those with a vested interest in traditional reform approaches or to realists who regard shareholder and managerial irresponsibility as both necessary and desirable. Nonetheless, consitutionalising the corporation requires systematic exploration: it has, at the very least, the potential to provide a mechanism by which responsible citizen/shareholders can meaningfully participate in corporate governance. The opportunity would then exist for regulatory issues that are currently imposed from outside - and are therefore only grudgingly addressed - to be legitimately raised *within* the corporation. The strategy offers the possibility that the equal citizen/shareholders of media corporations could utilise the reformed constitutional structure to at last link civic concerns with economic development, and to authoritatively imbue the irreversible processes of modernisation with civic norms.

BALANCING COMMERCIAL AND ETHICAL OBJECTIVES

The publishing decisions taken in the past and continuing into the present (see, for example, the *New Weekly's* current attack on the paparazzi, its canvassing of the rumour that Diana was pregnant when she died - "Did Diana and Dodi's unborn child die in the Paris tunnel with them?" - and extracts from Ketty Kelley's "vicious" book) by press, television and magazine entities clearly follow the dollar. It is hard to see what the "public interest" might be in many of these disclosures, especially (as Andrew Morton's account now reveals) those engineered by Diana herself for what appear to be her own, personal reasons.

The overwhelmingly commercial context that presently drives the decisions of media corporations means not only that sceptics or privacy-respecters will be thin on the ground but also that their reservations will be swept aside by invoking the obligation to nameless profit-seeking shareholders. Imagine the different dynamic that would exist in the public sphere of a constitutionalised media corporation, where at least some of those shareholders whose names are invoked could and would become involved in developing policies, admittedly with one eye on the competitive commercial environment in which they have invested. Is it so clear, for instance, that citizen/shareholders would be as keen on celebrity revelations as competition-obsessed editors?

Also, as things stand now, what do you think will be done to the employee whose remarks about Diana's "knockers" went to air? My guess is that his employers, driven by the commercial view that an outcry from the cult of Diana should be avoided, will make a sacrificial lamb of him. Whatever the outcome, there is little reason to think that it will be the product of any principled consideration. By contrast, the creation of a corporate public sphere would provide a forum in which ethical and principled positions could be crafted. Surely if the goal is responsible media corporations, then there must be an internal forum in which citizen/shareholders can consider the dimensions of their responsibility.

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1. J. Habermas, "The Public Sphere", (1974) 1 *New German Critique* 49.
2. *Ballina Shire Council v Ringland*, (1994) 33 NSWLR 680 at 725.
3. See R. Wacks, *Privacy and Press Freedom* (London: Blackstone Press, 1995).
4. R. Eells, *The Government of Corporations* (New York: Free Press, 1962).
5. *Ibid.*, p. 278.
6. A. Fraser, *The Spirit of the Laws: Republicanism and the Unfinished Project of Modernity* (Toronto: U. of Toronto Press, 1990), p. 357.

Liability for Inline Images: How an Ancient Right Protects the Latest in Net Functions

Kate Cooney examines the copyright liability of inlining images to indicate how copyright protection and liability have been extended in cyberspace.

A digital image is a computer file that is stored in a server. The digital image can be transferred by copying the computer file from its host server to other servers. This image can be created by either digitally scanning the original image onto the computer or by using graphic computer software to engineer a digital image.

An inline image is not a digital image but a *formatting* direction. You can create an inline image by referencing an images file name on your Web page.[1] When a visitor calls up your Web page their browser software will be instructed to retrieve the image file from its host server. This transference of image files occurs seamlessly, such that the user calling up the page would see the image and not the image file name.

The significance of inline images with regards to copyright protection, is that the image is loaded directly from its host server, and travels to the Web page visitor without going through the creator of the inline image's server at all. Thus, the creator of the inline image is not implicated in the image's reproduction.

This process can be explained by thinking of the inline command as a reference to a server that holds an image. However, when someone visits the page where an image has been inlined, instead of having to go to the server to view the referenced image, the inline formatting command tells their browser software to automatically retrieve the image for them.

DIGITAL IMAGES AS "ARTISTIC WORKS"

Although the concept of inlining digital images would have been far removed from the legislators' minds when they drafted the *Copyright Act* ("the Act") in 1968, the Act can protect some digital images from being inlined.

Digital images that have been scanned into the computer could be protected

under the category of "artistic works" under the Act.

An unlawful digital version of an artistic work would amount to a reproduction. For example, in the US decision of *Playboy Enterprises, Inc. v Frena*[2] a US District Court deemed scanned Playboy photographs as an infringement of Playboy's copyright. Digitally scanning a copyright work or reproducing an already scanned work, would be a breach of the copyright in the original "artistic work".

FOUR TIERS OF LIABILITY - INLINER LIABLE FOR AUTHORISATION

The person who inlines a digital image would not be liable for breach of the reproduction or publication right but could be liable for authorising others to reproduce or publish the image.

Inlining images is a process of creating a formatting direction that, when activated by someone's browser software, goes and finds the image file wanted and reproduces the image on someone else's computer screen. What is actually reproduced by the inliner is the image file name in the form of html language. Thus if an image was filed under the name "http://www.x'spage.com/images-face.gif", in order to inline this image the inliner must write in his/her page "<img src=http://www.x'spage.com/images-face.gif>". This means that a user's browser software is instructed to go to X's page and find and reproduce an image file called "face".

For the purposes of the Act a reproduction of a copyright work must sufficiently resemble the copyright work. "<img src=http://www.x'spage.com/images-face.gif'" would not sufficiently resemble an image of a face, as what has been copied is the image file name not the image itself, and the image file name is not subject to the copyright protection.

To reproduce an image the image must be reproduced in a material form. The definition of material form in the Act requires some form of storing the image. By copying the image's file name an inliner has not stored the image in any way. The reproduction of the image only occurs when someone else accesses the inliner's page and their browser software causes the image to be reproduced. Thus, at no stage has the inliner actually reproduced the image.

Arguably the person who inlines an image would not be liable for publishing the work either, as they have not supplied reproductions to the public. However, a court may hold the inliner liable for authorising the publication because they made it possible for reproductions of the work to be supplied to the public. Similarly, although the technology in creating inline images may allow the inliner to escape direct liability, this person may still be liable for authorising others to reproduce the images.

On the same analysis whether an inliner is held liable for the distribution or exhibition of the copyright image would depend on how strictly the courts interpret distribution and exhibition.

In *UNSW v Moorehouse*[3] , Moorehouse argued that UNSW had authorised the making of the infringing reproductions of his works, by allowing students free access to photocopiers installed in the library, but failing to exercise control or supervision over what books were copied and how much of any work was copied.

Gibbs J held that persons who have under their control the means by which an infringement of copyright may be committed and make it available to other persons, knowing or having reason to suspect it will be used to commit an infringement and omitting to take reasonable steps in limiting the use to legitimate purposes, will be authorising the infringement that resulted from its use.

An inliner, in creating an inline image on a page accessed by others, has created the means by which others could infringe the copyright in the image. And in placing an inline image on a publicly accessed terminal, the inliner should reasonably suspect that someone would browse the page and save the image.

It is possibly arguable that prefacing the page with a notice warning that copyright permission has not been obtained would amount to a reasonable step in limiting the use of the image to legitimate purposes and therefore an effective denial of authorisation.

WEB BROWSER LIABLE FOR REPRODUCTION

The person who accesses the page with the inline image and saves that page will be liable for reproduction of the image. What appears on the screen of that person's computer is a copy of the digital image and thus the two works would sufficiently resemble each other. If that person stores the work in some way, whether it be by printing a hard copy version, saving the image on a disk or in the computer's hard drive, the image would have been reproduced in a material form. Thus a person who accesses an inline image and downloads it would be directly infringing the creator's right to reproduce the work.

A user who downloads an inline image may defend their action by claiming they had an implied licence to do so. The creator of the original image, by making the image publicly available as a public file on their server, and by not creating a software block to people inlining their images, has given the copyright infringer an implied licence to inline their image.

Some argue that image files in the public domain are not free to be reproduced. They argue that commonsense suggests that just because something is in the public domain does not mean it can be legally reproduced: the publisher of a book, in a world in which there are photocopiers, is not giving permission to the world to make copies of the book.

What this defence does raise is that, if a copyright owner is serious about protecting their images there are a number of techniques to stop people from inlining their works. Firstly the creator could create a written script that changes the names of images and all the links to those images. This would disrupt the transference of the image file as the file name would be changed frequently. Secondly the creator could require users to "sign in" to the server providing a user name and password before files are sent. Or the creator could use a preprocessor to generate dynamic URL's for the images. This would work much like the first example.

BULLETIN BOARD OPERATORS

A bulletin board operator would be liable for reproduction of a digital image that sits in its server. The act of storing the image makes the bulletin board operator liable for reproduction. Whether the operator had to know or have reason to believe the image was infringing copyright is uncertain.

In the US the courts have followed two approaches. In *Religious Technology v Netcom*[4], the District Court of California decided that for a bulletin board operator

to be liable for a third party's copyright infringement it must have some knowledge of that infringement.

The court in *Playboy Enterprises, Inc v Frena*, on the other hand, decided that a bulletin board operator is strictly liable for copyright infringements of third parties.

The Clinton Administration's *National Information Taskforce Working Group on Intellectual Property Rights* ("White Paper") of September 1995, has supported this judicial move towards a strict liability regime for bulletin board operators.

A bulletin board operator would also be liable for the publication of the inline image, as by having the image on its server the operator is supplying reproductions of the image to the public. By the same token, a bulletin board operator could also be liable for distributing and exhibiting in public a copyrighted work.

CARRIERS LIABLE FOR THIRD PARTY BREACHES OF COPYRIGHT

In Australia we have the unique situation of a carrier being liable for third party breaches of copyright. In the US a carrier is deemed a conduit of information and would not be liable for copyright breaches by third parties. But the *Telstra v APRA*[5] decision has made carriers susceptible to copyright suits.

The High Court recently upheld the Federal Court decision that found Telstra liable for breaches of copyright by a third party who transmitted copyright works via Telstra's telecommunications network. The breaches occurred on a "music on hold" service and the Court found that because "music on hold" was an incidental service to the basic telephone service it was liable for this breach.

The case in the Federal Court turned on the court's interpretation of s26(5) of the Act[6]. That section states that a subscriber to an incidental service of a carrier shall be deemed to be a subscriber to the carrier. The majority held that the transmission of "music on hold" was a service to callers and was incidental to the provision of telecommunication services. Because Telstra had an agreement with its customers to provide them with telecommunication services and that service included the incidental "music on hold" service, Telstra should be deemed by operation of s26 of the Act to have an agreement with its customers to provide them with "music on hold". It did not matter that the "music on hold" was at best, extremely incidental to the telecommunication service.

The Federal Court held that a transmission of "music on hold" over Telstra's wired network amounted to a transmission of musical works to subscribers of a diffusion service for which Telstra was liable. Although the exclusive rights in "artistic works" do not include the right to cause the work to be transmitted to a diffusion service (s31 (1)(a)(v)), it can be argued that this case represents a general proposition that carriers are liable for third party copyright breaches that occur on an incidental service to its network.

Using this general proposition with the inline image example, a carrier is arguably liable for copyright breaches in inline images that occur over an incidental service. Creating inline images is just one of many Web functions, and as the World Wide Web is an incidental service to the telecommunications network, a carrier could be deemed liable for copyright infringement by a third party who uses the carriers network to inline an image.

If this proposition proves correct, telecommunication carriers may be liable for an enormous number of potential copyright infringements. And if copyright owners decide to pursue carriers for copyright infringements, carriers will be forced to screen material or dramatically restrict services.

CONCLUSION

It is clear that the Act does apply to the digital world and the new function of inlining images. If Australia follows judicial trends and the White Paper proposals holding bulletin board operators strictly liable, copyright protection and liability will greatly exceed the non-digital world. If copyright owners are serious about protecting their on-line material, they are better off implementing a technical solution which is cheaper, quicker and most importantly effective.

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1. *See http://wwwpatents.com/weblaw.html.*
2. 839 F. Supp. 1552 (M.D. Fla. 1993).
3. 1975 133CLR1.
4. 33 IPR 132.
5. *See http://www.austlii.edu.au/au/cases/cth/high-ct/unrep338.html*
6. (1995) 131 ALR 141.