

CASE NOTE

TCN CHANNEL NINE PTY LTD V NETWORK TEN PTY LTD

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Introduction

[155] *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd*² considers the issue of substantial reproduction and fair dealing defences in relation to copyright infringement in television broadcasts. It is the first Australian case to directly consider the scope of copyright protection of television broadcasts.

Facts

TCN Channel Nine Pty Limited (Nine) claimed that Network Ten Pty Limited (Ten) infringed copyright in its television broadcast by re-broadcasting excerpts from various Nine television programs in Ten's evening television program, *The Panel* over the period from 10 August 1999 to 28 June 2000. *The Panel* is a talk show comprised of a regular panel and guest panelists who discuss recent events and current issues, using television footage from a variety of sources as a basis for humorous comment and critical discussion. The claim of copyright infringement related to 20 excerpts of Nine footage, ranging in length from eight seconds to 42 seconds. The excerpts were from a variety of programs including *The Today Show*, *Who Wants to be a Millionaire*, *Days of Our Lives* and *Sale of the New Century*.

Issues

Nine claimed that Ten's re-broadcasting of excerpts of its programs constituted an infringement of its copyright in the television broadcast as provided for in s 87(c) of the *Copyright Act 1968* (Cth) (the Act). Nine also claimed that Ten had breached s 87(a) of the Act by making a cinematograph film of the programs or a copy of such films, but this latter claim has not yet been determined. This judgment relates only to Nine's claim in relation to s 87(c) of the Act.³

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² [2001] FCA 108.

[156] *(i) Substantiality*

In order for Nine to establish that Ten had infringed s 87(c) of the Act it needed to show that Ten had re-broadcast a 'substantial part' of Nine's television broadcast in accordance with s 14(1)(a) of the Act. Television broadcast is defined in s 10 of the Act to mean 'visual images broadcast by way of television, together with any sounds broadcast for reception along with those images'. Conti J noted that the issue of substantiality was the key issue in Nine's case.⁴

(ii) Fair dealing for the purpose of criticism or review and for the purpose of reporting the news

Ten argued that even if Nine was able to establish the notion of substantiality, some of the excerpts constituted a fair dealing for the purpose of criticism and review and/or for the purpose of reporting the news. Section 103A of the Act provides that a fair dealing with an audio-visual item does not constitute an infringement of the copyright in the item if it is for the purpose of criticism and review and s 103B(1)(b) of the Act provides that a fair dealing with an audio-visual item does not constitute an infringement of the copyright in the item if it is for the purpose of reporting the news.

Decision on substantiality

The two main issues considered in relation to substantiality were:

- the definition of television broadcast — in order for the court to determine whether re-broadcast of footage constituted copyright infringement in the television broadcast, it needed to first define television broadcast; and
- the factors that are relevant in determining the question of substantiality in relation to a television broadcast.

Television broadcast

Nine submitted that each visual image that is broadcast constitutes a television broadcast. It argued that it therefore follows that use of any visual image comprised in a television broadcast is an infringement of the copyright in that broadcast. It relied for its argument not only on the s 10 definition of television broadcast, but also on the

³ Nine's claim in relation to infringement of copyright pursuant to s 87(a) was listed for hearing on 14 and 15 May 2001.

⁴ Ibid para 8.

wording of ss 25(4)(a) and 87(a) of the Act, which deal with cinematograph films of television broadcasts.⁵ Its alternative argument was that television broadcast relates to the whole of each program or the whole of each segment of a program, where the program breaks down into segments.

Ten argued that the s 10 definition of television broadcast does not allow for the notion of television program, submitting that a television broadcast is measured by the length of time of transmission of each of Nine's television signals. It argued that it would therefore comprise the images from a full day or a full week.

Conti J rejected the primary submissions of both parties in relation to television broadcast. He concluded that television broadcast, for the purposes of broadcast copyright, is the broadcaster's program, or if a program is comprised of segments, the relevant segment of the program. He noted that it will be a question of fact in each case to determine what constitutes a broadcaster's program or program segment. Conti J determined that a television broadcast excludes advertisements, station breaks and station logos.

[157] *Test for determining substantiality*

Conti J noted that there is no Australian authority dealing directly with the scope of protection of television broadcasting.⁶ In establishing what factors to consider in determining the issue of substantiality in relation to a television broadcast he relied on the decision in *Nationwide News Pty Ltd v Copyright Agency Ltd*.⁷ That case dealt with protection of a published edition, which, like a television broadcast, does not require originality for the establishment of copyright.⁸

(i) *Quality and quantity*

In order to determine whether a substantial part of a television broadcast has been re-broadcast, Conti J concluded that both the quality and the quantity of the excerpt

⁵ Nine submitted that the use of the words 'any of the visual images' and 'any of those images' in s 25(4)(a) determine the meaning of 'visual images' in s 87(a), and that s 87(c) should implicitly be read the same way.

⁶ [2001] FCA 108, para 23.

⁷ (1996) 65 FCR 399.

should be considered. He noted that while the emphasis to be placed on each consideration will vary from case to case, a quantitative approach will generally be a practical starting point.⁹

While Conti J stated that he would not venture a conclusion on the basis of quantity alone, he noted that were quantity the sole factor, and were the entire programs rather than program segments the basis of measurement, Nine would fail to establish infringement in relation to all but one of the 20 excerpts. On a purely quantitative analysis, he therefore concluded that use of 20 seconds of footage from a 43 minute 21 second program of *Who Wants to Be a Millionaire*, 42 seconds of footage from a one hour 29 minutes and 56 second program of *The Today Show* and 25 seconds from a 38 minute nine second program of *Days of Our Lives* would not infringe copyright. Use of 20 seconds of footage from a 40 second program of *Newsbreak*, however, would infringe copyright. He acknowledged that were the program segments the basis for measurement the issue would be a bit muddier.

(ii) Purpose

Conti J also considered Ten's purpose in using the excerpts, noting that an object of satire, comedy or light entertainment will not normally involve infringement because it will not involve imitation.¹⁰ He concluded that Ten was using the excerpts for a quite different purpose to Nine's objective in broadcasting the source program and that Ten was not 'pirating' Nine's content.

(iii) Commercial effect

In balancing the three considerations of quality, quantity and purpose, he considered whether Ten had interfered with Nine's commercial interest, noting that direct or indirect diminution of Nine's profits is relevant. He assessed whether 'harm has been inflicted on Nine's commercial interest in the whole of [158] the program or program segment and whether Nine's commercial interest has been interfered with in terms of

⁸ While the quality or the materiality of the part taken, will generally be the dominant consideration in relation to Pt III copyright works, Conti J suggests that the emphasis on quality relates directly to the issue of originality in the work.

⁹ [2001] FCA 108, para 67.

¹⁰ Ibid para 67.

the nature, value and degree of what has been taken'.¹¹ Conti J found that Ten had not infringed Nine's copyright in relation to any of the excerpts.

Decision on fair dealing

In the event the court found that Ten had substantially reproduced Nine's television broadcast, Ten sought to rely on the defences of fair dealing for the purpose of criticism and review and fair dealing for the purpose of reporting the news. Conti J made comments on these defences notwithstanding his finding in relation to copyright infringement.¹²

(i) Purpose of use

Conti J held that an objective test should be applied in determining whether a particular use was a fair dealing. He agreed with Nine, however, that evidence of a subjective purpose contrary to the purpose of criticism and review, may disqualify a copyright infringer from relying on the defence. The purpose of criticism and review must be genuine.

(ii) Scope of criticism and review

He concluded that while criticism and review involve the passing of judgment, they 'are words of wide and indefinite scope which should be interpreted liberally'.¹³ He confirmed that use of material for the purposes of satire and light entertainment could constitute a fair dealing for the purpose of criticism and review. One of the claims, for example, related to Ten's re-broadcast of a scene from *Days of Our Lives*, in which one of the characters from that show, Marlana, is shown to be possessed by the devil. *The Panel* comments on the footage were to the effect that the writers of the show were resorting to desperate measures to prolong the life of the show. Conti J concluded that although the re-broadcast and the accompanying commentary involved satire and humour, it was for the purpose of criticism and review and he would have upheld the defence of s 103A.

¹¹ *Ibid* para 70.

¹² As Conti J found that there had not been an infringement of Nine's copyright in the television broadcast his comments in relation to Ten's fair dealing defence are obiter.

¹³ [2001] FCA 108, para 66.

Ten failed to make out the defence of criticism and review where Ten was using footage purely for the purpose of entertainment, with no overriding objective of criticism or review or of reporting news. He therefore rejected Ten's defence of criticism and review in relation to the use of footage of Kerri Anne-Kennerley from *The Midday Show*, which *The Panel* used as a basis for comments about her and *The Midday Show*, which she had been hosting. Conti J concluded that Ten was satirising Ms Kennerley and her performance as presenter, but not engaging in criticism or review.

(iii) Scope of news

He also interpreted 'news' broadly, stating that it is not restricted to current events and that it may involve the use of humour. The fact that something is news does not mean it is not entertaining and vice versa.¹⁴ He noted, however, the difficulty in relying on a strict distinction between news and entertainment. He accepted Ten's defence of fair dealing for the purpose of reporting the news in relation to the use of footage of children rehearsing a song intended to be used at the Sydney Olympic Games. He also accepted the defence in relation to footage from the Inaugural Allan Border Medal Dinner showing Glenn McGrath failing to notice the Prime Minister's attempts to congratulate him. He rejected [159] the defence in relation to footage of the Prime Minister singing 'happy birthday' to Sir Donald Bradman.

(iv) Sufficient acknowledgement

The issue of sufficient acknowledgement, as required by s 103A of the Act, was also raised, with Nine arguing that Ten had not sufficiently acknowledged the source of the footage. While Conti J confirmed that it must be a question of fact in each case, he concluded that use of Nine's onscreen watermark by Ten was adequate acknowledgement.

Conti J considered each excerpt in relation to which fair dealing was raised as a defence, finding that he would have upheld one or both of the defences in relation to 11 out of the 20 programs involved, and would have rejected the defences in relation to the remaining nine programs.

¹⁴ Citing Hill J's comments in *Nine Network Australia P/L v. Australian Broadcasting Corporation* [1999] FCA 1864, para 36.

Conclusion

This case is important because it is the first to address the issue of infringement of copyright in a television broadcast. It provides guidance on the issues to consider in determining whether the re-broadcast of footage will constitute infringement of copyright.

Conti J's willingness to take into account the purpose for which the material was re-broadcast in order to establish whether a substantial part of the broadcast had been used, arguably allows greater scope for use of footage than would have been the case had he applied a test based solely on considerations of quality and quantity. It is apparent from the court's approach that there is in fact some overlap of the factors relevant to the issue of substantiality and those relevant to fair dealing.¹⁵ While Conti J's decision in relation to the fair dealing defences is persuasive authority only, his consideration of ss 103A and 103B(1)(b) indicates that they are to be interpreted broadly.

It will be interesting to see how successfully Conti J's reasoning in relation to the issue of substantiality and fair dealing is able to be applied to works other than television broadcasts.

Nine has applied to appeal the decision, although at the time of writing no appeal date has been set.

¹⁵ [2001] FCA 108, para 49.