

Book Reviews

TELLING US WHAT WE CAN AND CANNOT WATCH

Deciding What We Watch: Taste, Decency and Media Ethics in the UK and the USA, by Colin Shaw. Oxford: Oxford University Press, 1999. Pp.184, £12.99 (pb), ISBN 0 19 815936 6.

This book fits into the limited body of literature that examines directly the regulation of broadcast media in the UK and the USA. The content focuses on terrestrial television and to a lesser extent radio. The text also makes occasional but interesting references to satellite television and the Internet. The book explores the boundaries that broadcasters should observe regarding taste and decency in a free society and how these are reached. The text outlines the similarities as well as the key differences between the regulatory systems and the contexts within which they operate in both the UK and the USA. The author draws upon his own personal experiences as a broadcaster and regulator in both countries and also quotes from interviews with academics, senior broadcasters and regulators in both territories to make his case. Valuable as this is, by foregrounding the opinions of media's elite, the author fails to include the views of audiences which he states should be central to the regulatory decision-making process.

The central thesis of the book is that as the regulation of the media industries becomes increasingly difficult due to the proliferation of the media, issues relating to taste and decency are increasingly made within what the author refers to as the 'third domain' of human conduct. The 'third domain' is a space between total control and complete freedom where programme makers and broadcasters make decisions about media content that take into account the wishes of audiences and also the frameworks provided by internal and external regulators. A key feature of the book is the way it draws implicitly upon an expansive definition of regulation. This enables the text to go beyond a narrow view of regulation, as something imposed upon broadcasters, to take into account how social, cultural, moral, legal, technological and economic factors impact upon the decisions made by programme makers, broadcasters and regulators. The book therefore contributes to the growing body of literature within cultural studies that sees regulation as a complex phenomenon that increasingly takes place outside statutory mechanisms and increasingly within voluntary or self-regulatory frameworks.

The book is divided into nine chapters. Chapters 1–3 set up the context within which the later chapters are to be read. Chapter 1 presents the author's understanding of the 'third domain' before outlining what he sees as the major differences between the UK and the USA. The second chapter outlines how these differences have impacted on the development of the broadcasting systems in both societies and the mechanisms used to regulate them. Shaw suggests that whilst both countries have employed regulation to maintain diversity in programming they have very distinct approaches, with the UK engaging in a higher level of intervention than the USA. The third chapter defines taste, decency and obscenity before providing an overview of the main issues addressed in the following chapters. The chapter closes with an account of the mechanisms that programme makers, broadcasters and regulators employ when

deciding what we watch. In Chapter 3 Shaw states that taste is ephemeral and that decency is more permanent. His reasoning is that the law distinguishes between the two, as there is no legal offence of 'bad taste' but there are laws dealing with indecency. On the surface this is a pertinent point, but it overlooks the possibility that taste formations are influenced by structural features such as class, race and gender.

Chapters 4–8 examine a range of taste and decency issues within the UK and the USA. Chapter 4 examines regulatory issues raised by children's programming and also the adult programmes watched by children. Chapter 5 examines the shifting regulation of sex in broadcasting since the 1960s. Chapter 6 explores the regulation of bad language within broadcast media. Interestingly, the author is comfortable discussing the treatment of words like 'fuck' and 'cunt' in this chapter but glossed over in a perfunctory way the representation of rape on television at the end of Chapter 5. Chapter 7 addresses the regulatory issues that have arisen from news and reality programming. Chapter 8 deals with the regulatory implications of privacy for programme makers and broadcasters. Chapter 9 outlines the case for media regulation before concluding that the future of the public interest in broadcasting lies within the 'third domain'.

Deciding What We Watch makes a valuable contribution to the existing literature on the regulation of the media industries in the UK and the USA. The book offers an illuminating insider's view on media regulation, a perspective that is often missing from academic accounts. The publication would be of interest to students and academics within cultural studies, people working within the media industries and lawyers working in the field. Unfortunately due to the date of publication the book is not able to take into account recent regulatory shifts within UK broadcasting, such as the creation of OFCOM and the forthcoming Communications Bill, nor is it able to comment on recent developments with digital television. Perhaps these developments could be included in a second edition.

SHAUN KIMBER

King Alfred's College, Winchester

THE WAR AGAINST DOPING

Drugs in Sport, by David Mottram (ed.). London: Routledge, 3rd edn., 2002. Pp.432, £25.00 (pb), ISBN 0 415 24886 8.

The timing of the third edition of *Drugs in Sport* is most apposite, coming as it does, at a time when the sports industry has geared itself up for another round of the drum-beating and flag waving crusade against doping in sport. In February 2003, the good and the great gathered in Copenhagen to bow before the WADA (World Anti-Doping Agency) altar and to give praise for the new World Anti-Doping Code. Politicians queued to pledge their support and sign the Copenhagen Declaration, and the UK Government vowed its support and promised to think very hard about the possibility of doing something to support the 'war' on doping. All in all, it was a nicely staged event.

Behind the political spin however lies a serious and rather disturbing message to athletes: test positive and your career is likely to be finished. Athletes to whom I have

spoken broadly support the provisions of the new Code but then they have not tested positive. To the lawyer the code represents the vanguard of an anti-doping crusade aspiring to purge sport of doping at virtually any price, including justice to athletes.

The object of the WADA Code is to harmonise doping regulations. Why would sport wish to do this seeing as the process of harmonisation will do little of itself to win the 'war'? A reasonable assumption might be that sport is seeking to bombproof itself against the law and lawyers. To adopt a strict liability standard across all sports prevents any dispute on the grounds of lack of guilt. At the same time, however, it challenges one of a defendant's most basic rights – to assert innocent consumption.

Supporters argue that the code is flexible enough to allow for a reduction of the penalty for a doping infraction, even to zero, where the athlete is 'innocent'. However the code insists that this provision can only be invoked if the athlete can substantiate an alternative explanation as to why the test was positive – an extremely unlikely event. Equally it misses the point. One of the main reasons that athletes challenge doping bans is because they wish to clear their name. A positive finding with no sanction is still a positive finding.

WADA has even managed to produce some extremely contrived criteria, including the usual adverse effects on health and unfair advantage arguments, in attempting to justify why caffeine and other recreational drugs should remain on the banned list. Why this justification was deemed necessary is impossible to explain as it has long been clear that sports governing bodies cannot justify such substances being on the banned list.

These issues are sufficient in themselves to justify a lawyer's concern. The concerns multiply however when they are put into context. Athletes, when entering sports competitions, subject themselves to binding arbitration on all disputes. That means that they cannot go to court and appeal against the findings of the internal hearing. Also, the highest dispute resolution panel, the Court of Arbitration for Sport (CAS), has a long way to go before it convinces many that it is a legitimate alternative to a national appellate court.

The CAS does not operate a system of precedent nor does it publish fully the results of its hearings. Cases that are published show glaring inconsistencies in translation between the French and English versions. One of the main planks of any athlete's appeal is likely to be that the procedures during the investigation and in the hearings are flawed, making the ultimate decision unsafe. This procedural ground for challenge is effectively removed in the CAS by its ability to consider the facts *de novo*.

Sport has built for itself an almost impregnable fortress of rules and institutions to guard against doping; what it believes, spuriously, to be the ultimate threat to its future. In the process, athletes' rights have been largely disregarded. Of course, the real threat to sports' governing bodies is not unfair competition or athletes' health but the promotion of sport and the potential loss of income brought about by an unclean image. The irony then is that the doping 'war' is a self-fulfilling prophecy. How many of us would even be aware of the issue if it were not trumpeted from the battlements by WADA and their like?

Challenges on scientific grounds remain a favoured strategy for those lawyers brave enough to represent athletes and take the fight to the governing bodies. There has been a degree of success in these arguments, notably the nandrolone cases, although they ultimately proved unsuccessful. Anyone interested in the scientific side of doping, be it in a professional or academic capacity, would be wise to keep at their

side a copy of *Doping in Sport*. Written by eight authors, seven of whom are from a chemistry or sports science background, *Doping in Sport* provides a clear, and as far as is possible jargon-free, elucidation of the main scientific issues. Chapters covering central nervous system stimulants, doping and respiratory tract disorders, anabolic steroids, growth hormones, blood boosting, sports injuries, alcohol and creatine are presented clearly and authoritatively and can be understood even by lawyers who flunked GCE science in the dim and distant past.

Where the book is less effective is when it moves away from scientific exposition towards political opinion. Statements such as, 'exercise scientists should be prepared to take the lead and adopt a more high-profile role in the fight against drug abuse in sport' is not particularly scientific and is better suited to Copenhagen sound-bites than it is to academic discourse. Ultimately it is a little disappointing that more could not have been written challenging the scientific approach of WADA and the code which would at least have given some lawyers cause for hope in the battles that lay ahead.

JOHN O'LEARY

School of Law, Anglia Polytechnic University

INTELLECTUAL PROPERTY RIGHTS, TRIPS AND DEVELOPING COUNTRIES

Global Intellectual Property Rights: Knowledge, Access and Development, by Peter Drahos and Ruth Mayne (eds.). Basingstoke: Palgrave Macmillan, 2002. Pp.281, £15.99 (pb), ISBN 0 333 99028 5.

Global Intellectual Property Rights: Knowledge, Access and Development consists of 14 separate articles and an introduction. The articles have been written by practitioners and academics who are in many cases well-known for their views on the effect of the strengthening of intellectual property rights on developing countries. The international team of contributors include Carlos Correa from Buenos Aires, Willem Pretorius from South Africa and John Sulston and Ruth Mayne from the UK. Mayne is also one of the editors. The interdisciplinary nature of the book is apparent: the contributors include scientists, lawyers, philosophers and economists. The introduction and one of the chapters, Chapter 10, have been written by Peter Drahos, an academic whose scrutiny of *inter alia* the development of international treaties is analytical and thought provoking.

As indicated above, the thrust of this collection is as to the effect of the strengthening of global intellectual property rights on developing countries, in particular on access to drugs, on access to knowledge and on the (in)ability of developing countries themselves to build on existing resources which are protected by intellectual property and mainly owned by those in developed nations. The majority of chapters have as their focus the effect of TRIPS on developing countries, in particular concerning patents, although the discussions roam much more widely than simply analysing the provisions of that Agreement. The majority of the contributors are critical of the effect of the increase in intellectual property right protection. Some are more circumspect in their views, pointing out that there are measures under the TRIPS Agreement that allow flexibility for developing countries. In this context Correa

discusses parallel imports, exceptions to patent rights and compulsory licensing. Love deals with the ability of a government to authorise the use of a patent without the permission of the owner. However, as Love points out, what TRIPS permits and what developing countries do tend to be two different things. This theme runs through a number of the contributions. Balasubramaniam points to the hypocritical stance taken most notably by the US but also by other developed countries who for many years while they considered their countries to be developing, not only refused to protect intellectual property in the global market place, but also took advantage of the flexibility available under the existing Conventions. That was until they felt that their domestic industry was ready to feel the benefit of global trade.

In relation to the politics that so clearly play a central role in the development of global intellectual property rights, Drahos points to the power influences that were apparent in the drafting of the TRIPS agreement and to the subsequent activities of the USA, the EU and a number of other developed countries in 'encouraging' developing countries to adhere to more than the minimum standards required under TRIPS (TRIPS-plus). Pretorius, dealing with the same topic, points to a series of activities undertaken by US representatives in their attempts to encourage South Africa to change its law on parallel importation of patented medicines; a similar account is given by Khor. Perhaps one of the most startling events is narrated by Pretorius (p.192),

11 February 1998: the US Department of State tells USTR that the New York Times is researching an article on the South African trade dispute. Steven Fox from USTR tells Jay Ziegler in South Africa to use the following statement:

'We are very concerned about the implications of these amendments. We have conveyed our concerns to the government of South Africa in strong terms and are consulting closely with the affected US companies about appropriate action.'

Given the widely held view that TRIPS was in large part negotiated under the influence of regulatory capture of the negotiators by large multi-national corporations, it would appear that the behaviour of these same corporations knows few bounds: '[Developed] states should also be questioning whether they ought to continue to support the rent-seeking agendas of big business on intellectual property rights' (Drahos p.179).

As suggested, the majority of the chapters are concerned in one way or another with patents. The catalyst for this was, of course, the South African Medicine Act of 1997 which allowed parallel imports of cheap patented drugs into that country. This was followed by the challenge to that Act by pharmaceutical companies and their subsequent climb down. Health is an emotive issue. When millions are dying due in part to their inability to afford the essential drugs over which patents are held in the developed countries, it is unsurprising that public opinion is likely to be stirred. It is much more difficult to capture the public imagination in an area which is connected with copyright or with trade marks. It is therefore to their credit that Story and Lea investigate some effects of strengthening copyright on the international educational agenda and on software respectively. The effect of increasing rights and the consequent impact on developing countries in the educational sphere is highlighted in an emotive plea by Sente quoted in Story: 'Allow us to study and become the kind of citizens of the world that they would be proud of... Woe is the life of the modern day student living in "Darkest Africa" for obviously we are still being kept in the slave

quarters of the world' (p.140). So copyright clearly can be a sensitive issue, although realistically it will not be easy to capture and to channel public opinion.

Other strands and questions emerge from reading the contributions in the book. Blakeney looks at the CGIAR system: the association of public and private donors that supports an international framework of agricultural research centres and oversees the largest agricultural research effort in the developing countries. CGIAR owns a number of valuable germplasm collections. No thought was given to the intellectual property issues arising from these collections when they were being developed; rather the public interest philosophy of the organisation was uppermost, and that was to increase crop yields to meet increased demand. Attempts have been made to gain property rights in materials derived from the collection. The result has been a restriction on access to those same materials. It would seem that once again intellectual property rights issues and in particular patent 'grabs' engender an anti-innovative culture (Macdonald, p.34).

One brave attempt has been made to keep information in the public domain, which is the information that derives from sequencing the human genome. Sulston, a co-founder of the Human Genome project, describes the anxiety over the question of property rights that surrounded the discovery in this area, particularly when break-away rival groups started to patent results, so inhibiting access and use to other researchers. Sulston and his team went through what appears to be a remarkable process to come to the conclusion that the information that they were developing should remain in the public domain, unfettered by private property rights. One alternative canvassed was the idea of 'open source' rights, by analogy with the open source software movement where intellectual property rights are used to ensure access to and dissemination of software. However, using such a framework was considered antithetical to the results the team working on the human genome project wished to achieve, which was one where the information should truly and properly be in the public domain, unencumbered by private property rights. This, it was felt, would facilitate access by researchers and others, as well as make the information part of the prior art and thus more difficult to protect by way of patent rights. What is fascinating is that Sulston and his team had all the advantages of seeing other methods of ownership and dissemination having been used in practice. These were discarded in favour of a no-ownership rule.

But on this last point it must not be forgotten that not one of the contributors to the book depends for his or her salary on intellectual property rights. Each derives financial benefit in some other way, whether from an academic institution, a NGO or by relying on their skills as an advocate in court. Would any of the contributors change their views if they were reliant on patents, or on copyright or on trade marks for their daily bread? It is impossible to say. However it does illustrate the point that it is the individuals acting within the multi-national corporations that must be convinced of the broadly held views represented in the book that TRIPS, TRIPS-plus and regulatory capture by these corporations forcing developing nations to adhere to rules that are more appropriate in some (but not all cases) for developed countries is neither in their short nor long term interests. What is needed is understanding and tolerance on both sides and a debate where all are involved on equal terms – a suggestion forcefully made by Drahos.

Other noteworthy points to emerge from the book include the discussion by Sahai concerning plant variety protection in India. A sustained campaign was mounted in

1994 in India to allow farmers the right to sell seeds. This culminated in the Plant Variety Protection and Farmers Rights Act 2001 which does just that. This was seen as pivotal to the survival of the many millions of farmers in India. If they did not have the right to sell seeds, that would leave the way open to the multinational corporations to dominate the market, driving the population from its traditional role. The campaign was organised mainly by way of disseminating hard-copy literature and holding seminars. What is interesting is that no mention is made of the Internet as a means of raising awareness of the campaign. But then of course India is a developing country. How different are the resources in developed countries. Grass roots campaigns are often fought using the Internet as a means of communication. The crisis over the supply of aids drugs in South Africa is a case in point. Traditional methods of dissemination were certainly used. But the pressure groups also had the benefit of the Internet to facilitate and enhance the spread of information about the campaign. How much quicker the dissemination of that information. But this, of course, only goes to emphasise one further chasm between the information rich and information poor countries, the developed and the developing.

In summary, this book is very interesting. It does have its faults which careful editing could have avoided. For instance the reader is told a number of times of the facts of the aids drugs crisis in South Africa. They are also told on several occasions when developed countries introduced product patents, with some variations. But these are trivial complaints compared with the quality and variety of the contributions. It is becoming more fashionable these days to criticise TRIPS and lament the effect that the Agreement has on developing countries. What is needed are more informative publications such as this where valuable, enlightening and well-informed contributions are made to this debate. This book is highly accessible and should be read by all those involved in or learning about the intellectual property system. It makes a very valuable addition to the developing literature in this area.

CHARLOTTE WAEDELDE

*Co-director AHRB Research Centre for Studies in
Intellectual Property and Technology Law
School of Law, University of Edinburgh*

CYBERSPACE LAW DOWN UNDER

Cyberspace Law: Commentaries and Materials, by Yee Fen Lim. South Melbourne: Oxford University Press, 2002. Pp.569 + xxvi, £36.95 (pb). ISBN 0 19 551576 5.

The mounting number of books about cyberspace which have been published in recent years can be taken as a signal of the growing social, political and commercial importance of the Internet. Their diverse geographical origins also impart evidence of the multi-jurisdictional reach of the Internet. Added to the burgeoning catalogue of American works, there have materialised several titles in the United Kingdom. Now the collection is steadily growing in the Asia-Pacific region. This book adds to that collection, with an examination of the law said to be 'from an Australian perspective' (p.vi). The author does indeed explain the cyberspace law affecting that jurisdiction but also encompasses in even greater measure source materials from the United States,

as well as giving the reader a passing acquaintance with the cyberspace laws in New Zealand and, to a lesser extent, Singapore. By contrast, the comparisons with the United Kingdom in particular and within the European Union in general are meagre.

The opening chapter provides an introduction to the nature of the Internet and rightly emphasises its 'executive' organisation (p.3) through the likes of the Internet Architecture Board. At the same time, there is no countervailing argument to the comment that the law is 'stretched' by the Internet (p.1), including the assertion by Lessig that the Internet is not only shaped by the 'code' upon which it is founded, but also that the development of code will allow for 'a perfect tool of control' to be wielded 'by commerce with the backing of government' (*Code and Other Laws of Cyberspace*, New York: Basic Books, 1999, pp.x-6). The paucity of detailed analysis – the 'commentaries and materials' of others are very much to the fore – is emphasised further by the fact that the pattern set in this opening chapter and its successors is that the author's own comments are confined to relatively short sections of 'Notes and Questions'. These are generally stunted and tend to be of the 'Question' more than the 'Note' variety. At times, the reader experience has the feel of being confronted by a 569-page examination paper.

Perhaps the most interesting theme that the author ventures into is that jurisdiction is 'easily the central legal issue arising through all Internet legal discourse' (p.vi) and is 'an all pervasive issue' (p.60). The point is explored in Chapter 2 by way of case law from the United States and, more expectedly, from Australia. Yet, the chapter sets out the range of issues which evidence this remark rather than capturing or analysing the differences of juridical approach between Australia, the United States and Europe to jurisdictional conflicts of laws.

The remainder of the book tackles substantive issues of cyberlaw. However, the underlying theme is very much based upon the development and demands of e-commerce, on the basis that e-commerce is 'the buzzword of the new millennium' (p.62). Though this emphasis is shared by others (see especially L. Edwards and C. Waelde, *Law and the Internet: A framework for electronic commerce*, Oxford: Hart, 2000), it is a view which underplays the transformative social and political uses of the Internet and the legal issues arising (for which see Y. Akdeniz, C. Walker and D. Wall, *The Internet, Law and Society*, London: Longman, 2000). Within the author's set parameters, there follow chapters on Electronic Contracting, Privacy, Encryption, Electronic Signatures, Internet Crime, Internet Content Regulation, Copyright, Trade Marks Law, and Patents. But it is very much through the prism of e-commerce that these subjects are tackled. For example, the issue of privacy, in Chapter 4, barely considers the privacy of the employee versus the employer or that of the citizen versus the state. As a result, it is possible for the author to adopt the very partial view that 'privacy is about control not secrecy' (p.127, *per* Bruce Slane) and that, 'The modern model for personal data privacy has been an economic and commercial construct, rather than a human rights construct.' (p.136) – tell that to James Malone or Alison Halford, whose cases have substantially shaped the European law of privacy. Another example of the e-commerce bias is found in chapter 6, where it is asserted that encryption 'poses serious challenges to both the philosophical foundation and the operation of all western democracies' (p.213). Beyond a newspaper article in the *Baltimore Sun*, there is no evidence cited for such a dire conclusion, a level of discussion which would surely be considered insufficient in a book with wider boundaries than e-commerce. Likewise, the assertion in chapter 8, Internet Content

Regulation, that, 'the core concern is not what the content should be, but whether and how we can regulate it' (p.335) is unduly simplistic and underplays cross-border quarrels about issues such as gambling or hate speech. Indeed, Chapter 8 is one of the least successful in the terms of the book, and one is left wondering how attempts to classify and regulate Internet content under the Australian Broadcasting Services Amendment (Online Services) Act 1999 are actually faring and whether Australia is truly determined to vie with China and Saudi Arabia in the repression stakes. Throughout, the pattern of meagre 'Notes and Questions' is generally observed. So is the reluctance to venture into European comparators, with American materials far more prominent, especially in Chapter 7, Internet Crime, which is largely based around the (US) President's Working Group on Unlawful Conduct on the Internet, the Electronic Frontier (2000) and other official Washington publications.

The catalogue of chapters outlined above is much as one would expect, save that it omits the impact of cyberspace on taxation, that most fundamental of reasons to avow national sovereignty and therefore a core issue both to e-commerce and jurisdiction. Reviewing the list of topics as a whole, it might be said that the book betrays an emphasis towards the intellectual property issues, and these are also the most detailed and informative, containing the most extensive and perceptive remarks by the author. The issue of Electronic Signatures, Chapter 6, is also particularly well done and finely detailed. As to whether the author's overall conclusion in this subject area (pp.453, 542), broadly that copyright and patents laws have seen off the challenge of the computer nerds and have emerged with strengthened rights for property owners is sustainable, might, nevertheless, be doubted. The *Napster* decisions are rightly addressed as important, but the continued development of peer-to-peer distributed networks, such as Kazaar (Gnutella is also mentioned at p.451), shows no sign of falling away. The latest developments are that the record companies are at last joining them rather than beating them, with Apple recently launching the iTunes Music Store, a paid music service.

Since the manuscript was delivered by the author on the coincidental anniversary of both Chinese New Year and Shrove Tuesday of 2002 (p.vii), it would be churlish not to celebrate this supplement to the cyberlaw library. It almost goes without saying that, as a product of Oxford University Press, it is produced and proofed to an excellent standard and that the referencing and indexing are very good, save that there is no bibliography (or perhaps it could be called a 'Further Reading List'). However, the book does not bring champagne quality to the party. It is challenging at the best of times for collections of commentaries and materials to leave a distinctive taste, and the lack of annotations by the author by no means assists to achieve otherwise in this case. A more satisfying explanation awaits as to how a jurisdiction like Australia picks and chooses between the competing and inescapable influences of the New World and Old Europe and yet still attempts to maintain a distinctive legal voice, if that is still viable within the global reach of cyberspace.

CLIVE WALKER
Professor of Criminal Justice Studies
CyberLaw Research Unit, School of Law, University of Leeds



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