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Constitutional Defamation Defence Disappears as Theophanous Effectively Overruled

Richard Potter examines the recent High Court decision in Lange v. ABC and its impact upon constitutional and qualified privilege defences to defamation actions.

Three years ago the front pages of newspapers were filled with the news that the High Court determined that the Constitution implied a right of every individual to speak freely on political or governmental issues. This was a quantum leap from previous cases which discussed the implied right within the narrow context of specific legislative provisions and whether they contravened the freedom. Theophanous extended this in one fell swoop to a personal right of immunity from all defamation law (subject to the publisher being unaware of any falsity in the material, not publishing recklessly and publication being reasonable).

Three years later the High Court unanimously dispensed with Theophanous without formally overruling it. The majority in Theophanous was a tenuous one with Justice Deane expressly stating that he did not fully agree with the reasoning of the other majority Justices, but would join them because he effectively agreed with the end result. On this basis the High Court in Lange v ABC was able to seize upon this and say that it was arguable that Theophanous did not contain any binding statement of constitutional principle.

To formally overrule Theophanous would have meant that the High Court would have to justify overruling a recent case for no other perceived reason than a change in its bench. By dealing with Theophanous in this manner, the case could simply be left hanging; no longer effective precedent, but not actually overruled.

A unanimous judgment meant that neither of the remaining majority Justices in Theophanous had to explain or justify their apparent volte face. Furthermore the show of strength provided a clear signal to recent critics of the High Court that it had returned with one voice to a more conservative judicial approach.

BACKGROUND TO THE CASE

The Lange case involved defamation proceedings following a *Four Corners* programme in 1990 which accused Lange of effectively being in the pockets of large business concerns in New Zealand by receiving political contributions in return for possible favours after the general election.

A defence of qualified privilege was pleaded pursuant to common law and also under section 22 of the *Defamation Act* 1974 (NSW) ("**Act**"). The defence was amended after Theophanous to include the implied constitutional defence. The case provided an ideal vehicle to challenge Theophanous as Lange had a safety parachute if the main argument was unsuccessful. If the argument that the wrong test was used in Theophanous failed then a subsidiary argument was available that the discussion involved New Zealand and not Australian politics. Foreign political discussion should not be the basis for an implied freedom in the Australian Constitution.

There was a prevailing feeling that Theophanous may be overruled and a number of media institutions intervened in the proceedings to argue against Lange, and in the alternative to argue that common law qualified privilege should be expanded to take the place of the constitutional defence to try and ensure no practical change, ie one defence substituted for the other.

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THE HIGH COURT DECISION

Judgment was handed down on 8 July 1997. The High Court unanimously accepted the argument that the wrong test had been applied in Theophanous and the correct test should be similar to the test historically applied to laws potentially contravening express rights of the Constitution.

As with express constitutional rights, the implied constitutional freedom (which was affirmed by the High Court) provided a limitation on legislative or executive powers to the extent that any laws which sought to confine or limit the freedom could be restricted or invalidated. On this basis, the implied freedom cannot confer a personal right of immunity from any law, ie provide an absolute defence to proceedings. The correct test to apply is to first look at whether the law contravenes the freedom, and if it does, whether the proposed law is reasonably appropriate and adapted to achieving its required object. It was held that even though the Act and the common law of defamation were a restriction of the constitutional freedom, these laws were still consistent with the constitutional freedom by providing a balance between freedom of speech and the protection of private reputation.

EFFECT ON COMMON LAW QUALIFIED PRIVILEGE

Having dealt with the constitutional question, the court then turned to the defamation aspect and looked at common law qualified privilege. Although not clear from the judgments, Theophanous appeared to also extend qualified privilege to run concurrently with the implied freedom. Many practitioners regarded this as a separate defence to be relied on in addition to the implied freedom defence.

The High Court affirmed the extended qualified privilege defence and declared that all Australians have an interest in disseminating and receiving information, opinions and arguments concerning governmental and political matters that affect people of Australia. The narrow defence of common law qualified privilege which requires each reader of the material to have an interest in the subject matter was therefore broadened to encompass all Australians where the subject matter is political or governmental. However this defence was tempered by the imposition of a condition of reasonableness on the part of the publisher.

The condition requires the publisher relying on the defence to establish that it had reasonable grounds for believing the material to be true and took all reasonable steps to verify the accuracy of the material beforehand with the person defamed. This state of affairs has been in place in NSW since the commencement of the Act in 1974. Section 22 of the Act provides a statutory defence of qualified privilege which is available in addition to the defence of qualified privilege at common law. The statutory defence broadens the interest group of people viewing/reading the material, but contains an express condition of reasonableness. In the 23 years the provision has been in existence, only three reported decisions have been

successful as the courts have traditionally taken a narrow view of this condition. The real test will therefore come when common law jurisdictions such as Victoria or South Australia interpret reasonableness under the common law and ultimately the High Court is provided with an opportunity to look closely at this question once more.

So far as the Lange defence was concerned, the particulars provided did not bring the publication within the extended defence. The matter was remitted back to the Supreme Court with an opportunity provided to the ABC to amend its defence in view of the High Court's comments on extended qualified privilege.

The Lange case has recently been settled and this case will not therefore provide a further vehicle for determination of "reasonability" under the common law defence. In view of the specific comments made by the High Court as to what would constitute reasonable conduct on the part of the publisher, the expanded common law defence may well be narrower than the NSW statutory defence. It will therefore be interesting to see how other states interpret and apply this defence in future.

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Diana, Privacy and Media Corporations

Kathe Boehringer examines the role of media corporations in the context of invasive media practices and proposes new models of corporate governance to raise corporate and individual responsibility.

The indoor sport that everyone loves to play is bashing the media, particularly when it can be readily viewed as "out of control". Public outrage fuelled by the perceived "hounding" of Princess Diana has fastened on easy targets: lower forms of media life - "irresponsible" hirelings, like editors, journalists and photographers - and despised categories like "the hacks of Fleet Street", "ghoulish" royal watchers and the now-infamous "paparazzi". Unfortunately, the sleaze dimension of these usual suspects has diverted attention from the systemic corruption that lies at the heart of the erosion of privacy.

The symbiosis between the political system and the media-entertainment system is obvious: politics demonstrably takes place in and through the media, and politicians are only as good as their last media appearance. It is only a matter of time before being a good media performer will be regarded by both parties and politicians as more valuable than being a good parliamentary performer. Indeed, the emphasis is on "performance" rather than on plain old hard work in the constituency or parliamentary committee rooms.

ROLE OF THE MEDIA IN SELF-GOVERNANCE PROCESS

For its part, the media-entertainment system serves largely as a publicity amplification service for politicians. An increasingly concentrated media busies itself with brokering acclamation[1] rather than in providing the institutional basis within which critical public opinion may be formed, yet still claims Fourth Estate status. But that view of the media - as a vital forum in which citizens debate and form opinions crucial for self-governance - is belied by the High Court's characterisation of the media's role in the 1992 free speech cases. The High Court's protection of freedom of political communication relates to a specific and limited activity - citizen engagement in the *electoral process only*. The wide array of self-governance opportunities in which citizens might become engaged were active citizenship genuinely contemplated - i.e. beyond the realm of "official" politics - was not canvassed. Judicial recognition of the Australian media's "vital" role is therefore restricted to the field of representative politics.

Mr. Justice Mahoney's view of the media is refreshingly far-ranging:

> *"It is the power of the media which alone remains, in the relevant sense, arbitrary. ...The media exercises power, because and to the extent that, by what it publishes, it can cause or influence public power to be exercised in a particular way. And it is, in the relevant sense, subject to no laws and accountable to no-one; it needs no authority to say what it wishes to say or to influence the exercise of public power by those who exercise it."*[2]

LAW REFORM PROPOSALS AND RESPONSES

Given the cosy relationship between the representative political order and the media-entertainment system, it is perhaps not surprising that law reform attempts to protect individuals from media invasions of privacy have been largely unsuccessful. Raymond Wacks provides a detailed and depressing account of the numerous attempts at law reform since 1945 in a Britain notorious for a tabloid press that has plumbed new depths of sensationalism, irrelevance and outright lies.[3] Law reform, in seeking to vindicate dignity- and autonomy-based privacy interests arguably undermined by invasive media practices, runs up against the carefully cultivated image of the media as the guardians of free speech.

In these circumstances, strong privacy protection measures like criminalising particular journalistic conduct is bound to be represented *by and in the media* as "interference". Providing individuals with remedies in tort is a cure that may be worse than the disease: redress is contingent upon a costly, prolonged and *public* court process. At another level, administrative measures - say, the creation of an independent press council - are inherently unsatisfactory: to the extent that such councils are given strong disciplinary powers, they will be accused of "do-gooding" as well as political interference; if their powers are weaker, then their "toothless tiger" actions will be viewed as largely beside the point.

Given the difficulties associated with establishing legitimate and effective regulation, potential regulatees argue for self-regulation: the media in Britain, for example, point to the self-restraint campaign recently launched by *The Independent* to illustrate the possibilities of such an approach. While self-regulation might bear fruit in a context where conduct will be judged in terms of the institution's acknowledged civic responsibilities, it is unlikely to be effective in situations where there is widespread political and judicial acceptance that media corporations' primary responsibilities are to "the bottom line".

CORPORATE GOVERNANCE AND RESPONSIBILITY

The impossibility of regulating media entities *from the outside* - in respect of privacy or any other value - means that regulation from the inside needs to be considered. The unlikely reform vehicle that presents itself is that of corporate governance. Lawyers, familiar with reform approaches that involve tweaking doctrine and reinterpreting rationales, may baulk at such a suggestion. But lawyers should recall that corporate governance structures arose historically in contexts where enterprises understood themselves as much in "civic" terms as in commercial terms, and that doctrines like *ultra vires* emerged in such a context.

Anyone interested in developing a media culture of responsibility should find the notion of a robust internal *political* forum attractive. After all, only such a forum, constituted in the light of the corporation's commercial goals as well as civic responsibilities, could possibly generate the kind of corporate commitment to responsible media practices that is the *sine qua non* of genuine and lasting reform. Media enterprises can hardly be seen to clothe themselves in the raiment of the Fourth Estate and yet regard corporate governance as an arena in which only shares vote, and in which responsibility for generating appropriate privacy practices is definitionally irrelevant.

MEDIA CORPORATIONS AS PRIVATE GOVERNMENTS

There is no doubt that contemporary media corporations are private governments.[4] Their increasingly global reach and influence makes it imperative that the *constitutional* significance of such private governments be recognised. Short-sightedness and sheer venality weds us to the traditional view of the corporation as merely a private mechanism that maximises profits for shareholders. As Eells points out:

> *"To many observers of corporate governance it seems anomalous that our corporate polities are in effect self-perpetuating oligarchies by reason of their internal authority structures. The anomaly is that these allegedly autocratic enclaves persist in the middle of a society dedicated to constitutionalist principles with respect to public government, thus perpetuating a system of private governmental enclaves at odds with our public philosophy of government. This disparity of governmental forms and processes ... has led to demands that the corporation be "constitutionalized", just as critics demand the introduction of responsible government in labor unions."*[5]

NEW POLITICAL FORUM FOR CITIZENS/SHAREHOLDERS

To the extent that economic globalisation undermines the regulative capacities of the nation-state, citizens would be well advised to consider other political forums within which their capacities for self-governance can be exercised. Because "the principle of nationality has become little more than a constitutional mirage", Fraser argues that:

> *"the best hope for constitutional freedom may turn upon our willingness to move beyond the politically threadbare illusion of autonomous nationality by creating a multiplicity of 'little republics' within the associative forms of a newly self-assertive civil society."*[6]

The notion of an "assertive civil society" may seem a distant goal, inundated as we are with images of national politicians, globe-trotting "celebrities" and distant economic elites as movers and shakers. Yet a redesign of corporate governance opens up a new forum for citizens interested in public life but whose appetite for civic engagement is dulled by the sterility of vision-free political parties and representative government.

Re-designing the corporate governance of media corporations may not appeal to

those with a vested interest in traditional reform approaches or to realists who regard shareholder and managerial irresponsibility as both necessary and desirable. Nonetheless, consitutionalising the corporation requires systematic exploration: it has, at the very least, the potential to provide a mechanism by which responsible citizen/shareholders can meaningfully participate in corporate governance. The opportunity would then exist for regulatory issues that are currently imposed from outside - and are therefore only grudgingly addressed - to be legitimately raised *within* the corporation. The strategy offers the possibility that the equal citizen/shareholders of media corporations could utilise the reformed constitutional structure to at last link civic concerns with economic development, and to authoritatively imbue the irreversible processes of modernisation with civic norms.

BALANCING COMMERCIAL AND ETHICAL OBJECTIVES

The publishing decisions taken in the past and continuing into the present (see, for example, the *New Weekly's* current attack on the paparazzi, its canvassing of the rumour that Diana was pregnant when she died - "Did Diana and Dodi's unborn child die in the Paris tunnel with them?" - and extracts from Ketty Kelley's "vicious" book) by press, television and magazine entities clearly follow the dollar. It is hard to see what the "public interest" might be in many of these disclosures, especially (as Andrew Morton's account now reveals) those engineered by Diana herself for what appear to be her own, personal reasons.

The overwhelmingly commercial context that presently drives the decisions of media corporations means not only that sceptics or privacy-respecters will be thin on the ground but also that their reservations will be swept aside by invoking the obligation to nameless profit-seeking shareholders. Imagine the different dynamic that would exist in the public sphere of a constitutionalised media corporation, where at least some of those shareholders whose names are invoked could and would become involved in developing policies, admittedly with one eye on the competitive commercial environment in which they have invested. Is it so clear, for instance, that citizen/shareholders would be as keen on celebrity revelations as competition-obsessed editors?

Also, as things stand now, what do you think will be done to the employee whose remarks about Diana's "knockers" went to air? My guess is that his employers, driven by the commercial view that an outcry from the cult of Diana should be avoided, will make a sacrificial lamb of him. Whatever the outcome, there is little reason to think that it will be the product of any principled consideration. By contrast, the creation of a corporate public sphere would provide a forum in which ethical and principled positions could be crafted. Surely if the goal is responsible media corporations, then there must be an internal forum in which citizen/shareholders can consider the dimensions of their responsibility.

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1. J. Habermas, "The Public Sphere", (1974) 1 *New German Critique* 49.
2. *Ballina Shire Council v Ringland*, (1994) 33 NSWLR 680 at 725.
3. See R. Wacks, *Privacy and Press Freedom* (London: Blackstone Press, 1995).
4. R. Eells, *The Government of Corporations* (New York: Free Press, 1962).
5. *Ibid.*, p. 278.
6. A. Fraser, *The Spirit of the Laws: Republicanism and the Unfinished Project of Modernity* (Toronto: U. of Toronto Press, 1990), p. 357.

Liability for Inline Images: How an Ancient Right Protects the Latest in Net Functions

Kate Cooney examines the copyright liability of inlining images to indicate how copyright protection and liability have been extended in cyberspace.

A digital image is a computer file that is stored in a server. The digital image can be transferred by copying the computer file from its host server to other servers. This image can be created by either digitally scanning the original image onto the computer or by using graphic computer software to engineer a digital image.

An inline image is not a digital image but a *formatting* direction. You can create an inline image by referencing an images file name on your Web page.[1] When a visitor calls up your Web page their browser software will be instructed to retrieve the image file from its host server. This transference of image files occurs seamlessly, such that the user calling up the page would see the image and not the image file name.

The significance of inline images with regards to copyright protection, is that the image is loaded directly from its host server, and travels to the Web page visitor without going through the creator of the inline image's server at all. Thus, the creator of the inline image is not implicated in the image's reproduction.

This process can be explained by thinking of the inline command as a reference to a server that holds an image. However, when someone visits the page where an image has been inlined, instead of having to go to the server to view the referenced image, the inline formatting command tells their browser software to automatically retrieve the image for them.

DIGITAL IMAGES AS "ARTISTIC WORKS"

Although the concept of inlining digital images would have been far removed from the legislators' minds when they drafted the *Copyright Act* ("the Act") in 1968, the Act can protect some digital images from being inlined.

Digital images that have been scanned into the computer could be protected

under the category of "artistic works" under the Act.

An unlawful digital version of an artistic work would amount to a reproduction. For example, in the US decision of *Playboy Enterprises, Inc. v Frena*[2] a US District Court deemed scanned Playboy photographs as an infringement of Playboy's copyright. Digitally scanning a copyright work or reproducing an already scanned work, would be a breach of the copyright in the original "artistic work".

FOUR TIERS OF LIABILITY - INLINER LIABLE FOR AUTHORISATION

The person who inlines a digital image would not be liable for breach of the reproduction or publication right but could be liable for authorising others to reproduce or publish the image.

Inlining images is a process of creating a formatting direction that, when activated by someone's browser software, goes and finds the image file wanted and reproduces the image on someone else's computer screen. What is actually reproduced by the inliner is the image file name in the form of html language. Thus if an image was filed under the name "http://www.x'spage.com/images-face.gif", in order to inline this image the inliner must write in his/her page "<img src=http://www.x'spage.com/images-face.gif>". This means that a user's browser software is instructed to go to X's page and find and reproduce an image file called "face".

For the purposes of the Act a reproduction of a copyright work must sufficiently resemble the copyright work. "<img src=http://www.x'spage.com/images-face.gif'" would not sufficiently resemble an image of a face, as what has been copied is the image file name not the image itself, and the image file name is not subject to the copyright protection.

To reproduce an image the image must be reproduced in a material form. The definition of material form in the Act requires some form of storing the image. By copying the image's file name an inliner has not stored the image in any way. The reproduction of the image only occurs when someone else accesses the inliner's page and their browser software causes the image to be reproduced. Thus, at no stage has the inliner actually reproduced the image.

Arguably the person who inlines an image would not be liable for publishing the work either, as they have not supplied reproductions to the public. However, a court may hold the inliner liable for authorising the publication because they made it possible for reproductions of the work to be supplied to the public. Similarly, although the technology in creating inline images may allow the inliner to escape direct liability, this person may still be liable for authorising others to reproduce the images.

On the same analysis whether an inliner is held liable for the distribution or exhibition of the copyright image would depend on how strictly the courts interpret distribution and exhibition.

In *UNSW v Moorehouse*[3] , Moorehouse argued that UNSW had authorised the making of the infringing reproductions of his works, by allowing students free access to photocopiers installed in the library, but failing to exercise control or supervision over what books were copied and how much of any work was copied.

Gibbs J held that persons who have under their control the means by which an infringement of copyright may be committed and make it available to other persons, knowing or having reason to suspect it will be used to commit an infringement and omitting to take reasonable steps in limiting the use to legitimate purposes, will be authorising the infringement that resulted from its use.

An inliner, in creating an inline image on a page accessed by others, has created the means by which others could infringe the copyright in the image. And in placing an inline image on a publicly accessed terminal, the inliner should reasonably suspect that someone would browse the page and save the image.

It is possibly arguable that prefacing the page with a notice warning that copyright permission has not been obtained would amount to a reasonable step in limiting the use of the image to legitimate purposes and therefore an effective denial of authorisation.

WEB BROWSER LIABLE FOR REPRODUCTION

The person who accesses the page with the inline image and saves that page will be liable for reproduction of the image. What appears on the screen of that person's computer is a copy of the digital image and thus the two works would sufficiently resemble each other. If that person stores the work in some way, whether it be by printing a hard copy version, saving the image on a disk or in the computer's hard drive, the image would have been reproduced in a material form. Thus a person who accesses an inline image and downloads it would be directly infringing the creator's right to reproduce the work.

A user who downloads an inline image may defend their action by claiming they had an implied licence to do so. The creator of the original image, by making the image publicly available as a public file on their server, and by not creating a software block to people inlining their images, has given the copyright infringer an implied licence to inline their image.

Some argue that image files in the public domain are not free to be reproduced. They argue that commonsense suggests that just because something is in the public domain does not mean it can be legally reproduced: the publisher of a book, in a world in which there are photocopiers, is not giving permission to the world to make copies of the book.

What this defence does raise is that, if a copyright owner is serious about protecting their images there are a number of techniques to stop people from inlining their works. Firstly the creator could create a written script that changes the names of images and all the links to those images. This would disrupt the transference of the image file as the file name would be changed frequently. Secondly the creator could require users to "sign in" to the server providing a user name and password before files are sent. Or the creator could use a preprocessor to generate dynamic URL's for the images. This would work much like the first example.

BULLETIN BOARD OPERATORS

A bulletin board operator would be liable for reproduction of a digital image that sits in its server. The act of storing the image makes the bulletin board operator liable for reproduction. Whether the operator had to know or have reason to believe the image was infringing copyright is uncertain.

In the US the courts have followed two approaches. In *Religious Technology v Netcom*[4], the District Court of California decided that for a bulletin board operator

to be liable for a third party's copyright infringement it must have some knowledge of that infringement.

The court in *Playboy Enterprises, Inc v Frena*, on the other hand, decided that a bulletin board operator is strictly liable for copyright infringements of third parties.

The Clinton Administration's *National Information Taskforce Working Group on Intellectual Property Rights* ("White Paper") of September 1995, has supported this judicial move towards a strict liability regime for bulletin board operators.

A bulletin board operator would also be liable for the publication of the inline image, as by having the image on its server the operator is supplying reproductions of the image to the public. By the same token, a bulletin board operator could also be liable for distributing and exhibiting in public a copyrighted work.

CARRIERS LIABLE FOR THIRD PARTY BREACHES OF COPYRIGHT

In Australia we have the unique situation of a carrier being liable for third party breaches of copyright. In the US a carrier is deemed a conduit of information and would not be liable for copyright breaches by third parties. But the *Telstra v APRA*[5] decision has made carriers susceptible to copyright suits.

The High Court recently upheld the Federal Court decision that found Telstra liable for breaches of copyright by a third party who transmitted copyright works via Telstra's telecommunications network. The breaches occurred on a "music on hold" service and the Court found that because "music on hold" was an incidental service to the basic telephone service it was liable for this breach.

The case in the Federal Court turned on the court's interpretation of s26(5) of the Act[6]. That section states that a subscriber to an incidental service of a carrier shall be deemed to be a subscriber to the carrier. The majority held that the transmission of "music on hold" was a service to callers and was incidental to the provision of telecommunication services. Because Telstra had an agreement with its customers to provide them with telecommunication services and that service included the incidental "music on hold" service, Telstra should be deemed by operation of s26 of the Act to have an agreement with its customers to provide them with "music on hold". It did not matter that the "music on hold" was at best, extremely incidental to the telecommunication service.

The Federal Court held that a transmission of "music on hold" over Telstra's wired network amounted to a transmission of musical works to subscribers of a diffusion service for which Telstra was liable. Although the exclusive rights in "artistic works" do not include the right to cause the work to be transmitted to a diffusion service (s31 (1)(a)(v)), it can be argued that this case represents a general proposition that carriers are liable for third party copyright breaches that occur on an incidental service to its network.

Using this general proposition with the inline image example, a carrier is arguably liable for copyright breaches in inline images that occur over an incidental service. Creating inline images is just one of many Web functions, and as the World Wide Web is an incidental service to the telecommunications network, a carrier could be deemed liable for copyright infringement by a third party who uses the carriers network to inline an image.

If this proposition proves correct, telecommunication carriers may be liable for an enormous number of potential copyright infringements. And if copyright owners decide to pursue carriers for copyright infringements, carriers will be forced to screen material or dramatically restrict services.

CONCLUSION

It is clear that the Act does apply to the digital world and the new function of inlining images. If Australia follows judicial trends and the White Paper proposals holding bulletin board operators strictly liable, copyright protection and liability will greatly exceed the non-digital world. If copyright owners are serious about protecting their on-line material, they are better off implementing a technical solution which is cheaper, quicker and most importantly effective.

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1. *See http://wwwpatents.com/weblaw.html.*
2. 839 F. Supp. 1552 (M.D. Fla. 1993).
3. 1975 133CLR1.
4. 33 IPR 132.
5. *See http://www.austlii.edu.au/au/cases/cth/high-ct/unrep338.html*
6. (1995) 131 ALR 141.

Digital Terrestrial Television - Implications for Australian Television

Jock Given looks at some practical and policy considerations behind the introduction of Digital Terrestrial Television in Australia and explains why bandwidth is the villain of the piece.

Content is king, or so the cliche goes. Of course, if it were, we probably wouldn't be here arguing about Digital Terrestrial Television (**DTT**). Content often looks like it's king: the studios in Hollywood have been wearing their crowns comfortably enough for decades. Super League and the ARL are killing each other for content. At the current rate, they'll be doing it until there's no content left standing. Stuart Diver scrambles out of his icy private nightmare to find the media carriers - or is it carrion? - waiting, no longer with those grubby chequebooks, but with 'contracts of employment' (an enterprise bargain if ever there's been one), and Diver himself an instant King of Content. If only public tragedy wasn't so damned unpredictable, you could start up a niche channel.

But content is not king, because bandwidth is such a bugger. And whatever the zealots dream about the end-of-scarcity, from where I'm standing, bandwidth looks like it's going to become an even bigger bugger. This is why DTT is so important a development. If you think competition in the provision of bandwidth is important, then DTT might prove to be the most viable wireless link to the home - the one best able to compete with the copper that's already there. And if you think having different content providers controlling different lines of access to their audiences is a useful starting point for ensuring a diversity of views, then DTT might look more attractive than a solitary superhighway, however wide.

BANDWIDTH SCARCITY

Bandwidth is a bugger because there's not enough of it. The Telstra Multimedia/Foxtel and Optus/Optus Vision cable roll-outs have significantly expanded the available bandwidth in the areas they have covered. Satellites are further expanding them. But so too, the revised powers and immunities for carriers under the *Telecommunications Act 1997* will constrain the terrestrial bandwidth bonanza we've seen in metropolitan areas over the last few years. Telstra and Optus both appear to be saying that their roll-outs have effectively stopped. We might find, far from 1 July 1997 being the dawn of a new era, that 1991-97 proves to have been an unusual window where optimism and activity in building terrestrial facilities overflowed. Warren Lee spoke earlier of DTT as a 'spectrum grab' by free-to-air broadcasters. We could equally see the extensive powers and immunities granted to Telecom and its predecessors until 1991, and to all three carriers between 1991 and 1997, as a 'sidewalk grab' or a 'nature strip grab' - a special set of rules which allowed them to build telecommunications infrastructure without all the state and local government planning complexities which confronted anyone who wanted to build anything else and which now confront both them and their new competitors.

And what abundance there is so often seems to vanish before our eyes. In the US, local cable viewers have significant viewing choices taken away from them when their monopoly provider chooses to switch their channel line-up on cable systems with very finite space, given the technology of the day. Spare channels on Australia's cable systems diminish by the week, Telstra's overseas lines get eaten up by Internet traffic as soon as they're laid, Word 6 devours the new hard drive whose speed so mesmerised you last Christmas, cinema audiences who were perfectly happy with daggy looking dinosaurs one decade want real ones the next and won't be remotely scared by anything else. Wide screens, Dolby Stereo, surround sound, they're going to be wanting to smell the things next. God help the people who have to sit in the mixing room editing that.

Expectations escalate, bandwidth demands soar and scarcity hangs on very tight. So who we let use or construct the bandwidth and what we let them use it for are critical public decisions.

RE-THINKING REGULATORY POLICY RATIONALES

Bandwidth is also a bugger because it's not a neutral concept. The architects of the *Broadcasting Services Act* might have wanted that legislation to be technologically neutral, but reality keeps busting out all over the legislative shop. Separate satellite pay TV licences in the Act hinted that seamless technology neutrality was an illusive creature, even in 1992. Digital radio is forcing some rethinking about whether special rules are going to be necessary to accommodate this new way of delivering radio or whatever other services the relevant spectrum might be wanted. And on-line services are not fitting neatly into or out of the service categories in the Act.

Elsewhere, the government picked GSM and bunked AMPS as the technology-of-choice for mobile telephony not so much because it was a 'better' technology (whatever that might mean), but because it was thought better capable of sustaining competing service providers. Hasn't that made them some friends in the bush, once AMPS' superior coverage characteristics have become clearer. The government has arm twisted and eventually legislated Telstra into a commitment to make available a specific technology, ISDN, to most Australians. The spectrum licensing system, whose very rationale was its ability to leave technology choices to the market, has found it hard, in practice, to resist prescription about the uses to be made of particular technologies.

So the technology choices keep getting made by governments, despite the rhetoric that they don't, and each time they're laden with value judgments. I don't mind value laden judgments being made about technology choices because decisions to leave those choices, to the market place are no less value laden. Leaving Telecom to choose its technology to deliver telephony to remote Australia may have been a crucial factor in limiting the development of satellite over the last decade and a half - a technology perhaps peculiarly well-suited to Australia. Leaving Foxtel and Optus Vision to drive a truck through the *Broadcasting Services Act* in relation to the development of cable TV, while setting up a special regulatory regime for satellite pay TV, has been arguably the most important element of recent media policy history.

As so often happens with major technological change, the scale of the investment and planning required for DTT gives us a chance to use the moment to think carefully about where we want our media industry to go. The introduction of radio in the 1920s and 30s gave us the chance to invent a national broadcaster. The introduction of television gave us the chance to decide that the 'dual system' of commercial and public broadcasting which we had arrived at by the 1950s would serve us well in this new medium. FM in the 1970s gave us the chance to invent community broadcasting. UHF television made regional commercial TV aggregation and truly national commercial television networks feasible.

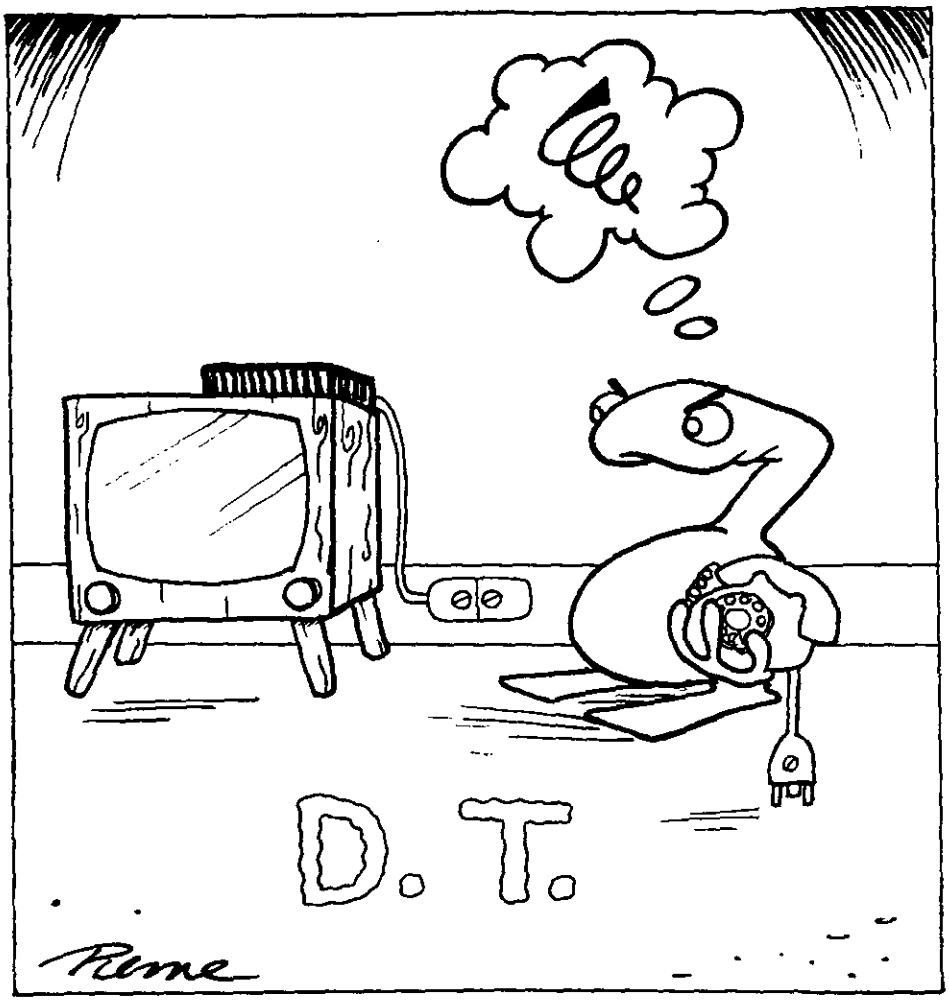
CONTROL OVER BANDWIDTH

So the task is to work out what policy challenges are around for Australian television and communications that DTT might help us address. For me, there's one central issue: the main reason bandwidth in Australia is a bugger is because the same buggers have got it all.

Compare us with the US. Network TV, cable TV, DBS, local exchange carriers, long distance carriers - all essentially different businesses run by different people, although the (US) *Telecommunications Act 1996* wants them all to move onto, and compete in, each others' patches. Network television has got its hands on spectrum for digital transmissions, but they have to hand it back, at some rapidly receding point in the future.

Look at the UK. Terrestrial TV dominated by the BBC, Granada and Carlton; pay TV dominated by satellite operator BSkyB; cable TV consolidating around Cable and Wireless, but with BSkyB wielding huge influence; telephony dominated by British Telecom. Although the mechanism is very different to the US, terrestrial TV in the UK has got its hands on the digital TV spectrum. Very big players, but quite a few of them.

Then look at Australia. Over 60% of the terrestrial TV audience is taken by PBL and Seven, where News is a significant shareholder; pay TV clamouring to be allowed to consolidate around News Corporation and Telstra, with PBL "equalising" its way in somehow; telecommunications dominated by Telstra. And the ABA has recommended that terrestrial TV get the digital TV spectrum, initially.



COMPETITION AND DIVERSITY OF OWNERSHIP

I think we have to see DTT as an opportunity to diversify players in the Australian media business, or at least to ensure that the limited diversity already existing is not further reduced. In that, I think DTT's capacity to offer a link to households which is not dependent on the cable or satellite infrastructure controlled by the telecommunications carriers is vital (although the set-top box is still capable of achieving any of the gatekeeper power that centralised transmission infrastructure does not). Broadcasters have always been in control of their own technical destiny and I want to see them at least with the option of choosing to stay that way.

The tough issue is how to achieve it. Do we seek competition and diversity within platforms or between platforms? That is, do we try to get many players into DTT, or do we try to encourage a big new player which concentrates its attention on digital delivery and can compete with the major terrestrial and pay operators? I don't think the latter is really an option, because I don't think the commercial future of the digital terrestrial platform is secure enough for anyone to take a punt on it alone. Our best option is to ensure there is space for existing free-to-air broadcasters on the digital platform, although I'm troubled by the nature of the ABA Report on Digital Terrestrial Television which appears so focussed on that as the sole objective.

PROBLEMS WITH THE ABA REPORT

The main purpose of the ABA's approach seems to be to replicate in the digital transmission era the structure of the analogue free-to-air television industry. It's not at all clear why that should be the only goal. In particular, we might look much more closely at the experience of regional commercial television under aggregation and investigate ways of using DTT in the bush to do something more than slavishly follow the metropolitan industry structure. That is what is happening in telecommunications, with regional operators like Northgate.

I agree totally with the scepticism which has already been expressed about High Definition Television as a major driver in the consumer television market. People

have been talking about HDTV for decades - successive improvements in the black and white days were thought of as 'high definition' at the time. When the technologies that now bear the name 'HDTV' began to be developed, the goal was cinema quality pictures and CD-quality sound. The problem is, cinema-quality pictures have got better and better, and cinema sound is now capable of way more dramatic things than simple home CDs. Further, the cinema has reinvented itself as a social experience, totally differentiating itself from the experience of even high resolution audiovisual entertainment in the home. I simply don't believe a substantial share of consumers are going to think HDTV alone is worth many dollars to them.

Finally, the ABA report seems to have problems even on its own terms. It tries to treat the existing free-to-air stations equally, promising each a digital channel. Yet the reality is that this can only be achieved if there is shuffling around. I don't understand all the technical issues, but I'm troubled at the implications that Channel 10, the most vulnerable commercial broadcaster in a multi-channel environment, will need to shift frequencies - a fairly inequitable outcome, in a vision which is entirely based on equity for existing players.

ROLE OF NATIONAL BROADCASTERS

It's worth noting that in the UK, the BBC has been given the DTT multiplex with the best reach. One of the most important things that needs to happen with DTT in Australia is a restatement of the enduring significance of the national broadcasters, the ABC and the SBS, to our television culture. They need to be given a central place in any future television transmission system. The ABC, the SBS, the Ten Network - I'm not at all averse to the vulnerable getting a leg up. If the strong complain, we can always tell them to bugger off.

This is the full text of a speech given by Jock Given, Director, Communications Law Centre, UNSW at the IIC Conference in Sydney on 13 August 1997.

Telstra v APRA - Implications for the Internet

Simon Gilchrist examines recent High Court decision and the implications for Internet service providers in terms of their liability for infringement of copyright on-line

The recent High Court of Australia case on the liability of Telstra for the playing of music on hold (*Telstra Corporation Limited v Australasian Performing Right Association Limited (14 August 1997)*) has immediate implications for the development of the Internet industry in Australia.

At its broadest, the case imposes strict liability on Internet Service Providers (ISPs) for the transmission of copyright material to their customers - even material over which they have no control and no knowledge. This has exposed all Australian based ISPs to the very real risk of being at the receiving end of legal proceedings.

BACKGROUND TO THE CASE

The proceedings were brought by APRA (an Australian collecting society for musical works) against Telstra (one of the general telecommunications carriers) over the issue of who, if anyone, should be liable for the music transmitted over the general telecommunications network as "music on hold".

Telstra's involvement in the provision of music on hold occurs the following ways:

(a) an organisation plays music to its callers that it puts on hold. In this case Telstra's only involvement is the operation of the telecommunications system.

(b) Telstra plays music to callers to its service centres that it puts on hold.

(c) Telstra provides its CustomNet service to certain customers. The CustomNet service is a call managing system. As part of the service Telstra provides music on hold to callers to CustomNet customers that are put on hold.

In each of the above circumstances, music is played either via a CD or tape player or via a radio receiver.

THE CLAIM

APRA commenced proceedings in the Federal Court of Australia against Telstra arguing that the transmission of music in each of the above circumstances constituted an infringement of its diffusion right in the music and that Telstra was liable for that infringement. APRA is for all practical purposes the owner of the diffusion right in all musical works in which copyright subsists.

The High Court accepted APRA's arguments. (The trial judge found for Telstra (*(1993) 118 ALR 684; (1993) 27 IPR 357; (1993) 46 FCR 131*) but APRA successfully appealed to the Full Federal Court (*(1995) 131 ALR 141*) and the High Court rejected Telstra's appeal.)

The case focused on the meaning of the diffusion right, which is defined in section 26 of the Copyright Act - one of the less clear sections of the that Act. The owner of the diffusion right in a work has the exclusive right to object to the transmission of the work to subscribers to a diffusion service.

Section 26 provides that "the transmission of material to subscribers to a diffusion service" means the transmission by wire of the material in the course of a service of distribution of broadcast or other material (whether provided by the person operating the service or not) to the premises of subscribers to the service.

The person liable for the transmission of material to subscribers to a diffusion service is the person operating the service. That person is deemed to be the person who enters into agreements with subscribers and undertakes to provide them with the service (regardless of whether he or she is the person who transmits the broadcast or other material). Section 26(5) provides that where the diffusion service is incidental to or part of a service of "transmitting telegraphic or telephonic communications", a subscriber to the telegraphic or telephonic service is deemed to be a subscriber to the diffusion service.

Telstra argued that it did not have agreements with its customers to distribute music to them. It argued therefore that there was no transmission of music to subscribers to a diffusion service.

The High Court held that the diffusion service does not need to be for the transmission of the copyright material, but can be for the transmission of other material, in the course of which copyright material is transmitted. The High Court deemed Telstra to have agreements in place with each of its customers for the provision of a service - being music on hold. It did this by holding that music on hold was a service and deeming Telstra to have agreements with each of its subscribers to provide that service. It therefore found Telstra liable.

The critical step in the High Court's reasoning was that Telstra had agreements with each of its customers to provide (incidental to or as part of the service of transmitting telegraphic or telephonic communications) a service of distribution of broadcast or other matter to the premises of the customers.

There is no element of intent or knowledge in copyright infringement proceedings. If a person does an act comprised in the copyright in a work without the authority of the owner of copyright, he or she infringes copyright - regardless of whether he or she knew or ought reasonably to have known that their acts would constitute an infringement of copyright. An infringer's state of mind, however, is relevant when determining the monetary remedy that the infringer should pay. The basic rule is that an infringer must pay either damages or an account of profits. The owner of copyright is entitled to choose what method generates the highest dollar figure. If, however, an infringer can prove that he or she infringed copyright innocently (i.e. that he or she was not aware and had no reasonable grounds for suspecting that his or her acts would constitute an infringement of copyright), the owner of copyright is only entitled to an account of the infringer's profits. Damages are typically larger than an account of profits. In addition, it is usually difficult, time consuming and therefore expensive to quantify an account of profits.

The High Court did, however, accept Telstra's defence in relation to the transmission of music that originated from a radio broadcast. This is a technical defence which was primarily designed to allow cable operators to re-transmit free to air broadcasts.

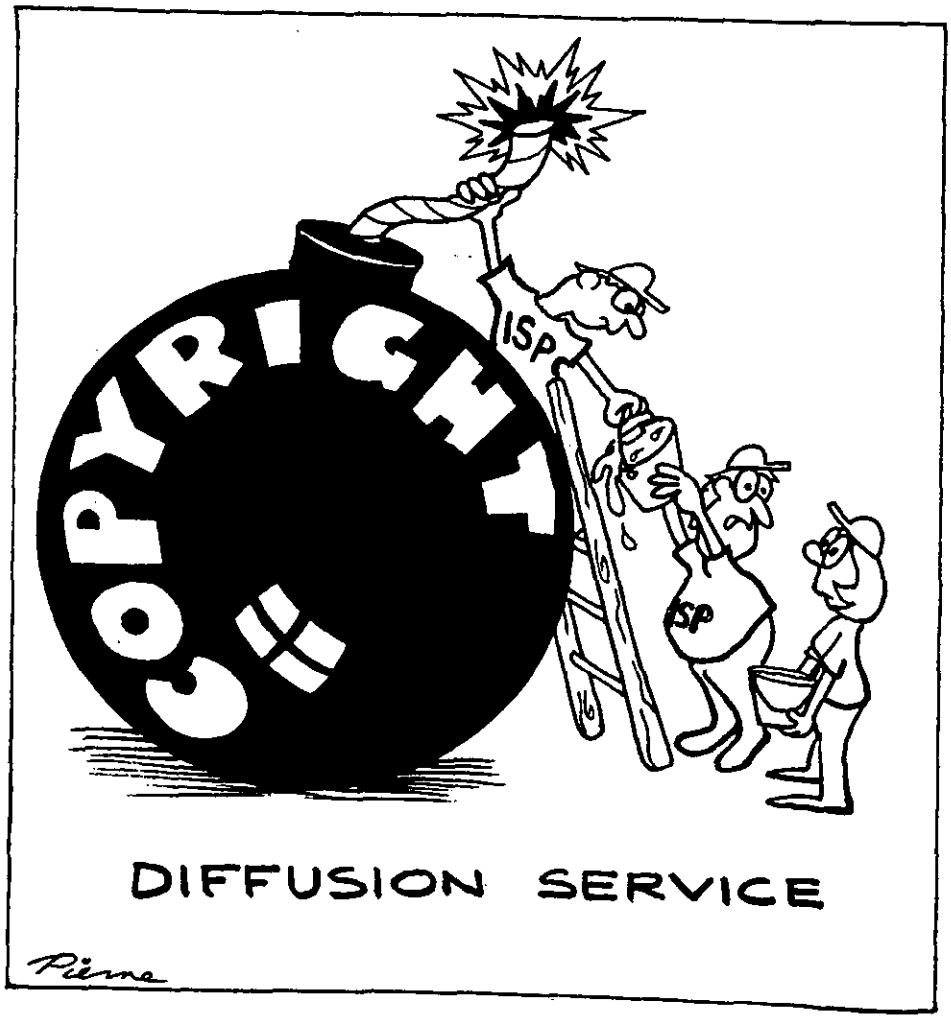
IMPLICATIONS FOR ISPs

This case has direct implications for ISPs. It would appear from the case that an ISP that unwittingly transmits unauthorised copyright material from the Internet to a customer's computer will be directly liable for the infringement of copyright caused by that transmission.

An ISP's primary function is to transfer material from the Internet to its customers. This material consists of e-mails sent to the ISP's customers, messages posted to news groups and viewed by the ISP's customers, computer files stored on FTP sites and down loaded by the ISP's customers, or web pages viewed by the ISP's customers. In short all of these activities involve the transmission of material from the Internet to the computers of the ISP's customers. Some of this material is either created by the ISP or is created by the ISP's customers and stored by the ISP on its servers (such as web sites that the ISP hosts). The majority of the material, however, is originated by third parties who have no connection with the ISP or its customers (other than being physically connected to the Internet).

The majority of this material is protected by copyright, this includes not just literary works but also images, music and video.

In many circumstances the owner of copyright has consented to the transmission of its material over the Internet - that is the purpose of the Internet. The act of placing copyright material on the Internet in all likelihood constitutes an implied licence to anyone to transmit, view and/or listen to the



material. A licence does not need any formalities, it can be implied.

In certain circumstances, however, the copyright owner will not have consented to the placement of its material on the Internet. From the reasoning in the Telstra v APRA case it appears that if an ISP transmits copyright material to its customers in the course of transmitting other Internet content, that transmission is a "transmission to subscribers to a diffusion service". In those circumstances, the unauthorised transmission of that material from the Internet to an Internet user's computer will constitute an infringement of the diffusion right in the material.

It also appears that an ISP would be directly liable for the infringement of copyright in the above circumstances. This is because it is the person who has agreements with its customers to transmit Internet material to them. Section 26(5) does not apply because the service of transmitting Internet material is not "only incidental to, or part of, a service of transmitting telegraphic or telephonic communications".

This is the case regardless of whether the ISP

(a) agreed to transmit the copyright material;

(b) originated any of the copyright material;

(c) had any knowledge of the existence of the copyright material; or

(d) had any way to prevent the transmission of the copyright material.

In other words the ISP faces strict liability.

The ISP is primarily liable for the infringement. The copyright owner is not required to take any action (or even identify) the person who place the copyright material on the Internet.

STEPS AN ISP CAN TAKE

The only way an ISP can totally avoid liability is to obtain licences from copyright owners. In the case of some classes of copyright material this is relatively straightforward (but not necessarily cheap). For example, APRA can grant licences in respect of virtually all musical works in the world. Most business that play or broadcast music have an APRA licence. But these types of blanket licences are not available for all classes of copyright material. For example, there is equivalent of APRA for photographs. In other cases only an incomplete licence is available. For example, the Copyright Agency Limited (CAL) may be able to grant on-line licences for some of the literary works controlled by it but not others. As a practical matter, therefore, an ISP can only obtain licences for certain types of copyright material. The Telstra v APRA case, however, together with the growth of the Internet may be the impetus for many owners of copyright to appoint collecting societies to collect royalties from ISPs and similar organisations on their behalf.

An ISP cannot "contract out" its obligations by stating in its agreements with its customers that it will not be liable for any infringement of copyright of which it is not aware. Its liability may only be waived by the owner of the infringed copyright material. An ISP can, however, attempt to shift its monetary exposure via contract. An ISP can seek to obtain indemnities from its customers in respect of any material that those customers post to the Internet, for example, material that a customer includes in a web site hosted by the ISP or material that a customer posts to a news group. As a matter of course an ISP should obtain indemnities from its customers for any liability that the ISP may incur as a result of material posted on the Internet by its customers, whether for infringement of copyright or other intellectual property rights or defamation or otherwise.

An ISP could also seek to obtain indemnities from the other ISPs that it connects to. An ISP's only connection to the Internet is via other ISPs - that is the nature of the Internet. Those ISPs are, however, unlikely to provide such indemnities. In certain limited circumstances an ISP may be able to commence proceedings against the person who placed the unauthorised material on the Internet or the ISP that originally hosted the material. But this would depend on the ISP being able to identify the person, being able to overcome any jurisdictional hurdles if the person is located outside Australia and being able to recover any judgment against the person.

At a practical and immediate level, however, this decision will encourage ISPs to take a totally "hands-off" approach to the material that they transmit. If an ISP can show that it did not monitor or control what it transmitted to customers, it may be able to succeed on an argument that it was an innocent infringer. This would limit a copyright owner's remedy to an account of profits. An individual copyright owner may think twice about commencing proceedings if all it stands to gain is an account of profits. A collecting society, however, would still stand to recover significant sums given the number of copyright owners it represents.

Of concern to the development of the Internet in Australia is the possibility that ISPs and similar businesses will engage in a form of risk arbitrage and avoid basing themselves in Australia. Even if this does not strictly speaking serve to shield offshore ISPs from liability, a local copyright owner may be less inclined to take action against them.

This case and the risk that it imposes on Telstra and ISPs is likely to be the impetus for the Federal Government to amend the Copyright Act to clarify whether and if so when carriers and ISPs should be liable for the unauthorised transmission of copyright material by them. This is particularly the case given the Government's desire to maximise the value of Telstra in the upcoming float. The Federal Government has released a discussion paper on the reform of the diffusion right "Copyright Reform and the Digital Agenda" (http://www.dca.gov.au/pubs/digital.html). It has proposed that ISP's only be liable for unauthorised transmissions that they "authorised". Whilst this is not an entirely satisfactory solution, it should assist most ISPs. Any reforms, however, are likely to take a significant amount of time before being agreed on and enacted.

In the meantime, unless they take appropriate steps, ISPs should expect to start receiving polite but firm letters of demand from copyright owners and their lawyers. OzEmail, one of Australia's largest ISPs, is already in court with APRA for alleged infringement of copyright in musical works.

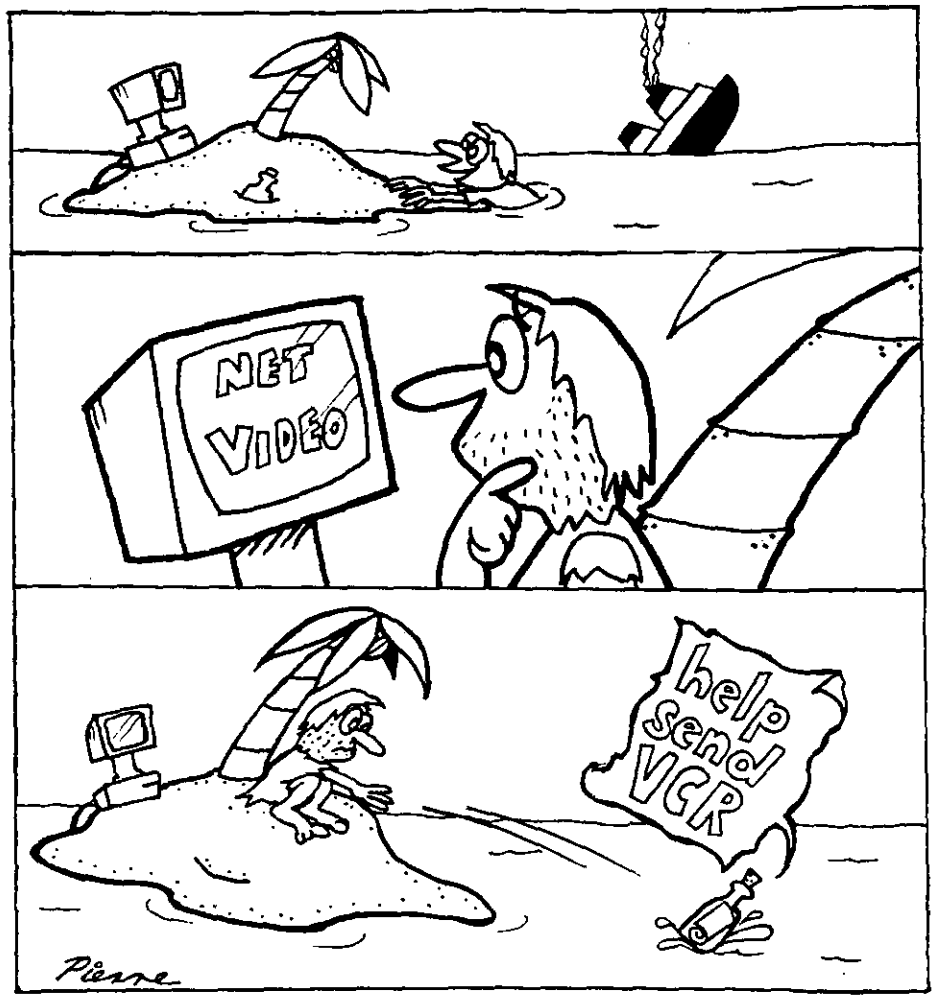
Simon Gilchrist is a lawyer at Gilbert & Tobin.

TV Or Not TV? What the Internet is Not

John Colette explores the commercial viability of the move to "video-on-the-Net" and the misconceptions behind it.

Most organisations charged with "modernising" themselves through addressing the Internet face an underlying challenge to deliver things that "work" in this new environment. For at least two years after Tim Berners Lee demonstrated the HTML protocol to fellow academics, the World Wide Web consisted mostly of the same grey pages, (numbering in the thousands....) concerning the academic world which originated them.

In the few years since then, the medium of the millennium has been seen as the contested ground for the next generation of businesses. All businesses. From traditional media companies, to software developers to companies without a history prior to 1992, the Internet is looking for its "killer apps" - the breakthrough ideas that will leverage players into this new market into a dominant position.



DRIVING ELEMENTS OF THE MEDIUM

So what do we have? A medium, with the ability to carry different media types that utilises an addressing system that pre-empts the "portable" telephone number in terms of mobility. We have a medium which is able to be produced on technology that costs a fraction of that required for print production and publishing, or traditional broadcast media. We have a medium that allows a global footprint which draws an audience to the media, rather than delivers pieces of media (broadcast signals, bits of paper) to the audience.

For many, the most important feature of the medium is that it allows the audience to respond, to reconfigure the content as it is experienced.

What is being offered in the face of this possibility is (drum roll...) television.

For some, the only thing that the Internet can aspire to, is to mimic television. From the "channels" model of megadollar network websites, to the push to "video-on-the-Net" there seems to be an imaginative vacuum that cannot understand a screen based media outside of television. Marketing doublespeak like "media rich experience" or "content diversity" mean that television is seen as the "aspirational" model for conceptually challenged media pioneers.

PROBLEMS WITH VIDEO-ON-THE-NET

Lets get it straight. Video-on-the-Net is hopelessly far behind the early "postage stamp" experience of video on a PC. There is already an existing means of distributing video based material - it's called TV. There is already a full screen, full motion, stereo sound video replay device with that is capable of deploying content in 80% of Australian homes and businesses. It's called a VCR. Video on the Internet runs at 1/100th of the speed of a x2speed CD ROM. And how popular was CD ROM as a medium for video distribution?

Looking at the facts, the Internet is a packet switched technology. Video is a streaming technology. Even with the use of severe compression and buffering, the size and quality of a "video" feed is a joke. Why would anyone bother to download video across the world when every design guide for web content stresses that still images should be kept to a minimum size?

THE BANDWIDTH MYTH

Forget the myth of "soon the bandwidth is coming". There is nothing to suggest that foreseeable bandwidth will allow an improvement. Accessing Fox News online's video feeds on a 256k ISDN line is still very slow compared to a first generation CD ROM. This is partly due to the fact that the point-to-point bandwidth people have available is one thing, but the switching technology to

carry data packets is not available in a form that will allow "the bandwidth" the video-on-the-Net cargo cult is hoping for.

From a purely practical viewpoint, what is the business case for providing all of this bandwidth? Both major telecommunications providers are involved with providing multiple video feeds to the home - it's called cable TV. The type of market share available is far short of the slice available for broadcast media. What additional benefit is there is providing more bandwidth in an environment where consumers are prepared to pay around $40 a month in total for ALL services delivered on the cable?

It is true that cheap digital video ("DV") cameras, desktop editing systems and new enabling technology have lowered the entry point for producing video content. However, it still is not that cheap, and in a perfect world, where a media democracy of "many-to-many" content prevailed, what would we watch? Each other's home videos?

My assistant at work used to make short 3D movie clips, compress them, optimise the frame rates and deploy them on his web site. I questioned him about his intentions in this activity, and he said it was a way of "getting things out there". Would you care to spend five minutes logging on and downloading some?

LITTLE VIABILITY AS A MASS APPLICATION

The factors of quality of experience, cost of delivery and specifity of content all affect the video-on-the-Net question. For specialist applications, like remote approval of film and video post production, there is a strong case for highly specific content at a premium price - but the motivation is completely different. This is not a "mass" application - it is more like using video bearers in traditional broadcasting applications.

The cost of delivery is important, because originating good content costs money. For this to be practical, the cost of production needs to be recouped over range of paying markets - even offset against the cost of multiple productions with different profit differentials. This is how the studio system in Hollywood emerges as a means of consistently producing viable, mass market, entertainment properties. Once the investment in these is made, the technical quality of the delivery medium is controlled, as well as the revenue streams to be gained from that delivery. Will people pay per view for Internet TV?

Overall, the quality of experience is the most important factor in determining the viability of a delivery medium. Internet based video is likely to improve in quality, but at the same time it is unlikely to reach VHS quality within a reasonable planning period for serious consideration by business. At the same time, the recent US launch of domestic DVD, (about to take off locally during the Christmas season) delivers Dolby surround sound, video way past VHS quality, no tape drop outs and enhanced media features (including additional film notes) in a package the size of a CD ROM. Give me the choice between a Hollywood movie, and some bumf lurching like a pixilated postage stamp across the Internet at two frames a second and the choice is a no-brainer. Someone will be on the Internet looking at video, but that's a hobby, not a media business.

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CanWest's control of TEN

John Corker reports on the Federal Court's first decision under the *Broadcasting Services Act* 1992 that deals with the concept of control of a broadcasting licence.

In CanWest Global Communications Corporation ("**CanWest**") and Donholken Pty Ltd and Selli Pty Ltd v Australian Broadcasting Authority ("**ABA**"), a judgement of Hill J handed down on 8 August 1997, the Federal Court has given a clear indication that the phrase, "in a position to exercise control" of a licence, company, newspaper or control of votes cast at a meeting of the company is to be interpreted broadly.

Hill J, in determining whether there was a reviewable error made by the ABA in its finding that CanWest, a foreign person, was in a position to exercise control of Ten Group Ltd ("**TGL**") has relied strongly on the judgement of the Full Federal Court in the case of *Re Application of The News Corp Ltd* (1987) 15 FCR 227 (*News Corp* case) and reaffirmed that:

> *"questions of control, whether through voting power or financial interests, are to be determined by practical and commercial considerations rather than highly refined legalistic tests. The relevant provisions of the Act [Broadcasting Act 1942] are not directed to or concerned with subtleties of company law."*

This is entirely appropriate as it is the *News Corp* case upon which the control rules of the BSA were based. Hill J, in adopting the above quote of Lockhart J says that "the same may with even greater force be said of the present legislation".

Two companies, Selli and Donholken were established at the behest of CanWest to hold shares in the TEN Group Limited which might otherwise have fallen into the hands of persons described by Mr Izzy Asper, Chairman and Chief Executive of CanWest as "anti-bodies, mischief makers or stupid people". The *News Corp* case approach led Justice Hill to comment on the two companies:

> *"Where a company is established in circumstances that its sole business is the holding of shares in another company where every substantial question which could in that company arise for decision requires the consent of the foreign person, where the foreign person carries substantially all of the financial risk and where the foreign person can act to ensure that both the shareholders and directors can be replaced by persons who might be expected to do the bidding of the foreign person if the existing shareholders and directors do not, common sense and reality permits of only one conclusion, namely that the shares held by the special purpose company are under the control of the foreign person."*

This concept of common sense and reality or "commercial and economic reality rather than of legal theory" was endorsed by Hill J in a number of areas of the judgement.

The first of these was in the acceptance of the ABA's finding that CanWest had a 52.5% voting interest by reason of it being in a position to exercise control of votes cast by Selli and Donholken at a general meeting of TGL. The ABA had not found that there was any agreement or understanding between CanWest and the directors of Selli or Donholken as to way votes might be cast. Nor had it found that CanWest had an immediately enforceable right to determine the way that the votes were cast. The ABA had relied on an overall factual matrix of control to make the voting interest finding.

Hill J said:

> *"Normally where control is not direct through trusts or shareholdings, it would be necessary for the Authority to reach a conclusion as to whether an arrangement as to the exercise of votes existed without which a finding of control could not be reached. Certainly it would have been open to the Authority so as to find in the present case, just as it was also open to the Authority to find that there was no necessity for any understandings or arrangements to have been arrived at because of the straightjacket in which the Selli and Donholken directors and shareholders were placed... So tight was the control that there was, in my view, no need in this case to make a finding of arrangement."*

COMPANY INTERESTS

One aspect of this judgement that may cause media lawyers to re-consider how transactions and corporate structures in the media sector might be planned is the confirmation that the concept of de facto rather than legal control applies not only in the area of control of a licence, company or newspaper but also in the area of company interests, particularly in the area of voting interests. Hill J specifically says:

> *"The alternative test of "shareholding interest" must likewise be construed broadly, having regard to the definition of "control" in s.6(1) of the Act."*

It is suggested that he means company rather than shareholding interest as the deemed 15% company interest level is the alternative test of control.

But what seems to follow from this is that the definition of control, which includes legal and equitable rights but also arrangements, understandings and practices, whether or not enforceable, is to be given considerable weight wherever it appears in the Act. It further follows that this de facto control should be borne in mind when assessing whether certain interests are company interests and their quantum. This seems appropriate because measuring company interests is a means of measuring control, not just a technical concept.

QUALIFYING REQUIREMENTS

One of the most difficult aspects for the ABA in assessing the transaction documents was to consider the effectiveness of clauses that seek to stop interests arising, obligations becoming binding or powers to convert being operable unless the interest, obligation or power arises or can be exercised without breaching of foreign control and ownership legislation.

There were a large number of these types of clauses. The ABA took the view that certain of these provisions were not effective in preventing the ABA from

finding that a situation of possible control existed and would therefore not operate in practice to prevent a breach of the control provisions occurring. The judgement sets out a number of these clauses and decides that one such clause does not have the effect intended by its drafter.

Hill J says:

> *"In my view the qualifying requirements clause does not require a contrary conclusion. ... I do not say that it is a sham or that it would be consciously ignored by the parties to the various agreements, but the practical result is that CanWest can, at any stage ensure that options are exercised or debentures converted to ensure that shares in Selli and Donholken are held by persons, who although not controlled by CanWest are known to be sympathetic to that company."*

It seems therefore that the ABA can look behind these "qualifying requirements" and consider the practical and commercial effect of them on the conduct of the parties in determining whether they will prevent a company interest or control arising.

CONCLUSION

The concept of control under the BSA, whether it appears as part of a company interest test or in determining whether a person is in a position to exercise control of a company, licence or newspaper, is to be interpreted broadly. There is no need for an immediately enforceable right to exist nor even any need for any implicit or explicit understanding or arrangement to exist between the person who is in the position and the entity that may be controlled. The primary means by which control questions under the BSA are to be determined is the one elicited by Lockhart J in the *News Corp* case. They are to be determined by practical and commercial considerations, by commercial and economic reality rather than by legal theory.

[Note: An appeal has been lodged against this decision to the Full Federal Court.]

John Corker is Manager, Legal of the ABA. The views contained in this article of those of the author only, not the views of the ABA.

Media Policy and Anti-siphoning

In the first of a 2 part series on anti-siphoning, Brendan Moylan analyzes the current legislative and policy regime and explains why it is unfair on pay TV operators and in need of substantive reform

After the dust of the media ownership debate has settled, it appears that once again nothing is to be done about the anti-siphoning provisions found in section 115 of the *Broadcasting Services Act* 1992 (Cth) ("**BSA**"). After a brief flurry of interest at the time of the recent Ashes Tour of England, the issue of how to address the problems inherent in the anti-siphoning provisions of the BSA has been side stepped by a Government which has demonstrated a singular inability to act decisively in the area of media policy. Nonetheless, those problems still exist: section 115 continues to operate unfairly in favour of free-to-air broadcasters without providing any consequent benefit for consumers.

SIPHONING DEFINED

According to the Explanatory Memorandum to the BSA, "siphoning" involves the:

> *"obtaining by a subscription television broadcasting licensee of the rights to broadcast events of national importance and cultural significance that have traditionally be televised by free-to-air broadcasters, such that those events could not be received by the public free of charge".*

In other words, siphoning is the migration of programming from free-to-air television exclusively to pay TV. An "event" can only be "siphoned" where:

(a) the *exclusive* rights to televise that event are acquired by a pay TV operator;

(b) the event is one of "national importance and cultural significance"; and

(c) the event is one which is traditionally shown by free-to-air broadcasters at no charge.

Siphoning is characteristic of events with a short "shelf life": ie, events which have high viewer demand over a short time period, most obviously sporting events[1].

LEGISLATIVE INTENT & MEASURING SUCCESS

At the time section 115 was introduced, the then Minister for Communications and the Arts observed that "for at least 5 years, less than 20% of Australians will have access to pay TV". The Australian Broadcasting Authority ("**ABA**") has noted on a number of occasions that a significant proportion of the viewing public will choose not to subscribe to pay TV at any time, whether for financial or other reasons. Section 115 was introduced on ostensibly equitable grounds to ensure that non-subscribers continued to have access to events of "national importance and cultural significance" which had been traditionally shown on free-to-air television.

In determining whether the anti-siphoning provisions operate effectively the first question to ask is whether the legislation has prevented pay TV operators from obtaining exclusive rights to events of "national importance and cultural significance" which had been traditionally shown on free-to-air television so that those events are no longer seen on free-to-air television. The second question to ask is at what cost this end has been achieved and whether it could be achieved more efficiently.

RELEVANT PROVISIONS

The principal anti-siphoning provision of the BSA is section 115, which provides:

"The Minister may, by notice published in the Gazette, specify an event, or events of a kind, televising of which should, in the opinion of the Minister, be available to the general public."

Section 115 is complemented by section 99, which makes the holding of a subscription television licence conditional upon the conditions set out in Part 6 of Schedule 2 of the BSA. Clause 10(1)(e) of that Schedule prevents a subscription television licensee acquiring the rights to televise an event specified in a notice issued under section 115(1) unless:

(a) a national broadcaster has the right to televise the event; or

(b) a commercial television network covering greater than 50% of the Australian population has acquired the rights to televise the event.

OPERATION: THE ACQUISITION OF RIGHTS

It should be stressed that the combined operation of section 115, section 99 and clause 10(1)(e) *do not* prevent a pay TV operator acquiring the rights to televise a listed event. They do, however, prevent a pay TV operator acquiring those rights prior to the acquisition of similar rights by a commercial or national broadcaster. It follows that a subscription broadcast licensee can never acquire exclusive rights to a listed event.

Importantly, however, section 99 prohibits a pay TV operator acquiring the right to televise a listed event "on a subscription television broadcasting service" until a national or commercial broadcaster has acquired the rights to televise the event. In other words, a pay TV operator cannot acquire the right to televise a listed event (even where such rights are limited to televising the event on pay TV) until a national or commercial broadcaster has acquired the right to televise the event.

The anti-siphoning provisions of the BSA provide an incentive for free-to-air broadcasters to acquire all rights (including pay TV rights) to listed events. Those pay TV rights can then be re-sold to pay TV operators, effectively handing control of access to listed events to free-to-air operators. Additionally, it allows free-to-air operators who acquire rights to listed events - and not event organisers - to profit from the sale of pay TV rights to those events.

Provided that subscription broadcast licensees cannot acquire the free-to-air rights to a listed event, there is no reason why those subscription broadcast licensees should be prohibited from bidding for and acquiring the exclusive right to broadcast listed events on pay TV.

DIVERSITY AND PAY TV

The furore over the limited coverage of the Ashes cricket tour of England in 1997 focused attention on the anti-siphoning provisions of the BSA . The Nine Network, which held the rights to televise the tour, argued that it could not shift regular programming to make room for the cricket[2]. Pay TV offers a compromise because multi-channel networks have sufficient channel space to devote to coverage of entire events. The anti-siphoning provisions of the BSA can and have been used to prevent realisation of the potential of pay TV to provide more complete coverage of listed events.

The ABA conducted an initial investigation[3] into which events of "national importance or cultural significance" should be gazetted by the Minister under section 115. In its response, the Federation of Australian Commercial Television Stations ("**FACTS**") argued that the ABA's "national" focus was inappropriate:

"Many events which are considered important by many Australians may not meet the ABA's criteria of "national importance or cultural significance" This is particularly so of a great many sporting events which have very strong, but regional, or local following."[4]

The irony of this argument - that the great majority of such events are not (and, applying the logic advanced by Nine in its decision not to televise sessions of the Ashes series, could not be) televised by free-to-air operators - appears to have escaped FACTS. FACTS went on to recommend that the Minister include on the list "all events ... which the general viewing public are presently able to view free of charge", arguing that pay TV operators would pay inflated prices for rights to events in order to secure programming[5].

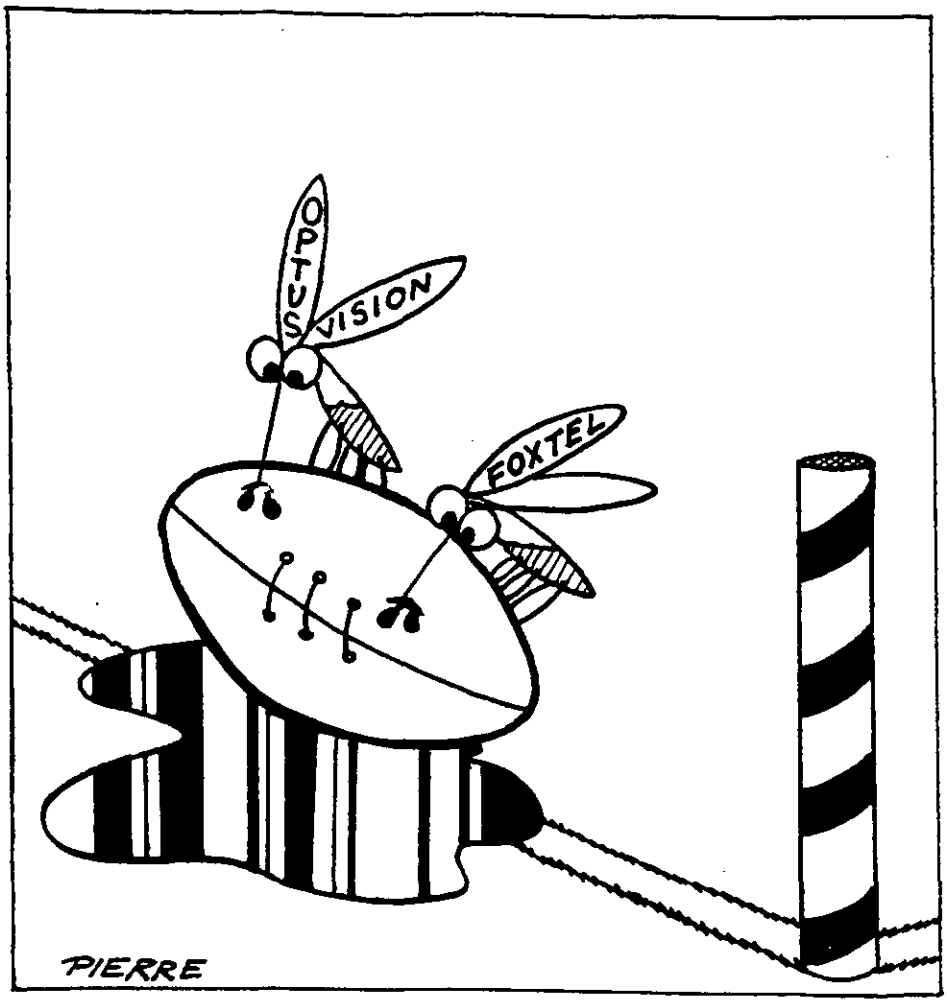
COMPOSITION OF THE LIST

In its 1994 report on its investigation into the possible composition of the anti-siphoning list, the ABA noted that "apart from a few major sports, all other sporting bodies and the [then Trade Practices Commission] oppose the FACTS position"[6]. The Australian Football League, for example, submitted that legislative restrictions on AFL coverage were "unwarranted and unnecessary", pointing out that its "current contract with the Seven Network ... combined with market forces and public demand will ensure that major AFL events will remain on free-to-air television"[7]. The Australian Cricket Board wanted to retain the ability to "canvass the wider market including pay television" in the event it considered that "it was not possible to achieve a fair market price from terrestrial broadcasters"[8]. In its response to the ABA's Investigation Paper, the Confederation of Australian Sports (the peak umbrella body for national sporting organisations) submitted that "arguments which imply that Australian sports coverage already works in the public interest would be difficult to justify"[9]. FACTS appears to have been as interested in protecting events organisers against themselves as it was at protecting the ability of the general public to continue to view certain events.

The ABA developed four options for the anti-siphoning list which it presented to the Minister. They ranged from a comprehensive list (similar to that advocated by FACTS) to a "watch" list (which contained no events but rather proposed continuous monitoring which might trigger the listing of certain events in the future). In its report, the ABA argued that the comprehensive FACTS list was likely to limit the ability of pay TV to deliver diverse coverage of events, noting the "limited capacity of free-to-air broadcasters to provide complete coverage of events to which they hold ... rights"[10]. Further, the ABA argued, a comprehensive list such as that advocated by FACTS "could be considered anti-competitive as it gives the power to commercial television to 'hobble' pay TV by restricting their exclusive access to virtually all current sports"[11]. Despite such objections, and despite the ABA's recommendations that a compromise position be adopted, the list finally gazetted by the Minister for Communications and the Arts on 6 July 1994 was in substantially the form suggested by FACTS[12].

REMOVING EVENTS FROM THE LIST

In response to concerns that free-to-air broadcasters would "hoard" rights,



section 115 of the BSA was amended to provide for removal of events from the list:

(a) automatically after a period of 168 hours (7 days) from the time of the event ; and

(b) at the discretion of the Minister.

The Explanatory Memorandum accompanying the relevant amendments to the BSA suggested that the Minister could exercise his discretion to remove events from the list where commercial broadcasters had been given a "real opportunity" to acquire the relevant rights but had chosen not to do so, or where the rights to an event were acquired by a commercial television licensee who then failed to televise the event or televised only an unreasonably small proportion of the event.

Unfortunately, and because of the nature of the listed events (in particular the short term appeal of such events), the amendments to the BSA which allow for the removal of listed events have had no practical effect. Automatic removal under section 115(1B) of the BSA is effectively useless: none of the events contained in the anti-siphoning list are likely to be watched 7 days after they have concluded[13].

THE NINE NETWORK CASE

In early 1997 the Australian mens cricket team toured South Africa. News Corporation Limited ("News") acquired the right to broadcast matches played by the Australian team while on that tour. News initially offered the free-to-air rights to the series to the Nine Network but the parties were unable to agree on terms. News then concluded an agreement with the Seven Network Limited ("Seven") under which Seven was granted the exclusive Australian free-to-air television rights to the tour matches. Importantly, however, Seven was precluded from commencing its telecast of any match earlier than 7 days[14] from the conclusion of the relevant match. Further, Seven was under no obligation to telecast any part of any match in respect of which it held rights. News then sold the exclusive pay TV rights to the series to FOXTEL. No restrictions were placed on FOXTEL's ability to broadcast the matches.

The practical effect of the arrangements between News, Seven and FOXTEL was to give FOXTEL exclusive live rights to the tour while Seven had the rights to televise a highlights package and a delayed telecast.

Nine argued to the ABA that the arrangements between News, Seven and FOXTEL contravened section 115. The critical issue was whether Seven, in acquiring delayed and highlight rights, had acquired "the right to televise" the tour within the meaning of clause 10(1)(e) of the BSA. After an investigation, the ABA concluded that Seven had acquired the rights to televise the event within the meaning of clause 10(1)(e).

Arguing that the ABA had misconstrued the operation of the licence condition contained within clause 10(1)(e), Nine challenged the ABA's finding under the *Administrative Decisions (Judicial Review)* Act 1977 (Cth). Nine contended that FOXTEL was only entitled to acquire rights equivalent to or less than the rights acquired by Seven. In response, FOXTEL argued that the reference to the "right to televise" in clause 10(1)(e) was a reference to a bare entitlement to televise the event and said nothing about when that right was to be exercised. Justice Lockhart found for Nine, holding that:

> *"The rights acquired by the subscription licensee must, in order to satisfy condition 10(1)(e), be rights not greater than the rights of the free-to-air broadcaster to televise the event."*[15]

His Honour held that the right to televise highlights of a cricket match is not substantially the same as the right to broadcast the match itself. On appeal, the Full Federal Court upheld Justice Lockart's finding.

The effect of the decision in the *Nine Network* case is to reinforce the ability of free-to-air broadcasters to act as arbiters of which events will or will not be shown on pay TV. Taken to its logical conclusion (and bearing in mind the fact that removal of events from the list in the Minister's discretion is unlikely to occur before an event's "use by date"), Justice Lockhart's decision means that free-to-air broadcasters can prevent events being shown on pay TV even where they choose not to acquire the rights to televise that event themselves.

PROPOSED AMENDMENTS

It has recently been proposed[16] that the BSA be amended to allow pay TV operators to acquire the exclusive right to broadcast listed events on subscription broadcast services while preventing them from acquiring all rights (in particular free-to-air rights) to listed events. With no significant sporting events currently being contested the pressure to amend the legislation appears to have dissipated.

DIGITAL TELEVISION

A related issue which deserves brief mention is the allocation of digital licences. Currently the ABA has expressed support for the proposal to allocate digital terrestrial television licences to the existing free-to-air broadcasters at no cost. While, ostensibly, free-to-air operators promise to deliver high definition television, the introduction of digital television will also allow them to deliver more channels over the same bandwidth they currently use to deliver a single channel. This would free up hours of broadcast time for the coverage of listed events that would otherwise clash with popular programming which, to date, free-to-air broadcasters have shown a reluctance to displace in favour of listed events.

The cynical view is that free-to-air broadcasters are content to let the government ignore the issue of amendments to the anti-siphoning provisions of the BSA on the basis that arguments that they do not currently show all of a listed event will ultimately be defeated by the use of multiple channels.

CONCLUSION

The anti-siphoning provisions of the BSA have prevented pay TV operators from acquiring exclusive rights to listed events, and, conversely, have allowed free-to-air operators to continue to acquire rights to those listed events. In this respect, then, the anti-siphoning provisions of the BSA have succeeded in preventing the deprivation of programming. The cost of this success has, however, been felt most acutely by pay TV operators (who are beholden to free-to-air broadcasters for rights to listed events), events organisers (who miss out on profits from the sale of rights to pay TV operators) and consumers (who are denied more extensive coverage of listed events).

The type of siphoning at which the BSA is aimed can only occur where:

(a) the siphoned event is televised on free-to-air television; and

(b) a subscription television licensee is able to acquire exclusive rights to the event so that free-to-air broadcasters are precluded from obtaining rights to televise the event.

The first element goes to the composition of the list. The section 115 list contains many events which are not actually seen on free-to-air television, and, additionally, free-to-air television can only broadcast a fraction of these events. It is impossible to "siphon" an event from free-to-air television if the event shown is not shown on free-to-air television, and consequently there can be no justification for the list including events which are not shown on free-to-air television.

The second element goes to the nature of rights acquired. Events can only be "siphoned" if the rights obtained by a pay-TV operator are exclusive and preclude free-to-air broadcasters acquiring rights to televise the event. Accordingly, in order to be effective the rules need only prevent a subscription television operator acquiring the free-to-air rights to an event.

The solution would appear to be to amend section 115 so that subscription television licensees are prohibited from acquiring free-to-air rights to events but entitled to acquire the exclusive pay TV rights to those events. Perhaps free-to-air broadcasters could similarly be restricted from acquiring pay TV rights.

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1. Communications Law Centre, *Program Siphoning and Pay TV: Submission to the Australian Broadcasting Authority*, March 1994, p 3.

2. See for example: Bradley, A., "It just isn't cricket when TV players deprive sports fans", *The Australian*, 6 June 1997; MacDonald, J., "Nine's decision has cricket fans stumped", *The Australian*, 5 June 1997; Carlton, J., "Nine hits a bum note", *The Sydney Morning Herald*, 7 June 1997. Channel Nine argued it could not disturb existing programming: Smith, M., "Live TV coverage will be a test of our nerves again", *The Sydney Morning Herald*, 4 June 1997, and offered the first session to the ABC and SBS (although it refused to offer them to community broadcaster, Channel 31: Wright, T., "Channel 9 says community TV fails Ashes test", *The Sydney Morning Herald*, 10 June 1997), subsequently expressing surprise when they refused (see the comments of Nine executive Mr David Leckie in Oliver, R., "Pay-Less TV", *The Sydney Morning Herald*, (the Guide), 16 June 1997). The ABC pointed out it too had existing viewers to consider and questioned Nine's motives (Wright, T., "Auntie holds out on test", *The Sydney Morning Herald*, 12 June 1997). Nine had adopted a similar position in 1994 during the previous Ashes tour of England: Kidman, M., "How'zat? Live cricket will be on pay-TV only", *The Sydney Morning Herald*, 29 January 1997.

3. See the ABA's *Pay Television "Siphoning" Investigation Information Paper*, 1994, and *Report to the Minister for Communications and the Arts: Pay TV Siphoning Investigation*, 13 May 1994.

4. Submission of the Federation of Australian Commercial Television Stations in response to the ABA's Investigation Paper, 29 March 1994.

5. Ibid. This argument implies, of course, that free-to-air broadcasters obtain rights at less than market price and that event organisers miss out on additional profits they might otherwise realise from the sale of rights to pay TV operators.

6. Op cit n 4, p 32.

7. Submission by the Australian Football League in response to the ABA's Investigation Paper, 25 March 1994.

8. Submission by the Australian Cricket Board in response to the ABA's Investigation Paper, 8 April 1994.

9. Submission by the Confederation of Australian Sports in response to the ABA's Investigation Paper, 25 March 1994.

10. Op cit n 4, p 33.

11. Ibid.

12. Davies, A., "Real Winners are Commercial Stations", *The Sydney Morning Herald*, 1 June 1994: *"Don't be fooled by the Government line that it has protected the public interest in reserving the list of programs for free-to-air television. The real winners from yesterday's decision on pay TV with commercial networks, and in particular, Mr Kerry Packer's Nine Network, which specialises in sport. The list goes much further than the favoured Option 3 of the [ABA]."*

13. See Lockhart J in *Nine Network Australia* Pty Limited v Australian Broadcasting Authority (1997) 143 ALR 8 at 16.

14. The period was initially set at 3 months but was shortened by agreement between the parties.

15. Ibid at 16.

16. Martin, C., "Alston to change law in row over Ashes". *The Australian Financial Review*, 4 June 1997, p 5; Davies, A., "New Law to no-ball incomplete Ashes TV", *The Sydney Morning Herald*, 4 June 1997, p 3; Martin, C., "TV Cricket has Alston", *The Australian Financial Review*, 5 June 1997, p 9.

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