

Fair or Foul Dealing: The Panel and Copyright

Tim Golder and Teresa Ward examine the Federal Court decision dealing with allegations of copyright infringement by Channel Nine against Channel Ten over humorous rebroadcasts by The Panel.

The show *The Panel* has fast become a weekly fixture in the schedules of many television viewers. The blend of satire and occasionally serious conversation draws on both print media and television broadcast sources for topics of conversation and inspiration. Nothing is sacred to the members of *The Panel's* team. Anything and everything comes under scrutiny as the lens of *The Panel* highlights the serious and the ridiculous in the week's news and entertainment.

Late last year, Channel Nine (Nine) brought proceedings against Channel Ten (Ten) for an alleged breach of television broadcast copyright by showing short excerpts on *The Panel* of 20 of Nine's programs. Justice Conti of the Federal Court had to consider two main issues: the scope of the television broadcast copyright granted under section 87 of the *Copyright Act 1968* (Cth) and the application of the fair dealing defence to copyright infringement in relation to each of the excerpts taken.

THE SCOPE OF TELEVISION BROADCAST COPYRIGHT: S 87

Nine argued that Ten had infringed the exclusive rights given to them under section 87, as owners of the television broadcast copyright in their television programs. Section 87(a) grants the exclusive right to make cinematograph films of the broadcast, and section 87(c) grants the exclusive right to re-broadcast the broadcast.

Scope of copyright?

In order to show breach of television broadcast copyright, Nine had to show that Ten had taken a relevant part of each television broadcast in question. Nine's critical submission was that taking any of the visual images comprised in a television broadcast amounted to a relevant taking in relation to the television broadcast because of the operation of section 25(4)(a). Section

25(4)(a) is an interpretative provision which deems that a reference to a cinematograph film of a television broadcast is a reference to any of the visual images comprised in the broadcast. Nine argued that section 25(4)(a) extends the scope of television broadcast copyright to each and every visual image of the broadcast, so that one did not need to show (unlike with other parts of the copyright regime, such as literary works) that a substantial part had been taken.

Justice Conti rejected Nine's submission for two reasons. First, section 25(4)(a) did not apply to section 87(c), which was only concerned with re-broadcasting and not making cinematograph films. Second, although section 25(4)(a) did operate on section 87(a), the requirement that a 'substantial part' of the broadcast

had to be taken remained. He considered that taking a literal interpretation of the impact of section 25(4)(a) on section 87(a) gave a nonsensical result. A single image is not a substantial part in most circumstances, and Justice Conti commented that such an interpretation would mean that a single sound of a sound broadcast would also infringe copyright. He therefore held that there would be no infringement unless a substantial part of the relevant broadcast was taken.

He accepted Ten's submission that section 25(4)(a) was included to ensure that a series of single images taken would be capable of infringing copyright in certain circumstances, eg. a series of photographs taken from a broadcast for the purposes of inclusion in a poster or advertisement. It was not intended to extend the scope

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of copyright to each and every visual image in the broadcast. To do so would be to grant television broadcast copyright greater protection than other forms of copyright, which was an unlikely legislative intention.

Justice Conti's concern that television broadcast copyright not be extended beyond copyright for original works may be valid, however, section 25(4)(a) is only concerned with infringement when cinematograph films are made of television broadcasts, not the scope of copyright to be granted in a more abstract sense. The wording of the section does make reference to both a photograph of any of the visual images in a broadcast, and a cinematograph film of any of the visual images in the broadcast. The section also does not express itself as subject to any other provision of the Act. This would seem to suggest that more than single photographic images taken for posters is intended and that the section is, therefore, intended to extend television broadcast copyright under section 87(a).

Assessment of 'substantial part'

In determining how to identify a 'substantial part' of a broadcast, His Honour considered the approach to substantiality taken in relation to both copyright works and published editions. The assessment of substantiality in relation to copyright works focuses on the quality or materiality of what is taken, rather than the quantity. The approach taken to published edition copyright focuses on the object or purpose of the use which the material is put to, as well as quality and quantity. He considered that the latter approach better informed the court on the approach to take in relation to television broadcast copyright. He therefore held that substantiality should be assessed by reference to both the quality of presentation and screen appearance taken, and the quantity of the program taken in terms of viewing time, as well as the purpose of the taking. The emphasis placed on either will depend on the circumstances of the case; however, purpose will be a significant factor that will, in some situations, be a material determinant of substantiality.

A simple and practical test for broadcasters will therefore be to ask if there has been a commercial pirating, in the sense that harm has been inflicted, or potentially will be inflicted, on the television broadcaster's commercial

interest in the program eg. a reduction in ratings, diminution of advertising profits. If a broadcaster takes visual images from a competitor for the purpose of including them in a similar broadcast then the purpose will be a prohibited one, and substantiality will be established so long as a sufficient amount in terms of quantity and quality has been taken. However, as with the excerpts taken by *The Panel*, if the taking is for the purpose of comment, satire or light entertainment then this will not ordinarily involve infringement because no commercial interest of the competitor has been damaged, provided that a significant part has not been taken in terms of quality and quantity.

FAIR DEALING DEFENCES

Justice Conti considered the fair dealing defence, even though it was strictly unnecessary given his earlier finding of no infringement. He commented that fair dealing involves a question of degree and impression and is to be judged by the criterion of a fair minded and honest person. He went through the footage of each segment deciding in principle whether the often irreverent commentary could be called fair criticism, review, or reporting the news.

Reporting the news

Justice Conti commented that the use of humour does not disqualify commentary from being a fair dealing for the purposes of reporting the news. However he commented that the distinction between news and entertainment was difficult to determine in some situations and was a question of degree. News is also not restricted to current events, but the events depicted must be objectively judged as newsworthy. He considered that the defence of reporting the news would have been made out in relation to an excerpt of *The Inaugural Allan Border Medal Dinner* that was shown on *The Panel*. Members of team pointed out the fact that in the broadcast Glenn McGrath, a well-known cricketer, had not noticed the Prime Minister's attempt to congratulate him. Ten argued that unusual or incongruous moments in the Prime Minister's life were inherently newsworthy and Justice Conti agreed.

He would not have granted the defence, however, in relation to an excerpt of *Midday* that showed the Prime Minister singing 'Happy Birthday' to Sir Donald

Bradman. The commentary of the members of *The Panel* was:

Did anyone see when Kerri-Anne got the Prime Minister to sing Happy Birthday to Don Bradman?

That will get him back in.

It's not right to mock someone's stature but he really looks like he should have a hand up his... .. moving his mouth when he sits on that little stool.....

Well I reckon if he didn't sing it, she would have put her hand.....

Kerri-Anne will not take no for an answer.

She is essentially a Labor voter 'cos she got Costello to do the Macarena... and made him look like an idiot and now she's done it with John Howard.

Justice Conti considered that the commentary was for the purpose of satirising the Prime Minister and Kerri-Anne Kennerley and was not 'reporting the news'. The events had been televised earlier in full and were not newsworthy in any other way.

Criticism or review

Justice Conti commented that criticism or review must be fair and genuine. Any hidden motive may disqualify reliance on criticism or review, particularly if the copyright infringer is a trade rival using the copyright subject matter for their own commercial benefit. If the criticism or review is genuine, however, it need not be balanced. For example, Justice Conti would have accepted the defence in relation to an excerpt shown from the show *Days of Our Lives*, which showed a long-standing character, Marlina, as devil possessed. Justice Conti considered that the commentary given by the members of *The Panel* was fair review because it was insinuating a loss of originality and novelty in the show, or, in the words of *The Panel* commentators:

The writers sit around and they go... they've gone after 10 or 11 years and they've gone "guess we've got to make someone possessed".

He considered that the defence would not apply in relation to a segment of *Simply The Best* that was shown. Ten had argued that the criticism was of the underlying artistic work in the design when members

of *The Panel* said:

The set was a little.....

Perplexing.

It was sort of like the seats were 'Who Wants to be a Millionaire' meets the desks of 'The Footy Show' meets an inner-city brothel. It was just... what I imagine an inner-city brothel would look like is what I mean.

Justice Conti considered that there was not a viable basis for criticism or review and that the members of *The Panel* were just trying to be amusing. In fact, he commented that there was not 'a viable basis for comprehending, much less resolving, what was the true nature of the criticism.'

Sufficient acknowledgement

Both defences require that sufficient acknowledgement of the author of the work is given before the defence can be established. Justice Conti commented that this is ordinarily achieved by communicating, by spoken words or writing the authors' name. He held that use by Ten of an 'on-screen watermark

'Ch 9' was sufficient acknowledgement even in the absence of Nine's logo being shown.

WHAT DOES IT MEAN FOR BROADCASTERS?

Based on Justice Conti's judgment, taking small parts of a competitor's broadcast programs, or segment of a program, will generally not be an infringement of copyright so long as the excerpt is not used for a commercial purpose, or to damage a competitor's interests. A practical test for broadcasters will be to ask if there has been a commercial pirating, in the sense that harm has been inflicted, or potentially will be inflicted, on the television broadcaster's commercial interest in the program. If there has then it is likely that there has been a substantial taking. An assessment of the quality and quantity of the excerpt is still essential, but the purpose element will be significant in determining the final outcome.

A word of warning, however - although certainly providing a level of comfort, there is no guarantee that Justice Conti's

interpretation of sections 25(4)(a) and 87 will be followed, and, therefore, the use of a small (insubstantial) part of a competitor's broadcast (where the fair dealing defence is not available) may still carry with it some risk.

The fair dealing defences will be available despite the program having a primarily humorous or satirical focus. The defence of reporting the news is not restricted to serious commentary, however it must be clear that it is news and not entertainment, a distinction which is often difficult to draw. If the criticism or review is genuine then the commentary need not be balanced, or serious. However hidden commercial motives may disqualify a broadcaster from relying on this defence, particularly if they are a trade rival using the copyright subject matter for their own benefit. These issues will be a question of degree and impression, and, ultimately, what sense of humour the court thinks a fair and honest minded person has!

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M-Commerce and Wireless Advertising - Legal Challenges for Carriers

Buying a coke with your mobile phone is just the beginning for mobile commerce, Niranjan Arasaratnam and Joanna Davidson discard the hype to assess this new service.

The mobile commerce reality finally caught up with the hype in Australia in May. Coca Cola installed nine vending machines at Sydney's Central Station which allowed consumers to "dial a Coke" using their Telstra mobile phones and have the cost of the drink added to their phone bill. The phrase "Dial a Coke" was added to the suburb display on the screen of phones which have the location display option enabled, reminding consumers that the service is available. This initiative represents only the most miniscule tip of the mobile commerce iceberg.

Mobile location services are value-added services that are based on a consumer's location. They combine three factors that

boost the value of information to the typical consumer: personality, time-criticality and location-dependency. They have the potential to provide solid revenue streams to carriers in mobile markets where voice telephony revenues are reaching saturation point.

Interestingly enough, regulation is driving the development of mobile location services internationally. For example, in both the US and the EU, legislation mandates carriers to provide emergency services location information in the near future. This has had a significant impact on the positioning technology adopted by mobile network operators.

Developments in mobile location service technology raise some unique privacy concerns. Regulators in overseas markets are paying increasing attention to such concerns. In Australia, with the new privacy legislation on the horizon, the regulation of this technology is at an embryonic stage.

A UNIQUELY SENSITIVE TECHNOLOGY

Mobile location services carry with them some novel legal issues. In particular, the major privacy concerns of the wired internet (including surveillance, spam and profiling) are magnified by wireless technology. It allows carriers to form a