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## Article for *Copyright World*

### *Appeal decision in broadcast copyright case*

Ian McDonald and Mary Pollatis, Australian Copyright Council, 20 July 2002

Two of Australia's leading commercial television station networks have been engaged in litigation relating to the re-use of television footage from one network (Channel Nine) in a light-hearted current affairs programme entitled *The Panel* on another (Channel Ten). As reported in 112 *Copyright World* at 3, at first instance Ten was held not to have used any "substantial part" of any broadcast by Nine, and therefore not to have infringed Nine's broadcast copyright. While it was not necessary for him to do so, the judge at first instance also discussed whether the fair dealing defences of reporting news or criticism or review were available to Ten. Conti J concluded that, had he been required to do so, he would have rejected the application of either defence to almost half of the excerpts of Nine which were incorporated into *The Panel*.

Nine appealed, arguing that, properly construed, copyright in a broadcast subsists in each and every image and sound broadcast (therefore arguing that the concept of "substantial part" did not apply to broadcasts at all).

The Full Court of the Federal Court handed down its judgement on 22 May 2002, allowing Nine's appeal in part. In particular, the Court accepted Nine's argument that the nature of copyright in a broadcast differs from the nature of copyright in other types of material:

Visual images and accompanying sounds as they are broadcast, themselves satisfy the definition of "television broadcast" ... One does not have to wait until there has been a transmission of enough of the images and sounds to constitute a programme, or any other subject matter, before concluding that a television broadcast has been made ...

The issue of infringement of copyright is necessarily bound up with the way in which the interest protected is defined ... Rebroadcasting of any of the actual images and sounds [from a broadcast] is an infringement ... whether or not the subject matter of the re-broadcast is characterised as a programme, a segment of a programme, an advertisement, a station break or a station logo, or as a substantial part of any of those things. (per Hely J at paras 80-85)

The judgement of Finkelstein J (at para 12) contrasts the nature of copyright in a broadcast, and copyright in a cinematograph film:

One can immediately see a distinction between what constitutes a television broadcast and what constitutes a cinematograph film. A television broadcast is defined by reference to the visual images that are broadcast, whereas a cinematograph film is more

than a series of visual images. It is the aggregate of those images when they are embodied in an article or thing.

(Interestingly, as the concept of “substantial part” is irrelevant to a finding of *prima facie* infringement, the position under Australian law is that a broadcast arguably has a higher standard of protection than the material *in* the broadcast.)

As there was no dispute that Ten had indeed both reproduced and re-broadcast images and sounds from Nine’s broadcast, the appeal court then had to consider whether Ten was able to rely on any of the fair dealing defences.

As noted above, the trial judge found that, had it been necessary for him to decide the matter, a fair dealing defence would have been available to Ten in relation to a number of the claimed infringements. Nine did not appeal the availability of fair dealing in relation to four of these instances, but did appeal a number of others.

The appeal court recognised that in a number of cases “different persons might legitimately hold different conclusions” in relation to whether a fair dealing defence is available: per Hely J at para 110. Nonetheless, the appeal court allowed Nine’s appeal in relation to all but one of those in relation to which it had appealed, and rejected Ten’s arguments that the trial judge had erred in a number of instances in rejecting a fair dealing defence.

The decision (*TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* [2002] FCAFC 146) may be found via both [scaleplus.law.gov.au](http://scaleplus.law.gov.au) and [www.austlii.edu.au](http://www.austlii.edu.au).