

finally, the need to amend section 10 in order to remove the distinction between satellite and cable.

A number of delegates expressed alarm at the delay in reform and suggested that an absence of pressure on the Government to examine the issue since the ABT reports of 1982 and 1984 has contributed to the delay. Justice Sheppard commented that a likely result of calls for reform would be to focus attention on how change may affect consumers - particularly the cost of purchasing products under a new regime. Stephanie Faulkner of APRA commented that the recent Prices Surveillance Authority report has hurt the industry by leading to a downturn in investment.

### Conclusions

The Workshop made a number of general conclusions, not the least of which was of the numerous deficiencies in the *Copyright Act* in relation to protecting satellite transmissions and the owners of underlying works.

The current situation, where cable transmissions are only protected if they come within the meaning of a "diffusion service", and the distinction drawn between broadcasting via satellite, and broadcasting via cable, is one that needs urgent review. Although cable was not common in 1968, it is increasingly utilised and the current situation is discriminatory. Suggested ways of reviewing this problem included the adoption of the Berne approach of an exclusive right to communicate to the public; the adoption of the UK approach of a more extensive right covering cable, based on communication to the public rather than "diffusion to subscribers"; or the creation of a broader right to communicate to the public that would encompass the right of public performances.

A number of delegates stressed that it is important to realise the *Copyright Act* also needs reform to take account of emerging technologies such as multimedia and interactive products, in addition to existing problems with the protection of computer-based products.

Concerns were expressed that sweeping reforms to the Copyright laws, requiring owner/creators to sell upfront additional rights, would operate to the detriment of those groups, who have traditionally only achieved a position of equal bargaining power with producer/suppliers through collective bargaining arrangements.

The advent of increasing numbers of new technologies poses a challenge for more than just copyright legislation; the Workshop examined the inability of the

criminal law to prevent signal piracy, and submission were made that legal requirements were unduly complicated and out of touch with commercial reality.

The transnational potential of broadcasting makes the existence of satisfactory arrangements on an international level extremely important; the current situation is that reform to conventions is slow and consensus almost impossible to achieve, with the result that the current protection to holders of

property right is at best sketchy. There are limitations on Australia's ability to increase protection at a domestic level and agitate for reform at an international level.

*For a full text of conference proceedings, reference should be made to the tapes of proceedings. Copies of papers presented at the conference may be obtained through the Administrative Secretary, CAMLA.*

## Edmond In Wonderland

Georgina Waite reports on the recent defamation action brought

by Vldas Meskenas against Edmond Capon

*"Then you should say what you mean" the March Hare went on.*

*"I do" Alice hastily replied - "*

*At least I mean what*

*I say - that's the same thing, you know."*

*"Not the same a bit" said the Hatter.*

*- Lewis Carroll*

In a recent defamation case Edmond Capon, Director of the Art Gallery of New South Wales, was found to have defamed artist Vldas Meskenas in comments made by Capon about a portrait of Rene Rivkin which Meskenas had entered in the Archibald prize. The jury awarded Meskenas \$100 for the damage to his reputation and the judge ordered Edmond Capon to pay the artist's legal costs. Edmond Capon has appealed against the costs order.

The action was based on comments by Capon, which appeared in the Sun-Herald reported as follows:

*"It is simply a rotten picture. It's no good at all. I don't care what Rene thinks. I looked at the picture and thought "yuk!"... the hand's all wrong, so are the eyes. And look at the neck, it looks like it's been painted with chewing gum."*

The plaintiff alleged that these words gave rise to imputations that the plaintiff was:

1. an inferior artist; and
2. so incompetent that he painted a second rate picture.

Judge Christie of the District Court ruled that Edmond Capon's comments were capable of conveying both these imputations, although the jury found only the first imputation to be conveyed to the ordinary, reasonable reader of the Sun-Herald.

The case had given rise to debate on two issues. First, does the art critic who attacks an artwork necessarily discredit the artist? Second, where a defence of comment is raised, should a defendant be

required to prove that they honestly held the opinion represented by the comment itself, or the opinion inferred from the comment as identified in the imputations drafted by the plaintiff.

### Say What You Mean

Identifying what a published comment means will always pose difficulties in the law of defamation. The defendant is accountable not only for the meanings he or she intends but also any secondary or inferred meanings which might be conveyed to the hypothetical "ordinary, reasonable reader". As with most of the law's hypothetical referees the ordinary, reasonable reader is of fair, average intelligence and not perverse, morbid or avid for scandal. Needless to say, such people disagree about what particular words or comments mean but the defendant must have them all in mind when expressing an opinion.

Capon's words fell to be measured by the ordinary, reasonable reader of the Sun-Herald's Tempo column and the jury found that such readers would understand Capon to be imputing that Meskenas was "an inferior artist". This is despite the fact Capon's words are clearly directed to the particular portrait of Rene Rivkin. As the defendant's Counsel pointed out, if a critic lambasts one of Picasso's works as "simply a rotten picture" about which the critic thought "Yuk!", would the critic have to qualify those remarks by saying "but I think his other works reflect his genius", lest he or she be taken to hold the opinion that Picasso was an inferior artist.

The point is that all artists do some work which is of poorer quality; no artist is uniformly excellent. A criticism of a work may mean no more than that the

artist lacked skill or competence in executing this particular work - or a criticism may impute that the artist's work is generally of a poor standard - this case shows that it is a slippery slope for a critic from conveying the former opinion to conveying the latter. There is arguably uncertainty as to whether remarks directed wholly to a particular work of art (or performance or whatever) can be regarded as capable of giving rise to such general imputations as "the artist is an inferior artist" and, if so, such imputations should not be left to the jury without some qualification.

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### I Mean What I Say

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**C**riticism of artworks is commonly defended as "fair comment", that is, that it represented the honest opinion of the speaker on a matter of public interest (the latter point generally being presumed in the case of identified art works).

Capon raised the defence of comment in response to the claim against him on the basis that he meant what he said. From his testimony it is clear that he believed his criticism of the portrait was well founded. However, during the proceedings Justice Christie ruled that the defence was no longer available after Capon gave evidence in cross-examination that:

- he did not intend to say anything about Meskenas as a painter, his comments were directed towards the painting;
- he did not intend by his statements to say anything derogatory about Meskenas as distinct from the painting;
- he did not intend to say, nor was it his opinion, that Meskenas was an inferior artist or so incompetent that he painted a second rate picture.

Under Section 32(2) of the Defamation Act 1974 (NSW) the defence of comment is defeated if "at the time when the comment was made, the comment did not represent the opinion of the defendant". There has been some judicial debate about whether the defence of comment under the NSW Act addresses the words of the comment itself or the imputations drafted by the plaintiff.

Support for the former view has been expressed in the NSW Supreme Court and the Court of Appeal. In *Petritus -v- Hellenic Herald Pty Ltd (1978)* Samuels JA expressed the view that the defence "is directed to the character of the vehicle by which those meanings, whatever they are,

are conveyed; that is by a statement of fact or by a statement of opinion... In my opinion, a defence of comment under the 1974 Act must be directed, not to the imputations specified in the statement of claim but to the matter as defined in S.9(1)."

By contrast, the Privy Council in *Lloyd -v- David Symes & Co. Limited (1986)* held that the defence of comment must be directed to the imputations and, further, that if the defendant did not intend the imputations found by the jury, then those imputations cannot have represented the defendant's opinion. Judge Christie applied the Privy Council's ruling in the Capon case as follows:

"As a result of the view I took of that decision and the manner in which it appeared to me to affect the decision of the NSW Court of Appeal in *David Symes & Co. Limited -v- Lloyd* and the manner in which that decision affected previous decisions on the question of comment, I came to the view... that there is no defence of comment available to the defendant in these proceedings. (*The Judge noted the defendant's evidence outlined above and continued*). In those circumstances, it would seem to me not possible for the defendant to successfully plead comment, which must be at the very least congruent with the imputations".

There is strong argument in favour of the approach taken in Lloyd's case on the basis that the cause of action under the NSW Act lies in each imputation published by the defendant and, if the jury finds such an imputation has been made out, then that is what must be defended, but the application of Lloyd's

case considerably erodes the protection available to defendants seeking to express opinions on matters of public interest. Words often convey meanings which the speaker may not intend (or reasonably foresee) and applying Lloyd's case the defendant has no option to say - "I didn't intend to say it but if that was what was conveyed it did represent my opinion." This would not have assisted Capon, who did not hold the opinion imputed, but could be a reasonable response from other defendants whose opinion was in fact congruent with the unintended imputations.

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### Not The Same Thing

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**S**aying what you mean and meaning what you say is not the same thing in the law of defamation because the law looks to the effect of the words on the ordinary, reasonable reader not the intention of the speaker. Comment is not a watertight defence for those expressing opinions on matters of public interest because unintended meanings may be conveyed which may be left to the jury as capable of arising even though the speaker could not have reasonably foreseen those meanings and which, on the authority of Lloyd's case, the speaker is precluded from arguing represented his or her opinions.

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## Recent ACT defamation cases

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### True Innuendo

**I**n *Graham Charles Evans -v- John Fairfax & Sons Limited and Alan Ramsey and John Alexander*, the plaintiff, a Senior Commonwealth Public Servant sued for defamation in the ACT Supreme court over an article published in the Sydney Morning Herald on 14 April 1990 titled "*Cosy in the Corridors of Power*". The plaintiff alleged that the article conveyed in its natural and ordinary meaning imputations that:

- (a) The plaintiff's career advancement in

the Commonwealth Public Service was only the result of the patronage from the Prime Minister;

- (b) The plaintiff in his capacity as secretary of the Department of Primary Industry & Energy lacked the confidence of his Minister, Mr John Kerin;
- (c) The plaintiff was a person whose successful career in the Public Service was due more to his enjoyment of a nasty system of patronage than to anything else;
- (d) The plaintiff was prepared to advance his career through cronyism rather