proving what happened in an EDI transaction. Those laws differ from state to state, and in some states the only "evidence" of a paperless transaction may simply be inadmissible.

Thirdly, in relation to certain transactions, the question of who carries the risk - and so, who bears a loss if one is suffered - will depend on whether the transaction is by EDI or by paper. The law of negotiable instruments has well-established rules, which are generally conceded to be equitable, to allocate losses when someone is defrauded in a cheque transaction. But the law is not so clear, and may not be so equitable, in an EDI money transaction.

Paper bills of lading for carriage of goods by sea or air themselves confer title in those goods. The goods can be sold while at sea by selling and transferring the paper. What will the EDI analogy be? Will it be foolproof against fraud?

That leads into the fourth point - the question of security generally. Security is needed against the fraudulent and against the malicious. We have well developed means of ensuring that an order for copper wire is authenticated and delivered to the correct address; and that the payment for it is sent to the correct person. There is a danger that we will fall into the trap of regarding the computer as infallible or the information transmitted as incorruptible.

Computer viruses could reek havoc if they got into the systems which keep business running. Increasingly those systems will be EDI systems. If anything, our vulnerability is increased as business embraces the "just in time" (JIT) philosophy of management. Because EDI holds out the promise of greatly reduced response times, and the promise of the ability to monitor stock levels and movement of goods in transit, businesses which aim to be efficient are looking increasingly to working with reduced levels of stock, spare parts and components. The obligations of all participants to maintain security should be clearly spelt out.

The banking industry, which has long experience with electronic transactions, has always understood that where big sums of money are involved, both accuracy and security are vitally important. But even in banking with closed systems used only by bankers, there have been problems of fraud and problems or error which have cost enormous sums of money. Somebody bears the cost of these things. The question is who?

Inevitably similar problems will arise with EDI transactions. For one thing, those transactions will give rise to large payment orders. Secondly, very valuable commodities will sometimes be involved in these transactions - for example a ship load of wheat or iron ore. The danger there is not so much that somebody will fraudulently make off with the cargo, but that somebody will fraudulently create the appearance that they have title to the cargo and will sell it or raise money using it as security.

There is also the unhappy fact that businesses do fail. When a company goes into liquidation, for example, it becomes a vitally important question as to whether a particular shipment of goods had passed, or as to whether a particular payment has been made, or is still incomplete and capable of being stopped.

The attitude that problems within industries should be sorted out by negotiation and without resort to litigation is probably to be encouraged. But our courts are full of examples of former trading partners unable to compromise and resolve matters without the intervention of the courts. In those cases it is vitally important to know just what the legalities are. Prudent business people will want to know that in advance. And they will derive little satisfaction from seeing their company's name in the High Court lists - even if in the end they prevail - when they reflect that a well-drafted agreement negotiated at the outset might have saved all that trouble and expense.

Public television in Australia

Beth McRae argues that public television is being ignored

The campaign to establish a community based public TV service in Australia has had a long and contentious history stretching back to 1974, when community resource video centres flourished. By the early 1980s organisations such as Open Channel in Melbourne and Metro in Sydney transmitted public TV programming on SBS television.

The costs of broadcasting and lack of any real commitment on the part of the federal government contributed to dissipation of the demand for an alternative television service until the late 1980s when a resurgence of demand led to the then Minister for Transport and Communication, Gareth Evans, making the inspired decision to permit the first test transmission on a separate UHF frequency.

Since mid 1988, approximately 20 weeks of test transmissions have gone to air in metropolitan Sydney, Melbourne and Adelaide, produced by ten locally based public TV groups. Nearly all have had high levels of programs produced by or for community groups. Programming has at times been dazzling in its ambitious nature, particularly considering inadequate financial resources and the dependence on volunteers.

In the telecommunications debates of recent times, public television barely rates a mention. Considering the fundamental notion that the airwaves are a public resource on licence in the public trust, one can ruminate endlessly about why the issue is so thwarted and regrettably marginalized.

Financial viability

Inevitably it comes down to dollars. There are no potential profits to be made and financing the cost of operation is not simple. While public television groups have ample evidence of strong community demand for public TV it has been impossible to date to convincingly prove that the financial models will work. Because legislation to permit sponsorship announcements during test transmissions is still before parliament, the degree of potential sponsorship revenue has yet to be tested. The public TV sector has always expected to use sponsorship as an important revenue source. Sale of air time, subscriber membership fees, workshop training and program sales would generate additional revenue.

As with public radio, the issue of financial viability for public TV is difficult. Although the federal government has made it clear it will not provide funding, the public TV sector is likely to seek initial assistance for start up costs. State government departments and local councils are a more realistic possibility for on-going assistance. Already local government organisations have shown strong interest in test transmissions. Given that the essence of public TV is local community access, control and ownership, indications are that local government may become intensely involved.

Reports and reviews

Over 15 years there have been no fewer than nine reports into the feasibility of

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A narrowing of the principle

Justice Shepherd's view is similar to the view taken by the High Court of England against the Grundy organization when they sought to restrain the sale of a booklet of photographs of characters from Neighbours (*Grundy* v *Startrain* 1988). Grundy sought to restrain the publication of the booklet on the basis that it misrepresented an authorisation or approval by the program Neighbours.

The judge, consistent with the view that has been taken in the United Kingdom cases on this point, found that there was no other way to sell a book featuring photographs of the characters of Neighbours other than to describe them as such and that to do so was entirely permissible. When one examined the book one discovered that it was produced by an independent organization. The photographs belong to the publisher or had been printed with the licence of the owner of the copyright. Accordingly, publication of the booklet was not passing off and should not be restrained. The view being taken on this point in the United Kingdom must concern Australian lawyers, particularly having regard to Justice Shepherd's dissenting judgment in the Hogan case.

The most recent decision in the area is the Federal Court of Appeal decision in the Gary Honey case, *Honey* v *Australian Airlines* (1989) and on appeal (1990). Gary Honey is a champion long jumper who holds a number of Australian and Commonwealth records. He competed in the Commonwealth Games on behalf of Australia and was photographed in full flight during the long jump. The photograph was taken with the permission of the copyright owner and used on posters distributed in schools by Australian Airlines. Australian Airlines had produced a range of posters of various athletes. The poster featuring Gary Honey featured in small letters in one corner his name, description of the event and the words "Australian Airlines". The same photograph was also used by a religious organization of the charismatic church in South Australia called the House of Tabor.

Gary Honey sued Australian Airlines on a character merchandising point. He asserted his image was being used to promote the business of Australian Airlines without his approval. Against the House of Tabor he also argued that he was a Catholic and objected to having his image associated with the House of Tabor and the promotion of its products.

Gary Honey's case failed at first instance and on appeal. On appeal, the court acknowledged that it is possible for someone with a valuable commercial reputation to prevent it being used in a commercial context without their permission. However, the court found that the manner of the use of the photograph in both instances conveyed to an on-looker a vigorous athlete in full flight rather than the personality or reputation of Gary Honey. The court also had regard to the fact that Gary Honey was an amateur athlete who would have been obliged to pay his royalties to the Amateur Athletic Association and to the manner in which both items were distributed: the poster to schools and the House of Tabor's publication to Christian bookshops.

'our law is based on misleading and deceptive conduct and passing off'

The finding for the defendants was made notwithstanding a recognition that Australian Airlines' principle objective in promoting sport in schools is one of improving the goodwill and standing of the company in the community and evidence to the effect that Gary Honey had received sponsorship for promotion of sportsgoods in previous years.

The recent cases demonstrate that our law in the area of character merchandising is based on misleading and deceptive conduct and passing off and not on any recognition of a property in personality or character. In the absence of copyright or registered trade mark right which is infringed by the unauthorised use of character, the owner of a valuable character must have a well established reputation and the offending message must be in a manner which conveys a commercial endorsement before the owner can be confident of success.

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Public television in Australia

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public TV, culminating in the Department of Transport and Communications commissioning the Communications Law Centre (CLC) to prepare a major report evaluating the test transmissions and assessing the readiness of public TV groups to provide a sustainable television service.

The Department is now reviewing responses to the report from the public TV sector and other interested parties. The CLC report concludes that the groups which are ready to provide public TV services, on an interim or test basis, should be allowed to do so and emphasises that TVU in Melbourne, in association with Open Channel, and Metro TV in Sydney are best resourced for this. Most groups are considering setting up consortiums which could accommodate various community organisations and educational institutions. This would assist the financial viability of an alternative new television service.

It is extraordinary that the federal government will shortly decide about the introduction of pay TV services without simultaneously making a long overdue decision regarding public TV.

Local programming

It would be naively optimistic to assume that any pay TV service would accommodate local production (although some aspirant players argue differently), or community and educational programming. The likely scenario of pay TV channels transmitting movies, sport and other entertainment, without a high level of Australian content suggests there is a great need to introduce a public TV service that would create a balance in the overall broadcasting framework and would hopefully provide the missing link in the programming diversity.

The Saunderson Inquiry report *To Pay or Not to Pay* , recommended that pay TV (delivered by cable) should include provision for one channel to be allocated for community programming that would be cross subsidised by a percentage of the operator's gross revenue. This raises the possibility that any Australian public TV service could be partially supported by pay TV.

Meanwhile, the public TV sector continues to argue that the remaining UHF band 4 frequency, Channel 31, should be allocated to public TV. Considerable uncertainty surrounds the government's plans for use of the sixth channel and absence of relevant policy regarding frequency allocation has lead to the public TV sector staking a claim.

Ultimately the real prohibiting factor to introducing public TV is the lack of the political will to do so, as demonstrated by successive governments. With a new Minister in Kim Beazley and proposed sweeping reforms to broadcast and telecommunications regulatory regimes it is critical that public broadcasting is fully on the agenda.

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