successful as the courts have traditionally taken a narrow view of this condition. The real test will therefore come when common law jurisdictions such as Victoria or South Australia interpret reasonableness under the common law and ultimately the High Court is provided with an opportunity to look closely at this question once more.

So far as the Lange defence was concerned, the particulars provided did not bring the publication within the extended defence. The matter was remitted back to the Supreme Court with an opportunity provided to the ABC to amend its defence in view of the High Court's comments on extended qualified privilege.

The Lange case has recently been settled and this case will not therefore provide a further vehicle for determination of "reasonability" under the common law defence. In view of the specific comments made by the High Court as to what would constitute reasonable conduct on the part of the publisher, the expanded common law defence may well be narrower than the NSW statutory defence. It will therefore be interesting to see how other states interpret and apply this defence in future.

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Diana, Privacy and Media Corporations

Kathe Boehringer examines the role of media corporations in the context of invasive media practices and proposes new models of corporate governance to raise corporate and individual responsibility.

The indoor sport that everyone loves to play is bashing the media, particularly when it can be readily viewed as "out of control". Public outrage fuelled by the perceived "hounding" of Princess Diana has fastened on easy targets: lower forms of media life - "irresponsible" hirelings, like editors, journalists and photographers - and despised categories like "the hacks of Fleet Street", "ghoulish" royal watchers and the now-infamous "paparazzi". Unfortunately, the sleaze dimension of these usual suspects has diverted attention from the systemic corruption that lies at the heart of the erosion of privacy.

The symbiosis between the political system and the media-entertainment system is obvious: politics demonstrably takes place in and through the media, and politicians are only as good as their last media appearance. It is only a matter of time before being a good media performer will be regarded by both parties and politicians as more valuable than being a good parliamentary performer. Indeed, the emphasis is on "performance" rather than on plain old hard work in the constituency or parliamentary committee rooms.

ROLE OF THE MEDIA IN SELF-GOVERNANCE PROCESS

For its part, the media-entertainment system serves largely as a publicity amplification service for politicians. An increasingly concentrated media busies itself with brokering acclamation[1] rather than in providing the institutional basis within which critical public opinion may be formed, yet still claims Fourth Estate status. But that view of the media - as a vital forum in which citizens debate and form opinions crucial for self-governance - is belied by the High Court's characterisation of the media's role in the 1992 free speech cases. The High Court's protection of freedom of political communication relates to a specific and limited activity - citizen engagement in the *electoral process only*. The wide array of self-governance opportunities in which citizens might become engaged were active citizenship genuinely contemplated - i.e. beyond the realm of "official" politics - was not canvassed. Judicial recognition of the Australian media's "vital" role is therefore restricted to the field of representative politics.

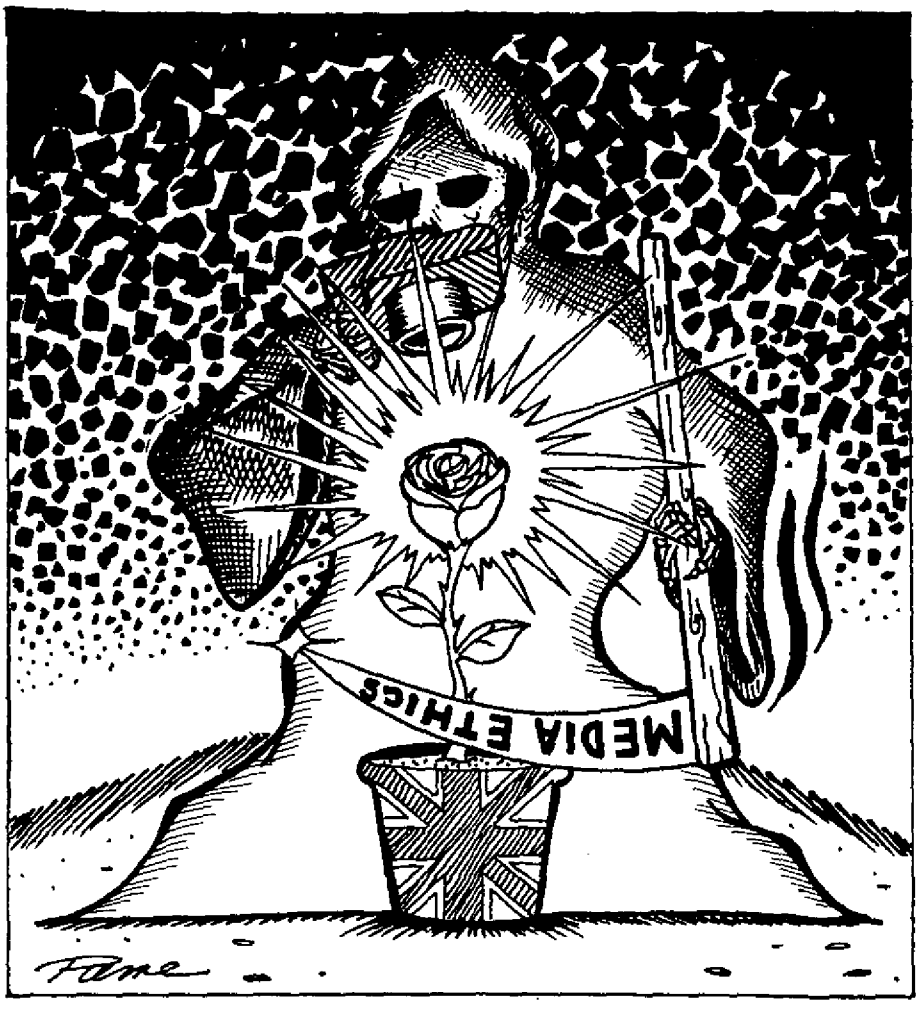
Mr. Justice Mahoney's view of the media is refreshingly far-ranging:

> *"It is the power of the media which alone remains, in the relevant sense, arbitrary. ...The media exercises power, because and to the extent that, by what it publishes, it can cause or influence public power to be exercised in a particular way. And it is, in the relevant sense, subject to no laws and accountable to no-one; it needs no authority to say what it wishes to say or to influence the exercise of public power by those who exercise it."*[2]

LAW REFORM PROPOSALS AND RESPONSES

Given the cosy relationship between the representative political order and the media-entertainment system, it is perhaps not surprising that law reform attempts to protect individuals from media invasions of privacy have been largely unsuccessful. Raymond Wacks provides a detailed and depressing account of the numerous attempts at law reform since 1945 in a Britain notorious for a tabloid press that has plumbed new depths of sensationalism, irrelevance and outright lies.[3] Law reform, in seeking to vindicate dignity- and autonomy-based privacy interests arguably undermined by invasive media practices, runs up against the carefully cultivated image of the media as the guardians of free speech.

In these circumstances, strong privacy protection measures like criminalising particular journalistic conduct is bound to be represented *by and in the media* as "interference". Providing individuals with remedies in tort is a cure that may be worse than the disease: redress is contingent upon a costly, prolonged and *public* court process. At another level, administrative measures - say, the creation of an independent press council - are inherently unsatisfactory: to the extent that such councils are given strong disciplinary powers, they will be accused of "do-gooding" as well as political interference; if their powers are weaker, then their "toothless tiger" actions will be viewed as largely beside the point.



Given the difficulties associated with establishing legitimate and effective regulation, potential regulatees argue for self-regulation: the media in Britain, for example, point to the self-restraint campaign recently launched by *The Independent* to illustrate the possibilities of such an approach. While self-regulation might bear fruit in a context where conduct will be judged in terms of the institution's acknowledged civic responsibilities, it is unlikely to be effective in situations where there is widespread political and judicial acceptance that media corporations' primary responsibilities are to "the bottom line".

CORPORATE GOVERNANCE AND RESPONSIBILITY

The impossibility of regulating media entities *from the outside* - in respect of privacy or any other value - means that regulation from the inside needs to be considered. The unlikely reform vehicle that presents itself is that of corporate governance. Lawyers, familiar with reform approaches that involve tweaking doctrine and reinterpreting rationales, may baulk at such a suggestion. But lawyers should recall that corporate governance structures arose historically in contexts where enterprises understood themselves as much in "civic" terms as in commercial terms, and that doctrines like *ultra vires* emerged in such a context.

Anyone interested in developing a media culture of responsibility should find the notion of a robust internal *political* forum attractive. After all, only such a forum, constituted in the light of the corporation's commercial goals as well as civic responsibilities, could possibly generate the kind of corporate commitment to responsible media practices that is the *sine qua non* of genuine and lasting reform. Media enterprises can hardly be seen to clothe themselves in the raiment of the Fourth Estate and yet regard corporate governance as an arena in which only shares vote, and in which responsibility for generating appropriate privacy practices is definitionally irrelevant.

MEDIA CORPORATIONS AS PRIVATE GOVERNMENTS

There is no doubt that contemporary media corporations are private governments.[4] Their increasingly global reach and influence makes it imperative that the *constitutional* significance of such private governments be recognised. Short-sightedness and sheer venality weds us to the traditional view of the corporation as merely a private mechanism that maximises profits for shareholders. As Eells points out:

> *"To many observers of corporate governance it seems anomalous that our corporate polities are in effect self-perpetuating oligarchies by reason of their internal authority structures. The anomaly is that these allegedly autocratic enclaves persist in the middle of a society dedicated to constitutionalist principles with respect to public government, thus perpetuating a system of private governmental enclaves at odds with our public philosophy of government. This disparity of governmental forms and processes ... has led to demands that the corporation be "constitutionalized", just as critics demand the introduction of responsible government in labor unions."*[5]

NEW POLITICAL FORUM FOR CITIZENS/SHAREHOLDERS

To the extent that economic globalisation undermines the regulative capacities of the nation-state, citizens would be well advised to consider other political forums within which their capacities for self-governance can be exercised. Because "the principle of nationality has become little more than a constitutional mirage", Fraser argues that:

> *"the best hope for constitutional freedom may turn upon our willingness to move beyond the politically threadbare illusion of autonomous nationality by creating a multiplicity of 'little republics' within the associative forms of a newly self-assertive civil society."*[6]

The notion of an "assertive civil society" may seem a distant goal, inundated as we are with images of national politicians, globe-trotting "celebrities" and distant economic elites as movers and shakers. Yet a redesign of corporate governance opens up a new forum for citizens interested in public life but whose appetite for civic engagement is dulled by the sterility of vision-free political parties and representative government.

Re-designing the corporate governance of media corporations may not appeal to

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