

# Precious images: copyright law and television broadcasts



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Over the last several years, Australian media magnate Kerry Packer has sought to maximise the value of the intellectual property assets of the television station Channel Nine. He has made a concerted effort to expand the scope of copyright protection over television broadcasts screened. The television station Channel Nine has taken a number of legal actions against its rivals and competitors — including the Australian Broadcasting Corporation and Network Ten. It has alleged that the broadcasters have used substantial parts of copyrighted television broadcasts without their permission.

In *Nine Network Australia Pty Ltd v Australian Broadcasting Corporation* (1999) 48 IPR 333, Channel Nine brought a legal action against the Australian Broadcasting Corporation in an effort to claim copyright ownership over the millennium fireworks held by the City of Sydney [<http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/federal%5fct/1999/1864.html>]. Justice Hill doubted whether copyright could subsist in subject matter as ephemeral as a fireworks display. His Honour also maintained that, in any case, the ABC would be protected by the defence of fair dealing — both for the purposes of reporting the news, and for criticism and review. The response to the decision was twofold: first of all, Channel Nine started using footage from the ABC and New Zealand TV coverage of the millennium without permission, [Paul Barry. 'The Fireworks Fight', Media Watch, ABC, 7 February 2000, <http://www.abc.net.au/mediawatch/transcripts/s98367.htm>] and second the City of Sydney trademarked the word 'Eternity' even though its claim to the symbol was doubtful. [Linda Morris. 'Eternity has limits, Sartor Decrees', *The Sydney Morning Herald*, 12 January 2001, p1.]

In 2001, Channel Nine brought a legal action against Network Ten for copyright infringement. Ten re-broadcast twenty segments from episodes of certain Nine television programs in Ten's entertainment program *The Panel*. For instance, there was an excerpt from the *Midday Show* of Prime Minister John Howard singing happy birthday in honour of Australian cricketer legend Don Bradman. Nine alleged the segments constituted the re-broadcast by Ten without the license of Nine of a substantial part of each television program, and thus an infringement of Nine's copyright in the television broadcasts under the *Copyright Act 1968* (Cth).

In *TCN Channel Nine v Network Ten* (2001) 50 IPR 335, Justice Conti of the Federal Court held that a television

broadcast could be defined as a television program, or where applicable, a segment of a program [[http://www.austlii.edu.au/au/cases/cth/federal\\_ct/2001/108.html](http://www.austlii.edu.au/au/cases/cth/federal_ct/2001/108.html)]. His Honour found that Network Ten was not guilty of copyright infringement, because it had not reproduced a substantial part of the television broadcasts of Channel Nine. In the alternative, Justice Conti considered whether Network Ten could raise the defence of fair dealing — for the purposes of reporting the news, and research and criticism. His Honour held that eleven of the twenty segments would have been protected under the defence of fair dealing. However, his Honour found that nine excerpts were not within the scope of the defence of fair dealing, because they were not for the purposes of reporting the news, or for research and criticism.

In *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2002) 55 IPR 112, the Full Federal Court upheld an appeal by Channel Nine [<http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/FCAFC/2002/146.html>]. Surprisingly, Justices Hely, Finkelstein and Sundberg held that a television broadcast could be defined as a single visual image — rather than a whole television program. As a result, their Honours found that the videos of *The Panel* segments reproduced a substantial part of the television broadcast. The Full Federal Court also took a narrower reading of the defence of fair dealing. The majority found that the primary judge was in error in finding that the defence of fair dealing was made out with respect to a number of excerpts — including from *A Current Affair* program, the *Allan Border Medal Dinner* program, and the *Today Show*. However, the Full Court found that the primary judge was in error in finding that the defence of fair dealing was not made out on the 'Simply the best' program, as the criticism by *The Panel* of the show's format was justified. In all, the Full Court found that Network Ten had used eleven excerpts unlawfully.

Network Ten were granted special leave by the High Court to appeal the decision of the Full Federal Court. The High Court recently heard argument over the matter on 7 September 2003 in Canberra. Network Ten did not fare well. The barrister for the television network argued that a television broadcast should be defined as a whole day. Justice Gummow said that this was a greedy submission. The lawyer alternatively argued that a television broadcast should be defined as a television program. Network Ten refused to make arguments about fair dealing, because they wanted

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to merely reinstate the decision of Justice Conti. The High Court was notably frustrated by this reluctance to deal with fair dealing. Channel Nine maintained that individual images were of great commercial value — mentioning such precious images as the sentencing of the Bali Bombers, the S11 Twin Towers attack, and the Concorde crash. They contended that a television broadcast should be defined as a single visual image — rather than in terms of a television program or unit.

Justice Gummow and Justice Hayne were the most sceptical of Channel Nine's argument. They suggested that the notion of an 'image' was merely a metaphor or an analogy for the technical process of the transmission of the television broadcast. Justice Gummow and Justice Hayne also questioned why broadcasts should receive a 'deluxe' treatment — as opposed to works and other subject matter — in terms of copyright infringement. Justice Kirby and Acting Chief Justice McHugh recognised that there were important and significant freedom of communication issues at stake. Nonetheless they reiterated that the statute gave quite a specific command, and they could not see how they could ignore the suggestion that a television broadcast was defined as an image. These two judges seemed that would have been much happier to deal with the matter in terms of fair dealing. Justice Callinan stressed the

commercial value of television broadcasts. He also adopted the language of Channel Nine that Network Ten were 'pilfering' its images. Chief Justice Gleeson and Justice Heydon were absent from the court and took no part in the proceedings.

The High Court has reserved its judgment in *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd*. Whatever the outcome, the decision will have a great impact upon the operation of the television broadcasting industry. Channel Nine has threatened to take further legal action against its rivals Channel Seven and Network Ten. In *The Sydney Morning Herald*, Peter Meakin said that the company would consider action against other television programs:

*The Panel are smart people and will work out the implications. It will have far more impact for Sportswatch and Sports Tonight. They're going to have to hire some people and do some work themselves instead of thieving material from others. [Sarah Crichton. 'Nine has last laugh at The Panel', The Sydney Morning Herald, 23 May 2002].*

The judgment will have wider implications for the definition of copyright work and other subject matter, the defence of fair dealing, and the freedom of communication. ■

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