Communications Law BULLETIN

CAMLA

Communications & Media Law Association Incorporated

Print Post Approved PP: 234093/00011

Football and Fair Dealing: Telstra v Premier Media Group

Andrew Stewart discusses Telstra Corporation Pty Limited v Premier Media Group Pty Ltd & Anor [2007] FCA 568,

Volume 26 Nº 1

October 2007

Inside This Issue

Introduction

As evidenced in "The Panel" case between the Nine and Ten television networks, the fair dealing exceptions in the *Copyright Act 1968* (Cth) present challenges to both copyright owners and users. Those challenges expand as the content delivery platforms enabled by the expansion of digital technologies increase.

The case of *Telstra Corporation Pty Limited v Premier Media Group Pty Ltd & Anor* [2007] FCA 568, is one of the first in the world to grapple with those challenges, such as the unresolved issue of the outer limits of the fair dealing exceptions and the application of those exceptions in the "new media" space.

Although the decision was interlocutory in nature, it points to the courts taking a robust approach to the application of the fair dealing exceptions. The judgement also suggests that it may be difficult to convince a court that the exceptions should be applied differently as between the "established" media of free to air and pay TV and the "new" media of online and mobile.

The Facts

Through Telstra Bipond, Telstra exclusively licenses the broadcast and cinematograph film rights for matches conducted by the National Rugby League (***NRL***) for communication to the public via the internet and 3G enabled mobile phones. Telstra held a version of those rights since 2001 and entered into a new licensing arrangement in October 2006 as part of a new sponsorship agreement with the NRL.

Under the licensing arrangement with the NRL, Telstra is entitled to show:

- full NRL matches, and highlights from those matches of unlimited length, but not until 24 hours after the conclusion of the particular matches; and
- highlights of NRL matches of not more than five minutes per match within the 24 hour period after the conclusion of the particular match.

Telstra's rights also enable it to operate, and generate revenue from, the NRL website.

Premier Media Group produces a suite of pay TV channels which it supplies to Foxtel, Austar and Optus for broadcast on the Foxtel and Austar pay TV platforms. Those channels include three dedicated sports content channels, FOX SPORTS 1, 2 and 3 and a 24/7 dedicated sports news channel, FOX SPORTS NEWS.

Pursuant to an agreement with the NRL, Premier Media Group is the exclusive licensee of rights in NRL content for pay TV, with the free to air rights being held by the Nine Network. Premier Media Group produces coverage of NRL matches on the FOX SPORTS channels and news stories relating to sporting events on FOX SPORTS NEWS.

Premier Media Group also supplied sporting news content from FOX SPORTS

Communications Law Bulletin

Editors: Matt Vitins & Page Henty

Printing & Distribution: BEE Printmail

Website: www.camla.org.au

Contents

NEWS to News Digital Media Pty Limited for use on the foxsports.com.au website which, at the time, was jointly operated by Premier Media Group and News Digital Media. Additionally, Premier Media Group also supplies sporting news content to mobile telephone operators Hutchison and Vodafone, as well as Telstra. This content included, but was not limited to, reports on the outcomes of NRL matches.

The FOX SPORTS NEWS content which was the subject of the proceedings consisted of hosted reports on the outcomes of NRL matches similar in format to traditional news reporting. The reports were illustrated with selected footage from the relevant NRL matches. The length of footage used varied, in some cases up to two and a half minutes.

In supplying news sports content for use on the foxsports.com.au website and on the mobile networks, Premier Media Group relied on the fair dealing exception contained in section 103B of the *Copyright Act*.

The Proceedings

Telstra commenced proceedings by way of an order for short service seeking an interlocutory injunction from the Federal Court to restrain Premier Media Group (in the case of online and mobile) and News Digital Media (in the case of online) from:

- using more than 45 seconds footage of any one NRL match in a report;
- using more than 90 seconds footage of any NRL matches (in total); and
- making any report available for more than 24 hours after the conclusion of the earliest match referred to in the report.

In its opening submissions, Telstra asserted that it had formulated the orders generously, permitting Premier Media Group to use an amount of footage clearly beyond an amount that the Court would likely find constituted fair dealing at a final hearing.

In summary, Telstra argued that Premier Media Group's and News Digital Media's use did not fall under the protection of the fair dealing exception because:

- the uses of NRL footage exceeded the long established conventions in the free to air and pay television industries; and
- even if the uses of NRL footage complied with those long established conventions, the sophisticated market for sporting content rights and the "unique circumstances" of the continuous, on demand availability of content delivered via the internet or 3G mobile, meant that those conventions should not apply to the new media context.

To support those arguments, Telstra pointed to a number of factors which it said affected the fairness of the use by Premier Media Group and News Digital Media of NRL footage. These included that:

- News Limited, being a part owner of the NRL, Premier Media Group and 100% owner of News Digital Media, was effectively granting rights with one hand (through the NRL) and then taking away with the other (through Premier Media Group and News Digital Media);
- the continuous, on demand nature of new media required a different approach to the fair dealings exceptions; namely that shorter extracts should be used which are available for a restricted time; and
- in supplying content from FOX SPORTS NEWS for use in the new media space, Premier Media Group was not itself using the NRL footage for the purpose sanctioned by section 103B of the *Copyright Act,* but was merely supplying content pursuant to a business arrangement.

The Decision

For the purposes of the interlocutory hearing, the there was no dispute that the material supplied by Premier Media Group for online and mobile use contained a substantial part of the work over which Telstra had exclusive rights, namely the coverage of an NRL match. Also, there was no dispute at the interlocutory stage that the outcomes of NRL matches were newsworthy.

Accordingly, the questions to be considered by the Court at the interlocutory phase were whether:

- Telstra had demonstrated a prima facie case that Premier Media Group and News Digital Media were not entitled to rely on s103B of the *Copyright Act*, and were therefore infringing Telstra's exclusive rights in NRL footage; and
- the balance of convenience favoured Telstra.

In deciding that Telstra had failed to establish a prima facie case and that the balance of convenience favoured Premier Media Group and News Digital Media, Allsop J made a number of points with respect to Telstra's argument. In summary these included:

- Modern news journalism relies on the use of adequate visual images and the viewing public expect that news reports about sporting events will be illustrated with vision of those sporting events. This expectation is the basis of the public interest protected by section 103B of the *Copyright Act.*
- Fair dealing is always a matter of judgement and impression but the following factors detracted from Telstra's argument that the length of footage used by Premier Media Group exceeded that which was fair:
    - Evidence was tendered by Premier Media Group of comparable examples of sports news reporting from both free to air and pay TV which included similar lengths of footage;
    - In December 1995, Telstra had asserted in the context of AFL matches that use of 1 minute per quarter and 2 minutes at the end of an AFL match constituted fair dealing; and
    - What industry participants view as fair dealing is unlikely to be determinative of what constitutes fair dealing but a general view about the legitimacy of a certain length of footage would be a relevant consideration.
- There was insufficient evidence on an interlocutory basis to support the argument that there ought to be a different set of rules applying to the internet and online as compared with free to air and pay television. Allsop J acknowledged that the matter would need to be further ventilated at the final hearing, which might lead to a conclusion that different rules should apply as between the established media and new media.
- The fact that News Limited had ownership interests in the body which granted Telstra its exclusive rights and the organisations accused of infringement was irrelevant, particularly given that Telstra had clearly entered into its arrangement with the NRL in the knowledge that third parties could rely on the fair dealing entitlement. The judge specifically referred to the fact that the Telstra/ NRL sponsorship agreement contained a provision to this effect.
- Although the outer limits of what constituted a "fair" amount of footage were a matter for the final hearing, 45 seconds of footage (as reflected in the form of Telstra's orders) was clearly a "bare minimum" of what could be used to illustrate and the test of what was fair was not what was the bare minimum required to report news.
- The fact that Premier Media Group was supplying other parties with the news stories for use on mobile networks, did not deprive it of the ability to rely on the fair dealing defence. Allsop J took the view on an interlocutory basis that at the very least, Premier Media Group's conduct was associated with the reporting of news, as required by section 103B of the *Copyright Act*.

On the issue of balance of convenience, Allsop J noted that although Telstra had not unreasonably delayed in commencing the proceedings, Premier Media Group had not "sprung a massive surprise" as it had been engaging in very similar conduct during at least 2006. The fact that Premier Media Group had existing contractual relationships which would be detrimentally affected by the granting of the injunction was one of the factors which lead Allsop J to take the view that the balance of convenience favoured Premier Media Group.

Allsop J dismissed the interlocutory application and awarded costs to Premier Media Group and News Digital Media.

Implications

As the proceedings settled shortly after the interlocutory hearing, some care needs to be taken in analysing the implications of the decision. Having said that, if other judges follow the directions set by Allsop J in this case, a number of conclusions can be drawn.

Duration of fair dealing

Contrary to the popular view, fair dealing, at least for the purposes of reporting news, is likely to be measured in minutes rather than seconds.

Previous decisions in the UK, such as *British Broadcasting Corporation v British Satellite Broadcasting Limited* [1992] Ch 141, and in Australia, such as *TCN Channel Nine Pty Limited & Ors v Network Ten Limited* 2001 [FCA] 108 and *Thoroughvision Pty Limited v Sky Channel Pty Limited* [2005] FCA 1527 each considered the use of footage of approximately 10 to 45 seconds. Accordingly this was the first audio visual copyright case in either the established or new media worlds to consider the potential outer limits of the fair dealing exception in the audio visual context.

Given His Honour's view that he was not convinced of any difference in the application of fair dealing between established and new media, his comments regarding 45 seconds representing a bare minimum apply equally to fair dealing in the new media space as to the free to air and pay TV contexts. It should be noted however that it is not possible to draw clear lines and each instance will have to be judged on its merits.

Newsworthiness

Additionally, the length of time that material can be used for under fair dealing is not going to be strictly limited to short durations such as 24 hours. The Judge's analysis of how long a news report remains "newsworthy" points to a robust approach to this issue.

Ultimately, perhaps, the issue is not so much the province of lawyers but of editorial staff of media organisations. While the issue may become somewhat clouded in the context of commercial competitors and the fight for ratings in the established media world and page impressions or clicks in new media, nonetheless if a journalist judges reasonably that something continues to be newsworthy, then it may well be.

Technology Neutrality

The reluctance of Allsop J to accept Telstra's assertions that new media requires new rules, appears to be an example of the Court taking an approach consistent with the underlying intention that the *Copyright Act* be technology neutral. While we will not have the benefit of detailed evidence and submissions on this point, the argument for different rules as between television on one hand and internet and mobile on the other, in the writer's view, suffer from some significant flaws.

Firstly, the argument relies upon the assertion that the new media landscape delivers content in a non-linear way, that is, the consumer controls when and how often they access a particular piece of content. By way of contrast, free to air and pay television providers determine when and how often a viewer receives the content. Accordingly, the opportunity for multiple viewing does not exist in the established media environment. It seems somewhat strange to argue that an exception to the *Copyright Act* intended to protect the public interest in receiving news should apply in a more limited way in the new media context merely because the public has a greater degree of control over its access to news reports in the online environment or by mobile.

In any case, in the current environment of digital video recorders, including Foxtel IQ, Microsoft Media Centre PC's and TiVo (available in the US and now in Australia) the days of the content supplier determining the when and how of content delivery are numbered. These devices enable linear content to be rendered in a non-linear way. The linear/non linear argument is rapidly becoming obsolete.

Secondly, and perhaps more significantly, it is difficult to sustain a discriminatory approach to the different forms of media, or more accurately, content delivery in the face of true convergence. This can be illustrated in the case of mobile content. There may be an argument that in the context of mobile phones, a different set of rules is required given that consumers tend only to look at small amounts of audio visual material on the relatively small screen of a handset. Given that an element of the fair dealing defence is the commercial impact of the use on the copyright owner or exclusive licensee, the ability of non-rights holders to use amounts of footage that correspond to a consumer's attention span on a small screen may have an impact on the commercial value of such rights.

However, once any form of content can be delivered via a mobile device and the consumer can choose whether to view the content on the inbuilt screen or on a larger display panel, it becomes impossible, from a fair dealing perspective, to discriminate between content delivered to a mobile device and content delivered to a traditional television set.

Technology has advanced to the stage when mobile devices can be "hooked up" to larger screens. The practical and legal distinctions between mobile and other devices are now moot.

New media value

Regardless of the view taken on how the fair dealing exception should be applied, the fact that Telstra was moved to attempt to protect its rights in NRL content in the new media space demonstrates that there is significant commercial value in new media rights. How parties may value those rights, particularly clips rights, after this case remains to be seen, but it is likely that this will not be the last case to consider what is fair in the new media space.

Note: The writer represented Premier Media Group in these proceedings but the views expressed are his own.

Andrew Stewart is a Partner at Baker & McKenzie, Sydney.

Issues for Corporates and Regulators in Second Life and Virtual Worlds *

Nick Abrahams looks at what virtual worlds are, why they are important, and forecasts the legal issues that could become relevant to virtual residents.

Introduction

The Federal Government has recently relaxed regulations governing the more mature media/information distribution platforms, however rapid advances in distribution technologies may require regulation by the Government. This regulation of media distribution may move into areas previously unknown to traditional media law such as taxation, money laundering, and the regulation of crimes such as sexual assault.

This paper considers:

(a) the challenges to regulators of the dramatic rise in popularity of Virtual Worlds like *Second Life* as an alternative to traditional entertainment and information services like TV, radio and newspapers;

(b) the risk issues for corporate entities when setting up presences in Virtual Worlds like *Second Life*; and

(c) relevant caselaw from around the world involving Virtual Worlds.

Why should we be interested in Virtual Worlds?

When we speak of Virtual Worlds, it conjures up images of spotty youths playing computer games involving mythic creatures and duels with magic swords. However such easy dismissal of this phenomenon is unwise. Virtual Worlds or Massively Multiplayer Online Games are a multi-billion dollar industry and are the fastest growing sector of the entertainment economy.[1] Far from being "just a video game", they represent the leading edge of the movement of the Internet from the standard 2-Dimensional web interface to a fully immersive 3-Dimensional web experience.

Take for example *Second Life*, a Virtual World much discussed in mainstream press of late. The average age of *Second Lifers* over seven million inhabitants is 32 years,[2] with 45% of the inhabitants being women.[3]

Over 50 universities have established presences (so called "Islands") in *Second Life*, including Harvard, Duke, INSEAD, MIT and Vassar. These universities are running courses solely "in-world" for students all over the world.

Most of the world's leading consumer brands have Islands, including ABN Amro, Accenture, Adidas, BMW, Calvin Klein, Coca-Cola, General Motors, H&R Block, ING, Kraft, Lacoste, Mazda, Mercedes-Benz, MTV, NBA, Nissan, PA Consulting, Phillips, Samsung, Sears, Sony, Starwood Hotels, TMP Worldwide, Toyota, Vodafone, Wells Fargo Bank and Xerox.[4] The prestigious news agency Reuters has even set up a news bureau in-world covering events in *Second Life*. In Australia, the ABC has an Island and Telstra has built 11 highly interactive Islands. Telstra are also supporting customers to explore *Second Life* by making bandwidth used by BigPond customers on *Second Life* not count towards that customer's data cap.

Islands in *Second Life* today are like websites were back in the late Nineties, corporates have Islands but they are, generally, viewed more as experiments with a new form of interaction with and between their brand, their people and their customers. For example, Coca-Cola has given *Second Life* residents permission to use the "Coke" trade mark in *Second Life* in an almost unrestricted manner.[5]

All the major technology companies have significant presences in *Second Life*. CISCO use its Islands to display its equipment and even sets up virtual prototypes. For example, CISCO recently set up a working prototype of a virtual hospital, where potential customers could move around and use CISCO's wireless communication within the virtual hospital environment.[6] A technology company that is betting big on Virtual Worlds is IBM. IBM have committed to spending US$100 million on its Virtual World developments over the next few years.[7] One of IBM's main uses of its 24 Islands in *Second Life* is to have virtual meetings of its people (on closed IBM-only Islands). IBM sees Virtual Worlds as a potential video conference replacement.

Governments too are getting involved, for example, there is a Swedish Embassy in *Second Life*. The politicians, eager for any edge, are also engaged, with the likes of Barack Obama and Hilary Clinton both having Islands.

The key differentiator between *Second Life* and other Virtual Worlds is that in *Second Life* the Participant (which for the purposes of this paper includes individuals using the Virtual World and corporates with businesses/presences set up in Virtual Worlds) earns currency in-world (so called "Lindens") and can exchange these Lindens for US dollars. The GDP (i.e. the amount of money that changed hands between Participants) for *Second Life* in 2006 was US$220 million and is estimated to rise to US$700 million in 2007.[8]

Second Life is not a quest/contest game, i.e. there is no specific goal in *Second Life*. It is just an environment where people can go to meet each other and/or create things. In relation to quest-based Virtual Worlds, it is worth noting that one of the most popular, *World of Warcraft*, has over 8 million subscribers (more than the populations of New Zealand and Ireland together), each paying a monthly subscription fee to participate.

What is a Virtual World?

Wikipedia defines a Virtual World as:

> *A computer-based simulated environment intended for its users to inhabit and interact via avatars. This habitation usually is represented in the form of two or three-dimensional graphical representations of humanoids (or other graphical or text-based avatars).*
>
> *The world being computer-simulated typically appears similar to*

the real world, with real world rules such as gravity, topography, locomotion, real-time actions, and communication. Communication has, until recently, been in the form of text, but now real-time voice communication using VOIP is available. This type of virtual world is now most common in massively multiplayer online games (Active Worlds, Second Life, Entropia Universe, The Sims Online, There, Red Light Center, Kaneva, Weblo), particularly massively multiplayer online role-playing games such as EverQuest, Ultima Online, Lineage, World of Warcraft, or Guild Wars.

Second Life, one of the most well-known of the Virtual Worlds, was developed by Linden Labs in California and is served from Linden Labs' servers located in the USA. A Participant is able to move an avatar (of their own design) through the world, creating things, buying things (with their Lindens) or trading things and generally interacting with other avatars. In this regard *Second Life* sees itself as a natural extension of popular 2-Dimensional social networking websites such as MySpace.

Linden Labs' goal for *Second Life* is "to create a user-defined world of general use in which people can interact, play, do business and otherwise communicate".

While there are other Virtual Worlds, the critical factors of *Second Life* that distinguish it from other Virtual Worlds are:

a) Participants own the creations that they make in-world; and

b) Participants can exchange their Lindens for US dollars at the Linden Labs-operated currency exchange. The exchange rate moves but hovers around the 270 Lindens to US$1 mark.

Whether *Second Life* is the future of the 3D web or whether another platform will become dominant is the subject of conjecture. The competition between Virtual World platforms has been likened to the "Browser Wars" with respect to the 2D web between Netscape Navigator and Internet Explorer in the late Nineties.

What are the regulatory implications?

Sexual assault and pornography

Police in Britain, Belgium and Holland are considering whether users of *Second Life* are committing a crime if their avatar sexually assaults or stalks another avatar.[9]

While that may seem a highly unusual suggestion, it needs to be borne in mind that the Participants in these Virtual Worlds spend so much time with these characters that they become emotionally connected to them and an assault on their avatar has a traumatic effect (in the Participant's mind) similar to the effect that would occur if the assault occurred in real life.

In Australia, the criminal laws related to sexual assault would not extend to virtual sexual assault and it is likely that law enforcement would have to rely on the provisions of the relevant criminal statutes related to use of a carriage service to menace or harass[10] or stalking via electronic communications.[11]

Further, police in Germany are investigating the practice of "Ageplay" in *Second Life*.[12] Ageplay is where one Participant takes on the avatar of a child and engages in sexual acts with an adult avatar. Virtual depiction of sex with a minor is dealt with differently around the world. In Germany and Australia, such depictions would likely be considered unlawful publication of child pornography.[13] While in the USA, such depictions may not be unlawful.

It is also possible for Virtual Worlds to be used for the sale of age-restricted goods and services to minors. This area has received a lot of regulatory attention in relation to mobile phone and Internet content and the potential issues in Virtual Worlds will need to be considered.

Money laundering

Virtual Worlds are especially popular and advanced in South Korea. In fact more South Koreans participate in Virtual Worlds than watch television.[14] However, because of the ease of creating false identities, Virtual Worlds have been used to launder money in South Korea.[15] More dramatic commentators have suggested that Virtual Worlds could be the 21st century's equivalent to hiding funds offshore.

The United Kingdom's independent watchdog, the Fraud Advisory Panel, has released a report of its study into financial services regulation and Virtual Worlds and it has recommended that the UK Government must act to ensure that funds exchanged in Virtual Worlds "count as genuine financial instruments covered by existing laws and regulations".[16]

Tax

Even in the Virtual World, the taxman is a certainty. Generally speaking, tax authorities are able to tax earnings made in Virtual Worlds when these earnings are taken out of the world. However, what is less clear is whether income and capital gains can be taxed if they do not leave the Virtual World. This topic is the subject of a report due soon from the Joint Economic Committee of the US Congress.[17]

The Australian Tax Office has cautioned Australian corporates involved in *Second Life* to be aware of the GST implications of their in-world activities.[18]

Gambling

Australia has strict restrictions on online gambling. Arguably the types of gambling opportunities which can be found in *Second Life* breach these laws. The major issue is how to effectively police these transgressions. Does Australia have the ability to enforce criminal sanctions against residents of foreign countries? The answer is likely to be yes given that the Internet has, in effect, created a global jurisdiction where an individual could face criminal proceedings in another country regardless of the fact that he/she did not ever set foot in that other country.

A case in point is the recent sentencing of Australian, Hew Griffiths, to 51 months jail in the USA.[19] Griffiths never went to the USA, but rather ran an Internet site from his home on the NSW central coast. This site contained material and information that enabled users to circumvent the copy protection protocols on commercial software. Because there was mutual criminality (i.e. circumventing copy protection is a crime in the US and in Australia), the Australian Government ultimately allowed Griffiths to be extradited to the USA.

Promotions and lotteries

Many corporates are running promotions or competitions in *Second Life*. For example Lacoste held a promotion with a prize in Lindens for the best design of a virtual Lacoste shirt. Australia has a patchwork of state-based legislation governing promotions, competitions and lotteries. It is likely that such promotions/competitions, where accessible to Australian residents, technically need to comply with Australia's promotions, competitions and lotteries legislation.

Market manipulation

Virtual Worlds are economies and with *Second Life* having a GDP of US$700 million, quite significant ones at that. Like all economies there are capital inflows and outflows and Participants investing in these Virtual Worlds need to have transparency and certainty about the way these economies are run. In the real world, there are layers of financial regulation which ensure the markets operate in an appropriate manner and minimise market manipulation. In Virtual Worlds, there are stock markets, complex financial transactions and multi-layered derivative structures. Therefore, it is possible to manipulate these markets and cause financial damage to the other Participants and, indeed, crash the economy. The US Virtual World, *EVE Online* has complex financial structures and has been hit by several frauds on the markets which has had significant impact on Participants.[20]

What are the issues for corporates setting up a presence in a Virtual World?

There are significant risks, legal and otherwise, for corporates when they create their Virtual World presences or sites (**VW Sites**). These corporates (**VW Site Operators**) should be aware that, while there are many similarities between operating a standard 2D website and a VW Site, the risks and costs of operating a VW Site are greater.

Location releases

Corporates need to be careful to ensure they have relevant location releases for buildings and locations depicted in their VW Sites. It is settled law that a film of a building is not a breach of the copyright in the building.[21] However recent arguments have been put forward that this exception may not apply to renderings of buildings in VW Sites.[22] For example, it was alleged that the depiction of the Sydney Opera House on Telstra's Island in *Second Life* may have been a breach of copyright in the building. If a drawing of a building does not breach the copyright in a building, then arguably a graphic depiction of a building should also not breach copyright, however this is yet to be judicially considered.

Another potential claim which may be available to iconic structures like the Sydney Opera House is to allege that the use of images of the structure on a VW Site could be regarded as an endorsement by the relevant structure and constitute

passing off. This is likely to be a very difficult argument to make out, however care should be exercised by VW Site owners in the choice of structure as the adverse PR from a claim (even if unfounded) can be damaging. For example, Telstra came in for adverse publicity as a result of the depiction of Uluru on one of the Telstra Islands. The use of this icon raises some very sensitive issues as Uluru does have its own specific legislation which prohibits members of the public gaining access to, flying over or seeing certain sacred areas on and around Uluru. Representatives of Uluru's traditional owners, the Anangu people, were concerned that it may be possible for Participants to view these sacred sites on the depiction of Uluru in *Second Life*. After review, this apparently is not the case. So while this issue and the Sydney Opera House issue appear to have been unfounded, these claims did create several days of adverse PR for Telstra.

EULAw

Every Virtual World is governed by an end user licence agreement (**EULA**) which sets out the terms upon which a Participant may use the Virtual World. If corporates are investing significantly in their VW Sites then that investment is completely subject to the terms of the EULA. These terms set out the rights and obligations of the Participants and are, generally, drafted very much in favour of the owner of the Virtual World (**VW Owner**). Similar to the way software companies are able to impose their EULAs on users without any opportunity for negotiation, a VW Site Operator trying to set up a VW Site is unlikely to have an opportunity to separately negotiate the EULA terms which apply to it. Therefore VW Site Operators need to understand the risks inherent in the EULA construct.

These EULAs, generally in a "click-wrap" format (which of itself discourages review by Participants), create a system of private laws (so called "EULAw" [23]) which often are at odds with the legal system in the physical world. Potentially this means that the 3-D Internet risks becoming ghetto-ized into "walled" Internet communities governed by private laws.

Some of the significant issues arising from EULAw are:

(a) Power of licensor: The EULA gives the VW Owner supreme power, including the ability to remove a Participant (including a VW Site Operator) and confiscate all their property.

(b) Jurisdiction: EULAs are often governed by US law (mostly Californian law because many of the game owners are resident in California) and require that any dispute go to arbitration in the US.

(c) Changes are binding: EULAs will generally allow the VW Owner to change the EULA at any time and such change becomes effectively immediately.

(d) Complexity of documentation: The EULA is often made up of a complex series of inter-related documents which the Participant will need to comply with. For example, in *EVE Online* the Participant must agree to be bound by the following documents: 1) End User Licence Agreement; 2) Terms of Service; 3) Forum Rules; 4) Chat Rules; 5) Subscription Fees and Payment Options; 6) Website Terms of Use Agreement; 7) Online User and Character Name Policy; 8) Online Reimbursement Policy; and 9) the Suspension and Bar Policy.[24]

This complexity increases the likelihood of a Participant breaching the EULA.

(e) Virtual Property Ownership: *Second Life* is distinct from other Virtual Worlds because Participants own the IP which they create in-world. However a question is raised over what rights a Participant gets over the IP it creates in a Virtual World where the EULA expressly states that IP created by the Participant is owned by the VW Owner. For example *World of Warcraft* has a provision in its EULA that expressly prohibits the sale outside the world of any property created in-world. *World of Warcraft* players were ignoring this prohibition and selling virtual property created in-world on various internet auction sites. These sales generated millions of dollars for the Participant-sellers and created a business of "game gold" farms in lower wage countries. However such is the potential impact of this provision that eBay has now suspended the selling of any *World of Warcraft*-related virtual property on eBay.[25]

(f) Whether the prohibition is enforceable is a subject of conjecture though it is worth noting that the South Korean Government has specifically legislated to ensure Participants get some rights in the virtual property they create.[26]

Publication liability

It is possible that corporates who develop their own VW Sites will be liable for the actions of Participants. For example, the VW Site Operator may face liability under defamation laws for defamatory comments made by a Participant-invitee (i.e. a Participant who comes to the VW Site Operator's VW Site). Liability for the publication of child pornography is also possible where activities such as Ageplay occurs on the corporate's VW Site or indeed IP infringement liability is possible where a Participant-invitee misuses a trade mark or uploads third party content to a corporate's VW Site.

The risk is made greater by the fact that corporates want Participants to come to their VW Sites and the main way to attract Participants is to give the Participants the tools on the VW Site to create things (be it blogs, photos, music, or even 3D objects). It is that same user generated content that can then cause the problems for the VW Site Operator outlined above. This is, however, familiar territory, as the liability of a publisher in relation to chat rooms, etc on 2D websites has been clearly recognised. However, it is significantly more difficult to monitor the activities of avatars across a whole VW Site than it is to moderate a chat room.

The risk to VW Site Operators in relation to the activities of Participant-invitees is not limited to legal risk, there is also a significant risk of brand/reputational damage arising from poor behaviour occurring on a VW Site.

Disputes

Corporates should be aware of the most expeditious way to resolve disputes in relation to activities on the VW Site. Participant-invitees will lodge complaints with VW Site Operators in relation to the actions of other avatars which impacted on them while they were on the VW Site, for example, allegations of lewd conduct or inappropriate language. Corporates and their advisers need to know the most efficient method of resolving these disputes, which may often require expediting a request for action from the VW Owner. Corporates should ensure they have a clear policy (including escalation points) for such disputes.

Griefing

Griefing is where Participants intentionally cause trouble in a Virtual World. For example, the ABC's Island on *Second Life* was completely blown up in a griefing attack. It was extraordinary to see a group of avatars standing around staring at a bomb crater where the ABC Island used to be. Other forms of griefing include graffiti, placement of competitors' trade marks and marketing materials on a corporate's VW Site and sex-related harassment or assault.

A corporate with a VW Site needs to continually monitor the Site to ensure griefing does not occur or is remedied quickly if it does occur. However this is a significant ongoing cost.

Adverse publicity

As can be seen from the above risks, there is significant potential for brand damage in Virtual Worlds. Therefore, VW Site Operators require clear guidelines, dispute resolution frameworks and PR response procedures.

Caselaw

Bragg v Linden Labs[27]

Marc Bragg, a *Second Life* Resident (and lawyer in the physical world) had worked out a way of acquiring land in *Second Life* at an undervalue. Linden Labs claimed Bragg's method of purchasing land broke the terms of the EULA. As a result Linden Labs terminated Bragg's account and confiscated all of his virtual property. Bragg has sued Linden Labs in the District Court in Pennsylvania claiming Linden Labs breached Pennsylvania's Unfair Trade Practices and Consumer Laws by unfairly terminating his account. Linden Labs tried to strike the matter out by relying on its EULA which requires any Resident to arbitrate any dispute with Linden Labs. On 30 May 2007, Judge Eduardo Ralerene refused to enforce the arbitration provision, ruling that Linden Labs' EULA constituted a "contract of adhesion". The suit continues.

Blacksnow Interactive case[28]

The owner of *Dark Age of Camelot* was sued by Blacksnow Interactive, which was seeking a declaration that the EULA provisions prohibiting the sale of in-world property outside of the world did not infringe the VW Owner's copyright. The case was dismissed on procedural grounds.

Li Hongchen v Beijing Arctic Ice Technology Development Co[29]

A Participant in the Mongyue ("Red Moon") Virtual World, Li Hongshen, brought an action in the Beijing Second Intermediate Court (famous for its intellectual property decisions),[30] alleging that the developer of Mongyue had been negligent in protecting Li's virtual property as Li's in-world property had been stolen by hackers who had accessed the developer's database. The Chinese court recognised Li's rights in the virtual property and upheld the case, awarding Li the amount he had spent on subscription fees.

Marvel Enterprises, Inc. v NCSoft[31]

City of Heroes is a virtual world where Participants can create their own superheroes and fight crime. Marvel brought an action against the owner of *City of Heroes*, NCSoft, alleging that *City of Heroes* infringed Marvel's copyrights as it allowed Participants to make avatars that closely resembled Marvel's own superheroes. The parties eventually settled.

Chaoyang District case[32]

In December 2003, a court in Chaoyang District of Beijing recognised a plaintiff's rights in virtual equipment and ordered the equipment be "returned" and 1560 yuan (US$188) in compensation be paid.

Qiu Chengwei case[33]

This case gives prominence to the potential consequences if the law does not recognise virtual property. In 2005, Qiu Chengwei contacted the Chinese authorities to complain that another player in *Legend of Mir III* had refused to return an enchanted sword (valued at $870) lent to him by Qiu in-world. When the authorities failed to act, Qiu murdered the other player (in real life).

Conclusion

This paper has sought to address the real legal issues that are arising for regulators and corporates in their involvement in virtual worlds. It does not deal with the legal issues between the Participants themselves. This has been the subject of much research[34] and is too complex to deal with here. However, there appears to be an analogy between Virtual Worlds and professional sports in this regard. Players in professional sports have to comply with a given set of rules and face liability (both tortuous and criminal) if they act significantly beyond those rules. The same may be said to apply to Participants in Virtual Worlds.

Virtual Worlds are a growing phenomenon and create many challenges for our regulatory structure as the platforms for entertainment / information dissemination become much more immersive and concepts of media law must expand to provide certainty and law and order. The 3D Web is a certainty and corporates are using Virtual Worlds like *Second Life* as a way of learning about the opportunities and risks associated with this new marketing and transactional environment.

Nick Abrahams is a Partner in the Sydney office of Deacons.

(Endnotes)

* This article was first published as 'Media Law For Virtual Worlds' in the UNSW LJ ed 30(1) AND Forum Vol 13(1)

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Right Place Right Time for National Indigenous Television

John Corker introduces the National Indigenous Television Service and the legislative history behind its inception.

On 13 July 2007 the first broadcast of the new National Indigenous Television service (***NITV***) took place. The service is compiled at the Imparja Television studios in Alice Springs and uplinked from Sydney to a national satellite beam. Initially the service will be mainly received at the 150 or so terrestrial retransmission sites in remote Aboriginal communities throughout Australia. This 'Beaming in the Bush' launch is a first stage with plans and negotiations well underway for retransmission on other platforms. These will be facilitated by the March 2007 amendment to s212 of the *Broadcasting Services Act 1992* (Cth)(***the Act***) which extends the protection against legal suit in respect of retransmission to those persons who 'do no more than transmit program material supplied by National Indigenous TV Limited.'

How NITV came about is largely a story of political happenstance that dates back to the year 2000. It is true that Aboriginal and Torres Strait Islander people have been producing their own television programs and services in their own communities since the mid 1980s and aspired to provide a national service for at least that long but it only became possible when the current Government announced in June 2006 that $48.5m would be made available over the next four years to establish the service.

In 2000, the Commonwealth Government was trying to get the *Broadcasting Services Amendment (Digital Television and Datacasting) Bill 2000* through the Senate and in those days, for a Bill to be passed, it needed either the Democrats or the Greens and Senator Harradine to support it if the Opposition didn't.

The Bill contained a long list of statutory reviews to be conducted as digital-rollout progressed and the Government agreed to insert another one at the behest of the Democrats. To be conducted before 1 January 2005 there was to be a review of 'the viability of creating an indigenous television broadcasting service and the regulatory arrangements that should apply to the digital transmission of such a service using spectrum in the broadcasting services bands'. The objects of the Act were also to be amended to include:

> s. 3(1)(n) To ensure the maintenance and, where possible, the development of diversity, including public, community and **indigenous broadcasting**, in the Australian broadcasting system in the transition to digital broadcasting.

The mention of Indigenous broadcasting had never before appeared in the Act. Local pirate TV stations in Yuendumu (NT) and Ernabella (SA) had existed for a number of years and then been licensed under the *Wireless and Telegraphy Act 1905* (Cth) later with 'limited licences' under the *Broadcasting Act 1942* (Cth) deemed to be community broadcasting licences under the *Broadcasting Services Act 1992* (Cth), but there had been no mention of Indigenous broadcasting in legislation.

In March 2000 the final report of the Productivity Commission inquiry into the Act recommended that the Government should examine the need for, and feasibility of, establishing an Indigenous broadcasting service, including who should provide the service, how the service should be provided; the additional government resources required; and a timetable for implementation.

Following this recommendation a feasibility study was commissioned by ATSIC and the National Indigenous Media Association of Australia. The report was prepared by Malcolm Long & Owen Cole in December 2000 and set out 4 models for a national service, preferring a partnership model between existing Aboriginal broadcasters. Approaches to the Minister over the next four years were unsuccessful in advancing the cause.

In April 2004 DCITA released its discussion paper on the required statutory review. The National Indigenous Television Committee (***NITV Committee***) was formed from among existing Aboriginal broadcasters and program makers to help develop a submission to the review. Following a summit of Aboriginal broadcasters held in Redfern in July 2004, the submission for a stand alone national Indigenous narrowcasting service was prepared, the key concepts being that it be a national service and that it reach as many Aboriginal and Torres Strait Islander people as possible. DCITA also conducted consultation meetings in many centres around the country and commissioned Gilbert + Tobin to provide rough costings for providing various models of an Indigenous television service.

On 11 August 2005 the report of the review was released and canvassed four options:

- a stand alone national broadcaster at a cost of $80m p.a. by year 5
- imposing an increased Indigenous programming responsibility on SBS at a cost of $4.8m capital and $5.7m per annum.
- enhancement of the existing Indigenous Community Televsion (***ICTV***) narrowcasting service being provided on Imparja at a cost of $10m p.a. for capital and content. The ICTV service was already being provided by a number of Aboriginal communities and media organisations who were aggregating content shot in their communities, at a hub based in Alice Springs, and then providing it to Imparja for uplink. This service was going to air 24/7 albeit with a high program repetition rate.
- a new Indigenous television content production fund for $6m p.a.

The review report contained no preferred option and suggested that the Ministerial Taskforce on Indigenous Affairs should consider whether any recommendation should be made to Government. The NITV Committee was told there was no current intention to act on the review report.

However, a week can be a long time in politics and this was the lead up to the Government trying to get the *Telstra (Transition to Full Private Ownership) Bill 2005* through the Parliament. On 17 August 2005 the Minister announced $90m for a *Backing Indigenous Ability* initiative which would 'address phones, Internet and videoconferencing in remote Indigenous communities and improve Indigenous radio and television contingent on the passage of the sale of Telstra legislation.' No details were available but with the government casting around for projects to appease Barnaby Joyce and the Nationals who were seeking to maximize the size of the Future Fund and new regional telecommunications projects, the Minister announced on 1 September that the Telstra Sale was to benefit Indigenous Televsion and that $48.5m of the $90 m *Backing Indigenous Ability* funds were to be allocated to develop an Indigenous television service over four years to be used to build on the existing ICTV service broadcast by Imparja.

On 8 September the *Telstra (Transition to Full Private Ownership) Bill 2005* was introduced into Parliament and on 14 September, the Bill passed through the Senate.

This was the right place at the right time for Indigenous Televsion and has created a unique opportunity to provide a new and innovative service that will reflect Aboriginal Australia to Aboriginal and non-Aboriginal Australians. Program genres will include children's programs and an Aboriginal AFL footy panel show.

The Foundation members of NITV are Imparja Television Pty Ltd, Indigenous Remote Communications Association, Indigenous Community Televsion Ltd, Indigenous Screen Association Incorporated, Australian Indigenous Communications Association and the Federation of Aboriginal and Torres Strait Islander Languages Corporation. The service has offices in Alice Springs and Sydney.

The challenge now is to establish a service that entertains and informs audiences so brilliantly that the service must be continued beyond 2011.

John Corker is a director of National Indigenous TV Ltd, Executive Director of the National Pro Bono Resource Centre and a visiting fellow at UNSW.

High Court Takes The Wind out of Shipbuilders Sails

Marina Lloyd Jones reports on a recent decision in which the High Court considered the meaning of 'artistic craftsmanship' and the copyright / design overlap.

In April of this year, the High Court was required to consider the interplay between art and function, and between copyright and designs, in the context of a case involving the design of racing yachts. Its decision in *Burge v Swarbrick*[1] provides useful guidance on the meaning of "artistic craftsmanship", a term at the heart of the copyright / design overlap.

Mr. Swarbrick and the JS9000

The respondent, Mr. Swarbrick, was a well-known naval architect who had designed and was involved in the manufacture of the JS 9000, a commercially successful racing yacht. After drafting plans for the boat, Mr Swarbrick had created a "plug", a full-scale model of the hull and decks. Moulds were formed around the plug, becoming an inverted reproduction of the plug, and then used to produce mouldings (parts of the boat itself) which themselves were exact replications of the plug. The resulting mouldings were then fitted out with the keel, rigging and other components to form the finished boat.

While the original plug had been destroyed, Mr Swarbrick had provided mouldings to two of his employees, who later left to work for Boldgold Investments Pty Ltd ("Boldgold"). Boldgold began to manufacture a boat using the mouldings, and Mr Swarbrick applied for an interlocutory injunction alleging infringement of his copyright in the drawings, the plug, the mouldings and the boat itself. Mr. Swarbrick had not registered any designs relating to the JS9000 under the *Designs Act 1906* (Cth) (since replaced by the *Designs Act 2003* (Cth) ("Designs Act")) and admitted that the design for the plug and the mouldings had been industrially applied (in other words that he had manufactured more than 50 articles). As explained below, this admission and the failure to register required him to prove that the relevant works were "works of artistic craftsmanship" protected by copyright.

The copyright / design overlap

Certain objects may qualify for "dual protection" if they are both as "artistic works" under the *Copyright Act 1968* (Cth) ("Copyright Act") and registrable as designs under the *Designs Act*. For instance, the visual features of the shape of a chair may be registered as a design, while the drawing of the plan for the chair, and the chair itself, may also be "artistic works" protected by copyright. Conversely, a designer may lose their ability to enforce copyright if they take certain action relating to a corresponding design.

Various legislative amendments have sought to establish appropriate boundaries between these two forms of protection, and a degree of overlap remains. The "overlap provisions" are set out in sections 74 to 77A of the Copyright Act, and following amendments made by the *Designs (Consequential Amendments) Act 2003* (which came into force on 17 June 2004, after the events considered in *Burge v Swarbrick*), the law as it currently stands is:

- a copyright owner who registers a design corresponding to the relevant artistic work (where that registration relates to the three-dimensional features of a product) will be prevented from enforcing their copyright against infringers and must rely on design law;
- a copyright owner who registers a design corresponding to the relevant artistic work (where that registration relates to the two-dimensional pattern on a product, such as a wallpaper design) will retain their copyright protection in the artistic work and enjoy "dual protection"; and

- a copyright owner who industrially applies a design corresponding to the artistic work by mass producing objects to the design will be unable to enforce their copyright (unless the work is one of artistic craftsmanship, in which case copyright will still be enforceable).

It is the exception to the third part above, for "works of artistic workmanship", which may assist designers who have industrially applied a design but failed to register it (as with Mr Swarbrick). The High Court's analysis of the term (which is undefined in the Copyright Act) in *Burge v Swarbrick* remains relevant despite the overlap provisions having since been amended.

"Works of artistic craftsmanship"

Before the High Court, Mr Swarbrick submitted that the plug and the mouldings were "works of artistic craftsmanship" and that he should therefore retain his ability to enforce copyright in relation to them despite industrial application. Mr Swarbrick argued that he had intended to design a yacht of great aesthetic appeal, and that the JS 9000 realised this intention. The respondents contended that Mr Swarbrick had set out to design a functional racing yacht to meet the practical demands of a specific market, and that visual and aesthetic appeal was simply one of a number of considerations. In endorsing the respondents' analysis the Court:

- rejected the idea that utility and beauty, or function and art, are mutually exclusive. A work could be one of artistic craftsmanship despite its form being partially dictated by functional considerations; and
- held that determining whether a work is one of artistic craftsmanship "turns on assessing the extent to which the particular work's artistic expression, in its form, is unconstrained by functional considerations" [at 83 to 84]. The greater the requirements in a design brief to satisfy utilitarian considerations, the less scope to encourage substantial artistic effort.

The High Court disagreed with the Federal and Full Federal Courts' view that the plugs and mouldings were works of artistic craftsmanship. In designing the plug for the boat, Mr. Swarbrick's key aim was creating speed on the water, and in seeking to achieve it he was acting in the role of an engineer rather than an artist-craftsman. In other circumstances he may have fulfilled the latter role but that was not the case with this design brief.

The artistic craftsmanship exemption is significant for designers: if they can bring their work within its scope, they will be able to mass produce objects corresponding to the design while still being entitled to enforce their copyright against infringers. The High Court's judgment in *Burge v Swarbrick* has usefully clarified this scope. However, once a copyright owner has registered an artistic work as a design, a separate section of the overlap provisions will apply and the artistic craftsmanship exemption will not assist.

Marina Lloyd Jones is a Senior Associate in the Sydney office of Allens Arthur Robinson

(Endnotes)

1 (2007) 72 IPR 235

A Very Expensive Lobster:

Jennifer Lusk revisits *Blue Angel Restaurant v John Fairfax and Sons Ltd (1989)* and the mutual dislike that exists between defamation law and restaurant reviewers.

One would think that the very purpose of a review is to offer the critical opinion of the reviewer on any given subject. One might also think that a reviewer who constantly lied about that opinion would soon find him or herself on the scrap heap due to complaints. Leo Schofield, whilst known for being highly critical, is also a well respected journalist, commenting on and critically reviewing the arts and food for over thirty years. In 1984, he reviewed the *Blue Angel Restaurant* for the *Sydney Morning Herald*, with, according to him, the same critical eye with which he had reviewed many other establishments across the country. But in this case, a harsh but honest opinion created one of the most well known and controversial defamation cases in Australian history. The restaurant and its owner, Mr Marcello Marcobello, sued for defamation and won, receiving over $100,000 from John Fairfax and Sons Ltd and Leo Schofield.

On May 21st, 1984, Mr Schofield dined at the Blue Angel Restaurant with the intention of reviewing it. He took note of the tank of live lobsters, a trend that was only just beginning at the time, and the appearance of the restaurant and staff for comment in the review. He and his companion ordered and dined, Mr Schofield forming a critical opinion of his meal for the pending review. The pair finished their meal, left a tip and Mr Schofield's card and left. The review which appeared in the Sydney Morning Herald on May 29th was not particularly favourable and was written in Schofield's satirical and flamboyant style, prefaced with a reworded version of Lewis Carroll's Lobster Quadrille. He drew attention to the live lobsters and the polyester shirts of the waiters. With regard to the meal, he claimed the lobster was overcooked, a culinary crime against such an expensive creature, and that the garlic prawns and lemon sole 'suffered from the same over-enthusiastic exposure to heat'[1].

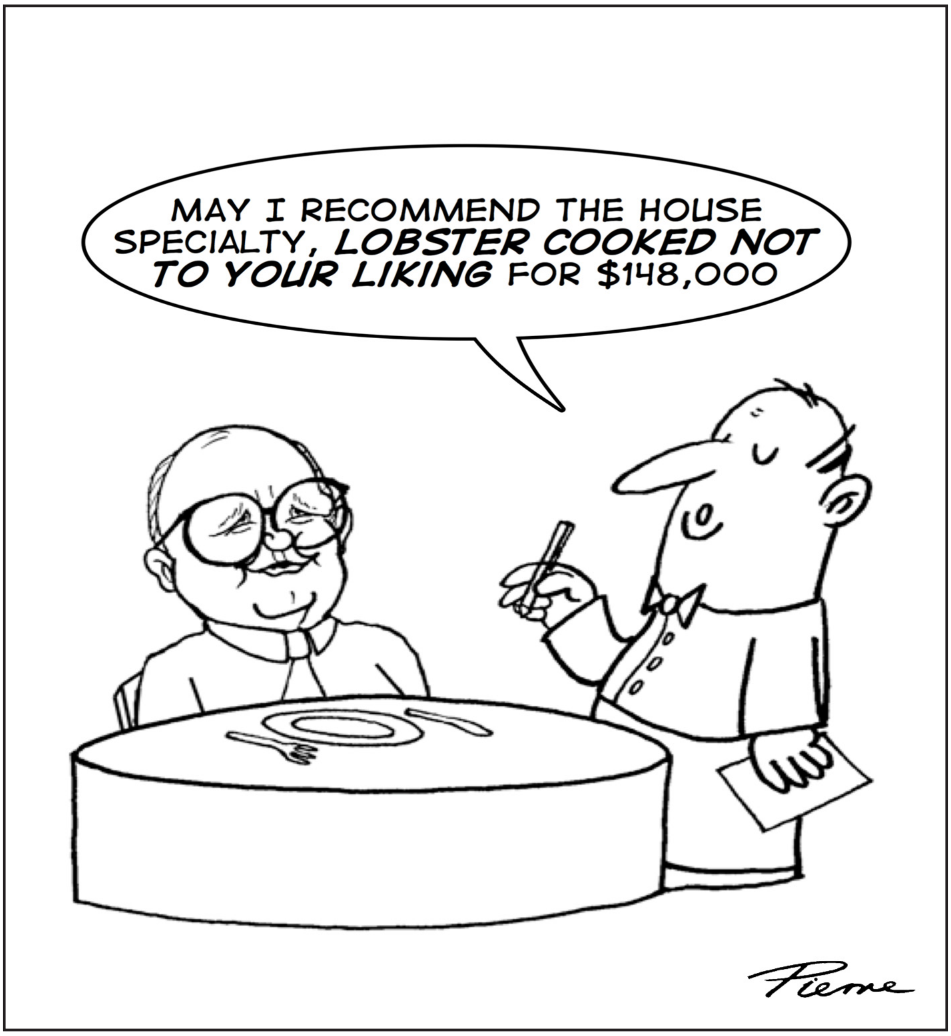
Mr Marcello Marcobello, the owner of the Blue Angel Restaurant took offence to Mr Schofield's review, claiming that it was 'all lies'[2] and that the review carried defamatory imputations. The restaurant and Mr Marcobello sued both Schofield and his publishers for defamation, the case coming before Justice Enderby and a four person jury in 1989. The claim was that the article imputed that the plaintiff:

- Was a cruel and inhumane restaurateur in that [the restaurant] killed live lobsters by boiling them alive;
- Was an incompetent restaurateur in that [the restaurant] broiled lobsters for 45 minutes contrary to accepted culinary methods;
- Was a restaurateur that charged a price for excellent fresh lobster which when later cooked incompetently… did not then represent good value,
- Was an incompetent restaurateur in that [the restaurant] served lobsters with charred husks of shells, meat destroyed as to quality and claws containing white powder;
- Was an incompetent restaurateur in that [the restaurant] served severely overcooked garlic prawns and lemon sole that was severely overcooked and slimy with oil.[3]

Mr Marcobello claimed that these defamatory imputations had resulted in a loss of business from Australian customers for his restaurant and personal pain and suffering due to the loss of his reputation as a restaurateur.

The case was tried under New South Wales defamation law, with the defences of fair comment and truth. The defence claimed that not only was Mr Schofield's opinion fairly held and reasonably stated, but that it was based on truth, at least pertaining to that particular occasion. Witnesses, including Mr Schofield's dining companion, Mr David Spode, claimed that they too had eaten overcooked meals there and Mr Marcobello's own father, Frank Marcobello, stated that he had misgivings about the cook, Ms Antonnella Cortese, and her cooking methods. It was also pointed out that there had been errors in the original printing of the article, specifically the mistyping of 'broiled' as 'boiled'. The plaintiff pointed out that no correction of these errors had been printed. The plaintiff also offered witnesses claiming that the food in question was very good and not overcooked and Ms Cortese offered detailed explanations of her cooking methods. The plaintiff also threw doubt on Mr Frank Marcobello's testimony, claiming that his ongoing feud with his son was his reason for testifying for the defence.

The counsel for the defence, Mr McPhee QC, asked the jury to consider that Mr Schofield had merely offered his honest, albeit rather harsh, opinion on the meal he received on that particular occasion. He pointed out that Mr Schofield had no reason to lie and that it was not beyond the bounds of possibility that mistakes were made in the kitchen that night resulting in a below standard meal. He also made it clear that the genre and style of the review allowed for some exaggeration and creative flair and that a reasonable audience would recognize details included in the article in order to create amusing and entertaining reading. Mr Neil QC, counsel for the Plaintiff, on the other hand, claimed that Mr Marcobello and his restaurant were the butt of undeserved ridicule in the article. He pointed out that Mr Schofield had gone beyond mere humour and that in doing so what he had written 'did not accurately describe the meal'[4]. He also claimed that it was not a possibility for Ms Cortese to have overcooked three dishes in one evening and that therefore, Mr Schofield must have been mistaken in his claims about his meal.



The Jury found in favour of Mr Marcobello and the Blue Angel Restaurant and the court asked that Mr Schofield and John Fairfax and Sons Ltd pay $22,000 to the Blue Angel and $78,000 to Mr Marcobello personally. Interest of over $50,000 was also added.

It would appear, both under the defamation law in New South Wales at the time and the new nationally consistent *Defamation Act 2005* (NSW) (***Defamation Act***), that Mr Schofield had a strong defence of what is now called honest opinion. As it stands today, honest opinion holds as a defence if the following can be shown. Firstly, that the publication in question 'was an expression of opinion of the defendant rather than a statement of fact'[5]. Secondly, that the 'opinion related to a matter of public interest'[6]. Thirdly, that the 'opinion is based on proper material'[7], which is provided in some form so the public can form their own opinions. Proper material, for these purposes, is considered to be material that can be proven to be substantially true. This is a little more restrictive than the law at the time of the case, but it would seem reasonable for this case to be argued with this defence.

The very nature of a review is that the opinion of the reviewer is being presented for the reader's interest, to both inform and challenge the opinions of others. In this sense, the apparent dislike of both the food and the restaurant is clearly the opinion of Mr Schofield and not fact. The facts of the article are the barest descriptions of the meals and surrounds, on which Mr Schofield forms his opinions. Readers can see from what was described why Mr Schofield would form the opinion that he did, especially given his role as a critical reviewer. Whilst that exact evening can never be recreated, the reader also has the opportunity at all times to attend the restaurant in question and form their own opinion.

The problem is that while a jury can be shown the tank of lobsters and the polyester shirts of the waiters – both matters which came up in court as carrying imputations of a defamatory nature – It is very difficult to prove that the descriptions of the food are true. Whilst Mr Schofield provided the jury with other witnesses who claimed it was indeed possible to receive an over cooked meal at the Blue Angel, and had a great deal of experience and clout behind his own testimony, and although he had no reason to lie in his review, it was clearly not enough for that particular jury. As for being a matter of public interest, it is generally considered that reviews are aimed at informing consumers about the products or services they are purchasing. Therefore reviewing is very much a matter of public interest and would not exist were it otherwise.

The case is much more difficult to defend under the broader defences of justification and contextual truth. The law is yet to be tested in court in its current form, but one assumes that the degree to which a defendant must prove the truth of the material on which an honest opinion is based is lower than the requirements for proving the truth of statements and imputations defended under the justification defence. Here the defence is that the imputations made are true. The equivalent section of the *Defamation Act 1974* (NSW) was used a part of the defence of the Lobster case at the time, one presumes in relation to the overcooked meals and the imputations of incompetence. Unfortunately, without the actual meal, photos of the meal, multiple witness statements about that particular meal or video footage, and some proof as to whether such a meal was an accidental occurance or the standard fare for that restaurant, it is almost impossible to genuinely prove the truth of such statements. The burden of proof falls on the defence rather than the plaintiff and can be difficult to uphold.

It would be possible for a lawyer to argue Mr Schofield's case under the defence of qualified privilege, which allows defamatory material to be published if it can be proved that:

> the recipient has an interest or apparent interest in having information on some subject, [that] the matter is published to the recipient in the course of giving to the recipient information on that subject [and that] the conduct of the defendant in publishing that matter is reasonable in the circumstances.[8]

All reviewers would argue that their role in providing information to consumers is a vital part of our business system. Fellow journalist, Stephen Downes went as far as to say that 'criticism is essential to cultural development.'[9] The hole in the defence for Mr Schofield then is whether or not he acted reasonably in the circumstances. Given the caustic nature of the review, it would be fair for the plaintiff to argue that the review was unnecessarily negative and that the humourous tone added unnecessary connotations to the information and opinion Mr Schofield was sharing with the public.

There are other changes in the *Defamation Act* to consider that would change how this case would be tried today. Firstly there would be a single cause of action from Mr Marcobello, since all imputations must now be carried under the one suit. Also, the Blue Angel restaurant itself would not be able to sue, given that it is a corporation which one assumes had more than ten staff members at the time and certainly has more than ten now. The amount in damages requested by the court may also change, given that there is now a new cap on the amount paid for non-economic damages in any defamation suit. This cap is $250,000, which one assumes is the amount to be awarded in the most severe cases. The Blue Angel Restaurant suffered no financial difficulty after the review, despite its claims of losing Australian clientele, virtually doubling its sale figures in the four years before the trial. Therefore, Mr Marcobello would only be entitled to non-economic damages. It would be for the judge to decide to what extent he had suffered as a result of the defamation. There is no precedent under the new laws yet to say how much Mr Marcobello would be entitled to, but it would seem the that the $100,000 total would be more than he would get today. Even the $78,000 he was initially awarded personally may be excessive today, given that the claimed damage to his reputation did not relate to moral or financial matters, or indeed his general character outside his business.

There is a possible debate about whether a review as scathing and as sartorial as Mr Schofield's review could be considered ethically sound. The Sydney Morning Herald subscribes to the code of ethics laid out by the Australian Journalists Association (***AJA***). Mr Schofield's review is in compliance with this code of conduct barring two points. It was pointed out in the trial that Mr Schofield did not identify himself as a reviewer or as an employee of the Sydney Morning Herald until after he had left, which could be seen as ignoring the point in the AJA code which asks that journalists 'use fair, responsible and honest means to obtain material'[10], though this point goes on to show that it is clearly intended to relate more to interviewing sources openly and honestly. The code also asks that reporters 'do [their] utmost to achieve fair correction of errors.'[11] This clearly was not done by either Mr Schofield or the paper, regarding the apparently minor errors, which actually caused contention in the case.

It would seem under the new *Defamation Act* that Mr Schofield would have had strong defence available to him, with two weaker defences to fall back on. But the case would come down to the skill and arguments of the lawyers and the leanings of the jury, just as it did in 1989. Unfortunately the one thing Mr Schofield could no more do today than he could in 1989 is offer up exact evidence that the meal was as he claimed it to be. This is a potential danger facing food reviewers. *Blue Angel Restaurant v John Fairfax and Sons (1989)* was a landmark case in defamation law as it highlighted this dilemma. Not only restaurant reviewers, but theatre and literary reviewers were effected by the outcome. It became apparent that stating an opinion might no longer be defensible in court. The concern is that there is no way to absolutely recreate a performance or meal as evidence for a jury. Whilst having documented evidence and second opinions to back up a review seems to be the first step to protection in defamation suits, eventually it will come down to a jury and whether there is sufficient evidence to support the opinion of the reviewer.

Jennifer Lusk's essay was Highly Commended in the 2006 CAMLA essay competition.

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Managing Media Organisations

William Walder considers the political and technical context that motivated last year's media law reforms.

In 2006 Federal Communications Minister, Helen Coonan, launched a discussion paper on the reform of media regulation in Australia. The paper reignited debate over the two issues that underpin the future of the mass media in this country – ownership and technology. The issue of media ownership in Australia has been problematic for successive Federal Governments. Mooted legislative changes often seem to be subject to the approval of the country's powerful media moguls, rather than being tailored to the expansionary demands of an evolving media industry that is dancing to the iTune of rapid technological change.

The Howard Government tried to reform media laws twice before, in 1997 and 2004, only to fall at the last hurdle. This time, with a senate majority, the chances of eliciting change were more likely. Though key differences in opinion remain amongst politicians, commentators and media professionals over the proper content of the reforms, there was a common acceptance that change was long overdue.

Until the introduction of media reform legislation in 2007, the regulations governing media ownership had remained practically unchanged for twenty years. In the late 80s, the then Labor Treasurer Paul Keating banned cross-media ownership, announcing with characteristic élan that you could be a queen of the screen or a prince of print, but not both.[1] This stipulation that a media proprietor could not own a newspaper and a TV channel in the same market enshrined the traditional distinction between print and broadcast media in law, simultaneously seeming to thwart the ambitions of Australia's two most powerful media magnates, Rupert Murdoch and Kerry Packer, preventing them from completely dominating the media scene and preserving at least some pretence of maintaining media diversity.

Whatever the aims of the policy, far from encouraging media diversity, the aftermath of this legislation led to Packer and Murdoch becoming more dominant not less. Murdoch bought Herald & Weekly Times to end up with over 60 per cent of the Australian newspaper industry and Packer sold then bought back Channel 9 for an enormous profit, which resulted in him bestriding Australian television like a colossus.[2] The two other major players in the Australian media market both lost out through the policy; Fairfax had to divest itself of its television holdings and was left with little room to expand. The Herald & Weekly Times was swallowed up by Murdoch. Rumours persist that the policy was designed to punish Fairfax and the Herald & Weekly Times, while pandering to the wishes of Murdoch and Packer.[3]

The ensuing twenty years may have seen the power of Packer and Murdoch become further entrenched. The media landscape of 2006, immediately before the introduction of the most recent media reform legislation, looked very different to when Paul Keating initiated the last major change in industry legislation.[4] By 2006, the traditional distinction between print and broadcast media looked increasingly archaic and increasingly insufficient to describe modern media as the boundaries between forms become increasingly blurred and as new forms developed.

Then Press Council Chairman, Professor David Flint, noted as far back as 1995 that the old compartmentalisation of the media 'is now melting before our eyes' and it is technological advances that are the driving force behind this trend.[5] The buzzword for this trend is 'convergence', with technological and industrial effects providing pressing policy imperatives that Government could ill-ignore, as Helen Coonan was very aware. 'We simply cannot afford to just stand still and put our head under the doona on this one', she said. 'We must move it on or we are going to look like some outpost from the rest of the world.'[6]

The technologies of digitisation, broadband internet and video streaming, amongst others, have all allowed media companies to diversify the ways in which they present information to their consumers with a view to getting maximum use value out of that information. Ideas cross national and generic boundaries in a multitude of formats and examples abound from our everyday media consumption. For instance, magazine publishers have launched digital TV channels based on successful titles. French media conglomerate Lagardère based 'Match TV' on their successful magazine title, 'Paris Match', and UK publishing giant EMAP set up music channels, 'Kerrang!' and 'Smash Hits', after their magazine namesakes.[7] Just as Coonan's proposals sought to move Australia towards a digital future, the signs are that the Australian media is already experiencing convergence.

Even Australia's own 'Aunty', the ABC, is getting in on the act, diversifying into print among other things and publishing its arts magazine, 'Limelight', its radio program guide and numerous TV show spin-offs, as well as book titles.[8] Channel 7 has similar magazine links with News Ltd and witness the multi-format commercial feeding frenzy around popular reality TV shows, such as 'Australian Idol' – TV, mobile phone, online, magazine, music publishing, etc – and the format itself has gone global, finding success in media climates from Europe, to the US, to Africa. 'Idol' is clearly more than just a TV show and highlights the redundancy of persisting with media definitions that differentiate between magazines, newspapers, television and radio; all of which is now available via one digitalised medium – the internet. As Chris Berg asserts, the reality facing government is that, "regardless of whether the service traditionally delivers only sound, or only television, they now compete with a technology uniquely suited to delivering entertainment" and partial regulation is insufficient to meet the demands of the new media landscape.[9]

Content is only part of the convergence issue, however, as the *technological* convergence that allows multi-format media production has also facilitated new opportunities for separate sectors of the communications industry to merge or form alliances – a process of *industrial* convergence.[10] A perusal of the different media interests encompassed within Murdoch's News Corp umbrella graphically illustrates the nature of industrial convergence. Murdoch is well established as a 'prince of print', cornering over 60 per cent of Australia's newspapers, but he also has extensive interests in broadcasting (primarily pay TV, cable and satellite – even sharing ownership of Foxtel with his great rivals from PBL, the Packer dynasty!), magazines, book publishing, online and other interests including the internet (most notably with MySpace), music, advertising, market research and even the National Rugby League![11]

While not as extensive, other major players such as Packer's PBL, Kerry Stokes' Seven Network, Fairfax and Telstra have similarly diversified into fields not traditionally associated with their official 'raison d'etre'. A telecommunications firm such as Telstra, benefits from the economies of scale deriving from its role as a 'carrier', so when you call up for pay TV, the subscription, internet access, landline and mobile phone service can all be tied up in one transaction.[12] So with interests in broadcasting, online services and publishing it could be misleading to think purely of phone lines when thinking of Telstra. Rather than describing companies as broadcasters, publishers, etc, new patterns of media ownership transcend such easy compartmentalisation – perhaps 'media businesses' is a more apt description.

While the technological and industrial forces driving media convergence present challenges for policy makers, new technologies and changing ownership patterns have had profound effects on those who work in media environments, such as newspapers, magazines, television and radio. For those working in the industry for some time, convergence issues have radically altered the ways that they work and the work that they do. But it is on the news media in particular that the impact of technology could have the widest implications due to the Fourth Estate role as democracy's gatekeeper and watchdog.

The possibilities and potential of new technologies would appear to be of endless benefit to media professionals in their news gathering activities. Word processing, email, mobile phones, laptop flexibility, handheld cameras, the internet, etc – all these digital, telecommunications technologies allow instant communication with people all over the world from your desk, but are also flexible enough to be taken anywhere.

Rob Curtain has been News Director at 3AW for 10 years, a radio journalist for 25 years, and extols the virtues of the new technologies and the flexibility it allows for news reporting and his managerial role. 'It's all gone digital, smaller and better quality', he says. 'Mobile broadband is faster, better quality, and whatever I can do in the office I can now do in the field, plus editing's faster and cleaner.' Rob also finds that much of the 'office drudgery' can be handled by computers, removing many onerous managerial tasks, but finds this time gained is far outweighed by the mass of information that arrives through the 'wonders' of email – media releases, advisories, etc. This he sees as the biggest impediment to managers carrying out their jobs.[13]

It is the increasingly desk-bound nature of jobs in print that many journalists fear is preventing them doing their jobs properly, according to two separate surveys. Collette Snowden from the University of South Australia interviewed journalists as part of a study into how they used technology. She found that far from liberating journalists to go out and do the kind of background investigative research that they need to do, many felt that technology acted more to 'restrain them, to keep them confined to their offices'. Collette says this threatens journalists' Fourth Estate role as 'their function is to bear witness, and I don't think you can bear witness when you're stuck in your office'.[14]

The 'Definition: Journalist' survey of Australian journalists in print and broadcasting, conducted by Tapsall and Varley, found that journalists felt similarly shackled by new technology and were quite forthright in condemning new technology. 'New technology has not made us free, it has imprisoned us', said Margo Kingston, a prominent Sydney journalist. 'It has its demands and we must obey.'[15]

Peter Weiniger, a journalism lecturer at RMIT and former *Age* journalist of 18 years standing, echoes the view that journalists are now 'chained to their desks' by new technology, and sees technology as a threat to journalistic credibility, especially in the modern tendency to what he calls 'Google journalism'. With newsrooms facing more restricted budgets, meaning fewer journalists and less money or time to send them out to cover a story. Instead, they rely on the internet, and Google research by journalists has increasingly taken the place of going out and finding things out for themselves. 'If you're researching the ten best beaches in Thailand, there's no chance of you being sent to find out!' he says. 'Editors will tell you to look it up on the net, with little chance to fact check or be thorough'. Peter feels an over-reliance on this form of research devalues much of what journalists do.[16]

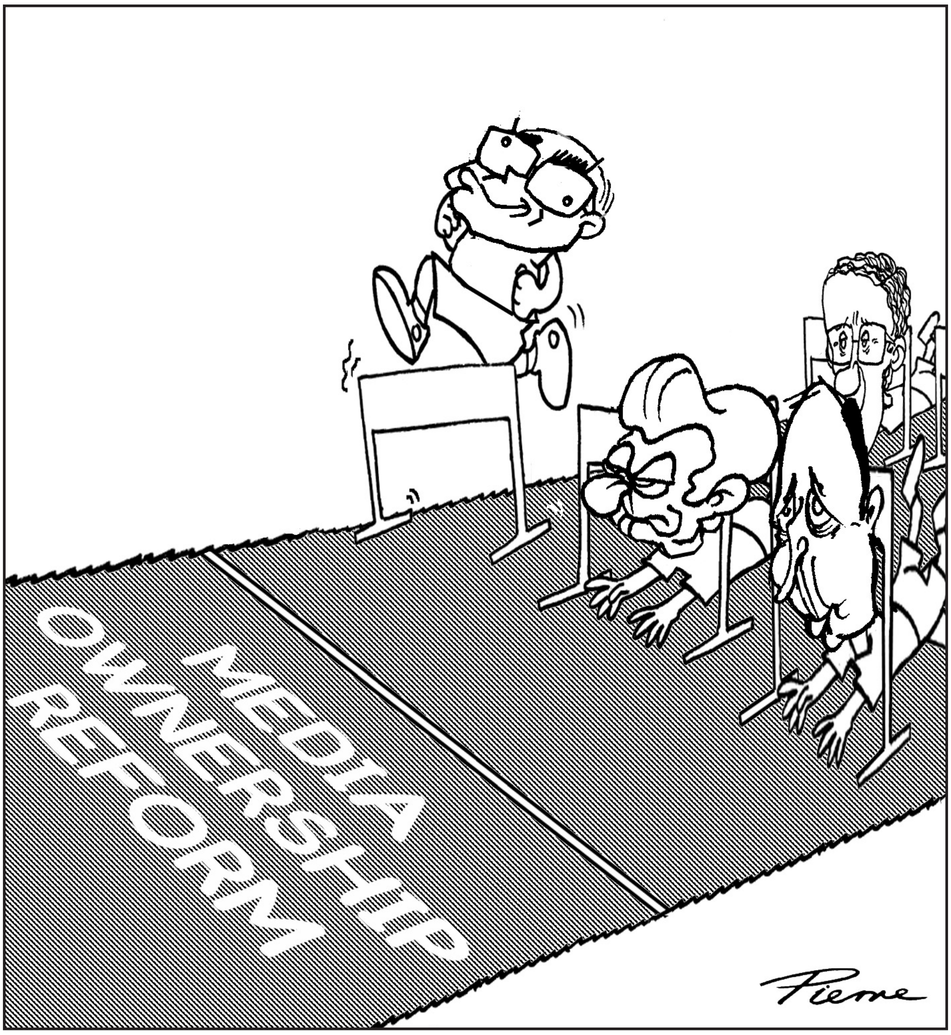
However, the internet perhaps represents the future of journalism in many ways, and is certainly the site where TV, radio, mobile technology, music and print all unite in the ultimate expression of media convergence in terms of news. Bruce Dover, formerly of News Ltd, set up the first Australian CNN bureau, staffing it with former print journalists, expecting them to talk to TV cameras, write for web sites and edit for mobile phones. CNN developed a 'content management system' where reporters 'write' the story once, commonly as a TV script, then edit it for other media, including mobile phone text messages. This is the ultimate in convergence, according to Dover. 'I don't know if there's a one-model-fits-all, but at CNN where we see everything converging, it makes more sense for journalists to work across platforms rather than be platform-specific,' Dover says.[17]

Tapsall and Varley found that the new layer of tools and techniques introduced by technology merely added to the work of journalists, rather than making their lives less complicated, and Collette Snowden found that 89 per cent of journalists she surveyed had received no training for this new technology.[18] Journalists are expected to be familiar with technology, 'especially with convergence, as more and more of the work they do becomes multi-functional', which increases the pressure on them according to Snowden; 'they're struggling to learn how to use the new technology in different formats, for different purposes', she says.

The challenges of convergence are asking more of media professionals, according to Rob Curtain, but he's more sanguine about the immediate effects, not viewing them with the same terror as his print colleagues. 'People need to be more technically literate; they have to be flexible and open to new ideas, especially to take advantage of the new opportunities', he says. These skills are also needed by managers in the new environment, but Rob feels that 'although newsrooms are better resourced in terms of technology than they were, they used to be better resourced in terms of staff'. Budgetary pressures and more concentrated ownership patterns resulting from industrial convergence have meant that there are fewer newsrooms and fewer journalists. This means managers need to be "more resourceful, using more initiative to use [their] staff efficiently while getting the most from the new technology", he says.[19]

On the concentration of ownership, Rob Curtain sees further implications for journalists in terms of reduced employment options. 'In Melbourne Radio, there are only three different companies that own the stations, whereas there used to be six, and 3MP and SEN now buy news from 3AW – they don't have separate newsrooms anymore', he says. 'There's fewer places to move around to; fewer jobs'. This is a worry too for Peter Weiniger, who cites the print options for Melbourne journalists, 'you've got Fairfax or Murdoch, that's it!' he says. If you have a disagreement with your bosses at Fairfax, then News Ltd is the only other employer, and Peter points out that many journalists may not wish to work for Murdoch anyway.[20]

While Rob Curtain, from his perspective in radio, seems to have embraced technology more fully and more enthusiastically than his colleagues in print, he does recognise drawbacks that derive from convergence, such as polarised ownership patterns leading to fewer employment options. But for print journalists, the shrinking job market is only one aspect of how they seem to feel trapped by technology and the effects of convergence, fearing for their future freedom to fully carry out the watchdog role so crucial to our democracy if current trends continue. Rob Curtain is less pessimistic,



but still describes the future as 'the great unknown'. What is clear is that changes in technology and ownership patterns are altering the shape and nature of the media industry; technological and industrial convergence challenging the very fundamentals of news gathering, with worrying implications for the Fourth Estate and democratic accountability.

The means of ensuring a diversity of media 'voices' has been one of the key issues that has always underpinned debate over media regulation. The dominant interests of Murdoch and Packer have loomed over policy makers, who are wary of the power wielded by both of them through their vast array of media outlets. It was true for Keating back in 1986 and was still a concern for Coonan in 2006. However, it could be argued that as existing regulations become increasingly obsolete given the drives of technological and industrial convergence, only radical policy reform can meet these challenges and offer some chance of preserving diversity.

The Productivity Commission's 'Broadcasting: Final Report' slammed the then current regulations for having produced:

> a history of political, technical, economic and social compromises … (whose) legacy of quid pro quos has created a policy framework that is inward looking, anti-competitive and restrictive[21]

The Commission found that far from preserving diversity, media regulation had only caused further polarisation of media interests; a view long held by Professor David Flint at the Press Council, who went further, stating that 'media regulation has held us back'.[22] Along the same lines as Flint, the Productivity Commission recommended that foreign ownership restrictions should be relaxed immediately, subject to foreign investment rules already existing, and cross-media ownership should also be relaxed, conditional to various criteria being met beforehand and contingent on the public interest preservation of media diversity.[23]

Helen Coonan's media reforms were long overdue, given the pressures of convergence and the need to address the issue of digitalisation. In framing those reforms, however, she nonetheless recognised the need to relax regulations balanced with the need to maintain diversity. Turner and Cunningham note the trend internationally 'away from interventionist cultural and communications policy in favour of a deregulationist, or strategic, "government-at-a-distance" approach' and that 'as we move towards a more fragmented and fiercely commercial environment, governments have felt entitled or constrained to step back a little'. It was the degree to which Coonan decided to step back that was up for debate over the months following the release of her discussion paper. But it was also the degree to which the government was (or was not) prepared to step forward and confront the media bullyboys, Packer and Murdoch, in the name of a wider Australian public interest that shall determine Coonan's and the Howard Government's legacy.

William Walder's essay was Highly Commended in the 2006 CAMLA essay competition.

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Communications and Media Law Association Incorporated

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Entries are to be submitted by Friday 2 November 2007 to:

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C/- AUSTAR Entertainment Pty Ltd
Wilcox Mofflin Building
46-52 Mountain Street
ULTIMO NSW 2007
Tel: +61 2 9295 0153
Fax: +61 2 9295 0163
Email: phenty@austar.com.au

or

Matt Vitins

C/- Allens Arthur Robinson
Deutsche Bank Place
Corner Hunter & Phillip Streets
SYDNEY NSW 2000
Tel: +612 9230 4000
Fax: +612 9230 5333
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