

## Graeme Samuel's Address to the Communications and Media Law Association

On 4 May 2010, Graeme Samuel, Chairman of the Australian Competition & Consumer Commission, presented the following address to CAMLA. This is an edited version of the speech.

### Past predictions

I am sure that if I asked each of you here this evening to forecast the state of play in the media and its convergence with telecommunications, I would receive perhaps 100 different views. So let me repeat some of my own predictions made just a couple of years ago to an audience of mainstream media reporters and members of the business community.<sup>1</sup>

I suggested that internet blogs would become a credible threat to established and mainstream news outlets and that competition to break the latest news would be fiercer than ever. I said consumers of news and entertainment would abandon brand loyalty to one or two sources and increasingly put their trust in new websites and new technologies. It followed, I argued, that advertisers would chase consumers to these new and different mediums in order to get their messages across to the somewhat nomadic tribe that is the modern media consumer. With declining advertising revenues and changes to cross-media ownership laws I also foreshadowed that traditional news outlets may need to merge or acquire new territory. The picture I painted was that soon would come the day when there would be no such thing as a stand-alone newspaper, radio station or television station. The modern media company would be a blend of all three with an online presence as well delivering content across multiple platforms. Finally, I said this brave new world would mean that regulators like the ACCC would have a substantial role to play to ensure these changes would benefit competition and consumers.

Of course I was not alone in analysing future trends in journalism and the media market. For media proprietors, there is a great deal riding on being ahead of the next digital wave.

### Is content or distribution king?

In general, media companies provide content to the public for free – or at a substantially low cost – and rely on advertising for revenue. Consequently, media markets can be thought of as 'two-sided', with advertisers on one side and consumers on the other. In order to maximise profitability, media companies need to consider their actions on both sides of the market. For example, if a media company increases the price it charges consumers, its audience may decline, reducing the amount it can charge for advertising. If consumers can go elsewhere – and at no cost – to get the exact same news and information that was originally produced by the media company, advertisers may miss-out on reaching those consumers and decide to move their advertising elsewhere.

At the heart of this issue are internet search engines and Google in particular. When you type keywords into a search engine, the subsequent search is not of every page on the internet but rather of pages already identified and indexed by Google or other search engines. This is to ensure that relevant results are returned in a short period of time. The search can become narrower still by manipulating search results so that particular pages are ranked higher than others with the aim of directing more people to these ranked sites.

<sup>1</sup> 'Will the media survive the digital revolution', Walkley Business Lunch, 16 October 2007.

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## ISP liability for copyright authorisation: the trial decision in *Roadshow Films v iiNet* Part Two

This is the second and concluding part (the first part was published in the April 2010 edition of the Bulletin) of an exploration of the contours of copyright authorisation liability as that liability relates to a case involving the Australian internet service provider iiNet and thirty-four film and television companies. In this part the findings in *Roadshow Films v iiNet* will be described, together with a critique of certain aspects of the trial judgment.

## The UK Defamation Bill 2010: A Review

Jason Bosland examines proposals for amendment of UK libel law.

## Harbour Radio Pty Ltd v Australian Communications and Media Authority [2010] FCA 478

Harbour Radio, which operates 2GB in Sydney, has successfully challenged a decision by the ACMA to investigate a complaint by an advertiser against 2GB for adverse comments broadcast on the Ray Hadley Morning Show.

The decision is the first to consider the interpretation of the complaint handling provisions of the Commercial Radio Code of Practice and the investigative powers of the ACMA. The effect of the decision is to reverse the approach historically taken by the ACMA in determining whether a complaint is a 'Code complaint' and demonstrates the discrete nature of the investigative powers granted under the Broadcasting Services Act 1992 (Cth).

## Refused Classification

In this article, Jessica Azzi considers the relationship between early book censorship laws and the current classification law.

Some commentators have drawn an analogy between the indexing and ranking process of search engines to 'old fashioned' distribution methods like the paper boy delivering the morning papers. Writing in the online newsletter *Business Spectator* last month, financial journalist Alan Kohler argued that because Google – and search engines generally – 'distribute' the internet by guiding consumers to web pages, restricting access to search engines effectively shuts down content supply to consumers.<sup>2</sup> He wrote that in order to be distributed by a search engine, a web page must have free access. If it's not free, Google doesn't index it at all or the word 'subscription' appears next to the search result indicating it must be paid for.

Mark Day writing in *The Australian's* Media section in response to Kohler's piece challenged the theory that if you lose Google you lose your entire audience. He argued – and his boss Rupert Murdoch agrees – that content is what supports the supply chain and drives purchases.<sup>3</sup>

The difficulty so far has been restricting access to content. This is where the iPad comes in.

## Will the iPad be the saviour or death of newspapers?

Depending on who you read, the iPad will either save newspapers by making users pay for content – or, by locking content away, it will reduce the number of readers and therefore advertising revenue will decline and newspapers will be worse off.

In a nutshell, media organisations such as *The Australian* will provide content to Apple to distribute via the iPad for a fee, thereby cutting Google and other search engines out of the picture. To become a successful distribution method this will require consumers to purchase an iPad and a plan from a provider as well as pay for the newspaper application.

There has been a great deal of hype generated by the latest offering from Apple but it is worth noting that neither a mobile platform for reading books or large documents is new – Amazon released the Kindle in 2007 – and paywalls for content have been in place at media outlets like the *Financial Review* in Australia and the *Wall Street Journal* for some years. In June this year British titles *The Times* and *Sunday Times* will have paywalls and from January 2011 the *New York Times* website will have a 'hybrid' system where a visitor to the website will be allowed to view a certain number of articles free each month but to read beyond that, the reader must pay a flat fee for unlimited access, much like the 10 article per month limit imposed on registered but unpaid readers by the *Financial Times*.<sup>4</sup>

I currently use a Kindle to purchase and read the latest books – although I can't let this opportunity pass to note my increasing frustration at the restrictions imposed by publishers on what I can download to my Kindle – restrictions imposed simply because I am an Australian resident.

I am also well served by my Blackberry which has all but replaced paper and ink in my daily life. The thud of newspapers at 6am on

2 Alan Kohler, 'Publish and be damned', *Business Spectator*, 9 April 2010. Republished in Crikey.

3 Mark Day, 'iPad could save newspapers and attract ad dollars', *The Australian*, 12 April, 2010.

4 Paul Harris, 'Rupert Murdoch defiant: 'I'll stop Google taking our news for nothing'', *The Guardian*, April 7 2010.

my doorstep has been superseded by the buzzing of my Blackberry at 3am with tomorrow's headlines and news clips sent directly to my email inbox.

But with all these techno gadgets, we need to accept that the future is not all mobile and wireless. Indeed wireless will probably never replace fibre optic cables when it comes to another growth area for digital media – IPTV.

### **Drivers for high speed broadband – IPTV and other uses of fibre optic cables**

Last month ISP iiNet announced it had teamed with content aggregator FetchTV to be the first in Australia to offer this IPTV service later this year.<sup>5</sup> Telstra has announced its T-Box download and streaming service. These IPTV products will compete with existing internet enabled devices including Foxtel IQ; TiVo; and Sony's PlayTV accessory to the PlayStation 3 console.<sup>6</sup> And for some time now a number of ISPs have been offering unmetered downloads of audio visual content, for example the ABC's iView.

I note that senior management at Foxtel consider free-to-air channels on the digital platform as their serious competition, but I wonder if they should be glancing over their shoulder at the new entrants in the IPTV market as the potential challengers to Foxtel's dominance of Pay TV.

While entertainment is obviously a strong driver for high speed internet data transmission, there are a range of other important social, environmental and economic benefits of a fully operational high speed broadband network.

### ***there is overwhelming agreement that Australia needs to develop a high speed broadband network***

I will refrain from entering the political debate over the Government's NBN project. Whether we achieve the ultimate objective of high speed broadband by extensive fibre or wireless networks is a policy decision that will be debated and ultimately resolved by our legislators in Canberra. But I think it is fair to say that there is overwhelming agreement that Australia needs to develop a high speed broadband network.

### **Blogs a credible threat?**

Two years ago I suggested that internet blogs would become a credible threat to established and mainstream news outlets and that competition to break the latest news would be fiercer than ever. Many in the mainstream media then and now treat weblogs with derision.

Tonight I'll just share three examples of well resourced blogs that are taking it up to traditional publishing houses.

I have already mentioned *Business Spectator* – a free financial news source which has been giving the websites of major newspapers a run for their money since it launched in late 2007. This is not surprising when you consider that its writers are former heavy hitting reporters from *The Age* and *The Australian*.

Overseas, American political blog *The Huffington Post* was rated in 2008 by both *Time Magazine*<sup>7</sup> and *The Observer*<sup>8</sup> as the most powerful blog in the world. Like *Business Spectator* it recruited

professional columnists and it has attracted high-profile guest contributors.

At the other end of the news spectrum, celebrity news website, *TMZ* – which is owned by Warner Bros – has been responsible for breaking news such as the death of Michael Jackson and socialite Paris Hilton's jail-term for driving offences. Interestingly *TMZ* started as a website but now has a television show that recently screened on *Go!* – the free-to-air digital channel owned by Channel Nine. This is an example of convergence whereby a media brand exists across platforms and is not limited to print, audio or visual communication.

Reputable mainstream media organisations, must be nervously wondering what to do as they watch the newcomers, the bloggers, slowly but surely creeping their way up the ladder like pirates with daggers between their teeth. What is even more worrying for these traditional media organisations is that some of their assumptions about users trusting known brands are starting to look a little shaky.

### ***For regulators like the ACCC, it means ensuring regulation relied on during the last century, does not become an irrelevant fallback position that fails to serve the public's best interests***

For a growing base of users, blogs are all equally valid sources of news, information, entertainment, and gossip, and users are not necessarily discriminating between traditional and new sources. Where once media companies could reassure themselves that audiences would always default back to traditional houses of journalism, this is becoming less and less the case, although it must be said old media companies do still dominate many of the most visited sites.

### **So what does that mean for those of us here today?**

Quite a lot actually. For the media it means finding new ways of remaining relevant to an increasingly fragmented and disloyal audience. For regulators like the ACCC, it means ensuring regulation relied on during the last century, does not become an irrelevant fallback position that fails to serve the public's best interests.

### **A media under siege**

In 2007, publisher and chairman of the *New York Times* Arthur Ochs Sulzberger Jr said:

*I really don't know if we'll be printing The Times in five years, and you know what? I don't care.*

His statement was not meant to be a morbid prediction that one of the world's great 'old' media brands would soon be dead. What he was trying to say was that old media companies could no longer rely on revenues of the past and needed to develop ways of drawing money out of new technologies.

### **New models emerging**

Every major newspaper, radio station and television station in this country has to some degree embraced the digital age. Blogs,

5 Jordan Chong, 'iiNet signs online TV deal with Fetch TV', *Australian Associated Press*, April 12 2010.

6 Thomas Hunter, 'T-Box' unveiled as Telstra spruiks superfast broadband' *The Age*, November 19 2010.

7 Tom McNichol, 'Time.com's First Annual Blog Index', *Time Magazine* (online edition) 2008.

8 Staff reporters, 'The world's 50 most powerful blogs', *The Observer*, 9 March 2008.

moderated by journalists, now sit alongside traditional articles and commentary on newspaper websites. Television stations are increasingly making their content available on-line and radio is finding a new lifeline through podcasting and streaming on-demand content.

In Australia this trend of convergence has continued and in the last two years three major news outlets have dramatically changed their online presence.

For example the ABC – a radio and television broadcaster – created its version of a broadsheet newspaper's opinion page of when it launched *The Drum* late last year. For the first time ABC journalists have been writing analysis of a political or economic issue.

*The Drum* launched after News Limited created a one-stop opinion website for all of its Australian newspapers called *The Punch*. And *The Age* and *Sydney Morning Herald* mixed a new website with nostalgia when it re-branded its online opinion pages as *The National Times* after the weekly Fairfax publication of the seventies and eighties.

## ***In an evolving media landscape there is a substantial role for regulators to play to ensure changes benefit competition and consumers***

The ABC is also testing other approaches in the convergence space. The first episode of the new season of *Doctor Who* was available on the ABC's iView service well before the show went to air. Despite 112,000 downloads on the weekend between iView availability and the episode airing on Sunday evening, the show achieved more than a million viewers on the night. Perhaps even more telling as a convergence issue are the other ABC statistics for that week. It was the biggest in the history of the ABC's catch-up viewing service with 224,000 visitors, 540,000 visits and 2.8 million page views.<sup>9</sup>

### **Social media – the explosion of public journalism**

One aspect of the new digital world that I don't think anyone realised the full potential of, was social media websites in particular Facebook and Twitter. The Australian Federal election in 2007 and the American Presidential election in 2008 saw these digital platforms put to enthusiastic use by candidates as a way to directly reach an audience without relying on traditional media. Most Australian politicians have a Facebook page and/or a Twitter feed and increasingly use these to make policy announcements or give updates throughout their daily pursuits.

During question time in the Federal parliament, Canberra press gallery journalists tweet commentary on the performance of the Government and Opposition members and in doing so completely bypass their newsdesks and editorial control.

Along with content, social media sites have created a new market for advertising. Facebook has allowed advertising for some time and a joint study released by Nielsen Company and Facebook last month reported that advertisements placed in a 'social' context where a Facebook user can become a 'fan' of the product or service advertised had more impact than standard webpage advertising. It is worth keeping in mind that Facebook is a co-author of that report.<sup>10</sup> Twitter is soon to enter the advertising

arena with 'promoted' tweets being trialled in the US by big corporate advertisers such as Starbucks and Sony Pictures.<sup>11</sup> And advertisers are chasing consumers to whatever new platforms are adopted by users. And media proprietors are, from commercial necessity examining the opportunities for acquisition and merger, recognising the ever changing landscape for sources of revenue, in the form of advertising dollars and content subscription fees.

In this evolving media landscape there is a substantial role for regulators to play to ensure changes benefit competition and consumers.

### **New roles for regulators**

We have now experienced several years under the new regime passed into law last decade bringing about significant reforms to Australia's foreign and cross-media ownership laws. These rules limit owners to controlling no more than two of the three media platforms of television, radio or print in any one market. There is of course also a voices test in the legislation, which prevents the number of independent media operators falling below five voices in metropolitan areas and four in regional and rural markets.

These in themselves are important tests that media companies need to satisfy to gain approval of a merger, and these safeguards will be monitored by ACMA. It is important to remember that these hurdles are additional to existing requirements, including perhaps one of the most important tests, the need to satisfy section 50 of the *Trade Practices Act 1974* (Cth) (the **TPA**), which is the ACCC's focus.

Section 50 of the TPA specifically requires the ACCC to consider the dynamic characteristics of the market. This presents a challenge in an industry characterised by constant changes in technology and consumer taste. It is important to remember that the prohibition contained in section 50 is against any acquisition of shares or assets that "would have the effect, or be likely to have the effect, of substantially lessening competition in a market".

In connection with its assessment of the application of this prohibition to any acquisition of shares, the ACCC must consider whether the acquisition gives rise to circumstances which, after taking account of the analysis of relevant markets, and competition in those markets, would be likely to lead to a substantial lessening of competition.

The TPA does not prescribe the circumstances where the acquisition of specific shareholding interests, for example small minority shareholdings, might give rise to these competition concerns. That becomes a matter for examination by the ACCC having regard to all the relevant circumstances. Without being prescriptive, issues that we would initially examine are whether the shareholding interest concerned either alone or taken together with other 'friendly' or 'supportive' shareholding interests would enable one or more parties to control or substantially influence the operations of the target company.

Under the current media ownership legislation, owners of one form of media in a market, say, a newspaper, are not allowed to control another form of media in the same market, for instance a radio or television station. Acquiring more than 15 percent of another form of media is regarded, by the media ownership legislation, as gaining control. Some interpret this limit of 15 percent as the point where ownership begins to look more like a controlling interest under the TPA, and thus potentially throws up questions of competition. Others would point to other numbers as the point where alarm

9 Staff reporters, 'ABC scores 112,000 video streams for Doctor Who premiere' *mUMBRELLA online*, 19 April 2010.

10 Jack Neff, 'Nielsen: Facebook's Ads Work Pretty Well', *Advertising Age Online*, April 19, 2010.

11 Mikael Ricknäs and Juan Carlos Perez, 'Update: Twitter to start pushing advertising to users' *Computer World Online*, April 13 2010.



bells should start ringing. However the matter is more complicated than a simple line in the sand. An ability to influence control over a company may kick in well below the 15 percent mark, if for example two significant shareholders decide to use their combined voting powers to influence the direction of a company. It is impossible to give a concrete answer on when competition concerns might be triggered, as every case is unique. I note simply for comparison that under the *Corporations Act 2001* (Cth), the threshold at which control becomes an issue in the context of a takeover is generally accepted to be 20 percent.

Our analysis is an exhaustive process of examining and defining the market, talking to involved parties, their competitors and their customers and making a sober, informed decision on the level of competition based on the facts, rather than emotive responses or comment in the press.

Companies are not required to notify the ACCC of mergers before they proceed. However, we encourage them to do so, as the ACCC will conduct its enquiries regardless of whether the parties involved have approached us in the first instance or not. Where a merger is likely to raise concerns, the ACCC does not hesitate in seeking injunctions to block deals proceeding, or where they have already occurred, seeking forced divestitures or unwinding of arrangements.

### **Media merger guidance**

Before we can make any assessment of whether a merger is likely to raise competition concerns, the ACCC first needs to define the markets that the two parties involved operate in, and how much overlap there is and whether they provide competitive tension for each other. In mid-2006 the ACCC released a paper providing broad guidance on the Commission's approach to assessing future media mergers. This paper is available on the ACCC's website.

In the past, the ACCC has regarded the media as four distinct products – free-to-air television, pay television, radio and print. Those products have been thought of as having little overlap in content or advertising. With the technological changes I have just mentioned under way, it is clear we can no longer rely on these neat pigeon holes that have been reasonably reliable in the past. No longer can traditional media boundaries be used to define separate markets when there is an increasing blending of the lines between mediums. And as we witness even further levels of convergence in the market, it is likely that how a market is defined will need to evolve over time.

As those traditional media boundaries blur, focus may shift from the way information is delivered to the actual products media companies offer. If, television stations, newspapers and radio stations begin offering content in a similar format - let's take video updates of selected news stories as an example - do they suddenly cease to be different? And does that mean that where in the past they may have been considered to be separate markets, does this now make them direct competitors? For a consumer, it may make little difference if they are downloading their morning update from the *NineMSN*, *Sydney Morning Herald* or *3AW* websites.

In this regard, we now consider there are three main categories the ACCC will investigate as part of its assessment of any proposed merger: the supply of advertising opportunities to advertisers; the supply of content to consumers; and the acquisition of content from content providers. Other more specific products – such as premium content; classified and display advertising; and the delivery of news, information and opinion – may also be critical when considering particular mergers.

So if we take supply of content as an example, if the price of one source of content rises, or its quality falls post merger, the

question is the same one that arises in all mergers – what are the real alternatives for consumers?

Where new services develop or look likely to do so in the foreseeable future, we will take them into account in assessing media mergers and acquisitions under the provisions of the TPA. And at all times, the ACCC will be looking closely at any content, advertising or news and information markets where concentration appears to be occurring. Not only in Australia as a whole, but also in regional markets, as the TPA requires.

## ***As traditional media boundaries blur, focus may shift from the way information is delivered to the actual products media companies offer***

### **Regional markets**

There have been specific concerns raised about the level of media diversity in regional markets that do not enjoy the same level of choice as the larger metropolitan areas. It is a perfectly valid concern from those living in regional areas that they not be left with reduced choice as the result of mergers or acquisitions proceeding. This has been an issue of particular concern to operators of radio stations in regional areas, who have expressed concern that diversity safeguards introduced with the new media rules may impose onerous obligations that threaten the viability of some of their operations.

There are specific protections built into section 50 of the TPA that require the ACCC to consider the impact of proposed mergers on markets in regional Australia. Consequently, the ACCC will take into account the differing circumstances in rural and regional Australia compared with urban areas. The ACCC understands the importance of local content in these areas and that consumers rely heavily on local suppliers of news and information, as compared to consumers in urban areas who have greater access to a variety of media choice. We also understand that much of the additional choice being opened up by the internet and other more global forms of communication is not always a suitable substitute for local information. *CNN* or the *BBCWorld Service* might be very handy for finding out what's happening in the Middle East, but you're likely to be disappointed if what you really want to know is what time the local dog show starts.

Competition in those local markets may be more vulnerable following a merger than competition in the larger cities. As such, the ACCC will continue to consider implications at the local and regional level when assessing mergers proposed for those areas, as we did in the Macquarie Bank case.

### **Media diversity**

One of the major issues has been the issue of diversity, and it's about that that I want to make a few comments.

It's been suggested that the issue of diversity is purely a social issue, and not an economic one, and thus not able to be dealt with under section 50 of the TPA. Let me say quite clearly that diversity is not, in the view of the ACCC, solely either a social or an economic issue; it's both. We cannot guarantee diversity into the future, but lest this is interpreted as saying that the ACCC cannot deal with reductions of diversity flowing from media mergers, I want to make it quite clear what our position is.

Diversity needs to be seen from three perspectives: content producers such as editors and journalists in the context of news and information, advertisers, and consumers. A lot of the current

debate about diversity is flowing from content producers - editors and journalists - who have their own views as to the desirability of the diversity of opinion from their viewpoint as producers of that content. But diversity is about providing a choice of content, views and style. Competition motivates and forces suppliers of content to serve the diverse needs and demands of advertisers and consumers. As to content, in terms of entertainment, news, information and opinion, and as to the means of distributing that content to consumers so that they can receive it in the manner that they want to receive it.

Inevitably there is a desire by media outlets to distinguish themselves from their competitors. Competition will force content producers to produce diverse content. Above all, competition is directed towards and ensuring that, as far as possible - and this is important - it's the demands and preferences of consumers that are the drivers, not the views of legislators, media proprietors or content producers.

### ***There is a connection between local content and advertising that is important in discussions about diversity***

How would these principles apply to a media merger? Simply put, one way a media merger would generate competition concerns would be if the merged company could substantially reduce the quality of the content it supplies to consumers. Taking newspapers as an example, a publisher who is less constrained by competition could downgrade the general presentation and layout of its newspaper. The proportion of advertising to content could be increased. The use of colour might be decreased, and so on. But the publisher could also reduce the quality of its newspaper by reducing the diversity and coverage of content provided to readers. Clearly, the potential for the newspaper to do this is increased if consumers do not have alternative sources of equivalent content, for example, news content.

But newspapers also earn revenue from advertisers and there is an important connection between local content and advertising that is important in discussions about diversity. For free-to-air television networks and radio, advertising is their only source of revenue. And any advertiser would be concerned about their advertising reaching fewer prospective customers because the media proprietor has reduced the quality and diversity of its content. In the short term, cutting content may reduce the costs to the owners of the newspaper, but in the longer term, it is likely to impact on the number of readers bothering to pick it up.

In the case of suburban newspapers, there is a strong incentive for owners to continue to provide relevant local content, as this is what appeals most to readers of these publications, potentially increasing the number of readers and therefore making them attractive to advertisers. This is why measuring the potential effect on advertisers is a critical aspect of assessing how diversity might be affected in the context of potentially reduced competition.

Lessening the total number of media owners in an area may have the effect of reducing diversity of content, but it is important to remember that owners are constrained to a point by the reader/advertiser relationship. It is also worth noting that retaining separate owners in a market does not guarantee quality or diversity. Owners are always free to unilaterally change their format, increase the ratio of advertising to content or narrow the range of content they provide in an attempt to cut costs.

Mergers do not therefore automatically mean diversity is likely to be reduced if it is commercially sensible for the new owner to maintain

it. Likewise, separate ownership does not necessarily always ensure diversity for customers. In a merger context, a reduction in competition can lead to a reduction in diversity. Where this arises, the ACCC will take this into account as part of its competition assessment under section 50 of the TPA.

I might note that at the time of the 2007 legislative changes relating to cross media ownership, I suggested that some of the breathless predictions then being made of a merger frenzy involving the media barons were unlikely to emerge in reality.

In fact the number of applications for media mergers under the new laws has not been especially high. The Commission has overseen the acquisition of Rural Press by Fairfax and the acquisition of Southern Cross Broadcasting by both Fairfax and the Macquarie Media group, but not the subsequent exits by each organisation from Southern Cross.

### **Ensuring access to news content in the digital media environment**

As some of you will no doubt be aware, the ACCC played a role as mediator rather than regulator in mediating solution between media outlets and key sporting organisations over access to sporting news in the digital media environment. This resulted in a new Code of Practice for Sports News Reporting that was announced by the Minister for Broadband, Communications and the Digital Economy, Senator Stephen Conroy, in March this year.

The emergence of digital media created new opportunities for content such as sporting scores to be transmitted over new technologies. As such, digital content became a new and potentially lucrative commodity in the market place.

On the one hand you had sporting organisations such as Cricket Australia and the AFL recognise the value of sporting information and images and maximising this value by restricting access to a handful of media outlets who, in turn, traded on this exclusivity. On the other hand, you had other media outlets excluded from this information and images and they were forced to purchase the content – if they could afford it – off their competitors to use in their own publications and broadcasts.

What sort of newspaper, website or mobile phone application would be without sports coverage? Some smaller regional newspapers had no choice. APN News and Media – a publisher in northern NSW and Queensland, did not run a contemporary AFL picture for two years. And independents, such as Shepparton News, had to restrict images, too. Publishers faced other issues, such as restrictions on the number of updates of match reports and how many photographs could be published or sold on.

In early 2009 a Senate Standing Committee on Environment, Communications and the Arts recommended that media outlets and key sporting organisations negotiate among themselves access to sporting events for bona fide journalists and photographers, regardless of the technological platform they use to distribute information and images.

A further recommendation of the Committee was that failing a successful resolution between parties, a mandatory code of practice under the TPA be developed.

The Minister, Senator Stephen Conroy, asked the ACCC to find a way forward and following a number of roundtable meetings mediated by the ACCC, a voluntary code of conduct was achieved. There now exists a voluntary code supported by an administration committee on which sit the major players from sport – including the AFL, the NRL, Cricket Australia, Tennis Australia and Australian Rugby Union – and the major players from the media – Fairfax, News Limited, APP, Getty Images and Agence-France Press.

The code requires these organisations to allow all bona fide news organisations, to be accredited to report sporting news subject to the principles of fair dealing and where syndication occurs, the recipients of the content should be bound by the same principles of fair dealing.

### **Protecting the public interest**

This brings me to the question of how we go about ensuring the public is the winner as a result of all this upheaval. Convergence is potentially opening up a vast array of new channels for distribution of audio visual and print entertainment, news, information and opinion. With new delivery channels comes the possibility of new forms of content emerging as well, thereby potentially increasing choice for consumers.

The ACCC's challenge during this evolution of the media market will be to promote competition and not allow incumbents to impede the development of competitive choices for consumers.

Thus, the ACCC is focussing on ensuring minimal roadblocks to efficient investment in new infrastructure that will open up channels of distribution. Where it is economically inefficient to duplicate infrastructure our job will be to ensure access is provided on reasonable terms to competitors and the owners of the infrastructure, thereby providing competitive choices to consumers. In other words, we'll be trying to keep the pipes clear of blockages.

### ***it is essential that content and content production is not concentrated in a manner that can inhibit competitive choices for consumers***

The ACCC is also focussing on control of content and content producers. With an increasing diversity in distribution channels, it is essential that content and content production is not concentrated in a manner that can inhibit competitive choices for consumers. As regulators we need to ensure that content does not become locked in the hands of the few, to the detriment of consumers or advertisers. Where content isn't locked – and in fact there is an increasing range of distribution methods such as IPTV – it is important that the content available provides greater choice for consumers rather than more of the same over a different platform.

On first blush it would appear convergence is already working in the consumer's interest by providing a range of new content. New forms of distribution, be it over the net, portable devices, time-shifting, IPTV or other formats promise more flexibility and new services. Extra competition is also good news, as it means potentially better prices, more innovation and wider choices for advertisers and consumers. Despite the apparent increase in diversity that the digital age promises, there are still very real risks that we may end up the poorer if we do not keep our eye on just where control lies for the material we want to receive. As I've mentioned before, with the actual distribution models constantly changing, second-guessing and trying to control the dominant platforms isn't likely to be a successful strategy.

What remains important is access to eyeballs, and the content those eyeballs are seeking is becoming increasingly important to our considerations when assessing media mergers and other arrangements.

### **Conclusion**

Rupert Murdoch thinks the last newspaper will be printed in 2040 – and maybe he'll be right. After all, the world scoffed in 1975 when Bill Gates predicted the world would one day have a computer

in every home. But even predicting the death of newspapers is becoming old-hat and it seems the death of broadcast TV is now firmly on the pessimists' agenda. How long will it be before we are talking about the imminent demise of the internet?

Coping with change will require flexibility from both the media and regulators and that change will only continue to accelerate. But the legacy of that change is that technology and the growing swell of community input is placing the future of the industry in the hands of the public.

I for one can't wait see what they do with it.

# ISP liability for copyright authorisation: the trial decision in *Roadshow Films v iiNet* Part Two

This is the second and concluding part (the first part was published in the April 2010 edition of the Bulletin) of an exploration of the contours of copyright authorisation liability as that liability relates to a case involving the Australian internet service provider iiNet and thirty-four film and television companies. In this part the findings in *Roadshow Films v iiNet* will be described, together with a critique of certain aspects of the trial judgment.

## The primary infringing activities

In *Roadshow Films v iiNet* the particular technology used for the primary infringing acts was peer-to-peer software coded to BitTorrent protocol.<sup>1</sup> Internet users armed with such software form a virtual network, and are able to copy file content from others in the network and, as a feature of the protocol, make the copied file content available to others in the network. That is to say the Internet users in the network who commence copying to their computer a file (which might be encoded for a particular film) are contemporaneously obliged under the protocol to make available copied content to others in the network who desire that content. This forms an online gathering known as a 'swarm' of Internet users who are intent on securing (say) a copy of the same film title through a flurry of communal copying and communication. The applicants were concerned that such distribution of their content was occurring without their permission by persons using iiNet internet connections. Their action was brought against iiNet, the internet service provider (ISP), for authorising that distribution.

## The position of iiNet

The respondent iiNet sold internet access to its subscribers in volumes measured by gigabytes ('gigs'). The terms of that service provision conferred upon iiNet power to cancel a service for illegal or unusual use.<sup>2</sup> The applicants – while no doubt benefiting if illegal copyright infringement was curtailed by such contracts – were not privy to those contracts, and iiNet was perceived by the applicants to be uncooperative in working with them to curtail the activities of persons engaging in unauthorised BitTorrent distribution of the applicants' repertoire using iiNet subscriber accounts. The applicants were coordinated and organised by a peak body; the Australian Federation Against Copyright Theft (AFACT). Concern about those using iiNet subscriber accounts (iiNet users) arose from (i) AFACT being able to identify internet users in BitTorrent swarms by reference to unique internet protocol (IP) addresses allocated to iiNet subscribers, and (ii) the absence of any discernable policy or action by iiNet to deal with subscribers whose accounts were identified by AFACT as being used by infringers.

Evidence on iiNet's posture and attitude about the unauthorised distribution of the applicants' repertoire by those using iiNet services was obtained by two employees of AFACT who in mid-2008, as trap-evidence gatherers subscribed to iiNet, joined in BitTorrent swarms by connecting only with iiNet subscribers' accounts (identifiable by an iiNet-specific IP address prefix) and thereafter copied from those communicating in the swarm and communicated to those copying in the swarm the applicants' repertoire. Technical support was sought from iiNet by the AFACT employees and by this means further trap evidence was obtained of the type of advice iiNet provided to those who identified themselves as BitTorrent file-sharers. For example in mid-2008 one of the AFACT employees alerted iiNet that the movie *Kung Fu Panda* was slow to download and asked whether his uploading of other films was to blame. The answer provided by iiNet technical support was that uploads would only affect downloads minimally.<sup>3</sup>

## The case resolved to three staggered legal issues

AFACT also engaged a copyright piracy forensics firm operating out of Denmark, DtecNet Software APS, to collate data attributable (by IP addresses and a unique computer identifier) and pseudonymously identified iiNet subscribers' accounts being used to engage in unauthorised BitTorrent distribution of the applicants' repertoire. This was achieved by using deep packet inspection of the unique attributes of the data being transmitted, and being able to make a unique identification of iiNet users' computers transmitting on the relevant BitTorrent network. The DtecNet data, collected from June 2008 until August 2009, was forwarded weekly over 59 weeks to iiNet. The data gave notice of the date and time the alleged infringements of copyright took place; the IP address of iiNet subscribers used by the alleged infringers at the time of the infringements; the motion pictures and television shows in which copyright had been identified as being infringed; and the particular applicant controlling the rights

1 *Roadshow Films Pty Ltd v iiNet Limited (No. 3)* [2010] FCA 24, [56]-[77] (**Roadshow Films**). A good description of the protocol is found in David Lindsay, 'Liability of ISPS for End-User Copyright Infringements' (2010) 60 *Telecommunications Journal of Australia* 29.1, 29.2-29.3.

2 *Roadshow Films*, [99].

3 Affidavit of Aaron Guy Herps, filed in the proceedings on 15 December 2008, [28]. A contentious post-script to this trap-evidence gathering exercise was that once the identity of one of the trap-evidence gatherers became apparent to iiNet, iiNet reported that person to the Western Australian police for violation of the criminal provisions of the Copyright Act. The specific reporting of the trap-evidence gatherer was regarded by the trial judge as 'not intended to be taken seriously': *Roadshow Films* at [170]. This conclusion was surprising in view of the contents of the correspondence forwarded to the police (and not reproduced in the judgment) which included an analysis of the criminal liability of the trap-evidence gatherer written by the iiNet Chief Executive.



in the relevant motion pictures and television shows.<sup>4</sup> The information was capable of permitting attribution by iiNet of the particular subscriber accounts allocated to those implicated IP addresses at the nominated time. However, aside from on-forwarding the notices to the Western Australian police (discussed below) iiNet's conduct was consistent with what was found to be its unwritten policy on such matters; iiNet did not take any action in respect of those identified subscriber accounts.

### The reasons for decision at trial

As explained in Part One, in 2001 and 2004 two rounds of legislative reform to the *Copyright Act 1968* (Cth) (**Copyright Act**) produced: (i) a control-based codification of authorisation (sections 36(1A) and 101(1A)), (ii) an exception to authorisation liability for the providers of communications facilities arising from the facilities' mere use by others (sections 39B and 112E), and (iii) conditional limitations upon copyright remedies that can be awarded against carriage service providers (the Part V, Division 2AA safe-harbour regime). The proceedings initiated by the applicants claimed that iiNet had authorised the infringements of the AFACT employees, those iiNet subscribers in the BitTorrent swarms that the AFACT employees joined, and the iiNet subscribers identified in the notices by DtecNet. In defending itself iiNet argued that it had not authorised any exploitation of the applicants' copyright, but that if it was found to have so authorised, it could rely on the 'mere use of facilities' exception, or failing that, it could seek the protection of the limitation on remedies provided by the safe-harbour regime. The case thus resolved to three staggered legal issues.

### Authorisation liability

There were two important preliminaries to the authorisation analysis by the court. The first was whether any actual primary infringements had been proven to have occurred. The second was the nature of any such infringements in terms of the exclusive right structure of copyright.

#### Trap evidence

On the first issue, a contested matter was whether exploitations of copyright entailed in the trap-evidence gathering had been licensed by those represented by AFACT, and was thereby non-infringing. The trial judge found that it was, distinguishing the facts before the court from those in *Moorhouse* where a person 'at the behest' of a copyright owners' interest group gathered trap evidence by infringing the copyright of the plaintiff, Moorhouse.<sup>5</sup> In *Moorhouse* the High Court found that the plaintiff Moorhouse was oblivious to the infringing act at the relevant time.<sup>6</sup> In *Roadshow Films* the trial judge distinguished *Moorhouse* on the basis that the trap evidence gathering was done by individuals employed by AFACT (whereas the gatherer in *Moorhouse* was seemingly a volunteer) and that the plaintiffs in *Roadshow Films* had a higher degree of awareness of the gathering than the plaintiff in *Moorhouse*.<sup>7</sup> That finding, however, was not regarded by the court as being of 'real consequence' because the licensed trap evidence gathering provided evidence from which the court could infer other non-licensed actions.<sup>8</sup> More significantly, the trial judge considered that the DtecNet evidence supplied direct

evidence of transmissions of the applicants' repertoire being made by users of iiNet internet access who were manifestly not licensed by the applicants.<sup>9</sup>

#### Single or repeated exploitation of copyright?

The second issue was the nature of those transmissions as an exploitation of copyright. The DtecNet data identified the iiNet users transmitting file data to a swarm, as distinct from iiNet users receiving file data as one of the swarm. How should that transmission be regarded as copyright exploitation? The trial judge applied the concept of communication to BitTorrent distribution as a singular making available and electronic transmission to the (collective) swarm, being members of the public.<sup>10</sup> This aspect of the court's characterisation of the rights exercise seems correct in itself.

### *This characterisation as one (on-going) act of infringement as opposed to several acts of infringement (determined by a user's connection-disconnection-reconnection practices) is contestable*

More controversially such communication was regarded by the court as being made just once by an iiNet user, no matter on how many separate occasions particular subject matter was made available by a user during different internet sessions.<sup>11</sup> The court's approach rejected the applicants' argument that each time such a user disconnected and reconnected, and again distributed the same subject-matter to a differently constitute swarm, that the user separately communicated that subject matter to the public. This characterisation as one (on-going) act of infringement as opposed to several acts of infringement (determined by a user's connection-disconnection-reconnection practices) is contestable. In part the judge relied upon a provision in the Part VB educational copyright licensing scheme to support the analysis.<sup>12</sup> That provision deems there to be another act of communication to the public by an educational institution where subject matter is 'remains available online' for longer than 12 months. However it is reasonably clear that this provision would not have any application under the statutory licences if the educational institution chose for the material to not remain available online for a period of less than 12 months. The provision is directed to material left available on an educational institution's server continuously, year-in-year-out, for new student cohorts. To the extent that the provision had any analogous relevance to the facts here, it might be if an iiNet user's computer was left on and an iiNet internet connection open for a period of more than 12 months during which time an applicant's film copyright was continuously being made available via BitTorrent. In any event the judge's analysis minimizes the number of identified iiNet users who could be regarded as repeat infringers in respect of the one film title.<sup>13</sup>

4 *Roadshow Films*, [100]-[104].

5 *Moorhouse v University of New South Wales* (1974) 3 ALR 1, 14.

6 *University of New South Wales v Moorhouse* (1975) 133 CLR 1, 7-8.

7 *Roadshow Films*, [342]-[343].

8 *Roadshow Films*, [344]. Compare Merkel J's approach in *Ward Group v Brodie & Stone* (2005) 64 IPR 1, [51]: 'The reason, however, why trap purchases are not generally considered a consent to infringing use is that the infringing conduct is usually already occurring when the goods bearing the infringing mark are advertised or offered for sale to the public in the jurisdiction. In that situation the trap purchase is made to establish that fact, and cannot be seen to be a consent to the infringements that are occurring.'

9 *Roadshow Films*, [344].

10 *Roadshow Films*, [310].

11 *Roadshow Films*, [285]-[288].

12 Section 135ZWA(2A) in Part VB of the *Copyright Act*. (See also to like effect section 135JA(4).)

13 Relevant to section 116AH(1), item 1, condition 1 of the safe-harbour regime.

*The requirement for an authoriser to supply 'the actual means of infringement'*

Leaving aside those two preliminary points, twenty iiNet accounts (identified from the IP addresses listed in the AFACT notices) were considered in depth as a result of a preliminary order permitting detailed discovery in respect of a finite number of accounts. These were regarded by the court as providing the "most specific evidence of copyright infringement by iiNet users in these proceedings".<sup>14</sup> Had iiNet authorised those infringements which occurred using accounts after iiNet had received AFACT notices which enabled iiNet to identifying those accounts? In *Roadshow Films* the court's answer was: no. This answer was arrived at without recourse to the three codified factors which were explained in Part One. Instead, the following passage from Gibbs J judgment in *Moorhouse* was particularly relied upon by the trial judge:

*It seems to me to follow from these statements of principle that a person who has under his control the means by which an infringement may be committed – such as a photocopying machine – and who makes it available to other persons knowing, or having reason to suspect, that it is likely to be used for the purpose of committing an infringement, and omitting to take reasonable steps to limit its use to legitimate purposes, would authorize any infringement which resulted from its use.*<sup>15</sup>

Working back from that application of principle to the facts in *Moorhouse*, in *Roadshow Films* the trial judge reasoned that there could be no act of authorisation unless iiNet actually provided the 'means' of infringement.<sup>16</sup> The broadband internet access supplied by iiNet was merely a 'precondition to infringement', and not the 'means'.<sup>17</sup> The 'means' was found to be the BitTorrent protocol itself.<sup>18</sup>

### ***there were two relevant powers in iiNet that were said by the applicants to exist to prevent or avoid infringement: the first was to pass-on to subscribers warning notices, the second was to terminate the iiNet subscriber accounts***

The important aspect of the reasoning was that the trial judge's conclusion that iiNet did not authorise the infringement of the iiNet users' 'regardless' of the codified factors, and was solely on the basis of iiNet not supplying those users with the 'actual means' of infringement.<sup>19</sup> The mandatory nature of those factors is explained by the legislature as follows: "In determining ... whether or not a person has authorised the doing in Australia of any act comprised in the copyright ... *the matters that must be taken into account include the following*" [listing the three codified factors].<sup>20</sup> The court devised a threshold criterion by which 'to authorise' is defined to mean (and seemingly to only mean) to actually provide the 'means'

of infringement. If it withstands appellate review, new judge-made law will be created which will be difficult to reconcile with the modern statutory language and modern authorities, and perhaps will substitute in place of that modern law a principle which loosely resembles pre-1911 law in which secondary liability arose only if one actually caused the infringement.<sup>21</sup> Lindsay summarises his similar view thus:

*The great problem with the reasoning of the judge on this important point is that it reflects neither precedent nor the relevant provisions of the Copyright Act.*<sup>22</sup>

#### *Codified factors one and three: power to prevent and reasonable steps*

In line with a finding of no authorisation for failure by iiNet to supply 'the actual means of infringement', the consideration of the three mandatory factors was consigned in the trial judge's reasoning to obiter.<sup>23</sup> The first was the power in iiNet to prevent the infringing acts. In relation to the identified sample of twenty accounts identified from the AFACT notices, there were two relevant powers in iiNet that were said by the applicants to exist to prevent or avoid infringement, and seemingly if they were exercised by iiNet as a staggered response, that exercise would have averted the litigation. The first was to pass-on to subscribers warning notices once AFACT had provided iiNet with the DtecNet notices. The second was to terminate the iiNet subscriber accounts repeatedly being used for infringement notwithstanding the provision of warning notices. In relation to termination, the applicants pointed to the broad cancellation discretion that iiNet had conferred upon itself in its supply terms. In short, the policy that the applicants wanted iiNet to implement was to pass on warnings to an account holder identified by allocated IP address, and that if repeated infringement occurred by use of the account after the warnings, to terminate the account for a period of time. This is known commonly as 'graduated response'.

For those twenty accounts, the court found that iiNet had no power to prevent the doing of the infringing acts undertaken by those using the internet access supplied to those accounts. Introducing his 'power to prevent' analysis the trial judge referred to his earlier finding that:

*There is a distinction between a precondition to infringement and the 'means' of infringement. Any number of persons may have control over whether a precondition exists, and therefore have the power to prevent the infringement by refusing to provide the precondition, but the Court does not believe that all such persons have the power to prevent the infringement relevant to a finding of authorisation.*<sup>24</sup>

Moreover when dealing with the 'power to prevent' statutory factor, the trial judge conflated the first and third mandatory factors to find that the only judicially recognisable power to prevent was a power that was reasonable to exercise in all the circumstances. As Lindsay points out, it is problematic to interpret a statutory provision which explicitly separates power to prevent from reasonable steps as if Parliament intended that the two be read together.<sup>25</sup> But having joined

14 *Roadshow Films*, [124].

15 *University of New South Wales v Moorhouse* (1975) 133 CLR 1, 13.

16 *Roadshow Films*, [382].

17 *Roadshow Films*, [400]-[401].

18 *Roadshow Films*, [402].

19 *Roadshow Films*, [415].

20 *Copyright Act 1968* (Cth), sections 36(1A) and 101(1A).

21 The pre-1911 law is discussed in Part One.

22 Lindsay, above note 1 at 29.9.

23 *Roadshow Films*, [416]: 'Nevertheless, as s 101(1A) is phrased as considerations that 'must' be considered, the Court is compelled to go into further consideration of the issue of authorisation pursuant to the considerations in s 101(1A)(a)-(c) of the Copyright Act.'

24 *Roadshow Films*, [417].

25 Lindsay, above note 1 at 29.11.

those two factors by placing a reasonableness gloss on the legislative text, the trial judge then separated the two aspects of the graduated response which the applicants submitted comprised a power to prevent; passing-on of warning notices leading to termination. By means of this separation, the trial judge considered each aspect of suggested conduct discretely rather than as an integrated whole, against an integrated legal standard (a reasonable to exercise power to prevent) that the trial judge had devised notwithstanding the statutory logic.

Under the court's approach, merely passing on warning notices, without more, was found not to prevent infringement because:

*It may be readily assumed that merely passing on notices could hardly be a power to prevent infringement or a reasonable step without more, given that a person intent on infringing would quickly become aware that such warnings were ineffectual if termination of accounts did not follow ... That is, an ineffectual step is not a power to prevent infringement nor is it a reasonable step. ... That can hardly be a power to prevent infringement.<sup>26</sup>*

It is by no means clear that the trial judge's assumption is correct. It could be equally assumed that the receipt of such a notice in an iiNet subscriber household might have an immediate and permanent chilling effect upon propensity of iiNet users in the household to infringe the applicants' copyright by use of the BitTorrent protocol. However leaving to one side the correctness of this judicial assumption, the court then considered that account termination was not reasonable because:

- The broad contractual power in iiNet to cancel subscriber accounts was largely irrelevant because the applicants were not privy to the contract;
- Notwithstanding the DtectNet information, matters of copyright infringement were too difficult for iiNet to determine;
- The express conditioning of the safe-harbour regime upon iiNet adopting and reasonably implementing 'a policy that provides for termination, in appropriate circumstances, of the accounts of repeat infringers' was not relevant;
- While iiNet could have cancelled an identified subscriber account and thereby stopped infringements continuing by iiNet users, it was not reasonable for iiNet to decide to do that without a court first determining that infringement had occurred;
- Termination would deny an iiNet user internet access for non-infringing purposes, and the evidence revealed that the identified accounts were not predominately used for infringing the applicants' repertoire.<sup>27</sup>

By considering graduated response in this segregated way but against an integrated legal standard, iiNet was found to have no reasonable power to prevent infringement. The trial judge's post script to the analysis was an echo from 1909.<sup>28</sup> Fault lay with the applicants for choosing the wrong respondent. The trial judge's observation was that iiNet:

*does not stand in the way of the applicants pursuing those who have directly infringed their copyright nor in the way of the applicants pursuing any of the constituent parts of the BitTorrent system for authorisation.<sup>29</sup>*

#### *Codified factor two: nature of the relationship*

The nature of the relationship between iiNet and the primary infringers was also considered by way of obiter. The trial judge found that there was a direct contractual relationship between iiNet subscribers who infringed, and a more distant relationship between iiNet and non-subscribers who used iiNet internet access services to infringe – for example a member of the household of an iiNet subscriber. The nature of the relationship between a supplier and consumer of internet access in gigabytes (the file-sharing of audio-visual material is notoriously bandwidth intensive) did not lead to a finding that it was in iiNet's financial interest that its customers infringed copyright in the applicants' repertoire.<sup>30</sup> To support that analysis, the court observed that in respect of the 20 identified accounts from the AFACT notices 'only half of the subscribers moved up to a higher plan in the period examined, and one of those ten subsequently downgraded back to their original plan'.<sup>31</sup> However it is far from clear that such evidence supports the court's analysis, unless in that period (July 2008 to August 2009) the average plan-upgrade rate across all Australian household broadband subscribers was at 45-50% or higher. No such evidence was referred to by the trial judge.

### **Fault lay with the applicants for choosing the wrong respondent**

#### *Other factors: knowledge in, inducement by or other conduct of iiNet*

The consideration by way of obiter of how the three codified factors applied to iiNet's position led the court to reinforce its conclusion that no act of authorisation had occurred. Other arguments made by the applicants to claim iiNet's authorisation liability relied upon three main types of evidence.

First was evidence of specific knowledge in iiNet of infringement. The trial judge, based upon admissions by the iiNet Chief Executive under cross-examination, found that iiNet had (at least during the course of the litigation) been provided with sufficient information to have understandable notice of infringements arising by use of specific iiNet subscribers' accounts.<sup>32</sup> The court found however that such knowledge of infringement, even if coupled with the power to prevent such infringement, "is not, ipso facto, authorisation" in view of its earlier analysis.<sup>33</sup> It is this holding that will be a central issue of contention in any appeal. The applicants' case on authorisation is that any ISP has an obvious power to prevent infringing use undertaken using one of its subscriber's account, and that power is converted to authorisation of that use at least when the ISP has been given specific notice of ongoing infringing use, chooses to sit on its hands.

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26 *Roadshow Films*, [433].

27 *Roadshow Films*, [425]-[436]. Also iiNet submitted that it was unlawful under the *Telecommunications Act 1997* (Cth) (**Telecommunications Act**) to terminate a subscribers account on the basis of the DtectNet information. This was said by iiNet to arise in so far as to terminate an account in reliance upon that DtectNet information would be to make use of information relating to the contents of communications carried by iiNet for a reason not authorised by the Telecommunications Act. This argument failed because of a defence in the Telecommunication Act that the trial judge considered would have applied had termination been effected in those circumstances. That defence excused employee conduct done in performance of duties as an employee. The trial judge considered that if an iiNet employee used the DtectNet information to terminate an account, this defence would have applied because of the contractual discretion in iiNet to terminate for illegal use: *Roadshow Films*, [508]-[532].

28 Part One, text associated with note 6.

29 *Roadshow Films*, [445].

30 *Roadshow Films*, [452].

31 *Roadshow Films*, [551] and [235].

32 *Roadshow Films*, [471].

33 *Roadshow Films*, [472].



Second, the applicants pointed to evidence of iiNet overtly inducing infringement. In particular an iiNet radio advertisement explained what a 'gig' was in these terms: "A gig is about 500 hi-res photos or about 300 songs or about 5 episodes of *The Golden Girls*".<sup>34</sup> *The Golden Girls* was a television program series that was not available for online distribution in any authorised form and comprised a title in the applicants' repertoire.<sup>35</sup>

When cross-examined on the selection of *The Golden Girls* example for the advertisement, the iiNet Chief Executive stated it "was a very unfortunate choice". It is difficult to avoid the conclusion that at the time of the advertisement iiNet was at least careless about whether or not its subscribers downloaded infringing material. Far from considering this an admission of indifference, the trial judge made these findings about the use of the advertisement:

*The reference to Golden Girls was clearly intended to be humorous given its somewhat less than contemporary relevance. Indeed, the joke is that it is highly unlikely that someone would download an episode of the Golden Girls. It is not an invitation to download the Golden Girls. Rather, it is a tongue-in-cheek reference to a section of popular culture. The Court does not understand why [the iiNet Chief Executive] found it necessary to be so apologetic about the advertisement in his cross-examination.*<sup>36</sup>

It is perhaps surprising that the trial judge was able to objectively identify this intended humour. It seems clear enough that no humour was intended in the references to the 500 hi-res photos or 300 songs. Given this was a radio advertisement directed to 'non-technically minded people', objectively considered the advertisement might have been directed to a demographic that was expected by iiNet to have a positive preference for consuming *The Golden Girls*.

Third, there was the conduct of iiNet in forwarding the applicants' infringement notices to the Western Australian police. At the time of the initiation of the proceedings iiNet publicised in a November 2008 press release that the AFACT notices had been forwarded by iiNet to the police, and that AFACT had been advised by iiNet that "their complaints had been forwarded to law enforcement agencies and that they should follow the matter up with them".<sup>37</sup> The evidence of iiNet's general position – that copyright infringement undertaken by use of iiNet subscriber accounts was a police matter and not a matter to trouble iiNet with – was not dealt with substantively by the court.<sup>38</sup> For example, the above statement in the iiNet press release, and similar statements in iiNet correspondence to AFACT, was not included in the judgment. This is very surprising. A careful

reader of the judgment would not discover that this on-forwarding of the notices to the police was central to iiNet's response to the notices.<sup>39</sup> The self-promoted conduct of iiNet in on-forwarding the notices seems on its face to go to issues such as: iiNet's belief in the credibility of the notices; iiNet's knowledge about the likelihood of infringement; whether the steps that iiNet took in on-forwarding the notices to the police and publicly promoting that conduct were reasonable steps to prevent or avoid infringement; and the relevance of the conduct to any existence of a repeat-infringer policy for safe-harbour purposes. Presumably any appellate court will be asked to reconsider this evidence.<sup>40</sup>

### ***The submission of iiNet was that its unwritten posture – indifference unless subjected to court order – could amount to a qualifying policy for the regime is contrary to the object and purpose safe-harbour regime***

#### **Mere use of facilities provided authorisation exception**

Having established that there was no authorisation, the discussion of the 'mere use of facilities' exception was obiter. As explained in Part One, under a statutory authorisation exception the mere use of communications facilities provided by a defendant could not, without more, amount to authorisation.<sup>41</sup> However, and inconsistent with the trial judge's 'actual supply of means' theory of authorisation, the exception presupposes the existence of authorisation liability arises simply from the strong power that the provider of such facilities has to prevent resultant communications occurring over the network.<sup>42</sup> This inconsistency was explained away by the trial judge with the observation "it would appear that [the exception] provides protection when it is not needed".<sup>43</sup> That observation might be true if the trial judge's approach to authorisation liability were vindicated on final appeal. However, a more cogent explanation of the operation of the provision is found in the relevant Second Reading speech.<sup>44</sup> That explanation suggests that the trial judge's approach to authorisation liability at least is inconsistent with statutory purpose. Prior authority (more consistent with statutory purpose) of *KaZaa* and *Cooper* had established that actual knowledge or encouragement of the primary infringement took a defendant outside the protection of the provision.<sup>45</sup> That was because knowledge or encouragement

34 *Roadshow Films*, [480].

35 *Roadshow Films*, Transcript of proceedings, 2 November 2009, page 694.

36 *Roadshow Films*, [482].

37 The iiNet Media Release dated 20 November 2008 remains available at: [http://www.iinet.net.au/press/releases/201108\\_iinet\\_to\\_defend\\_court\\_action.pdf](http://www.iinet.net.au/press/releases/201108_iinet_to_defend_court_action.pdf)

38 The sole, quixotic, reference in the judgment was "much of the applicants' submissions, particularly in criticism of the respondent's practice of forwarding the AFACT Notices to the police, are predicated on an assumption that the actions of the infringing iiNet users are not criminal actions": *Roadshow Films*, [352].

39 In emails to AFACT dated 25 July 2008, 12 August 2008, and 29 August 2008 (all in evidence) iiNet, (and consistent with its Press Release) stated and then reiterated the on-forwarding, providing the contact details of the relevant Western Australian police officer to whom iiNet had passed on the notices.

40 A ground of appeal is that the trial judge erred in 'failing to refer to and adopt relevant evidence before the Court': *Roadshow Films* Notice of Appeal filed 25 February 2010.

41 *Copyright Act 1968* (Cth), sections 39B and 112E.

42 *Cooper v Universal Music Australia Pty Ltd* [2006] FCAFC 187, [32].

43 *Roadshow Films*, [573].

44 Thus, and as explained in Part One, liability created by *Music on hold* case was dealt with via section 22(6). "Typically, the person responsible for determining the content of copyright material online would be a web site proprietor, not a carrier or Internet service provider. Under the amendments, therefore, carriers and Internet service providers will not be directly liable for communicating material to the public if they are not responsible for determining the content of the material": House of Representatives, Chamber Hansard, Copyright Amendment (Digital Agenda) Bill 1999 Second Reading Speech, Daryl Williams MP, 2 September 1999, 9750. Sections 39B and 112E dealt with the consequences for carriers and internet service providers of the codified authorisation liability under the three mandatory, control-based factors. 'The reforms provide that a carrier or Internet service provider will not be taken to have authorised an infringement of copyright merely through the provision of facilities on which the infringement occurs. Further, the bill provides an inclusive list of factors to assist in determining whether the authorisation of an infringement has occurred': *ibid*

45 *Roadshow Films*, [568]-[569].



meant that the authorisation arose from more than the mere use of the facilities that had been provided by the defendant. In *Roadshow Films* the trial judge had not found encouragement but had found specific knowledge of infringements in iiNet arising from the applicants' notices. As such the court, considered itself bound by that prior authority to find that the 'mere use of facilities' defence would not have been available to iiNet.<sup>46</sup>

### The safe-harbour limitation on remedies

The final aspect of the trial judgment – also obiter in view of the earlier finding – was iiNet's eligibility for the limitation on remedies provided by the safe-harbour regime also explained in Part One. If liability had been found in iiNet, and if it qualified for the regime, its liability would have been confined to disabling access to offshore online locations and termination of specified customer accounts.<sup>47</sup> However qualification for the regime required that iiNet adopt and reasonably implement a policy that provides for termination, in appropriate circumstances, of the accounts of repeat infringers.<sup>48</sup> What was iiNet's relevant policy? It had no written policy.<sup>49</sup> Presumably the conduct of on-forwarding the AFACT notices to the Western Australian police did not seem to reflect any relevant policy. Rather, the Chief Executive gave evidence that iiNet's posture was that if it was ordered by a court to terminate the account of an infringer, it would so terminate. But, absent a subscriber's admission of copyright infringement, it would not terminate an account without a court finding of infringement and a court order.<sup>50</sup> In other words, its policy was that it would not act in contempt of such a court order. As explained in Part One, the underlying public policy explanation of the safe-harbour regime is to protect ISPs from liability arising from their customers' infringing acts in a way which minimizes both the prevalence of those infringing acts and that imposes least litigation cost on all concerned. The submission of iiNet was that its unwritten posture – indifference unless subjected to court order – could amount to a qualifying policy for the regime is utterly contrary to the object and purpose safe-harbour regime. However, it was a submission which was wholly accepted by the trial judge, who found that on the basis of that unwritten posture iiNet had adopted and reasonably implemented a policy that terminated the accounts of repeat-infringers. This finding too will be likely to attract appellate court scrutiny.

### Concluding comments

The trial judge's decision in *Roadshow Films* has as its core the holding that to authorise the exercise of an exclusive right means to actually supply the 'means' by which the exercise occurs, as opposed to supplying a pre-condition necessary to exercise the right. As applied in the case, the provision of internet access by iiNet was found to merely supply the latter and could therefore never comprise an act of authorisation. Also central to the decision was the interpretation of this statutory language: "the matters that must be taken into account include the following". The court determines the non-existence of authorisation liability 'regardless' of the matters there

set down. The control-based nature of the three codified factors, coupled with the existence of the authorisation defence for the mere use of communications facilities and the safe-harbour for transmission and connection services, all suggest a legislative intention that is contrary to the court's approach.

An important aspect of the applicants' case was that authorisation liability at least arose from the provision of notice of infringements. The exact position of the alleged authoriser, including its knowledge or indifference, has long had relevance in the assessment of authorisation liability. This is possibly related to the joint introduction (and often in the early cases the joint construction) of general authorisation liability and specific liability for knowingly permitting a venue to be used for an infringing performance.<sup>51</sup> In *Roadshow Films*, notwithstanding the lengths that the applicants went to provide notices, the finding was that knowledge of infringement, even if coupled with the power to prevent such infringement, "is not, ipso facto, authorisation".<sup>52</sup> This finding appears to be a far cry from modern authorities in which there has been a direct relationship of on-going control between the alleged authoriser and infringer.

***the finding was that knowledge of infringement, even if coupled with the power to prevent such infringement, "is not, ipso facto, authorisation"***

Appeal courts will likely reconsider the position of iiNet. If the core holding of the trial judge is upheld, it will create conditions for legislative intervention along lines that have occurred elsewhere. For example, the French have recently created a regulatory body known as HADOPI (the High Authority for the Dissemination of Works and the Protection of Rights on the Internet), which has taken relations between ISPs and copyright owners out of a cooperative scheme and into a regulatory one.<sup>53</sup> Similar is recent reforms in the UK. These are overseen by another regulatory body Ofcom. The new UK law requires ISPs to notify their subscribers if the IP addresses associated with those subscribers are reported by copyright owners, and to retain records on subscribers so reported in a form available to copyright owners through court order.<sup>54</sup> While industry cooperation is usually considered preferable to bureaucratic intervention, one of the paradoxes of the current court holding is that, if upheld, it will likely accelerate the Australian Parliament in regulating the copyright mores of ISPs.<sup>55</sup>

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46 *Roadshow Films*, [578].

47 As explained in Part One.

48 The public policy reasons for such a regime were explained in Part One.

49 '[The iiNet Chief executive] made clear that the detail of the policy does not exist other than in his mind': *Roadshow Films*, [614].

50 *Roadshow Films*, [614].

51 As explained in Part One.

52 *Roadshow Films*, [472].

53 See generally: Alexandre Entraygues, 'The HADOPI Law - New French Rules For Creation On The Internet' (2009) 20 *Entertainment Law Review* 264.

54 See generally: Ofcom, *Online Infringement of Copyright and the Digital Economy Act 2010*

*Draft Initial Obligations Code*, 28 May 2010 available at <http://www.ofcom.org.uk/consult/condocs/copyright-infringement/condoc.pdf>

55 On the choice between the 'private law' solution of inter-industry cooperation (effected through codes of conduct managing ISP authorisation liability) and the 'public law' solution of industry regulation (effected through a body such as the Australian Communication and Media Authority policing ISP handling of copyright notices) see the discussion by Andrew Wiseman and Matt Vitins, "'The means, baby'" – ISP responsibility for copyright infringement and the need for an industry code of practice' (2010) 81 *Intellectual Property Forum* 13.

# The UK Defamation Bill 2010: A Review

Jason Bosland examines proposals for amendment of UK libel law.\*

## Introduction

Over the past year there has been growing scrutiny of the operation of libel law in the United Kingdom. This scrutiny has been driven, at least in part, by the national press and by two freedom of speech lobby groups, Index on Censorship and English PEN, who have led an effective campaign to position English libel law as having a disproportionate and anti-democratic burden on freedom of speech. This campaign has led to a published report calling for substantial reform to the existing libel regime.<sup>1</sup>

## *The most frequent criticisms directed towards English libel law relate to the cause of action – in particular, its ‘burden of proof’ – and what are considered to be inadequate defences*

The topic of libel reform has also been the subject of a number of recent official inquiries and consultations – in particular, a wide-ranging inquiry into press standards by the House of Commons Select Committee on Culture, Media and Sport,<sup>2</sup> and two separate consultations by the Ministry of Justice.<sup>3</sup> The reform recommendations from these various inquiries were considered by a Working Group on Libel Reform, established by former Lord Chancellor Jack Straw.<sup>4</sup> The Working Group’s preferred options, in turn, effectively formed the basis of the previous UK government’s commitment to libel reform<sup>5</sup> – a commitment which, at least in principle, the new coalition government has agreed to continue.<sup>6</sup>

On the 26 May 2010, Liberal Democrat peer Lord Lester introduced the Defamation Bill 2010 into the House of Lords in an attempt to deal with the more substantive shortcomings of libel law in the UK. While the new coalition government has not yet expressed public support for the Bill, it is certain to provide a starting point for further

development and rigorous debate. This article canvasses the perceived problems with the current law and comments on the solutions proposed in Lord Lester’s Bill.

## Background – Perceived ‘Problems’ with English Libel Law

The debate over libel reform has centred around three perceived ‘problems’ with current English libel law,<sup>7</sup> each of which is said to cause a stifling of freedom of speech: the substance of the law (the cause of action and defences); the prevalence of ‘libel tourism’; and, the costs associated with libel litigation. A legislative amendment to deal with the specific issue of costs in libel litigation was attempted earlier this year but was defeated at the committee stage in the House of Lords.<sup>8</sup> It remains unclear, considering the strong criticisms directed at the proposed amendment,<sup>9</sup> whether the coalition will seek to resuscitate this reform initiative in its current form. This article will not consider the costs issue further.

### Cause of action and inadequate defences

The most frequent criticisms directed towards English libel law relate to the cause of action – in particular, its ‘burden of proof’ – and what are considered to be inadequate defences.

Libel is complete as soon as the defamatory allegations concerning the claimant are published. This means that a claimant is not required to prove that the published allegations are false<sup>10</sup> and general damages are presumed. Rather the burden is on the publisher to rebut the ‘presumption of falsity’ by proving that the allegations are true (otherwise known as the defence of ‘justification’).<sup>11</sup> Truth, however, will sometimes be difficult, if not impossible, to prove.<sup>12</sup> Moreover, even where truth can be established it will often lead to protracted and expensive litigation. Absent any other defence, these evidentiary burdens are said to have, as it is often called, a ‘chilling effect’ on speech.<sup>13</sup> Due to this chilling effect, it has frequently been argued that this burden of proof needs to be reversed.<sup>14</sup>

\* This article was written prior to the release of the Explanatory Notes to the Defamation Bill (available at <http://inform.files.wordpress.com/2010/06/defamation-bill-2010-explanatory-notes.pdf>). The Explanatory Notes, however, do not alter the author’s interpretation and opinion of the Bill.

1 English PEN and Index on Censorship, *Free Speech is Not For Sale* (2009), available at <[http://libelreform.org/reports/LibelDoc\\_LowRes.pdf](http://libelreform.org/reports/LibelDoc_LowRes.pdf)> (last accessed 11 June 2010).

2 House of Commons Culture, Media and Sport Committee, *Press Standards and Libel: Report together with formal minutes* (9 February 2010), available at <<http://www.publications.parliament.uk/pa/cm/cmcomeds.htm>>.

3 Ministry of Justice, *Controlling Costs in Defamation Proceedings-Reducing Conditional Fee Agreement Success Fees: Response to Consultation* (24 September 2009)

available at <<https://www.justice.gov.uk/consultations/docs/response-conditional-fees-consultation.pdf>>; Ministry of Justice, *Defamation and the Internet: The Multiple Publication Rule* (23 March 2010), available at <<http://www.justice.gov.uk/consultations/defamation-internet-consultation-paper.htm>>.

4 Ministry of Justice, *Report of the Libel Working Group* (23 March 2010), available at <<http://www.justice.gov.uk/publications/docs/libel-working-group-report.pdf>>.

5 Jack Straw, ‘Reform of Libel Laws will Protect Freedom of Expression’, *Guardian Online*, 23 March 2010, available at <<http://www.guardian.co.uk/media/2010/mar/23/jack-straw-libel-reform>> (last accessed 4 June 2010).

6 See *The Coalition: Our Programme for Government*, available at <<http://www.libdems.org.uk/siteFiles/resources/PDF/Government/Coalition-Programme.pdf>>.

7 It should be noted that these perceived problems do not necessarily represent the views of the author.

8 See *The Conditional Fee Agreements (Amendment) Order 2010*, available at <[http://www.opsi.gov.uk/si/si2010/draft/ukdsi\\_9780111496510\\_en\\_1](http://www.opsi.gov.uk/si/si2010/draft/ukdsi_9780111496510_en_1)>. This amendment was introduced following a Ministry of Justice consultation into cost issues in libel litigation: see Ministry of Justice, *Controlling Costs in Defamation Proceedings-Reducing Conditional Fee Agreement Success Fees: Consultation Paper*, (24 February 2009) available at <<http://www.justice.gov.uk/about/docs/costs-defamation-proceedings-consultation.pdf>>; Ministry of Justice, ‘Controlling Costs in Defamation Proceedings-Reducing Conditional Fee Agreement Success Fees: Response to Consultation’, (24 September)

available at <<https://www.justice.gov.uk/consultations/docs/response-conditional-fees-consultation.pdf>>.

9 See House of Lords, *Merits of Statutory Instruments Committee – Fourteenth Report* (16 March 2010), available at <<http://www.publications.parliament.uk/pa/ld200910/ldselect/ldmerit/94/9408.htm>>.

10 See *Belt v Lawes* (1882) 51 LQB 359, 361; *Reynolds v Times Newspapers* [2001] 2 AC 127, 192.

11 *Ibid.*

12 On the particular difficulties of proving truth in defamation actions, see G Robertson and A Nicol, *Media Law* (London: Penguin Books, 5<sup>th</sup> ed, 2008), 145-147.

13 See E Barendt, L Lustgarten, K Norrie and H Stephenson, *Libel and the Media: The Chilling Effect* (Clarendon Press: 1997); A T Kenyon, ‘Lange and Reynolds Qualified Privilege: Australian and English Defamation Law and Practice’ (2004) 28 MULR 406, 407.

14 See House of Commons Culture, Media and Sport Committee, *Press Standards and Libel: Report together with formal minutes* (9 February 2010), available at <<http://www.publications.parliament.uk/pa/cm/cmcomeds.htm>>, 39-40.

In addition to the difficulties faced in establishing truth, it is argued that other defences to defamation also fall short in providing adequate safeguards for freedom of expression. The fair comment defence, for example, will often encounter the same difficulties as the justification defence, with the defendant having to prove the truth of the material upon which the fair comment is based.<sup>15</sup> A particular concern in this regard is the potential stifling effect that this may have on academic and scientific literature and debate.<sup>16</sup> Indeed, the recent litigation against Simon Singh over his criticism of the British Chiropractic Association<sup>17</sup> has drawn attention to what is claimed to be a 'narrow' approach to the fair comment defence.<sup>18</sup>

The main criticism in relation to defences, however, relates to the perception that there is no effective 'public interest' defence to defamation.<sup>19</sup> In 1999, the *House of Lords in Reynolds v Times Newspapers Pty Ltd*<sup>20</sup> expanded traditional common law qualified privilege to provide a 'public interest'/'responsible journalism' defence (called 'Reynolds privilege'). The defence, however, has been criticised on the basis that the lower courts have frustrated its potential by applying it restrictively. This criticism has continued even following *Jameel v Wall Street Journal Europe Sprl*,<sup>21</sup> where the House of Lords endorsed a broad and flexible approach to the privilege.<sup>22</sup> In addition to concerns over its availability, newspapers and defence lawyers have claimed that the costs associated with complying with and litigating *Reynolds* privilege make it much less useful than it might otherwise be.<sup>23</sup>

#### Multiple publication rule and internet publication

What is known as the 'multiple publication rule' is also said to present significant problems, especially in relation to internet publications. This rule provides that each separate publication (copy or communication) of material forms a new cause of action.<sup>24</sup> Applying this rule, the courts have confirmed that the one year limitation period will begin to run each time the same article is accessed (downloaded) via the internet.<sup>25</sup> This means that an article, for example, could be the subject of a defamation action many years after its original publication date – perhaps even indefinitely. Obvious difficulties, therefore, arise in relation to the liability for publicly available digital archives and the possibility of having to defend material that was created many years earlier.<sup>26</sup>

Two possible solutions have been advocated as alternatives to the multiple publication rule. The first is to adopt a 'single publication rule', under which only one cause of action can ever arise in respect of *all* copies of defamatory material.<sup>27</sup> Another solution is to impose

## The main criticism in relation to defences is the perception that there is no effective 'public interest' defence to defamation

a one-year limitation period from the date that the material is first published or first appeared on the internet.<sup>28</sup>

#### Libel tourism

A further problem identified with English libel law is said to be the phenomenon of 'libel tourism'. Libel tourism describes the situation where a non-English libel claimant seeks relief in the English courts against a non-English defendant for a publication which has not originated in England but which has been published there to at least some extent (ie incidental publication). This arises due to the multiple publication rule and the supposed willingness of the English courts to accept jurisdiction over foreign publications.<sup>29</sup> Thus, the multiple publication rule operates such that an English tort will be committed with each individual publication of defamatory matter *in England*, even where it has originated elsewhere. In turn, English courts will generally accept jurisdiction<sup>30</sup> where a 'real and substantial tort' has been committed in England,<sup>31</sup> judged by reference to the claimant's reputation within the jurisdiction and the extent of publication. This test, according to critics, is currently all too easy to satisfy, allowing foreign claimants with minimal local reputations to seek redress for publications where only a fraction of the total number have occurred in England.

The particular concerns over libel tourism are twofold. The first is a purely domestic concern – that foreign claimants who have suffered more harm in another jurisdiction should not be able to bring their actions in England. The second concerns the chilling effect that libel tourism is said to cause internationally – in particular, that publishers in every other country in the world are currently required to consider the threat of being sued in England for the 'incidental' publication of material that might take place there. This is claimed to have the practical effect of exporting 'draconian' English libel laws to the rest of the world, irrespective of the balance struck between libel and free speech in jurisdictions where publications originate. Indeed, some states in the US, where freedom of speech receives much greater protection than in the UK, have responded to the specific threat of libel tour-

15 *Lyon v Daily Telegraph Ltd* [1943] KB 746 (CA).

16 See House of Commons Culture, Media and Sport Committee, *Press Standards and Libel: Report together with formal minutes* (9 February 2010), available at < <http://www.publications.parliament.uk/pa/cm/cmcmuds.htm>>, 41.

17 *British Chiropractic Association v Singh* [2010] EWCA Civ 350.

18 See English PEN and Index on Censorship, *Free Speech is Not For Sale* (2009), available at < [http://libelreform.org/reports/LibelDoc\\_LowRes.pdf](http://libelreform.org/reports/LibelDoc_LowRes.pdf)> (last accessed 11 June 2010), 9.

19 *Ibid*; House of Commons Culture, Media and Sport Committee, *Press Standards and Libel: Report together with formal minutes* (9 February 2010), available at < <http://www.publications.parliament.uk/pa/cm/cmcmuds.htm>>, 41-45.

20 [2001] 2 AC 127 (HL).

21 [2006] UKHL 44.

22 See House of Commons Culture, Media and Sport Committee, *Press Standards and Libel: Report together with formal minutes* (9 February 2010), available at < <http://www.publications.parliament.uk/pa/cm/cmcmuds.htm>>, 41-45 (in particular the summary of submissions).

23 *Ibid*.

24 This rule was established in the *Duke of Brunswick v Harmer* [1849] 14 QB 185.

25 See *Loutchansky v Times Newspapers Pty Ltd* [2001] EWCA Civ 1805, [73]-[76]. It should be noted that an appeal to the European Court of Human Rights did not find that the publication rule amounted to a breach of Article 10 (freedom of expression) of the European Convention on Human Rights and Fundamental Freedoms: see *Times Newspapers Ltd v United Kingdom* (App no 3002/03 and 26373/03, 10 March 2009).

26 Ministry of Justice, *Defamation and the Internet: The Multiple Publication Rule* (23 March 2010), available at <<http://www.justice.gov.uk/consultations/defamation-internet-consultation-paper.htm>>.

27 *Ibid*, 22 (where this solution was recommended).

28 See House of Commons Culture, Media and Sport Committee, *Press Standards and Libel: Report together with formal minutes* (9 February 2010), available at < <http://www.publications.parliament.uk/pa/cm/cmcmuds.htm>>, 59 (where this solution was recommended).

29 For a recent academic discussion, see R Garnett and M Richardson, 'Libel Tourism or Just Redress? Reconciling the (English) Right to Reputation with the (American) Right to Free Speech in Cross-Border Libel Cases' (2009) 5(3) *Journal of Private International Law* 471

30 Either by granting leave to serve outside of the jurisdiction or by rejected an application to stay proceedings on the basis of *forum non conveniens*: see, eg, *Berezovsky v Michaels* [2000] UKHL 25; *Jameel v Dow Jones & Co* [2005] EWCA Civ 75.

31 See, eg, *Berezovsky v Michaels* [2000] UKHL 25.



ism by enacting legislation to prevent the enforcement of foreign libel judgments.<sup>32</sup>

## Main features of the Defamation Bill 2010

The Defamation Bill purports to respond to the above shortcomings by limiting the availability of the cause of action and by enhancing the scope of the defences.

### Cause of action

#### Multiple publication

Clause 10 provides a solution to the problems raised by the multiple publication rule. It applies to any publication which (1) is published by the same person on multiple occasions and (2) on each occasion, has the same, or substantially the same, content. It provides that the date of each publication is deemed to be the date of the first publication (clause 10(1)(a)) and that any cause of action is to be treated as having accrued on that date (clause 10(1)(b)). It does not, as suggested elsewhere,<sup>33</sup> reverse the common law rule that each new publication gives rise to a new cause of action. Rather, subsequent publications will form a new cause of action but such cause of action will be said to accrue on the date of the original publication. The practical effect, of course, is that the claimant will be unable to rely on such cause of action for publications which occur after the limitation period.

This is a significant proposal and is likely to resolve many of the difficulties faced by internet publishers and those in control of archives. One potential limitation of the proposal, however, relates to the requirement that the publications be made by 'the same person'. This would appear to exclude, for example, the owners of third party archives and online databases to which material is licensed. The scope of this aspect of the Bill might warrant expansion and should be subject to further scrutiny as to its practical operation.

#### Bodies corporate

Clause 11 provides that a body corporate must show, in order to pursue an action, that the publication "has caused, or is likely to cause, substantial financial loss to the body corporate". This measure is a response to the concern that corporations can use the threat of defamation litigation to silence critics and stifle freedom of speech.<sup>34</sup>

It should be noted, however, that unlike the changes introduced in Australia in 2005,<sup>35</sup> the proposal does not impose a blanket ban on the ability for corporations to sue. It simply requires that corporations prove the likelihood of financial harm before the court will allow a corporate claimant to pursue an action. One potential issue with this 'hurdle' approach, already raised elsewhere,<sup>36</sup> is that it is likely to lead to increased pre-trial hearings and an increase in litigation cost.

Another concern – and one that needs to be subject to further scrutiny – is that the proposal contains no exception, as in the Australian legislation,<sup>37</sup> which would allow non-government organisations or smaller corporations to sue. This is significant because smaller corporations and especially NGOs are likely to find it much more difficult to prove actual or likely financial loss, yet may nevertheless be rightly seen as deserving claimants.

### Substantial harm

Clause 12 provides a mandatory 'strike out' mechanism which would *require* that an action for defamation be struck out unless the *claimant* can show that:

1. the publication has caused substantial harm to the claimant's reputation; or
2. it is likely that such harm will be caused to the claimant's reputation by the publication.

The aim of this provision is to avoid the 'presumption of damage' under the common law. There are, however, two issues with this provision. First, it might be questioned whether this amendment is really necessary considering the existing grounds available to the court to strike out a claimant's case. Thus, on the application of a defendant a court already has the power to strike out a case as an abuse of process where a 'real and substantial tort' has not been committed.<sup>38</sup> Indeed, it is difficult to see how the test of 'substantial harm' would differ from a 'real and substantial tort'. It would appear that the only difference would be that the proposed provision makes strike out mandatory. This leads to the second problem. If strike out is mandatory, it appears that the claimant would have to prove substantial harm prior to going to trial. This will inevitably lead to an increase in pre-trial hearings and an increase in litigation costs. Considering this, it would appear much more sensible to leave the law as it currently stands – where it is incumbent upon the defendant to raise the issue under abuse of process – and reject this proposal.

### Multi-jurisdictional publications

Clause 13 attempts to introduce a solution to libel tourism. It provides that where the court is satisfied that the publication has also been published outside of the jurisdiction:

*no harmful event is to be regarded as having occurred in relation to the claimant unless the publication in the jurisdiction can reasonably be regarded as having caused substantial harm to the claimant's reputation having regard to the extent of the publication elsewhere.*

A number of questions hang over the operation of this proposal. The first is that it is unclear how looking at the extent of publication *outside* the jurisdiction could sensibly inform the court's assessment of the harm caused by a tort committed *within* the jurisdiction. Rather, it appears that the provision seeks to achieve its aim of combating libel tourism by requiring the court to make a false or fabricated assessment of local harm – false in the sense that the court is put in the absurd position of having to look at 'apples' (extent of foreign publication) under the pretext of assessing 'oranges' (local harm). Surely, pretending that local harm has not been suffered, or has not been suffered to its true extent, is an unsatisfactory way of dealing with the real 'problem' – that is, the ability for foreign litigants to seek redress for that harm.

The second question relates to the compatibility of the provision with Council Regulation 44/2001 (known as the Judgment Regulation), which governs jurisdiction issues in civil litigation in the European Union. The Judgment Regulation states that a person domiciled in a Member State shall be sued in the courts of that state<sup>39</sup> or in the

32 For a discussion of this, see House of Commons Culture, Media and Sport Committee, *Press Standards and Libel: Report together with formal minutes* (9 February 2010), available at < <http://www.publications.parliament.uk/pa/cm/cmcmums.htm>>, 53. This was prompted largely by the case involving Dr Rachel Ehrenfeld and the action brought by Khalid Bin Mahfouz regarding allegations made in Ehrenfeld's book *Funding Evil: How Terrorism is Financed and How to Stop It*.

33 Inforrm's Blog, 'Lord Lester's Defamation Bill – An Overview', 27 May 2010, available at <<http://inforrm.wordpress.com/2010/05/27/lord-lesters-defamation-bill-an-overview/>>.

34 See, House of Commons Culture, Media and Sport Committee, *Press Standards and Libel: Report together with formal minutes* (9 February 2010), available at < <http://www.publications.parliament.uk/pa/cm/cmcmums.htm>>, 46-48.

35 See, eg, *Defamation Act 2005* (NSW), s 9.

36 Inforrm's Blog, 'Lord Lester's Defamation Bill – An Overview', 27 May 2010, available at <<http://inforrm.wordpress.com/2010/05/27/lord-lesters-defamation-bill-an-overview/>>.

37 *Defamation Act 2005* (NSW), s 9.

38 See *Jameel v Dow Jones & Co* [2005] EWCA Civ 75.

39 *Council Regulation 44/2001*, article 2(1).



courts of each Member State where the 'harmful event' occurred.<sup>40</sup> The European Court of Justice in *Shevill v Presse Alliance*<sup>41</sup> held that where a person is sued in the court of the Member State in which he or she is domiciled, the court *must* accept jurisdiction and that court has jurisdiction to award damages for all harm caused by the publication. Alternatively, where a claimant seeks to sue a defendant in a Member State in which the defendant is not domiciled, the court of the Member State can award only damage for harm caused by a 'harmful event' in that Member State.

It has been suggested that clause 13 of the Bill, if it were to become law, would be in breach of these rules.<sup>42</sup> This, however, is not the case. Clause 13 does not say anything about the court's jurisdiction; rather, it is directed to whether or not a harmful event has occurred in the UK. A UK court will still be required to accept jurisdiction where the defendant is domiciled in the UK. However, the operation of clause 13 may mean that there is no case to answer in relation to any publication that has occurred in the UK, even if there *is* a case to answer for the publication of the defamatory matter elsewhere. *Shevill v Press Alliance* makes it clear that this is not inconsistent with the Convention – "the sole object of the Convention is to determine which court or courts have jurisdiction to hear the dispute... It does not, however, specify the circumstances in which the event giving rise to the harm may be considered to be harmful to the victim."<sup>43</sup>

## Defences

Part 1 of the Bill deals with the defences of truth, honest opinion and responsible publication. Apart from a couple of exceptions, this aspect of the Bill is unlikely to have the intended effect of granting significantly enhanced protection to freedom of speech. This is because many of the proposed provisions simply restate defences already available at common law or repeat defences currently provided for in other statutes.

### Truth

Clause 4 of the Bill provides that the common law defence of 'justification' is to be renamed 'truth'. Clause 5, outlining what is required to establish the defence of truth, reiterates the requirement at common law that the matter complained of must be substantially true. In order to establish substantial truth, a defendant may show that the meaning (or meanings) alleged by the claimant are substantially true (clause 5(2)(a)) – again, a reiteration of the common law. Alternatively, clause 5(2)(b) provides that a defendant can assert that the matter or words complained of have a less serious meaning(s) and that such meaning is substantially true. This, however, would already be available at common law under a *Lucas-Box* plea.<sup>44</sup>

Clause 5(4) simply repeats the justification defence currently available under section 5 of the *Defamation Act 1952* (UK). This provision provides that where matter complained of contains two or more distinct allegations and the defendant cannot prove the substantial truth of each allegation, the truth defence will not fail where the allegations that cannot be proved to be true do not materially injure the claimant's reputation having regard to the allegations that *can* be proved true.

Clause 5(3), however, contains an amendment to the truth defence that has the potential to have a significant impact on the extant law, depending on how it is interpreted. It provides that:

*A defence of justification does not fail only because a particular meaning alleged by the claimant is not shown as being sub-*

*stantially true, if that meaning would not materially injure the claimant's reputation having regard to the truth of what the defendant has shown to be substantially true.*

The ambit of this 'exception' to proving the substantial truth of the claimant's meaning is uncertain on the face of the proposed provision. There are at least two possible general approaches that could be taken. The first approach – the broad approach – is to treat clause 5(3) as allowing a defendant to *admit* evidence of additional true material in order to show that the claimant's pleaded meaning does not cause further material injury to his or her reputation, even in circumstances where that additional true material is not contained within the matter and, as is required by clause 5(4), does not go towards establishing the substantial truth of a separate allegation complained of by the claimant. It is unclear how the courts would (if, indeed, they would) limit the types of additional material that could be taken into account. One possibility is that it might be confined to material that is currently admissible in mitigation of damages in defamation cases – for example, the claimant's general bad character as it relates to the allegation<sup>45</sup> or facts relevant to the circumstances in which the defamatory allegations were made.<sup>46</sup>

The narrow interpretation, on the other hand, would confine the additional true material to facts the evidence of which has been admitted in reliance of an *unsuccessful* justification plea. Clause 5(4) (currently section 5 of the *Defamation Act 1952* (UK) already does this in relation to 'partial justification'. At common law, where a claimant alleges that two separate and distinct allegations arise from a publication, a defendant may be able to justify one allegation (partial justification) but not the other. However, rather than using partial justification to mitigate damages, as allowed at common law, clause 5(4) provides a complete defence provided that the undefended allegations do not materially damage the claimant's reputation in light of the true allegations. Clause 5(3) would have the effect of extending this beyond 'partial justification' to include all instances where evidence is admitted in support of a truth defence – for example, where evidence is admitted in order to prove the substantial truth of the claimant's meaning or the defendant's meaning under a *Lucas Box* or *Polly Peck* justification plea.<sup>47</sup> Unlike under a broad interpretation, however, it is likely that clause 5(3) could not be used to support the *admission* of evidence that was not already admitted in support of a legitimate truth defence. This interpretation might be said to be confirmed by the language of the provision, which requires that regard be had to the "truth of what the defendant *has* shown to be substantially true."

### Responsible publication

Clause 1 of the Act provides a defence for 'responsible publication on matters of public interest'. This provision requires that the defendant prove:

- (a) that the words or matters complained of were published for the purposes of, or otherwise in connection with, the discussion of a matter of public interest; and
- (b) the defendant acted responsibly in making the publication.

In deciding whether the defendant acted responsibly, all the circumstances of the case are relevant (clause 1(3)). Sub-clause (4) sets out a list of factors that may be taken into account, many of which have a counterpart in the list of factors enunciated by Lord Nicholls under existing *Reynolds* privilege. Moreover, it is difficult to see how this defence materially differs from *Reynolds* privilege and why the courts would apply it any less restrictively.

40 Council Regulation 44/2001, article 5(3).

41 *Shevill v Presse Alliance* [1995] 2 AC 18 (Case C-68/93).

42 Inforrm's Blog, 'Lord Lester's Defamation Bill – An Overview', 27 May 2010, available at <<http://inforrm.wordpress.com/2010/05/27/lord-lesters-defamation-bill-an-overview/>>.

43 *Shevill v Presse Alliance* [1995] 2 AC 18 (Case C-68/93), [37]-[38].

44 See *Lucas-Box v News Group Newspapers Ltd* [1986] 1 WLR 147.

45 See *Scott v Sampson* (1882) 8 QBD 491.

46 See *Burstein v Times Newspapers* [2001] 1 WLR 579, [41]-[42]; *Turner v News Group Newspapers Ltd* [2006] EWCA Civ 540.

47 For a useful discussion of these pleas, see: AT Kenyon, *Defamation: Comparative Law and Practice* (London: UCL Press, 2006), 80-87.

Sub-clause (5) specifies that one of the factors that may be considered when considering whether the defendant acted responsibly is “whether a publication reports accurately and impartially on a pre-existing matter (for example, that there is a dispute between two parties)...”. This provision, in effect, provides a statutory recasting of the ‘doctrine of reportage’ which has recently emerged under the common law as a particular application of *Reynolds* privilege. This doctrine protects the neutral reporting (republishing) of allegations originally made by a participant to a dispute or controversy of public interest, provided that such report has the effect of reporting the fact that the allegations were made and not their truth.<sup>49</sup>

### Honest opinion

Clause 2 changes the name of the common law defence of fair comment to ‘honest opinion’, while clause 3 defines its scope. This name change is unlikely to have a significant effect on the scope of the defence, considering the prevailing opinion that the label ‘fair comment’ is largely a misnomer<sup>50</sup> – something that the Court of Appeal recently confirmed in the case of *British Chiropractic Association v Singh*.<sup>51</sup> Assuming, then, that ‘comment’ and ‘opinion’ are treated as roughly synonymous, clause 3 amounts to little more than a restatement of the common law. Thus, as under the common law, the honest opinion defence will be established under clause 3 where the following conditions are satisfied:

- the words or matters complained of relate to a matter of public interest (clause 3(2));
- that the ordinary person would consider the words or matter to be expressions of opinion (clause 3(3)); and
- that an honest person could form the opinion on the basis of proper material (clauses 3(4) and (5)).

Clause 3(6)(c) confirms that the material forming the basis of the opinion need not be referred to in the publication itself, which is consistent with the dominant view of the English common law.<sup>52</sup> Clause 6(b), however, does modify the common law in one important respect: it provides that the honest opinion may be based on facts learned by the defendant *after* the publication of the opinion.<sup>53</sup>

Clause 3(8) deals with the republication of opinion material. It provides, in much the same way as the common law,<sup>54</sup> that a defendant cannot rely on the honest opinion defence if (a) he or she knew that the original author did not in fact hold the opinion or (b) the defendant had reason to believe that the original author did not in fact hold the opinion and published it without further inquiry.

### Responsibility for publication

Generally speaking, under the current law – common law<sup>55</sup> and under section 1 of the *Defamation Act 1996* – mere disseminators of material, with the exception of internet service providers and caching services,<sup>56</sup> have the onus of showing that they were not at fault in the dissemination of defamatory material in order to avail themselves of a defence (for example, by showing that they did not have actual knowledge of the defamatory material, did not exercise editorial control or were not negligent as to the content of the publication).

The Bill repeals the section 1 of the *Defamation Act 1996* and replaces it with clause 9(1)(a), which effectively removes the burden on ‘facili-

tators’ to prove lack of fault. ‘Facilitator’ is defined as ‘a person who is concerned only with the transmission or storage of the content of the publication and has no other influence or control over it’ (clause 9(6)). Significantly, it would appear to provide a defence even where a facilitator has *actual knowledge* of the defamatory matter. The most obvious impact of this proposal relates to internet hosts. Currently, under the *Electronic Commerce (EC Directive) Regulations 2002*, internet content hosts are only protected from liability where they (1) do not have actual knowledge, are not aware of facts or circumstances from which the existence of the matter would have been apparent, or (2) remove content when they become aware of its existence.<sup>57</sup>

Clause 9(1)(b) provides a specific defence for broadcasters of live programmes in circumstances in which it was not reasonably foreseeable that the defamatory words or matters would be published.

Perhaps the most important provision, however, is clause 9(2). It establishes a ‘notice and take-down’ defence for *any* person, apart from the primary publisher, who is responsible for the publication of defamatory matter. Under this ‘notice and take-down’ defence, a defendant will have a defence *unless* it can be shown *by the claimant* that:

1. the notice requirements under clause 9(3) have been complied with;
2. the notice period (14 days or such other period as the court may specify) has expired; and
3. the words or matters complained of have not been removed from the publication.

‘Primary publisher’ is defined as an “author, editor or a person who exercises effective control of an author or editor” (clause 9(6)). Again, the provision allows a defendant to avoid the burden of proving absence of fault at common law by placing the burden on the claimant but it appears that the defence will only be of practical use to those who do not fall within the definition of facilitator under clause 9(1) (which provides a complete defence).

### Conclusion

Having provided a short review of the main provisions of Lord Lester’s Bill, it is apparent that it does not respond to the perceived problems that plague libel law by undertaking radical or wholesale reform. Rather, it tweaks what already exists. Some of the proposals, as I have indicated, are eminently sensible – for example, the amendment to the truth defence under clause 5(3), the ‘notice and take-down’ defence and the multiple publication provision. Unfortunately, most of the ‘reforms’ to the defences simply repeat existing statutory defences or codify those already available at common law, and a number of the proposals – such as the mandatory strike-out mechanism under clause 12 and the measure to deal with libel tourism – heavily miss the mark and must be rejected. Despite its shortcomings, however, the Bill has only received one reading in the House of Lords and has the potential to develop significantly as it proceeds through various stages of debate and redrafting.

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48 For a discussion of this defence, see J Bosland, ‘Republication of Defamation Under the Doctrine of Reportage – The Development of Common Law Qualified Privilege in England and Wales’ (2011) *Oxford Journal of Legal Studies* (forthcoming), available at <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1619735](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1619735)>.

49 See, eg, D Butler and S Rodrick, *Australian Media Law* (Pyrmont: Thompson, 3<sup>rd</sup> ed, 2007) 85.

50 [2010] EWCA Civ 350, [36].

51 See *Lowe v Associated Newspapers Ltd* [2006] EWHC 320 (QB).

52 For the common law position, see *Cohen v Daily Telegraph Ltd* [1968] 1 WLR 916, 918.

53 See P Milmo and WWH Rogers, *Gatley on Libel and Slander* (London: Sweet & Maxwell, 11<sup>th</sup> ed, 2008) 362, relying on *Lyon v Daily Telegraph* [1943] KB 746 (CA).

54 See the general principles set out in *Vizetelly v Mundie’s Library* [1900] 2 QB 170 (CA); *Goldsmith v Sperrings* [1977] 1 WLR 478

55 See *Electronic Commerce (EC Directive) Regulations 2002*, rr 17 and 18.

56 *Electronic Commerce (EC Directive) Regulations 2002*, r 22.

# Harbour Radio Pty Ltd v Australian Communications and Media Authority [2010] FCA 478

Harbour Radio, which operates 2GB in Sydney, has successfully challenged a decision by the ACMA to investigate a complaint by an advertiser against 2GB for adverse comments broadcast on the Ray Hadley Morning Show. The decision is the first to consider the interpretation of the complaint handling provisions of the Commercial Radio Code of Practice and the investigative powers of the ACMA. The effect of the decision is to reverse the approach historically taken by the ACMA in determining whether a complaint is a 'Code complaint' and demonstrates the discrete nature of the investigative powers granted under the Broadcasting Services Act 1992 (Cth).

## Background

On 1 December 2009 Harbour Radio Pty Limited (**Harbour Radio**), the commercial radio licensee which operates the talkback station 2GB, received a letter from the Australian Communications and Media Authority (**ACMA**) indicating that it had made a decision to investigate a complaint regarding material broadcast by Harbour Radio on the Ray Morning Hadley Show. The investigation was to take place pursuant to the ACMA's duty to investigate under section 149 of the *Broadcasting Services Act 1992* (Cth) (the **BSA**).

During August 2009, Ray Hadley discussed the Federal Government's ceiling insulation scheme and allegations of rorts under the scheme. A business trading as the House Doctor, operated by a Mr Kalfa, was one of the businesses discussed by Ray Hadley and his listeners.

Prior to the comments by Mr Haldey, the House Doctor had been advertising its insulation services on 2GB after being approached by 2GB in early 2009 and agreeing to pay \$27,600 for one month's advertising. As part of the advertising, Ray Hadley had been reading live advertisements for the House Doctor's services during his programs. When allegations against the House Doctor came to light, the live read advertisements were cancelled in a scenario described as a reverse of 'cash for comment'.

Subsequently, Mr Kalfa wrote to Harbour Radio complaining that 2GB had broadcast allegations including that the House Doctor had charged similar amounts of money despite varying ceiling sizes and that it used services such as Google Maps to determine ceiling sizes without confirming the size by inspection. Mr Kalfa denied the allegations.

Mr Kalfa wrote:

*Our family business undertook in good faith advertising on radio 2GB only to learn later that we became the 2GB vehicle for repeated criticism of the government stimulus package by virtue of a campaign of unsubstantiated and unjustified allegations. We request that you give your urgent attention to the matters we have raised with a view to redressing the situation.*

Although Harbour Radio responded to the letter of complaint, it did not believe that it was dealing with a complaint pursuant to the Commercial Radio Codes of Practice and Guidelines (2004) (the **Codes**) as the letter of complaint did not refer to the Codes either specifically or generally. Accordingly, Harbour Radio did not respond in the manner which would have been required had Mr Kalfa suggested that there had been a breach of the Codes.

On 13 November 2009 Mr Kalfa wrote to the ACMA alleging a breach of the Codes, in particular clause 1.3b relating to simulating news or events in such a way as to mislead or alarm listeners.

Following receipt of a letter from the ACMA indicating that it was investigating Harbour Radio pursuant to the Codes and sections 148 and 149 of the BSA, Harbour Radio requested a Statement of Reasons pursuant to section 13 of the *Administrative Decisions (Judicial Review) Act 1977* (The **ADJR**).

After engaging in correspondence with ACMA, arguing without success that Mr Kalfa's letter was not a complaint within the complaint handling provisions of the Codes, on 24 February 2010 Harbour Radio commenced proceedings under the ADJR.

## Legal framework

Sections 148 and 149 of the BSA set out the rights of members of the public to complain to the ACMA regarding broadcast matters and the ACMA's duties with respect to such complaints:

*148 Complaints under codes of practice*

*If:*

- (a) *a person has made a complaint to a provider of broadcasting services on a matter relating to:*
  - (i) *program content; or*
  - (ii) *compliance with a code of practice that applies to those services and that is included in the Register of codes of practice; and*
- (b) *if there is a relevant code of practice relating to the handling of complaints of that kind—the complaint was made in accordance with that code of practice; and*
- (c) *either:*
  - (i) *the person has not received a response within 60 days after making the complaint; or*
  - (ii) *the person has received a response within that period but considers that response to be inadequate;*  
*the person may make a complaint to the ACMA about the matter.*

Section 149 of the BSA then provides that, unless the ACMA is satisfied that the complaint is frivolous or vexatious or not made in good faith, it must investigate the complaint.

The Codes are divided into sections, each section referred to as a Code. Code 5, the complaint handling Code, indicates

*5.1 The purpose of this Code is to prescribe:*

- (d) *the method of handling complaints made by members of the public to licensees regarding compliance with these Codes; and*



- (e) *the manner of reporting by the commercial radio industry to the [ABA (now ACMA)] on complaints so made.*

5.2 For the purposes of this Part, a complaint is **an assertion:**

- (a) *made in writing by letter or fax by a person who provides his or her name and address;*  
(b) *to a licensee or a person at the radio station concerned who is acting with the apparent authority of the licensee;*

**that the licensee has broadcast matter which, in the opinion of the complainant, breaches these Codes.** *Complaints need not specify the section of the code to which the complaint relates, but must adequately identify the material broadcast and the nature of the complaint. (emphasis added)*

The ACMA indicated in the Statement of Reasons that the complaint:

*appears to relate to the accuracy of factual material presented in broadcasts, which is a matter covered by Code of Practice 2*

and

*while the complaint did not assert a breach of the code, it was taken...to contain an implicit assertion that Harbour Radio had broadcast matter which, in the opinion of the complainant, had breached the codes.*

Additionally the ACMA indicated that it also intended to include in the investigation "an examination of Harbour Radio's compliance with clauses 5.7 and 5.7 of the Codes."

## **The ACMA submitted that the assertion of breach of the Codes was implicit**

### **Issues**

As identified at the by the Court (at [37]), the central question was:

*whether the delegate was correct to conclude that Mr Kalfa's letter of 25 August 2009 constituted a written complaint which fell within the terms of cl 5.2 of the Commercial Radio Codes.*

Harbour Radio submitted that, because the complaint did not assert a breach of the Codes, the complaint to it was not made in accordance with clause 5.2 of the Codes and therefore the requirement in section 148(b) was not met.

Accordingly, Harbour Radio submitted (at [27]):

*it was not open to Mr Kalfa to make a complaint to ACMA under s 148 of the Broadcasting Act and there was no obligation on ACMA to investigate his complaint to it. Harbour Radio submits that the delegate's decision to the contrary is affected by legal and jurisdictional error and should be quashed or set aside .*

Additionally, Harbour Radio took the view that the ACMA had misconstrued the complaint and that it was not open to the ACMA to sever aspects of a complaint to alter its character so that it becomes amenable to the ACMA's jurisdiction.

The ACMA submitted that the assertion of breach of the Codes was implicit and, even if the delegate was incorrect in finding an implicit assertion, the assertion was not required in order to satisfy section 148(b) or enliven section 149.

Despite the Codes being developed in consultation with the ACMA, the ACMA also submitted that:

*(section) 148(b) should only pick up provisions of the Codes as they related to the making of complaints and not about the scope of them ... and not pick up any provisions that seeks to limit complaints about breaches of the Codes.*

Finally, as noted by the Court at [41], the:

*ACMA made a further attempt to save the decision in the event that all other arguments had gone against it. It argued that its powers to investigate (to be found elsewhere in the Broadcast-*

*ing Act and in other legislation) were adequate to support its decision to do so in the present case even if it came under no obligation from the terms of s 149(1) of the Broadcasting Act.*

### **Finding**

The Court did not accept the ACMA's submissions and set the decision aside with costs finding that (at [40]):

*The reasons given by the delegate do not afford a reason adequate in law to support her conclusion that ACMA was bound to investigate the complaint made to it by Mr Kalfa. Nor has any other reason been advanced which would support such a conclusion.*

In making its finding the Court recognised that (at [40]):

*the requirement in cl 5.2, that the assertion of breach reflects the opinion of the complainant, is not without significance ... what is needed is an assertion that, in the opinion of the writer, a code has been breached. That condition was not met in the present case.*

Additionally, the Court did not accept that the ACMA's alternative jurisdiction under a different section of the BSA meant that the decision should not be set aside, noting at [41] that:

*that was not the effect of the decision. The effect of the decision was that ACMA was obliged to investigate Mr Kalfa's complaint to it ...what ACMA may decide to do, based on other statutory provisions, need not be considered here.*

### **Implications**

This decision will be welcomed by the industry as, in upholding the terms of the Codes, the Court has confirmed that the Codes place practical parameters around the obligations of broadcasters. At [40] the Court notes that the requirement under the Codes that a complainant explicitly assert a breach:

*emphasises that it is not left to the recipient to search for, or eliminate, implications that might arise from the terms of a letter, much less speculate about the opinion of the writer. What is needed is an assertion that, in the opinion of the writer, a code has been breached.*

At [38] the Court confirmed that the "contrary assumption would be unrealistic" identifying that:

*Code of Practice 5 imposes a series of obligations on a broadcaster when a written complaint is made to it under cl 5.2. A complaint of that kind is one of, no doubt, a wide variety of written communications that might be made by a member of the public (whether an individual or a business) with a broadcaster. Some such communications might contain a complaint of one kind or another about programs in general or a particular program. The writer of such a letter may desire some level of inquiry (or other action) or be content merely to express a point of view. In my view, it is apparent from the terms of Code of Practice 5 that those who developed the code thought it important that it be apparent from the terms of a complaint that it constituted an allegation of breach of the Commercial Radio Codes.*

The industry can take some comfort in the Court's declaration (at [38]) that:

*a broadcaster is not required to speculate about the purpose or motives of someone advancing a "complaint" which is not assertively one about breach of the Commercial Radio Codes.*

The case demonstrates that broadcasters are entitled to rely on the terms of the Codes and seek a review where they disagree with the interpretations placed on them by the ACMA.

As a consequence of the decision, the ACMA will need to ensure it approaches the exercise of its powers in accordance with the terms of the BSA, rather than a general invocation. This will promote integrity in the regulatory framework and counter against the possibility of capricious decision-making.

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# Refused Classification

In this article, Jessica Azzi considers the relationship between early book censorship laws and the current classification law.

*If you had a million years to do it in, you couldn't rub out even half the 'Fuck you' signs in the world. It's impossible<sup>1</sup>*

## That's real cute, Holden. But you've been banned.

After completing a three year project researching the history of book censorship in Australia as part of the Australian Literature Resources' project 'Banned in Australia', Martina Bullock and Nicole Moore made a 'conservative' estimate that 500 scholarly or literary texts had been banned from entering Australia from 1901 until 1973.<sup>2</sup> Additionally, they estimated that

*16,000 titles of all genres, including pulp fiction, erotica, underground pornography, magazines, comics, art books and pamphlets were banned by Customs between the early 1930s and early 1970s.<sup>3</sup>*

The Refused Classification (RC) label (which has the effect of banning publications, films and computer games) has been the recipient of much recent attention since Senator Conroy, Minister for Broadband, Communications and the Digital Economy, announced plans for mandatory internet filtering.<sup>4</sup> These plans evoke memories of Australia's history of rigorous censorship, the not-so-distant predecessor of the RC label. This article explores the development of the RC label from a book censorship scheme implemented by a prohibition of imports through the Commonwealth Government's power over customs.

## *the banning of *The Catcher in the Rye* in 1956 was a catalyst for a review of Australian censorship*

Broadly, for a large part of the last century, recommendations and decisions to censor were underpinned by concerns over material that was obscene and/or would deprave the minds of those exposed to it.<sup>5</sup> For much of the twentieth century, Australia had a rigorous

book censorship scheme, presided over by the Commonwealth Government through the *Customs Act 1901* (Cth).<sup>6</sup> While this scheme ostensibly extended only to imports, it had a much broader reach, reflecting the infancy of the Australian publishing industry in the early to mid twentieth century. At that time, it was common for Australian manuscripts to be sent to Britain for publication.<sup>7</sup> Upon their return to Australia they were subject to the legislation governing imports. Constitutional limits meant that the Commonwealth's power to regulate censorship was limited to imports; material which was not imported was dealt with by the States.<sup>8</sup>

## "How the Stories became secret"<sup>9</sup>

Three Commonwealth departments were responsible for the prohibition of publications: The Commonwealth Department of Trade and Customs, the Postmaster-General's Department, and the Attorney General's Department.<sup>10</sup> Books which fell into at least one of the following categories were targeted:

- publications which were blasphemous, indecent or obscene;<sup>11</sup>
- publications which unduly emphasised matters of sex or of crime or were calculated to encourage depravity;<sup>12</sup> and,
- seditious publications.<sup>13</sup>

The Department of Trade and Customs played the biggest role, making the decision to prohibit entry of a publication and enforcing the prohibition through Customs. The Postmaster-General's Department was empowered by the *Post and Telegraph Act 1901* (Cth)<sup>14</sup> to deliver publications, and its powers extended to confer a discretion to the Director of Post and Telegraphs to refuse to transmit or deliver any issue of a periodical which contained obscene or indecent matter.<sup>15</sup> The prohibition of works which fell into the seditious category was carried out by the Attorney General's Department. The Book Censorship Board was established in 1933 by then Prime Minister Joseph Lyon's conservative United Australia Party, and in 1937 was renamed the Literature Censorship Board.<sup>16</sup> Its role was to make censorship recommendations concerning the first two categories and to pass these recommendations onto the Minister for Customs and Trade, the latter being responsible for making the decision to prohibit.<sup>17</sup>

1 JD Salinger, *The Catcher in the Rye* (1951).

2 Martina Bullock and Nicole Moore 'Introduction' *Banned in Australia: Introducing Australia's Bibliography of Banned Books*, 2008: <http://www.austlit.edu.au/specialistDatasets/Banned/bullockMoore> (last accessed 20 June 2010) (Bullock and Moore, *Banned in Australia Bibliography*).

3 Ibid.

4 Department of Broadband, Communications and the Digital Economy, *Measures to increase accountability and transparency for Refused Classification material* December 2009: [http://www.dbcde.gov.au/\\_\\_data/assets/pdf\\_file/0020/123833/TransparencyAccountabilityPaper.pdf](http://www.dbcde.gov.au/__data/assets/pdf_file/0020/123833/TransparencyAccountabilityPaper.pdf) (last accessed 20 June 2010) at 1 (DBCDE, *December 2009 Paper*).

5 For example, *Customs Act 1901* (Cth) s52(c) (repealed).

6 *Customs Act 1901* (Cth).

7 Nicole Moore, 'Secrets of the Censors: Obscenity in the Archives' in National Archives of Australia, *Presented at the National Archives of Australia*, 2 May 2005: <http://www.naa.gov.au/about-us/research-grants/margaret-george-award/former/moore-paper-2004-old.aspx#seventeen> (last accessed 20 June 2010) (Moore, *Secrets of the Censors*).

8 Gareth Griffith, "Censorship in Australia: Regulating the Internet and Other Recent Developments", *Briefing Paper 04/02*, Parliament of New South Wales (March 2002).

9 Moore, *Secrets of the Censors*.

10 Ibid.

11 *Customs Act 1901* (Cth) s52(c) (repealed).

12 *The Customs (Prohibited Imports) Regulations 1938* Schedule 2 item 14 (repealed).

13 *The Customs (Prohibited Imports) Regulations 1938* Schedule 2 item 14 (repealed).

14 *The Post and Telegraph Act 1901* (Cth) s29(3) (repealed).

15 *The Post and Telegraph Act 1901* (Cth) s29(3) (repealed).

16 Moore, *Secrets of the Censors*.

17 'Best Selling American Novel Banned' *The Sydney Morning Herald* (1 August 1945): <http://www.naa.gov.au/about-us/research-grants/margaret-george-award/former/moore-banned.aspx> (last accessed 18 June 2010).

The first Australian book to be prohibited from import into Australia was Norman Lindsay's *Redheap*, in May 1930, prior to the establishment of the Book Censorship Board.<sup>18</sup> The decision was made on the grounds that excerpts from the book were indecent or obscene.<sup>19</sup> Interestingly, the complaints which initiated the banning of *Redheap* were made by a Victorian member of federal parliament in whose electorate the fictional town of Redheap was located.<sup>20</sup> This aspect of the decision reflects the role that influential vocal minorities are capable of playing in a classification scheme.<sup>21</sup>

## *The focus of classification legislation shifted from concepts of depravity or corruption of minds to, in the seventies, community standards*

In 1944 the Literature Censorship Board recommended the banning of Kathleen Winsor's *Forever Amber*. A thousand page bodice ripper set in England in the midst of the Bubonic Plague, Hollywood turned it into a film in 1947. It was the highest selling book in the US during the 1940s in the US,<sup>22</sup> although it was banned in 14 American states, with the Massachusetts' Attorney-General listing 70 references to sexual intercourse, 39 illegitimate pregnancies, seven abortions, 10 descriptions of women undressing in front of men, and 49 "miscellaneous objectionable passages".<sup>23</sup> In making his recommendation that *Forever Amber* be prohibited from entry into Australia, Dr LH Allen, Chair of the Literature Censorship Board, from 1937 until 1957,<sup>24</sup> wrote "popularity is no sure guarantee of worth. The source of its notoriety is more properly to be found in a crude and obvious appeal to the sex instinct".<sup>25</sup> The then Minister for Trade and Customs, Senator Richard Keane made the decision to ban the novel commenting "I consider it an undesirable book and not an acquisition to the literature of the Commonwealth".<sup>26</sup>

Books prohibited from being imported into Australia were placed on a list, and in 1935 Thomas White, then Minister for Trade and Customs, announced in Parliament that "any importer of books can get a complete list of those books which are banned".<sup>27</sup> Despite the Minister's assertion importers had only limited access to this list,

which was kept completely secret from consumers until 1958.<sup>28</sup> National Australia Archives (NAA) records show that the Department of Trade and Customs were fearful of disclosing the list.<sup>29</sup> Advice was given against the disclosure of the list from a Customs official to the Comptroller-General of the Department of Trade and Customs:

*There is a very keen desire on the part of certain organisations to obtain a list of the prohibited books and if they could obtain copies there is little doubt that the lists would be used to criticize the Department.*<sup>30</sup>

## **From censorship to classification**

In their construction of the history of book censorship in Australia, Bullock and Moore identify the banning of *The Catcher in the Rye* in 1956 as a catalyst for a review of Australian censorship of books.<sup>31</sup> Since its publication in 1951, it had been both popular and held up as one of the best American literary works of the fifties, to the point that it was gifted by US ambassadors to foreign governments around the world.<sup>32</sup> The Parliamentary Library's copies of *The Catcher in the Rye* were seized by Customs from the Library in September 1957; the banned books list was still secret at this time and the Parliamentary Librarians were unaware that the novel had been banned.<sup>33</sup> The folklore surrounding this banning is certainly not short on melodrama: in September 1957, Customs, at an Australian airport, seized copies of *The Catcher in the Rye* which were innocuously sent as a gift from the US Government to the Commonwealth Government.<sup>34</sup>

The following year Minister Denham Henty, then Minister for Trade and Customs, in the Menzies government, put in place a review of the banned books list which was to take place every five years, and permitted partial disclosure of the banned books list.<sup>35</sup> From the list, 178 titles were gazetted in Parliament, marking it the first time the list had been officially made public.<sup>36</sup> Over the next few decades the Commonwealth's power over classification yielded, and state classification legislation developed, indicating the limits of a customs head of power to regulate classification.

The focus of classification legislation shifted from concepts of depravity or corruption of minds to, in the seventies, community standards.<sup>37</sup> The 1968 case, *Crowe v Graham*,<sup>38</sup> foreshadowed the pending change. Windeyer J held that when determining whether

18 ' "Redheap": banned in Australia', *Sydney Morning Herald* (22 May 1930).

19 ' "Redheap Banned: Mr Norman Lindsay's First Novel', *The Argus* (17 April 1930): <http://www.middlemiss.org/matilda/2009/08/reprints-the-banning-of-redheap-by-norman-lindsay.html> (last accessed 20 June 2010).

20 Moore, *Secrets of the Censors*.

21 Donald McDonald, 'Sense and Censorbility', Speech delivered at Currency House, Sydney, 26 September 2007.

22 Moore, *Secrets of the Censors*.

23 Elaine Showalter, 'Emeralds on the home front', *The Guardian* (10 August 2002): <http://www.guardian.co.uk/books/2002/aug/10/featuresreviews.guardianreview19> (last accessed 18 June 2010).

24 Moore, *Secrets of the Censors*.

25 Decisions, with Comments, on Literature Forwarded by the Customs Department to the Commonwealth Book Censorship Board, 1933–1957, NAA: A3023, Folder 1945/1947.

26 'Best Selling American Novel Banned' *The Sydney Morning Herald* (1 August 1945): <http://www.naa.gov.au/about-us/research-grants/margaret-george-award/former/moore-banned.aspx> (last accessed 18 June 2010).

27 Commonwealth, House of Representatives, *Parliamentary Debates*, Volume 146 at 135.

28 Bullock and Moore, *Banned in Australia Bibliography*.

29 Ibid.

30 Stephen Payne, 'Aspects of Commonwealth Literary Censorship in Australia, 1929-1941' MA Thesis, Australian National University, 1980.

31 Bullock and Moore, *Banned in Australia Bibliography*.

32 Ibid.

33 Ibid.

34 David Fickling, 'Restricted Viewing', *The Guardian* (7 July 2003): <http://www.guardian.co.uk/world/2003/jul/07/worlddispatch.filmcensorship> (last accessed 20 June 2010).

35 Moore, 'Secrets of the Censors'. Moore estimates that Kathleen Winsor's *Forever Amber* was removed from the list in 1958.

36 National Archives of Australia: Attorney-General's Department, Central Office; C4480, National Literature Board of Review correspondence on censorship and legislation, 1938-59; 1958/23, Commonwealth of Australia records about importation of prohibited publications and letters about censorship 1958.

37 Darryl Williams, "From Censorship to Classification" (1997) 4 *Murdoch University Electronic Journal of Law* 4: <http://www.murdoch.edu.au/elaw/issues/v4n4/will441.html#n34> (last accessed 20 June 2010).

*Customs Act 1901* (Cth).

38 (1968) 121 CLR 375.

material was indecent the proper inquiry was whether it offended against community standards of decency, rather than whether it depraved or corrupted susceptible minds.<sup>39</sup> In 1970, the then Minister for Customs and Excise, Don Chipp, spoke of the need for adults to be able to see, hear, and read what they wish;<sup>40</sup> a principle underpinning current classification law.<sup>41</sup> The R rating for films was introduced in 1971 and adults were able to view films, that otherwise, if subject to customs legislation, would likely have been refused entry into Australia.

### ***In 1970, the then Minister for Customs and Excise, Don Chipp, spoke of the need for adults to be able to see, hear, and read what they wish***

Accordingly, classification legislation at state level was reformed so that it shifted from the concept of depravity embedded in the *Customs Act 1901* (Cth) towards community standards and the reasonable adult.<sup>42</sup> These changes at State level were accompanied by the *Classification of Publications Ordinance 1983* (ACT),<sup>43</sup> the Commonwealth legislation at the heart of the reforms. It contained two restricted categories for film and videos ('R'<sup>44</sup> and 'X'<sup>45</sup>), and two for literature (Category 1<sup>46</sup> and Category 2<sup>47</sup>), and material was to be judged according to the degree of offence it would cause a reasonable adult.

### **RC today**

The *Classification (Publications, Films and Computer Games) Act 1995* (Cth) (**Classification Act**) sets out the legislative framework for the classification of publications, films and computer games and provides that classification decisions are to be made in accordance with the National Classification Code (**Code**),<sup>48</sup> which is extracted below:<sup>49</sup>

Classification decisions are to give effect, as far as possible, to the following principles:

- (a) adults should be able to read, hear and see what they want;
- (b) minors should be protected from material likely to harm or disturb them;
- (c) everyone should be protected from exposure to unsolicited material that they find offensive;
- (d) the need to take account of community concerns about:
  - (i) depictions that condone or incite violence, particularly sexual violence; and
  - (ii) the portrayal of persons in a demeaning manner.

Furthermore, the *Guidelines for Classification of Publications* and *Guidelines for the Classification of Film and Computer Games*<sup>50</sup> (collectively **Guidelines**) are also available to assist the Classification Board label material. The former, inter alia, instructs that:<sup>51</sup>

Publications that appear to purposefully debase or abuse for the enjoyment of readers/viewers, and which lack moral, artistic or other values to the extent that they offend against generally accepted standards of morality, decency and propriety will be classified 'RC'.

The classification of online content is also reliant upon the Code and the Guidelines. The Australian Communications and Media Authority (**ACMA**) can issue a take-down notice to the owner of a website with an "Australian connection" which hosts,<sup>52</sup> streams,<sup>53</sup> or links<sup>54</sup> to prohibited content or potential prohibited content. Content hosted overseas is subject to a 'blacklist' which is passed on by the ACMA to filtering vendors who then prohibit the access to blacklisted content of those who have purchased filtering services.<sup>55</sup> Prohibited content and potential prohibited content respectively include, that which the Classification Board has classified RC or X18+, and content for which there is a substantial likelihood that it if it were classified by the Classification Board it would be classified RC.<sup>56</sup>

The amendment of the Classification Act in 2007 controversially introduced a provision whereby material that advocates the doing of a terrorist act is refused classification if there is a risk that the praise may lead a person, regardless of their age or mental impairment, to engage in a terrorist act.<sup>57</sup> Placed in the chronology of the development of Australian classification law, this amendment is a step back in time. It moves away from the reasonable adult, and instead asks classifiers to consider the impact of material on an unreasonable person who is not an adult.<sup>58</sup> How is a reasonable adult to consider this impact? Similarly, proposed plans for mandatory internet filtering of legal online material, readily accessible in other jurisdictions, are also backward looking, and undermine developments which have seen Australian classification law move away from its early days of rigorous censorship.

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39 Ibid, at 395, 398.

40 Commonwealth, House of Representatives, *Parliamentary Debates (Hansard)*, 11 June 1970 at 3372.

41 *National Classification Code*.

42 See for example *Classification of Publications Act 1973-74* (SA).

43 *Classification of Publications Ordinance 1983* (ACT) (repealed).

44 *Classification of Publications Ordinance 1983* (ACT) s35(2) (repealed).

45 *Classification of Publications Ordinance 1983* (ACT) s35(3) (repealed).

46 *Classification of Publications Ordinance 1983* (ACT) s35(1) (repealed).

47 *Classification of Publications Ordinance 1983* (ACT) s35(3) (repealed).

48 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s9.

49 *National Classification Code*.

50 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s12.

51 *Guidelines for the Classification of Publications 2005*.

52 *Broadcasting Services Act 1992* (Cth) Schedule 7 cl 47

53 *Broadcasting Services Act 1992* (Cth) Schedule 7 cl 56.

54 *Broadcasting Services Act 1992* (Cth) Schedule 7 cl 62.

55 DBCDE, *December 2009 Paper*, 3.

56 *Broadcasting Services Act 1992* (Cth) Schedule 7 cl 1.

57 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s9A.

58 Explanatory Memoranda accompanying the *Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Act 2007*, 12.



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