provided by the proceedings brought last year by actor Gordon Kaye against the British newspaper "Sunday Sport".

Gordon Kaye, a well known television comedy actor, was severely injured during a freak hurricane which struck England in January of 1990. He was placed on a life support machine, and to assist his recovery, notices were placed at the entrance to the hospital ward instructing visitors to see a member of staff before visiting Kaye.

On 13 February 1990 a journalist and photographer from the *Sunday Sport*, a newspaper which the Court of Appeal described as "lurid and sensational" ignored the notices and entered his room, to take photographs. Mr Kaye, perhaps not surprisingly in view of his condition, did not raise any objection, instructed the journalist and photographer to leave, but they refused and were eventually ejected by staff. Kaye, when asked, was entirely unaware of their visit.

The Sunday Sport refused an invitation to return the photographs, and indicated its intention to publish them, and to sell them to other newspapers.

Kaye's family brought proceedings to prevent publication of the photographs and an alleged "interview". Their action, framed in defamation, trespass and invasion of privacy, failed. The Appeal Court said, persuasively, that the action was not properly brought in defamation – the photographs could inspire only pity, not ridicule or contempt. There was no separate right to privacy, and therefore Kaye and his family had no means of preventing publication.

This case is an example of the unfortunate consequences of confusing defamation law with the protection of privacy. I therefore do not agree that plaintiffs (or anyone else) will benefit from the proposed exclusion from the defence of truth, of "certain private facts". If privacy is to be protected, it merits its own separate cause of action.

Court ordered apologies

While the Federal Court's power under the *Trade Practices Act* to order corrective advertising has attracted little comment, suggestions that the Supreme Court have an equivalent power to order a correction, when it finds that a defamatory, untrue settlement has been published, meet with howls of protest.

However, the value of such a power, unless the corrective statements can be obtained exceptionally quickly, must be limited. Advocates of defamation law reform on the media side are quick to criticise plaintiffs for seeking monetary damages at all – saying that if it is the restoration of a reputation which is at stake, that can be sufficiently done by an apology.

My own experience, assisting a variety of complainants in relation to alleged defamations, has been that newspaper proprietors in particular expect to be allowed days and even weeks in which to make up their minds to publish the most obliquely worded "clarification" or "correction", and then take umbridge when a complainant suggest that this is not sufficient to totally restore her or his good name.

I do not believe that it is practically possible to adopt a system which will compel newspapers or broadcasters to publish retractions or apologies, by court order, sufficiently quickly for them to have a real effect in restoring a plaintiff's reputation. Seldom can an apology published later than the next edition of the newspaper or program be sufficient to fully correct defamatory material. It can be no surprise therefore that some plaintiff, having gone through the process of trying to persuade a newspaper or broadcaster to correct mistakes, seek to recover monetary damages in addition to an apology.

Conclusion

To read many contributions to the defamation law debate from the media side (I do not include the other contributors to this Forum), is to gain the impression that all plaintiffs in defamation actions are unworthy gold diggers, seeking to gag the press. I do not believe it is so. Very few defamation plaintiffs make a profit from their cases, and those who do pay a great price in the discomfort and indignities of court proceedings. Publishers, meanwhile, are portrayed as martyrs to free debate and the democratic process, struggling to bring unpublishable truths to their readers or viewers. In fact, if we drove motor cars with the reckless disregard to other persons and their property that some reporters and media organisations show for the accuracy of their stories, and for the protection of individual reputations, we would be sued no less often, with equally expensive results and, in addition, would be likely to face criminal prosecution. I do not share the view that defamation laws in Australia should be substantially reined back.

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Rental rights – and the Copyright Act

Stephen Peach argues that the advent of digital technology has opened up new avenues for exploiting musical copyright for which artists should be remunerated

The advent of digital technology in the sound recording industry may, contrary to initial expectations, result in the decimation of that industry unless appropriate amendments are made to the *Copyright Act 1968*.

The acceptance of the compact disc format in Australia, in keeping with the experience of other major markets in the western world, has exceeded all industry expectations. In Australia, vinyl records now account for less than 10 per cent of all records sold each year and that figure is steadily declining. By way of contrast, sales of compact discs now account for more than 50 per cent of the balance.

The advantages of compact discs for the listener are well documented. One of these advantages, which is on the verge of being commercially exploited in Australia on a massive scale, is that a compact disc (or, more importantly, the sound embodied within the compact disc) does not deteriorate with repeated playing. It is, for all practical purposes, indestructible.

Of course, this characteristic also makes the rental of compact discs a commercially viable proposition. Regardless of the quality of the equipment used to play the disc, the disc itself will remain unaffected. This is in stark contrast to vinyl records which will suffer from significant and rapid deterioration depending upon the care taken with the record and the quality of the equipment on which it is played. The susceptibility of vinyl records to such damage has, in the past, acted as an effective barrier to the commercial exploitation of records through rental. The compact disc has eliminated that barrier and, already, compact discs are available for rental on a limited basis through many smaller record stores and video rental stores. However, if the experience of Japan is any indication (where in excess of 6000 rental outlets are currently operating), large scale compact disc rental is just around the corner.

No rental right

Section 85 of the *Copyright Act 1968*, which specifies the nature of copyright in sound recordings, provides that it is the exclusive right to make a copy of the sound recording, to cause it to be heard in public or to broadcast it.

A similar provision is contained in the Act in relation to musical works which, in the case of records, are embodied in the sound recordings. Section 31 of the Act provides that, in relation to musical works, copyright includes the exclusive right to reproduce the work in a material form, to publish it, to perform it in public, to broadcast it, to cause it to be transmitted to subscribers to a diffusion service and to make an adaptation of it. Neither section contains any reference to a right to hire the sound recording or the musical work. It has generally being accepted that, in those circumstances, the owner of copyright in the sound recording or the musical work has no "rental right". That is, the owner does not have a right to prevent unauthorised rental of records embodying the sound recording or musical work or a right to receive royalties or other compensation for the rental of those records.

No distribution right

It has been argued, following the decision of the Frankfurt Am Main Regional Court (Germany) in *Andreas Vollenweider and Friends AG* v *Medienpool Gesellschaft* (1989) that, at least in relation to musical works, there is a right to prevent unauthorised hiring of such works. The court in that decision held that a right of distribution (such as is specifically provided in the German copyright legislation) is divisible and that an owner of copyright can reserve the right to lend or hire when selling or authorising the sale of an article embodying copyright material.

To apply that decision in Australia, where the legislation does not provide for copyright to include a right of distribution, requires the right of publication (as contained in Section 31 of the Act in relation to musical works) to be construed as a right of distribution or to include such a right. Whilst there has been some debate on that issue, Section 29(3) of the Act would appear to render such debate irrelevant, at least in relation to the distribution of records. That sub-section provides, in part, that "the supplying (by sale or otherwise) to the public of records of a ...musical work... does not constitute publication of the work." Accordingly, even if the right of publication was held to contain a right of distribution (arguably entitling the copyright owner to reserve rights of rental), the sale or other distribution of records, at which point the rental right would need to be exercised, will not constitute an exercise of that publication right.

Royalties should be remuneration for exploitation

On the assumption that no rental right presently exists under the Act, the growth of CD rental outlets in Australia poses a great threat to the continued viability of the sound recording industry and the artists and composers who rely upon it. The income of copyright owners, including recording artists and composers, is still largely tied to, and dependant upon, the sale of "original" copies of records manufactured and/or distributed by record companies. The artist or composer typically receives a royalty for each record sold. The linking of the royalty with the sale of the record, whilst understandable in historical and commercial terms, blurs the concept of the royalty as remuneration for the use of the sound recording and the musical work embodied therein. The fact that such use, up until recent times, has largely been limited to the manufacture of records is simply a result of the available technology. However, current technological developments enable the dissemination of high quality copies of sound recordings in a number of different ways that do not depend upon the purchase of the record. Each alternative method of distribution of a sound recording, including the rental of the record, nonetheless constitutes an exploitation of the sound recording and the musical work in respect of which the copyright owner is entitled to be remunerated.

Survey evidence from Japan has revealed that in excess of 90 per cent of the compact discs rented are used to make a home copy. There is little doubt that this experience would be repeated in Australia. If the income of copyright owners continues to be tied to the sale of records, then the level of income derived form the exploitation of sound recordings and musical works will decline. While the implications for recording artists who are presently under contract are serious, they are catastrophic for those who hope to obtain a recording contract in the future, especially if the artist's music is of limited or marginal appeal. Declining incomes will result in less money being available to foster developing artists.

Amending the Copyright Act

The *Copyright Act 1968* is intended to ensure that the exploitation of a person's intellectual property is properly protected and/or properly compensated, however that exploitation may occur. Advances in technology have, however, tended to undermine the protection afforded by the Act. CD rental, which enables high quality copies of sound recordings to be obtained at a significantly lower cost to the consumer, is nothing more or less than the commercial exploitation of another's intellectual property for personal gain. The copyright owner is not presently entitled to receive any compensation for this new, and now commercially viable, use of the copyright material.

There can be no moral or legal justification for the failure of government to adequately protect the rights of copyright owners and to continue to protect those rental rights have already been introduced into the copyright law of many countries, including the United Kingdom, United States of America, France and Germany, in recognition of the growing threat to copyright protection posed by CD rental. At a time when Australian music is contributing significantly to the growth in Australia's export income, the need to protect that income is self evident.

Submissions have been made by the Australian record Industry Association ("ARIA") to the Commonwealth Attorney-General seeking amendment of the Act to include a rental right. The Department is presently seeking submissions from other interested parties on the amendment proposed by ARIA and on the question of rental rights generally.

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commercial services and advertiser supported pay TV.

Finally, there should be continued, indeed expanded, self-regulation in appropriate areas. The voluntary codes on violence and self regulation of commercial airtime have been successful. It has been a co-operative effort between the broadcasters with the input, advice and overview of the regulators and we believe there is significant further scope using these role models.

In conclusion, I think it is fair to say you will be hearing from us a lot more and a lot less defensively than has recently been the case. We cannot underwrite our continued economic viability while, at the same time, adopting a heavy regulatory hand with what remains of our businesses.

The real test of how serious we are about self regulation will be to see how much progress is made in the review process of the Broadcasting Act and the significant scope for self-regulation within that review between now and the time of the next election.

Bob Campbell is the Chief Executive of Network Seven. This is an edited version of a paper presented to the ABT Conference, "Deregulation ... in Step with the World", held in Sydney in November 1990.