A "Real Life" trespass at the Santa Fe Gold

Max Bonnell examines a recent Victorian decision on an attempt to prevent a broadcast of material obtained by concealed cameras

The Supreme Court of Victoria refused to grant an injunction restraining Channel Seven's *"Real Life"* programme from broadcasting a videotape of a striptease show filmed by a hidden camera in a Melbourne hotel *(Whiskisoda Pty Limited -v- HSV Channel Seven Pty Limited*, judgment of McDonald J, 5 November 1993).

The facts

At 1.00 pm on 29 October 1993, four members of a crew from *Real Life* entered the Santa Fe Gold Hotel where, with a concealed camera, they filmed a lunchtime strip tease show that (according to McDonald J) featured "a nude woman engaged in a sexually explicit performance in the presence of a number of males".

During the following week, *Real Life* advertised that it intended to expose the entertainment at the Santa Fe Gold as "one of Melbourne's biggest embarrassments". On 4 November 1993, Whiskisoda Pty Limited, the licensee of the Santa Fe Gold, commenced proceedings against HSV Channel Seven Pty Limited and applied for an injunction to prevent the broadcasting of the videotape filmed at the hotel.

The plaintiff's case: copyright, contract and trespass

Whiskisoda made three claims against Seven. The first that a broadcast would infringe its copyright in the performance was not pursued before McDonald J. Nor was much attention paid to the second, that Seven had breached an agreement with Whiskisoda not to film activities inside the hotel.

The remaining and the most substantial claim was that Seven had trespassed by breaching a condition of its licence to enter the hotel's premises. On this point there was conflicting evidence. Ross Kennedy, of Whiskisoda, said that signs displayed at the hotel's entrance read: "Strictly no filming permitted on premises". Warren Wilton, Real Life's Bureau Chief and a member of the crew that visited the Santa Fe Gold, said that he had seen no signs. If there were no signs, Seven argued, there was no limitation upon its crew's licence to enter the hotel.

Walkins and trespass

On the question of trespass, McDonald J turned to the decision of Young J in *Lincoln Hunt (Australia) Pty Limited v Willesee & Ors (1986)*.

That case concerned a "walkin" by a Channel Nine camera crew on the premises of a company that sold investment schemes, accompanied by one of that company's dissatisfied customers. Refusing to grant an injunction restraining Channel Nine from broadcasting what it had filmed, Young J set out the following principles:

- a walkin crew commits a trespass if there is no licence for it to enter the premises;
- whether any licence exists depends upon an analysis of any implied or express invitation extended by the occupier;
- the court may grant an injunction to prevent publication of a tape filmed by a trespasser if confidentiality is involved or if the publication would be unconscionable; and
- to obtain such an injunction, the plaintiff must be able to show that it will suffer irreparable damage if the injunction is not granted. If damages are an adequate remedy, no injunction will be granted.

In short, the fact that a walkin camera crew may have committed an actionable trespass is not in itself a sufficient ground for the granting of an injunction to restrain the broadcasting of what was filmed. Something more is required: there must be a breach of confidentiality or the circumstances must be "such to make publication unconscionable".

Whiskisoda argued that the intended broadcast would breach confidentiality because it would enable the wide identification of the hotel's performers and customers, who were entitled to their anonymity. It was also argued that the broadcast would be unconscionable because it would make it difficult for the hotel to retain its performers and customers, causing irreparable damage.

McDonald J dismissed Whiskisoda's argument on confidentiality almost out of hand. He could find no legal principle that would protect the confidentiality of the performers or audience at a strip tease show. In any event, he did not believe it possible to identify any performer or spectator from *Real Life's* carefully edited tape.

Serious questions

McDonald J found that there were "serious questions" of both fact and law for the court to decide: essentially, these were whether the camera crew's licence to enter the hotel was limited in any way, and whether a trespass had occurred. Were the plaintiff to succeed, McDonald J considered, it could be compensated adequately by an award of damages, perhaps including exemplary damages. Accordingly, the broadcast would not be "unconscionable" in the sense intended by Young J, and the balance of convenience did not require that an injunction be granted.

The evidence brought in this application requires comment. Much of it - on both sides - amounted to little more than posturing. Kennedy, for Whiskisoda, claimed that if *Real Life's* tape were broadcast, performers would leave the hotel and customers would be reluctant to visit it, for fear that their exhibitionism and voyeurism might be broadcast to a wider public. This contained an inference that the hotel would suffer ongoing damage, which was without foundation for the simple reason that there was no realistic prospect that *Real Life's* visit would be repeated. A used story is a dead story: *Real Life* had its story, and had no reason to come back. The suggestion that camera crews might become regular visitors at the Santa Fe Gold was ridiculous.

For Seven, Wilton gave evidence that the purpose behind *Real Life's* story was to air the views of a group named the "Centre Against Sexual Assault" that the entertainment at Santa Fe Gold might encourage attacks against women. It was not possible, Wilton said, to deliver this message effectively without pictures. An injunction would damage the story because it would "go stale".

"Go stale"? It is safe to assume that Wilton did not mean to suggest that sexual assault would cease to be a newsworthy topic. He may have meant that Santa Fe Gold might stop giving strip shows, or that those shows would stop endangering women, but in either case, *Real Life's* act of public service would have been shown to be unnecessary. What Wilton really meant, of course, was that he had a good story in the can and wanted to use it. So why not say so?

It is usual for the publication or

broadcasting of prurient material to be justified by reference to a high moral purpose. There is nothing new in this. The practice is at least as old as Edmund Curll, the unlovely 18th century English pornographer, who defended some of his more lurid efforts by claiming that "they treat only of matters of the greatest importance to society ... are directly calculated for antidotes against debauchery and unnatural lewdness."

Usually, of course, it is necessary for a publisher to raise a defence involving the public interest when defamation proceedings are brought. But no such proceedings were taken here. It would be refreshing, just once, for a broadcaster to tell a court; "Our business is to make a profit from entertaining people. It is a legitimate business. Television is a visual medium, so we need images. People want to see pictures, not listen to descriptions. We try to give people what they want and so long as we remain within the law, we should not be stopped."

But perhaps it is naive to expect that kind of candour. It's very rare, in real life.

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To preselect a carrier

Trish Benson discusses the recent preselection of long distance telecommunications carriers

By early 1994, the residents of Sydney, Melbourne, Canberra and Brisbane will have voted to preselect their long distance telecommunications carrier as Telecom's monopoly on telecommunications services is opened up to competition from the second carrier, Optus. Progressively, all telephone subscribers across Australia will be asked to select their preferred carrier.

The ballot is seen as fast tracking competition and it is a part of the Government's commitment to micro economic reform. There are a number of issues that have not been adequately addressed in the economic reform debate (a debate that has become so pervasive both prior to and during the preselection ballot) and one of those issues is the need for deregulation; and inherent within deregulation is the need for competition within telecommunications.

Over the past one hundred years, the telephone has become an integral part of Australia's economic and social life. While the economic benefits of having an accessible and affordable telephone (and not related services, such as facsimiles, voice mail, the use of bulletin boards, etc) are well documented as advantaging the business community, the social functions and its benefits and not taken into account in the debates. The social functions of the telephone nearly always pertain to women's use of the phone and how that usage maintains and facilitates community life.

Choice

The ballot has been applauded as providing consumer choice, however there is no recognition that choosing a phone company is very unlike choosing a can of baked beans from the supermarket shelf. The price of long distance phone calls became a major issue during the ballot (and providing consumers with pricing information became a major sticking point between consumer advocates during the ballot process). Some sections argued (reasonably coherently) during the ballot that the social functions and the provision of an affordable and accessible telecommunications network was a much wider issue than which phone company provided the cheapest long distance calls - Telecom or Optus.

Even choosing a long distance carrier on pricing alone is extremely difficult for residential consumers. The carriers change their pricing structures regularly and the plethora of information made available (largely via advertising in the media) is exacerbated by the Telecom offered family and friends discounts and flexiplans, and what has become a catch cry of both carriers - "customer service".

The costs

A criticism of the ballot process by consumer groups is the amounts of money being poured into advertising by both carriers - approximately $20M. The ballot, which is being overseen by AUSTEL, the telecommunications regulator, is costing $35M and includes a community education program. This criticism is again justified when many low-income earners cannot afford a telephone, are finding it increasingly difficult to pay for continued access to a telephone, or do not access to the standard telephone service (such as people who are hearing impaired, with speech difficulties or are deaf).

These criticism of the ballot process are indicative of the concerns that residential consumers also have towards the advent of competition. As far as residential consumers are concerned, some of the promises that competition promised have as yet to be realised.

Residential consumers may get cheaper long distance phone calls if they can wade through the plethora of information about pricing and if the issue of affordability and accessibility to the standard telephone service for many disadvantaged is not debated publicly. The question that needs to be asked is whether the quality of servicethat Telecom provided before the introduction of competition could have been improved without resorting to a very limited debate about the functions of a telecommunications network and millions of dollars being poured into the coffers of advertising agencies.

This article by Trish Benson, Co-ordinator of the Consumers' Telecommunications Network, does not reflect the views of the Network.

VI$COPY almost there

David Throsby proclaims the near arrival of a new collecting society

The process of establishing a copyright collection agency for visual artists and craftspeople in Australia is now almost completed. The National Association for the Visual Arts (NAVA) has been working on this project for over four years, firstly by undertaking an extensive feasibility study with assistance from the Copyright Agency Limited (CAL) and then by setting in train the lengthy process of incorporation of the company, to be known as VI$COPY.

Towards the end of last year, Hans Guldberg of Economic Strategies Ltd produced a detailed paper looking at the income projections for VI$COPY in its first five years. The study analysed the histories and financial strategies of similar agencies in Europe and assessed the developing market sectors in Australia. From this study, a Business Plan was developed outlining the objectives, structure and projected financial arrangements for the proposed agency.

The Memo and Articles for VI$COPY are being prepared by Corrs Chambers Westgarth following substantial input from Natasha Serventy, the legal consultant to the project. When these are finalised, the company will seek incorporation. There has been strong support for the establishment of VI$COPY from a number of sources, including the Visual Arts/Craft Board of the Australia Council, the NSW Ministry for the Arts and other State Ministries, the Australian Cultural Development Office, and CAL. NAVA is still actively lobbying to put together a financial support package to carry VI$COPY through its establishment stages towards full self-sufficient operation.

VI$COPY looks forward to the final stages of negotiating for funding and the commencement of operations during the year. The establishment of VI$COPY will at last fill a significant gap in the existing scope of provision for copyright protection of Australian artist.

David Throsby, Chair, N.A.V.A.