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## Indigenous media is a priority, and not just a luxury

**Dot West argues for clear government policy, matched by funding, to strengthen Indigenous media in Australia. In this, the first of a two part article based on her 1993 Boyer Lecture, West sets Indigenous media in context.**

**N**on-Indigenous Australians have held the power of the media for over 200 years giving us various images of Australia including a negative portrayal of its indigenous population.

Looking at the history of Australia is certainly a learning process for non-Aboriginal people who have been educated from a white perspective. Just consider this point alone: when did you become aware that Aboriginal children were being taken away from their families and being raised in missions and institutions? And more importantly when did you find out how Aboriginal people felt about this genocidal treatment? I bet you didn't learn about it in your school books. We learnt it from our own people. So on our Indigenous media outlets - on our radio stations, in our newspapers, in our books, on stage and through television we tell our history.

### The Power of the Media

**T**he media has significant power to determine what issues are important, their meaning, and to set the public agenda. It can strongly influence peoples' ideas and values, including their ideas about Aboriginality. At its worst it can help institutionalise racism. White Australians, like all white majorities, institutionalise their own value systems at the expense of minority groups. Every time we're put down as savage or primitive or hopeless, white people are reassured that they are civilized, modern and successful. We're also tired of being the subject of so much hypocritical scrutiny. The mainstream

media talk of the "Aboriginal drinking problem" is nothing but a racist generalisation.

Media stereotypes do more than hurt the feelings and damage the aspirations of Aboriginal and Torres Strait Islander people. They are helping to build racist attitudes which I believe can cost lives. Look at the death in Perth of Louis Johnson. In January 1992, on his nineteenth birthday, Louis was deliberately driven over by white youths in a car. One of his killers later admitted this horrendous deed was committed because Louis was black. This was a murder which did not at the time attract sensational reporting or evoke a public outcry.

Racist attitudes towards Aboriginal people were being reinforced and circulated with great intensity in the Western Australian media in the lead up to the murder. From early 1990 the media presented juvenile delinquency and youth crime as having reached the proportions of a major social crisis. Most of the crimes (large or small) were directly attributed to young Aboriginal people, such that any youth related crime in W.A. is now almost automatically assumed to involve Aboriginal people.

But not all media treatment of Aboriginal affairs is negative and biased and we must recognise the good and conscientious work carried out by many journalist who have brought important issues to public attention and are working to raise the level of understanding. There are some examples that come to mind: The movie "Deadly" which provides a look at Aboriginal deaths in custody in a different light, and the documentary "Exile and the

Kingdom" in which the people at Roebourne W.A. tell their own story. The movie "Blackfella's" tells the story of a young Aboriginal man just out of prison trying to go straight, highlighting the many influences in his way.

### Indigenous Broadcasts

**J**ust as mainstream media can change attitudes, so can Aboriginal and Torres Strait Islander Media. The Kimberley group which commenced its first broadcast in 1987 on the ABC is an example. The Aboriginal community wanted a way to help maintain their own languages, and portray and inform about their own culture and way of life. They also wanted to counteract the bad publicity their people were receiving in the local paper and the consequent low self-esteem the local Aboriginal people felt when they dealt with the white community. Interestingly enough, when this group first started broadcasting it was the only media group apart from the ABC providing a radio service to this region. So the audience was not only the Aboriginal people but also the non-Aboriginal community. This group didn't just turn white people's thinking about, it also turned the thinking of the Aboriginal community. It made people proud to be Aboriginal in the white dominated community. Over time the service empowered a group of people who once felt powerless in their own country. It instilled pride and built self-esteem amongst the young and old.

This is just one example in the very short time Aboriginal and Torres Strait Islander people have been involved in the

Media Industry. We now have 6 Aboriginal radio stations licensed, about another 6 groups working towards a licence, about 90 remote communities licensed to deliver both radio and television services, various newspapers, a television station, many performers in all fields of the arts, authors, playwrights, a publishing house and the list goes on.

## Language

**O**ur role in the media industry is not just to inform our own people but also to educate and inform non Aboriginal people. We report on the news and current affairs which is relevant to our people, we tell of what's going on in the languages of our area or in a more easily understood form of English. We try to cut out what we call high English. Down to earth language is all that is needed. We are not out to impress people, we are out to inform, to communicate. With high English it's more than likely you will fail to communicate. For example we don't say "legislation" when "law" will do.

Indigenous Media in Australia has a big role in maintaining our languages. At the time of invasion there were about 250 different Aboriginal and Torres Strait Islander languages. There are now fewer than 90 still in use, and not all of them are spoken as first languages.

## The Government Broadcasters

**T**he Federal Government already funds two media services - the ABC and the SBS. From our point of view, that's two networks largely for non-Indigenous Australians. We want a third network for and about Indigenous Australians. Admittedly both services have provided very good programs for and about Aboriginal and Torres Strait Islander people but it hasn't been often enough, nor localised enough. The SBS ensures that immigrants to this country are able to maintain and broadcast their own languages and inform Australia about their culture. This alone was certainly a credit to the Federal Government for its insight and appreciation of other cultures but once again it forgot the diverse needs of its own Indigenous culture.

The population of Australia's Aboriginal and Torres Strait Islander community is extremely diverse in its culture with many different languages spoken. So can you imagine these national media groups trying to service Australia's Indigenous people. The SBS only broadcasts in the capital cities.

The ABC realised it couldn't cater to all of Australia's Indigenous peoples. This

realisation was also formally recognised through the DIX report in 1981/2, a review document on the ABC. The report basically recognised that cultural diversity came within the ABC's broadcast responsibility. The Corporation began to allow different Aboriginal media groups to have access to the ABC's radio airwaves.

This arrangement commenced in 1981/2 when the ABC purchased radio programs from C.A.A.M.A. (the Central Australian Aboriginal Media Association) and then broadcast them under ABC control. In 1985 the first unsupervised access on the ABC was undertaken by the Torres Strait Islanders and in the same year Aboriginal

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people in Perth were broadcasting on the ABC. In 1987 and 1988 Aboriginal access extended to the Kimberley region where groups could broadcast within their own regions and in their own languages. This arrangement was not met very favourably by some bureaucrats. There are now 3 radio stations in the Kimberley producing and presenting about 35 hours of Aboriginal programs to the region via the ABC.

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### Perspective

**A**ustralians were experimenting with radio as far back as 1905 and the first station 2SB in Sydney began broadcasting in November 1923. But it wasn't until June 1976 when Melbourne's station 3CR broadcast the country's first Aboriginal radio program. One month later 2XX in Canberra transmitted Australia's second Aboriginal radio show. So it took 53 years for our voice to be heard in our own programs, and this came about initially through the Public and community radio stations which only started operating in the mid seventies.

There are now over 100 licenced community radio stations and about 30 of them have some Aboriginal and Torres Strait Islander programs. These include 6 stations owned and operated by Aboriginal and Torres Strait Islander media organisations in Alice Springs, Brisbane, Townsville, Port Augusta, Perth and Kununurra.

We now have over 500 hours a week of Indigenous radio being produced by Indigenous people. Unfortunately, TV presents a different story. Less than 1% of Australia's television programs are produced by Indigenous people.

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### Policy and Training

**W**e have been able to apply our talents to the media industry like a duck takes to water. Many Indigenous media workers have developed great broadcasting and production skills. There has been a lack of clear policy and direction from government. There has been very little or no formal training at all. But the Indigenous media industry feels it's essential to provide training opportunities for our people in this field of work. Not only tertiary education but also practical training in all areas of the industry from management and journalism to technical skills. There still needs to be a more concentrated effort made to increase the numbers and ensure that all positions within our own organisations are occupied by Indigenous people.

It is estimated that over 200 Aboriginal and Torres Strait Islander people are involved in community media either as employed staff or volunteers. The ABC currently employ 73 and SBS 16 Indigenous Australians in various fields of their operations. But you can count on one hand the number of Aboriginal or Torres Strait Islanders employed in the commercial electronic media, and the numbers for the print media are even lower.

The government's response to some of the recommendations from the Royal Commission into Black Deaths in Custody is a prime example of how low on the priority list Indigenous Media is. Recommendation 205 was split into two parts, the first part emphasising the importance of Indigenous Media and recommending further funding where necessary. The second part stressed the need for Aboriginal and Torres Strait Islander people to be employed in mainstream media and this media to set up codes of practice for use when reporting about Indigenous Australians. The Federal Government has provided funds to

mainstream media to train Indigenous people and has also funded a National meeting to address the codes of practice issue. But on the other hand the Indigenous media industry is still struggling for adequate funding, and some organisations have been operating on the smell of an oily rag. To this date no money has been provided to Indigenous Media from the Deaths in Custody funding. It appears that white industry once again has claimed black dollars.

We've had to convince our own people and the major funding bodies that Indigenous media is a priority, and not just a luxury. We've had to compete for limited funds while issues like health and education are clearly important priorities. *The second half of this article, which outlines the mechanisms for establishing a national Indigenous media service, will be published in the next edition.*

*Dot West is Chairperson of NIMAA, Training and Broadcasting Co-ordinator for the Broome Aboriginal Media Association, and presents a weekly program on Radio Goolarri in Broome.*

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## The formidable process of reform

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### Duncan Kerr outlines the Federal Government's proposed reforms to the Copyright Act.

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**I** am acutely aware that the protection of intellectual property under the Copyright Act and through International Conventions is critical for the maintenance and development of Australia as a significant force in our region and throughout the world. We are at the edge of a technological revolution which will change the fundamental nature of copyright. To quote one lawyer who remains anonymous, "copyright must be the tollgate to the new information super highways".

The Government's intentions have been signalled: to review rental of sound recordings in the light of technological change; enact a workable moral rights scheme for creators; review the impact of the growing number of copyright royalty collecting societies; and implement parallel importation of sound recordings.

Within the next few weeks, Bob McMullan (responsible for copyright policy regarding the arts) and I will release a paper on new moral rights legislation. By that time we will have taken to cabinet proposals for a new tax-based scheme for a

levy on blank audio recording media. Cabinet will have before it my proposed amendments to the Act to streamline the procedure for payment by Governments for use of private copyright material, particularly photocopying. A little further down the track, the Government will address Copyright Law Review Committee Reports on protection of computer software and databases and the report on employed journalist's copyright. Other areas of Copyright Law under review include Performer's Rights and Government Copyright in Legislation.

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### The Copyright Convergence Group

**I**n order to deal with the consequences of the convergence of the telecommunications, broadcasting, computing, entertainment and information industries, we need to understand the technological environment. To this end, the Transport and Communications portfolio has recently initiated a communications future project, as announced by David Beddall, which is

being conducted by the Bureau of Transport and Communications Economics.

The CAMLA workshop on Copyright and New Communications Technology demonstrated that the Copyright Act needs urgent but considered amendment. This would mesh it with the Government's Broadcasting Services Act. This is why I am establishing the Copyright Convergence Group - a broadly based committee to deal with these matters. The Attorney General's Department and the Department of Transport and Communications is to liaise with the Centre for Telecommunications Law and Policy on this project.

The Group will convene a major seminar early in 1994 to consider proposals for amending the Copyright Act to cater for technological change. Invitations will be extended to representatives of all relevant copyright owner and user interest groups to attend the seminar or make submissions. The ultimate aim is a system which gives a fair allocation of copyrights and access in respect of transmissions over the air - be they broadcasts or narrowcasts and covering satellite, microwave - and cable transmissions.

At the international level, some amendments will be required if the Uruguay round of GATT negotiations is concluded. More extensive changes may be needed if the protocol to the Berne Convention, and the new instrument for the protection of performers and record producers and broadcasters, currently under discussion, are concluded.

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### **A simplified Act**

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**A**nother strong desire of mine is that these far reaching changes find their home in a simple and understandable Copyright Act. I will be referring to the Copyright Law Review Committee an examination of options to simplify the Act both in its form and substance.

In simplifying the Copyright Act, there is a responsibility to examine the central platform of the Act. This will mean close scrutiny of what has been called "broadly based rights". I have a certain attraction to an Act which reflects broad rights including communication and distribution rights. I believe the pigeon holing of rights in the Act has exacerbated difficulties the Act experienced as technology overtook it.

From time to time there are calls for a fundamentally different approach to the prescription of copyrights. As I understand these calls, they are advocating

the substitution of more general, technology neutral rights for the existing elaborate regime. Such rights would readily attach to any new technology that came into use for the creation or enjoyment of copyright materials. One likely outcome of this approach may be that more would be left to judicial determination. In turn, one beneficial outcome might be that less defined rights would encourage users and owners to deal with each other outside the courts. The voluntary licensing could end the uncertainty of generally worded exceptions to exclusive rights. However, that scenario would, in turn, require the development of effective machinery by copyright owners to provide complete licence cover. This would be important to substantial users with the need for licences at very short notice - particularly broadcasters.

On the international scene, provided that Australia complies with the minimum requirements of Berne, there is nothing to stop us from providing more extensive rights. This is, of course, subject to the policy issue of having to extend those benefits to other Berne member nations. We should remember that we can be courageous in reviewing our Copyright Act - we are not beholden to the squabbles in international circles.

The issue of a distribution right, which is currently being considered for possible inclusion in both the Berne protocol and the new instrument on record producers and performers is a little more problematical. Submissions by WIPO to the committees on these instruments suggests a broad distribution right, qualified by exhaustion by first sale - with certain qualifications in the case of rental and, possibly, lending. At first instance, this seems a much more complex approach than separate, affirmative publication and rental rights. However, I do not express a concluded view to that effect.

In the new instrument on record producers and performers, a right of communication to the public has been suggested for sound recordings and performers. This would encompass both broadcasting and cable distribution. In discussions delegations have expressed concerns about merging the rights of broadcasting and other communication to the public.

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### **Appointments to CLRC**

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**T**he third major initiative is reforming the process of appointments to the Copyright Law Review Committee.

The committee has an enviable record of achievements in the 10 years of its existence. While the committee's output is clearly impressive - particularly for a part-time body, the real measure of the committee's performance is the general acceptance of its recommendations. Again, it has an enviable record. Its major recommendations for action - in the reports on performers' protection and importation - have in the main been agreed to or enacted. The exception is moral rights. The Government has now made a commitment to legislate, while the committee recommended no action, admittedly by a slim majority.

The Government is taking steps to ensure that membership of the committee is more representative of the copyright community and Australian society. In future all appointments to the committee will be advertised ensuring the broadest possible field of interested people are considered. It is important that the community has confidence in the selection process and perceives it as being more fair, equitable and open. We will maintain a rolling list of those who have expressed an interest. To that end, the Department will be writing to relevant groups to explain our new policy. In certain circumstances, I will also be contacting qualified people who have not expressed an interest, where in my view the list does not contain the necessary expertise.

The challenges facing those of us responsible for copyright law review and reform are formidable. But the record of work up to now undertaken not only by the Government but also by very conscientious private sector representatives - serving on the CLRC and in other forums - has shown a readiness to meet those challenges.

*This is an edited version of an address to the 6th Copyright Law and Practice Symposium, on 28 October 1993, by The Honourable Duncan Kerr, MP, Minister for Justice.*

# Sun brought to earth on s.52 claim

The media can breathe a sigh of relief after a recent Federal Court decision confirming that the editorial content of their publications is protected from actions for misleading and deceptive conduct under the Trade Practices Act.

**W**ith the advent of the Trade Practices Act (1974), lawyers were quick to realise the potential of section 52 which prohibits conduct in trade or commerce which is "misleading or deceptive". For disgruntled subjects of news, current affairs and other information publications the section offered an attractive additional (or alternative) remedy to an action in defamation.

## Legislation

**T**o succeed in an action under s.52 or related provisions of the Act, an applicant would only need to show by reference to the publication that the conduct of the publisher was misleading or deceptive. It would not be necessary to establish that the publication was also defamatory. Such an action would also be heard in the Federal Court, where it could be coupled with a defamation claim but could thereby avoid a jury trial which, in some defamation jurisdictions, is a defendant's right.

Following the 1984 decision in *Australian Ocean Lines Pty Ltd v- West Australian Newspapers Ltd* that newspaper reports were capable of breaching s.52 if they were misleading or deceptive, the Federal Parliament recognised that the section was not intended to be used in this way and introduced a new section 65A. In effect, s.65A provides that s.52 and its related provisions do not apply to a publication by a person who carries on business of providing information except where:

- (a) the publication is an advertisement; or
- (b) the material published relates to the supply or possible supply of goods or services put out by the information provider itself.

While the drafting of the actual section admittedly leaves something to be desired, its purpose is clear: Editorial content of newspapers, magazines, radio and television programs is exempt from action under s.52; advertisements and other promotional material in which the publisher has a commercial interest are not. The Attorney-General's Second Reading Speech indicates that section 65A was intended to operate to exempt the media from s.52 type actions "which could inhibit activities relating to the provision of news and other information..."

## Sun Earth Homes

**D**espite this, however, there have been a number of attempts to circumvent s.65A, the most recent and most novel occurring in *Sun Earth Homes Pty Limited & Ors v- Australian Broadcasting Corporation*. The ABC was sued for breaches of sections 52 and 55 of the Trade Practices Act in addition to defamation, injurious falsehood and breach of contract in relation to a story on "The Investigators". The program dealt with complaints about the quality of services provided by a kit home company Sun Earth Homes Pty Ltd and the quality of bricks manufactured and supplied by its associated company Terra Firma Bricks Pty Ltd.

The Applicants claimed that the ABC was not protected by s.65A because:

- (a) a radio promotion for the program was an advertisement;
- (b) the television program was incorporated into the radio item by the references made to it in the radio program and was therefore part of the same advertisement; and
- (c) the television program constituted an advertisement for a book published by the ABC entitled "The Complete Consumer".

As reported by Bill Childs (Communications Law Bulletin Vol 11 No 1 Autumn 1991), Justice Burchett considered that each of these claims was arguable and refused the ABC's application soon after proceedings commenced to have the Trade Practices claims struck out.

## Decision

**A**fter a two week trial in late 1993 involving more than 25 witnesses and a total damages claim in excess of \$5 million, Justice Wilcox found that the ABC was fully protected by s.65A. Sun Earth, and two other Applicants, directors of Sun Earth, also failed in their actions for defamation, injurious falsehood and breach of contract. Allegations in the program that Sun Earth and one its directors, James Firbank had acted incompetently, deceptively and unethically in business matters were proved to be true. Terra Firma succeeded only on the defamation claim and was awarded \$30,000 damages.

In relation to the Trade Practices claims, Justice Wilcox considered that while the

radio program constituted an advertisement none of the Applicants was identified in it and it was therefore not necessary to determine whether its contents were misleading. The Applicants did not press the argument that the television program, being incorporated into the radio program, became in itself an advertisement. However, Justice Wilcox commented that this was an untenable proposition which, if it were correct, would defeat the purpose of s.65A.

While accepting that if the program about the Applicants was published in connection with the supply of goods or services or the promotion of such supply the case would fall into one of the exceptions in s.65A, the judge found that "it would be a departure from reality" to treat the television program as a publication in connection with the supply or promotion of the "Complete Consumer" book or as an advertisement for it. He said:

"The purpose of the segment was to provide information to viewers. The reference to the book was merely a footnote. This seems to be a case of a book seeking to exploit a television program's popularity and reputation, not a case of a television program being treated to promote a book. The televised material contained no promotion for other programs."

## Comment

**T**his decision, which was not appealed, is in accord with the intentions of s.65A and represents a significant victory for the media in its ongoing battle to stave off attempts to bring defamation cases under the guise of s.52 actions. However, publishers should continue to be wary. Much of the terminology in s.65A is vague - Justice Burchett referred to its "jumbled accumulation of artificially defined expressions" - and therefore open to exploitation by creative legal minds including any members of the judiciary unsympathetic to the media. And in the Sun Earth case, Justice Wilcox accepted that a promotional item for "The Investigators" program did constitute an advertisement and that s.65A would not have excluded the operation of s.52 in relation to any misleading conduct constituted by that publication.

Ross Duncan is a solicitor in the Legal & Copyright Department of the ABC.

# "Bootlegs" revisited

Jim Dwyer and Andrew Wiseman report on the recent litigation brought by Sony Music  
against Apple House Music.

In June 1993 Sony Music Australia Limited learnt that Apple House Music proposed releasing on the BANANA Label a series of CD's embodying the performances of some of Sony's "superstar" artists (including Michael Jackson and Billy Joel). Sony learnt from AMCOS that the copyright in the sound recordings to be released by Apple House Music was either owned by, or licensed to Apple House Music. Apple House Music represented that in no circumstances was the product "bootleg".

Apple House Music maintains that a "bootleg" record is an illegal record. The rest of the music industry understands a "bootleg" record to be a record made secretly or without the knowledge or authority of the performing artist.

On the basis of Apple House Music's representations as to the status of the sound recordings proposed to be released by it, AMCOS considered it had no alternative but to grant licenses to reproduce the works which were the subject of the Inquiry Notice received from Apple House Music.

Sony was not content to accept the representations made by Apple House Music that the CD's in question were not bootlegs. Accordingly, Sony engaged in direct correspondence with Apple House Music in mid to late June. In particular Sony sought details of the recordings, including copies of them. No substantive response allaying Sony's concerns had been received from Apple House Music by the end of July.

## Claim

On 2 August 1993, Sony commenced proceedings in the Federal Court of Australia in Sydney, including an application for interlocutory injunctions restraining Apple House Music from marketing and selling its records. The proceedings were founded on alleged breaches of provisions of the *Trade Practices Act 1974* and the *Fair Trading Act 1987* (SA). Sony claimed that the release by Apple House Music of CD's embodying sound recordings of performances of Michael Jackson would amount to misleading and deceptive conduct. The CD's were not approved by Sony or Michael Jackson, Apple House Music was not affiliated with Sony or Michael Jackson and the recordings in

question were not of the same nature or quality as Michael Jackson's approved recordings.

Until Sony was given the opportunity to listen to the recordings in question no view could be formed as to whether there was any claim for copyright infringement. There was no infringement of Michael Jackson's performance rights. The limited scope of the 1989 amendment to the *Copyright Act* which, by Part XIA, introduced into Australian law performance protection, excluded performances by USA residents (the USA not being a signatory to the Rome Convention).

Approximately one hour before the hearing on 4 August Sony's legal advisers received the proposed artwork for the CD's in question. Approximately half an hour before the hearing Sony's legal advisers received copies of each of the three CD's making up "the king of pop" series of Michael Jackson CD's, to be released by Apple House Music.

Sony's concerns were justified. The recordings were bootlegs. The artwork contained minimal disclaimers.

## The "Unauthorised" Recordings

To give Sony an opportunity to consider fully whether any copyright claim might be made, Sony, with Apple House Music's consent, had the matter stood over to 18 August 1993. During that time Michael Jackson joined the proceedings. It was established that Volumes II and III of "the king of pop" series were a reproduction of the charity concert given by Michael Jackson in October 1992 at the football stadium in Bucharest, Romania. That concert was broadcast live-to-air from Bucharest, hot-mixed by a BBC engineer in a BBC broadcast truck positioned outside the stadium, and broadcast live via satellite simultaneously on television and radio in most countries in Europe and in a limited number of countries in the Middle East and Africa. It is and remains unclear from where Volume I was derived, or by what means. However, the taping of the live concerts took place without the knowledge or permission of Michael Jackson. The person or company responsible for taping the concert (or the broadcast) was not identified by Apple House Music.

The pleadings were not enlarged to incorporate any claim of copyright infringement. Further evidence however was served in support of the claim of misleading and deceptive conduct. In addition, Sony and Michael Jackson amended their application to include claims of passing off and infringement of Michael Jackson's "right of publicity". The right of publicity argument drew analogies with the common law right of publicity in some states in the USA and drew support for its recognition in Australia from cases including *Henderson -v- Radio Corporation Pty Limited*, *Moorgate Tobacco Co Limited -v- Phillip Morris Ltd (No 2)* and *10th Cantanae Pty Limited -v- Shoshana Pty Limited*.

On 16 August 1993, as part of its evidence, Apple House Music provided Sony's legal advisers with a fax copy of a revised version of its artwork. This gave much greater prominence to disclaimers by adding the work UNAUTHORISED in block red capitals with parallel lines above and below it, giving the appearance of a word stamped on the artwork, and disclaimers in white letters on a red background appearing at the top and bottom of the front cover.

## Interlocutory Application

On 18 August 1993 Einfeld J heard the application for interlocutory relief.

In respect of Apple House Music's original artwork, Einfeld J found "I would have had little difficulty myself in pronouncing the injunction which the applicants seek for something of the kind".

In respect of the revised artwork, without the UNAUTHORISED "stamp" discussed above, again Einfeld J found "I would be strongly inclined to grant the injunction, for despite the disclaimers on the label that I have described, the strong impression given by the label in that form would be that it was a recording of which Michael Jackson was at least aware and which he did not disapprove. The disclaimers would still not be likely to overbear the impression that members of the public were purchasing a true Michael Jackson disc".

The addition of the UNAUTHORISED "stamp", however, which extended on a diagonal slope from bottom left to right

obliquely through the middle of the CD cover, swayed His Honour, on the evidence before him, against granting Sony and Michael Jackson the interim orders they sought. In return, Apple House Music would feature the disclaimers represented in the revised artwork and undertook to disclose to Sony's and Michael Jackson's legal advisers all marketing and promotional material prior to its release.

### Appeal

**S**ony and Michael Jackson sought and obtained from Einfeld J leave to appeal. Between 18 August and 29 September 1993, when the matter came before the Full Court of the Federal Court comprising Lockhart, Sheppard and French JJ, Apple House Music further revised its proposed artwork

by adding a more prominent disclaimer, again in the form of a diagonal representation of the word UNAUTHORISED, on the back cover of the CD's. In addition, the third version of the artwork included, on the back cover, disclaimers mirroring those added previously to the front cover, at the top and bottom of the cover in white text on red background.

The Full Court came to the view that Einfeld J had not erred in applying the principles to an interlocutory hearing seeking injunctive relief and dismissed the appeal noting however the undertaking furnished to the Court by Counsel for Apple House Music to feature the enhanced disclaimers as represented in the further revised artwork. The Full Court noted that it may be that evidence would be led at the final hearing of attitudes and of reactions of

various persons who may be concerned in the purchase of the CD's which may show that notwithstanding the disclaimers, there is nevertheless established misleading or deceptive conduct.

Following the appeal, Apple House Music again revised its artwork for the covers of the CD's in question. It gave even greater prominence to the disclaimer in the form of an UNAUTHORISED "stamp" on the back cover of the CD's to mirror that appearing on the revised artwork for the front cover. However, Apple House did not use this fourth round of artwork when it released its CD's, reverting to the third round artwork.

The parties are presently completing the discovery process in preparation for the final hearing.

*Jim Dywer and Andrew Wiseman, Allen Allen and Hemsley.*

## Performers Protection - the gap exposed

Stephen Peach expounds upon the problems of and possible solutions to "unauthorised" sound recordings.

**T**he recent release, by the Adelaide based firm Apple House Music, of unauthorised sound recordings of many well known recording artists has exposed a significant gap in the performers' protection provisions of the *Copyright Act 1968 (Part XIA)*.

All of the recordings released to date are recordings of non-Australian artists. In relation to such artists Part XIA provides, in effect, that the following criteria need to be satisfied before the relevant artists can take action under the Act to restrain dealings in, and the exploitation of such unauthorised recordings. In short:

- (a) the recording must be a performance given on or after 1 January 1992; and
- (b) the performance must have been given by an artist who is a citizen, protected person or resident of a country specified in the Regulations made under the Act (the most important omission being the United States of America); and
- (c) the performance must have been given in such a country (again, the most important omission is the United States of America).

Most, if not all, of the recordings released by Apple House Music would appear to be recordings of performances given prior to 1 January 1992 or performances given by citizens, protected persons or residents of non-scheduled countries or performances given in non-scheduled countries or a combination of these. The recordings were "unauthorised" in the sense that the release of the recordings was not authorised by either the artist or the artist's record company. That fact is explicitly stated on the covers of all records released by Apple House Music.

Unauthorised recordings by many well known artists such as Madonna, Prince, U2, Michael Jackson and Queen have been

released on to the market without the recording artist receiving any recording royalties. Statutory mechanical royalties are paid, but these only represent a small proportion of the amount that these artists would typically receive upon the release of an authorised album.

The release of these recordings is a cause for both concern and embarrassment, not only in Australia, but internationally. In most territories of the world, including the United States of America, the release of such recordings can be restrained. In some territories, copyright legislation is relied upon whilst in other territories reliance is placed upon various unfair competition laws. It is a matter of great concern that a country that has, until recently, been at the forefront of copyright and intellectual property protection should be unable to adequately restrain the release of these unauthorised recordings, particularly in circumstances where firms such as Apple House Music are commercially exploiting the intellectual property of the artist without the artists' consent and without paying any, or any adequate, compensation. The concern has been acknowledged by the Commonwealth Government and the matter is under review by the Minister for Justice, The Honourable Mr Duncan Kerr.

The protection gap could be effectively closed if the following amendments were to be made to Part XIA of the Act.

- (a) The requirements for protection should be made disjunctive, not conjunctive. In other words, it would be sufficient if the performance was given in a scheduled country or given by a citizen, protected person or resident of a scheduled country. It would not be necessary for both requirements to be fulfilled. This would bring the Act in line with the corresponding UK Act, the *Copyright, Designs and Patents Act 1988*;

- (b) Dealings in unauthorised recordings, whenever made, should be restricted. As presently drafted, the recording must be of a performance (in relation to non-Australian artists) given after 1 January 1992. There seems no reason why the date of the performance should be a relevant factor provided that dealings in, or exploitation of, the recordings is not made retrospectively illegal;
- (c) The United States of America should be scheduled. The argument against scheduling the USA is that it is not a signatory to the Rome Convention. However, the USA is able to restrict dealings in unauthorised recordings through a variety of unfair competition laws and, as such, is able to provide de facto performers' protection. In those circumstances, there seems no practical justification for refusing to acknowledge the fact and extending performers' protection under our Act to the United States of America; and
- (d) Those who obtain the exclusive recording services of the artists should be entitled to maintain a separate action under the performers' protection provisions in circumstances where the performer does not consent to the recording of the performance. This approach has also been adopted in the UK legislation and acknowledges the reality that many artists look to the record company to safeguard their interests. In those circumstances, there seems little justification for not giving those companies the express right to maintain an action against those who exploit the unauthorised recordings.

*Stephen Peach is a partner of the firm Gilbert & Tobin in Sydney.*



# Report

## Protecting your property rights in new communications - signals, programs and technology

**A Summary of the proceedings of the seminar held on 22 September 1993 sponsored by Communications & Media Law Association, Media & Communications Committee, Law Council of Australia, LAWASIA. Prepared by Elizabeth Collins, Allen Allen & Hemsley.**

**T**his workshop examined a broad range of perspectives on the protection of property rights in new communications, particularly satellite and cable transmissions. The conclusion was unanimously reached that there are serious deficiencies in the current domestic and international framework, and that there is an urgent need for reform in order to afford at least adequate protection for the holders of property rights in new communications.

### The urgent nature of reform

**T**he boom in the communications industry means that a number of new technologies will become commonplace in the next few years. In particular, the advent of pay television in Australia has brought with it the possibility of a number of competing forms of technology. Although the *Broadcasting Services Act 1992* was enacted in the belief that pay TV delivered by satellite using digital compression technology would provide the most superior service from both a technical and a consumer-interest perspective, it is also expressed to be "technology-neutral".

The result of this is that there is likely to be a number of alternatives to the satellite delivered service, in the form of microwave ("MDS") transmission, cable and possibly an optical fibre network utilising telephone lines. There has also been a proliferation in the number of geostationary satellites in the Asia-Pacific region, most of which are capable of delivering communication services to parts of Australia.

It is in this context that the protection of property rights in new communications was examined. It was however stressed by several delegates that the problems affecting holders of property rights do not only apply to Pay TV. Libby Baulch of the Australian Copyright Council pointed out that similar problems with copyright

legislation are being experienced in relation to computer-based products and interactive services, and Janette Paramore stressed the importance of an overhaul of laws to take account of new technologies such as CD ROMs and multimedia products.

The conference was opened by the Chairman, the Hon. Mr Justice Sheppard. Eric Hitchen from FACTS gave an introduction to developing technology in the communications area and highlighted the growth in the number of geostationary satellites which were capable of delivering communications, especially in the Asia-Pacific region. These satellites are capable of delivering an increasing number of services and a number of the satellites have the potential to deliver communications to the main population belt of Australia. In addition, a number of satellites, including PanAm Sat's "PAS 2", are planned for launch in 1994 and beyond. These satellites may deliver services to Australia via an up-link from either Australia or other countries such as the United States.

With the launch of so many new satellites, an increasing issue for the international community is frequency interference. Satellites must be about 3 degrees apart or they interfere with the receiving or transmitting frequency of other satellites. The increasing demand for a geostationary orbital position, which are administered by the International Telecommunications Union, has led to situations such as Indonesia leasing Tonga's allocated ITU rights.

Hitchen also discussed new developments such as video compression, which allows for an increased number of programmes to be delivered on a frequency band by compressing the delivery signal, and high definition television (HDTV), which presents a superior picture for consumers but which would be extremely costly to convert to.

### Deficiencies in the Copyright Act 1968

**C**harles Alexander of Minter Ellison Morris Fletcher and Jane Levine of Allen Allen & Hemsley discussed copyright issues arising out of four case studies. By way of

example, the first case study dealt with the situation where a North Queensland tourist resort rebroadcast a television service to each guest room via cable. The television service was received fortuitously via access to an international satellite. The study assumed an agreement existed between the original service operator and an Australian company, assigning rights for commercial exploitation of the service exclusively to that Australian company.

The case studies concluded that there are a number of "gaps" in Copyright legislation. This was also the conclusion reached by Libby Baulch in her presentation. The key issues discussed are described.

- For the service to come within the meaning of "broadcast" as defined in the *Copyright Act 1968*, the service must be a broadcast to the public. The service will not be a broadcast "to the public" if for instance, it is a point-to-point service, or possibly if the signal is encoded. In the situation where a satellite broadcast is received by an earth station which then retransmits the programme via alternative technology such as MDS, arguably the satellite broadcast would not be "to the public" and therefore would not be protected under the *Copyright Act*. A service provider operating under a narrowcasting class licence, for instance, non-English language channels, may be found not to be broadcasting "to the public", in which case the broadcasts would not be protected. There are also problems if the transmission is not viewed as a whole, and section 22(6) suggests this may be the case, as an up-link to a satellite cannot be classified as "to the public".
- Section 91 of the Act provides that copyright subsists in a broadcast only if it is made from a place in Australia or the *Copyright (International Protection) Regulations* apply, namely, the broadcast is made from a country which is a party to the Rome Convention. In addition, copyright only subsists if the broadcast is made by an authorised person.



The problems associated with relying on universal membership and compliance with international instruments are discussed below; a noteworthy non-member of Rome is the United States, accordingly any broadcast coming from the US is not protected. Another relevant factor is that although section 22(6) operates to deem a broadcast made by a person from a satellite to have been made by the person at the time and from the place from which the material was transmitted from the earth to the satellite, it will not always apply and some ambiguity may arise as to who is the person "making" the broadcast.

- The various situations involving another jurisdiction also demonstrate that a number of other broadcasts will not be protected. If a broadcast is made from Australia but receivable overseas, it is probably not a protected broadcast as "public" is likely to mean the Australian public. There are also gaps where the transmission originates from the country that does not recognise Australian copyright law, or where it originates from a satellite itself, for instance, film or photographic material shot from the satellite and beamed back to earth.
- The potential ramifications of a transmission not being a "broadcast" may include the fact that, in the absence of a provision to the contrary, the broadcaster would probably not need the permission of the Australian copyright owners to make the broadcast.
- "Broadcast" is defined as to "transmit by wireless telegraphy to the public", which excludes cable transmissions. As discussed below, a cable transmission *may* be a "diffusion service", however the diffusion right is not a general cable transmission right. In order to obtain copyright protection of cable transmissions, there would first need to be a broadcast within the meaning of the Act, and then a cinematograph film made of that television broadcast. The distinction between protection of satellite and cable transmissions has been removed from other jurisdictions such as the United Kingdom, where the relevant Act provides for subsistence of copyright in the cable program similar to the copyright which subsists in a sound or television broadcast.
- If the satellite service is retransmitted via cable, section 199(4) may apply to authorise the transmission if it is "transmitted to subscribers to a diffusion service". If the retransmission is provided

simultaneously and is by way of "broadcasting" it may be treated as a "secondary broadcast" under section 25(3) and no infringement will occur.

However a question arises under this provision as to whether the "secondary broadcaster", having been deemed not to have used the record, is also deemed not to have used any underlying copyright works such as literary or music works. In addition, if a premises operator is held to be operating a "diffusion service", sections 199(4) and 26(3) may apply to effectively preclude the premises owner from being sued for infringement of the broadcast or underlying work.

- Live material broadcast via satellite may not be protected as there is no underlying work or film, and if a copy is made of live material it may not constitute a breach of copyright if the broadcast is not protected.
- An unauthorised decoder which obtains access to a pay television service without payment raises 2 issues.

Firstly, the illegal decoder itself may be infringing copyright. If the consumer receives and views the transmission simultaneously, there is no breach of copyright in the broadcast assuming the reception is in a private home and is not then "rebroadcast" by the consumer. There may be an infringement of rights in underlying works, for instance script or film. If the consumer makes a copy of the broadcast, again assuming it is for private use, it is likely that copyright will not be infringed by virtue of the operation of section 111.

Secondly, there is a question of whether the criminal law will provide recourse, through sanctions, in the situation where the service provider is deprived of revenue. The Crimes Act has not been amended at a State or Federal Level to take account of this situation, and it is unlikely that it would be covered by existing larceny or related offences. It is possible that Commonwealth legislation such as the *Telecommunications Act 1991*, the *Telecommunications Interception Act 1979* and sections of the Commonwealth *Crimes Act* relating to computers may provide a remedy by indirect means, however clearly a more desirable result would be an amendment criminalising dishonest reception, such as can be found in the *U.K. Copyright Designs and Patents Act 1988*.

- The concept of "ownership" of copyright in broadcasts, currently

limited to the class of persons set out in section 91, needs revision. For instance, in the case of a broadcast from a satellite, questions as to ownership of copyright arise. There also may be a problem for persons operating under a class licence as section 91(b) refers to broadcasts made pursuant to a licence "granted" under the *Broadcasting Services Act 1992*.

### International protection of property rights

**T**he international protection of rights in communications technologies was examined in a discussion on the current protection afforded by membership of international conventions, the limitation of this protection, and proposals for reform.

The *Berne Convention* adopts the principle of national treatment, so that an author of a work (protected by the Convention) will be given the same rights and protection in another country (of the Union) which that other country grants to its own nationals. Chris Creswell, of A-G's, argued that in some circumstances this may be an impediment to reform of Australian law, as the Parliament may be reluctant to confer privileges on foreign rights holders that are not enjoyed by Australian rights holders overseas.

Berne confers protection on "literary and artistic works" and grants the author of the work the exclusive right of authorising broadcasting communication of their work by means of wireless diffusion or re-broadcasting to the public. In addition, Article 14 protects a cinematographic work as an original work in its own right. The exclusive right can be reduced to a right to remuneration. The last time the Berne Convention was revised, however, was in 1967, and as such the Convention is to a large extent now out of date. Justice Sheppard suggested that Berne itself may need a major overhaul.

The *Rome Convention* provides that a wireless transmission not intended for or able to be received by the public is not a "broadcast" under Article 3(f). Rome gives the producer the right to remuneration for a broadcast of a sound recording, and the performer the same right for a broadcast of a recording of a performance provided, however, that the Convention member has not reserved the right not to apply Article 12. Article 13 grants to the broadcaster exclusive rights in respect of rebroadcasting, recording and duplication of unauthorised recordings, and a right to remuneration for paid public showings of TV receptions.

However, Chris Creswell noted that the United States has no plans to become a signatory to the Rome Convention, which

has prompted agitators within the Berne reform movement to push for an extension of Berne to cover matters dealt with under Rome.

The *Brussels Convention* attempted to address the problem of "spill-over", whereby a satellite transmission may be receivable not only in the country intended to receive the transmission, but also in neighbouring countries. Brussels requires signatory states to take "adequate measures" to prevent spillover and situations conducive to signal piracy. However it only applies to fixed satellite service transmissions, or "point to point", and does not apply to transmissions intended for reception by the general public or "point to multi point". The convention does not create rights in satellite signals, nor does it deal with rights of copyright owners of material carried in the transmission. It does not adopt a "national treatment" standard. In addition, no Asian countries have as yet become signatories. Therefore from an Australian perspective, protection afforded by this Convention is limited.

### Proposed reforms at the international level

Chris Creswell outlined a number of proposed reforms to the Berne Convention, such as confirmation that Article 11 extends to satellite broadcasting and the abolition of the broadcasting licence in Article 11. In addition provisions relating to the enforcement of rights and ways of dealing with the circumventing of signal devices have been discussed. A Committee of Experts convened by WIPO to examine a possible protocol to Berne have also examined proposals that both performers and record producers have an exclusive right over "digital communication to the public". The Committee has yet to come up with a unified approach to reform.

Libby Baulch discussed proposals by WIPO to move away from a segmented approach and instead view the communication to the public as a whole as the "broadcast". However this proposal raises the question of determining which law should apply in a situation where the broadcast transcends national boundaries. The European Community have indicated that they may favour the application of the law of the country of emission, however WIPO has expressed concerns that owners of copyright may be inadequately protected if the country of emission has inferior rights to the country where the broadcast is normally received.

The GATT draft TRIPS text has the potential to sideline the specialist conventions, however it was noted that TRIPS excluded moral rights. Although it proposed a level of protection for performers similar to that required by

Rome, the protection offered to broadcasters is not obligatory.

### Alternatives to amending copyright legislation

Bill Childs, while agreeing that a piecemeal review of the *Copyright Act* would be inadequate, argued that the law to an extent is incapable of keeping up with technology. He cited the example of the definition of a "broadcasting service" in the BSA 1992, which excludes services available on demand on a point-to-point basis, including a dial-up program. The potential scope of this exclusion could place a large number of services outside the reach of the BSA, despite the fact that it professes to be technology neutral.

He also suggested that an alternative to struggling to keep the law abreast of new technology is to change the way rights holders trade their rights in the marketplace; if rights owners were to sell their rights ahead of process it may not be necessary to create new rights. Concerns were raised by Jock Given and Owen Trembath that upfront selling of rights will hurt the creator, and the contractual reality of artists selling to producers/distributors was that it did not take place on an equal footing.

Michael Gordon-Smith, of SPAA agreed with Bill Childs that there was a need for a major re-think on protection of property rights. He viewed the issue of copyright largely as an issue of control, over revenue and integrity, and noted that developments in areas such as the digitised image and satellite broadcasting threaten traditional areas of control.

Technological development has also lead to confusion about what rights are actually being traded. He emphasised that from an industry perspective the current copyright laws are too complex, increasing transaction costs for all parties and ultimately operating to constrain innovative use of material; if for instance, all the rights owners in old library footage cannot be identified, the risk of possible infringement may deter further use of the material. He also argued that the formulators of public policy should take into account the need to reduce costs and adapt laws to the commercial environment; he cited the restrictions imposed by the *Corporations Law* on profit-sharing arrangements between an author and a production company as an example of disharmony.

Justice Sheppard suggested that the view taken by the Workshop had been that "pirates" reception of broadcasts was unmeritorious, and that perhaps instead of calling for reform the originators of broadcasts should better protect their interests through contractual and

encryption services. Dick Rowe highlighted the problem in Europe, where suppliers have denied program material to operators without a guarantee that the signal will only be receivable by the subscription base. The risk that this situation could repeat itself in Australia was a real one, although Bill Childs claimed this was a situation where the market was likely to adjust itself in response.

### Likelihood and certainty

One feature of the Workshop was that discussion did not always recognise that, in reality, two broad problem areas were being addressed. First, there is the *likelihood* that existing copyright law will not adequately deal with the more complex relationships between intellectual rights holders and those seeking to exploit those rights commercially in the new communications environment. Second, there is the *certainty* that existing law (both copyright and other legislation) will not properly protect rights holders against the inevitable interest of unauthorised operators who will endeavour to pirate product for commercial gain.

This second consideration flows from the inherent difference between existing "free-to-air" broadcasting services and subscription services, and the fact that in relation to the latter there is a commercial value in the broadcast itself. The inevitable incidence of piracy of pay TV services will mean that the ambit of original negotiations between rights holders and broadcasters will not be an effective substitute for full protection under all relevant law, protection which does not currently exist.

Ross Kelso from Telecom outlined the pilot television service currently operating in Centennial Park and reiterated the call for urgent reform. In particular, he stressed the need to examine retransmission rights, creating equivalent rights for satellite and cable transmissions, effective ways of remunerating the rights owners and the creation of enforceable rights against "pirates" who obtain the benefits of programming without paying for it.

Mark Armstrong, of the Centre for Media & Telecommunications Law & Policy, argued that a radical re-think of the *Copyright Act* was not necessary; although clearly some amendments were necessary. He discussed the graduating levels of protection found in the *Broadcasting Services Act* and suggested that such a system may be appropriate for Copyright legislation. Professor Armstrong also stressed the importance of not tying any change to a particular technology, and

finally, the need to amend section 10 in order to remove the distinction between satellite and cable.

A number of delegates expressed alarm at the delay in reform and suggested that an absence of pressure on the Government to examine the issue since the ABT reports of 1982 and 1984 has contributed to the delay. Justice Sheppard commented that a likely result of calls for reform would be to focus attention on how change may affect consumers - particularly the cost of purchasing products under a new regime. Stephanie Faulkner of APRA commented that the recent Prices Surveillance Authority report has hurt the industry by leading to a downturn in investment.

### Conclusions

**T**he Workshop made a number of general conclusions, not the least of which was of the numerous deficiencies in the *Copyright Act* in relation to protecting satellite transmissions and the owners of underlying works.

The current situation, where cable transmissions are only protected if they come within the meaning of a "diffusion service", and the distinction drawn between broadcasting via satellite, and broadcasting via cable, is one that needs urgent review. Although cable was not common in 1968, it is increasingly utilised and the current situation is discriminatory. Suggested ways of reviewing this problem included the adoption of the Berne approach of an exclusive right to communicate to the public; the adoption of the UK approach of a more extensive right covering cable, based on communication to the public rather than "diffusion to subscribers"; or the creation of a broader right to communicate to the public that would encompass the right of public performances.

A number of delegates stressed that it is important to realise the *Copyright Act* also needs reform to take account of emerging technologies such as multimedia and interactive products, in addition to existing problems with the protection of computer-based products.

Concerns were expressed that sweeping reforms to the Copyright laws, requiring owner/creators to sell upfront additional rights, would operate to the detriment of those groups, who have traditionally only achieved a position of equal bargaining power with producer/suppliers through collective bargaining arrangements.

The advent of increasing numbers of new technologies poses a challenge for more than just copyright legislation; the Workshop examined the inability of the

criminal law to prevent signal piracy, and submission were made that legal requirements were unduly complicated and out of touch with commercial reality.

The transnational potential of broadcasting makes the existence of satisfactory arrangements on an international level extremely important; the current situation is that reform to conventions is slow and consensus almost impossible to achieve, with the result that the current protection to holders of

property right is at best sketchy. There are limitations on Australia's ability to increase protection at a domestic level and agitate for reform at an international level.

*For a full text of conference proceedings, reference should be made to the tapes of proceedings. Copies of papers presented at the conference may be obtained through the Administrative Secretary, CAMLA.*

## Edmond In Wonderland

**Georgina Waite reports on the recent defamation action brought**

**by Vldas Meskenas against Edmond Capon**

*"Then you should say what you mean"  
the March Hare went on.  
"I do" Alice hastily replied - "  
At least I mean what  
I say - that's the same thing, you know."  
"Not the same a bit" said the Hatter.  
- Lewis Carroll*

**I**n a recent defamation case Edmond Capon, Director of the Art Gallery of New South Wales, was found to have defamed artist Vldas Meskenas in comments made by Capon about a portrait of Rene Rivkin which Meskenas had entered in the Archibald prize. The jury awarded Meskenas \$100 for the damage to his reputation and the judge ordered Edmond Capon to pay the artist's legal costs. Edmond Capon has appealed against the costs order.

The action was based on comments by Capon, which appeared in the Sun-Herald reported as follows:

*"It is simply a rotten picture. It's no good at all. I don't care what Rene thinks. I looked at the picture and thought 'yuk!'.... the hand's all wrong, so are the eyes. And look at the neck, it looks like it's been painted with chewing gum."*

The plaintiff alleged that these words gave rise to imputations that the plaintiff was:

1. an inferior artist; and
2. so incompetent that he painted a second rate picture.

Judge Christie of the District Court ruled that Edmond Capon's comments were capable of conveying both these imputations, although the jury found only the first imputation to be conveyed to the ordinary, reasonable reader of the Sun-Herald.

The case had given rise to debate on two issues. First, does the art critic who attacks an artwork necessarily discredit the artist? Second, where a defence of comment is raised, should a defendant be

required to prove that they honestly held the opinion represented by the comment itself, or the opinion inferred from the comment as identified in the imputations drafted by the plaintiff.

### Say What You Mean

**I**dentifying what a published comment means will always pose difficulties in the law of defamation. The defendant is accountable not only for the meanings he or she intends but also any secondary or inferred meanings which might be conveyed to the hypothetical "ordinary, reasonable reader". As with most of the law's hypothetical referees the ordinary, reasonable reader is of fair, average intelligence and not perverse, morbid or avid for scandal. Needless to say, such people disagree about what particular words or comments mean but the defendant must have them all in mind when expressing an opinion.

Capon's words fell to be measured by the ordinary, reasonable reader of the Sun-Herald's Tempo column and the jury found that such readers would understand Capon to be imputing that Meskenas was "an inferior artist". This is despite the fact Capon's words are clearly directed to the particular portrait of Rene Rivkin. As the defendant's Counsel pointed out, if a critic lambasts one of Picasso's works as "simply a rotten picture" about which the critic thought "Yuk!", would the critic have to qualify those remarks by saying "but I think his other works reflect his genius", lest he or she be taken to hold the opinion that Picasso was an inferior artist.

The point is that all artists do some work which is of poorer quality; no artist is uniformly excellent. A criticism of a work may mean no more than that the

artist lacked skill or competence in executing this particular work - or a criticism may impute that the artist's work is generally of a poor standard - this case shows that it is a slippery slope for a critic from conveying the former opinion to conveying the latter. There is arguably uncertainty as to whether remarks directed wholly to a particular work of art (or performance or whatever) can be regarded as capable of giving rise to such general imputations as "the artist is an inferior artist" and, if so, such imputations should not be left to the jury without some qualification.

### I Mean What I Say

**C**riticism of artworks is commonly defended as "fair comment", that is, that it represented the honest opinion of the speaker on a matter of public interest (the latter point generally being presumed in the case of identified art works).

Capon raised the defence of comment in response to the claim against him on the basis that he meant what he said. From his testimony it is clear that he believed his criticism of the portrait was well founded. However, during the proceedings Justice Christie ruled that the defence was no longer available after Capon gave evidence in cross-examination that:

- he did not intend to say anything about Meskenas as a painter, his comments were directed towards the painting;
- he did not intend by his statements to say anything derogatory about Meskenas as distinct from the painting;
- he did not intend to say, nor was it his opinion, that Meskenas was an inferior artist or so incompetent that he painted a second rate picture.

Under Section 32(2) of the Defamation Act 1974 (NSW) the defence of comment is defeated if "at the time when the comment was made, the comment did not represent the opinion of the defendant". There has been some judicial debate about whether the defence of comment under the NSW Act addresses the words of the comment itself or the imputations drafted by the plaintiff.

Support for the former view has been expressed in the NSW Supreme Court and the Court of Appeal. In *Petrus -v- Hellenic Herald Pty Ltd* (1978) Samuels JA expressed the view that the defence "is directed to the character of the vehicle by which those meanings, whatever they are,

are conveyed; that is by a statement of fact or by a statement of opinion... In my opinion, a defence of comment under the 1974 Act must be directed, not to the imputations specified in the statement of claim but to the matter as defined in S.9(1)."

By contrast, the Privy Council in *Lloyd -v- David Symes & Co. Limited* (1986) held that the defence of comment must be directed to the imputations and, further, that if the defendant did not intend the imputations found by the jury, then those imputations *cannot* have represented the defendant's opinion. Judge Christie applied the Privy Council's ruling in the Capon case as follows:

"As a result of the view I took of that decision and the manner in which it appeared to me to affect the decision of the NSW Court of Appeal in *David Symes & Co. Limited -v- Lloyd* and the manner in which that decision affected previous decisions on the question of comment, I came to the view... that there is no defence of comment available to the defendant in these proceedings. (*The Judge noted the defendant's evidence outlined above and continued*). In those circumstances, it would seem to me not possible for the defendant to successfully plead comment, which must be at the very least congruent with the imputations".

There is strong argument in favour of the approach taken in Lloyd's case on the basis that the cause of action under the NSW Act lies in each imputation published by the defendant and, if the jury finds such an imputation has been made out, then that is what must be defended, but the application of Lloyd's

case considerably erodes the protection available to defendants seeking to express opinions on matters of public interest. Words often convey meanings which the speaker may not intend (or reasonably foresee) and applying Lloyd's case the defendant has no option to say - "I didn't intend to say it but if that was what was conveyed it did represent my opinion." This would not have assisted Capon, who did not hold the opinion imputed, but could be a reasonable response from other defendants whose opinion was in fact congruent with the unintended imputations.

### Not The Same Thing

**S**aying what you mean and meaning what you say is not the same thing in the law of defamation because the law looks to the effect of the words on the ordinary, reasonable reader not the intention of the speaker. Comment is not a watertight defence for those expressing opinions on matters of public interest because unintended meanings may be conveyed which may be left to the jury as capable of arising even though the speaker could not have reasonably foreseen those meanings and which, on the authority of Lloyd's case, the speaker is precluded from arguing represented his or her opinions.

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## Recent ACT defamation cases

### True Innuendo

**I**n *Graham Charles Evans -v- John Fairfax & Sons Limited and Alan Ramsey and John Alexander*, the plaintiff, a Senior Commonwealth Public Servant sued for defamation in the ACT Supreme court over an article published in the Sydney Morning Herald on 14 April 1990 titled "*Cosy in the Corridors of Power*". The plaintiff alleged that the article conveyed in its natural and ordinary meaning imputations that:

- (a) The plaintiff's career advancement in

the Commonwealth Public Service was only the result of the patronage from the Prime Minister;

- (b) The plaintiff in his capacity as secretary of the Department of Primary Industry & Energy lacked the confidence of his Minister, Mr John Kerin;
- (c) The plaintiff was a person whose successful career in the Public Service was due more to his enjoyment of a nasty system of patronage than to anything else;
- (d) The plaintiff was prepared to advance his career through cronyism rather

than on the merits of the performance of his duties.

Justice Higgins in his decision of 12 February 1993 was satisfied from the evidence in the case that the public servant would have inferred from the article ".....that proper merit procedures for promotion had been either by-passed or degraded by reason either of political influence or of the empire-building machinations of the Secretary, Prime Minister and Cabinet", and that the statement in the article that the plaintiff and Mr Kerin did not 'get on' seemed to convey to public servants ".....an implication that Mr Kerin lacked confidence in the plaintiff's capacity to carry out his duties to the Minister's satisfaction".

His Honour noted that Counsel for the defendants had not seriously disputed that the article imputed that the plaintiff had benefited from 'patronage', and had conceded that the reference to Mr Kerin had been factually incorrect. Justice Higgins went as far as to say "Of course, what was said of the relationship between the plaintiff and Mr Kerin was a lie. It lacked any foundation other than that Mr Kerin had expressed and, indeed, maintained a personal preference for Mr Miller as his Departmental Head. It was a lie that was no doubt hurtful to both the persons referred to. Notwithstanding that its falsity was demonstrated to the defendants, they refused to correct it. That attitude was in my opinion, gravely reprehensible. A quality journal, such as the Sydney Morning Herald, should have had the good grace to apologise for a proven inaccuracy, particularly one perceived to be both hurtful and damaging."

Although, in his decision as to costs Justice Higgins stated that he could make no finding as to whether the reference to Mr Kerin's relationship with the plaintiff was known to be a lie to the author of the article or any responsible officer of the first defendant at the time of publication.

Because the plaintiff had expressly rested his case on the contention that the article conveyed the defamatory imputations pleaded in its natural and ordinary meaning, and had not relied on a true innuendo, it was held that the test to be applied was whether the article conveyed the imputations pleaded to the ordinary reasonable reader. Justice Higgins found that none of the imputations pleaded were made out, and entered verdict for the defendants, but found that

had any of the defamatory imputations been made out he would have awarded damages of \$25,000 for hurt to the Plaintiff's feelings, \$30,000 for damage to his reputations within the Public Service, and \$15,000 by way of aggravated damages.

In his decision as to costs of 23 April 1993, his Honour commented that "The entire litigation may have been avoided, in my view, had the defendants responded reasonably to the plaintiff's letter of demand and complaint and provided, by a published correction, as suitable and timely vindication of the plaintiff's reputation", but also noted that it was the Plaintiff's choice to proceed on the imputations as pleaded, and ordered that there be no order as to the costs of any party.

(An appeal against this decision was heard by the Federal Court in August, and the Court has reserved its decision).

### Identification

In the case of *Raymond Johnston -v- Australian Broadcasting Corporation*, the plaintiff was awarded \$17,500 damages for defamation arising out of an edition of the 7.30 Report broadcast on 27 July 1987. The plaintiff, a worker employed at the New Parliament House site, was shown in close up during the broadcast and depicted as being one of a group of workers taking an unauthorised early lunch break. Justice Higgins in his judgment of 7 April 1993 when discussing the issue of identification found that the plaintiff had been recognised by persons in NSW and the ACT, and did not need to call a witness who had actually seen the broadcast in Queensland, South Australia, Western Australia and the Northern Territory, as he was satisfied that it was probable that at least one person in each of those jurisdictions had viewed the program and recognised the plaintiff.

In the case of *Allworth -v- John Fairfax Group & Ors*, the plaintiff sued in the ACT Supreme Court over an article published in the Sydney Morning Herald on 3 August 1991 criticising the plaintiff's conduct in the management of the Canberra Raiders Rugby League team. In an interlocutory decision given on 25 March 1993 Justice Higgins considered and compared the "contextual imputations" defence of section 16 of the *Defamation Act 1974 (NSW)*, the "Polly Peck" defence, and the "truth and public benefit" defence of section 6 of the *Defamation Act 1901 (ACT)*,

formerly NSW).

His Honour held that a defence pleaded under section 16 *Defamation Act 1974 (NSW)* is only to those imputations pleaded by the plaintiff which are proved to arise from the matter complained of and to be defamatory of the plaintiff. The contextual imputations alleged "....must, alone or in combination, insofar as they can be combined, differ in substance from the imputation or imputations pleaded by the plaintiff," and be capable of "reaching" the sting of the plaintiff's imputation. Further, Justice Higgins commented that the section 16 and "Polly Peck" defences are not entirely co-extensive and that "The s.16 defence is to the pleaded imputations. The "Polly Peck" defence is to the matter complained of which is alleged to convey some or all of the imputations particularised.". The concepts of "public interest" under section 16 of the *Defamation Act 1974 (NSW)* and the requirement of "public benefit" under section 6 of the *Defamation Act 1974 (ACT)* were discussed and his Honour concluded that substantively, a defendant is entitled to plead the same contextual defences to alleged publication in the ACT as to alleged publication in New South Wales.

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# Trading in Radcom Licences: some future shocks

Paul Mallam examines the creation of a new spectrum licence and the tradeable nature of rights of access to the spectrum.

**T**he Radiocommunications Act 1992 was a legislative response to the rapidly increasing technological and commercial demands being placed upon radiocommunications spectrum. Amongst other things, the Act creates a new spectrum licence, which involves tradeable rights of access to the spectrum for periods of up to ten years. Much of the new trading system is yet to be fleshed out by the newly created Spectrum Management Agency (the "SMA"), which has responsibility for administering the Act.

The purpose of this paper is to suggest that, whatever approach is adopted by the SMA, the new Act will inevitably lead to some policy and legal surprises in the future.

## Trading in Licences

**T**he provisions in the Act which deal with trading in spectrum licences are beguilingly simple. Section 85 of the Act provides for the assignment of licences. Any assignment must comply with section 88, pursuant to which the SMA may determine rules for the assignment of spectrum licences. But what are the consequences if a transferor fails to comply with the rules determined by the SMA? Is the assignment effective, notwithstanding any defect in the transfer? On one view, this is a matter for the parties to the transaction. However, that is not entirely so, because subsection 86(2) provides that the assignment cannot take effect until the Register of Licences is amended.

Where the SMA's rules have not been compiled with, should registration be effected? This in turn gives rise to an issue of whether the Act requires substantial or strict compliance with the rules regarding assignment. If strict compliance is required, then compliance with every aspect of the rules is necessary. Otherwise, the assignment will be ineffective.

Further, what if the rules are not complied with at all? In that case, is the assignment invalid? If so, is the SMA entitled to regard the purported vendor of the licence as continuing to be the licensee? If so, is the purported purchaser transmitting unlicensed radio-communications? At best, the purported purchaser might be regarded as a third party user.

The above examples highlight the importance of the SMA's rules for

assignment of licences, in the overall scheme of administration. Those rules must be clear and certain, but sufficiently flexible to cover the wide-ranging circumstances in which a licence might be assigned. For example, apart from a sale of the licence, assignment might occur by will, bankruptcy, winding-up of a company, court order or devolution of law. All of these examples give rise to their own issues.

## Register of Licences

**T**he concept of a tradeable licence also gives rise to questions regarding the status of the Register of Licences. The effect of section 85 of the Act appears to be that it is a register of title, somewhat similar to the Torrens system of land title. If so, then some questions must be raised regarding the effect of section 144, which provides for registration of the details of authorisations given by licensees to third party users to operate devices under their licences. If entry of a licensee on the Register provides proof of ownership of the licence, is registration of an authorisation given to third party users an act which confers some legal entitlement? If so, what is the result if a licence is transferred "under the feet" of a third party user? Will the third party user be able to claim continuity of tenancy, in much the same way that a lease runs with the land, when title to land is transferred? Or has the third party lost all rights under the licence, with her or his only action being against the licensee who sold the licence (possibly in breach of the third party user agreement)? Again, these are issues which the SMA may well be required to address, given the effects of registration.

As the value of the spectrum increases, lawyers and others will be advising on transactions which in some cases are worth very large amounts of money. The only verification of a transferee's title in a licence will be the Register of Licences. Accordingly, from a commercial user's perspective, it is essential that the Register is accurate and up to date.

## Commercially valuable information

**W**hen purchasing spectrum licences, there are other kinds of information of which the SMA will be the only source. For example, the SMA may know of facts likely to result in consideration being given

to the suspension or cancellation of a licence. Indeed, it may even be in the process of suspending or cancelling a licence. Is this information which the SMA should provide to a potential purchaser when inquiry is made of it? Alternatively, there may be plans to resume part of the spectrum, which affect a licence about to be transferred. Ought the resumption proposal be disclosed by the SMA to the purchaser, upon inquiry? One solution would be to place relevant information on the Register of Licences. For example, it should be a relatively simple task to devise a software package which identified any correspondence relating to the possible suspension, cancellation or resumption of a licence and note it on an electronic register.

In relation to information dissemination, a further issue will be the extent to which section 2A of the Trade Practices Act renders the SMA liable for misleading or deceptive conduct under section 52 of that Act. Section 2A generally makes the Commonwealth and Commonwealth authorities subject to the Trade Practices Act in respect of the conduct of a business. Just what constitutes the conduct of a business is unclear, although the SMA arguably will be conducting a business when administering a price-based allocation system. If this is so, and statements are made in the course of administering that system, then the SMA will be under an obligation to ensure that the information is not misleading or deceptive under section 52 of the *Trade Practices Act*.

Of course, whether the SMA is subject to the *Trade Practices Act* or not, it could be liable for negligent misstatement, if it negligently provides information to a person who thereby suffers a loss. These considerations emphasise that the SMA must have an appropriate system to properly disseminate information and to ensure that it is accurate. The large sums of money involved in buying and selling the spectrum will mean that, inevitably, if information provided by the SMA is wrong and loss is occasioned, then the SMA will be asked to foot the bill.

All of these issues suggest that the SMA and administration of the spectrum is likely to be an area of increasing public and legal attention over the next few years.

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# Report

## A report on seminars conducted by The Centre for Media and Telecommunications Law and Policy at the University of Melbourne

**The first seminar, held on 30 October 1993, examined legal and policy options necessary to deal with developments in the delivery of audiovisual and film material and new and planned services including Pay TV, narrowcasting, MDS, cable and global satellite services. The Seminar also examined the impact of these developments upon program material and production.**

**Prepared by Martin Cooper**

### **Australian content: new rules and policies?**

**T**he Seminar produced much of the usual reiteration of fixed positions by the Networks, the Australian Broadcasting Authority and the various interest groups but was notable for its lack of any of the fiery exchanges which have marked meetings of this kind in the past.

Perhaps this was due to a remarkable absence of any serious debate of the reasons behind Australian Content Policies. There seemed a general acceptance of the notion that the cultural justifications for Australian Content quotas and related policies no longer needed defence and have become a given in the debate.

Perhaps the lack of heat also reflected the one-sided nature of the debate; there was no representation from the unions, cultural bodies or fringe groups, such as the narrowcast/pay television lobby.

### **Brian Johns**

**B**rian Johns, Chairman of the Australian Broadcasting Authority ("ABA") reiterated his visionary, even inspirational, theme of previous public statements that "The real issue for broadcasting policy will always be programs, because programs talk to people about their concerns and relationships. What we all are about is identity".

The audience is now there, he said. The issue is how to provide Australian programming to it economically. His answer is to turn to regional and global markets which are emerging - the "frontierless markets". In Asia, he suggests, we have a natural market in

which we do not have to establish our credentials as Australian producers must do in Europe.

Johns' message is that Producers should seek co-production arrangements in the Asia/Pacific region to overcome our "forbidding cultural trade imbalance". "In buying we should also be selling" and to do so we must be looking at the whole gamut of film and television production funding program to ensure that they pull together with energy and innovation without the need for prescriptive quotas and formulas.

However, in answer to a question, Johns confirmed his view that transmission quotas will be in place for "quite a long time - but as a safety net leaving us free to take risks".

Commenting on the section 102 Pay TV quota, Johns seemed confident that the draft guidelines published by the ABA will be sufficient to ensure that the spirit of a 10% of drama being Australian produced quota will be achieved.

### **Deborah Richards**

Deborah Richards of the ABA then launched two recent publications of the ABA entitled "*Trends and Issues No.2*" and "*No.3*".

She pointed out that the statistical material contained in Issue No.2 entitled "*Australian Content on Television 1990-1992*" indicates that the top 10 programs in all key television markets in 1992 were Australian made. Noting that each of the commercial networks complied with its Australian content requirements pursuant to Television Program Standard 14 in each of the years under survey, she demonstrated that the policy as set out in TPS14 has been implemented with a degree of flexibility.

Part 3 of the survey shows the drama/diversity score for a large number of particular programs and illustrates with some clarity the distortions and imprecisions which inevitably arise from a program classification system based on general definitions. For example, the fact that a motion picture called "Sebastian and the Sparrow" can earn 21DDS points whilst a 6 x 30 minute children's drama program of the quality of "Kaboodle" can earn 5.25

points would seem to raise some questions.

The second paper (No.3) is entitled "*Viewing Australia*" and consists of the results of an in depth polling carried out by the independent research organisation, ANOP Research Services Pty Limited. The research produced little or no surprising outcomes, finding that the most popular type of Australian programming is serials (27%) and that women are more likely to prefer this type of programming.

Current affairs programming is the second most popular programming type but heavy commercial television viewers were almost twice as likely to prefer serials to current affairs programming. Again, people in the 18-24 year old age group are much less likely to nominate documentaries and infotainment programming than people older than 55 years. Mini-series, movies and the news were all considered to be the best type of Australian programming by 70% of respondents with ABC viewers giving these a heavier weighting than commercial viewers.

The demand for Australian programming is apparently strong and in all program categories except information programs and serials and soaps, the view is that there is "not enough" of such programming.

### **Sean O'Halloran**

**T**he material contained in the "*Viewing Australia*" report contrasts to some extent with the research material reported by Sean O'Halloran of the Seven Network supported by Bruce Gyngell, Chairman of the Nine Network that indicates that Australian audiences are turning away from soaps and serial drama towards infotainment programming. This research was suggested to be the reason for the recent cancellation by the Seven Network of "*A Country Practice*".

O'Halloran repeated the often heard commercial Network position that quotas are an unnecessary rigidity in the programming system which has not resulted in any greater Australian content on commercial television.



The standard network position that the rise of Australian drama occurred as a result of natural growth of audience demand, which demand was instantly and spontaneously met by the Network, does not sit comfortably with the facts but is vigorously maintained and deeply believed.

Given that quotas are a fact of life for "political reasons", O'Halloran proposed a number of substantial amendments to the present system set out in TPS14. In summary, he suggested:-

- the elimination of the overall transmission quota (that is the 50/50 requirement);
- a reduction of the drama quota from 850 points to about 400;
- an elimination of quality factors from the equation altogether;
- the elimination of the diversity quota which, in his view "reflects the cultural arrogance that underlies program quotas"; and
- the Australian factor should be substantially re-worked to ensure that certain anomalies that the Network believes exists are eliminated - e.g. a film should not lose its Australian content points because its musical track is composed and recorded in another country.

Asked whether the effect of these amendments would not be to render the quota system completely valueless, O'Halloran replied that the Networks "will accept an increase in the overall quota depending on how the mathematics turn out".

#### **Bruce Gyngell and David Hill**

**A** lively debate took place between Bruce Gyngell and David Hill, Managing Director of the ABC, on the merits and virtues of Pay Television and the speed with which new technologies will become a fact of life in Australia.

Gyngell is of the view that commentators and policy makers have got their "time frame wrong by at least 10 years" and that new technologies will not be a fact of life until well into the next century. Hill challenged this view vigorously and argued that the proliferation of satellites, the cabling of Sydney for the Olympics and the attendant requirement for equality for other capital cities and the arrival of Pay Television will all dramatically change the means and nature of the delivery of audio visual entertainment in this country "within two years".

Hill warned of the new international services "which will have little regard for frontiers, little regard for national regulation and little regard for Australian content". He is firmly of the view that Australian programs will be acceptable to Asians despite the differences in culture although Gyngell, and Elizabeth Jacka of

Macquarie University, vigorously argued that "indigenous programs is what it is all about".

However, David Hill does see Asia as just another window for Australian programming rather than a new major market. He maintained the standard ABC line that the new international television service and the ABC's excursion into Pay Television will not deny free-to-air viewers of the ABC any program material and that the additional programming demands can be met from within the existing resources of the ABC which are, apparently, so under utilised that they can produce material for two 24 hour a day services without additional cost. He assured the audience that "there is a bloody big fence around free-to-air television".

#### **Bob Weiss and Chris Lovell**

**T**he programming interests were represented by Bob Weiss, President of the Screen Producer's Association of Australia and Chris Lovell, Chairman of the Film Finance Corporation. Both acknowledged that programming cannot be forced onto an audience but expressed concern that programming should not be determined entirely by economics.

Weiss's point is that it does not matter *why* Australian programming is produced but that it is. Weiss's concern is that policy in Canberra is being driven by economic rationalists rather than the cultural argument - "we want to be able to make our own mistakes" - and expressed the concern that there is not enough discussion about end results of policy and too much analysis of "who gets what, when and how".

Lovell's concern is that there is a very real disparity between the requirements of an Australian certification of a film for 10BA of the *Income Tax Assessment Act* purposes and what scores well under TPS14. Seeing this disparity as entirely undesirable he advocates that the Division 10BA test should be reflected in TPS14. This is because, in his view, 10BA reflects cultural and economic reality but TPS14 "is rooted four square in culture - it does not require production here (as does the 10BA "wholly or substantially" test) and leads to production going off-shore, particularly to New Zealand. Lovell points out the absurdity of a program such as "Stark" being given half points as an Australian drama because it was written by a non-Australian notwithstanding that it was so Australian in every other respect.

#### **Jock Given**

**J**ock Given, Policy Adviser at the Australian Film Commission outlined the impact of Australia's foreign treaty obligations upon cultural policy particularly as it applies to program content quotas. He pointed out that under a variety of international arrangements including the GATT round, the CER treaty

with New Zealand, various international co-production agreements and the APEC agreements, Australia may find itself very vulnerable in the interantional market for cultural programming which resembles "less a dog eat dog environment, than a T-Rex eats puppies world". He exhorted the conference that "we must be clever in our use of our international agreements to achieve our cultural goals".

#### **Helen Mills**

**H**elen Mills, Director of the Communications Law Centre, expressed her concern that the conference had not considered cultural policy and Australian content on radio and wondered if this was because it was considered to be narrowcasting or simply a mature market. She is concerned that on radio, Australian composed music quotas have been replaced by "Australian performed" quotas.

Discussing the retreat from regulatory policy in relation to Australian content, Mills noted the implications of section 128 of the Broadcasting Services Act with its capacity for Parliament to override program standards.

Finally, she expressed the view that Pay Television Services should have the same Australian content requirements applied to them as applied to commercial television.

#### **Conclusion**

**W**hile the conference overall was a useful one, one could not escape the conviction that many of those involved had not grasped the fact that very shortly technology will prevent traditional mechanisms of cultural policy from being effective to achieve Australian content.

**The second seminar held on 31 October 1993, examined law reform proposals and developments in case law, human rights and the practice of journalism. The focus was upon defamation law and journalists' sources. Prepared by Martin Cooper.**

#### **The right to investigate and report**

**D**efamation law reform was prominent on the speakers' agenda, no doubt stimulated by the recently published New South Wales Law Reform Commission Report(Discussion Paper 32 of August 1993), as was the topical debate about "shield laws" for the protection of journalists' confidential sources. The highlight, however, was the inaugural lecture by the newly appointed Hearne Professor, Sally Walker.

## The voice of the Judiciary

In introducing the session, Justice Michael Kirby appealed for both legislative and executive branches to play their role in defamation law reform, the history of which he described as "melancholic". He pointed out that it is now more than 16 years since the ground breaking Australian Law Reform Commission Report on privacy and defamation law but none of its recommendations have yet been implemented.

Chairman of the NSW Law Reform Commission, former Justice Gordon Samuels Q.C., spoke about the Commission's report on defamation law reform, referring to its examination of the role of juries in defamation trials. He expressed the view that either jury trials in defamation cases should be abolished entirely or the role of juries should be confined to determining whether pleaded imputations are conveyed and are defamatory. Mr Samuels also said that he was firmly in favour of a system of retraction and apology and spoke favourably of the Annenburg proposals in the United States which require a retraction or reply choice for publishers within 30 days of publication of defamatory material. He emphasised, however, that "you have to give both sides something if these types of solutions are to work- the carrot and the goad".

## Ruskin and Littlemore

One of the more lively sessions of the conference featured a paper on the right to publish and defamation law by Victorian barrister, Jeremy Ruskin and some reactionary views on the need for defamation law reform from Stuart Littlemore QC.

Ruskin dealt briefly with the obligation upon the plaintiff to spell out all the imputations which he/she contends reasonably arise from the words complained of and the extent to which the plaintiff is entitled to restrict from consideration by the jury those imputations to which there may be a good defence. Noting that the imputations must reasonably arise from the article or program, Ruskin also noted that the defendant is restricted to justifying only meanings which are reasonably open. But how, he asked, does a defendant confront the situation in which the plaintiff seeks to restrict the proceedings to only part of the article or the program?

He commented on the recently decided Victorian case of *Curran -v- Herald & Weekly Times Limited* (1993) in which Sir James Gobbo reviewed the authorities in relation to broadening the imputations.

Justice Gobbo says the decision in *Polly Peck (Holdings) -v- Trelford* (1986) UK High Court is good law and the defendant can look at the whole article to show the whole meaning and justify that meaning.

Ruskin referred to the decision in the UK case of *Kashoggi* which effectively determines that the fact that a statement may be defamatory and not capable of justification in one particular extreme factual situation does not render the whole article defamatory if there are many other meanings which are true and not defamatory arising from the same facts.

Littlemore said he does not understand the need for any cap on damages and applauds the notion that damages are a means of punishing the media for irresponsibility. However, in view of the recent decision in *Meskenas -v- Capon* he is in favour of some "clearer statement of what is comment" so that the situation which confronted his client in that case, namely that because he did not believe that Meskenas was a bad artist prevented the defendant from relying upon the defence of comment if Meskenas was able to convince the jury that the defendant's remarks could carry the imputation that he was a poor artist.

## Reputation, truth and privacy

The seminar concluded with a most thoughtful inaugural lecture by Professor Sally Walker. The Professor examined the relationship between "reputation", "truth" and "privacy" with a view to critically evaluating recent proposals for reforming the law of defamation.

In her view a major defect with current proposals for reform is their failure to address the question of the role of defamation law. If the objectives of the policy are not examined then the reforms now proposed may yet again fail to arrive at a system which balances the vital conflicting rights of the public's right to know against the individual right to privacy. She argued that any law of defamation must:-

- be justified in the public interest;
- go no further than is necessary to protect the private right; and
- be sufficiently clear to determine what the various parties rights are.

In Professor Walker's view, reputation is not one's character but rather what people think is your character. Accordingly, defamation law should not be used to protect people from publications which do not go to reputation but merely cause people to be shunned, for example, allegations of mental illness or identifying the victim of a rape allegation.

She also argued strongly against any reversal of the onus of proof, as in Irish

law, because the plaintiff may not be able to prove vague allegations. Only in cases where there is detailed or specific information as to time and place should the plaintiff be under any burden of proof.

In Professor Walker's view privacy should be dealt with by a separate law but she is firmly in favour of immediate reform. In this respect she points to the injustice of *Kayes* case in the UK where an actor grievously injured had his photograph taken by a tabloid photographer who illegally gained access to the hospital in which the actor lay gravely ill. He was obliged to rely upon malicious falsehood to stop publication of the photographs which she said was an entirely inappropriate way to protect what is really an issue of privacy.

Professor Walker's paper will be published and will make an important contribution to the academic debate about the very foundation of defamation law.

## Shield Laws

The fact that they both have jobs as presenters of ABC television programs is about the only thing, it seems, which Quentin Dempster and Stuart Littlemore have in common on the issue of shield laws to protect journalists from having to disclose confidential sources in court.

In a spirited defence of the traditional journalist's view of the obligation to disclose sources, Dempster argued for a more inquisitive press which, he said can only come if private sources are relied upon. Private sources will only come forward if they obtain absolute protection from disclosure. Dempster is in favour of absolute privilege for journalists along with that for doctors, lawyers and others.

Littlemore, on the other hand, takes the view that shield laws are mostly a shield to journalists' own incompetence and foolishness. Often, he argued, journalists claim secrecy for their sources simply because they regard it as "better to be a martyr than a mug".

A more moderate view was put forward by Neil McPhee QC arguing that the "principle of necessity" should be applied; that is, disclosure of sources should only be compelled if it is necessary for justice to be done, if that evidence is relevant and material. He conceded that one of the difficulties with this is that often only the journalist will know if there is a source, if the source is tainted by malice and if the journalist's conduct is "reasonable" for the purposes of a defence under section 22 of the *Defamation Act* (NSW).

McPhee finally proposed that section 10 of the *United Kingdom Contempt Act* which imposes an onus on the applicant for disclosure to overturn the presumption in

favour of the public interest in protection of sources as a better solution.

Andrew Robson, a Melbourne solicitor, also raised the interesting and somewhat alarming new practice being used by Federal authorities to force disclosure of sources by threatening journalists with a charge of "aiding and abetting the commission of a crime" under section 5 of the *Commonwealth Crimes Act*.

### Free speech

**P**rofessor Cheryl Saunders of Melbourne University delivered a comprehensive paper on High Court decisions on constitutional reform in relation to the recognition of media rights. This paper was complimented by one by Professor Mark Armstrong and Vanessa Holiday of the same university. These papers raised a number of questions including:-

1. what are the freedoms which are inherent in the freedom of political expression which has been established by the High Court in the *Nationwide News -v- Australian Capital Television* cases?;
2. what are Australia's obligations under international treaties to which it is a party particularly the International Covenant on Civil and Political Rights ("ICCPR"), the first optional protocol to which Australia ratified in 1991.

Pointing to the case of *Derbyshire County Council -v- Times Newspaper* (1992) in which the influence of international covenants on the common law is considered - in this case an EEC Directive upon the right of the Council to sue for defamation - she questioned what the High Court priorities would be in such a case. Regrettably, she said that issue was not finally resolved in that case because the Court of Appeal found that there was "no inconsistency" between the Directive and the common law.

Professor Saunders also referred briefly to the options which are available to institutionalise journalists rights as aspects of the freedom of speech right:- to institute a bill of rights; or leave the Courts to slowly define these rights.

In their paper, Professor Armstrong and Ms Holiday noted a number of areas in which the Commonwealth Parliament could, if it chose, transform the law relating to freedom of speech including:-

1. statutory recognition of freedom of speech and the need for editorial discretion and journalistic integrity, as a counter balance to objects and provisions already contained in Commonwealth law. This could apply to traditional laws and requirements for the newer self regulatory schemes;
2. enactments of specific Commonwealth shield and "whistle blower" laws; and
3. Commonwealth reform of defamation and privacy laws in whole or in part.

They then briefly analysed the alternative of a constitutional bill of rights along the lines of the United States system, a "modern" bill of rights not enshrined in the constitution, the process of rights implied by the High Court and specific legislative recognition. They then briefly referred to Article 19 of the ICCPR allowing individuals to appeal to the Human Rights Commission once they have exhausted all avenues of appeal within their own jurisdiction.

No doubt many of the issues raised and debated at the conference will be examined closely during the course of the current Senate Standing Committee on Legal and Constitutional Affairs into the rights and obligations of the media.

Inquiry Chairman, Senator Barney Cooney spoke at the conference and, refreshingly for a politician, seemed prepared to be bipartisan and inquisitive about the sorts of issues the Inquiry will look at. He expressed his great concern at the system of rewards and punishment which exists where a journalist who writes favourable stories is rewarded with leaks and inside background briefings and a journalist who does not is denied such privileges.

He also defended politicians against allegations of gross neglect of defamation issues arguing that a politician in this sort of area must carry with him or her the weight of public opinion.

## The pros and cons of various distribution methods for Narrowcast and Pay TV

**Barney Blundell argues AAP's view that a regionalised system**

**is the best method of distribution of emerging TV services.**

**E**veryone with a vested interest will claim and explain why their method is the best and tend to play down their disadvantages. Technologists tend to talk of best technology, biggest capacity, what is best for Australian manufacturers, Telecom unions, etc. If we are not careful Australia once more could be in the position of having expensive technology waiting for a market.

I believe we need to start with what the customer wants: a range of services offering quality and affordability. The range of methods available for broadband distribution, include ADSL, satellite, cable, MDS, UHF or additional OFDM-derived channels on existing UHF transmitters; or most likely a combination of them all. However, there is no such thing as the perfect technology.

### Cable Head Operators

**A**P advocates the use of satellite feeds to MDS transmitter sites or local cable feeds, to provide the quickest, most cost-effective and operationally effective way to provide Pay TV to capital cities, regional cities and major country towns.

The basis of AAP's proposals has been to operate along the lines of the US Pay TV industry, which utilises "cable head operators" on a regionalised basis. These

operators gather programs from a range of national, international and local sources and then feed them into local cable systems (where available) or MDS transmitters with up to 31 channels to choose from, to cover their various service areas.

In the Australian context AAP would envisage 6 to 10 national channels being broadcast by satellite for direct reception in rural homes and into small rural communities (some of which could be cabled to share one dish).

Cablehead operators in major population centres would also receive selected programs from satellite and retransmit the signals on MDS, cable or even ADSL systems along with perhaps some directly received overseas content, plus local insertion of video tape of both English and foreign language films.

### UHF

**I** believe this scenario could well be applicable using UHF in country areas (as is done in New Zealand) at zero cost to subscribers. However our 23 UHF channels have been allocated as high power licences to existing broadcast TV operators and it is not practical to re-use frequencies due to probable interference in other cities. From a national cost point of view, I believe it would be cheaper to

compensate existing licensees to reduce power and re-use these frequencies, than have every subscriber pay to install cable, MDS or satellite receiving equipment.

The main advantages of regionalised systems are: the ability to separately franchise the marketing and operation of various regional areas; lower subscriber costs; speedy ramp up of subscriber numbers; and the ability to regionalise programming to cover local content and delay to cover time differences and to obtain regionalised advertising revenue.

This proposal does not damage Optus because it involves the utilisation of the same number of national distribution channels as a pure DBS system, but at less cost to the subscribers.

Each technology has its own characteristics and advantages; from satellite with immediate near-national coverage, to MDS and cable with the ability to add regional content.

### Cable

**C**able is the best long term solution and as an interim measure could be used to fill in small areas missed by MDS. As cable becomes available MDS transmitters can be moved and re-utilised to cover other areas of lower population density. However, rollout of cable to cover major areas is many years away.

Without pre-empting the Minister's proposed Expert Group, to simply put this task into perspective; to run cable past 80% (4½ million) of Australian residences, requires considerable effort. Leaving aside the proposed start up date of 1995, and assuming a year 2000 target with 20% of those houses taking feeds for Pay TV service, this would require street cable to be laid past 4,000 houses per working day (225 days per year) of 17,000 per week, and to further splice and terminate cable into 20% of those houses, i.e. 800 per day.

AAP's estimate for this work is about \$13 billion. It should be noted that telecommunications users will protest strongly if they believe they are cross-subsidising Pay TV.

Another factor that has emerged with cable is that it is very susceptible to the quality of joint splicing and termination errors by ongoing maintenance staff. Poor joints cause reflections that may be tolerable in any analogue system but cause errors in a digital system.

### ADSL

**T**he alternative of using existing copper wire and dialling up the Pay TV program required from a database at the nearest exchange may overcome the need for cable. However, video retrieval is not a universal

answer. The system is unlikely to operate in rural areas or with urban premises over four kilometres from the nearest exchange. Up to four kilometres has been quoted but obviously a gradual deterioration will occur over distance and the actual usable distance will be fairly subjective. Present quality looks reasonable for movies but does not look suitable for sports events. The recent announcement by Telecom that they may lose many exchanges would increase the average subscriber to exchange distance.

Obviously performance is dependent on the quality of the local lines - and we have all experienced less than optimum telephone lines. For instance it will not operate on loaded line pairs, which apparently still abound on interexchange links in many areas. We are also yet to be advised of the proposed cost of subscriber end equipment and the cost of 100 Megabit exchange switching equipment still remains a major barrier. And, of course, if several TV sets are required in one household for different programs, a second telephone line and total duplication of equipment is required.

### MDS

**C**urrent statistics indicate there are over 100 cities which are large enough to support MDS or UHF retransmit facilities: Assuming UHF remains unavailable, the networks required for MDS coverage can be broken up into capital city, major regional cities and smaller cities and towns.

To cover a major city requires a central transmitter from a high point plus a number of repeaters. For example, a difficult city such as Sydney could be covered with one high power transmitter and 6 repeaters to fill in the major blank areas to obtain around 80% coverage. However, similar coverage could be obtained in Perth with only one or two additional low power repeaters.

A major regional city of the size of Townsville or Darwin would support a franchise "cablehead" operator who could have large satellite receive systems, could provide a studio for locally inserted programs, and store and forward national programs to align them with local time zones.

Adjacent cities, such as Toowoomba/Warwick and Bathurst/Orange could be interconnected by point-to-point microwave to allow utilisation of a single studio/cablehead to drive two separate MDS systems.

For smaller cities and towns, a satellite earth station and a rack of six low power MDS transmitters could relay the national programs more cost-effectively than each dwelling having its own satellite equipment.

The disadvantage of MDS is that each area needs to be individually engineered to maximise the coverage of the MDS signal which requires "line of sight" to the transmitter antenna.

### Cost

**A**ssuming a reasonably large subscriber base, the cost of MDS is approximately one third the cost of direct satellite reception. Key to these calculations is the cost of direct reception by satellite. AAP's costs are based on the current cost of subscriber compression equipment of US\$700 which equates to over \$1,800 after exchange conversion, sales tax, freight and a 20% markup in the local operator, plus the dish and LNA.

A regionalised MDS system would allow a choice of satellite and MDS in both country areas and in city areas where line of sight for MDS reception was not possible. This would, of course, depend on the proposed availability of cost-effective subscriber and compression equipment to allow transmission of 6 channels on a satellite transponder.

The cost to cover each city needs to be examined on an individual basis along with the sales estimates for each city to ensure an adequate return on investment for the proposed number of subscribers. Otherwise direct satellite reception should be utilised.

Overall, it would appear that with a 20% Pay TV penetration some 200 cities could well be served by MDS or a hybrid DBS/MDS solution. Figures of above 3% to 5% penetration in capital cities, 10% to 15% in major regional cities and 10% in regional towns are likely to support MDS operations. *This is an edited version of a paper presented at the IIC Conference held at the SBS on 14 October 1993.*

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