

Communications Law BULLETIN

CAMLA

Communications & Media Law Association Incorporated

Print Post Approved PP: 234093/00011

Cloudy Day for Copyright Control: The 'Optus TV Now' Case and the Battle Between Content Protection and Innovation

Tureia Sample provides an overview of the background, legal issues and implications for participants in the media industry arising out of the recent Federal Court decision in *Optus v NRL & Ors*.¹

The recent first-instance decision in the Optus TV Now litigation has attracted much attention. The case is an Australian first for cloud technology and the 'private and domestic' time-shifting exception to copyright infringement for broadcasts under section 111 of the *Copyright Act 1968* (Cth) (the **Copyright Act**). At the heart of the dispute is the tension between encouraging innovation on the one hand and protecting existing copyright investments on the other.

Although the AFL and the NRL matches were the focus of protection in this litigation, the implications of the case extend further afield. The dispute is entering uncharted territory for broadcasting in Australia and will affect all Australian free-to-air television (and radio) programming, not just sports events. It will also have considerable impact on negotiations for media rights fees, growth of digital media and the interpretation of copyright law.

At first instance, Justice Rares decided in favour of Optus.² But with the AFL, NRL and Telstra promptly lodging an appeal on 10 February 2012 and intense lobbying underway in Canberra, the controversy is far from over.

Optus TV Now service

The Optus TV Now service is a cloud-based subscription service which allows users to record free-to-air television programs (including AFL and NRL matches) and replay them back on a compatible device (namely PCs, Apple devices, Android devices and 3G devices).

To make a recording, users navigate an electronic program guide to select programs and then click the 'record' button. Optus' complex recording system then makes four copies of each broadcast for every user request. These are then stored in Optus' NAS (network attached storage) computer at its data centre (aka 'in the cloud') for up to 30 days.

When requested by a user, the selected programs are streamed to the user's enabled devices. It is important to note that, contrary to some media reports, the content is *streamed* to the customer and not *downloaded* (which is relevant to the copyright claims in the litigation).

Up to 45 minutes of programming can be stored for free (although all subscribers must first have an Optus Zoo account). Alternatively, subscribers can pay \$6.99 for 5 hours or \$9.99 for 20 hours of storage per month.

Volume 30 N° 4
March 2012

Inside This Issue:

Cloudy Day for Copyright Control:
The 'Optus TV Now' Case and the
Battle Between Content Protection
and Innovation

Convergence Review:
An Ambitious Agenda for
Overdue Reforms

Holding Back the Tide:
King Canute Orders and
Internet Publications

Spectrum Management and the
Future of the "Sixth Channel"

Cloud Computing in the Wake
of MegaUploads

Communications Law Bulletin

Editors

Valeska Bloch & Victoria Wark

Editorial Board

Niranjan Arasaratnam
Page Henty
David Rolph
Shane Barber
Lesley Hitchens
Matt Vitins
Deborah Healey

Printing & Distribution: BEE Printmail

Website: www.camla.org.au

¹ *Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd (No 2)* [2012] FCA 34 (1 February 2012).

² *Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd (No 2)* [2012] FCA 34 (1 February 2012).

Contents

Cloudy Day for Copyright Control: The 'Optus TV Now' Case and the Battle Between Content Protection and Innovation

Tureia Sample provides an overview of the background, legal issues and implications for participants in the media industry arising out of the recent Federal Court decision in *Optus v NRL & Ors*.¹

Convergence Review: An Ambitious Agenda for Overdue Reforms

Kate Jordan and Toby Ryston-Pratt take a look at the Convergence Review Committee's Interim Report, its implications for the media and communications industry and make some observations about the current recommendations, including proposed changes to media ownership laws.

Holding Back the Tide: King Canute Orders and Internet Publications

Sophie Dawson and Paul Karp consider the treatment and utility of King Canute orders and their implications for internet publishers.

Spectrum Management and the Future of the "Sixth Channel"

Sarah Strasser looks at the status of spectrum management in Australia, focusing on the future of the last unallocated channel of spectrum reserved for broadcasting purposes.

Cloud Computing in the Wake of MegaUploads

Joelle Vincent considers the implications for cloud computing industry following the investigation and shutting down of online storage service provider, MegaUploads.

What is all the fuss about?

Consumers across the globe have been making personal recordings of free-to-air television programs on their personal video recorders (**PVRs**), and prior to that video cassette recorders (**VCRs**), for decades. In Australia, live free-to-air television can already be watched via mobiles under the retransmission scheme³ with Optus Zoo, Telstra and Vodafone Hutchison. So some may ask, what is all the fuss about?

Certainly Optus' position is that the Optus TV Now service is a legitimate personal recording service which is no different to a PVR. Moreover, the Optus TV Now service only permits temporary copies to be streamed which is arguably less offensive to rights-holders than permanent copies being downloaded.

But to others in the industry, the Optus TV Now service is going just that bit further. The service is available on a mobile device whereas many established PVRs are predominantly still physically tied to the home. In addition, under the retransmission scheme (whereby Optus, Telstra and Vodafone Hutchinson retransmit live and unaltered free-to-air television programs to mobiles), at least the underlying rights-holders in the television programs receive *some* remuneration.

In some countries home taping is remunerated (eg by statutory licences or a levy).⁴ In contrast, the operation of the Optus TV Now service in Australia does not return any revenue to the copyright owners. Moreover, for practical reasons the mobile retransmission scheme is limited to only the national signals of the ABC and SBS main channels. This makes Optus TV Now more attractive because it offers mobile access to all Australian free-to-air channels including the digital multi-channels.

Further, more than just a recording device, the Optus TV Now service is virtually live. On certain devices, programs can be replayed just two minutes after the live free-to-air broadcast commences. Even the use of the word *Now* in the marketed brand 'Optus TV Now' portrays an appealing flavour of immediacy.

From the AFL and NRL's perspective, Optus is making money from their intellectual property without paying any rights fees as well as threatening the exclusivity of internet and mobile rights deals.

The litigation

On 26 August 2011 Optus boldly initiated proceedings under section 202 of the Copyright Act, seeking protection against copyright infringement notices from the AFL and NRL. The litigation then exploded into a landmark test case involving major players in the communications, sports, media and legal industries and four complex copyright claims (see timeline of proceedings at the end of this article).

The AFL, NRL and Telstra then filed a cross-claim, alleging that Optus infringed the copyright in the broadcasts and films of the AFL matches and NRL matches by making cinematograph films (that is, recordings) of the broadcasts of the matches without a licence. They further alleged that Optus 'communicated' the recordings 'to the public' when such recordings were streamed to users' compatible devices for viewing.

In its defence, Optus said that no licence was required because the copies were made by Optus subscribers, not Optus, under the section 111 time-shifting exception. In Optus' view, it is merely trading in functionality and cloud storage services, not the copyright content itself.

³ Copyright Act 1968 (Cth), Part VC.

⁴ For example, in the United States the *Audio Home Recording Act* of 1992 has established a levy on blank tapes and an exemption for home taping. A similar scheme was attempted by the Australian government but declared constitutionally invalid by the High Court in *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480.

Screenrights (an Australian non-profit company that collects audio-visual licence fees for rebroadcasting TV programs including via mobiles) also sought to make an *amicus curiae* submission in relation to the retransmission scheme. Leave was denied by Justice Rares but Screenrights are open to make another submission in the appellate proceedings.

Justice Rares' judgment

The hearing was set down for four days in December 2011 but was dealt with in two. Seven principal legal issues were agreed which essentially relate to three questions.

1. Did the user or Optus 'make' the recordings (or copies) of the broadcast?⁵
2. If it was the user, did those recordings (or copies) fall within the time-shifting exception of sections 111(1) and (2) of the Copyright Act?
3. When the recorded program was streamed to the user for later viewing, did Optus or the user 'communicate' such recording to 'the public'?⁶

On 1 February 2012, Justice Rares found in Optus' favour on all three questions.

Who made the recording?

On the first issue, Justice Rares found that it was the user who made each recording when the user clicked the 'record' button on their compatible device. He found that because individuals had to program each recording and because Optus only made individual copies for customers if a request was received, it was the individual user and not Optus that were making the copies.

Justice Rares noted that section 111 is technology neutral and does not require the user to have any particular relationship (such as ownership) to the recording equipment. He described the Optus TV Now service as 'simplicity itself'⁷ and 'apparently easier for a user to employ than some of the technologies available ... such as a DVD recorder, DVR (digital video recorder) or VCR'.⁸

Importantly, despite Optus providing substantial technology for the recording process (including picking up the free-to-air broadcast in MPEG-2 form; recording it in four formats; storing it on Optus' NAS computer; and then streaming the recording), Justice Rares held that the process was no different to a person using other more traditional equipment such as a VCR or DVR. He relied on cases such as *Moorhouse*,⁹ the US case of *Cartoon Network*¹⁰ and the Singaporean case of *Record TV*¹¹ in this regard.

This logic can be questioned. For example, traditional DVRs are usually pieces of hardware located in the home which are more directly controlled by the consumer. In comparison, Optus TV Now is a sophisticated recording process 'in the cloud' which is almost entirely managed by Optus' infrastructure and not familiar to most customers.

It is this very point that is being appealed to the Full Federal Court on the basis that Justice Rares erred by 'finding that the service that Optus TV now offers the user is substantially no different from a VCR or DVR'.¹²

Were the recordings made within the time-shifting exception?

Justice Rares found that the user's recordings were within the time-shifting exception; the user made the recordings solely for their private and domestic use for watching the program at a more convenient time. He confirmed that section 111 does not stipulate any minimum time requirement for what will be 'more convenient' and that it is a subjective decision depending on the circumstances of the viewer. Justice Rares explained that a user may stop viewing to make a cup of tea or finish a task at work in order to watch a program at a more convenient time, even if that was 'near live' and within minutes of the start of the broadcast. Weight was given by his Honour to the legislative intent of section 111 and the operation of the Optus terms and conditions on this point, as discussed below.

The dispute is entering uncharted territory for broadcasting in Australia and will affect all Australian free-to-air television (and radio) programming, not just sports events.

Was the recording 'communicated to the public'?

Finally, on the third question, Justice Rares also found in Optus' favour. His Honour said that the user was responsible for electronically transmitting, or making available online, the program recording because it was the user that initiated streaming the program back to its compatible device by clicking the 'play' button. Optus, it was held, merely enabled the user to make such choices and to give effect to them. Justice Rares considered the principles of *iiNet*¹³ closely on this issue.

Justice Rares further held that such users of the TV Now service were not 'the public' because the communication is only made by the person who made the recording. His Honour also noted that the communication lacked any commercial detriment to the rights-holders (particularly in comparison to that caused in *Telstra v APRA*¹⁴). His Honour followed *Cartoon Network*¹⁵ and *Record TV*¹⁶ in this regard and distinguished the recent UK case of *ITV v TV Catchup*.¹⁷

Was the digital file an 'article' distributed for trade?

A separate issue was raised by the NRL alone, namely that the digital file comprising the streamed NRL footage was an 'article or thing' and that it was distributed for the purpose of trade.¹⁸ Justice Rares briefly dealt with the claim, dismissing it on the basis that section 111 applies to the user, not Optus, and that no infringement occurred.

5 Within the meaning of the *Copyright Act 1968* (Cth), sections 86(a), 87(a) and 87(b).

6 Within the meaning of the *Copyright Act 1968* (Cth), sections 10(1), 22(6), 22(6A), 86(c) and 87(c).

7 *Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd (No 2)* [2012] FCA 34 (1 February 2012) [21].

8 *Ibid* [22].

9 *University of New South Wales v Moorhouse* (1975) 133 CLR 1.

10 *Cartoon Network, LP v CSC Holdings, Inc*, 536 F 3d 121 (2nd Cir, 2008).

11 *Record TV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830.

12 Australian Football League, 'Notice of Appeal', *Australian Football League v Singtel Optus Pty Ltd*, NSD206/2012, 10 February 2012.

13 *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 194 FCR 285. However, note that this decision is subject to appeal: Transcript of Proceedings, *Roadshow Films Pty Ltd v iiNet Ltd* [2011] HCATrans 210 (12 August 2011).

14 *Telstra Corporation Limited v Australasian Performing Right Association Limited* (1997) 191 CLR 140.

15 *Cartoon Network, LP v CSC Holdings, Inc*, 536 F 3d 121 (2nd Cir, 2008).

16 *Record TV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830.

17 *ITV Broadcasting Ltd v TV Catchup Ltd (No 2)* [2011] FSR 40.

18 Within the meaning of the *Copyright Act 1968* (Cth), sections 103 and 111(3)(d).

Policy choice

Justice Rares' judgment was peppered with policy references to the 'realities of modern life' and the development of ordinary private and domestic copying over the decades as a result of advances in technology.¹⁹ Interestingly, Justice Rares acknowledged the overarching policy considerations by stating:

this question resembles the old conundrum of which came first: the chicken or the egg? Different courts confronted by a similar dilemma to that presented here have approached it by recognising that identification of a policy choice may be a key to construing whether an infringement of copyright has occurred.²⁰

Clearly Justice Rares was well aware of, and sensitive to, underlying policy issues and did not want to stymie innovation nor find against parliamentary intention to facilitate public access to broadcast content.

If Justice Rares' decision is upheld on appeal, the case will have a major impact on the negotiation of media rights fees.

Legislative intent

In his judgment, Justice Rares also gave considerable weight to the history and legislative intent of the section 111 time-shifting exception.²¹ He was influenced by the Explanatory Memorandum and statements that the 2006 amendments were intended to 'restore credibility to the [Copyright] Act',²² 'accommodate the development of technologies and the ordinary ways in which individuals can avail themselves of them'²³ and that the private and domestic time-shifting practices would have 'negligible market impact'.²⁴ Importantly, Justice Rares also acknowledged that section 111 had been amended to extend 'private and domestic use' to mean 'on or off domestic premises' (emphasis added) which extends application of the exception to remote devices such as mobiles.²⁵

This analysis all played in favour of Optus.

Optus terms & conditions

In addition, Justice Rares noted that Optus informed users that a recording could only be made for private and domestic use.²⁶ Optus informed users in a number of ways, including carefully constructing the service terms and conditions by including conditions such as:

- It is a breach of copyright to make a copy of a broadcast other than to record it for your private and domestic use.

- Optus TV Now is for your individual and personal use.

The success of Optus with this line of argument is a reminder of the importance of underlying contract conditions.

Legal framework

The Optus TV Now proceedings were initiated by Optus just days after receiving cease and desist letters from the AFL and NRL. Some may have been surprised by the speed and confidence of this pre-emptive strike. But when viewed in the context of the legal framework behind this litigation, and how carefully Optus designed its terms and conditions and technological infrastructure supporting the service, it appears that Optus was thoroughly prepared for the dispute.

The setting for the dispute was the introduction in 2006 of the private time-shifting exception under section 111 of the Copyright Act. This exception provides that copyright is not infringed if:

a person makes a cinematograph film or sound recording of a broadcast solely for private and domestic use by watching or listening to the material broadcast at a time more convenient than the time when the broadcast is made.²⁷

The time-shifting exception was introduced as part of the Australia-US Free Trade Agreement reforms to bring Australian copyright law more in line with United States law. In Parliament, the stated intention was to broaden the previous 'home taping' exception which was of little practical benefit as it was effectively limited to *live-to-air* broadcasts.²⁸

Unsurprisingly, Optus firmly supported the introduction of the exception and foreshadowed the Optus TV Now service in its 2005 submission when it stated:

When Optus starts offering digital subscription broadcast services, we plan to make personal digital recorders (PDRs) available that will connect to our network so users can record television programs for viewing at a more convenient time ... These PDRs will offer greater viewing choice and convenience while also fairly extending the availability of the material without undermining the copyright owners rights ... Optus would welcome these changes.²⁹

In addition to this legislation, there are two strands of case law which support the legal framework behind the Optus TV Now service. The first confirms the proposition that there is no inherent copyright in a sporting event or spectacle: see *Victoria Park Racing*,³⁰ *Motorola*,³¹ *Telstra v PMG*³² and most recently in the UK the *FAPL* case.³³ The second category of cases, which was directly relevant to the issues before the Court, reflect an international trend (particularly in the US and Singapore) of innovation overriding copyright protection, such

19 *Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd (No 2)* [2012] FCA 34 (1 February 2012). See, eg, [74], [76].

20 Ibid [62].

21 Ibid [53]–[57].

22 Ibid [55].

23 Ibid [84].

24 Ibid [55].

25 Ibid [8].

26 Ibid [72], [75].

27 *Copyright Act 1968* (Cth), section 111(1).

28 Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth), 96 [6.1].

29 Optus, Submission to Attorney General's Department, *Review of Fair Use and Other Copyright Exemptions*, 6 July 2005, 2.

30 *Victoria Park Racing and Recreation Grounds Company Ltd v Taylor* (1937) 58 CLR 479.

31 *National Basketball Association v Motorola, Inc*, 105 F 3d 841 (2nd Cir, 1997).

32 *Telstra Corporation Limited v Premier Media Group Pty Ltd* (2007) 72 IPR 89.

33 *Football Association Premier League Ltd v QC Leisure* [2012] FSR 1.

as *Sony v Universal*,³⁴ *IceTV*,³⁵ *Capitol Records*,³⁶ *Cartoon Network*,³⁷ *ITV v TV Catchup*³⁸ and *Record TV*.³⁹

Record TV

The Singaporean case of *Record TV* warrants further mention for a number of reasons. First, Optus, owned by Singaporean company SingTel, would have been well aware of the favourable *Record TV* decision in preparing the Optus TV Now service and anticipating the litigation. Second, not only did the case feature in Justice Rares' decision — it involved similar legal and technical issues to the Optus TV Now service — but the Singaporean time-shifting provision was based upon and is identical to the Australian provision.⁴⁰

The *Record TV* litigation was between MediaCorp (Singapore's largest broadcaster) and a company called Record TV. The dispute related to Record TV's internet-based digital video recorder service which allows registered users to record free-to-air TV programs. Similar to the Optus TV Now service, the Record TV service is essentially a time-shifting service which streams recordings of programs to a registered user's computer for up to 15 days. The issues for the Singaporean court were identical to the issues raised in the Federal Court of Australia: whether Record TV had infringed MediaCorp's rights to (a) make copies of; (b) communicate to the public; and/or (c) authorise the copying and/or communication to the public of those copyrighted shows.

After losing in the High Court, Record TV ultimately prevailed in the Singapore Court of Appeal in 2010. In a comprehensive win, Record TV was held not to be liable for any of (a), (b) and (c) above. The policy objective behind the Court's reasoning in *Record TV* is summed up by Rajah J when he said:

This appeal raises an important policy issue as to how the courts should interpret copyright legislation in the light of technological advances which have clear legitimate and beneficial uses for the public, but which may be circumscribed or stymied by expansive claims of existing copyright owners.⁴¹

This pro-public benefit approach in *Record TV* resonates with the approach taken in *IceTV*⁴² and informed Justice Rares' decision in favour of Optus.

Potential impact

Media rights revenue

If Justice Rares' decision is upheld on appeal, the case will have a major impact on the negotiation of media rights fees. The fact that Optus can get access to and make free-to-air content available without paying for it will arguably diminish the value of exclusive internet and mobile rights.

And when content buyers either withdraw or refuse to pay premiums for exclusivity, the impact is felt the hardest by the content sources: the producers, the big studios, and in the case of sports events, the sporting codes. For the sporting codes, media rights revenue is now

the single most important revenue source (surpassing other revenue such as sponsorship and entry fees) so an ultimate win for Optus will severely threaten their revenue streams.

This potential drop in digital rights fees also means that the content owners will be forced to 'think outside the box' to generate new forms of revenue which are not reliant on traditional broadcast fees.

No doubt developers have been keenly watching the litigation and wondering if the green light would be given to such digital devices which exploit the broadcast copyright exception.

Moreover, it is likely that the devaluing of mobile and internet rights will lead to an increase in 'bundled' rights deals. That is, buyers of content will demand platform neutrality and seek to licence numerous media rights in the one package (eg television, internet and mobile rights) so as to remain the exclusive 'home' of such content.

Digital media products

The Federal Court's endorsement of Optus' monetisation of the time-shifting exception will also open the flood gates for new digital devices and business models based on the time-shifting copyright exception.⁴³

The explosion of innovation following successful court cases has already been seen in the US. For example, following on from cases such as *Cartoon Network*⁴⁴ (where the US Court found that TV content stored in the cloud through remote personal video recorder functionality did not breach copyright) it has been observed that the successful outcome of the case had a significant positive impact on venture capital investment in cloud computing in the US.⁴⁵ Further, on 14 February 2012, a new cloud DVR service called 'Aereo' was launched in New York. This service allows users (for US\$12 per month) to stream free-to-air broadcast content to a user's computer, laptop, iPad or Apple-TV and (based on the US decisions of *Sony*⁴⁶ and *Cartoon Network*⁴⁷) store recordings of these programs 'in the cloud'.

Already the uptake of digital media is exploding and consumers have access to personalised digital products such as FOXTEL iQ, T-Box, TiVo, Play TV, GoogleTV, myTVR and EyeTV. In 2011, Amazon, Google and Apple each unveiled 'cloud' music services.

And now that Optus has pioneered the cloud-based TV Now service in Australia there are sure to be more to follow. No doubt developers have been keenly watching the litigation and wondering if the green light would be given to such digital devices which exploit the broadcast copyright exception. So far, the answer is summed by Optus' post-decision marketing campaign for Optus TV Now: 'Yes, it's possible'.⁴⁸

34 *Sony Corp. of America v Universal City Studios, Inc*, 464 US 417 (1984).

35 *IceTV Pty Limited v Nine Network Australia Pty Limited* (2009) 239 CLR 458.

36 *Capitol Records, Inc v MP3Tunes, LLC*, No. 07 Civ. 9931 (SDNY, 2011).

37 *Cartoon Network, LP v CSC Holdings, Inc*, 536 F 3d 121 (2nd Cir, 2008).

38 *ITV Broadcasting Ltd v TV Catchup Ltd (No 2)* [2011] FSR 40.

39 *Record TV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830.

40 Copyright Act (Singapore, cap 63, 2006 rev ed) s 114.

41 *Record TV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830, 833.

42 *IceTV Pty Limited v Nine Network Australia Pty Limited* (2009) 239 CLR 458.

43 It should be noted that the section 111 time-shifting exception only applies to *broadcasts*, and does not extend, for example, to musical works or other digital content.

44 *Cartoon Network, LP v CSC Holdings, Inc*, 536 F 3d 121 (2nd Cir, 2008).

45 Observation by US academic Josh Lerner in his study 'The Impact of Copyright Policy Changes on Venture Capital Investment in Cloud Computing Companies' (2011) <http://www.analysisgroup.com/uploadedFiles/Publishing/Articles/Lerner_Fall2011_Copyright_Policy_VC_Investments.pdf>.

46 *Sony Corp. of America v Universal City Studios, Inc*, 464 US 417 (1984).

47 *Cartoon Network, LP v CSC Holdings, Inc*, 536 F 3d 121 (2nd Cir, 2008).

48 For example, this campaign was displayed in a full page spread in MX News on 6 February 2012, page 32.

Copyright law

Of course, for the time being, Justice Rares decision has also clarified certain provisions of the Copyright Act. Subject to further appeal, the time-shifting exception will extend to complicated cloud-based recording services, and viewing after even a short delay of a few minutes and before the program has finished is also acceptable as a 'more convenient time'.

In addition, on the complex issue of whether there had been a communication to the public, Justice Rares confirmed that even though the Optus TV Now service relied on sophisticated infrastructure operated by Optus, it was the individual user who was responsible for the communication, and that such users were not 'the public'. Interestingly, Justice Rares also touched upon the existing anomaly in the Copyright Act whereby a person can satisfy a defence of making a copy within an exception but at the same time be caught under another exercise of copyright such as 'communicate to the public' for that same activity.⁴⁹ On this issue Justice Rares noted that:

it would be anomalous if the communication to the maker of the recording for the protected purpose for which he or she made it was an infringement of copyright.⁵⁰

Finally, it would have been useful if Justice Rares had considered the vexed issue of 'authorisation' (which was raised by the statements of cross-claim). Given the streamlined approach to proceedings (in light of the imminent 2012 football season) it may not have been addressed because a primary infringement by the users was not established, however other similar cases (which also did not establish primary infringement) have considered this issue.⁵¹

Where to from here?

The controversy is far from over as the parties prepare for the appellate hearing in the Full Federal Court on 14 and 15 March 2012.

Moreover, there are other issues from the initial hearing which the parties agreed would be decided later (including whether Optus infringes copyright because the Apple QuickTime Streaming makes temporary copies of the programs). As such, whether Optus has established its claim of unjustifiable threats under section 202 of the Copyright Act cannot be determined fully until this QuickTime issue is also resolved.

For some, Justice Rares' decision was the correct policy outcome for consumers, innovation and legislative intent. Certainly, artificially curbing the growth of cloud computing and consumer desires to access content anywhere anytime would not be common sense. But did Justice Rares extend the private and domestic time-shifting exception too far? *Questions can be asked about the analogy the Court drew with traditional recording devices, as well as the somewhat unsatisfactory analysis given to the complicated issue of whether there had been a communication to the public.*

Given the complexities of the legal and technological issues involved and the wide-reaching ramifications for the media industry (including the sporting codes, broadcasters, telecommunications companies, digital device developers and consumers) it is likely that the dispute will be taken all the way to the High Court. Even then, with 2012 heralding the final report from the mighty Convergence Review and the ALRC review into the operation of copyright exceptions in the digital environment, potential changes to the legislation also mean that the clouds have not fully cleared for Optus.

Watch this space!

Tureia Sample is a Senior Lawyer at the Special Broadcasting Services Corporation. This paper expresses only the author's personal opinions.

⁴⁹ For example, a person may make a copy of a film which infringes section 86(a) which is then protected under the section 111 time-shifting exception, but separately be liable for a communication to the public under section 86(c) for that same activity.

⁵⁰ *Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd (No 2)* [2012] FCA 34 (1 February 2012) [105].

⁵¹ For example, *Record TV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830.

TIMELINE OF OPTUS TV NOW PROCEEDINGS

