

Media Alert

Is this the end for Optus' TV Now service?

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A review of:- National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd [2012] FCAFC 59

Introduction

Optus' TV Now Service has been suspended indefinitely less than a year into its operations after the Federal Court unanimously overturned the first instance judgment of Rares J to find that the TV Now Service infringed the copyright of the National Rugby League, the Australian Football League and Telstra.

Background

The TV Now service allowed customers to record and view programs broadcast on free-to-air television channels on a personal computer or a compatible mobile phone. A program selected to be recorded by the customer was stored on an Optus server and streamed on demand to the customer's device within as little as two minutes of the commencement of the free-to-air broadcast.

Optus commenced proceedings against the NRL and AFL following threats that Optus was breaching the copyright of the NRL and AFL in providing the TV Now service. Optus sought a declaration pursuant to s. 202 of the *Copyright Act 1968 (Cth)* (**the Act**) that such threats were unjustified.

First Instance

Justice Rares held that when a TV Now customer recorded a program, the customer was the 'maker' of the recording

by virtue of pressing the record button on the TV Now interface and initiating the process of recording. Optus could not be considered the maker of the recording as the TV Now system merely facilitated this process. His Honour drew an analogy with the processes employed by a VCR or DVD.

The recordings made by the customers fell into the 'private and domestic use' exception in s. 111 of the Act which prescribes that no copyright infringement will be found if:

"a person makes a cinematograph film or recording of a broadcast solely for private and domestic use by watching or listening to the material broadcast at a time more convenient than the time when the broadcast is made."

Appeal

The Full Court rejected the conclusion of Rares J that the customer was solely the maker of the copyright.

The Court held that the customer was the catalyst for the program being recorded and "*instigates the copying*" given that an Optus employee could not press the requisite button to record the program. However, subsequent to the customer commencing the recording process, the sophisticated and purpose-built Optus system effects the copying of the program.

The Full Court considered:

"It equally is not apparent to us why a person who designs and operates a wholly automated copying system ought of course not be treated as a "maker" of an infringing copy where the system itself is configured designedly so as to respond to a third party command to make that copy."

Accordingly, the Court held at best, Optus and its customer, made the copy of the program. At worst, Optus made the copy of the program alone, unaccompanied by its customer.

The Court held that the customers were excluded from liability by virtue of s. 111 however Optus was not. Optus, in creating the recordings, sought to derive market advantage through commercial exploitation of a product and therefore, was clearly not using the copies for private and domestic use.

Consequences

It remains to be seen whether Optus will seek leave from the High Court to appeal their Honours' decision. However, at least for the present time, for many legal industry commentators, the normal 'order' of intellectual property has been restored. However, it is of note that the Court did emphasise that the conclusion reached in the proceedings was specific to the facts and circumstances surrounding the TV Now service.

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