

Article for *Copyright World*

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WIPO-IP Australia Regional Symposium

In March 2000, the World Intellectual Property Organization and IP Australia (incorporating the Patent, Designs and Trade Marks Offices) co-hosted a regional symposium in Sydney entitled *Strategic Management of Intellectual Property in the 21st Century*. The symposium was part of the series of regional symposia conducted by WIPO as part of its technical co-operation and development programs.

Speakers from around the Asia-Pacific region spoke on the interaction between intellectual property and the information economy in the new millennium, the modernisation of the administration of intellectual property, strategic management of a portfolio of intellectual property, and intellectual property management and the digital environment. There were workshops conducted on the identification, protection and management of intellectual property creations, protection for emerging technologies, e-commerce and intellectual property and protection of traditional knowledge.

In his opening address, WIPO's Director General Dr Kamil Idris identified the key issues facing the international intellectual property community as the need to keep pace with technological developments and to assist developing countries to unleash their innovative potential enabling them to trade and compete.

The symposium statement identified the following areas for future work and international co-operation:

- the development of, and agreement upon, the basic principles of protection for traditional knowledge, folklore and intellectual property aspects of biodiversity and the implementation of appropriate means of protection, including compensation and benefit sharing;
- the raising of awareness of intellectual property principles and the strategic use of IP in building business capacity among industry participants, policy makers, educators, administrators, the judiciary, the general public and others;
- the augmentation of existing capacities of IP offices;
- the enforcement of IP rights – its cost, effectiveness and certainty and the greater co-operation between rights holders and enforcement agencies; and
- the development of compatible and harmonised legislation and administrative systems internationally.

New Year's Eve fireworks case

Nine Network Australia Pty Limited v Australian Broadcasting Corporation [1999] FCA 1864

Sydney's spectacular millennium eve fireworks display and harbour show was the subject of a last minute legal battle over the right to broadcast the event.

One of Australia's commercial broadcasters, Nine Network Australia Pty Limited, had entered into an agreement with the Council of the City of Sydney under which Nine was required to contribute to the cost of the event in return for "an exclusive right" to record and televise the event.

In about August 1999 Nine became aware that Australia's public broadcaster, the Australian Broadcasting Corporation (ABC) was planning to broadcast the event (or parts of it) in Australia and around the world as part of its participation in the BBC-led international TV consortium.

In early December, Nine sought from the Federal Court an injunction to prevent the ABC's broadcast in Australia on the basis that it would infringe Nine's exclusive rights in relation to the copyright in various aspects of the event, including the fireworks display.

The issues for decision were whether:

- Nine had an arguable case that it was the exclusive licensee of copyright material owned by the Sydney City Council;
- the broadcast planned by the ABC would infringe that copyright;
- the ABC had any arguable defences to infringement;
- the balance of convenience favoured the grant of an injunction, taking into account the strength of Nine's arguable case and the public interest, among other matters; and whether
- there were any discretionary matters which disentitled Nine to injunctive relief.

The Court declined to grant Nine's injunction thus allowing the ABC's coverage in Australia to go ahead.

One of the potentially interesting aspects of the case was the issue of whether or not the script or schedule that governed the sequence of the fireworks was a "dramatic work" for the purposes of copyright protection. A dramatic work is defined in section 10(1) of the Copyright Act 1968 (Cth) as including:

(a) *a choreographic show or other dumb show; and*

(b) *a scenario or script for a cinematograph film;*

but does not include a cinematograph film as distinct from the scenario or script for a cinematograph film.

Nine's argument was that the fireworks show alone, or in combination with other events comprising the show, was in the nature of a series of composed events and would have dramatic unity and interest and was therefore a dramatic work.

Although certainly not “doomed to failure”, the Court’s view was that this argument was not strong. Similarly, the Court had reservations about whether copyright could subsist in the copperplate representation of the word “Eternity” in lights affixed to the Sydney Harbour Bridge. The representation of a smiling face in lights on the Harbour Bridge had, in the Courts’ view, better prospects for copyright subsistence. Nine’s strongest case was in relation to lanterns in the shape of sea creatures, to be towed around the harbour on barges. The Court’s view was that these were works of artistic craftsmanship and that the drawings on which they were based were also protected as artistic works.

In the event that copyright subsisted in any of the elements comprising the event, the ABC’s broadcast would clearly infringe copyright in those elements unless the ABC could rely upon a defence to infringement. The ABC put forward three defences.

Firstly, in reliance on section 42 of the Copyright Act, the ABC argued that its broadcast would constitute a fair dealing with copyright material for the purpose of reporting the news. There was a suggestion from Nine that the fact that the broadcast was likely to be humorous and entertaining (owing to its hosts, two well known Australian comedians) meant that it would not be news reporting. The Court expressed the view that the fact that humour is used does not necessarily negate the defence of news reporting and thought that the ABC’s argument on this point was not a weak one.

Secondly, the ABC sought to rely on defences involving the filming and broadcasting of works of sculpture on permanent public display and the incidental filming of artistic works (sections 65 and 67). The Court did not analyse these defences in detail but acknowledged that the existence of these defences meant that it did not follow that filming and broadcasting artistic works was necessarily an infringement.

Ultimately, the decision whether to grant an injunction turned on the issue of balance of convenience. The Court held that the balance of convenience did not favour the grant of an injunction because:

- an injunction would frustrate the ABC’s preparations for the broadcast which it had undertaken at considerable expense; and
- the public interest would be served by the national broadcaster being able to show segments of the celebration to those who chose to watch it.

Nine’s delay in bringing the action was also a factor in the Court’s decision.

After the decision, Nine signalled its intention to proceed against the ABC in respect of copyright infringement but has since discontinued the action.