

"The Panel" Decision of the Full Federal Court

Jackie O'Brien, Sabiene Heindl and Dana Wintermantel consider broadcast copyright in "The Panel" decision.

Once considered by many to be one of the weaker forms of copyright protection, the strength of broadcast copyright has been significantly bolstered by the Full Federal Court decision in *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd*.

The decision of the Full Federal Court of 22 May 2002 has significant implications for broadcasters, editors, producers and others within the television and motion picture industries.² The Full Federal Court held that the making of videos of third parties' television footage and rebroadcasting of any of the actual images and sounds constituted copyright infringement. Furthermore, fair dealing defences were undermined by elements of subjectivity and degree.

OVERVIEW

Briefly, Channel Nine alleged that Channel Ten had engaged in copyright infringement under the *Copyright Act 1968* (the Act) by broadcasting short excerpts of Channel Nine programs on its television show "The Panel" as its members highlighted the "serious" and "ridiculous" in that week's news and entertainment. The appeal to the Full Federal Court involved 10 program segments shown on The Panel ranging from the Prime Minister singing "Happy Birthday" to Sir Donald Bradman to

Marlena from "Days of Our Lives" levitating above a bed.

Channel Ten defended the action on the basis that the broadcast of the segments constituted "fair dealing"... either for the purpose of "criticism or review"³ or "the reporting of news".⁴

THE DECISION AT FIRST INSTANCE

At first instance, Justice Conti considered two main issues:

1. The scope of the television broadcast copyright under:
 - (a) section 87(a) of the Act – which grants the owner of the copyright in a television broadcast exclusive rights to make a cinematograph film of the broadcast or copy of such a film;

2. Whether or not the fair dealing defence would apply.

Justice Conti held that in order to infringe copyright in a television broadcast it was necessary to take a "substantial part" of that subject matter. He concluded that whether an excerpt was to be considered "substantial" was to be determined by reference to the particular subject matter. In relation to television footage, the subject matter was a program or a segment of a program with a self contained theme and did not include advertisements, station logos or station breaks.

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Justice Conti concluded that Channel Ten had not infringed copyright in Channel Nine's programs because the excerpts taken were not substantial in terms of quantity or quality and were not taken for a commercial purpose. Justice Conti also addressed the fair dealing defences, although this was not strictly necessary given the nature of his findings on copyright infringement.

which is transmitted or capable of being observed as a separate image on a television screen.

Videos of a television broadcast

The Court closely analysed section 25(4) of the Act and the catalyst for its enactment, namely the Spicer Report.⁶ The section relevantly provides:

"(4) In this Act:

(a) a reference to a cinematograph film of a television broadcast shall be read as including a reference to a cinematograph film, or a photograph, of any of the visual images comprised in the broadcast; and

(b) a reference to a copy of cinematograph film of a television broadcast shall be read as including a reference to a copy of a cinematograph film, or a reproduction of a photograph, of any of those images."

"any of the visual images" encompasses one or more of those images, without any requirement that the images should amount to a substantial part of the broadcast.

The Court rejected the argument put forward by Channel Ten namely that "whilst s25(4)(a) makes it clear that photographs can infringe, there would need to be sufficient photographs to amount to a substantial part of an identified broadcast."⁷ The Court considered this "unconvincing" as it paid insufficient regard to the recommendations of the Spicer Report, namely that "the taking of a photograph of any part" of a television broadcast should be an infringement.

Re-broadcast of a television broadcast

In respect of section 87(c) of the Act, the Court stated that the notion of "re-broadcasting" incorporated Channel Ten's transmission of The Panel segments that it had captured on video. In particular, Justice Hely stated:

"When is a television broadcast made? A television broadcast is made when the transmission of visual images and any accompanying sound begins. A television broadcast continues to be made as the transmission of visual images and any

THE DECISION OF THE FULL FEDERAL COURT

The Full Federal 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 held that there was no requirement that the visual images constitute a substantial part of the original broadcast.

In reaching this conclusion, the court first 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'.⁵ In contrast, the court considered a television broadcast to be a sequence of still images. Therefore, the court held that copyright can subsist in each and every still image

The Court concluded that the section extends the scope of copyright in television broadcasts to each and every visual image of that broadcast. Further, the fact that section 25(4) applied to both a photograph of any of the visual images, as well as to a cinematograph film, supported the notion that the expression

*accompanying sounds continues. Visual images and accompanying sounds as they are broadcast, themselves satisfy the definition of "television broadcast": cf the observations of Buckley LJ in Spelling Goldberg at 296. One does not have to wait until there has been a transmission of enough of the images and sounds to constitute a programme, or any other subject matter, before concluding that a television broadcast has been made."*⁸

Justice Hely held that the interest protected by the copyright is the actual images and sounds in the broadcast, rather than a larger "whole" or composite of interests. He concluded that a "television broadcast in which copyright may subsist is made whenever visual images and accompanying sounds are broadcast by way of television".⁹ His Honour expressly rejected the notion that the "thousands" of transmissions daily lead to any inconvenience or absurdity.¹⁰

WHAT ABOUT THE "FAIR DEALING DEFENCE"?

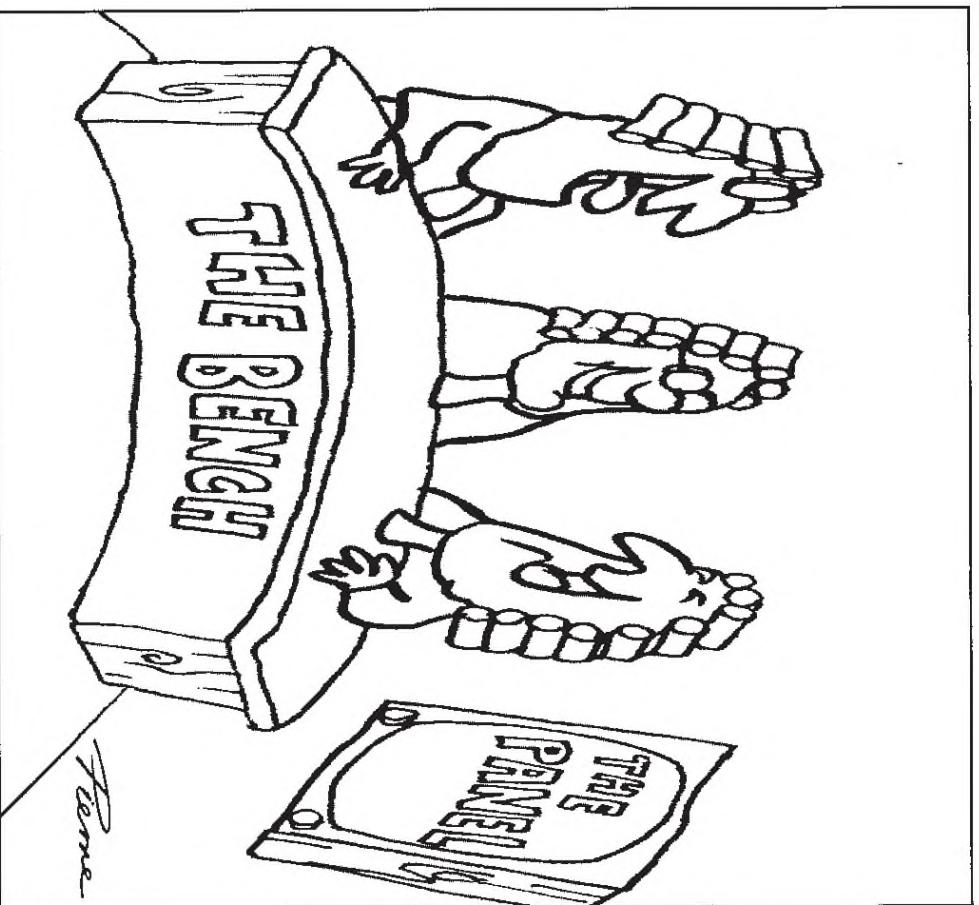
Channel Ten argued that the broadcast of the 10 segments the subject of the appeal constituted fair dealing for the purpose of either criticism, review or the reporting of news. The Appeal was upheld in relation to five of the 10 segments.

Justice Sunberg stated "*the defence of fair dealing involves questions of degree and impression, on which different minds can reasonably come to different conclusions*".¹¹ This is clearly borne out by the decision itself in which the three Federal Court judges reached different conclusions about whether or not the fair dealing defence was established in relation to some of the segments.

The Court did broadly agree on the principles that emerged from authorities involving fair dealing defences (as summarised by Justice Conti at first instance), which included¹²:

Generally:

- "fair dealing involves questions of degree and impression; it is to be judged by the criterion of a fair



minded and honest person, and is an abstract concept";

- "fairness is to be judged objectively in relation to the relevant purpose, that is to say, the purpose of the criticism or review or the purpose of reporting the news; in short, it must be fair and genuine for the relevant purpose" ...;

Criticism and review:

- "must be genuine and not a pretence for some other form of purpose, but if genuine, need not necessarily be balanced";

News:

- "news is not restricted to current events" and "may involve the use of humour though the distinction between news and entertainment may be difficult to determine in particular circumstances".

Channel Nine argued that it was incumbent upon Channel Ten to prove that it had the relevant purpose of

criticism or review or of news reporting. It argued that Channel Ten's purpose was to entertain, provide program content and achieve ratings and that this did not ground a fair dealing defence. The Court held that even if that was Channel Ten's purpose, this did not disentitle it from relying on the fair dealing defence if Channel Ten's program involved or included criticism, review or reporting of news.

The Court considered the particular Panel Segments the subject of the appeal. Those of particular interest are the segments for which the Court reached differing views. For example:

- *The Today Show* segment showed Boris Yeltsin shaking hands with three former Russian Prime Ministers. Justices Hely and Sunberg confirmed the primary judge's statement that there could be an overlap between news and entertainment and that the primary judge had not erred in coming to the conclusion that the particular segment was entertainment only. In contrast, Justice Finkelstein concluded that the discussion

“whether there should be an age limit imposed on a president, while considered in a humorous way because of Yeltsin’s known drinking and memory problems, was newsworthy.” This was all that was required for fair dealing.

- The *Simply the Best* segment showed the audience casting a vote on which was the “best” variety of things, however the voting was given no context. Justice Finkelstein stated that the Panel’s discussions about what the vote was for and the various possibilities raised was justified criticism about the show’s format. On the other hand, Justices Sunberg and Hely agreed with the primary judge that the fair dealing “defence was not made out because of the paucity of the evidence which left no viable basis for comprehending, much less resolving, what was the true nature of the alleged criticism”.

THE CONSEQUENCES...

The Panel decision generates little comfort or certainty in relation to the dealings and treatment of broadcasters. On one hand, the threshold for copyright infringement has been significantly reduced. Broadcasters, editors, producers and others within the television and motion picture industries risk copyright

infringement in the making of videos of third parties’ television footage and rebroadcasting of any of the actual images and sounds. There is no requirement that the visual images so transmitted must constitute a substantial part of the original broadcast.¹³ This obviates any previous need to consider whether any harm had been inflicted on the television broadcaster’s commercial interest in the program.

Yet in the face of heightened risks of copyright infringement, the Federal Court did not perceptibly broaden third parties’ ability to establish a defence to such infringement. Rather the Federal Court highlighted in both word and deed the element of “subjectivity” in recognising that different people may reach different decisions on whether or not the defence of fair dealing applies. The Panel decision itself contains conflicting conclusions on whether or not a particular segment could be properly characterised as the reporting of news or criticism or review. For example, it appears that where humour is involved it is more difficult to establish the fair dealing defence. Ultimately, whether the defence can be established will depend on subjective judicial determinations based on questions of degree and impression.

The decision is currently the subject of an application for special leave to the

High Court of Australia. Many will await the outcome of the application with great interest.

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1 [2002] FCAFC 146 (22 May 2002).

2 The decision of the trial judge was discussed in “Fair or Foul Dealing: The Panel and Copyright”, Golder, T and Ward, T, *Communications Law Bulletin*, Volume 20, Number 3, 2001 at page 6.

3 Section 103A of the Act.

4 Section 103B of the Act.

5 Section 10 of the Act.

6 *Report of the Copyright Law Review Committee*, 1959 (the *Spicer Report*).

7 Justice Hely at paragraph 68 [2002] FCAFC 146 (22 May 2002).

8 Justice Hely at paragraph 80 [2002] FCAFC 146 (22 May 2002).

9 Justice Hely at paragraph 82 [2002] FCAFC 146 (22 May 2002).

10 Justice Hely at paragraph 88 [2002] FCAFC 146 (22 May 2002).

11 Justice Sunberg at paragraph 2 [2002] FCAFC 146 (22 May 2002).

12 Justice Hely at paragraph 98 [2002] FCAFC 146 (22 May 2002).

13 Despite the fact that the court did suggest that in certain circumstances copyright infringement may not occur if the re-broadcast does not substantially resemble the original footage (eg, if the segment has been cropped or the sound removed) or it is very “insubstantial in duration”.

Sharing the Burden of Providing Local Content in Regional Television

John Corker comments on a recent ABA proposal for increased programming of local news and information on commercial television in regional Australia.

The Australian Broadcasting Authority (the ABA) should be congratulated for finally taking on the difficult issue of localism in regional television programming. Ensuring appropriate coverage of matters of local significance has been an object of the *Broadcasting Services Act* since 1992 but this is the first time the ABA has suggested a solution.

The proposal has the potential to be a win/win for the industry and the public but not in its current form.

In its report released on 27 August 2002 the ABA suggests that a licence condition be imposed on all regional commercial television licensees in regional Queensland, New South Wales and Victoria that requires them to broadcast a minimum amount of programs about matters of local significance by meeting a points target each week equivalent to 45 minutes of local news or 90 minutes of local information per week. Comments were sought by 31 October 2002.

What the proposal lacks is the flexibility for licensees to share this responsibility between them in the most efficient commercial manner.

Commercial television news services in regional and remote Australia have been closing down for some time. The reason is that local news programs aren’t rating as well as other programs. Significantly this has occurred in three of Australia’s largest regional markets, Wollongong, Newcastle and Canberra. The ABA has formed the view that the market is unable