticise the existence of certain traditional and appropriate presumptions in the interpretation of statutes, such as the narrow construction of criminal statutes in favour of the accused and fiscal statutes in favour of the taxpayer or the presumption that statutory provisions are not intended to deprive subjects of their basic civil rights and liberties.

8 Above n1 at 326 (emphasis added).

9 Cornish, W R, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, (2nd edn, 1989) at 5-6.

10 In a submission made to the Copyright Law Review Committee last year, the Office of Regulation Review stated at 39 that "Australia has a substantial and consistent net deficit in royalty transactions related to copyright ... the difference between inflows and outflows — the annual net flow — has been around \$1.2 billion in recent years." (emphasis added). The submission went on to state at 5 that "... a general extension of copyright protection ... would have few (if any) tangible benefits and holds the risk of substantial costs". These references to the submission of the Office of Regulation Review were read out by Sir Anthony Mason in a Paper entitled "Reading The Future", delivered to the Australian Library and Information Association on Wednesday 1 May 1996 at the State Library of New South Wales.

11 (1774) 4 Burr 2408, 98 ER 257.

principle of statutory interpretation which gives primacy to the economic reward of the copyright owner would hardly help to achieve the sort of balance described by Professor Cornish and it would, with respect, be appropriate for the High Court in its consideration of the case to distance itself from Burchett J's suggested interpretive principle.

B. *The Diffusion Right*

The "diffusion" right is the right given by the *Copyright Act* 1968 to authors of literary, musical and dramatic works and the owners of copyright in films to cause the work or film to be transmitted to subscribers to a diffusion service. The right is actually rather mysterious.¹² It is not just that non-lawyers and lawyers without any specialised knowledge of copyright or communications law do not readily recognise or understand what the diffusion right is. Since there is little or no Australian case law in the area to shape the profession's knowledge of the term, even many copyright lawyers do not know that much about the right beyond a general understanding that diffusion means the transmission of electronic signals over wires rather than through the air. It would certainly be more readily comprehensible if it were called a "cable right", although that might not actually express the legislative intention. Other jurisdictions to which one would normally turn for interpretive assistance use entirely different terminology to express concepts which may or may not be directly analogous to those concepts informing the Australian Act.¹³

There is little in the legislative history of the diffusion right to shed light on its meaning. The diffusion right first surfaced in Australian copyright law in the *Copyright Act* 1968 on the recommendation of the Copyright Law Review Committee which did little more than broadly recommend the adoption of the provision for a diffusion right found in subsection 48(3) of the *Copyright Act* 1956 (UK). Since the statutory provision referred to "a service of distributing broadcast programmes, or other programmes", it is not particularly helpful here. Nor does there seem to be any further historical evidence of legislative intent. The second reading speech of the Bill which became the *Copyright Act* 1968 is without detail and similarly unhelpful. What did go on in those statutory drafters' offices back there in the 1960s?

The legislative history of the diffusion right can shed little direct light on the legislative intent behind particular words in the particular subsections of section 26. Neither can much direction be gained as to the general import of the diffusion right provisions from the communications context in which both the *Copyright Act* 1968 (Cth) and the *Copyright Act* 1956 (UK) upon which it was based were passed. It is reasonably clear that the specific technology of

12 The Copyright Convergence Group in its 1994 Report *Highways To Change*, Australian Government Publishing Service, Canberra, at 19 described the diffusion right as "inadequate and confusing and, therefore, undesirable". The Report called for the abolition of the diffusion right on the basis that it should be encompassed within the broader, technology neutral right of transmission to the public which was promoted in the Report.

13 The apparently corresponding right in the United Kingdom, for example, in the *Copyright, Designs and Patents Act* 1988 (UK), s16(1)(d) is the exclusive right of the owner of the copyright in a work to "include it in a cable programme service". "Cable programme service" is then quite elaborately defined in a further provision of the Act (s7) which does not closely correspond to any provision of the *Copyright Act* 1968 (Cth).

music on hold was not known or contemplated at the time when those Acts were passed¹⁴ and that the new diffusion right was intended, at least in part, to deal with the contemporary technology of small scale diffusion of television broadcasts and the retransmitting of free to air broadcast material along a material path from a community receiving antenna.¹⁵ That antenna was used for the purpose of cable retransmission of television programs, in particular, to television viewers in far-flung areas where there was some difficulty with wireless reception. The diffusion right provisions of the *Copyright Act* 1968, however, do go beyond the retransmission of broadcast material over a wire and must have been intended to include the use of cable technology to originate programs as well as retransmit broadcast programs.¹⁶

It seems, therefore, that the search for legislative intention cannot easily be a contextual one. The Act itself does provide some guidance to meaning in subsection 26(1):

A reference in this Act to the transmission of a work or other subject-matter to subscribers to a diffusion service shall be read as a reference to the *transmission of the work* or other subject matter *in the course of a service of distributing broadcast or other matter* (whether provided by the person operating the service or by other persons) *over wires*, or over other paths provided by a material substance, *to the premises of subscribers to the service*.¹⁷

Just sending a work or causing a work to be sent over a wire is not enough for liability. Subscribers are necessary. Liability requires that the transmission of a copyright work be in the course of providing a diffusion service to subscribers. To find that Telstra is liable for breaching APRA's exclusive diffusion right, therefore, it is necessary to find that Telstra has transmitted musical works over wires in the course of a service of providing such works to the premises of persons who subscribe to that service. And the Federal Court has made such a finding, assisted by other subsections of section 26 which provide that the person operating the service is deemed to be the person causing the works to be transmitted¹⁸ and that where a service of distributing matter over wires is "only incidental to or part of, a service of transmitting telegraphic

14 Above n1 at 303 per Sheppard J. Black CJ, however, at 296, was of the view that the "possibility of copyright matter being played to callers through the telephone system" could possibly have been foreseen by parliament when it enacted the provisions.

15 Van Caenegem, W, "Copyright, Communication and New Technologies" (1995) 23 *Federal Law Review* 322 at 337: "The origin of the cable right is as a limited redistribution right for broadcasts and thus is subsidiary to the broadcast right. It was included in the Copyright Act to recognise the capturing of free-to-air broadcasts (that is, wireless transmissions) for further re-distribution via cable to remote areas where the broadcasts themselves could not be received." See also Cornish, above n9 at 356 and McKeough, J and Stewart, A, *Intellectual Property in Australia* (1991) at 127.

16 The inclusion of the statutory deemed licence in s199(4) to a person who retransmits authorised broadcasts to subscribers to a diffusion service must mean that the diffusion right was not intended purely to catch retransmitted broadcasts!

17 Emphasis added. "Guidance" here may not be a particularly appropriate word. The comment of the Copyright Convergence Group in their 1994 Report, above n12, which was released after the judgment of Gummow J in *APRA v Telstra* at first instance had been handed down, was this, at 19: "The provisions of section 26 are highly technical and their interpretation has tested the best judicial minds".

18 Subsection 26(2).

or telephone communications", a subscriber to the latter service is deemed to be a subscriber to the former service.¹⁹ It was held by the Federal Court that there was a relevant diffusion service, namely, the service of distributing music on hold, that that service was part of or incidental to the service of telephony, and that a subscriber to the telephone service is ipso facto a subscriber to the service of distributing music on hold. No separate subscription to the diffusion service is required.

This is undeniably a plausible interpretation of the relevant statutory provisions. Perhaps this is a necessary interpretation of the relevant statutory provisions. But there is also a certain craziness about it. I subscribe to the telephone service. I pay for its ability to provide me with voice to voice private communication links. Although I can perfectly well imagine myself becoming a subscriber to a diffusion service coming over the telecommunications wires, something like Pay-TV, for instance, I find it hard to think of myself as a subscriber to a music on hold diffusion service. If I wanted Pay-TV, I would make an agreement with the Pay-TV service provider, subscribe to the service and pay for it. I seem to make no such agreement for music on hold. I do not even like music on hold and I would never subscribe to a music on hold diffusion service if I could possibly help it. There is no doubt about my subscriber status, however, if Burchett J is right in saying that "... the subscribers to whom I have referred as customers of Telecom making calls to numbers provided with the facility to play music on hold are to be taken to be subscribers to the service of distributing matter over wires".²⁰

Music on hold may be only the beginning. If the High Court confirms the decision of the Full Federal Court in the case, there will be a new model of liability in the communications environment. The Report of the Copyright Convergence Group appeared after the decision at first instance in the *Telstra* case but before that of the Full Federal Court and one of the comments on the case in that Report was this:

On the other hand, if the decision at first instance is overturned, it is possible that Telstra, in its capacity as common carrier, could be responsible for the content of the services provided by means of its infrastructure. This too is an undesirable outcome.²¹

Many issues of content regulation and responsibility in the new communications environment and new possibilities of liability for telecommunications carriers for copyright infringement open up with the decision of the Full Federal Court and ultimately a quite dramatic shift of resources from those carriers and their subscribers to copyright owners could therefore take place.

Take the facsimile machine, for example. The owner of copyright in a literary work has the exclusive right to cause the work to be transmitted to subscribers to a diffusion service.²² If someone faxes a document to me which breaches a literary work copyright, then on the Telstra analogy, the telecommunications carrier which carries the facsimile signals could be made liable for

19 Subsection 26(5).

20 Above n1 at 319.

21 Above n12 at 20.

22 *Copyright Act 1968*, s31(1)(a)(v).

that breach. This is on the basis that there would be a relevant diffusion service, namely the service of distributing facsimile reproductions, that that service was part of or incidental to the service of telephony and that a subscriber to the telephone service is ipso facto a subscriber to the service of distributing facsimile reproductions. The very fact that I have a machine to receive faxed messages seems to confirm my status as a subscriber to a "facsimile service". And what about applications like video conferencing and the transmission of digitised works of various kinds over the telephone lines where my home computer is attached to a modem? It is difficult to see anything in that which would take the telecommunications carrier out of the *Telstra* model of liability.

The convergence of telecommunications, broadcasting, cable, information technologies and networked computing applications (which all evolved as separate communications technologies) with the advent of digitised material means that services can now all be delivered by interchangeable technologies. Many different sorts of applications can be delivered by the telecommunications infrastructure and emerging networks. And this raises further possibilities of *Telstra*-style liability reasoning for the new generation of communications services.²³ Will the *Telstra* decision make network infrastructure providers responsible for the content of on-line services through the back door and without the sort of elaborate legislative decision making process which one would expect to precede such a change in the law? Would the transmission of an on-line database in digitised form accessed through the use of a public telecommunications network be a diffusion service which could render Telstra liable for copyright infringements? Are subscribers to the telephone service automatically subscribers to that diffusion service? What about music on demand - a storage in digitised form of sound recordings which can be ordered and delivered on-line to a subscriber to the service? That service could well be viewed as a diffusion service which is "incidental to or part of a service of transmitting...telephone communications"²⁴ and which musical work copyright owners could use to draw a telecommunications carrier into liability on the reasoning made available to them by the *Telstra* decision. Presumably there are, with such services, targets for liability in the form of clearly identifiable non-carrier service providers,²⁵ something which was not the case in the *Telstra* music on hold decision, but the presence of such a service provider making use of the telephone lines for the provision of its services does not necessarily mean that Telstra cannot still be made liable under section 26 for the infringements committed by the service provider.

If, in order to avoid both having to say that persons who do not want to hear or have never thought about music on hold nevertheless are subscribers to a music on hold diffusion service and setting up a model of liability which could fundamentally alter the existing balance of interests in the communications

23 Since the Federal Court decision was handed down, APRA has demanded, from Australia's internet service providers, a payment of music royalties of one dollar per subscriber per year. This could produce annual royalty payments ranging from tens of thousands to millions of dollars. *The Australian*, 2 July 1996.

24 *Copyright Act* 1968, s26(5).

25 The access of non-carrier service providers to the telecommunications networks is regulated by the *Telecommunications Act* 1991 (Cth), Part 9 and such providers are viewed as themselves being customers of the telecommunications carriers.

environment, the High Court were minded to find a plausible alternative to the statutory interpretation accepted by the majority in the Full Federal Court, it could readily do so. Such an alternative exists in the judgment of Gummow J at first instance and in that of Sheppard J in dissent on the appeal. Both judges took the view that the service of transmitting telephonic communications cannot itself be viewed as the relevant diffusion service,²⁶ that it is necessary to find a distinct service of distributing matter before subsection 26(5) can operate,²⁷ and that there is in fact no relevant diffusion service here. The callers who perforce listen to music on hold cannot legitimately be viewed as subscribers to a music on hold diffusion service:

But the fact that Telecom operates the telephone service will not turn the provision of music on hold by Telecom or anyone else into a diffusion service for the purposes of the Act. And it will not turn those who listen to music on hold into subscribers to a diffusion service because they do not subscribe to any such service.²⁸

Without subscribers to a service, no liability under the diffusion right is possible and Telstra is released. Sheppard J went on, in dissent, to say:

Much was made of s.26(5) but, so it seems to me, it cannot control the whole meaning of the section nor be read so as to confer rights which are not to be found even incidentally in the provisions of s.31 which, after all, is the provision which confers the right, or in the remaining provisions of s.26.²⁹

This robust and assertive interpretive strategy certainly avoids the awful problem of defying common sense which bedevils the majority judgments, careful and finetuned though the logical arguments there are. And the strategy also leads to a substantively appropriate result in the case. The view of the Copyright Convergence Group on the issue of music on hold is that "as a matter of policy", music on hold is a commercial use of copyright material which should require the permission of and payment to the copyright owner.³⁰ That may be true. It may not be. However, to use the diffusion right given by the *Copyright Act* 1968 to find a defendant on whom legal responsibility can be placed (for the purpose of giving effect to that debateable policy) and, further, to make that defendant a general telecommunications carrier, whose role has not hitherto been viewed as one of content regulation and responsibility, is not the most fair or sensible way for the law of copyright to begin to participate in the new communications environment.

26 Above n2 at 363 per Gummow J and above n1 at 301 per Sheppard J.

27 Above n2 at 363 per Gummow J.

28 Above n2 at 364 per Gummow J. See also above n1 at 300 per Sheppard J.

29 Above n1 at 301 per Sheppard J.

30 Above n12 at 19. The composition of the Copyright Convergence Group which produced this Report may be worth noting here. The composition was such that each member of the four person committee could reasonably be said to have a significant affiliation with copyright owners, individuals and organisations, and that there was no copyright "user" representative or other person specifically appointed to speak for and promote the public interest on the committee.