

Every broadcaster needs a basic understanding of media law, as breaches could prove very costly to both the broadcaster and the station. Community broadcasters are often familiar with the responsibilities they must meet under the Broadcasting Services Act (1992) and the associated Community Broadcasting Code of Practice. But this is not the only area of the law to affect the community broadcasting sector. Broadcasters also need to be aware of their obligations under common law and relevant federal and state legislation. Media law primarily deals with broadcast material that may be viewed as

- defamatory
- in contempt of court
- offensive, including discriminatory content
- in breach of copyright

There's a journalistic adage that says, "If in doubt, leave it out". You should refer all suspicious material to someone at the station who has the expertise to advise you. If you feel there is even a remote possibility that the material you want to broadcast could break a law, don't use it until it is cleared.

As the broadcaster, you are responsible for what you broadcast. In the case of court action, both the presenter and the station could be liable, and be sued or fined. In addition, the presenter could be sued again, by the station this time, for getting the station into trouble in the first place.

Defamation

Defamation has been described as:

A statement which may tend to lower the plaintiff in the estimation of right-thinking members of society generally, or

A publication without justification which is calculated to injure the reputation of another by exposing him to hatred, contempt or ridicule.

In essence, defamation is injury to a person's reputation. There is no defence in suggesting that "very few people would have heard the

program". If only one person hears the comment, the grounds for defamation have been laid. Careful drafting of material so that the defamatory meaning is contained in innuendo or implied will not avoid liability. There's also no defence in claiming that the material was broadcast in a language other than English. Another common problem is rebroadcast - using defamatory material from another source makes you as liable as if you were the original publisher.

It has been judged defamatory to say that a person is a coward, dishonest, or cruel. It would be defamatory to suggest that a public figure acted in his or her public capacity to further his or her private interests. It is defamatory to suggest that some one has committed a criminal offence, prior to a conviction. It has also been held to be defamatory to publish anything which makes a person look ridiculous, or which lowers a persons professional standing. You can defame a person without intending to do so, without naming them or even without knowing of their existence.

Companies do not have a cause of action for defamation unless they are not for profit corporations or corporations with less than 10 employees. Groups cannot sue for defamation although one or more members of the group may sue if that particular member is specifically identified in the defamatory material. You cannot defame someone who is dead.

Injurious falsehood is akin to defamation. However, injurious falsehood is where a defamatory and false statement is made about a business which causes damage to the business. A similar tort - Slander of title may be committed when the quality of a person's goods is attacked maliciously and falsely so that actual damage results to a person's trading. Exaggeration or "mere puffery" is a defence to an action of injurious falsehood. (eg. where it is said that for instance XYZ cereal is far more nutritious than any other) Malicious falsehood is also actionable and

occurs where it is falsely said that a person has died, retired or ceased to trade.

A useful thing to remember is to try and place yourself in the shoes of the person/s you are talking about. Would you be outraged if you were that person?

Until 31 December 2005, each State had different legislation in respect of defamation law. Whilst some aspects of the legislation were similar, there was no real uniformity amongst the States. On 1 January 2006, each Australian State passed substantially uniform defamation laws which took effect from 1 January 2006. The Australian Capital Territory has introduced similar laws which conformed with the uniform defamation laws on 23 February 2006 and it is anticipated that the Northern Territory will follow suit shortly. .

In the instances where programs are produced in one state, and also replayed in other states, the choice of law rule states where material is published in more than one Australian jurisdictional area, the applicable law is the law of the area with the closest connection to the harm caused by the publication.

Defences to an action in defamation

1. Justification

Under the uniform law, you will not be liable for defamatory matter if you can prove that the meaning of what you said is substantially true.

2. Qualified Privilege

Under the legislation, the defence of qualified privilege applies to public documents and a fair report of proceedings. Under the common law you also have a defence in a range of other situations such as where suspicions are reported to the police.

You will be successful in the defence of qualified privilege if you can show that:-

- Your listeners had an interest in receiving information of the subject of the complaint; and
- The defamatory matter is broadcast in the course of giving information on the subject of the complaint.

Under the common law, you must also prove that your conduct is reasonable in the circumstances.

The defence of qualified privilege will be destroyed if you were malicious.

Fair protected reports

The most important categories of qualified privilege for the media are fair protected reports. If you can prove that a matter was, or was contained in a 'fair' report of 'proceedings of public concern' you may escape liability. Proceedings of public concern include Parliamentary proceedings, the courts, tribunals, Royal Commissions and the like. This defence will be defeated if the plaintiff proves that the broadcast was not fair; was not published honestly for the information of the public or the advancement of education. The key element here is fairness. For example, it would not be fair and accurate to broadcast a report of the sensational aspects of a trial, without devoting time to the defendant's plea of not guilty. Or not mentioning any of a parliamentarian's rebuttal of a particularly damaging attack made under the protection of absolute privilege in Parliament. In essence, you need to be fair in your report of what happened.

Absolute privilege

There are special occasions when a person must be able to defame another, and get away with it. Such cases could be a Member of Parliament speaking inside the parliament; someone giving evidence at a trial; or a Royal Commissioner handing down findings. On these occasions, things that need to be said

could not be said, if the speakers were not covered by absolute privilege.

The defence of absolute privilege provides complete immunity regardless of the intention or motive of the publisher.

3. Honest Opinion

Honest opinion means that you may comment on a matter of public interest, so long as it is related to a matter of public interest and the matter was expressed as an opinion and not a statement of fact. Opinion must be clearly distinguished from the facts on which it is given and must not be malicious otherwise the defence may fail. Those facts must themselves be true.

Penalties

A retraction or an apology on air is not a defence against a defamation action. An apology can be published without admission of fault or liability and is admissible in mitigating damages. You should seek legal advice before announcing an apology or retraction.

An offer of amends can be made generally or in relation to a particular issue complained of. If accepted by the plaintiff, they cannot continue or commence proceedings in relation to the whole matter.

The present remedy for defamation is damages - the payment of money by you and/or the station sufficient to compensate the person for the harm to their reputation. There must be an appropriate and rational relationship between the damages and harm sustained. The current limit is \$250,000 for non-economic loss.

Some community stations carry defamation insurance. For more information on the CBAA's Defamation Insurance deal for members please refer to the Insurance Chapter.

Contempt of Court

While you don't normally face a prison sentence for defamation, contempt of court is punishable by a fine and/or imprisonment.

In the case of broadcasting, contempt of court consists of anything mentioned on air which could obstruct the proper administration of justice, with emphasis on the "could", or could jeopardise the respect of the community for the administration of justice.

There is no federal legislation defining contempt of court. Legal precedents have provided the working definition. There are three main types of contempt of concern to community broadcasters:

1. Broadcasting material which may prejudice an impending trial.- Contempt by Publication

You can comment on a crime before a person has been charged, and after the person has been convicted, but not while the case is being, or is about to be considered by a court.

Once a person is charged or summonsed, the proceedings are "sub judice" preventing mention or comment on the facts of the case. Everyone is entitled to a fair trial, regardless of their prior record. Nothing can be said by the media that would unfairly prejudice a person's fair trial. Thus it is a contempt to say "two persons murdered" as opposed to "two persons allegedly shot dead" as the case may be not one of murder at all but may allow for a more innocent interpretation. This pre-judges the issue.

There are two limbs to the sub-judice rule: 'a real or definite' tendency to affect the impartial administration of justice by the court and a tendency to impose improper pressure in the

parties to litigation. Knowledge of proceedings or intent is not necessary.

Remember that a court case is not over until any appeals have been heard. During the trial a fair and accurate report of the proceedings can be given, but no comment.

2. Scandalising the Court.

It is a contempt of court to bring the legal system into disrepute, to infer for instance, that a judge lacked impartiality. To imply that a person received a light sentence for some reason could affect the respect of the community for the proper administration of justice.

3. Refusing to reveal sources of information to a court or tribunal.

This is a particular problem for journalists, whose Code of Ethics requires them to “respect all confidences”. The Courts do not accept the principle of the confidentiality of information sources and could hold a person to be in contempt of court for refusing to disclose their sources as it interferes with the actual conduct of court proceedings

Publication of confidential sources may tend to prejudice the issue. For instance, if the confidential source says “I saw Mr X murder Mr Y”, it should be reported as “it has been alleged by a person claiming to have witnessed the incident that Mr X shot Mr Y”. Clearly there are dangers for broadcasters if suspicion is cast on a person who is not charged or is innocent.

Contempt of Parliament

Breach of privilege, or contempt of parliament, is hard to define. In practice, material that could be considered in contempt of parliament would be anything broadcast that may be regarded as exerting improper pressure on members of parliament, or bringing the institution itself into disrespect, or disclosing the secret proceedings of parliamentary committees.

The sentence for contempt of parliament, varies from state to state. The federal, Victorian and South Australian Parliaments have the power to imprison offenders. The New South Wales parliament simply excludes representatives of offending media organisations from its precincts.

Offensive Content

Offensive material usually refers to content that may be considered to be discriminatory or obscene.

Discriminatory and Racist Content

Federal legislation allows for prosecution of individuals who broadcast material that is deemed to be discriminatory on the basis of race (Racial Discrimination Act), gender (Sex Discrimination Act) or disability (Disability Discrimination Act). The Racial Discrimination Act 1975 was amended in 1995 to make it an offence to incite racial hatred or violence, or to vilify a person or group because of their race.

The Human Rights and Equal Opportunity Commission Act provides the basis for prosecution if a person has not received equal treatment based on their sexual preference, religious beliefs, age, political convictions, etc.

In addition to federal discrimination law, a community broadcasting station may be found in breach of its licence conditions. The Community Broadcasting Code of Practice 2.3 states “community broadcasting licensees shall not broadcast material which may stereotype, incite, vilify or perpetuate hatred against, or attempt to demean any person on the basis of ethnicity, nationality, race, gender, sexual preference, religion, age, or physical or mental disability”. Furthermore Code 1.6 states that stations shall “incorporate programming policies which oppose and attempt to break down prejudice on the basis of race, sex, nationality, religion, disability, ethnic background, age or sexual preference”.

Obscenity

Under the common law it is an offence to broadcast obscene material however there are no hard and fast laws as to what constitutes obscene material. Material is judged on a case by case basis and is measured against "contemporary community standards". For example, there is no absolute ban on the use of particular language. Whether the material is to be judged by the standards of the community as a whole, or by the standards of the section of the community to which it is addressed, has not been resolved in law.

The Community Broadcasting Code of Practice 2.2 states that "community broadcasting licensees will avoid censorship wherever possible, however, consideration shall be given to the audience; the context; the degree of explicitness; the propensity to alarm, distress or shock; and the social importance of the event".

Judging whether program material is obscene can be very difficult. Because of the nature of community radio, catering as it does to diverse groups, there are occasions when language not acceptable on commercial radio stations may be allowed. Factors such as the target audience, the age of listeners, the time of broadcast and the existence of content warnings, will be relevant.

Judging current community standards is equally difficult. Are words that were considered obscene ten years ago still considered obscene today? The answer is, not always. The context is relevant - words used in a serious discussion of a matter of social interest will not be obscene while they would be if used in another context, flippantly or gratuitously.

Blasphemy is a sub-category of obscene content. There has been no prosecution for blasphemy in Australia. It has been argued in the courts that there is no foundation for the offence under Australian law as there is no formal national religion. For more on this issue refer to the chapter on Censorship.

Copyright

Copyright law is defined in federal legislation under the Copyright Act (1968). Please refer to the CBAA Handbook chapter on Copyright.

Legal Advice

Media law is very complex, and whenever in doubt, refer questionable material to the Station Manager. You can also contact the CBAA for some advice. It may need to be passed on to a lawyer, so its helpful for the station to have a person with legal expertise who is willing to advise you on such matters.

Summary

Community broadcasters are usually familiar with the responsibilities they must meet under the Broadcasting Services Act (1992) and the associated Community Broadcasting Code of Practice. But this is not the only area of the law to affect the community broadcasting sector.

Broadcasters also need to be aware of their obligations under common law, legal precedents, the Copyright Act and Anti-Discrimination Act. Management committees must pay particular attention to the Trade Practices Act, and Corporations Law / Incorporations Act.

Continued Over

Test Questions

1. What does it mean to defame someone?
2. In what circumstances can you publish defamatory material and not get into trouble?
3. Is it possible to defame a Trade Union or a Company?
4. Will you be liable for defamation if you repeat something a newspaper/magazine/book has printed?
5. Can you report on proceedings in Court, Parliament or Royal Commissions.
6. If you are defamed what are some of the remedies available to you?
7. Are there any restrictions in Australia on publishing blasphemous and obscene material?

8. What are some of the restrictions on reporting a criminal trial? Specify four?
9. What does racial vilification mean? Give two examples of how you could racially vilify someone on air.
10. Give three examples of intellectual property?
11. How is copyright protected in Australia and what is actually protected?
12. What does manufacturer's copyright protect?
13. You are producing a promotion cart for the station's major sponsor, Apple Computer. You decide to use a thirty second sting from Silverchair's latest soundtrack. Will you have any copyright problems?
14. You have just composed and written the lyrics to a song which is copyright. You decide to transfer all rights in the song to your best friend. Can you do this ?
15. What does the ABA stand for and what are some of its functions?
16. Give three examples of actions not amounting to breach of copyright?
17. What are the two main features of Community Radio which set it apart from commercial radio and the ABC and SBS?

1. What does it mean to defame someone?

When you broadcast something that lowers a person's (and some a limited number of not-for-profit organizations and companies with less than 10 employees') reputation in the eyes of a person who hears the broadcast. .

2. In what circumstances can you publish defamatory material and not get into trouble?

, There are broadly three defences:

(a) The material complained of was true
Remember however that the onus is on the defendant (ie. the broadcaster) to prove that the meaning behind the statement is true. It is not necessary for the plaintiff (i.e. the person defamed) to show that it was false.

(b) The material was protected. In other words it was covered by absolute privilege (which applies to statements made in court or parliament) or by qualified privilege (which applies to fair and accurate reports of statements made in court or parliament).

(c) Where the statement is fair comment on a matter of public interest. Remember it is not easy to define exactly what 'fair comment' is. You may think it is, but the court may not agree. Again, the onus is on the defendant to prove that it was fair comment on a matter of public interest. It is not up to the plaintiff to prove that it was unfair.

3. Is it possible to defame a Trade Union or a Company?

Yes and No.. The Courts have held that a trade union can sue in defamation. However,

where that trade union is a company, then it will only be able to sue if it is a not-for profit organization with less than 10 employees. This also applies to companies.

4. Will you be liable for defamation if you repeat something a newspaper/magazine/book has printed?

Yes. Defamation occurs when defamatory material is 'published'. It does not matter if you are not the author of the defamation. If you publish it (including repeating something that

was first published in another medium) then you are also liable. The fact that someone else has published it and not been sued does not guarantee that you will escape.

5. Can you report on proceedings in Court, Parliament or Royal Commissions.

Yes, fair and accurate REPORTS of court or parliamentary proceedings are protected by qualified privilege (see answer to question 2). Remember your reports must be both fair and accurate. However you may not COMMENT on the rights or wrongs of court cases while they are proceeding. Comments such as 'the accused is obviously guilty', 'the witness for the prosecution was lying' or 'the defendant was framed' could be in contempt of court.

6. If you are defamed what are some of the remedies available to you?

I could request a public apology and retraction. I might ask for an opportunity to address the matter on air. I can take the case to court and request financial compensation for the damage the comment has caused me either personally or professionally.

7. Are there any restrictions in Australia on publishing blasphemous and obscene material?

Yes, under Section 118 of the Commonwealth Broadcasting and Television Act, it is an offence to publish material which is blasphemous, indecent or obscene. Although there have been no prosecutions brought under section 118, all broadcasters should be

aware of the restrictions it imposes. In addition to the prohibition under Commonwealth legislation, all states and territories have laws prohibiting 'indecent', 'offensive', 'obscene' and similar publications. As community values have changed over the years the view as to what is indecent or obscene has narrowed considerably. However material that is broadcast indiscriminately to a wide audience (as in a radio broadcast) may be viewed differently to material which is circulated to a narrow or restricted audience.

Where material is questionable it could be wise to ensure that it is in context, and there for a legitimate purpose, and not merely to shock or offend. It may also be wise to broadcast a warning beforehand. You should also be sensitive to time slots and the type of people listening.

8. What are some of the restrictions on reporting a criminal trial? Specify four?

(a) Always refer to the accused as 'the accused' or 'the alleged thief' or 'the alleged killer' rather than a word implying guilt such as 'the embezzler' or 'the thief' or 'the hit-run driver' until the case is over and the time for appeal has elapsed.

(b) Similarly refer to any actions as 'alleged' actions (e.g. 'the alleged gunshots') until after the case has concluded.

(c) Accurately identify the accused. You could be in trouble if you identified the wrong person as the accused, or the identification was

ambiguous. In certain cases courts issue suppression orders which prohibit the identification of the accused, or of their alleged victims. Disobedience of such orders may be punished as contempt of court.

(d) You must also report a trial objectively and fairly, giving equal attention to both the prosecution and defence cases.

9. What does racial vilification mean? Give two examples of how you could racially vilify someone on air.

Racial vilification refers to behaviour that incites hatred and violence against a particular group of people on the basis of their race and/or ethnicity. There is Commonwealth legislation, as well as legislation in most states and territories, which makes it an offence to engage in this type of behaviour. As a broadcaster you may be prosecuted under the legislation if you say something, or broadcast something, (e.g. a song or interview) that racially vilifies a particular group.

While many of the statements made by people such as Pauline Hanson may be offensive, and might be inconsistent with the policies of individual stations or the Code of Practice, most of these would not be strong enough to be caught by the racial vilification legislation. However Ron Casey's famous little gem "makes you feel like getting a dozen or so of your footballer friends together, going down to the local Chinese restaurant and sorting the little bastards out" could be in breach of the legislation. Likewise neo-Nazi anti-Jewish slogans could also be examples of racial vilification.

10. Give three examples of intellectual property?

The following are copyright:

- (a) A novel
- (b) A recording from a TV show
- (c) A song

11. How is copyright protected in Australia and what is actually protected.

Copyright in Australia is protected by Commonwealth legislation, namely the Copyright Act. Copyright protects the expression of an idea rather than the idea itself i.e. you may have a fantastic little melody floating around in your head, but until you write down the notes or record it, it won't be protected by copyright.

12. What does manufacturer's copyright protect?

Manufacturer's copyright protects works that are not original, such as sound recordings, television and sound broadcasts and published editions of works. The protection given is not to the original work of the author, but for the protection of the producer of the recording or film.

13. You are producing a promotion cart for the station's major sponsor, Apple Computer. You decide to use a thirty second sting from Silverchair's latest soundtrack. Will you have any copyright problems?

Yes. I can not use commercially released music under a sponsorship announcement (or strictly speaking, under a station promotion - but everyone does it!). If my station has paid its AMCOS fee it is alright to use specially composed production music under sponsorship announcements or have background music specially composed and performed by local artists who hold exclusive copyright.

14. You have just composed and written the lyrics to a song which is copyright. You decide to transfer all rights in the song to your best friend. Can you do this ?

Yes. As with other types of property copyright can be bought or sold, or passed on to another person (e.g. by way of a will). Michael Jackson now owns the copyright to most of the Beatles' songs.

15. What does the ABA stand for and what are some of its functions?

ABA stands for Australian Broadcasting Authority. Its functions include:

- (a) To plan the appropriate allocation of radio and television licences.
- (b) Upon complaint, to investigate whether a licensee is satisfying the conditions of its licence.
- (c) To develop program standards and monitor compliance.

16. Give three examples of actions not amounting to breach of copyright?

1. If the APRA copyright fee has been paid, I can use music within APRA's repertoire.
2. I can broadcast a short piece from a play or a film if I am using it for the purposes of criticism or review.
3. I can broadcast the serialisation of a novel if I have the permission of the copyright owner. Some authors may freely give permission, while other, particularly more commercial authors, may want a significant payment or refuse permission altogether.

17. What are the two main features of Community Radio which set it apart from commercial radio and the ABC and SBS?

- (a) Community radio provides for participation by members of the station's community in its decision making structures (e.g. through election of a board of management) and in its on-air programming.
- (b) Community radio depends significantly on the contribution of volunteers, as opposed to paid staff.

The answers to the media law test were compiled by Jo White and Darce Cassidy.

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