

Communications Law Bulletin



United States Special Edition

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Editors' Note

Many of the key legal issues facing the media, entertainment, telecommunications and technology industries are global. A development on one side of the world can have deep ramifications somewhere else. For example, a proposed acquisition of a publishing company in Washington can lead to rumblings all the way over in the carpeted hallways of Sydney law firms. In this edition, we zero in on some of the legal developments that have been playing out in the United States this year, and look at the impact of those changes on the Australian legal landscape.

The team at Norton Rose Fulbright (**Dr Martyn Taylor**, **Dietrich Marquardt** and **Maxine Richard**) walk us through some developing trends in the regulation of tech giants in the United States and the key implications for Australia. Also on the tech front, we hear from **Richard Hoard** (Jones Day) and **Emina Besirevic** (Clayton Utz) take a close look at the Metaverse and how IP rights can be protected. Coming to us directly from the Metaverse, **Anna Kretowicz** (CAMLA Young Lawyer) interviews **Tom Griffin**, Associate General Counsel at Meta, Sydney. Tom discusses his career to date, his role at Meta and the ever-changing nature of privacy and data protection laws. We also hear from Seattle based lawyer, **Mary Huang** on her role as product counsel for Microsoft, having made the leap to the States after time as a Sydney based IP lawyer. Mary talks to CAMLA Young Lawyer Secretary **Belyndy Rowe** (Bird and Bird) about the challenges of advising on the expansion of one of the world's most utilized cloud platforms.

On defamation, **Sylvia Alcarraz** (Dentons) dives into a breakdown of the trial by social media storm surrounding the *Johnny Depp v Amber Heard* defamation trial. **Nathan Buck** and **Jeremy Marel** (Kennedys) take a step back and examine the use of juries in defamation proceeding in America and Australia. We also hear from **Dan Lunniss** (McCullough Robertson) on the future of *NYT v Sullivan*, and the enforceability of Australian defamation judgements against US publishers.

A US based transaction that perked up the ears of Australian competition lawyers and the ACCC were proceedings brought by the Department of Justice in the District Court for the District of Columbia in



Eli Fisher



Ashleigh Fehrenbach

relation to the recent proposed acquisition of Simon & Schuster by Bertelsmann Se & Co. KGaA, owner of Penguin Random House. **Jennifer Dean** and **Benjamin O'Mara** (Johnson, Winter & Slattery) look at this case in detail, assessing the dichotomy in antitrust doctrine between the orthodox approach of assessing competitive harm by reference to consumer welfare and retail price, and advocates for change.

On the intellectual property and Australian Consumer Law front, the team at MinterEllison (**Zeina Milicevic**, **Jaimie Wolbers** and **Humyara Mahbub**), examine the Full Court's judgment in the protracted dispute between US company State Street Global Advisors and Maurice Blackburn regarding the use of the replica of the iconic statue, Fearless Girl. For more on copyright, **Laksha Prasad** and **Emma Johnsen** (Marque Lawyers) consider the claim made against Mariah Carey's "All I Want for Christmas", a reminder that it's never too early to start celebrating – or litigating for that matter.

There are some exciting seminars and events still to come on the CAMLA agenda for 2022 – be sure to keep your eye out for them.

Thank you to all our contributors for this Special Edition of the CLB. To our readers, we hope you enjoy the read!

Ash and Eli



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Regulating the Technology Giants - Trends in the United States and Implications for Australia

Dr Martyn Taylor (Partner), Dietrich Marquardt (Senior Associate) and Maxine Richard (Lawyer), Norton Rose Fulbright¹

In an increasingly data-driven world, the global reach, and resulting power, of 'Big Tech' (and digital platforms more broadly) has grown both organically and through acquisitions. Following various accusations that major digital platforms are engaging in anticompetitive conduct, there has been growing concern from various quarters that existing competition laws may be insufficient.

These concerns have evolved in the context of greater social and political awareness of data protection, privacy and cybersecurity. These concerns also reflect growing recognition of aspects of the 'neo-Brandeis' school of thought, often flippantly referred to as 'hipster antitrust'. This school of thought argues for greater dispersion of political and economic control and a greater recognition of the distributional implications from concentration of economic power. President Biden's Executive Order on Promoting Competition in the American Economy of 9 July 2021 stated, for example *"excessive market concentration threatens basic economic liberties, democratic accountability, and the welfare of workers, farmers, small businesses, startups, and consumers"*.

Given such concerns, policymakers and regulators have been working together across the globe to examine whether further regulation is appropriate. To date, different jurisdictions have adopted different approaches. The European Union, for example, has adopted a more heavy-handed approach. The Australian Competition & Consumer Commission (ACCC) is similarly considering these competition and consumer law concerns. Australia has the benefit of being able to observe developments in other countries to determine whether greater regulation is appropriate for Australia and, if so, what form it could best take for Australia's unique market circumstances.

This article therefore explores the legislative, political and regulatory developments in the United States (US) and consider the lessons that could be learned by Australia.

United States

In the US, a politically-charged environment means any proposed legislation and enforcement action relating to digital platforms has been subject to significant scrutiny and debate. During the 2010s, the US was reluctant to act, partly because the US was a global leader in the technology

sector. However, in the 2020s, it now appears that there is growing bipartisan support for some form of regulation to boost competition in digital markets, although there is no bipartisan support on the form and nature of any regulation.

In October 2020, the US House Judiciary Subcommittee on Antitrust published a report on the state of competition in digital markets.² This report examined the adequacy of legislative frameworks to address competition issues in digital markets and found that due to the unique nature of these markets, dominant players such as the GAFA firms were able to establish monopolies through control of essential distribution channels, allowing them to effectively limit, if not eliminate, competition. The report also highlighted self-preferencing practices and 'killer acquisitions' (where a dominant market player acquires a smaller, usually innovative, competitor to shut down its operations). The report proposed three core recommendations to address potential anticompetitive conduct and improve competition in digital markets, being:

1. The reform of antitrust laws, including the revitalisation of the doctrine of "essential facilities", which obliges firms in a position of dominance in a market to provide non-discriminatory access to their services;
2. The structural separation and introduction of line of business restrictions for dominant firms; and
3. Changing the presumptions for future acquisitions by dominant platforms such as the GAFA firms such that any acquisition by a dominant platform would be presumed anticompetitive unless the merging parties can demonstrate that the transaction was in the public interest and that such benefits could not be achieved through organic growth (i.e. the benefits cannot manifest absent the proposed acquisition).

Despite the bipartisan nature of the investigation which led to the report, the recommendations from the report did not have unanimous support. No Republican members of the subcommittee endorsed the report's recommendations. Nevertheless, the Antitrust Committee worked with Congress and in June 2021, the Judiciary Committee favourably proposed the following six bills.³

¹ This article reflects the personal views of the authors and does not reflect the views of Norton Rose Fulbright or any of its clients. This article is deliberately intended to be neutral and does not advocate any particular view.

² See Investigation of Competition in Digital Markets, Majority Staff Report and Recommendations, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, Jerrold Nadler and David Cicilline.

³ <https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=5025>

1. The American Innovation and Choice Online Bill (H.R. 3816)⁴

If enacted, this Bill would introduce a number of prohibitions applicable to digital platforms with a substantial connection to the US, and a market cap of at least \$550 billion in the last 12 months or at least 1 billion global users (**Covered Platform Operators**). The proposed prohibitions include:

- conduct amounting to self-preferencing;
- unfairly limiting the access to competing products on a platform (for example, by hindering the compatibility of third-party apps);
- unfair or discriminatory enforcement or application of a platform's terms and conditions of use among similar users; and
- preventing a competing business from accessing or operating on the same platform, operating system, or using hardware or software features.

Interestingly, this Bill has received support from both liberal Democrats and populist Republicans.⁵ It is sponsored in the Senate by Amy Klobuchar, a Democrat from Minnesota, and Chuck Grassley, a Republican from Iowa, as well as ten others.

2. The Merger Filing Fee Modernization Bill of 2021 (H.R. 3843)

In June 2021, the Merger Filing Fee Modernization Bill of 2021 passed the Senate with a super-majority and strong bipartisan support. If passed by the House of Representatives and enacted into law, the legislation would result in a significant increase in filing fees for large transactions, as well as larger budget appropriations for both the Federal Trade Commission (**FTC**) and the Department of Justice (**DOJ**), which would assist with enforcement and compliance monitoring capability.

3. The Platform Competition and Opportunity Bill of 2021 (H.R. 3826)

The Bill applies to Covered Platform Operators, and would prohibit them from acquiring other firms unless they were able to demonstrate the existence of clear and convincing evidence that:

- the target is not a competitor, or a “nascent or potential” competitor of the digital platform; and
- the acquisition would not enhance the platform's market position, or affect its “ability to maintain its market position” for services related to its existing platform.

4. The Augmenting Compatibility and Competition Enabling Service Switching (ACCESS) Bill of 2021 (H.R. 3849)⁶

This Bill would require large online platforms (as defined by the FTC) to maintain interfaces that would allow consumers and businesses to easily move between platforms. This Bill is reminiscent of the Consumer Data Right (**CDR**), which was introduced by the Australian government in November 2017. Under the CDR regime, consumers must be given the ability to share their data between services providers.

5. The Ending Platform Monopolies Bill (H.R. 3825)⁷

The Bill seeks to make it unlawful for a dominant platform to leverage its ownership or control over multiple business lines to self-preference and disadvantage competitors in ways that undermine free and fair competition.

6. The State Antitrust Enforcement Venue Bill of 2021 (H.R. 3460)

The proposed legislation, which unanimously passed the Senate in June 2022, would allow state officials the same deference as federal antitrust enforcers as to the venue in which cases are heard. Supporters of the Bill argue that this would result in more efficient and effective antitrust enforcement.

In recent months, additional legislation has been proposed. In March 2022, the *Open App Markets Bill* (H.R. 7030)⁸ was introduced. The Bill is intended to regulate the operation of app stores run by covered companies, being the owners or controllers of app stores with more than 50 million users in the US. If passed, the Bill would prohibit covered companies from forcing developers to use an in-app payment system owned or controlled by the covered company; requiring that pricing or conditions of sale be equal to or more favourable on its app store than those of competitors; or punishing developers for using or offering different pricing terms or conditions of sale through competitor in-app payment systems or on other app stores.

Most recently, the *Digital Platform Commission Bill* was introduced in Congress by Democratic Senator Michael Bennet. If enacted, the proposed legislation would create a federal digital platform regulator to protect consumers, oversee digital platforms, promote competition and defend the public interest.⁹

However, despite the large number of new legislation being proposed to address the competition issues in relation to digital platforms, they are each beholden to the US political developments. To date, the Democrats have controlled the House of Representatives, while the Republicans have controlled the Senate, effectively blocking a legislative

4 A copy of the Bill is available here: <https://www.congress.gov/bill/117th-congress/senate-bill/2992>

5 How American Innovation and Choice Act Regulates Big Tech, Changes the Internet (bloomberg.com)

6 A copy of the Bill is available here: <https://www.congress.gov/bill/117th-congress/house-bill/3849?q=%7B%22search%22%3A%5B%22H.R.+3849%2C+the+Augmenting+Compatibility+and+Competition+by+Enabling+Service+Switching+%28ACCESS%29+Act+of+2021%22%5D%7D&r=1&s=1>

7 A copy of the Bill is available here: [https://www.congress.gov/bill/117th-congress/house-bill/3825/text#:~:text=Introduced%20in%20House%20\(06%2F11%2F2021\)&text=To%20promote%20competition%20and%20economic,platform%20and%20certain%20other%20businesses.](https://www.congress.gov/bill/117th-congress/house-bill/3825/text#:~:text=Introduced%20in%20House%20(06%2F11%2F2021)&text=To%20promote%20competition%20and%20economic,platform%20and%20certain%20other%20businesses.)

8 A copy of the Bill is available here: <https://www.congress.gov/bill/117th-congress/senate-bill/2710/text>

9 Bennet Introduces Landmark Legislation to Establish Federal Commission to Oversee Digital Platforms | Press Releases

10 Lawmakers racing to pass tech antitrust tech reforms before midterms

solution in the absence of bipartisan support to date. It remains to be seen whether the November midterm elections could shift this balance of power and ultimately lead to the enactment of legislation.¹⁰

Executive action

In the absence of legislative change, the Biden Administration has been actively seeking to increase the level of competition scrutiny over the technology sector in the US economy by using existing legislative frameworks.¹¹

Political appointments to the FTC

In June 2021, Lina Khan was appointed as Chair of the Federal Trade Commission (FTC) by the Biden Administration. Khan was historically an outspoken critic of Big Tech and proponent of antitrust law reform.

In May 2022, Alvaro Bedoya was confirmed by the US Senate as a Commissioner of the FTC. Bedoya has been outspoken on social discrimination issues in the context of privacy and surveillance technology.

President Biden's Executive Order

On 9 July 2021, President Biden issued an *Executive Order on Promoting Competition in the American Economy* which aims to empower and protect consumers by adopting an aggressive, whole-of-government approach to tackling anticompetitive conduct in key markets. As part of this order, the President gave clear directives to the US antitrust agencies to vigorously enforce existing antitrust laws and challenge past anticompetitive mergers.

Shortly after the issuance of the order, the FTC and the DOJ announced a review of their approach to the enforcement of anticompetitive mergers under US antitrust laws. The FTC also withdrew its support for the 2020 Vertical Merger Guidelines.¹² This demonstrates how both agencies have adopted an aggressive approach to merger clearance, with the FTC in particular opting for riskier litigation, effectively testing the precise ambit of the law, in the hopes of securing pro-competitive outcomes.¹³

The FTC's recent opposition to the acquisition by Meta (formerly Facebook) of Within Unlimited (**Within**) demonstrates that the FTC is now more willing to consider new theories of harm in the technology sector, consistent with the Executive Order.

Australia

In Australia, the ACCC has taken a measured approach to potential reform since 2017 by conducting a series of inquiries in order to better understand the competition and consumer issues relating to digital platforms and identify potential solutions, both through existing and new legislation or regulation.¹⁴

The first major inquiry, the *Digital Platforms Inquiry*, considered the effect of digital platforms (with search, social media or other digital content aggregation functions) on competition in media and advertising services markets.¹⁵ The final report, issued on 26 July 2019, led to the establishment of a specialised digital platform unit within the ACCC.

Since February 2020, the ACCC has been conducting a five-year inquiry into markets for the supply of digital platform services, including digital advertising technology services

and digital advertising agency services.¹⁶ As part of this inquiry, the ACCC is considering the potential need for reform and new regulatory tools to address the competition and consumer concerns related to digital platform services and is due to issue its findings and recommendations to the Minister before 30 September 2022.¹⁷

The inquiry also led to the introduction of the *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act 2021* (Cth) (the **Code**), which came into effect on 2 March 2021. The Code enables the Treasurer to designate certain digital platforms falling within the scope of the Code and being subject to obligations relating to commercial relationship between the relevant platforms and news media outlets. Although no digital platforms have yet been designated under the Code, its introduction triggered voluntary commercial agreements involving many news media organisations. This Code has been widely described as a 'world first' and has been globally controversial.

Conclusion

Technology antitrust developments in the US and Australia demonstrate that common concerns are emerging in both jurisdictions, but there is, to date, no global consensus on policy solutions beyond enforcement action under existing competition laws. Australia is uniquely positioned to monitor developments in the US and to learn from the US experience.

In the US, the growing preference for some form of law reform is clear, but the absence of bipartisan support for a specific regulatory solution has blocked legislative reform. As a consequence, US regulators are currently seeking to implement greater competition scrutiny of the technology sector within the existing legislative framework. The Biden Administration and the FTC have been exploring more novel theories of harm to address perceived deficiencies in US legislation.

In Australia, the ACCC has been scoping the relevant issues and is continuing to make policy recommendations, but again the path to legislative reform is unclear. Meanwhile, the ACCC has identified digital platforms as a key enforcement priority, commenting "*the major digital platforms create a unique set of competition and consumer challenges*". It remains to be seen whether some of the approaches currently being adopted in the US to competition enforcement may start to influence the future application of competition law in Australia. Regulation of the technology giants is certainly at the frontier of antitrust issues in the 2020s.

11 FACT SHEET: Executive Order on Promoting Competition in the American Economy - The White House

12 Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines

13 See for example, *In the Matter of Lockheed Martin Corporation, a corporation, and Aerojet Rocketdyne Holdings, Inc., a corporation* (Lockheed/Aerojet, *In the Matter of*); *In the Matter of Illumina, Inc., a corporation, and GRAIL, Inc., a corporation* (Administrative Part 3 Complaint).

14 See the ACCC's Digital platforms inquiry, Digital advertising services inquiry, and Digital platform services inquiry 2020-2025.

15 See Digital platforms inquiry

16 See Digital platform services inquiry 2020-2025

17 See Digital platform services inquiry 2020-2025



INAUGURAL CAMLA ANNUAL ORATION EVENING

Her Excellency the Honourable Margaret Beazley AC KC, Governor of NSW

"Freedom of Speech: To What End?"

Tuesday 8 November | 6.00 pm

**Harbourview Room & Terrace
Level 4, Australian Museum, 1 William Street, Darlinghurst**

**Followed by a cocktail reception
Dress code: semi-formal**

\$130 for CAMLA members | \$150 for non-members

Register at www.camla.org.au/seminars



Her Excellency Margaret Beazley AC KC Governor of NSW

Her Excellency the Honourable Margaret Beazley AC KC is the 39th Governor of New South Wales.

Prior to her appointment as Governor, Her Excellency enjoyed a long and distinguished law career spanning 43 years, during which time she served as a role model for women in law at both the State and national level.

Appointed Queen's Counsel in 1989, in 1993 she was made a judge of the Federal Court of Australia, the first woman to sit exclusively in that Court. In 1996, she achieved the distinction of being the first woman appointed to the New South Wales Court of Appeal and, subsequently, the first woman to be appointed as its President. She served, on a number of occasions, as Administrator of the Government of the State of New South Wales.

She was made a Companion of the Order of Australia in the Australia Day Honours List on 26 January 2020 for "eminent service to the people of New South Wales, particularly through leadership roles in the judiciary, and as a mentor of young women lawyers".

Her Excellency brings her deep commitment to education, youth leadership, human rights and social justice to the role in service of the people of New South Wales.

The Use of Juries in Defamation Proceedings in America and Australia

Authors: **Nathan Buck** (Special Counsel) and **Jeremy Marel** (Senior Associate), Kennedys.

Following a unanimous verdict in his favour in June 2022, Johnny Depp said that *'the jury gave me my life back'*.

That might be thought a strange thing to say. It seems to suggest the verdict was not inevitable but some sort of gift; one which was given voluntarily and therefore might have been withheld. It reveals an uncomfortable reality about juries – they have a choice. And if they have a choice, they (or a different jury) might have decided otherwise.

Johnny Depp's defamation proceeding against Amber Heard was tried by a jury of seven in the Fairfax County Circuit Court in Virginia (although, because it was live streamed, it was effectively also tried by many millions of other people around the world, who could watch snippets of the testimony online and then reach and share their own 'verdicts' in the court of public opinion).

The jury (and much of the internet) sided with Mr Depp.

They found he had been defamed by Ms Heard and awarded him US\$15M in damages (which was reduced to US\$10.35M because of a cap on punitive damages in Virginia¹). They also found that Ms Heard had been defamed by Mr Depp and awarded her US\$2M.

More recently still, in August 2022, there was another jury verdict, this time in Texas. A jury of 12 ordered Alex Jones – a far-right conspiracy theorist – to pay a total of US\$49.3M (US\$4.1M in compensatory damages and US\$45.2M in punitive damages) to the parents of Jesse Lewis, a victim of the Sandy Hook shooting in 2012. He had claimed they lied about Jessie's death and that the shooting was a US government hoax (staged using actors to serve as a pretext for taking away American guns).

These eye-watering sums could not have been awarded in Australia – where the award of damages must have a *'rational relationship'* to the harm suffered (s.34²) and is at any rate subject to a maximum upper limit (s.35), and where plaintiffs cannot be awarded punitive damages (s.37).

They also could not have been awarded by a jury. Even in the (increasingly rare) instances of jury trials in defamation proceedings in Australia, it is still the judicial officer not the jury who will award damages.

The American position – a right to trial by jury

In America, the right to trial by jury is enshrined in the United States Constitution.³

The US Declaration of Independence (1776) had accused King George III of *'depriving us in many cases, of the benefits of trial by jury'*.

Article III of the US Constitution (1788) provided that all criminal hearings shall be by jury.

Later, the Bill of Rights (1791) enshrined the right to civil hearings by jury (*'where the value in controversy shall exceed twenty dollars'*).⁴

This did not *create* a right to a jury trial, but rather 'preserved' the right which already existed in 1791 at common law. Even prior to the American Revolution, that law had included that cases of libel may be heard by jury (a precedent established in a 1735 case involving publisher John Peter Zenger – who had been imprisoned in 1734 for printing political attacks on the colonial governor of New York before subsequently being acquitted when he successfully argued, for the first time, that a publication could only be libellous if it was proven to be false).

Australia's 'uniform' defamation laws

American law varies across its 50 states.

By contrast, thankfully for Australian defamation lawyers, we have substantially uniform defamation laws which were enacted in each State and Territory in 2005 and 2006.

One area which is not uniform, however, is whether defamation proceedings are to be tried by judge or jury.

In all but three of the least populous jurisdictions⁵, the parties may elect to have a jury trial.

For example, in New South Wales, s.21(1) of the *Defamation Act 2005* (NSW) (**the NSW Act**) provides that, unless the court orders otherwise, a plaintiff or defendant in defamation proceedings may elect for the proceedings to be tried by jury.⁶

In proceedings involving a jury, the jury is to determine whether the defendant has published defamatory matter

1 The total award included \$5M in punitive damages, which was reduced to \$350,000 (the legal limit in Virginia).

2 References are to the *Defamation Act 2005* (NSW).

3 And in fact is referred to five times – once in Article III, Section 2 of the original text and four times in the Bill of Rights (the Fifth, Sixth and Seventh Amendments).

4 The Seventh Amendment to the US Constitution.

5 The Australian Capital Territory, the Northern Territory, and South Australia.

6 The same right also exists in Victoria, Queensland, Western Australia, and Tasmania.

about the plaintiff and, if so, whether any defence raised by the defendant has been established (s.22(2)), but the judge is to award damages (s.22(3)).

The position in the Federal Court of Australia

But there is a tension between the position under the NSW Act and under the *Federal Court of Australia Act 2011* (Cth) (**FC Act**).

Section 39 of the FC Act provides that civil trials in the Federal Court of Australia (**FCA**) shall be by a judge without a jury (unless the court otherwise orders).

Under s.40, the FCA has a broad discretion to direct a jury to hear either a particular issue of fact or the whole suit, but only where ‘*the ends of justice appear to render it expedient to do so*’.

In *Wing v Fairfax Media Publications Pty Limited* [2017] FCAFC 191 (**Wing**), it was said not only that ss.21 and 22 of the NSW Act were directly inconsistent with ss.39 and 40 of the FC Act, and were therefore inutile or inoperative to the extent of the inconsistency⁷, but also that the provisions of the NSW Act ‘*are not relevant to the exercise of the discretion in s 40*’ of the FC Act.⁸ The applicant seeking to depart from the usual mode of trial by judge alone bears the burden of bringing the claim within s.40 of the FC Act. He or she ‘*must do so not by reference to general considerations relating to the virtues of a jury trial, but by reference to the particular case*’.⁹

We are not aware of any defamation proceeding which has been tried by jury in the FCA. While Rares J granted an application for a jury trial in *Ra v Nationwide News Pty Ltd* [2009] FCA 1308 (**Ra**), those proceedings were resolved at a mediation (and *Ra* has been criticised and not followed subsequently¹⁰).

A choice of judge or jury

The end result is that, by choosing the jurisdiction in which they sue, Australian defamation plaintiffs can in effect also choose whether they wish to be heard by a judge or jury - they can choose to sue in a State or Territory court and then elect for a jury, or they can choose to sue in the FCA¹¹ and be heard by a judge.

The question which follows is, which is preferable?

There are, undoubtedly, strong arguments in favour of juries.

Our system of democracy relies on the participation of the people - by voting, we participate in the election of the legislature; through jury service, we participate in the administration of justice. Lord Devlin once said that each jury ‘*is a little parliament*’ and ‘*the lamp that shows that freedom lives*’.¹²

These arguments perhaps apply with more force to criminal proceedings, where a person’s liberty is at stake, but in any event are not to be dismissed lightly.

Even so, when it comes to defamation proceedings in Australia, we think there are factors which weigh significantly in favour of trial by judge rather than trial by jury.

First, it seems to have been accepted in some cases that trial by jury is likely to take longer, and therefore be more expensive, than an equivalent trial by judge.¹³ If that is right, it is obviously undesirable for defamation plaintiffs in particular - given the statutory cap on damages, there is a risk that legal costs could be disproportionate even to the maximum amount of damages under s.35.

Secondly, juries might also be seen as more likely than judges to be susceptible to influence by emotional or irrelevant factors, such as media reporting. For example, albeit in a criminal context, the trial of Bruce Lehrmann, accused of raping Brittany Higgins, was delayed following the storm of publicity that surrounded Lisa Wilkinson’s Logies acceptance speech in June 2022. This is a particular risk in defamation proceedings, which are often the subject of heavy media reporting.

Determining the meaning of the publication

A third, and we think significant, advantage of judge over jury, at least in defamation proceedings, is that it makes it more feasible, at an early stage of the proceedings, to separately resolve the question of defamatory meaning (rather than the parties being put to the additional cost and difficulty of empanelling a jury to do so, as was previously the practice under the now repealed s.7A of the *Defamation Act 1974* (NSW)).

In the UK, in *Bokova v Associated Newspapers Ltd* [2019] QB 861, it has been said that one of the principal benefits of s.11 of the *Defamation Act 2013* (UK) (**the UK Act**), which abolished the ‘right’ to trial by jury in libel and slander proceedings, has been to clear the way for the court to decide the meaning of the publication as a preliminary question.¹⁴ It was said (at [10]):

The benefits are obvious. Indeed, if there is no factual dispute on the issue of publication (e.g. a dispute over the actual words published, reference or innuendo), I struggle to see circumstances in which the parties would want to proceed through the stages of defamation litigation without having meaning determined. Its determination can lead to the parties resolving the dispute without the

⁷ *Wing* at [21]-[27].

⁸ *Wing* at [34].

⁹ *Wing* at [43].

¹⁰ *Roozendaal v Fairfax Digital Australia and New Zealand Pty Ltd & Anor* (2015) 232 FCR 487; *Wing v Fairfax Media Publications Pty Limited* [2017] FCAFC 191.

¹¹ As to the FCA’s jurisdiction to hear defamation matters, see for example: *Crosby v Kelly* [2012] FCAFC 96, *Oliver v Nine Network Australia Pty Ltd* [2019] FCA 583 at [6]-[18] and, more recently, *Massarani v Kriz* [2022] FCA 80 at [48]-[64] and *Malecki v Macko* [2022] FCA 766 at [8]-[11].

¹² Lord Devlin, in ‘*Trial by Jury*’, London, Stevens & Son, 1978, p.164.

¹³ *Ange v Fairfax Media Publications Pty Ltd* [2010] NSWSC 1383 at [36]; *Wagner & Ors v Harbour Radio Pty Ltd* [2017] QSC 222 at [75].

¹⁴ *Bokova v Associated Newspapers Ltd* [2019] QB 861 at [8]-[9].

need for further litigation. Even if the claim cannot be settled at that stage, there remains significant benefits for the future conduct of the case. A defendant would know, for example, what would be required for any truth defence to have a real prospect of success...But most importantly, it avoids the spectre of hugely wasteful litigation (perhaps requiring up to a year's preparation and several weeks of trial) of a meaning that the words are found not actually to bear.

In Australia, this 'spectre' too often materialises in proceedings in which defences are pleaded and run, and there is a trial, only for the court to find that the imputations were not conveyed or were not defamatory.¹⁵ This can be avoided if meaning is resolved one way or the other at a preliminary stage, which in turn is facilitated by the absence of a jury.¹⁶

In Australia, the utility of determining meaning as a separate preliminary question is starting to be recognised¹⁷ and the procedure has been adopted in some cases heard by judges not juries.¹⁸

It has sometimes been said that jurors are better placed than judicial officers to assess how ordinary reasonable people understand mass media publications.¹⁹ This was Justice Rares' view in *Ra* and *Wing*, for example, including because, he thought, '*juries are well suited, and often better suited than a judge, to use and evaluate community standards and the sense in which ordinary reasonable people understand a publication*'.²⁰

There is some attraction to the idea that the question of how the hypothetical ordinary reasonable person would understand a publication should be answered by the lay people who themselves make up the pool of 'ordinary reasonable' people.

But the jurors are not, themselves, the hypothetical referees. An individual juror is not simply invited to give his or her own subjective view of the meaning of the publication. The

test is still objective. Each juror is still required to step into the shoes of the 'hypothetical' ordinary reasonable person. The process is therefore still artificial and this involves a risk (such as that to which the High Court has referred in relation to the old s.7A trials²¹) that the jury may misunderstand its task.

By contrast, judges are regularly required to apply objective tests, using the standard of the ordinary reasonable person – not only in defamation matters but also in negligence proceedings²² and, as was observed in *Wing*, '*in the field of misleading or deceptive conduct and passing off*'.²³

Serious harm threshold

The position is complicated further by the introduction of the new s.10A (the serious harm threshold).²⁴

The judicial officer, not a jury, is to determine whether the serious harm element is established.²⁵

If a party applies for this to be determined prior to trial, the judicial officer is to determine it '*as soon as practicable*' (unless satisfied there are special circumstances justifying the postponement of the issue to a later stage of the proceedings).²⁶

But this will almost inevitably require a determination of meaning (a question for the jury under s.22(2)), since the seriousness of the imputations conveyed will be highly relevant to the likelihood of serious harm to the plaintiff's reputation. There is therefore an inconsistency between s.10A(3) and s.22(2), which we think leaves little if any work to be done by juries if meaning is to be resolved by a judge as part of the overall serious harm question.

The speed of the judgment or verdict

One potential advantage of having a jury is that they give an immediate verdict. By contrast, judges are required to give reasons. And the more complex the issues, presumably the longer the judgment will take to be written and published.

15 Recent examples include *Taylor v Nationwide News Pty Ltd (No 2)* [2022] FCA 149 and *Bazzi v Dutton* [2022] FCAFC 84 (in which Rares, Rangiah and Wigney JJ found, on appeal, that the imputations were not conveyed).

16 In *Bokova*, the Court suggested a reason for this was the reluctance of defendants to put forward an alternative meaning which might be held against them by a jury but could be disregarded by judges.

17 For example, *Radio 2UE Sydney Pty Ltd v Parker* (1992) 29 NSWLR 448 at 473 per Clarke JA; *Triguboff v Fairfax Media Publications Pty Ltd* [2018] FCA 845 at [22]-[32] per Bromwich J; *Gould v Jordan* [2020] FCA 1191 at [17]-[33] per White J.

18 For example, *Russell v Nationwide News Pty Ltd* [2013] ACTSC 241; *Triguboff v Fairfax Media Publications Pty Ltd* [2018] FCA 845; *Dent v Burke* [2019] ACTSC 166; *Gould v Jordan* [2020] FCA 1191; *Stead v Fairfax Media Publications Pty Ltd* [2021] FCA 15 (where Lee J determined meaning as a separate question during the trial); *Schiff v Nine Network Australia Pty Ltd* [2022] FCA 658.

19 *Ra v Nationwide News Pty Ltd* [2009] FCA 1308 at [19]; *Wagner & Ors v Harbour Radio Pty Ltd* [2017] QSC 222 at [76].

20 *Wing* at [55].

21 *John Fairfax Publications Pty Ltd v Rivkin* [2003] HCA 50; (2003) 201 ALR 77 at [120]; *John Fairfax Publications Pty Ltd v Gagic* [2007] HCA 28; (2007) 230 CLR 291 at [13].

22 For example, s.5B(1)(c) of the *Civil Liability Act 2002* (NSW), which provides that a person is not negligent in failing to take precautions against a risk of harm unless '*a reasonable person in the person's position would have taken those precautions*'.

23 *Wing* at [44].

24 Section 10A, or an equivalent, is in force in NSW, Victoria, Queensland, South Australia, Tasmania and the Australian Capital Territory, but not in Western Australia or the Northern Territory.

25 *Defamation Act 2005* (NSW), s.10A(3).

26 *Defamation Act 2005* (NSW), s.10A(5).

A principal purpose of defamation proceedings is public vindication. The longer that vindication is delayed, the greater the risk that the purpose of the proceedings may be undermined.²⁷ Delay in giving judgment therefore has the potential to frustrate the plaintiff's vindication (it is often said, especially within the context of defamation, that 'justice delayed is justice denied'²⁸).

On the other hand, because juries do not give reasons, jury verdicts are inscrutable and unexaminable. As a result, it may be that errors are more likely to remain undetected. Furthermore, although parties have a right to appeal to the Court of Appeal following a jury trial²⁹, it is notoriously difficult to overturn a finding of a jury which will only be overturned if no reasonable jury could have reached it.³⁰

Towards uniformity

There are fundamental differences in America's and Australia's defamation laws, in theory and in practice. These stem in large part from the US Constitution, which guarantees freedom of speech and the right to jury trials.

Some would say that America's defamation laws strike a more suitable balance - between protection of the right to freedom of expression on the one hand, and protection of the right to reputation on the other - than Australia's laws which are often said to be unfairly 'pro-plaintiff'. For

example, it is a common complaint that our law requires the publisher to prove truth, whereas in America it is for the plaintiff to prove falsity. Another common complaint is that, as we have seen, the inconsistency between ss.21 and 22 of the NSW Act and ss.39 and 40 of the FC Act allows plaintiffs to sue in the FCA and thereby avoid a jury trial.

We have raised the question whether defamation proceedings are more suited to be tried by judge or jury. But really the question is unanswerable. There are both critics and defenders of jury trials who each have good reasons in support of their respective views. At least for the sake of uniformity, however, and to resolve the tension between the position under the 'uniform' defamation laws and under the FC Act, we think Australia should continue its move towards the UK position by mirroring s.11 of the UK Act, such that the default position would be that defamation proceedings are tried by judge rather than jury.

27 *Rush v Nationwide News Pty Ltd (No 6)* [2018] FCA 1851 at [115].

28 See, for example, *Stead v Fairfax Media Publications Pty Ltd* [2021] FCA 15 at [317].

29 *Supreme Court of Act 1970* (NSW), s.102.

30 *John Fairfax Publications Pty Ltd v Rivkin* [2003] HCA 50 at [185]; *Beran v John Fairfax Publications Pty Ltd* [2004] NSWCA 107.



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Fearless Girl Keeps Standing in Australia

Authors: **Zeina Milicevic** (Partner) **Jaimie Wolbers** (Senior Associate) and **Humyara Mahbub** (Lawyer), MinterEllison

The Full Court of the Federal Court of Australia has handed down a judgment in the protracted dispute between State Street Global Advisors and Maurice Blackburn in relation to the use of a replica of the iconic statue, Fearless Girl.

Key Takeouts

- Businesses should obtain targeted legal advice when entering agreements relating to the procurement and use of intellectual property.
- Artists should also obtain advice to ensure that they do not inadvertently assign or provide an exclusive licence in relation to their valuable rights that may cut off alternate revenue streams in respect of their artistic works.
- The scope of copyright licences needs to be carefully considered and carefully drafted.

State Street Global Advisors (**State Street**), an American investment management company, has lost its appeal to the Full Court of the Federal Court of Australia (**Full Court**) regarding the use of a replica of the famous Fearless Girl statue by Australian law firm Maurice Blackburn.

In 2017, State Street commissioned artist Kristen Visbal to create Fearless Girl as part of a marketing campaign to promote its Standard & Poor's Depository Receipts (**SPDR**) Gender Diversity Index Exchange Traded Funds (known as the SHE fund), which tracks against State Street's Gender Diversity Index. The original statue was displayed in New York City, across from the New York Stock Exchange. At that time, State Street and Ms Visbal entered into a master agreement dealing with the use of the statue. Under that agreement, Ms Visbal granted State Street an exclusive licence to "display and distribute two-dimensional copies, and three-dimensional Artist-sanctioned copies, of the Artwork to promote (i) gender diversity issues in corporate governance and in the financial services sector, and (ii) SSGA and the products and services it offers". Ms Visbal otherwise reserved all uses of the Fearless Girl statue to herself subject to certain restrictions, and the parties agreed certain "Pre-Approved Uses", which would not be subject to any obligation of Ms Visbal to discuss in good faith with, and obtain written approval from, State Street.

The exhibits to the master agreement included a trade mark licence. The trade mark licence recorded that State Street "is the exclusive owner of the FEARLESS GIRL trademark (the **Trademark**) in connection with goods and services that support women in leadership positions and the empowerment of women, and that promote public interest in and awareness of gender diversity and equality issues". By the licence, State Street granted Ms Visbal an exclusive, royalty-free, worldwide, right and licence to use the Trademark on and in connection with "(i) three-dimensional copies of the Statue in various mediums and sizes in connection with the offer of goods for sale (**Merchandising**); (ii) two-dimensional copies of the Statue for Artist's portfolio, for "fine art" purposes; and (iii) two-dimensional copies of the Statue in various mediums and sizes in connection with Merchandising (collectively, the **Licensed Products**)."

In accordance with the trade mark licence, State Street is the registered owner of Australian Trade Mark No. 1858845 for the word mark "FEARLESS GIRL" in relation to certain services in classes 35 and 36.

In 2019, Maurice Blackburn commissioned Ms Visbal to produce a limited-edition reproduction of the statue for an Australian campaign regarding workplace gender equality. Maurice Blackburn had previously advocated on behalf of clients and independently on issues of workplace sexual harassment, gender discrimination in hiring, and the gender pay gap. Two co-sponsors, the Australian superannuation funds United Super Pty Ltd (Cbus) and H.E.S.T. Australia Ltd (HESTA), joined the Maurice Blackburn campaign, which saw the Fearless Girl replica installed in Federation Square in Melbourne's CBD on 26 February 2019.

State Street commenced proceedings in the Federal Court of Australia alleging that Maurice Blackburn had infringed its trade mark rights in the FEARLESS GIRL mark, infringed copyright in the statue, engaged in conduct that was misleading or deceptive, or likely to mislead or deceive, in breach of the Australian Consumer Law (**ACL**) and conduct which amounted to the tort of passing off.

At first instance, the primary judge rejected all of State Street's claims. The primary judge held that the Fearless Girl statue had a reputation in Australia separate and distinct from both State Street itself and the State Street Fearless Girl marketing campaign. The primary judge considered that the Maurice Blackburn campaign was directed to the public at large and concerned gender equality generally, whereas State Street's Fearless Girl marketing campaign was directed to publicly listed companies and financial institutions and concerned gender diversity issues in corporate governance and in the financial services sector (particularly female representation on the boards of such companies). Despite this, his Honour did grant relief to State Street by ordering that if the replica was to be displayed with any wording, it should be displayed with very specific wording explaining its origins.

State Street subsequently appealed to the Full Court. In its appeal, State Street contended that the primary judge rejected its claims because his Honour mischaracterised the evidence and should have found that State Street's marketing campaign had given it a significant reputation and associated goodwill in Australia or, at the least, that the Australian public was aware of the State Street Fearless Girl marketing campaign and that it was used to distinguish the services of the entity behind the campaign. Interestingly, State Street observed that they did not get the opportunity to make oral submissions as a result of the COVID-19 pandemic and posited that this might explain why the primary judge consistently mischaracterised the evidence.

The Full Court dismissed the appeal with costs. A summary of the Full Court's findings in relation to the key grounds of appeal is set out below. On the COVID-19 observation, the Full Court noted that such a situation seems implausible in a case involving thousands of pages of material, multiple witnesses who gave oral evidence, and extensive reasons for judgment explaining why the primary judge did not accept State Street's case. This impression of implausibility was reinforced by the fact that

State Street had been unable to identify any material evidence or submission that they contend the primary judge overlooked, or any error in principle.

Scope of State Street's rights

State Street contended that the primary judge misconstrued the rights held by State Street and wrongly assessed all of State Street's claims by reference to the master agreement. The Full Court held that neither contention was sustainable. In particular, the Full Court held that primary judge had to assess the rights which State Street acquired from Ms Visbal under the master agreement as they were the ultimate source of State Street's allegedly infringed copyright and trade mark rights. Otherwise, the Court considered it clear that the primary judge understood that the other claims did not depend on the master agreement.

Misleading and deceptive conduct and passing off

State Street argued that Maurice Blackburn represented that the Australian statue or Maurice Blackburn were somehow associated with State Street, and that the association with State Street was the reason that Maurice Blackburn chose the statue.

The Full Court agreed with the primary judge that the statue was not associated with State Street's campaign. Rather, the statue had taken on "a life of its own" and was now associated with gender equality issues generally. The Full Court quoted the primary judgment where Justice Beach held that:

"[State Street] conflates the reputation of the New York statue with its own reputation."

While many people knew the statue, not many people in Australia were aware of State Street or its connection to the statue and the Full Court held that the primary judge was right to focus on reputation in Australia.

The Full Court was not convinced by State Street's argument that Maurice Blackburn had chosen the statue because of its connection to State Street. In fact, the relationship between State Street and Maurice Blackburn was described as "antithetical" by the primary judge.

The primary judgment also dealt with State Street's claim that Maurice Blackburn represented that the replica was the New York Statue. State Street argued that an invitation issued by Maurice Blackburn to view the statue that stated "the iconic Fearless Girl statue in Australia" represented that the replica was the original. However, that invitation led with the text "Australia's own Fearless Girl is here". The primary judge stated that in that context, the reference to "Fearless Girl in Australia" must be read with the headline "Australia's own". Taken together, the invitation text cannot be reasonably understood to mean the statue being displayed is the New York Statue. The Full Court agreed with the primary judge's reasoning.

Consistent with the reasoning applied in relation to the misleading and deceptive conduct arguments, the Full Court did not accept that Maurice Blackburn had committed the tort of passing off. The Full Court held that the primary judge was right to say that Maurice Blackburn "and its campaign partners were loosely 'associated' with the New York statue, but only in the sense that they were using and promoting the replica which was of course a copy of the New York statue" but that this went nowhere. It went nowhere because there was no association found in Australia between the New York statue and State Street or State Street's Fearless Girl marketing campaign.

Trade mark infringement

On the allegation of trade mark infringement, although Maurice Blackburn and its campaign partners had used the words "Fearless Girl" to promote the replica statue and its workplace gender equality campaign, the Full Court agreed with the

primary judge that they had not used the words "Fearless Girl" as a trade mark – that is, the words were not used "as a sign to distinguish ... services ... provided in the course of trade by a person from ... services ... provided by any other person". There was no dispute between the parties that artistic naming conventions require a replica to be given the same title as the original.

Copyright infringement

As noted above, the master agreement between Ms Visbal and State Street granted State Street an exclusive right to "create and use two- and three-dimensional copies of the statue in connection with 'gender diversity issues in corporate governance and in the financial services sector'". The Full Court found that there was an "important and obvious" distinction in the agreement between the exclusive field granted by Ms Visbal to State Street and all residual rights otherwise reserved by Ms Visbal. The rights reserved specifically included reproductions in connection with "Gender Diversity Goals", which were defined in the preamble as supporting "women in leadership positions, empowerment of young women, women's education, gender equality, the reduction of prejudice in the work place through education, equal pay for women, and the general well-being of women".

State Street's campaign was held to be about gender diversity issues in corporate governance only. Maurice Blackburn's campaign was held to be about general equality for women, including equal pay. The Full Court held that:

"accepting that a purpose or object (say X) is sufficiently broad to encompass other narrower purposes and objects (say Y) does not mean that the creation, use, display or distribution of a reproduction for purpose of object X is also the creation, use, display or distribution of the reproduction in connection with purpose or object Y."

Maurice Blackburn's use of the work was considered by the Full Court to be outside the scope of State Street's exclusive licence and therefore State Street had no standing to sue for copyright infringement.

Revocation of injunctive order

In the primary proceedings, the Court ordered that Maurice Blackburn be restrained from displaying the replica unless it was displayed with no plaque, or a plaque that said only the words:

"[t]his statue is a limited edition reproduction of the original 'Fearless Girl' statue in New York that was sculpted[sic] by the artist Kristen Visbal. The original statue was commissioned and is owned by State Street Global Advisors Trust Company. This reproduction is owned by Maurice Blackburn who purchased it from the artist. Maurice Blackburn has no association with State Street."

Maurice Blackburn cross appealed contending that there was no proper foundation for the making of the injunction. The Full Court agreed, finding that there was insufficient foundation for the primary judge to make the injunctive order. The provisions of the ACL, which empower the Court to make injunctive orders, require that the Court be satisfied that a person has engaged, or is proposing to engage, in conduct that constitutes or would constitute a contravention of relevant provisions of the ACL, such as section 18 which prohibits a person from engaging in misleading or deceptive conduct. As the Court did not find that Maurice Blackburn had engaged, or was proposing to engage in, misleading or deceptive conduct, that requirement was not satisfied and there was no legal basis to make the injunctive order. With the Full Court revoking the injunctive order, Maurice Blackburn may now display the replica without the restrictions as to the wording of any plaques.

The full decision is *State Street Global Advisors Trust Company v Maurice Blackburn Pty Ltd* [2022] FCAFC 57.



Interview: Mary Huang

Belyndy Rowe, Senior Associate at Bird & Bird and CAMLA Young Lawyer Secretary, sits down with **Mary Huang**, Principal Corporate Counsel at Microsoft. Mary commenced her career as an IP lawyer in Sydney at Addisons before undertaking a Master of Law at New York University Law School, then working as an associate attorney at K&L Gates before commencing in her current in-house role. Currently based in Seattle, Mary is a product counsel for Microsoft Azure's global expansion engineering team.

BELYNDY ROWE: Mary, thank you for speaking with me today. Could you tell us a little about your current position and your role as attorney in the Cloud + AI team at Microsoft in Seattle?

MARY HUANG: I support and counsel the Azure global expansion engineering team in their strategy as Azure expands and grows globally. Azure is the cloud infrastructure platform that Microsoft provides around the world. My engineering clients look after the strategy for choosing new countries to build Azure infrastructure and growing in a country that already has that infrastructure.

The work is really wide-ranging because we are very much strategy advisers and we have a blend of counselling, transactional, regulatory, and strategy work. One part of what I do is to understand the geopolitical situation and human rights landscape in the country that we're going into. I also focus on regulations that would impact the operation and adoption of Microsoft Azure. We're thinking about areas like cybersecurity, data localisation, trade law, critical infrastructure – matters of that nature which are crucial to the operation and adoption of Azure. It goes beyond just legal analysis.

BELYNDY: A lot of the privacy and AI space is starting to lead into questions about human rights and the ethical framework that we put around the advice we're doing in private practice in Australia. It sounds like your work encompasses a lot more than providing legal analysis, is that fair to say?

MARY: Absolutely! The question becomes "if we do have real human rights concerns in a country, do we want to offer certain services in that country? What if the wrong people get hold of or use our technology?" Microsoft respects

human rights, which is a core value of the company, and we take human rights concerns very seriously.

BELYNDY: It sounds like you are very strategic about where you launch, where your product is, and what sort of activities it's supporting.

MARY: Absolutely, that's a good way to put it.

BELYNDY: What led you to this job? What would you say most motivates you to do what you do?

MARY: That's a great question. I think I had a really meandering path to this role. I started my practice in Sydney, Australia as an IP lawyer, doing both litigation and transactional work. After a few years, I thought that going overseas and being at the frontier of innovation would be better suited for the career development that I wanted. I moved to New York, got my LLM at NYU and landed a job at K&L Gates in Seattle in the technology transactions practice group. That was a very natural transition for me – I was getting exposure in what I really love about technology – high tech, big data, huge technology companies like AWS, Microsoft, and T-Mobile. To be at the forefront of that world is super exciting – it's very innovative and there are a lot of challenging aspects in the regulatory space.

After my experience in private practice, I decided to take up a role at Microsoft. They were a client when I was in private practice and I very much enjoyed working with them. Fundamentally I think they are so brilliant and very kind people, which is a very precious combination. I also feel that I really align with the values they hold as a company when it comes to diversity and inclusion, and pro bono work. I also admire the company's ability to stand up for what

is right without wavering to the huge political polarization that is happening in the US.

BELYNDY: You sound like your role is very much about the big picture, the "eagle's view" of things.

MARY: I think that would be accurate. Looking at the big picture is very important, and I try to keep our key objectives and principles at the front of my mind. Also, it is essential to working in a role that is very international, which by the way, is very enjoyable because I'm speaking with attorneys around the world all the time, learning about their legal landscape, and how that affects the way we work. Fundamentally, we're providing very important cloud infrastructure that will accelerate the digital economy of a country. To be at the next frontier of economic development in that way is very exciting.

BELYNDY: How did you find moving from practice in Australia to the US?

MARY: I found the transition to be quite smooth actually. As an IP lawyer, there are a lot of similarities because Australia and the US are both common law countries. The thing I found to be most different is that in the US, lawyers are a lot more specialised when they are in private practice. It's very rare for someone to be an IP lawyer and do both litigation and transactional work, which is what I did back home. Here you are either a litigator or a transactional lawyer unless you're in a more boutique environment.

BELYNDY: How about working with people in the US? How did you go about establishing your network?

MARY: I've only practised in Seattle – in New York I was studying – but I would say that my colleagues have been very warm and welcoming. They introduced me to

other attorneys and Australians which helped to expand my network, and I have established long-lasting friendships with people who started as colleagues.

BELYNDY: How does your in-house role differ to what you were doing in private practice?

MARY: I used to be a subject matter expert as a private practice attorney. I knew my area of law like the back of my hand and I got to work on a wide variety of technology transaction matters and with varying sizes of clients across many industries, but in a discrete manner, because you're only plugged in when you're needed and then you're taken out once the matter is completed. It was a very different experience. Now I am in much more of a generalist role. I'm very focused on strategy and strategic deals. As a product lawyer, I also get to see something evolve from conception as an idea, to the build, and the implementation and maintenance – the entire lifecycle.

BELYNDY: What do you see as the opportunities for your team in the next 6-12 months?

MARY: In the next 6-12 months, the most challenging thing will be navigating in a more geopolitically complex world. For Microsoft, we thrive on the stability of countries. For example, as Europe gets more complicated with the Russia-Ukraine crisis and resources become more strained, those kinds of issues become the forefront of how we consider pursuing certain strategies. Microsoft is very much impacted by the events of our world. I didn't expect those two things to be so intertwined, but as it turns out - we live in a very interconnected world! As much as technology brings people closer, it is also impacted by any division or conflict.

In terms of other developments, all tech companies are facing increasing regulation and what it means to continuously operate in a compliant way. The difficulty is harmonisation. I think regulation being introduced is not a bad thing and can be a meaningful change, but when it's done so differently across all the jurisdictions that you are operating in across the world, how do we harmonise that on a practical level?

BELYNDY: Will we ever end up with a harmonised world view of privacy?

MARY: Probably not! But we can try! Hopefully there will at least be regions of multiple countries where things are more or less the same. If we have a few different models, that's also ok and we can work with that. However, the fear is that there would be thousands of different models. That's where it would get really complex.

BELYNDY: In your role as legal advisor to the business, how do you manage tensions between supporting technological innovation and dealing with ethical issues arising from the different technologies?

MARY: We try to always look at the ethical considerations that play a part in our business and technology, and we have specialized colleagues who facilitate that process. Going in with our eyes wide open has allowed us to put in certain controls that would help us address those concerns.

BELYNDY: Are there any challenges that your team faces when working on multi-geographic teams?

MARY: It's not so much a challenge, but given that we have a global team, you do have to be conscious of finding time zones that work for everyone and you have to be a bit more accommodating in terms of working outside normal business hours. People do appreciate the collaboration and flexibility, so it's worth putting in a bit of effort to try and find meeting times that are time zone friendly.

I would also say you have to be super respectful and empathetic to the fact that as a global company, you have people in other countries who speak English really well, but also, it's not their first language. It is important to be inclusive of non-native English speakers and understand that if you were working in their native language, there's probably no way that you would be as articulate.

BELYNDY: Do you have any key mentors of people who influenced who you are?

MARY: I have an excellent mentor at Microsoft! He was a client, and when I transitioned to Microsoft, he was so great at helping me embrace the dynamic and culture at Microsoft. He would set

up a monthly meeting with me to make sure I had someone that checks in on me, and if I had any questions, he would answer them quite candidly. That went a long way in helping me feel comfortable in this big corporation with hundreds of thousands of employees around the world. I'm so grateful to have my mentor in my life because it would have been a very confusing experience otherwise!

I'm also lucky enough to have a fantastic manager. She is everything that I would want to be if I was a team leader; a great communicator and leader. She leads with empathy and clarity. She is someone who gives you a lot of autonomy in what you do but is there as backup and support when you need her and is very responsive to your questions. I think that's a great balance to have. You always want someone who trusts you but is also there to support you.

Lastly, I rely very heavily on the friends I went to law school with because everyone had very fulfilling but different careers and they have shown me that there are different ways of being an attorney than what we were fed at law school. That is, that you go into a firm and that is your entire life. My friends have taught me that you can do so much with your legal career: you can go in house or a non-profit, you can be in policy, you can work for government, you can be a consultant. There are so many opportunities in law, and my friends have inspired me to look beyond that very myopic vision of what being an attorney means.

Overall I've been really fortunate in my legal career to have encountered so many influential and inspiring people.

BELYNDY: Many thanks for speaking with me today Mary.

MARY: My pleasure, thanks for having me!



Belyndy Rowe

Johnny Depp v Amber Heard

Authors: **Sylvia Alcarraz** (Managing Associate) and **Kathryn Murray** (Solicitor), Dentons

A live streamed trial, a social media storm, an award of \$US15 million in damages and a soon-to-be film adaptation – the highly publicised and highly controversial *John C. Depp, II v. Amber Laura Heard* defamation trial was unlike any defamation trial we are likely to ever see play out here in Australia.

The trial offered an insight into the public figures' troubled relationship, resulting in one of the most highly documented defamation cases of recent times. It also raised broader and more fundamental questions surrounding decisions to be made when balancing a free press in the Court room and ensuring a fair trial. It also showed how defamation cases play out differently in the US and Australia.

Background

The facts go back to 2012 when Mr Depp and Ms Heard were said to have entered into a relationship. Over the years, the media depicted their relationship as being one that was volatile and shaped around accusations of infidelity and use of drugs and alcohol. In 2016, Ms Heard was granted a restraining order against Mr Depp, soon after which, they divorced.

On 18 December 2018, Ms Heard authored an op-ed published in *The Washington Post*, in which Ms Heard discussed her experience of domestic violence. The op-ed titled *"Amber Heard: I spoke up against sexual violence – and faced our culture's wrath. That has to change"* detailed Ms Heard's claimed experience of being a public figure who represented a domestic violence victim.

Critically, although Mr Depp was not named or openly referenced in the op-ed, he said it left little doubt who Ms Heard was referencing and argued that it clearly implied he was violent towards her.

In 2019, Mr Depp filed a \$US50 million defamation suit in the Fairfax County Circuit Court against Ms Heard alleging that the op-ed she authored damaged his reputation and career.

Ms Heard countersued Mr Depp for \$US100 million for false allegations said to have been made in multiple statements to the media by Mr Depp's former lawyer Adam Waldman. She cited comments made to *The Daily Mail*, one of which being *"Amber Heard and her friends in the media used fake sexual violence allegations as both sword and shield, depending on their needs. They have selected some of her sexual violence hoax 'facts' as the sword, inflicting them on the public and Mr Depp"* published on 8 April 2020.

This was not the first defamation trial between the former Hollywood A-List couple.

In 2020, Mr Depp brought a libel case in the Royal Courts of Justice in London, where he sued British tabloid *"The Sun"* after it published an op-ed describing Mr Depp as a *"wife beater"* and claiming that he had assaulted Ms Heard.

Ms Heard testified in this trial where the Judge, Mr Justice Nicol found that *The Sun* had proved that the allegations were *"substantially true"*, finding that 12 of the 14 accusations had been proved to the civil standard.

There are a number of key reasons Mr Depp may have pressed on with his defamation claim against Ms Heard in the US against the backdrop of an unsuccessful defamation case brought in the UK against *The Sun* (and despite defamation cases being historically more difficult for plaintiffs to win in the US). Firstly, in the UK, there is no First Amendment enshrined protecting freedom of the press; secondly, and perhaps more significantly, the US the case was being heard before a jury whereas the UK case had been decided by judge alone.

The US case

Mr Depp sued over three false and defamatory statements:

- (a) *"I spoke up against sexual violence – and faced our culture's wrath. That has to change"*;
- (b) *"Then two years ago, I became a public figure representing domestic abuse, and I felt the full force of our culture's wrath for women who speak out"*;
- (c) *"I had the rare vantage point of seeing, in real time, how institutions protect men accused of abuse"*.

Similar to Australia, the defence of truth was available to Ms Heard and with it being the only complete defence to defamation, the legal teams embarked on an extensive exploration of Mr Depp's life and his relationship with Ms Heard to prove the truth of statements made in the op-ed.

The discovery process exposed a myriad of domestic violence allegations from both parties. Ms Heard described instances of domestic violence and sexual abuse in often alcohol fuelled attacks by Mr Depp. The case differed to other defamation cases in terms of the sheer number of audio and video recordings available to be played to the jury. Private moments that were caught on tape were aired for the world to see and for the Court of public opinion to weigh in on through the use of social media.

Mr Depp maintained his denial of all allegations claiming Ms Heard falsely made these claims to destroy his reputation.

Both parties reflected on the damages suffered as a result of the defamatory article and statements made. Mr Depp and Ms Heard claimed that acting roles and modelling contracts were lost, which expert analysis confirmed were quantifiable. Additionally, both parties made submissions on the immeasurable decrease in business and revenue because of their reputations being tarnished. Mr Depp said he had lost *"nothing less than everything"* as a result of the allegations made against him.

Judgment

On 1 June 2022, after a 13-hour deliberation the jury returned a verdict in favour of Mr Depp. The jury found that Ms Heard had defamed Mr Depp by publishing all three false and defamatory statements for which he claimed.

The jury separately found that Depp, through his lawyer Adam Waldman, defamed Heard in one of three counts in her countersuit.

Mr Depp was awarded **\$US15 million** in compensatory damages due to the defamatory article affecting his reputation and career. Ms Heard was awarded **\$US2 million** in damages for the defamatory statements made by Mr Depp's former lawyer.

Defamation in US and Australia

It is interesting to consider how this case might have played out in Australia.

In the US, the elements of a defamation claim are similar to the those in Australia, with the exception that defamation plaintiffs who are 'public figures' face much heavier burdens than 'public figures' suing in Australia. The case of *The New York Times Co. v Sullivan* held that for a public figure to prove defamation, the plaintiff must prove that the defaming comments were not only false but also written with "actual malice." Actual malice is defined as making a statement "with knowledge that it was false or with reckless disregard of whether it was false or not."

From a procedural perspective, the media outlet itself is likely to have been sued as a publisher. In the *Depp v Heard* case, the *Washington Post* was not sued, likely due to the protections afforded by the "actual malice" standard established in the 1964 Supreme Court case *New York Times Co. v. Sullivan*. Hence, whilst an individual acting with "actual malice" is difficult to establish (but not impossible to prove as shown in the *Depp v Heard* case), suing a media outlet that is not directly involved in the dispute on a personal level, makes the burden harder to prove.

The two other key differences between US and Australia are the damages awarded, and the freedoms granted by the First Amendment.

Damages

In the US, damages can be significant. There is no cap on damages that can be awarded in defamation matters for reputational or economic loss. It is entirely based on the judge's discretion. By comparison, in Australia there is a cap on non-economic loss damages that can be awarded, being \$421,000.¹ However, there is no limit in terms of payouts for economic loss which is awarded by the Court in terms of the amount of income it considers has been lost, both past and future. The largest award was to Rebel Wilson in the sum of \$4.75 million,² however, that was overturned on appeal where the Court of Appeal held that there was no basis for which to award economic loss and reduced the damages awarded to \$600,000.³

The largest sum awarded in a defamation case to an individual in Australia was to Geoffrey Rush.⁴ In his successful defamation case against the *Nationwide News*, Wigney J awarded Mr Rush the sum of \$AU2.9 million after stories were published alleging Mr Rush behaved inappropriately towards Eryn Jean Norvill, his co-star in the Sydney Theatre Company production of *King Lear*. Mr Rush maintained his denials of his claim. *Nationwide News* appealed the decision but were unsuccessful.⁵

No live-stream

With cases involving wealthy high-profile celebrities, the *Depp v Heard* case has shown it is easy to forget that the trial is about someone's life. Ms Heard applied to keep the TV cameras off but lost that application.

There are a number of key reasons we are unlikely to see this media storm in Australia.

First, the First Amendment to the US Constitution protects the freedom of speech and of the press. Court cases are therefore recorded and broadcast because to not do so, would prohibit the exercise of free speech. The First Amendment guarantees the public access to see what is going on behind closed doors.

Second, Court cases are not televised in when there is no jury for reasons of privacy, so defendants are not further subjected to stress and humiliation, nor further trial by media. The *Courts Legislation Amendment (Broadcasting Judgments) Act 2014* prohibits broadcasting of cases, except for the judge's final remarks in certain circumstances. This Act prevents what should be a fair process of justice and a public court room crossing the line into 'entertainment'. In more recent times, we have seen the highly anticipated judgments of Chris Dawson and George Pell live streamed for the public.

Whilst here in Australia the Court is open for the public to attend, the 'open press and open Court room' stops short at televising or streaming trials.

Conclusion

The *Depp v Heard* trial raises the question about whether the jury was influenced by the media storm, bias and misinformation that were readily available online. Although the jurors were instructed not to read about the case online, or on social media, they were not sequestered and were allowed to keep their phones. At the time of writing this article, the TikTok hashtag #justiceforjohnnydepp had a whopping 21.6 billion views. By comparison, the TikTok hashtag #justiceforamberheard only had 136.1 million views. Mr Depp's legal team maintained that this was not a case of 'trial by TikTok' rather it was a case where there was no evidence to prove the truth of the allegations made.

In the Court of Public Opinion, Mr Depp has walked away with a win. Generally, people seem to have overlooked the fact that Ms Heard did in fact, also win and since the judgment was delivered, Mr Depp has received immense public support, with reports surfacing of Mr Depp being re-offered roles where he was previously asked to stand down. Unlike her ex-husband, Ms Heard has not had such a positive response, with online petitions growing to have her removed from her most notable role in *Aquaman*.

At the time of writing, Ms Heard had changed some of her legal team and it was reported she is appealing the decision. It will be interesting to see how the US Courts manage the appeal noting some of the criticisms that have arisen by the way this trial was managed.

1 Defamation Act 2005 (NSW) s 35

2 Wilson v Bauer Media Pty Ltd [2017] VSC 521

3 Bauer Media Pty Ltd v Wilson (No 2) [2018] VSCA 154

4 Rush v Nationwide News Pty Limited (No 7) [2019] FCA 496

5 Nationwide News Pty Limited v Rush [2020] FCAFC 115

Songbird or Magpie? What *Stone v Carey* Says About the Rising Wave of Copyright Claims in the Music Industry

Authors: **Laksha Prasad** (Lawyer) and **Emma Johnsen** (Senior Associate), Marque Lawyers

'Tis the season for frivolous copyright claims, and it's open season on the music industry's biggest players.'

In what seems like an endless stream of copyright claims against pop artists such as Dua Lipa, Ed Sheeran and Sam Smith, it appears that the Queen of Christmas herself hasn't been spared.

In June of this year, singer-songwriter Andy Stone (who performs under 'Vince Vance') filed copyright infringement proceedings against Mariah Carey, songwriter Walter Afanasieff and Sony Music over their 1994 mega-hit, *'All I Want for Christmas is You'*.

The complaint, which seeks \$20 million (USD) in damages from the defendants, claims that Stone is the "co-owner and proprietor of the rights, title and interest in and to the copyright work *'All I Want for Christmas is You'*" and that neither Carey nor her team "sought or obtained permission from [Stone]" to use the song.

In addition to copyright infringement, Stone has also made allegations of unjust enrichment, misappropriation and a violation of the Lanham Act (being the US' statute on trade marks and unfair competition).

Stone's *All I Want for Christmas is You* was released in 1989 and is a known work in its own right – having charted on *Billboard's* Hot Country Songs list six times between 1993 and 1999, as well as racking up over 4 million plays on Spotify. However, Carey's track is undoubtedly more popular with over 1 billion plays on Spotify, an estimated sale count of over 16 million copies worldwide and earning at least \$60 million (USD) in royalties to date.

Is this just another baseless copyright claim?

Other than the titles of the song (and some Christmas-themed *scènes à faire*), the two tracks are completely different. Stone's complaint doesn't allege that the songs are substantially similar, which is a fairly integral fact in any claim for copyright infringement. Stone has made a much broader claim that the defendants "knowingly, wilfully, and intentionally engaged in a campaign to infringe" his copyright in the work *'All I Want for Christmas is You'*.

Why has Stone brought his claim now?

Why, after almost 30 years of peaceful co-existence between the two songs, has Stone filed a complaint now? Is there a time limit to these kinds of claims?

The short point is yes, there is (three years, to be exact) – however, in this instance the allegation hinges on the ongoing infringement. That is, each time that Carey's track is streamed, licensed or sold, the three-year timer restarts and allows Stone to sue for damages over the infringement that has occurred over that period.

How is Stone's complaint likely to fare in Court?

As mentioned, Stone's complaint doesn't actually allege that the songs are substantially similar, which spells disaster for the viability of the claim past the pleadings stage. Instead, the complaint focuses on the words that comprise the title of the song.

Unfortunately for Stone, titles and short phrases don't typically possess sufficient originality or authorship to qualify for copyright protection in the US and many other jurisdictions. Not to mention, the words *'All I Want for Christmas is You'* are used in hundreds of song titles across the world, many of which predate both Stone and Carey's tracks.

The misappropriation and trade mark claims in Stone's complaint will likely face similar criticisms.

In particular, the United States Patent and Trademark Office directs that "the title of a single creative work is not registrable". However, with the right amount of publicity and marketing, a song title can create sufficient secondary meaning to become registrable as a trade mark. This was seen with the Red Hot Chili Peppers' use of the word 'Californication' and The Beatles' song titled 'Yellow Submarine'.

Alas, Stone has not made any submissions in his complaint as to why the phrase *'All I Want for Christmas is You'* should be recognised as a common law trade mark, so it is unlikely that this allegation will persuade the Court either.

So why all this palaver for a claim that is undoubtedly doomed to fail?

It has long been surmised that the wave of frivolous copyright claims has not only increased the public profile of lesser-known claimants (with even lesser known, yet 'similar' tracks), but is also becoming a proven strategy to coax lucrative settlement deals out of successful artists.

Settlement can offer more favourable outcomes and in this context, has ranged from song-writing credits (such as Sam Smith giving musician Tom Petty credit on his hit single *'Stay with Me'*, despite the similarities in their songs being labelled a 'complete coincidence') to the promise of future royalties (in 2018, producer Pharrell Williams agreed to pay Marvin Gaye's estate a 50% share of future royalties in his *'Blurred Lines'* track, although Williams claimed he was only trying to 'channel that late-70s feeling' rather than copy Gaye's 1977 disco song *'Got to Give it Up'*).

Following his successful defence of the most recent copyright claim to be brought against him, however, UK-singer Ed Sheeran sought to address and expose the ambitions of opportunistic claimants looking to capitalise on this trend.

In April, the UK's High Court found that Sheeran had neither 'deliberately nor subconsciously copied' part of grime artist Sam Chokri's 2015 song *'Oh Why'* and used it in *'Shape of You'*.

In a video posted to his Twitter account, Sheeran said "I feel like claims like this are way too common now and have become a culture where a claim is made with the idea that a settlement will be cheaper than taking it to court. Even if there's no base for the claim."

It's really damaging to the song-writing industry. There's only so many notes and very few chords used in pop music. Coincidence is bound to happen if 60,000 songs are being released every day on Spotify."



Interview: Julian Keyzer

Australian lawyer **Julian Keyzer** is a Senior Vice President, Business & Legal Affairs at Fox Entertainment, now based in New York City, after 10 years of living in Los Angeles. He previously worked in the Business & Legal Affairs team at Viacom (now Paramount Global) (supporting networks such as MTV and Vh1) as well as in Business and Legal Affairs roles at NBCUniversal (including supporting networks and platforms such as NBC, Bravo, E!, USA Network, Syfy, Oxygen and the Peacock streaming service, as well as a number of the company's television studios).

Marlia Saunders, Partner (Media) at Thomson Geer, who worked with Julian at Blake Dawson (now Ashurst) until he moved stateside in 2009, spoke with him on Zoom about his new role and his experiences working in the entertainment industry in the U.S.

MARLIA SAUNDERS: You've been in your current role at Fox Entertainment for eight months now - can you tell us about what your job entails?

JULIAN KEYZER: To give a little background for those who may not know, networks, studios, and production companies in the United States usually have a business affairs team and a legal affairs team. Sometimes those roles or departments are combined and sometimes they're separate. Basically, business affairs executives handle the front-end commercial negotiation of deal terms and legal affairs executives then paper the closed deals. So, when a TV show is being developed or produced, the business affairs negotiators will handle deals with the production company or studio that will produce the show, the talent that will appear in the show, any executive producers etc., and then legal affairs attorneys will draft and negotiate the contracts based on those deals. Sometimes, a subset of a legal affairs role is what's known as "production legal," which essentially involves lawyering the day-to-day matters that come up on a production, such as participant releases, location agreements, employment issues, defamation issues, and so on. If you are in a combined business and legal affairs role, like I am currently, you are basically handling everything I've described - negotiating and papering deals end-to-end and handling most legal issues that arise on the applicable production. Of course, networks and studios also regularly have other specialist legal teams such as dedicated

IP, employment, litigation, compliance, and tax lawyers (or if not, engage outside counsel for advice in those areas).

In my current role I am focused on original production, in particular in the unscripted television space. I currently support the FOX Network, our in-house unscripted studio FOX Alternative Entertainment and Studio Ramsay Global (which is a joint venture production studio co-owned by FOX and celebrity chef Gordon Ramsay), so the types of shows and content that I work on really runs the gamut. FOX is, of course, known for many hit "shiny floor" show formats that Aussies are familiar with such as "The Masked Singer," "So You Think You Can Dance" and a number of formats that I don't think have made their way to Australia yet, like "Next Level Chef."

MARLIA: 'Shiny floor' shows - is that actually the terminology that's used in the industry? I love it!

JULIAN: Yes - literally because the studios used to film those types of shows traditionally have a shiny floor!

Another fun thing I've been working on recently is an initiative that FOX started called the FOX Alternative Entertainment International Unscripted Format Fund. Without sounding like I'm regurgitating a press release, basically, FOX acknowledged that many of the most successful television series in the unscripted genre over time, be it "Idol," "Big Brother," or "Dancing With The Stars," have emanated from outside the

United States, and so they established a \$100M fund dedicated to investing in developing and incubating unscripted formats internationally. The goal is to tap into all that creativity around the world by partnering with local creators and networks to finance and develop new concepts that, in success, will also benefit FOX in the United States and globally. So, I've been working on a number of projects in that space lately, which generate a lot of interesting issues, depending on the territories I'm working with.

MARLIA: That sounds like such a great initiative. What's a regular day in the office for you?

JULIAN: At the moment I work entirely remotely, because the rest of the division I'm a part of is pretty much based in LA. The timing of when this job came up for me was just after I had relocated to New York, so FOX was generous enough to pioneer me working from here.

I've travelled back to LA a few times already, and I want to make that happen on a regular basis.

My team is great. The last time I visited coincided with the team's return to the office post-pandemic, so I finally got to meet a lot of my co-workers in person at the office and sit amongst everyone for the first time. It was truly an "oh, I remember what it used to be like to see people in person at work!" moment. Like most things I take for granted, I didn't realize how much I missed that, until it became so rare. It was nice to go to

the FOX studio lot and actually feel like a part of something in the flesh again, instead of just behind a screen. As I think so many people can identify with, when you're working remotely for as extensive a period as many of us have been, it's so easy to get sucked into work and meetings for hours to the point that you get to the end of the day and you realize that you went from your bedroom to your laptop, and almost didn't see the outside world at all. I probably work a lot later than I would if I were in an office too, because you leave an office, whereas I am always here.

MARLIA: I feel like that's life now – the lines have blurred between home and the workplace.

JULIAN: And if we're being honest with ourselves, it doesn't feel like it's ever going to change. The world feels different.

In any case, my workdays in this role vary a lot. TV production has such ebbs and flows, and unscripted programming in particular can be the most unpredictable in terms of the issues it can produce for you day-to-day. It is totally normal for me to find myself in the situation where I've set out to achieve certain items on my "To Do" list on any given day, and get nowhere close to doing any of them because of curve balls thrown by one production or another. It's part of the fun and keeps you on your toes. The landscape is also more competitive and under pressure than ever, so there is always a rush deal request in your future.

MARLIA: How was your experience starting out working in Hollywood?

JULIAN: Overall great, although I totally had imposter syndrome. I came from a law firm in Sydney, where we worked on all sorts of media related matters, but I hadn't had this level of in-depth involvement in all the steps of producing a television show from start to finish in the same way that I've experienced in my in-house roles in the United States, so I learned A LOT. I was so fortunate to land at companies like Viacom and NBCUniversal in my early years. They have such well-run business and legal affairs departments, with so many super experienced entertainment lawyers (many of whom have been involved in agenda setting shows and case law), so I had the most amazing mentors to draw upon. As far as coming in from an Australian background and not necessarily knowing the Hollywood way

of doing things, the business and legal affairs teams at those companies were the best school I could have asked for in terms of learning how things are done here.

It feels totally embarrassing in retrospect, but one thing that I initially found funny when I was starting to work in this field in LA is that it's totally possible that you'll run into talent randomly when you've been working on their deal earlier that day. The longer you live amongst it, you can certainly become desensitized to seeing people, and you've of course always got to keep it professional regardless, but on the odd occasion it happens, it's always a bizarre feeling when you've spent the day in a protracted negotiation with a high-level personality's reps only to be behind that celebrity in the line at the supermarket later that night. You get over the inner-super-fan mostly, but I've always told myself if I reach the point that I feel so desensitized and jaded about the industry that I don't find anything "magical" about being a part of it anymore, and there's no-one or no thing that could invoke me to have a fan-super moment, then that's when it's time for me to choose another line of work.

MARLIA: Have you come across many Aussies working in Hollywood?

JULIAN: There are so many Aussies in LA and New York, but I haven't come across very many working in entertainment law so far. One of my very best friends, whom you know from Uni as well - Vanessa Grunstein (now Vanessa D'Andrea) - and I have been side by side through much of our American entertainment lawyer experience, working at the same companies on and off and generally in each other's professional orbit. Other than that, I've generally found it rare to have another Aussie working at the same place as me. I think a lot of people come to LA and New York to be on camera or to produce, not to be entertainment lawyers!

MARLIA: What are the key differences between Australian lawyers and US lawyers?

JULIAN: I've been fortunate enough to work alongside and on the opposing side of a lot of brilliant lawyers in both countries.

One thing that I've found interesting transitioning between being a lawyer back home to over here is – and this

isn't so much a difference between American and Australian lawyers per se, but perhaps more of a unique quirk of the US entertainment industry and "Hollywood" – it felt very ingrained in us when training as baby lawyers in Sydney that we were expected to be dispassionate in our communication style when negotiating and giving legal advice. Not all lawyers communicate that way across the board of course, but it feels generally how things are. By contrast, sometimes, in "Hollywood," it can feel like that notion goes entirely out the window. With the confluence of agents, managers, entertainment attorneys, often with blurry division of roles, you can encounter much more elevated communication styles than you expect when sending emails or having phone calls between Ashurst and Mallesons.

MARLIA: Yes, don't put anything in writing that you don't want a judge to read.

JULIAN: Right!! You definitely encounter some passionate personalities here.

The approach to contract language and drafting is another big difference I notice. "Plain English drafting" is very commonplace in Australia, and isn't as standard here, at least in my experience of the entertainment industry. At this stage, sadly, I find myself a magnet for being asked to revise contract forms. Some people have as their God-given talent to sing, or dance or act, and all I got was contract drafting. I want my money back!

MARLIA: Not when that's what you do for a job though – it's a handy skill to have as an entertainment lawyer in the States! You sat the New York Bar Exam when you first moved to the US – was that intense?

JULIAN: It. Is. Horrible! (in that sadistic rite-of-passage way.)

In my opinion, the content you have to learn generally isn't harder than in Australia. Actually, the reason Australian lawyers usually don't have to do a whole new law degree in the United States before taking the Bar exam is rooted in the fact that many legal principles are largely the same amongst common law countries. (Australian lawyers usually just have to get their Australian law degree vetted by an accredited service to make sure it was issued by a credible educational institution and then pass the Bar and Ethics exams in the applicable state in which they're seeking to practise, whereas lawyers coming from civil law

countries often have to undertake a new American law degree).

What did feel much harder at the time though, was the testing style. When we did College of Law or Practical Legal Training in Uni, there was an exam for each subject, so you could compartmentalize things a little - get one exam out of the way on one day and then move on to the next topic and next exam on another day. The New York Bar is one exam covering all of the topics at once over multiple days. There's one day devoted to multiple choice questions (and they're those mind-game questions where there are two right answers but one answer is more right than the other), then another day of essays, and another for a separate ethics exam. I would say to anyone contemplating doing it, that I really had to lock myself away for two months and do basically nothing else but study. Thinking back to how I felt at the time, the idea of working while preparing for that exam is crazy to me. It feels like a death wish to try doing the Bar exam without signing up for a "Bar review" course to prepare as well.

MARLIA: After working in such prestigious roles in entertainment law, do you think you could ever move back to Australia?

JULIAN: Australia is my home no matter where life takes me, so I could never say that's out of the question. In fact, Aussies that move overseas and then speak unkindly about their roots is a pet peeve! That said, if I'm being honest, I find it hard to unpack that question generally, because I'm so entrenched here now in my life and work. In terms of the entertainment industry, the industry in Australia is naturally much smaller, so when I think about the possibility of moving home I often wonder what my role would be. By sheer population size, there is a lot more opportunity here in the field that I have now devoted so much of my career to, so that's one of those questions I have a lot of uncertainty about. That said, I think that rapid globalization of content deals with streamers buying out properties worldwide for global exhibition regardless of where a show is produced, as well as growth in streamers' appetite for local content in each market, have opened up lot more Business & Legal Affairs roles in the Australian market than would have been the case if you'd asked me this question 5 years ago. Of course, Australia also has its own unique and specialized funding practices for TV production, and so more roles are opening up in Australia that call upon and mirror the experience I have gained in the US, so it is always a possibility,

particularly as we see a bridging of the gap in the US and Australian TV markets in terms of quality, budget and volume of content.

Honestly, I don't know the answer, but I could never rule it out, so I just choose to bury my head in the sand on that question and let life choose it for me. All of that said, some of the things that have happened in this country over the last several years certainly give me pause, and make me long for home.



Marlia Saunders



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A Battle of the Books: Penguin Random House and Simon & Schuster Litigation

Authors: **Jennifer Dean** (Partner) and **Benjamin O'Mara** (Associate), Johnson, Winter & Slattery

Introduction

On 1 August 2022 the hearing of proceedings brought by the US Department of Justice (**DoJ**) to block the proposed USD 2.2 billion acquisition of Simon & Schuster by Bertelsmann Se & Co. KGaA owner of Penguin Random House (**Penguin**) (the **Proposed Transaction**) commenced in the United States District Court For the District of Columbia.¹ U.S. District Court Judge Florence Y. Pan oversaw the 3-week non-jury trial, which concluded on 19 August 2022. At the time of writing, her Honour's judgement is still reserved.

Close regulatory scrutiny of the Proposed Transaction was perhaps always inevitable given it would reduce the so called 'Big Five' of publishing in the US to four. However, the proceedings have brought into sharp focus an emerging dichotomy in antitrust doctrine between the orthodox approach of assessing competitive harm primarily by reference to consumer welfare and retail price, and advocates for change. In particular, advocates for change who are concerned by broad trends toward increased market concentration and argue for antitrust enforcement to expand its focus to other indicia including worker and supplier welfare.

The Biden Administration has made its ambition for substantial change explicit via a detailed executive order and significant personnel changes at the Federal Trade Commission (**FTC**) and DoJ. The DoJ has similarly placed itself on the side of change by seeking to block the Proposed Transaction principally on the basis that it would enable major publishers to pay authors less.

In contrast, Penguin and Simon & Schuster (the **Defendants**) have found themselves on the orthodox side of the argument, submitting that upstream concentration without an ability of the merged entity to restrict outputs or raise prices in retail markets does not raise concerns from an antitrust perspective.

Historically, Australia has tended to steer more of a middle path on these debates. While that is unlikely to change, it is clear that the change of government at the Commonwealth level is also likely to result in some re-orientating of competition policy.² Furthermore, the Australian Government and the Australian Competition and Consumer Commission will be watching developments in the US closely.

The DoJ's case

Defining the market

The DoJ argues there is a relevant product market for the acquisition of US publishing rights for anticipated top-selling books.³ Such books receive advance payments of USD 250,000 or more and, require publishers with particular editorial, marketing and publicity expertise, and sophisticated sales and distribution capabilities.⁴ According to the DoJ, only a select few publishers meet these requirements.⁵

The DoJ argues USD 250,000 is an appropriate cut-off because of the close connection between advances and anticipated sales – that is, a book awarded a large advance is very likely to have large anticipated sales.⁶ It also notes that both PRH and S&S recognise USD 250,000 as a significant threshold in their ordinary business operations (e.g. requiring higher-level approvals and additional documentation).⁷

In these circumstances, the DoJ also argues that self-publishing and / or smaller publishers are not effective substitutes to the expertise and resources of the major publishing houses when it comes to acquiring rights to anticipated top-selling books.⁸

The merger is unlawful

The DoJ argues the merger is presumptively unlawful because the market share of the combined entity (49% of the narrow market it alleges) will amount to well above the 30% threshold⁹ identified as raising potential concerns and

¹ *United States of America U.S. Department of Justice Antitrust Division v Bertelsmann Se & Co. KGaA, Penguin Random House, LLC, ViacomCBS and Simon & Schuster, Inc.*, 1:21-cv-02886-FYP United States District Court, District of Columbia 1.

² For example, see Andrew Leigh, 'A More Dynamic Economy' (FH Gruen Lecture, Australian National University, Canberra, 25 August 2022) <<https://ministers.treasury.gov.au/ministers/andrew-leigh-2022/speeches/fh-gruen-lecture-australian-national-university-canberra>>.

³ *United States of America U.S. Department of Justice Antitrust Division v Bertelsmann Se & Co. KGaA, Penguin Random House, LLC, ViacomCBS and Simon & Schuster, Inc.*, 1:21-cv-02886-FYP United States District Court, District of Columbia, United States' Pre-Trial Brief filed 22 July 2022 1, 19.

⁴ *Ibid* 20.

⁵ *Ibid* 21.

⁶ *Ibid* 23.

⁷ *Ibid* 24.

⁸ *Ibid* 8.

⁹ See *Philadelphia. National Bank*, 374 U.S. 321 (1963) 363–65.

effectively twice the market share of its next biggest rival HarperCollins with 24%.¹⁰ The DoJ also estimates that the alleged market would be highly concentrated with total market share of the top four publishers being at least 90%.¹¹

The DoJ relies on both internal management documents from the merger parties and economic modelling to argue that the merged entity would be able to profitably lower advances to authors in the market for anticipated best sellers, because large publishing houses would face insufficient competitive constraint from smaller publishing houses or self-publishing options and because the reduction in the number of large publishing houses would facilitate tacit coordination.¹² The DoJ's economic model anticipates advances to decrease by 5.8% for PRH and 15.3% for S&S in the case of a merger.¹³

The DoJ alleges high structural barriers to entry, noting that even after a decade in industry Amazon rarely succeeds in acquiring anticipated top-sellers,¹⁴ and that authors' agents cannot counteract the anticompetitive effects of the merger since they are numerous and diffuse, with no power to manufacture competition or control publisher interest in a book.¹⁵ In response to the Defendants' contention that the merger will increase efficiencies, the DoJ submits that the District Court has always struck the balance in favour of protecting competition, even if a potential merger may also result in efficiencies.¹⁶

Ultimately, the DoJ alleges that a reduction of author compensation would mean that fewer authors will make a living from writing, reducing the overall output of books and harming consumers as a result.¹⁷

Defendants' response

Market definition

The Defendants submit that alleging a separate market for books that generate USD 250,000+ advances is an attempt by the DoJ to find harm in a 'tiny corner' of the actual market after being 'unable to identify any harm to competition in the broader market for the acquisition of all book rights'.¹⁸

The Defendants submit that a number of practical indicia do not support the DoJ's market definition, namely:¹⁹

- industry actors do not recognise a separate market for books that will receive advances of US \$250,000+;
- books in this price segment do not share common characteristics or uses;
- acquiring books in this segment does not require unique facilities – they are edited, printed, and distributed using the same people and facilities as all other books; and
- there is no distinct set of authors selling only USD 250,000+ books.

The Defendants also argue that the market posited by the DoJ is so narrowly defined as to capture only an insubstantial amount of commerce.²⁰

No likelihood of substantial harm

The Defendants submit that the DoJ's focus on the upstream market is a direct result of its inability to identify any likely harm at the consumer level.²¹ Further, effects in any upstream market should only be of concern in an antitrust context if the transaction would enable the merged entity to reduce input supply in the retail market (i.e. the market for the supply of books to consumers) which is not the case with respect to the Proposed Transaction.²² Rather:

- A range of large publisher rivals could readily expand and in many cases already have plans to do so.²³ Other rivals among the top twenty also possess the necessary talent, experience and reputation to be effective competitors for anticipated top selling books.²⁴
- Agents have substantial countervailing power with respect to the sale of rights to publish highly sought after titles and use their skills and experience to decide which publisher(s) to invite to consider a given book and which acquisition format will best serve their clients' interest.²⁵

10 (n 3) 30.

11 Ibid 23.

12 Ibid 28-40.

13 Ibid 39.

14 Ibid 43.

15 Ibid 46.

16 Ibid 48.

17 Ibid 35.

18 *United States of America U.S. Department of Justice Antitrust Division v Bertelsmann Se & Co. KGaA, Penguin Random House, LLC, ViacomCBS and Simon & Schuster, Inc.*, 1:21-cv-02886-FYP United States District Court, District of Court, Defendants' Pre-Trial Brief filed 22 July 2022 1, 15.

19 Ibid 16-22.

20 Ibid 25.

21 Ibid.

22 Ibid 26.

23 Ibid 31.

24 Ibid.

25 Ibid 4.

Even if the DoJ's theory of harm is accepted, the Defendants argue it is too narrow to be material. In support of this the Defendants cite the statistic that the acquisition of books with advances higher than USD 250,000 represents only 2% of the overall US market and Simon & Schuster and Penguin are the top two bidders for these kinds of books only 7% of the time.²⁶

The Defendants also point to a number of efficiencies that will result from a merger.²⁷ Given the fragmented and competitive nature of downstream markets (including major disruptors such as Amazon), it seems reasonable to assume that the benefits of these efficiencies would inevitably be passed on to consumers.

How does this case fit into the US' broader regulatory strategy?

There is arguably transition in progress in antitrust regulation in the US at present. The policy objective of reversing the broad trend of increased concentration in American markets has been made explicit in a recent Biden Administration Executive Order²⁸ which sets out a program of new legislation and vigorous enforcement of existing laws. In addition, longstanding advocates for change, including Lina Khan and Jonathan Kanter, have also been appointed to key positions in the FTC and DoJ.

With these changes, the orthodox focus on consumer welfare (measured by retail price, output and product quality) is being questioned. In the article that first saw Khan rise to prominence, *Amazon's Antitrust Paradox*, she outlined her case that orthodox antitrust law doctrine 'views low consumer prices, alone, to be evidence of sound competition' and that it is therefore ill-equipped to 'capture the architecture of market power in the modern economy.'²⁹ In Khan's view, large digital platforms offering low-cost or free goods and services to consumers exemplify this principle. In the five years since Khan's article was published, there have been increasing calls for antitrust analysis to expand its focus to other sites of potential harm arising from concentrations of market power, including worker and supplier welfare.

This expanded focus has now been made explicit in President Biden's Executive Order, which directs antitrust enforcement agencies to consider a worker's ability to bargain for higher wages and better conditions as a relevant consideration in deciding whether to block a merger.³⁰ It is also likely to be reflected in updates to the US merger guidelines³¹ with comments being sought specifically on aspects of competition which may be overlooked by the current guidelines.³²

As mentioned above, close regulatory scrutiny of the Proposed Transaction in the US was perhaps always inevitable given it would reduce the so called 'Big Five' of publishing to four. However, the increased regulatory focus on economic structuralism and on theories of harm beyond the orthodox consideration of the impact of a transaction on consumer prices are clearly evident in the DoJ's case.

In particular, it is relatively rare to see regulatory proceedings commenced to block a merger in circumstances where there is no allegation that an increase in retail prices

is likely to result. In this case the DoJ's primary focus is on supplier or author welfare. While it also argues that lower advances may result in fewer books being published and less choice for consumers, this allegation appears to be something of an afterthought. Intuitively, it is hard to imagine that many of the books the DoJ is primarily concerned with (i.e. those that attract advances of USD 250,000+) would not be published as a result of any marginal drop in the size of advances paid.

The DoJ's focus on market structure arguably also risks obscuring some of the competitive dynamics which are unique to this creative sector. For example, the practical challenges associated with identifying top selling books in advance,³³ and the non-price factors that authors consider, such as the ability to work with particular editors. This non-price aspect is captured in comments by the 'mega-agent' Jennifer Rudolph Walsh, who in response to a question from the bench about whether agents have a fiduciary duty to secure the highest possible advances stated, "[m]ore isn't always more".³⁴

Conclusion

With the outcome of this case still pending and several other major enforcement proceedings by the DoJ ongoing, it is uncertain how sympathetic the US courts will be to this new regulatory approach. Most judges hearing these cases were appointed under Republican or Democratic administrations that broadly accepted orthodox antitrust doctrines and may view questions such as the welfare of workers as being more properly dealt with directly via regulation of employment relationships than antitrust litigation. In that context, it remains to be seen how effective the DoJ's more robust enforcement stance will be in the medium term.

26 Ibid 36.

27 Ibid 40-42.

28 'Executive Order on Promoting Competition in the American Economy', *The White House* (July 09, 2021) <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

29 Lina M. Khan, 'Amazon's Antitrust Paradox' (2017) 126(3) *Yale Law Journal* 710, 716.

30 (n 29).

31 'Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers', *Federal Trade Commission* (18 January, 2022) <<https://www.ftc.gov/news-events/news/press-releases/2022/01/federal-trade-commission-justice-department-seek-strengthen-enforcement-against-illegal-mergers>>.

32 Ibid.

33 Markus Dohle, the CEO of Penguin Random House testified on 4 August 2022, "Everything is random in publishing. Success is random. Best sellers are random. That is why we are the Random House!" quotation from Katy Waldman, 'Is Publishing About Art or Commerce?' *The New Yorker* (online 16 August, 2022) <<https://www.newyorker.com/books/page-turner/is-publishing-about-art-or-commerce-penguin-random-house-simon-schuster-antitrust>>.

34 Ibid.

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Profile: Tom Griffin

CAMLA Young Lawyer **Anna Kretowicz** recently interviewed **Tom Griffin**, Associate General Counsel at Meta, to discuss working in-house at the company that arguably defines the zeitgeist of the 21st century. Anna Kretowicz is a Judge's Associate and is reading for the Bachelor of Civil Law at Oxford University in 2022-23.

ANNA KRETOWICZ: Hi Tom, thanks for chatting to us. Let's start with something easy; could you tell us a bit about yourself? Where do you work, and what's your role in the organisation?

TOM GRIFFIN: I work at Meta. I've been here for a little over two years and am based in our beautiful Sydney office.

I'm an Associate General Counsel in the APAC Privacy Legal team. I manage a team that is primarily focused on regulatory engagement on all things privacy across the APAC region.

ANNA: Where have you worked previously and what led you to your current role? Has it been a long road to a dream position, or more of a series of opportunities that you didn't really pan out?

TOM: I started my career at Allens, where I managed to get myself onto the Tech, Media & Telco team after stints through the corporate and litigation departments as a grad.

During my time at Allens, I was fortunate to have the opportunity to go on a variety of secondments. I spent four months at Westpac, four months at Crestone Wealth Management and six months at a start-up called Data Republic. I liked the work at Data Republic so much that I made the leap in-house there after seven years at Allens.

My current role at Meta is certainly a dream position, but it's definitely been a series of opportunities rather than a master plan. Perhaps it's only fitting to end up at Meta, given the amount of time I've spent on Facebook and Instagram in my life!

ANNA: What are some of the most challenging or interesting aspects of your current role?

TOM: The scale of the company, the breadth and diversity of APAC as a region, and the ever-changing nature of privacy and data protection laws make this an immensely challenging and fascinating role.

Meta has a range of well known and loved products, as well as an ambition to play a central role in the development of the next evolution of computing - the metaverse. It's very satisfying to be working at the cutting edge of both technology and the law.

ANNA: What are some of the key skills or qualities that you think lawyers in this field, being a constantly and quickly developing one, need?

TOM: Beyond the technical skills that all lawyers need to be effective in any role, the key attributes to make impact in this space are curiosity and adaptability. If you are genuinely interested in the subject matter (both the technology and the legal concepts that apply to the technology) then you should thrive. Equally important is the ability to move quickly and adapt to ever changing environments.

ANNA: Do you think that the privacy law landscape is lagging behind the rate at which technology is being developed and used? And relatedly, what sorts of reforms to privacy law would you hope to see over the next five years (if any)?

TOM: The nature of technology and innovation is that there is always likely to be some kind of lag between the state of the art and the current legal landscape. My personal view is that principles-based laws (for example the Australian Privacy Act) are best equipped to deal with the potential gaps as they are usually intended to be technology-agnostic by design.

That's not to say that reform isn't a good thing. Meta has made a number of submissions in Australia, APAC and across the world, where we think we have some useful insights to provide. Overall, we are keen to see consistency to the extent possible, and to ensure that any reforms are focused on protecting users as well as the integrity of the internet and digital world.

ANNA: Is the future in the Metaverse? What excites (or maybe even scares) you the most about working for a company that is arguably definitive of the 21st century?

TOM: The potential of the metaverse is incredibly exciting. It's been amazing to see the evolution of the technology across AR and VR even in the short two years I have been at Meta.

Every time I put on an Oculus headset I am amazed by the level of immersion you feel, and how quickly your brain and hands adapt to engaging with things in VR. I have a pair of the Meta x Raybans Stories sunglasses and love them for taking calls and listening to podcasts in an unobtrusive way.

It's exciting to think about how the physical world and the digital world will continue to converge and interact as technology develops over the next few years. In the same vein it's also fascinating to think about the impact these new technologies will have and the legal and regulatory implications that will inevitably follow.

Overall, I'm optimistic about the potential of the metaverse across a range of applications and excited to be part of one of the leaders in the space.

ANNA: Having started out on the CAMLA Young Lawyers Committee yourself, what tips would you have for young

lawyers or law students looking to break into the technology, media and communications law space?

TOM: One of the great things about the technology space in particular is the pace of change and innovation. Not only in the technology itself but in the legal and regulatory context as well. It means that relatively young lawyers have the opportunity to establish themselves early in their careers as subject matter experts.

Not having grey hair isn't an impediment (nor is having grey hair). The pace of change is a great leveller. It means that lawyers who have a deep interest in technology and the capacity to keep pace will thrive.

ANNA: And finally, if you weren't working in privacy law, or even law at all, what would you be doing?

TOM: I've always wanted to be a marine archaeologist. So you'd probably find me beneath the waves searching for lost cities and sunken treasures.



Anna Kretowicz

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The Future of *NYT v Sullivan* and the Enforceability of Australian Defamation Judgments Against US Publishers

Author: **Dan Lunniss** (Lawyer), McCullough Robertson

Introduction

Across the world, defamation claims garner a lot of attention and publicity (think *Depp v. Heard* and the *Sandy Hook* parents v. *Alex Jones* (of ‘InfoWars’ infamy)). Locally, public interest in such cases is also intense (think *Ben Roberts-Smith v [various publishers]* or *[Rebel] Wilson v Bauer Media*). However, the principles upon which defamation claims are determined can vary significantly between jurisdictions. These variations can have important (and potentially fatal) ramifications for the enforcement in foreign jurisdictions of defamation judgments delivered by Australian courts.

The United States of America (US) is one such jurisdiction where differing principles create difficult and potentially insurmountable barriers for the enforcement of judgments delivered by Australian courts. One such principle is the US standard of “actual malice” (the **Standard**). Derived from the landmark 1964 First Amendment decision of *New York Times Co. v. Sullivan*, 376 U.S. 254, the Standard is a ‘threshold’ principle that governs defamation actions in the US. Ultimately, the Standard may prevent the successful enforcement of Australian defamation judgments in the US, against US-based entities like Google who was the unsuccessful respondent in the recent decision of *Barilaro v Google LLC* [2022] FCA 650.

The Standard (*New York Times Co. v. Sullivan*)

The Supreme Court of the United States’ decision of *New York Times v. Sullivan* established the Standard for defamation cases brought by “public figures” against publishers (e.g. media outlets). In subsequent decisions, including *Curtis Publishing Co. v. Butts*, 388 U.S. 130 and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, the term “public figure” was expanded to include non-elected public officials, of two distinct ‘kinds’ (being, public figures for ‘all-purposes’ and public figures for ‘limited-purposes’).

In short, the Standard means that for a ‘public figure’ to successfully make out their claim for defamation they must prove, amongst other things, that the publisher knew the ‘defamatory’ story was false when published or that it recklessly disregarded the possibility that it was false (requiring proof of the defendant’s internal state of mind). This is a high standard, particularly in modern times when publishing occurs almost instantaneously. Unsurprisingly, the Standard has made it very hard for public figures to sue publishers in the US; it has been a bedrock of US media law.

Coral Ridge v. Southern Poverty

The Standard remains a controversial topic.

In the recent Supreme Court ruling in *Coral Ridge Ministries*

Media, Inc., d/b/a D. James Kennedy Ministries v. Southern Poverty Law Centre, 597 U.S., Justice Clarence Thomas’ dissenting judgment suggested that “[the decision] and its progeny have allowed USA based media organisation and interest groups ‘to cast false aspersions on public figures with near impunity’”.

Coral Ridge v. Southern Poverty, related to proceedings brought by Coral Ridge Ministries Media, Inc doing business as D. James Kennedy Ministries (the **Ministry**) (a not-for-profit Christian ministry), which broadcasts pre-recorded messages of Dr D. James Kennedy (its late founder). Southern Poverty Law Centre called the Ministry a “hate group” on its website and in some of its publications. In response, the Ministry alleged that it had been defamed by the Law Centre’s declaration of it.

The Ministry petitioned the Supreme Court to revisit the Standard, after losing its claim in lower US courts. Amongst other things, it lost those claims on the basis that its defamation claim did not clear the “near-insurmountable hurdle” of the Standard. In this regard, the US Court of Appeals for the Eleventh Circuit found that as the Ministry had “failed to adequately plead actual malice” it would affirm the decision of the US District Court for the Northern District of Alabama’s, dismissing the Ministry’s defamation claim against Southern Poverty Law Centre.

During submissions to the Supreme Court, both parties addressed the Standard. The Ministry contended that the Standard had become obsolete, and no longer acted “as a bulwark to protect civil rights”. Rather, it had instead become “a sword used to bludgeon public figures with impunity while hiding behind the [Supreme] Court’s mistaken view of the First Amendment”. In response, the Centre resisted the notion that the Standard presents a hurdle too great for public figure defamation plaintiffs to overcome. Instead, it submitted that the Court’s protection of free and open debate in this area was essential.

In the end, the Supreme Court declined to revisit the Standard, leaving intact the higher bar for public figures to successfully bring defamation claims. It remains to be seen whether on a different set of facts, the Supreme Court may be more inclined to revisit the Standard.

Refinement of the Standard certainly appears possible in light of recent comments made by conservative Supreme Court Justices Clarence Thomas and Neil Gorsuch. Even before the *Coral Ridge v. Southern Poverty* decision was delivered, both justices were cited calling upon the Supreme Court to revisit the breadth of the *New York Times v. Sullivan* decision. In this regard, they have called for the Court to consider how the decision is applied to social media and technology companies,

in circumstances where, as Justice Gorsuch noted “*thanks to the revolutions in technology, today virtually anyone in [the US] can publish virtually anything for immediate consumption virtually anywhere in the world*”. The immediacy of publication in modern times often means that there is very little time to test the veracity of information or check or cross-check the reliability of its source(s). Combined with the added pressure to ‘break’ news or information quickly and first (where possible), such conditions can (and do) contribute to the publication of erroneous and in some cases, defamatory matters. However, such factors also mean, in the context of the Standard, that proving that the publishers of such works knew the ‘defamatory’ matter was false when published or that it recklessly disregarded the possibility that it was false is also difficult. In Australia, more than 50% of defamation matters now involve digital publications.¹

Defamation in Australia: *Barilaro v Google*

For a claim in defamation to succeed in Australia, the plaintiff does not need to establish that the defendant knew the ‘defamatory’ story was false when it published it or that it recklessly disregarded the possibility that it was false. In this regard, a principle equivalent to the Standard does not need to be satisfied to establish a claim for defamation in Australia. Rather it is “*damage to reputation which is the principal focus..., not any quality of the defendant’s conduct*”.²

In summary, in *Barilaro v Google*, Mr Barilaro (the Deputy Premier of NSW at the time) claimed that three imputations were falsely conveyed by two videos published on YouTube (a platform operated by Google LLC) by ‘friendlyjordies’ (aka. Jordan Shanks-Markovina). They were that Mr Barilaro (1) is corrupt, (2) had committed perjury and (3) had engaged in blackmail.

By way of background, Mr Barilaro’s claim stemmed from initial complaints made to YouTube, regarding 11 of Mr Shank’s videos. YouTube determined that none of the 11 videos violated its “*hate/harassment policies*”. Mr Barilaro demanded that it remove the videos, which it refused to do. The Court noted that Google made a considered decision to keep the 10 videos available on YouTube from this date, knowing of their content and Mr Barilaro’s complaints.

Before the hearing of the matter, Mr Shanks settled with Mr Barilaro and Google withdrew its substantive defences. This meant that the Court’s decision only relates to the assessment of the damages to be awarded to Mr Barilaro. In this regard, the Court ordered, amongst other things, Google to pay Mr Barilaro \$715,000.

A more in-depth look at the case is beyond the scope of this article. But, for the purpose of enforcement, it is useful to note that as part of the proceedings, in July 2021, the Court granted Mr Barilaro leave to serve his claim on Google in the US state of California, where Google is incorporated.

Enforcement of Australian judgments in the US

The procedure for enforcing an Australian judgment in a foreign jurisdiction will vary from country to country (depending on the laws of the local country). As Australia

is not a party to the *Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters 1971*, it relies on other reciprocal enforcement arrangements that it has with particular counties (for example, the *Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters 1994* treaty, with the United Kingdom).

For jurisdictions that do not have reciprocal enforcement arrangements with Australia (for example, the US and China), the process may vary significantly. The US does not have federal laws governing foreign judgments. The applicable legal framework for enforcing foreign judgments in the US is found within the local laws of the different states.

A number of states, including California (where Google LLC is incorporated), have enacted a version of the *Uniform Foreign-Country Money Judgments Recognition Act (2005)* (together with the 1962 *Uniform Act*, the **Uniform Acts**) and modelled their individual state statutes dealing with the recognition and enforcement of foreign judgments upon them. In this regard, the essential form of a foreign judgment that is eligible for recognition varies from state to state. California, where Google LLC is incorporated, has codified the Uniform Acts in *California Code of Civil Procedure §§ 1713 to 1724*.

The concepts of ‘recognition’ and ‘enforcement’ are separate under US law. Other than by way of cross-claim or affirmative defence (not applicable in Mr Barilaro’s case) a party seeking to enforce a foreign judgment, decree or order in the US must, at first instance, file a fresh suit in federal or state court seeking to have it ‘recognised’ (i.e. converted into a US judgment and therefore considered *res judicata*). Once ‘recognised’, the foreign judgment is enforceable in the US (i.e. as a domestic judgment). However, the recognition can be opposed by a defendant, who has defences available to it derived from the ‘comity’ principle. Under this principle, the US will not recognise foreign judgments if doing so would, for example, be prejudicial to US interests.

All US states that have modelled their applicable state statutes on the Uniform Acts have adopted mandatory and discretionary grounds to refuse the recognition of foreign judgments. These grounds vary from state to state. Of relevance to Mr Barilaro’s case is that under § 1716(f) of the California Code, Californian courts cannot not recognise a foreign judgment for defamation if the judgment is not recognisable under Section 4102 of Title 28 of the *United States Code*, meaning in Mr Barilaro’s case, that:

1. **28 U.S. Code § 4102(a)(1)(A)**: the defamation law applied in the Australian court’s decision provided at least as much protection for freedom of speech and press as would be provided for by the First Amendment to the Constitution of the US and by the constitution and law of California; or
2. **28 U.S. Code § 4102(a)(1)(B)**: even if the defamation law applied in the Australian court’s decision did not provide as much protection for freedom of speech and press as the First Amendment to the Constitution of the US and the constitution and law of California, that Google would have

1 University of Technology Sydney Trends in Digital Defamation: Defendants, Plaintiffs, Platforms (2018).

2 Dow Jones & Co Inc v Gutnick (2002) 210 CLR 575; 194 ALR 433; [2002] HCA 56 at [44].

been found liable for defamation by a US court applying the First Amendment to the Constitution of the US and the constitution and law of California.

Notably, Mr Barilaro would bear the burden of establishing that, amongst other things, the application of the defamation laws above, in order to achieve 'recognition' of his Australian judgment in the US. As a 'public figure', the Standard would be considered in the assessment and would be a very difficult hurdle for Mr Barilaro's defamation claim to overcome.

Enforcing *Barilaro v Google*

In light of the above, if Google does not accept the enforceability of the decision on its US incorporated entity, then in order to enforce his Australian defamation judgment, the process would be for Mr Barilaro to begin a fresh lawsuit in the US, seeking to have it 'recognised' and therefore enforceable in the US (and on Google LLC). As noted above, Mr Barilaro's fresh lawsuit would likely be instituted in California.

However, should Mr Barilaro take such steps, the determination as to whether his Australian judgment would be recognised would be the subject of very different defamation laws to those in Australia. In this regard, due to the Standard, a fresh lawsuit brought by Mr Barilaro in a US court, on the same set of facts as *Barilaro v Google LLC*,

may well have a very different outcome. It is for this reason observers note that US-based entities (like Google), which do not have a local entity in operation on Australian shores, are given somewhat of a 'shield' from defamation penalties in jurisdictions like Australia, by very powerful US defamation laws (including, the Standard).

In the circumstances, Google's next move is anyone's guess. On the one hand, if it abides by the Australian Federal Court's ruling and pays the judgment amount to Mr Barilaro, then arguably, Google may be seen to be accepting the enforceability of the judgments of Australian Courts on it.

While Google can obviously afford to pay, the question may actually be whether Google wants to be (and can afford to be - reputationally) the subject of reoccurring claims that, leaving aside the costs associated, keep its conduct and internal decision making in the news. Should Mr Barilaro commence recognition and enforcement proceedings in a US court, these considerations may be one reason why Google might want to avoid challenging them.

In any event, in light of the potential recognition and enforcement challenges that the Standard presents for Mr Barilaro's case, the Federal Court's judgment may end up being a bit of an empty (and perhaps expensive) victory for Mr Barilaro.



MEDIA POLICY: PRIORITIES FOR A NEW GOVERNMENT

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How to Protect Your IP Rights in the Metaverse

Authors: **Richard Hoad** (Partner), Jones Day and **Emina Besirevic** (Lawyer), Clayton Utz

Many forward-thinking organisations are already making plans for how they intend to protect, exploit and defend their IP rights in the metaverse.

The metaverse is a whole new world, and with it come new commercial opportunities. Whether it is creating the software on which the metaverse is built or designing the clothes and accessories which virtual avatars will wear – the metaverse is not just a buzzword. Futurists predict that those who brave this next internet frontier may be rewarded handsomely. Of course, wherever there are opportunities, there are also risks. This article outlines some of the risks and opportunities in the metaverse for IP owners.

What is the metaverse and what does it mean for business?

While “metaverse” has been a buzzword over the past year or so, the term was first coined by Neal Stephenson in the early 1990s in his science fiction novel, *Snow Crash*. The novel describes a virtual reality-based internet in which the main character lives in an imagined version of the world through a life-like avatar (described as an “extension” of the character). Plugged in with goggles and earphones, the protagonist walks the wide streets of “the Metaverse”, home to amusement parks, shops, offices, and entertainment complexes.

While the building blocks of the metaverse are still in the process of being imagined and assembled, the metaverse represents a fundamental shift in how we interact with the internet. It is said to be both the gateway to most digital experiences and a core component of future physical experiences. Instead of having access to the internet, we will, in a sense, be within the internet – blurring the distinction between online and offline activity.

In a metaverse environment, global consumer brands can allow customers to experience products in this parallel version of the world without ever shipping a single physical item. A metaverse avatar can attend a live virtual performance (like the concert Justin Bieber gave late last year) or a boardroom meeting. In time, this technology has the potential to make videoconferencing – such a boon during COVID – appear quaint, as avatars replace camera images.

The opportunities for intellectual property right owners in the metaverse

Trade marks

In the metaverse, much like the real world, the value of a trade mark is two-fold: it is both a commercial asset and a tool to protect a brand from infringement.

Brand owners should be considering whether their existing IP strategies provide sufficient protection in a metaverse environment. To take one example: under Australian law, while a registered trade mark covering clothing would be infringed by the sale of physical clothing online, there is some doubt as to whether the use of the trade mark on clothing worn by avatars in the metaverse would be an infringement. As such, it is prudent for brands to seek to update their trade

mark portfolios to reflect the development of the metaverse – and many leading brands have done just that. For instance, in late 2021, Nike filed an array of trade mark applications with the US Patent and Trademark Office (USPTO) which included the sale of virtual shoes and apparel in the metaverse. Similarly, McDonald’s has filed 10 trade mark applications with the USPTO and three trade mark applications with the European Union Intellectual Property Office seeking to protect “virtual food and beverage products.”

Patents

User experience and participation in the metaverse will be dependent on a variety of technologies. This may include augmented reality (AR) and virtual reality (VR) headsets, or even surgically implanted chips in human brains (as Elon Musk’s company Neuralink is already promoting). Beyond hardware components associated with the metaverse, there may be opportunities to claim patent protection relating to software processes for the metaverse environment. Software innovations can include processes for performing, accessing, or synchronising states within the metaverse. For example, earlier this year Meta filed patent applications relating to eye and face tracking technologies. Last month, Magic Leap filed a patent application in Australia that processes images of a user’s eye in order to reproduce virtual images in the most life-like size.

Copyright

One sector which has been quick to see the potential of the metaverse is the music and entertainment industry. In late 2021, the 3D virtual browser-based platform, Decentraland, hosted its first metaverse music festival featuring 80 artists and DJs. Equipped with a VIP area, food trucks and a merch village, the festival featured everything one might expect at an ‘actual’ music festival. These events provide new opportunities for copyright owners to obtain royalties for the use of copyright works – and also represent a new environment which needs to be monitored for possible infringements.

Non-fungible tokens (NFTs) have also been the subject of considerable interest over the past year. Some NFTs have recorded purchase prices in the millions of dollars. Just as ownership of a physical asset (eg. a book) is distinct from ownership of the underlying copyright, the same is true for NFTs. A purchaser of an NFT will generally only acquire a limited licence to use any underlying copyright (consistent with their rights as owner of the NFT). However, this position can be altered by agreement between the creator and the purchaser. Creators and purchasers of NFTs should therefore consider ownership of copyright and the extent of any copyright licence before entering into a sale agreement.

Designs

In Australia, the registration system for designs provides rights holders protection for the overall appearance of a product resulting from one or more of its visual features. Importantly, in the Australian Designs Act, a product is defined as a thing that is manufactured or hand made. In other words, for its design to be capable of protection under the Designs Act, an article must take up space and mass in the real world – it must have a physical form.

Computer-generated objects may function as an integral part of a digital product without necessarily embodying a physical form. For instance, a graphical user interface (GUI) is an object that visually represents the communication presented to the user for easier interaction with a machine. The Chrome icon you click when wanting to open the Google search engine (as opposed to opening a command prompt, adding application commands, and feeding instructions to start the Google Chrome application) is an example of a GUI. Because they do not occupy space or mass, novel designs embodied in such items are unlikely to be protected under the design registration regime as it presently exists in Australia. While countries such as Singapore and Japan are ahead of the curve in developing legal frameworks to register designs related to emerging computer technologies, Australia is yet to catch up. IP Australia is currently considering changes to Australian designs law to provide protection for virtual designs. In the meantime, however, the extent of protection available for virtual designs remains uncertain.

How you can manage and mitigate risk in the metaverse

Brand protection and enforcement

If the metaverse is an extension of our reality, then it will also be an extension of the difficulties businesses already face in protecting their brands in the physical world. The metaverse won't be free from counterfeiting and copycats. In fact, the metaverse may make it easier, and cheaper, to reproduce trade marks in the form of NFTs or virtual images (as opposed to producing physical counterfeit goods).

Businesses should therefore consider a proactive approach to brand protection and enforcement. The first step is to consider establishing a presence in the metaverse. After all, you cannot stop infringements if you are not aware they are occurring. The second step is to register trade marks for use in a virtual marketplace. Trade marks are not confined to word marks, but can include non-traditional signs such as movement marks, holograms and sound marks. Brands that take such a proactive approach are likely to have a more efficient way of enforcing trade mark rights if the prospect of litigation arises.

There is a growing misalignment between what trade mark classes were designed to protect and what they are currently protecting. For instance, while class 9 has historically been used to file trade marks relating to, among other things, electronic equipment and instruments for scientific research, it is now being used to cover "downloadable virtual goods" in "virtual online worlds". For example, the virtual Nike shoes described above were filed in the United States in class 9, in conjunction with class 35 (retail store services). In forming a trade mark protection strategy for the metaverse, it is therefore important for companies to consider expanding the scope of registration by adding additional classes.

Proactive metaverse agreements

When deciding to enter the metaverse, it is important to consider the terms and conditions of any metaverse platform you intend to work with. If you are a developer of a platform, you have the ability to set appropriate and balanced terms that will encourage adoption by users and IP owners alike.

One important consideration is interoperability: that is, how various platforms within the metaverse will interact with one another. Further, agreements will need to balance the interests of rights holders with the interests of prospective customers. Intellectual property rights holders could be expected to prefer

working with platforms that clearly stipulate how IP rights are managed and protected on their platform. Individuals, on the other hand, will want to move easily between platforms, and take their virtual clothing, cars or artwork with them. These interests may conflict, and it is important to be aware of them whether creating a platform, licensing content for a platform, or entering a platform as a user.

Where businesses have a licence to use a brand owned by a third party, they should review their current licence agreements to assess whether they confer sufficiently broad licences to cover the intended uses of the licensed IP in the metaverse. If they do not (or if the position is unclear), the licensee should seek to renegotiate the licence terms if use in a metaverse environment is potentially on the radar. Difficulties may arise where they are competing interests, such as where the IP is licensed to different companies in different jurisdictions. Perhaps their exclusive rights in the real world will be shared on a non-exclusive basis in the metaverse. Or perhaps the IP owner may wish to preserve these new opportunities for itself. All of these issues should be reviewed in the context of the metaverse.

Confronting anonymity in the metaverse

We have become accustomed to the concept of online anonymity and the challenges that this presents in enforcing IP rights. In the metaverse, identities can also be hidden by digital avatars. This, along with the anonymous nature of the blockchain, can make it challenging for brand and content owners to enforce their rights in the metaverse. There are various legal mechanisms which can be used to seek to uncover the identity of online infringers, but they are not without their complexities. IP owners looking to engage in the metaverse should consider the IP policies of platforms with which they seek to engage – eg. whether they have "take down" procedures and/or will disclose the identities of suspected infringers. The IP policies of businesses such as YouTube, Facebook and the like have been developed over many years. Will metaverse platforms take their lead from these established internet pioneers?

Considering patentability of inventions

Seeking patent protection for inventions associated with the metaverse will have its challenges. One challenge will be the requirement to demonstrate that the invention is novel and involves an inventive step. Is the new technology within the metaverse environment similar to an existing product or process outside the metaverse environment? If the only difference between a proposed invention and the prior art is that it has been deployed in the metaverse, applicants are likely to face difficulty in obtaining patent protection.

In a similar vein, there may be difficulties in demonstrating that the alleged invention is patentable subject matter (or, to use the language of the Australian Patents Act, a "manner of manufacture"), in much the same way as computer-implemented inventions have floundered in Australia.

Takeaways for IP owners

Although the metaverse is very much in its infancy and industry experts estimate that it will take 5 to 10 years to be fully realised, it is already clear that it will present both challenges and opportunities for IP owners. Many forward-thinking organisations are already making plans for how they intend to protect, exploit and defend their IP rights in the metaverse. Considering these issues now will ensure that businesses are ready for whatever the metaverse may bring.



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