

## A Boom for Multimedia Copyright Owners: NRL v Optus

The Full Court of the Federal Court last week held on appeal in the case of *National Rugby League Investments Limited v Singtel Optus Ltd* [2012] FCAFC 59 that Optus had infringed copyright in television broadcasts by providing a television recording service.

### Intellectual Property Update

#### The Facts

Two members of the Optus group of companies, namely Singtel Optus Pty Ltd and Optus Mobile Pty Ltd (together referred to as "Optus"), offered a television recording service known as "TV Now". Subscribers of TV Now could instruct Optus to record free-to-air television programs of their choice and then have them "streamed" at a later time to their computer or Smartphone.

The TV Now service raised the ire of the AFL, the NRL and Telstra; the AFL and the NRL had granted Telstra an exclusive licence to make free-to-air television broadcasts of football matches they conducted. This meant that all three parties had copyright interests in those television broadcasts.

The AFL, NRL and Telstra sued Optus for copyright infringement in the Federal Court, alleging that by offering the TV Now service, Optus was recording (ie. copying) broadcasts of football matches.

#### The Decision of the Federal Court

At first instance, in *Singtel Optus v National Rugby League Investments* (No 2) [2012] FCA 34, Justice Rares of the Federal Court held that it was the subscribers who made the recordings of the football matches because it was through their use of TV Now service that the recordings were made. This meant that it was the subscribers who were breaching copyright.

However, Justice Rares also found that because the subscribers were broadcasting the matches to themselves on an individual basis for their own personal use, they fell within the "private and domestic use" defence in section 111 of the *Copyright Act 1968* (Cth).

#### Who does this affect?

- Copyright owners
- Broadcasters
- Media agents
- Online viewers

#### Article Highlights

- Breach of copyright applicable when copying and online broadcasting an "exclusive licensed" tv programme.
- Optus and individual subscribers deemed jointly responsible for the breach of copyright.
- Full Court ruling limits the "private and domestic use" exception and preserves the value of internet licensing rights.



### Issues on Appeal

There were two issues raised in the appeal to the Full Court of the Federal Court, being as follows:

1. Who was the “maker” of the recordings (i.e. copies) of the football matches? Was it Optus or the customer, or both of them together?
2. If Optus was the “maker” of the copies, did Optus fall within the “private and domestic use” defence in section 111 of the *Copyright Act 1968* (Cth)?

### Decision of the Full Court of the Federal Court

The Full Court, made up of Justices Finn, Emmett and Bennett, made the findings set out below.

1. The “maker” of the copies  
The Court’s preferred view was that Optus and the subscriber were jointly and severally responsible for making the copies. This was because whilst Optus facilitated the recording, it was the customer that initiated the process by which the recordings were produced. In the Court’s words, ‘[w]ithout the concerted actions of both, there would be no copy of the football match for the subscriber’.

In the alternative, the Court held that Optus was solely responsible for making the copies because the service it offered captured, copied, stored and made available programmes for later viewing.

2. The applicability of the “private and domestic use” defence  
The Court held that Optus could not, as either the sole maker of the recordings, or as joint maker with the subscribers, fall within the private and domestic use defence.

In coming to this decision, the Court held that nothing in the “private and domestic use” defence suggested that it was intended to cover commercial copying on behalf of individuals. The Court distinguished the use of TV Now from copying on a private device on private premises for private use; it was different to the use of a home VCR or DVD recorder.

### Conclusion

The decision of the Full Court will be welcomed by copyright owners as it limits the “private and domestic use” exception and preserves the value of internet licensing rights. Conversely, the decision will be criticised by service providers like Optus whose services offerings of television and radio content will be significantly narrowed.

The Full Court acknowledged that the decision raised some question of “difficulty and considerable uncertainty”.

It remains to be seen whether the legislature will see fit to more clearly balance

### Contact



**David Cox**  
PARTNER

t: +61 8 9426 6636  
e: dcox@jacmac.com.au

**Alastair Lagrange**  
SOLICITOR

t: +61 8 9426 6746  
e: alagrange@jacmac.com.au



the rights of copyright owners and those of service providers like Optus. Such intervention may be desirable with the increasing complexity and popularity of recording technologies.

In the meantime, watch this space for a possible appeal to the High Court.

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### Contact Us

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**t** +61 8 9426 6611 **f** +61 8 9321 2002 **e** [jacmac@jacmac.com.au](mailto:jacmac@jacmac.com.au)

**a** Level 25, 140 St Georges Terrace, Perth, Western Australia 6000  
GPO Box M971, Perth, Western Australia 6843

**[www.jacmac.com.au](http://www.jacmac.com.au)**