Needless to say, this is not uncommon in most developed cultures in the world with the exception of the United States (although even there, there are considerable indirect subsidies through tax breaks and so on). It is proper that the question should be regularly asked whether, if public moneys are to be spent in such quantities, the public is getting "what is wants" for its dollar and is the process too "hit and miss"?

Given that the Australian film industry has received well in excess of $1 billion in total Government subsidies in the last 15 years, one is obliged to ask whether the Australian public has had "a good return" on this investment.

Two - Is a Government cultural policy which places major emphasis on training and culturally supportive institutions preferable to one which provides substantial ongoing subsidy for individuals and companies which actually "produce" cultural material?

This age old debate has no clear resolution and the *Creative Nation* statement does not purport to provide any answer to those whose complaint is that cultural policy constantly encourages the establishment of new "creators" but it does not sustain those creators over time (unless you are the happy recipient of a so-called "Keating Award"!).

Three - to what extent should cultural bureaucrats be making creative choices?

Obviously, when there is a greater demand for funds than funds available choices must be made but the question still remains whether these should be on purely economics or also take into account qualitative issues of cultural value. It is interesting to note that the Film Finance Corporation having started out as being entirely "deal driven" has steadily and inexorably intruded further and further into qualitative issues. More and more frequently it is determining that an otherwise qualifying project will not be funded unless an additional producer is appointed, or has a different director or, in the documentary area particularly, that the script is re-worked.

The FFC now demands a "presentation credit" above the title of films in which it invests rather than an end credit acknowledging its financial support for the film. This is a significant change of emphasis and "style".

Whether these types of intrusions are good or bad is not dealt with or resolved by *Creative Nation*. In fact, they are compounded to some extent because *Creative Nation* talks about creating market and the exploitation of the arts which must, inherently, involve creative decisions being made in favour of "popular" artforms as against traditional high culture.

Sum

Creative Nation is a bold, precise and clear statement of the involvement of a Government which genuinely believes that culture is essential to the creation of a coherent and worthwhile nation state.

The linkage between cultural policy and this Government's aspirations to republicanism should not be overlooked - it is difficult to shed an entire cultural heritage in the process of becoming a republic if you do not have a sound and complete culture within the newly independent nation state. The significance of this linkage could be overstated but the emphasis upon institutions in *Creative Nation* would seem to confirm the linkage.

Martin Cooper, Martin Cooper & Co., Lawyers.

The real issues in "Who Weekly"

Kaaren Koomen reports on the issue of identification and identifying the real issue.

In June 1994, *Who Weekly*, a magazine with a distribution of approximately 112,000 copies in the NSW and ACT each week, published a photograph of Ivan Milat, the person presently facing trial in relation to the seven *"backpacker murders"*, along with a charge of attempted murder, armed robbery and unlawful possession of firearms. The photograph was featured prominently on the front cover of the magazine and a smaller copy was on page 29. In the photo Mr Milat was depicted singing at a private gathering at his family home. The facial features and upper torso of the accused were clearly visible from the photograph.

Following the publication the Attorney General brought an urgent application for injunctive relief against the publisher of the magazine, Time Inc. Magazine Company Pty Ltd ("Time"), on the basis that the publication of the photographs involved a triable issue for contempt of court. Charges for contempt were brought against Time and the editor the next day.

The interlocutory hearing came before the NSW Court of Appeal (Kirby P; Handley and Sheller JJA) on 7 June 1994.

Implied right of free communication

Time argued that the case involved balancing the right of free expression and the right to fair trial, and that, at least at the interlocutory stage of proceedings, the balance favoured free expression. Reference was made to the implied Constitutional right to free communication, referred to by the High Court in *Nationwide News Pty Ltd v Wills and Australian Capital Television Pty Ltd and Ors v The Commonwealth of Australia.* (The interlocutory proceedings were heard before *Theophanous v The Herald & Weekly Times Ltd and Stephens v West Australian Newspapers Ltd).*

Kirby P, with whom Handley and Sheller JJA agreed, said that in deciding whether to grant an injunction in these types of cases it was necessary to not only consider whether there was a triable matter of contempt but also the impact of such an order on free expression and communication.

The Court said that it was established as part of the law of Australia that the Court will usually seek to defend the right of free communication ordinarily enjoyed by all members of the community *(Council of the Shire of Ballina v Ringland*, unreported, Court of Appeal (NSW), 25 May 1994). This was "a precious right" which was in addition to any constitutional right of free expression or communication.

However the Court said that also at stake in this case was another "precious right" - that of an accused person to a fair trial. Kirby P described this as a right to *"have that trial conducted before a jury and with witnesses uninfluenced by relevant matters which have been published and which may adversely affect that right".*

The Court explained that the right to a fair trial was not only a right of the accused person but also of the Crown, representing the community, to ensure that in appropriate cases a person who is in fact guilty can be properly convicted according to law in a manner which can withstand appellate scrutiny. Kirby P stressed that it is in cases where the alleged crimes of the accused are already notorious and of high media interest that our commitment to this right is truly tested.

In balancing of the competing rights of freedom of communication and fair trial Kirby P found that, at least to the degree of satisfaction required to grant interlocutory relief, it is *not* the case that *"the Constitution or any right of free communication which is implied in it, diminishes the right of the accused to fair trial which the courts must*

protect." Kirby P said that the right of fair trial *"appears to be just as much a part of the fabric of the law which the Constitution defends through its judiciary as that which establishes or assumes to be the right of free communication".*

Identification and prejudice

The basis of the interlocutory proceedings was that the publication had the tendency to interfere with the due course of justice. The modern test is whether *"a particular publication presents a real risk of serious prejudice to a fair trial, ie. a serious injustice" (Hinch v Attorney General for the State of Victoria.* It must be shown that there is a *"real risk"* of prejudice, *"not mere fanciful speculation".*

Time argued that the Attorney General had failed to establish by admissible evidence that identity would be an issue at trial in a way which would be affected by the publication, and accordingly it had not been shown that the publication carried a *"real risk"* of impeding the fair trial of the accused. However, the Court of Appeal said:

"It is enough that identity might be in question. That possibility can rarely, if ever, be excluded in a serious charge such as murder".

sketches vs photographs

One of the arguments raised by Time was that a lifelike sketch of the accused had been published in *The Age* newspaper in Melbourne before the photograph in question was published by Time. Time said that there was an insufficient difference between sketches and photographs for one to constitute contempt whilst the other apparently does not.

The Court of Appeal disagreed, Kirby P stating that there was *"a great difference"* between a *"photographic representation of an accused person and a drawing".* It is difficult to accept that this distinction is as great as Kirby P suggests. Whilst a photograph may convey a more precise and realistic image than a drawing or sketch, this distinction really depends on the quality of the artist and how realistic the drawing or image is. It is questionable whether this is a satisfactory basis for such a distinction.

Kirby P also made the point that the drawing of the accused in a newspaper published primarily in Victoria meant that this publication did not take place in the main catchment area from which jurors for the accused trial are likely to be drawn and where many or most of the witnesses live. It is important to note that at the full hearing it was conceded by the Attorney General and accepted by the Court that there was no question of jurors being prejudiced by the publication of a photograph of the accused. Accordingly, the issue of identification was considered only relevant in relation to potential witnesses.

orders not futile

Time argued that as the actual distribution of the magazine was the responsibility of a distributing company it had no effective control over the distribution or retrieval of the relevant edition of the magazine. On this basis Time argued that the orders sought by the A-G were futile and thus should not be invoked.

The Court of Appeal did not accept this proposition, finding that an order against Time would deal with those copies of the magazine which had been returned to Time and would also prevent any further resale of the material to local or overseas interests. More importantly, Kirby P said:

"[t]he fact that entire success could not be secured does not establish that the provision of the relief sought would be a futility. It would not be. At the very least, the orders, once made, would uphold the legal rule long established in this country defensive of the right to fair trial".

This suggests that the deterrent or educative role of an order of this kind could overcome any practical defects in the effectiveness of the order itself.

The Court also held that Time should be obliged to take *"resolute and vigorous"* steps to effect the order, rejecting Time's argument that it should only be obliged to take those steps which were *"reasonably necessary".* However, the Attorney General did not object to the variation of the order which allowed Time to sell copies of the relevant edition of the magazine to which "immovable" plain black adhesive stickers had been affixed to obscure the face of the accused.

the full hearing

At the full hearing in August 1994 a differently constituted Court of Appeal (Gleeson CJ, Sheller and Cole JJA) heard fresh argument on all legal and factual questions regarded by the parties as being material. The Court held that the test for contempt of the kind alleged in this case was *"whether the clear tendency of the publication was, as a matter of practical reality, to interfere with the due course of justice in the prosecution in question".*

In relation to photographs of the accused, reference was made the leading authority in *Ex Partes Auld re Consolidated Press Ltd* in which Jordan CJ said:

"The test to be applied in order to determine whether the publication of a photograph of an accused person, in such a way as to state or suggest that it is he who is accused, is a contempt of court, ... is to see whether, as at the time when the photograph was published, there was a likelihood that the identity of the accused would come into question in some aspect of the case, so that publication of the photograph would be likely to prejudice a fair trial. ..."

The rationale for this approach is the view that the publication of the accused's photograph might impair the reliability of the evidence of witnesses on the issue of identity. For example, after viewing a photograph, a witness may displace the image in their mind of the person who they saw on a previous occasion with the (different) image of the person in the photograph.

Time's submissions

The Court of Appeal addressed four of the submissions put by Time. First, it was argued that having regard to the extensive police operation and publicity that had taken place by the date of the publication (and indeed hearing), the likelihood of further witnesses coming forward to give evidence on the issue of identification was, in all practical reality, low.

It was common ground that both witness "A" and witness "B", the only two known identification witnesses who were to give evidence in relation to the charges of attempted murder and attempted robbery, had made their identification of the accused before the relevant publication from photographs shown to them by the police. The Court accepted that there was no real risk that their evidence will be contaminated. Moreover, witness A resided at all relevant times in the United Kingdom where *Who Weekly* does not circulate, but where other photographs of the accused had been published by the British press.

Further, contrary to the interlocutory proceedings, it was accepted at the full hearing that there was no real likelihood of a photograph of the accused affecting jurors.

Time's second argument related to the principle of open justice. It was said that one of the functions of the media is to act as the "eyes and ears" of the general public and

report on matters heard in open court which, because of time and geographic constraints, as well as the physical limitations of the court itself, many members of the public are unable to attend and obtain information on themselves.

As Mr Milat had appeared in open court, many people had exercised their right to attend the court and had seen the accused in person. Hundreds more may do so during the trial. By publishing a photograph of the accused Time was exposing no more than what members of the public would have seen had they had the opportunity to attend the Campbelltown court in person. To be consistent with the defence of fair report, which is specifically designed to protect media accounts of proceedings heard in open court, Time argued that the publication of a photographic image of an accused person who has appeared in an open court ought not to be regarded as contempt.

Time's third argument was that, relying on the defence of fair report of proceedings in open court, much information about the accused had already been made available to the public, including his age, racial background, approximate height, eye colour. By the time of the hearing there had also been a number of sketches made of the accused as he sat in open court which had been published on television programs and in newspaper articles, some of which had made no attempt to obscure the image of the accused.

Time said that it was unreasonable and unrealistic to presume that a photograph may contaminate the evidence of a witness in a way which was different from an artist's sketch or a vivid verbal description of the accused. Further, Time argued that the content of the *Who Weekly* article was balanced and was far less prejudicial to the accused than other material which had been published by way of fair report of the proceedings.

Accordingly, Time argued that the practical impact of the *Who Weekly* publication on the fair trial of the accused, even if the emergence of a new identification witness was viewed as a possibility, would be that "of a snowflake in a furnace" and would not constitute a *"real risk"* to the evidence of witnesses or the due administration of justice.

the CA's findings

Without addressing these arguments in any detail, Gleeson CJ, with whom Sheller and Cole JJA agreed, took the view that a case of contempt had been made out.

"[I]n the circumstances that existed at the time of the publication of the photograph, the clear tendency of the publication was, as a matter of practical reality, to interfere with the due course of justice. Identity was a central issue in the case. There is a real and definite possibility that the evidence of people who might come forward as witnesses for the Crown, or the defence, will be contaminated by their having seen the photograph of Mr Milat before performing an act of identification".

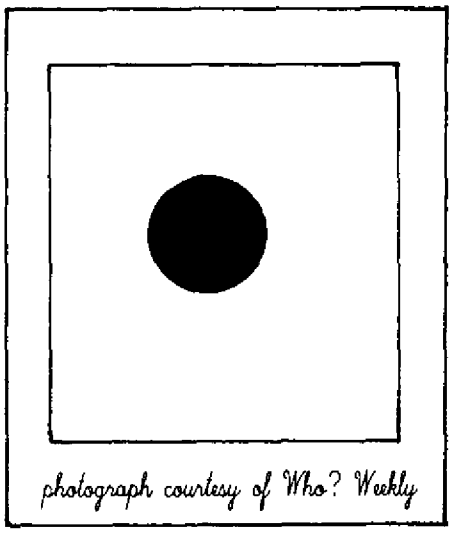
Time had also said that the way in which photographic images of accused persons have hitherto been considered by the law now contravened the implied right of freedom of communication or expression recently established by the Commonwealth Constitution.

The Court of Appeal curtly dismissed this argument with the comment that, whilst it was perfectly legitimate for a magazine such as Time to *"seek profit from providing information and entertainment"*, they had *"no right, under the Constitution, or at common law, to do so at the expense of the due administration of justice"*.

Fines of $100,000 and $10,000 were ordered against Time and the editor of the magazine respectively. Time was also ordered to pay the Attorney-General's costs.

High Court appeal

Time has sought special leave to appeal to the High Court. One of the grounds upon which special leave is sought is that in practical terms the Court of Appeal's decision results in a virtual strict liability offence. This is because in almost every case in which a photograph of an accused is published it is theoretically possible that a new witness who *"might"* have seen the photograph *"might"* come forward at some future stage, notwithstanding that where the accused has appeared in an open court, anyone, *including possible witnesses*, could have attended the court and seen the accused *in person*.



photograph courtesy of Who? Weekly

Further, Time has asserted that this hypothetical *"possibility"* of prejudice to a fair trial, referred to by Gleeson CJ, is disproportionate to the impact which this would have on the Constitutional guarantee of free communication, recently affirmed in *Theophanous v The Herald & Weekly Times Ltd* and *Stephens v West Australian Newspapers Ltd.*

Time also seek to argue that the view taken by the Court of Appeal is inconsistent with the law and practice of many other Western democracies, including the United States, United Kingdom, New Zealand, Canada and South Africa. In reference to the United States, Time has argued that US courts have consistently held that the publication of information, images and photographs relating to an accused person who has appeared in an open court at which the public may freely come and go is irreconcilable with the constitutional protection afforded by the first and fourteenth amendments to the United States Constitution.

It is argued that the fact that Australian law, having recently recognised the implied constitutional right to free expression, is out of step with other democracies, and in particular the way in which the US courts have upheld the media's right to free expression in relation to matters seen and heard in an open court, renders the case of contempt against Time a matter which the High Court ought to review.

conclusion

Whilst the issue of identification was the focus of the proceedings before the Court of Appeal, the sub-text of Time's case is the way in which the implied rights of free communication in the Constitution will affect the Australian media in the future. Also in issue is the ability of the law of contempt to accommodate technological change in the form of photography in courtrooms and, in time, possibly even the televising of Australian court proceedings.

The outcome of the application to the High Court, to be heard on 17 February 1995, is awaited with great interest.

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