

FROM RUSSIA WITH A LICENCE? THE FEDERAL COURT OF AUSTRALIA ON RETRANSMISSION OF INTERNATIONAL TV BROADCASTS AND PROVING LICENCES

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Legal Briefings - By **Rebekah Gay**

In a recent case, the Federal Court of Australia has restrained re-transmission of Russian TV stations to Australian consumers via the Internet.¹

However, the main applicant Connect TV had its own case dismissed as it could not prove that it was the 'exclusive licensee' to the relevant copyright in Australia.

BACKGROUND

The proceedings relate to a number of Russian language television programs broadcast by television stations in the Russian Federation.

Connect TV makes these programs available to customers in Australia by way of satellite transmission. It claimed that, by virtue of various agreements with foreign corporations, although not the original Russian broadcasters, it had the exclusive right to communicate the broadcasts to the public in Australia.

The respondents were also facilitating access to the Russian television programs for Australian viewers. They had entered into an arrangement with an intermediate company that intercepted the Russian broadcasts and converted them to digital content. The respondents facilitated access to that content by providing viewers with set-top boxes and access codes that enabled the content to be streamed to the viewer.

Connect TV alleged that, by providing facilities by which Australian consumers could receive Russian free to air television signals, captured in Russian and rebroadcast over the internet, the respondents were infringing its rights.

Under the *Copyright Act* television broadcasters own 'broadcast copyright' which enables them to restrain the rebroadcasting of their broadcast or the communication of their broadcasts to the public through other means, including the internet. Through the domestic implementation of the Rome convention,² Russian television broadcasters have the same rights in Australia as Australian broadcasters have to protect their broadcasts.

His Honour Justice Tracey found that, by rebroadcasting the signals, the respondents had indeed infringed the copyright of the original Russian broadcasters (some of whom were joined as parties to the proceedings).

EVIDENCE OF THE EXCLUSIVE LICENCES

The Court found, however, that the evidence relied upon by Connect TV to establish its exclusive licence was insufficient.

While Connect TV tendered licence agreements with a number of intermediary foreign corporations that purported to make it an exclusive licensee to certain rights in Australia, it did not tender the licence agreements made between the original Russian copyright owners and the intermediary corporations. Connect TV sought to fill this lacuna in its evidence by procuring letters prepared by lawyers at each of the relevant Russian broadcasters explaining the relationship between that broadcaster and the relevant intermediary corporation.

The respondents objected to the admission of the letters on the grounds that they constituted hearsay. Connect TV sought to argue that they were admissible under s66A of the *Evidence Act* as evidence of the relevant corporation's state of mind.

His Honour rejected this argument finding that the relevant exception did not apply. Without this evidence Connect TV could not prove the chain of title to its exclusive licences.

THE MEANING OF 'BROADCASTS'

Another argument sought to be put forward by the defence, namely that copyright did not subsist in the real-time television broadcast, as distinct from the individual programs making up the broadcast, was thoroughly rejected by his Honour.

The suggestion, that parliament's intention in creating broadcast copyright did not extend to allowing the prevention of wholesale rebroadcasting of a broadcaster's television channel without its permission, is a curious one to say the least.

OUTCOME AND NEXT STEPS

While an injunction was made in favour of the Russian broadcasters parties, the case brought by Connect TV in its own name was dismissed.

The matter will now likely be set down for a hearing on the quantum of pecuniary remedies.

The practical effect of the findings so far is that, if the successful applicants wish to claim damages, they will need to prove damage caused to the Russian broadcasters directly, rather than to Connect TV. One would expect that this will be a more difficult task than establishing Connect TV's loss. Any account of profits sought will be ordered in favour of the Russian broadcasters.

LESSONS LEARNED

The case makes clear that an exclusive licensee will need to prove the whole chain of licence if it wishes to have standing to bring a copyright infringement action. It is not enough to prove the final licence in the chain and then try to fill the gap in the evidence with letters or other secondary materials.

It is also necessary to show that the rights said to be infringed are actually included in what has been granted to the licensee. A licensee with the exclusive right to broadcast television channels via satellite will not have standing to restrain the rebroadcasting by other methods, such as via the internet.

ENDNOTES

1. *Connect TV Pty Ltd v All Rounder Pty Ltd* (No 5) [2016] FCA 338.
2. International Convention for the Protection of Performers, Producers and Phonograms and Broadcasting Organisations, Rome, 26 October 1961.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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