"facts" of the story.

Subsection (b)(2)(iii) provides a mechanism for a defendant who ***repeats a defamation from another source*** to "correct" or "clarify" by indicating that the defendant did not intend to assert the truth of the statement but merely reported what another had said. This form of "correction" does not, however, vindicate the plaintiff's reputation because it does not necessarily indicate that the statement is false, only that the particular defendant does not assert that it is true. A defendant relieved of liability for all but provable economic loss by such a correction should be required to identify the person asserting the truth of the statement even if the original publication did not do so. This provides the plaintiff the opportunity to seek vindication from the source.

Nothing in this section, however, requires the news media or others to disclose *the identity of confidential sources.* Thus, if there is a confidential source, the media defendant would have three alternative courses of action: (1) limit liability by issuing a correction under this section and identifying its source; (2) issue a correction under subsection (b)(2)(i) or (ii) without identifying the source but fully vindicating the plaintiff's reputation; or (3) defend the defamation action.

The 1993 model Act would apply to all claims for damages arising out of harm to personal reputation caused by the publication of falsehoods. Thus, certain *actions for emotional stress* and *breach of privacy* could be covered, although not defamation as such.

- Responses

This model Act has attracted significant media support. It does not seek, of course, to cure the inadequacies of US litigation at large - that would mean taking on too many vested interests.

However, Henry Kaufman, general counsel of the New York based Libel Defence Resource Center, which represents media defendants, is cautious about the 1993 model Act. He says:

"It is possible to envision that more potential claims will be resolved without litigation and that what litigation does go forward - despite publication of a correction or clarification - will be less costly and less extended. It is even possible ultimately to envision that, with the fear of costly and extended litigation lessened, both the accuracy of journalism and the protection of reputation will be enhanced."

The unacceptability to the media of the earlier proposal for a "vindication action" and the lack of support from other quarters for the *Uniform Defamation* Act demonstrate the difficulties for defamation law reform whether here or in the US. The latest American proposal does seem to have the advantage of stressing the vindication of reputation as the primary justification for defamation law - a point made by the NSW Law Reform Commission.

The *quid pro quo* in the correction procedure of limiting damages to economic loss would, if approved here, have a bigger impact because plaintiffs have a more successful record. If this is to be coupled with a change in the substantive law making it more difficult for public figures to sue, it would be more attractive to plaintiffs.

The great advantage of such a change in the defamation law would be the pursuit, and the early publication by the media, of matters of public interest. If, for example, the Australian public had earlier notice of some of the major financial debacles of the 1980s, it is possible that the losses could have been lower. The beauty of the current US proposal is not that the media's power would be unlimited - it would still be liable for losses - but that plaintiffs would have to prove loss. This is food for thought for reformers here.

Development

There is potential for some convergence between the US and Australian substantive libel law being modified by constitutional considerations. The present High Court has already demonstrated a remarkable ability to lead the development of the law in a number of significant areas. The context of litigation in the US has opened up libel law to the impecunious and even unwilling libel plaintiff which because of the procedural complexities impose considerable unrecoverable costs which only the richest media organisation can contemplate. In Australia, only the rich and powerful normally have access to the courts for defamation. However, Australians do have access to an established system of alternate dispute resolution through the Press Council. While the way American litigation is conducted calls out for reform, the suggested solution, for practical purposes, seeks to side-step and cut short those complexities.

Its success depends on the proposition, supported by research, that many if not most American litigants, at least initially, are more interested in vindication than damages. But how does one persuade the plaintiff's lawyers to follow this course?

An alternative to this approach might be for the American media to endorse the concept of media accountability through press or news councils. Professor Louise W Hermanson's work in this area, including her major survey of news council complaints, suggests that alternative dispute resolution through such bodies, supported by the media, may well provide the remedy which the principled libel plaintiff cannot easily achieve in the litigation forest. This process should not inhibit the application of the proposals for legislative reform; experience demonstrates that successful news councils can exist alongside legislation.

Cast And Crew contracts - ASC provides prospectus relief

Katherine Sainty outlines a Class Order issued by the Australian Securities Commission

Producers who offer points to cast and crew as part of their package have been exempted from the prospectus provisions of the Corporations Law. Under a new Class Order effective from 6 October 1993, the ASC has exempted service contracts that offer points or an entitlement to revenue or copyright in a film.

The exemption is extensive and also applies to contracts offering a share in the final work or revenue to any person in the film, writing and entertainment industries who provides personal or professional services, or a script.

The exemption does not apply to private investors - a producer will still have to provide a prospectus for their contributions.

The Class Order effectively ends debate on the way in which contracts for cast and crew should be drafted to avoid the risk of contravention of the Corporations Law, by recognising and reinstating an industry practice. The exemption has a wider reach than the film and television industries and encompasses arrangements reached with recording artists and live performers in stage productions.

Practically, where a producer proposes a contract for a cast or crew member for a film

where they are given a share of the net profits of the film, the Class Order requires that the contract include the following elements:

1. Personal or professional services are to be provided;
2. No money is to be paid to the producer by the cast or crew member for the profit share;
3. The right of the cast or crew member under its contract to terminate the contract or take action for default is independent of other crew members' contracts;
4. No other participation interest is given and the profit share does not relate to any other securities;
5. The contract is made before 31 December 1995.

If a contract is one with a script writer for the acquisition of the rights in a script, it will also be exempt from the prospectus provisions of the Corporations Law under this Class Order if the script has been written by the person receiving the profit share or an employee or officer of the company receiving the profit share. In other words, if a producer has commissioned a script from a script writer who is not an employee or officer of that producer's company and the producer wishes to assign the rights in the script to a second producer, the producer is not entitled to any profit share as part of the consideration for that assignment.

This is conistent with the rationale which prompted the ASC to grant the ruling. The ASC views cast and crew contracts and others as service contracts rather than investment contracts with the entitlement to the participation interest or profit share being an incidence of payment for those services.

However, where a participation interest is granted as part of the sale of an asset, to a party who is unrelated to the provision of services, no relief is available.

The Class Order has a sunset provision, 31 December 1995. The Order and related issues will be reviewed prior to that date.

Philip French of the ASC has acknowledged the valuable contribution of a number of industry bodies in formulating the Class Order.

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"Music on Hold" copyright test case - future challenges

Anne Peters looks at a recent important test case which considered the copyright implications of playing music to telephone callers placed on hold

In this report Peters says the case highlights certain difficulties under copyright law, and suggests that the whole question of music on hold might be an appropriate area for consideration by the newly-formed Copyright Convergence Group.

The case

In *APRA Ltd v Telstra Corporation Ltd*, the Federal Court (Gummow J) decided that playing music to telephone callers placed on hold ("music on hold") does not constitute an infringement of copyright under the *Copyright Act 1968* (the "Act"). The parties to the case sought to test the consequences under the copyright law of a number of agreed factual situations.

The Court held that none of the exclusive copyright rights referred to below had been breached and that Telecom, and businesses using equipment connected to Telecom's telecommunications network, were therefore entitled to play music on hold without infringing copyright.

At the date of writing, appeal papers were due to go to the Federal Court registrar for settling in mid-February 1994. No date has yet been set for the appeal hearing. Accordingly, the decision should be treated with some caution at this stage.

Background to the Decision

The Australasian Performing Right Association Limited ("APRA") is the assignee of certain copyright rights in the majority of Australian lyrics and music and acts as a collecting agency for the payment of royalties to the relevant songwriters and publishers. APRA contended that Telstra Corporation Limited (trading as "Telecom"), which provided a music on hold service known as CustomNet, was:

- *by transmitting music on hold played by third parties, or by playing its own music on hold - performing the music (that is, the "work") in public and causing the work to be transmitted to subscribers to a diffusion service in breach of the Act; and*
- *by transmitting music on hold to mobile telephones - broadcasting the work in breach of the Act.*

APRA based its case on sections 31(1)(a)(iii)-(v) of the Act which provide that copyright, in relation to a literary or musical work, includes, respectively, the exclusive right to perform the work in public, to broadcast the work and to cause the work to be transmitted to subscribers to a diffusion service.

The Decision

The Court held as follows:

Performance of a work in public *(s31(1)(a)(iii))*

A public performance resulting from the emission of sounds from an apparatus which receives electromagnetic signals is deemed under the Act to be caused by the operation of the receiving apparatus, not the transmitting apparatus (refer s27(3) of the Act). The Court held that this clearly refers to the person who has control of the receiver (being the earpiece or speaker of a telephone). Accordingly, Telecom could not be said to have caused a public performance by playing music on hold.

Broadcasting a work *(s31(1)(a)(iv))*

Playing music on hold to callers who are using a mobile telephone network constitutes a transmission by wireless telegraphy (an element of the definition of "broadcast" in the Act). However, to be a broadcast within the meaning of the Act, the transmission must be "to the public". As a technical matter, each mobile telephone user, according to the Court, is properly to be viewed as receiving a separate transmission. In addition, the mobile telephone network service is essentially a service to facilitate confidential communication between two people.

The Court held that it would be a distortion of the broadcasting provisions of the Act to hold that if, during the course of this private communication, one party was to communicate a work to the other