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The visual artist in the global information economy

Peter Drahos examines some recent developments on the Australian and international level.

It seems that the artist's back is set to join the sheep's back in helping Australia to prosper. The *Creative Nation* statement signals an ever deepening policy interest by the Commonwealth Government in the arts. In part this is motivated by a recognition of the intrinsic importance of art and culture, but no one reading *Creative Nation* can fail to notice the way in which it weaves together art, technological innovation and economic opportunities. Australia's interactive multi-media exports, it is said, could be worth more than $20M by 1997-98.

There is, in *Creative Nation,* an implicit recognition of the fact that copyright based industries like the visual arts are making and will continue to make an increasing contribution to national economies as these economies struggle for a share of the global information market. Visual artists, provided they are willing to embrace digital forms of expression, are set for times of increased market opportunity.

specific steps and downsides

As part of its *Creative Nation* package , the Government has promised to "provide a legal framework which will protect the interests of Australian creators and artists in the new communications environment. *Creative Nation* takes some specific steps in this direction. It commits the Government to funding the establishment of a copyright collecting society for the visual arts (known as VI$COPY). It also states that the Government will accept the recommendations of the Copyright Convergence Group on the reform of the Copyright Act 1968. Amongst other things, this will mean that copyright owners will be given a broad-based right of transmission to the public. This will be an exclusive right which is not tied to a mode of delivery (eg broadcasting) but rather will be a general right of the owner to communicate information. More than likely if the Copyright Law Review Committee agrees, this right will be accompanied by a general right of distribution of copyright material.

Creative Nation seems to make good reading from the point of view of the visual arts community for it promises that the Government will reform copyright law to meet some of their needs and help them to participate in a brave new world of export opportunities in the global information and services market.

But brave new worlds have downsides. There are several reasons why visual artists should be cautious and critical readers of *Creative Nation,* rather than optimistic ones. It should be remembered that historically copyright law in the Anglo-American tradition began as a form of privilege that belonged to the Stationers' Company rather than to authors and artists. Within that tradition, it remains true even today that copyright statutes are primarily concerned with the protection of the interests of owners rather than the interests of creators. Creators may, of course, be owners but there is no necessary connection between the two since copyright is a piece of personal property the ownership of which may be assigned to others.

the international order

Perhaps the first and most important thing for the visual arts community to understand is that the extent to which the Australian Government can determine standards of copyright protection is itself limited by the emerging international regulatory order. Standards can be set locally, nationally or globally. More and more standards are set globally. A clear example of this trend is the Uruguay Round of the GATT (General Agreement on Tariffs and Trade), which saw the GATT becoming involved in the development of standards for things as diverse as food and intellectual property.

GATT, TRIPS, the WTO & GATS

The GATT contained a separate agreement called TRIPS (Trade-Related Aspects of Intellectual Property Rights). TRIPS sets standards for most areas of intellectual property including copyright. The TRIPS agreement imposes obligations on member states to have proper enforcement procedures, and the dispute resolution procedures within the

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GATT will mean that intellectual property conventions will be tied to a workable enforcement mechanism. This benefits all copyright owners, including visual artists.

But there are ways in which TRIPS fails to help visual artists. For instance, Article 9(1) of TRIPS does not require members of the GATT to comply with Article 6 *bis* of the Berne Convention for the Protection of Literary and Artistic Works, the Article dealing with moral rights (the right of attribution and the right of integrity). As it happens, Australia will introduce some form of moral rights legislation in order to comply with its obligations under the Berne Convention, but the absence of these rights from the GATT signals the fact that the principal players at the GATT (the QUAD countries - the US, Europe, Japan and Canada) do not see them as a priority issue.

It should also be remembered that the drafting of the TRIPS agreement was heavily influenced by the private sector, with large US companies playing a leading role. Neither the US or its corporate intellectual property community are likely to pursue the interests of visual artists with even mild enthusiasm. One only needs to look at the US *Visual Artists Rights Act 1990* to see the very modest gains which visual artists have made in that country.

Visual artists will have to start thinking about ways in which to gain a voice in the GATT's successor organization, the World Trade Organization ("WTO"). The danger is that WTO will in the long run be responsible for globally implementing a weak scheme of moral rights protection, and perhaps even excluding it from certain new digital mediums that artists choose to use.

Visual artists also have to appreciate that the GATT agreement will have the effect of opening up the Australian market for the export of culture and art from other countries. The GATT agreement contains a General Agreement on Trade in Services (GATS) which establishes a multilateral framework for the progressive expansion of world trade in services. This may seem remote from the needs of the visual artist but it is not. Under GATS countries will come under pressure to remove barriers to trade in the audio-visual sector, a sector of importance to the visual artist.

In the dying stages of the last GATT round, Europe and the US disagreed on this sector, the US objecting to the use by European countries of film subsidies and television quotas. The US, the world's greatest exporter of audio-visual material argued, in essence, that art and culture ought to be able flow freely throughout the world. The Europeans proposed that

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various articles like Article XIV on General Exceptions of the GATS should be modified to recognize the cultural specificity of the audiovisual sector. The US probably in time will see its vision of trade in culture come to pass. Its National Information Infrastructure initiative (released by the Clinton Administration 15 September 1993) is being imitated by other countries.

The presence of a global information infrastructure will facilitate trade in culture and in any case the WTO can be expected to pursue the matter. A global trade in culture raises many issues, but if the theory of comparative advantage is right, then one can expect some countries to dominate this trade with the result that there will be a progressive homogenization of national cultures. Australian visual artists along with creators of all kinds may find themselves awash in a king tide of cultural and artistic imports.

property in expression and a US experience

The strong copyright protection which TRIPS implements and which *Creative Nation* promises to build on may have some unexpected effects on artists. To begin with, as copyright protection increases the cost of creativity also rises. Artists, like all creators, play a dual role in the creative process. They are both users and producers of material. In all areas of artistic life there are traditions, genres, ways of doing things that constitute the artist's raw materials. The greater the copyright protection of these raw materials, the greater the cost of expression and therefore, somewhat, paradoxically the less incentive to produce new works.

Artists will have to think long and hard about the degree of protection they want for images in the emerging global economy. Property in expression, it should be remembered, sets limits on the freedom of expression. The US case of *Rogers v Koon* illustrates the kind of problem that artists will have to confront. A photographer who had taken a photo of a husband and wife holding a litter of puppies brought a copyright action against an artist who had used the photo to create a wooden life-sized sculpture called "String of Puppies". The argument was that the sculpture was an unauthorized copy of the photograph and this succeeded.

Koons, the artist, never denied that he had used the photograph to create the sculpture, but argued that he had a defence under the fair use doctrine. One of Koons' central arguments was that he belonged to a tradition of postmodern art, a tradition which deliberately took popular broadly circulating images and relocated them in an artistic context. This method of work has as its goal the parody and criticism of a society that is thought by its artist critics to be full of banal, mass produced images that reinforce a shallow production line culture. Andy Warhol is one famous exemplar of this artistic method.

No First Amendment ("Congress shall make no law ... abridging the freedom of speech...") issue was raised in the case, showing the almost automatic priority that property principles have over free speech principles. (However, there are a number of copyright cases in which the First Amendment argument has been raised. See, for example, *Harper & Row Publishers v. Nation Enterprise; Sid & Marty Krofft Television Productions v McDonald's Corp; Triangle Publications v Knight-Ridder Newspapers; Pacific & Southern Co. v. Duncan).*

The property economic perspective totally dominated the court's analysis. Essentially they saw Koons as an individual "sailing under ... the flag of piracy", rather than the representative of a distinctive kind of artistic tradition that was seeking to communicate a critical and unsettling message. The fact that Koons stood to make a considerable profit from the sculpture counted heavily against his claim of fair use.

free speech and protection

The free speech issue is not so remote in this case. If we accept that art is a form of speech, then the restrictions that intellectual property places on that speech at least require that the free speech issue be faced. Had the issue been raised in a First Amendment context, the outcome in the case would almost certainly have not been different, for the court would probably have found that Koons was not prohibited from using some similar image or the idea behind the photograph. In a balancing exercise, free speech interests would not have won here.

As visual artists enter a global economy which has a global information infrastructure, they will have to think creatively about their place in it. Amongst other things they will have to ensure that they receive meaningful moral rights protection rather than just symbolic protection, and they will have to reflect on how the balance of copyright protection is to be struck to accommodate their different interests.

Peter Drahos, Senior Lecturer in Law, Faculty of Law, Australian National University.

Insults on the Internet

Recent UK defamation cases may change the nature of Internet discourse permanently - a report from Denton Hall, Solicitors

The Internet, which has rapidly become an anarchist's playground, may soon be reverting to its original purpose: exchange of information between academics. The reason is that in both the US and the UK some users are abandoning the traditional Internet method of responding to defamatory comments - posting a reply on Internet - and are instead issuing proceedings for libel. Observers put this down to the increased numbers of users who are not versed in Internet protocol.

Either way it seems that the effect of the recent batch of libel cases will be to change the nature of Internet discourse permanently. Users in future may need to exercise more caution when sending criticisms and opinions.

how does Internet work?

Internet is, broadly, the result of interconnected regional computer networks. It does not exist as an independent body and has no central governing board or constitution.

Internet can be accessed via access providers such as CompuServe or Demon. A user may interconnect to Internet via an access provider's network and the access provider may also give access to online databases. When an E-mail message is sent, it passes from the sender's terminal to his/her access provider on to a destination access provider and finally to the destination E-mail address. A message can also be sent to bulletin boards (either open to all Internet users or just to subscribers of a particular access provider). These bulletin boards operate like a conventional notice board so

that any user who has access to it can read all the messages on the board. Bulletin boards have been described as "the lowest entry-barrier mass-media system in history".

who is liable?

It is clear that the author of a libellous Internet message is potentially liable to the victim. However, the author might be unidentifiable, untraceable, outside the jurisdiction of the victim's courts or, if traceable, have insufficient funds to meet a claim. The victim may therefore look for somebody else to sue.

In the UK everyone who has taken part in the publication of a libel is theoretically liable, subject to certain defences which are discussed later. In the case of a newspaper this includes the author, editor, printer, publisher and vendor. It is not clear, however, against whom, apart from the author, a person libelled in an Internet notice is entitled to bring proceedings.

Since the Internet itself is not an independent entity but merely a series of interconnected networks, there is no one to sue apart from the author of the libel and the access provider.

Applying the laws of defamation to Internet's access providers (and this could include the sender's access service provider or the destination access provider) presents clear difficulties. The access providers will argue that they operate a "telematic" service, i.e.: a communications system for the exchange of information, equivalent to a telephone company or the Post Office, but simply using a different medium. On this basis, access providers should no more be liable for delivering a libellous message than the Post Office is for delivering a libellous letter or British Telecom for defamatory comments made over the phone or sent by fax. For E-mail, since it is a form of person-to-person communication, the analogy seems valid.

Sending a message to a bulletin board is more akin to print publishing in that the message is disclosed to a section of the public, but the analogy ends here since the access providers merely set up the system and do not take an active part in the placing of a message on a bulletin board.

From a practical perspective, it would be impossible for an access provider to vet the vast number of messages appearing daily on these bulletin boards and, even if the access provider did check the bulletin boards, how could it know or find out (as a print publisher usually has to do) whether or not a message is defamatory? Any decisions of the access providers' liability could have implications for British Telecom and other telecommunications access providers.

In the US, where different libel laws apply, the US access service provider CompuServe was held not to be liable for defamatory statements made by its network users. This was on the basis that CompuServe had exercised no additional editorial control and had neither knowledge nor reason to know of the comments or their defamatory nature.

defences

The access providers' liability will depend on where they fit into the traditional categories of publisher, printer, distributor or vendor. If the Courts decide that the access providers should be treated as publishers then they will only have the same defences as the author - which relate to the truth of the message or fair comment. It seems that the access provider's role corresponds best to a distributor since it does not arrange or edit the text.

However, there is a further defence for a person who has only taken a "subordinate part in disseminating" the item. In newspaper and book publishing this has been held to apply to distributors and sellers but not to printers. What is more, this defence can only apply to a distributor or seller if they can show that:

- they did not know that the book/paper contained the libel complained of;
- they did not know that the book or paper was of a character likely to contain a libel; and
- this lack of knowledge was not due to any negligence on their part.

The access providers have a strong argument that this defence should be extended to them. If access providers are held to fit into this category then can they argue that they did not know that the message was of a character likely to contain a libel? The access providers undoubtedly do know that there are likely to be libels on the Internet, but they could argue that they did not know that a particular message contained a libel. If this argument succeeds then how do they show that they were not negligent? How can an access provider possibly check all messages and avoid negligence?

Unlike other forms of publication, the Internet system allows the aggrieved party a very simple immediate right of reply and access providers could argue that this should be taken into account when considering the damage done by a libel published in this way.

conclusions

While it seems unfair to hold the access providers liable for messages which they cannot possibly vet, it is likewise wrong that an individual should have no effective remedy for libellous allegations made against him/her which could have a profound effect on his/her reputation.

There are wider problems: even if it is decided that Internet should be regulated, how could this be done, given its non-centralised international nature? If access providers are expected to control their users' comments, this will also create problems in relation to censorship and breach of privacy, but that is another story....

This article is reproduced from "The Interface" (January 1995, pp4-5), a newsletter from Denton Hall, Solicitors, London.

APPLICATIONS for EDITOR

After this edition (Vol.14 No.3), Anthony Mrsnik will retire from the editorship of the Communications Law Bulletin. CAMLA is therefore calling for applications for a new editor.

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Cross-border television broadcasts

Ian McGill and Ian Carroll discuss issues relating to the regulation of satellite broadcasts.

This is an edited extract of a chapter on the negotiation of television broadcasting rights from "Legal and Commercial Aspects of Sport". Even though it deals more particularly with broadcasting of sporting events, the problems identified apply equally to other forms of television programming.

Asia Pacific Satellite Systems

The growth in the number of delivery options for television has made national borders increasingly irrelevant to the sale of television rights in Europe.

In the Asia Pacific region there has been substantial growth in the capacity to deliver a television signal by satellite direct to the home. There are a total of 38 communications satellites in orbital slots over the Asia Pacific, the majority of which carry television broadcasting signals. The most powerful with the largest footprints are listed in the Table (see page 7). The demand for capacity to deliver television signals by satellite has been the stimulus for development of the satellite market.

Australia's geographic location has successfully but artificially isolated it from these developments. However, the Table demonstrates there will soon be a dramatic increase in the number of satellite transponders whose footprint covers at least some part of Australia. This capacity will be in addition to the Optus B series satellites which are capable of covering both Australia and New Zealand. Their combined transponder capacity is 32.

For example, the Asiasat 2 system will be able to carry the Star Television network to most of the populated areas of Australia. It could be received in Sydney with a 1.1m dish. The beam of the PAS-2 satellite "hotspots" Australia. It can carry traffic direct from the USA to Australia. The footprint of Apstar 2 is also planned to reach Australia. However, a recent launch mishap means this is unlikely to occur this year.

Direct broadcast by satellite *("DBS")* has the capacity to sidestep regulation by the government of the state receiving the broadcast. A viewer need only install a parabolic antenna or satellite dish to receive the signal. Regulation has traditionally controlled the scope and content of broadcasting from a foreign satellite by imposing conditions on the earth stations retransmitting the signal which are usually located within the domestic jurisdiction.

Satellites capable of *DBS* are by their nature very powerful. They create large footprints which may, deliberately or unintentionally, create transnational overspill. In either case, a nation state within the footprint may object to the overspill but may be powerless to control it.

International Regulation

Attempts on an international level to control DBS into foreign countries have seen a number of international organisations consider the issue, including the Commission of European Communities and the General Agreement on Tariffs and Trade.

The Radio Regulations under the International Telecommunications Convention provide only the most limited form of protection for states unwillingly receiving direct broadcasts. Regulation 2674 provides:

In devising the characteristics of a space station in the broadcasting-satellite service, all technical means available shall be used to reduce, to the maximum extent practicable, the radiation over the territory of other countries unless an agreement has been previously reached with such countries.

Different interpretations have been placed on this Regulation. Nations such as the United States argue it is subject to such a large number of technical constraints that it should realistically be viewed as only a planning goal. The opposing view argues the Regulation requires the state responsible for the broadcast to obtain the prior consent of the state receiving the broadcast.

These opposite views have been debated at length in the United Nations. In December 1982 the General Assembly adopted the controversial Resolution 37/92. Paragraph 13 of the Resolution reads *"a state which intends to establish or authorise the establishment of an international direct television broadcasting satellite service shall without delay notify the proposed receiving state or states of such intention and shall promptly enter into consultation with any of those states which so requests"*. Paragraph 14 provides that an international direct television broadcasting satellite service shall only be established in accordance with Paragraph 13 and in conformity with the relevant instruments of the International Telecommunication Union.

The United States, Great Britain, Belgium, Italy, Japan and the Federal Republic of Germany have consistently argued that the principle of prior consent is unacceptable, and were strongly opposed to Resolution 37/92, even though it did not clearly articulate a prior consent requirement. They argue that the principle of free-flow of information, which applies to radio broadcasting in general, also applies to direct satellite broadcasting.

However the opposing view is that direct broadcasting, at least in instances such as TV Marti where it is deliberate, constitutes an infringement of state sovereignty.

Australian Regulation of Foreign Satellites - Broadcasting Services Act

It may be (as argued by Armstrong at the Australia and New Zealand Sport Law Association, 3rd Annual Conference, 1993) that a *DBS* service not originating in Australia can be delivered to Australia without the need for an Australian licence. This depends on whether the Federal Government has power to control what is broadcast to Australia by intentional satellite and the non-existence of any laws against selling satellite decoders or dishes in Australia.

Some commentators argue that it would be difficult for Australia to object to satellite television signals originating from South-East Asia given that ATI, the ABC's satellite service, is broadcast to nations in the South-East Asian region via Indonesia's Palapa satellite but without the permission of the government(s) involved.

The current Australian regime for broadcasting services under the *Broadcasting Services Act 1992 (Cth.) ("the BSA")* is largely technology neutral. In order to determine whether a particular service is regulated, an analysis of the content of that service rather than the means of its delivery is required.

A "broadcasting service" is defined as one that delivers television programs or radio programs to persons having equipment appropriate for receiving that service *(s.6(1)BSA)*. The means of delivery of that service is irrelevant.

There is potential for some broadcasting services as defined in the *BSA* to fall outside its regulation. The *BSA* appears to assume the "round peg" of broadcasting services will fit neatly into the various "round holes" of the six categories prescribed by the Act.

A commercial broadcasting service and a subscription broadcasting service require a specific licence allocated by the Australian Broadcasting Authority *(ss14 and 16 BSA, respectively)*. The provision of one of these services without a licence is an offence *(ss131 and 132 BSA)* carrying a stiff penalty (see below).

types of service

As a consequence of the way each of the "round holes" above is drafted, if the peg does not fit then the service is unregulated even if it would otherwise constitute a "broadcasting service". Therefore, it may be possible to attempt to structure the particular service in a manner that places it outside the categories identified above. Alternatively, the service may be established so it fits into the less regulated narrowcasting categories.

A **"commercial broadcasting service"** is a broadcasting service which:

(i) provides programs intended to appeal to the general public;
(ii) provides programs that are freely available to the general public to be received by commonly available equipment;
(iii) is generally funded by advertising revenue;
(iv) operates as part of a profit making enterprise; and
(v) complies with any additional determinations or clarifications made by the Australian Broadcasting Authority.

This definition provides scope for a foreign operator to provide services to Australia by *DBS* without a licence to operate a commercial broadcasting service. For example, the service may be structured so the transmitting enterprise does not make a profit in Australia. This may be done by sourcing any profits from advertising revenue through a program packager. Of course, in order to receive a *DBS* transmission, the viewer needs to purchase the necessary equipment. However, the equipment supplier in Australia would not be operating a commercial broadcasting service. Rather, it would merely supply equipment capable of receiving programs supplied by another person. Alternatively, if the service is encrypted (i.e. scrambled) and special decoders are required it may not be "fully available to the general public to be received by commonly available equipment".

A **"subscription broadcasting service"** is one that:

(i) provides programs having wide appeal;
(ii) is made available to the general public but only on payment of a subscription fee; and
(iii) complies with any additional determinations or clarifications published by the Australian Broadcasting Authority.

A licence for a subscription broadcasting service using a satellite (other than an Optus satellite) may not be allocated by the Australian Broadcasting Authority until 1 July 1997 *(s96(3) BSA. The three licenses for subscription broadcasting services using an Optus satellite have already been issued. Licence C has been issued to a subsidiary of the ABC. Licences A and B have been issued to new entrants to the television industry)*. This provision is designed to ensure that, prior to the sunset date, the only licensed subscription broadcasting services in Australia will be transmitted via the Optus satellite system.

As with commercial broadcasting services, there may be scope for a subscription broadcasting service to be provided by a foreign person without the need for an Australian licence. This would depend on an ability to allow subscription fees to be paid in a country other than Australia. Credit cards may well be used for this purpose. However, an Australian entity assisting in the payment of subscription fees due to an overseas entity may be guilty of aiding and abetting a breach of the *BSA*. This is an offence under the *Commonwealth Crimes Act (s5(1))*.

A similar problem has arisen in Canada where DirecTV (a US satellite service) provides a *DBS* service into that country. The Canadian Radio-TV Telecommunications Commission has told the operator it must carry a Canadian version of its service on a Canadian satellite in order to offer a legal service in that country. However, DirecTV could still broadcast into Canada without meeting this requirement. Canadian subscribers may find it relatively easy to avoid Canadian regulation by crossing the border and buying the necessary hardware from a US dealer using a falsified US address to subscribe.

There may be some scope for a service to be provided as a "subscription narrowcasting service", avoiding the need for a specific licence. A subscription narrowcasting service is one which is available on payment of a subscription fee and whose reception is limited by being targeted to special interest groups, limited locations, limited periods or programs of limited appeal. Such a service is authorised by a class licence. Therefore if the service falls within the definition, it may be provided without the need for a specific licence under the *BSA*. The question is, of course, whether the service is sufficiently limited so as to be "targeted".

The fine for providing a commercial broadcasting service or a subscription broadcasting service without a licence where one is required is $2million. This is a continuing offence carrying an additional maximum penalty of 10% of the fine for each day the offence continues.

Australian Regulation of Foreign Satellites - Telecommunications Act

In addition to possible lack of coverage in the broadcasting regime, there may be scope to deliver a *DBS* service to Australia without offending the laws regulating telecommunications.

Under the *Telecommunications Act*, the Government has declared the general carriers (i.e. Telecom and Optus) as the primary providers of Australia's public telecommunications infrastructure and networks. Together they have the exclusive right to be the primary suppliers of selling satellite services between distinct places in Australia and a place in Australia and a place outside Australia (s.91). However, a person may supply an international satellite service by use of a satellite based facility if the service is supplied to the holder of a prescribed earth station licence and is supplied by means of that earth station (s.103). An "earth station" could simply be a dish in a backyard or on a rooftop (Reg. 3, *Radiocommunications Regulations 199)*. Provided the service does not then fall within the definition of a broadcasting service (see above), it may be provided without infringing the broadcasting and telecommunications regime.

However, the *Telecommunications Act* states that the provision of a telecommunications service supplied by the use of a satellite between a place within Australia and a place outside Australia is an international service (s.5). The international service providers class licence permits the supply of an eligible international service subject to compliance with the class licence conditions. Those licence conditions require a service that connects to a public switched telephone network (e.g. a cable service) to enrol with Austel and be subject to Austel control of tariffs etc. Such a service would also have greater difficulty avoiding classification as a commercial or subscription broadcasting service subject to regulation by the *BSA*.

Practical Implications

Although there appears to be a wide scope for a foreign operator to deliver a direct broadcast satellite service to Australia without a licence, the exercise is not without some risk. The fines that may be imposed are

substantial. At the date of publication, no organisation has begun to provide such a service. In the end, whether unlicensed direct broadcast satellite transmissions are made from another country to Australia will depend on the ability of the foreign operator to structure the service (and collect any necessary revenues) without having a presence in Australia that exposes it (or those assisting it) to the possibility of being in breach of the *BSA* or the *Crimes Act*.

For the organiser of a sporting event, cross border broadcasts can denigrate from the value of exclusive television rights granted in a territory. On the other hand, given the plethora of proposed and existing satellite transponders with Australian coverage, there may be scope to market an event to foreign satellite operations for delivery to an Australian audience.

Ian G McGill is a partner of and Ian Carroll is a solicitor with Allen Allen & Hemsley. This is an edited extract of their chapter called "The Negotiation and Sale of Television and Other Rights Associated with a Sporting Event" from "Legal and Commercial Aspects of Sport", Law Book Company, 1995.

TABLE
South-East Asian Satellites

Satellite	Owner	Launch Date	Transponder Capacity	Footprint
PAS-2	Pan-AmSat	July 1994	32	Asia-Pacific from Thailand to the US West Coast and North East and South-East Asia, Russia, China, Australia and New Zealand
PAS-4	Pan-AmSat	Early 1995	32	Primarily serving the Indian Ocean region but including Japan, the republics of the old USSR, South East Asia, China and Australia
Asiasat 1	Asian Satellite Telecommunications Company (Cable and Wireless, CITIC and Hutchison Whampoa)	April 1990	24	Asia and the Middle East
Asiasat 2	As for Asiasat 1	April 1995	33	China, Japan, Indonesia, India, the Middle east, the republics of the old USSR, Hong Kong, Taiwan, Korea and Australia
Apstar 1	APT Satellite Company (shareholders include China Telecommunicaitons and Broadcast Satellite Corp and Hong Kong Chia Tai International Telecommunications Ltd)	September 1994	24	Mainland China, Hong Kong, Indonesia, Japan, Singapore, Vietnam
Apstar 2	As for Apstar 1	Unkonwn	32	As above and extending into Europe, Russia and India and Australia
Palapa B2P	Indonesia state-owned telecommunications company PT Telecommunikasi	March 1987	24	Indonesia, The Philippines, Papua New Guinea, Thailand, Malaysia and Singapore, Cambodia, Vientam
Palapa C	PT Satelindo	June 1995	34	As above and Taiwan, Hong Kong, New Zealand, Eastern Australia, Bangladesh, India, Korea, Japan, Eastern China, Macao
Total number transponders			235	

In addition to the satellites listed in this Table, communications satellites are planned by companies such as Rimsat and Unicom which will have a total capacity of 74 transponders. Other smaller companies such as Columbia and Pacificom have satellites in operation and planned.

Thaicom's two satellites covering South East Asia will have a total of 24 transponders.

Not included in the Table is information on the footprints for the Intelsat satellites over the Asia Pacific (Intelsat V series to Intelsat VII), which also carry television broadcasting signals. These broadcasts make up a small but significant part of their payloads. These satellites are often described as the "workhorses" of the industry due to the variety of transponder configurations available.

Information compiled by *Australian Pay TV News*, Level 20, 133 Castlereagh Street, Sydney and reprinted with permission.

FEATURE

David Williams outlines amendments to the Corporations Law in relation to prescribed interest schemes and prospectuses and how they'll affect, amongst other things, Division 10BA qualifying films.

Financial reporting obligations and prescribed interest schemes

The September 1994 changes to financial reporting obligations in relation to prescribed interest schemes.

The *Corporate Law Reform Act 1994 ("Act")* has made significant changes to the Corporations Law particularly relating to continuous disclosure, including financial reporting. These provisions commenced on 5 September 1994. In addition, the *Corporations Regulations Amendment 1994* implement certain aspects of the continuous disclosure regime.

This article looks at the changes in the financial reporting requirements in relation to unlisted prescribed interests, such as investments in Division 10BA qualifying films, unit trusts and agricultural investments such as fruit production and marketing schemes.

financial reporting requirements

New financial reporting requirements will apply to prescribed interest schemes which are Disclosing Entities under the new Division 11 of Part 3.6 of the Corporations Law.

The new requirements include half-yearly accounts, provision for a limited audit each half year, compliance with accounting standards, a report by the trustee or representative (together referred to as the "trustee") and lodgement of accounts with the ASC.

accounts to be prepared

Under the new provisions, accounts are required to be prepared each "accounting period", which basically means each half-year and each financial year. The requirement for half-year accounts is new.

Each "accounting period", the trustee of a disclosing entity must prepare, or cause to be prepared:

- a profit and loss account; and
- a balance-sheet,

in accordance with applicable accounting standards.

Trustee's report

In addition to the trustee's responsibilities to prepare, or cause to be prepared, the accounts described above for each accounting period, the trustee must also prepare, or cause to be prepared, a report by the trustee.

The trustee's report is required to:

- review the operations of the prescribed interest scheme during the accounting period;
- review the results of those operations; and
- give particulars of any significant change in the state of affairs of the scheme during the accounting period.

limited audit

The half yearly accounts must either be audited or subject to a limited scope review by the auditor. If the latter course is chosen, the auditor must report, after reviewing the accounts:

- whether any matter has come to the auditor's attention which causes the auditor to believe that they are not drawn up so as to give a true and fair view of the profit or loss and state of affairs of the scheme, or in accordance with the Corporations Law and applicable accounting standards; and
- if such a matter has come to the auditor's attention, a description of the matter and a statement of the auditor's reasons for that belief.

lodgement of accounts

The accounts, trustee's report and auditor's report must be prepared and lodged with the ASC before the end of:

- 90 days after the end of each financial year; and
- 75 days after the end of each half year.

The manager is responsible for lodgement of the accounts, trustee's report and auditor's report.

The Regulations also provide that the manager's annual return under section 1071 will be required to be lodged within 90 days, which is the same period as is required for lodgement of the accounts and trustee's report and auditor's report.

Consequential amendments have been made to the covenant binding the trustee in section 1069(1)(f) requiring accounts to be sent to prescribed interest holders.

The previous period of 2 months is now 90 days.

A further covenant in inserted in section 1069(1)(ea) requiring the trustee and manager to comply with the provisions described above governing accounts of Disclosing Entities in the new Division 11 of Part 3.6 of the Corporations Law.

exemptions and modifications

The ASC has the power to exempt specified persons from all or specified disclosing entity provisions.

In addition, regulations may be made to exempt specified persons from all or specified disclosing entity provisions, to modify all or specified disclosing entity provisions or to declare specified securities of bodies not to be Enhanced Disclosure ("ED") Securities.

It is not clear in what circumstances exemptions or modifications will be made.

David Williams, Partner, Mallesons Stephen Jaques

The life and times of a prospectus

The September 1994 changes relating to prospectuses - life, content and method of correction.

The *Corporate Law Reform Act 1994 ("the Act")* provides for a number of changes to the provisions of the Corporations Law regulating the life, content and method of correction of prospectuses.

These changes apply with effect from 5 September 1994 (the dated of commencement of *the Act*) to all prospectuses issued from that date.

extended life of prospectuses

The Act permits the life of a prospectus to be extended from 6 months to 12 months after the date of issue of the prospectus.

In light of the obligations of prospectus issuers to disclose any price sensitive information under the new continuous disclosure provisions, the restriction of the life of a prospectus to 6 months was seen as an unnecessary and costly restriction for continuous issuers.

Therefore section 1040(1) of the *Corporations Law* now prohibits the issue or allotment of securities after the end of 12 months from the date of issue of the prospectus.

Consequential amendments have been made to the provisions concerning the validity of allotments or issues and the statement required to be included in prospectuses concerning the life of the prospectus.

The ASC has indicated that it is considering granting relief to allow some prospectuses to have a life of 13 months. This would be to accommodate difficulties in including the most recent accounts in the prospectus.

existing prospectuses?

The transitional provisions of *the Act* provide that where a prospectus has been issued prior to the commencement of *the Act* (i.e. before 5 September 1994), the amended prospectus provisions do not apply.

Fund managers will not be able to extend the life of a prospectus currently in use to 12 months or take advantage of the new mechanisms for correction of prospectuses.

incorporation by reference

The ASC's policy of allowing prospectuses to incorporate certain technical or financial information into the prospectus by referring to that information in the prospectus and providing the information separately to investors has been expanded.

Provided that the document to be incorporated:

- is a document lodged with the ASC under a provision of the *Corporations Law* at any time prior to lodgment of the prospectus (or a supplementary or replacement prospectus); and
- is summarised in the prospectus; and
- will be provided free of charge to investors, and the prospectus states that a copy of the document is available free of charge during the life of the prospectus,

then the document and the information contained in it is taken to be part of the prospectus under the provisions of the *Corporations Law.*

These provisions will be useful in enabling the simplification of some prospectuses by allowing material such as statutory accounts, the constituent documents of prescribed interest schemes and documents lodged under the enhanced disclosure rules to be incorporated in a prospectus by reference. However, issuers should also be aware that full prospectus liability will apply to the material incorporated by reference.

Importantly, an issuer of the prospectus may rely on the incorporated information for the purposes of satisfying its obligations to provide information to investors. However, care needs to be exercised to ensure that significant information is given adequate emphasis in the prospectus as a whole to ensure that the prospectus in not misleading.

correction of prospectuses - new methods

The circumstances in which a supplementary prospectus must be issued and the information which must be included by a supplementary prospectus have been revised by *the Act.*

These changes are very important for prospectus issuers. The procedures adopted by fund managers for identifying when a supplementary prospectus must be issued need to be assessed in the light of *the Act. The Act* also provides for two different options to be followed in processing applications received after a supplementary prospectus has been issued.

matters requiring a supplementary prospectus to be issued

The existing requirement remains that a supplementary prospectus must be issued where any significant changes affect matters set out in a prospectus or significant new matters arise after the issue of the prospectus.

The Act now also provides that if a mistake or omission concerning information in the prospectus which was based on a state of affairs existing at the time of issue of the principal prospectus is subsequently discovered during the life of the prospectus, the prospectus must be corrected.

A prospectus must also be corrected under the new provisions whenever the issuer becomes aware during the life of the prospectus that the prospectus is deficient.

The definition of a "deficiency" in relation to a prospectus, includes, but is not limited to:

- a material statement that is false or misleading; or
- a material omission from the prospectus.

This new inclusive definition of a "deficiency" means that any information that comes to light during the application period for securities under a prospectus that would have had to be included in the prospectus to ensure that the prospectus was not false or misleading (and therefore to avoid liability under section 996 of the *Law*) but was not required by the specific requirements in section 1021 or 1022, must be included in a supplementary prospectus. Immaterial omissions may also be rectified.

When considering whether a prospectus in deficient, regard must also be had to any changes to or omissions from any information incorporated by reference into the prospectus (see above).

supplementary versus replacement prospectus

The Act provides two alternative means to correct a deficient prospectus or insert further information:

- by issuing a supplementary prospectus; or
- by issuing a replacement prospectus.

The concept of a supplementary prospectus being an additional insert into the principal prospectus in not new. Each page of the supplementary prospectus is now required to state that the document is to be read in conjunction with the principal prospectus and identify the principal prospectus and any other supplementary prospectuses.

A replacement prospectus allows the issuer of a prospectus to circulate one document and not two. This has obvious marketing, as well as administrative, advantage.

A replacement prospectus has the same purpose as a supplementary prospectus and each page of the replacement prospectus must contain a bold statement that the document is a replacement of the principal prospectus and identify the principal prospectus.

A replacement prospectus may not, however, be used to substantially restyle or reword the original prospectus. *The Act* requires a replacement prospectus to have the same wording as the original prospectus except to the extent that it corrects a deficiency or provides particulars of a new occurrence.

It is interesting to note that "deficiencies" in a prospectus justifying the issue of a supplementary or replacement prospectus are no longer confined to material deficiencies. Thus, the including of particulars of a new occurrence may allow scope for some flexibility in revising an original prospectus.

consequences of correcting a prospectus

Under the new provisions, once a deficiency or mistake in a prospectus has been discovered, or where any other information (which may be immaterial but relevant) is to be included, and either a replacement or supplementary prospectus has been issued (not just lodged), the original application form ceases to be "current". An application form may also no longer be current if a new application form is lodged with the ASC. This may occur for example where information to be incorporated by reference is set out in the application form.

If a prospectus issuer receives an application form that is not current when the issuer receives the application, then the issuer must give a written notice to the applicant:

- informing then that the application form received is not current;
- telling them how the issuer intends to deal with the application (there are two options discussed below); and
- attaching a copy of each supplementary prospectus or replacement prospectus issued after the prospectus to which the application form was attached and a current application form.

There are two options where a non-current application form is received:

(1) treat the applications as withdrawn and refund the application money (with interest); or

(2) at the same time as notifying the applicant that their application form was not current, issue the securities to the person. If a "material adverse change" has occurred in relation to the securities since the application form used was issued, the issuer must give the applicant a reasonable opportunity to return the securities and receive a refund of their application money (with interest).

For the purposes of option (2) above, a material adverse change will occur if a change occurs or new matter arises that is likely to have a material adverse effect on the value of the securities.

There are some technical problems in the way in which these new provisions are worded, particularly in relation to the distribution of new application forms after earlier application forms have ceased to be current. These problems have been drawn to the attention of the ASC and it is likely that class orders will be made to clarify these matters.

David Williams, Partner, Mallesons Stephen Jaques.

Editor's note

Reference should also be made to the following articles by David Williams:

- *"Fund raising for films - does 'Lightning Jack' represent a one off or a way forward into the future?"* (CLB Vol 13 No 4, pp 1-2); and
- *"Continuous Disclosure - an additional legal obligation"* (CLB Vol 14 No 2, pp 19-20).

COMMUNICATIONS AND MEDIA LAW ASSOCIATION (CAMLA)

ESSAY PRIZE

The Communications and Media Law Association is holding an essay competition in 1995.

The purpose of the competition is -

- to encourage high quality work in undergraduate communications and media law courses; and
- to improve links between those studying and practising in the area.

The prize will be given for -

- a previously unpublished essay which is the original work of the author
- completed by a student enrolled in an undergraduate or postgraduate course, possibly as part of that course
- on a subject relating to communications or media law
- of 1000-3000 words.

A prize of $1000 and a one year membership of CAMLA will be awarded to the winner. The winning essay will be published in the Communications Law Bulletin.

The winning entry, to be selected by a panel of experienced communications and media law practitioners, is likely to demonstrate original research, analysis or ideas. The panel will not necessarily be seeking detailed works of scholarship.

The award will be made at the annual CAMLA Dinner or Christmas Function.

Please send three copies of each entry typed well-spaced on A4 paper. The name, address and telephone/fax contacts for the author should be included on a separate, detachable sheet. The author's name should not appear on the pages of the essay.

Entries should be submitted to:

The Administrative Secretary
Communications and
Media Law Association
PO Box 545
GLEBE NSW 2037

by 30 September 1995

Transparency, prescience and speed - broadcasting in the new South Africa

Victoria Rubensohn reports on the challenge of broadcasting regulation in South Africa.

Writing this in the midst of the Packer/Fairfax frenzy, the ABA environment looks a little more exciting than usual. However, viewed from the other side of the Indian Ocean, in South Africa, the role of our broadcasting regulator looks comfortingly tranquil.

South Africa established its Independent Broadcasting Authority (IBA) early in 1994, and by November, when it began conducting hearings for its daunting "Triple Inquiry", it had acquired seven Councillors and approximately 45 staff, none of whom, with the exception of one Councillor, had any previous experience of independent regulatory activity.

Transparency is, naturally enough, a paramount virtue in the "New" South Africa. In pursuit of this ideal, the IBA Councillors were appointed by the outgoing De Klerk government in March 1994, after a strenuous round of public hearings (or more appropriately, public grillings) by a selection panel appointed by the Transitional Executive Council - a process so public and transparent that the very concept would be likely to strike fear into the heart of Australian regulators!

the Triple Inquiry

Establishing themselves with a skeleton staff, the IBA was immediately launched into an enormously taking "Triple Inquiry", into the protection and viability of public broadcasting services, Cross media regulation of private (commercial) broadcasting licences and local content regulations for television and radio. On the former subject, the IBA will make recommendations to the Minister; on the latter two, it will make the regulations itself.

The Triple Inquiry hearings are scheduled to end in late April 1995, and as the IBA is the first independent authority of its kind set up in the new South Africa, those hearings have represented a pioneering experiment in public process, and as such, have been carefully scrutinised by the press and interested parties. For the first time all interested South Africans have had an opportunity to have their voices heard, both through submissions and the less conventional method of written questions from the public gallery at the hearings themselves. Though the hearings have, by necessity, been held only in Johannesburg, the IBA has for most of them chosen a venue in a part of town accessible to Johannesburg's black population.

The context into which this exercise in transparency fits, is the *Independent Broadcasting Authority Act* of October, 1993. This *Act* (largely modelled on our *Broadcasting Services Act*) establishes the IBA "to regulate broadcasting activities in the public interest", independent of all political influence and free from political or other bias or interference. The signs so far are that the Government of National Unity (GNU) is stringently observing that commitment.

The scope of the IBA's remit renders it far more powerful than the ABA, its regulatory power over the public broadcasting sphere being the clearest example. The *Act* also provides for the devolution of powers relating to the administration, management, planning and use of the broadcasting services frequency bands to the IBA.

the broadcasting environment

This new regime ushers in a profoundly different broadcasting environment for all South Africans, and the shift from a "police state" culture to one of almost obsessive transparency is almost dizzying in its nature and its speed. Inevitably, the new order, committed by Parliament to a genuine mixed broadcasting system, will involve a considerable transfer of power from the South African Broadcasting Corporation (SABC), which, as South Africa's public broadcaster (albeit receiving over 70% of its revenue from commercial sources), dominated the broadcasting scene, with growing competition from the private terrestrial, subscription service M-Net. M-Net, a South African invention which has now gone international, is owned by the four major press groups in South Africa, and was established in 1986 to secure access for them to the tv advertising market in order to preserve their print monopoly position.

SABC presently has three tv channels and 23 radio services, 16 of which are regional. Apart from M-Net, BOP-TV, situated in the previous "homeland" of Bophuthatswana is the only other tv service available, and is run on a commercial basis.

Both Bop and M-Net broadcast predominantly US material. Apart from SABC's 23 radio services (predominantly FM), Radio 702, a commercial talk service broadcasts in the region surrounding Johannesburg. The SABC radio empire is vast by Australian standards, but its size is determined in part by the existence of eleven official languages in South Africa, plus a number of additional unofficial languages. Radio Zulu claims the largest black audience in the country, of approximately 3 million.

All existing commercial services were grandfathered for eight years by the *IBA Act* of 1993.

new licences

Since the beginning of 1995, the IBA has been licensing community radio services on a one-year temporary licence basis. Many of these services obtained 3 month test licences in the latter part of 1994. This licensing is proceeding rapidly, and by April 1995, the IBA expects to have conducted hearings into 200 applications for community licences, which should produce up to 80 licences. Placing a priority on the issuing of community licences has obvious political significance in a country where the majority has been denied a voice for so long.

The IBA will not call applications for private tv and radio licences until after the publishing of the regulations generated by the Triple Inquiry, probably in the last quarter of 1995. By that stage, the significant changes which SABC is presently undergoing and planning should be more evident, rendering the broadcasting environment into which private licences will be introduced, more certain. Decisions as to the number of private licences which might be issued have not yet been taken, and clearly in part depend on frequency availability and competing demands on the broadcasting spectrum.

challanges

However, the commitment of the South African government to a mixed system of broadcasting is absolute - only the way the numbers shake out remains in doubt. The

IBA is now also having to consider the implications of broadcasting services delivered outside the broadcasting service frequency band (e.g. wireless cable), and the imminent arrival of international satellite footprints over South Africa.

The fledgling IBA still very sparsely staffed, faces enormous challenges in a very short time-frame - challenges which would appear daunting to any mature broadcasting regulatory agency. The importance of its role in ensuring an equitable and healthy broadcasting sector in South Africa cannot be overestimated.

The significance of its task is perhaps best illustrated by the fact that the illiteracy level in South Africa is about 60% of the population, with estimates as high as 80% among rural women. The obvious consequence is that the use of print media among the majority population is extremely limited, although there is strong evidence of multiple access via a literate "reader". Thus broadcasting is of obvious social, educational and political significance. TV access, as opposed to ownership, is estimated as up to 50% of the black community, but is limited by the price of sets and limited electrification in non-urban areas. In these circumstances, the importance of radio to the black community is overwhelming, and will be a significant factor in the IBA's blueprint for the broadcasting environment of the New South Africa.

Victoria Rubensohn has been a consultant to the IBA since May 1994.

Cool or Gross Childrens TV

Cathrine West reviews recent developments in childrens television

"I feel embarrassed for them doing it on national television" boy, grade 3-4 on kissing and partial nudity on TV.

"I feel like I want to get a bazooka and blow the two up and get rid of it, because I hate fighting and sometimes I leave the room" boy, 10 years of age, on violence in television programs.

what the children think

These are two examples of concerns expressed by Australian kids to the Australian Broadcasting Authority ("ABA") in its recent survey of children's attitudes to violence, sex and swearing on Australian television *(ABA Monograph 4)*. The survey involved 1,602 primary school children between 8 and 12 years of age from schools in NSW and 18 focus groups of 5-12 year olds in Sydney and NSW country towns. A group of parents was also surveyed.

The survey of children themselves is the first by the ABA. The ABA has previously conducted research into adult attitudes to classification issues but has not undertaken research of childrens' views. The ABA considers it has a statutory responsibility under the *Broadcasting Services Act 1992 ("the Act")* and the Childrens Television Standards to take into account children's television interests. One of the objects of *the Act* is "to ensure the providers of broadcasting services place a high priority on the protection of children of exposure to program material that may be harmful to them (section 3(j)).

The results of the survey include:

- violence, in particular depictions of animals being hurt or people being killed, was most likely to upset children;
- in contrast, sex and nudity concerned only 8% of children and swearing upset only 2% of children;
- almost 66% of children did not like to watch children being hurt and almost 60% were concerned by parents arguing or hitting each other;
- almost 50% of children enjoyed programs depicting realistic monsters and ghosts;
- children take an active role in their television viewing, expressing independent motivation both in the selection of programs and in their reaction to programs that upset them. For instance, 92% of children claim to watch the news citing personal interest in being informed of current events as their motivation. 55% of children indicated that they had stopped watching television or changed channels as a result of being upset by a television program. Girls are 22% more likely than boys to stop watching programs that included violence, kissing and swearing;
- almost 66% of children claimed to watch television every day, whilst just over 25% of children said that they did not watch television everyday but on most days. Over 50% of children watched television before school and 77% watched after dinner on school days.

The second stage of the survey will consist of a research study by the ABA into what children enjoy about the television programs they watch. This stage will involve consultations with producers and writers of childrens shows.

Australian content

The ABA is presently reviewing the requirement for minimum levels of Australian content for commercial television broadcasters. The current Television Program Standard (TPS14), inherited by the ABA from the Australian Broadcasting Tribunal, contains a minimum requirement of the equivalent of 16 hours per year for Australian childrens drama for the primary school age group ("Australian C Drama").

In 1992, the commercial broadcasters averaged the equivalent of one extra hour of Australian C Drama above the minimum level. The ABA has proposed in a recently released Working Paper that the current requirement be doubled to 32 per year, to be phased in over a period of 3 years.

After the release of the Discussion Paper, the ABA received a submission from the Federation of Australian Commercial Television Stations ("FACTS") arguing that the quota system under TPS14 creates an imperative to mass produce programs and that there is no explicit legislative requirement for the ABA to determine a standard that sets particular levels for childrens drama programs or any program genre. Further, that the only regulation of Australian content should relate to a transmission quota rather than a specific requirement for the broadcast of certain types of drama. FACTS considers that the usefulness of the quotas in the sixties and seventies in boosting drama production has been outlived and they now inhibit diversity and high end drama.

The ABA took the view in the Discussion Paper that the standard for specific drama is necessary to ensure the continued production and broadcast of childrens drama on commercial television. The ABA did not accept FACTS submission. The ABA considers that section 122 of *the Act* requires it to determine a standard in respect of the Australian content of programs of commercial television and, in exercise of this power, it has a significant degree of discretion as to what constitutes "Australian content of programs" sufficient to include specific quotas for children's drama.

The ABA has also suggested that the definition of "Australian program" be extended to programs in relation to which a certificate under section 10BA of the *Income Tax Assessment Act* has been issued. This

will assist producers of childrens programs who traditionally have found access to funds difficult as it will allow official co-productions to be included in the quota.

The ABA proposed release of a revised standard for discussion in early 1995. It is likely that the increased Australian C Drama quota will be included in the revised standard.

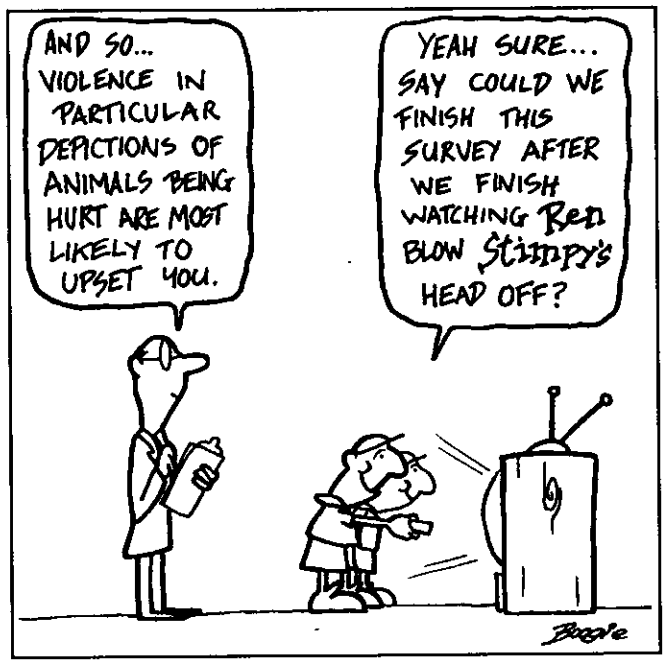
other developments

Another impetus for the production of Australian childrens drama programs is the Commonwealth Government's commitment made in the *Creative Nation* statement to spend at least 10% of the $20 million per annum allocated to the Australian Television Production Fund on Australian childrens drama programming. The programs produced with the fund will not count towards the proposed revised quota. This should further boost the production of childrens television programs.

One of the subscription television services to be operated by the ABC's dedicated subsidiary company will offer predominantly childrens programming (the other is a 24 hour news channel). The Minister has imposed on the subsidiary company's licence significant Australian content requirements. Accordingly, the amount of quality Australian childrens programs broadcast on television in Australia will increase dramatically.

The Australian Childrens Television Foundation was the host of the first World Summit on Television and Children in March 1995 which will be followed by the Festival of Television for Australian Children. One of the issues to be addressed at the Summit is the provision of childrens programs which reflect childrens needs, concerns, interests and culture.

Cathrine West is a solicitor at Blake Dawson Waldron.



What Price Access

Don Robertson and Bruce Meagher discuss the Privy Council's decision on the use of market power.

The *Competition Reform Bill 1994*, adopting many of the reforms suggested by the Hilmer Report, has highlighted the critical issue of when a corporation possessing market power may refuse access to goods or services provided by it. Even more difficult is the issue of what price that corporation may charge for access, including any monopoly rents it would otherwise be able to charge. That is, can it charge the monopoly price or must it only charge the price payable in a competitive market.

The Privy Council has recently delivered an important judgement in a case concerning these issues and the principles relating to the use of market power. Although New Zealand has its own unique regulatory framework in the area to which the judgement relates, the decision is of general importance.

background

The judgement is the culmination of a long running dispute concerning the term and conditions of interconnection between the networks of Telecom New Zealand ("TCNZ") and Clear Communications ("Clear"), the new entrant in the New Zealand telecommunications market. *[Ed.: see article "Interconnection and the dominant market position in New Zealand", CLB Vol 13 No 4, which reported on the NZ Court of Appeal decision].*

Clear brought an action under section 36 of the New Zealand *Commerce Act 1966*, a close equivalent to section 46 of the Australian *Trade Practices Act.* Section 36(1) provides:

No person who has a dominant position in market shall use that position for the purpose of:

(a) restricting the entry of any person into that or any other market; or

(b) preventing or deterring any person from engaging in competitive conduct in that or any other market; or

(c) eliminating any person from that or any other market.

The Australian *Trade Practices Act 1974* contains similar words, except that it applies to all corporations having a substantial degree of power in a market, not just those who are dominant.

the facts

Before 1 April 1989, TCNZ had a monopoly over the provision of telecommunications services. Clear entered the market intending to compete with TCNZ for long distance calls and local calls for business customers in the CBDs of Auckland, Wellington and Christchurch.

Unlike Australia, New Zealand has no statutory right for competing carriers to interconnect with each other, no industry specific regulator and no provisions whereby guidance can be given as to the terms and conditions of interconnect, other than the provisions of the *Commerce Act.*

Whether interconnection should in fact occur was not in contest - TCNZ agreed that it should and had negotiated terms of interconnection in relation to long distance calls.

It is important to note that for the provision of business customer calls in the relevant CBDs, Clear intends to establish both local exchanges and a local loop, that is, direct connections to each of its customer's premises. The issue between the parties was the terms and conditions for interconnection which would allow Clear customers to communicate with TCNZ customers.

A number of offers and counter offers were made before matters reached an impasse in negotiations in relation to a particular contract for which Clear required interconnection.

the offer trial

At trial, TCNZ made an offer, based on a model developed by two US economists (the *"Baumol-Willig Pricing Rule"*). Under that offer:

- TCNZ would levy an access charge, equivalent to the monthly line rental for

businesses, less any saving in average incremental cost resulting from Clear establishing its own local loop;

- TCNZ would levy a traffic charge from its own customers, equivalent to the standard charge less any saving occasioned by Clear carrying the call part of the way. An equivalent charge would be paid by Clear in respect of Clear's customers whose calls were delivered on the TCNZ network;
- Clear would meet the cost of the bridge between the Clear and TCNZ switches at TCNZ's incremental cost;
- TCNZ accepted that periodic adjustments might have to be made; and
- TCNZ further accepted that when Clear's local network became big enough there would be reciprocity in the access levy.

Clear rejected this proposal claiming that:

- there should be no access levy;
- TCNZ should bear sole responsibility for universal service costs;
- there should be either a free exchange of calls between networks or a settlement regime.

the Baumol-Willig Pricing Rule

This rule, most simply stated, says that it is an acceptable use of market position for the supplier of goods or services in particular markets to charge its competitor the opportunity cost arising because the competitor is supplying goods or services which, in other circumstances, the supplier might have expected to have supplied itself. This is true despite the fact that in a situation such as the present the supplier is in a position to dominate the market.

Under the *Baumol-Willig Pricing Rule* the market is to be assessed as if it were a "perfectly contestable market", that is, a market where there is complete freedom of entry and exit and where potential competition precludes monopolistic behaviour and economic inefficiency.

The designers of the rule accepted that TCNZ was able to secure monopoly rents, which would not exist in a fully contested market. However, they did not regard this as invalidating the model.

the decision

The Privy Council concluded that the perfectly contestable market and the *Baumol-Willig Pricing Rule* were appropriate tools to use in distinguishing legitimate from illegitimate market conduct.

It was held that it was not inappropriate to recover opportunity cost even though they acknowledged that to some extent this might involve the extraction of monopoly rents.

implications of the decision

If the reasoning in this case were to be applied to section 46 of the *Trade Practices Act*, it would profoundly influence the philosophy and method of application of that section. The following important points were made:

The concepts of "purpose" and "use" of market power are interrelated. However, whilst it is legitimate to infer "purpose" from the use of market power to produce anticompetitive effects, the converse argument is not legitimate. As the court says, it is "a hopeless task" to say that TCNZ did not have an anticompetitive purpose. A competitor will always be seeking in one sense to "deter" the other competitor from competing successfully. One cannot infer that conduct is improper use of market power from such an "anticompetitive" purpose.

A court may distinguish legitimate use of market power if the market player offers its goods or services at the same price as it would in a fully competitive market, namely, at marginal cost. In other words, a person with a substantial degree of market power does not "use" it unless that person acts in a way which a person not in such a position but otherwise in the same circumstances would have acted.

In a market where there are economies of scale and scope, marginal cost is not the correct yardstick. The theory of perfect contestability is an appropriate model to use in this case. This model implies that there can be differential pricing, with prices varying in ratio to their marginal cost (Ramsay Pricing). It also implies that price should at least cover marginal cost or average incremental cost. Some prices should also deliver a contribution towards common costs arising from economies of scale and scope. Further, there is an implication that competitors are entitled to recover opportunity costs.

On this basis a market player having a substantial degree of power in the market is entitled to recover opportunity costs, even if this includes monopoly rents.

The purpose of provisions such as s46 should not be to remove the monopoly elements of pricing but to create the conditions for competition where these monopoly rents can be "competed out" of the market. A monopolist is entitled, like everyone else, to compete with its competitors. If it was not permitted to do so it would be holding an "umbrella" over inefficient competitors which competition laws are not intended to do.

Don Robertson is a partner and Bruce Meagher a solicitor with Freehill Hollingdale & Page

Improper "use" of Data

Sheila McGregor and Lesley Sutton discuss the implications of an English Court of Appeal decision for laws covering computer-held data and electronic data communications.

Section 88 of the *Telecommunications Act 1991 (Cth)* makes it a criminal offence for an employee or any person performing services on behalf of a carrier or eligible service provider (a *"prescribed person"*) to *"use"* any information or document that has come to their knowledge or into their possession in their capacity as a *"prescribed person"* except in certain defined circumstances.

The *Telecommunications Act* does not give a definition of the term *"use"*.

Similarly, the New South Wales *Privacy and Data Protection Bill* would make it a criminal offence for a public employee or former employee to *"use"* any personal information to which the employee or former employee has or had access in the performance of his or her official functions for the purpose of obtaining a financial or other benefit.

Again, there is no definition of *"use"*.

The English Court of Appeal has recently been required to look at what the term *"use"* means in the context of data protection in *R -v- Brown (Gregory Michael) [1994] 2 WLR 673.*

the facts

The case involved an alleged contravention of s5(2)(b) of the *Data Protection Act 1984 (UK)* which prohibits *"the use ... of any data, for any purpose other than the purpose or purposes described in the entry"*.

The appellant was a police officer. He was also in the debt recovery business. The appellant was found guilty of two contraventions of the *Data Protection Act.*

In the first contravention, the appellant's debt recovery business had been engaged by one party to recover a debt owed by another party. The appellant caused a computer check to be carried out via a police computer relating to the second party's vehicle. No data emerged as a result of the computer check. However, the appellant was found guilty of attempted improper use of data.

In the second contravention, the appellant again ran a police computer check on a vehicle that belonged to a party being investigated by the debt recovery agency. There was no evidence that the appellant

did anything with the information that he recovered, beyond calling it up on the screen for viewing. He was found guilty of improper use of the information.

The trial judge ruled that a person *"used"* personal data if he held it, in the sense of bringing it up on the screen of a computer, and it was this point that was considered by the Court of Appeal.

the decision

The Court of Appeal overturned the trial judge's decision. The Court held that *"use"* in s5(2)(b) of the UK *Data Protection Act* bore its ordinary meaning, and that to *"use"* data within the meaning of the section it was necessary to do something more than call it up on the computer screen in order to view it.

Laws J commented:

"in our judgement, it is one thing to access the computer and view what is contained within it and it is another thing then to use the information itself ... it is necessary to do something to the data, not merely to access it, before it is "used" within the statute. That would have arisen if the appellant, having accessed the information, then proceeded in the ordinary sense of the term, to make some use of it, so as for example in his own business affairs to deploy the information obtained against the interest of somebody else".

conclusion

The decision of the Court of Appeal, if followed in New South Wales, would mean that any party who wished to enforce privacy provisions such as those contained in the *Telecommunications Act* or the New South Wales *Privacy and Data Protection Bill* would be required to prove not only that information has been accessed, but also that the offending party has acted upon that information. As was discovered in *R -v- Brown*, proving that somebody has *"used"* information can be extremely difficult, if not impossible.

This result can be contrasted with the terms of the various State Acts dealing with computer crime. Section 109 of the *Crimes Act 1900 (NSW)*, for example, relates specifically to *"accessing"* of information, and could potentially extend to other conduct in *R -v- Brown*.

It will be interesting to see how the Acts dealing with *"use"* of information are found in practice to overlap with Acts dealing with *"accessing"* of information, and how the various State and Commonwealth pieces of legislation relevant to the security of electronically stored data are found to fit together in circumstances where their application gives different results.

Sheila McGregor and Lesley Sutton, Freehill Hollingdale & Page, Sydney.

National radio services for, and by, Indigenous people

A new chapter in Australian broadcasting begins with the launch of the National Indigenous Radio Service.

The National Indigenous Radio Service ("NIRS") will create a new sound on the current wave of national radio services and is an historic step for Indigenous broadcasting. It was officially launched when the keynote address of the newly elected Chairperson of NIMAA (the National Indigenous Media Association of Australia), Eileen Torres, was broadcast nationally. (The full speech is available from the NIMAA Secretariat).

The commencement of the National Indigenous Radio Service is the first time that a dedicated Aboriginal and Torres Strait Islander owned and operated national radio service was broadcasted on Australian airwaves.

"The National Indigenous Radio Service will provide Aboriginal and Torres Strait communities with the opportunity to nationally broadcast news, information and views concerning local, regional and national issues and to quickly address in a co-ordinated manner matters raised in the mass media that create a distorted view of Indigenous society".

The NIRS will begin broadcasting on a full time basis as soon as an intensive technical appraisal of the NIRS capabilities has been conducted. Initially, the NIRS will receive programming from Aboriginal and Torres Strait Islander radio stations that can supply programming on a regular basis.

This will enable the NIRS to broadcast Indigenous produced and presented material from all States and Territories to over 80 Aboriginal and Torres Strait Islander communities across the country.

capabilities

The design of the NIRS will incorporate technology to enable the 83 Broadcasting for Remote Aboriginal Communities Scheme ("BRACS") communities to receive the NIRS and also to provide program material for the service.

NIMAA has received preliminary technical advice indicating that the NIRS has the capacity to carry a text or data stream on the existing satellite channel. If the channel can be split to carry a data service, the National Indigenous News Service will piggy-back with the NIRS on the satellite channel.

This will create a dedicated Indigenous operated and produced satellite channel that provides an audio service to carry Indigenous news, views and information complemented with a data service that will deliver hard copy to accompany the NIRS audio material.

The technical appraisal of the NIRS will also disclose what technology is needed to enable a national Indigenous talk-back to operate on the NIRS.

The national talk-back program will create a forum where Aboriginal and Torres Strait Islander community leaders, elders and representatives can discuss news or issues, or respond to any publicity regarding their communities.

A national Aboriginal and Torres Strait Islander talk-back program would provide an economical and timely medium to respond to any issues of concern for Indigenous communities - especially in responding to biased, stereotypical and negative mass media coverage when it occurs.

value

The national Indigenous talk-back program - and the NIRS - will give Aboriginal and Torres Strait Islander communities the chance to re-establish song lines that have been broken since white occupation of Australia.

As soon as the technical appraisal is conducted, the infrastructure for the NIRS will be established and the service should be operating.

The National Indigenous Radio Service will provide Aboriginal and Torres Strait communities with the opportunity to nationally broadcast news, information and views concerning local, regional and national issues and to quickly address in a co-ordinated manner matters raised in the mass media that create a distorted view of Indigenous society.

Furthermore, the NIRS would provide a very effective medium for educating the wider society of the rich cultures and heritages of Aboriginal and Torres Strait Islander peoples.

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Contributions & Comments

From the members and non-members of the Association in the form of features, articles, extracts, case notes etc. are appreciated. Members are also welcome to make suggestions on the content and format of the Bulletin.

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Communications and Media Law Association

The Communications and Media Law Association was formed in 1976 and brings together a wide range of people interested in law and policy relating to communications and the media. The Association includes lawyers, journalists, broadcasters, members of the telecommunications industry, politicians, publishers, academics and public servants.

Issues of interest to CAMLA members include:

- defamation
- broadcasting
- copyright
- advertising
- telecommunications
- contempt
- privacy
- censorship
- film law
- freedom of information

In order to debate and discuss these issues CAMLA organises a range of seminars and lunches featuring speakers prominent in communications and media law policy.

Speakers have included Ministers, Attorneys General, judges and members of government bodies such as the former Australian Broadcasting Tribunal, the Australian Broadcasting Authority, Telecom, the Film Censorship Board, the Australian Film Commission and overseas experts.

CAMLA also publishes a regular journal covering communications law and policy issues – the Communications Law Bulletin.

The Association is also a useful way to establish informal contacts with other people working in the business of communications and media. It is strongly independent, and includes people with diverse political and professional connections. To join the Communications and Media Law Association, or to subscribe to the Communications Law Bulletin, complete the form below and forward it to CAMLA.

To: **The Secretary, CAMLA, Box 545, Glebe, NSW 2037**
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