Copyright Subsistence: Subject Matter Other than Works (Part IV)

The *Copyright Act 1968* (Cth) (*CA*) introduced new categories of subject matter in order to protect entrepreneurial investment. Part IV aims to protect "new" technologies and the investment of resources in the production of media and content.

The content protected by Part IV is known as "subject matter other than works" or, more succinctly, "other subject matter" This subject matter includes:

- Sound recordings; [1]
- Cinematograph films; [2]
- Television and sound broadcasts; [3] and
- Published editions of works. [4]

CA s 90

For these subject matter, there is no requirement of originality. Rights are granted to the "makers" of these subject matter. The terminology for the creator is different in Part III and IV - the creators of Part III works are called "authors" and the creators of Part IV subject matter are called "makers".

Copyright in Part IV subject matter is "in addition to, and independent of" any copyright subsisting in the work under Part III. [5] Thus, a single item may have many layers of copyright. For example, a recording of a song will have copyright protection in the underlying musical work (the musical notation), literary work (the lyrics), as well as copyright in the actual sound recording.

Video overview by Kylie Pappalardo on Part IV Subject Matter Other Than Works.

1. Sound Recordings

Copyright in sound recordings subsists by virtue of s 89 of the *Copyright Act*. "Sound recording" is defined in s 10 as "the aggregate of the sounds embodied in a record". [6] "Record", in turn, is defined to mean "a disc, tape, paper or other device in which sounds are embodied". [7] This definition is designed to be technology neutral and covers CDs, DVDs, electronic files etc.

2. Cinematograph Films

Section 90 of the *Act* provides for the subsistence of copyright in cinematograph films.

"Cinematograph films" is defined in s 10 to mean:

"the aggregate of the visual images embodied in an article or thing so as to be capable by the use of that article or thing:

(a) of being shown as a moving picture; or

(b) of being embodied in another article or thing by the use of which it can be so shown;

This includes the aggregate of the sounds embodied in a sound track associated with such visual images". [8]

The means by which a "moving picture" is produced is not relevant in determining whether the end result is a "film".

Sega Enterprises Ltd v Galaxy Electronics Pty Ltd; [9] *Galaxy Electronics Pty Ltd v Sega Enterprises Ltd* [10]

In the cases Sega Enterprises Ltd v Galaxy Electronics Pty Ltd and Galaxy Electronics Pty Ltd v Sega Enterprises Ltd Sega wanted to stop parallel imports of its video games. As there is no restriction on importing non-infringing computer programs, Sega argued that the games were "films".

It was held that the moving images in a computer-generated video game was a film. The definition should not be interpreted narrowly, but is intended to cover new technologies, the emphasis being on the end product rather than the means adopted to create those pictures.

Virtual Cop was in reality very similar to a traditional movie; two protagonist police officers struggle to investigate criminal activities at various locations, complete with an introduction and triumphant finale.

- it is not the means by which the video is shown on the screen, but the end result that is important.
- The important distinction is that the video game is capable of producing the video imagery and the soundtrack, and hence that video and soundtrack was 'embodied' in the game.

Video overview by Caitlin Low on Cinematography films.

3. Television and Sound Broadcasts

Section 91 of the *Act* provides that copyright subsists in television and sound broadcasts. This copyright can subsist even if there is no copyright in the underlying material being broadcast. For example, there is no copyright in a sporting match or spectacle, but the maker of the broadcast of that match or spectacle will have copyright in the broadcast.

Specifically, section 91 provides:

> "Subject to this Act, copyright subsists in a television broadcast or sound broadcast made from a place in Australia: (a) under the authority of a licence or a class licence under the Broadcasting Services Act 1992; or (b) by the Australian Broadcasting Corporation or the Special Broadcasting Service Corporation".

There are three relevant definitions in s 10 of the *Act*:

- "Broadcast" is defined as "a communication to the public delivered by a broadcasting service within the meaning of the *Broadcasting Services Act 1992* (Cth)."
- "Television broadcast" means "visual images broadcast by way of television, together with any sounds broadcast for reception along with those images".
- "Sound broadcast" means "a broadcast otherwise than as part of a television broadcast".

A key aspect of the concept of broadcasting, which is apparent in the definition of "broadcast", is that it is "to the public".

Telstra Corp Ltd v Australasian Performing Right Association Ltd [11]

In the case of Telstra Corp Ltd v Australasian Performing Right Association Ltd APRA argued that when Telstra played music on hold to subscribers, it was broadcasting that music to the public.

It was held that music on hold played to individual callers was considered to be played "to the public".

"The use of the words "to the public" conveys a broader concept than the use of the words "in public" since it makes clear that the place where the relevant communication occurs is irrelevant. That is to say, there can be a communication to individual members of the public in a private or domestic setting which is nevertheless a communication to the public."

Video overview by Thomas Gardner on Telstra Corp Ltd v Australasian Performing Right Association Ltd.

Network Ten Pty Ltd v TCN Channel Nine Pty Ltd ("The Panel") [12]

In the High Court of Australia case of Network Ten Pty Ltd v TCN Channel Nine Pty Ltd Network Ten had a variety show called The Panel, which broadcast clips taken from other networks. A panel of commentators then provided (often humorous) commentary on the clips. The Panel used several short clips taken from Channel Nine. Nine sued under right to rebroadcast.

The Full Federal Court held that any unauthorised rebroadcasting of a broadcast would be an infringement of copyright (subject to any defence of fair dealing that Ten might have had).

Broadcast "means visual images broadcast", not the "aggregate of visual images" like films. Therefore, the rebroadcast of very short clips from a program could still constitute an infringement.

Ten appealed to the High Court. The High Court, by a three to two majority, overturned the Full Federal Court's decision. The High Court held that a single image appearing on a television screen with accompanying audio does not constitute a television broadcast.

The majority held at [74]:

> "There can be no absolute precision as to what in any of an infinite possibility of circumstances will constitute 'a television broadcast'. However, the [twenty] programmes which Nine identified in … its pleading … answer that description. These broadcasts were put out to the public, the object of the activity of broadcasting, as discrete periods of broadcasting identified and promoted by a title, such as The Today Show, Nightline, Wide World of Sports, and the like, which would attract the attention of the public".

The majority also noted at [77]:

> "… the circumstance that a prime time news broadcast includes various segments, items or 'stories' does not necessarily render each of these 'a television broadcast' in which copyright subsists …"

Copyright is only infringed if you rebroadcast the program, or a substantial part of the program. Otherwise broadcast makers would get much more protection than other copyright owners.

In dissent, Kirby J and Callinan J held in separate judgments that any short series of images will be a broadcast, so any re-broadcasting of any images must be re-broadcasting of a broadcast, regardless of length.

4. Published Editions of Works

Section 92 of the *Copyright Act* provides that "copyright subsists in a published edition of a literary, dramatic, musical or artistic work, or, of 2 or more literary, dramatic, musical or artistic works".

The published edition copyright protects the layout and formatting of printed pages. For example, the precise layout and formatting of newspaper pages will attract separate copyright protection than the underlying literary and artistic works forming the actual newspaper articles.

This type of protection was only introduced with the *Copyright Act 1968*, as such, there is no copyright protection afforded to published editions of books published before 1968. [13]

Video overview by Elizabeth Morrell on Published Editions.

1) *CA* s 89
2) *CA* s 90
3) *CA* s 91
4) *CA* s 92
5) *CA* s 113(1)
6), 7) *CA* s 10
8) s 10(1)
9) [1996] FCA 761
10) [1997] FCA 403
11) (1997) 191 CLR 140
12) (2004) 218 CLR 273
13) *CA* s 224