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Judgment Summaries: Pragmatic Reform at the Nexus of Law and Media

Fiona Ring won the 1998 CAMLA Essay Prize with this paper, which examines judgment summaries as a practice developed by the Courts to improve communication between the law, media and the public.

The inclusion by some courts of a summary in the judgments delivered in highly politicised or publicised cases is a technique that has been increasingly employed in recent years. The Federal Court has now used them routinely for the last four years, notably in the delivery of its two judgments during the Super League dispute[1]. This emerging innovative practice by the courts, to improve communication between the fields of law and media, warrants a preliminary investigation into its impact on the process and outcomes of media reporting.

This is the argument that is developed in this paper through a consideration of the judgment summary as a mechanism to mediate the localised incompatibilities between the two fields of media and law. There are two components in this process. The first component is to fragment the pre-theorised relationship between the judiciary as the third branch of government, and the media as the fourth estate[2], in order to preclude the exaggeration of the impact of the judgment summary on this relationship. On the basis of this analysis, the second component will be to evaluate the ability of the judgment summary to mediate the localised incompatibilities between the two fields. As a methodological note, the aim of this paper is not to critique the standard of journalism in Australia, but to identify the institutional circumstances that are specific to the media field and to evaluate the impact of the judgment summary on these circumstances.

From this preliminary investigation it would appear that, at this early stage in its development and use, the judgment summary is having a positive impact on the process and outcomes of media practice.

FRAGMENTING THE RELAYS BETWEEN LAW AND MEDIA

In order to isolate the pragmatic function of the judgment summary, it is first necessary to fragment the theoretical relationship that is presumed, by some, to exist between the media and law. For instance, in his lecture discussing the relationship between the judiciary, as the third branch of government, and the media, as the forth estate, Sir Gerard Brennan presumes a highly theorised relationship between the two institutions. The relevant passage from Sir Gerard Brennan's lecture reads as follows:

> *I venture to suggest that... the well furnished legal journalist... who is familiar with the jargon, the procedure, the statutes, and the precedents will find much to report and comment upon in the work of the court and their fidelity to the rule of law, including the legitimacy of the techniques which the courts employ in interpreting and developing the law*[3].

This statement presumes that the media will scrutinise legal decisions according to their legitimate deployment of techniques of legal reasoning. Against this high normative standard, Justice Kirby judges the media reporting in Australia to be of a "debased standard"[4]. He has stated that

> *"generally speaking, the media are not now really interested in communicating information in a neutral and informative way... Issues are now personalised, politicised and trivialised"*[5].

Speaking from positions of authority within the legal field, both Sir Brennan and Justice Kirby construct a normative standard for the media, as an instrument for the critical evaluation of the law (according to standards of legal technicality). While such methods may be suitable in their own work, the imposition of these standards onto journalistic analysis involves an over-theorisation of the link between media and law which subsumes the reality that the media is a field distinct from the law. As recognised by Justice Nicholson[6], there are a multiplicity of discourses operating at the nexus of law and media and it is problematic to critique the method of one field (the media) according to the technical strategies of another (the law). As Justice Nicholson argues

> *"the methodology of the law is offended by the methodology of the media, yet each considers the search for justice is best served by the method which it employs"*[7].

In practical terms this means that rather than being furnished with legal skills and attributes, the "well furnished journalist" will be equipped with training and experience in the methodology of the media. This methodological distinction impacts on the process and outcome of media reporting, and structures the relationship of the media to law so that it is incidental, rather than instrumental (as is suggested by Sir Brennan). It means

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that the aspect of the court system that is most scrutinised by the media is not legal process or technicalities, but the outcome of court decisions and how they affect the parties concerned. The process of media reporting is organised according to the principle of "newsworthiness" and not according to the techniques of legal reasoning which are particular to the field of law. As a legal affairs writer for *The Australian* newspaper, Janet Fife-Yeomans[8] reflects this methodological distinction in commenting on the fact that her primary responsibility is to report accurately, and is not structured by an additional or external duty to the courts. This comment is substantiated by the *Australian Journalists Code of Ethics* that prescribes that:

> *[Journalists] shall report and interpret the news with scrupulous honesty by striving to disclose all essential facts and by not suppressing relevant, available facts or distorting by wrong or improper emphasis*[9].

While this standard encompasses a responsibility for accuracy, there is no prescription of a direct responsibility owed by the media to the law.

Moreover, the imperatives of time and space restraints that are common to all media practitioners distinguish the structure of the discursive practice in this field from the process of legal reasoning and analysis. As Fife-Yeomans recounts:

> *We (print) journalists must condense a 500-page judgment or a full day's hearing into 500 or 600 words. Radio journalists with half-hourly deadlines have to pick up the gist of even the most legally and factually complicated judgments or hearings in a matter of minutes. If we miss anything, we face the wrath of our boss and our own disappointment. If we make a mistake, we face the much more serious wrath of the courts. We can face contempt of court charges or be sued.*[10]

This passage is included not to defend media practice, but to offer an explanation of the institutional circumstances that structure the discursive practices of media practitioners in highly particular and technical ways. Journalists across all mediums are subject to regulation by the immediacy of the mediums through which they communicate, by the audience or readership for which they report and by the law, in the form of contempt. These are the imperatives that must structure the process of media reporting and outcomes of those reports, not the normative standards imposed by legal practitioners. Accordingly, it is in reference to the successful negotiation of the institutional circumstances of the media, and not the law, that the effectiveness of the judgment summary should be assessed.

In this context, it is appropriate to distinguish the purpose of the judgment summary from that of the full reasons for decision. As emphasised by the Full Federal Court in its judgment summary for the *Super League Case*:

> *The Full Court's reasons for judgment constitute the authoritative pronouncement on the appeals. This document is merely a brief and necessarily incomplete summary, which is intended to assist in understanding the principal conclusions reached by the court*[11].

This passage suggests that the immediate purpose of the executive summary is to "avoid misunderstanding [and] to state accurately the effect of the decision of the

court"[12], a function which explicitly excludes the level of technicality appropriate for in-depth legal analysis. It follows that the acceptance of the methodological validity of the judgment summary depends on a recognition of its function as distinct from that of the judgment proper. The judgment summary is thus located at the external limits of the field of law, for consumption and use within a multiplicity of non-legal discourses, particularly within the media field.

ISOLATING THE PRAGMATIC IMPACT OF THE JUDGMENT SUMMARY ON MEDIA REPORTING: SUPER LEAGUE - A CASE STUDY

The identified priorities and institutional circumstances that structure the discursive practices of the media provide a context for the next section of the paper: an investigation of the impact of the judgment summary on those practices. This investigation will use the judgment summaries published in the Super League decisions as a case study. It is structured according to the anecdotal evidence of the media reporting of those cases provided by Bruce Phillips[13], Director of Public Information for the Federal Court, and by Janet Fife-Yeomans[14]. As leading cases in which judgment summaries have been used effectively, this account should provide a preliminary indication of their actual impact on media reporting.

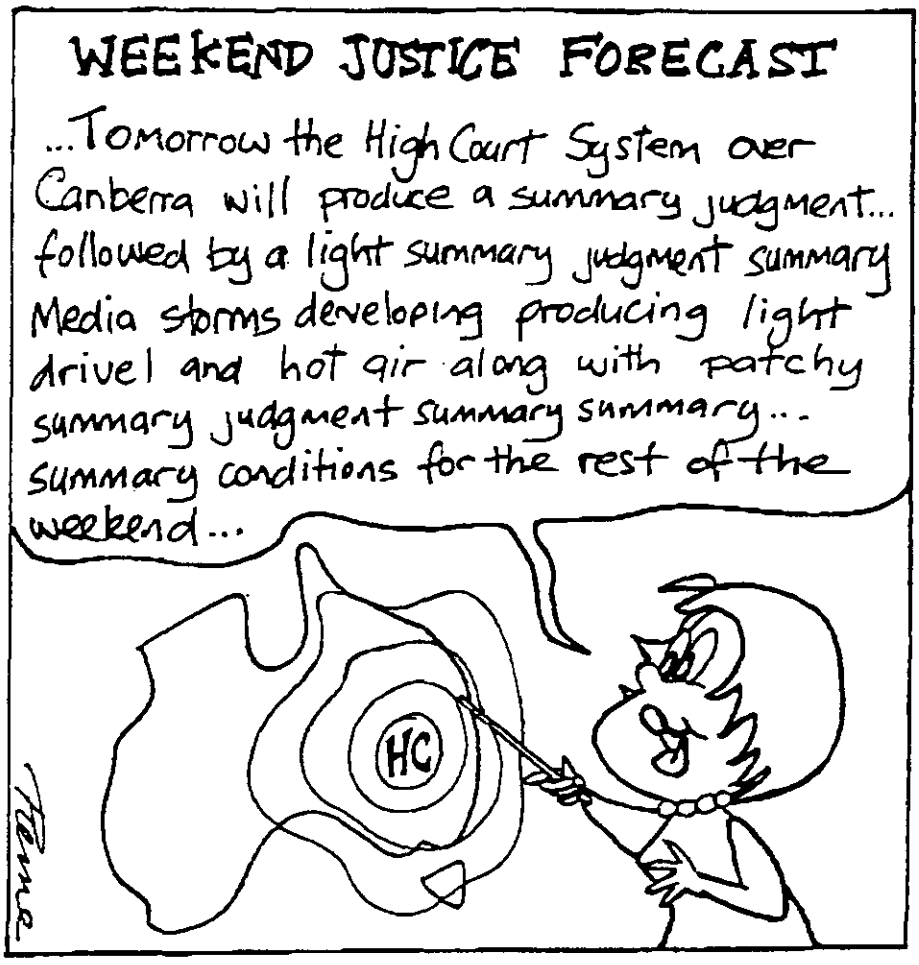
During the Super League dispute, the delivery of the judgments of Justice Burchett[15], in the first instance, and the Full Federal Court[16], on appeal, were effected by distributing about 250 copies of the judgment summary to journalists and interested members of the public. The demand for the summaries was described by both Fife-Yeomans and Phillips as extraordinary[17]. As one journalist described it to Phillips, they were attacked by the journalists *"like they were jackals after the last piece of meat on a bone"*[18]. This desperation reflects the enormous pressure on journalists to get a copy of the judgment summary in order to file a story quickly. In fact, in that case, Phillips[19] observed that electronic journalists (from radio and television) immediately filed stories by reading the last sentence of the judgment into the phone, before leaving the court building. The impact on print media was equally direct. In addition to extensive coverage by a range of specialist reporters (including legal affairs reporters, communications correspondents, sports writers and business journalists) copies of the judgment summaries written by Justice Burchett and the Full Federal Court were extracted in both *The Sydney Morning Herald*[20] and *The Australian* newspapers[21].

For these types of highly 'public' decisions, Phillips[22] suggests that it is the responsibility of the federal courts to be "proactive and anticipate what the needs of the journalists are going to be". The anecdotal evidence compiled in reference to the *process* of media reporting, and the newspaper articles examined, as evidence of the *outcomes* of media reports[23], suggest that this pragmatic goal is indeed being facilitated by the employment of the strategy of distributing judgment summaries. The description of events surrounding two such prominent cases that have included summaries serves to illustrate the highly specific techniques of deployment of judgments by the media. It accurately demonstrates the range of impacts of the summaries across a number of different reporting techniques within the field of media.

The primary function of the judgment summary is seen by Phillips[24] to be "to maximise accuracy and minimise mistakes". This accords with the self-acknowledged ethical imperative on journalists to report the news accurately[25]. In the case of electronic media reporters, who lack extensive legal training, this impact of judgment summaries can be quantified according to the ability of journalists to file stories immediately and to report on the outcome of the case and essential issues without misrepresenting the complexities of the legal decision. While accounts of electronic media reports of the *Super League Cases* are not included in this paper, the same-day broadcast[26] of Justice North's judgment summary in *Maritime Union of Australia v Patrick Stevedores No 1 Pty Ltd*[27] provides evidence of an even more dramatic employment of the summary. The immediate transmission of the court's decision by a judge to the public necessarily excludes the journalist from the process and precludes the possibility of inaccurate information. In cases where there is no "talking judgment" but the summaries are instead distributed to journalists (as is generally the case), Phillips[28] suggests that the reports filed by electronic journalists from the courtroom may not be complete, but they are less likely to be inaccurate. This reflects the localised impact of the judgment summary on media practice, as structured according to the self-acknowledged imperatives of the media to publish accurate information and contrasts with the normative standard of the media as the fourth estate that is imposed by Sir Brennan.

Phillips[29] also points to the explanatory function of the judgment summary. The summary in the *Tasmanian Dam Case*[30] was taken as an opportunity for the High Court to express the view that "the Court's judgment does not reflect any view on the merits of the dispute". This statement indicates that it is another function of the judgment summary to *explain* the limitations of the legal decision, as well as to set out legal outcomes. This function is demonstrated in the Super League case by the structure of the coverage in *The Australian* newspaper. A number of articles considered the impact of the Super League decisions on a range of external matters, including the organisation of the rugby league competition in Australia[31] and the implications for subscription television[32] (in terms of profitability and viability) without presuming that the decision adjudicated those specific issues. The inclusion of extracts of the summaries[33] allowed the public to realise the limitations of the decision while the media coverage explained its consequences. The particular deployment of the summary by a number of specialist reporters (including specialists in the field of sports, communication, business and legal journalism) demonstrates the practical impact of summary (outlining the outcome of a complex legal decision) which serves as the starting point for specialised investigations of the implication of the decision *outside* the legal field.

Finally, the articles by *The Australian*'s legal correspondents, Janet Fife-Yeomans and Jody Scott, indicate a distinct function of the summary as an organisational tool, for those journalists who will use it, in conjunction with the full reasons for decision, to extract and analyse more technical legal issues. In the coverage of the Super League cases, the two journalists considered the legal positions of the parties[34], the basis on which the decisions were reached[35] and the appeal options available within the legal system[36]. While Fife-Yeomans[37] considers that extensive practical experience in reporting on legal decisions leaves specialist legal reporters well equipped to extract newsworthy issues from legal decisions, she also recognises and advocates the judgment summary as an organisational tool to facilitate the analytic practices of journalists.



This description of the multiple deployments of the judgment summary by media reporters suggests that, even at this early stage of its use, the technique is having a positive impact on pragmatic aspects of the discursive processes and practices of the media.

CONCLUSION

The specific purpose of this paper has been to consider the ability of the judgment summary to mediate the localised incompatibilities of the fields of law and media. This has involved considering the methodological distinctions between law and media and specifying that the judgment summary should be developed and used in ways that accommodate the specific institutional circumstances of the media field. The investigation in this area indicates that judgment summary has a significant role to play as pragmatic reform, anticipating the needs of journalists and thereby improving the efficiency of media reporting and the accuracy of media reports.

1 *News Limited v Australian Football League Limited* [1996] ATPR 41-466 and *News Limited v Australian Football League Limited* [1996] ATPR 41-521 *(The Super League cases)*

2 Sir Gerard Brennan, 'The Third Branch of Government and the Fourth Estate'. The second lecture in the series, *Broadcasting, Society and the Law*, Faculty of Law, University of Dublin, April, 1997.

3 Ibid (emphasis added).

4 Hon Justice Michael Kirby, 'Judiciary, Media and Government' (1993) 3 *Journal of Judicial Administration* 63, 70.

5 Ibid.

6 Hon Justice R D Nicholson, 'The Courts, the Media and the Community' (1995) 5 *Journal of Judicial Administration* 5.

7 Ibid.

8 Fife-Yeomans, Personal Communication (1998) Legal Affairs Writer for *The Australian* newspaper.

9 Media, Entertainment and Arts Alliance (MEAA), Australian Journalists Association's Code of Ethics. Internet Address: http://www.alliance.aust

10 Janet Fife-Yeomans, 'Fear and Loathing - the Courts and the Media' (1995) 5 *Journal of Judicial Administration* 39, 40.

11 *Super League Case (No 2)* (1996) ATPR 41, 521.

12 Hon Sir Daryl Dawson, 'Judges and the Media' (1987) 10 *UNSW Law Review* 17, 24. This comment was made in reference to the case of *Tasmania v Commonwealth* (1983) 158 CLR 1 *(The Tasmanian Dam Case)*, but it applies equally to the *Super League Cases*.

13 Bruce Phillips, Personal Communication (1998) Director of Public Information for the Federal Court.

14 Fife-Yeomans, Personal communication, above n 8.

15 *The Super League Case (No 1)* [1996] ATPR 41-466.

16 *The Super League Case (No 2)* [1996] ATPR 14-521.

17 Phillips, above n 13; Fife-Yeomans, Personal Communication, above n 8.

18 Phillips, above n 13.

19 Ibid.

20 *Sydney Morning Herald* (Sydney) 24 February 1996; *Sydney Morning Herald* (Sydney) 5 October 1996.

21 *Weekend Australian* (Sydney) 24 and 25 February 1996; *Weekend Australian* (Sydney) 5 and 6 October 1996.

22 Phillips, above n 13.

23 For print journalism, at least.

24 Phillips, above n 13.

25 MEAA, above n 9.

26 The delivery of Justice North's judgment was not a live broadcast but the turn around was so quick that, according to Phillips, it was "as good as live".

27 [1998] 378 FCA (21 April 1998).

28 Phillips, above n 13.

29 Ibid.

30 (1983) 158 CLR 1, 59.

31 D.D. McNicoll, Trudy Harris and Stephen Lunn, 'Arthurson absolves rebels as League celebrates victory', *The Weekend Australian* (Sydney) 24-25 February 1996; Stan Wright, 'There's One Comp in '96', *The Weekend Australian* (Sydney) 24-25 February 1996; Janet Fife-Yeomans and Jody Scott, 'Super League wins football war', *The Weekend Australian* (Sydney) 5-6 October 1996; D.D. McNicoll, 'Two competitions likely unless rivals strike peace deal', *The Weekend Australian* (Sydney) 5-6 October 1996.

32 Deborah Brewster, 'Optus claims win in battle of the broadcasters', *The Weekend Australian* (Sydney) 24-25 February 1996; Deborah Brewster, 'Foxtel hits pay-TV tryline', *The Weekend Australian* (Sydney) 5-6 October 1996.

33 Justice Burchett, 'Burchett spells out detail of decision', *The Weekend Australian* (Sydney) 24-25 February 1996; 'Summary of the Full Court's Decision', *The Weekend Australian* (Sydney) 5-6 October 1996.

34 Janet Fife-Yeomans, 'Dishonesty tag to stick: ARL', *The Weekend Australian* (Sydney) 24-25 February 1996; Jody Scott, 'Judge finds News acted unlawfully, dishonestly', *The Weekend Australian* (Sydney) 24-25 February 1996.

35 Jody Scott, 'Agreements were unlawful', *The Weekend Australian* (Sydney) 5-6 October 1996; Jody Scott, 'Court dismisses bans on freedom grounds', *The Weekend Australian* (Sydney) 5-6 October 1996.

36 D.D. McNicoll, 'We will appeal - Cowley', *The Weekend Australian* (Sydney) 24-25 February 1996; Trudy Harris, 'ARL vows to fight on to High Court', *The Weekend Australian* (Sydney) 5-6 October 1996; Janet Fife-Yeomans, 'Few options left to stop News juggernaut', *The Weekend Australian* (Sydney) 5-6 October 1996.

37 Fife-Yeomans, Personal communication, above n 8.

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Accessors After the Fact: The Media as Accomplice to Patriarchal Myths of the Female Offender

Louise Falconer looks at myths concerning the female offender perpetrated by the media and their impact on women and society.

Women do not naturally commit crime. This simple, yet distorted and oppressive notion is fundamental to the perception of the female criminal. Myths concerning the female offender are pervasive in modern society and can be characterised in one of two ways. One concerns the popular explanations for her crime – because she is sexually deviant, biologically different, or because she is "mad". The other belief manifests itself in the way that she is portrayed, perhaps as a "whore", perhaps as a "witch" or perhaps as "masculine". Such prejudices, having arisen from Judeo Christianity, as well as the works of early criminologists, still colour modern society's beliefs. These antiquated modes of thought have not been laid to rest because they are continually resurrected by the media. The media has immense power to alter public opinion. It is a power that can be harnessed to obstruct, whether intentionally or not, change in society's norms. For the most part, the media participates as a player with societal institutions to maintain women as "Women",[1] it is therefore essential for those wishing to debunk anachronistic myths to expose the weaknesses in journalist discourse.

The cases of Lindy Chamberlain and Myra Hindley have been employed to illustrate the links between the media and the continual blurring of myth and reality. These two women have been chosen specifically because both were convicted of child murder. Their crimes disturbed fundamental social constructs and thus exemplify the extent to which prejudices pertaining to the female offender still linger. Myths and their resonances have particular importance for women because myths concerning women's innate capacities have pervaded every aspect of society.[2]

> *"Myth is not an idle tale, but a hard working active force; is not an intelligent explanation... but a pragmatic charter of primitive fear and moral wisdom."*[3]

Nowhere is this more apparent than in the realm of crime, where fear of the fallen woman still rages.

THE PERPETRATOR: WHY THE MEDIA MATTERS

"The media" is not a disembodied spectre, nor is it a term of art. In this context it is not just an individual journalist, an editorial decision, commercial necessity or a tabloid as opposed to a current affairs programme. It is the nexus of all these factors and the intense force that the conflation produces. It would be negligent to isolate any one of these elements, as while "the media" is not by any means a harmonious collective, the repercussions it induces are not traceable to any ultimate source.

The media serves many functions, not least in keeping the public informed. Yet it has been repeatedly recognised that a self adopted role is to reaffirm the consensual morality of society.[4]

> *"When such fundamental values are violated, such as the murder of a child, the news media... provide an opportunity for the reaffirmation of the basic moral standards of society."*[5]

It is this function that renders the media a threat to changes in traditional understanding of female criminality. The media's response to female offenders, and in particular murderers, reaffirms the "phallocentric" culture in the broad sense, defined by Smart as the unconscious and subjective reproduction of patriarchal beliefs.[6] It participates in the dominant social paradigm, therefore is subscribing to and preserving phallocentrism. Violence and crime is defined in masculine terms so the female offender is of course "unnatural".

Mass media has developed to become an important socialising agent. It not only selectively reflects aspects of society, but over time actively shapes it.[7]

> *"One of the areas where the media are most likely to be successful in mobilising public opinion... is on issues about crime and its threat to society".*[8]

The immense power of the media is best illustrated by looking at the issue from two different, yet overlapping perspectives, both grounded in the "fear of crime" mentality. The nurturing of this perception by the media ironically comes at a time when crime rates are in fact declining.[9]

Research reveals the extensive normative impact the media has, not only on thinking patterns but consequentially on a women's actions and lifestyle choices. Women display a grater fear of crime than men, despite the fact that men are more likely to be the victims of crime.[10][11] This is linked to media generated images of likely crimes and victims, most notably reporting individual acts of crime by strangers, particularly against white young women.[12] Research has shown that safety, above affordability and convenience, was most important to a women when deciding upon housing, modes of transport and leisure activities. Their movement was impaired by a 'socialised fear perspective' of the world. Daly and Chasteens' conclusion is that the extreme examples of crime against women used to make news has lead to undue restriction on women's movement.[13]

This kind of reporting also abets overall distortion of the broader picture of crime. Crimes that occur least often are most likely to be reported in the news.[14] The focus on high profile crime means that the statistically prevalent crime is ignored, and its social context and implications become obscured. An example is the focus on "stranger" rape, which overshadows the far more typical cases of rape by partners.

THE EVIDENCE: THE MYTHS AND HOW THEY ARE PERPETUATED

Both Lindy Chamberlain and Myra Hindley's circumstances provide a microcosm of the interrelations between crime, the media and social opinions. Academics cite Lindy Chamberlain's case as a cataclysm of Australian psyche and

culture, a drama that tapped deep in the Australian identity, yet essentially it was "mundane" case of infanticide.[15] Myra Hindley was also a convicted child murderer, on a different continent, in a different era, her treatment still bears remarkable similarities. As someone convicted of sadistic abductions, rape and torture of several teenagers, her crimes were doubtless horrific. Her male partner in crime, Ian Brady has long since faded from the headlines. Yet Hindley, still imprisoned 31 years later, still frequently makes the headlines. At the heart of these disparities and similarities are the mythologies surrounding women and crime.

Every statistic relating to criminal trends highlights the unavoidable fact that women are typically non criminal. This is a fact that crosses all historical, cultural and national boundaries.[16] Despite the small percentage of women offenders,

> *"fear of the non-conforming woman has transcended ethnic, racial and religious bounds in almost all civilisations throughout history"*[17].

Ancient mythology and Judeo Christianity are the origins for what has become the contradictory perception of women, evolving from two opposing ways female sexuality affected men. [18] On the one hand women are regarded a superior beings canonised in the form of Virgin Mary, a woman who is simultaneously a mother and a virgin. But she is also Eve, the quintessential evil woman, the seductress and the temptress.[19] The media construction of Chamberlain exemplifies this duality. Goldsworthy states, they

> *"concentrated simultaneously on her sexuality and on her maternity, [she] challenged and violated the largely unconscious but deeply ingrained conviction that motherhood is good, and female sexuality is bad and never the twain shall meet"*[20].

At the time of her trial in September 1981, Lindy was six months pregnant. Typical headlines were: "*Guilty Mother*", "*The Young Mother with Far Away Eyes*" and "*Dingo Baby Mother*"[21]. One witness commented that she was a model wife and mother.[22]

However at the same time, "Lindy's sexuality became a major point of discussion among journalists"[23].

> *"Lindy looked stunning in her off the shoulder apricot dress, her little body faultlessly suntanned as far as the eye could see"*[24]

> *"It's easy to see why Michael is a pastor and not a priest"*[25]

> *"She dressed in a fairly sexy sort of way. She was obviously aware of how she looked. I think that she was aware of her sex appeal."*[26]

The press was confronted with an unresolvable contradiction – the alternate conceptions of women were collapsed into one. Chamberlain was a mother, and pregnant, but her sexuality could not be denied. Goldsworthy suggests that had she not been pregnant as well as prettily dressed when she stood trial, she may never have been sent to gaol.[27]

Hindley on the other hand was painted purely as the sexual deviant,

> *"hardly the stuff of pin up stereotypes... it was the only mould the press could find for her"*[28].

The most pervasive myth, according to Omodei is that female delinquency is predominantly sexual delinquency.[29] This can perhaps be traced to the nineteenth century work of Lombroso. In *The female Offender* they located the cause of criminality in the biology of the individual. One of Lombroso's assertions was that a large part of female deviance is sexual in nature. The theory of woman as "deviant" emerged.[30] Hindley's unstable sexuality has been implicitly linked with the deviance that led to the murders.[31] Much was made of the fifty books on sadism and torture found in Hindley and Brady's house. Passages from De Sade's *Justine* were read out at the trial as evidence of their moral corruption.[32] Tapes of their own sexual activity and pornography only deepened their depravity and in doing so concreted the link between sexual deviancy and criminality. The press ran headlines like" "*My Nights of Passion with Myra Hindley*" and "*Sex Romps with Ex Nun in E Wing*"[33]. Sexual deviancy is again aligned with depravity, female sexual desire with violent transgression.[34]

BAD IS MAD

A persuasive assumption is that to deviate in a criminal way is proof of some sort of mental imbalance[35]. If the criminal act cannot be rationalised logically this is used as a convenient label to explain the inexplicable. It has long been assumed that women are more inclined to sick or made behaviour than men[36]. Henry Maudsley was one of the first doctors to identify the inherent madness in women's bodies. He believed that the normal functionings of the female body, an "irritation of the ovaries or uterus" were the cause of deviance and insanity[37]. It is still a trend in punishment to find more women committed to some sort of psychiatric care than men[38]. The question then becomes whether the woman was 'bad' or whether she was actually 'mad'. In fact, one headline concerning Hindly actually ran" "*Mad or bad?*"[39]. The irony in the Hindley case is that Brady was transferred in 1985 to a psychiatric hospital, diagnosed as a paranoid schizophrenic. Hindley on the other hand is quite sane. Birch notes that had Hindley been sent to a psychiatric ward, it is probable that she would have been released by now. The labelling of Brady as "mad" allowed his unfathomable acts to be explained, thus we see his disappearance from public consciousness. But Hindley denies the 'mad', repudiating popular assumptions and explanations for such crime ensures her image is a recurring one in the news.

MASCULINISATION

Lombroso believed that the female criminal was a result of a masculinisation process, that the delinquent woman belonged more to the male sex than the female sex[40]. Freud saw female criminal aggression as the failure of to adopt appropriate feminine attitudes[41]. In the nineteenth century, evidence that a woman had been properly socialised in her feminine role led to an acquittal of murder charges. A reported at one such trial was disturbed by the accused's failure to weep but could report later that, "womanhood was fully established when she burst into tears"[42]. In a similar vein it has been suggested that Lindy Chamberlain was convicted for her failure to cry[43]. It was written in the *Canberra Times* that her adherence to the dingo story accounted for her image as a

> *"cold blooded, heartless murderer, instead of perhaps a confused, depressed mother in a state of uncontrollable mental imbalance"*[44].

If she had spilled a teary confession, claiming that she didn't know what came over her, she may well have become the object of pity because she was obviously 'mad'. Yet she defiantly asserted her innocence. Her eagerness to speak to the media raised accusations of self aggrandisement and heartlessness. Her lawyer pleaded with her to be more "demure", to be more feminine.[45]

Hindley was also constructed in masculine terms. The famous brooding

photo of Hindley glaring defiantly at the camera, shows not a glimmer of remorse. Hindley has herself stated the intense scrutiny forced her to cultivate an expressionless face, which was interpreted by most as callousness[46]. At the trial, her sister testified that Hindley "hated babies and didn't believe in marriage"[47]. In her book *On Iniquity*, Hansford wrote of Brady" "*on the whole her looks ordinary... Myra Hindley does not. Now in the dock she has a great strangeness and the king of authority that one might expect to find in a woman guard of a concentration camp*"[48].

The masculinisation of both women was compounded by the nature of the crime – child murder. Lombroso maintained that strong proof of the degeneration of a female criminal is the lack of maternal instinct.[49] Both Chamberlain and Hindley were portrayed as the arch 'anti mother'. Chamberlain's defence summed up his case, and popular sentiment, by stating,

> *"women do not usually murder their babies, because to do so would be contrary to nature"*[50].

But in the public's opinion, even if the murder charges were untrue, Chamberlain had still neglected the responsibility for her child's welfare. However stated that by the time Chamberlain came to be tried, "she stood condemned for violating the stereotypes and sanctity of motherhood, of transgressing the boundaries of normal, passive motherhood. Moreover by raising the possibility of having killed her child, she became transformed into an unnatural mother and a witch.[51]

DEMONISATION

Portrayal of women as witches is consistent throughout Western history. The witch is a mythical embodiment of the male fear of women[52]. During the notorious witch hunts of the middle ages, it is estimated that 500,000 witches were burned, 85% being women[53]. The image of the fallen woman as a witch, demon or evil incarnate is still a current one.

The demonisation of Chamberlain is clear from this quote of a forensic expert at the trial:

> *"All the time, she was there behind me. Staring. She just stares. She is, you know, a witch. I could feel her eyes burning holes through my back"*[54].

Johnston illustrates that imagery of witch hunting is still firmly rooted in our society.

> *"The spectre of Lindy as a witch was rarely articulated, yet the notion percolated just beneath the surface"*[55].

Uluru, an inherently mysterious place was one element contributing to the witch construction:

> *"The spinifex rustles and the brown hawks and black crows wheel overhead. At night the dingoes howl."*[56]

In this context, it is unfortunate the Chamberlains were Seventh Day Adventists:

> *"Some talked of sorcery. Others told of fearful rites carried out in the desert."*[57]

There was speculation that Azaria meant 'Sacrifice in the Wilderness', that Lindy was prone to dressing her in black, that police had found a child's coffin in the Chamberlain's home.[58] Bryson captures the mood, quoting a tax driver who said to him, "they ought to burn the bitch".[59]

Myra Hindley's crime against children took her outside the realm of other explanatory devices, and thus she could only be a devil. She was labelled by the *Sun* as: "*The most evil woman in Britain*". She has ben consistently used as the yardstick of what is truly evil. At her trial, Hindley refused to take the oath on the bible, preferring instead to affirm, in "keeping with the faithless monster image she later acquired."[60]

THE DEFENCE

There is some evidence to suggest that the extent of influence on the public's beliefs isn't absolute, and that the media effects is severely limited.[61] It is arguable then that the media is only the messenger. It is merely holding up a mirror to society in an obtrusive manner, revealing what we do still really believe? This perspective defines the media the as passive spectator. Extensive empirical research, as cited earlier, as well as common sense indicates that this is not the case.[62]

John Slee, a journalist with the *Sydney Morning Herald* concedes that some parts of the media are prone to exaggeration. But he states that to leap from exceptional cases to generalised condemnation of the media is to fall into the same error of which the media itself is accused.[63] His assertion is legitimate and is given credence by an example provided by Rhode. She believes that the media coverage of the OJ Simpson murder trial was a watershed in coverage of domestic violence. The media blitz resulted in positive changes, among them new legislation and heightened awareness.[64]

There are traditional assertions which validate mass media's role in society. An example is that it provides the public with knowledge and protection, "an informed citizenry is an armed citizenry".[65] This and other assertions like it however lose relevance when the actual *manner* of reporting on women and crime is scrutinised. There are few valid justifications for perpetuating myths that women are trying to eradicate. What is potentially of deep concern is apparently the media is yet to concede the skewed view it can present. Despite Justice Morlings inquiry into the Chamberlain trial, Slee writes,

> *"a confident view on how prejudicial the media coverage of that case was just isn't possible".*[66]

CONCLUSION: CASTRATING PHALLOCENTRISM

Female offenders are seen to be doubly deviant, they have breached the law of the land, and more fundamentally, 'natural law' relating to their femininity.[67] Clearly myths about female crime predate any media involvement, but clearly an important issue to resolve is the ways in which the media, such a potent force in modern society still perpetuates myths that ought to have disappeared into the annals of time. It is essential to engage in such a debate because the media validates the dominant phallocentric beliefs about female criminality. A major strategy for disrupting this construction is to persistently challenge the terms on which it is lodged. The trials by society of Chamberlain and Hindley reveal the deeply rooted beliefs that continue to undermine the polemics of female criminality, and reveal the discourse to be truly defined in masculine terms. As Birch states.

> *"The mythology of Myra reveals about all that we do not have language to represent female killing and that a case like this disrupts the very terms that holder gender in place".*[68]

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24 Johnston, *op cit*, p90

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26 *Sun*

27 Howe, *op cit*, p50

28 Bardsley, *op cit*, p294

29 Omodei, *op cit*, p54

30 Bardsley, *op cit*, p99

31 *Id*, p144

32 Birch, *op cit*, p47

33 *Sunday People* July 1983 and *Sunday* February 1988

34 Birch, *op cit*, p50

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36 Bardsley, *op cit*, p97

37 *Id.*, p106

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51 Howe, *op cit*, p6

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Australian Telecommunications Policy in the New Millennium: A Global Perspective

Valerie McKay looks at the way in which key global regulatory and technological developments rather than domestic considerations will play an increasingly stronger role in the shape of future telecommunications regulations and legislation in Australia.

INTRODUCTION

The Australian telecommunications industry has undergone significant changes in the last decade, from government owned monopolies to an environment of open competition. Broadly, the communications industry has evolved into its present state via three major reform phases. The most recent of these phases, which captures the present arrangements, is the 1997 package of legislation that entered into force on 1 July 1997. This included the *Telecommunications Act 1997* (TA) and Parts XIB and XIC of the *Trade Practices Act 1974*, (TPA) enacted specifically to address competition issues arising in the newly liberalised Australian telecommunications industry. The object of the TA is:

> *...provide a regulatory framework that promotes the long-term interests of end-users of carriage services or services supplied by means of carriage services; and the efficiency and international competitiveness of the Australian telecommunications industry*[1]

During the next decade, it is believed that international trade agreements and technological developments will transform telecommunications into a globally focused industry underpinned by a supranational regulatory regime. This paper discusses a major international telecommunications agreement, administered by the World Trade Organisation (WTO) and suggests that it will form the basis of a future global regime. It then considers which organisation's) could be a suitable global regulatory body to administer a supranational regime. The global nature of the industry is being further entrenched

by rapid technological developments. It is conceded implementing a comprehensive global regime is no simple task and notes that many other factors will need to be addressed in the formulation of any serious global telecommunications regulatory regime. However, it seems more likely than not that some form of agreement will be reached in the next 10 years and therefore any domestic legislative changes will be influenced by these global developments.

INTERNATIONAL REGULATORY DEVELOPMENTS

Amongst many other individual countries, there appears to be a growing trend towards liberalised telecommunications markets[2]. Between countries, multilateral trade frameworks are being established, in particular through the World Trade Organisation (WTO)[3]. The inclusion of telecommunications as part of the 1994 Uruguay Round of trade talks illustrates a significant supranational development. The Final Act 1994 resulting from the Round includes the General Agreement on Trade in services (GATS)[4]. The GATS establishes binding multilateral rules covering market access, national treatment of foreign services and service suppliers, and government regulation of trade in services[5]. One of the annexes to the GATS relates to telecommunications. When the Uruguay Round negotiations closed, agreement had not been reached on the regulatory disciplines provided in the telecommunications annex[6]. These disciplines included an access and interconnection provision for public telecommunications transport networks[7]. A Negotiating Group on Basic Telecommunications (NGBT)[8] was established to work towards negotiating commitments by countries to an agreement on basic telecommunications. Negotiations were concluded in February 1997[9] and the Report of the Group on Basic Telecommunications (GBT) released. The GBT, which entered into force on 5 February 1998, contains schedules of various commitments by 69 countries relating to market access and rules for fair market practice[10]. Offers made under the GBT are legally binding and disputes between countries can be taken to the WTO dispute resolution panel[11].

Australia's commitments to the GBT include allowing an unlimited number of basic telecommunications carrier licences and no sector specific foreign equity limits for new carriers. Foreign investment opportunities in existing carriers are also included in the one-third privatisation of Telstra and in Optus and Vodafone[12]. Interestingly, these commitments were already provided for from 1 July 1997 through the new framework, independently of the GATS telecommunications negotiations[13].

The next Round of talks is scheduled to commence by January 2000. It seems likely that more countries will make commitments to the GBT at this point and further issues such as international accounting rates will be negotiated. It is contended that the GBT, which presently accounts for more than 91 per cent of global telecommunications revenues[14] will form the basis of a supranational regulatory framework in the future.

KEY PARTICIPANTS IN REGULATORY DEVELOPMENTS AND A POTENTIAL GLOBAL REGULATOR

The implementation of the GBT has come about through the work of key players. Of these, the US is arguably the most influential player with the European Union (EU) and the Organisation for Economic Cooperation and Development (OECD) also involved in moves towards establishing a uniform policy framework. The EU and OECD prepare extensive reports on telecommunications developments, and support adoption of liberalisation policies, privatisation and competition in telecommunications markets[15]. Organisations such as the World Trade Organisation (WTO), the World Bank, the International Monetary Fund (IMF) and the International Telecommunication Union (ITU) are also key players in telecommunications developments. The WTO has 132 Members[16] and administers the General Agreement on Tariffs and Trade (GATT) and GATS, while the World Bank and IMF provide finance for countries to privatise their public telecommunications operators (PTOs)[17]. The ITU is a treaty organisation established in 1865. It has 188 national members[18] and its three sectors deal with coordination and development of technical and operating standards for telecommunications and radiocommunications, including satellite services[19]. Its basic treaties may only be altered at plenipotentiary conferences, held at four-yearly intervals[20].

As proposed above, the GBT could form the basis of a global treaty and legal framework for access to telecommunications services. A regulatory body would be required to administer this treaty and it is suggested that the WTO and/or the ITU would be an appropriate choice. One possibility would involve the WTO taking responsibility for competition policy issues including access and the ITU administering technical regulation, similar to the situation in Australia with the Australian Competition and Consumer Commission (ACCC) and the Australian Communications Authority (ACA). At present, the ITU has more Members than the WTO and decisions are made on a consensus basis. The WTO has fewer Members and less representation from developing countries. Requiring countries to ratify the GATT, GATS and the principles contained therein before being admitted as Members controls membership to the WTO. There are advantages and disadvantages with both groups. For example, the ITU is sometimes criticised for its cumbersome negotiating process, which tend to emphasise "... careful deliberation and continuity over speed and flexibility"[21] and require consensus from all countries often resulting in lengthy delays in reaching decisions[22]. However, the WTO may also be seen as being controlled by developed countries' interests to the detriment of developing countries' interests[23]. A global regulatory body would require an effective decision making process that is fair to all participants but allows for fast decision making so as to keep pace with technological developments. Regardless of which organisation controls the global regulatory regime, its seems likely that regulators within individual countries, for example, the ACCC would continue to give effect to the principles via their own regulatory methods.

TECHNOLOGICAL DEVELOPMENTS SHAPING FUTURE TELECOMMUNICATIONS REGULATION

Future telecommunications regulation will depend in large part upon technological developments. Like the information industry, the telecommunications industry is very dynamic and characterised by rapid changes in communications technology. For example, innovations are providing new methods of delivering domestic and international telecommunications services and altering demand patterns by offering superior services at lower prices.

Satellite technology is one example of the speed at which technology changes. Less

than thirty years ago, satellite technology was prohibitively expensive for individual nations. Through treaty organisations such as Intelsat[24] and Inmarsat[25] the pooling of resources meant that technology was affordable and available to most countries on a fairly equitable basis. This arrangement worked well when government owned monopolies dominated the industry and the technology was expensive. However, today's satellite technology is less expensive so there is increased demand for limited spectrum space coming from nations and private commercial operators with sophisticated services available to consumers. The Radiocommunication sector within the ITU, which is responsible for the allocation of scare orbital space and frequency spectrum to accommodate satellites has to consider many competing interests[26]. These technological developments have caused many to question the continuing existence and effectiveness of groups such as Intelsat and Inmarsat with some members advocating privatisation of the organisation and open competition in the industry[27].

Satellite technology also serves ever increasing mobile markets Worldwide, the mobile market has increased sevenfold between 1990 and 1995[28], while Australians have one of the highest per capital take up rates in the world[29]. Domestic and international mobile networks are rapidly expanding culminating I the first truly global mobile networks appearing this year[30]. Therefore, there is an argument that access to global networks should be regulated on a global basis.

Not only is telecommunications technology developing, rapidly, but there is increasing convergence with other industries such as information technology and broadcasting. A key issues for future regulation and policy is the link between telecommunications and Internet technology. The information age is giving rise to unprecedented demand for services providing instant worldwide data transmission. The Internet which to date has developed with minimal regulation arguably presents the greatest regulatory challenge in the future. Delivery of Internet services is presently via public telecommunications infrastructure and the emergence of Internet voice technology will create access and pricing issues between information technology providers and telecommunications service providers.

According to the OECD, mobile phone growth is the current driver of the telecommunications market and Internet growth will see the next wave of infrastructure development[31]. It is proposed that demand for data traffic will eventually exceed demand for voice, the same way voice telephony demand succeeded telegraph as the preferred means of communication last century[32].

OTHER ISSUES AFFECTING THE ESTABLISHMENT OF A GLOBAL TELECOMMUNICATIONS REGIME

There are other factors and issues related and distinct from telecommunications that will also require consideration in the creation of an effective global telecommunications regulatory regime. The factors that Drahos and Joseph identify as having a significant effect on supranational telecommunications policy include: the telecommunications market itself; competition policy; telecommunications standard setting; the international telecommunications accounting regime; intellectual property; and satellite regulation[33]. In another paper, competing interest of various players, threats to national sovereignty and foreign investment policies are nominated as key factors[34]. These are all necessarily linked with telecommunications in some form or other and obtaining international consensus on these complex factors will be complicated.

Thus, it may be argued that the development of a supranational telecommunications regime is too difficult give the many complex issues involved. However, international treaty making has achieved consensus in more complicated arenas. For example, the Law of the Sea Convention[35] resolved many contentious issues and political differences and the treaty is now supported by 138 nations including the US[36]. The US, EU and the OECD support implementation of a market access model for world telecommunications markets. Given past experiences in agreements such as TRIPS[37] and the persuasive power of the US to 'get things done' through bilateral, multilateral or even unilateral means, its seems inevitable that some supranational policy will be formulated. Furthermore, as asserted by Frieden, "[t]he increasingly volatile, complex, and competitive telecommunications environment, closely linked with information service markets, supports a new world telecommunications order."[38]

IMPLICATIONS FOR AUSTRALIAN TELECOMMUNICATIONS POLICY

As outlined above, there are some significant developments occurring in a global context which are likely to have an effect on the direction of Australian telecommunication policy and regulation. The TPA provides that by 1 July 2000, there must be a comprehensive review of the operation of the Part IXB[39]. Although no equivalent provision applies to the TA, it is suggested that the same date would be an appropriate time to review the legislation. In three years the effects of competition in more sectors of the industry should be apparent so a review would be timely. Although a comprehensive global access regime will not be in place by 2000, further progress towards the formation of a framework will have occurred and alterations could reflect any changes if required.

With respect to international telecommunications issues, Australia has been an active participant in WTO and ITU negotiations and it is proposed that this stance be maintained to ensure that Australian viewpoints are aired and the effects of any global agreements are understood. Furthermore, it is argued that Australia's competition policy and foreign investment rules are compatible with the global market access model of telecommunications being formed through the GBT. As noted earlier, Australia's GATS commitments are generous with no restrictions on basic telecommunications carrier licences and no sector specific foreign equity limits for new carriers.

CONCLUSION

The international industry is a state of flux. In the medium term it is suggested that international telecommunications agreements such as the GBT will form the basis of a future global regulatory framework. It is also submitted that future access regulation will be driven from a supranational perspective headed by a global regulatory body, but administered by a national regulator.

Rapid growth and convergence of telecommunications technologies also point towards a future global regulatory regime. There are, however, many complex issues that will have to be resolved before a supranational regime can be implemented. Although this will be a difficult task, it is not impossible as international cooperation has been

achieved in areas more politically sensitive than telecommunications.

Finally, Australia's current telecommunications and competition policies appear consistent with international trends towards market access models. It is submitted that Australia should maintain its position in international fora to voice issues concerning Australian industry and participate in development of policies to be incorporated into the global regulatory agenda.

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The Police Videotape Record of Interview as "Documentary": Its Use and Implications from a Film Theory Perspective

Jean Burton explains the links between Police Videotape Interviews and prime time entertainment.

In 1998 the relationship between the law and the media in Australia is becoming more committed than ever. Crime reporting on television has left the news room and gone onto the streets, not just with news crews but passers-by with their handheld video cameras ready to shoot out-of-focus footage to send to ratings-hungry networks. Inadvertent community surveillance has turned Australia's Funniest Home Videos into The World's Silliest Criminals. This is the ever evolving commercial face of the partnership between these two cultural institutions, the face that entertains and smiles at television's consumers.

The commercial arena aside, more importantly, what of the *professional* partnership between media and law? How has the technology of the media influenced and infiltrated the processes of law in Australia? Although there are now remote room cameras available for courts and surveillance footage tendered as evidence, this essay argues that the police videotape record of interview (PVRI) is one of the most influential and challenging media-based introductions to the legal framework.

This statement is premised on my belief that the PVRI can be considered as documentary footage, in a film theory sense, and this is where its links and relevance to the law are interesting. The argument will be developed by focusing briefly on the concept of evidence and historical perspectives of the law, introducing film theory and cultural influences as they apply to the PVRI and, finally, directions for the future. In doing so I will demonstrate that not only does this essential legal tool carry the "truth claim" of documentary, but that its connection to culture positions it on the verge of media exploitation.

Before proceeding further it is important to identify the PVRI as distinct from other audiovisual material, such as surveillance videos or amateur footage, that may be produced or procured by the law. For the purposes of this essay the PVRI refers purely to the interview carried out by police officers with a suspect in controlled surroundings in a police station[1], and using the example of Western Australian law.

Videotape interviews were first trialed in Western Australia in 1987, and by 1994 legislation was drafted for amendments to the *Criminal Code (WA)* to include videotape interviews as evidence. However, to allow time for purchase, training and installation of equipment, the legislation did not come into effect until November 1996. Section 570(D)(2) of the Code states that evidence of an admission by an accused person standing trial for a serious offence is not admissible unless on videotape. There are provisions for reasonable excuse and exceptional circumstances, as defined in section s570(D)(1) and (4) respectively, when a videotape recording has not been possible, resulting in frequent legal argument as to admissibility. This clearly identifies the PVRI as a unique and important "document" in relation to the admission of evidence. It is salient at this point to examine these two fundamentally legal terms.

ORIGINS OF "DOCUMENT" AND "EVIDENCE"

The use of the word "document" is deliberate because it is culturally connected to the law. Brian Winston in *Claiming the Real: the documentary film revisited* traces the origin of the word "documentary" as an adjective from 1802 and of "document", ("something written, inscribed, etc, which furnishes evidence or information, only") from 1727. He comments that words such a "muniment", "affidavit" and "writ" become incorporated into the generic "document", and that these words stem mainly from the legal profession; that they bind

> *"writing and what is written to the common law, specifically to evidence before the law in both the pre-modern and the modern period. The contemporary use of "document" still carries with it the connotation of evidence."*

"Evidence" stems from the science-as-inscription argument which says that initially, due to observation and experiment, science became external to thought. In other words, according to Switjink this grounded scientific data as not belonging *"to the consciousness of the perceiving subject... because different observers will obtain the same data."* Science was inscribed in writing or pictorial representations (eg. anatomical and botanical drawings) and held to occupy the area closer to knowledge than opinion. Data became inscribed evidence of the physical universe.

From the 1600s, however, mathematical probability entered the scientific realm and by the early 1900s the result was that social observations could be "proved" by probabilities and considered scientific "laws". Winston says that *"[a]gainst this background of numbers, social investigation became transformed"*. Nichols, according to Winston, takes this point further by suggesting that criminality then became measured by probabilities:

> *which governed similar people, doing similar things, in similar situations, with similar motives, goals, and results. Such an algebra replaces personal knowledge of specific individuals – their family history, past behaviour, typical traits, and established goals. It is the algebra of the city and of the management of populations.*

In other words, what were previously seen as observations could be examined on a statistical basis that provided probable outcomes; evidence backed up by numbers but without regard for the personal.

With the introduction of the photograph in the mid 1800s as an extension of the scientific device, that is, producing

evidence, the link for the cinematograph to be given evidential status is established. By the early 20th Century photography was to become an indispensable and widely used criminology tool. It is a process of evolution that film, video and computer visual technology have subsequently taken their place alongside the photograph as the visual producer of evidence.

It is from this point that "traditional" film documentary theory develops in the 1920s and 1930s, including Grierson's "actuality", what he saw as evidence of reality; the introduction of the aesthetic or "creative treatment" by such people as Flaherty and Vertov who played with images for effect; and of course the later developments of verite and its hybrids such as direct cinema and 'fly on the wall' (eg Sylvania Waters).

Throughout all discussion, however, there has been an underlying premise which continues to be problematic: film (= science = evidence) = truth – the truth claim of documentary. It is not my intention to dwell on the truth claim in terms of traditional documentary styles suffice to say that it is deeply ingrained, almost as commonsense; "the camera doesn't lie." Instead, keeping this important point in mind, I wish to return to the realm of the PVRI and examine its documentary relationship to law and culture. Winston says:

> *Although documentary's truth claim depends ... on the fact that, because of the camera, scientific evidence is what is on the screen, scientific evidence itself is influenced by the concept of evidence in the law ... So the law provides the general cultural concept of evidence into which science and documentary's truth claims in general both fit.*

This confluence of the camera and the law at the point of truth only adds to the problematic area of the gap between the evidence and truth. If follows then that the legal profession is constantly striving to narrow the gap in order to fight crime and achieve convictions, and that this occurs by providing the best possible evidence for the jury and/or judge to have before them. Evidence is provided by witness testimony and exhibits, and this now of course includes the PVRI which is considered on the upper level of "truth", and particularly if it contains an admission.

In Western Australia, since the PVRI's introduction pleas of guilty have increased and challenges to evidence have decreased. Therefore, the PVRI must be contributing to reducing the gap between evidence and truth. With that comment made, and acknowledging the different perceptions possible for the word "evidence," I turn again to the cultural implications of the camera as evidence and the documentary identifiers connected to the PVRI.

MEANS OF RECORDING THE INTERVIEW

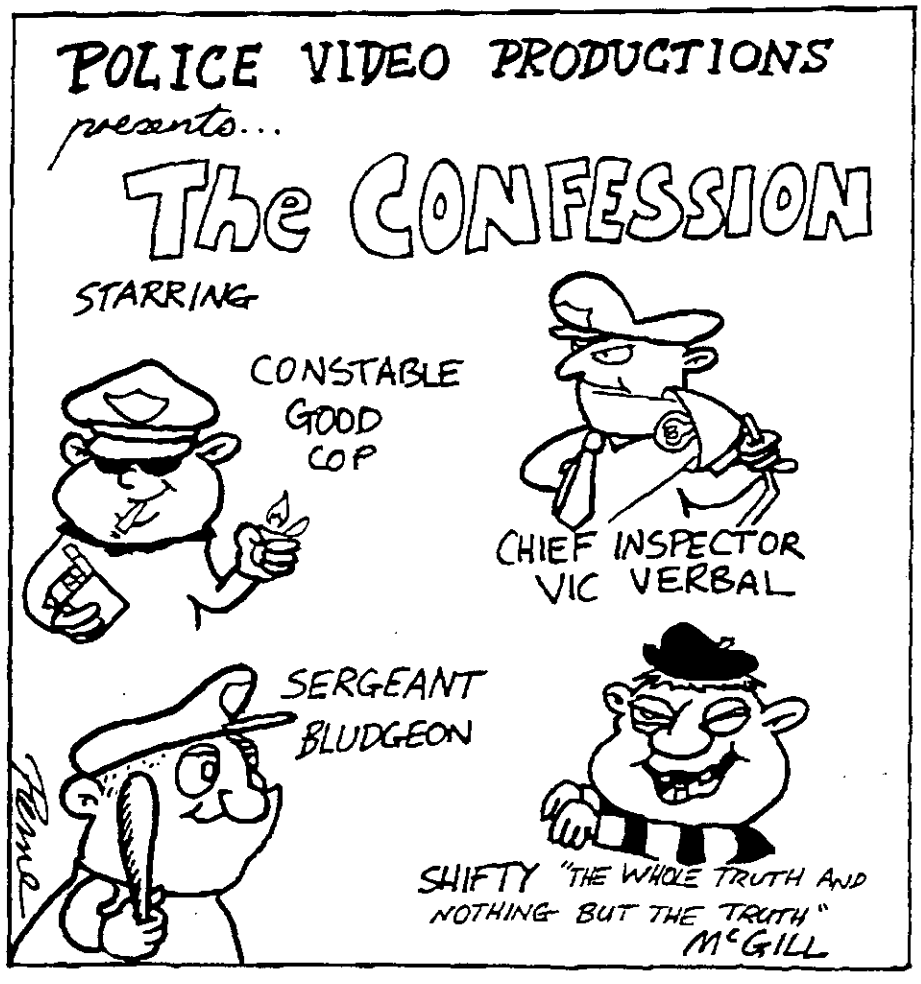
The means of production of the PVRI are very controlled. Equipment is standard and procedures clearly defined by the ideology of the state though legalisation. The camera is positioned in a location that covers the interviewing room with table and chairs and two videotapes are used simultaneously; one for backup. Videotapes are recorded with a visible reference to the date and time on screen and tape. The result of the production is that there is limited scope for "creative treatment". However, in the remotest interpretation of the concept, "creative treatment" does occasionally occur in answer to legal requirements in the form of editing which will be discussed below.

Considering the environment of the PVRI, what is also produced is a unique camera gaze, akin to the documentary gazes. As Bill Nichols explains:

> *"Just as various prefigurative choices in the use of language signal the moral point of view of a historian, 'the camera's gaze' may signal the ethical, political and ideological perspective of the filmmaker".*

In other words, different filming techniques reflect a film maker's point of view which can result in, for example, a professional, humane or curiosity gaze, to name a few. With the PVRI, although it is technically a detached visual recording – the camera is not handheld but controlled from a console – the result is, I would suggest, a legal gaze. This is because it is a visual document which has an evidential purpose, a strong narrative and a varied audience (police, legal professionals, jurors) that are related to the ideological requirements of the law, which separates it from the professional gaze or surveillance video.

This links tenuously to an ethical consideration. Nichols again, in *Blurred Boundaries,* comments that,



"The proximity of the camera to its subject or the relentlessness of its gaze may provoke discomfort when it obtains evidence with regard for tact, or perhaps even decency."

In the circumstance of the PVRI the suspect's rights to receive a "tactful" and "decent" gaze from the camera are somewhat waived once consent is given for the video interview to take place; that is, they have no control over the camera's gaze.

To a significant extent, this legal gaze in the PVRI also arises from an obvious feature which is one of the documentary's critical techniques, the interview. Corner links the law to documentary by calling interview speech, "variously obtained and used", as his evidential mode 2 (testimony). Using Nichols' definitions of documentary type, interview identifies the PVRI as an interactive mode of documentary. He states,

"this form raises ethical questions of its own: interviews are a form of hierarchical discourse deriving from the unequal distribution of power, as in the confessional and the interrogation".

Because of the nature of institutional procedures in place during a PVRI there is obviously an unequal distribution of power between police officers and the suspect. However, it is important to note that, from a legal point of view at least, the suspect is not completely powerless because of the fundamental premise of innocence until proven guilty. Even so, once the unequal power relationship is established between police officer and suspect, there are a minefield of cultural issues that arise in the interview room.

First, according to Nichols, *"for every fact, for every piece of incontrovertible evidence, more than one argument can be fashioned"*. One of the standard means of shaping an argument in documentary is by authorial control of editing. This can affect narrative and relationships to fiction and evidence. Editing is not problematic with the PVRI in the way that is debated in a number of documentary styles; that is, in actively putting forward a position of argument. However, as highlighted earlier, there is a limited amount of "creative treatment" given to the PVRI when inadmissible or irrelevant portions are edited out of the original recording, such as references to previous convictions.

Second, according to Guynn, *"Narrative is never absent in documentary films"*. Corner and Nichols develop this point by suggesting that the narrative structuring of exposition through chronology and causal connections in a question and answer format have long been a feature of documentary. This is clearly demonstrated in the PVRI through the use of questions and answer to establishes times and activities linked to the inquiry investigation. Further, there is often more than one narrative in the PVRI: the narrative of the legal/police institution, and the narrative of the suspect – and the two often conflict as to fact; for example, a suspect denying knowledge of being at a certain place at a certain time. This does not subvert the truth claim of documentary, however, because the fundamental premise of camera = truth hovers over the narrative.

Although narrative can certainly be applied to the PVRI, when it is linked to evidence then the problematic areas of motive and intent are introduced. These arise because the PVRI is considered to be "raw" footage. It is not treated by technology or further cultural significances by way of editing or authorial interference – "cooked". The PVRI is only the primary representation; as Corner explains, *"the recorded sounds and images from which the film is constructed"*. This leaves it devoid of additional cultural readings adding to the film's meaning. Because of this the PVRI remains "on the back burner"; never totally "cooked" but also, by its use in the legal profession, being removed from its "raw" state by attempting to demonstrate intent and motivation – two very loaded cultural concepts – through the narrative.

Nichols states succinctly, *"No image can show intent or motivation"*. This is also important when considering the suspect's demeanour during a PVRI, something that previously was unavailable for juries to have as evidence. As an example, a PVRI may appear in its 'raw' state to indicate an expressionless suspect making an emotionless admission to an alleged offence. However, by the time the PVRI is tendered at trial, the accused, through legal representation, may argue that the admission was made in a state of shock or under duress. Nichols expands on this:

The same evidence, or facts, can often be placed quite convincingly within more than one system of meaning, or given more than one interpretation. Court trials often hinge upon precisely this fact and involve not only matters of circumstantial evidence but the meaning of documentary evidence itself. For this reason the status of the photographic image in legal proceedings is far from cut and dried and it may serve us well to recall the caution exercised there.

Once again this challenges the truth claim but still doesn't deny the PVRI's possibilities; juries now have another evidential tool to consider with other evidence.

ISSUES REGARDING LANGUAGE ON THE PVRI

It would be erroneous at this point not to acknowledge the powerful cultural impact of language on the PVRI and how it contributes to evidence, power, narrative, motive and intent. As viewers of texts, we are aware of jargon when hearing a police officer speak on television or listening to counsel in court. Different social and cultural institutions such as the law and police have distinctive language patterns, and it follows that because they hold the power in the PVRI, they therefore control the pattern of language in that situation.

This can provide a very persuasive environment. For example, in the Rodney King trial the accused police officers (when *they* were being interviewed) used one-dimensional language and emotionless responses with, according to Nichols, *"no space for critical consciousness or dialectical thought"*. A more public example of this concept was the American media/military's use of "friendly fire" to explain allied deaths caused by their own fire. This is an area strongly connected to semiotic analysis not pursued here, but it goes to demonstrate that language can be crucial in shaping an argument or proposition.

CONCLUSION - THE FUTURE FOR PVRI

Finally, I wish to conclude with some comments and concerns for the future of the PVRI. One of the constants of documentary is that nothing is constant. Documentary styles have adapted and hybridised to the point where one of the most popular television forms at present is the "reality TV genre[2]. Corner says, *"It would be hard to find another period when so many different styles of documentarism were being broadcast"*.

Although the idea of a controlled interview such as the PVRI may not be appealing now as "infotainment", society's present fascination with crime

and voyeuristic social deviancy such as paedophilia, combined with television networks' lust for ratings, is creating an ever-increasing market for whatever can be broadcast. There are legislative limits in place now (up to $100,000 fine or 12 months' imprisonment in Western Australia) to prevent the broadcasting of PVRI's, but the demand and influence of the media moguls cannot be denied. One only has to look at the relationships between media barons and political leaders and the re-emergence of media ownership issues to confirm this point.

CONCLUSION

In summary the points I have raised regarding: the production of the PVRI; the documentary theory including the interview, gaze and editing; and cultural considerations of narrative and language, demonstrate that the PVRI is significantly aligned with documentary style from a film theory perspective. It is also undeniably important as documentary evidence from a legal perspective. Introduce the considerable political and economic influence of the commercial media and the PVRI seems poised to join the constantly evolving reality TV documentary game. It must only be a matter of time before the media-legal relationship is reaffirmed; the "evidence" will be in front of us, on screen, prime time.

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1 Mobile units are used in certain circumstances; eg remote areas.

2 See "The World's Silliest Criminals".

Page references supplied by the author throughout the text have not been reproduced.

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Child On Line Protection Act Halted for Now

John Corker looks at the battle over the Child On Line Protection Act in the United States.

The war has broken out again in the US between the free speech on-line groups and the government over new laws which seek to protect minors from harmful material on-line. The Child On-Line Protection Act (COPA), passed by the US Congress on October 7, and signed into law by President Clinton on October 21, 1998 was prevented from coming into operation by a temporary restraining order granted on 19 November 1998 by Judge Lowell Reed Jr. of the US District Court. This order prevents the Government from enforcing the Act and is likely to stay in place until a full hearing is held of the substantive issues raised by the plaintiffs.

The plaintiffs are diverse and include the New York Times, Sony On-Line, CBS New Media, Time, Condomania, a leading on-line seller of condoms, OBGYN.NET, a site about women's reproductive health and RIOTGRRL, a feminist e-zine.. They all argue that whilst the law purports to restrict the availability of materials to minors, the effect of the law is to restrict adults from communicating and receiving expression that is clearly protected by the First Amendment. They say that the law will put a wide range of web sites in danger of prosecution for what amounts to constitutionally protected content, such as information about safe sex, gay and lesbian issues, medical conditions, or even poetry[1].

This is round two in a battle that started more than two and a half years ago where the same forces met in the same US District Court to battle over the now infamous section of the Communications Decency Act (CDA) which made it a felony to transmit or display any "indecent" material on the Internet that could be obtained by minors. The plaintiff's Memorandum of Law in support of their Motion for the Restraining Order states:

This is Congress' second attempt to impose criminal sanctions on the display of constitutionally protected, non-obscene materials on the Internet'... Recognizing that the Internet had become a powerful "new marketplace of ideas' and "vast democratic fora" that was "dramatically expanding" in the *abscence* of government regulation, the Court imposed the highest level of constitutional scrutiny on content-based infringements of Internet speech.

The Supreme Court found that the CDA was too wide ranging, not specific enough and struck down that law.

The COPA has tried to get around the difficulties of the CDA case by creating a definition of harmful material which is remarkable for its specificity:

> *"material that is harmful to minors" means:*
>
> *any communication, picture, image, graphic imagefile, article, recording, writing or other matter of any kind that is obscene or that (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors is designed to pander to, the prurient interest; (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post pubescent female breast; and (C) taken as a whole, lacks serious literary, artistic, political or scientific value for minors*

The COPA imposes criminal and civil penalties on person who:

> *knowingly and with knowledge of the character of the material, in*

commerce by means of the world wide web make any communications for commercial purposes that is available to the minor and that includes any material that is harmful to minors.

It is a defence to a prosecution if the defendant:

in good faith has restricted access by minors to material that is harmful to minors:

(a) by requiring the use of a credit card, debit account adult access code, or adult identification number

(b) by accepting a digital certificate that verifies age; or

(c) by any other reasonable measures that are feasible under available technology.

The plaintiffs argue that age verification systems would turn away many potential visitors to their sites and significantly commercially damage them. The editor of an e-zine called *Salon* said:

Our site occasionally has columns containing sexual content. *Salon* would have to put up a gate saying you have to register. Our circulation would plummet overnight. Anytime you stop the normal impulse of a reader to click on your site, you lose traffic.

Judge Reed has stated that issues as to whether it would be economically realistic and technologically possible to verify the identity information of visitors are still very real issues to be determined by law.

Proponents of the law suggest that it does no more than take what already exists under State law on-line. But the plaintiffs argue the law could end up applying local standards to web sites which are by their very nature global and thus applying the lower standard of a State law to a global jurisdiction is inappropriate.

The Act was signed into law despite advice from the Justice Department that provisions of the Act may constitute an unconstitutional restriction on free speech. It was reported[2] that President Clinton approved the COPA proposal because it was attached to critical spending legislation. This happened similarly with the CDA which was linked to assuring passage through Congress of the US Telecommunications Act of 1996. This has interesting parallels to the way that laws in Australia which seek to restrict access to 'adult' or offensive material are passed through Parliament. For example, an amendment to the *Broadcasting Services Act 1992* moved by Senator Harradine which restricts the broadcast of "R" rated material on subscription broadcast television until both houses of Parliament have approved it was accepted by Government in order to assure passage of legislation which fixed the debacle it had got itself into with the tender processes for Pay TV satellite licences A and B[3].

Debate has raged about whether the recently released Starr report would have been covered by this law. Chris Barr, editor and chief of CNET said "it's a lot more targeted than the original CDA, but it would be problematic for companies like ours to find out the age of users before giving access to things like the Starr report". Government Attorney Karen Stewart argued that the Starr report would be out side of the scope of the statute because of its political nature. However the judge allowed the Starr report to be considered in the temporary restraining order proceedings on the basis that sites felt like they could face a prosecution for posting the report.

CONCLUSION

This ongoing battle highlights the difficulty of the application of the criminal law in the content of the on-line medium and how little we still understand the implications of direct regulation in this area. It also highlights how easy it is for laws to have unintended consequences. The full hearing of the action challenging the COPA is due to be heard in December 1998.

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1 Courtney Macvinta, CNET news.com, 'CDA II critics claim temporary victory ', November 19, 1998.

2 Courtney Macvinta, CNET news.com, 'Suit filed against CDA II', October 22, 1998.

3 Senate Hansard: Thursday, 13 May 1993, p.531.

Sound Unlimited: Music & Copyright in Cyberspace

Mark Bamford looks at how the music industry is moving its business on-line and the response of various copyrght collection societies.

The music industry is taking its first tentative steps into cyberspace. At stake is a potentially lucrative method of exploiting music. However, significant difficulties need to be overcome, not the least of which is rights protection. This article reviews some developments in the music industry as it gears up for the move on-line.

THE MUSIC INDUSTRY GOES ON-LINE[1]

Most major record companies and a host of independent labels have web sites. The size and complexity varies. By way of example, the Epic Records Group regularly updates its artists' web sites and often incorporates electronic bulletin boards to obtain feedback from customers. George Michael's label, Aegean Records, places the Internet more centrally in its business strategy. Aegean recently jointed up with Sun Microsystems Intervid, Iterated Systems and Real Videos/Real Audio to launch a web channel which delivers real video, digital quality sound and content.

Perhaps the most common form of electronic commerce conducted on the Internet by music industry players to date is the mail order service. For the purpose of such a service the web site acts as a shop front enabling browsers to sample products (eg music from a CD) and then to order and pay for them by e-mail The products are delivered to the customer by post.

The UK based Internet Music Shop provides a mail order service and makes monthly sales of around £25,000, growing at a rate of 25% per month.

Tower Records has plans to launch such a service in the UK following the success of its US retail stores. Tower Records will stock 350,000 different albums, videos and books which will be available to customers, in some cases at lower prices than found in retail outlets.

A few companies have gone a further step and provide music direct to the customer via the Internet. Central to this process is advanced information technology, and it is not surprising that the main proponents are US software developers.

Cerberus operates what is referred to as a 'digital juke box'. To operate the juke box a customer must acquire the appropriate software. The software allows the customer to download music onto the customer's computer hard-drive and then onto a mini-disc that can be used and re-used like an audio tape or floppy disc and played in any conventional mini-disc system.

The US based Internet music systems manufacturer, Liquid Audio, has formed a number of strategic alliances with other software companies for the purpose of developing systems to enhance on-line delivery of music. Liquid Audio has achieved CD quality sound on the low bandwidth of the Internet by developing new compression technology that has improved on Dolby digital compression.

An Internet user with a 'Liquid' music player can preview music titles with the player's streaming audio function. 'Streaming audio' currently works by apportioning a block of memory (a buffer in the random access memory of the users' computer) with two seconds of music so that it may begin playing that portion while it is downloading the next section of music to that same block. This means that the listener can hear the song in real time without having to wait for the whole song to download. If after previewing the music, an Internet user wishes to acquire it, the user can press a download button which will initiate a secure credit transaction and a one to two hour download of the title and its multimedia elements. When the music is downloaded to the user's CD-Rom drive, the quality of the resulting audio disc is virtually the same as a normal CD.

Another on-line juke box has been launched by a2b Music. AT&T, the US Telecom group behind the a2b Music software, claims it can reduce the download time for an average three minute song from twenty minutes to eight minutes and is currently negotiating with record labels belonging to Polygram, TimeWarner and EMI to load up the jukebox with their artists' product. AT&T has already reached an agreement with Bertelsmann, the German media group, in connection with the Group's Arista and RCA labels.

COPYRIGHT CLEARANCE[2]

What then are the copyright clearances required for such exploitation of music on-line?

An Australian on-line music distributor will need to clear copyright in the sound recording and the underlying music work of all songs exploited via its on-line service which are protected by copyright in this country.

In most cases a record company will control copyright in the sound recording by virtue of its recording agreement with the artist.[3] In some instances it may be necessary for the record company to revisit its agreement with an artist to ensure that it has obtained the necessary rights.

Where the on-line distributor does not hold the rights in the sound recording, a licence to copy the sound recording for the purposes of the service will be necessary.

The relevant rights in the underlying musical work (ie, the song and lyrics) which may be utilised in any particular instance of on-line distribution are the rights historically referred to in the industry as the 'mechanical right' (to make audio reproductions) and the 'synchronisation right' (to reproduce in audio visual adaptations such as videos). In addition, there is the so-called 'transmission right' which covers transmissions to subscribers of a cable or other wire-based service [4]. Such rights are likely to be administered, at least in part, by various collection societies.

Mechanical and synchronisation rights in musical works have historically been administered by the Australasian Mechanical Copyright Owners Society (AMCOS) on behalf of the copyright owners. However, at present such rights for music on-line have not been granted to AMCOS[5] and consequently it is likely that the relevant music publisher or artist controls such rights.

It seems that the transmission right will be utilised through on-line exploitation of music following the recent decision in Telstra -v- APRA[6]. Although the subsequent court case between APRA and OzEmail, which may have put the matter beyond doubt, was settled before a decision was reached, APRA administers the transmission right on the basis that it is utilised. In administering the right, APRA has reached agreement with members of the Internet Association of Australia so that Internet services providers who are members contribute to a fund which essentially covers the right to transmit musical works on-line.

ON-LINE COPYRIGHT AND WEBCASTERS IN THE US

In the US, the battle for on-line copyright royalties is hotting up in the context of 'webcasting' or on-line radio.

The US Copyright Office in Washington is considering implementing regulations that may have the effect of imposing a mechanical royalty for on-line radio[7]. Traditional forms of radio broadcast do no utilise the mechanical right and consequently broadcasters currently only pay performing right royalties.

Copyright in music in the US is in part regulated by the Digital Performance Rights and Sound Recordings Act 1995 which was introduced to maintain and affirm the mechanical rights of songwriters and music publishers in the face of technology which allows for digital delivery of recordings. The proposed regulations may affect this legislation so as to blur the distinction between mechanical rights and performing rights in relation to 'Digital Phonorecord Deliveries' or DPDs of music - a method of delivery for music on the Internet. This would mean the individuals accessing music for a single performance of the work may have to bear the cost of mechanical royalties.

The proposals result from a private agreement between the Recording Industry Association of America (RIAA) and National Music Publishers Association (NMPA) concerning the mechanical royalty paid to composers for the recording of performances of their music. The new regulations specifically address fees to be paid for electronic sale and distribution of recorded music under the 1995 Act. The regulations include two vague categories of 'incidental' and 'transient' DPDs. These could encompass temporary copies of parts of the recording that are made during transmission via the Internet and temporary copying in a computer's random access memory.

This aspect of the proposed US regulations is opposed by the Coalition of Internet Webcasters (whose membership comprises AudioNet Inc, Real Networks Inc, and Terraflex Data Systems Inc). They argue that streaming and transmission that occurs in the course of performance of sound recordings should be exempt from liability under the mechanical right. Essentially the Coalition argues that any bill that will ultimately be submitted to Congress should represent the viewpoint of all relevant parties involved in the business of on-line music, whether they be music publishers, record companies, broadcasters or the consumer public in general. Although the Copyright Office's Notice invites such participation, the agreement between the NMPA and the RIAA that underpins the proposed rules was reached to the satisfaction of merely half the industry. It is arguable that, unless incidental copying in the transmission process becomes an exemption from copyright infringement, then electronic commerce involving the flow of copyright material on the Internet will be unduly restricted.

COPYRIGHT MANAGEMENT - IMRIMATUR

Collecting societies such as the APRA and AMCOS and their contemporaries around the world have a significant stake in the utilisation of copyrights in music on-line . What is clear, however, is that merely identifying rights usage is only the first step in securing revenues for a collecting society's members. The second step is to police and track the use of music on-line.

One of the most significant developments for this second step in the European Community is the introduction of the IMPRIMATUR programme. IMPRIMATUR is an acronym standing for Intellectual Multimedia Property Rights Model and Terminology for Universal Reference. The programme is funded by the European Union and its participants include telecom companies, library associations and music industry groups. Its purpose is to establish standard copyright management systems for a whole range of industries that use text, imaging or audio in an electronic format. The intended result is a commercial software prototype with internationally agreed standards which will enable Internet trade in intellectual property. The programme is an important part of the work of the Confédération Internationale des Sociétés de'Auteurs et Compositeurs and is being coordinated by the UK based Authors' Licensing and Collecting Society.

In the UK, the Mechanical Copyright Protection Society (MCPS) is currently testing a demonstrator model of the authorising system.[8] Under the model, copyright works indexed for licensing purposes on the MCPS database are uploaded on to the IMPRIMATUR server and given invisible watermarks. These watermarks tie the work to a system where its use can be regulated and audited[9].

Without adequate safeguards and initiatives such as IMPRIMATUR, copyright piracy is likely to continue to plague the music industry in cyberspace, as it does presently, costing 5% of the world's gross market share. Indeed the problem of piracy is further complicated in cyberspace by the cross jurisdictional nature of the medium. A pirate may locate in a jurisdiction where copyright protection laws are lax or may readily adopt a fleeting presence across a number of jurisdictions so as to avoid detection and prosecution.

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1 The commercial developments stated are current, to the best of the authors' knowledge, at the time of writing.

2 Unless otherwise specified the position is stated according to Commonwealth Law.

3 A significant exception is 'production music'. The Australasian Mechanical Copyright Owners Society (AMCOS) controls rights in the sound recording and musical work for such music.

4 As commercial applications of the web expand the public performance right in both the sound recording and musical work may be utilised by users who receive the services in premises such as gyms, clubs and cafes.

5 Excluding 'production music' the on-line rights for which are held by AMCOS

6 Telstra Corporation Limited -v- Australasian Performing Right Association Limited 38 IPR 294

7 The Federal Register Notice of Proposed Rule Making In Mechanical and Digital Phonorecord Delivery Date Adjustment Proceeding (62 Fed Reg 63506) lists proposals for the new regulation.

8 The author understands that there has been some consultation between MCPS and AMCOS/ APRA in relation to trails of the system.

9 For further details visit http:www.imprimatur.alcs.co.uk. For the purpose of the demonstrator model, MCPS has combined with Liquid Audio.

Football, Meatpies, Kangaroos and Holden Cars ....and Kiwifruit

Therese Catanzariti and Diane Hamilton review the release of draft Australian Content Standard for Commercial Free to Air Television.

Late on Friday evening 13 November 1998, the new draft Australian Content Standard slipped into the Australian Broadcasting Authority website **http://www.aba.gov.au/what/program/oz_review/**

The Australian Content Standard sets out, among other things, minimum levels of Australian programming which must be broadcast on commercial television, and what the Australian Broadcasting Authority, the ABA, considers to be an "Australian program" for inclusion in the quota. Australian Commercial television licensees must comply with the Standard. The object of the standard is to "promote the role of commercial television in developing and reflecting a sense of Australian identity, character and cultural diversity by supporting the community's continued access to television programs produced under Australian creative control".

The prime catalyst for the review was the decision of the High Court in the Project Blue Sky case, which held that the Content Standard was inconsistent with Australia's obligations under the Australia/New Zealand Closer Economic Relations Trade Agreement because New Zealand programs did not count towards a commercial broadcaster's quota of "Australian programs". This was contrary to the Broadcasting Services Act 1992 which provides that the ABA must

determine a standard for Australian content and must perform its functions consistent with Australia's international obligations. In July 1998, the ABA issued a discussion paper. The ABA invited comments and consulted with the industry, both on the Project Blue Sky issue, and more generally on the operation of the Standard since it was introduced in 1995.

CONCERNS EXPRESSED IN SUBMISSIONS

The written submissions can be found on the ABA website. The submissions indicate that the main concern of many Australian film and television industry participants was not so much New Zealand programming, but programming from other countries.

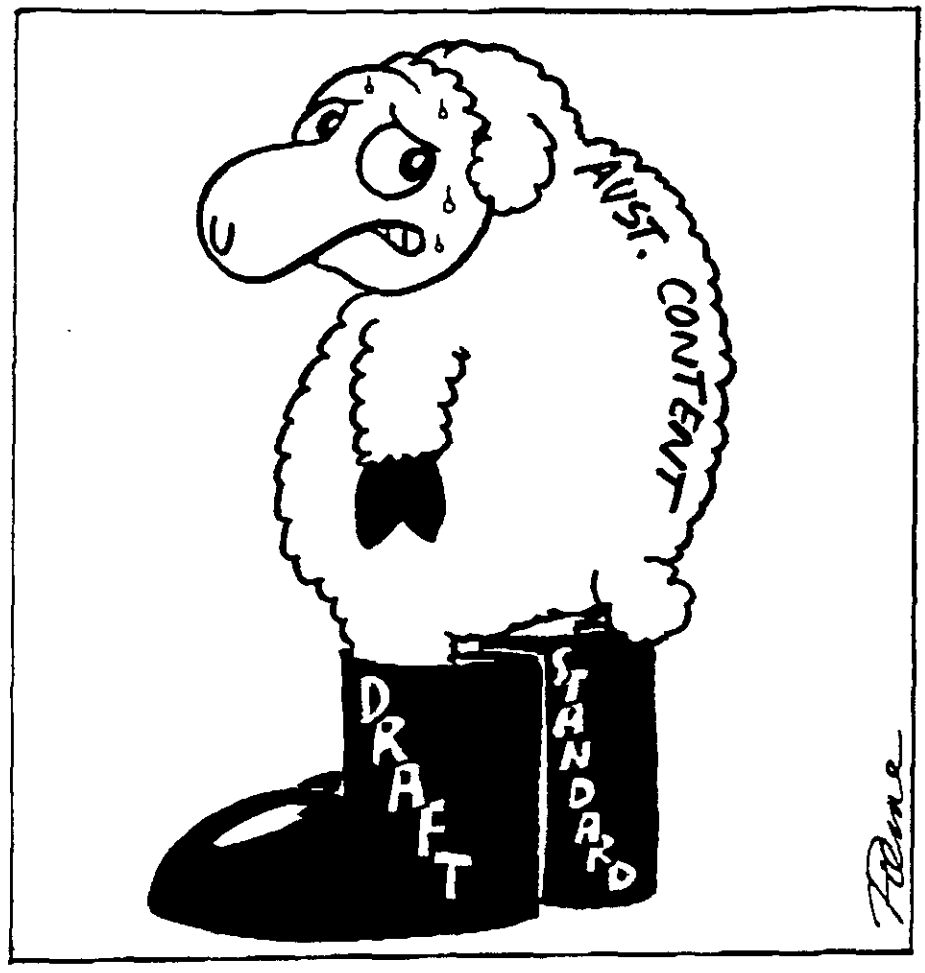
First, there was a concern that foreign producers would argue that their program was a New Zealand program, because there is no definition in New Zealand of what is a "New Zealand program". Many argued that programs such as "Xena The Warrior Princess" could be considered "New Zealand programs" and so count as Australian content because it is shot in New Zealand, even though United States producers had creative control. Second, there was a concern that foreign producers would rely on other treaties, such as the GATT and other World Trade Organisation treaties.

Some of the submissions called on the government to repeal the provision of the BSA which requires the ABA to comply with Australia's international obligations. It is no coincidence that many Australian film and television industry participants also lobbied Canberra against the OECD Multi-lateral Agreement on Investment.

THE DRAFT STANDARD

The main change in the Draft Standard has been to include New Zealand programming as counting towards Australian content. However, the Draft Standard now includes a threshold test of what the ABA considers to be a "New Zealand program". The test has the same creative elements as the Australian test.

In addition, the Draft Standard provides that the ABA has a discretion to disallow a program which meets the threshold test of being an "Australian program" (or a "New Zealand program") if there is a significant non-Australian (or non-New Zealand) content. The same sort of discretion appears in the test of what is "Australian drama" for the purposes of Australian subscription television. The discretion also appears in Division 10BA of the *Income Tax Assessment Act, 1936*. Division 10BA grants concessional treatment to investment in "qualifying Australian films". A "qualifying Australian film" must satisfy certain tests, and must also not have a significant non-Australian content.



The discretion introduces some uncertainty into the operation of the Standard. Division 10BA allows for the Department of Communications, the Information Economy and the Arts to issue a provisional certificate before a "qualifying Australian film" is completed. However, generally the ABA does not assess whether a program is an "Australian program" until after it has been broadcast. Broadcasters may be reluctant to commit to a program if there is some risk that it may not be an "Australian program". There is no provision in the *Broadcasting Services Act* which prevents the ABA giving producers and commercial broadcasters opinions on whether a program will satisfy the criteria for inclusion in the Australian content quota. If the discretion remains in the Standard, the ABA may come under pressure to give pre-broadcast opinions.

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The Communications Law Bulletin is the journal of the Communications and Media Law Association (CAMLA) which is an independent organisation which acts as a forum for debate and discussion and welcomes the widest range of views. The views expressed in the Communications Law Bulletin and at CAMLA functions are personal views of the respective authors or speakers. They are not intended to be relied upon as, or to take the place of, legal advice.

Contributions and Comments

are sought from the members and non-members of CAMLA, including features, articles, and case notes. Suggestions and comments on the content and format of the Communications Law Bulletin are also welcomed.

Contributions in hard copy and on disk and comments should be forwarded to:

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Communications and Media Law Association

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

Issues of interest to CAMLA members include:

- defamation
- contempt
- broadcasting
- privacy
- copyright
- censorship
- advertising
- film law
- information technology
- telecommunications
- freedom of information
- the Internet & on-line services

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

Speakers have included Ministers, Attorneys-General, members and staff of communications regulatory authorities, senior public servants, executives in the communications industry, lawyers in media and communications law, and overseas experts.

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