

TCN CHANNEL NINE PTY LTD V NETWORK TEN PTY LTD

TASHA SMITHIES AND GEORGE PAPANIKITAS¹

[249] This appeal to the Full Federal Court was from a decision of Justice Conti dealing with copyright infringement of television broadcasts. It considers what constitutes a television broadcast for the purposes of copyright infringement, and the related issue of how substantiality is to be determined in the context of television broadcasts. The case also examines the fair dealing defences for the purposes of criticism and review and the reporting of news in the context of television broadcasts. These issues have not previously been judicially considered in Australia.

TCN Channel Nine Pty Ltd had at first instance unsuccessfully contended that the re-broadcast by Network Ten Pty Limited, as part of its program *The Panel*, of excerpts from other programs previously broadcast by Nine constituted an infringement of Nine's broadcast copyright conferred by s 87(c) of the *Copyright Act 1968* (the Act).

Nine had alleged two breaches by Ten, namely:

- Ten's making of a cinematograph film of the Nine programs (in contravention of s 87(a) of the *Copyright Act*); and
- Ten's re-broadcast of 20 segments of the Nine programs (in contravention of s 87(c) of the *Copyright Act*). The 20 segments of the Nine programs included segments from programs such as: *A Current Affair*, *The Inaugural Allan Border Dinner*, *Midday*, *Wide World of Sports*, *Australia's Most Wanted*, *Pick Your Face*, *Crocodile Hunter*, *The Today Show* and *Nightline*.

Conti J found at first instance that Network Ten had not re-broadcast a substantial part of any of the 20 segments pleaded by Nine. In relation to the first claim that Ten had made a cinematographic film his Honour interpreted s 25(4) of the Act, which operates as a deeming provision in relation to television broadcasts, as incorporating a requirement of substantiality which had not been made out by Nine.

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[250] **Findings on Appeal**

Hely J delivered the primary judgment in which Finkelstein J and Sundberg J concurred except in relation to findings on the availability of fair dealing defences.

Substantiality

Section 87(a): What constitutes a cinematograph film?

The making of a cinematographic film of a television broadcast, insofar as it consists of visual images, or a copy of such a film, is an infringement of copyright in the television broadcast by virtue of s 87(a) and s 101 of the Act. Hely J found that s 25(4) of the Act is in the nature of a deeming provision, operating so that a cinematographic film or photograph of any of the visual images comprised in a television broadcast is an exclusive right of the copyright owner.

Contrary to Conti J's findings, Hely J concluded that the fact that s 25(4) applies to a photograph of any of the visual images comprised in the broadcast supports the view that the expression 'any of the visual images' encompasses any one or more of those images, without any requirement that the images should amount to a substantial part of the broadcast. More relevantly, his Honour found that s 25(4) would apply to a *film* capable of being shown as a moving picture of any of the visual images comprised in a television broadcast, whether or not the sequence of images constituted a substantial part of the source broadcast or not. In so finding, the court held that there was no need to determine what constitutes a television broadcast, and that Nine had established contravention of its s 87(a) copyright in the source broadcasts.

Section 87(c): What constitutes a television broadcast?

Hely J identified the interest protected by the copyright as the visual images broadcast by way of television and any accompanying sounds. Ten contended that the benchmark for what constitutes a broadcast is a day's television, while Nine submitted that each visual image which is broadcast constitutes a discrete television broadcast. In rejecting Ten's benchmark as inherently arbitrary in its application, his Honour concluded that a television broadcast is made whenever visual images and accompanying sounds are broadcast by way of television. At paragraph 85 of his judgment, his Honour states that:

Re-broadcasting of any of the actual images and sounds so broadcast is an infringement of copyright under s 87(c), 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.²

His Honour considered that the question of substantiality did not arise as each of *The Panel* segments consisted of a plurality of visual images. In doing so he noted the special nature of the interest protected in the case of copyright in a television broadcast. Nonetheless, Hely J observed that in cases of re-broadcast transmissions which last for a fraction of a second, or where images are unaccompanied by sound, and vice versa, questions of substantiality may arise. Accordingly, his Honour found that subject to the potential availability 'fair dealing' defences, the re-broadcast of *The Panel* segments were an infringement of copyright under ss 87(c) and 101.

Defences raised

At first instance Ten submitted that the re-broadcasts of *The Panel* segments could be defended on the basis that the re-broadcasts were a fair dealing for the purpose of criticism or review³ or a fair dealing for [251] the purpose of reporting news.⁴ In respect of some segments both defences were put forward by Ten. Conti J had found that Ten would have failed on its fair dealing defences, pursuant to ss 103A and 103B of the Act, in relation to nine of the twenty broadcasts pleaded. In total, 10 of the program segments on which Conti J made findings were the subject of appeal by both parties. Hely J reviewed those segments which Conti J found to constitute fair dealing and overturned the primary judge's findings in relation to three of them.

In so doing Hely J commented that, in assessing whether a defence of fair dealing existed, Ten is not disentitled from relying on the s103A and 103B defences by reason only of the commercial nature of its activities, and that criticism may involve an element of humour or 'poking fun at' the object of the criticism. Hely J thus found that the broadcasting by Ten of *The Panel* segments infringed Nine's copyright in the television broadcasts from which they were extracted and that no defence of fair

² TCN Channel Nine Pty Ltd v Network Ten Pty Limited [2002] FCAFC 146, 85.

³ *Copyright Act 1968* s 104A.

⁴ *Copyright Act 1968* s 103B.

dealing was available to Ten in relation to twelve out of the twenty segments which were the subject of the proceedings.

Sundberg and Finkelstein JJ

Sundberg J concurred with Hely J's findings, except in relation to one of Ten's notices of contention regarding the availability of the fair dealing defences for which he agreed with the primary judge's findings. Finkelstein J similarly agreed with Hely J's findings. In addressing the question of what constitutes a television broadcast, his Honour found that the visual images that constitute a broadcast need not be an aggregate of images, that there is copyright in either each and every still image which is transmitted or in each and every visual image that is capable of being transmitted on a television screen. In considering the availability of fair dealing defences, Finkelstein J deviated from Hely J's findings on three segments. The Court thus found infringement of Nine's copyright in relation to eleven of the impugned segments.

Summary

The Court found that Ten had contravened Nine's s 87(a) copyright in the source broadcasts by making a cinematographic film of them. Importantly, Hely J did not consider the issue what constituted a television broadcast as determinative in this regard. The Court also found that the re-broadcast of extracts from Nine programs was an infringement of Nine's copyright under ss 87(c) and 101 of the Act. Ten's liability was subject to the availability of 'fair dealing defences', which it found to apply in nine of the segments so that infringement was made out in relation to 11 of the segments for which Nine claimed breach of its copyright.