A Big Boo: The FTA and Copyright Duration

Copyright Duration: The FTA and

Communication Law Association

Law Association and Media

Communication

A Big Boo: The FTA and
Copyright Duration

Communication Law Association

Law Association and Media

Communication

A Big Boo: The FTA and
Copyright Duration

Communication Law Association

Law Association and Media

Communication

A Big Boo: The FTA and
Copyright Duration

Communication Law Association

Law Association and Media

Communication

A Big Boo: The FTA and
Copyright Duration

Communication Law Association

Law Association and Media

Communication

A Big Boo: The FTA and
Copyright Duration

Communication Law Association

Law Association and Media

Communication

A Big Boo: The FTA and

Communication Law Association

Law Association and Media

Communication

A Big Boo: The FTA and

Communication Law Association

Law Association and Media

Communication

A Big Boo: The FTA and

Communication Law Association

Law Association and Media

Communication

A Big Boo: The FTA and

Communication Law Association

Law Association and Media

Communication

A Big Boo: The FTA and

Communication Law Association

Law Association and Media

Communication

A Big Boo: The FTA and

Copyright Duration

Communication Law Association

Law Association and Media

Communication

A Big Boo: The FTA and

Copyright Duration

Communication Law Association

Law Association and Media

Communication

A Big Boo: The FTA and

Copyright Duration

Communication Law Association

Law Association and Media

Communication

A Big Boo: The FTA and

Copyright Duration

Communication Law Association

Law Association and Media

Communication

A Big Boo: The FTA and

Copyright Duration

Communication Law Association

Law Association and Media

Communication

A Big Boo: The FTA and

Copyright Duration

Communication Law Association

Law Association and Media

Communication

A Big Boo: The FTA and

Copyright Duration

Communication Law Association

Law Association and Media

Communication

A Big Boo: The FTA and

Copyright Duration

Communication Law Association

Law Association and Media

Communication

A Big Boo: The FTA and

Copyright Duration

Communication Law Association

Law Association and Media

Communication

A Big Boo: The FTA and

Copyright Duration

Communication Law Association

Law Association and Media

Communication

A Big Boo: The FTA and

Copyright Duration

Communication Law Association

Law Association and Media

Communication

A Big Boo: The FTA and

Copyright Duration

Communication Law Association

Law Association and Media

Communication

A Big Boo: The FTA and

Copyright Duration

Communication Law Association

Law Association and Media

Communication

A Big Boo: The FTA and

Copyright Duration

Communication Law Association

Law Association and Media

Communication

A Big Boo: The FTA and

Copyright Duration

Communication Law Association

Law Association and Media

Communication

A Big Boo: The FTA and

Copyright Duration

Communication Law Association

Law Association and Media

Communication

A Big Boo: The FTA and

Copyright Duration

Communication Law Association

Law Association and Media

Communication

A Big Boo: The FTA and

Copyright Duration

Communication Law Association

Law Association and Media

Communication

A Big Boo: The FTA and

Copyright Duration

Communication Law Association

Law Association and Media

Communication

A Big Boo: The FTA and

Copyright Duration

Communication Law Association

Law Association and Media

Communication

A Big Boo: The FTA and

Copyright Duration

Communication Law Association

Law Association and Media

Communication

A Big Boo: The FTA and

Copyright Duration

Communication Law Association

Law Association and Media

Communication

A Big Boo: The FTA and

Copyright Duration

Communication Law Association

Law Association and Media

Communication

A Big Boo: The FTA and

Copyright Duration

Communication Law Association

Law Association and Media

Communication

A Big Boo: The FTA and

Copyright Duration

Communication Law Association

Law Association and Media

Communication

A Big Boo: The FTA and

Copyright Duration

Communication Law Association

Law Association and Media

Communication
The EXTENSION LAID BEAR

The term of copyright protection is designed to provide authors with a return for their labour and thus provide an incentive for creative activity. At the same time the public has an interest in using, enjoying and building upon those works. It is necessary to consider what effect the extension will have on those interests, and any other benefits or detriments that it may bring.

Incentives vs public domain

The main economic rationale for copyright is to supply a sufficient incentive for creation. By providing protection to authors it allows them to recoup their initial investment and prevent others from simply copying the fruits of their labour. Therefore the question is whether an extra 20 years provides such an added incentive to create, that it is justified when balanced against the overall loss to the public domain.

The answer is that it is doubtful whether such future benefit will be taken into account by authors when deciding whether to create works or not. "Distant advantages tend to be much less persuasive as a motivator of action than relatively immediate advantage." The IPRC came to a similar conclusion, stating that there was no evidence that an extension would provide incentives to create works not already being produced.

The actual economic value of a 20 year extension is worth very little to the author. In an amicus curiae submission made to the United States Supreme Court in Eldred v Ashcroft (a constitutional law case challenging the legitimacy of the 20 year extension), a group of economists presented evidence that the twenty year extension provided essentially no incentive to create new works. This view was expressed by Justice Breyer in his dissent in Eldred. Using assumptions about the time value provided by the economists, he wrote: "[I]t seems fair to say that... 20 years of earning $100 per year for 20 years, starting 75 years into the future, is worth less than seven cents today."

The marginal added incentive must be compared against the detriment to the public domain. The most immediate effect of a 20 year extension means that potential authors are further deprived of the opportunity to reshape works to reflect the events and culture of their time. As Chafee wrote, "a dwarf standing on the shoulders of a giant can cast a shadow of himself." In other words, works can be enriched by the input and development of new authors. It has been suggested that the public domain is not static, and that access to works can be obtained through a variety of exceptions to copyright rules, for example fair dealing.

New ideas for digital broadcasting developments, some suggested in this paper, could be included in a future model for improved understanding. The sale of transmission services in Australia, and forthcoming spectrum still require solutions that might be better understood by knowledge of the "digital" transmission services that the communication partners especially as these entities involve major transactions.

Digital television is barely visible to the average consumer or citizen, yet the consumer continues to pay for infrastructure and is reduced to a citizen with limited access to knowledge about developments.

The Australian public must have knowledge of the technological and transactions of change in order to remain vigilant about Australian broadcasting and cultural and financial assets. The focus must be on present problems and the plans for the sale of spectrum. Models need to be developed and critiqued by a range of industry experts who do not reach "quick-fix" conclusions for policy. The closed transnational of Australia's transmission infrastructure suggest the need for a new approach to 'knowledge management' for Australia's public broadcasting future.

Cate Dowd is an academic at the University of Melbourne in the Department of Information Systems. Further references:


Shu, J. (July 2001), 'Avant First off the Mark', The Australian, p. 11.


10 See: (http://iacl.org.au)

11 The draft HMPFL was published in July 2000 by ETISIO (European Telecommunications Information Services Office) as "Digital Television in Europe - HMPFL" and can be located via http://dmtp.economics.demon.co.uk/ hmpfl20000217.htm

12 See: (http://iacl.org.au)


20 See: (http://iacl.org.au)

21 The draft HMPFL was published in July 2000 by ETISIO (European Telecommunications Information Services Office) as "Digital Television in Europe - HMPFL" and can be located via http://dmtp.economics.demon.co.uk/ hmpfl20000217.htm

22 See: (http://iacl.org.au)

23 The MPEG-2 Transport stream is the common international standard that it is for enhanced, interactive or Internet profiles. See the broadcast channel Protocol stack on page 56 of Australians Guide to New Media, 2000: "A Guide to the Technology of Digital Television". This HMPFL draft 1 document or corresponding pages of the latest HMPFL version 2 via http://www.pcc.gov.au/gia/qs/broad/sectionv.pdf

24 DVB Digital Video Broadcasting, retrieved n. 23. 25

25 See: (http://iacl.org.au)

26 See: (http://iacl.org.au)

27 A user agent in a helpfull assistant or applications which can communicate for "helping" the user with applications with an Application Program Interface. See page 73 of the "DVB-H MHP-1.1 document, above n. 23".

28 Dowd C, 2003, above n. 2.

The recent growth in communications technology, particularly the internet, has led to a proliferation of channels and platforms for content delivery. This has increased the need for content providers to manage their intellectual property rights effectively.

However, the increased use of digital technology has also led to new challenges in protecting intellectual property. For example, the rise of online piracy has forced content creators to develop new strategies to protect their work.

In Australia, the Copyright Act 1968 provides protection for copyright works, including literary, dramatic, musical, and artistic works. The act also includes provisions for copyright infringement and remedies for copyright owners.

The Copyright Act allows for the creation of derivative works, such as translations, adaptations, and abridgements. It also allows for the making of copies for private purposes or for the purpose of criticism, review, or research.

In conclusion, the growth of communications technology has brought new opportunities for content creators, but it has also presented new challenges in protecting intellectual property. Content creators must be aware of the provisions of the Copyright Act and take steps to protect their work from unauthorized use.
media has meant that copyright holders want added protection, particularly in light of the increasing ease with which copyright infringements occur. A 2003 report by the Allen Consulting Group suggested that technological developments were undermining the incentives provided by copyright law and that protection should therefore be extended. However, it is at issue there is not the period of copyright protection per se, but rather the width of protection whilst copyright subsists. Piracy will occur regardless of the term, and what is important is finding better methods to enforce authors' rights rather than providing the same rights for a longer period.

**CONCLUSION**

There is little evidence that Australia should be embracing an extra 20 years of protection for copyright works. Whilst extending the term will provide some benefits in the form of easier copyright management and harmonisation with major trading partners, these are overwhelmingly outweighed by the detriments it will bring. The extension is highly unlikely to provide any greater incentives for creation and it reduces the public domain of works. It also offers little of the way of economic advantages since Australia is a net importer of copyright material. Given that Australian material already receives life plus 70 years of protection in the US, extending the term here only benefits US copyright owners.

The decision to extend the term is best understood as a trade concession provided to the US in the course of concluding the Free Trade Agreement. Perhaps the negotiators believed that overall Australia had more to gain than lose from the Agreement and were thus willing to make the desired changes to copyright. However, the decision has wide-ranging effects on the public availability and development of copyright works, making it a real ‘booo boo’.

Leon Sher is an articulated clerk at Allen Arthur Robinson, Melbourne, and Nirjanan Arunanathan is a partner at the firm’s Hong Kong office.

1. The draft version of the agreement can be found at: http://www.-draft.gov.au/release/press/ia/patentindex.html. The legislation will not be retrospective.

**Broadband Wars**

David McCulloch provides a perspective on the recent ACCC moves against Telstra's wholesale and retail broadband pricing.

Australia is at a critical point in the growth of broadband. This is reflected in the serious battle being waged between Telstra and its wholesale internet service provider (ISP) customers over Telstra’s broadband pricing. The Australian Competition and Consumer Commission (ACCC) stands in the middle of the fray, seeking to adjudicate.

**STATE OF BROADBAND IN AUSTRALIA**

To set the scene for the hostilities it is necessary to take a snapshot of the state of broadband in Australia. Currently, there are about 600,000 broadband subscribers, or about 7% of households. At the retail level about half of these services are provided by Telstra, either on its Hybrid Fibre Coaxial (HFC) cable, or via DSL, which uses the traditional copper phone line, commonly known as the public switched telephone network (PSTN), as the conduit.

With the exception of about 130,000 customers on the Optus HFC cable, most of the remainder of subscribers acquire their services from ISPs who are reselling Telstra’s DSL service. The industry sees broadband as an area of considerable growth. Telstra has a publicly stated goal of acquiring at least 1 million customers (retail and wholesale) by the end of 2005.

Whilst Australia’s broadband penetration rates are behind countries like South Korea at 53% and Canada at 35%, there is a sense that a tipping point has been reached. In part, this is because there is a ready market for broadband—dial up internet users. How quickly broadband penetration can increase is reflected in the Canadian experience, which increased from 2% penetration to its current level of 35% in only three years.

**CYPHETICAL FOR HOSTILITIES**

To meet its goals Telstra needed to drive take-up, and increase both its retail and wholesale customer base. At the same time, Optus — the second largest player in the market — needed agents that are still being understood by those who embrace theory and practice and ‘read everything and know all the institutions and practices’.

Digital transmission infrastructure developments in Australia began with negotiations for new facilities that involved the ABC, the Australian Government and an Israeli TCT company, Ntl. The Telecommunications Broadcasting Services (Digital Conversion) Act 1998 (Cth) marked the major turning point that synchronised with the pre-sale of national transmission services in 1999. The changes evolved behind a screen of commercial-in-confidence, which meant that ‘interaction-knowledge cycles’ about the Commonwealth transmission towers were barely noticed, indeed were contained. However, the transactions for implementation of services did prompt limited services in major metropolitan regions by 2002, but these were highly disproportionate to the costs. Plans for regional Australia are another stage of developments for 2004.

By July 1999 the Australian Broadcasting Authority (ABA) had published technical plans for approaches to digital terrestrial television broadcasting, which included digital channel plans (DCP) for the nation. From mid 2000 onwards ACMA transmitters and digital signals for the ABC were tested in a period of consolidation. Ntl, the international company that entered into a contract for 15 years with the Australian Government and the ABC was pleased with a long-term contract to deliver digital broadcasting transmission services.

*Ntl’s services to the ABC covering a whole network of analogue TV and radio and digital television transmission services is probably largest out-sourced transmission contract in the world.* (Ntl, 2000)

*The provision of transmission services via an international company has presented ongoing risks for ‘national-public’ broadcasters as they have a high dependency on large networks, which are increasingly owned by private operators whose primary interests are in making profits.

By mid 2001 an Australian newspaper reported that “transmission specialist Ntl is bedevilled with old technology...and crippling debts of almost $40 billion”.

By the end of 2001 Ntl announced a series of ‘cost cutting initiatives’. In February 2002 Ntl announced that it would sell its Australian broadcast business for $850 million dollars to Macquarie Bank and focus on its core business in Europe.

Although the closed transactions for transmission services were limited to a few agents of change due to commercial-in-confidence in negotiations the flaws were soon exposed. However Australian citizens have been denied knowledge (and services) about public assets valued somewhere between $650 million (see Government Assets Sales Register) and $850 million dollars. Had information about transmission infrastructure been factored into a model as a communicative transaction, then the financial one, the reach of knowledge may have been higher.

Digital technologies have already enabled multi-channel and a range of creative concepts in the broadcasting domain and spectrum is emerging with a potential commercial value. For some years the Australian Government has speculated on the returns from the sale of spectrum, adopting a commodity approach that is apparent in Productivity Commission documents. Spectrum management plans noted via the Productivity Commission could only ever be once deployed once digital infrastructure systems, or transmission facilities, were in place.

**THE COST OF SPECTRUM**

Australia’s broadcasting infrastructure problems combined with payments to the Government for particular usage of digital technology for multiple streams or Datacasting as outlined by the productivity commission suggests
Television in Australia
Knowledge cycles of digital

In the vision of the Federal Parliament of the Australian Government, the digital transition in Australia has been a significant milestone in the evolution of television. This transition has not only introduced new technologies but also heralded a new era of media consumption, where viewers have gained access to a wealth of content from a variety of platforms. The digital transition has not only revolutionized the way content is distributed but has also had a profound impact on the nature of the viewing experience, offering viewers a more personalized and interactive experience. In this article, we will explore the implications of the digital transition in Australia, its impact on the media landscape, and the challenges it presents for content creators and audiences alike.

In recent years, the Australian government has been at the forefront of digital media innovation, introducing policies and frameworks to support the transition to digital television. This transition has been part of a broader strategy to modernize the media ecosystem in Australia, making it more efficient, accessible, and reflective of the needs of its diverse population. The digital transition has allowed for the delivery of high-quality digital television services, enabling the broadcast of high-definition programming, interactive services, and on-demand content. This has not only enhanced the viewing experience but has also provided new opportunities for content creators to reach a wider audience.

The digital transition has also led to a transformation in the media landscape, with the decline of traditional analog television services and the rise of digital platforms. This has resulted in a more competitive market, where content providers are vying for viewers’ attention with innovative and diverse offerings. The digital transition has also facilitated the expansion of local content, with Australian producers developing new and compelling narratives that resonate with the diverse experiences and perspectives of the Australian audience.

However, the digital transition has not been without its challenges. The process of transitioning from analog to digital television has required significant investment in infrastructure, equipment, and content creation. This has resulted in some areas experiencing delays in the rollout of digital services, affecting the availability of programming for some viewers. Additionally, the transition has also highlighted the need for continued investment in digital literacy and training, ensuring that all segments of the population can benefit from the new media landscape.

In conclusion, the digital transition in Australia marks a significant milestone in the evolution of television. It has opened up new opportunities for content creators and viewers alike, transforming the media landscape and providing a more personalized and interactive viewing experience. While the transition has not been without its challenges, the Australian government’s commitment to modernizing the media ecosystem has ensured that the digital transition is a success, offering a brighter future for the media industry in Australia.
three reductions were not sufficient when it issued a Part A Competition Notice on 19 March 2004. This is a comparatively swift timeframe for the ACCC to issue a Competition Notice. The ACCC hoped that the notice would ensure Telstra offered appropriate reductions in the market place. The ACCC declined to advise Telstra what those reductions should be.

Telstra continued to make public statements that it was concluding wholesale arrangements with many wholesale customers. Again, many wholesale customers indicated that meaningful negotiations were not occurring. At the same time, representatives of Telstra let it be known that pricing was not anti-competitive, and that Telstra was prepared to have the matter adjudicated in court.

However, on 1 April 2004, Telstra released new wholesale pricing which offered two packages. The first, labelled as “Protected Rates” was described as providing an effective 40% discount off retail prices. The second, a “Growth Option” was described as offering greater reductions on higher speed plans.

The ACCC cautiously welcomed these plans.

The new pricing has not placated many ISPs who indicate that the extent of the margins is not as claimed, and that they only apply to ISPs that are prepared to exactly replicate Telstra’s retail offerings. Some ISPs have expressed concern that Telstra has cleverly engineered a solution that will satisfy the ACCC but not wholesale customers.

At the time of writing (early April 2004), the ACCC is reviewing these revised plans in light of ISP objections.

WHAT NEXT?

It remains to be seen whether the ACCC accepts Telstra’s recent offer and, if so, withdraws the Competition Notice, or if it determines that the offer is not sufficient.

CONCLUSION

The outcome of the current pricing debate is yet to be determined, as is its impact on a competitive broadband market.

The importance of the issue is not limited to just broadband as we know it. It extends to the full range of advanced services which broadband provides the platform to potentially deliver. A key application – and the key danger to the incumbent – is voice over IP. New entrants who today provide standard broadband services to consumers may tomorrow be in a position to offer an effective substitute for traditional PSTN voice telephony services. This potentially has huge ramifications for Telstra’s local access and local call revenues. This is a key reason why the current battle is being fought so hard, and why a game of brinkmanship with the regulator is being waged.

It is also why it is so important that the competition regulatory regime - and the regulator - are able to efficiently and expediently prevent leveraging of market dominance to stymie the development of a more competitive and advanced communications environment in Australia.

David McCallum is General Manager, Government Affairs at Optus in Sydney.

HIGH COURT: MAJOR DECISION

The High Court, by a three to two majority, overturned the Full Federal Court’s decision. The High Court held that a single image appearing on an Australian television screen with accompanying audio does not constitute a television broadcast. The majority found that, in this case, the ‘television broadcasts’ were the 20 Channel Nine programs from which the excerpts shown by Ten had been taken. The Court described these as broadcasts “put out to the public, the object of the activity of broadcasting as discrete periods of broadcasting identified and promoted by a title... which would attract the attention of the public”. In coming to this conclusion, the majority criticised the Full Court’s approach for giving an artificial meaning to the Act and for privileging the rights of television broadcasters over those of other copyright holders. The majority’s interpretation of the Act drew on the historical development of copyright law and established the principles that a television broadcast comprises a “transmission over the air of a television programme”. This view was accepted by the High Court, which ruled that the copyright protection in television broadcasting was not limited to the rights of the television broadcaster, but extended to any individual who utilised the broadcasting service.

MINORITY DECISIONS

In separate judgments, Justices Kirby and Callinan both agreed with the Full Federal Court’s construction of a ‘television broadcast’ as each single visual image and the accompanying sound broadcast. Both minority judgments gave priority to the text of the legislation over the ancillary materials, and maintained that the wording of the Act established the limits to a purposive approach to statutory construction favoured by the majority.

Furthermore, the minority focused closely on the nature of the interests to be protected by the broadcast rights. Copyright. Referring to the well-known test that ‘what is worth copying is prima facie worth protecting’, Justices Kirby and Callinan argued, in the highly competitive and commercialised broadcasting industry, broadcasters have a strong interest in re-broadcasting snippets of footage from their competitors and that the broadcast copyright should protect against this conduct.

The minority judges recognised that their broad interpretation of broadcast copyright gave a stronger degree of protection to broadcasters than other copyright holders. While Justice Kirby was almost apologetic that his analysis of Federal Court’s broad construction of broadcast copyright was intended to be a unique form of copyright, and that a greater level of protection was justified in the competitive and ‘nakedly commercial context’ of broadcasting, in which ‘expansive infrastructures, fees, techniques and resources are required’. The High Court remitted the case to the Full Federal Court for redetermination of whether, in light of its findings on the scope of the television broadcast copyright, the excerpts shown by Ten were substantial parts of Channel Nine’s programs contrary to Justice Conti’s findings.

COMMENTS

The High Court’s decision in The Panel case may be welcomed for having addressed some of the key criticisms directed at the Full Federal Court judgment. In particular, by maintaining the management threshold, the High Court has ensured that television broadcasters are no longer privileged with a greater degree of copyright protection than other copyright holders, including the producers of other Part IV subject matter (most notably films) and the creators of a broadcast’s underlying works. Furthermore, the High Court decision reaffirms the utility of the substantial part test within the television broadcast copyright regime, thus restoring a key mechanism by which the courts have traditionally sought to resolve copyright law’s fundamental tension between creators’ private interest in protection and the public interest in access.

But for those in the broadcasting industries, the High Court’s decision does not offer any real comfort beyond confirming that broadcast copyright subsists in television programs and advertisements. Indeed, by its reliance on an unsolved definition of ‘television broadcast’, the High Court has allowed an unfortunate degree of uncertainty to survive in relation to the subject matter of this form of copyright. For broadcasters wishing to reproduce parts of television programs for their own use, any uncertainty as to whether their actions might be in breach of the Copyright Act is compounded by the subjectivity involved in the court’s determination of whether the use constitutes fair dealing. As the history of The Panel case itself reveals, the courts have assessed the fair dealing defence in a highly erratic fashion. It seems unlikely that broadcasters will risk using excerpts of other broadcasters’ programming on such an unreliable and uncertain basis, especially when consideration is given to the high costs involved in the television industry.
to them. In further particular, he makes it plain that Allister Campbell, Blair’s media man, had been meddling with the dossier and trying to harden its case for war.

In any journalist’s terms, this was a giant story. The key document used by the Government was messed with and over-cooked or “sexed up” as Gilligan termed it. It is not clear how many people Gilligan told inside the BBC about how he had had this scoop. In the normal course, and for reasons of exclusivity and outwitting your competitors, you would not be going around blabbing that some time soon you would be breaking a big WMD story. That Gilligan let it be known that he had had such a story was told to some because the presenters of his radio program knew about it and so did his producers from the previous night. In the night before the early morning interview, MOD media people told a major story on WMDs would break the next morning on the “Today” program. They were duly listening. At 6:07 am Gilligan did the following interview live to air from his phone at home, one week after talking off-the-record to Kelly:

Well the 45 minute isn’t just a detail, it did go to the heart of the government’s case that Saddam was an imminent threat and it was repeated four times in the dossier, including by Prime Minister himself, in the foreword; so I think it probably does matter. Clearly, you know, if it’s, if it was, if it was wrong, then, things are, got wrong in good faith but if they knew it was wrong before they actually made the claim, that’s perhaps a bit more serious.

Note that the claims that Lord Hutton spends 300 pages on are not the substantive claim that the dossier had been “sexed up” under government pressure, causing concern among intelligence officials. They are the added extras, that (a) the government “probably knew” the 45 minute claim was wrong; and (b) the reason the 45 minute claim was not in the original dossier draft was because it was single sourced and therefore unreliable.

The SUBSTANCE

Did Gilligan do a “Thorne” or did he dive in deliberately?

His notes reveal a typical journalist’s jumble of thoughts, names, quotes and ideas. In my view, there is no clue there as to which branch of intelligence officials he turned to speak on Gilligan’s part. I’ll read some:

‘...transformed week before publication to make it go…’

‘...the classic was the 45 mins most things in a dossier were double source but this was single source. One source said it took 45 minutes to set up a missile assembly, that was misinterpreted…’

‘...it was a week before the publication date of the dossier, it was actually rather, a bland production. It didn’t, the, the draft prepared for Mr Blair by the Intelligence Agencies actually didn’t say very much more than was public knowledge already and, er... Dorning Street, our source says ordering a week before publication, ordered it to be sexed up, to be made more exciting and ordered more facts to be, to be discovered... essentially, er..., the 45 minute point, er, was, was probably the most important thing that was added...’

The notes are classic. I suspect he was concentrating on Kelly, not wanting to get the burden of Kelly’s remarks wrong, taking notes that he would “write up” later when he got back and could recollect what had passed between them. That’s what he did. In general, to me, a

was required to comply with the ARPANSA Standard, and that the Applicant did comply with the ARPANSA Standard. On the Applicant’s evidence the estimated level of EM emissions as a result of the development would be 0.0009 per cent of the maximum exposure limits under the ARPANSA Standard. The Court held that the application of the precautionary principle had not been triggered and that, therefore, the measurement of 1V/m was not a recognised standard approved and imposed by a regulatory body, the proposed condition to restrict EM emissions to less than 1 V/m should not be included in the conditions of consent.

In NTL Australia Ltd v Willoughby Council [2000] NSWLEC 244 (27 November 2000) per Bignold J the respondent Council submitted it should be a condition of consent that EM emissions be less than the predicted emissions stated in a report by Broadcast Communications Limited ("BCL Report"). The parties and the Court agreed that the relevant standard to be applied was found under the International Commission on Non-Ionising Radiation Protection (ICNIRP) 1998 Guidelines ("ICNIRP Guidelines" or "ICNIRP 1998 Guidelines"). The maximum non-occupational exposure level under the ICNIRP 1998 Guidelines was 200W/m² which is the same as the current ARPANSA Standard of 0.08W/kg.

The proposed condition was opposed by the Applicant on the grounds that:

- the condition ignored the expert evidence showing showing EM emissions to be well below the levels set out under the ICNIRP 1998 Guidelines;
- the condition ignored the existence and appropriateness of the ICNIRP 1998 Guidelines.

The Court held that the proposed condition went far beyond the recommendations made in the BCL Report, and that the condition was so excessive as to be unlawful. The court held that the Telecommunications Act specifically permits and encourages.

Mary-Ellen Horvath is a lawyer with Sydney corporate and telecommunications law firm, Truman Hoyle.
The diagram represents a flowchart or process diagram. The text is not visible due to the nature of the diagram. However, the diagram seems to be related to a process, possibly in a technical or industrial context, given the context of the surrounding text which includes terms like "content and condition," "emission," and "central nervous system." The diagram appears to be part of a larger document, possibly related to environmental or health regulations, given the specific terms and context.
But the blame game is not the point. I think some important structural points are being missed both by Hutton and by the BBC here.

First, the BBC is under massive pressure to perform in the ratings, cut costs, outlink pay TV and pay-per-view and, as a public broadcaster, be all things to all people. It is under the usual thrombosis from the powerful Murdoch press in Britain. But the BBC negotiations are coming up. As a result its investment in labour-intensive investigative reporting of the traditional kind—the kind you see on Panorama or Four Corners—has fallen sharply in the last 10 years.

Two, the CNN revolution has transformed news broadcasting around the world. The BBC World was the first response to the idea that news is covered by having a reporter on-the-spot reporting live to it what the Americans call an anchor and we call a presenter. The disease has now infected domestic reporting as well. Everything is live, instant and it’s just happened.

Three, the trend of investigative reporting and the rise of the internet and opinion is a direct result of the extraordinary technological change of the last 15 years that began with satellites, went on to the internet which involves fibro optic cable and broadband and has hit the streets as video cameras more widely used than ever. Communication from anywhere to anywhere is possible and is getting massive use and driving massive profits for some telcos. But the real question is still McLuhan’s: is the medium the message? Is anyone saying anything worthwhile? Where has the content gone?

I suspect the judicial system, and Lord Hutton in particular, have little interest or knowledge in these changing media industry processes. On the surface, they seem to have little to do with the law. We in the media have seen the revolution. We see a foreign correspondent busting his gut and risking his life to tell a war zone only to send his report and hear his foreign editor say they only need some voice over—maybe written in London or Sydney—because pictures have already come via satellite from Reuters or CNN or NBC or Sky or agencies and yours aren’t quite as good.

In the real media world—the one that consumers listen to or watch—news is quick and dirty and it is competing with such wonderful inventions as flyby programming, home video, pornography and the Net. How to make it interesting? The truth is that the industry environment Andrew Gilligan was operating in and the BBC was setting up for him. The CNNisation of news.

MISTAKES, JUDGMENTS AND THE LAW

In this environment, the distance between the working life of Andrew Gilligan and the working life of Lord Hutton could not be more different. Yet again, the disconnection between law and journalism. I would argue that this case shows clearly the need for a re-thinking of the law of defamation. We all make mistakes. I know, I know, my audience of lawyers will say journalists make more than others. But let’s just say that no-one’s an island and Andrew Gilligan had a great CV. He was in an industry undergoing great change, emphasising fierce competition in the marketplace. He was also working in an environment at virtual war with its sponsor. He was also working in the most contentious area of Government policy. He was also working under a media barrage from the Prime Minister’s PR man. Was a mistake, live and unscripted, inevitable?

If we answer ‘yes’ to that question, should we condemn the man, suck him and hope he never darken a media legal office again and tut-tut all around the world? I think not. Should we close down ‘live’ for the BBC and put it at a disadvantage in its battle with the private sector? I don’t think so.

Here’s an idea. Like the Americans, we should accept mistakes honestly made (or, in this case, if I am correct, and hope he reasonably held) and media legal allowances for the consequences. The consequences could be:

• quick retraction if proven false;
• debating the allegation; and/or
• equal and appropriate space for reply.

This notion has been swirling around the media and communications for ages—time to do something about it. Hutton refers derisively to recent (2001) judgments by Reynoldes J about the need for protecting public reputation. This is true, but my cry is for an adult and fulsome public debate.

The BBC Defence Correspondent, in this case Andrew Gilligan, was operating in an environment where he knew his source did not say it, that the Blair Government “probably” knew that the claim that Saddam could get chemically weapons launched within 5 minutes was nonsense. Is that thought, backed up by further evidence and argument, not worth an airing in a democratic policy? The problem was that it was tacked on to the Kelly interview but, in my opinion, there had been no Blair Government management, Gilligan should have been given space and time to put his view as an add-on to the Kelly report. Blair could have replied publicly and Gilligan could have been judged. Let’s not be so afraid of ‘a man’s reputation’ (Blair’s)!

CONCLUSION: GILLIGAN WAS 95% RIGHT!

These were extraordinary times. Some might wish we could wipe the slate clean and start this century again. The “big picture” was that Gilligan reported that the weapons of mass destruction were a political weapon, not a military threat to the West and that the political process was being tortured. Under Henry VIII, he would have lost his head, but that was a monarchy. Under Tony Blair, you lose your livelihood because we are in a democracy.

Gilligan listed his central Kelly charges in a letter he wrote to the Deputy Leader of the House of Commons in late June last year:

‘As the transcript, available on the Internet, makes clear, I also repeated to the [Foreign Affairs] Committee the charges of my source that the dossier had been sexed up; that the 45-minute claim was uncorroborated and considered unreliable; that it was included in the dossier, in the words of the source, “against our wishes”; that the information contained in the dossier was untruthful with the general tone and tenor of the dossier because, in the words of my source, it “did not reflect the considered view they were putting forward”; and that the dossier had been transformed just before it was published at the behest of Downing Street.’

All those were true.

The editor of The Spectator wrote that Gilligan was 95% right. Where he went wrong was to fall foul of the politicised decision-making process that the Blair government had installed in its drive to war.

Gilligan’s “added extra” was wrong-headed and mis-placed but hit a Blair sore spot because the distinction between ‘a vehicle to sell the “Misses Resolution”’ had become so thin. In an environment where the WMDs didn’t exist, Blair was on thin ice assuring the British public of his pro-environment and imminent threat. I suspect Gilligan’s report was not so much wrong as too close to the Prime Ministerial slot.

Andrew Gilligan is 95% scapegoat, 5% in error.

Peter Manning is Adjunct Professor of Journalism at the University of Technology, Sydney and a former Executive Producer of ‘Four Corners’ (ABC) and ‘Winner’ (Seven Network).

Case Note: Electromagnetic Radiation and Telecommunications Networks

Mary-Ellen Horvath considers the recent decision of the NSW Land and Environment Court in Hutchison Telecommunications (Australia) Pty Ltd v Baulkham Hills Shire Council.

In the recent decision of Hutchison Telecommunications (Australia) Pty Ltd v Baulkham Hills Shire Council [2004] NSWLEC 104, the Land and Environment Court of New South Wales (Court) considered the “precautionary principle” and confirmed the appropriate regulatory standards to be applied to electromagnetic radiation (EMR) emissions from mobile telecommunications base stations.

The Court held that it was inappropriate and not in the public interest for the Court to attempt to impose a standard that is not recognised by a national regulatory body and, moreover, that the creation of new regulatory standards is not a matter for the Court.

BACKGROUND

On 18 February 2003, Hutchison 3G Australia Pty Limited (Hutchison) lodged a development application (DA) with Baulkham Hills Shire Council (Council) to erect a mobile telecommunications base station - a monopole, approximately 36 metres in height with three panel antennae, located on land owned by Sydney Water in Castle Hill East (facility). On 20 August 2003, the Council gave notice of its determination refusing consent for the DA, stating:

“The Development Application has been refused on the following grounds:

1. Based on lack of evidence.
2. Duty of care to the residents.
3. The application is not in the public interest.

On 15 September 2003, Hutchison filed an application under section 128 of the Environmental Planning and Assessment Act 1979 (EP&A Act) in the Court, appealing the Council’s decision to refuse the DA.

ISSUES

In its Statement of Issues, the Council identified the following issues:

• potential adverse health impacts of EMR;
• adverse visual impact; and
• public interest and objectors’ concerns.

Two weeks prior to the hearing the Council resolved to grant consent, subject to certain conditions, many of which were disputed. In essence, the disputed conditions were that:

• the power to the antenna be limited to 10 watts;
• EMR emissions from the facility be measured at less than 1 volt metre at 1 volt/metre (1V/m) in any place frequented by a member of the public (the origin of the measurement of 1V/m is addressed below); and
• future mobile operators proposing to co-locate on the new tower must submit details of their proposal to the Council and adhere to the conditions of consent imposed on Hutchison.

The most contentious issue was the potential adverse health impacts and whether the Council had the power to impose a standard which is more stringent than the relevant standard set out in the Australian Communication Authority’s - Maximum Exposure Levels to Radiofrequency Fields - 3kHz to 300 kHz published by the Australian Radiation Protection and Nuclear Safety Agency in May 2002 (ARPANSA Standard).

Legislative framework

The Court summarised the operation of relevant legislation and industry codes (at par 17):

The provision of telecommunications in Australia is governed by a complex and comprehensive Commonwealth legislation. It is necessary to briefly review this to understand the legal framework relevant to this development application and the limits imposed on field strength under the Commonwealth Telecommunications Act 1997 (Cth) (the Telecommunications Act) in conjunction with the Trade Practices Act 1974 (Cth) regulating the telecommunications industry whilst the Radiocommunications Act 1992 (Cth) (the Radiocommunications Act) regulates the use of the