

Article for *Copyright World*

Virginia Morrison, Australian Copyright Council, 21 January 2002

No support for DVD price discrimination

Film production companies cannot use copyright law to charge DVD rental businesses higher prices for DVDs than they charge consumers. This was the effect of the Federal Court's decision in an action brought by the Australian Video Retailers Association against Warner Home Video (referred to in the December/January issue of *Copyright World*).

The principal issue in the case was whether rental of video DVDs infringed copyright in computer programs embodied in the DVDs, as the Copyright Act confers on owners of copyright in computer programs the exclusive right of rental. If production companies controlled the right of rental they could authorise retail outlets to rent DVDs in return for higher prices.

The Court held that the rental of a DVD did not involve a "commercial rental arrangement" in respect of a computer program, as the computer programs embodied in a DVD were not the "essential object of the rental" (section 31(5)); rather the essential object of the rental arrangement was to obtain access to the video and audio content on the DVD.

A further question was whether a "substantial part" of any film or computer program embodied in a DVD was reproduced by the playing of the DVD in a DVD player or personal computer.

In relation to films, the Court held that "the ephemeral embodiment of tiny fractions of the visual images and sounds that comprise a cinematograph film or motion picture sequentially does not constitute the act of making a copy of the motion picture or cinematograph film...neither the whole nor any substantial part of a cinematograph film or motion picture is ever embodied in the RAM of a DVD player or personal computer at any given time".

In relation to computer programs, the Court held that the temporary storage of a substantial part of a program in the RAM of a DVD player will not involve a reproduction of the computer program in a "material form" as the program cannot be reproduced from the RAM in the DVD player (without modification of the player).

Australian Video Retailers Association Ltd v Warner Home Video Pty Ltd [2001] FCA 1719 is available at:
http://www.austlii.edu.au/au/cases/cth/federal_ct/2001/1719.html

Record companies misused market power trying to prevent parallel imports

Following the legalisation of parallel imports of sound recordings in July 1998, two of Australia's major record companies have been held to have misused their market power in trying to keep parallel imports out.

In an action brought by the Australian Competition and Consumer Commission, Universal Music Australia and Warner Music Australia were found to have put pressure on retailers by threatening to renegotiate supply deals or, in some cases, cancel them altogether, with the intention of discouraging those retailers from sourcing product from other countries, such as Indonesia.

The Federal Court held that this conduct breached sections 46 and 47 of the Trade Practices Act. Section 46 prohibits the use of a substantial degree of market power for the purpose of preventing the entry of a person into a market. Section 47 prohibits “exclusive dealing” which involves offering to supply goods or services on condition that goods or services will not be acquired from a competitor, where that exclusive dealing has the purpose, effect or likely effect of substantially lessening competition.

Penalties are yet to be determined.

The decision is available at

<http://scaleplus.law.gov.au/html/feddec/0/20014/0/FD003290.htm>

When will an owner of copyright not be an owner?

A recent High Court case has shed some light on the application of the principle that an equitable interest in copyright might be created in circumstances where it would be inequitable for the legal owner to hold the copyright otherwise than on trust for some other person.

This case involved an appeal by the Australian Broadcasting Corporation against the grant of an injunction preventing the broadcast of film footage taken at a “brush tail possum processing facility”. The film was made via hidden cameras installed in the facility operated by Lenah Game Meats (where possums were lawfully slaughtered for the sale of their meat on the export market) by unidentified trespassers. It was then sent (presumably by the same people) to an animal liberation organisation who passed it on to the ABC for the purpose of broadcast.

The case canvassed several important issues, including privacy and constitutional rights of communication regarding governmental and political matters.

The appeal was allowed by majority on the basis that Lenah Game Meats could not show the breach or threatened breach of a legal or equitable right arising from the broadcast.

In the course of their judgment, Gummow and Hayne JJ considered how copyright law may have applied to the broadcast of the film, had Lenah Game Meats put it in issue. Their Honours suggested the principle described above might apply in a situation where a person has made a film in circumstances involving the invasion of the legal or equitable rights of a person, or a breach of the maker’s obligations toward a person. “It may then be inequitable and against good conscience for the maker to assert ownership of the copyright against the plaintiff and to broadcast the film. The maker may be regarded as a constructive trustee of an item of personal (albeit intangible) property, namely the copyright” (at pars 102-103).

In such a situation, the plaintiff would be entitled to a declaration as to the subsistence of the trust and a mandatory order requiring an assignment of the legal title. In the meantime, any dealing with the film, such as the making of a broadcast, would be subject to interlocutory restraint, as an invasion of the equitable interest in the copyright.

Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd [2001] HCA 63 (15 November 2001) is available at http://www.austlii.edu.au/au/cases/cth/high_ct/2001/63.html