

Media Alert

Round one to Optus

February 2012

Singtel Optus Pty Limited & Anor. v National Rugby League Investments Pty Ltd (No 2) & Ors.

On 1 February 2012 the Federal Court handed down its decision in the much anticipated proceedings involving Optus' TV Now service. The Court held that the TV Now service does not infringe upon the copyright of the National Rugby League, the Australian Football League or Telstra.

The decision may have a substantial impact upon the value of a content owners' product and their current and future exclusive rights arrangements.

Background

The TV Now service, which was implemented by Optus in July 2011, allows customers of the service to record and view programs on either a computer or compatible mobile phone. The program selected to be recorded by the customer is stored on an Optus network (rather than on the customer's PC or mobile phone) and then streamed to the customer's device when the customer chooses to view the recorded program.

The recorded programs can be viewed by TV Now customers within approximately two minutes of the commencement of the free-to-air broadcast.

Prior to the introduction of the TV Now service, the NRL and AFL had entered into agreements where Telstra was provided with an exclusive licence to use free-to-air broadcasts of live and pre-recorded NRL and AFL games on the internet and through mobile technology.

Following the introduction of TV Now, the NRL and AFL notified Optus that they would seek to restrain Optus from continuing to provide its TV Now service. Optus subsequently commenced proceedings against the NRL and AFL seeking a declaration pursuant to s. 202 of the *Copyright Act 1968 (Cth)* that the threats made by the NRL and AFL were unjustified.

Decision

Justice Rares held that when a TV Now customer recorded a program, the recording was made not by Optus but by the customer for the customer's private and domestic use. His Honour considered that such a recording was analogous to recording programs onto VCR or DVD formats.

Further, even though recorded programs could be played back within a matter of minutes of the live broadcast, the recordings were deemed to be viewed by the customer at a time more convenient than the time when the broadcast was made.

Accordingly, His Honour found that the recordings did not infringe the copyright of the NRL, AFL or Telstra as the recordings fell within the exception in s. 111 of the *Copyright Act*.

The exception under s. 111 of the *Copyright Act* prescribes that no copyright infringement will be found if:

"a person makes a cinematograph film or sound 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 Court granted leave to appeal the decision and it is likely, given the significant ramifications of the judgment, that an appeal will be filed by the Respondents.

However, as an appeal will not be determined prior to the 2012 NRL and AFL seasons, which commence on 1 March and 24 March respectively, TV Now users will continue to be able to view NRL and AFL games within minutes of their free-to-air broadcast.

The judgment now puts at risk the substantial value of exclusive licence arrangements between owners of content and providers of content to subscribers and viewers.

We look forward to seeing how this is resolved by appeal in the next round of this ground breaking dispute.

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