

# CAMLA COMMUNICATIONS LAW BULLETIN

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Bonus Edition

## War Crimes, Defamation and the Scope of Journalistic Privilege under the Evidence Act 1995 (Cth): *Roberts-Smith v Fairfax Media Publications Pty Ltd (No 3)* [2020] FCA 2

**Adaena Sinclair-Blakemore**, Associate, Baker McKenzie, explains the significance of the recent *Roberts-Smith v Fairfax* judgment on journalists' sources.

### 1. Introduction

In *Roberts-Smith v Fairfax Media Publications Pty Ltd (No 3)* [2020] FCA 2, Justice Besanko considered whether a journalist's privilege under section 126K(1) of the *Evidence Act 1995 (Cth)* (Act) is displaced if the identity of the journalist's informant is disclosed in the Outlines of Evidence filed by or on behalf of the journalist in the proceedings.

The proceeding concerns Ben Roberts-Smith, who is a former Commander in the Special Air Service Regiment (SASR) of the Australian Army and was awarded the Victoria Cross in 2011. However, since June 2018, Roberts-Smith has been the subject of an investigation by the Australian Federal Police (AFP) into allegations of war crimes committed by Roberts-Smith and other members of the SASR while deployed to Afghanistan.<sup>1</sup>

### 2. The Scope of Section 126K

Section 126K of the Act provides that:

- 1) If a journalist has promised an informant not to disclose the informant's identity, **neither the journalist nor his or her employer is compellable to answer any question or produce any document that would disclose the identity of the informant or enable that identity to be ascertained.**
- 2) The court may, on the application of a party, order that subsection (1) is not to apply if it is satisfied that, having regard to the issues to be determined in that proceeding, the public interest in the disclosure of evidence of the identity of the informant outweighs:
  - a) any likely adverse effect of the disclosure on the informant or any other person; and

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<sup>1</sup> See Nick McKenzie and Chris Masters, 'Police Investigate Ben Roberts-Smith over Alleged War Crimes' (online), *The Sydney Morning Herald*, 29 November 2018 <<https://www.smh.com.au/national/police-investigate-ben-roberts-smith-over-alleged-war-crimes-20181126-p50i1hb.html>>; Nick McKenzie and Chris Masters, 'Ben Roberts-Smith under Police Investigation for "Kicking Handcuffed Afghan Off Small Cliff"' (online), *The Age*, 22 September 2019 <<https://www.theage.com.au/national/ben-roberts-smith-under-police-investigation-for-kicking-handcuffed-afghan-off-small-cliff-20190910-p52pys.html>>.

# Editors' Note

Dear readers,

We are thrilled to present you with this, CAMLA's **bonus edition** of the Communications Law Bulletin. Conscious as we are that you have been unable for months to meet face-to-face for CAMLA seminars and networking events, we thought we would do our bit to increase the connection between our members by publishing an extra edition of the CLB this year. This is among the raft of other initiatives on which the CAMLA Board and Young Lawyers Committee are continuing to work hard to help the membership #stayconnected through all this. If the Pulitzers had a prize for thoughtfulness, it still probably wouldn't go to us. But it's nice of you to say.

Speaking of CAMLA's other corona-initiatives, our friends at **Baker McKenzie** hosted a brilliantly informative CAMLA webinar, '**Contracts, Cancellations and Coronavirus in the Tech-Media Industry**'. The wonderful team at **McCullough Robertson** hosted a **workplace relations** webinar dealing with the legalities and practicalities around standing down employees, the requirements under the *Broadcasting and Recorded Entertainment Award 2010*, alternatives to standing employees down, and various other employment law issues related to the unfolding coronavirus shutdown. On 25 June 2020, CAMLA and Ashurst hosted the excellent **Prepublication 101** webinar featuring **Larina Alick**, Executive Counsel at Nine, **Marlia Saunders**, Senior Litigation Counsel at News Corp Australia, **Prash Naik**, General Counsel Doc Society, and **Leah Jessup**, Business & Legal Affairs Executive at Endemol Shine Australia. Organised by CAMLA Young Lawyers as a valuable introduction into prepub by some of the best in the business, this webinar was widely attended and gratefully received. These webinars are being made available to members to be enjoyed via the CAMLA website, placing CAMLA comfortably among the most game-changing content streaming platforms to launch in Australia in the last decade.

Speaking of webinars and game-changing content streaming platforms, another webinar is on its way. This one will address the future of Australian screen content following the release of the **Supporting Australian Stories on our Screens Options Paper**. The webinar, hosted by Baker McKenzie at 1:30-2:30pm on Thursday 2 July 2020, will feature some of the leading voices from within that discussion, including the ACMA's **Fiona Cameron** (co-author of the Options Paper), **Bridget Fair** (CEO, Free TV) and **Emile Sherman** (the Academy Award winning and nominated producer for *The King's Speech* and *Lion*).

Still focusing on the streaming platforms (not an altogether unfamiliar activity for me over the last few months), nbn's **Jessica Norgard** profiles **Netflix's** Director of Production Policy (APAC), **Deb Richards**. On top of that, Minters' **Kosta Hountalas** comments on the **USYD v ObjectiVision** case and the implications it can have for commercialising IP. Baker McKenzie's **Liz Grimwood-Taylor** talks us through the ongoing consultation around changes to the *Online Safety Act*. Ashurst's **Nina Fitzgerald**, **Eoin Martyn**, **Caroline Christian** and **Jasmine Collins** help us to understand copyright ownership where material is created by artificial intelligence. McCullough Robertson's **Beck Lindhout** and **Robert Lee** provide a useful chart to clarify defamation law in a social media context. HWL Ebsworth's **Teresa Torcasio**, **Laura Young** and **Chantelle Radwan** summarise the **ACCC v Trivago** ruling. Corrs' **Michael Do Rozario**, **Simon Johnson** and **Bianca Collazos** tell us why it's time to stop force-feeding cookies to users, following a recent GDPR ruling by the CJEU. And Bakers' **Adaena Sinclair-Blakemore** explains the significance of the recent **Roberts-Smith v Fairfax** judgment on journalists' sources.

With great thanks to all our contributors, we hope you enjoy this edition as much as we have!

**Ashleigh and Eli**

- b) the public interest in the communication of facts and opinion to the public by the news media and, accordingly also, in the ability of the news media to access sources of facts.
- 3) An order under subsection (2) may be made subject to such terms and conditions (if any) as the court thinks fit.

Section 126K(1) shields a journalist and their employer from having to disclose their sources where

a journalist made a promise to an informant not to disclose the informant's identity. However, subsection (2) introduces a public interest test which enables a court to order that the privilege does not apply where the public interest in disclosure outweighs any likely adverse effect of the disclosure. This rule replaces the old common law rule, called the "newspaper rule", and creates a rebuttable presumption that a journalist does not need to disclose their sources' identities.<sup>2</sup>

### 3. Facts of the case

Roberts-Smith commenced defamation proceedings against Fairfax and three individual journalists (Nick McKenzie, Chris Masters and David Wroe) after articles published in August 2018 revealed the allegations of war crimes and an allegation of domestic violence against him. These allegations, which Roberts-Smith has vehemently denied, were borne out of an internal Australian Defence Force investigation which

<sup>2</sup> See Joseph Fernandez and Mark Pearson, 'Shield Laws in Australia: Legal and Ethical Implications for Journalists and their Confidential Sources' (2015) 21 *Pacific Journalism Review* 61.

was reported on by Fairfax Media outlets and journalists. Broadly, the allegations made by the journalists in the articles in issue are that:

- while in Afghanistan, Roberts-Smith murdered an unarmed Afghan civilian;
- while in Afghanistan, Roberts-Smith pressured junior SAS soldiers to murder unarmed Afghan civilians; and
- while in a hotel room in Canberra, Australia, Roberts-Smith committed an act of domestic violence against a woman.<sup>3</sup>

During the discovery phase of these proceedings, the respondents withheld producing 49 relevant documents on the basis that these documents are protected by s 126K(1). These documents include the journalists' notes of their meetings with informants, transcripts of interviews with informants and documents that the informants gave to the journalists during or after their meetings. The respondents argued that the documents included information like personal details, professional details, details of the informants' relationships to Roberts-Smith, unique vocabulary choices and phrases that the informants used. Further, the documents handed over to the journalists by the informants are documents that could only have been in the possession of very few individuals. On this basis, the respondents have argued that any disclosure would compromise the identity of the informants.<sup>4</sup>

However, Roberts-Smith argued that the identity of various sources had been revealed when the respondents filed and served their Outlines of Evidence. This is

because the Outlines of Evidence were given by named current and former SAS soldiers. Having regard to the contents of those Outlines combined with the name of the person whose Outline of Evidence it was, the respondent argued that the journalists' informants identities are apparent and therefore no privilege can exist over those identities. Roberts-Smith put forward numerous examples of this. One example is that in an article published in June 2018, it was said that SAS soldiers were the sources of an allegation against Roberts-Smith that he murdered an Afghan civilian on Easter Sunday in 2009. Only one of the Outlines of Evidence filed by the respondents refers to this incident and the applicant therefore argues that this witness must be the informant and his identity has been revealed. Therefore, the respondent argued that there is no privilege in the documents that relate to this informant.<sup>5</sup>

#### 4. Decision

However, Justice Besanko disagreed with this argument that the identity of a source can be inferred by simply comparing the contents of the publications with the Outlines of Evidence, and that such identification displaces the privilege in section 126K(1).<sup>6</sup> His Honour found that this overlooks the possibility of some other way the journalist may have been provided with that information. Further, it conflates the identity of a witness with the identity of an informant. Furthermore, the respondents submit that it is important to distinguish between eyewitnesses, informants and trial witnesses. So the judge concluded that while it may be reasonable speculation that persons who are

the subject of Outlines of Evidence are the journalists' informants, this is not a reasonable inference to be drawn over other inferences. Consequently, the privilege in section 126K(1) was not displaced and the respondents could keep the identities of their sources confidential.

#### 5. Implications and conclusion

The decision is significant because it reinforces the high bar that must be met before a court may find that the privilege in section 126K(1) has been displaced. Justice Besanko emphasised that any displacement of privilege must be evidenced by clear and unambiguous information which discloses the informant's identity and it cannot be displaced merely by inference. The judge analogised a waiver of privilege under section 126K(1) with a waiver of legal professional privilege to emphasise that any displacement or waiver of privilege must be made clear and unambiguous.<sup>7</sup>

Notably, Roberts-Smith did not make an application for production of the documents under section 126K(2). However, Justice Besanko commented in obiter that any such application would likely have been unsuccessful because the adverse effects of disclosure would likely have outweighed any public interest in disclosure.

Overall, this decision provides useful insight into the approach a court may take to the scope of protection afforded to a journalist and their sources under section 126K(1), which is a particularly timely issue in light of recent AFP raids on media outlets and growing concern over media freedom in Australia.<sup>8</sup>

<sup>3</sup> *Roberts-Smith v Fairfax Media Publications Pty Ltd (No 3)* [2020] FCA 2 at [8]-[10].

<sup>4</sup> *Roberts-Smith v Fairfax Media Publications Pty Ltd (No 3)* [2020] FCA 2 at [26].

<sup>5</sup> See *Roberts-Smith v Fairfax Media Publications Pty Ltd (No 3)* [2020] FCA 2 at [52]-[80].

<sup>6</sup> *Roberts-Smith v Fairfax Media Publications Pty Ltd (No 3)* [2020] FCA 2 at [81].

<sup>7</sup> *Roberts-Smith v Fairfax Media Publications Pty Ltd (No 3)* [2020] FCA 2 at [81].

<sup>8</sup> See, eg, Keiran Hardy, 'Press Freedom in Australia Needs Much More than Piecemeal Protection' (online), The Interpreter, 16 August 2019 <<https://www.lowyinstitute.org/the-interpreter/press-freedom-australia-needs-much-more-than-piecemeal-protection>>.

# Major ACCC Win, Federal Court Rules Trivago Misled Customers

**Teresa Torcasio, Partner, Laura Young, Partner and Chantelle Radwan, Law Graduate, HWL Ebsworth,** comment on the Federal Court's judgment in *ACCC v Trivago*.

On Monday 20 January 2020, the Federal Court ruled that travel comparison website, Trivago N.V. (**Trivago**), misled consumers about cheap hotel deals on Trivago's website and in its television advertising. The decision sends a strong message to businesses to ensure that any comparison tools offered to consumers accurately and clearly depict the nature of the search results that can be obtained through the use of the tool and the benefit (if any) to consumers if they rely on such results, a pertinent issue given the increasing presence of online comparison websites and tools.

## Background

In August 2018, the Australian Consumer and Competition Commission (**ACCC**) instituted proceedings in the Federal Court against Trivago.

The ACCC claimed that from at least December 2013, Trivago ran television advertisements depicting its website as an impartial and objective medium for price comparisons. The advertisements represented that the Trivago website would assist consumers to identify the cheapest prices for hotel accommodation. However, according to the ACCC, Trivago's website instead prioritised advertisers who were willing to pay Trivago the highest cost per click fee.

The Federal Court agreed with the ACCC, finding that until at least 2 July 2018, Trivago misled consumers into believing that the Trivago website provided an impartial, objective and transparent price comparison for hotel room rates, when this was not the case, for the reasons outlined below.

## The Breaches

### Cheapest Price Representation

Section 18(1) of the Australian Consumer Law states that a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

The Federal Court held that Trivago contravened section 18 of the Australian Consumer Law, as Trivago's website conveyed that it would quickly and easily identify the cheapest rates available for a hotel room responding to a consumer's search (referred to in the judgement as the "Cheapest Price Representation"), when in fact it did not. Justice Moshinsky stated at [203]<sup>1</sup>:

*"...in at least some cases, the cheapest offer for the hotel room did not appear on the Trivago website. This fact alone was sufficient to render the Cheapest Price Representation misleading or deceptive..."*

In making the Cheapest Price Representation, Trivago was also found to have contravened section 34 of the Australian Consumer Law, as it was determined that Trivago engaged in conduct that was likely to mislead the public as to the nature, characteristics and suitability for purpose of the accommodation search service provided through the Trivago website.

### Strike-Through Price Representation

The ACCC also alleged that Trivago's online "Strike-Through Price" comparisons were false or misleading as they compared offers for standard rooms with offers for

luxury rooms at the same hotel. This created a false impression of savings offered for the standard room (i.e., that the rooms were comparable and the price for the standard room was more competitive). Justice Moshinsky agreed. Critical to his finding was the depiction of standard rooms and luxury rooms online. His Honour stated at [207]<sup>2</sup>:

*"The Strike-Through Price appeared in red, Strike-through text, immediately above the Top Position Offer. It was a similar size to the Top Position Offer. The implicit representation that was conveyed was that the two offers that were juxtaposed, namely the Strike-Through Price and the Top Position Offer, were comparable offers apart from price; in other words, that the offers were, apart from price, 'like for like'. This is the natural inference from the presentation of the Trivago website."*

A consumer that hovered the cursor above the Strike-Through Price would see the following text:

*"The Strike-through price corresponds to the cheapest offer we received from the most expensive booking site on Trivago for this hotel and your stay dates."*

The presence of such text was not enough to prevent the court from concluding the Strike-Through Price representation amounted to a misleading representation and was a contravention of section 18 of the Australian Consumer Law.

Justice Moshinsky also held the representation amounted to a contravention of section 29(1)(i) of Australian Consumer Law, which prohibits the making of false or misleading representations in

<sup>1</sup> *Australian Competition and Consumer Commission v Trivago N.V.* [2020] FCA 16, [203].

<sup>2</sup> *Ibid*, at [207].

connection with the supply or possible supply of goods or services, or in connection with the promotion by any means of the supply or use of goods or services.

### Top Position Representation

The ACCC also alleged that Trivago misrepresented that the top position offers on its website were the cheapest available offers for an identified hotel, or had some other characteristic which made them more attractive than any other offer for that hotel. The Federal Court agreed, ruling the representation to be in contravention of section 18 and section 29(1)(i) of the Australian Consumer Law.

In support of this, Justice Moshinsky pointed to expert evidence which established that higher priced offers were selected as the top position offer over alternative lower priced offers in 66.8% of listings. Justice Moshinsky stated at [219]<sup>3</sup>:

*“Contrary to the Top Position Representation, in many cases the Top Position Offer was not the cheapest offer for the hotel, nor did it have some other characteristic that made it more attractive than any other offer for the hotel.”*

And further at [221]<sup>4</sup>:

*“The Top Position algorithm did not use non-price attributes of the offers to determine the composite score (and thus the Top Position Offer). As noted above, a very significant factor in the selection of the Top Position Offer is the CPC [i.e. ‘cost-per-click’], that is, the amount that Trivago will be paid by Online Booking Sites (rather than the quality of the hotel accommodation offer).”*

<sup>3</sup> Ibid, at [219].

<sup>4</sup> Ibid, at [221].

### Key Takeaways

The decision highlights the importance of ensuring that any comparison tools or representations offered for use by consumers accurately depict the nature of the search results and the benefit (if any) to consumers if they rely on such results. Such comparison tools are used widely in the market, both through increasingly popular comparison websites (as in the case of Trivago) but also by other businesses that wish to demonstrate that their product or offering is better than some other alternative or competitor. It is important for businesses that use price comparisons in their marketing or advertising to properly scrutinise their offering to ensure that they are not misleading consumers.

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# 2020 Vision: IP Commercialisation Lessons from *USYD v ObjectiVision*

**Kosta Hountalas**, Lawyer, MinterEllison, discusses the recent *ObjectiVision* judgment and the implications it has for commercialising intellectual property.

## Overview

In *University of Sydney v ObjectiVision Pty Limited*,<sup>1</sup> a failed attempt to commercialise technology in the field of visual electrophysiology formed the basis of a dispute heard by Burley J. In a 214-page judgment, His Honour was tasked with dissecting a particularly complex factual matrix, which gave rise to claims of various breaches of contract, copyright infringement, estoppel and implied licensing.

This case note focuses on the copyright issues thrown up in the dispute, which give rise to a useful summary of the law in relation to copyright in software, and its commercialisation.

## Background

Back in 2000, the University of Sydney (**USYD**) and ObjectiVision Pty Limited (**ObjectiVision**) entered into a commercialisation arrangement, whereby ObjectiVision would commercialise technology developed by employees of USYD in relation to the detection of blind spots in a patient's eye (such as in the case of cataracts or glaucoma). The technology is known as 'multi-focal visually evoked potential' (**mfVEP**). USYD, the owners of the mfVEP, licensed its use to ObjectiVision so that it could be commercialised and brought to market (ie turned into a fully-functional, economically viable device that could be marketed to ophthalmic and other eye-related specialists). The device was called the **AccuMap**.

A key part of commercialising the mfVEP was to design a software platform built into the AccuMap for the mfVEP to run off. The first iteration of the software known as Objective Perimetry Evoked Response Analysis (**OPERA**) was created in 2001 by one of ObjectiVision's founding shareholders, Dr Alex Kozlovski.

By 2005, the commercialisation process was not as advanced as anticipated, and ObjectiVision developed new versions of the AccuMap (v2) and OPERA software (v2.3).

When things had not significantly improved by 2008, USYD sent through a notice of breach to ObjectiVision and altered the mfVEP licence to ObjectiVision so that it was no longer exclusive. USYD then developed its own software, known as TERRA, to replace OPERA.

By 2011, relations had deteriorated to the point where USYD gave notice to ObjectiVision that it would terminate the licence altogether. USYD then proceeded to commercialise the mfVEP with another party (**Visionsearch**).

## Legal arguments

USYD commenced proceedings in 2014, alleging that it had terminated the agreement with ObjectiVision which licensed the use of the mfVEP, and that ObjectiVision's continued use of the technology was infringing USYD's rights.<sup>2</sup>

ObjectiVision cross-claimed on a number of grounds,<sup>3</sup> including that:

- the agreement (and therefore licence) was never validly terminated, so that USYD's commercialisation work with Visionsearch was in breach of ObjectiVision's agreement with USYD; and
- ObjectiVision's copyright in the OPERA v2.3 software had been infringed by USYD using it in the AccuMap devices held by USYD, and by reproducing part of the OPERA v2.3 source code in TERRA.

Burley J ultimately found that that ObjectiVision's licence had been validly terminated by USYD, and rejected ObjectiVision's copyright infringement claims.

## Overview of relevant copyright law

The following principles of law relate to ObjectiVision's copyright infringement claims:

- copyright subsists in original literary works, including computer programs;<sup>4</sup>
- copyright in a computer program includes the exclusive right to reproduce the computer program (or a substantial part of the computer program) in a material form;<sup>5</sup>
- reproduction (or authorising the reproduction) of a computer program by someone who is not the owner, and is not licensed by the owner, is an infringement;<sup>6</sup>
- generally, the person who brings a copyright work into existence is its 'author',<sup>7</sup> although this does not

<sup>1</sup> [2019] FCA 1625 ('*ObjectiVision*').

<sup>2</sup> *Ibid*, [22].

<sup>3</sup> *Ibid*, [23].

<sup>4</sup> *Copyright Act 1968* (Cth) ('CA'), Part III. See also definition of 'computer program' in 10(1).

<sup>5</sup> *Ibid*, s 31(1)(a)(i).

<sup>6</sup> *Ibid*, s 36(a).

<sup>7</sup> *IceTV Pty Limited v Nine Network Australia Pty Limited* [2009] HCA 14, [98].

always equate to ownership, such as if that person has created the work as an employee in the course of their employment,<sup>8</sup> or they have subsequently assigned their rights to the work to another person;

- where multiple persons' efforts have brought a work into existence, it will be a question of fact and degree whether their effort is sufficient to render them an author for the purpose of copyright law;<sup>9</sup>
- an implied licence may exist to use copyright works in a manner that would otherwise be infringing, where the copyright owner was aware of such use;<sup>10</sup> and
- given the nature of source code, which can be hundreds of thousands of lines of code, the unintentional copying of a small number of source code lines is unlikely to infringe.<sup>11</sup>

In response to ObjectiVision's infringement claims, USYD and Visionsearch argued that ObjectiVision had not proven:

- authorship (ie that ObjectiVision had brought OPERA v2.3 into existence);
- ownership (ie that ObjectiVision was the current owner of the copyright in OPERA v2.3); and
- subsistence (ie that OPERA v2.3 was an original work).

### Copyright authorship

USYD claimed that ObjectiVision had not proven that the software developers of OPERA v2.3 were joint authors for the purpose of copyright. USYD argued that a number of software developers had been engaged by ObjectiVision to work on OPERA v2.3 (and its predecessor versions) in an inconsistent fashion, at different times and varying levels of capacity. Therefore, not all their

work was of the right kind of skill and labour required to warrant their contributions as authorial. This was rejected by the Court and the software developers were found to be joint authors.

Burley J's reasons included that:

- each developer made a contribution to the final OPERA v2.3;
- for each subsequent contribution, the contributor had to understand how their work would necessarily interact with the existing code, which would indicate that each contributor had collaborated with the others; and
- there was a common instructor throughout the software development process (that common instructor being Associate Professor Klistorne).<sup>12</sup>

### Copyright ownership

After joint authorship had been established, the next question was whether ObjectiVision actually owned the copyright in OPERA v2.3.<sup>13</sup> Two key questions arose:

1. Were the software developers employees of ObjectiVision at the time they contributed to OPERA v2.3? If they were, copyright would have automatically subsisted with ObjectiVision.
2. If not, had the copyright vesting in each developer been assigned to ObjectiVision (eg through an effective Consultancy Agreement)? If it had, copyright would have subsequently subsisted with ObjectiVision.

It was vital that ObjectiVision demonstrate copyright ownership (at least as a joint author) for it to have a right to sue for infringement. The analysis of this issue was complex, and each developer was slightly different.

For example, ObjectiVision had engaged software consultants (PMP) to perform some of the work, pursuant to an arrangement in which PMP agreed to assign any and all of its intellectual property (IP) rights to ObjectiVision. Some of PMP's employees, however, switched to independent contractors during the course of their work for ObjectiVision. The result was that during their time as employees, PMP was the author and first owner, and ObjectiVision was the subsequent owner, however once they became independent contractors to PMP, they retained copyright ownership and no further assignments were effectively executed.

Other issues that played against ObjectiVision were deficient assignments and unexecuted agreements.

In the end, the Court found that ObjectiVision had not established copyright ownership in respect of the majority of the contributions from software developers. ObjectiVision contended that even if it only had fractional ownership interests, it was still entitled to injunctive relief and nominal damages, however, as outlined below, the Court did not need to resolve this as copyright infringement was not proven.

### Subsistence of copyright

Subsistence was not a major issue and the Court was prepared to find that OPERA v2.3 was an original work.

### Copyright infringement

Two separate infringement claims were advanced:

1. USYD infringed copyright in OPERA v2.3 by reproducing the software in the AccuMap devices USYD held.<sup>14</sup>

8 CA, s 35(6).

9 *ObjectiVision*, [480]; CA ss 78 – 83. See also definition of 'work of joint authorship' in s 10(1).

10 See, eg, *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 229 CLR 577; *Beck v Montana Constructions Pty Ltd* (1964) NSW 229.

11 *ObjectiVision*, [640]–[648], [730].

12 *ObjectiVision*, [560].

13 *Ibid*, [584]–[614].

14 *Ibid*, [618]–[635].

2. USYD and Visionsearch infringed copyright in OPERA v2.3 by reproducing it when developing the TERRA software.<sup>15</sup>

In relation to claim 1, Justice Burley held that USYD had an implied licence to use OPERA v2.3, largely due to evidence His Honour accepted that ObjectiVision was fully aware of USYD's use of the software, and that this implied licence was never effectively revoked by ObjectiVision (although, this point became redundant, by way of a pleading deficiency on ObjectiVision's part).

In relation to claim 2, expert evidence was tendered that went to the similarity of OPERA v2.3 to TERRA, and a key issue was that one of the software developers had worked on

both, after moving from ObjectiVision to USYD. After an extensive analysis of the source code in each software product, including a finding that only 0.07% of the 175,293 lines of code in TERRA were the same as in OPERA v2.3, Justice Burley was not satisfied that infringement had occurred, and that any reproduced lines of code were merely 'fragmentary and inadvertent'.<sup>16</sup>

### Commercial implications

This decision is a useful and timely reminder of what parties should be alive to when negotiating and entering into arrangements such as procurement, consultancy or service agreements, which involve the creation, assignment and commercialisation of IP rights. As can

be seen in this case, the issues that arise in relation to copyright can be complex, particularly with software products.

Parties procuring or commissioning the creation of a product should consider the following:

- **Authorship:** Where multiple persons are working on the product, thought should be given to how their contributions might impact on whether they are the legal authors of any copyright subsisting in the resulting product. Software development should be project-managed effectively so that each developer's contribution can be clearly demonstrated, collaboration between developers should be encouraged, and where possible, there should be a common 'instructor' throughout the development process.
- **Ownership:** Where it is contemplated that both employees and independent contractors will work on developing the product, it is vital that appropriate agreements are in place. For the avoidance of doubt, employee agreements should contain robust IP clauses that make it clear that IP created in the course of employment will vest with the employer. For third-party contractor agreements, there should be an effective assignment clause and warranties to the effect that the contractor will only allow employees, or contractors that have signed a similar agreement to work on the product.
- **Implied licences:** To avoid a finding of an implied licence which might be contrary to the intentions of the licensor, all of the contemplated and permitted use of IP rights should be explicitly set out in a licence agreement, including the process of termination. In the event that a licence should need to be revoked, the revocation should be clearly communicated to the licensee.

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**BRIDGET FAIR** (CEO, FREE TV);

**EMILE SHERMAN** (PRODUCER, SEE-SAW FILMS - ACADEMY AWARD WINNER AND NOMINEE FOR THE KING'S SPEECH AND LION).

**FIONA CAMERON** WILL PROVIDE THE BACKGROUND AND PURPOSE OF THIS MEDIA REFORM PLUS A GENERAL SUMMARY OF THE 'OPTIONS PAPER'. **BRIDGET FAIR** WILL DISCUSS THE FACTORS OF IMPORTANCE TO AUSTRALIAN BROADCASTERS IN THE CONTEXT OF THE OPTIONS PAPER AND **EMILE SHERMAN** WILL ADDRESS THE CONCERNS MOST RELEVANT TO AUSTRALIAN INDEPENDENT PRODUCERS IN A MULTI-PLATFORM ENVIRONMENT.



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<sup>15</sup> Ibid, [636]-[736].

<sup>16</sup> Ibid, [798].



# Australian Government Opens Consultation on a New Online Safety Act

**Liz Grimwood-Taylor**, Knowledge Lawyer, Baker McKenzie, comments on the proposed changes to the Online Safety Act.

On 11 December 2019, the Australian Government's Department of Communications and the Arts (**DCA**) began a consultation<sup>1</sup> on its proposal to create a new Online Safety Act, following through on recommendations made in a 2018 review<sup>2</sup> to reform and expand the existing patchwork of online safety laws. On the same day, the Government also issued an Online Safety Charter,<sup>3</sup> outlining expectations for industry to protect Australians from harmful online experiences.

## 1. Overview of the proposals

In 2018, the DCA conducted a review of the *Enhancing Online Safety Act 2015* (Cth)<sup>4</sup> (**EOSA**) and the online content scheme in Schedules 5 and 7 of the *Broadcasting Services Act 1992* (Cth)<sup>5</sup> (**online content scheme**).<sup>6</sup> The review report found that the online content scheme was "out of date and no longer fit for purpose"<sup>7</sup> and recommended that it be replaced. The EOSA fared better, with the report noting that the eSafety Commissioner's work has delivered a sea change in policies and online safety activity.<sup>8</sup> Nevertheless, the report recognised that the eSafety Commissioner's work was hampered, amongst other things, by limited powers and out-of-date legislation.

To address the issues identified in the 2018 review, the DCA's December

2019 proposal is to create a new Online Safety Act (**OSA**), with objects of promoting online safety, preventing online harm and protecting Australians online.<sup>9</sup> According to DCA, the OSA would consolidate existing protections from the EOSA with the online content scheme, and strengthen those protections.<sup>10</sup>

In parallel to the OSA consultation, the Government has issued its Online Safety Charter.<sup>11</sup> The charter articulates online safety expectations relating to online service provider responsibilities, user empowerment and autonomy, and transparency and accountability.

## 2. The Finer Details...

There is a lot to consider in the consultation Discussion Paper<sup>12</sup>, and online service providers would do well to read the paper in full to understand the nuances of the Government's proposals and its implications.

Key aspects of the proposed OSA include:<sup>13</sup>

- a set of basic online safety expectations (**BOSE**) focusing on user empowerment, transparency, service integrity and collaboration with government and civil society;
- an extension of the EOSA's cyberbullying scheme for Australian children to cover

relevant electronic services and designated internet services, as well as social media services;

- a new cyber abuse scheme for Australian adults, which would include a new end user take-down and an associated civil penalty regime to combat menacing, harassing or offensive material intended to cause serious distress or serious harm;
- consistent take-down deadlines for image-based abuse, cyber abuse, cyberbullying and seriously harmful online content, so that online service providers will have to remove that material within 24 hours of a request from the eSafety Commissioner;
- an improved version of the BSA's online content scheme, which will require the Australian technology industry to take a more active and extensive role in addressing access to harmful online content, and give the eSafety Commissioner greater powers to address illegal and harmful content hosted overseas;
- a requirement for online service providers to offer the best available technology to prevent children's access to harmful content, supplemented by a new accreditation scheme to evaluate available tools and an obligation

<sup>1</sup> Department of Communications and the Arts, 'Consultation on a new Online Safety Act' (Web Page, 11 December 2019) <[https://www.communications.gov.au/have-your-say/consultation-new-online-safety-act?\\_sm\\_au\\_=iVVWHWKTPfZpVPrKkM6NKsW8f6TG](https://www.communications.gov.au/have-your-say/consultation-new-online-safety-act?_sm_au_=iVVWHWKTPfZpVPrKkM6NKsW8f6TG)>.

<sup>2</sup> Lynelle Briggs, *Report of the Statutory Review of the Enhancing Online Safety Act 2015 and the Review of Schedules 5 and 7 to the Broadcasting Services Act 1992 (Online Content Scheme)* (Review Report, October 2018).

<sup>3</sup> *Online safety charter*, Australian Government (at December 2019).

<sup>4</sup> *Enhancing Online Safety Act 2015* (Cth).

<sup>5</sup> *Broadcasting Services Act 1992* (Cth).

<sup>6</sup> Department of Communications and the Arts, 'Reviews of the Enhancing Online Safety Act 2015 and the Online Content Scheme' (Web Page 26 June 2018) <<https://www.communications.gov.au/have-your-say/reviews-enhancing-online-safety-act-2015-and-online-content-scheme>>.

<sup>7</sup> Lynelle Briggs, *Report of the Statutory Review of the Enhancing Online Safety Act 2015 and the Review of Schedules 5 and 7 to the Broadcasting Services Act 1992 (Online Content Scheme)* (Review Report, October 2018) 10.

<sup>8</sup> *Ibid* 20.

<sup>9</sup> Department of Communications and the Arts, *Online Safety Legislative Reform* (Discussion Paper, December 2019) 55.

<sup>10</sup> *Ibid* 7, 41, 55.

<sup>11</sup> *Online safety charter*, Australian Government (at December 2019).

<sup>12</sup> Department of Communications and the Arts, *Online Safety Legislative Reform* (Discussion Paper, December 2019).

<sup>13</sup> *Ibid*.

to proactively inform users about available opt-in tools and services;

- a specific and targeted power for the eSafety Commissioner to direct Australian ISPs to block access to sites hosting terrorist or extreme violent material for a defined period where an online crisis event (such as streaming of a terrorist attack) occurs. The new power would complement the existing *Criminal Code* provisions regarding abhorrent violent material and provide ISPs with immunity when implementing a direction of the eSafety Commissioner; and
- an ancillary service provider scheme giving the eSafety Commissioner the ability to request search engines, app stores and other ancillary service providers to disrupt access to websites, apps and/or games which have been found to have systemically and repeatedly facilitated the distribution of harmful content.

### 3. Significance of the proposals

The Government's proposal is a significant step forward in terms of online regulation. In their current form, the OSA proposals could have

considerable implications for online service providers.

The proposed enhanced powers of the eSafety Commissioner point to increased regulation and intervention by the Government in online safety. Online service providers will be expected to take the BOSE into account when designing and updating their services and processes. Providers would also need to be well prepared to handle transparency reporting directions from the eSafety Commissioner, given the likely reputational impacts of having to publicly report on non-compliance.

Additionally, operators of a broader range of services - such as gaming chat services, messaging apps, app stores and search engines - would need to prepare themselves to deal with notices and/or requests from the eSafety Commissioner to take down or disrupt access to certain harmful content. Of particular significance, the truncated timeframe for responding to take-down notices might result in online service providers having to develop or reorganise their take-down procedures. Service providers would also need to review and potentially improve their child protection tools and services, and

assess how to integrate required information about opt-in tools and services into the user experience.

While online service providers may be concerned about the impact of the proposals on them, a revamp of the BSA's online content scheme is long overdue and could have some positive outcomes. Consolidating the scheme with the EOSA and new online safety arrangements might also simplify the legislative landscape for online service providers and individuals seeking to understand their rights and obligations. In proposing specific criteria and triggers for cyber abuse-related take-down notices and the eSafety Commissioner's site blocking powers, it also seems that the Government has attempted - at least - to pre-empt likely criticisms of those activities as inhibiting freedom of expression and imposing an unreasonable burden on online service providers.

### 4. Next steps

Online service providers should consider the implications of the Government's proposals for their businesses and whether to make a submission to ensure their perspectives are taken into account.

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# AI: Understanding the IP: An In-depth Analysis of Copyright and the Challenges Presented by Artificial Intelligence

**Nina Fitzgerald**, Partner; **Eoin Martyn**, Senior Associate; **Caroline Christian**, Lawyer; **Jasmin Collins**, Summer Clerk, Ashurst, discuss the issues that arise in the ownership of AI-generated intellectual property.

Ray Kurzweil, the leading US author, inventor and futurist (and current Director of Engineering at Google) famously defined AI in 1990 as “*the science of making computers do things that require intelligence when done by humans*”. Whilst it has generally been accepted that computers might be capable of performing mathematical and scientific tasks, creativity has long been considered a uniquely human quality. However, 30 years on from Kurzweil’s definition, computers are creating all types of original works including artistic, literary and musical works.

Traditionally, copyright protection has been available in instances where technology has been used as a tool to assist a person to create a work (for example, using a camera to take a photograph). In these circumstances, the person has been credited as the creative mind that identified or set the scene resulting in the original work. Recent advances in machine learning and the growth of computing power have meant that AI can now create works which are, arguably, independent of human creativity. This raises the question of whether these AI-created works can be protected by copyright?

In this article, we examine the current legal framework for copyright protection in Australia and areas of potential reform, the Court’s treatment of technology-assisted works and how copyright interacts with artificially intelligent machines and AI-created works.

## Current legal framework

In Australia, an original work can be the subject of copyright protection provided that certain criteria are met.

One category of works protected by copyright is “literary works”. The definition of “literary work” in the *Copyright Act 1968* (Cth) (the **Act**) expressly includes a computer program. Therefore, the source code that forms the software of a computer program is protected as a literary work.

Ownership of the copyright in a computer program will generally be held by the authors of the code for the software that forms it. Copyright in the software that powers an artificially intelligent machine that delivers intuitive functionality, such as checking the weather or traffic conditions, subsists and is first held by the person or company that developed the software.

But what about works created by the AI system itself?

Relevantly, each work must have an “author”. Authorship necessitates that a “qualified person” be the author of a work in order for copyright to subsist. A qualified person is defined in section 32 of the Act as an Australian citizen or a person resident in Australia (under the *Copyright (International Protection) Regulations 1969* foreign nationals from certain countries obtain the same protection under Australian copyright laws). Of course, AI systems are neither human persons nor citizens.

Originality, on the other hand, requires a degree of human ingenuity. This was confirmed by the High Court in *IceTV Pty Ltd v Nine Network Australia Pty Ltd* [2009] HCA 14 where time and title information of scheduled television shows were not sufficiently original to attract copyright protection. The High Court held that originality requires some

independent intellectual effort or sufficient effort of a literary nature, during the creation of the work.

## Can AI-created works be protected using copyright under the Act?

It can be difficult to discern ownership for output generated by more developed AI systems. Copyright protection of the output behind an AI system is not a causal result of human action but can be attributable to the AI system itself.

A well-known example of a wholly AI-created work is *The Next Rembrandt*, a 2016 portrait created by an artificially intelligent machine following large scale analysis of existing works by the Dutch painter, Rembrandt. The artificially intelligent machine used deep learning algorithms and facial recognition techniques to produce a 3D textured output that mimicked the artist’s distinct style but was otherwise a unique and original painting. Although the artificially intelligent machine was given parameters to guide the output, the level of autonomy showcased the growing capabilities of machine learning.

Independently generated, AI-created works such as *The Next Rembrandt* present a significant challenge to the fundamental requirement of authorship, which underpins the Australian copyright regime.

Whilst not tested in Australia, it is likely that copyright ownership of *The Next Rembrandt* would meet the same fate as the phone directories in *Telstra Corporation Limited v Phone Directories Company Pty Ltd* [2010] FCAFC 149. In this case, the Full Federal Court considered whether copyright subsisted in

phone directories, which were largely compiled by computer-automated processes using a number of databases. Whilst the computer automated process stored, selected and compiled the data to produce the directories in their final form, the databases from which the data were drawn were updated by humans.

Although there was an element of human involvement in the creation of the works, the Full Court held that copyright did not subsist in the directories. The Full Court found that the creation of the material form of the directories was carried out by a computer program, with no substantive human input. Considering the requirement that there be a degree of intellectual effort in the creation of the work, the Full Court found it was not sufficient that this originality requirement was satisfied in the work's preparatory steps, but was instead needed in the creation of the work itself.

Similarly, the Full Federal Court in *Acohs Pty Ltd v Ucorp Pty Ltd* (2012) 201 FCR 173 considered copyright protection over work largely created by a computer-automated process. The Court considered whether copyright subsisted over safety information sheets created by a computer programme that arranged the relevant data into the required format. While Acohs asserted that copyright subsisted in the HTML code of the safety information sheets, the Court found that the machine-generated HTML codes were not subject to copyright protection as they were not written by human authors.

Therefore, under the current legal framework in Australia, while the creator of an artificially intelligent machine will generally retain copyright over the machine's source code, AI-created works will not attract the same copyright protection, as these works lack the element of human intervention.

### Potential reform

If AI-created works could be protected by copyright, who should be considered to be the author? Is it the person who uses the AI to create a work, even if all that person did was operate the machine? Or, the

person who created the AI (e.g. by developing the algorithms)? Or, most controversially, the machine itself, which could then perhaps constitute an exception to the rule that the author of a copyright work is the first owner of any copyright subsisting in it (i.e. in a similar manner that an employer is the owner of any copyright subsisting in works created by an employee under the terms of the employment contract)? Potentially complicated issues of joint ownership and the appropriate duration of copyright protection afforded to AI-created works could also arise.

Looking overseas, the UK allows copyright to subsist in AI-created works by attributing authorship of the works to the creator of the artificially intelligent machine or computer program. Section 9(3) of the UK's *Copyright, Designs and Patents Act 1988 (CDPA)* provides that the author of a work which is "computer-generated" shall be taken to be the person "by whom the arrangements necessary for the creation of the work are undertaken". Section 178 of the CDPA further defines a computer-generated work as one that "is generated by computer in circumstances such that there is no human author of the work".

The rationale behind the UK legislation is to create an exception to the requirement of human authorship in order to provide due recognition and protection for the work that goes into creating a program capable of independently generating works, even where much of the final work's originality is contributed by the machine.

A shift towards the UK approach would present a number of challenges, including how the duration of copyright protection should be treated? Under section 33 of the Act, copyright typically subsists in Australia for 70 years after the author's death. As artificially intelligent machines do not "die", according to its ordinary meaning, section 33 would not have the same time-limiting effect. In the UK, section 12(7) of the CDPA

provides copyright protection for 50 years from the end of the year in which the work was made. A similar approach is adopted in Australia for sound recordings and cinematographic films, whereby copyright continues to subsist until 70 years after the year in which the copyright material was first made public (section 93(2) of the Act). A comparable approach could be adopted in Australia for AI-created works.

### Further developments

Considerations of the impact of AI on IP are being made globally. In December 2019, the World Intellectual Property Organisation called for public submissions as part of a public consultation on AI and IP policy. Comments were submitted by various member states and individual industry groups, including the Australian government.

As part of its response to the WIPO request for submissions, the Australian government considered copyright and grappled with the complicated issues of authorship and ownership in light of the effects of attributing copyright to AI-created works. Whilst the government did not provide any conclusive remarks, they did highlight that it would be useful to understand what would be considered an 'AI-generated copyright work' and how much of a role AI should have in creating a work, in order for the AI to be attributed with copyright suggesting that the Australian government may be considering reform.

AI certainly poses challenges for copyright protection. Given the recent advances in machine learning and the growth of computing power, the distinction between technology-assisted works and AI-created works may soon diminish. It is important to consider whether the current legal framework for copyright in Australia requires reform to keep pace with advancements in technology. It is encouraging to report that the Australian government is considering these issues, and we expect to see further debate on the intersection of AI and copyright in the years to come.

# Defamation: The Social Media, Social-distancing Edition

Rebecca Lindhout - Special Counsel, McCullough Robertson Lawyers and Robert Lee - Solicitor

With many of us working from home, we are increasingly relying on technology, including social media, to keep us connected. It is easy to forget that the increased use of social media (and the publication it relies on) exposes us to a greater risk of defamation claims (and potentially increases the damages flowing from those claims given the ease of widespread publication). It is also particularly topical given the NSW

Court of Appeal's confirmation of the Voller decision<sup>1</sup>, and the implications that has for companies who have social media pages.

This article sets out a high-level overview of the operation of defamation law by reference to recent Australian social media cases. This first two pages addresses the elements of a defamation claim – a defamatory imputation, which is published to a third party, and which

is about the plaintiff. The final page of this article details some of the key decisions around damages (assuming no defence is made out, noting that following the NSW Court of Appeal's decision in Voller<sup>2</sup>, the defence of innocent dissemination is likely to play an increasingly important role) before briefly turning to the future of defamation in the social media context and some practical considerations for 'the now'.

## Who is the ordinary reasonable person?<sup>3</sup>

The person is to be determined by having regard to:

- different temperaments, outlooks (e.g. some are naturally suspicious and others naturally naïve) and degrees of education;
- the tendency to draw implications more freely than a lawyer, particularly derogatory implications and being prone to a degree of loose thinking;
- the tendency to read between the lines in light of their general knowledge and experience; and
- the tendency to take into account emphasis given by conspicuous headlines or captions,

and then finding the midpoint of all those temperaments, abilities and tendencies.

## Can memes contain a defamatory imputation?<sup>4</sup>

A photo taken at an 18th birthday party, and posted to Facebook, went viral inspiring the creation of satirical memes and media stories about the plaintiff's haircut he pleaded were defamatory.

"Expression of views concerning hairstyle, or trends such as vegetarianism, or of dislike for a celebrity are insufficient, without more, of imputing actionable meanings unless there is some defamatory act or condition capable of being conveyed, in circumstances where the absence of darker meanings is 'palpable'".

## Element 1:

**Does the material contain a defamatory imputation, as determined by reference to the ordinary reasonable person?**

## Incorporation of defamatory material through a hyperlink?<sup>7</sup>

Bailey put a hyperlink, together with some neutral text on her Facebook page. The hyperlink re-directed Facebook users to YouTube content which was clearly defamatory of Bottrill (it suggested that Bottrill was a member of a satanic group and a satanic paedophile group).

The text Bailey included was held to be a sufficient snippet or context to entice a searcher to click on the hyperlink. The neutrality of the text under the hyperlink was not sufficient to constitute refutation and it didn't matter that it was automatically generated. The circumstances gave rise to incorporation of the defamatory content.

## What about material which is not in English?<sup>5</sup>

Proceedings were commenced by an Archbishop against a former parishioner who maintained a persistent campaign of criticism against the Archbishop on Facebook, including in posts in Arabic.

The defamation of the Archbishop was held to be serious, including that he has failed the Church, is evil and worse than ISIS, is violent, drunk, dishonest and incompetent. It did not matter that the statements were in Arabic rather than English.

Damages of \$150,000 and a permanent injunction were awarded.

## Defamation via private text messages?<sup>6</sup>

McIntosh sent text messages with defamatory imputations to a close friend.

The Court held that the text messages sent by McIntosh were different from the usual 'spontaneous, informal text messages often sent to family or friends', and that they were comparatively longer, structured, and grammatically correct. Le Miere J emphasised that the ordinary reader would read the text messages as considered statements, not informal text messages. Further, applying the Thornton principle, it was sufficient that the words complained of were capable of sustaining harm to Armstrong by lowering him in the estimation of right thinking members of society generally.

Armstrong was awarded \$6,500 in damages, including \$1,500 for aggravated compensatory damages, and an injunction was issued against Mr McIntosh restricting him from publishing the words or any similar words defamatory of the Plaintiff.

1 Fairfax Media Publications; Nationwide News Pty Ltd; Australian News Channel Pty Ltd v Voller [2020] NSWCA 102

2 Ibid.

3 Trkulja v Google Inc [2018] HCA 25 at [31], [32].

4 Mossmani v DailyMail.com and others [2016] NSWDC 264 and others at [17]

5 Zaia v Eshow [2017] NSWSC 1540 [Note the later case of Zaia v Eshow [2019] NSWSC 740 where Eshow was held in contempt of court for breaching the injunction.]

6 Armstrong v McIntosh [No 4] [2020] WASC 31

7 Bailey v Bottrill (No 2) [2019] ACTSC 167

### What is participation in publication?<sup>8</sup>

Following *Trkulja*, the test for publication is 'tolerably clear'. It is whether a person has participated in the publication. Participation must be deliberate or with knowledge, but regardless of the degrees of participation. Whether a person who includes a hyperlink to defamatory material has participated in the publication is a matter of context such as the circumstances of the post on the host page and accompanying words or content on the page (including whether it adopts, repudiates or discounts the original statements).

### Liability for the poster, irrespective of author<sup>9</sup>

O'Reilly commenced defamation proceedings against Edgar and alleged that a total of 22 defamatory imputations were posted on ten Facebook posts. Edgar claimed that he was not the 'author' of some of the posts (as they had been written by someone else), however the Court held that this was immaterial – defamation is about publication not authorship.

The Court further held that the award must be conscious that an award of damages needs to be sufficient to convince a bystander, who later learns of a slur through the "grapevine", of the baselessness of the charge. Damages of \$250,000 were awarded, having regard to amounts awarded for other social-media based defamation.

### Liability of a media company for comments on its public Facebook page<sup>14</sup>

Voller was a detainee at a youth detention centre. A Four Corners program entitled "Australia's Shame" featured graphic footage of Voller being restrained in a chair and subject to other maltreatment by guards of the detention centre. The defendants used their public Facebook pages to disseminate links to news stories about Voller. The public could comment on the public Facebook page. Voller alleged that some of the comments made on the Facebook pages were defamatory.

Each of News Corp, Australian News Channel (Sky News) and Fairfax Media (now Nine) were held to be the primary publisher of third party comments on their public Facebook pages, even where they as the 'publishers' had not been requested to remove the content or even put on notice of the relevant content. They were held out as primary publishers because they allowed and encouraged comments and they had the capacity to hide comments until they could be monitored and vetted, but did not do so.

The court also issued a reminder that those who post comments on Facebook posts are not automatically absolved of liability – they can be found liable separately as primary or secondary publishers.

### Element 2:

**Did the defendant participate in the publication of that material to a third party?**

(and, in the social media context, who is the participant where a post is liked or commented on by someone else?)

liked and shared (9,000 and almost 13,000 times, respectively).

The court determined that Aldridge's liability for secondary publication of the Facebook comments did not require proof that Aldridge could directly control the authors of the comments or that they were complicit. He had to establish that he could not, with reasonable diligence, have known about the defamatory material in the comments. So, Aldridge was considered responsible not only for the defamatory contents of his own Facebook posts but also for the defamatory comments of others on his posts and Johnston was awarded \$100,000 in damages.

### Is liking an endorsement?<sup>13</sup>

Eardley, a senior police officer, commenced an action in relation to a segment on a Channel Nine News broadcast which she alleged imputed that she was responsible for posting a string of sexist posts about Greens MP Jenny Leong which aimed to bully, attack and humiliate Leong.

To support its truth defence, Nine Network asserted that the fact that Eardley had liked one of Nine Network's posts meant she had endorsed it. This was rejected - McCallum J stated: "each of those imputations poses an objective enquiry as to whether the plaintiff was responsible for or an instigator of the relevant posts or campaign respectively." The "liking" of a post is not the same as posting the material oneself.

### 'Liking' which draws attention to a statement<sup>15</sup>

Bolton alleged that numerous posts by Stoltenberg on his Facebook page gave rise to defamatory imputations including that Bolton was corrupt and dishonest, and compared Bolton's conduct to that alleged of Don Burke, Craig McLachlan and Harvey Weinstein.

Stoltenberg operated a public Facebook page known as 'Narri Leaks' on which Loder published content. Stoltenberg (and others) set up a filter which required administrators to approve posts before they were published to the Facebook page. However, comments on posts could be made before without being reviewed.

Payne J found that the act of "liking" a post was not enough to attract liability based on the facts before him. However, he noted that such conduct could attract liability if evidence showed the "like" had drawn the attention of others to the post (for example if it caused the post to appear on another person's Facebook feed). Without further evidence of such an effect, liking a post is not analogous to hyperlinking to defamatory content.

Loder was found to have published comments on one of Stoltenberg's posts which endorsed his post, drew attention to those words and urged other to express their agreement with the post, amounting to an act of authorisation of the original post. Bolton was awarded \$110,000 in damages (plus \$10,000 in interest and costs). \$10,000 was for the comments made by Loder on one of Stoltenberg's posts.

### Element 3: Is the imputation about the plaintiff?

Per section 9 of the *Defamation Act 2005* (NSW) (and equivalent provisions under the Uniform Defamation Laws 2006), a corporation cannot bring a claim for defamation unless it was an 'excluded corporation' at the time of publication. A corporation is an excluded corporation if it is not a public body and either:

- the objects for which it is formed do not include obtaining financial gain for its members or corporators, or
- it employs fewer than 10 persons and is not related to another corporation.

Where a publication is potentially 'defamatory' to a corporation but only mentions the company name (eg, Meriton) and not the name of individuals behind the company (e.g. a senior executive), owners and managers cannot simply bypass legislative limitations including section 9 by suing for defamation as individuals. In order for the "man or woman behind the company" reported on being able to sue for defamation when they are not explicitly referred to, an individual must demonstrate a bridge in the article between he or she and the company. "General notoriety", or evidence the individual is publicly connected with the company, will not in and of itself be sufficient.<sup>16</sup>

8 Ibid at [39]

9 Hockey v Fairfax Media Publications Pty Ltd [2015] FCA 652

10 O'Reilly v Edgar [2019] QSC 24

11 Johnston v Aldridge (No 2) [2018] SADC 72

12 Von Marbug v Aldred & Anor [2015] VSC 467. The substantive proceedings are yet to be heard, this was an application for leave to amend the pleadings.

13 Eardley v Nine Network Australia Pty Ltd [2017] NSWSC 1374 at [13]

14 Voller v Nationwide News Pty Ltd and others [2019] NSWSC 766. Damages are yet to be determined in this case.

15 Bolton v Stoltenberg [2018] NSWSC 1518

16 Trigubov v Fairfax Media Publications Pty Ltd [2018] FCA 845

### Aggravating defamation damages<sup>17</sup>

Stokes and Ragless were both members of a shooting club with different ideas about the direction the club should take. Stokes alleged Ragless defamed him in 132 publications (including on a Facebook page, links to which were emailed to members of the club).

The imputations were “clearly capable of exposing a person to hatred, contempt or ridicule, or causing a person to be shunned, or adversely affecting a person’s reputation when measured by how the ordinary, reasonable reader would understand the publication”.

The Court ordered general damages of \$70,000 and aggravated damages of \$20,000. The quantum of damages was partly due to the efforts of Ragless to attract people from outside the shooting community to the website and Facebook pages on which the defamatory statements were published, his failure to issue any apology and his insistence that his accusations were truthful despite a lack of evidence.

### You can ‘damage’ a reputation that is not exemplary<sup>19</sup>

Noone, a nursing director at a retirement village, was alleged, via Facebook, to have bullied staff, forged signatures, misused medication and otherwise acted negligently. During proceedings, Noone’s reputation was called into character, including comments from Smith DCJA that her answers were misleading and deceptive, and that she was not entirely frank with the court.

General damages of \$10,000 and aggravated damages of \$5,000 were awarded in respect of the statements found to be defamatory. This amount was determined having regard to the factual findings that the damage to her reputation caused by the undefended imputations was “not like someone with an exemplary character being defamed.”

### Significant damages can apply even where there is a limited audience and publication timeframe<sup>22</sup>

Scott made Facebook posts which were essentially warnings that three establishments owned/operated by Rothe were being used to rehome paedophiles.

Gibson DCJ observed that Defamation actions in relation to social media allegations of an extreme nature, generally without any basis and driven not by mere malice but some kind of Internet “road rage”, are increasingly common before the courts.

Rothe was awarded \$150,000 in damages, including \$50,000 aggravated damages. The entitlement to ‘substantial damages’ was adjusted downwards having regard to the extent of the publication (primarily Nambucca Heads) and the short time of the publication on Facebook.

### Defamatory posts about health professionals<sup>23</sup>

Al Muderis, an orthopaedic specialist, operated on Mazzella (second defendant). Mazzella alleged complications associated with the operation, none of which withstand scrutiny, but posted a series of publications on Facebook, YouTube and Pinterest that vilified the plaintiff. Duncan joined in that vilification.

The award (\$160,000 payable by Mazella and a further \$320,000 payable by both defendants for aggravated damages) was in part to take into account the grapevine effect and the fact that the allegations focused on Al Muderis in his professional capacity, where reputation is “extremely high or at the highest possible level” and so the imputations are ‘extraordinarily damaging’.

## Damages

### Spurious defences can aggravate Twitter and Facebook defamation<sup>18</sup>

Farley (a student) posted abusive and defamatory tweets about Mickle (his teacher, and acting headmistress) on Twitter and Facebook. Elkaim SC DCJ at [21]: “When defamatory publications are made on social media it is common knowledge that they spread... Their evil lies in the grapevine effect that stems from the use of this type of communication.”

Mickle was awarded \$105,000. \$20,000 aggravated damages were given because: (1) Farley deliberately ignored a letter sent by Mickle’s lawyers after the defamatory posts were made, and (2) Farley’s apology was contradicted by the pleaded defence of truth (and so the defence was raised spuriously).

### Damages for personal attacks to limited audiences on Facebook<sup>20</sup>

Greeuw posted to her personal Facebook page the comment: “separated from Miro Dabrowski after 18 years of suffering from domestic violence and abuse. Now fighting the system to keep my children safe.” Dabrowski sued for defamation.

“Defamatory publications on social media spread easily by the simple manipulation of computers. A public Facebook page is able to be viewed worldwide by whoever clicks on that page and the grapevine effect stemming from the use of this type of medium must be considered (ref *Mickle v Farley*). However it must also be recognised that Facebook is a source other than a mainstream news or information provider.”<sup>21</sup>

Dabrowski was awarded damages of \$12,500. This was despite the fact that there was no financial loss, the remarks were made by an estranged spouse to a limited audience, and removed after 6 weeks.

### Statements on public Facebook profiles cause more damage than private ones<sup>24</sup>

Reid (a football CEO) sued Dukic (a soccer coach) over nine defamatory posts published on Dukic’s Facebook wall, including allegations of fraud, dishonesty, theft and racism. Dukic removed all posts shortly after the claim was commenced.

It was relevant that Dukic’s profile was set to public, rather than private – as the posts were accessible to anyone, whether they were a “friend” of the defendant’s on Facebook, a Facebook user or someone that was neither. Default judgment was entered and damages of \$180,000 (\$160,000 and \$20,000 aggravated damages) were awarded.

It is widely acknowledged that defamation law has failed to keep pace with the changing landscape – including the significant role played by social media. As many of us embrace working remotely, and spend ever-more time on social media platforms, including newly popular platforms such as Zoom, it is clear that there is real risk in relation to defamation on social media, both for individuals in their personal capacity, and for organisations who use social media as a platform to promote their businesses (and whose employees use those platforms in a work capacity). It’s also worth bearing in mind that, the most serious cases of online defamation can attract criminal penalties (including imprisonment<sup>25</sup>).

The confirmation of the Voller<sup>26</sup> decision, and the recent damages awards

highlighted above emphasise that it is a dangerous time to be (or facilitate) a ‘keyboard warrior’. Reform in this area is coming – it is hoped that it will, among others, better strike the balance between people defending their reputation through claims (including ‘neighbourhood disputes’ which have moved online, aided by social media), and not clogging up the courts where there isn’t any actual damage done to that person’s reputation.

In the meantime, some practical steps you can take to reduce the risk of being held liable for defamation through social media are:

- ensuring privacy settings for social media pages are appropriate (a private social media page will lessen the scope of publication, and therefore damage<sup>27</sup>);

- having clear policies for your marketing and social-media teams to follow relating to moderating user-generated contributions to public social media pages (such as through filtering or blocking of certain words or phrases; and swiftly taking appropriate steps, such as removal, if content is defamatory). The policies should balance the need to remove defamatory content compared to removing all negative posts (which could give rise to a misleading or deceptive conduct claim); and
- ensuring any defences made out are legitimate (and not, for example, apologising for publishing defamatory statements and then pleading the defence of truth<sup>23</sup>).

17 Stokes v Ragless [2017] SASC 159

18 Mickle v Farley [2013] NSWDC 295

19 Noone v Brown [2019] QDC 133

20 Dabrowski v Greeuw (2014) WADC 17

21 Ibid, Bowden DCJ at [265]

22 Rothe v Scott (No 4) [2016] NSWDC 160

23 Al Muderis v Duncan (No 3) NSWSC 726

24 Reid v Dukic [2016] ACTSC 344

25 e.g. s529 Crimes Act 1900 (NSW)

26 Fairfax Media Publications and Ors v Voller [2020] NSWCA 102

27 Mickle v Farley [2013] NSWDC 295

# CAMLA CLB Interview:

## Debra Richards



**Debra Richards'** reputation as a trailblazer in the media and entertainment precedes her (and we aren't just talking about her hosting of the CAMLA Cup for many years!) – Debra is the former CEO of both ASTRA and Ausfilm, and is currently the Director of Production Policy at Netflix for the APAC region.

Debra spoke with **Jessica Norgard**, Acting Deputy General Counsel (Communications, IP and Commercial) at **nbn** about her renowned career, challenges that the media & entertainment industry are facing and the path forward for Australian content.

**JESSICA NORGARD:** Thanks so much for agreeing to chat with me and sharing some of your experience and insights into the media industry. First, for anyone who has been living under a rock, can you please tell us a bit about yourself and your current role?

**DEBRA RICHARDS:** Thanks Jessica, tell me again how I was convinced to do this?! So, I am currently Director, Production Policy, APAC for Netflix. Production Policy is a small team covering the globe and is part of a larger Public Policy team for Netflix. I cover policy specifically dealing with production which may include production capacity (stage space, crew depth), incentives, and the range of issues that may emerge from pre through to post production in the Asia Pacific region. This region is from India through to Japan, including South Korea, South East Asia, Australia and New Zealand. My colleague in Amsterdam covers Europe, Middle East and Africa, another colleague covers Latin America and Spain and of course there is UCAN which is the US and Canada. The APAC main office is in Singapore and I work closely with Nick O'Donnell, Director, Public Policy, ANZ, based in Sydney.

**NORGARD:** I imagine millions of people are very grateful to you and the Netflix team for bringing us virtually endless content during lockdown and keeping us sane. Certainly an essential service! Now, you have had a very interesting and illustrious career – could you please tell us about your previous roles?

**RICHARDS:** I am not sure how I landed at Netflix, but I suspect I would not be here without the experience of my previous roles as a regulator, industry representative and advocate. My graduate study had been in the arts - communications, literature, performing arts, even a Masters in Theatre - so the obvious career path for me was the Public Service. I often described myself in the past as a 'broadcast bureaucrat' - as I grew up in the public service and greatly valued the fact that I was steeped in governance, accountability, public processes and policy development. From an initial gig in Canberra, I managed to grab a position in Sydney at the Australian Broadcasting Tribunal as Secretary to the then Children's Program Committee, and where I first met my esteemed colleague Dr Nick Herd who is now Head of Research and Policy at Ausfilm.

I spent 13, sometimes frustrating but always interesting, great years with the regulator; involved in a number of major inquiries including those for Australian content (programs & advertising), children's television, classification, anti-siphoning & sports rights. This was in addition to implementing a new broadcasting regime from

a quasi-judicial tribunal to a co-regulatory authority; a stint as an adviser to the Minister for Communications & the Arts; and eventually Director of Programming and Licensing covering content for radio and television, research, renewing and licensing new services including subscription television.

I took another leap when I was rung to see if I was interested in starting a new industry body for that very same subscription TV industry - when I became CEO of ASTRA (Australian Subscription Television & Radio Association), one radio announcer described my move as being similar to the then Deputy Chief Censor leaving the Classification Board to make 'porn'!

Another 12 years at ASTRA, where my first piece of correspondence was to respond to myself about codes of practice... Again many of the issues carried across so it was implementing Australian content expenditure requirements, codes of practice, captioning, ensuring a fair go in the digital terrestrial conversion process and many of those 12 years hitting a head against an anti-siphoning brick wall.

After a break for most of 2010 I received another phone call asking if I would be interested in 'rebuilding' Ausfilm, a member organisation of government and industry set up to attract international production, co-production and post-production to Australia, with an office in LA! Of course I said 'yes' and before I knew it I was talking with Hollywood studios about Australia as a preferred destination to work with the best production services, locations, crew and talent available. Ausfilm is an extraordinary team of screen businesses and screen agencies all working together to market Australia as the place for local and international production and advocating key incentives policy to keep Australia competitive in the global market.

After almost nine years I took another phone call to gauge my interest in taking on a Netflix role in the Asia Pacific region. I must admit I was torn, I loved my Ausfilm job but the opportunity was overwhelming, and after some soul searching and key advice, I decided I would regret not 'giving it a go'. So here I am and it has been an incredible nine months.

**NORGARD:** Your passion for encouraging local production and content is impressive. Speaking of which, there are currently discussions as to whether there should be Australian content obligations for on-demand subscription services like Netflix. This is obviously a hot topic at the moment after the ACCC's Digital Platform Inquiry, Screen Australia and the ACMA's Options Paper released in April,



and the announcement of a suspension of specific local content quotas for 2020 as an emergency response COVID-19. Can you tell our readers where this is up to / any insights or future predictions you might have as to the outcome?

**RICHARDS:** Netflix is currently participating in the Minister's (for Communications, Cyber Safety and the Arts) consultation process in response to the 'Options Paper', and it has been encouraging that the Minister is keen to hear from all stakeholders and open to options to ensure the continued creation, production and distribution of Australian stories. The consultation roundtables have been an excellent avenue to hear people's views and concerns about the present regulatory framework and blue sky thinking of the way forward. Of course we cannot pre-empt any decisions by the government but it is fair to say that throughout the consultation there has been strong commitment to work to an outcome that ensures Australians can see themselves reflected on screen and those stories and those that make them can be showcased to the rest of the world.

**NORGARD:** What do you consider to be some of the biggest legal and/or regulatory challenges facing the media and entertainment industry?

**RICHARDS:** Well since COVID-19 a number of these challenges have been brought into greater focus. There is the current discussion around how best to ensure the continued production of Australian screen stories; with more and more distribution outlets and models, the perennial issue of IP protection and valuing copyright; the changing viewing (and listening) patterns and ways of accessing content by consumers; the continuing objective to ensure children are protected from material that may be harmful; the need to ensure everyone has access to key communication and entertainment services; and how all of these challenges impact on existing, new and emerging services; and of course there is always anti-siphoning!

**NORGARD:** The way that we consume content has changed quite a lot throughout your career. From the day you began working in this space, what are the three biggest transformations you've witnessed?

**RICHARDS:** There have been many but if I had to choose just three, then first is probably 'Equalisation' of services in the 80's - that's 1980's. This was a decision of the then federal government to provide, to the extent possible, equal access to the same number of television services across the country. Having grown up on the south coast of NSW I was raised on two channels, being the ABC and local commercial regional station WIN. While the aim to provide 'equal services' was seen as a key policy objective, I did feel a sense of loss and nostalgia the first time the WIN logo was accompanied by the nine distinct dots of the Nine brand, and as distinctly regional services gradually faded; and regulation to mandate or ensure local content in regional Australia has been trying to keep up ever since.

Secondly, being part of and implementing the changes to the broadcasting regime:

- After 50 years of adding to and amending the Broadcasting Act of 1942, it was replaced by the Broadcasting Services Act of 1992.
- The Australian Broadcasting Tribunal became the Australian Broadcasting Authority (now the Australian Communications & Media Authority) and under this new structure licensing renewal processes, content

standards, and complaints previously conducted as full public inquiries became an administrative process with regulation by exception. There was also a judicial arrangement between the Tribunal and those it regulated which became a co-regulatory approach with the Authority. The Tribunal was handed a new Act to administer, and given the substantive change (and to assist that transition) Tribunal staff wrote and performed a musical - "ABT Off the Air" - and commenced the Authority the following day!

Number three is probably the digital evolution across production and distribution which has enabled multiple new services, new and innovative ways of making content, and new players. What more can I say?

**NORGARD:** Fast forward as quickly as we can past 2020, and 10 years into the future - what does the media and entertainment industry look like, and what role are you playing?

**RICHARDS:** Just quietly I used to think I should be retired by 2030 but I hope I will still be contributing in this space, as it always surprises me that many of the issues we deal with today and will in future still benefit from knowledge and understanding of the past. There will likely be more choice of content and an ease of navigation of how to find what you want to watch, listen to, play or engage with. What I hope for is a strong Australian production industry, with a consistent pipeline of work for domestic and global consumption.

**NORGARD:** For people who want to follow in your shoes, any advice?

**RICHARDS:** It is the advice I give to anyone who speaks to me about the next steps in their career, 'it's all common sense and your skills are transferable'. That is - don't discount your ability to do something just because you haven't done it before or are hesitant about whether you can do it - it's all part of the adventure.

Also some advice to live by from Bob Campbell - I ran into him after I had left ASTRA and said the usual "I was taking some time off to work out what I wanted to do, but that I was nervous about being out of the workforce for too long, I was thinking of taking at least six months, maybe longer as I really need a break". He said he had gone through the same 'process' when he left Seven (before Screentime) and advised, "Debra take six months, no, take 12 (months). Don't worry about it, it will all work out". And it did - 10 months later I received a phone call to consider taking on the Ausfilm CEO role. (PS also further advice is to always take a phone call!)

**NORGARD:** Thank you so much for your insights Deb! On behalf of all our readers, we are extremely grateful for your wisdom, future gazing and candour.



**Jessica Norgard** is a member of CAMLA's Young Lawyers Committee and the Acting Deputy General Counsel (Communications, IP and Commercial) at nbn.

# Why it's Time to stop Force-feeding Cookies to Users

**Michael Do Rozario** and **Simon Johnson**, partners, and **Bianca Collazos**, law graduate, Corrs Chambers Westgarth.

A recent ruling by the Court of Justice of the European Union (CJEU) has confirmed that users must actively consent to cookies under the European Union General Data Protection Regulation (GDPR).<sup>1</sup>

Laws in the US state of California are catching up with the EU, and in Australia, the recommendations of the Australian Competition and Consumer Commission's (ACCC) Digital Platform Inquiry – which include a number of additional protections for consumers within the Privacy Act – will be considered this year. Given these recent global developments, now is the time for companies to start looking closely at their cookie usage, consent and related internal policies.

In *Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband e.V. v Planet49 GmbH* (Planet49 case), Planet 49 GmbH – an online gaming company collecting data for a promotional online lottery – maintained a website which was configured to provide cookie consent via an opt-out process. Participants were required to deselect a pre-checked checkbox to refuse consent to Planet49 storing cookies on the participant's device. Planet49 also transferred the personal information of participants to its third party partners and sponsors.

After considering submissions from multiple European Governments and the opinion of the Advocate General, the CJEU determined that:

- consent via a pre-checked checkbox which the website user must deselect to refuse his or her consent does not constitute the requisite consent to collect personal information;
- it was of little significance whether the information stored by a company met the definition of personal data in the GDPR; and
- a service provider must give a website user clear information regarding cookies, including the purpose, the duration and whether or not third parties have access to those cookies.

In an Australian context, Planet49's cookie approach would meet the requirements of the Privacy Act as it currently stands. In contrast to the findings of the CJEU, current Australian regulation allows for both express and implied consent.<sup>2</sup> While the Australian Privacy Principles (APPs) require consent to be informed, voluntary, current and specific, they do not preclude companies from the use of pre-filled opt out checkboxes.<sup>3</sup>

However, given the clear global trend towards actual consent being required, it is likely that the Australian position will change.

The ACCC Digital Platforms Inquiry Final Report was released on 26 July 2019, and recommended a number of additional protections for consumers within the Privacy Act.<sup>4</sup> These recommendations were aimed at strengthening notification and consent requirements, and would bring the APPs closer in line with their European counterpart. The Australian Government has indicated it supports many of these measures and will conduct a consultation period this year.<sup>5</sup>

The GDPR requires companies to obtain 'freely given, specific, informed and unambiguous' consent for the processing of an individual's personal data.<sup>6</sup> Additionally, the consent must be 'clear affirmative action', where the regulation strictly precludes 'silence, pre-ticked boxes or inactivity' from constituting valid consent.<sup>7</sup>

In the US, the California Consumer Privacy Act (CCPA), which commenced on 1 January 2020, takes the GDPR one step further, allowing Californian residents to:

- demand companies to disclose within 45 days what information is collected;
- request a copy of that information;
- see a list of all third parties the data was shared with; and
- demand that their personal information not be sold.<sup>8</sup>

1 *Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband e.V. v Planet49 GmbH* (C-673/17) [2019] ECR. See link here.

2 *Privacy Act 1988* (Cth) s 6(1).

3 Office of the Australian Information Commissioner, 'Chapter B: Key concepts' (Australian Privacy Principles guidelines, July 2019) pt B.35, B:40. See link here.

4 Australian Competition and Consumer Commission, 'Digital Platforms Inquiry - Final Report' (ACCC Report, July 2019).

5 Australian Government, 'Regulating in the digital age: Government Response and Implementation Roadmap for the Digital Platforms Inquiry' (Government Response, December 2019) See <https://treasury.gov.au/publication/p2019-41708>.

6 EU GDPR Article 2(h) of Directive 95/46.

7 EU GDPR Recital 32.

8 California Consumer Privacy Act of 2018 [1798.100 – 1798.199].

The third party cookie aspect of the Planet49 case is also likely to be addressed by changes implemented by browser companies aimed at eradicating such third party cookies (see, for example, this announcement from Justin Schuh, Director of Chrome engineering at Google), however the privacy laws apply to both first party and third party cookies.

### Next steps

In light of the Planet49 case and the fast pace of law reform in this space globally, companies should review their use and consents for

cookies, in particular those cookies that store personal information (or information that can be aggregated to create personal information), require specific information to be given and require direct consent to be informed.

We recommended that companies look to:

1. Conduct an audit of how the company places and uses cookies.
2. Assess whether the collected data can be accessed by third parties, and if this is clearly and properly disclosed to website users.

3. Assess whether the data they collect rises to the level of 'personal information', and if so, whether it is covered by privacy policies and current company practices.
4. Assess whether they need to consider the 'Do Not Sell' rules created by the CCPA.

In our view, a best practice cookie policy would make clear:

- who might have access to the personal information;
- how long they will have access for; and
- the purpose of collecting such information.

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

- defamation
- broadcasting
- copyright
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- contempt
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- censorship
- film law
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In order to debate and discuss these issues CAMLA organises a range of seminars featuring speakers prominent in communications and media law policy.

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

CAMLA provides a useful way to establish informal contacts with other people working in the business of communications and media. It is strongly independent, and includes people with diverse political and professional connections. To join CAMLA, or to subscribe to the Communications Law Bulletin, complete the form below and forward it to CAMLA.

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