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To What Extent Does Racial Vilification Legislation Limit Free Speech Within the Australian Media?

Fidelma Maher, in this CAMLA Essay Prize winning paper, argues for greater sophistication in the media's ability to report and analyse divergent racial views as a potential counter to the need for racial vilification legislation

Anti-vilification legislation aims to protect particular groups against the damage caused by vilifying speech. Proponents of the legislation highlight the importance of limiting the harm of racism, by restricting racially vilifying speech. Some opponents of the legislation, particularly within the theoretical history of American social libertarianism, argue that a vigorous free market of ideas is the best way of encouraging open and informed debate, where racist ideas can be analysed and argued against. For the media, with its fundamental role in reporting news and information, vilification legislation means that journalists are restricted in merely reporting racially vilifying material, and must balance it within the wider context of historical and societal racial oppression. This applies pressures on journalists, within the already existing constraints of their roles, to act as de-facto educators. It is essential that freedom of the press is not limited so as to nullify any racial discussions. Racial vilification legislation has a vital role in providing recourse when all other avenues have been lost, or when the vilification is such that it is best decided in the legal arena. This reliance on the legislation, however, can be limiting, as the debate is constrained within legal boundaries. Open discussion within the media provides a greater forum for diverse viewpoints, and allows a dissemination of ideas that is impossible within the law. Ultimately, the media have a responsibility to report news, even if this news is potentially hurtful to members of our society. This is illustrated with the example of Pauline Hanson and One Nation, and the legislative and media response to their perceived racism.

THE EFFECT OF LEGISLATION

Racial vilification legislation is supported by international treaties and local and national legislatures worldwide. Support and opposition to legislative restrictions on free speech come from a variety of perspectives. Matsuda asserts that individuals who identify with groups that have been traditionally vilified are more likely to be aware of incidents of racial vilification, and connect them to a wider system of racism. These groups,

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then, are more likely to be supportive of racial vilification legislation than individuals who have not been subject to racism:

> *"The typical reaction of target-group members to an incident of racist propaganda is alarm and immediate calls for redress. The typical reaction of non-target-group members is to consider the incidents isolated pranks, the product of sick-but-harmless minds. This is in part a defensive reaction: a refusal to believe that real people, people just like us, are racists. This disassociation leads logically to the claim that there is no institutional or state responsibility to respond to the incident. It is not the kind of real and pervasive threat that requires the state's power to quell." (Matsuda 1989: 2327)*

This quote highlights the difference between Australian and American approaches to free speech. Matsuda calls for the introduction of an anti-racial vilification legislation that is specifically designed to target the historical and social oppression of racial groups within the United States. The prevailing belief in social libertarianism in the United States means that the consideration of free speech is paramount, resulting in the situation whereby the First Amendment protects the rights of the Ku Klux Klan and other racist groups and affords them police protection to march and assemble in public areas. Even the American Civil Liberties Union has fought court battles to ensure the rights of Nazi Party groups to hold rallies (Downs 1986: 233). Australians are much less protective of any perceived right to free speech, and are more willing to accept legislative controls.

Continuing the argument in favour of American laws to prohibit hate speech, Mahoney highlights another way in which American constitutional approach to governance has prevented the introduction of racial vilification legislation;

> *"The limits of rights only can be properly understood through a contextual, purposive, harms-based approach which respects equality. This approach not only exposes previously hidden issues but also affects how the issues are framed and how legal principles are applied. It challenges the assumption that human behaviour can be generalized into natural, universal laws. It challenges civil libertarian orthodoxy, centred on the individual's relationship to the state, by emphasizing the importance of the relationship of individuals to one another." (Mahoney 1996: 807)*

Both in theory and in practice, Australian racial vilification laws strive to create a balance between the rights of the individual or the media to free speech, and the very real harm that can be done through racial vilification.

THE MEDIA, RACIAL VILIFICATION AND WAR

In an environment where supporters of free speech often place the ideological ideal of a "free" press above all other considerations, it is dangerous to underestimate the power of the media to inform and shape popular opinion. The recent history of warfare is littered with accounts of media being used as propaganda machines. Aside from the more complex questions of media independence in conflicts such as the recent Iraqi war, governments have been directly involved in media manipulation during conflicts, from pamphlet drops, to Radio Free Europe, to manipulation of new media

technology in Bosnia. One example of this was the conflict in Rwanda, which saw a highly organised systematic use of radio manipulation to spread disinformation and coordinate violence:

> *"Nowhere in the post-Cold War world was the radio used as insidiously as in Rwanda. There, the now deposed Hutu government utilized official and unofficial radio sources to incite and carry out the 1994 genocide, in which an estimated eight hundred thousand people, mostly Tutsi, were killed." (Metzl 1997: 629)*

Metzl says that international law restricting the use of radio jamming technology, and the American disinclination to support radio jamming as limiting to free speech, contributed to the failure to prevent radio propaganda assisting the genocide in Rwanda.

It is obvious that local racial vilification legislation is virtually useless in an undemocratic, war-torn society. What is arguable, however, is that if local or international law can be used to protect racial groups against the extremes of media-based racial vilification, that is, explicit and protracted incitement within the media, then considerations of free speech must come behind the protection of people.

While this is an extreme example of racial vilification within the media, and it is certain that a free and vigorous press will not necessarily participate in racial vilification propaganda, it is obvious that ignorance, convenience and prejudice can combine to create racially vilifying material in the media as much as direct influence. The question is, at what point does *"an odd mixture of interesting analysis punctuated by sensationalized negative stereotype"* (Alexander 2002: 110) stop being racially insensitive, and start being racially vilifying? The answer to that question can often depend on which racial group you belong to, demonstrating just how subjective racial vilification legislation must be.

RACIAL VILIFICATION AND DOMINANT CULTURES

Racial Vilification legislation is often seen to be less forceful towards occurrences of racial vilification of "dominant" (predominantly white) groups by traditionally oppressed racial groups. The race of the person making vilifying speech is as much a consideration as the race of the material's target when determining the existence of racial vilification. Racial vilification is most effective when directed at historically oppressed groups. Matsuda illustrates this with the case of Malcolm X making speeches that include the term "white devils". While any attack on the basis of race is damaging, attacks by the racially oppressed on groups that are not tied to social/historical racial oppression are less harmful because they are not tied into an overall system of racism:

> *"Because the attack is not tied to the perpetuation of racist vertical relationships, it is not the paradigm worst example of hate propaganda. The dominant-group member hurt by conflict with the angry nationalist is more likely to have access to a safe harbour of exclusive dominant-group interactions. Retreat and reaffirmation of personhood are more easily attained for historically non-subjugated-group members." (Matsuda 1989: 2361)*

Within the context of the media, is the white reader offended by an anti-Western speech by a member of a nationalistic group better equipped to find reaffirmations of personhood in the mainstream press than the Asian or Middle-Eastern reader is when confronted by news stories, editorials and opinion columns that demonstrate, if not racism, then at least a level of cultural ignorance that they feel alienated by? The function and popularity of ethnic newspapers must in some part be tied to the lack of representation of that ethnicity in the mainstream media. As it is apparent that racial vilification does not exist within a cultural vacuum, it is arguable that the media thus has a responsibility to foster an environment where the market place of ideas is a viable illustration of the nature of racial debate.

RACIAL VILIFICATION AND ONE NATION

Regardless of their accuracy or moral value, Pauline Hanson's One Nation policies tapped a core of dissatisfaction in the community. The response by elements of the media and cultural "elites" were not effective to completely counter the policies of One Nation. This should be seen as a failure of the media. If journalists are convinced of the inaccuracy of a person's opinion, they should be able to present enough proof to the contrary to demonstrate the truth as they see it. The failure of cultural commentators, editorialists and celebrity opinion to convince large swathes of the community that Pauline Hanson and her policies were racist, inaccurate and dangerous is partially a result of an inability to understand the audience they needed to address, as opposed to the audience they actually had. Advertising departments of newspapers, magazines and television and radio stations carefully calculate their audience demographics. If, for example, the Sydney Morning Herald or ABC Radio present powerful, cogent arguments detailing the problems with Pauline Hanson and One Nation policies, but only a small degree of their audience are even inclined towards Hansonism, how does this benefit the dissemination of a broad range of information within the social market place? In other words, preaching to the converted may be comforting, but it does not substantially contribute to the marketplace of ideas if the audience for those ideas is narrow, and the same ideas are being disseminated.

It can be argued that some of the seductiveness of Pauline Hanson and

One Nation was the way in which issues that had been circumscribed were given attention in the media. Regardless of the validity or fairness of the beliefs of One Nation and its supporters, it is obvious that the debate revealed genuine concerns of both supporters and opponents of One Nation that had not been substantially expressed. The massive media coverage surrounding the rise and fall of Pauline Hanson made room not only for the extreme beliefs on both ends of the ideological divide, but also for reasoned, educated arguments concerning not only the substance of One Nations agenda but also the nature of the debate itself.

Lawrence McNamara's essay, *"The Things You Need: Racial Hatred, Pauline Hanson and the Limits of Law"*, discusses the law's failure to proscribe all forms of hate speech, in the context of the unsuccessful racial vilification action against Pauline Hanson.

> *"The law accepts Pauline Hanson in her own words, on her own terms, and in doing so grants a legitimacy to the political discourse in which she engages. It protects her on the basis of grammar and syntax, and leaves the parties to fight the battle for meaning in the domains of politics and culture." (McNamara 1998: 121)*

McNamara argues that the failure of law to recognise the racist foundation of Pauline Hanson's policies indicates that *"there is more to Ms Hanson's statement than the purely legal and literal interpretation uncovers"* (McNamara 1998: 122). This assertion suggests that to rely on legal methods as a way of dealing with racial vilification is to restrict the discussion to its legal boundaries. Language, by its very nature, is more flexible and fluid than the law is able to regulate. The intertextual relationships of language, as espoused by post-structuralist theorists such as Julie Kristeva, suggest that all writing and speech is influenced by the texts that come before them (Kristeva 1980: 69). Regardless of whether Pauline Hanson is consciously a racist, the language she uses does not exist in a vacuum, but is influenced by the language of those who have come before her, both those who share similar ideas and those who have fought them. Stanley Fish describes this discourse as speaking in code, where, "the speaker does not deceive the audience but tells it what it wants to hear, and, moreover, tells it in terms that allow its members to give full rein to their prejudices and yet appear to repudiate them (Fish 1994: 90).

LANGUAGE AND THE MEDIA

What affect does this have on the media? While there may be little legal recourse to someone merely because the language they use *infers* racist ideas, and has racism as its grounding principle, this does not mean that their language should be repeated without question in the media. When language is taken on its surface value, when it is reduced to its legal parameters, then meanings intrude without the control or conscious will of the journalist. The power of certain historically racist words, such as nigger, kike, or slope, is now accepted to the point where these words are not used in the media, or if referenced are often reduced to the truncated level of profanity. If the media can accept the insulting power of single words, then it should also be able to put racial discussion within its wider social and historical framework. Failure to contextualise racial discussion can inadvertently perpetuate the very racism that such discussions purport to dispel. Meadows describes this failure as a second form of racism, and says that it:

> *"Is more widespread and more insidious because it is largely invisible. This is the kind of racism that puts forward naturalised versions of events relating to race that inscribe into them certain propositions as a set of unquestioned assumptions. It enables racist statements to be made, divorced from the racist basis on which such statements depend." (Meadows 2001:165-6)*

Only by questioning assumptions and statements made by both themselves and sources are journalists able to morally and usefully navigate the racial discussions that lie outside the protection of the law.

This issue is made more problematic when groups wage moral battles through the legal system. This is illustrated as McNamara asserts:

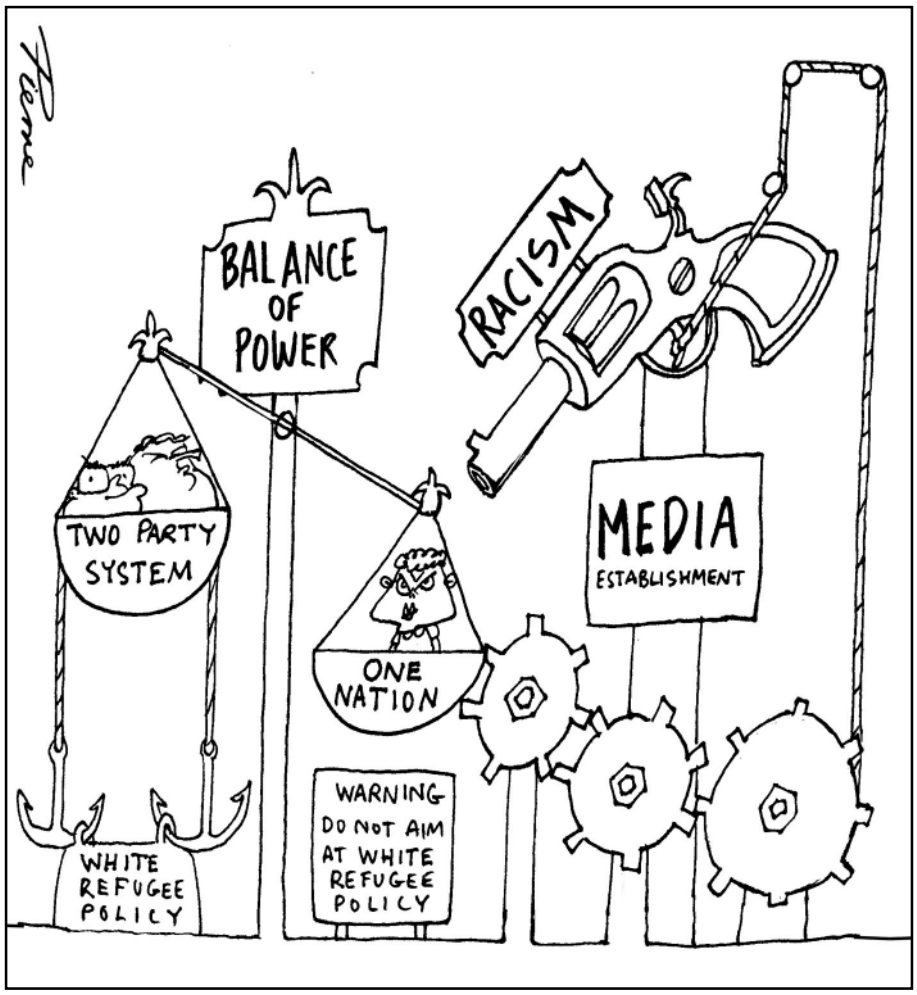
> *"To legally validate the statements of Pauline Hanson should not be to suggest they deserve respect; simply because the law says something is acceptable does not necessarily imbue it with civil or moral worth" (McNamara 1998: 122).*

If society solely relies on legal methods as a response to conduct that "ought not to be tolerated", then the success or failure can only be viewed within legal principles. Lively debate throughout the media should exist alongside any legal course. There is often a risk of so-called "trial by media" cases, but notwithstanding the restrictions of sub-judice contempt, the media has a role in educating the public about all facts in a debate, as well as reporting and analysis of different parties points of view.

Pauline Hanson's political threat to society, as implied by McNamara's article, are somewhat alleviated by the political decline of Pauline Hanson and One Nation. The dramatic decline in Pauline Hanson and One Nation's electoral vote in the March 2003 New South Wales State Election points to a success for the argument that open and vigorous debate can educate and change audience's opinions on certain topics. Critics may say that one reason for the decline in One Nation's political fortunes is due to the co-option of their policies by the mainstream political parties, but it could also be argued that

policy is not the sole reason when supporting a particular candidate. Rather, much of the media debate and publicity would have revealed flaws in One Nation's overall image, be they of policy, personal integrity, organisational abilities, or a failure to implement the policies they had espoused, leading to desertion by their constituency. Thus we can see the example of Pauline Hanson and One Nation as an instance where related legislation was unable to be implemented against alleged racial vilification, but where time and exposure in the media has led to the decline of the party's political fortunes.

The existence of racially vilifying beliefs in our society is without question. The use of legal methods to prevent publication of these ideas must be tempered by the importance of freedom of speech and the cost of prohibition of these ideas. Many personal vilification cases (that is, cases that are brought by individuals against other individuals) amply illustrate that vilification law can often be the final recourse against aggressive and protracted vilification. Legislation is, by necessity, a blunt object – laws must be broad and objective to comprise the full range of legal possibilities. The nuances of language and society can sometimes be lost within the boundaries of legal construction. Ideally, racial vilification legislation should not be necessary in relation to the media. The diversity of our media outlets should allow for conciliation to occur in the form of right of reply, an ideological variety of commentators, and, above all, a drive for true diversity of views in the media, so that no one opinion is given primacy. In the absence of this idealised media, however, it is clear that racial vilification legislation remains an effective, if unwieldy, tool for the oppressed.



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GTA3 and the Politics of Interactive Aesthetics

Dr. Mark Finn reviews the decision of the Office of Film and Literature Classification to refuse classification of Grand Theft Auto 3

The combination of computer technology with audio and visual media in computer games represents the essence of convergent entertainment. The games incorporate various facets of other forms of entertainment through a level of interactivity that makes them qualitatively different to any other form of media.

The interactivity of games and difference from traditional media is attractive to the consumers. Policy makers, on the other hand, seem to be struggling with how to effectively classify something which looks similar to other forms of content, but which engages the consumer in a totally different manner. The issues facing policy makers were demonstrated in 2001 when the Austra1ian Office of Film and Literature Classification **(OFLC)** issued a "Refused Classification" notice for the Playstation 2 game Grand Theft Auto 3 **(GTA 3)**.

THE GAME

GTA 3, the third instalment in a series of titles developed by Rockstar Games, has a gangland theme. The players control various characters as they traverse complex cityscapes engaging in various forms of criminal activity and complete violent missions to progress through the game.

GTA 3 also permits a significant degree of interactivity between the players character and non-players. All vehicles in GTA 3 (including police vehicles) can be commandeered by the player's character, and used in the commission of various crimes. Specific crimes require the possession of particular vehicles, so much of the game takes the form of a series of crimes interspersed with car-jackings.

The violence of the car-jacking will depend upon the weapons and firepower with which the player is equipped. The player can kill occupants of cars and any non-player as well as any of the law enforcement units which appear in the game, ranging from local police forces through to SWAT teams, FBI agents and the military.

The graphical presentation of GTA 3 allows the player to explore the three-dimensional game world. Lighting effects used throughout the game enhance the realism as does the fact that the game operates an accelerated day/night cycle in which one second of game time equals one minute of real time.

The three dimensional world allows for a detailed depiction of violent acts and interaction, including blood splatters. Some characters will attack the player at random while other non-players even attack each other. Whereas other games give the impression that the game world unfolds only as the player explores it, GTA 3 implies that its fictional universe will continue to function regardless of what the player does or does not do; pedestrians will continue to go about their business, drivers will continue to obey traffic signals and, just occasionally, innocent people will become the victims of crime.

The point of the game is to achieve criminal goals by utilising often deadly force. The player is rewarded financially for successfully committing crimes, and this money can then be used to purchase more weapons from gun stores located throughout the game world. Money can also be obtained by killing various non-player characters, with the amount received varying according to the type of character killed. It is this particular reward system that has attracted by far the most criticism, and it was, at least partially, the facet of the game which prompted the Australian OFLC to issue a Refused Classification notice for the game in its original form.

THE OLFC

The OFLC is the primary classification body in Australia and is responsible for the regulation of much of the published content Australian citizens see, hear and read. Operating under the *Classification Act* **(CACT)** and administering the *National Classification Code*, the Board is required to adjudicate on several thousand pieces of content every year, primarily in the form of books, magazines, films, videos, DVDs, music CDs and computer and video games. Section 11 of the *Classification Act* provides that Classification Board must asses the material to be classified in terms of:

- the standards of morality, decency and propriety generally accepted by reasonable adults; and
- the literary, artistic or educational merit (if any) of the publication, film or computer game; and
- the general character of the publication, film or computer game, including whether it is of a medical, legal or scientific character; and
- the persons or class of persons to or amongst whom it is published or is intended or likely to be published.

THE ASSESSMENT PROCESS

All bodies wishing to publish or distribute material in Australia must apply in writing to the OFLC for assessment by the Board, with the procedure for assessing computer games outlined under Section 17 of the Act. According to this Section, applications for assessment must be accompanied by a copy of the game (Section 17.l.cb), with any potentially contentious material being highlighted by a statement outlining the particulars of the material and a separate recording of that material (Section 17.2).

As is the case with all software titles released in Australia, the game carried an official OFLC rating, stating that the game had been classified as "MA 15+" and that it contained "high-level animated violence". However, while the rating carried the official OFLC stamp, it was in fact the result of an internal classification, done by staff at the game's distributors, Take2 Interactive (Ellingford, 2003). Given current staffing levels, it would have been physically impossible for the OFLC to classify all the content submitted to it in time to meet commercial deadlines. To circumvent this problem, most Australian game companies employed their own OFLC-trained reviewers to classify games according to official guidelines, allowing distributors to release the title while still awaiting "official" OFLC clearance. This process is actually described in the Act itself under Section 18.3, which states that:

> *If the applicant is of the opinion that the game would, if classified, be classified G, G(8+), or M (l5+), the applicant may also submit with the application:*
>
> *(a) an assessment of the computer game, signed by or on behalf of the applicant and prepared by a person authorized by the Director for this purpose, including:*
>
> *(i) a recommended classification for the game; and*
>
> *(ii) consumer advice appropriate to the game; and*
>
> *(b) a copy of any advertisement that is proposed to be used to advertise the game.*

In most cases, this "gentleman's agreement" benefited both parties, and had been operating successfully until the controversy over GTA3 brought the agreement to an end (Ellingford, 2003). In the case of GTA3, the OFLC took exception with the classification made by Take2 Interactive's in-house reviewers. Whereas Take2's reviewers had classified the game as MA15+, the OFLC argued that the game clearly exceeded the limitations of this rating. In a telephone conversation between the OFLC and the Managing Director of Take2, James Ellingford, the OFLC argued that the game permitted characters to engage in what it termed "sexualised violence", and as such was not suitable for teenage gamers (Ellingford, 2003). The primary concern here was the ability of players to hire prostitutes within the game world and then, if they chose to, kill them, although such acts were not part of the game's mission-based structure.

THE RESPONSE

Take2 Interactive responded immediately under the provisions of Section 43 of the Act, notifying the OFLC of its intent to appeal the decision. At a classification review board meeting held on 11 December 2001, some 35 days after the OFLC had ordered that all copes of GTA3 be removed from the shelves, Take2 Interactive presented its case for why the ban should be lifted, citing 35 separate points in its defence (Ellingford, 2003). The two main lines of Take2's defence were:

- That the OFLC decision had not been based on official classification code it was supposed to administer. While the code used to classify the game stated that 'any depiction of sexual violence or sexual activity involving non-consent of any kind' would be refused classification, at no point did it refer to a notion of "sexua1ised violence". Furthermore, Take2 argued that while the term "sexual violence" has a specific and recognised meaning in peer-reviewed psychologica1literature, "sexualised violence" has no such status. (Ellingford, 2003); and
- That while the game was inherently based upon the committal of violent acts, there was no direct connection between the ability to hire a prostitute in the game and any violence which was then done to them. According to Take2, the fact that no violence can be perpetrated while the prostitute is in the car with the protagonist undermines the notion of "sexualised violence" in that there is a clear point of disconnection between the depiction of sexual activity (as indicated by the car's rocking motion) and any violence that follows (Ellingford, 2003).

In response to Take2's contention that the classification code contained no direct reference to "sexualised violence", the Classification Review Board sought the advice of a senior government solicitor, Mr. Marcus Bezzi. However, rather than address the term in question directly, Bezzi instead focused on the need for the OFLC to remain consistent in its judgments. As the Classification Review Board's own documentation notes:

> *It was Mr. Bezzi's view that it would be desirable for the Review Board to be consistent in its deliberations, and if the Review Board found the (sic) a glossary of terms such as those listed in the film and videotape guidelines useful then such consistency could be achieved. The Review Board found such advice to be of assistance* (Classification Review Board, 2001).

This represents the Review Board's only discussion of the status of the term within the classification code, and as such it is difficult to read this part of the decision as anything but sidestepping around the issue. While the Classification Review Board noted that the representatives of Take2 Interactive "devoted much of their time and expertise to definitions of sexual violence" (Classification Review Board, 2001), it seems that the Review Board was unable to respond to this issue directly, even with the assistance of the Australian Government Solicitor.

The Review Board's response to Take2's arguments about the reading of the prostitute scene was somewhat more expansive, although they did not offer any direct response to the applicant's position. Instead, they provided a more detailed overview of the section of gameplay in question:

> *In one scene, of which the Review Board took particular note, the gamer stops to pick up a sex worker… She agrees to get in the car and the gamer drives onto a grassed, treed area. The car begins rocking and exhaust fumes are emitted in increasing amounts. The Review Board took this imagery to be a suggestion of sexual activity.*
>
> *After the sex worker leaves the car the gamer first drives off, then changes his mind and pursues her through the trees. A circle of white (which Ms. Baird for the applicant stated was a spotlight from a helicopter) appears on the ground. The sex worker is run over by the car and she is spread-eagled in the circle of 1ight/white.*
>
> *The sex worker then recovers and starts walking away. The gamer then leaves the car and accosts her by beating her repeatedly until she is prone on the ground and surrounded by red fluid. The gamer then takes the sex worker's money. This scene, from when she leaves the car until when the gamer returns to the car after assaulting her for the second time, takes over two minutes (Classification Review Board, 2001).*

While not referring directly to "sexualised violence", the Review Board made it clear that it is this connection between violence and sexual activity that represents the most contentious aspect of the game. According to the Board "*this juxtaposition gave the attack greater impact than if the two images had been widely separated by other game play"* (Classification Review Board, 2001). For this reason, the Review Board noted a number of things:

- that the OFLC was justified in its original decision to issue a "refused classification" notice for the game, as the level of violence depicted in the game "was unsuitable for a minor to see or play" (Classification Review Board, 2001);
- that had the OFLC had the opportunity to classify the game using a Restricted (18+) rating there may have been no need for it to be refused classification (Classification Review Board, 2001). However, under the Australian classification regime the highest level of restriction is MA 15+, which meant that any content which might be harmful to minors must, by definition, be refused classification.

With the rejection of the appeal, those responsible for the game's production and distribution were faced with two options

- leave the game as it was and accept that it would not be available in Australia; or,
- modify it so that the offending material was removed.

Rather than suffer extensive losses from the lucrative Australian market, Rockstar Games decided to take the expensive and unprecedented step of modifying the game's original code for the game, so that the version sold in Australia would be substantially different to that sold elsewhere. Specifically, the code was altered to prevent players from hiring prostitutes, thereby circumventing any possibility of the "sexualised violence" the OFLC was concerned about. With the offending content neutralised in this manner, the OFLC issued a MA 15+ rating for the game, allowing it to be once again offered for sale from February 15, 2002 (Monnox, 2002), more than two months after its original release.

ANALYSIS OF THE DECISION

The banning and then modifying of GTA 3 in Australia raises a host of questions about the place of computer and video games in society. In particular, the decision begs the question why the classification system for games in Australia has a highest rating of MA (15+), whereas all other forms of content are capable of receiving a R (18+) rating. It is possible to argue that there is an implicit assumption that games are designed primarily for minors, an assumption which is clearly not supported by the evidence. A recent survey by the online research company Ipsos-NPD found that in America 36 percent of players are 18 to 35, while 19 percent are over 36 (Interactive Digital Software Association, 2002). Moreover, figures also indicate that people who began playing games in their youth are continuing to play as they grow older. According to Jupiter Research, the median age of gamers is now 23, and as the gaming population continues to age, they are seeking increasingly mature content.

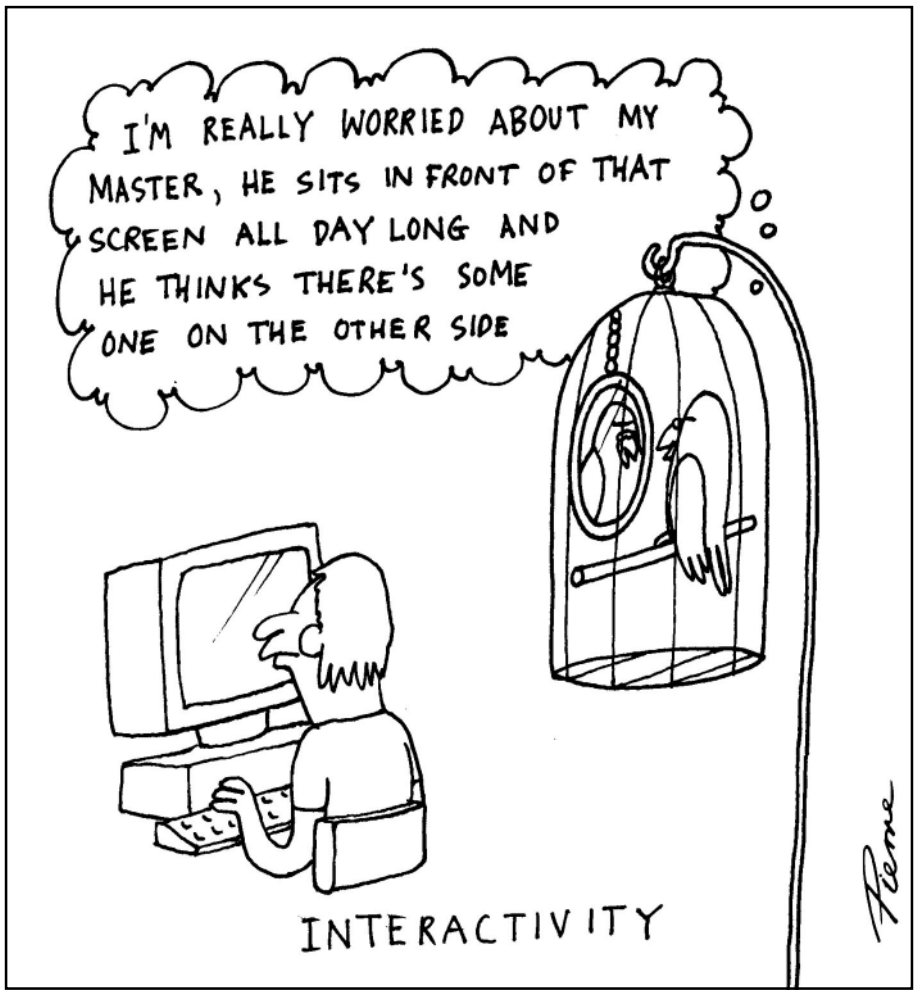
This indicates that current Australian policy is not in line with the realities of the video game market, a fact that has the potential to disadvantage consumers and the emerging domestic game development industry. Not surprisingly, there has been a

concerted effort on the part of both parties to persuade the government to revise its policies, resulting in an unusually large number of submissions to the OFLC's 2001 review of Australian classification regulations. Of the 372 submissions received by the OFLC, more that 90 were in relation to the possibility of an R (18+) category for games, including an online petition signed by 637 individuals (Brand, 2002: 36-30).

Despite this, the OFLC decided against introducing an R rating for games, choosing instead to maintain its existing classification regime in this area. Indeed it is possible to argue that in the wake of the GTA 3 decision the classification guidelines have actually been made even more stringent, with the notion of "sexualised violence" (which represented such a key issue in the GTA 3 debate) now written into the official guidelines (OFLC 2003).

While the battle to revise Australian game classification rules is likely to continue, it is possible to argue that the GTA 3 decision raises some deeper issues regarding the way in which all policy makers engage with game content. At its most basic level, the decision to refuse classification for GTA 3 was based on primarily aesthetic criteria, as are all decisions about the cultural merits of any form of content. However the fact that the relevant OFLC guidelines were based on guidelines developed for other media means that possibly inappropriate aesthetic criteria have been applied. Indeed, the Review Board's frequent use of terms such as "scene" indicate that they were utilising an aesthetic framework more suited to films and television programs than to the fluid, interactive text of a computer game.

Computer games are not like books, films, videos or television programs; they are premised upon a level of interactivity that makes them qualitatively different to these established media. While one could perhaps argue that games are not especially revolutionary when compared with a reader's flights of imagination when reading a good novel, such claims are usually made by those with little or no real experience with the game form. Like novels and other forms of established media, games do rely to some degree on the player's imagination to actualise the gameplay. But, unlike these other forms, games give players an unprecedented ability to change the way events unfold. No matter how many times a reader "imagines" the events of *The Godfather*, Luca Brasi will always die by strangulation towards the end of the novel. The same simply cannot be said of most games and of games like GTA 3 in particular. The importance of interactivity is in fact recognised by the Classification Review Board itself which noted that games *"because of their 'interactive nature' may have greater impacts and therefore greater potential for harm or detriment, on young minds than film or videotape"* (Classification Review Board, 2001). However, for the Classification Review Board "interactivity" seems to be roughly interpreted to mean "effects", an interpretation which fails to recognise the complexity of the relationship between player and game text.



The relationship between games and their players has received tremendous attention from the academic community over the past fifteen years, with scholars from a wide range of disciplines engaging with the topic. For example, many authors such as Silverman (2002), Parsons et. al. (2002) and Gal and Pfeffer (2003) utilise decision theory to explore many aspects of the game phenomenon, with particular attention being paid to the development of artificial intelligence in game environments. Similarly, researchers in the broad disciplines of information science and information economics

have also begun to examine a range of game-related concepts, with writers such as Kirriemuir (2000) and Chen (2000) representative of the former approach, while Wildman (1998) and Waterman (2003) offer good examples of the later. Even political science, which at first glance may not seem immediately applicable to the study of video games has made important contributions, with writers such as Deibert (2002) focusing on the broader ideological implications of games on society.

Not surprisingly, psychology represents one of the more prolific areas of research, with the question of effects representing an especially fertile area. In this respect, the work of writers like Ballard and Lineberger (1999), Colwell and Payne (2000), Slater (2003) and in particular, Anderson (1986, 1997, 2000, 2003) have continued a long tradition which uses a combination of laboratory and real-world studies to propose a direct causal relationship between violent games and violent behaviour and/or attitudes. While this body of literature is gaining increasing credibility (especially in the eyes of United States regulatory bodies), there still remains much contention about the validity of these claims, especially in terms of the laboratory-based studies. For example, Gauntlett (1999) argues that even the most "real-world" studies are heavily mediated by the presence of the researcher, and by the methodological techniques he or she applies. Sefton-Green (1998) takes the issue further by questioning the ideological motivation behind most effects studies. According to Sefton-Green, *"research from the effects tradition either sets out to create anxiety or to explain and allay such concern in the context of moral panics"* (Sefton-Green 1998: 14).

While acknowledging the importance of these debates, it is not the aim of this article to use them to contextualize the OFLC decision on GTA 3, and indeed to do so adequately would require a far longer discussion than is possible here. Instead, the present paper aims to approach the subject from the perspective of what could be broadly termed "interactive aesthetics", a notion which both draws on and informs (either explicitly or implicitly) many of the approaches outlined above. Much of the work in this area has focused on the ways in which games differ from traditional media, and in particular on the way in which narrative functions in the game world. As Juul explains, narrative as it is traditionally known cannot simultaneously exist with interactivity, in that narrative usually requires a compression of time, whereas interactivity can only take place in a real-time scenario (Juul, 1999). To illustrate this point, Juul uses the example of the 1983 Atari game Star Wars, arguing that if the computer is a narrative medium, then stories from other media should be directly translatable to the game format. However, in Juul's view, only the title and the language create a correlation between film and game, and the events of the game do not directly correspond with the events in the film indicating that there are clear differences between the two (Juul, 1999).

The question of the narrativity of GTA 3 is of great relevance here, for it would appear that at least part of the controversy surrounding the game rests upon a particular view of this concept. At one level, one could perhaps identify an overarching narrative structure within the game text, in that players can progress through the game world by fulfilling missions in a set order. These missions are usually preceded by a short pre-rendered sequence ("cut-scene") that gives the player information about what they have to do in the upcoming mission, as well as about related events in the game world. Based on these sequences alone, the "story" of GTA 3 follows the rise of an unnamed character through the underworld, focusing on a series of alliances he forms with various underwor1d figures. However, this narrative aspect is only of secondary importance in GTA 3, with the free-roaming interactivity engendered by the game's engine representing the primary drawcard.

CONCLUSION: POLICY AT AN IMPASSE?

As a body charged primarily with making decisions regarding the suitability of texts for public distribution, it is clear that, at least as far as games are concerned, the OFLC is basing its decisions upon aesthetic criteria which are at best questionable, or at worst seriously misleading. As it currently stands, computer games are primarily judged against the same basic criteria as films and videos, despite that fact that, as has been discussed in this paper, they operate in a very different fashion. Even when this difference is recognised, it is done with recourse to a model of media effects long abandoned in relation to other media. Rather than being seen as the most revolutionary aspect of the game form, "interactivity" is seen as its most dangerous characteristic.

The issue here is not the suitability of GTA 3 for children or the appropriateness of the OFLCs decision to refuse classification. Rather, what is at issue here is the very process by which all games are classified, a process which largely ignores the specificity of the gaming experience. Indicative of this is the fact that when classifying games the OFLC do not actually view the game as an interactive medium; rather they view a pre-recorded videotape of gameplay as supplied by the game's distributor. Not only does this leave the classification process open to abuse (by distributors supplying relatively "tame" excerpts of potentially controversial games), it also negates the possibilities of choice interactivity allows. In this respect,

it is perhaps not surprising that the OFLC and the Classification Review Board used the aesthetics of film and video in making their decisions; for them the experience of the game was in every respect the same as viewing one of these non-interactive media.

The problem faced by the OFLC however, is not simply a practical one of having access to appropriate technology. It is one of familiarity with the relatively new medium of games, for as the review documents clearly demonstrate, the people who govern the classification process in this country are not familiar with the increasingly sophisticated modes of engagement games offer. This has already been recognised by consumers, and has led to one attempt by a gamer to join the OFLC Review Board (Higgins and Wyld, 2002). While this attempt was unsuccessful, it does serve to demonstrate a growing dissatisfaction with the way games are classified in this country. This, of course is likely to change over time, as OFLC members are gradually replaced by individuals for whom games are not so alien a form. The OFLC is also very mindful of the dilemma it faces with respect to this particular form of entertainment, as evidenced by the fact that a significant portion of the Office's recent conference on the regulation of content in a convergent market was dedicated to games. However, until these issues are addressed, the OFLC, a body dedicated to "informing your choices", is likely to continue experiencing problems when dealing with the form of media that offers more choice to the consumer than any other.

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Postcard From Oulu, Finland

Therese Catanzariti Oppermann reviews developments in 4G telecommunications research in Finland.

In June 2002 I met a guy at a party. We started chatting and he told me he was moving to Finland. Now, here I am in Oulu, 600 km north of Helsinki, next door to Lapland and 160 km south of the Arctic Circle, taking a year's break from being a barrister.

Oulu's centrepiece is the Technopolis, a science park for ICT industries and home to hi-tech companies such as Nokia Mobile Phone R&D, a VTT research centre (VTT is Finland's CSIRO), Elektrobit and NetHawk who supply technology for wireless networks, and Oulutech, an incubator program for start-up companies.

The University of Oulu is a leading science and technology university. The guy I met at the party is the director of one of the university's research centres, the Centre for Wireless Communications **(CWC)**.

CWC provides an interesting insight into how Europe, and Finland in particular, finances and conducts telecommunications R&D. CWC's research is targeted and industry based. Funding is important but forms only one part of the equation. The key is relationships, partnership and co-operation, between local and foreign universities and industry. CWC leverages research, skills, resources, people and financing throughout Finland, Europe and the world.

CWC's main areas of research are 4G technology and Ultra Wideband.

For those like me from the M part of CAMLA… Until recently, 2G was the current generation of mobile phones. 2G is voice-oriented with a low data rate, up to 12 kb/s. The most common form of 2G is GSM.

2 ½ G (also known as GPRS) uses the spare capacity in GSM. It aggregates the voice slots to increase the data rate to around 60 kb/s.

3G is primarily data-oriented, although it still has voice. It has much higher data rates, theoretically up to 2Mb/s, but in practice up to 384kb/s, and most commonly 64kb/s. This is why you can stream video on 3G.

However, all of these structures (2G, 2 ½ G and 3G) are conventional cellular structures. Thus each user has to rely on a base station, and the data rate decreases as you move away from the base station. This means that there are islands of capacity depending upon where the base station is.

4G augments the coverage of a conventional cellular structure. If you have a wireless LAN network like a 802.11 system each user's device acts like a little base station. You can create capacity in the particular region through the presence of other users. Therefore, capacity exists where the users are, as opposed to where the base station is. This leads to ad-hoc network structures as the users move around. The users are the network.

Users can talk to each other if they are within a certain proximity of each other, even if there is no base station. However, they still need to use the base station if they want to talk to someone far away. This is why they *augment* the coverage of the structured cellular system.

4G is all data, with voice being one form of the data. Phones become data terminals. Data rates are much higher, with a maximum of 100Mb/s for a mobile device, and 1Gb/s for stationary devices.

However, 4G will only work if the system is spectrally efficient in term of bits per second per herz. This means that the system needs sophisticated

signal processing techniques. These techniques include MIMO (multiple input, multiple output), space-time coding, multi-carrier CDMA (code division multiple access), OFDM (orthogonal frequency division multiple access), adaptive radio links and SDR (software defined radio). These techniques are at the limits of modern communications science. Without them 4G cannot exist as the data rates would not come within the bandwidth restrictions. CWC is heavily involved in research for these techniques, and establishing a multi-million euro 4G lab to investigate key enabling technologies.

Ultra Wideband is a radio technology suitable for ad-hoc networks. It utilises a bandwidth of as much as 7.5 GHz (between 3.1 GHz and 10.6 GHz). This is 1500 times the bandwidth of 3G systems. The potential data rates are enormous. CWC recently measured data rates of up to 3Gb/s over short distances. Ultra Wideband also offers the ability to trade very high data rates over short distance systems, for lower data rates over longer distance systems.

CWC is completely funded by research projects and is involved in 22 projects this year. With a budget of 5 million euros for this year, CWC has 90 staff, mostly PhD students, post-doc academics and professors. There is a significant number of foreign academics and students, from places such as China, US, Sweden, Sudan, Romania, Serbia, Spain, Japan, Brazil and Italy.

CWC projects include military research for the development of things such as communications systems for fighter jets and ships. CWC also conducts research projects with Finnish companies like Nokia and Elektrobit. TEKES, the Finnish government funding body, provides 60% of research and development funding for such projects on the condition that a minimum of 2 other companies put up the balance of 40%. The results of the research and development are jointly owned by the companies and the university.

CWC is also involved in joint research projects with other European universities and companies that are generously supported through EU funding. The project model is collaborative research involving a number of competitor companies rather than individual competitive research. For example, CWC is involved in a project called PULSERS which augments 802.11 technology (such as WiFi and Bluetooth) with Ultra Wideband technology. The project partners include companies such as IBM Switzerland, Phillips UK, ST Microelectronics Switzerland, Motorola France and Telefonica Spain, and universities from Rome, Dresden, Karlsruhe and Finland. The project's budget is 45 million euros, with the EU providing roughly 50%.

Further abroad, the CWC also has a number of projects with companies in countries such as the USA and Israel, and universities including Yokohama and Osaka in Japan and MIT in the United States.

Yes, it is cold here. Today it reached -12 degrees Celsius!

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The Plot Thickens Formats, Sequals and Spinoffs After Goggomobil

Therese Catanzariti Oppermann reviews the recent Telstra Corporation Ltd v Royal & Sun Alliance Insurance Australia Limited decision.

The film and television industry trades in intangible rights. Format rights and the right to produce sequels, prequels, spin-offs and remakes are notorious smoke and mirrors. Demands are made, deals negotiated, letters exchanged, contracts executed, money paid. If anyone asks any questions someone might mutter something about Jaws,[1] whilst others might mumble in reply about a New Zealand clap-o-meter.[2] The recent matter of *Telstra Corporation Ltd v Royal & Sun Alliance Insurance Australia Limited* [2003] FCA 786 (**Goggomobil**) offers rare insight into this area of law.

AUSTRALIAN PRACTICE

Investors in Australian film often require the producer to assign to them the "ancillary rights" in the film, and to provide the investors a chain of title opinion letter from a lawyer confirming that the producer owns the ancillary rights. The ancillary rights include the right to produce or authorise the production of sequels, prequels, spin-offs and remakes.

Investors maintain that the revenue generated by formats, as well as sequel, spin-off and remake rights are a product of their investment in the initial film. The investors reason that the assignment of such rights to them serves to protect their right to share in the further revenue.

GOGGOMOBIL CASE BACKGROUND

In the *Goggomobil* case, the Federal Court was asked to consider whether certain advertisements for Royal and Sun Alliance trading as Shannons Insurance (**Shannons**) infringed Telstra's rights in a Telstra Yellow Pages (**Yellow Pages**) television advertisement. Shannons' advertisements were created by Wilson and Everard (**Wilson**) and aired on both television and radio. Telstra alleged that

Shannons appropriated the format, story and character that appeared in the Yellow Pages advertisement.

Telstra's claim was in copyright and passing off. Copyright offers a number of advantages for protecting format rights, and the right to produce sequels, prequels, remakes and spin-offs:

- Copyright is discrete personal property and may be assigned, licensed or transmitted by will.[3] In contrast, passing off requires reputation which is difficult to define, and may only be assigned as part of the assignment of a business as a going concern.
- Copyright arises on creation and continues for a statutorily defined period. However, passing off depends on promotion and trading, which may take significant time and effort to develop and maintain.
- A series of international treaties such as the *Berne Convention* and the WTO *TRIPS Agreement* protect copyright, making it conducive to trans-national transactions. In contrast, passing off is protected by piecemeal national laws, and depends on the laws of the particular jurisdiction.
- The *Copyright Act* provides a number of statutory evidentiary presumptions about authorship, ownership and year of creation.[4] Passing off does not offer such presumptions and the claimant bears the evidentiary burden.

Despite such advantages, Merkel J rejected Telstra's copyright claim, but accepted Telstra's passing off claim. However, close analysis of the judgment reveals that the case may be able to be distinguished as it turned on a few key facts.

Telstra's Advertisement

Telstra's Yellow Pages advertisement ("**Yellow Pages Advertisement**") featured a character with a thick Scottish accent who owns a rare and distinctive car called a Goggomobil. After trying unsuccessfully to fix the car in the driveway, the character goes to the house and searches the Yellow Pages. He rings a number of people, who apparently do not know what he is talking about. The character grows increasingly frustrated and resorts to spelling the name of the car - G-O-G-G-O - in his Scottish accent. Finally, the character finds someone who knows what he is talking about. The advertisement fades to the Yellow Pages logo.

Shannons

Shannons, a specialist in insurance for vintage, veteran or classic motor vehicles, engaged Wilson to create an advertising campaign.

Yellow Pages was approached to reproduce parts of the Yellow Pages Advertisement. Yellow Pages asserted copyright subsisted in their advertisement, and refused permission. Shannons instructed Wilson to create a script that did not reproduce the Yellow Pages Advertisement.

Shannon's Advertisement

The first Shannons advertisement (**First Shannons Advertisement**) featured the same actor playing the same character, with the same make of car, albeit a different model and different colour. The character is in the driveway, not the house, and makes calls from his mobile rather than from a landline. There is no Yellow Pages in sight. However, he is again forced to call a number of places and spell the name of the car before finally calling someone who knows what he is talking about.

Shannons' marketing consultant informed Telstra that they had rescripted Shannons' advertisement to avoid any reproduction of the Telstra advertisement. Telstra replied that the advertisement conveyed an association with, endorsement or affiliation by Telstra.

Shannons made some minor changes to the script[5], and further changes were made during production.

Shannons then produced a second advertisement (**Second Shannons Advertisement**) which featured the same actor playing the same character and the same make of car, albeit a different model and different colour. This time the voice-over and the character engage in a dialogue about Shannons' insurance policy. The character speaks with a Scottish accent but does not make any phone calls and does not say or spell the car name. However, he does pronounce the "O" in the phone number the same way as he pronounced "O" in Goggomobil.

Shannons also produced four radio advertisements (**Shannons Radio Advertisements**) in the form of a dialogue between a voice and the character providing information about Shannons' insurance policy. Again, the character does not say the car name or spell out the car name, but he does pronounce the O's in the phone number in the same distinctive way and all involved the use of a telephone.

COPYRIGHT ANALYSIS

In Australia, copyright and other subject matter are protected by the *Copyright Act 1968* (Cth) (**Copyright Act**).

The *Copyright Act* deems that copyright in a cinematograph film is infringed if a person who is not the owner of copyright does or authorises the doing of any act comprised in the copyright without the copyright owner's licence,[6] [7] including making a copy of the film, causing the film to be seen in public or communicating the film to the public.

However, Telstra did not claim infringement of copyright in the cinematograph film which was the Yellow Pages Advertisement itself. Instead, Telstra contended that Shannons had infringed copyright in the Yellow Pages Advertisement's script ("**Yellow Pages Script**") as a literary work

Literary work

Even though a film may not infringe copyright in the original film, the film may infringe copyright in the literary work i.e., the script of the original film. However, Telstra faced significant difficulties in making out its claim. The Yellow Pages Script that it relied on was the synopsis of the Yellow Pages Advertisement and key features of the Yellow Pages Advertisement did not appear in the script as they were improvised in the course of production. In short, the Yellow Pages Script differed markedly from the Yellow Pages Advertisement.

It appears that Telstra did not rely on Yellow Pages Advertisement's shooting script. While it may not have been written down in words, it still had material form, as it was fixated in the Yellow Pages Advertisement itself.

Ultimately, Merkel J assumed without deciding that the synopsis reflected the original script, and assumed copyright subsisted in the Yellow Pages Script.

Merkel J's analysis suggests that scriptwriters who favour vague outlines, advertising agencies who use concept documents, and directors who workshop the script during rehearsal or allow improvisation during production,[8] may limit copyright protection.

Dramatic work

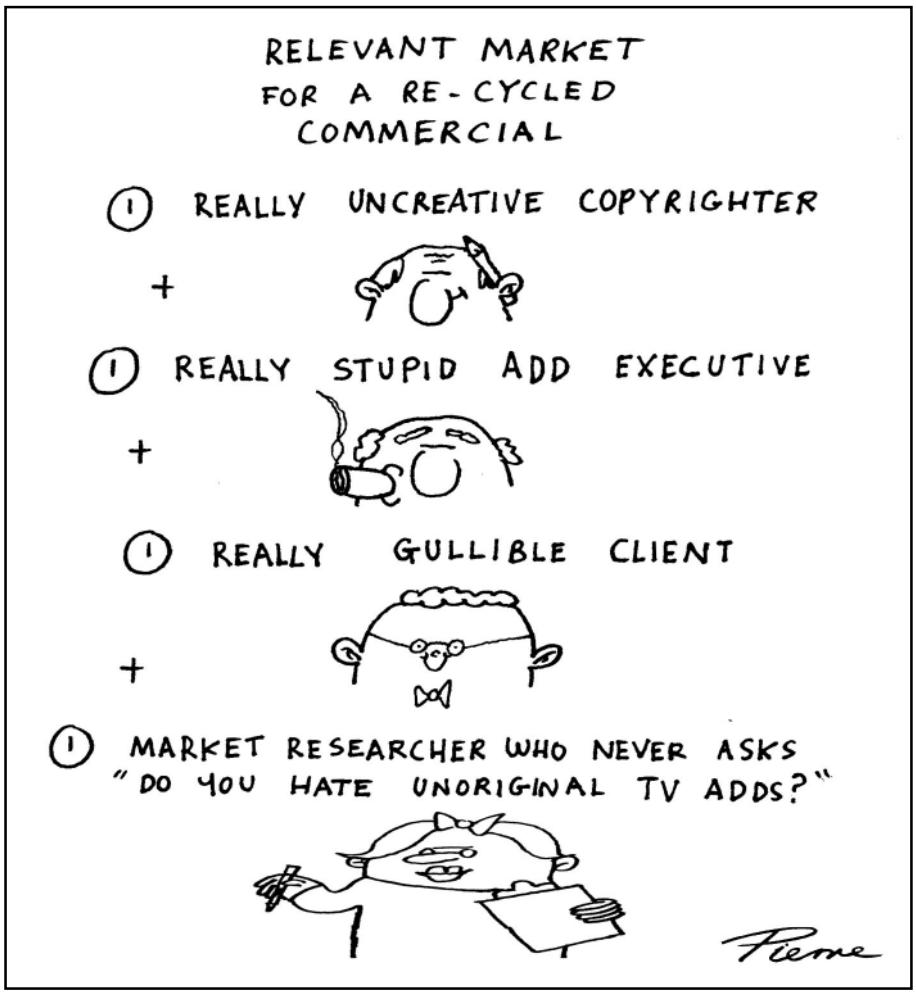
Telstra also argued that Shannons infringed copyright in Telstra's dramatic work. Dramatic work is defined to include a scenario or script for a cinematograph film.[9]

Usually, the claimant is relying on the script as the dramatic work, however, Telstra asserted that the Yellow Pages Advertisement was the dramatic work and did not rely on the Yellow Pages Script as the dramatic work. Telstra argued that the definition of dramatic work is inclusive and is not limited to scripts, but could include a series of dramatic events making up the story.

Structuralism and literary theory describe the story as the dramatic structure, the skeleton of the action, the roles and functions of the particular characters. The plot is the way that the story is told, the arrangement of the scenes. [10]

Merkel J analysed the advertisement and said that the series of dramatic events included.

- oil leaking from a yellow Goggomobil sitting on a jack in the enthusiast's driveway;
- the enthusiast's wife looking concerned as he flicks through a publication to find the phone number of someone who can help him repair his Goggomobil;



- the enthusiast's frustration at not being able to find someone who understands what a Goggomobil is;
- the need for the enthusiast to slowly repeat the word "Goggomobil" and later to spell it out slowly to try to communicate his problem;
- the enthusiast's elation when he finds a supplier who not only knows what the Goggomobil is but who can differentiate between particular models of Goggomobils;
- the happiness of the enthusiast with the outcome.

Merkel's analysis suggests that the elements of the copyright work are events rather than words, and the arrangement of the events is the plot. If Telstra was successful, it would have heralded the beginning of some form of protection of format rights and remake rights.

However, Merkel J said this claim had significant difficulties, as it was premised on the proposition that copyright can subsist notwithstanding that the work has not been reduced to material form.[11] It may be that Telstra's submission did not go that far – the dramatic work could have been fixed in the film itself, which was a distinct copyright from the dramatic work.

Infringement

Even if copyright subsists in the script of the original film, or in the series of dramatic events, the issue is to what extent that script or the series of dramatic events is infringed when someone takes the format of the original, or produces a sequel, prequel, remake or spin-off of the original.

Copyright in a literary work and in a dramatic work is the exclusive right to:

- reproduce the work in a material form,
- publish the work,
- perform the work in public,
- communicate the work to the public,
- make an adaptation of the work, or
- do any of the foregoing in relation to adaptation of the work.[12]

Importantly, "reproduction in material form" is not the same thing as "making a copy". A reproduction in material form is reproduction in any form of storage (whether visible or not) from which the work or adaptation, or a substantial part of the work or adaptation, can be reproduced.[13]

Unlike a cinematograph film, copyright in a literary work or a dramatic work may be infringed even if it is not an exact facsimile copy. A dramatic work is deemed to have been reproduced in material form if:

- a cinematograph film is made of the dramatic work, and the copy of the film is deemed to be the reproduction;[14]
- it has been converted into or from a digital or other electronic machine-readable form.[15]

In addition, it is not necessary to reproduce the complete dramatic work to infringe copyright in the dramatic work – it is sufficient if a *substantial part* of the work has been reproduced.[16]

There is no definition of substantial part in the *Copyright Act*. It is a question of fact to be determined having regard to all the circumstances.[17] The phrase "substantial part" refers to the quality of what is taken, rather than the quantity,[18] the essential or material features of a work.[19] In *Autodesk Inc v Dyason (No 2)*, Mason CJ considered that the essential or material features of the work could be ascertained by considering the originality of the part allegedly taken.[20] Copyright is not limited to the precise words, and may extend to the situations and incidents and the way in which ideas are presented.[21] There may be no copyright in an idea. However, there comes a point where an unprotectible idea becomes so detailed and expressed that it becomes protectible.

When considering the idea-expression dichotomy in *Zeccola v Universal City Studios Inc*[22] the Full Federal Court noted that copyright subsists in the combination of situations, events and scenes which constitute the particular working out or expression of the idea or theme and not in the idea or theme itself, observing that;

> *"Originality lies in the association, grouping and arrangement of those incidents and characters in such a manner that presents a new concept or a novel arrangement of those events and characters."*

The Court also recognised that while numerous factors such as sequences and dialogue are to be considered, they are to be looked at *"only as part of a process of forming an overall impression as to the originality"* of the subject matter when determining *"the extent of similarity or dissimilarity and whether or not there was copying."*[23]

In *Telstra,* Merkel J cited *Zeccola* and repeated that copyright does not protect ideas or concepts but only the form in which they are expressed, and noted that it was not sufficient for Telstra to establish that Shannons reproduced the ideas, concepts or themes of the Yellow Pages Script or the series of dramatic events in the Yellow Pages Advertisement.

Telstra only alleged that First Shannons Advertisement infringed Telstra's copyright. Merkel J said compared Telstra's copyright works to the Shannons First Advertisement and concluded:

- The Yellow Pages Script bore little resemblance to First Shannons Advertisement and that Shannons' copying in First Shannons Advertisement related to the concepts or themes employed in the Yellow Pages Script rather than the *expression of* the concept or themes.
- While there was a significant resemblance in the concept or theme of Telstra's series of dramatic events in the Yellow Pages Advertisement and First Shannons Advertisement, these resemblances related to the ideas and concepts rather than their expression, and were not sufficient to constitute the reproduction. The dialogue and setting or structure were not substantially the same, thus falling well short of substantial reproduction.

Merkel J's analysis suggests that even if Merkel J accepted that copyright would subsist in a series of dramatic events, a film would only infringe such copyright if it was a faithful reproduction of the story and the plot of the series of dramatic events. Therefore, a film that faithfully followed the format's events and sequence of events or a remake may infringe, but a sequel or spin-off which only takes some of the characters or some of the events, or which plays the events out in a different sequence, may not infringe.

Merkel J noted that First Shannons Advertisement "conjured up" or "evoked" the Yellow Pages Advertisement and its ideas and concepts, without reproducing it. This suggests that a sequel or spin-off which merely includes some of the characters or some of the events of the original, or a film which is "inspired by" another may not infringe copyright.

PASSING OFF ANALYSIS

Passing off protects the business and goodwill of a person. It does not protect the goods and services themselves.[24]

To bring an action in passing off, the claimant must establish:

- reputation in the relevant market in the relevant indicia;
- another person's use of the relevant indicia constitutes a misrepresentation that the other's product is the original, or is otherwise associated, connected or endorsed by the claimant;
- damage or a likelihood of damage to the claimant's reputation, business or goodwill.[25]

Reputation

The claimant may have a reputation even if the relevant market is not aware of the particular person. It is sufficient that the relevant market associate the particular product with a particular source.[26] The claimant must demonstrate that it had a reputation in the relevant market in the relevant indicia.

In *Telstra,* Merkel J considered the history of the Yellow Pages Advertisement, including its extensive televising for 6 years, reference to the Yellow Pages Advertisement in a

marketing textbook, and expert evidence about the advertisement's success and popularity. Merkel J also considered Shannons' own market research including Shannons' focus group reports which stated that the focus groups recognised the Yellow Pages Advertisement as an *"historic, outstanding, iconic, talked about and much loved Yellow Pages [television commercial]"* and Wilson's report which referred to the Yellow Pages Advertisement as "*immensely popular and ..one of the best remembered on Australian TV"*.

Merkel J held that Telstra's indicia of reputation were the character and the car in a problem solving context.

Misrepresentation

The claimant must prove that another's use of the relevant indicia constitutes a misrepresentation that the other's product or service is the original, or is otherwise associated, connected or endorsed by the claimant. The suggestion may be vague and imprecise – it is sufficient if some form of association or connection is conveyed notwithstanding that the precise form of the association or connection may not be articulated or identified.[27]

However, it is not sufficient to prove that a person has merely misappropriated a person's reputation. Passing off requires a misrepresentation. Thus, not every use of a person's indicia of reputation will be passing off. It is not passing off:

- to engage in ambush marketing – for example, if a person merely uses the occasion of an event to advertise a product or service and does not represent that they are associated with the event;[28]
- if the use of the indicia of reputation is qualified, for example if there are effective disclaimers;[29]
- if the indicia of reputation has been parodied or so corrupted, so it is clear that there is no association or connection between the owner and the person using the indicia of reputation.

If it is inherently unlikely. For example, in the *Tabasco* case,[30] Lehane J considered that it was unlikely that a person seeking an exhibition design service in Australia would wonder whether a company called "Tabasco Design" based in Ultimo had a commercial connection of some sort with the US based maker of the spicy and hot sauce called "Tabasco".

In *Telstra*, Merkel J said that the issue was whether Shannons' advertisements represented that Telstra is in some way associated or connected with Shannons, its advertisements or products. Merkel J said that the only substantial case of misrepresentation was the First Shannons Advertisement.

Merkel J referred to a type of advertising called "secondary" or "suggestive" brand advertising[31] which he described as advertising which conjures up a brand without referring to it, where images are so established and well-known that they create an impression of association or connection to a primary brand notwithstanding that the name of the brand does not appear, so that the image gives a ready impression of association or connection with the primary brand[32] .

Merkel J went on to suggest that if the indicia of reputation are secondary brands, then any use of the indicia may represent an association or connection, and may be passing off. In particular, he said;[33]

> *"The adoption of such characters, symbols or images by another advertiser will usually raise the question of whether that advertiser is representing it, or its goods or services, have an affiliation, association or connection they do not have"*

Merkel J then considered Shannons' market research which stated that the focus group participants associated the character and the car in a problem solving context with Telstra to determine that Telstra's indicia of reputation were a secondary brand. Merkel J held that the overall impression created by showing First Shannons Advertisement upon a significant portion of ordinary and reasonable members of the relevant class of the public was that Telstra was in some way associated or connected with First Shannons Advertisement or locating the services offered in the advertisement.

However, Merkel J's judgment does not mean that it is sufficient to establish that the indicia of reputation are secondary brands. Merkel J makes it clear that whether the use of the character and the car to solve a problem would result in secondary or suggestive brand advertising that would constitute a misrepresentation *depended on the manner and context in which that subject matter was employed.*[34] Merkel J noted:

- The *combination* of the character, car and the problem solving context in the First Advertisement was passing off. However, when the problem solving context was removed in Second Shannons Advertisement and the Shannons Radio Advertisements it was no longer passing off. The combination was critical.
- Shannons had deliberately retained all of the features of the Telstra advertisement that made the Telstra advertisement famous, popular and instantly recognisable, because Shannons needed to do this to achieve its objective of instant recognition and response. There was no parody or corruption of the original.
- There was no express disclaimer. Merkel J said that even the appearance of the Shannons logo was not inconsistent with the advertisement being a co-branded advertisement, with the advertisement also being a Telstra advertisement or one with which Telstra was associated or connected. Merkel J pointed out that Telstra's customers are all businesses so there would be nothing anomalous about Telstra advertising its services together with one of its customers.

Merkel J's analysis suggests that faithful reproduction of a format, or a faithful remake may constitute passing off. In addition, a sequel or spin-off which takes a key combination of characters, context and pivotal events may also constitute passing off.

However, the analysis also indicates that a number of things may not constitute passing off in particular:

- a more original sequel or spin-off which takes characters and places them in a different context, or only takes some characters, or some scenarios, may not constitute passing off;
- a format, remake, sequel or spin-off which is a parody or corruption of the original, or which features prominent disclaimers may not necessarily constitute passing off;
- the mere use of a character outside its context may not constitute passing off. Indeed, Merkel J held that the Shannons Second Advertisement and the Shannons Radio advertisements which featured the character did not constitute passing off and accepted that Telstra did not have proprietary rights or goodwill in the character. This is a significant departure from recent Australian cases[35] involving fictional characters where the courts held that using the character constituted passing off, notwithstanding that it was placed in a different context.

Relevant market

The definition of the relevant market is one key way of distinguishing *Telstra* from cases involving format rights, and the right to produce sequels, prequels, spin-offs, and remakes.

The relevant market is the customers or prospective customers of the product or service.[36] In *Telstra*, the relevant market was the viewing public. Merkel J noted that the Shannons' advertisement targeted motor enthusiasts, but was shown on commercial television to a large segment of the viewing public over a number of timeslots and in the course of a variety of programs.

In contrast, the relevant market for formats, sequels, spin-offs and remakes is not the general public. The relevant market are agents, film packagers, film financiers and investors, film and television producers, sales agents, distributors, and broadcasters. These are the creator's customers and potential customers, with whom the creator will deal and to whom they will try and sell their rights.

Merkel J accepted that the result may have been different if it was a different market. In particular, Merkel J said that Shannons' most compelling argument is the absence of Telstra branding and the presence of Shannons' branding. Merkel J said although it may be contended that the viewing public consisted solely of persons who had insured with Shannons or were aware of its specialised products who might have regarded it as a clever use of the Yellow Pages advertisement in an advertisement by Shannons insurance, such an argument is predicated upon the role of Shannons as a "special" vehicle insurer.[37]

The producer's relevant market is a more sophisticated market than the general public. The relevant market is much more likely to be alive to disclaimers and rights management issues.

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1 *Zeccola v Universal City Studios Inc* (1982) 46 ALR 189

2 *Green v Broadcasting Corporation of New Zealand* [1988] 2 NZLR 490

3 s196 Copyright Act

4 Part V, Division 4 of the *Copyright Act* – Proof of Facts in Civil Actions

5 Changes included spelling of Goggomobil, saying "Two G's, no E" rather than spelling out, and stopping after saying the first G a number of times.

6 s101 *Copyright Act*

7 s86 *Copyright Act*

8 consider for example the British director Mike Leigh ("Secrets and Lies") and the Australian director Bill Bennett ("Kiss or Kill") who rely on improvisation during production

9 s10 "dramatic work" *Copyright Act*

10 Rebikoff, S *"Restructuring Test for Copyright Infringement in Relation to Literary and Dramatic Plots"* (2001) 25 MULR 340

11 This would be a brave submission - copyright started as a publisher's prerogative and material form is a cornerstone of copyright law - see Finkelstein J's decision at first instance in *Telstra v Desktop Marketing Pty Ltd* (2001) 181 ALR 134. There would also be significant practical evidentiary difficulties if copyright subsisted in dramatic work without material form – the court would have no definitive copy of the work to compare the infringing work to.

12 s31(1) *Copyright Act*

13 s10 "material form" *Copyright Act*

14 s21(1) *Copyright Act*

15 s21(1A) *Copyright Act*

16 s14(1)(b) *Copyright Act*

17 *Blackie & Sons Ltd v The Lothian Book Publishing Co Pty Ltd* (1921) 29 CLR 396

18 *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273

19 *Autodesk Inc v Dyason* [No.2] (1993) 176 CLR 300 at 305

20 ibid

21 *Corelli v Gray* (1913) 30 TLR 116 at 117. per MR Cozens-Hardy; Rees v Melville (1914) MacG Cop Cas 168, 174 (Swinfen Eady LJ)

22 *Zeccola* supra n2

23 ibid

24 *ConAgra Inc v McCain Foods (Aust) Pty Ltd* (1992) 23 IPR 193 per Lockhart J

25 *ConAgra* supra n46

26 *William Edge & Sons v William Nicholls & Sons Pty Ltd* [1911] AC 693

27 *Mark Foys Pty Ltd v TVSN (Pacific) Ltd* (2000) 104 FCR 61

28 *South Australian Brewing Company Pty Ltd v Carlton & United Breweries Ltd* [2001] FCA 994 (unreported, 13/7/2001, Mansfield J), see also Kendall C and Curthoys J *"Running rings around the sponsors: The Sydney Olympics and Ambush Marketing"* (2000) 11 AIPJ 5

29 *Twentieth Century Fox Film Corporation v South Australia Brewing Co Ltd* (1996) 66 FCR 451

30 *McIlhenny Co v Blue Yonder Holdings Pty Ltd* 1997 39 IPR 187 ; see further McCabe B *"When Trading Off Reputation of Others is Not Misleading or Deceptive"* (1998) 6 TPLJ 51

31 see analysis of "secondary branding" in *Anheuser-Busch Inc v Budejovicky Budvar* (2002) 56 IPR 182 (Budweiser beer), *Arsenal Football Club v Reed* (2001) 54 IPR 623 (Arsenal soccer emblem)

32 para 57

33 para 57

34 para 69 and 74

35 *Pacific Dunlop Pty Ltd v Hogan* (Crocodile Dundee) (1989) 23 FCR 553, *Twentieth Century Fox v South Australian Brewing* (Duff Beer) (1996) 66 FCR 451, *Childrens Television Workshop v Woolworths* (Sesame Street) (1981) NSWLR 273, see also Morgan *"Mmmmm Beeeer - Character Merchandising in Australia & Duff Beer Case"* (1997) 10 IPLB

36 *ConAgra* supra n43

37 para 77

Update: Spam Legislation

Bridget Edghill updates the developments in spam legislation in Australia and the United States of America

After the removal of amendments suggested by the Labor Party and Democrats, the Howard Government's *Spam Act* and *Spam (Consequential Amendments) Act* were passed unamended by the Senate on 2 December 2003.

As discussed by John Corker in "Spam Bill Almost Law", *Communications Law Bulletin*, Vol 22, No 3 2003, a report of the Environment, Communications, Information Technology and the Arts Legislation Senate Committee issued on 31 October 2003 recommended that the Bills be agreed to without amendment.

THE PROPOSED AMENDMENTS

Both the Labor Party and Democrats had suggested amendments to the Bill. The amendments submitted by the Labor Party on 25 September 2003 and moved by Senator Kate Lundy most notably included:

- That not-for-profit political groups and trade unions be exempted from the legislation;
- That an electronic message is not a designated commercial message if the relevant electronic account holder has previously indicated that they do not wish to receive such messages;
- That a commercial electronic message is not unsolicited if at the time the message was sent, the sender had ascertained with reasonable diligence that the recipient had a specific commercial interest in receiving the message.

The proposed amendments also sought to give new powers to the Australian Communications Authority (**ACA**), allowing it to search and seize computer equipment in the course of an inquiry.

The proposed amendments were removed by the House of Representatives and criticised by the Howard Government for weakening the legislation. The Democrats also criticised the proposed amendments, with Democract Senator Brian Greig releasing a statement on 28 November 2003 claiming that, *"loopholes in the legislation are big enough to drive a truck through."*

THE MAIN FEATURES

With spam now accounting for approximately half of all e-mail worldwide, the new legislation seeks to combat spammers and the techniques they use, while at the same time protecting the right to free speech.

The main features of the new legislation include:

- a ban on the sending of unsolicited commercial electronic messages, to be enforced by the ACA;
- a prohibition on the sale, supply or use of electronic address harvesting software and lists generated from these for spamming purposes.

Also, in accordance with Part 2 of the Act, all commercial electronic messages must include:

- accurate details of the sender's identity;
- an 'unsubscribe' function.

Part 4 of the Act details the civil penalties that many be imposed for unlawful conduct under the legislation which include financial penalties and infringement notices.

A unique characteristic of the legislation is the provision for co-operation and negotiation with international organisations and the organisations of foreign countries to develop global guidelines and co-operative arrangements between countries. Such an agreement has already been created between the ACA and the Korea Information Security Agency, with both parties signing a *Memorandum of Understanding* on 20 October 2003.

In addition to infringement notices for minor transgressions there are substantial penalties - including damages of up to $1.1 million per day - in severe cases.

THE AMERICAN APPROACH

The United State has also recently adopted anti-spam legislation. The *Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003*, also known as the CAN-SPAM Act (**CAN-SPAM**), was passed by the Senate on 25 November 2003 and agreed to by the House of Representatives on 8 December 2003.

There are some similarities between the Australian legislation and CAN-SPAM in that they both prohibit 'harvesting' e-mail addresses. CAN-SPAM also prohibits senders of commercial e-mail from:

- disguising themselves;
- using incorrect return e-mail addresses;
- using misleading subject lines.

People who contravene these provisions face criminal penalties. In addition CAN-SPAM contains unique provisions stipulating that spam be truthful. If an e-mail is found to breach these provisions, the

government can fine the spammer US$250 for each e-mail sent that was untruthful!

CAN-SPAM also leaves room for the creation of a "Do Not Spam Registry". This would be similar to the recent, and controversial, "Do Not Call Registry". A "Do Not Spam Registry" may in fact create greater controversy in the USA due to First Amendment Protection of commercial speech.

Both the Australian legislation and CAN-SPAM are very limited in their approach for the same reason – most spam, and in the case of the USA, most illegal of deceptive spam, comes from overseas.

Thus, without international co-operation and enforcement mechanisms, bringing international spammers to justice is likely to prove problematic, as will creating a global approach.

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The 'Ordinary Reasonable Person' in Defamation Law

In the first of two articles, Roy Baker examines the way the law determines what is defamatory and asks what the law, and society generally, means by the 'ordinary reasonable person'

INTRODUCTION

Sydney has been proclaimed 'Defamation Capital of the World'. Despite serious competition for the title, the UK produces fewer writs per head of population and, on rough estimate, Australians start 35% more defamation actions than do the entire American population. Sydney alone sees a level of defamation litigation equivalent to 60% of that in the US.

This gulf between Australia and the US can be accounted for by the US's Constitution, the First Amendment of which requires that 'Congress shall make no law … abridging the freedom of speech, or of the press'. In the 1960, the US Supreme Court determined that that English common law of defamation whereby, as a general rule, publishers can be required to prove the truth of any defamatory allegation they publish, that was inherited by the US resulted in a 'chilling effect' that was an impermissible infringement of free speech[1]. Thus, the focus of US defamation law shifted from what publishers could prove to how they had behaved.

In contrast, Australia has largely retained the common law of defamation. The publishers' success rate at trial of around 32% arguably demonstrates that the system is hopelessly skewed in favour of plaintiffs. The expense and uncertainty involved in defending defamation proceedings is such that the media settle the bulk of defamation actions brought against them. Australia's major newspaper publishers, who receive threats of defamation proceedings almost daily, bear millions of dollars of defamation pay-outs each year.

THE NATIONAL DEFAMATION RESEARCH PROJECT

In this climate of vigorous litigation, the Communications Law Centre at the University of New South Wales was awarded funding from the Australian Research Council to conduct extensive research into defamation law.

The project was grounded in social research and used quantitative and qualitative research methodologies to explore social attitudes to a range of issues relating to defamation law. A phone survey of several thousand, randomly selected Australians is to be supplemented with an extensive series of focus groups around the country as well as by interviews with journalists, defamation lawyers and judges.

Pure research will contribute popular opinion to the debate about reforms that would narrow the gap with America. For instance, we shall seek to measure the extent to which the public think the award of defamation damages should be contingent on a lack of care by the publisher, rather than publisher's ability to prove truth.

Our social attitudes research, shall extend beyond contributing public attitudes to the law reform debate. We shall examine the public's role in defamation law and how defamatory material is understood by the public.

IDENTIFYING WHAT IS DEFAMATORY

Throughout Australia, with the exception of South Australia and the Australian Capital Territory, a jury may be involved in defamation proceedings. In some states they will be asked to determine whether the publisher has proved all charges it has levelled against the plaintiff. To this extent the defamation jury functions much like the jury in a criminal court.

Defamation juries have another two unique functions:

- determining what, if anything, the publication being sued over imputes about the plaintiff;

- determining whether that imputation meets the legal definition of what is defamatory.

Queensland and Tasmania are the only two states that have adopted a statutory definition of defamation. Those definitions are almost identical and Tasmania's will suffice to illustrate both:

> *An imputation concerning a person or a member of his family, whether that member of his family is living or dead, by which -*
>
> *(a) the reputation of that person is likely to be injured;*
>
> *(b) that person is likely to be injured in his profession or trade; or*
>
> *(c) other persons are likely to be induced to shun, avoid, ridicule, or despise that person;*
>
> *is defamatory, and the matter of the imputation is defamatory matter.*[2]

There is a subtle distinction between subsections (b) on the one hand and (a) and (c) on the other. Subsections (a) and (c) involve an element of disparagement, whereas such denigration is not needed for a publication to meet the definition set out in subsection (b).[3] For instance, an untrue report that a tradesperson has died is more likely to elicit sympathy than criticism, even though it will likely lead to a loss of custom.

The distinction between reports that denigrate and those that do not is crucial in the remaining states and territories that have no statutory definition of defamation. In these areas it is an essential ingredient of any action that plaintiffs show that some act or condition has been attributed to them which is to their discredit.[4]

Injurious falsehood is used to deal with untrue reports not meeting this requirement. This law has more in common with the defamation law of America than that of Australia, including the former's significantly less favourable treatment of plaintiffs.

Note, then, how in most of Australia the tradesperson whose death is deceitfully prematurely announced may enjoy less protection under the law than the tradesperson about whom a mildly disparaging, yet entirely well-meant, remark is made. Such iniquity is hard to comprehend while defamation law is understood simply as concerned with the protection of reputation.

DEFAMATION LAW AS THE ARBITER OF SOCIAL INCLUSION

American jurist Robert Post has argued in favour of an understanding of reputation that extends beyond conceiving it as a form of intangible property.[5] Reputation is commonly thought of as akin to commercial good will, something that can not only be bought and sold, ando built up through hard work and sound judgment. Like property it can also be stolen and defamation actions might be characterised as society's restitution to those wrongfully deprived of what is theirs.

Post also suggests that reputation can be seen in terms of human dignity. Post sees defamation law as governing 'rules of civility' which develop and maintain personal identity. He suggests that acts of defamation can be characterised as a breach of these rules. Building on the work of Erving Goffman[6] and the symbolic interactionist tradition in American sociology, Post shows how a breach of the rules of civility jeopardises two parties.[7] First is the plaintiff whose dignity is threatened. Second, the social competence of the publisher is also brought into question. An audience witnessing such a breach of civility is invited to decide who is in breach of social norms: the plaintiff or the publisher. Whichever side they choose, the other will suffer discredit and stigmatisation.

In this way Post argues that the dignity that defamation law protects is the 'respect (and self respect) that arises from full membership of society'. Rules of civility operate to distinguish members from non-members and defamation law enforces society's interest and that 'enforcing rules of civility is a matter of safeguarding the public good inherent in the maintenance of community identity'.[8]

To understand defamation law as a means of mapping the moral community, renders its indifference to the mistaken report of the tradesperson's demise is clearly explicable: such a publication does not bring into question the tradesperson's social membership. It also becomes clear why, as a general rule, the question whether publications cause damage to reputation is not decided by reference to evidence called by the plaintiff of actual damage to reputation. The issue for the law is not so much whether the plaintiff has suffered, but whether there has been a breach in the rules of civility that may have led to the dignity of the plaintiff or defendant being compromised.

IDENTIFYING THE MORAL COMMUNITY

Defamation law also identifies which communities are worthy of its support. This is expressed in the common law definition of what is defamatory. There are numerous variations in the way this test is formulated, but for current purposes I choose that contained in what is probably Australia's most commonly used reference on defamation law. As stated in Tobin and Sexton's *Australian Defamation Law and Practice*:

> The test is whether the publication would have been likely to cause the ordinary reasonable man or woman to have thought the less of the plaintiff.[9]

This limits protection to those

communities consisting of 'ordinary, reasonable people' and excludes the 'criminal classes'. This is typically exemplified by the law's refusal to recognise as defamatory allegations of being a police informant. While the informant may be exposed to severe retribution, there is no recourse in defamation law, the rationale being that no ordinary reasonable person would think less of someone for helping to enforce the law.[10]

DEALING WITH DIVISION WITHIN THE MORAL COMMUNITY

Who, then are these 'ordinary, reasonable people'? What are their values? And most interestingly, how homogenous are they? Put differently, what moral issues define the moral community and which divide it?

A few paragraphs prior to the above test as to what is defamatory, Tobin and Sexton had introduced defamatory publications as being those 'likely to cause ordinary, reasonable persons to think the less of the plaintiff or to shun or avoid the plaintiff'.[11] A tension between these two definitions is immediately apparent. The first, by making reference to 'the ordinary reasonable man or woman', creates a single, hypothetical construct as arbiter of what will injure the plaintiff's reputation: the 'ordinary, reasonable person'. This 'ordinary, reasonable person' embodies the sentiments of those within the community of 'ordinary, reasonable people'. While this does not necessarily imply a moral consensus, it at least requires the identification of the views of the majority as opposed to a minority of 'ordinary, reasonable people'.

In contrast, the second definition, by referring to the opinions of 'ordinary, reasonable persons', appears to permit the attitudes of minorities within the community of 'ordinary, reasonable people'. The most likely constraint on how small that minority can be is that the viewpoint must not be such that its possession disqualifies its adherents as regards the requirement of ordinariness.

Following on from the reference to 'ordinary, reasonable persons', Tobin and Sexton saw two consequences as likely to flow from a defamatory publication, each distinct from the other:

(a) a likelihood to cause damage to the reputation of the plaintiff in the eyes of right-thinking members of the community in general;

(b) a tendency to exclude the plaintiff from society.[12]

The scope for considering minority viewpoints might seem tempered by the term 'right-thinking members of the community *in general*' (my emphasis). 'General' can mean 'relating to … all members of a class or group', thus indicating an opinion shared among all right-thinkers.[13] But 'general' is as likely to be interpreted as 'common to many or most of a community',[14] which need not mean majority. What is more, the words 'in general' may simply identify the community to be considered: the views to be heeded are those of at least some right-thinking members of the general, broad community, rather than of any sub-community.

Similar ambiguities are not limited to Tobin and Sexton: they exist in many of the commonly quoted formulations of the defamation test. Our research indicates that the matter is barely clarified by judicial directions to juries. Take, for instance, the following direction given to a jury by Levine J, who has heard the bulk of defamation cases in New South Wales over recent years:

> [*D*]*efamatory means likely to lower the plaintiff in the eyes or estimation of fair minded, right thinking members of the community, likely to injure the plaintiff in his good name or reputation. You are members of the community and as such are best placed to apply community standards to this issue.*[15]

This is shortly followed by a reference to 'the ordinary, decent folk' and moments later by a direction that the benchmark to be applied is 'fair minded, decent, ordinary members of the community'.

The law has not been blind to the issue as to whether the defamation can be determined by reference to minority attitudes. Tobin and Sexton, for instance, immediately clarify that there is assumed to be a uniform community standard in determining what is defamatory. 'In other words, the jury must decide whether the meanings conveyed are defamatory or not by reference to "general community standards and not by reference to sectional attitudes"'.[16] They cite as authority[17] Brennan J in *Reader's Digest Services Pty Ltd v. Lamb*:

> *Whether the alleged libel is established depends upon the understanding of the hypothetical referees who are taken to have a uniform view of the meaning of the language used, and upon the standards, moral or social, by which they evaluate the imputation they understand to have been made. They are taken to share a moral or social standard by which to judge the defamatory character of that imputation, being a standard common to society generally.*[18]

Curiously absent from Tobin and Sexton's discussion of the issue is a subsequent case often quoted as authority that certain minority viewpoints can be considered. *Hepburn v. TCN Channel Nine* concerned an imputation that a registered medical practitioner 'is an abortionist'.[19] One question for the court was whether this imputation could be considered defamatory to the extent to which it relates to lawful terminations.

Hutley JA thought the argument that such in imputation is not capable of being defamatory to be 'startling':

> *As any abortion is regarded as wicked by a substantial part of the population on moral grounds, to say of a person that he is an abortionist may bring him into hatred, ridicule or contempt of ordinary reasonable people. As the objection to abortion is on moral grounds, to a substantial part of the community, legality is relatively irrelevant.*[20]

Glass JA addresses the issue more fully and concludes:

> *[A] man can justly complain that words, which lower him in the estimation of an appreciable and reputable section of the community, were published to members of it, even though those same words might exalt him to the level of a hero in other quarters. Where a television programme has been beamed to a large audience it can be presumed, without special proof, that its viewers will include some who advocate the "right to life" and abhor the destruction of foetuses, whatever the circumstances. In the estimation of such persons the plaintiff can claim to have been disparaged even if abortionist meant lawful abortionist. If it also meant unlawful abortionist, she can also claim to have been denigrated in the eyes of a different but substantial section of the viewers who support the existing law but do not want it extended.*[21] *(Emphasis added.)*

In the case of the mass media, at least, the defamation test as formulated in *Hepburn* means that every 'reputable' viewpoint on a moral issue is reflected in defamation law, provided that viewpoint is one held by an 'appreciable/substantial' group. Clearly *Hepburn*, like all defamation test formulations, evolves from the standard construct of the community of ordinary, reasonable people. According to *Hepburn*, 'ordinary' pertains to an 'appreciable' or 'substantial' section of the community', while 'reasonable' is equated with 'reputable'.

It is not hard to see how a general application of *Hepburn* greatly extends the range of material that can be deemed defamatory. Whether or not juries are routinely referred to the case is of no great import: the potential for juries to interpret the defamation test, as frequently formulated, in a way that permits consideration of views perceived to be those of the minority is still there.

Nothing short of extensive jury research will establish how often this happens. While the NDRP will not tackle such a task, we shall measure the extent to which people perceive issues as dividing, as opposed to defining, the community of ordinary, reasonable people. Part of our research will be to collect quantitative data on how much certain imputations damage reputation in the eyes of a representative sample of the population. Then we shall ask the same respondents to think about people who would come to the opposite conclusion as themselves as to what is defamatory. Could they think of these people as 'ordinary' and/or 'reasonable'?

The degree to which the application of *Hepburn* would lead to an expansion of what is deemed defamatory will be in proportion either to the extent to which people consider others who disagree with them as to what is derogatory to be 'ordinary' and reasonable', or the extent to which the population is prepared to characterise both sides of a debate as to whether a statement stigmatises as 'ordinary' and 'reasonable'. The question as to which is the better measure will depend on a second limb of our research, one that will be considered in the next article in this series: is the term 'ordinary, reasonable person' more likely to be considered tautological or an oxymoron?

The second article, due to appear in our next edition, considers the impact on defamation law of the phenomenon known as the 'third person effect': the tendency for individuals to exaggerate the difference between themselves and others. It looks at the potential for this to unnecessarily restrict speech and its relevance to law reform.

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1 *New York Times Co v Sullivan*, 376 US 254.

2 *Defamation Act 1957* s 5(1) (TAS). For the Queensland definition see *Defamation Act 1889* s 4.(1) QLD).

3 *Sungravure Pty Ltd v Middle East Airlines Airliban SAL* (1975) 134 CLR 1.

4 Eg *Aqua Vital Western Australia v Swan Television and Radio Broadcasters* [1995] Aust Torts R 62,709.

5 RC Post, 'The social foundations of defamation law: reputation and the Constitution', *California Law Review* (1986) 7A 691-742.

6 E Goffman, *Interaction Ritual: Essays in Face-to-Face Behavior*, (1967, Aldene Pub. Co., Chicago).

7 Post (1986), 711.

8 Ibid, 713.

9 TK Tobin & MG Sexton, *Australian Defamation Law and Practice* (1999, loose-leaf service, Butterworths, Sydney), Para 3120, Service 28.

10 *Blair v Mirror Newspapers Ltd* [1970] 2 NSWR 604).

11 TK Tobin & MG Sexton, Para 3010, Service 30.

12 TK Tobin & MG Sexton , Para 3010, Service 30.

13 *Macquarie Concise Dictionary*, 3rd edn.

14 Ibid.

15 *Purcell v Cruising Yacht Club of Australia*, unreported, NSW Supreme Court, 16 October 2001.

16 Para 3130, Service 28.

17 Para. 3125, Service 28.

18 (1982) 150 CLR 500 at 505-506.

19 [1983] 2 NSWLR 682.

20 Ibid, at 686B.

21 Ibid, at 694B.

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Contibutions 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.

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