

BEFORE THE BROADCASTING STANDARDS AUTHORITY

Decision No: 95/92

Dated the 7th day of December 1992

IN THE MATTER of the Broadcasting Act 1989

AND

IN THE MATTER of a complaint by

PETER EDMUNDS

of Pukekohe

Broadcaster

TELEVISION NEW ZEALAND
LIMITED

I.W. Gallaway Chairperson
J.R. Morris
R.A. Barraclough
L.M. Dawson

DECISION

Introduction

Computer piracy was investigated during an item on the *Holmes* programme broadcast on TV1 on 11 February 1992. Part of the item, recorded with the use of a hidden camera and microphone, portrayed the purchase by a reporter of a software programme from a Mr Frank Lane who was described as a computer pirate. The item also showed that later in the day the reporter and a cameraman visited Mr Lane. They were accompanied by a Mr Robertson, a representative from a computer company which imported the programme purchased earlier. Mr Lane invited the reporter inside and the broadcast then showed that a scuffle took place between Mr Lane and Mr Robertson in the doorway.

Describing the item as irresponsible journalism, Mr Edmunds complained to Television New Zealand Ltd, as the broadcaster, that the programme had not given the alleged pirate an opportunity to present his point of view. Moreover, TVNZ had allowed itself to be used by business competitors and by intruding on the alleged pirate, it breached his right to privacy.

Arguing that the scuffle did not involve its staff and that, before the scuffle, the alleged pirate had invited the reporter inside, TVNZ declined to uphold the privacy complaint. As he had been given ample opportunity to put his views, TVNZ continued, the alleged



pirate had been treated fairly. As he was dissatisfied with that decision, Mr Edmunds referred his complaint to the Broadcasting Standards Authority under s.8(a) of the Broadcasting Act 1989.

Decision

The members of the Authority have viewed the item to which the complaint relates and have read the correspondence (summarised in the Appendix). As is its practice, the Authority has determined the complaint without a hearing. The Authority has also received and determined a complaint from Mr Frank Lane, the alleged pirate, whose privacy was allegedly breached and who, Mr Edmunds complained, was not dealt with fairly on the item.

Because the complaints from Mr Edmunds and Mr Lane relate to the same programme, the Authority has included a substantial part of its decision on Mr Lane's complaint in this decision. However, as the broadcasting standards allegedly breached do not correspond, separate decisions have been issued.

The decision on Mr Lane's complaint recorded that the members of the Authority had read the District Court decision relating to the actions of two members of TVNZ's staff involved in making the item complained about. It continued with a summary of the broadcast to which the complaint related.

The Broadcast

The Authority considers that it is appropriate to start with a summary of the relevant part of the item which was broadcast on the *Holmes* programme on TV1 on 11 February 1992.

Referring to the computer industry's widespread concern about computer piracy, the item stated that the practice was common in New Zealand. After enquiries which, the reporter said, disclosed that it was easy to obtain pirated computer software, he was shown visiting the address of Mr Frank Lane, described as a second-hand dealer, where he purchased a software programme and the manual which accompanied it. That deal was filmed and recorded with the use of a hidden camera. The reporter's commentary also noted that a photocopier and computer were on the premises and they were described as the computer pirate's essential tools of trade.

The reporter then visited the business which was licensed to import the programme which had been purchased. A representative from that company, a Mr Robertson, said that both the programme and the manual were "pirated" copies. Mr Robertson said that the use of a hand-written label on the disc and the photocopied manual were evidence of that fact. The reporter and Mr Robertson were next shown visiting Mr Lane and knocking on the front door of his home. When Mr Lane, the alleged pirate, answered the door, the reporter said that he had bought some material that morning and wondered whether he could come in and discuss it. Mr Lane asked the reporter to come inside but



firmly refused to allow Mr Robertson or the cameraman to enter. It was not clear from the broadcast what exactly happened next but Mr Lane and Mr Robertson were seen to be scuffling in the doorway. The next shot after the struggle showed Mr Robertson on the path beside the house calling out "You're a pirate Frank Lane". The item concluded with another person from the computer industry emphasising the magnitude of the problem of computer piracy.

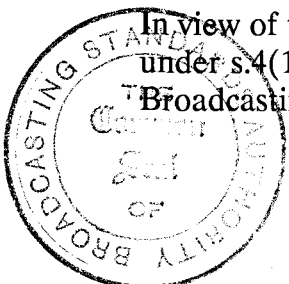
The Authority also considered the following points to be relevant. The incident which was filmed occurred on 24 January 1992 and was broadcast on 11 February. On 25 January Mr Lane complained to the Police about aspects of the incident. On 11 February, Mr Lane was contacted by TVNZ's reporter and asked about computer piracy but he declined to comment.

Mr Lane complained to the Police about the behaviour of the two TVNZ staff members and Mr Robertson and alleged that he had been assaulted. However, the Police did not proceed with the assault charge. It laid charges of trespass against the reporter, the cameraman and Mr Robertson. The Authority is not aware of the date on which the charges were laid but it did not happen before 11 February - the day of the broadcast complained about. The three defendants pleaded not guilty. Later Mr Robertson elected to be included in the diversion scheme which applies for first offenders and is, in effect, a guilty plea. The two TVNZ staff were convicted of trespass after a defended hearing and each received a suspended sentence. There is some dispute between the parties about the actual aspect of the trio's visit to Mr Lane when the trespass occurred. The Authority thought that the precise actions which constituted the trespass might be relevant to its decision and, accordingly, obtained a transcript of the judge's decision.

The decision recorded that the charge concerned the alleged trespass on Mr Lane's property after the reporter and cameraman did not leave when warned to do so. It related to an incident described by the opposing parties respectively as "interviewing by ambush" and "investigative journalism". It was also noted in the judgment that the reporter, while accompanied by Mr Robertson and the cameraman, visited Mr Lane with the intention to confront him with an allegation of criminality. The judge found that the elements necessary to prove trespass had occurred: the trespass, the warning to leave and the refusal to do so. He noted that a scuffle had occurred but he was not prepared to ascribe responsibility for it nor did he rule whether that part of the visit had involved trespass. The offence had been committed when the trio stayed on the garden path which, it seems, was the part of the broadcast in which Mr Robertson was shown describing Mr Lane as a computer pirate.

Standards Allegedly Breached

In view of the specific allegations raised by Mr Edmunds, TVNZ assessed his complaint under s.4(1)(c) of the Broadcasting Act 1989 and standard 4 of the Television Code of Broadcasting Practice. The former requires broadcasters to maintain standards which



are consistent with the privacy of the individual and the latter requires broadcasters to deal justly and fairly with any person taking part or referred to in any programme.

Privacy

The aspect of the item which Mr Edmunds alleged had breached the piracy standard was the broadcast of the confrontation created by the trio's unannounced visit to Mr Lane with the camera rolling. TVNZ said that the item showed an investigation into allegations of computer piracy and the visit was legitimate action on the part of customers. In the decision dealing with Mr Lane's complaint, the Authority wrote:

The Authority issued an Advisory Opinion dated 25 June 1992 in which it recorded the five relevant privacy principles which it applies to complaints which allege a breach of privacy. The Opinion explained that the specific facts of each incident are also relevant.

The first principle reads:

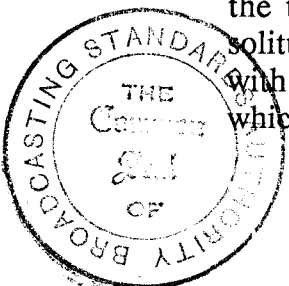
- i) The protection of privacy includes legal protection against the public disclosure of private facts where the facts disclosed are highly offensive and objectionable to a reasonable person of ordinary sensibilities.

As there were no private facts disclosed by the broadcast, the Authority decided that this principle had not been breached. The facts disclosed, for example the nature of some of Mr Lane's business equipment, could not be considered to be highly offensive private facts. The programme made a number of allegations, as opposed to reporting undisputed facts, which could be described as offensive but at no time did Mr Lane admit them and, as such, they are not relevant to the privacy aspect of the complaint that a broadcast disclosed highly offensive and private facts.

Another relevant privacy principle reads:

- iii) There is a separate ground for a complaint, in addition to a complaint for the public disclosure of private and public facts, in factual situations involving the intentional interference (in the nature of prying) with an individual's interest in solitude or seclusion. The intrusion must be offensive to the ordinary person but an individual's interest in solitude or seclusion does not provide the basis for a privacy action for an individual to complain about being observed or followed or photographed in a public place.

In relation to the broadcast complained about, the Authority considered whether the trio's visit involved the intentional interference with Mr Lane's interest in solitude. The broadcast, without question, involved the intentional interference with Mr Lane's business operations. It recorded a visit to his business address which, it was shown, was advertised prominently in the Yellow Pages of the



Auckland Telephone Directory. Moreover, as the item disclosed, the reporter had visited the premises earlier in the day and had bought some software during an exchange which was shown to be totally acceptable to both parties. In those circumstances, the Authority decided that the trio's visit could not be considered as the intentional interference (in the nature of prying) with Mr Lane's interest in solitude and, therefore, no aspect of the broadcast breached the privacy provision in s.4(1)(c) of the Act.

Dealing Fairly

Mr Lane's complaint, from which the above extracts are taken, did not refer specifically to standard 4 although a number of the issues raised by Mr Edmunds in his complaint were captured by Mr Lane's reference to s.4(1)(d) of the Broadcasting Act which requires broadcasters to maintain standards which are consistent with:

- (d) The principle that when controversial issues of public importance are discussed, reasonable efforts are made, or reasonable opportunities are given, to present significant points of view either in the same programme or in other programmes within the period of current interest;

Mr Edmunds' allegations which referred to a number of aspects of the broadcast were that Mr Lane, described on the programme as a second-hand dealer and alleged by both the reporter and the business representative to be a computer pirate, was not given the opportunity to either explain the procedure for the legitimate selling of second-hand computer software or respond to the allegation of computer piracy. When assessing Mr Lane's complaint that the item breached s.4(1)(d), the Authority stated:

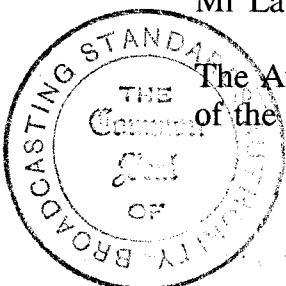
TVNZ explained that its reporter took Mr Robertson (who had earlier challenged the legitimacy of one of Mr Lane's business transactions) to Mr Lane's premises for the following reason:

What fairer opportunity could we provide for Mr Lane than to present him with the very man who was challenging his credentials?

TVNZ added that its reporter later contacted Mr Lane by telephone in order to give him an opportunity to comment. TVNZ argued that, as the complaint to the police referred to trespass and assault, it was spurious to suggest that Mr Lane should decline to comment to TVNZ about an allegation of computer piracy - a totally unrelated matter.

Mr Lane's solicitor in his submissions to the Authority emphasised the legitimate interpretation which could be given to Mr Lane's activities as they were revealed on the programme while, in contrast, TVNZ stressed the evidence as confirming Mr Lane's actions as those of a computer pirate.

The Authority noted that if the complainant had alleged a breach of standard 1 of the Television Code of Broadcasting Practice which requires broadcasters:



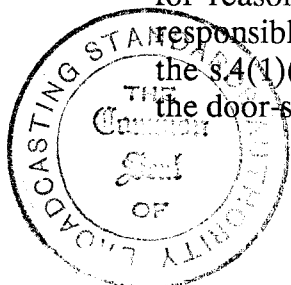
1 To be truthful and accurate on points of fact

then, it would have been necessary to decide whether the allegation was or was not correct. However, as both parties stated explicitly that the complaint did not allege a breach of standard 1, it was not required to do so. On the item, TVNZ alleged, forcefully, that Mr Lane was a computer pirate. It alleged he played an active indeed an important role in a criminal activity which, because of its impact, was a major concern to legitimate computer dealers. But it was an activity for which the police, for reasons which were not given, had a low conviction rate. In summary, the Authority considered that a serious allegation had been made which, to use the wording of s.4(1)(d), related to a controversial issue of public importance. As a consequence, the Authority asked, was a reasonable effort made or a reasonable opportunity given to Mr Lane to present his explanation?

Having gathered the information, TVNZ confronted Mr Lane on his door step with the person who, it believed, confirmed the implications of the evidence gathered. Faced with the reporter and Mr Robertson and while the camera rolled, Mr Lane displayed what appeared to be a surprising degree of self-control and invited the reporter into the house while declining admission to the other two. A fracas happened and precisely why it occurred is not important in this decision. TVNZ had attempted to give Mr Lane an opportunity to present his view but, for reasons which the parties cannot agree on, the circumstances were such that the opportunity to present those views did not eventuate. In other words, as the events unfolded on the door-step Mr Lane was not given a fair opportunity to present his point of view as required by the standard.

Nevertheless, TVNZ did not abandon its efforts to seek comment from Mr Lane after the incident on the door-step. Besides pointing out that Mr Lane could well have initiated contact, or made some other reasonable effort to present his point of view, TVNZ stated that its reporter telephoned Mr Lane on the day of the broadcast specifically to give him an opportunity to present his views. Apparently, Mr Lane declined to speak to the reporter at any length as he had by that time laid a complaint with the police alleging trespass and assault. The Authority accepted that Mr Lane's reaction was not unreasonable. It should be recalled that the item was filmed on 24 January and broadcast on 11 February - 18 days later - and it was only on the 18th day that Mr Lane was given an explicit opportunity by TVNZ by way of a telephone call to respond to the serious allegations in the broadcast. Moreover, TVNZ had the opportunity at the time of the broadcast on 11 February to report on its efforts to give Mr Lane an opportunity to present his point of view and his reaction. However, the item concluded with a comment about the magnitude of computer piracy.

Taking the actions of both TVNZ and Mr Lane into account, the Authority examined the broadcaster's statutory obligation. It decided, first, that probably for reasons associated with Mr Robertson's actions (for which TVNZ was not responsible), the attempted door-step opportunity was insufficient to comply with the s.4(1)(d) obligations in view of the seriousness of the accusation. Secondly, the door-step altercation changed the quality of the relationship between Mr Lane



and TVNZ and, as a result, it was unrealistic to expect Mr Lane to telephone with his account and it was also unreasonable to expect the reporter's telephone call on the day of the broadcast to be sufficient to deal with what by then was a confrontational and tense situation. TVNZ had initiated the confrontational approach which, as a result, required extra effort on its part to restore some degree of calm and balance of opportunity.

The Authority would point out that although threats to complain to the Police about a reporter's actions may not be unusual, an actual complaint, which had been made by the date of the broadcast, followed later by the conviction of two TVNZ staff for trespass, is indeed unusual. The procedures which led to that final result had been initiated by the time of the broadcast and, as a result, TVNZ would have been aware of the need to comply conscientiously with the broadcasting standards. That standard of effort was not forthcoming.

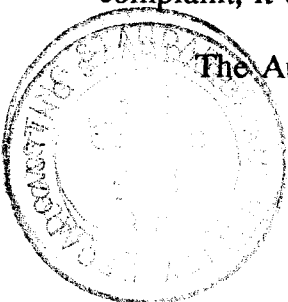
The item complained about made use of the "walk-in" technique with a camera rolling. While potentially most effective in confronting an alleged wrongdoer, the process makes use of the television broadcaster's implicit potential to dominate and, perhaps, intimidate. It was a technique which, for reasons not totally in TVNZ's control, proved to be ineffective on this occasion in providing a satisfactory opportunity for Mr Lane to respond to the item's allegations. Despite its failure as a means of obtaining Mr Lane's unguarded response other than to portray his participation in a struggle for which he might or might not have been responsible, TVNZ decided to show part of the confrontation which, in the Authority's opinion, emphasised the visual entertainment aspects although it did provide some information on the attitudes of those involved. While acknowledging that the walk-in technique is an acceptable technique for the appropriate occasion, the Authority believes that its use when serious allegations are made carries with it a special responsibility to ensure the accused person is given a reasonable opportunity to present his or her point of view.

In view of the similarity of the aspects of the broadcast which Mr Lane alleged were breached by s.4(1)(d) and the aspects alleged by Mr Edmunds to have breached standard 4, the Authority has arrived at an identical decision. It has concluded that Mr Lane was not dealt with justly and fairly as required by standard 4 of the Television Code of Broadcasting Practice.

For the reasons set forth above, the Authority upholds the complaint that the broadcast by Television New Zealand Ltd of an item on *Holmes* programme on 11 February 1992 breached standard 4 of the Television Code of Broadcasting Practice. The Authority declines to uphold the aspect of the complaint which alleged a breach of s.4(1)(c) of the Broadcasting Act 1989.

Having upheld a complaint, the Authority may make an order under s.13(1) of the Act. As with Mr Lane's complaint, it does not intend to do so. In the decision on Mr Lane's complaint, it continued:

The Authority has the power in s.16 of the Act to award costs. The Authority



points out that the provision refers to costs - it is not to be applied in a punitive manner or as compensation. It is a power which is very seldom exercised as it is most unusual for costs to be sought. However, in this case Mr Lane's solicitor sought costs which, at 20 October, amounted to \$5,075.83.

The complaint alleged that the broadcast breached s.4(1)(a), (b), (c) and (d) of the Broadcasting Act 1989. The Authority has only upheld the breach of s.4(1)(d) although, in its opinion, that was the central aspect of the complaint. In the circumstances, the sum of \$1,250.00 is awarded in costs to Mr Lane against TVNZ.

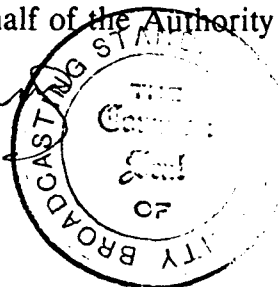
The Authority considers that these comments are relevant to the current complaint as it decided, as recorded in the decision, that Mr Lane had not been dealt with justly and fairly.

The order for the payment of \$1,250.00 applies only to Mr Lane's complaint - not to this one.

Signed for and on behalf of the Authority



Iain Gallaway
Chairperson



7 December 1992

Appendix

Mr Edmunds' Complaint to Television New Zealand Limited

In a letter dated 12 February 1992, Mr Peter Edmunds of Pukekohe complained to the Broadcasting Standards Authority about an item broadcast by Television New Zealand Ltd on the *Holmes* programme between 6.30 - 7.00 pm on 11 February. Although his complaint alleged a breach of privacy, which is the only ground on which a complaint may be made direct to the Authority, he raised other matters and, consequently, he was advised to make his complaint to TVNZ about all the aspects of the item which, he alleged, breached broadcasting standards.

Mr Edmunds later advised the Authority that he made seven allegations in his complaint to TVNZ. First, as the reporter referred to the owner of a computer company listed in the telephone directory as an alleged pirate, the owner, Mr Frank Lane, had not been given the opportunity to respond to that accusation. Secondly, the item was unbalanced in taking a legitimate distributor to confront Mr Lane. Thirdly, the reporter was incorrect in introducing himself, the legitimate distributor and the cameraman as representatives of a computer company. Fourthly, whereas Mr Lane invited only the reporter inside, the other two "clearly" forced their way in. Fifthly, the representative, on being ejected, said in a loud voice "You're a pirate Frank Lane" and Mr Lane was not given an opportunity to reply. Sixthly, while the reporter described Mr Lane as a second-hand dealer, he did not discuss whether Mr Lane was legitimately selling second-hand computer software. Seventhly, subsequent publicity had shown it to be inaccurate to describe the company representative as the legitimate owner of the distribution rights of certain software.

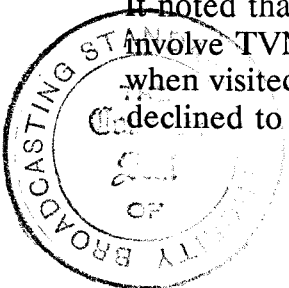
TVNZ's Response to the Formal Complaint

TVNZ advised Mr Edmunds of its Complaints Committee's decision in a letter dated 14 April 1992. It said that the complaint had been assessed under s.4(1)(c) of the Broadcasting Act which requires broadcasters to maintain standards consistent with the privacy of the individual, and secondly, standard 4 of the Television Code of Broadcasting Practice which requires broadcasters to deal justly and fairly with any person taking part or referred to in any programme.

TVNZ described the essence of Mr Edmunds' complaint in the following terms:

... the alleged "pirate" was assaulted by the film crew, that this privacy had been invaded and that he was not given the opportunity to refute any claims made about him.

It noted that Mr Lane had invited the reporter inside and that the scuffle did not involve TVNZ personnel. Further, Mr Lane had not responded to TVNZ's enquiries when visited by TVNZ or when approached later. In the circumstances, TVNZ declined to uphold either aspect of the complaint.



Mr Edmunds' Complaint to the Broadcasting Standards Authority

As he was dissatisfied with TVNZ's response, in a letter dated 22 April Mr Edmunds referred his complaint to the Authority under s.8(a) of the Broadcasting Act 1989.

He disputed TVNZ's contention that Mr Lane had been given the right of reply - describing the visit as a "confrontation". He also maintained that Mr Lane's privacy was invaded by the way the representative from the computer company and the cameraman "clearly forced their way inside". He believed that the programme should not have been broadcast until Mr Lane had responded to the allegations it contained.

TVNZ's Response to the Authority

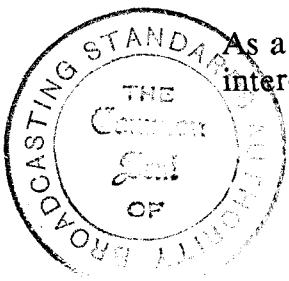
As is its practice, the Authority sought the broadcaster's response to the complaint. The Authority agreed to TVNZ's initial request to defer a reply until the completion of the defended trespass charges faced by two TVNZ staff arising from the incident. After the trial had been completed, it agreed to TVNZ's next request for an extension of the 20 working day time limit during which broadcasters are expected to respond to the Authority's request for information about a complaint. TVNZ's submission for an extension was based on the difficult issues raised by the complaint. TVNZ's lengthy response to the Authority's request for information was dated 26 August.

TVNZ began by providing some background in which described computer piracy as a major, and expanding, international fraudulent activity. However, it added, little media attention had been given to the issue and, as the Police had difficulty in gathering evidence to conduct a successful prosecution, there were few convictions in New Zealand or elsewhere. The substantial part of the item on *Holmes* complained about, it continued, had dealt with the hardening approach by the Business Software Association to the problem.

While investigating the story, TVNZ stated, the reporter heard many claims and decided to show computer piracy in operation which defrauded the legitimate licence holders. Having purchased allegedly illegally copied software, the reporter returned to the vendor to put his complaint that he had been sold illegally copied goods and took with him the person who could prove the goods were illegally copied. TVNZ explained:

As a journalist, the reporter had particular responsibilities. He wanted to be certain that Mr Lane had a clear and fair opportunity to state his views, and to reply to the claims being made. For those reasons he went with a cameraman to record Mr Lane's point of view.

As a reporter he also needed to show this "evidence" in his item, in the public interest. Again the camera served that purpose.



Dealing with the privacy issue, TVNZ began by noting it differed from the question of trespass for which its employers had been convicted. Describing the house visited as Mr Lane's place of business, TVNZ said that the reporter was invited inside but, as the computer representative was being filmed as he left, Mr Lane dragged the cameraman inside. When the company representative pulled Mr Lane away, the cameraman went outside.

Stressing that the reporter's responsibility was to obtain Mr Lane's side of the story, TVNZ said that trespass had not occurred at that point. It continued:

Having been asked to leave, the reporter and cameraman remained near the boundary of the property to interview Mr Robertson [the company representative]. It would appear that the Judge (in an oral decision) believed it was the interview outside the house that was the turning point, in his view, that the crime of trespass had been committed.

Drawing an analogy with an altercation in a supermarket, TVNZ concluded:

There was no invasion of Mr Lane's privacy - because he was visited at his place of business.

TVNZ recapitulated the events emphasising the point that its staff acted reasonably in all the circumstances. In summary, TVNZ said that the events did not breach the five principles of privacy outlined in the Authority's Advisory Opinion dated 25 June 1992.

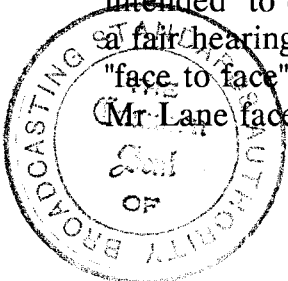
Turning to the complaint that Mr Lane had been treated unfairly, TVNZ repeated that the item investigated a major fraud in New Zealand and it showed Mr Lane's business as an example of the practice. The allegations against Mr Lane were clearly laid out and evidence in support was produced.

TVNZ also argued that Mr Lane had been given ample opportunities to answer the allegations. Upon visiting his business premises, the reporter had announced the programme he represented and introduced the business representative. However, Mr Lane had refused to discuss the matter with the representative and, TVNZ asked:

Why would anyone with nothing to hide have reacted in this way?

TVNZ argued that Mr Lane had had a number of options about his response but had chosen "not to take them up". Furthermore, Mr Lane declined to say anything when later telephoned by the reporter even though by that time he had taken legal advice and was aware of his options.

TVNZ agreed with Mr Edmunds' complaint that the reporter had said that he intended "to confront" Mr Lane but it disagreed that, as a result, Mr Lane did not get a fair hearing. The dictionary definition of "to confront", TVNZ said, was to bring "face to face". TVNZ added that the reporter acted fairly and responsibly in bringing Mr Lane face-to-face with Mr Robertson.



Arguing that Mr Lane was given ample opportunity to explain his ownership of the software which he sold, TVNZ maintained that Mr Lane was treated fairly.

Mr Edmunds' Final Comment to the Authority

When asked to comment on TVNZ's response, in a letter dated 20 September Mr Edmunds repeated his point that his complaint was concerned about Mr Lane being treated unfairly and the invasion of Mr Lane's privacy.

Explaining that he was not involved in the computer industry and was not a computer user but regarded himself as an average viewer who objected to the broadcast, Mr Edmunds added that he had viewed the programme again and he believed that computer piracy was an important subject to be dealt with. However, TVNZ should not have used Mr Robertson in its enquiries and, moreover, the broadcast had not proved that Mr Lane was a pirate. Mr Edmunds mentioned that he would have found the item acceptable if it had not involved an invasion of privacy or the unfair treatment of Mr Lane. He concluded by describing the broadcast as unprofessional.

