

Product Placement – US and UK Regulatory Reviews of an Expanding Market

Lesley Hitchens considers some of the issues associated with product placement in broadcasting and discusses recent reviews commenced by US and UK regulators.

Introduction

It was recently reported that "...Australia is the third-largest paid product-placement market after the US and Brazil and advertisers are expected to spend almost \$280 million on product placement in Australian television programming ... [in 2008]".¹ The growth in product placement is attributed to the increased ability of viewers to bypass the traditional spot advertisement.² Personal video recorders are providing viewers with more sophisticated means to do what they have probably nearly always done: 'skip the ads'.³ It is surprising that a relatively small market, such as Australia, should rank so highly in the product placement market, although it is well behind US expenditure, estimated as \$US2.9 billion in 2007.⁴ The United States (US) has been identified as the largest and fastest growing product placement market in the world,⁵ which is consistent with the size of the US television market. Like the US, Australia appears to be part of a global trend as the media and advertising industries search for forms of advertising which will relieve the dependency on traditional advertising forms.⁶

This growth in the product placement market prompted the Federal Communications Commission (FCC), the US communications regulator, to launch in June 2008, an inquiry (the **Inquiry**) into whether existing broadcasting rules might need to be changed.⁷ Product placement policy is also currently under consideration by the United Kingdom (UK) Government, although the policy and regulatory context is markedly different since product placement in broadcasting is currently prohibited. The UK's interest arises following changes to European Union (EU) rules on television broadcasting which will permit product placement for certain

types of television programming if a member state decides to allow it. Accordingly, the UK Government launched a consultation (the **Consultation**), in July 2008, on whether or not product placement should be permitted.⁸ Neither the UK nor the US review is completed, but this article will provide a brief overview of the issues and concerns being canvassed by the two jurisdictions.

The US Inquiry into Embedded Advertising

Despite a well-established product placement market, the increased use of placement practices caused the FCC to establish the Inquiry. With its launch, the FCC issued a brief issues paper which outlined the practices and the possible policy and regulatory concerns.⁹ The Inquiry remains at this preliminary stage.

The Inquiry refers to the term 'embedded advertising' to describe two practices which are its focus: 'product placement' and 'product integration'. The term 'product placement' is described as "...the practice of inserting 'branded products into programming in exchange for fees or other consideration" and 'product integration' as the practice of integrating "...the product into the dialogue and/or plot of a program".¹⁰ The purpose of these practices "...is to draw on a program's credibility in order to promote a commercial product by weaving the product into the program".¹¹ The FCC described some of the new types of advertising practices which are being offered by broadcasters, such as Fox Sports Network's claim to provide 'product immersion,' the practice of "immersing products into programs ... so that they really feel like it is part of the show", and

Volume 27 N° 3
January 2009

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Communications Law Bulletin

Editors: Matt Vitins & Lesley Hitchens

Printing & Distribution: BEE Printmail

Website: www.camla.org.au

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for those broadcasters in the UK seeking a more relaxed product placement regime, they will have to convince the Government they can re-build audience trust in their integrity

NBC's policy of "bringing in advertisers during programming development."¹² The goal, as the FCC noted, "... of many of these new marketing techniques is to integrate products and services seamlessly into traditional programming."¹³

From a regulatory perspective the FCC's concern is whether the existing sponsorship identification rules (**SIRs**) are adequate to embrace the changes in advertising techniques. An important principle underlying the SIRs is the entitlement of the public "...to know by whom they are being persuaded."¹⁴ The SIRs are based on legislative provisions found in the Communications Act of 1934. Section 317 requires that where matter is broadcast in return for consideration, received directly or indirectly, a licensee must broadcast, at the same time, details of the person who has requested the matter to be broadcast.¹⁵ The FCC has developed detailed rules which set out what will be required for compliance.¹⁶ Related to section 317 is a requirement that any other persons who receive consideration or who provide consideration must inform the licensee to enable compliance with the rules.¹⁷ This obligation applies "...regardless of where in the production chain the exchange takes place".¹⁸ Despite the use of the term 'sponsorship' by the FCC, these rules are broad in their reach, and capture all forms of commercial communication,¹⁹ including the traditional spot advertisement.

However, given that spot advertisements will by their very nature provide identification, mention of the trade or corporate name, or the name of the sponsor's product, will be deemed to be sufficient for compliance.²⁰

As indicated, the SIRs operate on a principle of disclosure. There is no objection in principle to paid-for content but the audience must be made aware of who is paying for that content to be presented. It follows then that practices such as product placement and other forms of embedded advertising are not in principle objectionable. The Inquiry is designed partly to gather information about trends in embedded advertising and the effectiveness of current SIRs. Although embedded advertising is not new, because of the growth in the product placement market and the more sophisticated means available to viewers to bypass traditional forms of advertising the FCC wants to establish the frequency and form of embedded advertising practices. Another aspect of the inquiry is a request for comment on possible changes to the SIRs. The areas for possible amendment include introducing a requirement that:

- the sponsorship identification announcement is made more obvious by requiring lettering to be of a certain size and to be aired for a particular time.

- an announcement must be made at the beginning and the end of the relevant program, provided it is longer than five minutes.²¹

Both these suggestions are taken from existing rules applying to television political advertising.²² Commercial communications currently require only one announcement to be broadcast and to remain on the screen long enough to be read or heard by the average viewer.²³

Currently there are no rules which explicitly prohibit embedded advertising in children's television programming, although the effect of FCC policies related to children's television makes it difficult for embedded advertising to occur. FCC policy requires 'bumpers' (for example, 'And now it's time for a commercial break') to be used to demarcate children's program content from commercial content.²⁴ Embedded advertising would fall foul of this separation policy because of the lack of 'bumpers'.²⁵ The FCC has queried whether its separation policy should be made explicit in its rules.

The FCC does not provide any indication of its likely position, but it does, by reference to submissions made in other contexts, give a flavour of the arguments which are likely to be put forward. Those who would advocate change have suggested that the current rules do not make it sufficiently clear to audiences that embedded advertising may be occurring. It has been suggested that the SIRs should also require announcements to disclose when embedded advertising is occurring.²⁶ Unsurprisingly, those likely to argue that the existing rules are adequate represent industry interests. A common assertion is that embedded advertising does not cause any substantial harm to audi-

ences. For those resisting change, it is also likely to be argued that increased disclosure requirements would amount to an unjustified interference with programming and so violate the First Amendment.²⁷ One of the arguments previously made by industry interests is that increased regulation would interfere with "artistic integrity".²⁸ This is an interesting argument to use because it is the risk of such interference, specifically, the risk to editorial independence, which is used to justify, in part, the prohibition on product placement in the UK.

UK Consultation on Product Placement

Product placement is defined under Office of Communications (Ofcom) rules as "... the inclusion of, or a reference to, a product or service within a programme in return for payment or other valuable consideration to the programme maker or broadcaster (or any representative or associate of either)".²⁹ Product placement is prohibited, although there are two situations which are treated as exemptions:

it is likely to be argued that increased disclosure requirements would amount to an unjustified interference with programming and would interfere with 'artistic integrity'.

- References to products or services which are acquired at no, or less than full, cost, provided that their inclusion is justified editorially (known as 'prop placement').
- Product placement which may be included in a broadcast of a cinema film or non-UK originated television programming, provided that no broadcaster (regulated by Ofcom) associated with the broadcast directly benefits from the arrangement.³⁰

The ban on product placement is consistent with two broader principles which apply to all advertising, sponsorship, and commercial references:

- the requirement for advertising and program content to be clearly separated; and
- the requirement that programs are not distorted by commercial references and that editorial independence over program content is maintained.³¹

Regulation of aspects of television program content has been governed by EU rules since 1989 through the *Television without Frontiers Directive (TWF)*.³² TWF requires member states to ensure that their national laws comply with the provisions of the TWF. Because of its rules on separation of programming and advertising content and requirements for editorial independence,

There is no objection in principle to paid-for content but the audience must be made aware of who is paying for that content to be presented

the TWF was treated by some member states (but not all) as imposing a de facto prohibition on product placement. In any event, the UK has long had in place such a prohibition. In December 2007, a new directive came into force to replace the TWF. The *Audiovisual Media Services Directive (AVMS)*,³³ which will replace the TWF, must be implemented by member states by December 2009. It is the AVMS which has explicitly opened up the possibility for product placement. The Consultation is part of the process of determining how to implement the AVMS into its national rules.

The AVMS defines product placement as "the inclusion of or reference to a product, or service or the trade mark thereof so that it is featured within a programme, in return for payment or similar consideration".³⁴ A member state is required to implement a

general prohibition on product placement, but may, by derogation, permit product placement for certain types of programming:

- feature films;
- television films and series;
- sports; and
- light entertainment programs.³⁵

It follows from this that product placement is not permitted in news and current affairs programming, whilst product placement in any type of children's program is expressly prohibited.³⁶ A member state may also permit prop placement provided that the goods or services have been provided free of charge.³⁷ However, where goods or services have a "significant value" (not defined), they will be treated as product placement.³⁸

Where product placement is permitted, programs making use of product placement must comply with the following:

- the editorial independence of the program must be maintained;
- programs must not directly encourage the purchase or rental of goods or services, for example, by making promotional references;
- the program must not give undue prominence to the product in question; and

- information must be clearly provided of the existence of product placement at the start and end of the program, and on resumption of a program after an advertising break. This latter rule however may be waived in the case of feature films or programs not produced by the broadcaster or an affiliate.³⁹

The rationale for this relaxation was to enable the European audiovisual media industry to secure increased revenue and to become more competitive, particularly with the US.⁴⁰

The Consultation Paper notes the justifications for a prohibition on product placement:

- the need for separation of commercial content from other content, so that viewers know "...when they are being 'sold to'";
- "that those licensed to broadcast are permitted to advertise to the public principally in order to fund entertaining and informative programmes (especially when the public resource of the terrestrial spectrum is used) rather than vice versa"; and,
- "that audiences are better served if the principal incentive for broadcasters is the production of attractive programmes, in the breaks of which they can sell advertising slots, rather than making editorial decisions based principally on the advertiser's wishes to include their products".⁴¹

The Consultation Paper canvasses the arguments to support product placement being allowed. One considered is that audiences are used to, and able to distinguish, product placement because of their exposure to US-sourced programs.⁴² However, the Government rejects the implication that this means that audiences are necessarily able "to distinguish product placement and raise their guard".⁴³ Further the current exception for non-UK originated programming does not compromise editorial integrity because programs have been acquired on the basis of their perceived audience appeal, not for the product placement.⁴⁴ The most crucial argument canvassed is the one used by the EU, namely that product placement revenue would help television broadcasters to be more competitive, especially at a time when they are facing increased competition for audiences and advertising revenues.⁴⁵ This might be seen as a difficult argument to resist, especially in the UK where some commercial broadcasters have public service responsibilities. However, the Government appears sceptical of how significant

an important principle underlying sponsorship identification rules is the entitlement of the public to know by whom they are being persuaded

the revenue increase would be especially given the constraints of the new EU rules, and it notes the growing concern in the US about the extent of product placement.⁴⁶ For the Government however, the key issue is "...whether the comparatively modest additional income which is forecast, at least in the short term, would justify abandoning the long-held principles of European and UK broadcasting".⁴⁷

Although the position could change after consultation, the Government has indicated that its preliminary preference is to legislate to prohibit product placement in all types of programming.⁴⁸ It justifies this as follows: "[t]he Government's central intention is to ensure continued viewer and consumer confidence in the integrity of ... programming ...".⁴⁹

Conclusion

As noted earlier, neither the Inquiry nor the Consultation has yet taken any steps beyond launching the process and canvassing the issues. Whilst there is little indication as to how the FCC will proceed, the Inquiry comes at a noteworthy time as the US inaugurates a new President. The FCC is compromised of five commissioners who are appointed by the President (with the consent of the Senate), although their five year terms of office do not terminate with a change of president.⁵⁰ However, the composition of the FCC will change from its current Republican dominance. Currently there are three Republican representatives, however one of them has recently resigned. The legislation imposes a limitation on the number of members who may be from the same political party. This means that with five commissioners, no party can have more than three commissioners. This resignation will provide the new administration with an opportunity to appoint a commissioner associated with Democrat interests. Significantly, an incoming president can appoint a new FCC Chairman. No announcement has yet been made.⁵¹ It has been the Democrat members of the FCC who have been the most vocal, for some time, in raising concerns about increasing embedded advertising practices and failures in the SIRs, and so with the incoming Democrat administration and consequent FCC changes, a more proactive stance by the FCC could be possible.

The UK Government has already expressed its preliminary preference, although it has indicated that it is open to other options if the case can be made strongly enough. It is likely however that that case will have to be made very forcefully given the emphasis which the Government has placed on the

need to ensure that the trust audiences have in broadcasters is not betrayed – something which is seen as a key element of the success of UK broadcasting.⁵² This emphasis on trust is particularly relevant following a wide scale investigation by Ofcom into practices used by television (and some radio) broadcasters in relation to programs which involved competitions whereby participants paid, via premium rate calls, to participate. The investigation completed in mid-2008 resulted in the imposition of fines of about £5 million. These essentially revenue raising activities were treated by Ofcom as advertising. For those broadcasters seeking a more relaxed product placement regime, they will have to convince the Government that following this recent abuse of trust, they can "...re-build audience trust in their integrity".⁵³ This may be difficult to achieve in the short-term.

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(Endnotes)

- 1 Rachel Browne, 'Ads' 30 seconds of fame under threat', *Sydney Morning Herald*, 24 August 2008, <http://www.smh.com.au/news/technology/ads-30-seconds-of-fame-under-threat-from-technology/2008/08/23/1219262614395.html>.
- 2 Ibid.
- 3 See also, Errol Simper, 'Corporate World turns to new forms of product placement', *The Australian*, 22 September 2008, <http://www.theaustralian.news.com.au/story/0,25197,24379998-13243,00.html>.
- 4 PQ Media Research, 'Branded Entertainment Market Defies Slowing Economy', Press Release, 12 February 2008, <http://www.pqmedia.com/about-press-20080212-bemf.html>.
- 5 Federal Communications Commission, *In the Matter of Sponsorship Identification Rules and Embedded Advertising: Notice of Inquiry and Notice of Proposed Rule Making*, 23 FCC Rcd 10682, 26 June 2008, n 8.
- 6 PQ Media Market Analysis, 'Global Product Placement Spending Grew 37% in 2006', Press Release, 14 March 2007, <http://www.pqmedia.com/about-press-20070314-gppf.html>.
- 7 Ibid.
- 8 Department for Culture, Media and Sport, *The Audiovisual Media Services Directive, Consultation on Proposals for Implementation in the United Kingdom*, July 2008, http://www.culture.gov.uk/images/consultations/AVMS_Consultation_Document.pdf (Consultation Paper).
- 9 Note 5 above.
- 10 Note 5 above, n2.
- 11 Note 5 above, para 2.
- 12 Note 5 above, para 3.
- 13 Ibid.
- 14 FCC, *In re Applicability of Sponsorship Identification Rules, Public Notice*, 40 FCC 141

- (1963).
- 15 47 USC §317(a)(1).
- 16 47 CFR §73.1212 (for commercial and public broadcasting) and 47 CFR §73.1615 (for cable).
- 17 47 USC §508.
- 18 Note 5 above, para 4.
- 19 In fact, the SIRs are not confined to commercial communications but cover other forms of communications such as political or issue-based.
- 20 47 CFR §73.1212(f).
- 21 Note 5 above, para 15.
- 22 47 CFR §73.1212(a)(2)(ii) and (d)
- 23 Note 5 above, para 5.
- 24 Note 5 above, para 6.
- 25 Note 5 above, para 16.
- 26 Note 5 above, paras 7 and 9.
- 27 Note 5 above, para 8.
- 28 Ibid.
- 29 Ofcom, *Broadcasting Code*, July 2005, rule 10.5.
- 30 Ibid.
- 31 See Note 29 above, section 10 (commercial references), statement of principles and rules 10.1-2, and section 9 (sponsorship). Ofcom is specifically charged with responsibility for ensuring that the rules it establishes have regard to the desirability of maintaining editorial independence for program content: Communications Act 2003 (UK), section 319(4).
- 32 OJ L 298, 17 October 1989, 23.
- 33 OJ L 332, 18 December 2007, 27.
- 34 AVMS, article 1(m).
- 35 AVMS, article 3g(1)-(2).
- 36 AVMS, article 3g(2). There are other restrictions such as no product placement for cigarettes and other tobacco products, or for prescribed medical products.
- 37 AVMS, article 3g(2).
- 38 AVMS, Recital 61.
- 39 AVMS, article 3g(2).
- 40 European Commission, *The Modernisation of the Television without Frontiers Directive: Frequently Asked Questions*, Memo/06/419, 9 November 2006, 2.
- 41 Note 8 above, Pt 4, para 9.
- 42 Note 8 above, Pt 4, para 27.
- 43 Note 8 above, Pt 4, para 28.
- 44 Ibid.
- 45 Note 8 above, Pt 4, para 30.
- 46 Note 8 above, Pt 4, paras 32-3.
- 47 Note 8 above, Pt 4, para 34.
- 48 Note 8 above, Pt 4, para 37. Although there is currently a prohibition on product placement under Ofcom rules, the Government has taken the view that the AVMS will require a legislative prohibition: para 21.
- 49 Note 8 above, Pt 4, para 38.
- 50 47 USC §154(a) and (c).
- 51 It is usual for an outgoing chairman, although not necessary, to resign as a commissioner'. FCC Chairman Martin resigned on 20 January 2009, the day of the presidential inauguration. Chairman Martin had been appointed by President Bush. Pending appointment of a new chairman, President Obama has appointed Commissioner Copps, a Democrat, as Acting Chairman.
- 52 Note 8 above, Pt 4, para 35.
- 53 Ibid.

Broadcasting and Social Networking – The Role of Privacy Guidelines

Michael Coonan looks at the use of best practice guidelines on privacy for broadcasters and social networking sites.

The potential adverse effects of privacy breaches in radio and television broadcasts are clearly present, if not amplified, in the online social networking context, particularly for children.

In its report *For Your Information: Australian Privacy Law and Practice* (the **Privacy Report**, August 2008) the Australian Law Reform Commission (**ALRC**) has made a number of recommendations relating to broadcasting and social networking.

In particular, in relation to the journalism exemption in the *Privacy Act 1998* (Cth) (**Privacy Act**) the ALRC has recommended an adequacy requirement for the privacy standards that media organisations must publish and adhere to in order to claim the exemption.¹ The ALRC suggests that:

*This is an important mechanism to ensure that the standards being relied upon are robust and of substance—while respecting the need for a high degree of media autonomy in order to protect freedom of expression—which is vital for the Australian Parliament's stated objective of ensuring safeguards for the handling of personal information.*²

To assist media organisations, the ALRC has also recommended that a template for media privacy standards be developed that they may adopt.³

The ALRC has indicated⁴ that that the template media standards could usefully be informed by the *Privacy guidelines for broadcasters*⁵ (**Broadcasting Privacy Guidelines**) developed by the Australian Communications and Media Authority (**ACMA**).

In light of this recommendation, this article examines the benefits of using guidelines in the hierarchy of regulatory tools, with a particular focus on broadcasters and social networking sites.

This article suggests that publishing guidelines on relevant regulations can be useful for both experienced and new players in the broadcasting and social networking industries; and, can play a particular role for social networking providers, against whom 'black letter law' may not be easily enforceable from one jurisdiction to another.

The Journalism Exemption

Section 7B(4) of the Privacy Act provides that acts done by a media organisation in the course of its journalistic activities (compared with, for example, its collection of personal

information for the purposes of a competition) can be removed from the jurisdiction of the Privacy Act.

In a 2006 speech, the Privacy Commissioner, Karen Curtis, suggested that the exemption "exists to ensure that information of importance to the public interest is not unduly restricted" and is a recognition of "the essential role that free journalism plays in a healthy democracy".⁶

The Privacy Act provides that, to be exempt, a media organisation must commit to published standards which deal with privacy. However, the Privacy Act is currently silent on what constitutes an adequate published standard.

As discussed in the Privacy Report, while the 'traditional' media has generally already published privacy standards (for example, in industry-developed broadcasting codes of practice and the Australian Press Council's *Privacy Standards for the Print Media*⁷), it is open to any media organisation to develop and administer media privacy standards.⁸

This may include emerging media organisations who may wish to obtain the benefit of the exemption in relation to the rules about

Guidance can buttress enforceable rules in primary legislation, subordinate instruments and industry-developed codes of practice.⁹ It can be used to provide immediate assistance in interpreting new regulations¹⁰ or can be prepared by reflection on the operation of a set of rules over a period of time.¹¹

Drawing on the work of Professor Julia Black, the Privacy Report notes that the appropriate time for guidelines is often some time after a rule is first introduced. Professor Black notes that "rules are just a 'best guess' as to the future".¹² If this is accepted, it would appear that rules are amenable to being supplemented with guidance after some experience with their application.

Drawing further on Professor Black's work, the Privacy Report notes that whether or not a rule is 'certain' depends not so much on whether it is detailed or general, but whether all those applying the rule (regulator, regulated firm, court/tribunal) agree on what the rule means.¹³

Dialogue between the regulator and regulated entities in developing guidelines is particularly important in establishing this shared understanding and is indeed vital to the effective operation of the co-regulatory framework for broadcasting and internet regulation in Australia.

Guidelines are often expressed in language that is easier to understand for the lay person

best practice guidance might be particularly useful for new entrants

collection, storage and use of personal information that would otherwise apply under the Privacy Act. Best practice guidance might be particularly useful for these new entrants.

Guidelines in the Regulatory Hierarchy

It is acknowledged that due to its non-binding nature, guidance alone, such as a media standard template, in and of itself will not stop privacy breaches and in and of itself will not provide remedies. However, when guidance is offered to media organisations with a recommendation for use, it can provide start-up check lists or, by providing a basis for the design of systems and procedures, promote behavioural change to achieve compliance more quickly than through remedial action.

From the perspective of decision-makers, guidance can also assist with (although, importantly, not fetter) the exercise of a discretion, often leading to better decision-making by aiding consistency. It has the dual benefit of educating the industry and public about what standards are expected.

than 'black letter law' and can provide case studies to illustrate the operation of a law or regulation. They can also usefully consolidate in one document explanation of related rules from different sources. And, they are flexible as they can be updated outside formal law-making processes to capture current issues.

Where operational check lists in guidelines are integrated into the regulated entity's standard procedures and internal management systems, there is increased opportunity to achieve, as well as prove compliance (for example, by showing records that certain procedures were followed). This is referred to in the Privacy Report as compliance-oriented regulation.¹⁴

A weakness of guidelines is that the public can mistake them for binding or enforceable rules. However, where their status is clear, they help achieve the aim, identified by the ALRC, of "...improving the clarity, consistency and enforcement of privacy laws".¹⁵

ACMA's Broadcasting Privacy Guidelines

The following looks at how the experience of interpreting privacy provisions in broadcasting codes of practice has been distilled into the guidelines which may, if the ALRC recommendations are adopted, assist in developing template media standards.

ACMA released the Broadcasting Privacy Guidelines in 2005 to assist radio and television broadcasters by giving an overview of the way in which ACMA will assess complaints which allege breaches of privacy provisions in the codes.

Speaking at the launch, ACMA's then Acting Chair, Lyn Maddock, noted that Broadcasting Privacy Guidelines sought to address the issue of "how to balance respect for an individual's privacy with the media's role of reporting matters of public interest".¹⁶ Ms Maddock suggested that the effects of privacy breaches can range from embarrassment, harassment and exclusion to detrimental effects on local

- the difference between public and private conduct;
- the use of publicly available personal information;
- obtaining consent to use private information;
- the position of public figures; and
- what constitutes the public interest.

ACMA now refers to these guidelines when reporting on privacy-related investigations of code compliance. For example, in an investigation completed in 2006, ACMA noted that although the Commercial Television Code of Practice does not define 'identifiable public interest', the issue is considered in the Broadcasting Privacy Guidelines.¹⁸

Being a flexible tool, it is open to ACMA to review these guidelines in consultation with industry to provide assistance in interpreting the privacy requirements of codes of practice in relation to current privacy issues in broadcasting.

and non-government organisations based within the UK as well as externally. ACMA was a contributor as well as the National Center for Missing and Exploited Children in the United States. Industry was represented by both local and global providers.

Acknowledging that the internet industry is very diverse, ranging from large global providers to small local services, the Social Networking Guidance states that the assistance it provides is not 'one size fits all'.²² Nonetheless, the document usefully attaches a summary of the relevant (UK) law and provides a check list of matters for providers to consider.

Risks faced by users, particularly children, are common irrespective of their location or the service they are using. These risks are outlined in the Social Networking Guidance. For example, it is noted that children are often unaware of the sometimes unintended audience for their online posts or of their capacity to hide certain information about themselves. As with the Broadcasting Privacy Guidelines, case studies are used to increase the impact of the message.

The Social Networking Guidance provides recommendations for good practice, including (in Part 2) that:

- language and terminology should be accessible, clear and relevant for users;
- providers should make safety information easily accessible, especially during the registration process—for example, reminders to users that they are not anonymous and can be traced through their IP address;
- care be taken about mapping user information from registration straight over to a user's profile;
- 'ignore' functions and the ability to remove friends and tools to review and remove comments be built in;
- defaults be set to private; and
- there be robust complaint handling procedures.

Providers of social networking sites are also reminded to be sensitive to the context in which sites for young users are presented to avoid inappropriate juxtaposition of images and text suitable only for adults with young users' profiles and inappropriate advertising.

Conclusion

In the discussion paper preceding the Privacy Report, the ALRC had indicated that it did not propose regulation of social networking. Rather, it had suggested that children young people, teachers and parents should be educated about social networking websites.²³

While describing the UK Social Networking Guidance as "a useful global initiative that may have an impact [on] the way in which this industry develops", the report notes that initiatives like this are unlikely to stop curious children from making bad privacy choices on the internet.²⁴

Similarly, guidelines in the broadcasting sector may not always prevent breaches of the

a weakness of guidelines is that the public can mistake them for binding or enforceable rules

social life and work opportunities. While noting that, on many occasions, there will be no easy answer, Ms Maddock hoped that the Broadcasting Privacy Guidelines would help raise media and public awareness of the issues.

The Broadcasting Privacy Guidelines were developed with extensive input from broadcasters; in particular, the industry groups Free TV Australia, Commercial Radio Australia and the Australian Subscription Television and Radio Association.

This is consistent with the co-regulatory system established by the *Broadcasting Services Act 1992* (Cth), under which industry groups develop regulation in consultation with ACMA.

As noted in the Privacy Report:

[a]s well as prescribing positive steps for compliance, guidance can be phrased in the negative and set out what will not be sufficient in order to achieve compliance with a principle.¹⁷

As such, the Broadcasting Privacy Guidelines outline steps that can be taken in production to avoid breaches of the codes (for example, avoiding sequences showing a subject's face, which may disclose their identity even where their name is not mentioned; and, using 'pixellation' so that footage can still be used without disclosing identity). The Broadcasting Privacy Guidelines include a number of case studies which emphasise the potential impact of privacy violations by the media in a way that is not possible in a document that contains rules alone.

In practical terms, the Broadcasting Privacy Guidelines assist broadcasters to make judgements about:

The Benefits of Guidance for Online Social Networking

Regulation of online social networking needs to assist both the user (through education) and the provider of social networking services to protect privacy.

Unlike the domestically based broadcasting industry, although providers of online social networking services often have an Australian presence, they usually deliver many of their services from outside Australia. Service delivery arrangements can be complex. These services are usually bound to comply with a matrix of legal obligations imposed by many jurisdictions. In these circumstances, guidelines may provide a flexible and useful tool that may be deployed across jurisdictions.

In the Privacy Report, the ALRC found that online social networking raises two main privacy concerns:

- The extent to which young people should be able to choose to disclose information about themselves online.
- The ability of third parties to post, alter or remove personal information about others in the online environment.¹⁹

While this article does not deal in detail with the regulatory options proposed by the ALRC for online social networking, it is worth noting that the Privacy Report does describe as a 'useful global initiative'²⁰ the United Kingdom (UK) Home Office *Good practice guidance for the providers of social networking and other user interactive services 2008* (**Social Networking Guidance**).²¹

As with the Broadcasting Privacy Guidelines, the Social Networking Guidance was developed cooperatively by government, industry

privacy provisions in the broadcasting codes of practice. However, guidelines in both sectors are likely to assist in establishing systems to prevent privacy violations. As with educating the providers of social networking sites, guidelines and the proposed media standards template can perform a valuable educative role for media providers.

Michael Coonan is a Senior Advisor in the Codes, Content and Education Branch at the Australian Communications and Media Authority. Any views expressed in this article are the author's own and not those of the Australian Communications and Media Authority. The recommendations of the Australian Law Reform Commission have not yet been accepted or rejected by the Government. The comments in this article should not be taken as an endorsement by the Australian Communications and Media Authority of the Australian Law Reform Commission recommendations.

(Endnotes)

- 1 'Recommendation 42–3 The Privacy Act should be amended to provide that media privacy standards must deal adequately with privacy in the context of the activities of a media organisation (whether or not the standards also deal with other matters)'. Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice* (The Privacy Report), Vol 2, p 1471.
- 2 The Privacy Report, Vol 2, p 1468.

3 'Recommendation 42–4 The Office of the Privacy Commissioner, in consultation with the Australian Communications and Media Authority and peak media representative bodies, should develop and publish:

- (a) criteria for adequate media privacy standards; and
 - (b) a template for media privacy standards that may be adopted by media organisations'.
- The Privacy Report, Vol 2, p 1471.
- 4 The Privacy Report, Vol 2, p 1469.
- 5 ACMA, *Privacy Guidelines for Broadcasters*, http://www.acma.gov.au/webwvr/assets/main/lib100084/privacy_guidelines.pdf.
- 6 Karen Curtis, Privacy Commissioner, *Presentation to the Australian Communications and Media Authority's Information Communications Entertainment Conference*, 23 November 2006, p 9, http://privacy.gov.au/news/speeches/sp07_06.doc.
- 7 Australian Press Council, *Privacy Standards for the Print Media*, http://www.presscouncil.org.au/pcsite/complaints/priv_stand.html.
- 8 The Privacy Report, Vol 2, pp 1458–1459.
- 9 In the Privacy Report it is noted that '[g]uidance is the third part of the regulatory approach adopted by the ALRC. It should be seen as sitting at the base of the regulatory model, in the sense that it is non-binding and, unlike primary and subordinate legislation, does not set out rules or obligations'. Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*. The Privacy Report, Vol 1, p 246.
- 10 For example, Communications Alliance's *Telecommunications Consumer Protections Industry Guideline (G631: 2007)*, released on 18 May 2008 with the registration by the Australian Communications and Media Authority of the *Telecommunications Consumer Protections*

Code C628: 2007. Available at <http://www.commsalliance.com.au/documents/guidelines/G631>.

- 11 For example, the ACMA's *Privacy Guidelines for Broadcasters*.
- 12 The Privacy Report, Vol 1, p 235.
- 13 The Privacy Report, Vol 1, p 235.
- 14 Citing Dr Christine Parker: '... the first step of compliance-oriented regulation is 'providing incentives and encouragement to voluntary compliance and nurturing the ability for private actors to secure compliance through self-regulation, internal management systems, and market mechanisms where possible'. The Privacy Report, Vol 1, p 238.
- 15 The Privacy Report, Vol 3, p 2249.
- 16 Lyn Maddock, *Launch of ACMA Privacy Guidelines for Broadcasters: Speech by Lyn Maddock, Act Chair*, 23 August 2005, <http://www.acma.gov.au/webwvr/aba/newspubs/speeches/documents/23aug05-lmaddock-privacyguidelines.rtf>.
- 17 The Privacy Report, Vol 1, p 248.
- 18 ACMA Investigation Report 1813, http://www.acma.gov.au/webwvr/assets/main/lib101072/tnt-report_1813.pdf.
- 19 The Privacy Report, Vol 3, p 2238.
- 20 The Privacy Report, Vol 3, p 2250.
- 21 *Good practice guidance for the providers of social networking and other user interactive services 2008 (Social Networking Guidance)*, developed on behalf of the Task Force on Child Protection on the Internet, <http://police.homeoffice.gov.uk/publications/operational-policing/social-networking-guidance>.
- 22 Social Networking Guidance, p 10.
- 23 The Privacy Report, Vol 3, p 2246.
- 24 The Privacy Report, Vol 3, p 2250.

A Question of Malice

Chris Chapman provides a case note on *Australand Holdings Limited v Transparency & Accountability Council Inc & Anor* [2008] NSWSC 669 which considered the requirements of publication and malice in an action for injurious falsehood.

The introduction of the uniform defamation laws definitively removed the right of a corporation with more than 10 employees to bring an action in defamation. As a result, a corporation which has its products or business publicly attacked must turn to other causes of action if it wishes to rely on the courts for assistance in defending such an attack. One cause of action which may be relied upon is an action for injurious falsehood.

Injurious falsehood is often viewed as related to defamation and it has previously been referred to as 'slander of goods'.¹ But there is a dearth of decided injurious falsehood cases in Australia, especially at the appellate level,² resulting in uncertainty as to the appropriate tests when seeking to establish a case. Decided in the middle of 2008, the decision in *Australand Holdings Limited v Transparency & Accountability Council Inc & Anor*³ (**Australand v TACI**) addresses the appropriateness of applying tests for publi-

cation and malice from the law of defamation to an action for injurious falsehood. The result was that, despite being characterised as an action for 'slander', proving a case for injurious falsehood requires meeting a different standard than is required in defamation actions.

Background – Injurious Falsehood

In the 1892 decision of *Ratcliffe v Evans*⁴ Bowen LJ described the availability of an action as:

That an action will lie for written or oral falsehoods, not actionable per se nor even defamatory, where they are maliciously published, where they are calculated in the ordinary course of things to produce, and where they do produce, actual damage is established law. Such an action is not one of libel or slander, but an action on the case for damage wilfully and intentionally done without just occasion or excuse,

*analogous to an action for slander of title. To support it actual damage must be shown, for it is an action which will only lie in respect of such damage as has actually occurred.*⁵

The availability in New South Wales of the action described in *Ratcliffe v Evans* was confirmed by Hunt J in *Swimsure (Laboratories) Pty Limited v McDonald*⁶ where His Honour described the action for injurious falsehood as:

*an action on the case at common law consisting of a statement of and concerning the plaintiff's goods which is false (whether or not it is also defamatory of the plaintiff) published maliciously and resulting in actual damage.*⁷

Kirby J described the cause of action as having seven elements in *Palmer Bruyn & Parker v Parsons*,⁸ but agreed with Gummow J that the essential elements are: (1) a false statement (2) made maliciously (3) of or concerning the plaintiffs' goods or business that (4) results in actual damage.⁹

For the purposes of the decision in *Australand v TACI*, McCallum J relied on Gummow's formulation of the required elements¹⁰ but that did not resolve the questions of what, in the context of an action for injurious falsehood, the appropriate test for publication is; nor did it address the question of the

required malice. Before addressing how Her Honour resolved those questions, however, a brief review of the facts is in order.

Australand v TACI – The Facts

The plaintiff, Australand Holdings Limited (**Australand**), alleged that the defendants, Truth and Accountability Council Inc (**TACI**) and Mr Solon Baltinos (**Baltinos**), prepared and published three documents that contained various false statements about Australand's business, including that Australand and its employees had participated in a criminal conspiracy to defraud its clients and the Court. Australand further alleged that the publication was motivated by malice on the part of the defendants and that, if not restrained, the publications would result in damage to Australand's business.

Injunctive relief had been granted to Australand in early 2007 when copies of a document entitled 'Official warning from the Transparency and Accountability Council Inc and the Transparency and Accountability Council Investigation Committee TACIC Board of Inquiry' (the **Leaflet**) were allegedly discovered in various business locations of Australand including outside of display home villages. The Leaflet contained various allegations that were styled as findings of

McCallum J required more than falsity to establish an improper purpose amounting to the required malice

an exhaustive investigation. The allegations (all of which the defendants were restrained from publishing as a result of the interlocutory relief) included the above mentioned conspiracy and that: Australand had acted illegally in its dealings with Mr Baltinos and his wife; Australand had breached numerous pieces of legislation including the *Crimes Act 1900* (NSW) and the *Secret Commissions Act 1905* (NSW); and Australand, through its company secretary and general counsel, had misled the Consumer Trader and Tenancy Tribunal (**CTTT**) and made statements that were misleading and designed to pervert the course of justice.¹¹ The hearing before McCallum J was on the question of whether the injunction should be made permanent.

The defendants denied the contents of the publications were false. The second defendant (Baltinos), who was the public officer of the first defendant (TACI), also denied any responsibility for publishing or composing the documents. Both defendants agreed that damage would inevitably flow from the publication of the information but this damage was an unavoidable result of publishing true statements about the plaintiff. As a result of the defendants' assertion that the allegations were true, much of the hearing was dedicated to exploring the truth of the allegations contained in the publications. These allegations centred on events surrounding the decision of Mr and Mrs Baltinos in 1998 to engage a builder to construct a home on a block of land owned by Mrs

The more difficult question for the Court was if the publications were made with the required malice

Baltinos and are not relevant in themselves to the questions of publication or malice.

What is relevant is the manner in which the publications came to be made. It was common ground that Mr Baltinos was unsatisfied with the manner in which his wife's house had been constructed by the independent builder engaged to perform that task. It was also common ground the Mr Baltinos felt Australand should take some responsibility for the builder's failure to perform the works to Mr Baltinos' satisfaction as the builder had been introduced to the Baltinos couple through Australand. The evidence showed that Mr Baltinos' attempts to involve Australand included corresponding with Australand's managing director,¹² taking unsuccessful action in the CTTT,¹³ and unsuccessfully appealing to the Supreme Court of New South Wales.¹⁴

The remaining publications of which Australand complained were two documents – one styled as an 'Interim Report' and the second entitled 'Final Report'. Both documents bore the name and letterhead of the TACI and were apparently designed to carry an impression of official findings of an authori-

tative body. Indeed, McCallum J placed great emphasis in her judgment on the fact that the interim report was presented in a manner that reflected 'the reasoned conclusions of an independent inquiry', which the defendants then deployed as part of a 'threat'¹⁵ to publish. In fact, the evidence showed that TACI was incorporated by Mr Baltinos to "air his grievances under the cloak of limited liability".¹⁶ Both reports contained the allegations complained of by Australand, repeated over many pages and in many different guises.

The Interim Report was provided to Australand under the cover of a letter inviting Australand to settle the Baltinos' grievance or suffer the Final Report being released to the public. The fact that the Baltinos were prepared to withhold publication if they received compensation was also a significant factor in Her Honour's finding of malice.¹⁷

The Issues Before the Court

McCallum J found the allegations contained in the publications were false. Her Honour also found that, while Australand had proven no special damage, the swiftness with which Australand had applied for an injunction and the concession by the defendants that damage would result from publishing the allegations combined to satisfy the requirement for damage.

This left the question of Mr Baltinos' responsibility for the publication of the statements

and if, in the circumstances, the required malice was present.

The question of the Second Defendant's liability for publishing the statements was resolved by reference to the law of defamation. The Court noted that there is little authority on the issue of the appropriate test to apply in determining whether a person 'published' a statement for the purposes of injurious falsehood. McCallum J therefore applied the well known test from *Webb v Bloch*¹⁸ and found that Mr Baltinos was responsible for the publication of the allegations.¹⁹

The more difficult question for the Court was if the publications were made with the required malice. Counsel for Australand had submitted, relying on *Palmer Bruyn*²⁰ that malice exists where the defendant intends harm or harm is the natural and probable consequence of the publication. Approached in this manner, the publisher takes the risk of being found liable for injurious falsehood when statements it believes to be true, but are in fact false, are published with the intention or natural result of injuring the business of another. McCallum J did not accept this submission, noting that *Palmer Bruyn* dealt with the requirement to link the damage complained of to the statements made – not to the question of malice.²¹

The Court then considered the question of malice from the perspective of defamation law. It is well understood that, in a defamation action, malice can be alleged by a plaintiff to defeat a defence of qualified privilege. In such circumstances malice has been found to exist where the publication is made with the sole or dominant purpose of harming the plaintiff.²² McCallum J held that this was not an appropriate test for the existence of malice in an action for injurious falsehood. Her Honour based her conclusion on defamation law's focus on the question of if the purpose was related to the occasion giving rise to the privilege (it being evidence of malice if it can be shown that the purpose was not so related). McCallum J stated that, while impropriety of purpose was the essence of malice, "the parameters of impropriety of purpose in the context of the tort of injurious falsehood are more elusive".²³

Malice – Impropriety

Where the Court did find the necessary impropriety to establish malice on the part of both defendants was in the threat contained in their communications with Australand. McCallum J found that, despite the stated aims of exposing the misconduct of Australand, the probable purpose of the defendants in preparing the publications was to induce Australand to compensate Mr Baltinos. In addition, the threat communicated was not merely to 'go public' with its information but to publish a

document calculated to convey the impression that Mr Baltinos' allegations had been upheld in an independent and competent inquiry.²⁴

Conclusion

Injurious falsehood is a cause of action relied upon much less frequently than defamation or actions for misrepresentation under the *Trade Practices Act 1974* (Cth). The relative rarity of injurious falsehood actions is directly related to the difficulty that a potential plaintiff faces in proving malice, and *Australand v TACI* is a good example of the difficulty of establishing this malice. Even when faced with outrageous statements that had been determined on several occasions by competent courts and tribunals to be false, McCallum J required more to establish an improper purpose amounting to the required malice. On the facts, the impropriety required to establish malice was probably the promise to withhold publication if compensation was paid. Assuming similar offers are not regularly made by editors, it would appear unlikely that media organisations would be held to account in injurious falsehood for their activities.

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(Endnotes)

- 1 LSJ October 2008 page 69
- 2 *Palmer Bruyn & Paker v Parson* [2001] 208 CLR 388 per Kirby J at 419.
- 3 [2008] NSWSC 669
- 4 *Ratcliffe v Evans* 2 QB 524.
- 5 *Ratcliffe v Evans* 2 QB 524 at 527.
- 6 *Swimsure (Laboratories) Pty Limited v McDonald* [1972] 2 NSWLR 796.
- 7 *Swimsure (Laboratories) Pty Limited v McDonald* [1972] 2 NSWLR 796 at 799D.
- 8 *Palmer Bruyn & Parker v Parsons* [2001] 208 CLR 388 per Kirby at 425.
- 9 *Palmer Bruyn & Parker v Parsons* [2001] 208 CLR 388 per Gummow J at [52].
- 10 *Australand Holdings Limited v Transparency & Accountability Council Inc & Anor* [2008] NSWSC 669 at [96].
- 11 *Australand Holdings Limited v Transparency & Accountability Council Inc & Anor* [2008] NSWSC 669 at [7].
- 12 *Australand Holdings Limited v Transparency & Accountability Council Inc & Anor* [2008] NSWSC 669 at [67].
- 13 *Australand Holdings Limited v Transparency & Accountability Council Inc & Anor* [2008] NSWSC

669 at [144].

14 *Australand Holdings Limited v Transparency & Accountability Council Inc & Anor* [2003] NSWSC 1163.

15 *Australand Holdings Limited v Transparency & Accountability Council Inc & Anor* [2008] NSWSC 669 at [165].

16 *Australand Holdings Limited v Transparency & Accountability Council Inc & Anor* [2008] NSWSC 669 at [78].

17 *Australand Holdings Limited v Transparency & Accountability Council Inc & Anor* [2008] NSWSC 669 at [167].

18 *Webb v Bloch* (1928) 41 CLR 331.

19 *Australand Holdings Limited v Transparency & Accountability Council Inc & Anor* [2008] NSWSC 669 at [99].

20 *Palmer Bruyn & Paker v Parson* [2001] 208 CLR 388 per Gummow J at 397.

21 *Australand Holdings Limited v Transparency & Accountability Council Inc & Anor* [2008] NSWSC 669 at [150-151].

22 *Horrocks v Lowe* [1975] AC 135 at 150 per Diplock, LJ.

23 *Australand Holdings Limited v Transparency & Accountability Council Inc & Anor* [2008] NSWSC 669 at [156].

24 *Australand Holdings Limited v Transparency & Accountability Council Inc & Anor* [2008] NSWSC 669 at [164].

Classroom Use of Multimedia Materials – Copyright Infringement or a ‘Special Case’?

Alex Farrar examines the impact of amendments to the Copyright Act 1968 (Cth) on the use of multimedia content in classrooms and questions whether these amendments have achieved their intention of providing greater flexibility in the use of copyright materials.

The use of multimedia content in the classroom has strong pedagogical justifications.¹ It offers an alternative to traditional classroom teaching methods, which are not geared towards visual learners,² whilst students regard the medium as being more current and relevant to their interests and experience.³ New classroom technology – such as interactive whiteboards⁴ – promote classroom use of multimedia content, and, when coupled with high-quality online multimedia libraries, such as the National Film and Sound Archive,⁵ create opportunities for its effective integration into curricula. However, the use of multimedia content in a classroom necessitates dealing with the copyright in the material in ways traditionally reserved exclusively for the copyright holder.

In 2006, the *Copyright Amendment Act* (Cth) (CAA) made changes to Australia's copyright law designed to permit limited, unlicensed 'flexible' dealings in copyright digital and multimedia materials for certain educational purposes. However, because the drafters of the amendments were focused on technology-neutrality and flexibility, the amendments have failed to establish bright-line rules.⁶ This essay contrasts the Government's intention in enacting the 'flexible dealing' provision, with its effect. The very

flexibility introduced in order to permit innovative, socially-beneficial use of copyright materials creates such uncertainty as to be a disincentive to use.

Use of Multimedia in the Classroom

Recent trials and pilots by State and Territory Departments of Education provide two examples of the ways in which schools and teachers are encouraged to use multimedia works in the classroom. The first example is the display of multimedia DVD ROMs (for example) on a communal interactive whiteboard to promote group learning.⁷ The second is the development by teachers of their own multimedia resources for use in a specific lesson,⁸ or in support of particular learning objectives.

In relation to this first type of use, delivery mechanisms like *Clickview* provide schools with centralised hardware for storage of digital or multimedia content.⁹ Typical use of a multimedia DVD ROM in a school would

the use of multimedia content in a classroom necessitates dealing with the copyright in the material in ways traditionally reserved exclusively for the copyright holder

section 28 allows schools to perform and communicate copyright material in class without having to pay a statutory licence fee

entail the storing of its contents on a central server (say, in a school's library) and reticulating the file to the classroom for use on its interactive whiteboard. Such use requires 'dealings' with the work including:

- making a digital copy of the work for uploading to the central server;
- the transmission from the library to the classroom requires multiple reproductions while in transit;
- the reception of the work on the recipient's whiteboard (or computer) involves public display and/or performance, and RAM copying.

A permanent copy of the work might also be made on the whiteboard's hard disk.

The second type of use involves the teacher compiling or transforming existing copyright materials into a single resource, often accompanied by lesson plans and worksheets. This second use is the more problematic within the context of 'fair dealing'.

Educational Exceptions Prior to the Copyright Amendment Act 2006

Because fair dealing's permitted purposes include those of research or study, even prior to the enactment of the CAA, teachers could make unauthorised use of copyright materials in certain, narrow circumstances, and only if such use was also 'fair'.¹⁰ Additionally,

the flexible dealing provision aims to provide a flexible exception to enable copyright material to be used for certain socially useful purposes

some uses were – and remain – permitted under the statutory licence scheme.

The 'fair dealing' exceptions to copyright infringement are specific, purpose-built and geared towards providing certainty for a user. But purpose-built provisions are necessarily narrow and inflexible. Developments in technology, coupled with the tightening of Australia's copyright laws under the free trade agreement with the United States (US), required a new approach.

Recent Amendments to the Australian System

The CAA amended the *Copyright Act 1968* (Cth) (CA) by introducing new exceptions to copyright infringement, including section 200AB which permits 'flexible dealing' in certain works,¹¹ and section 28 which permits limited performance and communication of works or other subject-matter in the course of educational instruction.

While these amendments change the way multimedia works can be stored, used, and viewed by schools and educational institutions, section 200AB has created a number

of problems. During the drafting of the amendments, a number of objections to the 'flexible dealing' provision were raised, including that it would lead to an increase in uncertainty,¹² its interpretation would be unclear and would lead to more litigation¹³, and that it would give too much power to courts at the expense of Parliament¹⁴. A number of these concerns are borne out in a detailed evaluation of the provision.

Section 28: Performance and Communication in the course of educational instruction

Section 28 of the CA states:

Where a literary, dramatic or musical work:

- (a) is performed in class, or otherwise in the presence of an audience; and*
- (b) is so performed by a teacher in the course of giving educational instruction, not being instruction given for profit, or by a student in the course of receiving such instruction,*
- (c) the performance shall ... be deemed not to be a performance in public if the audience is limited to persons who are taking part in the instruction or are otherwise directly connected with the place where the instruction is given.*

In short, section 28 allows schools to perform and communicate copyright material in class without having to pay a statutory licence fee. This permits schools to upload copyright materials to their computer networks or intranet, or to an interactive whiteboard or other content management system for the purpose of teaching a particular class, because a 'performance' under section 27 of the CA includes any mode of visual or aural presentation, including of films and television broadcast. While schools have always been able to show a film, stage a play, or play a CD, this provision has now been extended to allow

schools to utilise new technology to communicate copyright materials, even when doing so requires duplication of the materials.

The section also permits short-term storage of some third-party copyright material, but only for as long as necessary for a particular class. That is, schools can't make a library of stored materials for use as and when they are needed. It is to be stored for a particular class or activity only and cannot be used for entertainment purposes. Section 28 does not permit schools to circumvent copy protection embedded in a physical copy of the work such as macrovision-protection.

Section 200AB: the Flexible Dealing Provision

The stated aim of the flexible dealing provision is to 'provide a flexible exception to enable copyright material to be used for certain socially useful purposes while remaining consistent with Australia's obligations under international copyright treaties'.¹⁵

For the flexible dealing exception to apply, the following requirements, as set out in section 200AB(1), must be satisfied:

- (a) the circumstances of the use amount to a special case;*
- (b) the use is by a body administering library or archives, by a body administering educational institution or by or for person with a disability;*
- (c) the use does not conflict with a 'normal exploitation' of the copyright work; and,*
- (d) the use does not unreasonably prejudice the legitimate interests of the owner of the copyright.¹⁶*

Pursuant to section 200AB(3), 'use by a body administering educational institution' means a use that is:

- (a) made by or on behalf of a body administering an educational institution; and*
- (b) made for the purpose of giving educational instruction; and*
- (c) not made partly for the purpose of the body obtaining a commercial advantage or profit.*

The prohibition on obtaining a commercial advantage or profit does not prevent charg-

Paragraphs (a), (c), and (d) of the flexible dealing requirements mirror the language of the three-step test contained in Article 13 of TRIPS

Few teachers are equipped to conduct subtle statutory interpretation; a risk-adverse educator will rarely, if ever, determine that their proposed use accords with Article 13

ing a fee, on a cost-recovery basis, for providing a service to users.

Paragraphs (a), (c), and (d) of the flexible dealing requirements mirror the language of the three-step test contained in Article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)¹⁷ and, in fact, section 200AB's 'special case', 'normal exploitation' and 'unreasonably prejudice' terms are defined as having the 'same meaning as in Article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights'.¹⁸

TRIPS sets out minimum standards for drafters of copyright law, and, relevantly for section 200AB, the permissible limitations or exceptions to the rights of copyright owners. Article 13 of TRIPS provides that 'members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder'.¹⁹ This wholesale incorporation of terminology from TRIPS into domestic law is controversial,²⁰ because the 'three-step test' is intended to set parameters for the drafting of TRIPS-compliant exceptions by legislators.²¹ Instead, it has been incorporated verbatim as the text of the legislation, and now must be applied by courts to determine whether a particular use is permitted within Australian law.²² Few teachers are equipped to conduct subtle statutory interpretation; a risk-adverse educator will rarely, if ever, determine that their proposed use accords with Article 13. Article 13 itself contains no definition or explanation of the key 'three-step' terms. One WTO Panel decision has applied the three-step test.²³ However, the decision offers little practical or certain guidance for teachers or educators.

The Three-Step Test Considered

The First Step: Special Case

The WTO Panel found that 'special' means "limited in its field of application or exceptional in its scope", "narrow in quantitative as well as a qualitative sense", so that it does not exempt a large number of users.²⁴ 'Case' was held to mean "could be described in terms of beneficiaries of the exceptions, equipment used, types of works or by other factors".²⁵

the US Convention on Fair Use has established a practical guide for educational use of copyrighted multimedia material

The Second Step: Does Not Conflict with the Normal Exploitation of the Work.

The second step essentially requires a teacher to make a determination about the owner's possible use and exploitation of the work. According to the Panel, 'normal exploitation' includes actual and potential uses of the work.²⁶ Not every commercial use 'conflicts' with a normal exploitation of the work, only those uses that would deprive the owner of 'significant' or 'tangible' commercial profits.²⁷ 'Normal exploitation' should be something less than the full scope of the exclusive right.²⁸

This explanation doesn't provide assistance in transformative use, such as where a teacher integrates a clip from a film into a new multimedia compilation.

if educational institutions consider it too risky to rely on such an uncertain exception, the flexible dealing provisions could become practically redundant

The Third Step: Does Not Unreasonably Prejudice the Author's Legitimate Interests

The WTO Panel interpreted 'legitimate' to mean "[lawful] from a legal positivist perspective, but it also has the connotation of legitimacy from a more normative perspective, in the context of calling for the protection of interests that are justifiable in the light of objectives that underlie the protection of exclusive rights".²⁹ 'Prejudice' means any damage, harm or injury, but the key question is whether the prejudice is 'unreasonable'.³⁰

What is the degree or level of prejudice that may be considered unreasonable?³¹ The Panel said that this is to be determined on a case-by-case basis, weighing up respective interests and the real economic prejudice that such an exception causes to the author.³²

What Kinds of Uses are Allowed?

While section 28 is unproblematic, permitting the 'performance' of the multimedia program described in this essay's first example of potential use, section 200AB, even with the benefit of the WTO decision, pro-

vides no workable guidelines to teachers in respect of transformative use of multimedia. It is possible that section 200AB may permit teachers to create their own 'mashup' multimedia digital resources. At least to some degree, the section permits the copying of clips of film or music (for example) to embed in resources for classroom use, and to store those resources in a long-term manner. Further, under section 200AB, schools may be able to store copyright materials on a more permanent basis. But, in general, there are very few indicators as to how or what uses are permitted under section 200AB.

It remains to be seen how and to what extent schools will utilise the flexible dealing provision. What is certain is that the exception will not apply to what can loosely be described as 'commercial' activities, although drawing a boundary between what is and is not conducted for commercial advantage or profit is obviously difficult.³³ This lack of certainty in the interpretation of section 200AB raises a number of questions as to the practical availability of flexible dealing. A teacher cannot reasonably be expected to determine if his

or her proposed use conflicts with the 'normal exploitation' and 'legitimate interests' of a third-party copyright holder. Additionally, the policy-based assessment of copyright law's objectives, as required under the third-step, is a question for courts, not teachers and educational institutions.

If educational institutions consider it too risky to rely on such an uncertain exception, the flexible dealing provisions could become practically redundant.³⁴

What is the Solution?

Because section 200AB is already the product of a legislative balancing act, there are no clear solutions to its flaws. However, the US Convention on Fair Use, in wrestling with the same three-step test, has established a practical guide for educational use of copyrighted multimedia material (**Multimedia Guidelines**).³⁵ The Multimedia Guidelines are an agreement between copyright holders – including the Motion Picture Association of America, Time Warner Inc., Music Publishers' Association of the United States and others – as to what uses they will permit in relation to their materials. The private nature of the Multimedia Guidelines is limiting in scope, and may not be workable in the Australian media environment, where copyright is not concentrated in the hands of a few large studios and corporations. However, the Multimedia Guidelines illustrate how guidance can be developed to determine what is an acceptable level and use of copyright multimedia materials for educational use.

the Multimedia Guidelines represent the level of educational use deemed to be acceptable by leading multimedia copyright holders and provide clear guidelines to US educational users

The Multimedia Guidelines apply to projects that incorporate an “educators’ original material, such as lesson plans or worksheets, together with copyrighted material such as audio-visual material (referred to as ‘motion media work’), music, text, graphics, illustrations, photographs and digital software which are combined into an integrated presentation.”³⁶ In short, the Multimedia Guidelines provide certainty for teachers who wish to create their own educational, multimedia resources from third-party copyright materials.

The Multimedia Guidelines do not permit an instructor to use copyrighted materials over an extended period of time without obtaining the permission of the copyright holder.³⁷ Use of the multimedia by the educator is restricted to two years after the first instructional use within a class.³⁸ Any additional use “requires permission for each copyrighted portion incorporated in the production.”³⁹ This is the balance the parties have agreed to strike between the commercial interests of copyright holders and society’s educational and cultural interests.

Importantly, the Multimedia Guidelines represent the level of educational use deemed to be acceptable by leading multimedia copyright holders, and, in so doing, provides clear guidelines to US educational users.

Conclusion

In moving away from the crafting of specific exceptions, the Australian flexible dealing provision now requires a would-be user of copyright materials for educational use to make a number of objective determinations in relation to both his use, and the interests of the copyright holder, without the benefit of clear guidelines.

The stated aim of section 200AB is to “provide a flexible exception to enable copyright material to be used for certain socially useful purposes while remaining consistent with Australia’s obligations under international copyright treaties”.⁴⁰ While usage of copyrighted materials by schools and educators to create new, multimedia materials for classroom use, would serve a ‘socially useful’ purpose, the uncertainty created by the wording of the section creates a practical barrier to such use.

In a subject area mired with uncertainty, the US’s Multimedia Guidelines provide one example of bright-line rules that are effective and permit ‘socially valuable’ transformation of third-party copyright materials. While it may be that Australia is, at least in the medium-term, saddled with its current

scheme, introduction of similar guidelines – whether as part of a specific free exception or under a new cross-media statutory licence – could provide a solution to the uncertainty surrounding the creation of education multimedia materials using copyrighted works.

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(Endnotes)

1 See for example, Peter Kent & Matthew Holdway ‘Interactive Whiteboards, Productive Pedagogies and Literacy Teaching in a Primary Context’ at <http://www.englishliteracyconference.com.au/files/documents/Papers/Non-Refereed%20Papers/Kent%20and%20Holdway%20.pdf>.

2 Jayne Elizabeth Zanglein & Katherine Austin Stalcup, ‘Te(a)chnology: Web-Based Instruction in Legal Skills Courses’ (1999) 49 J. Legal Educ. 480 at 482-92.

3 Edith R. Werkentine, ‘Kingsfield Doesn’t Teach My Contracts Class: Using Contracts to Teach Contracts’ (2000) 50 J. Legal Educ. 112 at 120.

4 Interactive whiteboards are becoming commonplace in Australian schools. As an example, by 2011 every New South Wales state school will be provided with at least one interactive whiteboard: <http://www.theage.com.au/news/technology/schools-to-install-digital-whiteboards/2007/06/18/1182019011079.html>.

5 See www.nfsa.gov.au.

6 Andre Hampton, ‘Legal Obstacles to Bringing the Twenty-First Century into the Law Classroom: Stop Being Creative, You May Already be in Trouble’ (2003) 28 *Oklahoma City University Law Review* 223 at 224.

7 A report on the pilot program in Sydney is available at http://www.cli.nsw.edu.au/cli/files/interactive_whiteboard_trial_easiteach.pdf. The Victorian approach is summarised in Peter Kent & Matthew Holdway, ‘Interactive Whiteboards, Productive Pedagogies and Literacy Teaching in a Primary Context’ at <http://www.englishliteracyconference.com.au/files/documents/Papers/Non-Refereed%20Papers/Kent%20and%20Holdway%20.pdf>.

8 See Patrick Griffin & Kerry Woods, ‘Report for the Victorian Department of Education and Training’ at www.englishliteracyconference.com.au/files/documents/Papers/Non-Refereed%20Papers/Kent%20and%20Holdway%20.pdf.

9 For information on *Clickview*, see <http://www.clickview.com.au>.

10 Kimberlee Weatherall, ‘Fair use, fair dealing: The Copyright Exceptions Review and the Future of Copyright Exceptions in Australia’, Intellectual Property Research Institute of Australia, Occasional Paper No. 3/05 2005.

11 Section 200AB has become known as the ‘flexible dealing’ provision, since being referred to as such in the Attorney General Department’s media release of 14 May 2006 (2006) 14 (4) *Australian Law Librarian* 34.

12 Weatherall, above n 10 referring to the SPAA, ACC, Law Council and APRA/AMCOS submissions.

13 *Ibid*, referring to the Law Council and ACC submissions.

14 *Ibid*, referring to the CAL and APRA/AMCOS submissions.

15 Explanatory Memorandum, CAA [6.55].

16 Note that flexible dealing will not apply if the use would not infringe copyright due to another provision of the CA – including where that provision is subject to special conditions or requirements: s 200AB(6). The latter means that people cannot avoid compulsory licensing schemes by invoking the (unremunerated) flexible dealing exception.

17 CA, s 200AB(7).

18 CA, s 200AB(7).

19 See also Berne Convention for the Protection of Literary and Artistic Works, article 9(2).

20 Emily Hudson, ‘The Copyright Amendment Act 2006: The Scope and Likely Impact of New Library Exceptions’, Melbourne Law School Research Series [2006] *UMelbLRS* 5; (2006) 14(4) *Australian Law Librarian* 28.

21 *Ibid*.

22 *Ibid*.

23 World Trade Organization, United States – Section 110(5) of the US Copyright Act, Report of the Panel, WT/DS160R, 15 June 2000 (WTO Panel Report).

24 WTO Panel Report, above n 23, ss 6.109.

25 *Ibid*, ss 6.110.

26 *Ibid*, ss 6.178.

27 *Ibid*, ss 6.180.

28 *Ibid*, ss 6.182-189.

29 *Ibid*, ss 6.224.

30 *Ibid*, ss 6.229.

31 Raquel Xalabarde, ‘Copyright and Digital Distance Education: the Use of Pre-Existing Works in Distance Education Through the Internet’ *Columbia Journal of Law & the Arts* 26 CLMJLA 101,165.

32 WTO Panel Report, above n 23, ss 6.229.

33 Hudson, above n 20, 36.

34 *Ibid*.

35 Convention on Fair Use, Final Report to the Commissioner on the Conclusion of the Conference on Fair Use, Proposal for Fair Use Guidelines for Educational Multimedia, <http://www.uspto.gov/web/offices/dcom/olia/confu/confurep.pdf> (6 August 2008)

36 *Ibid*, ss 1.3.

37 Hampton, above n 6, 236.

38 *Ibid*.

39 Convention on Fair Use, above n 36, 52 ss. 3.2.1.

40 Explanatory Memorandum, CAA, [6.55].

Child Photographers, Not Child Pornographers

Suzanne Derry talks about the laws that apply when creating art involving children and the Australia Council protocols.

On 16 December 2008, the Australia Council for the Arts released protocols for working with children in art (the **Protocols**). The Protocols will apply to recipients of Australia Council funding from 1 January 2009.

This article looks at the laws that regulate artists' work with children and the Protocols.

Debate about the balance between child protection and artistic freedom was ignited last year by two incidents, both relating to the photography of naked children. The photograph of a naked teenage girl was published on invitations and exhibited by Australian photographer, Bill Henson, at a well known Sydney art gallery. Shortly afterwards, *Art Monthly Australia* magazine published a similarly controversial edition with the photo of a naked six year old girl on the cover taken by Polixeni Papapetrou.¹

These events have highlighted the need for artists to be aware of the laws that apply to their practice when working with children. They also raise the questions: when is a child photographer a child pornographer? What laws regulate such an artist's practice? Do those laws accurately reflect societal standards? And lastly, what do the Protocols say and do they achieve their intended purposes?

What laws apply to working with children in the Arts?

There are four main areas of law applicable to artists who work with children.

- employment laws;
- criminal laws relating to child pornography;
- classification laws; and
- proposed privacy laws.²

Other laws such as defamation, trade practices and surveillance devices legislation may also be relevant but go beyond the scope of this article.

Employment laws

Employment laws in relation to children vary across jurisdictions. As a threshold issue, it is important to ask whether the young per-

son concerned is defined as a 'child' under the relevant State or Territory employment legislation. A 16 year old is not deemed a child under the *Industrial Relations (Child Employment) Act 2006* (NSW), but is under equivalent legislation in Queensland.³

Employment of nude children

New South Wales,⁴ Victoria⁵ and Queensland⁶ prohibit the employment of children who are nude. In Victoria and Queensland, exceptions exist for children under 12 months where the parents have given consent and are present.⁷ In New South Wales,⁸ Victoria⁹ and Queensland,¹⁰ there are also prohibitions on placing the child in danger-

ous or emotionally or physically harmful situations. Furthermore, New South Wales¹¹ and Victoria,¹² require a permit or authority to work with children in entertainment, while in Queensland a parent's consent form or special circumstances certificate is necessary.¹³ In every State and Territory there are restrictions on children working during school hours.¹⁴

It is interesting to note that employment restrictions have not been cited in any of the recent public furore in relation to children and art. This perhaps indicates a preconception that photographs of naked children mean child porn. The public were exclusively concerned by the highly controversial issue of child pornography, but either unaware, or less concerned about child protection restrictions that address such matters in the everyday setting of employment law. It is also interesting that public comments about the law inadequately protecting children working with artists were only made in relation to child pornography and indecency offences under the *Crimes Act 1900* (NSW).

Criminal laws relating to child pornography

State and Territory criminal legislation prohibits the use of children for pornographic purposes and the possession and/or distri-

bution of child pornography. In New South Wales, using a child under the age of 18 years for the purposes of the production of pornographic material is an offence under the *Crimes Act 1900* (NSW) carrying a maximum penalty of 14 years imprisonment.¹⁵ The production or dissemination of child pornography is also prohibited.¹⁶

Child pornography offences are broadly defined in State and Territory criminal legislation and include offences for creating, publishing or disseminating pornography of children. For example, in the *Crimes Act 1900* (NSW) a child is used for pornographic purposes if:

- (a) engaged in sexual activity;
- (b) in a sexual context;¹⁷ or
- (c) as the victim of torture, cruelty or physical abuse (whether or not in a sexual context) in a manner that

the Protocols will apply to recipients of Australia Council funding from 1 January 2009

would in all the circumstances cause offence to reasonable persons,

for the purposes of the production of child pornography material.¹⁸

The artistic purpose defence:

In many States and Territories, defences are available where a work has been classified, or produced for a particular purpose. For example, section 91H (4) of the *Crimes Act 1900* (NSW) states "It is a defence to any charge for an offence [of production, dissemination or possession of child pornography]:

- (a) ...
- (b) that the material concerned was classified (whether before or after the commission of the alleged offence) under the Classification (Publications, Films and Computer Games) Act 1995 of the Commonwealth, other than as refused classification (RC), or
- (c) *that, having regard to the circumstances in which the material concerned was produced, used or intended to be used, the defendant was acting for a genuine child protection, scientific, medical, legal, artistic or other public benefit purpose and the defendant's conduct was reasonable for that purpose...*"

employment restrictions have not been cited in any of the recent public furore in relation to children and art

A recent report of the NSW Sentencing Council recommended that the defence set out in sub-section (c) be removed.¹⁹ The Sentencing Council wrote:

*The council is concerned that material which would otherwise constitute child pornography and be such as to cause offence to reasonable persons, should then be defensible on the potentially controversial and uncertain ground that the defendant was acting for a genuine artistic purpose*²⁰

Acting on recommendations of the Chair of the Sentencing Council, in late October last year the New South Wales Government announced its intention to remove the 'genuine artistic purpose defence' from the *Crimes Act 1900* (NSW).²¹

The other defences with which the 'genuine artistic purpose' defence is currently housed, including those relating to 'genuine child protection, scientific, medical, legal' or 'other public benefit purposes' remain

the Protocols create an additional federal regulatory system where one did not previously exist for those artists who apply for government funding

unquestioned. It would seem that after the recent debates, a genuine artistic purpose is no longer seen as a balancing consideration. Discussions at the time of the Henson furore often reflected on 'why artists should be allowed to exploit children in the name of art' and highlighted the gap between what is deemed pornographic under the New South Wales *Crimes Act* and what is deemed so by the public. However, the narrowing of the defence with respect only to artists risks, if introduced, a 'legislated distrust' in the purposes of the artist on the assumption that any work in which a child is pictured naked or partially naked is pornographic.

Classification and censorship laws

The National Classification Scheme applies to all films, computer games and submittable publications. The Classification Board has the role of classifying films, computer games and publications, as well as material available online (when referred to it by the Australian Communications and Media Authority). Under the National Classification Code which applies in all States and Territories, publications, films and computer games may be refused classification if they describe or depict in a way that is likely to cause offence to a reasonable adult, a person who is, or appears to be, a child under 18 (whether the person is engaged in sexual activity or not). It is an offence under State and Territory classification legislation to sell or exhibit material that has been refused classification.²²

in late October last year the New South Wales Government announced its intention to remove the genuine artistic purpose defence

Proposed privacy laws

There is currently no general right to privacy in Australia, nor is there a law specifically aimed at preventing the unauthorised recording or use of a child's image. The Australian Law Reform Commission (ALRC) has recommended the introduction of a statutory cause of action for invasion of privacy applicable to unauthorised photographs, with a public interest exception.²³ If such a right is introduced, it will be interesting to note how it applies to children.²⁴

The Protocols

The Australia Council introduced the Protocols on 16 December 2008. Compliance with the Protocols is a precondition to a grant of funding from the Australia Council. Artists are required to undertake that they

have complied or will comply with any relevant laws of their State or Territory and that they also have followed or will follow the Protocols.

The stated purpose of the Protocols is as follows:

*The following protocols have been developed through consultation with the arts sector, government partners and members of the general community. They support the Australia Council's longstanding commitment to encouraging young people's and children's involvement in the arts, both as participants in the creative process and as members of an audience. They are designed to help artists and arts organisations understand their legal obligations and to establish responsible steps for artists when they are involving children in the creation, exhibition or distribution of creative works.*²⁵

The Protocols set a variety of 'standards' with which artists must comply, noting that:

where these [standards] are not surpassed by any definitions or regulations in a state or territory, the Council requirements will apply. Where the state or territory laws and regulations exceed the minimum requirements set

*by these protocols, the state or territory requirements prevail.*²⁶

The Protocols therefore create an additional federal regulatory system where one did not previously exist for those artists who apply for government funding.

What do the Protocols regulate?

The Protocols address three types of activities:

- 'creation of a work of art';
- 'exhibitions and performances'; and
- 'distribution (for instance, through marketing materials or digital media)'.²⁷

As a very basic summary, the Protocols require that parental consent be obtained before an artist can work with a child under the age of fifteen. Australia Council funded exhibitors, presenters or distributors of artistic works must obtain a statement from the artist that the Protocols and any other relevant laws were followed before displaying or distributing an image of a child under 18 years old. The distribution of an artistic work depicting someone under the age of 18 is dependent on parental consent; and where the subject of a work is either fully or partially naked it can not ordinarily be distributed without first being classified.²⁸

While the Protocols themselves make it clear that "Laws in most states and territories impose a number of limits and constraints designed to protect children from exploitation and harm"²⁹ they set minimum standards which often exceed those required at law. For example, under the Protocols, artists and arts organisations that distribute a 'contemporary image of a real child' under the age of 18 need parental permission to distribute the image.³⁰

In this context, a 'contemporary image' is defined to mean an image taken in the last 18 years. The effect is that distribution of quite innocent images could become highly restricted. As put by David Marr, writing in the *Sydney Morning Herald*:

Here's how silly it is: the photograph of a 17-year-old dressed from top to toe in hat, gloves, greatcoat and working boots can't be put on the net after January 1 by any artist or organisation taking Australia Council funding unless the parents or guardians of that overdressed model consent to the image being there. That the young person is old enough to drive and consent

the effect is that distribution of quite innocent images could become highly restricted

the Protocols set minimums standards which often exceed those required at law

*to have sex doesn't matter. Unless Mummy and Daddy say so, the picture can't go up.*³¹

The Protocols create some further difficult hurdles for government funded artists. For example, where children are to be employed or photographed fully or partly naked permission from the parent and child must be obtained (which sounds wholly reasonable). However, artists are to give confirmation to the Australia Council, prior to commencing the work, that both the child (irrespective of their age) and their parent has understood the nature and intended outcome of the work, the parent will supervise the child while the child is naked, and that they agree that it is not sexually exploitative.³²

Conclusion

The laws on working with children and ensuring they are protected from becoming victims of child pornography are vital. They already exist. The Protocols create a confusing web of stringent preconditions to funding which will stifle and complicate Australian artists' ability to contribute to society. They place additional burdens on artists, implying they cannot be trusted to abide by the laws which protect children. The Protocols and narrowing the defence of artistic purpose in New South Wales send very strong messages about our intention, or lack thereof as a society to uphold the rights of artists. It will be interesting to see whether, upon their review at the start of 2010, the Protocols have increased child protection effectively, and at what cost to the arts.

The Protocols are available at www.austliacouncil.gov.au.

Suzanne Derry is a lawyer at the Arts Law Centre of Australia. The views expressed in this article are the authors own and are not those of the Arts Law Centre of Australia.

(Endnotes)

1 *Art Monthly Australia* Issue 221 (July 2008).

2 There is currently no general right to privacy in Australia. For more information about privacy and the proposed cause of action for invasion of privacy, see the earlier *Communications Law Bulletin*, Volume 26, No. 4 July 2008, in particular, M Tilbury 'Reviewing Privacy in New South Wales'.

3 *Child Employment Act 2006* (Qld) s 5.

4 *Children and Young Persons (Care and Protection – Child Employment) Regulation 2005* (NSW) cl 19.

5 The Mandatory Code of Practice for the Employment of Children in Entertainment (the Mandatory Code) is given effect by section 32 of the *Child Employment Act 2003* (Vic). Clause 19 of the Mandatory Code prohibits the employment of children naked unless they

are under 12 months, and their parents have permitted the employer to employ them nude and will be present for the entire period.

6 Sub-Section 8A(1) of the *Child Employment Act 2006* (QLD) prohibits the employment of a child either naked or clothed in a way that the sexual organs, anus or breasts of a female over 5, are visible.

7 *Child Employment Act 2006* (QLD) s 8A(2); Mandatory Code of Practice for the Employment of Children in Entertainment (Vic) sub-cl 19 (2).

8 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 222.

9 Mandatory Code cl 18.

10 *Child Employment Regulation 2006* (QLD) s 12.

11 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 223.

12 *Child Employment Act 2006* (Qld) s 9(1).

13 *Child Employment Act 2006* (QLD) s 10(1).

14 See for example: *Children and Young Persons (Care and Protection – Child Employment) Regulation 2005* (NSW) schedule 1, cl 5(1); *Child Employment Act 2006* (Qld) s 11; *Child Employment Act 2003* (Vic) s 11. Exemptions can generally be obtained through the education minister for the State or Territory in which the child resides.

15 *Crimes Act 1900* (NSW) s 91G.

16 *Crimes Act 1900* (NSW) s 91H.

17 'Sexual context' is not defined in the *Crimes Act 1900* (NSW) and is a subjective assessment. It is noted in G Griffith and K Simon *Child Pornography Law* Briefing Paper No 9/08 (2008) at 29 that:

it may encompass such things as pictures of naked children from legitimate nudist settings, where the actual depictions are found to dwell on these images and where, in all the circumstances, they cause offence to reasonable persons. The qualification that the material must 'in all the circumstances cause offence to reasonable persons' is a community standards test ... At any rate, it is left to the courts to decide what amounts to 'a sexual context' in any particular set of circumstances.

18 *Crimes Act 1900* (NSW) s 91G.

19 See: NSW Sentencing Council *Penalties Relating to Sexual Assault Offences in New South Wales*, (August 2008) at [4.44 – 4.47].

20 NSW Sentencing Council *Penalties Relating to Sexual Assault Offences in New South Wales* (August 2008) at [4.46].

21 See: Hon. John Hatzistergos *Major Government Crackdown on Sex Offences* Media Release (25 October 2008) where it is stated that:

The Child Pornography Working Party will also examine the artistic purposes defence in the context of child pornography involving the more general category of depicting children in a sexual context. The Government has supported in principle the report's recommendation to remove this aspect of the defence.

22 See: *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW); *Classification (Publications, Films and*

Computer Games) (Enforcement) Act 1995 (Vic); *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (ACT); *Classification of Computer Games and Images Act 1995* (Qld); *Classification of Publications Act 1991* (Qld); *Classification of Films Act 1991* (Qld); *Classification (Publications, Films and Computer Games) Enforcement Act 1996* (WA); *Classification (Publications, Films and Computer Games) Act 1995* (SA); *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (Tas); *Classification of Publications, Films and Computer Games Act* (NT).

23 See: Australian Law Reform Commission *Review of Australian Privacy Law* Discussion Paper 72 (September 2007) at [59.112-118]; Australian Law Reform Commission *For Your Information: Australian Privacy Law and Practice* Report 108 (August 2008) at [69.106-135].

24 See for example A Flahvin 'Murray v Big Picture UK Ltd: An Image Right for the Children of Celebrities?', (2008) *Communications Law Bulletin* 26(4), for discussion on the right to privacy in the UK and whether in recent case law that right transfers to the children of those who possess such a right due to their celebrity.

25 Australia Council for the Arts *Protocols for Working With Children in Art* (December 2008) at 2

26 Australia Council for the Arts *Protocols for Working With Children in Art* (December 2008) at 2.

27 Australia Council for the Arts *Protocols for Working With Children in Art* (December 2008) at 3-4.

28 Australia Council for the Arts *Protocols for Working With Children in Art* (December 2008) at 6-8.

29 Australia Council for the Arts *Protocols for Working With Children in Art* (December 2008) at 6-8.

30 Australia Council for the Arts *Protocols for Working With Children in Art* (December 2008) at 7

31 D Marr. 'Australia Council pulls the wool, hat and trench coat over our eyes' *Sydney Morning Herald* (19 December 2008)

32 Australia Council for the Arts *Protocols for Working With Children in Art* (December 2008) at 6.

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