Right Place Right Time for National Indigenous Television

John Corker introduces the National Indigenous Television Service and the legislative history behind its inception.

On 13 July 2007 the first broadcast of the new National Indigenous Television service (***NITV***) took place. The service is compiled at the Imparja Television studios in Alice Springs and uplinked from Sydney to a national satellite beam. Initially the service will be mainly received at the 150 or so terrestrial retransmission sites in remote Aboriginal communities throughout Australia. This 'Beaming in the Bush' launch is a first stage with plans and negotiations well underway for retransmission on other platforms. These will be facilitated by the March 2007 amendment to s212 of the *Broadcasting Services Act 1992* (Cth)(***the Act***) which extends the protection against legal suit in respect of retransmission to those persons who 'do no more than transmit program material supplied by National Indigenous TV Limited.'

How NITV came about is largely a story of political happenstance that dates back to the year 2000. It is true that Aboriginal and Torres Strait Islander people have been producing their own television programs and services in their own communities since the mid 1980s and aspired to provide a national service for at least that long but it only became possible when the current Government announced in June 2006 that $48.5m would be made available over the next four years to establish the service.

In 2000, the Commonwealth Government was trying to get the *Broadcasting Services Amendment (Digital Television and Datacasting) Bill 2000* through the Senate and in those days, for a Bill to be passed, it needed either the Democrats or the Greens and Senator Harradine to support it if the Opposition didn't.

The Bill contained a long list of statutory reviews to be conducted as digital-rollout progressed and the Government agreed to insert another one at the behest of the Democrats. To be conducted before 1 January 2005 there was to be a review of 'the viability of creating an indigenous television broadcasting service and the regulatory arrangements that should apply to the digital transmission of such a service using spectrum in the broadcasting services bands'. The objects of the Act were also to be amended to include:

> s. 3(1)(n) To ensure the maintenance and, where possible, the development of diversity, including public, community and **indigenous broadcasting**, in the Australian broadcasting system in the transition to digital broadcasting.

The mention of Indigenous broadcasting had never before appeared in the Act. Local pirate TV stations in Yuendumu (NT) and Ernabella (SA) had existed for a number of years and then been licensed under the *Wireless and Telegraphy Act 1905* (Cth) later with 'limited licences' under the *Broadcasting Act 1942* (Cth) deemed to be community broadcasting licences under the *Broadcasting Services Act 1992* (Cth), but there had been no mention of Indigenous broadcasting in legislation.

In March 2000 the final report of the Productivity Commission inquiry into the Act recommended that the Government should examine the need for, and feasibility of, establishing an Indigenous broadcasting service, including who should provide the service, how the service should be provided; the additional government resources required; and a timetable for implementation.

Following this recommendation a feasibility study was commissioned by ATSIC and the National Indigenous Media Association of Australia. The report was prepared by Malcolm Long & Owen Cole in December 2000 and set out 4 models for a national service, preferring a partnership model between existing Aboriginal broadcasters. Approaches to the Minister over the next four years were unsuccessful in advancing the cause.

In April 2004 DCITA released its discussion paper on the required statutory review. The National Indigenous Television Committee (***NITV Committee***) was formed from among existing Aboriginal broadcasters and program makers to help develop a submission to the review. Following a summit of Aboriginal broadcasters held in Redfern in July 2004, the submission for a stand alone national Indigenous narrowcasting service was prepared, the key concepts being that it be a national service and that it reach as many Aboriginal and Torres Strait Islander people as possible. DCITA also conducted consultation meetings in many centres around the country and commissioned Gilbert + Tobin to provide rough costings for providing various models of an Indigenous television service.

On 11 August 2005 the report of the review was released and canvassed four options:

- a stand alone national broadcaster at a cost of $80m p.a. by year 5
- imposing an increased Indigenous programming responsibility on SBS at a cost of $4.8m capital and $5.7m per annum.
- enhancement of the existing Indigenous Community Televsion (***ICTV***) narrowcasting service being provided on Imparja at a cost of $10m p.a. for capital and content. The ICTV service was already being provided by a number of Aboriginal communities and media organisations who were aggregating content shot in their communities, at a hub based in Alice Springs, and then providing it to Imparja for uplink. This service was going to air 24/7 albeit with a high program repetition rate.
- a new Indigenous television content production fund for $6m p.a.

The review report contained no preferred option and suggested that the Ministerial Taskforce on Indigenous Affairs should consider whether any recommendation should be made to Government. The NITV Committee was told there was no current intention to act on the review report.

However, a week can be a long time in politics and this was the lead up to the Government trying to get the *Telstra (Transition to Full Private Ownership) Bill 2005*

through the Parliament. On 17 August 2005 the Minister announced $90m for a *Backing Indigenous Ability* initiative which would 'address phones, Internet and videoconferencing in remote Indigenous communities and improve Indigenous radio and television contingent on the passage of the sale of Telstra legislation.' No details were available but with the government casting around for projects to appease Barnaby Joyce and the Nationals who were seeking to maximize the size of the Future Fund and new regional telecommunications projects, the Minister announced on 1 September that the Telstra Sale was to benefit Indigenous Television and that $48.5m of the $90 m *Backing Indigenous Ability* funds were to be allocated to develop an Indigenous television service over four years to be used to build on the existing ICTV service broadcast by Imparja.

On 8 September the *Telstra (Transition to Full Private Ownership) Bill 2005* was introduced into Parliament and on 14 September, the Bill passed through the Senate.

This was the right place at the right time for Indigenous Televsion and has created a unique opportunity to provide a new and innovative service that will reflect Aboriginal Australia to Aboriginal and non-Aboriginal Australians. Program genres will include children's programs and an Aboriginal AFL footy panel show.

The Foundation members of NITV are Imparja Television Pty Ltd, Indigenous Remote Communications Association, Indigenous Community Televsion Ltd, Indigenous Screen Association Incorporated, Australian Indigenous Communications Association and the Federation of Aboriginal and Torres Strait Islander Languages Corporation. The service has offices in Alice Springs and Sydney.

The challenge now is to establish a service that entertains and informs audiences so brilliantly that the service must be continued beyond 2011.

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High Court Takes The Wind out of Shipbuilders Sails

Marina Lloyd Jones reports on a recent decision in which the High Court considered the meaning of 'artistic craftsmanship' and the copyright / design overlap.

In April of this year, the High Court was required to consider the interplay between art and function, and between copyright and designs, in the context of a case involving the design of racing yachts. Its decision in *Burge v Swarbrick*[1] provides useful guidance on the meaning of "artistic craftsmanship", a term at the heart of the copyright / design overlap.

Mr. Swarbrick and the JS9000

The respondent, Mr. Swarbrick, was a well-known naval architect who had designed and was involved in the manufacture of the JS 9000, a commercially successful racing yacht. After drafting plans for the boat, Mr Swarbrick had created a "plug", a full-scale model of the hull and decks. Moulds were formed around the plug, becoming an inverted reproduction of the plug, and then used to produce mouldings (parts of the boat itself) which themselves were exact replications of the plug. The resulting mouldings were then fitted out with the keel, rigging and other components to form the finished boat.

While the original plug had been destroyed, Mr Swarbrick had provided mouldings to two of his employees, who later left to work for Boldgold Investments Pty Ltd ("Boldgold"). Boldgold began to manufacture a boat using the mouldings, and Mr Swarbrick applied for an interlocutory injunction alleging infringement of his copyright in the drawings, the plug, the mouldings and the boat itself. Mr. Swarbrick had not registered any designs relating to the JS9000 under the *Designs Act 1906* (Cth) (since replaced by the *Designs Act 2003* (Cth) ("Designs Act")) and admitted that the design for the plug and the mouldings had been industrially applied (in other words that he had manufactured more than 50 articles). As explained below, this admission and the failure to register required him to prove that the relevant works were "works of artistic craftsmanship" protected by copyright.

The copyright / design overlap

Certain objects may qualify for "dual protection" if they are both as "artistic works" under the *Copyright Act 1968* (Cth) ("Copyright Act") and registrable as designs under the *Designs Act*. For instance, the visual features of the shape of a chair may be registered as a design, while the drawing of the plan for the chair, and the chair itself, may also be "artistic works" protected by copyright. Conversely, a designer may lose their ability to enforce copyright if they take certain action relating to a corresponding design.

Various legislative amendments have sought to establish appropriate boundaries between these two forms of protection, and a degree of overlap remains. The "overlap provisions" are set out in sections 74 to 77A of the Copyright Act, and following amendments made by the *Designs (Consequential Amendments) Act 2003* (which came into force on 17 June 2004, after the events considered in *Burge v Swarbrick*), the law as it currently stands is:

- a copyright owner who registers a design corresponding to the relevant artistic work (where that registration relates to the three-dimensional features of a product) will be prevented from enforcing their copyright against infringers and must rely on design law;
- a copyright owner who registers a design corresponding to the relevant artistic work (where that registration relates to the two-dimensional pattern on a product, such as a wallpaper design) will retain their copyright protection in the artistic work and enjoy "dual protection"; and