

# Case Update: Seven Network Ltd v Commissioner of Taxation

**Martin Ross and Mark Lebbon review a recent decision of the Federal Court of Australia which considered whether copyright exists in audio-visual signals of major sporting events.**

## THE CASE

On 22 December 2014 Justice Bennett of the Federal Court of Australia delivered her judgment in *Seven Network Limited v Commissioner of Taxation*.<sup>1</sup>

*there had been no embodiment of the data stream so as to enable the showing of a moving picture prior to receipt of the signal at the receiver*

The proceeding was brought by Seven Network Limited (**Seven**) seeking declarations that it did not have to withhold tax on certain payments it made to the International Olympic Committee (**IOC**) under agreements relating to the use of the audio-visual feed of events and competitions in the Olympic Games.

A key consideration in Bennett J's judgment is whether copyright exists

in specific signals transmitted by the IOC to Seven for use in connection with Seven's broadcast of the 2004, 2006 and 2008 Olympic Games.

## THE ITVR SIGNAL

The IOC is the owner of the broadcast rights to the Olympic Games and grants media companies around the world the rights to broadcast events and competitions at the Olympic Games. Since the 2008 Olympic Games, the IOC, through its Olympic Broadcasting Services agency, has operated as the host broadcaster and is responsible for delivering the pictures and sounds of the Olympic Games through the transmission of the international television and radio signals (ITVR Signal) for use by its licensees. Prior to 2008 Olympic Games, the local organising committee was responsible for host broadcasting and often undertook this activity via a third party broadcaster.

The ITVR Signal transmitted by the IOC to Seven for use in connection with Seven's broadcast of the relevant Olympic Games was an international signal of events at the Olympic

Games. This feed was produced and provided to the authorised media companies and incorporated into their broadcasts.

Bennett J's judgment sets out in some detail the technical aspects and nature of the ITVR Signal. These matters were important to the reasoning in her Honour's decision.

The nature of the ITVR Signal and how Seven received that signal can be summarised as follows:

the ITVR Signal comprised an international television and international radio signal produced by the IOC's host broadcaster which was combined and transmitted live to the International Broadcast Centre (**IBC**) for distribution to Seven, and the IOC's other authorised Olympic broadcasters;

Seven received the ITVR Signal on a copper coaxial cable and there was no picture, image or sound recorded or permanently stored in the copper coaxial cable that transmitted the signal;

- the process of transmitting the ITVR Signal from the host broadcaster to Seven did not involve any recording or storage of the ITVR Signal;
- the data transported in the ITVR Signal by electromotive force through the copper coaxial cable could be converted into television coverage (i.e. visual images and sounds) only by use of a receiving device;
- no picture, image or sound could be recorded or permanently stored in the ITVR Signal and the ITVR Signal was not tangible and did not give physical form to an image or sound;
- visual images and sounds could not be reproduced from the ITVR Signal; and
- the ITVR Signal was not suitable for broadcast in its raw form and Seven could use or alter the ITVR Signal to create its broadcast signal.

## KEY QUESTION TO BE DETERMINED

Seven made a number of payments to the Swiss based IOC in connection with the broadcast of the 2004, 2006 and 2008 Olympic Games. One of these payments was for an amount of \$97,742,609 for use of the ITVR Signal (**Payment**).

<sup>1</sup> [2014] FCA 1411.

The Commissioner of Taxation (**Commissioner**) argued that the Payment should be considered a royalty within the meaning of the Australia-Switzerland Double Tax Treaty (**Swiss Treaty**).<sup>2</sup> If the Payment was characterised this way then Seven was required, pursuant to section 12-280 of Schedule 1 of the Taxation Administration Act 1953 (Cth), to withhold tax and remit it to the Commissioner on behalf of the IOC (which was the relevant taxpayer).

The Payment could only be taxed in Australia to the extent it was a royalty for the purposes of the Swiss Treaty. Article 12(3) of the Swiss Treaty provides that a payment will be a royalty if it is consideration for the use of, or the right to use, any copyright or other like property or right. Seven argued that the Payment was not for the use of copyright because the ITVR Signal was not of itself a sound recording or cinematograph film.

The critical matter for determination in the proceeding was whether the ITVR Signal could be considered a cinematograph film in which copyright subsists.<sup>3</sup>

For the ITVR Signal to be a cinematograph film, the Commissioner had to establish that visual images which made up the ITVR Signal were 'embodied in an article or thing'.<sup>4</sup> This necessarily required that the visual images be capable, with or without the aid of another device, of being reproduced from the relevant article or thing.<sup>5</sup>

## FEDERAL COURT DECISION

Bennett J found that the aggregate of the visual images were not embodied in any article or thing when they were transmitted by the ITVR Signal to Seven at the IBC. Rather, the visual images were first embodied in an article or thing only after the data stream was converted by a receiving device, such as a television receiver in Australia.<sup>6</sup>

In Bennett J's opinion, the consideration the IOC provided to Seven in return for the Payment was the right to receive the data stream of the ITVR Signal at the IBC and access to the stream of data at the IBC. The fact that the data could then be seen on a receiving television screen in Australia may have established that it could be produced from the data stream however it did not establish that it was capable of being reproduced.<sup>7</sup>

Her Honour distinguished the facts in this case from those in *Galaxy Electronics Pty Ltd v Sega Enterprises Ltd*<sup>8</sup>, which held that a computer game was a cinematograph film, on the basis that there had been no embodiment of the data stream so as to enable the showing of a moving picture prior to receipt of the signal at the receiver.<sup>9</sup> In contrast, a computer game was capable of reproducing the visual images which had been aggregated within it.

Bennett J stated:

The signal is more in the nature of the fleeting use of a medium of communication than an aggregate of sounds and visual images that may convey a cinematograph film of the Olympic event to the viewer.<sup>10</sup>

Her Honour also held that the words 'other like property or right' referred to in Article 12(3) of the Swiss Treaty was limited only to Australian statutory rights (ie - copyright) and was not to be given some broader meaning.<sup>11</sup>

In finding for Seven, Bennett J held that the subject matter of the Payment is not a cinematograph film, and is not a copyright 'or other like property or right'. Therefore, the Payment was not a royalty under the Swiss Treaty, and Seven was not obliged to withhold and remit to the Commissioner any tax from the Payment.

**'the subject matter of the Payment is not a cinematograph film, and is not a copyright 'or other like property or right'**

## COMMENTS

This case illustrates the complicated and technical nature of copyright in audio visual signals, recordings and broadcasts of major sporting events. Organisations dealing in such material, particularly when acquiring or licensing rights internationally, need to ensure their agreements accurately reflect the rights intended to be granted and are drafted in a manner mindful of any taxation consequences.

Businesses must always consider the withholding tax implications if any payments are made to, or by, a foreign party for the use of intellectual property. Without careful drafting and structuring, withholding tax can become an unrecovered cost in doing business. The case also reminds us that it is important to bear in mind that a royalty can arise whether the payment for the use of the intellectual property is comprised of a lump sum or a series of payments. Moreover, the courts will always look beyond the label that the parties have used in the contract to determine the substance of the payment(s).

The Commissioner has appealed the decision.

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2 *Agreement between Australia and Switzerland for the Avoidance of Double Taxation with respect to Taxes on Income* [1981] ATS 5.

3 It was not disputed that the question of whether copyright exists in the ITVR Signal was to be decided under Australian law.

4 See the definition of 'cinematograph film' in section 10 of the *Copyright Act 1968* (Cth).

5 Section 24 of the *Copyright Act 1968* (Cth).

6 [2014] FCA 1411, 122.

7 [2014] FCA 1411, 121, 124.

8 (1997) 75 FCR 8.

9 [2014] FCA 1411, 127.

10 [2014] FCA 1411, 127.

11 [2014] FCA 1411, 139.