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## **Alice through the wormhole: reconciling spatial and temporal disjunctions in the creation of content in Australian media law**

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## **Alice through the wormhole: reconciling spatial and temporal disjunctions in the creation of content in Australian media law**

### **Abstract**

Copy of powerpoint presentation to the conference.

### **Keywords**

australian, content, media, creation, law, disjunctions, alice, temporal, wormhole, spatial, reconciling

### **Disciplines**

Law

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## Alice through the wormhole: reconciling spatial and temporal disjunctions in the creation of content in Australian media law

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## What is the matter?

- Law based in a founding rationality
  - Grounded in the epistemes of C18<sup>th</sup>
- Presumes a knowing, willed actor
- Assumes actions based on rational modes of thought
  - Actions function from the mind
  - Actions are capable of being viewed by others as intended by the actor
  - Abjures the body and its viscosity

## Matter is the matter

- C18<sup>th</sup> presumptions/C21<sup>st</sup> behaviours
- Presumed rationality confounded
  - Altered states of a mediated and mediatised self
- Knowing, willed actor replaced
- Actions based on self-focussed modes of thought
  - Actions function from the self and desire
  - Actions as reflex
  - Centred on the body and its viscosity

## Bifurcation

- Desire to regularise embedded in media law
  - Regulation of the actions of individuals on the one hand
    - Private law
      - Defamation etc
  - Regulation of the reception of actions as encountered
    - Public law
      - Censorship, classification, content rules
- Regularising distinct zones grounded in the C18<sup>th</sup>
  - Grounded in norms and analytical modes of the past

## Why?

- **ACMA Investigation Live hosted entertainment radio programs: Adequacy of community safeguards for the protection of participants** January 2010
  - Regularising what?
    - Submitter 'Phillips'
      - 'the public has always had the choice of listening or changing the channel'
      - 'If people don't like Kyle they don't HAVE to listen or watch him. We have choices for a reason'.
  - ACMA report p 12

## What is this about?

- This man is Kyle Sandilands
- He has been a 'shock jock' on Sydney radio
- His stock in trade is ridiculing participants or other people on his shows
- Three instances caused controversy in 2009



20 July 2009

## The family member

- Kyle Sandilands: So, you are going to be flown over Dana. That's, that's the good news right?

Jackie O: The twist here is when Dana flies over, Sally, we're going to put her on Monday morning behind a door but there are going to be two other doors.

- Jackie O: You picked door number two? On the count of three: 1, 2, 3...

Saveth Chorn: Oh no!

- Dana Vann: Please Kyle, I'm on my knees. Let me stay please...

Kyle Sandilands: There's no need to get on your knees. Why is everyone blaming me as if this is my whole brainchild?

Dana Vann: ...please 2DayFM let me stay, please.

— Radio 2DayFM, *The Kyle and Jackie O Show*, 20th July, 2009

29th July 2009

## The minor

- Jackie O: We have her hooked up to the lie detector. She's not happy. I just saw her listening to that replay.

- Jackie O: Okay, what's your next question, mum?

Mother: Okay. Have you have sex?

Daughter: I've already told you the story of this and don't look at me and smile because it's not funny. Oh, okay. I got raped when I was 12 years old.

Kyle Sandilands: Right. And is that, is that the only experience you've had?



7 September 2009:

The media personality and comedian

"Magda could have another run out of it," he said on 2DayFM.

"She could get another season out of them, easy ... she's not skinny."

Jackie O suggested Szubanski might not be able to lose any more weight due to her build.

"That's what all fat people say," Sandilands replied.

"You put her in a concentration camp and you watch the weight fall, like she could be skinny."

## ACMA investigated whether

- Existing industry practice and regulatory arrangements, including the *Commercial Radio Codes of Practice and Guidelines* provide adequate safeguards for participants and subjects in live hosted entertainment programs on commercial radio?
  - Stunts
  - Prank calls
  - Competitions
  - Challenges

## Code of Practice 1: Programs Unsuitable for Broadcast

1.1 The purpose of this Code is to prevent the broadcast of programs which are unsuitable, having regard to prevailing community standards and attitudes

### Program Content and Language, including Sex and Sexual Behaviour

1.5 (a) All program content must meet contemporary standards of decency, having regard to the likely characteristics of the audience of the licensee's service.

(b) The gratuitous use in a program of language likely to offend the anticipated audience for that program must be avoided.

## Code of Practice 2: News and Current Affairs Programs

The purpose of this Code is to promote accuracy and fairness in news and current affairs programs.

2.1 News programs (including news flashes) broadcast by a licensee must:

- (d) not use material relating to a person's personal or private affairs, or which invades an individual's privacy, unless there is a public interest in broadcasting such information.

2.2 In the preparation and presentation of current affairs programs, a licensee must ensure that:

- (e) respect is given to each person's legitimate right to protection from unjustified use of material which is obtained without an individual's consent or other unwarranted or intrusive invasions of privacy.

## Code of Practice 6: Interviews and Talkback Programs

The purpose of this Code is to prevent the unauthorised broadcast of statements by identifiable persons

6.1 A licensee must not broadcast the words of identifiable persons unless:

- a. that person has been informed in advance or a reasonable person would be aware that the words may be broadcast; or
- b. in the case of words which have been recorded without the knowledge of the person, that person has subsequently, but prior to the broadcast, expressed consent to the broadcast of the words.

## The investigation considered:

- The level and specific nature of community concern in relation to these types of program elements using the facts and circumstances in the recent 2Day FM episode as a key case study;
- The practices, processes and protections already in place in the industry in relation to participants and subjects in such programming elements and in particular, to children;
- Whether industry practices and provisions in the industry's code are sufficient to meet the community's concerns in this area;
- If not, what additional regulatory arrangements would need to be put in place and what would be the most effective regulatory response; and
- Any other relevant matters.

## Focus on minors?

- Submitters:
  - Presumption that regulation should be limited to those who lack capacity
  - Others sought to regulate more broadly – regulation of the space as well as the broadcast
- Former presumes the ability of individuals to make rational choices
  - Proper mode of regularising limited
  - Action to be directed towards consumer not participant
- Latter recognises that will is overborne
  - Regularising of the mode of creation as well as broadcast

## Codes of Practice need to be amended to

- prevent the exploitation of participants in commercial radio programs;
- Ensure industry has practices and processes in place that provide safeguards for participants in commercial radio programs and that these are transparent to the public; and
- Deal with children as participants in commercial radio programs, including the requirement that the best interests of the child are the licensee's key consideration, irrespective of any consent given.
  - ACMA report p 24

## ACMA acknowledged

- that industry practices – internal policies, methods of obtaining consent and pre-recording segments – provide some important protections for participants. However, the ACMA considers the codes are not sufficiently meeting community concerns in relation to the protection of participants.
  - ACMA report p 26

## Follow the reality TV lead

- While the scope of this investigation was live hosted entertainment programs, the ACMA considers that any new code provisions should not differentiate between programming types. Live hosted entertainment programs cannot be clearly defined. It is the ACMA's experience that the format is experimental and often changing, and as such regulation would be difficult to apply. Common to live hosted entertainment programs are the programming elements which include audience interaction, including open-line conversations, competitions, pranks and stunts. Drafting code provisions, such as clause 1.9.7 of the FreeTV Code 2010, to set a high threshold for the prohibited material would not unduly restrict audience interaction in other programming genres such as news and current affairs.
  - ACMA report p 28

## ACMA follows the C18<sup>th</sup>

- But it recognises content creation as fluid and dynamic, and not temporally or spatially confined to creation on the one hand and broadcast on the other
- It is hampered conceptually by having to rely on the organising conception of the willed actor
  - (and constitutional imperatives)
    - regulatory arrangement has been structured to avoid the place or site or space of creation as the locus of regulatory endeavour absent a nexus with a broadcast itself.

## And so to the wormhole

- I am not a scientist
- I am using the wormhole as a way to explore the limits found in law's existing presumptions
- My focus is the actor's sense of the spatial and temporal dimension in which he or she functions – that act and communication occur at one and the same time
- The delineation contained within conventional accounts imposes impracticable limits
- ACMA recognises this

## Instead of structuring act and broadcast distinctly

- Through the use of wormhole theory, is it possible to conceive of action as temporally and spatially conjoined, dissolving the distinction between content creation on the one hand and broadcast or other kind of dissemination on the other?