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SPECIAL SPORTS EDITION

Riding the Technology Wave Some Insights from Australian Sailing's Vice-President Sarah Kenny

Victoria Wark, co-editor of the Communications Law Bulletin and formerly Senior Legal Counsel at the LOC AFC Asian Cup Australia 2015 chats to leading sports lawyer and Vice-President of Australian Sailing, Sarah Kenny, Consultant, Herbert Smith Freehills

Introduction

Sarah Kenny is an experienced corporate and commercial lawyer with a 20-year career as a Partner in the Corporate Group of Herbert Smith Freehills. Sarah is also a leading sports lawyer. She advises clients in sports and media industries, including national sporting organisations, venue operators, broadcasters, government entities and gaming and wagering organisations, on all aspects of their business.

Sarah's sports practice has covered all codes of football, the Olympic Games, mergers, acquisitions and privatisations and broadcasting, sponsorship, ticketing, hiring and other commercial deals.

Sarah's sailing career included numerous World Championships and the Los Angeles Olympic Games in the Windsurfing Demonstration event in 1984. In the same year Sarah was Sportswoman of the Year at the University of Sydney. Sarah is Vice-President of Australian Sailing, a member of the 2008, 2012, and 2016 Olympic Nomination Panels. Sarah was a key member of the leadership team that recently delivered significant governance and management reforms for Australian Sailing which have been described by the Australian Sports Commission as putting sailing at the

"forefront of governance reforms in sport".

Internationally, Sarah is the Vice-Chair of the Womens Forum and a member of the Events Committee of World Sailing and was recently elected to represent Oceania for the next four years on the Council of World Sailing

Victoria Wark co-editor, caught up with Sarah Kenny, hot off the plane from an exciting and successful few weeks at the Olympic Games in Rio for Australia's sailors. They chatted about some of the challenges and benefits that new media and technology offerings pose for smaller sports.

VW: The rise of social media and the proliferation of content via digital technologies has created new and often more affordable opportunities for businesses looking to commercialise their product. Smaller or non-professional sporting organisations are likely to be no exception. In fact many of these organisations have traditionally been unable to distribute their content through mainstream media.

Sarah thanks for agreeing to chat to CAMLA. Let's start if we can by looking at the pros and cons of new technology for sports, and in particular small to medium sized sports. How have you witnessed your sport, sailing, engage and reap the benefits of technological development?

CONTENTS

Riding the Technology Wave: Some Insights from Australian Sailing's Vice-President Sarah Kenny	1
Sport Sponsorships and Ambush Marketing: How to Avoid the Ambush	4
Case Update: <i>Australian Olympic Committee, Inc. v Telstra Corporation Limited</i> [2016] FCA 857	7
Taking the Squeeze Out of the Press	10
The Fourth Estate is Under Attack - and Defamation Law is Not Helping	16
Stalemate Over Chess Broadcast Rights	20
Profile: Eleni North - General Counsel and Company Secretary of the Australian Rugby League Commission	22
Social Media, Sports Stars and Celebs - Some Tips and Traps	23
On the Offensive: How Disruptive Technologies are Changing the Business of Sport	25



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SK: Well I think there have been and will continue to be huge opportunities for a sport like sailing as these technologies become more accessible and affordable. We've already seen some exciting developments around broadcasting and distribution of content in our sport. Apps and online technologies enable the public to experience like never before, great sailing events like the Volvo Ocean Race and the most recent America's Cup. Audiences are given amazing 'on-board' experiences through the use of multiple special cameras, graphics and tracking technologies. It has completely changed the way we can deliver our sport which traditionally has been challenging for broadcasters. The key thing however that we need to ensure in a technical sport like sailing is that we continue to strive to explain the sport and make it understandable to new audiences, as well as visually impressive.

Drone technology is obviously a big part of technological development. Drones can be used relatively inexpensively to follow multiple boats and get angles and footage in a manner that was previously very difficult if not impossible to deliver without significant expense. However, the quality of the footage from drones still needs improving to meet mainstream media's broadcast quality requirements.

VW: The improvements in technology – particularly the ability to interact in multiple ways with a sporting audience and to deliver and commercialise compelling content or interactive opportunities does however pose challenges for any organisation. What do you think are some of the key challenges?

SK: Yes, there are a number of challenges for sports emerging from their engagement or attempts to engage with the new commercial and technological environment.

As your readers will know, there are issues to be considered around how you define and sell rights, data protection and privacy, defamation, cybersecurity, content distribution and copyright. Risk awareness is key as is managing those risks appropriately, including in contracts with third parties.

When more complex legal or technical issues arise, expert advice should be sought. This is often something that smaller sports in particular cannot afford and they do not always have the most experienced professionals within the organisation to ensure they navigate these challenges in an efficient and effective way.

VW: What if anything can be done? Presumably the lack of resources (both financial and personnel) has and will continue to be a constant struggle?

SK: We need to make access to high quality advice and assistance possible by changing the model. There are many different sports but the issues and core service requirements do not vary that much, whether you are talking about best practice governance and compliance issues or a website facilitating fan engagement and member services. It is clearly not practicable for sport to access the best advice and resources in all areas. However, I think there is scope for a new shared service model across the different sports, where in key areas experts can be retained to develop the base product or service or provide the advice that can be accessed for an affordable fee by all sports. It is a model similar to some of the football codes that provide this type of service to their clubs. In sailing we have had recent experience in the benefit of similar streamlining and avoiding the duplication of effort and valuable resources across the States and Territories.

Sailing has a federated structure like a number of sports in this country. Earlier this year Australian Sailing took over responsibility for the administration, direction, promotion and sustainability of sailing across Australia. The State and Territory Member Association Boards continue to be responsible to their member Clubs and Classes for safeguarding the delivery of services by Australian Sailing, and now have a greater ability to focus on State and Territory priorities and issues whilst also having regular input into the development of a national strategy. Technology of course is the great enabler in projects like this, as so much can now be done from anywhere and output can be

delivered very quickly and efficiently to large numbers of people.

Another way that I think sports can increase or improve their engagement with technology is to ensure that you have diversity on the management team and on the board, specifically across age groups and experience and expertise, which should cover experience in social media, content distribution and technology. It is absolutely essential that sports of all sizes have innovative people and strategic thinkers on their boards asking the right questions and thinking about future applications or opportunities.

Sports bodies also collect a lot of data – about their athletes, members and fans. They are not immune to the risk of data breach or hacking and in fact can be targeted – as we saw recently when the World Anti-Doping Agency's systems were hacked and sensitive medical information and personal information of athletes (including Australian athletes) were accessed and published on the Internet. You need to ensure appropriate measures are in place and incidents are responded to properly. Appropriate management of cyber security risk is important. The "Health Check prompts" included in the ASIC Cyber Resilience Health Check (ASIC Report 429) provide a useful starting point for sports bodies.

VW: Finally, what about copyright – is it a valuable asset for sporting bodies?

SK: The vibe I get is that the smaller sports are more focused on accessing content from multiple sources and encouraging broad content distribution than creating and controlling their own copyright works. Sports want their content broadcast, published, tweeted and re-tweeted, added to posts and trending. Is the circle going in the other direction? I'm not sure. Copyright law has always struggled. Just when we thought the law was catching up – maybe it has become less relevant. Copyright will always be important but for some, enforcing copyright is less important. Copyright holders can generate income in different ways today that are dependent on mass distribution and publication rather than tight control and limited use.

In addition, the cost of producing, disseminating and manipulating content is coming down – anyone can create content. My 13-year-old son, for example can use his GoPro when he is sailing and publish it on YouTube that night.

If I think back four years – to the Olympic Games in London, there were rights-holders that acquired all or a large portion of the various media rights, but then did not use them all. There were scenarios where official broadcasters were not covering a sport or using a particular right, and the sport couldn't do a thing about it. By contrast, in at least some sports in the Olympic Games in Rio there was a real focus on maximising exposure across as many distribution channels as possible. By harnessing the benefit of multi-channelling and official apps the broadcasters and organisers are able to slice and dice content more effectively which ultimately meant more sports were presented and audiences had greater ability to access content how and when they wanted to.

In broad terms there is less paranoia around 'unauthorised' use of content – there is definitely a greater appreciation and expectation by rights-holders, sports, traditional and other broadcasters that all rights will be used. Increasingly we are seeing a push for sports to exploit their media rights themselves as part of this desire to maximise distribution channels.

VW: What about technology challenges for sporting venues? You've worked on stadium hire agreements and construction agreements for many stadiums including Stadium Australia and most recently the new Perth Stadium. What are some of the key issues that technology raises in this context?

SK: The value of wireless technology at major venues is now well recognised. Because stadium technology has real value, issues arise with access, ownership and control of the technology and the data. Technology gives venue operators and sports the ability to build databases and access and use very valuable fan and user data. It can also add value to the in-venue experience.

It is critical to ensure the in-venue experience remains attractive. The digital sports products still need the fans in live venues to make their product visually appealing, realistic

and exciting. I remember thinking when I experienced swimming live at an Olympic Games some years ago that it was not as good as watching it on TV, given how far away from the action you were and without the world record line. Today you would be able to watch the world record line on your mobile device from your seat.

The sophisticated venues now use technology to provide real time information about practical matters also like the length of queues at concession stands (and bathrooms) and to facilitate ordering of food and beverage from your seat.

There are other examples of venues trying to control access to its wireless technology or charging a fee to third parties seeking to offer online products or services connected with the event without being an official provider or sponsor.

Sarah Kenny – thanks very much for talking to CAMLA.



Sarah Kenny is Vice-President of Australian Sailing and a Consultant at Herbert Smith Freehills.



Victoria Wark is co-editor of the Communications Law Bulletin and formerly Senior Legal Counsel at the LOC AFC Asian Cup Australia 2015.

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Sport Sponsorships and Ambush Marketing: How to Avoid the Ambush

Stephanie Favotto and Julie Cox consider the protections available to official sport sponsors in Australia, including creative contractual provisions.

The recent Federal Court decision in *Australian Olympic Committee, Inc. v Telstra Corporation Limited* [2016] FCA 857 has called into question the value of official sponsorship arrangements in Australian sport. While sport sponsorship can be an effective method of creating goodwill in a brand, its value is susceptible to creative ambush marketing practices and ambiguous agreements.

Ambush marketing is “a company’s attempt to capitalize on the goodwill, reputation and popularity of a particular event by creating an association without the consent of the necessary parties.”¹ It includes a non-sponsor purchasing billboards in the vicinity of a sponsored event, offering tickets to an unaffiliated event or, in Telstra’s case, aligning with the official broadcaster of an unaffiliated event. These examples, whilst often dilutive of the official sponsorship, are typically legal. This article reviews the adequacy of legislative protections for official sport sponsors in Australia, including the impact of recent changes to Olympic Charter Rule 40.3, and highlights the importance of creative contractual provisions to protect against ambush marketing.

1. AOC v Telstra

The Federal Court’s recent decision in *AOC v Telstra* is controversial. While Wigney J remarked that Telstra “intended to, and may well have succeeded in, fostering some sort of connection or association between the Rio Olympic Games and the Telstra ‘brand’”, the Court nonetheless concluded that the advertising campaign did not contravene the *Olympic Insignia Protection Act 1987* (Cth) (OIPA) or the Australian

Consumer Law (ACL). In this case, Telstra released a comprehensive advertising campaign that referenced the Olympics and included the song “I Go to Rio” to promote its involvement with Seven’s “Olympics on 7” app. Telstra took care to only reference the Olympics in the context of its sponsorship relationship with the Seven Network. While the song “I Go to Rio” was a feature and a clear reference to the location of the 2016 Games, the campaign did not depict any athletes or other Olympic symbols or insignia.

The decision demonstrates that a successful ambush will generally not involve outright confusion, counterfeit products or the unauthorised use of third party intellectual property. Telstra cleverly positioned itself as the “official technology partner” of Seven’s coverage of the 2016 Olympic Games - at a cost presumably much less than it paid to be an official sponsor in previous years. The Court held that a reasonable person would not think that Telstra was a sponsor of the Olympics even though Telstra clearly associated itself with the Olympics. The judgment highlights that brand owners must be innovative when negotiating and enforcing sponsorship deals in order to protect the value of their endorsements.

2. Ambush Marketing Laws in Australia

There are a number of laws in Australia that attempt to prevent ambush marketing of major sports events. In fact, the Olympic Host City Contract requires host nations to enact legislation to prevent or minimise any direct or indirect unauthorised association with the

Olympic properties and/or the Games.² Legislation such as the OIPA and the (now defunct) *Sydney 2000 Games (Indicia and Images) Protection Act 1996* (Cth) were introduced in Australia to regulate the commercial use of the indicia, images and expressions associated with the Olympic Games. The legislation prohibits the use of certain Olympic expressions (such as “Olympics” and “Olympic Games”) for commercial purposes without a licence, whereby the commercial use would suggest that the user was a sponsor of the AOC, IOC, the Olympics, the Australian team or an individual athlete.

Australia has also introduced a range of laws in recent years to tackle ambush marketing in other major sports. For example, the *Major Sporting Events (Indicia and Images) Protection Act 2014* (Cth) and state equivalents such as the *Major Sporting Events Act 2009* (VIC) are designed to regulate the commercial use of protected indicia and images in major sporting events such as the Gold Coast 2018 Commonwealth Games and the Australian Open Tennis Championships.

The fundamental threshold question posed by the Olympic and major sporting event legislation is whether an advertisement would suggest to a reasonable person that the advertiser is a sponsor of - or provides sponsorship-like support to - a declared major sporting event or an associated body, team or athlete. However, it is questionable whether such legislation provides any measurable additional protection to official sponsors given that sections 18 and 29 of the ACL require

1 Jason K. Schmitz, *Ambush Marketing: The Off-Field Competition at the Olympic Games*, 3 Nw. J. Tech. & Intell. Prop. 203, 205 (2005).

2 Host City Contract Operational Requirements, 192 (2015). See: https://stillmed.olympic.org/Documents/Host_city_elections/Host_City_Contract_Operational_Requirements_September_2015.pdf.

consideration of the same threshold question. While it is convenient to point out that Olympic and major sporting event legislation exists to protect ambush marketing, it is arguable that such protections do no more than simply rephrase section 18 and 29 of the ACL for a sporting context.

Added to this apparent duplication is that the seemingly simple question asked by the ACL and the Olympic and major sporting event legislation is a high threshold to satisfy in the context of sport sponsorships. “Borderline”³ advertisements such as Telstra’s Rio television commercial will not meet this threshold – even though it is likely many viewers may have thought that Telstra was associated with the 2016 Olympics. In fact, “the ability of ambush marketers to convey subtle associations may mean that such behaviour is not sufficient to bring their conduct within the ambit”⁴ of the Australian Consumer Law or other targeted legislation.

Even Australia’s existing intellectual property legislation offers little protection to brand owners. In fact, many astute marketers will be able to ambush a sporting event without using third party trade marks, copyright or designs. For example, low cost South African airline, Kulula, produced an advertisement during the 2010 FIFA World Cup that read “Unofficial National Carrier of the You-Know-What”.⁵ The advertisement did not display FIFA’s trade marks but featured soccer-related indicia and images of the national stadium. Although the tongue-in-cheek advertisement made it clear that Kulula was not an official sponsor, thereby mitigating any risk of confusion or trade mark infringement, the airline was nonetheless able to free ride off the tournament’s goodwill without having to pay for the privilege of association. Such activity

demonstrates the shortcomings of intellectual property legislation in preventing ambushes.

3. The New Rule 40.3

Rule 40.3 of the Olympic Charter states that “[e]xcept as permitted by the IOC Executive Board, no competitor, team official or other team personnel who participates in the Olympic Games may allow his person, name, picture or sports performances to be used for advertising purposes during the Olympic Games.”⁶

Pursuant to Rule 40.3, non-sponsors - known as “Non-Olympic Commercial Partners” - are prohibited from identifying an athlete, team official or other team personnel during a specific blackout period. Similarly, athletes must ensure that they do not post any content featuring a Non-Olympic Commercial Partner on their own personal digital platforms (such as a Facebook page) during the blackout period.

Prior to the 2016 Olympic Games, Rule 40.3 was amended to introduce a new “waiver” process for the benefit of Non-Olympic Commercial Partners. These organisations are now able to apply for a waiver which allows them to feature “generic advertising” during the blackout period, being advertising that features an athlete but does not go so far as to suggest an association with the Olympics. Importantly, such generic advertising must be in-market and displayed on an ongoing basis at least four months in advance of the commencement of the Games, presumably so that consumers do not directly associate the campaign with the Olympics.

In order to obtain a waiver for the 2016 Olympic Games, a Non-Olympic Commercial Partner had to apply to the AOC five months before the commencement of the blackout period. As a matter of practice, this

presents some difficulties. A Non-Olympic Commercial Partner would not only need to decide on an athlete and finalise the relevant sponsorship agreement, but also prepare all marketing materials (including social media posts) and launch a media schedule months prior to the start of the Games. Nonetheless, many high profile brands jumped to take advantage of this loophole. For example, Under Armour launched a successful campaign featuring Michael Phelps despite Nike being an Official Supplier of the 2016 Games. While the waiver process is seemingly beneficial for athletes and Non-Olympic Commercial Partners, the relaxation of Rule 40.3 could be seen as another means of eroding the value of official sponsorships.

4. Are these adequate ways to avoid the ambush?

In short, no. The existing legislative regime in Australia does not sufficiently protect official sponsors from inventive ambush marketing practices. An ambusher can easily escape intellectual property legislation by avoiding the use of identical or similar trade marks in advertisements. Similarly, marketers can cleverly design advertisements like Telstra’s Rio campaign that foster some form of association without technically crossing the legal line.

Australian legislation, including the ACL and the various sporting-specific laws, require consideration of whether an advertisement suggests to a reasonable person that the advertiser is a sponsor of a particular sporting event, body, team or athlete. While this consideration will protect official sponsors from egregious acts of misleading conduct, it is the “grey area” that falls through the cracks and does the real damage. For instance, Bavaria Brewery distributed branded ‘leeuwenhosen’ to fans at the matches despite Anheuser-Busch being an

3 *Australian Olympic Committee, Inc. v Telstra Corporation Limited* [2016] FCA 857, 92-94.

4 Sebel, Jane; Gyngell, Dominic --- “Protecting Olympic Gold: Ambush Marketing and Other Threats to Olympic Symbols and Indicia” [1999] UNSW Law Journal 23 (1999) 22(3) University of New South Wales Law Journal 691, accessible at <http://www.austlii.edu.au/au/journals/UNSWLawJl/1999/23.html>.

5 *FIFA demands airline drop ad that didn't mention FIFA at all* (March 22, 2010), <https://www.techdirt.com/articles/20100322/0020568651.shtml>.

6 Olympic Charter, IOC, in force as from 2 August 2016 available at https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/General/EN-Olympic-Charter.pdf#_ga=1.43329317.1266789440.1476338545.

official sponsor of the 2006 FIFA World Cup.⁷ Similarly, Lululemon Athletica released a product line entitled the “Cool Sporting Event That Takes Place in British Columbia Between 2009 & 2011 Edition” despite Nike being an official sponsor of the 2010 Olympics.⁸ Since these examples of ambush marketing are “essentially legal,”⁹ it is the role of the sponsor to incorporate forward-thinking protections in their agreements in anticipation of these activities.

The relaxation of Rule 40.3 also poses new challenges. Even though the Michael Phelps commercial did not explicitly reference the Olympics, Under Armour was able to associate itself with the Olympics and capitalise on the goodwill of the Games. While the advertisement does not use any Olympic intellectual property or indicia, the footage clearly shows Phelps preparing for his final Olympics. The commercial has been viewed over 11.2 million times and won the top prize at Cannes - all without the estimated \$200 million price tag of being an official sponsor of the 2016 Olympic Games.

For these reasons, contractual protections in sport sponsorship agreements are the most effective avenue for brand owners to prevent the ambush, especially important where sponsors cannot confidently rely on local legislation or the Olympic Charter to maintain the value of sponsorship arrangements. Official sponsors should pay particular attention to category exclusivity, the definition of “Competitor”, first rights for broadcast inventory, “clean venue” provisions and ticketing restrictions. For example, as soon as the city of Atlanta was awarded the 1996 Olympic Games, non-sponsor Kodak raced to secure 50 major poster sites

This table sets out some contractual provisions sponsors should consider as part of negotiations with rights holders or sporting bodies

Term	Issue to consider
Category exclusivity	The value of a sponsorship arrangement is largely dependent on the scope of exclusivity. Sponsors should ensure that the definition of the relevant category and the parameters of the exclusivity are clearly defined. Sponsors should also be aware of any carve outs (such as existing relationships held by the sporting event or venue) that could dilute the sponsorship.
Definition of “Competitor”	Sponsors should ensure that any attempt to define a “Competitor” is broad and accounts for the potential overlap of product lines and advertising. Alternatively, sponsors should request the ability to approve other sponsorship arrangements where the Categories are closely related. For example, Olympus was the official “camera” sponsor of the US Open. In the relevant contract, consumer electronics companies were expressly excluded as Competitors. For this reason, the USTA allowed Panasonic to be the tournament’s official “consumer electronics” sponsor. Olympus sued and alleged that it did not receive the exclusivity it had paid for. Although the matter settled, this dispute may have been avoided had greater attention been given to the scope of category exclusivity and the definition of a Competitor. ¹¹
First Rights for Broadcast Inventory	Sponsors should insist on the first right to purchase broadcast inventory during the official coverage of the relevant sporting event. In addition, sponsors should push for the rights to purchase (or at least have the right to approve) broadcast sponsorships.
Clean Venue Provisions	Clean venue provisions aim to prohibit non-sponsor trade marks from appearing on signage, advertising or concessions in the vicinity of a sponsored sporting event. Where possible, sponsors should acquire advertising space (or at least approval rights) within the vicinity and other strategic locations in advance of the event.
Ticket Restrictions	Sponsors should insist that restrictions are imposed on any ticketing associated with the event to prevent non-sponsors from offering tickets for commercial purposes, including trade promotions.

throughout the city for the next four years.¹⁰ Had official sponsor Fuji (or even the US Olympic Committee) had the foresight or ability to require clean venue protection - or at least the first right of refusal - Fuji’s rights would not have been significantly diluted by a key competitor. Similarly, the AOC could have imposed greater restrictions on Seven’s ability to commercially exploit its broadcast rights. Ideally, Seven should have been required to offer a first right of refusal (or approval) for its broadcast sponsorships to official sponsors of the Games.

5. Conclusion

Ambush marketing legislation is predicated on the notion that ‘infringing’ advertisements will either use third party intellectual property or will misleadingly suggest

that the advertiser is affiliated with the sporting event, team or athlete. However, non-sponsors have been consistently able to leverage sponsored events and athletes without crossing that line. A crafty marketer will avoid using third party intellectual property and will position brands in a manner that satisfies the legal threshold. Accordingly, it is the responsibility of official sponsors to anticipate such activity and incorporate protections into their agreements that have an implicit impact on competitors not bound by the relevant contract. Parties to sponsorship agreements should draft with foresight, otherwise it could prove difficult to avoid the ambush.

Stephanie Favotto, Associate, and **Julie Cox**, Senior Associate, are lawyers in Sydney at Baker McKenzie.

⁷ See *Ambush Marketing: A Global Legal Perspective*, <http://www.gala-marketlaw.com/files/GALAAmbushMarketing.pdf>.

⁸ Leonard Glickman & Evan Eliason, *Brand Protection, Trademarks, and the Event That Shall Not Be Named: Event-Specific Legislation and the Olympic Games* (Sept. 9, 2013), <http://www.lawinsport.com/articles/intellectual-property-law/item/brand-protection-trademarks-and-the-event-that-shall-not-be-named-event-specific-legislation-and-the-olympic-games>.

⁹ Edward Vassallo, et al., *An International Look at Ambush Marketing*, 95 Trademark Rep. 1338, 1338 (2005).

¹⁰ Nick Fielding & Larry Black, *Ambush at Barcelona: Rivals are ‘piggybacking’ official sponsors of the Olympic Games* (July 19, 1992), <http://www.independent.co.uk/news/business/ambush-at-barcelona-rivals-are-piggybacking-official-sponsors-of-the-olympic-games-write-nick-fielding-and-larry-black-1534185.html>.

¹¹ See *United States Tennis Association Incorporated, US Open Series LLC and USTA National Tennis Center Incorporated v. Olympus Corporation of the Americas and Olympus Imaging America Incorporated*, WL 4902163 (N.Y. Sup. 2010).

Case Update: *Australian Olympic Committee, Inc. v Telstra Corporation Limited* [2016] FCA 857

Martin Ross, Partner, Mark Lebbon, Senior Associate and Todd Bromwich, Law Graduate, Hall & Wilcox

The Olympic Games is the largest sporting event in the world. Viewed by billions of people worldwide, many companies understandably seek to associate themselves with the excitement and inspiration of this international event.

While some companies enter arrangements with the International Olympic Committee (**IOC**) or Australian Olympic Committee (**AOC**) to become official partners or sponsors of the Olympics or Australian Olympic team, others may seek to connote an association with the Olympics without the authorisation of Olympic organisations. The ability of unauthorised persons to claim a direct or indirect association with the Olympics has previously been the subject of legal proceedings by rights holders and other interested persons.¹

In Australia, the AOC is exclusively empowered under the *Olympic Insignia Protection Act 1987* (Cth) (**OIPA**) to use for commercial purposes in Australia, and to grant licences to use, 'protected olympic expressions' as that term is defined in the OIPA.² The AOC can take action to stop others from trying to associate themselves with the Olympics and the Australian Olympic team.

In July 2016 the AOC brought proceedings in the Federal Court against Telstra Corporation Limited (**Telstra**) in relation to a series of advertisements by Telstra in the lead up to the 2016 Rio Olympics.

1. Telstra's advertisements

Telstra is the technology partner of Seven Network (Operations) Ltd (**Seven**) for Seven's 2016 Rio Olympics coverage. Telstra also

marketed Seven's 'Olympics on 7' app (**App**), which Telstra customers can access for free.

From 1992 to 2012 Telstra was the exclusive telecommunications 'Team Sponsor' of the Australian Olympic team under The Olympic Partner (**TOP**) programme, which gave Telstra the right to use certain protected olympic expressions, under licences granted by the AOC. Since 2015 another telecommunications company, Optus, has been the exclusive telecommunications 'Team Sponsor' of the Australian Olympic team, giving it exclusive use of these protected olympic expressions in the telecommunications category.

From early July 2016 Telstra produced a series of advertisements, including an email to its customer base, website content and television advertisements (**Telstra Advertisements**). The Telstra Advertisements included the following:

- a) promotion of the App and an offer of free access to the App for all Telstra customers;
- b) statements that included the expression 'Rio 2016 Olympic Games';
- c) statements referring to Telstra as 'Seven's official technology partner' and the 'Official Technology Partner of Seven's Olympic Games coverage' and encouraging customers to 'Go to Rio with the 'Olympics on 7' App'; and
- d) video depicting participants playing and watching Olympic sports on their mobile devices, accompanied the song 'I Go To Rio'.

The Telstra Advertisements promoted the App and stated that Telstra was

the 'Official Technology Partner of Seven's Olympic Games Coverage'. The Telstra Advertisements also included use of the words 'Olympics' and 'Olympic Games'.

The Australian Olympic Committee complained that the Telstra Advertisements used protected olympic expressions without a licence from the AOC and that the Telstra Advertisements would lead viewers to believe that Telstra had an affiliation or sponsorship arrangement with the AOC, the International Olympic Committee, the Olympic Games or the Australian Olympics team (collectively, **Olympic Bodies**). In response to the AOC's initial complaint, Telstra included a disclaimer in the Telstra Advertisements, to the effect that it was not an official sponsor of any of the Olympic Bodies. This disclaimer did not satisfy the AOC and the AOC demanded Telstra provide certain undertakings. The requested undertakings were not provided and the AOC consequently filed proceedings against Telstra in the Federal Court on 15 July 2016.

2. Issues in the legal proceedings

The key issues before Justice Wigney of the Federal Court were

- a) whether Telstra had used a 'protected olympic expression' for commercial purposes in contravention of Section 36 of the OIPA;
- b) whether Telstra had engaged in misleading or deceptive conduct under section 18 of the Australian Consumer Law (**ACL**); and
- c) whether Telstra had made false or misleading representations under section 29 of the ACL.

¹ See for example *Seven Network Limited & Ors v News Interactive Pty Ltd & Ors* [2004] FCA 1047, *New Zealand Olympic and Commonwealth Games Association Inv v Telecom New Zealand Ltd & Anor* (1996) 35 IPR 55.

² Sections 36 & 38 of the *Olympic Insignia Protection Act 1987* (Cth).

A. Olympic Insignia Protection Act 1987 (Cth)

The AOC claimed that the Telstra Advertisements breached Section 36 of the OIPA, which provides that a person must not use a protected olympic expression, such as 'Olympics' or 'Olympic Games', for commercial purposes, where they are not licensed by the AOC to do so.

Under section 30 of the OIPA, a protected olympic expression will be used 'for commercial purposes' when the expression has been applied to goods or services for advertising or promotional purposes. This application must suggest to a reasonable person that the provider of the goods or services is a sponsor of, or a provider of 'sponsorship-like support',³ to any or all of the Olympic Bodies.

The AOC alleged that the use of the protected olympic expressions in the Telstra Advertisements was an application of the relevant expressions to their goods or services for a commercial purpose, as they would suggest to a reasonable person that Telstra is a sponsor, or provider of sponsorship-like support, for one or more of the Olympic Bodies or part thereof.

B. Australian Consumer Law

The AOC also alleged that by publishing, causing to be published, or otherwise distributing the Telstra Advertisements, Telstra breached provisions of the ACL.

C. Misleading and deceptive conduct

Section 18 of the ACL provides that a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

The AOC claimed that the Telstra Advertisements conveyed a representation that Telstra has some form of affiliation or sponsorship arrangement with one or more of the Olympic Bodies. The AOC also claimed that the Telstra Advertisements lead

viewers to erroneously assume that Telstra had some form of affiliation or sponsorship arrangement with one or more of the Olympic Bodies, or that their goods or services had some form of endorsement or approval from any of the Olympic Bodies.

D. False or misleading representations

Sections 29(1)(g) and 29(1)(h) of the ACL provide that a person must not, in trade or commerce, and in connection with the supply or possible supply of goods or services, make false or misleading statements that the person or their goods or services have sponsorship or approval from another party.

The AOC claimed that the Telstra Advertisements falsely claimed that their goods or services had a sponsorship arrangement with one or more of the Olympic Bodies or that any of the Olympic Bodies had approved these goods or services.

3. Decision

On 29 July 2016 Justice Wigney of the Federal Court held that Telstra had not breached Section 36 of the OIPA or sections 18, 29(g) or 29(h) of the ACL.

A. Olympic Insignia Protection Act 1987 (Cth)

There was no dispute that Telstra applied protected olympic expressions to their telecommunications services as part of the Telstra Advertisements and that this application was undertaken for advertising or promotional purposes, or would likely enhance the demand for these services.

The main issue in contention was whether the Telstra Advertisements would suggest to a reasonable person that Telstra was a sponsor, or provider of sponsorship-like support, for one or more of the Olympic Bodies or part thereof. The Court noted that some of the Telstra Advertisements were 'borderline'⁴ and conveyed an

ambiguous or unclear message. While the Court found there was little doubt that Telstra intended the Telstra Advertisements to convey an association of sorts with the Rio Olympic Games, the association ultimately conveyed was between Telstra and Seven's Olympic Games broadcast and the App, rather than any Olympic Body.⁵

B. Australian Consumer Law

The AOC's case under the ACL was slightly broader than the case under the OIPA, as it was concerned with the overall impression conveyed by the Telstra Advertisements and was not limited to the use of protected Olympic expressions. The Court rejected the AOC's assertion that the Telstra Advertisements individually or collectively, conveyed a false or misleading representation or involved misleading or deceptive conduct under the ACL.

The Court held that the Telstra Advertisements did not convey, or were not likely to convey, to reasonable persons in the class to whom they were directed or likely to be received, that Telstra had some form of sponsorship, licensing or affiliation arrangement with a relevant Olympic Body. Again the Court held that the Telstra Advertisements would only convey to a reasonable person an association between Telstra and Seven, Seven's Olympics broadcast or the App. This representation was not considered misleading or deceptive.

In particular, the Court considered the following important considerations in reaching its decision:

- a) the words 'Olympics' and 'Olympic' were only used as part of a composite expression 'Olympics on Seven' or in the context of Seven's coverage of the Rio Olympic Games;
- b) the Telstra Advertisements did not refer to any Olympic Body or use any Olympic emblem or symbol;

³ Section 29 of the *Olympic Insignia Protection Act 1987 (Cth)*.

⁴ [2016] FCA 857, 142.

⁵ [2016] FCA 857, 103.

- c) the Telstra Advertisements did not show images of any member of the Australian Olympic team;
- d) the sports people depicted in the Telstra Advertisements were not Olympic athletes; and
- e) the Telstra Advertisements were about watching the Rio Olympic Games on a mobile device in circumstances where it was made clear enough that the coverage is Seven's Olympic coverage.⁶

4. Other matters

A. IOC approval

Under its agreement with Seven, Telstra was required to create a 'landing page' on its website in order to authenticate their customers' details before it could gain access to the App. Seven sought the IOC's approval of the form of this landing page, which included the script 'Go to Rio with the 'Olympics on 7' App'. No approval was sought in relation to the Telstra Advertisements.

Telstra contended that this approval from the IOC was 'an authorisation, licensing and/or approval arrangement with the IOC' which provided a complete answer to the AOC's claims, including the claim under the OIPA.

The Court held that Telstra was not a party to any authorisation granted to Seven by the IOC, regarding use of the protected olympic expressions. It also held that if Telstra had been a party to such an authorisation, this would not constitute a licence granted by the AOC for the purposes of the OIPA.

Notwithstanding provisions in the Olympic Charter providing that ownership of all rights in the Olympic Games and Olympic properties reside with the IOC and allowing for exploitation of those properties by the IOC, it is only the AOC which can grant a licence to protected olympic expressions for the purposes of the OIPA.

B. Olympic theme

The Court noted that the Telstra Advertisements were clearly themed around the Rio Olympic Games. However, Justice Wigney also stated that it is 'not enough for the AOC to prove that the advertisements were Olympic themed'.⁷ The conduct by Telstra, which simply promoted its relationship and arrangements with Seven, could not be regarded as misleading or deceptive, even in circumstances where the Telstra Advertisements related to, or sought to capitalise on, or exploit, in a marketing sense, the Rio Olympic Games.

While his Honour found in favour of Telstra, he noted that whether advertisements, marketing and promotions expressly refer to any Olympic Body, or use Olympic symbols or emblems is not determinative of whether an association was conveyed. Associations can be conveyed by subtle, emotive or pervasive suggestions.⁸

Evidence was led which showed that Telstra 'intended to exploit its commercial agreement with Seven as a way of associating itself...with the Olympic Games'.⁹ In this respect, the Court noted that intention is not a necessary element in demonstrating a breach of the OIPA or the relevant sections of the ACL. While such an intention may assist the Court in determining whether an impression was in fact conveyed, it is not a conclusive factor. In any event, the Court held that Telstra's intention was not to actually suggest a sponsorship arrangement with any or all of the relevant Olympic Bodies.

C. Inclusion of a disclaimer

The disclaimer added by Telstra to the Telstra Advertisements stated that 'Telstra is not an official sponsor of the Olympic Games, any Olympic Committees or teams'.¹⁰ While disclaimers will not always prevent conduct or representations from being misleading or deceptive,

the Court held that in this case the disclaimer acted to make it 'tolerably clear'¹¹ that Telstra had no sponsorship arrangement with any of the Olympic Bodies.

The AOC claimed that the use of 'official' within the disclaimer may suggest to a reasonable person that some unofficial sponsorship arrangement with any of the Olympic Bodies may exist. The Court stated that the disclaimer would have been clearer had it not included the term 'official', but it held that the disclaimer was 'sufficient to erase or reverse any impression that Telstra did sponsor any Olympic body'.¹²

5. Conclusion

The OIPA creates protections for marks and expressions relating to the Olympic Games and associated organisations and teams. The rationale for this protection is prevention of the unauthorised commercial use of those marks and expressions including unauthorised use by way of ambush marketing. In the recent Federal Court litigation the AOC was unable to use the protections under the OIPA to prevent Telstra's advertising campaign because the Court found that the use of Olympic related marks and expressions did not constitute an impermissible suggestion that Telstra was a sponsor of, or provided sponsorship-like support for one or more of the Olympic Bodies. Telstra's commercial association with Seven, an official broadcaster of the Rio Olympic Games, was a critical factor in the Court's analysis of the Telstra Advertisements.

Further, this case is a useful illustration of the application of sections 18 and 29 of the ACL to promotional material. The judgment reinforces the need to carefully consider the nature of, and intended audience for, representations made in advertising and sponsorship material.

⁶ [2016] FCA 857, 142.

⁷ [2016] FCA 857, 138.

⁸ [2016] FCA 857, 138.

⁹ [2016] FCA 857, 96.

¹⁰ [2016] FCA 857, 33.

¹¹ [2016] FCA 857, 105, 109 & 116.

¹² [2016] FCA 857, 143.

Taking the Squeeze Out of the Press

William Duff surveys the state of Australian defamation law post-Lange and American jurisprudence. He considers what changes to Australian defamation law may be desirable to protect freedom of expression in the public sphere.

1. Introduction

Beginning with the publication of the independent *Australian* newspaper in 1824, successive Australian governments have struggled with the notion of a free and independent press, especially when that press has proven critical of their processes and decisions.¹ While the earliest conflicts between the presiding executive and the “fourth estate” often took far more severe forms,² recent times have nonetheless seen no let up in the governments’ attitude of simmering hostility towards the press. While the entrenched attitudes of statesmen remain unchanged, the law of defamation may be seen to have usurped heavy-handed and reactionary regulation as the favoured retaliatory weapon of choice for thin-skinned politicians.

It is thus unsurprising that since federation Australian courts have been awash with defamation suits brought by slighted public figures against the media.³ One recent and highly publicised example concluded in June 2015. In that case White J of the Federal Court found several published statements from Fairfax’s

investigative “Treasurer for Sale” series to defame then incumbent Treasurer Joseph Benedict Hockey.⁴ In handing what can only be described as a pyrrhic victory to Mr Hockey, White J found Fairfax editor Darren Goodsir liable for defamation and disentitled to any available defence due to his actuation by improper motive.⁵

Senior media figures and media law pundits seized upon this judgment, declaring that the judiciary continues to “chill” freedom of speech – and thus the efficacy of a free and independent press, in favour of the protection of the reputation of wounded public figures.⁶ This sentiment is debateable. The case did at least generate renewed discourse on the antithetical liberties of reputation and expression that co-exist within the Australian legal system. It is thus argued that the stagnant position of Australian defamation law on freedom of expression post-*Lange*⁷ should be subject to immediate reconsideration, especially in an age where technological developments increase the volume of published information touching upon the public sphere.⁸

A substantial quantity of commentary already exists surrounding defamation law and freedom of expression. While academics, the NSWLRC, the ALRC and various task forces circa 1995 have produced measured solutions to remedy the chilling effect of defamation law, many of these proposals are now outmoded following the introduction of the *Uniform Defamation Laws*.⁹ This paper revisits a popular proposed remedy drawn from comparative international jurisprudence. In evaluating the possibility of a “Public Figure Doctrine” the author seeks to generate policy prescriptions concerning the future of Australian defamation law on matters of public importance.

The paper begins in part II with a consideration of the current state of Australian defamation law post-*Lange*.¹⁰ It canvasses the jurisprudential rationales that have guided both the High Court and legislators. Strengths and weaknesses of the current arrangements will be presented. In part III, the paper moves to an analysis of the American judicial system, the *Sullivan*¹¹ lineage of

- 1 B Edgeworth, “Defamation Law and the Emergence of a Critical Press in Colonial New South Wales (1824-1831)” (1990) 6 *Australian Journal of Law and Society* 50, 50-52.
- 2 For example, one of the earliest offences against polity resulted in a dawn pistol duel between editor of *The Australian* Robert Wardell, and Governor Darling’s right-hand man Colonel Dumaresq. O’Halloran, “Some Early Legal Celebrities (Second Series)” (1924) 10 *Journal of the Royal Australian Historical Society* 301, 345.
- 3 Crikey, *The Long List of Defamation Litigants in Australia*, (3 April, 2002), Crikey, <<http://www.crikey.com.au/2002/04/03/the-long-list-of-defamation-litigants-in-australia/>>
- 4 *Hockey v Fairfax Media Publications Pty Ltd* [2015] FCA 652, at [415] (White J).
- 5 *Ibid* [415].
- 6 J Massola, “Joe Hockey Fairfax Defamation Case: Rights Commissioner says law reform needed”, *The Sydney Morning Herald* (online), 30 June 2015 <<http://www.smh.com.au/federal-politics/political-news/joe-hockey-fairfax-defamation-case-rights-commissioner-says-law-reform-needed-20150630-g1dps.html>>; M Sexton, “Hockey’s Defamation Suit Shows need for wider Free Speech Debate”, *The Australian* (online), <<http://www.theaustralian.com.au/news/joe-hockeys-defamation-verdict-raises-questions/story-e6frg6n6-1227448116794>> (Password Access Required).
- 7 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.
- 8 D Rolph, “Hockey v Fairfax should start the debate on defamation law reform”, *The Conversation* (online), 3 July 2015 <<http://theconversation.com/hockey-v-fairfax-should-start-the-debate-on-defamation-law-reform-44012>>.
- 9 *Defamation Act 2006* (NT), *Defamation Act 2005* (NSW), *Defamation Act 2005* (QLD), *Defamation Act 2005* (SA), *Defamation Act 2005* (Tas), *Defamation Act 2005* (Vic), *Defamation Act 2005* (WA).
- 10 *Lange v ABC* (1997) 189 CLR 520.
- 11 *New York Times Co. v Sullivan* (1964) 376 US 254.

case law, and the resultant “Public Figure Doctrine”. It weighs the merits of this approach against its many criticisms. Part IV will isolate positive juridical developments suitable for incorporation into NSW law and assess whether such measures are a necessary or desirable step to take in the interests of protecting freedom of expression in the public sphere.

2. Australian Defamation Law – now is the winter of our discontent¹²

The tort of defamation in NSW is one of strict liability. It exists to protect the reputation of the individual plaintiff.¹³ In this way, the tort constrains other civil liberties – most notably the equally important right to freedom of expression. Both interests have long been declared fundamental rights of the person and have attracted universal legal protection in both common law¹⁴ and civil jurisdictions.¹⁵ Freedom of expression is furthermore important at a collective level in liberal democratic societies due to the regulatory effect that it may exert on media institutions that are reliant on certain communicatory liberties.¹⁶ To better understand current problems facing the law of defamation we must discuss the jurisprudential rationale behind defamation reform in the public sphere and determine the current state of NSW defamation law as it relates to public figures.

A. The frozen fourth estate

The last word on the implied freedom of political communication was delivered in *Lange*. Post-*Lange*, the High Court has failed to comprehensively answer to what extent constitutionally enshrined ideals are relevant or redundant to defamation law.¹⁷ The minority judgment of McHugh, Brennan and Dawson JJ in *Theophanous* posited that the framers of the constitution were aware of the muzzling effect of the law of defamation at the time of drafting, leaving no room for adjustment by way of public law.¹⁸ Differing views arose later in the landmark case of *Lange*. The majority decision however was arrived at for purely pragmatic reasons leaving a certain degree of uncertainty.¹⁹ The case law thus leaves open greater questions of public policy that will likely inform future legislators or advocates in this field.

Fuelling the debate over freedoms of expression and reputation involving public figures are timeless and objective ideological rationalisations, each of which agree on the need for a robust and unbridled media sector. Of particular note are two prominent lines of reasoning: the classic utilitarian “truth” approach, and the democratic functional approach. From the perspective of utilitarians, it has been posited that a free press is a requisite of the

marketplace of ideas that underpins public reasoning.²⁰ Freedom of the press, a derivative of freedom of expression is required for the discovery and dissemination of truth. It is also a necessary element in the education of society and the advancement of knowledge, and important as a balance against unchecked centralised power.²¹ This analysis does not set out to determine the relative weight this argument has had in shaping the Australian law, however, it may be safely inferred that these free-market ideals have found traction within the Anglo-Australian legal tradition culminating in the defence of truth.²²

A second, interrelated argument necessitating freedom of press by way of freedom of expression is the functional approach. This approach identifies the freedom as a requisite component of the representative system of government within a modern liberal democracy.²³ An exemplary explanation of this approach was given by Deane and Toohey JJ in *Nationwide News v Wills*.²⁴ In that case the court found that as a representative system of government drawing authority in modern times from the subjects of the realm, the Australian system by its very nature protected the rights of those individuals who invoked that governance system.²⁵ The culmination of this line of judicial reasoning ends in the *Lange*²⁶

12 A Hammond, *The Arden Shakespeare: King Richard III* (1981 edition, Routledge).

13 S Walker, *The Law of Journalism in Australia*, (1989) Law Book Company, p. 135.

14 See Generally: *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, (207)-(208) (Lord Steyne) for UK, *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 for Australia, DA Strauss, “Freedom of Speech and the Common Law Constitution in LC Bollinger et al (eds) *Eternally Vigilant: Free Speech in the Modern Era* (2002) 33, 40 for U.S.

15 For example: *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) as amended by *Protocol No 14bis to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 27 May 2009, CETS No 204 (Entered into force 1 September 2009), Art 10.

16 M Shapiro, “Libel Regulatory Analysis” (1986) 74 *California Law Review* 883.

17 P Applegarth, “Distorting the Law of Defamation” (2011) 30(1) *University of Queensland Law Journal* 99, 113.

18 *Theophanous v Herald & Weekly Times Ltd* [1994] 182 CLR 104, Brennan CJ at [28], Dawson at [11], McHugh at [23], accessed at < <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1994/46.html>>.

19 *Lange v ABC* (1997) 189 CLR 520; within the majority itself, Deane J proffered a differing view on the scope of the implied freedom, finally acquiescing to the majority to deliver pragmatic final orders.

20 D Milo, *Defamation and Freedom of Speech*, (2008 Oxford Scholarship Online, Jan 2009), 55-58.

21 T Campbell, ‘Rationales for Freedom of Expression’ in T Campbell and W Sadurski, *Freedom of Communication* (1994), 23.

22 *Defamation Act 2005* (NSW), ss 25,26.

23 D Milo, *Defamation and Freedom of Speech*, (2008 Oxford Scholarship Online, Jan 2009), 62-67.

24 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

25 *Ibid*, 723-724.

26 *Lange v ABC* (1997) 189 CLR 520.

defence of qualified privilege and may to an extent be seen to have informed legislators drafting the statutory equivalent.²⁷

B. Defending freedom of expression in the public sphere

As of 2015, all Australian jurisdictions operate under some variant of the Uniform Defamation Laws.²⁸ These uniform laws retrace the common law in many areas, however, they also introduce legislated changes in others – particularly in the area of defences.²⁹ In a discussion of defamation and the public sphere, only one statutory defence is entirely relevant;³⁰ that of qualified privilege.³¹ Even with its practical limitations, the extended common law defence of *Lange*, qualified privilege³² remains the default defence for defendants. This section discusses these defences and their efficacy as a response to historical forensic biases.

The statutory defence of qualified privilege enacted in 2005 is closely modelled on its predecessor, s22 (now repealed) of the Defamation Act 1974.³³ While the defence appears to allow for comprehensive protection of freedom of expression in matters in the public interest, there has been damning criticism of subsequent judicial interpretation of the provision. The defence

has been so significantly read down under the case law of its predecessor that what remains is in effect unworkable for defendants.³⁴ The term “reasonable” has proven problematic with judicial officers often incorrectly editorialising in their determination of reasonableness.³⁵ The somewhat anecdotal criticism is nonetheless well accepted and is supported by a paucity of case law where defendants have successfully relied on the defence.³⁶ Over the course of ten years, this statutory alternative has proven ineffective as a safeguard of the right to expression.

The common law defence of *Lange* qualified privilege thus remains an over-employed if under-successful avenue of recourse for defamation defendants in matters of public import. The defence builds upon the implied freedom of political communication established in *Nationwide*³⁷ and *ACTV*³⁸ and contextualised for the law of defamation in *Theophanous*³⁹ and *Stephens*.⁴⁰ While the latter two cases contain no clear majority position, a reconstituted court in *Lange* recognised the inconsistency between the common law and the implied constitutional freedom and extended the existing common law defence of qualified privilege so as to prevent conflict.⁴¹ The result was the

establishment of a narrow negative liberty preventing interference with the individual’s right to political communication. In broad terms, the court adopted a two-tiered test for the application of the defence which required:

- a) involvement of a government matter – which has since been refined in successive judgements, and;
- b) reasonableness on the part of the publisher.⁴²

It is not difficult to imagine situations in which such a defence could be employed in the protection of freedom of the press. However, scarce jurisprudence on the nature of the defence has proved highly limiting for practitioners. In an examination of the jurisprudence, both English and Canadian courts found the restrictive nature of the defence to be unsatisfactory when engaging with a modern world in which a reciprocal interest exists to receive matters of public interest beyond those categories expressly identified in *Lange*.⁴³ It is unclear whether the *Lange* defence strikes an acceptable balance between the interests of reputation and expression. McHugh J held *Lange* to be the final word on defamation law;⁴⁴ while a somewhat more forward-looking Kirby J respectfully disagreed.⁴⁵ Further academic

27 *Defamation Act 2005* (NSW), s 30.

28 *Defamation Act 2006* (NT), *Defamation Act 2005* (NSW), *Defamation Act 2005* (QLD), *Defamation Act 2005* (SA), *Defamation Act 2005* (Tas), *Defamation Act 2005* (Vic), *Defamation Act 2005* (WA).

29 D Rolph, “A Critique of the National, Uniform Defamation Laws” (2008), 16(3) *Torts Law Journal* 207, 227-239.

30 The common law defence of fair comment and statutory defence of honest opinion also exist, (*Defamation Act 2006* (NSW), s31), however these are of limited utility to media defendants outside of certain contexts.

31 *Defamation Act 2005* (NSW), s 30.

32 P Applegarth, “Distorting the Law of Defamation” (2011) 30(1) *University of Queensland Law Journal* 99, 113.

33 *Defamation Act 1974* (NSW), s 22; A Kenyon, “Six Years of Australian Uniform Defamation Law”, (2012) 35(1) *UNSW Law Journal* 31, 35.

34 D Rolph, “A Critique of the National, Uniform Defamation Laws” (2008), 16(3) *Torts Law Journal* 207, 233; P George, “Qualified Privilege – A Defence Too Qualified?” (2007) 3 *Australian Bar Review* 46, 68.

35 P Applegarth, “Distorting the Law of Defamation” (2011) 30(1) *University of Queensland Law Journal* 99,108.

36 D Rolph, “A Critique of the National, Uniform Defamation Laws” (2008), 16(3) *Torts Law Journal* 207, 233, and *John Fairfax Publications Pty Ltd v O’Shane* [2005] NSWCA 164, *Obeid v Fairfax* (2006) 68 NSWLR 150, and *John Fairfax Publications Pty Ltd v Zunter* [2006] NSWCA 227, [30]-[31] (Handley JA).

37 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

38 *Australian Capital Television Pty Ltd v Cth* (1992) 177 CLR 102.

39 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104.

40 *Stephens v West Australian Newspapers Ltd* [1994] HCA 45.

41 *Lange v ABC* (1997) 145 ALR 96.

42 *Ibid*, 114-115.

43 *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127; *Grant v Torstar Corp* [2009] SCC 61.

44 *Roberts v Bass* (2002) 212 CLR 1.

45 *Roberts v Bass* (2002) 212 CLR 1, 160 (Kirby J).

discussion and case law on the subject could well help to alleviate this standstill and elucidate whether an extended common law qualified privilege could secure a more balanced playing field where matters of public import are concerned. For now, however, this stagnant line of case law appears to be inadequate as far as freedom of speech is concerned.

3. The Public Figure Doctrine – the marketplace of (bad) ideas

In the ten years since the Defamation Act⁴⁶ came into force there has been little to no progress for public defamation defendants leading to an environment of self-censorship fuelled by uncertainty. It is therefore timely to reconsider the introduction of a “public figure test” as a response to the lack of clarity on the matter of public interest in *Lange* and as a means by which the balance between reputation and expression might be adjusted to reflect the various justifications for a free and inquisitive press explored in Part 2.

A. Testing the public figure

In 1994 in response to NSWLRC Discussion Paper 32 on Defamation,⁴⁷ Tobin summarised the American position on defamation in the public sphere as a dual-faceted reconstitution of the common law centred on either:

- a) identifiable public figures; or
- b) private plaintiffs in matters of public concern.⁴⁸

In relation to the application of defamation law to public figures, the US Supreme Court first handed down what would come to be known as the “Public Figure” Doctrine in the landmark case *NYT v Sullivan*.⁴⁹ The 1964 case reinterpreted existing common law in line with American constitutional arrangements. It created new laws of defamation which barred the plaintiff, a public servant, from recovering damages in defamation proceedings without satisfying the court that the offending statements were malicious.⁵⁰ In a subsequent case, *Garrison v Louisiana*, the Supreme Court settled on a reversal in the onus of proof as to falsity. It departed from the presumption of truth that formerly characterised common law defamation;⁵¹ the plaintiff would now carry the burden of proving falsity. In subsequent cases the Supreme Court outlined three non-exhaustive categories of public figure – the vortex figure, the all-purpose public figure, and the voluntary figure – all plaintiffs capable of satisfying the threshold criterion of “publicness”.⁵²

Categories of plaintiff proved a popular method for characterising proceedings as “public” and yet the Supreme Court also extended the public figure doctrine over private plaintiffs where the subject matter is one of public concern.⁵³ In *Gertz*, the court imposed the somewhat onerous standard of liability uniformly across all plaintiffs, abolishing the strict liability of

libel and slander.⁵⁴ This onerous burden of proving malice was ultimately, wound back, however, in *Greenmoss*⁵⁵ and *Hepps*.⁵⁶ In those cases the forensic burdens of public figure defamation would only apply to private suits where the subject matter constituting defamatory material was of public concern.

Tobin identifies opportunities for right of reply, the voluntary assumption of risk, and the First Amendment as prominent justifications for the Supreme Court’s decision in *Sullivan*.⁵⁷ While Australia’s different constitutional arrangements render obsolete any consideration of the third justification,⁵⁸ the other two reasons, in combination with broader public policy considerations outlined in Part II, are nonetheless valid justifications for the protection of freedom of expression in the public sphere.

B. The problem with *Sullivan*

The efficacy of the American public figure doctrine has been heavily criticised, in particular for the following perceived shortcomings:

i) Ambiguity

The *Sullivan* tradition has generated substantial uncertainty because of the vagaries of its internal workings. Primarily, the categorisation of the plaintiff as a public or private individual has been applied very differently and without continuity by courts of different jurisdictions.⁵⁹

46 Defamation Act 2005 (NSW).

47 New South Wales Law Reform Commission, *Defamation* (DP 32, 1993) at Chapter 10.

48 J Tobin, “The United States Public Figure Test: Should it be Introduced into Australia?” (1994) 17(2) *UNSW Law Journal* 383, 388-389.

49 *New York Times Co. v Sullivan* (1964) 376 US 254.

50 *New York Times Co. v Sullivan* (1964) 376 US 254. 279-284.

51 *Garrison v Louisiana* (1964) 379 US 64.

52 *Gertz v Robert Welch Inc* (1974) 418 US 323, 345, 351.

53 *Ibid.*

54 *Ibid.*, 351.

55 *Dun & Bradstreet v Greenmoss Builders Inc* (1985) 86 Led 593.

56 *Philadelphia Newspapers Inc v Hepps* (1986) 106 S Ct 1558.

57 J Tobin, “The United States Public Figure Test: Should it be Introduced into Australia?” (1994) 17(2) *UNSW Law Journal* 383, 389-390.

58 The argument is one stemming purely from the unique constitutional arrangements endemic to the United States of America – in particular the existence of the 1st Amendment.

59 New South Wales Law Reform Commission: Report 75 (1995) – *Defamation*; here the NSWLRC presents five different occasions where courts post *Sullivan* have grappled with characterisation difficulties. These are: *Rosenblatt v Baer* (1966) 383 US 75 at 85; *Curtis Publishing Co v Butts* (1967) 388 US 130 at 164; *Gertz v Robert Welch Inc* (1974) 418 US 323; *Time Inc v Firestone* (1976) 424 US 448; *Philadelphia Newspapers Inc v Hepps* (1986) 475 US 767; see also: R E Brown, *The Law of Defamation in Canada*, 2nd ed, Carswell, Toronto, 1994, at 27.4(1).

This lack of consistency has caused unnecessary expenditure of both time and resources in the resolution of fundamental questions of law,⁶⁰ and generates uncertainty. Ultimately these factors defeat the purported aim of the public figure doctrine by encouraging self-censorship⁶¹.

There are three further and related areas of profound difficulty: the definition of public concern, the possibility of a media/non-media distinction and finally forensic burdens in the private sphere.⁶² Criticisms of the definitional problems with “public concern” and media/non-media actors closely echo those of the public/private distinction. Questions centred on the American forensic approach to fault would likely further prove to be a problematic area with significant legal costs and lengthy discoveries a probable outcome in determining the subjective state of mind of the defendant.⁶³

ii) *Failure as a journalistic regulator*

The public figure test fails to promote responsible forms of journalism - a trend believed to occur for two reasons. First, to be held liable for defamation under *Sullivan* it must be proved that the defamatory statement has been published with knowledge of falsity or with reckless disregard as to veracity, thus establishing malice.⁶⁴ In imposing this test, a “perverse incentive” is created as sloppier practices by the profession diminish the plaintiff’s ability to prove reckless indifference.⁶⁵ Secondly, by reversing the presumption of falsity,

a disincentive against publishing false material is removed where the plaintiff is unable to establish truth.⁶⁶ Any impetus for responsible journalism disappears because there is no reason for defendants to seek out the true state of affairs.

iii) *Failure to determine truth*

The public figure test redirects the mechanisms of justice from resolving issues of veracity, to resolving issues of conduct.⁶⁷ A guiding principle of defamation law is the restoration of the plaintiff’s reputation through truth.⁶⁸ While monetary awards for reputational damage continue to be available to the plaintiff, a case may be won or lost within the *Sullivan* formulation purely on an issue of subjective fault on the part of the defendant. As Powe has stated “[i]t is now the defendant’s conduct, rather than the plaintiff’s reputation, that is on trial.”⁶⁹ This removes a fundamental aspect of the law of defamation and leaves unclear the place of “true” defamatory statements.

iv) *Discrimination against plaintiffs*

The imposition of a public figure test is a discriminatory mechanism capable of generating classes of plaintiff with differing rights. While the rationale behind increased protections afforded to classes of defendants is discussed above, little consideration has thus far been given to the rights of the plaintiffs to be treated equally in the eyes of the law. In the American context, this inequality was initially thought to have been remedied by the provision of certain immunities granted

by their public position.⁷⁰ The expansion of the definition of public figure, however, makes this position unclear. In Australia, this justification is inapplicable and would need to be considered further. While the discriminatory nature of such reforms cannot be dismissed, they may be outweighed by the relative importance of a free media sector as discussed above.

v) *Inefficacy of approach*

Perhaps the most important consideration weighing heavily against the implementation of a public figure test in an Australian context is the lack of empirical evidence supporting the efficacy of the approach in *Sullivan* in delivering on its objectives. Nonetheless it has been documented that plaintiffs in defamation cases post-*Sullivan* have been on average awarded higher damages than those in other civil suits.⁷¹

4. Recommendations

Some of the criticisms in part III are more compelling than others but the wholesale importation of the American common law public figure test is difficult to justify. Certainly criticisms i) and iv) carry little weight in reaching this conclusion. The criticism of ambiguity in i) should be dismissed for two reasons:

First, the criticism of ambiguity is one pervasive to almost all common law doctrines. In affording discretion to judicial officers, there must be a certain degree of ambiguity to prevent the construal of the law through an excessively narrow

60 New South Wales Law Reform Commission: Report 75 (1995) – *Defamation*, 5.12-5.13.

61 B Sandford, *Libel and Privacy*, (Prentice Hall, 2nd ed, 1991), 242-243.

62 J Tobin, “The United States Public Figure Test: Should it be introduced into Australia?” (1994) 17(2) *UNSW Law Journal* 383, 391-392.

63 New South Wales Law Reform Commission: Report 75 (1995) – *Defamation*, 5.13.

64 *New York Times Co. v Sullivan* (1964) 376 US 254.

65 M Shapiro, “Libel Regulatory Analysis” (1986) 74 *California Law Review* 883, 885-886; R Smolla, “Dun & Bradstreet, Hepps and Liberty Lobby: A New Analytic Primer on the Future Course of Defamation” (1987) 75 *Georgetown Law Journal* 1519, 1528.

66 R Smolla, “Dun & Bradstreet, Hepps and Liberty Lobby: A New Analytic Primer on the Future Course of Defamation” (1987) 75 *Georgetown Law Journal* 1519, 1528.

67 See D A Anderson, “Is Libel Law Worth Reforming?” in Soloski and Bezanson (eds) *Reforming Libel Law* (Guilford Press, New York, 1992) 7-8.

68 New South Wales Law Reform Commission: Report 75 (1995) – *Defamation*, 4.7-4.15.

69 L..A. Powe, *The Fourth Estate and the Constitution: Freedom of the Press in America* (University of California Press, Berkeley, 1991), 121-125.

70 N Strossen, “A Defence of the Aspirations – but not the Achievements of the US Rules Limiting Defamation Actions by Public Figures and Officials” (1985) 15 *University of Melbourne Law Review* 419, 421.

71 *Ibid*, 427.

scope. To take umbrage with the public figure test on this ground, one must equally turn a sceptical eye to the general workings of judicial discretions in the common law system.

Secondly, the criticism of ambiguity is one that may be overcome through considered legislation; as Pullan states: there is “no reason why what is essentially a simple statutory drafting technique can not be done” to remedy this.⁷²

Criticism iv) should be dismissed as a necessary casualty in ensuring freedom of expression. It has been argued forcefully that expansion of the freedom of expression inevitably comes at the expense of the right to reputation.

Criticisms ii), iii) and v) each stand as compelling reasons against importation of the public figure doctrine. Journalistic integrity and discovery of truth are important matters of public policy that should not be sacrificed in the pursuit of expressive freedom. Further, a lack of efficacy (criticism v)) in achieving purported outcomes renders the importation of foreign law an exercise in futility.

While Tobin’s 1994 report was prescient in its recommendations on this matter, with the benefit of hindsight, we can note some limitations of this approach.⁷³ A uniform statute reflecting qualified privilege is now frustrated by subsequent judicial interpretation. The current formulation is plagued by the same limitations as its predecessor.⁷⁴ In response to these developments, either the judiciary or legislators needs to break from precedent to redress the present

imbalance of interests.⁷⁵ Courts should adopt a less restrictive approach in defining reasonableness or alternatively develop common law qualified privilege as a way to overcome *Lange’s* considerable limitations.⁷⁶ Legislators could look to strengthen current guidelines by revising the wording of subsection (3)⁷⁷ to “must take into account”. This could diminish judicial officers’ tendency to editorialise, and restore the statutory defence of qualified privilege as a workable defence.

Alternatively, if policy-makers were to forge ahead with the introduction of a less preferable statutory public figure test, several cautions need to be issued.

For the reasons given by Tobin, the presumption of falsity ought to be retained in an Australian context.⁷⁸ Strict liability would need to be maintained in private actions; to change the forensic burdens without substantial justification would unduly prejudice private plaintiffs and compromise the *raison d’etre* of the law of defamation. The introduction of a new remedy of declaration of truth could potentially rectify problem iii) and bolster the integrity of the journalistic profession as undermined by problem ii). Finally, the abolition of strict liability in public cases could only work where considered criteria demarcating the public/private divide for both plaintiffs and matters in the public interest existed. Without legislated boundaries, Australian law could risk following the U.S. common law down the rabbit-hole of vortex figures⁷⁹ and eventually lose sight of the underlying goal of press freedom in relation to matters in the public interest.

5. Conclusion

If the public figure test were the law in Australia, the outcome of *Hockey v Fairfax*⁸⁰ would likely remain the same. The resulting outcry professing a systemic failure of defamation law to adequately protect freedom of expression is nevertheless valid. In private circumstances, the tort of defamation is justifiable in its infringement of the freedom of expression. Where matters of public concern are involved, however, infringement on the right to expression is less justified and requires more comprehensive protection.

This paper examined the viability of the incorporation of the public figure doctrine into the body of NSW defamation law. It found this is not a viable option. The American approach is riddled with practical and theoretical problems and is inconsistent with the goals of Australian defamation law. This is not to say, however, that the current configuration of defamation law in NSW is adequate – far from it. What is required is further judicial direction or substantial legislative change. Both the common law and statutory defences operate to chill freedom of expression in an area where the public would best be served by robust debate.

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72 R Pullan, “Unfairness is the Rule” (1989-90) 21(4) *Australian Author* 35, 36.

73 J Tobin, “The United States Public Figure Test: Should it be Introduced into Australia?” (1994) 17(2) *UNSW Law Journal* 383, 404-406.

74 D Rolph, “A Critique of the National, Uniform Defamation Laws” (2008), 16(3) *Torts Law Journal* 207, 232-233.

75 P Applegarth, “Distorting the Law of Defamation” (2011) 30(1) *University of Queensland Law Journal* 99, 114-117.

76 *Ibid*, 115.

77 *Defamation Act 2005* (NSW), s 30(3)

78 *Ibid*, 405-406.

79 *Gertz v Robert Welch Inc* (1974) 418 US 323.

80 *Hockey v Fairfax Media Publications Pty Ltd* [2015] FCA 652.

The Fourth Estate is Under Attack

And Defamation Law is Not Helping

By Rachel Baker

The media have traditionally been known as the fourth estate, regarded as an essential pillar of democracy, sitting alongside the clergy, the nobility and the people. This division is not formally recorded and has evolved over time but, for the purposes of this essay, the estates are loosely translated so that the second estate is symbolised by the judiciary and the third estate by Federal and State Parliaments, where the people are represented. On that basis, it is argued that Australia's second and third estates have not evolved with sufficient haste to keep up with the dramatic changes in the fourth, such that the content and application of defamation law are having the unintended consequence of exacerbating the challenges faced by the mainstream media. Economic pressures on the news media are being compounded, making quality journalism less profitable, and contributing to the stripping away of resources from newsrooms around the country. This divestment will be to the detriment of us all: we will see less scrutiny of society's most powerful figures, leading to a less-informed public and, potentially, a weakened democracy. This essay will examine defamation law, consider how some aspects of it are contributing to the undermining

of news media, and look at what can be done to help alleviate the disincentives to investigative journalism the law currently creates.

News media suffering in the new economy

The news media sector has undergone dramatic change in the past two decades. Classified advertising has shifted online, depriving print of the revenue stream that financed quality journalism for a century. The availability of free, constantly updated news online has seen print circulations drop and has forced publishers to give away their hard-earned content for (in most cases) nothing. In 2012-13, News Corp's Australian newspaper revenue fell 14 percent, on the back of a five percent drop in circulation revenue and 18 percent slump in advertising revenue.¹ In the same year, Fairfax Metro saw a 12 percent drop in revenue and a 21 percent fall in advertising revenue.² Readers are moving online but, when publishers follow them, the financial rewards are not there: for every dollar that is lost in print advertising, newspapers receive less than 10 cents in online advertising.³ Digital subscriptions do not create enough revenue to sustain newsrooms⁴ and, while there is evidence that reductions in

print circulation are bottoming out,⁵ the fact remains that some of this country's best loved mastheads – titles that have invested in expensive and risky investigative journalism throughout the 20th century, unearthed corruption and nourished our democracy by informing the public – now run at a loss or barely break even.⁶

While the large publications that are responsible for most of Australia's serious journalism remain in print, they have shed staff in large numbers. Fairfax cut more than 1800 journalists in 2012, while News Corp lost more than 1000 positions in the same year.⁷ In March 2016, Fairfax announced plans to cut another 120 editorial positions.⁸ It is estimated that since 2012, 20 percent of print journalists have been made redundant.⁹ Even worse than these figures is the fact that experienced investigative journalists are over-represented in the job losses,¹⁰ so the newspapers of today are not merely producing the same amount of copy with fewer reporters, but in some cases juniors are doing the work of seasoned professionals. Even though these losses have not been replicated in broadcast media and new, exclusively online (and in some cases print¹¹) players have emerged, there is still a

- 1 Paddy Manning, 'Exclusive docs show News' Australian papers dragging down the empire', *Crikey*, 20 August 2014, <http://www.crikey.com.au/2014/08/20/exclusive-secret-documents-show-news%E2%80%99-australian-papers-dragging-down-the-empire/?wmp_switcher=mobile>.
- 2 Paddy Manning, 'Now we know News' losses – how do they compare with Fairfax's?', *Crikey*, 21 August 2014, <<http://www.crikey.com.au/2014/08/21/now-we-know-news-losses-how-do-they-compare-with-fairfax/>> accessed 28 September 2015.
- 3 Eric Beecher, 'The death of Fairfax and the end of Newspapers: where is the journalism we need going to come from now?', *The Monthly*, <<https://www.themonthly.com.au/issue/2013/july/1372600800/eric-beecher/death-fairfax-and-end-newspapers>> accessed 28 September 2015.
- 4 Amy Mitchell, 'State of the News Media 2014', 26 March 2014, Pew Research Centre, <<http://www.journalism.org/2014/03/26/state-of-the-news-media-2014-overview/>>.
- 5 Nic Christensen, 'News Corp marketing boss: 'sales promotions are slowing print circulation declines'', *Mumbrella*, 11 May 2015, <<http://mumbrella.com.au/news-corp-marketing-boss-sales-promotions-are-slowing-print-circulation-declines-292637>> accessed 28 September 2015.
- 6 Beecher, above n 3.
- 7 Miyriam Robin, 'Fairfax slashes and burns, with over 100 regional journos gone in a year', *Crikey*, <<http://www.crikey.com.au/2015/07/13/fairfax-slashes-and-burns-with-over-100-regional-journos-gone-in-a-year/>> accessed 29 September 2015.
- 8 ABC News online, 18 March 2016, <<http://www.abc.net.au/news/2016-03-17/fairfax-staff-strike-in-solidarity-over-job-cuts/7254372>> accessed 30 March 2016.
- 9 Ibid.
- 10 Nic Christensen, 'Is this the worst time to be a journalist?', *Mumbrella*, 14 May 2013, <<http://mumbrella.com.au/is-this-the-worst-time-to-be-a-journalist-155470>> accessed 29 September 2015.
- 11 For example, *The Saturday Paper*.

net loss of investigative journalism. This is not simply about raw numbers but is due to entrenched industry practices, whereby the broadcast media generally expend fewer resources in unearthing stories and are far more reactive than print, which has long been the agenda-setter and the main source of original content. As the flow of original stories slows, we can expect to see more news items generated by press release and public relations departments. It is possible the more-with-less trend will lead to a diminution in quality and, as publications scramble for readers and online clicks, a higher concentration of lifestyle, weather and celebrity stories. In political reporting, this means fewer stories about important issues and a greater focus on personalities and stunts. It is no coincidence that the news media's falling circulation has come at the same time as the increasing disposability of Australian Prime Ministers.¹²

Challenges exacerbated by defamation law

The news media are facing a perfect storm of technological and social change that poses a threat to their future viability, but it is arguable that the current state of defamation law is making the situation worse than it needs to be, by making some defences unnecessarily difficult for the media to access. In comparison with other jurisdictions, it is easier to sue a media outlet for defamation in Australia, and harder for those media outlets to defend the claims made against them. For example, in Australia, the law presumes that defamatory matter is false and the onus is on the defendant to prove its truth.¹³ A judicial standard of proof, met by complying with rules of evidence, is often a higher standard of proof than the media

usually requires of itself before publishing a story. While many in the law may regard it as beneficial to impose more stringent standards on the media, journalists do not have the same time or resources as lawyers to research, verify and draft documents, and the mass media would grind to a halt if reporters worked to the same deadlines as lawyers and judges. News stories are produced in a high volume and need to respond to events in a timely manner. If journalists waited until every element of their stories could be proven true in a court of law, it is likely that many of the big scoops over the decades would not have made it to print or, by the time they did, the readers would not remember the individuals featured in them.

There is no public figure defence in Australia, whereas in the United States, since the 1964 case of *New York Times Co v Sullivan*,¹⁴ it has been established that public officials can win a libel suit only when they can prove actual malice: that is, when the publisher knew the information was wholly and patently false or that it was published with reckless disregard to its falsity. This standard was later applied to public figures as well as public officials.

Qualified privilege too qualified?

Australia has the defences of statutory and common law qualified privilege which, on paper, seem to provide a fair degree of protection, but the way in which they are applied means that, in order to rely on qualified privilege, there is an almost impossible hurdle for the publisher to pass in order to show that its conduct was reasonable in the circumstances.¹⁵ A prominent example of the difficulty in clearing

this hurdle was *Fairfax v Zunter*¹⁶, in which Fairfax was found to have acted unreasonably when it published a story about a caravan park owner who had lit an illegal backburn, which the fire authorities claimed had run out of control and into an existing bushfire.¹⁷ Newspaper staff had been unable to reach the caravan park by road or telephone, until a photographer rowed a boat across a river, found out the owner's name (which he appears to have telephoned in to the sub-editor's desk to be added to the reporter's copy¹⁸), confirmed he had lit an illegal backburn, and gave the owner the reporter's phone number.¹⁹ The owner did not contact the reporter until the following day, after the story had gone to print.²⁰

In the litigation, the plaintiff claimed (and Fairfax did not dispute) that he lit the backburn out of desperation because the fire brigade had offered him no protection from nearby bushfires, and that his backburn had not created a bushfire. The court did not engage with the argument that the newspaper's alternative – of not naming the plaintiff – would potentially have exposed it to defamation action from the other caravan park owners in the area. The unfortunate outcome for Fairfax in this case appears not due to the legislation, which seems to seek to protect publishers when they conduct themselves in accordance with orthodox journalistic ethics. Section 22(2A) of the *Defamation Act NSW* (as it then was, now section 30(3)) provides that reasonableness will be based on a range of factors that include the sources and the integrity of those sources (in this case one would think an RFS briefing attended by persons in charge of fire-fighting

12 Taflaga, Marija, 'We need to talk about Tony... Media coverage of the Abbott Opposition 2009-2013', page 2, accessed online at <http://www.auspsa.org.au/sites/default/files/we_need_to_talk_about_tony_marija_taflaga.pdf> on 12 January 2016.

13 Brennan David J, 'The Defence of Truth and Defamation Law Reform', *Monash University Law Review*, volume 20, no 1, 1994, 155.

14 376 U.S. 254 (1964).

15 Defamation Act 2005 (NSW), section 30(1)(c).

16 [2006] NSWCA 227.

17 *Ibid*, 9.

18 *Ibid*, 24.

19 *Ibid*, 18.

20 *Ibid*, 20.

units in the relevant areas would be regarded as a reliable source with integrity) and, if the plaintiff's response was not included, whether a reasonable attempt was made to obtain that response. The difficulty for Fairfax came in the Court's application of the statute to the facts, and its apparent reluctance to appreciate time imperatives faced by the media, the urgency in communicating information during emergencies such as bushfires and the responsibility of individuals (when on notice of an imminent publication) to respond to media enquiries in a timely manner to protect their own reputations and facilitate the flow of information about matters of public interest.

In *Fairfax v Obeid*,²¹ qualified privilege failed to protect one of the nation's most respected investigative journalists from a suit brought by former New South Wales politician Eddie Obeid. Here, Kate McClymont verified allegations through multiple sources, sought the plaintiff's response and included it prominently, but the publisher was found to have acted unreasonably because, in part, of the "structure" of the story: the headline did not contain the denial (even though the ordinary reasonable reader reads more than the mere headline²²) and the denial was "significantly undercut" by the paragraphs of allegations following it.²³ The judgment seems to suggest that part of the problem lay in the volume of allegations outweighing the plaintiff's brief denials, yet, when questions were put to the plaintiff prior to publication, he provided very succinct responses – often a

single word to multiple questions.²⁴ In addition, the publisher was found to have acted unreasonably because it did not provide an express disclaimer or otherwise indicate that the article was not intended to be understood as conveying imputations of corruption²⁵ (despite including Mr Obeid's denials, and having received pre-publication advice from an experienced defamation lawyer).²⁶ Such a disclaimer seems more suited to a legal rather than lay audience, which would arguably draw a similar inference from Mr Obeid's denials.

The recent decision in *Hockey v Fairfax*²⁷ indicates courts continue to narrowly define reasonableness. The case concerned articles published in the *Sydney Morning Herald* and *The Age* regarding political donations received by a body called the North Sydney Forum (NSF), which was set up to raise funds for the then Federal Treasurer, Joe Hockey. The Federal Court held that the articles conveyed no defamatory meanings (because of the context provided), but two tweets and one poster (which contained wording similar to or the same as the headlines used in the articles, "Treasurer Hockey for sale" or "Treasurer for sale") were found to be defamatory. White J held that the tweets had to be regarded on their own, because of the assumption that readers did not click on the link and read the article.²⁸ This conclusion was reached despite the inverse principle also being applied in defamation law: when a website contains a link to defamatory content, the publisher can be liable for the content of the link.²⁹

Once White J had decided that Fairfax could not rely on the complete articles to contextualise the tweets and posters, his Honour narrowly defined the range of conduct that would be regarded as reasonable for the purpose of statutory qualified privilege. White J held that Fairfax's conduct was unreasonable because it could have used different wording in the tweets and poster, and proceeded to suggest "alternative forms of eye catching promotion" of the articles.³⁰ In my view, this section of the judgment's reasoning demonstrates the imposition on the media of a judicial approach to language, albeit making a valid point about a brief headline not necessarily being defamatory.

The finding of unreasonableness was also based on the steps taken to give Mr Hockey a chance to respond to the articles, which were held to be inadequate,³¹ even though Fairfax made numerous attempts to contact Mr Hockey's office and a representative of the NSF,³² and sent a list of 12 questions to Mr Hockey (to which he responded with a 21-word statement).³³ White J also took issue with the fact that the questions put to Mr Hockey did not ask directly about payments or sale by Mr Hockey of his time,³⁴ even though they did refer to the exchange of VIP briefings or meetings for paid memberships. Given that Mr Hockey did not answer any of the questions put to him and referred questions to the NSF (which referred questions to Mr Hockey's office³⁵) it is unclear whether the additional questions

21 *Obeid v John Fairfax Publications Pty Limited* [2006] NSWSC 1059.

22 *Charleston v News Group Newspaper* [1995] 2 AC 65.

23 *Obeid*, above n 21, 72.

24 *Ibid*, 47.

25 *Ibid*, 75.

26 *Ibid*, 49.

27 [2015] FCA 652.

28 *Ibid*, 238.

29 E.g. *Visscher v Maritime Union of Australia*, NSWSC 2014, discussed in Michael Cameron, 'Media organisations try to interpret ramifications of Hockey case', *The Australian*, 27 July 2015.

30 *Hockey v Fairfax Media Publications Pty Limited* [2015] FCA 652, 244.

31 *Ibid*, 247.

32 *Ibid*, 284-290.

33 *Ibid*, 41.

34 *Ibid*, 362.

suggested by White J would have affected the article or Mr Hockey's level of engagement with it.

Because Fairfax was found to have acted unreasonably, the defences of statutory and *Lange* qualified privilege also failed, because a similar standard of reasonableness was held to apply³⁶ - despite calls for courts not to do this.³⁷ As such, malice did not need to be addressed, but White J nevertheless concluded that improper motive did exist, in the form of "personal animus" towards Mr Hockey at the time the headline "Treasurer for sale" was written by the SMH editor, Darren Goodsir.³⁸ His Honour found Mr Goodsir was "intent on getting back" at Mr Hockey,³⁹ over having been made to issue an apology to Mr Hockey about a different story six weeks earlier.⁴⁰ His Honour found that Mr Goodsir's instructions to the reporter to "drop everything and start digging into the NSF" was "also indicative of his state of mind".⁴¹ Although email correspondence between Fairfax staff revealed some strong language from Mr Goodsir (such as "I want to have this nailed to the cross in more ways than one" and "I have long dreamed ... of a headline that screams: Sloppy Joe!"⁴²), in my view, White J's assessment overlooks another plausible alternative: that Mr Goodsir's state of mind at that time was that Mr Hockey's strident protests and demands for an apology over the earlier article suggested that the Treasurer a) had something to hide; and b) thought he could bully the media into submission. The reaction of many journalists faced with those circumstances would likely be to pursue the story for the story's sake, but also to demonstrate the media's independence from

assertive public figures and threats of legal action.

White J found that the defendant's focus on Mr Hockey and the NSF, rather than other similar fundraising vehicles used by other politicians, was indicative of malice, but the Nicholls article devoted five paragraphs to the Wentworth Forum and Millennium Forum, similar vehicles whose activities had been previously exposed by the media. It just happened that the NSF was the most recent one to emerge. In my view, White J's reasoning on this point tends to overlook the way in which news (especially daily) publications function: they lead with and focus on what is new. To devote equal space and prominence to electoral funds that had long ago been ventilated in the media would be inappropriate for a daily publication.

It is arguable that the application of the qualified privilege defence has a tendency to be problematic because politicians are over-represented as defamation plaintiffs⁴³ and there is a risk that allowing them to use legal remedies for negative publicity could undermine the principles of the fourth estate and distort the objectives of defamation law itself. The news media are regarded as the fourth estate of society because keeping the population informed is considered an essential element of democracy, and the purpose of defamation law is to strike a balance between freedom of speech and protection of reputation. Yet the state of the law encourages politicians to use the courts to quell dissenting media, and makes investigative journalism even more risky and expensive - and therefore less appealing for publishers - than it would otherwise be. Weisbrot

argues the easy availability to politicians of defamation law not only "inhibits investigative reporting and robust political debate" but is "particularly inappropriate" because elected politicians can use the floor of parliament and the "extraordinary protections of parliamentary privilege" to defend their reputations.⁴⁴

What can be done?

Although a public figure defence may be a way off in Australia, statutory reform may help in reframing the test of reasonableness for qualified privilege, to explicitly require courts to consider what can reasonably be expected of news publishers, given the time constraints and structure of the media, and the public interest in scrutinising public figures and events. Beecher argues there is a role for the media in highlighting the challenges facing the industry and focussing the public's attention on what a future Australia with diminished investigative journalism would look like. He calls for the challenges facing journalism to be ventilated by the media, just as the media would cover threats to any other important industry or profession.⁴⁵ This may help develop a sense of public urgency, which could filter through to parliaments and courts, encouraging legal developments that are consistent with promoting a fair but strong and viable news media sector.

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35 Ibid, 284.

36 Ibid, 373, 374.

37 Sally Walker, 'Lange v ABC: the High Court Rethinks the 'Constitutionalisation' of Defamation Law' *Torts Law Journal*, volume 5, number 1 (March 1998), 52.

38 Above n 30, 385, 415.

39 Above n 30, 399.

40 Ibid, 402.

41 Ibid, 403.

42 Ibid, 293.

43 Judith Gibson DCJ, 'Defamation case law analysis and statistics' *Australian Defamation Law and Practice*, Hardcopy Service 70, September 2013.

44 Press Council media release, 'Australian Press Council Chair calls for urgent action on defamation law reform' 1 July 2015.

45 Ibid.

Stalemate Over Chess Broadcast Rights

Tom Platt looks at an interesting copyright issue arising from the commercialisation of the burgeoning sport of professional chess.¹

Over 200 million people tuned in to watch Magnus Carlsen, the 'Mozart of Chess', win the Chess World Championship from Viswanathan Anand in 2013. With top chess players becoming younger and more marketable (Carlsen moonlights as a G Star Raw model in his spare time), and chess participation growing rapidly in China and India, these figures will likely only increase. However, the potential commercial value of this interest is unclear, with the chess world having reached a stalemate over the scope of the right to broadcast a chess game.

In November 2016, Carlsen successfully defended his World Championship title against Russian challenger Sergey Karjakin. Ahead of the event, the official broadcaster of FIDE (Fédération Internationale des Échecs), Agon Limited (**Agon**), announced its intention to strictly enforce its "exclusive rights to broadcast the games".² In any other sporting context such a statement would not be controversial. Subject to prior agreements, an organising body ordinarily has the prima facie rights to license (on an exclusive basis or otherwise) a third party to create and broadcast a video stream, commentary, and related content such as press conferences. This conventional understanding was recently applied in *England And Wales Cricket Board Ltd & Anor v Tixdaq Ltd & Anor* [2016] EWHC 575 (Ch), with Justice Arnold holding that the publication of 8 second video clips infringed the copyright in cricket broadcasts owned by the England Cricket Board.

However, the nature of chess means that the spectacle of a chess game is not entirely captured by these traditional broadcast components. All you need to follow a chess game are the moves. As the November 1905 edition of *Lasker's Chess Magazine* noted, "[c]hess differs from other things in that the score of a game adequately and absolutely represents everything that transpires over the board.... Where is the reporter who could really convey a tithe of what transpires on the football field, the cricket field, the billiard table, the concert room or the theatre?"³

On this basis, it has been common practice (until now) for chess websites to report on live games by relaying the moves as they are played onto graphical chess boards. It is this practice that Agon is attempting to stop, seeking to restrict websites from relaying the moves until two hours after the end of each game. In the April 2016 Candidates Tournament (where the challenger for the World Championship was decided), Agon threatened four chess websites (**third party websites**) with legal proceedings if they continued to relay the moves live. With one of the third party websites having declared its intent to continue its live coverage,⁴ and Agon publishing a legal 'white paper' to justify its position,⁵ it appeared that the issue would again come to a head again in November.

Copyright in a chess game

Agon's claim has renewed a long debated topic of whether copyright can subsist in a chess game. Wilhelm Steinitz, the first ever Chess World

Champion, prior to his 1886 match with Johannes Zukertort, inserted a clause into the match contract providing that the "[p]roperty right in the record of all games played in the match shall insure to each player, who shall have the separate right of publishing any or all the games during the match".⁶ This went against the understanding of the day, with the International Chess Congress in 1899 noting "[w]e do not profess to be lawyers, but we have yet to learn that a spectator reproducing a game from memory is guilty of any breach of copyright."⁷

There are several reasons why the International Chess Congress's view remains appropriate today. Chess moves are made according to the rules of the game and therefore are unlikely to constitute a work of authorship. The 'discovery' of a move from a finite number of possible moves suggests that a chess move is inherently 'factual'. As has been argued elsewhere, "chess parameters... yield abstract concepts that are discovered rather than created... [and] one cannot legally (by chess terms) make or create moves on the board that fall outside the confines of those rules."⁸ By contrast, annotated chess games (where players add their analysis of the game alongside the notation of the moves) would be more likely to be protectable.

The third party sites argue that relaying the moves of a game is equivalent to an online newspaper publishing a rolling feed of a live football game, updating readers on the score and the progress of play. They argue that Agon's claim to be able to restrict reporting on and

1 Tom is a lawyer in Gilbert + Tobin's Intellectual Property group.

2 Agon, 'Agon Ltd Commences Legal Action Against Chess24, InternetChessClub, Chessgames and Chessbomb For Breaching Broadcast Restrictions', 12 March 2016, available at: <<http://www.agonlimited.com/news/2016/3/12/agon-ltd-commences-legal-action-against-chess24-internetchessclub-chessgames-and-chessbomb-for-breaching-broadcast-restrictions>>.

3 Lasker's Chess Magazine, November 1905, p 34.

4 Chessdom, 3 March 2016, 'AGON's new policy puts the Candidates Tournament idea in jeopardy', available at <<http://www.chessdom.com/agons-new-policy-puts-the-candidates-tournament-idea-in-jeopardy/>>.

5 Shekhovtsov & Partners, White Paper on Commercial Value and Protection of Exclusivity of Chess Moves during Broadcasts, available at <http://static1.squarespace.com/static/52cd2778e4bobo2edf9e4eed/t/56da18f8555986bc67eaae2d/1457133816887/white_paper_position.pdf>.

6 *Chess Monthly*, January 1886, p 136.

7 *Illustrated London News*, 20 May 1899, p 726.

fan discussion (including on social media) of the games while they are in progress, goes much higher than the right enjoyed by broadcasters in other sports. This appears to be the case. Due to the 'factual' nature of chess moves and the freedom of individuals to publish news (and in this context, scores of a football game, or moves in a chess game), it is unlikely that copyright will allow Agon to sustain its claims.

Click wrap agreements

Agon acknowledged the potential difficulty of protecting its broadcast through copyright and noted in its White Paper that the use of "additional legal tools" will be "absolutely necessary".⁹ To this end, Agon has inserted a click wrap agreement on its website that users are required to accept as a condition to viewing the broadcast. Clause 7 of the agreement inserted on the website for the April Candidates Tournament provided the following:¹⁰

*By using this website you expressly agree that the information about chess moves of the fide 2016 candidates tournament games is expensive to gather and time-sensitive and that uncontrolled copying of this information during or shortly after the end of respective chess game may reduce the incentive of the company to organize similar events in the future. **You further agree not to publish any information concerning the chess moves of the candidates tournament 2016 chess games during such games and within two hours after their end.** (emphasis added)*

With similar conditions imposed on spectators at the actual event, Agon is attempting to prevent the initial dissemination of the moves. However, notwithstanding potential issues relating to the enforceability of the agreement across different jurisdictions, Agon's click wrap solution faces two practical problems. First, the agreement is

only enforceable against the website user and does not create any cause of action against a third party website that has merely received the information. And second, if a third party website begins relaying the moves, it will be practically impossible to identify the user who has breached the agreement.

'Hot news' doctrine of misappropriation

The final ground on which Agon is attempting to protect its broadcast is under the US 'hot news' doctrine. For this reason, Agon chose New York state as the applicable jurisdiction governing its click wrap contract. Agon claims that its broadcast clearly satisfies the five elements of the doctrine, being:

- i. the plaintiff generates or gathers information at a cost;
- ii. the information is time-sensitive;
- iii. a defendant's use of the information constitutes free riding on the plaintiff's efforts;
- iv. the defendant is in direct competition with a product or service offered by the plaintiffs; and
- v. the ability of other parties to free-ride on the efforts of the plaintiff or others would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened.

The doctrine has been relevantly considered twice in recent years by the United States Court of Appeals for the Second Circuit. In *National Basketball Association v Motorola Inc* (1997),¹¹ the Court considered Motorola's handheld pager that displayed live statistics of NBA games in progress. In *Barclays Capital Inc v Theflyonthewall.com* (2011), the Court considered a third party website's reporting of daily stock recommendations.¹² In both cases, the Plaintiffs failed to make out the fifth 'free rider' element. Motorola and Theflyonthewall website were

both found to have expended significant resources in collecting the information themselves and therefore were not held to be free riding.

For Agon, it is tempting to think that the relaying of chess moves can be distinguished from both of these cases. The third party websites are not expending significant resources, they are simply relaying the moves, and they indeed appear to be reducing Agon's incentive to broadcast the information. However, Agon would likely face difficulties invoking the doctrine. The significant costs expended by Agon are not expended for the purpose of broadcasting the moves, but rather for the purpose of holding and hosting the event. Indeed, the cost of actually broadcasting the moves is negligible and is almost entirely accomplished by the chess boards themselves, which track and relay the moves electronically.

Breaking the stalemate

In 1899 the world's greatest chess players (including Wilhelm Steinitz) played in the London Chess Tournament. The tournament organisers received £70 from newspapers for the right to publish the games.¹³ While the value of this right may have since increased, come November, the onus will be on Agon to show that the legal position has changed. Agon has played a gambit, resting its case on click wrap agreements and the 'hot news' doctrine. But like most gambits, although we are only just out of the 'opening', Agon's position is looking dubious.

Postscript: On the eve of the match, Agon's application in the US District Court for an interlocutory injunction to prevent the rebroadcast of moves by the third party websites was rejected. Judge Marrero noted that the case was "quite comparable" to *NBA v Motorola* and that damages were likely an adequate remedy if Agon chose to seek relief after the event.

8 Alisa Melekhina and Neal Orkin, 'Intellectual Property Issues in Chess Games' (2011) 6 *Journal of Intellectual Property Law & Practice* 723 at 726.

9 Shekhovtsov & Partners, White Paper on Commercial Value and Protection of Exclusivity of Chess Moves during Broadcasts, available at <http://static1.squarespace.com/static/52cd2778e4bobo2edf9e4eed/t/56da18f8555986bc67eaae2d/1457133816887/white_paper_position.pdf>, 1.

10 FIDE, Terms and Conditions of FIDE 2016 Candidates Tournament Online Broadcasting, 12 March 2016, available from <<https://worldchess.com/terms-moscow-2016/>>.

11 *National Basketball Association v Motorola Inc*, 105 F. 3d 841 Court of Appeals, 2nd Circuit 1997.

12 *Barclays Capital Inc v Theflyonthewall.com Inc*, 650 F. 3d 876 Court of Appeals, 2nd Circuit 2011.

13 Edward Winter, 'Copyright on Chess Games', last updated 19 April 2012, available at <<http://www.chesshistory.com/winter/extra/copyright.html>>.

Profile: Eleni North - General Counsel and Company Secretary of the Australian Rugby League Commission



CAMLA Young Lawyers representative, Danielle Slim, recently spoke to Eleni North about her roles at the Australian Rugby League Commission and the negotiation of large broadcasting deals for sporting leagues.

Can you tell us a little bit about your role and your team?

I am the General Counsel and Company Secretary of the Australian Rugby League Commission (ARLC), which governs the National Rugby League (NRL) competition as well as a number of other competitions including grass roots rugby league. My primary focus is on the corporate and commercial law aspects that relate to the game. The NRL is fundamentally an entertainment business – one of the biggest in Australia – so the team’s commercial work focuses on a range of work relating to the broadcast and staging of major events and the exploitation and enforcement of the rights associated with the game of rugby league. The ARLC is also responsible for delivering a number of community and government initiatives across the country, which largely focus on grassroots rugby league. As General Counsel, I am part of the Executive team and in that capacity am responsible for People and Culture at the NRL, and for most of this year, also NRL’s Community team. This has given me the opportunity to expand my skills and experience across the game. There are three lawyers in the legal team. The ARLC also has a separate Integrity team with a number of lawyers, who deal with issues relating to players. As Company Secretary, I also provide support to the ARLC, which is effectively the governing body of the sport.

What motivated you to work within one of Australia’s most loved sports? Do you have a passion for NRL or sport generally?

I have always been interested in all sports and grew up with NRL, in particular. I understand the game and passion of its fans and supporters but also its ability to reach and influence a large part of our community. There is a great opportunity to use that scope and influence not only to entertain but to spread positive messages throughout the rugby league community and beyond. It’s something that the NRL takes seriously and invests heavily in. That was very important to me in deciding to accept the role.

What is your favourite sporting moment?

It has to be Johnathan Thurston kicking a field goal in extra time to win the 2014 Grand Final. The North Queensland Cowboys scored a try on the final siren to draw the match. It was an extraordinary ending to a hard-fought match. The tension in the stadium was amazing. Even the experts have called it one of the best Grand Finals of all time!

Many would consider working at the NRL a dream job!

It is absolutely a dream job – it’s an interesting, complex and dynamic role. There are not many roles that combine great high-quality legal work as well as the opportunity to contribute to the community.

The broadcasting of Rugby League on television has come a long way. A huge part of this progress has been due to the broadcasting rights agreements negotiated by the NRL. The recent deal was reportedly \$1.9bn over 5 years, a 70% increase on the existing deal. What was your/legal’s role in the negotiating process?

The NRL had a small team who were heavily involved in the media rights negotiations late last year (Australian rights) and early this year (New Zealand rights). As a lawyer, it is fantastic work to be involved in. It is both challenging and rewarding – but unlike other transactions which you complete and then hopefully don’t think about again, our media rights agreements are like the bible for our broadcast relations for the next five or so years. They are constantly under scrutiny and review.

The new deal is locked up until 2022, but beyond that, what do you see for the future of sports broadcasting rights?

Like all sports, we are keeping a keen eye on developments and watching how the landscape changes over the coming rights cycle. We expect there to be many changes. It’s exciting times for everyone involved.

What is the best career advice you have received?

Keep it simple.

It is much harder than it sounds.



Danielle Slim is a Senior Legal Counsel at Fox Sports Australia and a member of the CAMLA Young Lawyers committee.

Social Media, Sports Stars and Celebs

Some Tips and Traps

During the recent Rio Olympics, Australian swimmer Mack Horton learned the hard way how social media platforms are impacting the sporting arena. After calling his rival Sun Yang a “drug cheat”, Horton was (and continues to be) “trolled” on his Twitter and Instagram accounts by Chinese fans. The online abuse Horton received surely took some of the shine out of his gold medal win.

From a legal perspective, sports stars and celebrities have a range of issues that they need to consider when they participate in social media.

Defamation

Social media users are accountable for any defamatory comments they post online, being material that is likely to damage a person’s reputation. However, there are added layers of complexity in applying the traditional concepts of defamation to online publications, given that the law of defamation has developed with traditional media in mind.

Where the sportsperson or celebrity is the subject of a defamatory comment, these issues include:

- **working out who to sue.** Anyone who participates in the publication of defamatory material can be sued. However, in an online context, the ability to publish anonymously or pseudonymously means that it can be difficult or even pointless to commence civil proceedings against the key perpetrators of the defamation. Even where individual authors can be identified, it is often the case that they have limited assets. Individuals have started attempting to sue internet intermediaries, including search engines and social media platforms – but this raises jurisdictional issues (given that most social media platforms are based in the United States, where

laws place a great emphasis on freedom of speech, and do not have assets in Australia) and questions of whether such intermediaries should be held to be publishers at all or whether a defence of innocent dissemination should apply.

- **working out whether the online publications convey defamatory meanings.**
 - Changing community standards may mean that certain comments made on social media are held not to be defamatory when applying the “ordinary reasonable reader” test. The nature of the interaction now occurring online, including by internet “trolls”, may be seen by courts to be merely “vulgar abuse”.
 - Further, any defamatory meaning could be balanced where different views are published on the same account or post – it comes down to how the “matter complained of” in issue is defined, given that the court assumes that the ordinary reasonable reader or viewer reads or sees the whole of the matter complained of. This principle is complicated in a social media context, where Twitter feeds consist of short 140 character updates and Facebook profiles consist of various updates, photos, comments and tags. In the recent proceedings commenced by Joe Hockey against Fairfax¹, the Federal Court found that a bare tweet could be regarded as a discrete publication and its defamatory meaning determined separately from the material to which it hyperlinked.
- **working out whether a defence applies.** In particular, the defence of “honest opinion” is

available under the statute where a publication is an expression of opinion related to a matter of public interest which is based on “proper material” (being either true facts or privileged material, which is stated in the publication). The defence of “fair comment” is also available under common law. Although comments posted on social media usually represent the user’s opinion, they are not always expressed as such and frequently come across as statements of fact. Another problem with this defence in a social media context is that it is very difficult to set out the facts on which the opinion is based in 140 characters!

In circumstances where the sportsperson or celebrity is doing the posting, they should bear in mind the increased risks that come with publishing material online given the ease with which posts can be “liked”, “shared”, “retweeted” and “forwarded”, meaning that posts can very quickly go viral. Under Australian law, a new publication occurs each time online content is downloaded by a user (which continually refreshes the limitation period), so publishers could be exposed to actions in numerous jurisdictions and for an extended period of time. Once posted, the comments are also largely permanent and searchable.

Another key online issue is republication - if you repeat defamatory statements made by another person, you will yourself be equally liable for defamation as the person who said it originally. There is no need for the republisher to adopt or endorse the original statement – a simple repetition is sufficient. This has particular application in a social media context, where sharing published matter is quick and easy. The original publisher may be held liable for subsequent republications of their defamatory statements where the repetition of the words were the

¹ *Hockey v Fairfax Media Publications Pty Ltd* (2014) 332 ALR 257.

“natural and probable consequence” of the original statement – given the mechanisms of social media are specifically designed to allow users to share and redistribute content, this principle will be highly relevant.

Ultimately, running a defamation claim in the courts is a very lengthy and expensive process, can further increase the adverse attention given to a plaintiff and can sometimes turn out to be a pyrrhic victory. We saw this recently in the case brought by Stephen Dank against Nationwide News.² Dank, the sports scientist implicated in the supplements scandal which recently engulfed the rugby league and AFL, sued over a number of articles published in The Daily Telegraph newspaper and online. While the jury found that the newspaper had established defences (including a truth defence) to some of the articles established, Dank was entitled to judgment in his favour for one of the articles. However, the court held that the mitigating impact of the true imputation was such that it reduced the damages that should be awarded to nil. Instead, Dank was ordered to pay the newspaper’s costs of the proceedings.

Privacy

The rise of social media has resulted in the private lives of sportspeople and celebrities becoming increasingly public, with Instagram profiles and Facebook posts regularly becoming the subject of mainstream media coverage and water-cooler discussions.

In Australia, there is currently no recognised tort of privacy under common law or statute, although there have been various recommendations for the introduction of a statutory cause of action for serious invasions of privacy, including by the Australian Law Reform Commission in 2014.

In the UK, the equitable action for breach of confidence has been developed to provide legal protection to prevent the disclosure of private information. “Super injunctions” have been granted by the courts

to prevent the identities of famous people and details of their alleged affairs being published in British tabloids – including Jeremy Clarkson and various high-profile football stars. However, issues have emerged where their identities are revealed overseas given that the injunction only applies in the UK – in 2011, footballer Ryan Giggs’ name was revealed on Twitter after he was named under parliamentary privilege, rendering futile the injunction he had obtained.

A similar situation has occurred again this year, with celebrity couple “PJS” and “YMA” getting an injunction to prevent *The Sun on Sunday* from publishing details of a threesome between PJS and another couple – however the couple’s identities were able to be published outside England and Wales, and quickly went viral on social media and in foreign press, as a quick internet search will reveal. In May, Twitter’s legal team sent an email on behalf of PJS to users involved in naming him which requested that the tweet be removed.

Sponsorship and endorsements

Social media is increasingly being used as a sales platform, with “influencers” including celebrities, sportspeople and bloggers promoting various products and services. According to PwC, spend on influencer marketing reached \$70 million by 2014 and is expected to reach \$240 million in 2019. New apps such as “LikeToKnow.It” are providing the link between influencers and retailers, with Instagram users able to simply “like” a photo and receive an email into their inbox with links to buy the items on display. These posts may or may not be “#sponsored”.

This gives rise to issues under the Australian Consumer Law and the law of passing off which, amongst other things, prevent traders from engaging in misleading or deceptive conduct or making false or misleading representations, including in relation to any sponsorship, approval or affiliation (or lack thereof).

In the US, guidelines have been introduced by the Federal Trade Commission which require the disclosure of any connection between an influencer who is endorsing a product and the seller of the advertised product where it might materially affect the weight or credibility of the endorsement. A specific example given in the guidelines is that of a professional tennis player who has a contractual relationship with a clinic, and posts on social media about the results of a recent surgery, mentioning the clinic by name. Given the nature of social media, consumers might not realise that she is a paid endorser, and this might affect the weight consumers give to the endorsement. The Kardashian-Jenner family has recently been reprimanded for non-disclosure of over 100 paid product placements, with the hashtag “#ad” now being added to their posts.

There are no comparable guidelines in Australia as yet, but the general consumer protection laws apply equally to social media as to other marketing or sales channels. Traders can also be held responsible for misleading or deceptive posts or public comments made by others on their social media pages where they are aware of them but do not remove them promptly.³

Lessons

It is clear that social media can be a minefield for those brave enough to set up a public profile – particularly when the posts that tend to get the most “likes” and attract the most followers are the controversial ones! A few top tips are:

- Don’t post in anger – keep your rants off social media to avoid defaming someone.
- Be honest and transparent when selling products and services – but don’t be so honest and transparent about your life in general that you lose any semblance of privacy!

Marlia Saunders, Senior Associate, Ashurst Australia and **Sophie Dawson**, Partner, Ashurst Australia

² *Dank v Nationwide News Pty Ltd* [2016] NSWSC 295.

³ *Australian Competition and Consumer Commission (ACCC) v Allergy Pathway Pty Ltd (No 2)* (2011) 192 FCR 34.

On the Offensive: How Disruptive Technologies are Changing the Business of Sport

By Marlia Saunders and Anita Cade

In our world of fast-paced technological change, consumers are both a driver of changes in content models and a beneficiary of the explosion of choice of content and choice of platform. Sport is one area where the changes are at their most acute. The ready availability of mobile and online content platforms, apps and social media, and the varied and extensive content they can house, are significantly changing the business of sports content rights. As technology continues to change the way we access, discuss and otherwise participate in sports events, it is increasingly important for rights holders to innovate and embrace these new technologies. This is not simply a case of survival. It's a case of harnessing their benefits – from increased profits to improved loyalty and longevity.

New consumption habits shaping rights deals

Advances in technology have changed the way that we consume sports content. While there is still a place for linear, terrestrial coverage of sports content – on the couch at home at a time set by programmers at television networks (often on a delay), viewers are now increasingly able to demand “true live” coverage (or the ability to record and watch sports content at a time convenient to them). They are also regularly seeking access to content beyond traditional platforms, including via the internet and mobile devices – and often in more digestible options such as highlights packages.

In August 2015, the AFL broadcast rights deal was announced. With the free-to-air television, pay television, online and mobile coverage rights being carved up between Seven,

FOX SPORTS and Telstra, the deal is reported to be worth \$2.5 billion¹ – significantly higher than the previous rights deal. The deal appears to have been structured in response to the demand from fans for live coverage, highlights and replays, dedicated channels and digital access to coverage. The NRL broadcast deal was announced a few months later, reportedly at \$1.8 billion, and again significantly higher than the previous rights deal.

These deals demonstrate that in this environment of fragmented audiences, premium sports content still promises to bring the masses (and therefore the big advertising dollars) to one platform. In this regard, it reinforces the importance of sports content to free-to-air television in particular. In the digital space, these deals offer the promise of subscribers with a higher average revenue per user (RPU), as well as brand loyalty and “stickiness”.

The “players” in the AFL and NRL broadcast deals are the usual suspects, namely, free-to-air TV, pay TV and digital providers. But in the last few examples of these deals, we have seen an increased overlap or at least a blurring of the lines in the potential offerings of these usual suspects, in particular in the digital space. In the AFL deal, for example, it will be interesting to see exactly how the digital rights are divided, with all rights holders and the AFL itself making certain content available online.

For many years, rights agreements and licences to commercialise content have needed to be carefully drafted to accommodate changes in technology and platforms. As

the boundaries between the rights granted to different parties become even more finely tuned, it is critical that the drafting of such agreements is up to the challenge. The question of the breadth of “broadcasting” rights has been the subject of previous consideration by our courts and was tested again in April this year. Justice Hammerschlag of the NSW Supreme Court held that a program supply agreement between WIN Television and Nine Network, which granted WIN the exclusive licence to broadcast Nine's programming in the licence areas covered by WIN's stations, did not extend to allowing WIN to transmit such programs via the internet.² Nine was therefore permitted to continue transmitting its program schedule by live internet streaming, including to recipients in the licence areas covered by WIN's stations, with the Court finding that Nine was not under an implied obligation not to do so. Cases like these serve as an important reminder to parties to clearly set out the rights being licensed, including by future proofing the drafting to cover technological developments.

In addition to lines being blurred between traditional media participants, some participants are moving into entirely new areas (the AFL's acquisition of the management rights and freehold of Etihad Stadium springs to mind) and other new entrants are arriving. This year, Twitter launched its first live broadcasts of sporting events, initially with Wimbledon matches and then with a number of NFL games and soccer matches. In October, Twitter announced a partnership with the Victoria Racing Club to stream the 2016 Melbourne

¹ <http://www.afl.com.au/news/2015-08-18/afl-on-the-verge-of-signing-new-tv-deal>

² *WIN Corporation Pty Ltd v Nine Network Australia Pty Limited* [2016] NSWSC 523

Cup to an Australian and global audience. The deal was said to be Twitter's first live streaming deal outside of the United States³. The content from the Melbourne Cup race itself was supplemented by a range of other content, such as video clips over the course of the Melbourne Cup Carnival, including the concluding stages of every race, fashion, celebrity and venue highlights, and exclusive behind the scenes action. Similarly, while Optus has played in this space to some extent for some time, its more recent English Premier League deal, in which it is reported to have acquired all Australian broadcast rights (not just mobile), has well and truly cemented its position as a key player in this space.

The sports content rights arena is an increasingly crowded field. The more rights are carved up, and as more content is made available for each platform, the greater the challenges will be for players to clearly define their exclusivity arrangements and to leverage their content offerings to consumers. This landscape is also a fertile ground for disputes, as parties seek to protect the rights for which they have generally paid big bucks.

Increasing interaction, increasing sales

Social media of course provides an additional platform and the opportunity for sporting bodies and broadcasters to engage in two-way conversations with fans. It also enables fans to on-share content with their connections, thereby potentially expanding the audience for the content and attracting new fans in different markets and demographics.

The number of interactions recorded by social media platforms such as Facebook and Twitter during high profile sporting events is staggering.

During the Rio Olympic Games in August 2016, Facebook reported more than 1.5 billion likes, posts, comments and shares related to the Olympics⁴ and Twitter reported that over 187 million tweets were sent about the Games.⁵ During the 2014 FIFA World Cup, Facebook reported approximately 3 billion interactions related to the tournament, by around 350 million people, which was the largest conversation about an event on Facebook to date.⁶ The "Sensis Social Media Report 2016" found that more than one in four people discuss the television programs they watch on social media.⁷

With this increasing number of social media "conversations" comes increased marketing and promotional opportunities. According to the Clearinghouse for Sport, an Australian Sports Commission led information and knowledge sharing initiative, "the effective use of social media can assist sports to connect to new audiences, raise team and individuals profiles, potentially leverage new income streams and over time support enhanced capability, capacity and sustainability."⁸ To effectively leverage social media, sporting codes now employ a large number of journalists in-house, becoming media companies and content creators in their own right.

Social media platforms also provide additional opportunities to sell, including by athletes and personalities integrating paid products and services into their feeds and earning sponsorship dollars as a result. Sporting teams often send merchandise to key social media "influencers", who then share it with their followers via their own user-generated content, which in turn raises the teams' profiles with people who may not already be

fans. Given that these interactions are all happening online, the data and commercial benefits can be tracked, measured, valued and sold more effectively to sponsors. Having increased feedback and data about customers also means that sports companies can improve their offerings to answer demand, and can better develop new products and services.

Opportunities for ambush and reputational damage

The many layers of content rights and sponsorship properties which have resulted from these technological advances has unsurprisingly also opened up the potential for conflicts of interest and dilution of rights. Elite athletes have for many years been personalities and commodities in their own right, but their scope for leveraging that personality is now greater than ever and this is no longer the reserve of top professional athletes. Athletes from amateur sports or lower ranks of professional sports are now better able to attract their own sponsorships and endorsements. These individual arrangements as well as the increasing number of ways in which rights can be carved up, give rise to greater scope for conflict, as between athletes' individual arrangements and those with their team, code or network or between sponsoring parties competing for an exclusive piece of the action.

The extent to which the respective interests of different rights holders can collide in these sorts of arrangements was demonstrated recently during the Rio Olympic Games when Telstra's sponsorship of the Seven Network's exclusive broadcast of the event (as the "official technology partner") and associated marketing campaign was called into question by the

3 <https://blog.twitter.com/2016/announcing-the-melbourne-cup-live-on-twitter>

4 https://media.fb.com/2016/08/22/rio-2016-on-facebook-a-look-back-on-the-top-moments/?_ga=1.31325309.316806165.1466576019

5 <https://blog.twitter.com/2016/the-rio2016-twitter-data-recap>

6 <http://newsroom.fb.com/news/2014/07/world-cup-breaks-facebook-records/>

7 www.sensis.com.au/socialmediareport (page 33)

8 https://www.clearinghouseforsport.gov.au/knowledge_base/organised_sport/sports_administration_and_management/social_media_and_sport

Australian Olympic Committee (AOC). Telstra did not have an official sponsorship with the AOC or the International Olympic Committee, but it was an official sponsor of Seven's broadcast coverage. The Federal Court found that Telstra's campaign was not in breach of the *Olympic Insignia Protection Act 1987* (Cth), nor was it misleading or deceptive in contravention of the Australian Consumer Law. Although the campaign was clearly "focused or themed around the forthcoming Rio Olympic Games", it was found to properly convey an association between Telstra and Seven's broadcast and app, rather than a sponsorship of an Olympic body.

Another risk for sporting codes, networks and sponsors is potential reputational damage in the event that athletes or television personalities post inappropriate content or comments on social media. The Clearinghouse for Sport states that "sport needs to exert 'positive' control

over entities/individuals that are aligned with their sport/brand. To this end, there has been a concerted effort for organisations to develop policies and guidelines for employees, athletes and participants with regard to their professional and personal use and obligations toward their social media usage." Such guidelines can cover the organisation's expectations as to what is permissible to say or do online, and the consequences of engaging in unacceptable online behaviour.

Lessons

It is clear that new technologies are providing a wealth of opportunities for sporting codes, including additional or enhanced revenue streams, and increased exposure and engagement with fans. However, it will be important for organisations to continue to adapt to maximise these opportunities, and to be vigilant of the legal and reputational risks that come hand in hand with them.

In particular, organisations should invest due care in crafting the licence provisions and associated definitions in content rights agreements to ensure they are giving and getting what has been agreed, and that the parties are on the same page as to where the rights will lie as new technologies develop. Sponsors should also seek to ensure that they have legal and practical protection against ambush marketing, including through their arrangements with rights holders. Finally, both rights holders and sponsors should put in place clear social media guidelines for athletes, coaches and spokespeople to protect them against reputational risk.

Marlia Saunders is a Senior Associate and **Anita Cade** is a Partner, at Ashurst in Sydney.

Contributions & Comments

Contributions and Comments are sought from the members and non-members of CAMLA, including features, articles, and case notes. Suggestions and comments on the content and format of the Communications Law Bulletin are also welcomed.

Contributions in electronic format and comments should be forwarded to the editors of the Communications Law Bulletin at clbeditors@gmail.com

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- defamation
- broadcasting
- copyright
- advertising
- information technology
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