

MUSIC ON HOLD: FULL FEDERAL COURT FINDS FOR APRA

Simon Gilchrist examines the decision and implications of the appeal decision in *APRA Ltd V Telstra Corporation Ltd.*

On 23 August 1995 the Full Federal Court of Australia handed down its long awaited judgment in the appeal by APRA of the decision at first instance in *Australasian Performing Right Association Limited v Telstra Corporation Limited* (1993) 46 FCR 131. The Full Federal Court allowed the appeal and overturned the judgment of the trial judge.

The original proceedings were commenced by APRA as a test case to determine whether Telstra would be liable under Section 31(1)(a) of the Copyright Act for infringement of copyright in respect of the playing of "music on hold". Section 31(1)(a) of the Copyright Act provides as follows:

"(1) For the purposes of this Act, unless the contrary intention appears, copyright, in relation to a work, is the exclusive right:

- (a) in the case of a literary, dramatic or musical work, to do all or any of the following acts:*
 - (i) ...*
 - (iv) to broadcast the work;*
 - (v) to cause the work to be transmitted to subscribers to a diffusion service; ..."*

Telstra plays music on hold in a variety of situations. Music on hold may be played to a person who has made a telephone call:

- (a) to a Telstra service centre or office;

- (b) to a customer of Telstra who has installed appropriate equipment for the playing of music on hold (such as a CD player or a radio receiver);

or

- (c) to a customer who is connected to a call handling service provided by Telstra known as "CustomNet", if the particular CustomNet system includes music on hold.

Music on hold may consist of recorded music or, alternatively, broadcast music received by a radio receiver.

In each of these cases, music on hold is transmitted through the general telecommunications network operated by Telstra. Music on hold may also be transmitted to callers through mobile telephone systems operated by Telstra.

The Full Federal Court held that in circumstances where music on hold is transmitted through the general telecommunications network (in any of the three circumstances described above), Telstra would be liable for causing the music to be transmitted to subscribers to a diffusion service within the meaning of section 31(1)(a)(v) of the Copyright Act.

The Full Federal Court also held that in circumstances where music on hold is transmitted through mobile telephone systems operated by Telstra, that Telstra would be liable for broadcasting the work within the meaning of section 31(1)(a)(iv) of the Copyright Act.

The Full Federal Court, however, held that where the music on hold consists of broadcast music received by a radio receiver, Telstra would have an implied licence to retransmit pursuant to section 199(4) of the Copyright Act that music through the general telecommunications network.

The main conclusions that can be drawn from the judgment are:

- (a) the transmission of music over Telstra's general telecommunications network as part of a music on hold service constitutes the transmission of music to subscribers to a diffusion service;
- (b) that by operating the general telecommunications network Telstra is liable for causing the transmission of music on hold;
- (c) that a transmission of copyright material will constitute a service of distributing that material regardless of whether:
 - (i) the service fulfils an extremely subsidiary role in a much bigger operation;
 - (ii) the customer who receives the service separately and specifically seeks the service;
 - (iii) there is a separate agreement in relation to the service between the person who causes the transmission and the customer;

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and

- (iv) the service simultaneously distributes the material to numerous receivers or distributes the material at different times to different receivers.
- (d) a transmission to subscribers to a diffusion service may be partly by wire and partly by wireless technology;
- (e) the concept of "in public" (which is relevant to the concept of performance in public) and "to the public" (which is relevant to the meaning of broadcast) are the same and, consequently, those cases which discuss the meaning of "in public" also relate to the meaning of "to the public"; and
- (f) the concept of "to the public" means "to the copyright owner's public"; and
- (g) a transmission to one person can constitute a transmission "to the public."

The decision has significant implications for Telstra and any other operator of a telecommunications network such as Optus or Vodafone. The decision appears to impose strict liability on a telecommunications carrier for the transmission of copyright material over their networks as part of a service, regardless of whether the carrier actually supplies, operates or consents to the use of the equipment, from which the material originates, such as a computer bulletin board, a WWW site, or a CD player.

The decision clearly has significant implications for owners of networks such as Telstra, Optus Vision and Australis media in respect of the unauthorised transmission of copyright material over their Pay TV systems, even though they may have no control over the content that is transmitted.

Because many types of sound recordings enjoy a broadcast right (not all sound recordings do), the operator of a mobile telecommunications network will also be liable for the broadcast of sound recordings used to provide music on hold. (Sound recordings do not currently enjoy a diffusion right.)

The decision also has important implications generally in respect of the meaning of transmission "to the public" and performance "in public". It is clear that transmissions that may not have previously been considered broadcasts within the meaning of the Act, will now be viewed differently. In particular, the concept of "broadcast" would appear to include point to point transmissions.

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The implications of the decision will have to be considered carefully by the CLRC in their current reference to consider amendments to the Copyright Act in the light of the Copyright Convergence Group's report Highways to Change and, more immediately, Federal Cabinet in its consideration of a joint submission by Ministers Kerr and Lee in respect of the introduction of a broad based right of "transmission to the public". Regardless of whether the Government decides to introduce such a right, and regardless of

whether it elects to define the concept of "to the public", it will need to look very closely at the policy implications of making telecommunications carriers liable for the transmission of copyright material over their networks. It will also need to look very closely at whether all point to point transmissions should fall within the concept of "transmission to the public".

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