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Copyright liability for the playing of 'music on hold': Telstra Corporation Ltd v Australasian Performing Right Association Ltd

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Commentary on an appeal to be heard against a judgment of the Full Court of the Federal Court of Australia (given on 5 October 1995, reported in (1995) 60 FCR 221; (1995) 131 ALR 141)

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Copyright - intellectual property - whether the provision of music to be heard by telephone users placed on "hold" constitutes an infringement of copyright - whether Telstra, as a general carrier of telecommunications, is to be taken to have caused that music to be transmitted to subscribers to a diffusion service - whether Telstra, by operating a telephone network including a mobile phone network, is to be taken as transmitting work heard by a caller in a telephone call "to the public" - Copyright Act 1968 (Cth) ss 10(1), 26, 31(1)(a)(iv) and (v).

Headings in this case note:

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1. Introduction

{1} This is a test case brought by the Australasian Performing Rights Association (APRA), the assignee of copyright in musical and literary works for the purpose of the public performance rights (both live and mechanical), the right of transmission to subscribers to a diffusion service (the diffusion right) and the broadcast right. The question to be determined is whether Telstra (or Telecom as it was called at the outset of proceedings) by providing certain music on hold services, is liable to APRA because of a breach of their diffusion and/or broadcast rights under the *Copyright Act* 1968 (Cth). APRA sought declaratory and injunctive relief to restrain Telstra from performing or authorizing the performance in public of certain works in which it owned (by partial assignment) the copyright, as well as from broadcasting them or transmitting them by cable to any subscriber to a telecommunications service provided by Telstra, and from authorizing or permitting any person to connect to the telecommunications network any equipment capable of transmitting the works to Telstra subscribers.

{2} By agreement between the parties, the following fact scenarios were to be considered: (a) the provision of music on hold by some third party to a caller; (b) the provision of music on hold by a Telstra service centre to a caller; (c) the provision of music on hold by Telstra to a caller in the course of a special music on hold service provided by Telstra to certain customers, and known as "Customnet"; and (d) the transmission of music on hold through the mobile phone network. In each of these cases the music on hold is provided through the connection of either a radio or a CD, tape, or record player of some description to the network, either in the Telstra exchange or at the premises of the independent provider of music on hold services.

{3} At first instance (*APRA v Telstra Corp Ltd* (1993) AIPC 91-036) Gummow J rejected the notion that either the diffusion right or the broadcast right covers any of the specified music on hold services. This decision was overturned on appeal (*APRA v Telstra Corp Ltd* (1995) AIPC 91-160), the Full Federal Court holding that music on hold came within the broadcast right when the recipients were using mobile phones, and, by a majority, that the provision of music on hold came within the parameters of the diffusion right when using 'traditional' telephones (Black CJ and Burchett J, Sheppard J dissenting). At trial, Gummow J also rejected the contention that the public performance right covered music on hold, and that issue was dropped on appeal. A separate issue of authorisation under s 13(2) was not considered at any stage. In spite of the different fact scenarios, the judgments all centered on the crucial question whether Telstra as the owner and operator of the telecommunications infrastructure, was to be held liable for certain transmissions of copyright matter via that infrastructure, be it by itself in a distinct capacity or by others.

2. The diffusion right

{4} By virtue of s 31(1)(a)(v) of the *Copyright Act* 1968 (Cth) (the Act), copyright in a literary or musical work is the exclusive right 'to cause the work to be transmitted to subscribers to a diffusion service'. References in the Act to the terms 'transmission to subscribers to a diffusion service' are clarified in s 26, which holds the key to resolving the issues facing the court. As well as defining relevant terms, the section also prescribes certain exceptions and, of particular relevance here, aims to clarify the relationship between the person selecting the copyright works or subject matter and arranging its transmission, and the person who supplies the infrastructure permitting the transmission to occur, whether the latter is simultaneously a provider of telephone services or not.

{5} Although s 26 originated at a time when such services as 'music on hold' were not contemplated, and its main aim was to regulate the use of cable for redistribution of broadcast signals (a requirement of the Berne Convention), it in fact goes further and clearly contemplates both the transmission via cable of copyright works and subject matter other than broadcasts, and also transmission in association with or by means of infrastructure provided for a telephonic communications service. The definition of the cable transmission right in s 26(1) requires 4 basic elements: (a) distribution of works or subject matter; (b) in the course of a service distributing broadcast or other matter; (c) over a material path; and (d) to premises of a subscriber to the service.

3. Service

{6} A vital issue is whether the term 'service' referred to above under (d) is the telecommunications service or the service of distributing copyright subject matter or works; in terms of the present case, whether music on hold is an integral part of the telecommunications service provided by Telstra, or constitutes a separate service of distributing copyright works or subject matter. The answer to that question will largely determine the effect of s 26, because if the relevant service is the telecommunications service, transmission of music on hold will be subject to copyright, since the music is being distributed to the premises of a subscriber to the (telecommunications) service. Since the person who hears music on hold does not in fact request to hear it, but must listen to it as a necessary, unavoidable, and possibly unwanted incident of calling a party who is engaged, the provision of music on hold may not be a service if one uses the narrow sense of that word, i.e. something that is sought and desirable. The better view, however, is that the person who hears music as an unavoidable incident of using Telstra's telephone service, does so as a recipient of a broader telecommunications service, to which every Telstra customer is a subscriber. Whether that person likes or seeks the music is not relevant, in the same sense that a person may still be receiving a service even if she receives a series of nuisance telephone calls. This was also the view of the majority of the Full Court (per Black CJ at 39,440; Burchett J at 39,460). Of course, if the service in (d) is the telecommunications service, that points to Telstra being the person who distributes copyright matter to subscribers within the meaning of s 26 and thus being liable under s 31(3)(a)(v).

{7} What then of s 26(4), which provides that the person operating the service is deemed to be the person who enters into an agreement undertaking to provide a subscriber with the service? On one view, s 26(4) means Telstra cannot be deemed to be operating a diffusion service since it has not entered into an agreement with an ordinary telephone subscriber to supply them with music on hold. However, on the broader view of the meaning of "service" suggested above, this provision is no bar to Telstra's liability, since the service referred to in s 26(4) can then be regarded as the telecommunications service and not the music on hold service and Telstra has an agreement to provide an ordinary telephone service with every subscriber. Furthermore, a person either operates or does not operate the service; that that person does not have an agreement with some subscribers that expressly refers to some aspect of the service does not stop them being a person operating a service. A broad interpretation of service is also contemplated by s 26(3) which clearly envisages that there may be a service whether or not the ultimate audience wants or appreciates it. And the point is further reinforced by reference to s 26(5), which specifically states that the terms 'to the premises of subscribers to the service', may be read as 'to the premises of a subscriber to the service of providing telephone services, to which the service of distributing matter is incidental'. It is clear that it is irrelevant that the caller who receives music on hold has not (arguably) subscribed to the music on hold service, since it is the general telecommunications service (which may include receiving music on hold) that the person must have subscribed to. It is also irrelevant that some person may have paid Telstra or a third party to provide music to persons who call its premises: of course Telstra contracts with many users of its services on a variety of bases; they all receive a multi-faceted service, which for some includes the playing of music to callers on hold. The majority of the Full Court came to the same conclusions concerning the operation of s 26 (per Black J at 39,440; Burchett J at 39,460).

4. Distribution

{8} The point Gummow J makes (*APRA v Telstra Corp Ltd* (1993) AIPC 91-036 at 39,756) that distribution is not a good term to describe a telephonic communications service is correct because it is not an obvious term to apply to two-way communications. However, contrary to his view, it could be an appropriate term to describe a music on hold service. The latter point is relevant to s 26(5), which may, as Gummow J says (at 39,756), require the existence of a distinct service of distributing matter, i.e. some element of distribution. His Honour thought this does not exist on the basis of a narrow view of the meaning of the term 'distribution', but it seems clear that the term 'distributing' must be read, not in the sense of scattering simultaneously from one point to a number of points, but in the sense of uni-directionally sending something to a place removed in space. It is quite clear that the Act contemplates both the situation where the distribution may be to a number of premises at once and where it may be to one place only; it would be strange if the transmission were not covered by copyright if it is only received by one consumer and suddenly becomes subject to copyright if two or more consumers simultaneously receive the subject matter or works. The reason why the works or subject matter, if the transmission is to be covered by s 26, must be distributed to the *premises* of a subscriber, is that, as Burchett J points out (at 39,462), if it were to the subscriber in person, the right would basically be impossible to operate or control. The service cannot be anchored to a person, but by its nature must be anchored to premises, since liability cannot depend on the identity of the actual user of the service within premises to which it is attached: otherwise, if the caller is the person subscribing (i.e. contracting for the telephone service) then liability in copyright arises; if for instance, the caller is that person's spouse, it does not. Such an outcome cannot have been intended.

{9} It appears then that the majority of the Full Federal Court is right in its conclusion concerning the applicability of s 31(1)(a)(v). As to a general argument that the result is in some way unfair, or that the person thus held liable to pay royalties to the copyright owner is not the person benefiting from the distribution of the works, this is both untrue and irrelevant. Firstly, although a business presumably contracts with Telstra concerning the provision of music on hold services because it thinks it will derive some indirect benefit from providing music on hold to its own customers (e.g. persons calling it who cannot be dealt with immediately will not hang up), that does not mean that Telstra will not derive a benefit itself, if only (even where the Customnet service is not used), by an increase in the duration and intensity of the use of its telecommunications facilities. Secondly, if the specific wording and intention of s 26 are contemplated, it makes perfect sense that the legislator should set out to ensure that the provider of the telecommunications infrastructure and services to which the distribution of copyright matter is incidental, should be liable for the transmission of copyright matter. Such a person is in a perfect position to pass on the cost of copyright royalties to the users of its facilities, thus lowering transaction costs and rationalising accounting methods.

5. Broadcasting

{10} By virtue of s 31(1)(a)(iv) copyright includes the exclusive right to broadcast a work. In accordance with s 25(1) 'broadcasting' is to be read as referring to broadcasting by way of sound broadcasting or television. By virtue of s 10(1) broadcast means transmit by wireless telegraphy to the public. The dispute between APRA and Telstra revolved around the interpretation of the terms 'to the public'; it was accepted by both parties that the use of a mobile phone constituted a wireless transmission. The decision of the trial judge was based on the fact that the transmission of music on hold occurs in the context of private telephone conversations, the confidentiality of which is protected by law, and therefore it could not constitute a transmission 'to the public' (at 39,762). The transmission of music on hold to a mobile phone was thus not a broadcast of a work. The Full Court reversed the decision on appeal, unanimously finding that transmission of music on hold to mobile phones did constitute a broadcast.

6. The Public

{11} The term 'public' has attracted much judicial analysis in the context of s 31(1)(a)(iii) (the right to perform the work in public), but not in the context of s 31(1)(a)(iv) (the broadcast right). One point of contention is whether the public performance cases are relevant to the broadcast right, but the more general question is whether 'public' should be contrasted with 'private', or whether 'public' should be construed as 'the copyright owner's public', i.e. those persons a copyright owner may fairly consider as belonging to his audience. The latter approach really does no more than reduce the question to: is it fair that the copyright owner be compensated for the use that this particular audience makes of the works or subject matter? It is the relationship between copyright owner and audience that must be examined when using this approach, whereas when using the public/private approach, it is the relationship between the members of the audience that holds the key. However, the 'public/private', and the 'copyright owner's public' approaches, are not necessarily incompatible: a private (e.g. family) audience could be seen as merely one category which the copyright owner cannot fairly consider as his or her audience for the purpose of compensation for use of a copyright work. The 'fairness' approach is satisfactory since it permits the uses of the term 'public' in the performance and the broadcast right to be consolidated (whereas the public/private distinction seems mostly irrelevant to the broadcast right), and logically allows consideration of the issue on the basis, inter alia, of either the inherent commercial nature of the use, or its association with commercial activities.

{12} Whereas it was the association of the music on hold service with private conversations that led Gummow J to his conclusions concerning the broadcast right, the 'fairness' approach leads to exactly the opposite conclusion, since it compels the making of a clear distinction between the 'private conversation' element and the 'transmission of music on hold' element of the communication. The transmission of private conversation is different from the transmission of music on hold, in that where music on hold is being transmitted, the same music will be received by any number of people put on hold at the same time, irrespective of who they are or what they want. That is the essence of transmission to 'the public' which distinguishes it from transmission as part of a private conversation; the identity of the recipient is irrelevant because it does not determine which copyright matter will be sent. It is a confusion of language, as Burchett J points out (*APRA v Telstra Corp Ltd* (1995) AIPC 91-

160 at 39,466), to contemplate 'broadcast' in terms only of one transmission to a number of people, rather than a number of separate transmissions to a number of people; what is relevant is that the same matter is sent to any number of people, and that the content of the matter is determined independently of the identity of the recipient (as opposed to a telephone conversation, the content of which is determined by both parties). The particular use of the restrictive words 'to the public' in the context of wireless transmissions thus aims to exclude communication of a work as an integral part of a private conversation from being subject to copyright . For instance, if A in the course of a conversation, reads to B over a mobile telephone a poem in which C owns the copyright, this will not be covered by the broadcast right (ignoring other considerations); if A provides a service permitting a person who dials a certain number to hear recitation of poetry, that would constitute a transmission to the public, and thus a broadcast, and the kind of use a copyright owner could fairly expect to be compensated for, whether or not it is in fact provided at a cost. In other words, since the contents of the transmission of works as music on hold is not determined by the parties, and does not form an integral part of the conversation - quite the contrary, it only takes place because there is no conversation - and since it is associated with commercial use and thus should fairly attract compensation, it is clearly within the broadcast right. This approach fits comfortably with the defining of 'public' on the basis of the copyright owner's expectations, i.e. an audience which the owner could fairly consider as his paying public. It also does away with a need to consider at all how many people are in that audience at any given time. In that sense equating the terms 'the public' with the copyright owner's public is acceptable, i.e. a person making certain use of a copyright work for which the copyright owner may expect to be compensated. This leaves only a limited category of exception both to the broadcast and the public performance right.

{13} Finally, it should be noted that Burchett J points out (at 39,464 and 39,465) that the broadcasting element could be considered a part of the transmission by wire since most of the transmission will occur by wire even if a mobile phone is used, and the definition in s 26(1) does not require exclusive use of wires. If this is correct, and it seems reasonable, then the separate broadcasting issue may be irrelevant.

7. Conclusion

{14} The decision of the majority of the Full Federal Court concerning the diffusion right thus means that the provider of the telephone service will be liable under the Copyright Act irrespective of who actually provides the music and arranges its transmission to a caller on hold. In other words, Telstra are liable under fact scenarios (a), (b) and (c) (see above, Introduction). The unanimous decision of the Full Court concerning the broadcasting right that the same holds under the broadcast right where the music reaches the caller via electromagnetic waves rather than via cable; Telstra is thus also liable under fact scenario (d) (see above, Introduction). I have argued above that the decision of the Full Federal Court is correct on both counts, and have set out what I consider to be the main arguments in favour of that decision.

{15} Interpretation of the Copyright Act entails a constant process of adapting to changing times. Given the slowness of legislative processes, this exercise cannot be undertaken with a 'wait and see what the legislator does' attitude. A concern that the law is being 'adapted' to situations which could not have been within the contemplation of the legislator at the time of

drafting should not prevent logical extensions of the law based on the essential principles and premises that underlie it. Therefore pre- conceived notions of the meaning of certain terms within the Act, generated within a certain technological context, must not form a bar to an evolutionary approach. This is abundantly clear in the context of electronic rights, in which this judgment is of great importance; if the decision of the Full Court of the Federal Court stands, it clearly has significant implications for telecoms companies that transmit music on hold, but also for the transmission of copyright material over the Internet. The decision is also significant in light of the major review of the Copyright Act, which is in part inspired by concerns that the present Act does not adequately protect the rights of copyright owner against new forms of electronic exploitation of works and other subject matter.