By David Blackall

CAMERA JOURNALISM
Ethical and legal hazards

There are many legal and ethical obstacles that film-based journalists must consider before moving their product to completion.

Sometimes restraint on broadcast is beyond the control of producers, when a program is restrained unexpectedly due to the likelihood of it prejudicing court proceedings. While producers have no control over suppression orders, disastrous outcomes can be minimised and the chance of legal action decreased, through ongoing dialogue and informed consent with camera subjects. Where a situation justifies reduced informed consent, or when deceit is overwhelmingly in the public interest, producers need an ethical forum, an ethics committee, to discuss and document the process. This helps to ensure that the process is accountable and transparent, with record-keeping of legal guidance and consultation along the way. What follows are case studies that illustrate how ethical and legal considerations of camera journalism are most often intricately related. Each of these cases needed highly focused consideration prior to filming, and again before the final edit could proceed to broadcast or film festival screening.

DOES IT REALLY HAVE OVERWHELMING PUBLIC INTEREST?

In March 2013, BBC journalists covertly accompanied students from the London School of Economics to North Korea, secretly filming a documentary. Veteran undercover journalist John Sweeney, and his crew, posed as LSE professors in a Korean state-approved education tour. Prior to departure, a senior BBC committee pre-assessed the project as low risk, concluding the students were in no danger. But students complained, saying they were not fully informed until they arrived in Pyongyang. The university also claimed it was not informed, saying that nothing was in writing and that the BBC organised the trip. Once the ruse was public, North Korea threatened to publish personal details from the students' passports. Inevitable ethical questions should have been asked: what if the North Korean authorities had caught them? What would have been the outcome for the students? What happened to their North Korean guides? The severity of any punishment for the guides is an unknown, but is most likely to have been harsh, destroying careers and family. Answers to such questions are easily found in pre-existing cases.

In April 2013, North Korea sentenced Kenneth Bae, a naturalised US citizen, to 15 years hard labour. Bae will probably serve time in a special facility for foreigners, less harsh than the cruel centres for convicted North Koreans. Sources in South Korea suggested that South Korean-born Bae, a devout Christian, was arrested for photographing starving children. In 2009, two US citizens were sentenced to 12 years, but were later released after negotiations in Pyongyang by former US President, Bill Clinton.

For the LSE students, the BBC refused to apologise and screened the film, justifying the operation in the public interest. The *New York Times* reported that the BBC 'had claimed the students knew a journalist would accompany them and were reminded of it again, in time to have been able to change their plans'. However, this is not informed consent. For it to be truly informed, the students must sign

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an agreement that shows they understood all the possible outcomes.

Generally, filmmakers are ethically, but not contractually, bound to provide a reasonable understanding to participating subjects on what is voluntary participation and what constitutes the right to withdraw. Like medical research, filmmaking must apply no penalty as a result of someone not participating. However, it is critical for the filmmaker's rights and obligations, in ensuring the film's completion, that consent is revoked only when the subject can demonstrate that they are at real and unavoidable risk as a result of the film. Meanwhile, in law, the film and the filmmaker's rights are protected to an extent through the action for breach of contract.

It is difficult for television journalists and especially documentary filmmakers to envisage exactly how the >>

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story, style and final representation will unfold. However, a production process involving informed consent, with transparency, is more likely to enjoy a positive and consenting relationship with camera subjects – except where deception is necessary in the public interest. When this arises, discussion and approval should be sought from a body that works as an ethics committee. Usually, senior staff and lawyers will scrutinise material and the developing script, in anticipation of legal or ethical problems.

'FILM MADE ME OUT AS A TART'

In 2001, two teenage girls were unhappy about how they were featured in a documentary film entitled *Cunnamulla*, first broadcast on ABC TV. The film drew criticism for the way it portrayed the girls and their South Western Queensland town, Cunnamulla. Sydney's *Daily Telegraph* ran an article entitled 'Details of sex life in film made me out as a tart'. Initially, the young women wanted to restore their reputations through defamation, but their legal counsel instead chose the avenue of the *Trade Practices Act* 1974 (TPA).

However, the producer of *Cunnamulla*, renowned Australian director Dennis O'Rourke, later won a defamation suit himself – over comments about his filmmaking. In the ACT Supreme Court, Justice Crispin found that Aboriginal rights activist, Stephen Hagan, defamed O'Rourke when he was reported in the news media as saying that O'Rourke was unscrupulous in his conduct in making the film. Hagan was ordered to pay the filmmaker $80,000 plus interest. O'Rourke also sued *Nationwide News* for reporting Hagan's comments, and other claims in Sydney's *Daily Telegraph*, which was ordered to pay $100,000 plus interest.

It is interesting to note that defamation provided a remedy, whereas earlier proceedings against Dennis O'Rourke and his company based on s52 of the TPA did not come to judgment for reasons that are not apparent. The TPA case about the making of *Cunnamulla* was important for journalism and non-fiction filmmaking, as it showed that a filmmaker's conduct, which had been misleading or deceptive, could be pursued under the TPA. The process of making information available in the public interest is already limited, by many laws, and at the time it was feared that the TPA would add yet another burden.

Had the case gone to judgment, it may have established that all producers of commercial television news, current affairs and documentary would have to ensure informed consent before obtaining interview releases. They would be obliged to represent interviewees faithfully, as described in the release contract. If the final product strayed from the way in which the contract described the intended screen representation (which is often the case), then s52 would be available.

Section 52 of the TPA was complicated, and has now been replaced by the *Competition and Consumer Act* 2010. In 2008, Alan Bond failed in a claim of misleading or deceptive conduct against Paul Barry.[1] This particular case affirmed an important safeguard for published journalism, eliminating the need to avoid deception when there is overwhelming public interest at stake.

INFORMED CONSENT

If a producer was able to accurately envisage and then divulge the final intentions for the filmed material, on realisation, a 'reasonable' camera subject might still be forced to withdraw due to health risks as a result of the film's release. This was the case for Alice Perceval (and her two sons), included in the first cut of *Delinquent Angel* – my personal documentary on her father, the famous Australian painter, John Perceval. In response to her letter of revocation in 2000, all vision and audio of Alice and her two sons was removed, thus enabling SBS TV to broadcast the film.

Informed consent for Alice and her two sons (one of them, my son) was difficult to orchestrate from the other side of the world – she lived in Wales and I was editing in Sydney. Initially, there were telephone discussions about my intended vision of the film, and in 1996 Alice was sent a rough-cut. At this stage, there was little suggestion of the extent to which editing would improve the story by weaving our personal lives into the film. By August 1999, Alice signed a deed of release covering herself and her two sons: for copyright, image, likeness and voice – based on a revised rough-cut and a script.

The film was being funded by the Australian Film Commission (AFC) and would go into post-production in 1999. The rough-cut and script went to the AFC as part of the funding application. Consent for Alice (and her two sons, Marlow and Thomas) was therefore as 'informed' as possible – a rough-cut and script. She knew more then about the plan in 1999 than when she gave her initial consent in 1996, at the time of filming. Her consent was obtained through a deed (without consideration) signed by Alice, and witnessed by her husband, Ivan.

By early 2000, in seeking further contractual agreements from all participants, I sought Alice's informed consent for the third and final time. This involved a more binding contract. The film's lawyers of Stevenson-Court, in a thorough process, suggested I seek more substantial releases

before clearing the film for launch and broadcast. The only really viable course of action was to show Alice the finished film and negotiate a final and binding release. This was particularly relevant to an aspect of her copyright included in the final cut, overlooked by me before the lawyers' scrutiny, of her contributing to a pencil drawing executed with her father and our son Marlow.

Four months after completion, in March 2000, the film still awaited clearance and had been selected for three international film festivals (Sydney, Berlin and Melbourne). Without her agreement and on my receiving her letter of revocation, the only option was to start re-editing, removing Alice and her two sons from the film to enable the SBS broadcast.

This again raises the two important questions posed earlier in respect to filming subjects: when is consent truly informed? And what is the appropriate time for a subject to sign in consent? In Alice's case, informed consent had to be after her agreeing to the final cut. Ideally, the release should summarise and document the negotiation leading to agreement, with clauses acknowledging a viewing and approval of the final edit.

DELICATE LEGALITIES FOR THE PRODUCERS OF THE DOCUMENTARY – *THE TRIAL*

In 2005, 12 Muslim men were arrested in Melbourne, all charged with terrorism offences. They were held in severe conditions at Barwon Prison in Geelong and transported to court in Melbourne on a daily basis. After appeal, the court ruled the prisoners should be held in Melbourne in more humane conditions. Victorian Premier at the time, Steve Bracks, was quoted in the news saying that the arrests had 'probably disrupted the most serious preparation for a terrorist attack that we have seen in Australia'.[2] However, defence lawyer Robert Stary said, his clients 'had not been charged with planning a terrorist attack, but only with membership in a terrorist organisation'.[3] There were many in the echo chamber with Bracks, especially from the news media, all with potential to prejudice the trial.

> 'No target had been selected nor had there been any imminent, let alone actual, threat of personal injury or damage to property.'[4]

After a nine-month jury trial, hearing 482 conversations secretly taped by police, with 25 lawyers scrutinising 66,000 pages of evidence, seven men were sentenced on 3 February 2009 by Justice Bongiorno on the basis that the group 'led by Benbrika, encouraged and/or took some act towards the commission of a terrorist act some time in the future on an as yet undetermined target'.[5]

The Trial[6] is an important documentary film about this case. The DVD and associated website are important resources, especially for students of law and journalism. However, the film could not be seen in Victoria at the time of the public interest SBS broadcast, as the Commonwealth Director of Public Prosecutions argued that broadcast might prejudice further trials. This was unfortunate for public understanding, as the film revealed the serious nature and impact of Australia's new anti-terror laws, an issue which mainstream news media were failing to cover.

The film depicts defence lawyers working tirelessly, in a human rights context, only to be shattered by the disappointing outcome of guilty for most of their clients. The well-crafted film documents how the family of one of the accused suffered and how Australia's anti-terrorism laws could erode rights and attenuate news media analysis, resulting in speculation and sensational reporting of statements made by politicians and police. This was compounded by suppression orders and a fear of publishing in contempt of court amid a raft of untested new laws.

Greg Barns, barrister appearing for the defence and a central subject in *The Trial*, wrote in *Crikey.com*:

> 'Australia's anti-terror laws are so sweeping in their reach that they are embedding into our criminal justice system the repugnant concept of guilt by association'.[7]
>
> ... An organisation can be a terrorist organisation even if it has no terrorist act in mind. It is enough that a person subscribes to the philosophy of violence with the purpose of achieving a political end.'[8]

Barns argued that this amounted to thought crime and is therefore Orwellian, threatening free speech and undermining democratic values.

A FAIR TRIAL AND THE PRINCIPLE OF OPEN JUSTICE

While fictional in form, the Nine Network's *Underbelly* series was a documentary-like, factual representation of real >>

people, many of whom were facing court proceedings. No one could have summed up the potential of the series to prejudice a trial as well as Justice Betty King in her speech at the Melbourne Club:

> 'As a Justice of the Supreme Court of Victoria I am probably responsible for the majority of suppression orders that have been imposed in Victoria in the last three years or so, including one that could be described as infamous – the suppression of the televising of the series *Underbelly* by Channel 9 in Victoria.
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> The suppression order that I placed on *Underbelly* really seemed to surprise Channel 9. As far as I could tell they never treated it as a serious application before the court, they gave me the strongest of impressions that in their view no petty Supreme Court judge from another state (remembering all of this was run from Channel 9 in Sydney) would dare to stop a program that had been so heavily marketed and anticipated just for a criminal trial.
>
> The most fundamental tenet of that system of justice is that every person charged with a criminal offence has the right to a fair trial. In this country that includes a right to a trial by your peers, your fellow citizens uninfected with preconceived views.'[9]

When jurors watch critical aspects of a trial on national television, or they check details online, they are likely to be influenced. There are also jurors who may live on state borders, who may view a broadcast from a neighbouring state, which is not subject to an order. With borderless internet technology and DVD copies sold, or simply given away, the commercial considerations, the restrictions and the potential penalties are all conflicting tensions that producers must consider when developing and then marketing a program.

CAREFULLY DISCLOSING LEAKED DOCUMENTS BY WAY OF BROADCAST

The Trio Capital case was an international superannuation fraud, affecting many retirees across Australia. The sting targeted the Illawarra region and was ignored by most news media.

> 'The joint parliamentary inquiry found that the 2009 collapse of the Albury-based Trio Capital was the largest superannuation fraud in Australian history, affecting more than 6,000 investors.
>
> They had placed money through Trio Capital into two hedge funds, Astarra Strategic and ARP Growth, which siphoned their money to obscure Caribbean tax havens to the apparent benefit of a Hong Kong resident, Jack Flader.'[10]

Mainstream news and politicians alike have repeatedly claimed it was simply a collapse, not fraud. With the intention of correcting this myth, I filmed meetings held in 2012 by victims of the fraud, in the hope of eventually initiating a story for ABC *7.30 NSW*.[11] On 2 February

2013, I filmed a public speech delivered by Paul Matters, a Wollongong legal adviser to the victims. Matters claimed that he had received leaked suppressed court documents that revealed undisclosed details on Trio. As visible evidence, in the public interest, Matters' dramatic revelations would become central to the story for the ABC.

Matters held the documents up for all to view, alleging that they proved that Trio's collapse was intentional and that they arose from Shawn Richard's guilty plea, in his bid for a reduced sentence. As former CEO of Astarra Strategic Fund, Richard is the only person to be thoroughly investigated and subsequently convicted for his part in the disappearance of one-sixth of the total $175 million siphoned from Trio, which was never recovered.[12] He was convicted of two counts of engaging in dishonest conduct with respect to a financial product (s1041G(1) of the *Corporations Act*). Richard's role was central to the operation in Australia and he was extremely well paid.

Matters' filmed speech exposing the Richard case thus enabled pivotal references to other key players. So in compiling the program, the ABC contacted Wall Street's Charles Provini, who met Richard on a number of occasions. As former President of Paradigm Global Advisors, Provini counselled Trio Capital and US Vice-President Jo Biden's family company, which also worked with Richard. In a recorded telephone interview, ABC producers asked Provini if the Australian Securities Investment Commission (ASIC), the Australian Prudential Regulation Authority (APRA) or the Australian Federal Police (AFP) had ever contacted him in respect to Trio. Provini replied no, supporting what commentators have been saying – that ASIC should have been doing more in the Trio investigation.[13]

DRIFTING ALLEGIANCES AS PRODUCTION PROCEEDS

The ethical and legal considerations in filming and broadcasting are most often interlaced. The North Korean BBC case perfectly illustrates this intricate relationship. Unless each ethical aspect is thoroughly addressed, a production is more likely to end up in costly interlocutory battles. However, throughout the editing process, it is difficult for producers to see the inevitable ideological and representational 'drift' in allegiance. Commitment inevitably shifts from the original and informed contract with camera subjects towards the journalistic public interest and the commercial obligations bound into the final product. When there is continuous ethical dialogue – from the beginning of negotiation with camera subjects to the editing and post-production stages – then legal pitfalls that may later restrain the production process may be avoided, or at least will be more easily resolved. Similarly, such an ethical response may help fortify and prepare a response to unanticipated problems, such as those experienced by *The Trial*. ■

Notes: **1** *Bond v Barry* (2008) FCAFC 115. **2** E Lopez & D Cooke (2005) Raids disrupt 'imminent' attack, *The Age*, accessed 19 June 2013: http://www.theage.com.au/news/national/terrorist-attack-disrupted/2005/11/08/1131212027799.html. **3** R Bonner (2005), 'Australia arrests 16 in terror sweep', *The New York Times*, accessed 1 May 2013: http://www.nytimes.com/2005/11/08/world/asia/08iht-australia.html?_r=1. **4** *R v Benbrika & Ors* (2009) VSC 21 at [1], p3. **5** *Ibid*, at [4]. **6** 360 Degree Films (2009), *The Trial* website, accessed 1 May 2013: http://360degreefilms.com.au/productions/the-trial/. **7** G Barns (2008), 'Anti-terror laws bring out the thought police', *Crikey*, accessed 1 May 2013: http://www.crikey.com.au/2008/09/17/anti-terror-laws-bring-out-the-thought-police/?wpmp_switcher=mobile. **8** *Ibid*. **9** B King (2009), *'Underbelly' – A True Crime Story Or Just Sex, Drugs And Rock And Roll?* Transcript of Proceedings, Medico-Legal Society of Victoria. Speech heard at the Melbourne Club, accessed 1 May 2013: http://mlsv.org.au/files/2003-2010/Justice-Betty-King-Underbelly.pdf. **10** N Hasham & S Washington (2012), 'Please explain call over Trio Capital super theft', *Sydney Morning Herald*, accessed 1 May 2013: http://www.smh.com.au/business/please-explain-call-over-trio-capital-super-theft-20120516-1yr6r.html. **11** ABC 1, 'Leaked documents create tension around Trio collapse', Sydney, *7.30 NSW* program, 15 February 2013, accessed 1 May 2013: http://www.abc.net.au/news/2013-02-15/leaked-documents-create-tension-around-trio/4522442. **12** *R v Richard* [2011] NSWSC 866, [2] (Garling J). **13** M Taylor (2012) 'Should heads roll over Trio Capital?' *Money Management*, accessed 20 June 2013: http://www.moneymanagement.com.au/opinion/news-in-focus/should-heads-roll-over-trio-capital.

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