

April 2005

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02

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05

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06

Retransmission hearing recommenced

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07

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08

Registration for US royalties

If your titles have been broadcast in the United States in the last year, you may be owed retransmission royalties. To make sure that Screenrights International can collect this money on your behalf, you will need to have title details to us by June 20 in order for this information to be registered with the relevant US collecting society by its next July deadline.

09

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Feature: How long is a piece of string?

What constitutes a substantial part of a television broadcast?

One of the most difficult issues for filmmakers can be determining how much of another work they can use without running the risk of infringing copyright. The Copyright Act asks whether the part that is used is "substantial", but what does this mean?

Filmmakers can expect clarification on this and other copyright questions when the Full Federal Court hands down its decision in "the Panel Case" sometime later this year. In this article, lawyer Gail Fulton summarises the issues that will be decided by the Court and why they are important to people working in film and television.

Background

"The Panel Case" began when Channel Nine argued that rival network Channel Ten had infringed Nine's copyright by including extracts from Nine's programs in the weekly satirical program "The Panel". At first instance the case was decided in favour of Channel Ten with Conti J holding that Channel Ten had not used a "substantial part" of any of the broadcasts in question. Channel 9 successfully appealed that decision to the Full Federal Court. The Court overruled Conti J on the issue of the nature of the copyright in a broadcast and the relevance of questions of substantiality. In March 2004, Channel Ten was successful in its appeal to the High Court. The High Court as a result of this decision referred the case back to the Full Federal Court which heard arguments on the case in November 2004. Judgement was reserved on this case and is expected in the next couple of months.

The case has involved many issues and there have been considerable differences of judicial opinion on some key copyright matters. The following is a brief summary of some of the issues in question.

Copyright protection of a television broadcast

In addition to the more familiar things that copyright protects, such as scripts, artwork and films, the Copyright Act also recognises copyright in broadcasts. There have, however, been very few occasions on which the courts have considered the nature and scope of this protection.

Defining the extent of the copyright in a broadcast has been central to the Panel Case. The High Court held that copyright in a television broadcast subsists in broadcasts put out to the public "as discrete periods of broadcasts identified and promoted by a title". This equates the broadcaster's copyright to the copyright that subsists in the cinematograph films that are broadcast.

This overturned the Full Federal Court's more literal approach, that "a television broadcast in which copyright may subsist is made whenever visual images and accompanying sounds are broadcast by way of television" in practice, the application of this definition would have meant that copying even a single image, however brief, would infringe the copyright in the broadcast.



"The Panel" courtesy of Channel 10

April 2005

The importance of substantiality

As a result of the High Court's decision it is clear that not all copying will infringe copyright in a television broadcast – infringement of copyright will only be established if a "substantial part" of the broadcast has been copied.

Substantiality is therefore the basic threshold issue for determining if there is copyright infringement and this must be considered by reference to the whole of the program or possibly the segment that is broadcast. This assessment will involve questions of the quality of what is taken as well as the quantity.

The High Court remitted the case back to the Full Federal Court to determine whether, on the facts of the case, Channel 10's "The Panel" had used a substantial part of each of the relevant Channel 9 broadcasts.

The Full Federal Court has now heard argument on this issue and has reserved its decision.

Although this case deals with the issue of substantiality in the context of the copyright in a television broadcast, the fact that the court has now defined the scope of that copyright so that it aligns so closely to the copyright that subsists in films means that the application of these principles by the Full Federal Court will be of particular interest to filmmakers.

Applying the fair dealing defences

Channel Ten did not appeal to the High Court on the issue of the application of the fair dealing defences.

The decision of the trial judge Conti J, which was generally endorsed by the Full Federal Court on this issue, does provide some guidance to filmmakers. The trial judge summarised the key principles as follows:

(i) Fair dealing involves questions of degree and impression; it is to be judged by the criterion of a fair minded and honest person, and is an abstract concept.

(ii) Fairness is to be judged objectively in relation to the relevant purpose, that is to say, the purpose of criticism or review or the purpose of reporting news; in short, it must be fair and genuine for the relevant purpose, because fair dealing truth of purpose;

(iii) Criticism and review are words of wide and indefinite scope which should be interpreted liberally; nevertheless criticism and review involve the passing of judgment criticism and review may be strongly expressed;

(iv) Criticism and review must be genuine and not a pretence for some other form of purpose, but if genuine, need not necessarily be balanced;

(v) An oblique or hidden motive may disqualify reliance upon criticism and review, particularly where the copyright infringer is a trade rival who uses the copyright subject matter for its own benefit, particularly in a dissembling way; "the path of criticism is a public way"

(vi) Criticism and review extends to thoughts underlying the expression of the copyright works or subject matter;

(vii) "News" is not restricted to current events; and

(viii) "News" may involve the use of humour though the distinction between news and entertainment may be difficult to determine in particular situations.

If a filmmaker wishes to use a clip these fair dealing principles will be relevant - if the clip is not insubstantial and the use does not fall within these principles, a licence from the relevant copyright owners will be required.

April 2005

The implications for filmmakers

This case confirms that it is not an infringement of copyright to use insubstantial excerpts of television programs without the copyright owner's permission and without relying on fair dealing defences. The case also has given a useful set of guidelines to help in interpreting the fair dealing defences.

The decision of the Full Federal Court applying these principles to the facts of the case and determining which excerpts were and were not substantial parts of the broadcast material will be significant for filmmakers and broadcasters. In particular, any guidance on identifying the "quality" of a very short extract necessary to make that extract a substantial part will be useful.

In practical terms it is worth noting, however, that the Panel case has involved many lawyers, one Federal Court judge sitting at first instance, three Federal Court judges sitting in the Full Federal Court on appeal, five High Court judges, and is now back to the three judges of the Full Federal Court.

There have been significant reversals of decisions along the way.

In these circumstances it therefore seems unlikely that filmmakers will often feel confident to use excerpts from other films in their own programs without a licence to do so. The potential costs of a mistake are so large that the prudent course will usually be to seek and obtain licences even for seemingly small uses. These issues are most likely to arise when the purpose of the use is critical or satirical and the likelihood of obtaining a licence is remote. In these circumstances the issues of both substantiality and the fair dealing defences will be of critical importance.

Case Citations

Federal Court: TCN Channel Nine Pty Limited v Network Ten Pty Limited (2001) 108 FCR 2325

Full Federal Court: TCN Channel Nine Pty Limited v Network Ten Pty Limited (2002) 118 FCR 417

High Court: Network Ten Pty Limited v TCN Channel Nine Pty Limited (2004) 205 ALR 1

April 2005

Enhancetv's ANZAC Day feature proves popular with schools

Enhancetv's ANZAC Day feature has proved to be one of the site's most popular features ever, with schools across the country downloading a tree planting guide for commemorating the 90th anniversary of the landing at Gallipoli. The guide is for a tree planting ceremony with seedlings coming from the original Lone Pine at the Australian War Memorial.

Enhancetv Content Manager Jamie LeHuray said the enhance team worked in conjunction with the Yarralumla Nursery in Canberra to make the seedlings available to schools for \$4.95 plus postage.

Michael Kidd, who has been handling orders for the nursery, said: "There was a huge response from all over Australia. We sold well over 2,000 trees and the enquiries are still coming. We had a full team working around the clock taking orders and sending out trees. It is great to be part of such an important event."

"The demand has been greater than any of us anticipated," LeHuray said. "The popularity of this feature also means that many new teachers have learnt about the site and are making the most of the free resources to help them teach with television."

"This also benefits our filmmaker members, whose work is promoted on enhancetv," LeHuray said.

Filmmakers who are interested in finding out more about how they can promote their content, can email jamie@enhancetv.com.au for more information.

April 2005

Tracking down rightsholders

For Screenrights' Member Services team, tracking down filmmakers to pay them educational royalties has always been a pleasant task; it has also become considerably easier than it once was, as Dateline correspondent Mark Davis testifies.

As one of Screenrights' first members, Mark Davis thought his initial royalty cheque "was too good to be true," and he took some time to be convinced that he only had to complete a few forms to receive the payment. In a recent round of distributions, the team had no trouble tracking down Davis or getting him to return their calls.

"I think in the early days people had no idea what the money was for and getting them to answer our calls wasn't always easy," Member Services Executive Cameron Patience said. "Now they are much more familiar with us, and its usually only a very few people that we have to spend some time chasing."

Davis' first payment was for his film *Whitlam*.

"It was a two year project that left me mentally and financially exhausted," he said. "I developed my own recovery strategy that consisted of never answering the phone and under no circumstances ever opening any mail. After months of trying to illicit a response from me, an angelic emissary from Screenrights arrived on my doorstep. She had some forms in her hand and helped me fill them in, including the difficult bits like 'programme duration' and then delivered a very large cheque. Incredible. Screenrights bought me six months to contemplate my life crisis in peace."

When Davis' documentary *See No Evil* was recently identified as having been copied, the team once again found him.

"This time, being of sound mind, I returned the call," Davis said. "More helpful, efficient people guided me through the payment process and within a fortnight the cheque was there. How good can it get?"

The Member Services team has six years in which to track down rightsholders for payment, and each year a concerted effort is put into ensuring that the last few potential members are found before the deadline expires. The deadline for 1999 royalties is June 30 and with only 4.75% of this pool left to distribute, the team is focussing on getting in touch with these few remaining rightsholders.

"We urge anyone who is contacted by us about programs from this period to waste no time in getting back to us," Patience said.

April 2005

Retransmission hearing recommenced

The Copyright Tribunal hearing to determine a retransmission rate recommenced in the Copyright Tribunal on April 11, to continue over the following three weeks.

The Federal Government has declared Screenrights to be the copyright collecting society to administer provisions in the Australian Copyright Act requiring pay television operators to pay rightsholders for the retransmission of programs broadcast on free to air television.

Screenrights made an application to the Copyright Tribunal to determine the rate of equitable remuneration to be paid by pay television operators. The first part of the hearing took place in October 2004 for one week and dealt with the legislative background and the operation of retransmission schemes overseas. The second part of the hearing is on the question of the valuation of the retransmission right.

April 2005

Preliminary view for allocating government copying royalties

The Screenrights Board has formed a preliminary view regarding the manner in which government copying royalties should be distributed and allocated among rightsholders in certain copied programs. The Board is now calling for comments on this view before finalising changes to the distribution policy. Screenrights has been appointed to administer provisions in the Copyright Act allowing State and Federal departments to copy from television and radio provided they pay a royalty. The Screenrights Board determines the manner in which these royalties are distributed and allocated once the rate is determined. On 23 March 2005 the Board reached a preliminary view regarding the following:

1. Allocation to copyright owners in music videos;

The proposed allocation is based on the view that the majority of music videos are unlikely to contain significant literary or dramatic works (with the exception of the lyrics accompanying the musical work), whereas musical works are the focus. Following this line of reasoning the music video allocation collapses the allocation for literary and dramatic works (Script) into the allocation for musical works, creating a larger allocation for musical (and associated literary) works. It is of note, however, that this allocation removes any separate allocation to Script.

2. Allocation to copyright owners in radio programs;

The proposed policy distinguishes between 3 broad types of radio programs: Music programs (programs featuring music); Talk programs (programs featuring talk); and Music Talk programs (which contain a combination of the 2). A proportional allocation is then made to each of the underlying works depending upon the type of program in question.

3. Distribution mechanism for musical (and associated literary) works.

The proposed mechanism is based on the premise that it would be inefficient and difficult for Screenrights to independently acquire the information required to identify and locate copyright owners in musical (and associated literary) works contained in copied programs. Consequently, it was determined that the most efficient way of achieving this task was to make use of APRA's existing database which already holds the information required by Screenrights. The main effect of this approach is that, rather than distributing royalties on a program-by-program basis, total musical works royalties are pooled and then shared pro-rata amongst the identified musical (and associated literary) works. Each of these proposed policies (the full text of which are set out in **Appendix A**) mirror those currently in use under Screenrights Australian and New Zealand educational copying services.

Your views

In considering changes to its Distribution Policy, Screenrights always consults with key stakeholders. If you would like to comment on these proposed additions, please email Screenrights' Distribution Executive Cameron Patience, at cameron@screen.org by Friday 6 May 2005. The Board will then consider all feedback and decide upon appropriate changes to the Distribution Policy.

April 2005

Registrations for US royalties

If your titles have been broadcast in the United States in the last year, you may be owed retransmission royalties. To make sure that Screenrights International can collect this money on your behalf, you will need to have title details to us by June 20 in order for this information to be registered with the relevant US collecting society by its next July deadline. Screenrights International regularly registers titles with societies in Europe, Canada and the United States in order to collect royalties they are holding on behalf of our members. We ensure that the correct information is supplied to each organisation by their specified deadline, giving copyright owners a simplified means of accessing important sources of revenue from overseas.

If you would like further information about deadlines or supplying title information to Screenrights International, email international@screen.org