

Legal Issues for Wikis: The Challenge of User-generated and Peer-produced Knowledge, Content and Culture¹

Peter Black,² Hayden Delaney³ and Brian Fitzgerald⁴

1. Introduction

We live in a world increasingly dominated by user-generated and peer-produced knowledge, content and culture.⁵ This is particularly evident in the online world of Web 2.0,⁶ where the enormous growth and easy accessibility of user based production technologies has seen a paradigm shift to collaborative communication, including collaborative journalism and broadcasting. The wiki, in its simplest terms a website that can be edited by users, is one such technology and it is rapidly changing the way people communicate, from social networking through to research, education and business.

In line with this paradigm shift to collaborative communication and the rise of the wiki, this paper aims to highlight the copyright, defamation and privacy issues that are created through use of such a technology. This paper views the legal issues of wikis from the perspective of Australian law, with only occasional forays into comparative situations in other jurisdictions, particularly the United States.

¹ This research has been undertaken as part of the Law Program of the ARC Centre of Excellence for Creative Industries and Innovation <<http://www.cci.edu.au>>.

² Associate Lecturer, QUT Law Faculty.

³ Formerly a research assistant in the QUT Faculty of Law, presently a Trainee Solicitor at Hopgood Ganim Lawyers.

⁴ Professor of Law, QUT Law Faculty and Program Leader for Law in the ARC Centre of Excellence for Creative Industries and Innovation <<http://www.cci.edu.au>> and <<http://www.ip.qut.edu.au>>.

⁵ Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (2006) 5.

⁶ Tim O'Reilly, 'What is Web 2.0: Design Patterns and Business Models for the Next Generation of Software' *O'Reilly* <<http://www.oreillynet.com/pub/a/oreilly/tim/news/2005/09/30/what-is-web-20.html>>.

2. What is a wiki and who may be liable?

2.1 What is a wiki?

A wiki is a fully editable website that allows a user to read and add content to that site.⁷ While some wiki applications are open for anyone to edit, some wikis may limit access and/or functionality to a restricted group of users.⁸ The technology enables a user to visit, read, reorganise and update the structure and content of the wiki.⁹ The term 'wiki' is derived from the Hawaiian word for quick,¹⁰ alluding to the speed and ease with which a user can quickly edit a web page. The underlying rationale of a wiki is collaboration and the proliferation of knowledge. Indeed, the collaborative communication facilitated by wikis can be sourced to the free and open software movement.¹¹ The most notable example of a wiki is the online encyclopaedia Wikipedia.¹²

The most common use of a wiki is as a shared knowledge database for a physically dispersed community.¹³ A wiki may also be used as a repository for project documentation, reporting, collaborative software development, online glossaries, dictionaries, discussion groups, or as a tool to support a specific event such as a conference where it might support discussion, dissemination and the making of arrangements.¹⁴ A wiki can be of use to any situation that would benefit from a collaborative environment.

A wiki allows for non-linear, evolving, complex and networked texts, argument and interaction¹⁵ and is ideal for an environment where multiple persons are contributing to a project because a user can read, add or modify content to a

⁷ Naomi Augar, Ruth Raitman and Wanlei Zhou, 'Teaching and learning online with wikis' (Paper presented at the conference Beyond the comfort zone: Proceedings of the 21st ASCILITE, Perth, 5-8 December) 95.

⁸ Axel Bruns and Sal Humpheries, 'Wikis in Teaching and Assessment: The *M/Cyclopedia Project*' (Paper presented at the International Symposium on Wikis, San Diego, 17-18 October 2005) 4.

⁹ Naomi Augar, Ruth Raitman and Wanlei Zhou, 'Teaching and learning online with wikis' (Paper presented at the conference Beyond the comfort zone: Proceedings of the 21st ASCILITE, Perth, 5-8 December) 95.

¹⁰ Rick Klau, 'Technology in practice: Nothing but NET: Say aloha to the wiki' (2004) 30 *American Bar Association Journal* 20; Naomi Augar, Ruth Raitman and Wanlei Zhou, 'Teaching and learning online with wikis' (Paper presented at the conference Beyond the comfort zone: Proceedings of the 21st ASCILITE, Perth, 5-8 December 2004) 95.

¹¹ See Jan Cornelis and Marleen Wynants, *How Open is the Future?* (2005) <<http://www.vub.ac.be/downloads/bijlagen/boekcrosstalks.pdf>>

¹² See Wikipedia <www.wikipedia.org>. However, it should be noted that in line with Wikipedia's goal to create an encyclopaedia for everyone, not just internet users, the encyclopaedia is available on CD and in print form.

¹³ Mark Gaved, Tom Health and Marc Eisenstadt, 'Wikis of Locality: Insights from the Open Guides' *Knowledge Media Institute – The Open University* (Paper presented at WikiSym'06, Odense, Denmark, August 21–23, 2006) 119.

¹⁴ Silvan 'WikiTrails: Augmenting Wiki Structure for Collaborative, Interdisciplinary Learning', University of Frankfurt; A Aguiar and G David, 'WikiWiki weaving heterogenous software artefacts' (Paper presented at the conference Proceedings of the 2005 International Symposium on Wikis, San Diego, California, October 16 2005) 67.

¹⁵ Axel Bruns and Sal Humpheries, 'Wikis in Teaching and Assessment: The *M/Cyclopedia Project*' (Paper presented at the International Symposium on Wikis, San Diego, 17-18 October 2005) 3.

wiki page.¹⁶ Users can track changes made to a wiki page and other users can be automatically notified by email of such changes. In the past such methods of communication were unavailable, which resulted in less streamlined and more cumbersome forms of communication. Multiple people working on the same project created multiple versions which were ultimately combined into a single mosaic of information. This often resulted in teams working disparately rather than collectively and led to the duplication of efforts, resulting in inefficiency.

The simplest wiki applications limit a user to the edit of text and hyperlinks. However more sophisticated applications enable the adding of images, tables or interactive java¹⁷ components.¹⁸ A wiki allows documents to be written collaboratively by using mark up language in a web browser. Wikis rely on server side technology that allows visitors to make instant updates to a webpage via a web interface.¹⁹

2.2 Who may be liable for the content uploaded onto a wiki?

As mentioned, the legal issues that flow from the use of wiki applications include, amongst others, copyright, defamation and privacy. Generally speaking, the persons liable for the content on a wiki may include the person who posts the content (a contributor to the wiki), the owners of a wiki (that is, the person who owns the domain name, and originates and operates the wiki), the providers of the wiki platform or shell, and the person who hosts the content on a wiki (typically an internet service provider). To put this into context, for example a business or educator using wiki applications to facilitate their projects may themselves be liable as the owner and operator of the wiki, as will the person that hosts the wiki, the person who provided the platform or shell, and the persons who contribute content to the wiki.

2.3 What are some of the technical problems involved in the use of wiki applications?

The defining characteristic of a wiki, being its fully editable nature, also serves to create a number of problems. The open nature of a wiki can result in vandalism, inaccuracies and 'edit wars'.²⁰ A common example of an Australian edit war occurred in relation to which state had won the greater

¹⁶ Naomi Augar, Ruth Raitman and Wanlei Zhou, 'Teaching and learning online with wikis' (Paper presented at the conference Beyond the comfort zone: Proceedings of the 21st ASCILITE, Perth, 5-8 December) 95.

¹⁷ A java component is a piece of software that runs through a users internet browser through what is known as a 'Java Applet'.

¹⁸ Mark Lee, 'New tools for online collaboration: Blogs, wikis, RSS and Podcasting' (2005) *Training and Development in Australia* 17, 18.

¹⁹ Fernanda Viegas, Martin Wattenberg and Kushal Dave, 'Studying Cooperation and Conflict between Authors with history flow Visualisations' (Paper presented at the CHI Conference 2004, Vienna, 24-29th April 2004) 575, 576.

²⁰ The term 'edit wars' refers to two or more users persistently editing each others opposing views regarding the content of the article. See generally Ken Myers, 'Wikimmunity: *Fitting the Communications Decency Act to Wikipedia*' (Research Publication No 2006-08, The Berkman Center for Internet and Society, 2006) 7.

number of State of Origin matches, Queensland or New South Wales.²¹ The controversy arose over whether to include the 1987 exhibition match in Los Angeles into the games statistics. The supporters of each state frequently sought to either include or remove the reference to the exhibition game. Such 'edit wars' can be disruptive to the natural development of a wiki article and often administrators will step in to lock a section of a topic from further edits.

A wiki application is also susceptible to attacks from malware,²² once again because of the capacity for anyone to freely edit content. Recently an article in the German edition of Wikipedia was edited to include a hyperlink to malicious code, which although was promptly removed, still caused some disruption.²³ The Wikipedia article ironically concerned a page detailing information on the notorious Blaster Worm,²⁴ which in turn linked the reader to a website that infects a user's computer. However, most modern wiki applications provide for rollback facilities and other mechanisms to ensure information integrity, though this does little to protect users from Malware attacks discussed above.

Moreover, it is the open nature of wiki applications that makes the users and operators of the technology particularly susceptible to the variety of legal issues examined in this paper.

3. Some common examples of wiki applications

3.1 Wikipedia

Wikipedia is the most well known example of a wiki application implemented on a mass scale with considerable effectiveness. The goal of Wikipedia is to 'create and distribute a multilingual free encyclopaedia of the highest possible quality to every single person on the planet'.²⁵ Wikipedia first arose on the 15 January 2001 to complement the now obsolete Nupedia.²⁶ As at January 2007 Wikipedia has more than six million articles in multiple languages.²⁷ The accuracy of Wikipedia has been frequently questioned; however one recent study claimed that Wikipedia is no less accurate than Encyclopaedia Britannica in the articles studied.²⁸ Wikipedia is written by volunteers and

²¹ For a discussion of the controversy see Wikipedia, *Rugby League State of Origin* <http://en.wikipedia.org/wiki/Rugby_League_State_of_Origin#1987:_American_controversy> at 23 November 2006.

²² Malware refers to software designed to infiltrate or damage a computer system without the owners informed consent: Wikipedia, *Malware* <<http://en.wikipedia.org/wiki/Malware>> at 16 November 2006.

²³ *Wikipedia link led to virus site* (2006) Sydney Morning Herald <<http://smh.com.au/news/security/wikipedia-link-led-to-virus-site/2006/11/06/16>> at 16 November 2006.

²⁴ The Blaster Worm is a computer worm that spreads on computers running Microsoft operating systems which can result in computer systems becoming highly unstable: Wikipedia, *Blaster (Computer Worm)* <http://en.wikipedia.org/wiki/Blaster_worm> at 23 November 2006.

²⁵ Wikipedia, *Wikipedia* <<http://en.wikipedia.org/wiki/Wikipedia>> at 31 August 2006.

²⁶ Wikipedia, *Wikipedia* <<http://en.wikipedia.org/wiki/Wikipedia>> at 31 August 2006.

²⁷ Wikipedia, *Wikipedia* <<http://en.wikipedia.org/wiki/Wikipedia>> at 31 August 2006.

²⁸ Jim Giles, *Internet Encyclopaedias Go Head to Head* (2005) *Nature* <<http://www.nature.com/news/2005/051212/full/438900a.html>> at 31 August 2006; See also Village Voice, *Factually Speaking – Think Wikipedia is error ridden? Britannica's nearly as bad – and isn't nearly as nimble* <<http://villagevoice.com/screens/0552,dibbell,71299,28.html>> at 30 November 2006.

following the traditional principles of a wiki is open to the public to author.²⁹ Wikipedia is run by its parent organisation, Wikimedia, which is a non-profit organisation supported mostly through private donations and grants.³⁰ Wikipedia, along with most Wikimedia projects remain free of advertising.³¹

When an author creates a wiki page that comprises original material, the copyright over it is retained by the contributor, and the work is agreed to be available under a 'free documentation license'.³² This license allows for the redistribution of derivative works, provided the original author is attributed and the content remains available for online display.³³ The license further allows for translation. However while all original Wikipedia text is distributed under license, images and other media may be included where the 'fair use' or 'fair-dealing' doctrines are satisfied.³⁴

A feature of Wikipedia is that it allows users to keep a 'watch list' of pages they wish to monitor closely. When a page is modified the user is notified via email. This operates to allow topic experts to carefully scrutinize changes made and fix acts of vandalism.³⁵ Furthermore when a page is disrupted by vandalism or an edit war, a user can issue a request that an administrator protect the page.³⁶ An administrator is a Wikipedia user that has accrued a certain approval rating from other administrators.³⁷

Wikipedia also has policies developed regarding content, including a neutral point of view policy that requires all articles represent views fairly without bias.³⁸ For example, a recent controversy arose when a well known doctor, Anthony Benis, created an article on Wikipedia detailing what was known as his 'NPA personality theory'.³⁹ The article was deleted for violation of the bias policy.⁴⁰ While in situations such as the Benis controversy bias may be

²⁹ Ken Myers, 'Wikimmunity: *Fitting the Communications Decency Act to Wikipedia*' (Research Publication No 2006-08, The Berkman Center for Internet and Society, 2006) 4.

³⁰ Wikipedia, *Wikimedia Foundation* <<http://wikimediafoundation.org/wiki/Wikimedia:About>> at 12 October 2006.

³¹ Wikipedia, *Wikimedia Foundation* <<http://wikimediafoundation.org/wiki/Wikimedia:About>> at 12 October 2006.

³² Wikipedia, *Wikipedia: Copyrights* <<http://en.wikipedia.org/wiki/Wikipedia:Copyrights>> at 21 September 2006.

³³ Wikipedia, *Wikipedia: Copyrights* <<http://en.wikipedia.org/wiki/Wikipedia:Copyrights>> at 21 September 2006.

³⁴ Wikipedia, *Wikipedia: Copyrights* <<http://en.wikipedia.org/wiki/Wikipedia:Copyrights>> at 21 September 2006.

³⁵ Fernanda Viegas, Martin Wattenberg and Kushal Dave, 'Studying Cooperation and Conflict between Authors with history flow Visualisations' (Paper presented at the CHI Conference 2004, Vienna, 24-29th April 2004) 575, 576.

³⁶ Ken Myers, 'Wikimmunity: *Fitting the Communications Decency Act to Wikipedia*' (Research Publication No 2006-08, The Berkman Center for Internet and Society, 2006) 7.

³⁷ Ken Myers, 'Wikimmunity: *Fitting the Communications Decency Act to Wikipedia*' (Research Publication No 2006-08, The Berkman Center for Internet and Society, 2006) 7.

³⁸ Wikipedia, *Wikipedia: Simplified Ruleset* <[http://en.wikipedia.org/wiki/Wikipedia:Simplified Ruleset](http://en.wikipedia.org/wiki/Wikipedia:Simplified_Ruleset)> at 21 September 2006.

³⁹ *Vanity, Thy Name Ain't Wikipedia* (2006) *The Chronicle: Wired Campus Blog* <<http://chronicle.com/wiredcampus/article/1695/vanity-thy-name-aint-wikipedia>> at 16 November 2006.

⁴⁰ *Vanity, Thy Name Ain't Wikipedia* (2006) *The Chronicle: Wired Campus Blog* <<http://chronicle.com/wiredcampus/article/1695/vanity-thy-name-aint-wikipedia>> at 16 November 2006.

obvious, what is unclear is how such a policy could be enforced in subjective fields such as history or art. Wikipedia also has a verifiability policy that requires facts, viewpoints, theories and arguments only be included if they have been published by reputable sources,⁴¹ as well as a no original research policy that requires articles to not contain unpublished theories, data, statements, concepts, arguments or ideas.⁴² However arguably it is Wikipedia's enforcement of these policies, and not the policies themselves, that pose the legal risks.⁴³

3.2 Other Examples

An example of a wiki being used for education purposes can be demonstrated in a project undertaken by the Creative Industries Faculty at Queensland University of Technology, where wiki-based learning and assessment was implemented in the New Media Technologies subject.⁴⁴ There, wiki applications were used to facilitate tutorials, group work and the management of assignment topics.⁴⁵ The increasing trend amongst industries towards collaboration is in turn placing a heavier impetus upon educators to make students proficient in collaborative work, and a wiki application is an ideal platform to facilitate such learning.

Corporate wikis are increasingly used by companies and allow for a centrally managed content management system and project management.⁴⁶ A common software platform that facilitates corporate wikis is SocialText.⁴⁷ It has been estimated by the Gartner Group, that wikis will become mainstream collaboration tools in at least 50% of companies by 2009.⁴⁸

Another notable example is Wikia, which offers a platform for users to create their own wiki on a broad range of topics.⁴⁹ Wikia allows for different communities to contribute to topics that would be otherwise inappropriate to an encyclopaedia such as Wikipedia. For example Wikia hosts a popular wiki on Star Wars known as 'Wookieepedia', which canvasses a far more detailed discussion on the history of Star Wars than can be found on Wikipedia. Wikia differs from wikis developed under the auspices of the Wikimedia project as Wikia derives income from advertising.⁵⁰

⁴¹ Wikipedia, *Wikipedia: Simplified Ruleset* <http://en.wikipedia.org/wiki/Wikipedia:Simplified_Ruleset> at 21 September 2006.

⁴² Wikipedia, *Wikipedia: Simplified Ruleset* <http://en.wikipedia.org/wiki/Wikipedia:Simplified_Ruleset> at 21 September 2006.

⁴³ Ken Myers, 'Wikimmunity: *Fitting the Communications Decency Act to Wikipedia*' (Research Publication No 2006-08, The Berkman Center for Internet and Society, 2006) 8.

⁴⁴ Axel Bruns and Sal Humpheries, 'Wikis in Teaching and Assessment: *The M/Cyclopedia Project*' (Paper presented at the International Symposium on Wikis, San Diego, 17-18 October 2005) 5.

⁴⁵ Axel Bruns and Sal Humpheries, 'Wikis in Teaching and Assessment: *The M/Cyclopedia Project*' (Paper presented at the International Symposium on Wikis, San Diego, 17-18 October 2005) 5.

⁴⁶ Wikipedia, *Corporate Wikis* <http://en.wikipedia.org/wiki/Corporate_wiki> at 23 November 2006.

⁴⁷ Social Text <<http://www.socialtext.com/>> at 30 January 2007.

⁴⁸ *Email is so five minutes ago* (November 28 2005) Business Week Online <http://www.businessweek.com/magazine/content/05_48/b3961120.htm> at 23 November 2006.

⁴⁹ See Wikia, *Wikipedia: Simplified Ruleset* <<http://www.wikia.com/wiki/Wikia>> at 12 October 2006.

⁵⁰ Wikipedia, *Wikia* <<http://en.wikipedia.org/wiki/Wikia>> at 12 October 2006.

Wikis are also increasingly being used as a part of social networking sites, where users can contribute and alter content for the network. Such social uses of wikis can create legal difficulties as due to the informal and relaxed nature of most social networking sites, users are often unaware of the legal ramifications that may stem from posting content to the site.

4. Copyright issues with wikis

Recently a critic of Wikipedia through the use of a plagiarism detection program identified 142 Wikipedia articles from 12,000 that contained plagiarised content.⁵¹ Critics of Wikipedia have argued it must be held to a higher standard given it presents itself as an encyclopaedia.⁵² Wiki applications, much like file sharing programs, have an inherent susceptibility to copyright infringement given their open nature and the fact they are capable of disseminating content throughout the world very quickly.

4.1 Who is liable for infringing content on a wiki?

Liability in copyright can manifest as a direct infringement⁵³ or an infringement by authorisation of an infringing act.⁵⁴ In this sense the author of the infringing content on a wiki could be liable for direct infringement, while the person who hosts the content on a wiki – typically the person who runs the wiki – could be liable for authorising infringement. The scope of these two heads of liability will be discussed below.

4.2 Ownership and licensing of copyright material on a wiki

4.2.1 Ownership of Copyright

The general rule is the author of the work is the first owner of the copyright. The situation with wikis is complicated by the fact many authors may contribute to a page, and the contributing author is not always identified. This may give rise to issues of joint authorship. The implications of joint authorship are that each author takes ownership as a tenant in common,⁵⁵ and there is authority suggesting that one joint author cannot republish without the permission of co-owners.⁵⁶ If joint authorship does occur, an author of a wiki page should be mindful to obtain the permission of co-owners prior to republishing.

⁵¹ *Wikipedia Critic Finds Copied Passages* (2006) MSNBC <<http://www.msnbc.msn.com/id/15549674/>> at 16 November 2006.

⁵² *Wikipedia Critic Finds Copied Passages* (2006) MSNBC <<http://www.msnbc.msn.com/id/15549674/>> at 16 November 2006.

⁵³ *Copyright Act 1968* (Cth) s 36.

⁵⁴ *Copyright Act 1968* (Cth) s 36(1) for works; *Copyright Act 1968* (Cth) s101(1) for subject matter other than works.

⁵⁵ *Acorn Computers Ltd v MCS Microcomputer Systems Pty Ltd* (1984) 57 ALR 389.

⁵⁶ *Cescinsky v George Routledge & Sons Ltd* [1916] 2 KB 325; *Powell v Head* (1879) 12 Ch D 686; *Wiseman v Weidenfield & Nicolson* (1985) FSR 525.

A work of joint authorship refers to a work that has been produced by the collaboration of two or more authors and in which the contribution of each author is not separate from other contributions.⁵⁷ Whether a person is a joint author is a question of fact and degree and is tested by asking whether the person has contributed skill, labour or judgement of the kind protected by copyright, and whether the contribution is sufficiently significant.⁵⁸ The mere supply of ideas is insufficient as it is not a contribution as author.⁵⁹ However if a person corrects, edits or helps compile a work, then this may give rise to joint authorship depending upon the amount of skill and labour applied.⁶⁰ Relevantly where persons contribute to a collective work such as an encyclopaedia, there will be no joint authorship if the contributions are separate and distinguishable.⁶¹

In the context of a wiki encyclopaedia like Wikipedia, a wiki page is compiled differently from traditional encyclopaedias. A traditional encyclopaedia has distinct sections written by distinct authors which would not give rise to joint authorship. However, a wiki page is jointly contributed to by many authors in order to produce an article on a defined topic. Depending on the wiki, the separate contributions may or may not be distinguishable. Arguably a wiki page would give rise to joint authorship where there is no way of separating contributions. Even if contributions were identifiable it is arguable the action of contributing to a wiki page is analogous to jointly correcting, editing or compiling which has been held to give rise to joint authorship.⁶² Regardless it would still depend on the contribution itself, and whether it is sufficient to attract copyright.⁶³ One way to address and manage issues of joint authorship is to employ a method of tracking individual contributions, which is already provided by most wiki engines along with open content licensing (a permission to reproduce or communication given in advance) which is discussed below.

Ownership of copyright in a wiki is further complicated by the fact that often authors will only be identified by pseudonyms or are anonymous. Where a work is one of joint authorship, the identity of an author will be deemed disclosed if one of the names under which the work was published was the name of that author, or the identity of that author is generally known or can be ascertained by reasonable inquiry.⁶⁴ Copyright is presumed to subsist in the name appearing on the work unless this is disputed.⁶⁵ The process of

⁵⁷ *Copyright Act 1968* (Cth) s 10(1).

⁵⁸ *Hadley v Kemp* [1999] EMLR 589; *Flyde Microsystems Ltd v Key Radio Systems Ltd* (1998) 39 IPR 481, 486 (Laddie J)

⁵⁹ *Donoghue v Allied Newspapers Ltd* [1937] 3 All ER 503, 507 (Farwell J).

⁶⁰ *Springfield v Thame* (1903) 89 LT 242; *Samuelson v Producers Distributing Co Ltd* (1931) 48 RPC 580; *Prior v Lansdowne Press Pty Ltd* (1975) 12 ALR 685; *King v Murray* (1984) 2 IPR 99.

⁶¹ *Redwood Music Ltd v B Feldman & Co Ltd* [1979] RPC 385.

⁶² *Springfield v Thame* (1903) 89 LT 242; *Samuelson v Producers Distributing Co Ltd* (1931) 48 RPC 580; *Prior v Lansdowne Press Pty Ltd* (1975) 12 ALR 685; *King v Murray* (1984) 2 IPR 99.

⁶³ *Hadley v Kemp* [1999] EMLR 589; *Flyde Microsystems Ltd v Key Radio Systems Ltd* (1998) 39 IPR 481, 486 (Laddie J).

⁶⁴ *Copyright Act 1968* (Cth) s 81(4).

⁶⁵ *Copyright Act 1968* (Cth) s 127.

ascertaining the author of an entry on a wiki may be difficult when the author has used a pseudonymous or anonymous username to edit the wiki.

4.2.2 Copyright Licensing for Reuse

Some of the confusion or uncertainty over the status of any copyright material in a wiki can be alleviated through the use of an open content licence. In order to reproduce and/or communicate copyright material to the public you will generally need permission of the copyright owner. This is invariably given through a permission known as a (user) licence.

In relation to wikis the model adopted by Wikipedia, is for the contributor to retain copyright and to licence use of the work downstream by granting a generic permission in advance under the GNU⁶⁶ 'free documentation license' ('GFDL').⁶⁷ This license allows Wikipedia content to be copied, modified, and redistributed so long as the new version grants the same freedoms to others and acknowledges the authors of the Wikipedia article used.⁶⁸ Most other public wiki applications also appear to use the GFDL. There are however a limited number of exceptions. For example, two wikis on Wikia, namely Uncyclopedia⁶⁹ and Memory Alpha⁷⁰ use a Creative Commons license which requires users attribute authorship for non-commercial uses only and to share derivative works under the same license.⁷¹ As things stand the GFDL and CC licences are incompatible, meaning that material licenced under each cannot be mixed with each other. However, this is currently under review.

A new version of the GFDL - GFDL version 2 - is currently in development by the Free Software Foundation.⁷² Significantly the version 2 GFDL (draft) includes a specific provision for wiki relicensing. This provision appears to allude to a specific GNU license for wiki applications. This would be a welcome development as arguably the GFDL is unsuited to wiki applications given the requirement that the full license must be reattached to every reproduction. A specific GNU license for wikis would be better able to accommodate the unique characteristics of a wiki.

Where there is no express license of the copyright in a wiki page, a license may be implied in the circumstances as a matter of necessity.⁷³ It may be

⁶⁶ The GNU free documentation license designed by the Free Software Foundation. It refers to the recursive acronym "GNU's Not Unix".

⁶⁷ Wikipedia, *Wikipedia: Copyrights* <<http://en.wikipedia.org/wiki/Wikipedia:Copyrights>> at 21 September 2006.

⁶⁸ Wikipedia, *Wikipedia: Copyrights* <<http://en.wikipedia.org/wiki/Wikipedia:Copyrights>> at 21 September 2006. A direct link back to the Wikipedia article satisfies Wikipedia's author credit requirement.

⁶⁹ This is a wiki that is a satirical parody of Wikipedia.

⁷⁰ This is a wiki based around the Star Trek series.

⁷¹ See Creative Commons <<http://creativecommons.org/licenses/by-nc-sa/2.0/>> at 12 October 2006.

⁷² This draft can be found at Free Software Foundation <<http://gplv3.fsf.org/comments/gfdl-draft-1.html>> at 12 October 2006.

⁷³ See for example *Devefi Pty Ltd v Mateffy Perl Nagy Pty Ltd* (1993) 113 ALR 225, 240; *Trumpet Software Pty Ltd v Ozemail Pty Ltd* (1996) 34 IPR 481; *Gold Peg International Pty Ltd v Kovan Engineering (Aust) Pty Ltd* (2005) 225 ALR 57; *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* [2006] HCA 55.

argued that due to the inherent nature of a wiki as a fully editable website that allows any user to read and add content to that site, a license that allows for these basic functions must be implied as a matter of necessity. However it should be noted that similar arguments have been received by the courts with mixed results,⁷⁴ and must be necessary to give business efficacy and be so obvious that it 'goes without saying'.⁷⁵ Accordingly businesses and educators should be cautious in relying on such implied licenses.

4.3 In which jurisdiction will a person be liable for copyright infringement by the content on a wiki?

As with any online content, issues relating to the legal jurisdiction of a wiki are in a state of development and there is little guidance in the way of domestic law that resolves these issues. However domestic courts generally have substantial discretion regarding jurisdiction to adjudicate, choice of law or applicable law, choice of forum, and recognition and enforcement of judgments.⁷⁶ Although each of these matters is distinct, courts have tended to conflate them; the question of applicable law in copyright cases drives the exercise of the power to adjudicate such that courts generally decline to hear a case if their own law is not being applied.⁷⁷

The *Berne Convention for the Protection of Literary and Artistic Works* states 'the extent of protection, as well as the means of redress afforded to the author to protection his rights, shall be governed exclusively by the laws of the country where protection is claimed.'⁷⁸ The word 'country where protection is claimed' is generally accepted to mean the country where the infringement occurred.⁷⁹ This is in accordance with the notion that copyright is a territorial in nature, with the content of the exclusive rights of copyright holders being determined by the statute laws of each state.⁸⁰ Section 36(1) of the Copyright Act provides that "Subject to this Act, the copyright in a literary, dramatic, musical or artistic work is infringed by a person who, not being the owner of

⁷⁴ See for example *Devefi Pty Ltd v Mateffy Perl Nagy Pty Ltd* (1993) 113 ALR 225, 240; *Trumpet Software Pty Ltd v Ozemail Pty Ltd* (1996) 34 IPR 481; *Gold Peg International Pty Ltd v Kovan Engineering (Aust) Pty Ltd* (2005) 225 ALR 57; *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* [2006] HCA 55.

⁷⁵ *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266; *Devefi Pty Ltd v Mateffy Perl Nagy Pty Ltd* (1993) 113 ALR 225, 240; *Trumpet Software Pty Ltd v Ozemail Pty Ltd* (1996) 34 IPR 481; *Gold Peg International Pty Ltd v Kovan Engineering (Aust) Pty Ltd* (2005) 225 ALR 57; *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* [2006] HCA 55.

⁷⁶ Graeme B Dinwoodie, 'The Architecture of the International Intellectual Property System' (2002) 77 *Chicago-Kent Law Review* 993, 997.

⁷⁷ Graeme B Dinwoodie, 'The Architecture of the International Intellectual Property System' (2002) 77 *Chicago-Kent Law Review* 993, 998. However, as Dinwoodie notes at 1007, several courts are now permitting plaintiffs to pursue actions alleging claims under several disparate foreign copyright laws. See *Boosey & Hawkes Music Publishers Ltd v Walt Disney Co.*, 145 F.3d 481 (2nd Cir. 1998).

⁷⁸ *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature on 9 September 1886, Article 5.2.

⁷⁹ *Intellectual Property on the Internet – A Survey of Issues* (2002) World Intellectual Property Organisation <http://www.wipo.int/copyright/ecommerce/en/ip_survey/ip_survey.html> at 23 November 2006, 130.

⁸⁰ G Austin, *Private International Law and Intellectual Property Rights – A Common Law Overview* (2001) [21] World Intellectual Property Organisation <http://www.wipo.int/edocs/mdocs/mdocs/en/wipo_pil_01/wipo_pil_01_5.pdf> at 14 December 2006.

the copyright, and without the licence of the owner of the copyright, does in Australia, or authorizes the doing in Australia of, any act comprised in the copyright.” Section 101(1) provides similar protection for Part IV works. However what is somewhat unclear is how, in the context of internet based infringements, the location of the infringement is determined. Essentially there are two schools of thought as to how jurisdiction should be determined; either the countries in which the infringing material is received (‘country of reception approach’), or the location of the relevant causal event, which in the use of a wiki, will be the upload of information (‘causal event approach’).⁸¹

The country of reception approach for choice of law is demonstrated in the analogous case of *Dow Jones & Co Inc v Gutnick*.⁸² This involved a defamation dispute in which the High Court of Australia held that jurisdiction with regard to materials published over the internet could be asserted in the place where the defamatory material is accessed or downloaded.⁸³ However, this decision has been the subject of much criticism,⁸⁴ and has been stated as inappropriate to intellectual property as it deals with defamation whose focus is the location of where damage to reputation has occurred.⁸⁵

The causal event approach operates such that publication occurs in the jurisdiction where the information is uploaded, so in the context of a wiki the jurisdiction is the one in which an author uploads his or her work. This approach was recommended in the Commission of the European Community’s 1995 Green Paper on *Copyright and Related Rights in the Information Society*.⁸⁶ Such an approach would avoid the impracticalities associated with inadvertent copyright ownership in multiple jurisdictions which can occur under the countries of reception approach. Furthermore the approach seems to give effect to the notion of copyright as a territorial rather than absolute right.⁸⁷

⁸¹ See further B Fitzgerald, G Middleton and A Fitzgerald, *Jurisdiction and the Internet* (2002) LBC Sydney 60-62. As highlighted above under ss 36 and 101 of the *Copyright Act 1968*, where a person is found to be authorising infringement the act of authorising may occur overseas so long as the infringement occurs in Australia.

⁸² (2002) 210 CLR 575.

⁸³ *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, [44], [53], [54] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

⁸⁴ See for example Brian Fitzgerald ‘Dow Jones and Co Inc v Gutnick : negotiating ‘American legal hegemony’ in the transnational world of cyberspace’ (2003) 27(2) *Melbourne University Law Review* 590; Kimberley Heitman, ‘Free speech online: still shooting the messenger’ (2005) 28(3) *University of New South Wales Law Journal* 928; Francis Wilkins ‘Publish and be damned (or at least sued)’ (2004) 219 *Lawyers Weekly*, 8; Nathan Garnett ‘Dow Jones and Co v Gutnick: will Australia’s long jurisdictional reach chill internet speech worldwide?’ (2004) 13(1) *Pacific Rim Law and Policy Journal* 6; Richard Garnett, ‘Dow Jones and Company Inc v Gutnick : an adequate response to transnational Internet defamation?’ (2003) 4(1) *Melbourne Journal of International Law* 196.

⁸⁵ *Ward Group Pty Ltd v Brodie & Stone PLC* (2005) 215 ALR 716, [42] (Merkel J).

⁸⁶ *Green Paper on Copyright and Related Rights in the Information Society* (1995) Europa <<http://europa.eu.int/scadplus/leg/en/lvb/124152.htm>> at 17 November 2006.

⁸⁷ *Norbert Steinhart & Son Ltd v Meth Patents Pty Ltd* (1960) 34 ALJR 372, 374 (Fullagar J); G Austin, *Private International Law and Intellectual Property Rights – A Common Law Overview* (2001) [21] World Intellectual Property Organisation. <http://www.wipo.int/edocs/mdocs/mdocs/en/wipo_pil_01/wipo_pil_01_5.pdf> at 14 December 2006.

Regardless, the issue as to jurisdiction and copyright in relation to materials published on the internet is yet to be totally resolved. Internet based technologies such as wiki applications highlight the potential uncertainty that can arise in relation to copyright ownership. This uncertainty is perhaps elevated in relation to wikis due to their open nature and the corresponding large numbers of people able to claim ownership in material on a wiki. The broader issue of jurisdiction and copyright in relation to materials published on the internet is beyond the scope of this paper, and awaits clarity through case law or legislative amendment. Some have even suggested that we need to conceptualise a new style of translational law or *lex mercatoria*, common to many countries that can meet the vagaries of the Internet world and produce a single law solution.⁸⁸

4.4 Infringement

Copyright infringement will occur where a person who is not the copyright owner, without permission, does or authorises any acts which form part of an author's exclusive rights.⁸⁹ An infringement can be either direct or by authorisation.

4.4.1 Direct Infringement

This form of infringement deals with the liability of a contributor of wiki content. Where someone does an act that substantially infringes any of an author's exclusive rights a direct infringement will occur.⁹⁰ The term substantial is a question of fact and requires consideration of the work as a whole, both in terms of quality and quantity.⁹¹ The quality of parts of subject matter copied is the most important consideration, not the quantity.⁹² For example assume an author of a wiki page copies a paragraph from another work that is 50 pages long. If this paragraph in terms of its content was a vital, core or material part relative to the whole of the text this will likely be a substantial infringement.⁹³ The same is true for other mediums such as sound or video.⁹⁴

However, the practical difficulty of determining the identity of the user or author of the infringing wiki content means that the person who owns or hosts the wiki is more likely to be pursued for authorising that infringing content. The discussion below focuses on the potential liability of the owner of a wiki,

⁸⁸ Brian Fitzgerald 'Dow Jones and Co Inc v Gutnick : negotiating 'American legal hegemony' in the transnational world of cyberspace' (2003) 27(2) *Melbourne University Law Review* 590; G Dinwoodie, *Conflicts and International Copyright Litigation: The Role of International Norms*, in INTELLECTUAL PROPERTY IN THE CONFLICT OF LAWS 195 (Metzger et al. eds., 2005).

⁸⁹ *Copyright Act 1968* (Cth) ss 36(1), 101(1).

⁹⁰ *Copyright Act 1968* (Cth) s 36.

⁹¹ *Hawkes and Son (London) Ltd v Paramount Film Service Ltd* [1934] Ch 593; *Blackie & Sons (London) v Lothian Book Publishing Co Pty Ltd* (1921) 29 CLR 396.

⁹² *TCN Channel Nine Pty Ltd & Anor v Network Ten Pty Ltd (No 2)* (2005) 216 ALR 631, [15], [20], [27], [28] (Finkelstein J).

⁹³ *Dixon Investments Pty Ltd v Hall* (1990) 18 IPR 490, 494 (Pincus J); *Henley Arch Pty Ltd v Clarendon Homes (Aust) Pty Ltd* (1998) 41 IPR 433.

⁹⁴ See for example *TCN Channel Nine Pty Ltd & Anor v Network Ten Pty Ltd (No 2)* (2005) 216 ALR 631, [15], [20], [27], [28] (Finkelstein J).

rather than the host of the wiki, as the host of a wiki is likely to fall under the safe harbour provisions or the defences in ss 39B and 112E, as will be discussed later.

4.4.2 Infringement by authorisation

Copyright is infringed when any person authorises the doing of any act comprised of copyright without the license of the owner.⁹⁵ It is infringement by authorisation that will be the most problematic for owners of a wiki (that is, the person who owns the domain name, and originates and operates the wiki). Relevantly, for the purposes of infringement by authorisation it is irrelevant that the wiki owner is located outside of Australia.⁹⁶ The term 'authorise' has been held to mean to sanction, approve or countenance.⁹⁷ The factors a court will consider in determining whether a person has authorised an act comprised in the copyright include:

- the extent of the person's power to prevent the doing of the act concerned;
- the nature of any relationship existing between the person and the person infringer; and,
- whether the person took reasonable steps to prevent or avoid the doing of the act, including whether the person complied with the relevant industry codes of practice.⁹⁸

While it is useful to discuss these elements separately, it is important to note that these factors are not exhaustive and a court should also consider the need for a free flow of knowledge to allow the internet and other new communication technologies to operate at their full potential.

4.4.2.1 Power to prevent the infringement of copyright

In determining this element the courts will look at the ability of the authoriser to prevent infringement. The necessary type and level of control varies from case to case according to the circumstances.⁹⁹ The classic case for infringement by authorisation occurred in *University of NSW v Moorhouse* ('*Moorhouse*').¹⁰⁰ The case concerned a university which provided photocopiers for use in the library. The court found the university had authorised the infringement of copyright because it had measures available to prevent infringement which they failed to implement, including proper warning

⁹⁵ *Copyright Act 1968* (Cth) s 36(1) for 'works'; *Copyright Act 1968* (Cth) s101(1) for subject matter other than works.

⁹⁶ *ABKO Music and Records Inc v Music Collection International Ltd* [1995] RPC 657, 660 (Hoffman LJ).

⁹⁷ *University of NSW v Moorhouse* (1975) 133 CLR 1, 12 (Gibbs J), 20 (Jacobs J); *WEA International Inc v Hanimax Corp Ltd* (1987) 10 IPR 349, 362 (Gummow J); *Nationwide News Pty Ltd v Copyright Agency Ltd* (1996) 34 IPR 53, 75.

⁹⁸ *Copyright Act 1968* (Cth) ss 36(1A), s101(1A).

⁹⁹ *Winstone v Wurlitzer Co Ltd* [1946] VLR 338, 347 (Herring CJ).

¹⁰⁰ (1975) 133 CLR 1.

signs and user guides explaining what constitutes an infringement of copyright.¹⁰¹

In the context of the internet there are a number of cases which have considered infringement of copyright by authorisation.¹⁰² The case of *Cooper v Universal Music Australia Pty Ltd* ('*Cooper*')¹⁰³ considered a website known as MP3s4free.com. This website provided an organised directory of hyperlinks to websites that had downloads of infringing copies of music. The website in *Cooper* did not actually store the infringing MP3s; rather it provided three different types of hyperlinks including:

- hyperlinks that automatically commenced downloading a file from another website as soon as the hyperlink was clicked;
- hyperlinks that brought a user to another website from which they could download a file; and,
- hyperlinks that brought a user to another website from which they would click other hyperlinks which brought them to other websites where they could download the file.

In *Cooper* the court held that there was an infringement as the defendant had the capacity to remove hyperlinks, or structure the website in such a way that operators of remote websites could not automatically add hyperlinks without some supervision.¹⁰⁴ Given third parties could themselves add hyperlinks to the Cooper website, a wiki being fully editable could be considered to operate in a similar sense to the Cooper website. A wiki allows any user to add or modify information on a wiki page, some of which could infringe copyright. Accordingly, an argument could be made that the deliberate choice to create a wiki means that the creator had the power to prevent the infringement of copyright by establishing a different sort of website. However, such an interpretation would prevent the uptake of wikis and provide a perverse disincentive to innovate with respect to online communication.

Furthermore, most wikis allow for certain users to indicate a copyright infringement, and potentially remove data from a wiki page.¹⁰⁵ This policing function however is typically performed by wiki users themselves rather than the owners of the wiki site, although Wikipedia for example does provide for the capacity to make a direct request for removal to a Wikipedia agent.¹⁰⁶ This may demonstrate a capacity to control content to a similar level as in *Cooper*.

¹⁰¹ *University of NSW v Moorhouse* (1975) 133 CLR 1, 22 (Jacobs J).

¹⁰² See for example *Universal Music Australia Pty Ltd v Cooper* [2005] FCA 972; *Cooper v Universal Music Australia Pty Ltd* [2006] FCAFC 187; *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242.

¹⁰³ [2006] FCAFC 187.

¹⁰⁴ *Cooper v Universal Music Australia Pty Ltd* [2006] FCAFC 187, [41] (Branson J), [148]-[149] (Kenny J).

¹⁰⁵ See for example Wikipedia, *Wikipedia* <<http://en.wikipedia.org/wiki/Wikipedia:Copyrights>> at 14 September 2006.

¹⁰⁶ Wikipedia, *Wikipedia* <http://en.wikipedia.org/wiki/Wikipedia:Designated_agent> at 14 September 2006.

However, a wiki is arguably distinguishable from the situation in *Cooper* as in that case the website owner made no attempt to ascertain the legality of the files hyperlinked, whereas most wikis provide procedures for enforcement of copyright by the wiki community. Furthermore, the website in *Cooper* was designed primarily to facilitate copyright infringement whereas a wiki has many non-infringing uses.

The concept of control in the context of websites is further explored in the case of *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* ('*Kazza*').¹⁰⁷ This case concerned the peer-to-peer file sharing platform known as *Kazza*. The *Kazza* system had a number of technological controls that contributed to the court's finding of liability for infringement of copyright by authorisation. The court noted that while Sharman was not in complete control of users' actions it could have controlled access through filtering mechanisms such as keyword filtering, and flooding¹⁰⁸ searches with known non-infringing or 'gold' files.¹⁰⁹ Most wiki applications rely on the community of users to point out pages that violate policy or laws, but do not provide for automatic filtering mechanisms. Therefore it would seem a wiki is distinguishable from the situation in *Kazza*.

Furthermore, ss 36(1A)(a) and 101(1A)(a) refer to the words 'if any' in relation to a person's power to prevent the doing of the act concerned. In *Kazza*, counsel for the applicants submitted the words 'if any' should be interpreted as 'a person with no power to prevent the doing [of] the act concerned may nevertheless, by the interplay of the other factors prescribed, authorise infringement'.¹¹⁰ This should be contrasted with the previous position at common law that a person cannot be said to authorise infringement unless they have some power to prevent it.¹¹¹ Conversely, counsel for the respondent, Sharman, asserted the common law principles in *Moorhouse* still apply, but that the statutory provisions now provide a non-exhaustive list of matters to be considered.¹¹² The court in *Kazza* however rejected Universal Music's submission, instead finding the common law was merely codified and the *Moorhouse* test still applied.¹¹³ Therefore, it would seem control remains a necessary element for infringement. However as was seen in *Kazza* control does not need to be actual control, rather all that is needed is the power to prevent, or at least to substantially reduce, the incidence of copyright

¹⁰⁷ [2005] FCA 1242.

¹⁰⁸ The process of 'flooding' refers to the listing certain files first upon processing a search query from a user such that other files are effectively flooded out of the search.

¹⁰⁹ *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242, [411] (Wilcox J).

¹¹⁰ *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242, [360]. See also *Universal Music Australia Pty Ltd v Cooper* [2005] FCA 972, [83], [84] (Tamberlin J); Jane Ginsberg and Sam Ricketson, 'Inducers and authorisers: A comparison of the US Supreme Court's *Grokster* decision and the Australian Federal Court's *KaZaa* ruling' (2006) 11(1) *Media and Arts Law Review* 1, 16.

¹¹¹ *University of NSW v Moorhouse* (1975) 133 CLR 1, 7 (Gibbs J).

¹¹² *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242, [372], [373].

¹¹³ *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242, [402] (Wilcox J).

infringement.¹¹⁴ Persons who display indifference and forgo control which they could have exercised can therefore be found to have authorised infringement. Most wiki applications such as Wikipedia have the capacity to restrict a user's access by banning a user's ability to make edits to a wiki page. Furthermore since a number of controversies,¹¹⁵ Wikipedia has implemented an 'official actions policy',¹¹⁶ that allows a Wikipedia employee to protect or modify any article. Arguably this amounts to control in a similar sense to *Kazza*¹¹⁷ in that it gives a owner of a wiki the power to prevent, or at least substantially to reduce, the incidence of copyright infringement.¹¹⁸

4.4.2.2 *The nature of the relationship between a wiki and the infringer*

The relationship between the alleged authoriser and the infringer is a relevant factor in determining liability for authorisation.¹¹⁹ Authorisation will often be inferred where the relationship is one of employee-employer or principal-agent,¹²⁰ though such a relationship is not essential.¹²¹ With regard to corporate wikis, the contributors would usually be employees and this may increase the likelihood of a finding of authorisation as an employment relationship indicates a higher degree of control.¹²² Consequently corporations should be particularly diligent in ensuring their wikis are free from infringing content so as to satisfy the 'reasonable steps' requirement below. However applications such as Wikipedia typically have no proximate relationship between a wiki owner and a wiki contributor.

4.4.2.3 *What constitutes reasonable steps to prevent or avoid infringement in the context of a wiki?*

Where reasonable steps have been taken to prevent infringement there will be no liability for authorisation under the Act even where there is a high degree of control over content that is the subject of the infringement.¹²³ As discussed, reasonable steps in *Moorhouse* were considered to be accurate notices explaining all the relevant law in relation to copyright. The case of *Cooper* held the use of disclaimers purporting to absolve liability did not by themselves constitute a reasonable step where a website is set up and

¹¹⁴ *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242, [411] (Wilcox J).

¹¹⁵ See heading 6 for an example of such a controversy.

¹¹⁶ See Wikipedia, Policies and guidelines,

<http://en.wikipedia.org/wiki/Wikipedia:Policies_and_guidelines> at 17 November 2006.

¹¹⁷ [2005] FCA 1242.

¹¹⁸ *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242, [411] (Wilcox J).

¹¹⁹ *Copyright Act 1968* (Cth) ss 36(1A), s101(1A).

¹²⁰ *Australasian Performing Right Association Ltd v Jain* (1990) 18 IPR 663, 671 (Sheppard, Foster and Hill JJ).

¹²¹ *Australasian Performing Right Assn Ltd v Canterbury-Bankstown League Club Ltd* (1964) 5 FLR 415, 416, 417 (Ferguson J).

¹²² *Australasian Performing Right Assn Ltd v Canterbury-Bankstown League Club Ltd* (1964) 5 FLR 415, 416, 417 (Ferguson J); *Australasian Performing Right Assn Ltd v Jain* (1990) 96 ALR 619, 626, 627 (Sheppard, Foster and Hill JJ); *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242, [386] (Wilcox J).

¹²³ *University of NSW v Moorhouse* (1975) 133 CLR 1, 14 (Gibbs J).

structured in a way to primarily facilitate copyright infringement.¹²⁴ Therefore the presence of disclaimers in wikis is unlikely, of itself, to be a reasonable step as they only address infringement generally, rather than seek to actually prevent or avoid infringing acts.¹²⁵ In *Kazza* it was held that reasonable steps include technological controls such as keyword or non-infringing file filtering which operate to at least reduce infringement.¹²⁶ Therefore in order to minimise liability for infringement of copyright by authorisation, wiki owners should ensure that:

- notices explaining the relevant rules of copyright are prominently placed on a wiki; and,
- the wiki application is primarily used to facilitate non-infringing uses; and,
- as an extreme step, technological measures could be used to minimise copyright infringement, such as the use of plagiarism detection software to examine all content uploaded.¹²⁷

4.4.2.4 Other factors relevant to authorisation

Although *Cooper* and *Kazza* give important guidance, the concept of authorisation is qualified and will be determined on a case by case basis.¹²⁸ In addition to the statutory elements of authorisation discussed above, there are a number of other factors which courts have considered to be relevant to authorisation. For example where the authoriser obtains a direct financial benefit from an infringing activity a court is more likely to infer authorisation.¹²⁹ Most large wiki applications derive income either by donations and are unlikely to be seen as obtaining a direct financial benefit. However wikis that are used to assist corporations in their business or those wikis that do derive income from advertising may be said to incur a direct financial benefit from an infringement. Accordingly where there is a financial benefit from an infringing activity on a wiki, whether it be money from advertising, or an improved business model, this is likely to be relevant to authorisation.

More significantly, as the concept of authorisation is qualified and determined on a case by case basis, the inherent flexibility this grants to the court allows the law to adapt to new technologies. Indeed, in *MGM Studios Inc v Grokster Ltd*, Breyer J heavily emphasised the importance of the law not impeding technological development.¹³⁰ An overly restrictive approach to authorisation

¹²⁴ *Cooper v Universal Music Australia Pty Ltd* [2006] FCAFC 187 at [49] (Branson J), [151] (Kenny J).

¹²⁵ *Australasian Performing Right Association Ltd v Metro on George Pty Ltd* [2004] FCA 1123, [44] (Bennett J); *Universal Music Australia Pty Ltd v Cooper* [2005] FCA 972, [87] (Tamberlin J).

¹²⁶ *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242 [414] (Wilcox J).

¹²⁷ Similar software is currently employed by many educational institutions.

¹²⁸ *University of NSW v Moorhouse* (1975) 133 CLR 1, 7, 8 (Gibbs J).

¹²⁹ *Cooper v Universal Music Australia Pty Ltd* [2006] FCAFC 187 at [48] (Branson J), [150] (Kenny J); *Winstone v Wurlitzer Co Ltd* [1946] VLR 338, 353.

¹³⁰ *MGM Studios Inc v Grokster Ltd*, 125 S Ct 2764 (SC, 2005).

could have the effect of rendering new communication technologies like wikis as so impractical that their adoption would be stalled. Furthermore, it could have the effect of stifling further innovation and development in collaborative technology. Accordingly, it is vital that courts strike an appropriate balance between innovation and new collaborative communication technologies and the protection of copyright.

4.5 Are there any defences or excuses for infringement of copyright by a wiki?

4.5.1 Fair Dealing

Australia does not have a fair-use exception like the United States.¹³¹ Rather Australia employs a number of specific defences known as ‘fair-dealing’ defences. These defences provide that certain acts are not an infringement of copyright if done, *inter alia*, for the purpose of research or study,¹³² criticism or review,¹³³ reporting of news,¹³⁴ judicial proceedings, the giving of professional legal advice,¹³⁵ and recently parody or satire.¹³⁶

As previously discussed, liability may arise for contributors to a wiki, the owner of a wiki, and the person who hosts the wiki. It is therefore necessary to firstly determine who would be able to rely on the defence of fair dealing. It was submitted in the case of *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (‘the Panel Case’)¹³⁷ that the requisite purpose must be that of the respondent rather than that of some third party.¹³⁸ In the Panel Case, Channel Ten engaged Working Dog Pty Ltd (‘Working Dog’) to produce The Panel show. Counsel for Channel Nine therefore submitted Channel Ten could not rely on fair dealing defences as it was Working Dog who engaged in the dealing.¹³⁹ The court held in this instance that the purpose of Working Dog was the purpose of Channel Ten, but did not explain why this was so.¹⁴⁰ Fair dealing involves a question of degree and impression, and is judged by a fair minded and honest person.¹⁴¹ Regardless it would seem the contributors, owners and hosts of a wiki content can rely on a fair dealing provision if they can objectively show a genuine purpose to which fair dealing applies and the dealing is fair.¹⁴²

¹³¹ The US fair-use doctrine lists a number of factors a court should consider in determining whether a use is ‘fair’: *Copyright Act of 1976*, 17 USC §107 (1976).

¹³² *Copyright Act 1968* (Cth) ss 40 and 103C.

¹³³ *Copyright Act 1968* (Cth) ss 41 and 103A.

¹³⁴ *Copyright Act 1968* (Cth) ss 42 and 103B.

¹³⁵ *Copyright Act 1968* (Cth) ss 43 and 104.

¹³⁶ *Copyright Act 1968* (Cth) s200AB(5).

¹³⁷ (2002) 190 ALR 468.

¹³⁸ *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2002) 190 ALR 468, 488 (Hely J).

¹³⁹ *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2002) 190 ALR 468, 488 (Hely J).

¹⁴⁰ *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2002) 190 ALR 468, 488 (Hely J).

¹⁴¹ *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2002) 190 ALR 468, 488 (Hely J).

¹⁴² *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2001) 50 IPR 335, [50] (Conti J). See also Brian Fitzgerald et al, *OAK Law Project Report No. 1* (2006) 39.

With regard to the exception of research or study, it is the purpose of the person dealing with the material that is relevant, not the purpose to which the reproduction is ultimately put.¹⁴³ Arguably wiki applications such as Wikipedia and wikis used in education would potentially fall within this exception as they generally are developed, used and hosted for educational purposes and for the promulgation of knowledge. The *Copyright Act* prescribes a number of factors to determine whether a dealing is fair, including:

- the purpose and character of the dealing;
- the nature of the work;
- the possibility of obtaining the work within a reasonable time at an ordinary commercial price;
- the effect of the dealing on the potential market for, or value of, the work;
- in a case where part only of the work is copied, the amount and substantiality of the part copied in relation to the whole work.¹⁴⁴

The fair dealing exception for criticism or review may also be of relevance to wiki applications. This exception operates to allow thoughts underlying the expression of copyright works or subject matter, and allows for the incorporation of infringing material for this purpose. Where a wiki page incorporates copyright material for the purpose of genuine criticism¹⁴⁵ or review,¹⁴⁶ it is likely copyright will not be infringed. However where the criticism or review is for some ulterior purpose such as for use by a rival in a trade an infringer will be unable to rely on this defence.¹⁴⁷

The fair dealing exception for reporting of the news may be of relevance as a number of wiki applications are designed specifically as a medium for the delivery of news.¹⁴⁸ Copyright is not infringed if it is dealt with for the purpose of, or associated with, the reporting of news, *inter alia*, by means of electronic communication.¹⁴⁹ Therefore the communication of news on a wiki, like Wikinews,¹⁵⁰ being an electronic medium can fall under the reporting of news exception, provided that the use is fair.

¹⁴³ *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 95 ALR 625, 629 (Beaumont J).

¹⁴⁴ *Copyright Act 1968* (Cth) ss 40(2) and 103C(2).

¹⁴⁵ Criticism is defined to mean 'the act or art of analysing and judging the quality of a literary or artistic work, the act of passing judgement as to the merits of something and a critical comment, article or essay: *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 95 ALR 625, 631 (Beaumont J).

¹⁴⁶ Review is defined to mean 'a critical article or report, as in a periodical on some literary work, commonly some work of recent appearance or a critique: *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 95 ALR 625, 631 (Beaumont J).

¹⁴⁷ *Hubbard v Vosper* [1972] 2 B 84, 93 (Denning LJ).

¹⁴⁸ See for example Wikinews, a free content news service.

¹⁴⁹ *Copyright Act 1968* (Cth) ss 42 and 103B.

¹⁵⁰ See Wikinews <<http://www.wikinews.org/>> at 20 January 2007.

However, a wiki like Unnews,¹⁵¹ 'Your source of up to the minute misinformation', could not rely on the reporting of news exception, and up until last year would not have been able to rely on any fair dealing exception. Amendments to the Act passed last year mean that Unnews and similar wikis,¹⁵² may be able to rely on the fair dealing exception for parody and satire. These terms are not defined in the Act, but were discussed by Conti J in *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd*.¹⁵³ In addition to the use of copyright material being for parody or satire, the use must be fair.

4.5.2 Defences in ss39B, 112E

Defences are also available to persons (including a carriage service provider) for infringement by authorisation in certain circumstances where facilities provided by them are used by someone else to infringe copyright.¹⁵⁴ Wilcox J in *Kazza* stated the legislative intent was the protection of a 'mere messenger' such as internet service providers.¹⁵⁵ In *Kazza* it was held this defence does not apply where the defendants have encouraged infringement in some manner or form.¹⁵⁶ While it would seem most wikis do not go so far as to encourage copyright, they seem to be more than mere messengers. Wiki applications such as Wikipedia frequently exercise discretion as to the content on a wiki, and therefore play an active role. As such wiki owners may not be able to rely on these defences.

As far as the person hosting a wiki, typically an internet service provider, and the provider of the wiki platform or shell, is concerned, it is more likely that this defence will be available to them. However, in *Cooper* the court concluded that the internet service provider E-talk (trading as Com-Cen) could not rely on the defence as they 'derived a commercial advantage from the website operated by Mr Cooper that over and above payment for hosting services', 'knew about the website and the infringements of copyright' and failed to take reasonable steps to prevent the infringement.¹⁵⁷

4.5.3 Safe Harbour Provisions

Australia's obligations under the *US Free Trade Agreement Implementation Act 2004* (Cth) ('US Free Trade Agreement') lead to several new provisions in the *Copyright Act 1968* (Cth) that may be relevant for internet service providers hosting a wiki.¹⁵⁸ These provisions seek to strike accordance with the US 'safe harbour' provisions and limit the liability of Carriage Service

¹⁵¹ See Unnews <http://www.uncyclopedia.org/wiki/UnNews:Main_Page> at 14 February 2007.

¹⁵² See, for example, Uncyclopedia <<http://www.uncyclopedia.org/wiki/Content-free>> 14 February 2007., Undictionary <http://www.uncyclopedia.org/wiki/Undictionary:Main_Page> at 14 February 2007; and UnTunes <http://www.uncyclopedia.org/wiki/UnTunes:Main_Page> at 14 February 2007.

¹⁵³ (2001) 50 IPR 335, [16]-[17].

¹⁵⁴ *Copyright Act 1968* (Cth) ss 39B, 112E.

¹⁵⁵ *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242, [418] (Wilcox J).

¹⁵⁶ This included making statements such as 'join the revolution': *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242, [405] (Wilcox J).

¹⁵⁷ *Cooper v Universal Music Australia Pty Ltd* [2006] FCAFC 187 at [55-60] (Branson J), [170] (Kenny J).

¹⁵⁸ *Copyright Act 1968* (Cth) Division 2AA.

Providers ('CSP') by limiting remedies available against the infringing CSP.¹⁵⁹ To rely on these provisions the host of the wiki must:

- be a CSP;¹⁶⁰
- fall into a protected category of online activity;¹⁶¹ and
- comply with the conditions listed in s 116AH which requires, *inter alia*, that the CSP not receive financial benefit directly attributable to the infringing activity where they have the right and ability to control the activity.

A CSP is defined as a person supplying a carriage service to the public using a network unit.¹⁶² Accordingly, an internet service provider is likely to be a CSP. The second criterion would be met as the use of a wiki arguably falls under a Category C activity as it could be considered as the storing of copyright material at the discretion of a user on a system or network operated by the CSP. The third criterion would most likely depend upon whether the host of the wiki advertised in any way on the wiki.

It is unlikely that these safe harbour provisions would be available to the owner of a wiki, as a wiki would not meet the definition of a CSP as they do not provide a carriage service. Rather the owner of the wiki provides a platform to read, edit or add content which is uploaded via a website. If a wiki were considered to be a CSP, or if the definition of a CSP was to be broadened, then the second criterion would likely be met as the use of a wiki arguably falls under a Category C activity as it could be considered as the storing of copyright material at the discretion of a user on a system or network operated by the CSP. The third criterion largely depends on the wiki in question. Wikipedia for example clearly does not receive profits from infringing activities as no income is derived from advertisements. Wikia on the other hand does derive income from advertisements, and as such there may be a more proximate relationship between profit making and the infringing activity. In *Cooper* it was found that deriving money from advertisements where control was present was directly attributable to the infringing activity.¹⁶³

4.6 Issues with moral rights and wikis

An author of a wiki page may take a certain sense of pride in their work, and may object to others interfering with their work. The ease at which works can be modified on a wiki in turn can raise issues with moral rights. Moral rights are personal rights granted to authors of literary, dramatic, musical and artistic works as well as authors of films. There are three moral rights granted to authors, including:

¹⁵⁹ *Copyright Act 1968* (Cth) s 116AG

¹⁶⁰ See s 87 *Telecommunications Act 1997* (Cth) for the definition of a CSP.

¹⁶¹ See ss 116AC-116AF *Copyright Act 1968* (Cth).

¹⁶² *Telecommunications Act 1997* (Cth) s 87.

¹⁶³ *Universal Music Australia Pty Ltd v Cooper* [2005] FCA 972, [108] (Tamberlin J).

- attribution of authorship;
- right not to be falsely identified;
- integrity of authorship.¹⁶⁴

Moral rights cannot be assigned,¹⁶⁵ however it is possible to consent to waive moral rights.¹⁶⁶ Moral rights are present in most jurisdictions, although such rights are limited in the US.¹⁶⁷

4.6.1 Right of attribution of authorship

The right to attribution of authorship refers to a right an author has to be identified as the author of a work,¹⁶⁸ when an attributable act is done in respect of the work or a substantial part thereof.¹⁶⁹ Conceivably the use of a wiki could give rise to any of attributable acts. Therefore in order to ensure there is no infringement to authorship, authors of a wiki page should ensure they clearly identify the author where an attributable act is done in relation to the work or other subject matter. Such attribution should be clear and reasonably prominent,¹⁷⁰ in such a way that a person acquiring a reproduction would have knowledge of the author's identity.¹⁷¹ It is unclear whether attributing authorship in the wiki's metadata (viewable as the 'history' to a page) is sufficient attribution. However, given the nature of a wiki, arguably the user of a wiki has consented to attribution in that way when contributing to the wiki in the first place.

4.6.2 Right not to be falsely attributed authorship

The right of false attribution is a right of a person not to be identified as an attributor to a work where they did not contribute to such a work.¹⁷² An infringement will occur where there is an act of false attribution, which includes:

- inserting or affixing a person's name on a work or do something which implies falsely that the person is an author of the work or other subject matter;¹⁷³
- dealing with a person's name if the attributor knows that person is not the author of the work;¹⁷⁴ or,

¹⁶⁴ *Copyright Act 1968* (Cth) s 189.

¹⁶⁵ *Copyright Act 1968* (Cth) s 195AN(3).

¹⁶⁶ *Copyright Act 1968* (Cth) ss 195AW, 195AWA.

¹⁶⁷ *Copyright Act of 1976*, 17 USC § 106A (1976).

¹⁶⁸ *Copyright Act 1968* (Cth) s 193.

¹⁶⁹ *Copyright Act 1968* (Cth) ss 193(2) 195AZH.

¹⁷⁰ *Copyright Act 1968* (Cth) s 195AA.

¹⁷¹ *Copyright Act 1968* (Cth) s 195AB.

¹⁷² *Copyright Act 1968* (Cth) s 195AC.

¹⁷³ *Copyright Act 1968* (Cth) ss 195AD, 195AE(2)(a), 195AF(2)(a).

¹⁷⁴ *Copyright Act 1968* (Cth) ss 195AD, 195AE(2)(b)(c), 195AF(2)(b)(c).

- communicating the work to the public as being a work of that author if the attributor knows that he or she is not the author of that work.¹⁷⁵

The basis of this right is to protect damage to a person's reputation that could be incurred by an act of false attribution. Once again all the listed acts of false attribution could apply in the context of a wiki application. Commonly breaches of this right may occur by associating an author's name with a subject matter that negatively impacts upon that author.

4.6.3 Integrity of authorship

The right to integrity of authorship is the right not to have the work subjected to derogatory treatment.¹⁷⁶ Derogatory treatment includes the doing of anything that results in distortion, mutilation or a material alteration to a work or other subject matter that is prejudicial to the maker's honour or reputation.¹⁷⁷ Conduct alone that results in distortion, mutilation or material alteration does not, of itself, amount to derogatory treatment, unless it is shown to be prejudicial to the honour and reputation of the author. Wiki applications could give rise to a number of breaches of this right given that wiki pages may be frequently modified. For example an edit war, where users continually modify one another's work could amount to a breach of this right if it could be shown it was prejudicial to one's honour and reputation. If for example a wiki page that details a highly controversial topic such as the holocaust was contributed by someone with close ties to the Jewish community, and were modified to contain anti-Semitic statements arguably this would damage the original contributor's honour or reputation.¹⁷⁸

5.6.4 Defences for infringement of moral rights

It will be a defence to an infringement of moral rights where the infringement was reasonable¹⁷⁹ or consent was given by the author.¹⁸⁰ A number of factors will be taken into account in determining reasonableness including the nature of the work or film, purpose for which it is used, the manner used, the context used, the practice in the industry, voluntary codes and difficulty or expense.¹⁸¹ When looking at these factors it is apparent the nature of a wiki, being a fully editable website used in the context of collaborative contribution, and the difficulty, if not impossibility, of preventing such infringements, it is arguable that most uses of a wiki application that would constitute a breach of moral rights would be reasonable. An exception to this would be where the use was for malicious purposes.

¹⁷⁵ *Copyright Act 1968* (Cth) ss 195AD, 195AE(2)(d), 195AF(2)(d).

¹⁷⁶ *Copyright Act 1968* (Cth) s 195AI(2).

¹⁷⁷ *Copyright Act 1968* (Cth) ss 195AJ, 195AK, 195AL.

¹⁷⁸ Such edit wars on controversial subjects frequently occur, see for example Wikipedia, *Wikipedia: Lamest edit wars* <http://en.wikipedia.org/wiki/Lamest_edit_wars> at 21 September 2006.

¹⁷⁹ *Copyright Act 1968* (Cth) ss 195AR, 195AS, 195AT.

¹⁸⁰ *Copyright Act 1968* (Cth) ss 195AW, 195AWA.

¹⁸¹ *Copyright Act 1968* (Cth) ss 195AR(2), 195AS(2), 195AT(2).

5. Defamation

In 2005 an article was written on John Seigenthaler Sr, a US journalist and politician, alleging his involvement in the assassination of John F Kennedy.¹⁸² These defamatory statements remained on Wikipedia for some months resulting in considerable media attention. This demonstrates that wiki applications' risk of defamation often lies not in policies but the inability to proactively enforce those policies. Since the Seigenthaler controversy, Wikipedia has implemented an 'official actions policy',¹⁸³ that allows a Wikipedia employee to protect or modify any article. The Seigenthaler controversy should serve as a beacon to the risks associated with wiki applications and defamation.

5.1 Who may be liable for defamation content on a wiki?

Given their open nature, the increasing use of wiki applications by businesses or educators may potentially lead to a new realm of liability. Businesses or educators may themselves be liable for the content on a wiki where they are the owners of the wiki. In addition the persons who add content to the wiki application and host of the wiki may also be liable. Users of wikis within social networking applications need to be particularly aware of the applicability of defamation law to their postings.

Every person who contributes to the publication is potentially liable.¹⁸⁴ Publication includes publication over the internet,¹⁸⁵ and therefore an author of a wiki page can be seen to have published the material. Importantly to the owner and/or host of wiki applications, omitting to remove or amend a defamatory matter under one's control amounts to a publication.¹⁸⁶ A unique phenomenon of a wiki application is that realistically every single user has the capacity to control content as every user potentially has the ability to remove or amend defamatory material. Rather absurdly on a strict application of the law every single user could be therefore held liable for a defamatory publication. However, practically such a situation is unlikely to arise.

As discussed, since the Seigenthaler controversy,¹⁸⁷ Wikipedia has implemented an 'official actions policy'¹⁸⁸, that allows a Wikipedia employee to protect or modify any article. This in effect is exercising control over a defamatory matter, and could constitute in itself a publication by Wikipedia. It is useful to examine the extent of liability for a wiki owner or host by reviewing relevant domestic and international case law.

¹⁸² Ken Myers, 'Wikimmunity: *Fitting the Communications Decency Act to Wikipedia*' (Research Publication No 2006-08, The Berkman Center for Internet and Society, 2006) 6.

¹⁸³ See Wikipedia, Policies and guidelines, <http://en.wikipedia.org/wiki/Wikipedia:Policies_and_guidelines> at 17 November 2006.

¹⁸⁴ *Webb v Bloch* (1928) 41 CLR 331.

¹⁸⁵ *Dow Jones & Co Inc v Gutnick* (2002) 194 ALR 433.

¹⁸⁶ *Byrne v Deane* [1937] 2 All ER 204, 210 (Slessor LJ).

¹⁸⁷ See heading 6 for a description of the controversy.

¹⁸⁸ See Wikipedia, Policies and guidelines, <http://en.wikipedia.org/wiki/Wikipedia:Policies_and_guidelines> at 17 November 2006.

The US case of *Cubby v CompuServe*¹⁸⁹ held that a company that operated a database that contained a large array of publications, some of which contained potentially libellous material, was not liable as in reality it had little control over the publication's contents.¹⁹⁰ The court further reasoned that CompuServe had no more editorial control than a public library, book store or newsstand.¹⁹¹ The Queen's Bench Division of the UK courts reached a similar conclusion in *Bunt v Tilley*,¹⁹² where it was held that ISPs could no longer be considered publishers under UK law as they simply played the passive role of a facilitator to publishing content on the internet. By analogy this reasoning could be applied to a wiki. By contrast the case of *Stratton Oakmont v Prodigy Services Co.*¹⁹³ held that where an ISP exercised control over bulletin boards by deleting posts that breached their guidelines, it amounted to sufficient control for purposes of publication and therefore was defamation. As discussed all users of wiki applications have this capacity, as well as some extended capacities granted to administrators of wiki applications.

The position in the US has been modified somewhat since the introduction of the *Communications Decency Act* 47 USC § 230 (1996) ('CDA'). The effect of the CDA is to create immunity from a defamation action and states 'no provider or user of an interactive computer service shall be treated as the publisher or speaker of information provided by another information content provider'.¹⁹⁴ The operation of this provision was demonstrated in *Zeran v America Online Inc*¹⁹⁵ which concerned an anonymous post on an AOL bulletin board which praised the bombing of the government building in Oklahoma City and offered for sale tee-shirts with slogans bearing a similar sentiment. The anonymous poster (Zeran) left their home number on the bulletin board should anyone wish to purchase a tee-shirt. Consequently Zeran received numerous threatening phone calls. Zeran then proceeded to sue AOL for distributing defamatory material. The CDA operated as a defence to AOL for this action.¹⁹⁶ Recently the Californian Supreme Court in *Barrett v Rosenthal*¹⁹⁷ extended the reasoning in *Zeran*,¹⁹⁸ holding an internet user who posts material created by others to a website is immune from liability under the CDA. The court noted that when a person makes no changes to an article it does not expose the person who posts information to liability. Therefore this would cover the situation where a person posts defamatory content created by others to a wiki without making alterations. That person is then immune from liability under US defamation law.

¹⁸⁹ 776 F Supp 135 (1991).

¹⁹⁰ *Cubby v CompuServe* 776 F Supp 135, [11] (1991).

¹⁹¹ *Cubby v CompuServe* 776 F Supp 135, [12] (1991).

¹⁹² *Bunt v Tilley & Ors* [2006] EWHC 407.

¹⁹³ 23 Media L Rep 1794 (NY, 1995).

¹⁹⁴ *Communications Decency Act* 47 USC § 230(c)(1) (1996).

¹⁹⁵ [1997] 129 F3d 327.

¹⁹⁶ For a detailed discussion on the CDA and Wikipedia see Ken Myers, 'Wikimmunity: *Fitting the Communications Decency Act to Wikipedia*' (Research Publication No 2006-08, The Berkman Center for Internet and Society, 2006).

¹⁹⁷ 40 Cal.4th 33 (Cal. Sup. Ct., Nov. 20, 2006).

¹⁹⁸ [1997] 129 F3d 327.

Regardless, there is no equivalent defence to the CDA in Australian legislation, other than an untested defence in Schedule 5 clause 91 of the *Broadcasting Services Act 1992* (Cth)¹⁹⁹ and the defence of innocent dissemination, both of which are significantly limited in operation. The defence of innocent dissemination is discussed in detail below, but in terms of persons liable it would seem that in Australia this includes all those able to control and supervise the disseminated content.²⁰⁰

Australia should consider introducing an equivalent provision to § 230 for three reasons. First, it would provide certainty to the law, thereby creating an online environment where people are more inclined to speak freely and openly, instead of the current online climate where speech is uncertain and guarded due to the unclear exposure to liability. Second, such immunity would encourage wiki owners and hosts to self-regulate, through the use of blocking and filtering technologies. At the moment there is a perverse disincentive to self-regulate as any form of regulation clearly indicates control, which in turn exposes the wiki owner and host to liability. Third, in promoting self-regulation, such immunity reconciles two seemingly conflicted goals: the need to limit the availability of objectionable content to minors and preserving the robust exchange of ideas enabled by the internet.²⁰¹

5.2 In which jurisdictions is a person liable for defamation by the content on a wiki?

A cause of action for defamation may potentially accrue in each jurisdiction in which the defamatory material is received.²⁰² This is based on the notion that defamation's focus is damage to reputation, and that damage to reputation only occurs when the defamatory material is comprehended by a recipient.²⁰³ This in effect allows for multiple causes of action depending on where the defamatory material is received. In the context of the internet this can potentially give rise to a myriad of causes of actions, and it is the failure of the High Court to grant special significance to the internet that has led to related criticism of *Dow Jones & Co Inc v Gutnick* ('Gutnick'). It was submitted by the applicant in *Gutnick* that since the content was lawful in the United States (the location of the upload) the internet as a transnational discourse should not be inhibited by localised acts.²⁰⁴ The majority in *Gutnick* rejected that submission on the basis the internet constitutes no more than a widely disseminated publication and as physical media such as newspapers are often distributed worldwide the internet was not entitled to some special consideration.²⁰⁵ The

¹⁹⁹ This defence may operate to protect an ICH or ISP, but is untested and therefore not considered in this paper.

²⁰⁰ *Thomson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574.

²⁰¹ See Law Professors' Amicus Brief, *Barrett v Rosenthal*, November 22, 2004, <http://www.eff.org/legal/cases/Barrett_v_Rosenthal/law_professors_amicus_brief.pdf> at 9 February 2007.

²⁰² *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575

²⁰³ *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, [44] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

²⁰⁴ Brian Fitzgerald 'Dow Jones and Co Inc v Gutnick : negotiating 'American legal hegemony' in the transnational world of cyberspace' (2003) 27(2) *Melbourne University Law Review* 590.

²⁰⁵ *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, [38] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

court, however, explained that litigation would be futile in jurisdictions where the plaintiff has no a reputation.²⁰⁶ The majority in *Gutnick* dismissed concerns of a multiplicity of actions on the basis such actions could be defeated by *res judicata* and issue estoppel.²⁰⁷

In the context of a wiki application a cause of action for defamation could arise in each jurisdiction where the content of a wiki page is viewed. However, as damage to reputation is the touchstone of defamation, in order for a cause of action to be worthwhile a plaintiff will need establish a reputation in the jurisdictions where a cause of action is claimed. Given the broad implications of *Gutnick* in terms of the breadth of liability a potential defendant could face to a defamation action, particularly in the context of the internet, authors of a wiki page should be particularly diligent in ensuring the material they write is not defamatory, or if it is, that it can be defended.

5.3 When will a cause of action for defamation arise?

As a precursor to this discussion it should be noted that under Australian defamation law, no cause of action can arise in relation to defamation of deceased persons,²⁰⁸ and corporations unless that corporation has less than 10 employees²⁰⁹ or is not for profit.²¹⁰ However, the tort of injurious falsehood,²¹¹ which exists separately from defamation,²¹² still operates to provide some protection for corporations larger than 10 employees. Indeed, the tort of injurious of falsehood was used against a blogger in *Kaplan v Go Daddy Group*.²¹³

The common law which is preserved²¹⁴ in the unified defamation acts ('UDA') provides that in order for a matter to be defamatory it must either:

- bring the person into hatred, contempt or ridicule;
- cause people to shun or avoid that person; or,
- lower that person in the estimation of others.²¹⁵

²⁰⁶ *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, [53] (Gleeson CJ, McHugh, Gummow and Hayne JJ), [151] (Kirby J), [184] (Callinan J).

²⁰⁷ *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, [36] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

²⁰⁸ *Defamation Act 2005* (Qld) s 10; Note that as Australian defamation law is now unified, a reference to the Queensland statute is inclusive of statutes of other states.

²⁰⁹ *Defamation Act 2005* (Qld) s 9(2)(b).

²¹⁰ *Defamation Act 2005* (Qld) s 9(2)(a); A non profit corporation refers to a corporation for which its objects do not include financial gain for its members or corporators.

²¹¹ Injurious falsehood requires the publication of a false statement made maliciously, and resulting in actual damage to the plaintiff and seeks to protect the plaintiff's interest in the disposability of his or her products or business: *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680, 694 (Gleeson CJ), 711 (Kirby P).

²¹² *Mirror Newspapers Ltd v World Hosts Pty Ltd* (1979) 141 CLR 632, 639 (Mason and Jacobs JJ).

²¹³ [2005] NSWSC 636.

²¹⁴ *Defamation Act 2005* (Qld) s 6(2).

²¹⁵ See generally *Jones v Skelton* [1963] 1 WLR 1362; *Random House Australia v Abbott and Costello* (1999) 167 ALR 224; *Lewis v Daily Telegraph* [1964] AC 234.

The standard at which these tests are judged is that of ordinary, reasonable and fair minded members of society.²¹⁶ This standard is objective, and the intention of the publisher is irrelevant.²¹⁷ The third limb has the additional requirement of that in order to 'lower someone in the estimation of others', the material must disparage the plaintiff.²¹⁸ A statement will disparage a plaintiff where it attributes moral blame to the plaintiff.²¹⁹ For example if a wiki page contained a statement that a person was a paedophile that would clearly disparage that person.

5.4 What defences to defamation are relevant to wiki applications?

5.4.1 The defence of innocent dissemination

The defence of innocent dissemination may be of use to the owner of a wiki, as well as the host of the wiki. It is a defence to the publication of a defamatory matter if it is shown:

- the defendant published the matter merely in the capacity, or as an employee or agent, of a subordinate distributor;
- the defendant neither knew, nor ought reasonably to have known the matter was defamatory; and,
- the defendant's lack of knowledge was not due to any negligence on the part of the defendant.²²⁰

A person will constitute a subordinate distributor if the person

- was not the first or primary distributor of the matter;
- was not the author or originator of the matter; and,
- did not have any capacity to exercise editorial control over the content of the matter (or over the publication of the matter) before it was first published.²²¹

An internet service provider that hosts a wiki would likely fulfil all the requirements of a subordinate distributor. Edits to a wiki page are effectively instantaneous. Unless there was a significant time lapse between the upload of defamatory statements on a wiki, and the download of these defamatory statements, it would be virtually impossible to exercise editorial control over content prior to instantaneous publication. However, it is arguable that an

²¹⁶ *Reader's Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500, 505, 506 (Brennan J).

²¹⁷ *Lee v Wilson* (1934) 51 CLR 276; *Morosi v Broadcasting Station 2GB* [1980] 2 NSWLR 418

²¹⁸ *Sungrature Pty Ltd v Middle East Airlines Airliban SAL* (1975) 134 CLR 1.

²¹⁹ *Sungrature Pty Ltd v Middle East Airlines Airliban SAL* (1975) 134 CLR 1.

²²⁰ *Defamation Act 2005* (Qld) s 32(1).

²²¹ *Defamation Act 2005* (Qld) s 32(2).

owner of a wiki does have the capacity to exercise editorial control over the matter.

In *Thomson v Australian Capital Television Pty Ltd* ('Thomson')²²² the High Court held that where a publisher has the ability to control and supervise the disseminated content, then the defence of innocent dissemination is not available.²²³ In this case Channel Nine screened an interview which contained highly defamatory statements. Channel Nine licensed the program to Capital Television. At the time Channel Nine broadcast the interview, the program was simultaneously transmitted to a Capital Television relay station which sent the transmission to a studio where it was subsequently broadcast. Capital Television claimed that in doing this it simply acted as a subordinate distributor and disseminated the interview of Channel 9 without knowledge or control of the content of the program. The court rejected this submission as Capital Television should have been aware of the fact current affairs programs run a high risk of carrying defamatory statements.²²⁴ Accordingly Capital Television failed the second limb of s 32(1) as they ought to reasonably have known the material could be defamatory. Furthermore Capital Television were negligent in their processes to discover the content of programs prior to broadcast pursuant to the third limb in s 32(1).²²⁵

Whether the host of wiki content can control or supervise material to the extent alluded to in *Thomson* will depend both on the technical controls available to the wiki, and the content promulgated on the wiki. Where the material published has a propensity for attracting defamatory content the less likely it is that a party can rely on the defence of innocent dissemination.²²⁶ Arguably the content a wiki can contain is so broad that it would be impossible to know what is being published at all times. This is strengthened by the amount of republications and edits on a wiki, particularly high traffic wikis such as Wikipedia. Furthermore, while a television station may be able to discover the content through reasonable checks and measures, it would be seemingly impossible for a wiki application to check the content of a wiki application at the moment of publication on the internet. Were measures employed to check the content of wikis at the point of publication this would surely stifle the entire concept of a wiki, leaving content in the ultimate hands of employed editors rather than the public. However what is clear is that wiki applications will have the capacity to control content once they are made aware of that content and the defence will be unavailable.

In conclusion, it would seem the defence of innocent dissemination may be available to wiki application, but in confined circumstances. The longer defamatory material remained published on a wiki, the more reasonable it is to expect the content to be discovered and removed. Furthermore, owners of wiki applications should ensure there are adequate policies in place to ensure

²²² (1996) 186 CLR 574.

²²³ *Thomson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574.

²²⁴ *Thomson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574, 590.

²²⁵ *Thomson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574, 590.

²²⁶ *Thomson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574, 590.

that defamatory content is investigated expediently upon complaint so as to minimise the risk of losing the defence of innocent dissemination.

5.4.2 The defence of justification

It is a defence to an action for defamation to show defamatory imputations are substantially true.²²⁷ What constitutes 'substantial truth' has not been statutorily defined. At common law truth is required in both substance and effect.²²⁸ Truth in substance requires each and every statement of fact to be accurate in all but the most minor respects. Truth in effect requires that even if a statement is literally true, it is not true in effect if reasonable persons would draw untrue inferences. An example of truth in effect was given in the case of *Sutherland v Slopes*,²²⁹ which concerned the publishing of a book critical of a birth control program promoted by Mrs Slopes. The book, while making correct statements of fact, in effect conveyed the imputation the birth control program was obscene within the meaning of criminal law.²³⁰

However, if the justification meets the sting of the imputation, but other facts cannot be shown true then this will be sufficient for the purposes of the defence of justification.²³¹ For example, if the author of a wiki page alleged someone stole a television from their home on a Wednesday night, but in actual fact it was stolen from their place of work on a Friday night, then this would still be sufficient truth for the purposes of justification. The sting, being that a person is a thief, has been justified.

A further defence of contextual truth is provided for in the UDA.²³² This provision operates to view imputations in their context such that if it can be shown that one imputation is true and that imputation is of such a serious nature it overshadows the other untrue imputations.²³³ This is on the basis the falsity of the other imputations could not, viewed in the context of the true imputation, do further damage to the plaintiffs reputation.

5.4.3 The defence of honest opinion:

It is a defence to an action for defamation to show that:

- the matter was an expression of opinion rather than a statement of fact;
- the opinion related to a matter of public interest; and,
- the opinion is based on proper material.²³⁴

²²⁷ *Defamation Act 2005* (Qld) s 25.

²²⁸ *Sutherland v Slopes* [1925] AC 47

²²⁹ [1925] AC 47.

²³⁰ *Sutherland v Slopes* [1925] AC 47, 58.

²³¹ *Sutherland v Slopes* [1925] AC 47, 78, 79 (Shaw LJ); *Alexander v North Eastern Railway Co* (1865) 6 V&S 340.

²³² *Defamation Act 2005* (Qld) s 26.

²³³ *Jackson v John Fairfax & Sons Ltd* [1981] 1 NSWLR 36, 39, 40 (Hunt J).

²³⁴ *Defamation Act 2005* (Qld) s 31(1).

Proper material must be either substantially true, published on an occasion of absolute or qualified privilege or fair reports or public documents.²³⁵

Whether a comment is an opinion is determined by how recipients would interpret the statement.²³⁶ A comment is a deduction, inference, conclusion, judgment, remark or observation as distinct from a direct statement of fact. Therefore in order to rely on this defence an author of a wiki page must make it clear within the publication they are expressing an opinion not a statement of fact. This could still prove insufficient especially in relation to Wikipedia. As it is an encyclopaedia, an author may struggle to show they are not expressing a statement of fact, unless it is clearly commentary about stated facts. Furthermore a comment must be accompanied by what is known as a 'substratum of fact'.²³⁷ A 'substratum of fact' refers to the underlying facts on which a comment is made.²³⁸ The substratum of fact on which the comment is based must be identified unless the comment is based on a play or the text of a book or the facts are otherwise known or readily available to the reader on account of their notoriety.²³⁹ It follows that the author of a wiki page must identify the facts on which the comment is based, unless the fact falls into one of the above exceptions. What constitutes sufficient 'notoriety' was examined in the case of *Telnikoff v Matusevitch*, where it was given a broad meaning, going to facts within the common knowledge.²⁴⁰ This interpretation also gives way to the commercial reality that no editor would allow the factual material be set out in full before a comment in relation to a newspaper. Accordingly for matters that could be said to fall within common knowledge, these need not be set out but a reference is recommended. An author of a wiki page should thus take care to set out the full facts when he or she is writing with regard to obscure facts.

5.4.4 The defence of qualified privilege

There is a defence of qualified privilege for the publication of defamatory matter to a person (the recipient) if the defendant proves that:

- the recipient has an interest or apparent interest in having information on some subject; and,
- the matter is published to the recipient in the course of giving to the recipient information on that subject; and,

²³⁵ *Defamation Act 2005* (Qld) s 31(5).

²³⁶ *Clarke v Norton* [1910] VLR 494, 499.

²³⁷ *Kemsley v Foot* [1952] AC 345, 349 (Potter LJ); *Goldsborough v John Fairfax & Sons Ltd* (1934) 34 SR (NSW) 524; *Sims v Wran* (1984) 1 NSWLR 317

²³⁸ *Pervan v North Queensland Newspaper Co Ltd* (1993) 117 ALR 569, 590 (McHugh J).

²³⁹ *Myerson v Smith's Weekly Publishing Co Ltd* (1924) 24 SR (NSW) 20, 26, 27 (Ferguson J); *Hawke v Tamworth Newspaper Co Ltd* [1983] 1 NSWLR 699, 704 (Hunt J).

²⁴⁰ *Telnikoff v Matusevitch* [1991] 1 QB 102, 110.

- the conduct of the defendant in publishing that matter is reasonable in the circumstances.²⁴¹

This defence is based on the old New South Wales s 22 statutory qualified privilege defence,²⁴² which was infamous for its ‘spectacular lack of success’,²⁴³ especially with respect to mass communications. Accordingly, this defence is perhaps doomed to suffer the same fate,²⁴⁴ and may be of little assistance in the situation of defamatory comments being posted to wiki.

6. Privacy

The capacity of a wiki to broadly disseminate information by anyone raises a number of issues with regard to privacy law.²⁴⁵ While traditionally Australian law has been regarded as containing no common law right to personal privacy,²⁴⁶ the High Court in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (‘Lenah’),²⁴⁷ expressed that a tort of personal privacy should not be excluded from consideration, though such a tort should were it implemented should be limited to natural persons.²⁴⁸ No ultimate finding was expressed in *Lenah* regarding a personal right to privacy, with some judges such as Gleeson CJ preferring not to recognise such a tort, but opting to extend the doctrine of breach of confidence.²⁴⁹ Callinan J expressed the failure to recognise a tort of privacy was a ‘product of a different time.’²⁵⁰ With the advent of the internet, and technologies such as wikis, arguably such a right to privacy is worthy of reassessment by the High Court. Despite this, the majority in *Lenah* decided against recognition of such a right to privacy. More recently the Australian Law Reform Commission (‘ALRC’) has reopened the prospect of a personal right to privacy in a recent issues paper,²⁵¹ and is currently conducting a review of privacy law in Australia. However, there have also been civil cases in Queensland²⁵² and Victoria²⁵³ where damages have

²⁴¹ *Defamation Act 2005* (Qld) s 30(1).

²⁴² *Defamation Act 1974* (NSW), s 22.

²⁴³ Michael Gillhooly, *The Third Man: Reform of the Australasian Defamation Defences* (2004), 158.

²⁴⁴ For an excellent discussion of this defence, see Kim Gould, ‘The more things change, the more they stay the same ... or do they?’ (2007) 12 *Media and Arts Law Review* 29.

²⁴⁵ Issues relating to data protection are dealt with in the *Privacy Act 1988* and related state legislation and administrative standards. For an overview of this legislation see Australian Law Reform Commission (ALRC), *Issues Paper: Review of Privacy*, Issues Paper No 31 (2006) 53 <<http://www.austlii.edu.au/au/other/alrc/publications/issues/31>>. There is increasing concern as to whether this legislation provides sufficient protection in relation to websites and blogs: see ALRC at [5.236].

²⁴⁶ See for example *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479, 521.

²⁴⁷ (2001) 208 CLR 199.

²⁴⁸ *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 248, 256 (Gummow and Hayne JJ).

²⁴⁹ *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 224, 225 (Gleeson CJ).

²⁵⁰ *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 321 (Callinan J).

²⁵¹ Australian Law Reform Commission, *Issues Paper: Review of Privacy*, Issues Paper No 31 (2006) 53.

²⁵² *Grosse v Purvis* (2003) Aust Torts Reports ¶81–706.

been awarded for invasion of privacy. Other civil claims for invasion of privacy have been dismissed.²⁵⁴

In contrast, the US recognises four torts of privacy,²⁵⁵ including:

- Public disclosure of private facts;
- Unreasonable intrusion on solitude;
- Publicity which presents the plaintiff in a false light in the public eye; and,
- Appropriation of the plaintiff's name or visage.

This paper will focus its discussion with regard to the public disclosure of private facts, unreasonable intrusion on solitude and display in a false light, as these are more likely to arise in the context of a wiki.

6.1 Public Disclosure of Private Facts

The elements of this tort include a public disclosure, of private facts which are highly offensive and objectionable to a reasonable person of ordinary sensibilities and which are not outweighed by a sufficient and legitimate public interest in disclosure of those private facts.²⁵⁶ The final public interest element operates more as a defence than an element of the offence, in which the courts in the United States have interpreted broadly to take into account matters such as:

- the persons whose private facts are disclosed is a public figure, the social value of the information and the depth of the intrusion into private areas,²⁵⁷
- what a reasonable member of the community with decent standards would be concerned with,²⁵⁸
- a logical nexus between the complainant and the matter of public interest.²⁵⁹

²⁵³ *Doe v Australian Broadcasting Corporation* [2007] VCC 281.

²⁵⁴ See, for example, *Kalaba v Commonwealth* [2004] FCA 763 and *Giller v Procopets* [2004] VSC 113.

²⁵⁵ These four torts were derived from the influential journal article: Samuel D Warren and Louis D Brandeis, 'The Right to Privacy' (1890) 4 *Harvard Law Review* 193.

²⁵⁶ William Prosser, 'Privacy' (1960) 48 *California Law Review* 383.

²⁵⁷ *Briscoe v Reader's Digest Association Inc*, 483 P 2d 34 (Cal, 1971); Des Butler, 'A tort of invasion of privacy in Australia?' (2005) *Melbourne University Law Review* 339, 344, 345.

²⁵⁸ *Virgil v Time Inc*, 527 F 2d 1122, 1129 (Merill J) (9th Cir, 1975); Des Butler, 'A tort of invasion of privacy in Australia?' (2005) *Melbourne University Law Review* 339, 344, 345.

²⁵⁹ *Campbell v Seabury Press*, 614 F 2d 395 (5th Cir, 1980); Des Butler, 'A tort of invasion of privacy in Australia?' (2005) *Melbourne University Law Review* 339, 344, 345.

Practically the First Amendment in the US has acted to render this tort rarely successful. However were such a tort recognised in Australia, it may prove to have more bite than its American counterpart.

Although Australian courts are yet to recognise the existence of such a tort, some equivalent protection may be obtained through an action for breach of confidence and defamation. For example, in *Douglas v Hello Ltd*,²⁶⁰ the Court of Appeal (UK) effectively 'shoe-horn[ed] within the cause of action of breach of confidence claims for publication of unauthorised photographs of a private occasion'.²⁶¹ This result was, however, influenced by the European Convention on Human Rights, incorporated into the domestic law of the United Kingdom by the *Human Rights Act 1998* (UK).²⁶² While the public disclosure of private facts tort requires the facts be private, an action for breach of confidence requires the information to have the necessary quality of confidence.²⁶³ With regard to personal privacy, information that has a quality of confidence has been held to include personal affairs of prominent couples,²⁶⁴ the content of illegally taped telephone conversations,²⁶⁵ and sexual relations between persons.²⁶⁶ However information of this nature will not have a quality of confidence where it is already in the public domain.²⁶⁷ Therefore information posted onto a wiki may have the requisite quality of confidence, but only where the information, prior to its publication was not in the public domain. What constitutes the public domain is determined on a case by case basis, and will depend on the information disclosed.²⁶⁸ However given the very broad publication that can occur in wikis, if the purported confidential information is not quickly removed the quality of confidence could quickly disappear. Realistically publication in any form on the internet may be very difficult to contain, making an action for breach of confidence an unlikely remedy for the disclosure of private facts through a wiki.

In terms of who could be liable for a breach of confidence, it potentially could include the user who wrote the wiki page, and the owner of the wiki. This is because the courts have recognised that an obligation of confidence can extend to third parties who come into possession of confidential information.²⁶⁹ However for such an obligation to extend to third parties, the third party must receive the information in circumstances where they ought to know the information is subject to a duty of confidence.²⁷⁰ Therefore in certain circumstances the owner of a wiki may be considered a liable third party if

²⁶⁰ *Douglas v Hello! Ltd (No 3)* [2006] QB 125; [2005] 4 All ER 128.

²⁶¹ *Douglas v Hello! Ltd (No 3)* [2006] QB 125; [2005] 4 All ER 128, [53].

²⁶² See, for example, *Douglas v Hello! Ltd* [2001] QB 967; *Douglas v Hello! Ltd (No 2)* [2003] 1 All ER 1087; *Douglas v Hello! Ltd (No 3)* [2006] QB 125; *HRH Prince of Wales v Associated Newspapers Ltd* [2006] EWHC 522 (Ch). For a good discussion, see Andrew T Kenyon and Esther Milne, 'Images of celebrity: publicity, privacy, law' 10(4) *Media & Arts Law Review* 311.

²⁶³ *Coco v A N Clark (Engineers) Ltd* [1968] FSR 415.

²⁶⁴ *Duchess of Argyll v Duke of Argyll* [1967] Ch 302.

²⁶⁵ *Francome v Mirror Group Newspapers Ltd* [1984] 2 All ER 408.

²⁶⁶ *Stephens v Avery* [1988] Ch 449.

²⁶⁷ *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* [1963] 3 All ER 413.

²⁶⁸ See for example *G v Day* [1982] 1 NSWLR 24 where it was held the broadcast of personal information on two TV channels for a brief period did not constitute disclosure to the public domain.

²⁶⁹ *Campbell v MGN Ltd* [2004] 2 AC 457, 464 (Nichols LJ).

²⁷⁰ *Attorney General (UK) v Guardian Newspapers Ltd [No 2]* [1990] 1 AC 109, 281 (Goff LJ).

they become aware of information on a wiki which is, or ought reasonably expected to be, subject to an obligation of confidence. A practical example of some information may be an entry detailing the names, addresses and purchasing habits of customers, where that information was initially given in confidence in a government survey such as the Census.

Finally, the ALRC recommended the protection of sensitive private facts that relate to individual relationships, home, family and private life and the publication must cause distress, embarrassment or annoyance, upon an objective view of the person concerned.²⁷¹ Were such a recommendation implemented, legislated persons whose privacy was violated through content on a wiki would likely receive protection similar to the US.

6.2 Unreasonable intrusion on solitude

While the court in *Lenah*²⁷² left unclear the notion of an Australian right to personal privacy, the case of *Grosse v Purvis*²⁷³ ('Grosse') reignited the debate by implementing a modified US-style tort of unreasonable intrusion. In *Grosse*, the mayor of a local council alleged she suffered post-traumatic stress due to the persistent stalking and harassment by a former partner. Much of the conduct included intrusion into Ms Grosse's home, work and personal affairs both physically and through telephone calls. The District Court judge in *Grosse*, Skoien J found the conduct complained of amounted to stalking within *s 359B Criminal Code (Qld)*, and noted the crime of stalking had no counterpart in tort, as opposed to nearly every other offence against a person.²⁷⁴ Therefore Skoien J considered it appropriate to formulate such a tort to complement its counterpart in the *Criminal Code (Qld)*. In doing so Skoien J noted the implicit support of a tort of unreasonable intrusion by some judges of the High Court in *Lenah*.²⁷⁵ Skoien J recognised a tort of unreasonable intrusion with the following elements:

- a willed act by the defendant;
- that intrudes upon the privacy and seclusion of the plaintiff;
- in a manner which would be considered highly offensive to a reasonable person of ordinary sensibilities; and,
- which causes the plaintiff detriment in the form of mental, physiological or emotional harm or distress, or which prevents or hinders the plaintiff from doing an act which he or she is lawfully entitled to do.²⁷⁶

²⁷¹ Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy*, Report No 11 (1979) [236].

²⁷² (2001) 208 CLR 199.

²⁷³ [2003] Aust Tort Reports ¶81-706.

²⁷⁴ *Grosse v Purvis* [2003] Aust Tort Reports ¶81-706, 64 184.

²⁷⁵ *Grosse v Purvis* [2003] Aust Tort Reports ¶81-706, 64 186.

²⁷⁶ *Grosse v Purvis* [2003] Aust Tort Reports ¶81-706, 64 187.

The fourth element of Skoien J's test has been criticised as unnecessary in the sense that an unreasonable intrusion tort operates on a direct rather than indirect interference, and is therefore actionable per se, not reliant on evidence of detriment.²⁷⁷

In the context of a wiki application it is apparent this tort would be unlikely to apply as an internet based resource could not intrude upon the privacy and seclusion of a plaintiff. While it has been recognised, at least in the US, that the intrusion need not be physical, and may be by electronic means,²⁷⁸ as illustrated in *Grosse*, this tort is primarily concerned with matters akin to stalking. As a wiki must be voluntarily read in order to convey its contents, it could not be said to intrude on the privacy and seclusion of a plaintiff.

6.3 Publicity which presents the plaintiff in a false light in the public eye

This tort will apply where there is publicity of a matter concerning another which is a matter of a kind that would be highly offensive to a reasonable person, and the publisher knew of, or recklessly disregarded, the falsity of the matter and the false light in which the other would be placed.²⁷⁹ It is a defence to show the publication was non-malicious and in the public interest. In the context of a wiki, this tort would possibly have a broad application. For example there have been many disputes between Wikipedia and persons who are the subject of less than favourable articles on the Wiki. An example of such a dispute is the Seigenthaler controversy discussed earlier.²⁸⁰ As there is no such tort recognised in Australia, the only remedy is through an action for defamation.²⁸¹

7. A possible legal response to the use of wikis

It is clear that the unique collaborative nature of a wiki exposes the users, owners and hosts to potential liability in copyright, defamation and privacy law. These concerns could considerably limit the uptake and use of this new communication technology. Accordingly, it is perhaps worth considering whether the law should be reformed to allow the development of collaborative approaches to communication. One possible idea would be to provide a general immunity to wiki owners and hosts provided they adopt a system of self-regulation. This co-regulatory scheme could have the following features:

- a requirement on the wiki owner and host to provide notices to all users stating that no inappropriate material is to be uploaded (material that is copyright protected, defamatory or invasive of an individual's privacy);
- a method of logging which user(s) upload material to the wiki (this requirement is already a feature of most wiki engines);

²⁷⁷ See Des Butler, 'A tort of invasion of privacy in Australia?' (2005) 29 *Melbourne University Law Review* 339, 360.

²⁷⁸ See for example *Miller v National Broadcasting Co*, 187 Cal App 3d 1463 (1986).

²⁷⁹ Samuel D Warren and Louis D Brandeis, 'The Right to Privacy' (1890) 4 *Harvard Law Review* 193.

²⁸⁰ See heading 6.

²⁸¹ See heading 6.

- a take-down procedure, so that users are able to refer any inappropriate material to the owner, and the onus is then on the owner to take-down such material in a timely manner (the system could even establish reasonable time periods).

This system would still allow an aggrieved individual to sue the user who uploaded the inappropriate content, as well as the owner of the wiki where the owner has not removed the offending material in a timely manner. Accordingly, it balances the public interest in promoting technological innovation and a free flow of ideas on the internet, with an individual's rights in copyright, defamation and privacy. Furthermore, such a system has similar antecedents in existing legal frameworks. For example, with respect to copyright, in the US the *Online Copyright Infringement Liability Limitation Act* (a part of the DMCA) and s 116AG of the Australian *Copyright Act 1968* limits in certain circumstances the remedies available against carriage service providers to taking down infringing material, terminating a specific account and/or disabling access to an online location outside Australia, and with respect to defamation, Australia already has detailed provisions for offers to make amends.²⁸² As a co-regulatory scheme of this nature has the potential to protect an individual's legal interests while fostering collaborative communication on the internet, it is a potential reform that deserves further consideration.

This could be achieved in the copyright area by expanding the definition of CSPs to include the owner of a wiki and reconsidering to what extent a financial interest in hosting the website should deny the immunity. In defamation law this could be achieved through the introduction of a modified version of s 230 CDA into Australian law or expanding the current notion of make amends in the way outlined above. In relation to privacy (if it is recognised) or breach of confidence the issue would need to be given fresh consideration.

8. Conclusion

The move towards collaborative communication is unlikely to slow as technology continues to carve a path through barriers of communication such as physical remoteness. While wiki applications are a powerful collaborative tool especially in the fields of business and education as well as creative endeavour and social networking more broadly, there are undoubtedly a number of legal obstacles that could potentially stifle their use. While many of the legal issues surrounding wiki applications are present in most internet-based technologies, the open nature of wiki applications serves to heighten the risk of such an issue arising.

As this article has highlighted some areas of the law are ill-equipped to practically respond to the issues surrounding the use of wikis. The copyright

²⁸² *Defamation Act 2005* (Qld) ss 13-18.

issues surrounding wiki applications are those that arise in most internet based technologies. Uncertainty in relation to the appropriate jurisdiction for an infringement action is increased given the number of contributors to a wiki such as Wikipedia. In relation to defamation, the current view espoused by the High Court in *Thomson v Australian Capital Television Pty Ltd* is arguably riddled with uncertainty, and imposes an overly restrictive interpretation for an innocent dissemination defence. The expectation that a host of wiki content would check content prior to publication in order to escape liability for defamation is clearly inappropriate as it would self-defeat the open nature of a wiki. While a common law right of privacy has not yet been established it may not be too far off and in the interim the action of breach of confidence promises to create yet another area of uncertainty for a wiki owner. Arguably a co-regulatory scheme would therefore be better adapted in a practical sense to deal with collaborative technologies such as wiki applications.

Wikis are one of a growing range of technologies employed by people to produce and exchange knowledge and construct their cultural environments. We live in an age based increasingly around online social networks in which many users actively generate and participate in the knowledge and culture producing processes. In fact the cumulative effect of this participation is core to the production process. If we want Australians to be able to harness the power of these dynamic new technologies and services we need to be sensible about the legal regulation (infrastructure) we put in place. Wikis are a key component 21st century life and economy. In this light frightening people away from using them due to legal uncertainty is not a sensible policy standpoint. While the legal restrictions on technologies are necessary in order to prevent harm to persons from copyright infringement, defamation and breaches of privacy, we need to assess how the law might be able to accommodate these powerful and popular new technologies that have the potential to change the way people live, work and learn. In this sense we would argue that the law needs to strike a more workable balance between the prevention of harm, and the encouragement of new technologies. To this end we would call on the Australian government as part of its law making activities in this area to undertake (perhaps in collaborative mode) a more comprehensive analysis of the value of new web based technologies to Australian culture and economy and how this value might be better promoted through a more supportive legal framework.