

Article for *Copyright World*

Broadcast copyright not infringed; New moral rights law tested; Inquiry into relationship between copyright and contract law

Virginia Morrison, Australian Copyright Council, 4 July 2001

Broadcast copyright not infringed

As reported in the April issue of *Copyright World*, television broadcaster Channel Nine lost its bid to prevent rival broadcaster Channel Ten from re-broadcasting its footage in the light-hearted current affairs program called *The Panel*. Following judgement in the case, a further hearing was held to determine whether Channel Ten had infringed copyright in Channel Nine's footage by making pre-broadcast copies.

Channel Nine's claim in relation to the pre-broadcast copies was that each individual visual image in a television broadcast is protected within the scope of broadcast copyright. Section 25(4)(a) of the Copyright Act provides:

...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...

If this were the case, Channel Nine argued, then Channel Ten's making of pre-broadcast excerpts reproduced substantial parts of visual images contained in its broadcasts and therefore infringed copyright.

In dealing with this submission, Justice Conti referred back to his earlier judgement in which he had found that the appropriate way to measure a broadcast, for the purposes of broadcast copyright, was generally by reference to the program broadcast or an identifiable segment of the program (exclusive of advertising). He dismissed Channel Nine's argument regarding the individual images, finding (with reference to extrinsic material) that it was not Parliament's intention to grant broadcast copyright in each and every image broadcast. He found that this would be inconsistent with the requirement that a "substantial part" of copyright material must be taken before infringement is made out.

Therefore, the Court held that Channel Ten had not infringed Channel Nine's broadcast copyright as it had not copied a substantial part of any particular broadcast.

Although not having to decide the issue, Justice Conti dealt with Channel Ten's submission that it was entitled to copy Channel Nine's broadcasts because of an implied licence to do so based on industry practice. Channel Ten argued that it is common practice for all broadcasters to record each other's material. Justice Conti found that there was no evidence to support Channel Ten's assertion and that there does not exist in Australia, at least among the major television broadcasters, any established trade practice or custom constituting a mutually implied licence to make copies of one another's broadcast material.

New moral rights law tested

In the first public test of Australia's moral rights legislation, an architect has forced the National Gallery of Australia to consult him over plans to modify the building he designed.

The building housing the National Gallery was designed by architect Mr Col Madigan in the late 1960s. Last year, a firm of architects unconnected with Mr Madigan was selected to redevelop the building. Mr Madigan became concerned about the proposed redevelopment and, with the support of the Royal Australian Institute of Architects, challenged the Gallery's plans for the building on the basis that the proposed changes may infringe his moral right of integrity of authorship if he were not consulted in relation to the redevelopment.

As a result of Mr Madigan's assertion of his moral rights, the Gallery has put the plans for redevelopment on hold while it consults Mr Madigan in accordance with a procedure laid down in the moral rights legislation. Under this procedure, a building owner has a defence to infringement of the right of integrity by reason of alterations to a building if it has consulted the architect about the alterations in good faith.

Inquiry into relationship between copyright and contract law

As reported in the previous issue of *Copyright World*, the Federal Government has given its copyright advisory body, the Copyright Law Review Committee, a reference to inquire into the relationship between contract and copyright law. The inquiry is to focus particularly on online agreements that exclude or modify the legislative exceptions to copyright infringement.

The Committee has now published its Issues Paper entitled "Copyright and Contract". The Issues Paper looks at Australia's exceptions to infringement, including the fair dealing provisions; the of use mass market agreements, such as "shrinkwrap" and "clickwrap" agreements; issues relating to enforceability, including unfair contracts and consumer protection legislation; jurisdictional issues; and international approaches to the relationship between copyright and contract.

The Committee has asked for submissions by 10 August 2001. The Issues Paper is available from the Committee's web site at <http://www.law.gov.au/clrc>.