

Article for *Copyright World*

Current affairs send-up allowed to use TV footage

Ian McDonald, Australian Copyright Council, 5 March 2001

A recent Australian Federal Court decision sheds light on the nature of copyright in television broadcasts, and on the issue of substantiality in this context. The decision also discusses the application of the fair dealing defences of criticism and review and of reporting the news when one television station re-broadcasts material broadcast by another station.

Background

A commercial free-to-air broadcaster, Channel Ten, has for some years been broadcasting *The Panel*, a weekly television programme described as “a current affairs program that seeks to be entertaining and unscripted”. *The Panel* is comprised of current affairs, comedy, news and “chat” which is designed to look unscripted and unrehearsed. The programme relies heavily on the pre-production copying of footage sourced from media outlets (including both free-to-air and subscription television) and the subsequent re-broadcast of that material when the programme goes live to air with discussion and comment by regular and guest panelists.

A rival broadcaster, Channel Nine, alleged that Channel Ten had infringed copyright in its broadcasts of twenty programmes by re-broadcasting those broadcasts. (Under Australian copyright law, television and radio broadcasts are generally protected by copyright; the copyright in a broadcast is separate from copyrights in the material that is broadcast.) It was agreed that Channel Nine’s claim concerning Channel Ten’s pre-production copying of broadcasts for later use in *The Panel* would be heard separately from, and after the present hearing, if the need arose. (Channel Nine’s claim was that each of these constituted an infringing film of its broadcasts.)

Channel Nine did not make any claim of infringement in relation to any of the *underlying* material in its broadcast (for example, in relation to any scripts, or film in which it owned copyright, or in relation to which it had an exclusive licence).

The issue of substantiality

The initial question in deciding whether a “substantial part” of a broadcast had been re-broadcast is the question of what constitutes a broadcast within the meaning of the Copyright Act, insofar as copyright subject matter is concerned.

What is a "broadcast"?

Channel Ten, as defendant, submitted that seven days of broadcasting is a “broadcast” for the purposes of copyright subject matter. Alternatively, Channel Ten submitted that in no case should less than twenty four hours be viewed as constituting a single protected broadcast. Essentially, Channel Ten contended that the signal itself is what is protected as a broadcast, and that the copyright in the

broadcast can be identified without reference to the programmes which are broadcast.

Channel Nine, on the other hand, contended that each and every single image which is broadcast is separately protected as the subject matter of broadcast copyright. Alternatively, Channel Nine submitted that a television broadcast relates to the whole of each programme or else the whole of each segment if the programme breaks down into segments.

The trial judge, Conti J, preferred the alternative position put by Channel Nine, noting that it will be a matter of fact and degree in each case as to whether a particular segment which is broadcast on television will be a “broadcast” in terms of copyright subject matter. His Honour thus accepted that one looked to the programmes themselves to determine what constitutes a broadcast protected by copyright.

His Honour held that the broadcasts of the Channel Nine programmes, without the television advertisements which preceded or followed each programme, and without station promotions or identifiers, were broadcasts; that television advertisements should be treated as discrete broadcasts; and that where a given programme divides into segments, it may be legitimate on the facts of a given case to use a segment of the programme as the measure of a broadcast, rather than the whole of a programme.

Was a substantial part of any broadcast re-broadcast?

The excerpts of the Channel Nine programmes which were re-broadcast by Channel Ten were from 8 to 42 seconds in duration.

About half of the Channel Nine *programmes* from which the excerpts were taken were between 20 to 40 minutes long; the other half were over one and a half hours long. In some cases, the programmes lasted much longer (for example, a broadcast of one sporting programme lasted for almost five hours, and the broadcast of the Academy Awards lasted almost three and a half hours); however, in one case, involving the broadcast of a technical glitch within a “Newsbreak”, the “programme” which was broadcast by Channel Nine was only 40 seconds long. The *segments* from which the excerpts were taken were, arguably, generally only several minutes long. (Conti J found it unnecessary to hold whether or not all the segments put forward by Channel Nine were in fact “truly a segment in the sense of possessing a discrete or separate theme or story or report”: para 68.)

Conti J found that Channel Ten had not re-broadcast a “substantial part” of any of the broadcasts which were in issue, noting that “what was taken can be characterised as relatively *de minimis*, and for at least the most part trivial”. His Honour also noted the different purposes for which the excerpts of the broadcasts were used, and stated that “it cannot reasonably be postulated that any use by Ten of the footage or excerpts taken occasion harm to the scope of Nine’s legitimate entitlement to television broadcast copyright protection”.

Fair dealing defences

Under the Australian Copyright Act, copyright is not infringed where a dealing with the work within the scope of the exclusive rights of the copyright owner is a fair dealing and it is either for the purpose of reporting the news, or for the purpose of criticism or review.

While it was not necessary for him to do so, Conti J proceeded to discuss whether, if he had found that a substantial part of any of the broadcasts had been re-broadcast, Channel Ten could rely upon either of these defences.

His Honour found that the re-broadcast of just under half of the broadcasts in issue was defensible on the basis that the re-broadcast of the excerpt together with the discussion or comment which accompanied it was within the scope of the fair dealing exception for criticism or review. His Honour found that the rebroadcast of a further three excerpts was defensible on the basis that the discussion or comment brought the re-broadcast of the excerpt within the scope of the fair dealing exception for reporting news. In relation to some excerpts, Channel Ten may have been able to rely on either defence.

However, his Honour also concluded that, had he not found in Channel Ten's favour on the issue of substantiality, he would have found that the use of almost half of the excerpts was not defensible on the basis of either defence.

“Sufficient acknowledgement”

To rely on the fair dealing defence for criticism or review, a “sufficient acknowledgement” of the copyright material must be made.

His Honour noted that what constitutes “sufficient acknowledgement” in relation to subject matter other than works is “at large”, being “a question of fact in each case in relation to whatever “subject matter” is the subject of consideration”. Conti J then referred favourably to *Pro Sieben Media Ag v Carlton UK Television Ltd* [1999] 1 WLR 605, in which case the use of a television station identification logo constituted sufficient acknowledgement.

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We understand that Channel Nine may appeal the decision. At the time of writing, it was not clear whether the separate hearing in relation to the issue of pre-production taping of broadcasts would proceed.

The decision (*TCN Channel Nine v Network Ten* [2001] FCA 108) is available at scaleplus.law.gov.au/feddec/0/20011/0/FD000900.htm; and via www.austlii.edu.au.