

The Formulation of Government Policy for the Internet

At a recent e-business symposium, Dr Rod Badger discussed some of the key drivers for the formulation of Government policy for the Internet.

The portfolio of Communications, Information Technology and the Arts was created after the 1998 election, reflecting the Government's wish to ensure a more co-ordinated and integrated approach to all aspects of the developing information economy: infrastructure, services, the domestic IT sector, electronic commerce and content and cultural issues.

I want to discuss the key elements of the Government's agenda for the information economy as it affects the subject of this conference: "e-business".

That agenda is one which continues to change, and is perhaps permanently shifting in this area. This is a reflection of several factors:

- the rapid changes in technologies based around the interconnected computing platform we call the Internet;
- disagreement amongst stakeholders on the appropriate model for Government to adopt in key areas such as authentication;
- global factors which may be beyond Australia's control but not beyond our influence, for example the complex but important issue of domain name management at the international level.

E-commerce takeup in Australia has been steady rather than spectacular, but still very good by world standards. Business-to-consumer expenditure is running at

around \$150-200 million by most estimates, although one report last week put it at 4 times that. Business-to-business is more difficult to estimate, but global trends suggest it might be in the order of \$1 billion. Our overall rate of Internet penetration sees Australia consistently ranked third or fourth behind the USA, Canada and the Scandinavian countries.

REALITY CHECK

Before looking at e-commerce drivers and enablers and the role of Governments, both State and Federal, can I suggest a three-point reality check. Not because of any negative aspects of e-commerce potential. Quite the opposite. If the potential is to be realised we must remain hard headed and with our eyes on the main game.

So, some issues to bear in mind.

Firstly, the full economic benefits of e-commerce are still mostly down the

track. Two key studies in the past 12 months - conducted by the OECD and the US Department of Commerce - suggest that:

- the macro-economic impact of business-to-consumer e-commerce will be positive but is unlikely to be significant for some time;
- the impact of business-to-business e-commerce is much more significant;
- the contribution of "the information economy" to US economic performance rests largely with the IT sector rather than the more recent phenomenon of e-commerce.

This is not to say that we can ignore the very real commercial drivers for the uptake of e-commerce. Governments are rightly interested in encouraging electronic transactions by business as the wave of the future and one all businesses need to take into account in their business strategy. It is a new form of structural adjustment. But its full effects are just starting to be measured.

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Secondly, the current hype surrounding all things Internet may actually be counter-productive. A recent survey of company directors by KPMG found that this hype - the stock market effects which caused Alan Greenspan earlier this year to liken Internet stock investment to a lottery - ranked as one of the top 10 reasons adversely affecting investment in e-commerce. Company directors and executives will take notice when inventory and transaction costs can be reduced through common electronic cataloguing and ordering across an entire industry, as is occurring with Australia's major supermarkets and the automotive industry. But simply mentioning the words "Internet" and "website" - or suggesting a company add ".com" to its name - are not enough.

And thirdly, the Internet is not a universal communications medium. It is a medium for access and use by the better educated and better off in the world's more affluent countries, and to some extent by the middle classes of some developing countries. This might not be an issue for businesses who want to focus on these markets. There is nothing wrong with that. But it is an issue for governments, and while I will talk in a moment about

the benefits of government services online it would be a strange policy which did not ensure that the needs of the offline population continue to be served equally.

Let me now turn to the key forces driving the takeup of e-commerce in Australia, and the key factors in enabling that takeup to happen. Broadly speaking, the former tend to be the outcome of commercial and technological developments, while the latter is where government is concentrating its efforts.

E-COMMERCE DRIVERS

There appear to be three broad factors driving the takeup of e-commerce in Australia and most OECD countries.

The first two are fundamental commercial considerations: reducing the cost of business transactions, and increasing revenues through new markets.

With regard to new markets, the distinction between firms who have only ever existed on the Internet and existing firms seeking to position themselves in a virtual marketplace becomes clearer. The issues are generally not ones for

Government policy, but do raise very real challenges for existing contractual and financial structures. For example, how does a travel agent franchise based on geographic regions cope with franchisees entering the lucrative world of online travel where it would not make sense to confine your customers to one city.

The third driver is, I suggest, an odd mixture of fear and envy.

Fear of being left behind in what is clearly a phenomenon of major proportions. Because the growth trends for Internet usage are very high by any standards: there are now around 170 million Internet users worldwide, and Cisco systems tells us that there are seven new people on the Internet every second. The growth in specific sectors is equally rapid, for example the number of Internet banking users in Australia has doubled in the last 3 months, to around 300,000.

And a vague envy of what is occurring in the United States under the banner of "e-commerce", be it share floats, retailing or investment, together with an equally vague idea that it must be all connected to that country's startling economic

performance in recent years. Except that US Internet stocks are now coming under severe market scrutiny, online retail purchases in the US are still less than mail order catalogue purchases.

So maybe the envy is partly misplaced, although it can be put to good use in bringing about a more positive attitude to electronic business in the more conservative Australian firms.

E-COMMERCE ENABLERS

Infrastructure

Of course the entire structure of the Internet will not work unless there is sufficient capacity to carry traffic at high speeds and low cost. The Government has established the National Bandwidth Inquiry to examine the issue of bandwidth availability and pricing on "backbone" networks within, and to and from, Australia. Within Australia, the inquiry is considering availability between the rural and remote areas and the capital cities as well as inter-capital and international availability.

The Inquiry has been set up within the Department of Communications, Information Technology and the Arts under the auspices of the Australian Information Economy Advisory Council ("AIEAC"). The AIEAC is made up of company executives, industry and consumer peak bodies and academics involved in the information economy to provide high level industry and community input to Government decision making on information industries and information economy issues. A Sub Committee of AIEAC has been formed to provide expert input to the work of the Inquiry.

The main issues the Inquiry will report on are:

- the drivers of demand for bandwidth;
- potential constraints on bandwidth availability, including pricing within Australia and to and from Australia and key overseas markets; and
- relevant commercial and regulatory issues.

A discussion paper was expected to be put out in mid-September for public comment. The inquiry is expected to be completed towards the end of 1999.

One factor in Australia's high rate of home Internet usage (22% of households in capital cities) is the statutory requirement for residential users to have an option of untimed local calls. We sometimes take this for granted, but untimed call regimes are rare in Europe, where Internet users have recently staged a series of demonstrations - online of course - to protest at timed local call costs which they say are inflating the cost of home Internet access.

Legal and Regulatory Framework

The term "legal and regulatory framework" for e-commerce is a bit misleading. The legal and regulatory barriers to widespread use of electronic transactions are actually very few, a point made by the Attorney-General's Expert Group on E-Commerce in their report last year.

There are two key areas I would highlight.

Firstly, the *Electronic Transactions Bill 1999* was introduced into the Parliament earlier this year. It provides for recognition, under Commonwealth laws, of:

- information provided in electronic form;
- electronic "signatures" (by whatever technology);
- production and retention of documents electronically;
- rules for sending and receiving documents, and attribution.

The Bill, if enacted, will be complemented by State and Territory legislation.

Secondly, the Government has announced its intention to legislate for a national privacy scheme extending privacy safeguards to data collected in the private sector. We know from recent surveys that prospective online buyers are concerned not only with security of their transactions, but also with what happens to data about themselves gathered both voluntarily and semi-voluntarily through the likes of "cookies". The legislation, to be introduced during the Spring sittings of Parliament, will enable enforcement of National Principles for the Fair Handling of Personal Information. This will occur through industry codes of practice and, where necessary, through the Privacy Commissioner and the Federal Court.

Things are moving so fast in the e-commerce area that industry suppliers, users and government have in some cases agreed that specific regulatory structures be avoided to allow time for market solutions to develop, consistent with the "light touch", co-regulatory approach.

One example of this is authentication, where the Government is in the process of establishing a National Electronic Authentication Council ("NEAC"). The NEAC, chaired by the National Office for the Information Economy but with wide industry and user membership, will:

- oversee and facilitate standards development in authentication;
- provide information and advice to industry and users on technical and commercial developments;
- co-ordinate Australia's national and international work in these areas.

One final area of some importance and some complexity is the administration of Internet domain names, in particular the ".au" space. Domain names are a crucial component of "Internet infrastructure", both nationally and internationally.

The Government has encouraged industry to develop its own arrangements, and the establishment of the industry body auDA is a positive step. As auDA moves towards its first full AGM later this month, the Government will be monitoring developments closely.

Awareness Raising and Consumer Confidence

Getting the legal and regulatory framework right is a necessary but not sufficient step. Information and assistance for users and potential users of e-commerce will remain an important need for some time yet.

The Online Australia program is the Government's major awareness raising initiative, not just for e-commerce but for the wide (and apparently ever expanding) range of other social and personal uses to which the Internet can be put.

Online Australian initiatives, all in conjunction with major business and Government sponsors, include:

- a range of schools-based curriculum programs and competitions;
- major home Internet user 'expos' in Sydney and Melbourne next month;



- an agenda series of forums bringing together key industry players to identify issues and solutions in areas such as health, education, skills, e-commerce and metrics;
- a survey of the attitudes of Australian company directors towards e-commerce.

Consumer confidence in online transactions depends on reliable information and appropriate safeguards. The National Office for the Information Economy and the Treasury have jointly issued a series of consumer fact sheets dealing with topics such as credit card security and payment of duties and taxes. The most recent of these fact sheets deals with Internet banking.

Earlier this year the Minister for Financial Services and Regulation released a draft policy framework for consumer protection in e-commerce, and work is proceeding in consultation with industry on a draft model code of practice dealing with key consumer issues.

The National Office for the Information Economy has established a highly successful consultative group dealing with e-commerce assurance, in particular

website "seals of approval", and there seems to be industry and consumer support for NOIE convening groups such as this on "neutral ground."

Government Online

The Commonwealth has a firm commitment to excellence in online services, both in terms of delivery to the public and internal efficiencies.

A review is currently being conducted of the overall Government online strategy by the Office for Government Online, with options available for consideration by the Government in the near future.

A number of specific initiatives are already underway, and it is significant that they all involve a high degree of co-ordination and, in some cases, co-operative delivery with State and Territory governments. The real opportunities for electronic services delivery, payments and procurement will not be realised unless there is substantive co-operation across all levels of government. The Online Council, chaired by Senator Alston and including State and Territory Ministers responsible for the information economy, is a valuable mechanism for achieving this.

Some of the initiatives are:

- a review of Commonwealth electronic payment and purchasing, with an exposure draft document now available for industry comment until 24 September;
- linked with this, the Commonwealth and States are working within the framework of the Australian Procurement and Construction Council to ensure interoperability of the Government e-commerce framework across jurisdictions;
- the Government Information Centre pilot in Launceston - the aim of the centre is to provide information about Commonwealth and State services, but not the services themselves;
- the GOVERNET (Government Electronic Resources Network) project, another joint initiative among the Commonwealth, State and Territory Governments, which aims to provide online users, regardless of their location or entry point, with fast and easy navigation, discovery and access to government services across jurisdictions;
- local government services will be improved as part of the Trials in Innovative Government Electronic Regional Services (TIGERS) program.

Last year the Government established the Business Entry Point as the major transactions platform with small business (again, in co-operation with States and Territories) and the BEP will play a significant role in the rollout of the new tax system to business.

International Framework

It is a truism that the Internet is a global phenomenon (albeit one more prominent in the more advanced economies), but what this means in practice for e-commerce is still being played out on a number of fronts.

Traditional inter-governmental forums are tackling the issues in a positive way.

World Trade Organisation ("WTO") services negotiations are to commence by 1 January 2000. Australia has offered the view that the negotiations should be comprehensive, covering both basic and value-added telecommunications services.

Australia has proposed that the WTO's work on electronic commerce should be confined to areas where the WTO has a clear contribution to make to the legal framework for the conduct of global electronic commerce. Care is needed to discriminate between those areas where electronic commerce represents no more than a new way of doing familiar things, and those areas where it introduces significant change. Overall, the outcome should be based on the principle of a light-handed and industry-driven approach to regulation of the Internet.

The OECD has agreed on, or is actively developing, guidelines for the key e-commerce issues of taxation, privacy, authentication and consumer protection. It is also pursuing its traditional research and analysis role with regard to the economic impacts of e-commerce, and Australia is a major contributor to its work on business-to-business e-commerce.

But we are also seeing the development of international governance models which feature a joint role for governments, business and consumers.

Early initiatives from the private sector have included the e-commerce business rules developed by the International Chamber of Commerce, and the statement on the role of business issued by major industry bodies as part of the OECD Ministerial Conference on E-Commerce last year.

Much more ambitious is the establishment of the Internet Corporation for Assigned Names and Numbers ("ICANN"). ICANN is the non-profit corporation that was formed to assume responsibility for the IP address space allocation, protocol parameter

assignment, domain name system management, and root server system management functions formerly performed under US Government contract. An Australian, Greg Crew of ACIF, is one of the founding voting members of ICANN.

UNDERSTANDING WHERE WE ARE HEADING

In e-commerce, of course, there is never enough data. There seems to be an insatiable demand for statistics, let alone any serious analysis. The Government, in partnership with industry, is attempting to rectify this by undertaking a major study on the economic impacts of e-commerce.

This project will pilot the modelling of impacts at the macro and micro levels of the Australian economy, assessing the effect of e-commerce from the present to 2009-10.

Scenarios and qualitative data are being developed in conjunction with expert industry input from the Industry Reference Group (a group comprising 13 industry partners to the project, including Telstra, IBM, Australia Post and Unilever).

KEY ISSUES GOING FORWARD

As we enter the new millennium what are the key issues for business, for consumers and for government? May I suggest the following:

- Mainstreaming within business : That is, recognition of e-commerce as a core business strategy issue

rather than an IT issue. We have seen this change occur with the Y2K challenge. For SMEs the question is a simple one: what will e-commerce contribute to the bottom line? For larger firms, "back end" supply chain management will be just as important as "front end" marketing and sales over the Internet.

- Mainstreaming within government: Much the same considerations apply within government. Electronic procurements, payments and service delivery need to be seen as the norm. But this must not be at the expense of those who cannot or will not choose online interaction with government.
- Rural infrastructure and access: There is no doubt that access to online services in some rural and remote areas of Australia remains expensive and technically difficult in comparison with capital and regional cities. The Government is addressing this through targeted expenditure on infrastructure in regional areas, and is also exploring ways in which greater levels of service and price competition can be achieved. A co-ordination process with State and Territory governments has been established in this area.

This paper was an address to the e-business Symposium in Melbourne on 1 September 1999. The paper was written by Neville Stevens and was delivered by Dr Rod Badger. Dr Badger is the Acting Executive Director, Information Technology, Telecommunications and Broadcasting. Neville Stevens is the Secretary to the Department of Communications, Information Technology and the Arts.

The Structural Framework: Encouraging Creativity or Stagnation?

Singer and lawyer Karen Knowles seeks greater protection for artists' expression.

With the onset of the various new technologies changing the realities of existing industries, when looking at the "big picture", there is a need for legislative intervention and a need for business adaptation. We then have some big questions to answer:

- What are we encouraging?
- What are we valuing?
- Does the current framework serve these purposes?
- Is it time for a review?

HISTORICAL POSITION OF CREATORS IN AUSTRALIA

Historically, the position of creators in UK and Australia, as compared with continental Europe, has been very different. French law has long recognised rights of creators and artists whereas in the UK and Australia no natural rights are granted to the creator.

It is well established that Australian law is predominantly based on UK precedent. Over recent years, with its joining into the European Community, it has been necessary for the UK to adapt its laws in unison with other European countries. As a consequence, this obviously gives European laws more influence in Australia. However, it remains to be seen whether this influence will bring about cosmetic or more fundamental change in Australia.

DEFINING CREATION

The traditional view of what is meant by creation is an action by which, through adding, subtracting or combining previous elements, a completely new form is forged that did not previously exist. An artistic creation is that which transcends the mundane, questions or even provokes, provides us with a better view of who we are or deeply touches our inner self.

In this era, with the predominance of the balance sheet and content that is futile, superficial or simply entertainment

seeking immediate gratification, creation is often undervalued.

CLRC REPORTS

In Australia, we are currently engaged in an overview of copyright. The Copyright Law Review Committee ("Committee") has recently released two reports – the first predominantly dealing with exceptions to the exclusive rights of copyright owners and the second predominantly on the simplification of the *Copyright Act 1968* ("Act").

It is important to note, as Professor Dennis Pearce hastened to add at a Copyright Society Seminar late last year when speaking about the release of the first report, the limited terms of reference granted to the Committee when preparing these reports. Specifically, Professor Pearce noted that the Committee was not directed to review the policies behind the Act – the focus was on the simplification of the Act rather than a general review of copyright laws.

In relation to the first report, some commentators such as Peter O'Donoghue of Jacaranda Wiley Publishers have made some comments worthy of further consideration. Mr O'Donoghue noted:

- the need for some more hard thinking about the new paradigms and what these mean in practice, rather than merely preserving and extending privileges into the new world;
- the use of the word "balance" in the context of digital technology is nonsense;
- in the case of copyright and digital technology, the need to define what a normal exploitation is before we look at exceptions; and
- the proposed changes in the first report will mean "bucket loads of extinguishment" for authors and publishers.

On this last point, when a member of the Seminar panel was queried about the

potential drop in copyright owners' incomes if the Committee report recommendations were adopted, their reply was that the parties could seek a determination from the Copyright Tribunal about equitable compensation. A quick reality check would indicate that the cost involved in such an application is clearly prohibitive for most creators and therefore not a proposal of substance.

PROPOSED LEGISLATIVE AMENDMENT: DIGITAL AGENDA BILL

The Digital Agenda Bill has also recently been put forward by the Federal Government for comment.

The media release on the Bill and the stated objectives of the Bill appear to be at odds. While the promotional media release on the new Bill states that the Bill intends to promote "creative endeavour", one of its stated objectives is to reinforce the traditional utilitarian model of what is worthy of copyright. Under Australian law, no natural rights are given to the creator. I note with surprise that one well known commentator has expressed relief that this is clearly stated in the Bill's objectives. I, conversely, ask why, as we approach the 21st century, we are seeking to entrench what has always been, instead of seeing an overview of Australian copyright and new media law within a global context and with due consideration to the broader objectives of encouraging creativity. Surely we are now brave enough to break through the closed cycle of the past and consider other ways to achieve objectives of a flourishing, more dynamic society.

In the current constantly developing environment of new technologies redefining markets, use and misuse of ideas and forms of expression, we now need a definition of "creative endeavour". If we want the tradition of creative people to flourish, we need to discuss the possibility of defining this term, even from a legislative perspective, and not to allow ourselves to be easily overcome by simplistic rhetoric.

There is of course a fine line between what can and should be legislated for, and what should be left to other means to achieve stated objectives. Other considerations such as how such means can be manipulated without the backing of legislation need also to be considered. In that regard, I believe it is wishful thinking to believe that voluntary codes of ethics alone can protect creators if they are not legally binding.

Some may argue that defining "creation" is some sort of censorship. The contrasting argument is that without such a definition, a full "free-for-all" access, either to the original inspiration or the supposedly newly existing form, easily leads to a loss of meaning.

BUSINESS PRACTICES - THE REALITY

Aside from the various leaps and bounds being made in the technological spheres, from an historical perspective, most would agree that nowadays we live in a period of stagnation in relation to the creative arts.

In the musical field, aside from popular dance music, which uses the new technologies and means of adaptation to the full, a majority of today's releases are sticking to a proven formula, using and re-using well worn out conception and ideas, essentially going through the motions. Indeed, as mergers of the large corporations become more prevalent and impose their market share, there is an increase in the practice of old proven formulas being funded, and such music being the only music available on shelves.

While this "is just the way it is" for many, it is all too clear that this environment and attitude does not promote new ideas, concepts or true creation.

AMENDING COPYRIGHT OR OTHER MEANS?

We also need to question whether we should be solely considering the amendment of copyright or looking at other means.

Colin Golvan has raised the question whether the right of copyright can in fact provide the much needed and fundamental incentive to produce works. He discusses the possibility of protection against "unfair copying" and notes the dilemma of the two opposing arguments, which are:



- the application of a general prohibition against unfair copying to copyright may too heavily favour restrictions against the use of ideas (that have always been exempt from protection under the Act); and
- that in an age of free copying, it is too easy to disguise the form of expression of ideas as ideas and avoid copyright protection completely.

Susan King, in a more general sense, notes the limitation of copyright stating that "*current intellectual property laws are concrete parameters set out for concrete materials*".

On a practical level, a major problem that faces us in the new media environment is enforcement. New measures are required in order to adapt. As an example, there are many musicians and audio artists who are now actively engaged in "found sound appropriation" and the ranks of outlaws are continuing to grow. These issues pose the following questions:

- Is the law of copyright relevant there?
- How do we balance the need for artists to have resources open to them

while at the same time not encouraging plagiarism?

- Should we be promoting some sense of what is valuable in order for a proprietary right to ensue?

A WAY FORWARD

We need an international viewpoint when considering these issues as to talk merely from an Australian perspective is insular and ignores the reality of the new global environment. In this relatively new environment, such questions are surely required to be addressed in order for us to move forward.

This discussion is not merely the domain of legislators. Business people constantly make choices that affect these outcomes. I believe that we need to build international networks, working within our circle of influence and accepting responsibility for the society that we desire.

An encouragement to me in presenting these views are the comments made by Justice Michael Kirby, now of our Australian High Court, who has long argued that law is too important to be left

exclusively to lawyers, judges or parliamentarians.

Today I speak for the often silent voice of creative people and encourage a consideration that creators should be invited into the fold. There does exist a danger that copyright law reform will be driven by economic concerns of trade and competition rather than by an understanding of art and culture.

Finally, John Mountbatten in "Law: The Big Picture" has made the following comments with which I concur:

"Like art, at its best, law should aim, more often than it does, to challenge and, where necessary, shatter the shibboleths of received orthodoxy which inhibit human flourishing. Law should positively encourage the liberation of our deepest personal and social aspirations and point us -

wherever possible - in the direction of the sublime".

For me, that is the big picture and that is the challenge - not just for legislators but for us all.

Karen Knowles is a singer and a lawyer in the Melbourne office of Blake Dawson Waldron. She has over 20 years experience as a performer and recording artist.

Protection for Internet Consumer Transactions - A Purpose-Built International Consumer Protection Convention

Consumer protection for the Internet is a growing concern for governments across the globe. Daril Gawth argues the case for an international consumer protection convention.

For the first time in history, because of the Internet, we have a technology which allows and encourages literally millions of people to engage in minor consumer transactions to purchase goods and services internationally (those where the consumer and the merchant aren't in the same country); but only a new body of international law - a technology-neutral international consumer protection convention - would be effective in legally protecting such transactions. Why is that? The need for an international consumer protection convention arises for four major reasons.

Firstly, current international trade protection laws, such as the *Vienna Sales Convention*, are simply inapplicable to consumer transactions, those where the buyer is a private individual.

Secondly, national consumer protection laws, such as the *Trade Practices Act* and the *Sale of Goods Act* in Australia, whilst applicable to consumer transactions, are not applicable to international consumer transactions - they just don't operate outside their own national boundaries.

Thirdly, even if an extremely-determined legitimately-aggrieved consumer were to try to pursue a remedy via (say) an action in contract in a foreign court, virtually insurmountable problems would arise.

There implicitly exists an approximate monetary threshold below which it would simply not be cost-effective to pursue such an action. For convenience, that threshold could be set as low as about \$50,000. Thus, if you spent \$50,000 or less on purchasing goods or services internationally (via the Internet or otherwise) and the deal went wrong, then you've lost your money in the present legal regime - possibly a very large sum of money. Also, there will be enormous complexity, delay and uncertainty involved; and that will follow a dispute about who has jurisdiction.

Fourthly, one solution being explored by some - industry self-regulation ("improved" or otherwise) - just isn't practical, unless you think asking the fox to look after the chickens is a good idea.

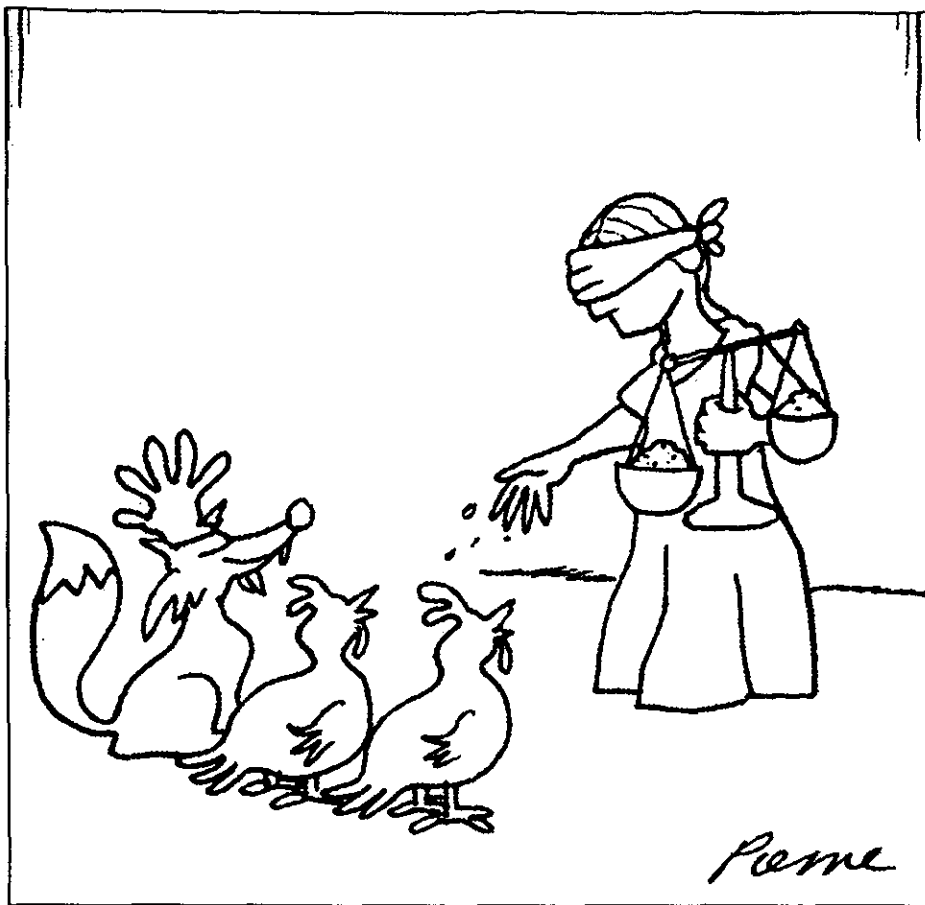
Thus, in practical terms, there currently aren't any means which offer effective (relatively cheap and simple) avenues of redress for aggrieved international Internet consumers. This fact is recognised by many, but no solution has yet been provided.

Interestingly, the recent arrival of the Internet (with its projected usage growth rate) hasn't created the problem - international consumer transactions can be mediated by other means - but the Internet has intensified it, and powerfully

stimulates demand for an effective remedy. The Internet is a social and technical phenomenon to which the law has not yet adjusted.

Protection is required to provide an appropriate mechanism for resolving post-transaction problems. These could arise where there are fully-performing consumers but, post-transaction, such consumers *prima facie* have some legitimate grievance concerning performance by a foreign Internet vendor, and where the vendor is hostile, uncooperative or unavailable, or there is some other problem with them preventing resolution of the problem. Such grievances will typically involve non-delivery or wrong-delivery of goods and services.

There are some who consider *any* regulation to be excessive; that regulation will simply strangle an emerging new economic force in its infancy, and that "market forces" will regulate the market. In recent times even the US Government appears to have taken a similar view - in "A Framework For Global Electronic Commerce", President Clinton stated that "governments must adopt a non-regulatory, market-oriented approach to electronic commerce" - but apparently to allow it room to grow in its formative years only (it stretches credulity to suggest that any government would allow any



sector of the economy to go unregulated and untaxed forever). And might "industry self-regulation" and "voluntary codes of practice" be enough to do the job? Probably not. It is likely, in the light of experience, that true self-regulation, as the only or principal form of consumer protection, would be ineffective and undesirable, and would set up rogue vendors as judges in their own cause. It is practically certain then that a balanced interventionist approach will be justified, between an over-regulated system and a completely unregulated laissez-faire system.

Without going so far as protecting consumers from themselves, Internet consumers will require some form of protection or Internet commerce will (already does) suffer from lack of consumer trust. What would they be protected from?

Apart from the sharp practice, negligence, etc. of vendors, they need to be protected from the ignorance they suffer relative to the knowledge the vendor has about their goods, services and business practices, and from their own ignorance concerning consumer rights and remedies available in the event of legitimate grievance.

Unless a remedy is soon found, consumer dissatisfaction with or suspicion of the Internet will result in critical loss of consumer confidence in the Internet and its promises, resulting in disastrous impact on the enormous Internet-driven stimulus predicted for the global economy, with associated flow-on effects and losses.

A POSSIBLE SOLUTION : AN INTERNATIONAL CONSUMER PROTECTION CONVENTION

So much for problems and rationales. What of solutions? What might an international consumer protection convention look like, what would it do, who would benefit, and what might be the costs?

An international consumer protection convention would need to consist of two major parts. The first part would provide for the establishment and operation of various functional organs within an overall organisation (possibly an "International Consumer Protection Organisation" or something of the like). Such organs would include a supreme governing body (perhaps a "Conference of States") consisting of delegates from all member nations. Under that might be an Executive body whose main function would be to oversee the effective

implementation of, and compliance with, the convention. Under that would be a judiciary (possibly an "International Consumer Court"). A fourth organ would be a technical-support body whose main function would be to provide the means of, and on-going development and support for the operations of the judiciary as a court operating in real time through the Internet, by means of appropriate tele-conferencing and data-processing technologies. The technical support body would also provide general support for the other organs of the Organisation.

The first part of the convention would thus contain provisions for the powers, functions and responsibilities of the various organs noted, including the procedural rules of the judiciary.

The second part would consist of "harmonised" (internationally acceptable) consumer protection laws, concerned with such matters as normative consumer protection laws (concerned with the general duties of vendors, consumer rights, remedies, etc.), and possibly with such matters as the requirement for the registration of vendors' unique identities (in a register administered by the convention), the requirement for such identity to be transmitted by prescribed manner within all transactions with consumers, rules about the filing of actions with the judiciary, and many other matters.

What would the convention do? Broadly speaking, it would provide cheap and simple remedies to the kinds of problems noted above. From a consumer's viewpoint, it would operate as a kind of global Small Claims Tribunal, with enforcement of court orders being effected by the national representative body of whichever nation the vendor is principally located. It would do this through provision of a court operating on-line in real time via the Internet, with all parties and the court visible and audible to each other wherever they may be.

The facilities for the hearing of matters to be heard by the court, would initially be provided in existing courts throughout the territories of each member nation. In most cases, the underlying infrastructure *already* exists (most courts already have Internet access). Eventually, parties might attend hearings *anywhere* there is Internet access - even from within their own homes.

Facility for the filing and receiving of court documents will be found wherever the parties have access to the Internet,

such as in the offices of their own solicitors, from a local library or other community organisation, from their own homes and business premises.

What might be the costs of such a convention, and who would benefit? Would there be winners and losers, or just winners? It is likely that the major costs of such a scheme would be the establishment and running costs of the organisation established to implement the convention. As it is necessarily a public sector initiative, funds required for it would come from governments (taxpayers). The direct and indirect

advantages to taxpayers however, in implementing such a scheme, would be immeasurably positive.

Other costs may include "compliance costs" which would be imposed upon vendors required to comply with the new regulatory scheme. What would that involve? Virtually nothing. A vendor would be required to register with a local national authority, possibly display some kind of certificate on their website, and implement a sub-system in their website-handling software to provide transmission of their unique identity-data to potential customers. All of these costs

would, in the wider scheme of general business activities conducted via the Internet, be utterly trivial. Would such costs be a problem if they were passed on to Internet consumers by vendors? They would be virtually un-noticeable; and would undoubtedly amount to a cheap form of transaction insurance the average consumer would be more than willing to pay for.

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Love Thy Competitor - Introducing the Facilities Access Code

Matthew McLennan explains the intricacies of the new Facilities Access Code.

Are you the proud owner of a telecommunications transmission tower? Are you planning to expand your existing network by building new telecommunications transmission towers or laying more underground cables? Would you like to hang your transmission equipment from one of your competitors' transmission towers?

If you answered "yes" to any of these questions, you will be interested in the Australian Competition and Consumer Commission's ("ACCC") new Facilities Access Code ("Code"). The Code sets the parameters for any future negotiations between carriers about access to certain telecommunications facilities. It came into effect on 13 October 1999.

WHAT IS THE FACILITIES ACCESS CODE?

The Code sets out the conditions on which a carrier who owns a facility (referred to as the "First carrier") is to provide another carrier (referred to as the "Second carrier") with access to the following telecommunications facilities ("Eligible Facilities"):

- telecommunications transmission towers (such as mobile towers);
- the sites of telecommunications transmission towers; and

- eligible underground facilities (such as the underground duct through which a wire, cable, or optical fibre may be laid).

The Code has been drafted by the ACCC in accordance with Part 5 of Schedule 1 of the *Telecommunications Act 1997*. Part 5 provides, in general terms, that telecommunications carriers must give each other access to Eligible Facilities. The Code supplements this general obligation with detailed administrative and operational procedures.

According to the ACCC, the objective of the Code is *to facilitate or encourage co-location (of telecommunications facilities) by mandating processes and procedures for timely access to facilities, to apply in circumstances where commercial agreement between carriers cannot be reached*. On this view, the Code is the safety net into which will fall access disputes which cannot be resolved commercially.

KEY FEATURES OF THE CODE

The Code is divided into 3 parts:

- Chapters 1 to 6, which contain the rules and procedures applicable to all types of Eligible Facilities;

- Annexure A, which deals with access to telecommunications transmission towers and the sites of those towers; and
- Annexure B, which deals with access to eligible underground facilities.

In this article our focus is on the general rules contained in chapters 1 to 6 of the Code.

First Principles

The freedom to negotiate is tempered by a requirement that the First and Second carrier comply with the timeframes specified in the Code. This requirement reflects the ACCC's goal of allowing commercial negotiation at the same time as preventing a reluctant First carrier from delaying the provision of access to a Second carrier.

Mandatory conditions of access

Chapter 2 of the Code contains the rules which are not open to negotiation. These are clearly the rules which the ACCC considers essential to the operation of the new access regime.

In the course of providing access, carriers must provide each other with information about their Eligible Facilities and technical needs. In order to ensure the unhindered flow of this information the

Code provides that carriers must keep confidential all confidential information provided to them and only use that information for the purposes of the Code.

In the eyes of the Code all carriers are equal and as such deserve equal access to Eligible Facilities. This principle is reflected in two important rules. The first is the non-discrimination rule. A First carrier is expected to take all reasonable steps to ensure that, as far as practicable having regard to its legitimate business interests and the interests of third parties, the access that a Second carrier receives is equivalent to that which the First carrier provides to itself. The second rule is the queuing rule. A First carrier is required to develop a queuing policy for applications for access to its Eligible Facilities. The queuing policy must be non-discriminatory and seek to ensure that Second carriers in the queue get access as soon as possible.

Finally, presumably to ensure that access disputes do not get bogged down in the courts, the Code requires carriers to engage in dispute resolution, including mediation.

Applying for access

Under the Code, the first step in the process of providing access is an exchange of information. Each First carrier must establish and maintain an "Information Package" in relation to the provision of access to its Eligible Facilities. This information package must set out, among other things, how access to Eligible Facilities is to occur and indicate the amount of time needed to gain access to an Eligible Facility.

A Second carrier's response, as it were, to a First carrier's Information Package is a "Facilities Access Application". Annexures A and B of the Code contain detailed rules about the content and timing of Facilities Access Applications. These rules vary according to whether the relevant Eligible Facility is a telecommunications transmission tower or an eligible underground facility.

Negotiating access

The general rule under the Code is that negotiations for access to Eligible Facilities must be undertaken in good faith and entered into and conducted in a timely manner. The goal of these

negotiations is the creation of a "Master Access Agreement" which deals with matters such as:

- access and maintenance procedures;
- dispute resolution procedures;
- charges for access;
- financial security requirements;
- technical specifications;
- such other procedures as the carriers may consider necessary for the due and proper joint operation of the Eligible Facility.

First carriers will undoubtedly often have concerns about the creditworthiness of those who wish to have access to their Eligible Facilities. The Code acknowledges the legitimacy of these concerns at the same time as seeking to prevent them from being used to delay access. Accordingly, the Code sets out a formal procedure by which a First carrier may object to the creditworthiness of a Second carrier and how the Second carrier is to respond to such an objection.

The provision of access will almost always require work to be done on an Eligible Facility. The Code refers to this as "Make Ready Work". It contains detailed rules about the performance of Make Ready Work which are intended to accommodate a First carrier's concerns that a Second carrier could damage its Eligible Facilities.

A key element of the philosophy underlying the Code is the conviction that it is economically more efficient for carriers to share Eligible Facilities. In order to promote sharing and the efficiencies it may bring the Code provides that carriers may choose to initiate or participate in what is known as a "Co-Location Consultation Process". A Co-Location Consultation Process involves a carrier informing all other carriers that it has plans to establish a new facility in a particular postcode area and requesting the other carriers to consider establishing a shared new site or facility.

Implementing access

The continuing viability of access to an Eligible Facility is preserved under the Code by rules on the maintenance and

use of Eligible Facilities. The First carrier is responsible for the maintenance of the Eligible Facility while both First and Second carriers are responsible for the maintenance of their own equipment installed at the Facility. A First carrier is entitled to undertake emergency repair work which may include turning-off a Second carrier's equipment. Otherwise carriers are not entitled to obstruct the use or operation of each other's equipment. These rules are supported by the First carrier's power to suspend access to an Eligible Facility in the event of abuse. Finally, by way of last resort the Code contains a long list of events which entitle either the First or Second carrier to terminate their access arrangements.

IMPLICATIONS FOR CARRIERS

It is unlikely that the Code will mean peace in our time in the realm of access disputes. Nevertheless, even if they do not want to love one another, carriers must learn to live with the Code. In broad terms, this means that they need to understand the Code and its effect on their business so that they can make an informed choice between:

- negotiating access terms freely with each other (subject to the mandatory provisions contained in chapter 2 of the Code);
- negotiating for access within the four corners of the minimum standards set by the Code; or
- failing agreement, resorting to arbitration (bearing in mind that, if carriers cannot agree on an arbitrator, the default arbitrator is the ACCC).

In addition, carriers planning to expand their networks will need to consider the impact of the Code. The Code may induce them to share facilities, and the cost of building them, with other carriers.

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Encryption, The Internet and Bernstein V. Dep't of Justice: The First Amendment Rescues E-Commerce and Privacy

US export restrictions for encryption software have long denied the Australian IT industry valuable cryptography technology. US attorneys Kurt Wimmer and Dawn Nunziato discuss how freedom of speech and privacy were used to strike down the export restrictions.

It's mid-1999, and the concept of an information economy finally has become more than rhetoric. Internet use has expanded to more than 160 million users worldwide. Electronic commerce is booming, with one company alone reporting more than \$1 billion per month of sales over the Internet. The need to protect online privacy has seized the attention of consumer advocates and legislators from Washington to Brussels. Concerns over protecting mission-critical computer systems from hackers are at an all-time high following several devastating virus attacks. U.S. software companies are seeking to further their access to an enormous global market.

And the development and export of encryption software – the one technological means to protect the integrity of e-commerce and computer systems and guard personal privacy on the Internet – is under attack by the U.S. government.

What's wrong with this picture?

Encryption – mathematical methods for encoding or scrambling the contents of written or spoken communication so that only the intended recipient can decrypt and access the communication – is widely regarded as the key to secure communications on the Internet. E-commerce relies on strong encryption to protect sensitive credit card and financial data, and Internet users have demanded greater protections for their privacy in both commercial and personal transactions. But the effectiveness of strong encryption to protect privacy has led to concerns by the law enforcement community that international terrorists could use encryption to keep their communications secret from law enforcement. This controversy has led the U.S. federal government to regulate encryption software as a munition – under this view, it can only be exported with a

licence from federal authorities. And because information posted on the Internet generally can be accessed from anywhere in the world, the Administration has taken the position that posting source code for encryption software on the Internet is an "export" that cannot occur unless the government grants the author a licence.

This standoff was broken decidedly recently by a combination of the First Amendment, the Ninth Circuit Court of Appeals in San Francisco, and a tenacious young mathematics professor named Daniel Bernstein. In a groundbreaking decision, the Ninth Circuit held that computer source code was expression protected by the First Amendment, and that the government's regulation of encryption source code effected an unconstitutional prior restraint on protected expression. In its 2-1 decision in *Bernstein v. U.S. Dep't of Justice*, the court also championed the importance of protecting the privacy of communications and transactions in the electronic realm. Similar constitutional challenges to government regulation of encryption software are currently pending in the D.C. Circuit and the Sixth Circuit, and Supreme Court review of this issue is likely. (Covington & Burling represents a group of *amici* challenging the government regulations in all three circuits, including the Electronic Privacy Information Center, Center for Democracy and Technology, National Association of Manufacturers, Internet Society, American Civil Liberties Union, as well as several world-renowned cryptographers.)

BACKGROUND

This case originated when Daniel Bernstein, then a graduate mathematics student at the University of California at Berkeley, developed a mathematical encryption formula. His formula was

expressed in both a scientific paper and in source code, in a high-level computer programming language called "C". Bernstein sought to publish both the source code and the scientific paper through ordinary channels of scientific interchange – including the Internet, the medium of choice for scientists to debate their methods and conclusions – for evaluation, testing, and critique by his peers. In its Export Administration Regulations, the U.S. Department of Commerce requires anyone wishing to "export" (defined to include publication via the Internet) encryption software to receive a government licence. The licence may be withheld if the Bureau of Export Administration concludes that publication is not "consistent with U.S. national security and foreign policy interests." Although an unfavourable licensing determination may be appealed to the Executive, there are no time constraints placed on executive review, and no judicial review of a licensing determination is provided for under the Regulations.

Bernstein applied for a licence to "export" his encryption source code under the predecessor regulatory regime to the Export Administration Regulations. Upon being denied a licence, he filed suit, claiming that the regulations imposed an unconstitutional prior restraint on protected expression.

THE FIRST AMENDMENT'S SCOPE IN THE DIGITAL ERA

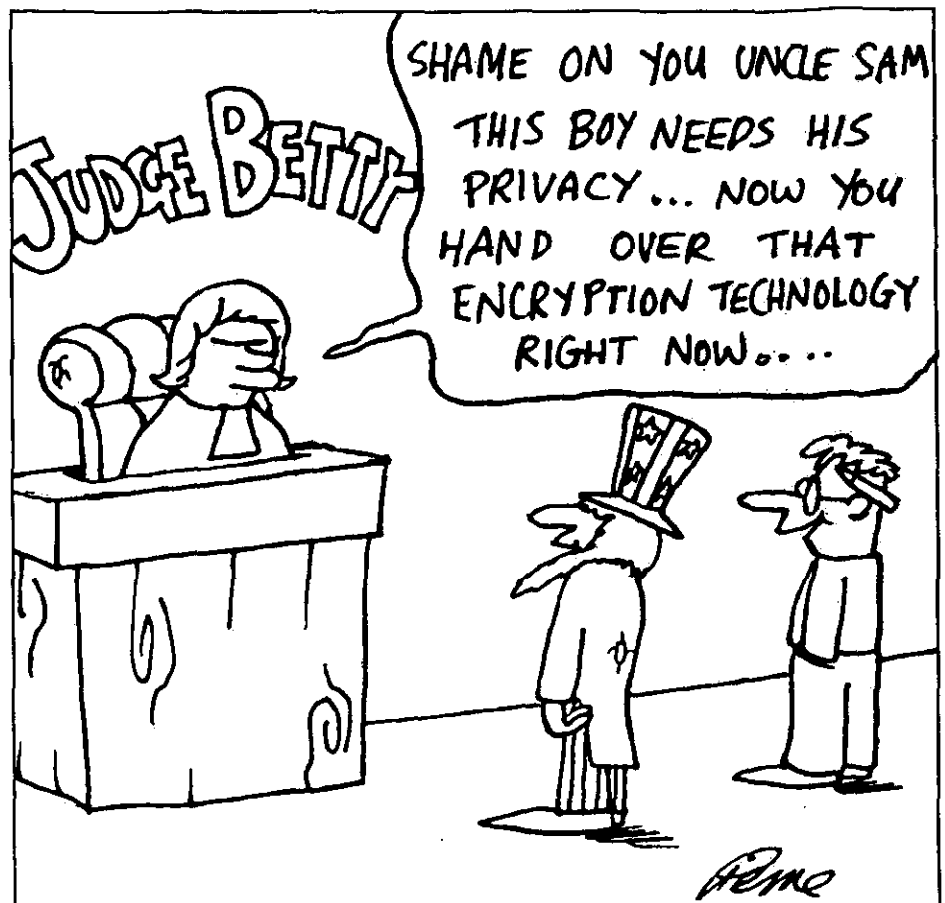
In addressing Bernstein's constitutional challenge, the Ninth Circuit first had to determine whether "computer source code" was expression protected by the First Amendment. This posed a rather novel legal question. It is well established that the spoken and written word are within the ambit of First Amendment protection because of their power to

communicate ideas or emotions to human beings. But does code written in computer programming language really merit First Amendment protection? Does it serve the same sort of communicative role as other forms of protected expression? Even if it has certain communicative elements or features, are these overwhelmed by its functional aspects, as the government argued? In the First Amendment speech/conduct dichotomy, does source code – given its functional qualities – fall on the less-protected “conduct” side of this dichotomy?

Computer source code – which is written in English-like programming languages such as C and BASIC – is distinct from computer object code – which is written in 0s and 1s. While object code directly controls the functioning of a computer, source code can be read and understood by humans and can be used by programmers and mathematicians to communicate with one another. In fact, Bernstein argued that he and his fellow scientists often used source code as a vehicle for communicating mathematical theories on the science of cryptography with precision and mathematical rigour. But, the government contended, even if source code is expressive in some limited sense, it is essentially *functional* expression deserving of limited First Amendment protection. In any case, the government argued, regulation of encryption software is directed toward the functional aspects of such code – its ability (once translated into object code) to encrypt text, and not at all at the expressive aspects of the code or ideas embodied within it.

In her decision, Judge Betty Fletcher held that, despite its functional aspects, computer source code merits full protection under the First Amendment. In declining to afford reduced protection for source code because of its functional features, she explained:

[T]he government's argument, distilled to its essence, suggests that even one drop of "direct functionality" overwhelms any constitutional protection that expression might otherwise enjoy. This cannot be so. The distinction urged on us by the government would prove too much in this era of rapidly evolving computer capabilities. The fact that computers will soon be able to respond directly to spoken commands, for example, should not



confer on the government the unfettered power to impose prior restraints on speech in an effort to control its "functional" aspects. The First Amendment is concerned with expression, and we reject the notion that the admixture of functionality necessarily puts expression beyond the protections of the Constitution.

Upon finding source code to be expression protected by the First Amendment, the Court had little difficulty in concluding that the licensing scheme embodied in the Export Administration Regulations imposed an unconstitutional prior restraint. In order to satisfy the dictates of the First Amendment, a pre-publication licensing scheme must either (1) provide for certain procedural safeguards, or (2) fall within an extremely narrow class of cases where the publication at issue would directly and imminently imperil national security (the *Pentagon Papers* standard). In order to be found constitutional, a licensing scheme that fails to meet the *Pentagon Papers* standard must (1) restrain expression for only a specified brief time period; and (2) provide for expeditious judicial review. The government did not contend that the Internet publication of encryption source code would directly and imminently imperil national security, and

the court found that the Regulations failed to provide the required procedural safeguards. There are no time limits imposed upon the Executive's review of a denial of a licence, and one denied a licence is not provided with any opportunity for judicial review (much less expeditious judicial review). Thus, the Regulations imposed an unconstitutional prior restraint on protected expression in violation of the First Amendment.

PRIVACY IN THE DIGITAL ERA

Beyond its groundbreaking First Amendment holding, the court also recognised that certain Fourth Amendment interests were at stake in the case before it. Judge Fletcher discussed the important role that encryption software plays in preserving the privacy interests of those who communicate and conduct business electronically using technologies such as e-mail, the Internet, and cellular phones. Without well-developed encryption technology, the court explained, we will be unable to carry over to the electronic realm the privacy in our communications and transactions that we have historically enjoyed in the non-electronic realm. In unprecedented language, the court recognised the need

to protect electronic communications and transactions from unwanted surveillance and interception:

In this increasingly electronic age, we are all required in our everyday lives to rely on modern technology to communicate with one another. This reliance on electronic communication, however, has brought with it a dramatic diminution in our ability to communicate privately. Cellular phones are subject to monitoring, email is easily intercepted, and transactions over the Internet are often less than secure. Something as commonplace as furnishing our credit card number, social security number, or bank account number puts each of us at risk. ... Whether we are surveilled by our government, by criminals, or by our neighbours, it is fair to say that never has our ability to shield our affairs from prying eyes been at such a low ebb. The availability and use of secure encryption may offer an opportunity to reclaim some portion of the privacy we have lost. Government efforts to control encryption thus may well implicate not only the First Amendment rights of cryptographers intent on pushing the boundaries of their science, but also the constitutional rights of each of us as potential recipients of encryption's bounty. Viewed from this perspective, the government's efforts to retard progress in cryptography may implicate the Fourth Amendment, as well as the right to speak anonymously, the right against compelled speech, and the right to informational privacy. (Citations omitted).

In sum, the court recognised that the unfettered development and use of strong encryption technology best serves the public interest in protecting the privacy of electronic communications and transactions.

THE FUTURE OF ENCRYPTION, PRIVACY AND FREE EXPRESSION

The broad holding of *Bernstein* provides a much-needed second step in the establishment of cyber-rights that was begun in *Reno v. ACLU*. In the *Reno* case, the U.S. Supreme Court established that the First Amendment applied in full force in cyberspace. The value of that case lies not only in its holding striking down portions of the Communications Decency Act, but in the scope of its language and analysis. Similarly, the *Bernstein* court now has established that computer source code is protected by the First Amendment and has done so in a decision that recognises that privacy rights are of crucial importance in an age defined by electronic commerce and Internet communication.

The *Bernstein* case thus provides a basis for moving forward. The most immediate benefit is that cryptographers such as Professor Bernstein finally will be able to discuss their science on the Internet effectively and with the protection of the First Amendment. The more global benefits, however, may inure to much broader groups. U.S. software companies that have been hampered in their efforts to market encryption software abroad will be able to more effectively compete with their international counterparts. U.S. companies that wish to secure their communications by exporting encryption software to their partners and employees abroad will be free to do so. Secure electronic commerce will be able to extend past our borders, and U.S. companies will be able to market goods and services effectively to security-conscious consumers around the world. Perhaps most importantly, the e-mail and other Internet communications of individuals everywhere will have the potential to be private.

The path toward the effective use of encryption is not, of course, an entirely clear one. The Department of Justice is

considering further attacks to the holding of the panel in *Bernstein*, and it almost certainly either will seek rehearing by the entire court or review by the U.S. Supreme Court. Two other federal Courts of Appeal have cases pending before them involving similar First Amendment challenges to export restrictions on encryption. In *Junger v. Daley*, 8 F. Supp. 2d 708 (N.D. Ohio 1998), currently pending before the Sixth Circuit, computer law professor Peter Junger was refused a government licence to publish encryption source code via the Internet. Junger is appealing from the district court's decision that source code – because of its functional characteristics – cannot be characterised as “pure speech” and does not merit full protection under the First Amendment. In *Karn v. U.S. Dep't of State*, 925 F. Supp. 1 (D.D.C. 1996), now on remand from the D.C. Circuit, cryptographer Philip Karn was also refused a government licence to publish encryption source code in electronic form. The district court in *Karn* held that, because the government regulations were not motivated by a desire to suppress expression but rather by legitimate national security interests, the First Amendment was not offended. If, as is likely, either the Sixth Circuit or D.C. Circuit companion cases are resolved differently from *Bernstein*, Supreme Court review of this important legal issue is likely.

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Dawn Nunziato is an Associate Professor at George Washington University Law School, where she teaches Internet law, computer law, and intellectual property. While associated with Covington & Burling, she represented the lead amicus group in the Bernstein and Karn cases.

Internet Censorship: the ABA responds

In a letter to the Editors, Jon Porter of the ABA responds to the article "Internet Censorship: See No Evil, Speak No Evil, Hear No Evil" published in the last edition of the CLB.

The co-regulatory scheme established by the *Broadcasting Services Amendment (Online Services) Act 1999* ("Act") addresses risks associated with illegal content and with content that is unsuitable for children, and does so through a range of regulatory responses. The scheme is based on the development of codes of practice by industry and the operation of a complaints hotline by the Australian Broadcasting Authority ("ABA").

Much has been written and much has been said about the regulatory scheme of which some has been misinformed. I'd like to address some of the issues raised in the article "Internet Censorship: See No Evil, Speak No Evil, Hear No Evil"¹ which require clarification.

ANTI-AVOIDANCE MEASURES

In the article it is stated that:

*"the new anti-avoidance measures will force ISPs and ICHs to scour their sites and networks each day to identify prohibited material. Once they discover any questionable material, ISPs and ICHs will have to decide whether the content is similar to prohibited content - a judgment on which significant penalties hang."*²

The co-regulatory scheme is complaints-based - it establishes a framework in which people who are concerned about particular internet content can make a complaint and have that complaint investigated. Under the scheme, ISPs and ICHs are not required to actively monitor or to classify content hosted on their services.

ICHs have a responsibility to remove prohibited content hosted in Australia from their service only once notified by the ABA of the existence of that content. This includes Internet content, notified in a special take-down notice, that is the same as, or substantially similar to, Internet content identified in an interim take-down notice or final take-down notice.

Similarly, it is only when overseas-hosted Internet content is notified by the ABA

to ISPs do ISPs have a responsibility to follow procedures set out in an industry code of practice (or in the absence of a code, an industry standard) for blocking access to that content. This includes Internet content notified by the ABA to ISPs that is the same as, or substantially similar to, Internet content previously notified by the ABA.

The anti-avoidance provisions of the Act specify that ICHs and ISPs are only required to respond to notices issued by the ABA.

Furthermore, there are a graduated range of enforcement mechanisms and sanctions contained in the Act to allow flexibility in dealing with breaches depending on the seriousness of the circumstances.

COMMUNITY CONCERN

The article also states:

*"[t]here is in fact a number of surveys and polls indicating an ambivalence towards Internet content regulation of the type proposed by the Act."*³

Findings from a three country international survey on attitudes to the Internet make clear that there is a high level of public perception that the Internet entails some risks for users and shows that Australians see industry, government and Internet users themselves as all having a part to play in the appropriate supervision and selection of Internet content.

The survey was undertaken in Australia, Germany and the USA by the Bertelsmann Foundation in co-operation with the Australian Broadcasting Authority during June 1999. It ascertains peoples' views on perceived risks associated with the Internet and practical ways of managing these risks. Please find attached a summary of the research findings.⁴

TECHNICAL AND COMMERCIAL FEASIBILITY

One of the areas of the new legislation that has been subject to considerable comment is the area relating to the

blocking of prohibited content hosted overseas. In the first instance, this matter is to be dealt with by industry codes of practice. It is only if industry codes are not developed and in place by 1 January 2000 or if a registered code of practice is found to be deficient, the ABA will need to move to the development of an industry standard.

In the event that neither a code of practice nor industry standard is in place, the ABA has the power to issue access-prevention notices directing all ISPs known to the ABA to take all reasonable steps to prevent end-users from accessing prohibited content hosted overseas.

In determining whether particular steps are reasonable, regard must be had to the technical and commercial feasibility of taking the steps. The issue of reasonableness will also be informed by the matters set out in section 4 of the Act which include:

- Avoiding the unnecessary imposition of financial and administrative burdens on ISPs and ICHs;
- The accommodation of technological change;
- The encouragement of the development of Internet technologies and their application;
- The practical provision of services to the Australian community; and
- The supply of Internet services at performance standards that reasonably meet the social, industrial and commercial needs of the Australian community.

Jon Porter is Assistant Manager, Online Services Content Regulation at the Australian Broadcasting Authority.

1. 'Internet Censorship: See No Evil, Speak No Evil, Hear No Evil', *Communications Law Bulletin*, Vol 18 No 2 1999, page 3.

2. Ibid, page 3.

3. The full report contains detailed comparative data for the three countries that participated in the study and can be accessed at the ABA's website.

4. Ibid, page 4.

FAIR WHEELING AND DEALING

Does Channel 7's multi million dollar payment for exclusive Olympic broadcast rights in Australia guarantee it absolute exclusivity? Geoff Dilworth examines how the fair dealing provisions of the Copyright Act allow some legitimate erosion of exclusive rights by competitors.

FAIR DEALING – AN OVERVIEW

Under sections 40-43 of the *Copyright Act 1968* ('Act') there are four categories of fair dealing, namely research and study; criticism or review; reporting of news; and the giving of professional advice.

Why have these fair dealing sections in the Act? One view expressed in relation to the fair use provisions of the United States *Copyright Act* was: -

"Its origins lie in judge made attempts to moderate the harsh or inequitable impact of the copyright law on sometimes unforeseen circumstances. Fair use permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."

The Australian Copyright Council expresses it thus: -

"The Fair Dealing defences.... have traditionally been formulated to ensure that the advancement of knowledge and the creation of new works is not stifled by excessive fetters on the ability of creators to draw on the work of those that preceded them."

The concept of fair dealing is not simply a creature of statute and existed well before the introduction of the Act: -

"It is perhaps as old as copyright protection itself. The modern statutes merely codify the concept which has evolved through a large and wide ranging body of case law."

In order to place fair dealing in the context of copyright infringement, it is useful to consider some infringement basics. If copyright subsists in a published news article, then an unauthorised reproduction of the literary work (or a substantial part of it) will amount to an actionable infringement. Another

element of infringement is that the infringer must have copied, either directly or indirectly, the original article of publication. Copyright is not like patent law which bestows monopoly rights. If it were possible to reproduce the article without copying the original article, that is by independent mental and physical process, then there of course will be no infringement. An example would be if two journalists obtained independently of each other the same interview from the same source and the result was similar in its expression.

IS IT NEWS AND IS IT FAIR?

If your purpose is news reporting and your treatment of the copyright owner's product is fair then you, the infringing journalist or publisher, will be able to use the copyright owner's product with impunity provided in the case of news reporting in a newspaper, magazine or periodical it is sufficiently acknowledged.

In *Beloff v Pressdram Limited* the plaintiff journalist was asked whether what she had written was news and she replied: -

"It is news in the sense that everything I write is news. The fact of my writing this article is news; and of my writing any other article in the Observer is news."

The interesting aspect of this examination by the court is that it is not the "Maudling-Hoffman" affair which was being examined for its newsworthiness but the fact that the Observer's political correspondent had written about the affair that made it news. Mr Foot of Private Eye in evidence said: -

"It was a very significant development that the political correspondent (of the Observer Newspaper) had written a large article on this... Such an article is not far off editorial comment and is therefore very important."

The plaintiff's counsel conceded that the fact that the Observer had published an article on the affair was important. The judge acknowledged that the plaintiff also conceded that the article in Private Eye was for the purposes of reporting current events within the meaning of the legislation.

Ungoed Thomas J also noted that it seemed that it was common practice in the press to receive and use leaked confidential information, and this practice did in fact occur at the Observer itself. Nevertheless, the judge was of the view that the leaking of the memorandum and its publication were clearly unjustifiable and in his view constituted a dealing which was not fair within the statute.

Whilst one could view the judge's finding as somewhat authoritative, that is, that the publication of leaked information is prima facie an unfair dealing, the judge was also of the view that this case was essentially: -

"an action for breach of confidence under the guise of an action for infringement of copyright - an action springing from breach of confidence but framed in breach of copyright."

The reason for the judge's comments could be because of his view, as confirmed by the plaintiff's counsel, that the case would never have been brought to court except that the memorandum published by Private Eye disclosed a confidential source of the Observer.

In *Commonwealth of Australia v John Fairfax and Sons Limited*, Mason J followed *Beloff* in finding that the publication of leaked government documents, which could not without the leak have been published at all, was not a "fair dealing" of previously unpublished works.

In *Associated Newspapers v News Group* the defendant newspaper had merely presented the correspondence to the

public and there had been little or no criticism or review. This case involved the Daily Mail Newspaper, which had obtained exclusive rights to a series of letters between the late Duke and Duchess of Windsor. A series of these letters was printed in the newspaper. The defendants, who were the owners of the rival Sun Newspaper, printed one of the letters and a portion of another letter in the Sun.

In *Fairfax and Associated Newspapers*, the publication of the verbatim quotations of the government documents and the royal love letters respectively was held not to be a fair dealing for the purposes of criticism and review. Yet there is an argument, based on free speech principles, that it is the verbatim quotations themselves that are intrinsically newsworthy under the news reporting category.

In *Associated Newspapers*, Walton J stated that the media is not prevented by copyright restrictions from publishing information or facts about an event in the so called public interest. His Honour said the media are simply not able to publish using the precise words which somebody else has used. This of course is the classic application of the idea/expression dichotomy to the complaint that copyright restricts free speech. Whilst it is true that news per se, like information, facts and ideas, is not able to be protected or restricted by copyright, it is here that the dividing line between ideas and their expression becomes blurred when examining the verbatim comments of political figures.

Walton J then went on to examine whether what the Sun printed could be labelled "reporting current events" within the meaning of the UK legislation. It is clear that the Australian equivalent of the relevant section is not restricted to current events and is therefore able to be read more widely. Walton J stressed the word "current" and stated that whilst the death of the duchess was a current event, the actual content of the letters was not. Apparently the content of the letters made it clear that the duchess wanted them to be published but again the judge did not see this as a current event. His Honour did give some examples of where non-current events might come within the section, but only if the historical material was reasonably necessary to deal with current events. In *Beloff*, *Ungoed-*

Thomas J by contrast appeared to accept that "current events" and "news" were synonymous.

On the question of fairness, Walton J followed traditional lines in finding that it is not a fair dealing for a trade rival to take copyright material and use it for their own benefit.

Dealing with the amount of the copyright material used, His Honour noted that a substantial portion of the letters was reproduced, but stated that the whole of the letters could well have been reproduced as an illustration of a theme other than the mere content of the letters. He gave as an example an article commenting on the instruction in grammar given to monarchs of the House of Windsor.

This view is certainly a little less restrictive than that of Whitford J in the earlier case of *IPT Publications* and others v *Time Out Ltd* and others where it was held that:-

"The Defendants could not avail themselves of the defence of fair dealing either under Section 6 (2) (criticism or review) or under Section 6 (3) (reporting of current events) of the Act. These defences were intended to protect reviewers or commentators who wished to quote part of the copyrighted work to illustrate such review or comment..."

Whitford J went on to observe that:-

"Once it is established that the whole or a substantial part of the copyrighted work has been produced the defences under Section 6 (2 and 3) are unlikely to succeed."

In *Express Newspapers PLC v News (UK) Limited* a journalist from the Daily Express (owned by the plaintiff) obtained an interview with a Miss Pamela Bourdes on an airline flight. Miss Bourdes was in 1989 enjoying notoriety for her alleged liaisons with public figures. The Daily Express published the "exclusive interview" and on the same day "Today" (owned by the defendant) published an article based on the Daily Express story and reciting verbatim the comments by Miss Bourdes in the Daily Express story. The defendant counterclaimed against the Plaintiff arising out of a quite separate

story alleging that the defendant had done to the plaintiff just what the plaintiff had alleged the defendant had done in the Pamela Bourdes incident. The court held that a party could not plead two inconsistent cases and by way of obiter dicta the judge said that the case was more to do with journalistic ethics rather than a genuine commercial dispute.

In *De Garis and Moore v Neville Jeffress Pidler Pty Limited (The Journalist's Case)* the plaintiff alleged that the defendant's news clipping service had infringed their copyright in articles published in daily newspapers. The copyright material reproduced by the defendant was clipped then photocopied from the plaintiff's newspapers and the input by Neville Jeffress Pidler was fairly limited. Beaumont J in the Federal Court had no difficulty in holding that section 41 of the Act did not apply.

Importantly, His Honour held that "news reporting" under the Act was not confined to current events and was to be interpreted by means of a dictionary definition.

With respect to fairness generally, Beaumont J held that reasonable proportions of the copyright material only could be taken. As the defendant took the whole of the plaintiff's work without commentary, it was not fair.

COMMERCIAL PURPOSE - NO FAIR USE?

In *The Journalist's Case* the court considered the commercial purpose of the news clipping service and cited recent U.S. cases as authority for the proposition that a commercial purpose militates quite strongly against a finding of fair use. In the authoritative 1994 decision of the U.S. Supreme Court in *Universal City Studios v Sony*, it was held that copying onto a video tape cassette for commercial purposes was presumptively unfair. This view was in the course of finding that home video taping for time-shift purposes was a private non commercial activity.

However, the view that commerciality taints any fair use has recently come under attack by the U.S. Supreme Court in *Campbell v Acuff-Rose Music Inc* where the court examined in detail the fair use provisions in the U.S. *Copyright Act*.

Fair use in the United States is governed by section 107 of the US Act. The purposes are similar to those in Australia and include criticism, comment and news reporting. Section 107 sets out certain factors which shall be considered, namely:-

1. purpose and character of use (including whether of a commercial nature);
2. nature of copyright work;
3. relative amount used; and
4. effect upon potential market.

These factors correspond almost identically with section 40 (2) (a) to (c) of the Australian Act.

The claim in *Accuff-Rose* was brought by the composers of the song "Oh Pretty Woman" against 2 live crew, a rap group, who produced a parody of the song entitled "Pretty Woman". The Court of Appeals had relied upon the Sony decision and found that the commercial nature of the parody meant that it was not fair within section 107. However, on appeal, the Supreme Court said that by "...giving dispositive weight to the commercial nature of the parody the Court of Appeals erred" and further stated:-

"The Court of Appeal's elevation of one sentence from Sony to a per se rule runs as much counter to Sony itself as to the long common law tradition of fair use adjudication".

WORLD CUP SOCCER

Whilst the U.S. Supreme Court in *Sony* in 1994 upheld the presumption of no fair use where commercial gain was a motive, in the United Kingdom in an earlier case the same commercial factor was examined. In *British Broadcasting Corporation v British Satellite Broadcasting Limited* the issue involved unauthorised use of copyright material by trade rivals in the news reporting industry. The BBC paid just under 1 million pounds for the exclusive right to broadcast the 1990 World Cup football tournament played in Italy. BSB in its sportsdesk program played excerpts taken from the BBC broadcasts. The excerpts

varied in length and were played within 24 hours of the game. The excerpts concentrated on goals scored and near misses and were played by way of an introduction and also in slow motion.

There was no doubt as to the copyright in the BBC broadcast or that BSB infringed BBC's broadcasts in this manner. BSB relied on the fair dealing provisions in the United Kingdom Copyright Act, namely section 30(2) which referred to "reporting current events" (not the reporting of news as in the Australian equivalent). The BBC relied on *Beloff and Johnstone v Bernard Jones Publications Limited* as authority for the proposition that the dealing must be fair for the approved purpose, namely reporting current events, and not for any other purpose. The BBC submitted that the other purpose of BSB was to compete with the BBC for a sports audience and to build up a sports audience more quickly using BBC material. Scott J conceded that BSB was endeavouring to produce programs that would be attractive to viewers and went on to say:-

"But if a program is a genuine reporting of current events, it is, in my opinion, absurd to say that an endeavour to make the program more attractive is an oblique motive"

and

"... the fact that the other broadcaster is a commercial rival of the copyright owner does not "ipso facto" take the case outside fair dealing. It is a factor, and perhaps in some cases a very weighty factor, to be taken into account into considering whether there has been fair dealing, but it is no more than a factor."

Scott J had no difficulty in finding that the BBC's programs were current events for the purposes of section 30(2):-

"The Sportsdesk program seemed to me to be genuine news reports, albeit confined to news of a sporting character."

Whilst there are few Australian cases on this point, it is reasonable to assume that an Australian court would take a similar view given the similar legislative provisions in both statutes and the wider definition of 'news' in the Australian Act.

FIRST PUBLICATION RIGHTS

The copyright holder's right to first publication is considered to be a factor in fair dealing decisions both in the U.K. and in the U.S.. In *Harper and Rowe v Nation Enterprises* the U.S. Supreme Court held 6:3 that the Nation magazine had not dealt fairly with the unpublished written memoirs of former president Gerald Ford. Ford had contracted with Harper and Rowe to publish his memoirs and Harper and Rowe had contracted with Time Magazine for the pre publication of excerpts of the book. Nation Magazine had obtained an unauthorised copy of the book and hurriedly prepared a summary of the book consisting of verbatim quotes which it freely admitted was designed to "scoop" the Time article. The memoirs were politically of interest as they contained former President Ford's account of Watergate and his pardon of former President Richard Nixon. The majority believed that the right to first publication was essentially a commercial right in that the right lies primarily in exclusivity. The court went further and said:-

"The obvious benefit to author and public alike of assuring authors the leisure to develop free of expropriation outweighs any short term "news value" to be gained from premature publication of the author's expression."

Under the "purpose" factor of section 107 of the U.S. Act the majority believed that the news value in the Nation article was the fact that it was scooped:-

"(Nation) actively sought to exploit the headline value of its infringement, making a "news event" out of it's unauthorised first publication of a noted figure's copyrighted expression."

The majority in *Nation* stressed the commerciality of the infringement in that:-

"The user (Nation) stands to profit from exploitation of the copyrighted material without paying the customary price".

Nation was decided by the Supreme Court after *Sony* and before *Accuff-Rose*. As a

result of the latter decision, the factor of commerciality may not be as much a determining factor as it was for the Supreme Court in both the Sony and Nation cases.

In Nation, the U.S. Supreme Court found that the investment of money and resources into creating a work should not be forfeited by pre-emption of the right to first publication. Lloyd and Mayeda comment that this majority view hints that the decision may have been different if there was a possibility of the information not being released to the public in the near future.

Mason J in Fairfax held that a dealing with an unpublished work under section

41 of the Act was an important factor in deciding whether such dealing was fair. The statement by the majority in Nation certainly followed that same reasoning. Subsequent cases in the United States also support the same argument, but in New Era Publications International v Henry Holt and Co the judge said:-

"... I do not think that Harper and Rowe ... leads to the inevitable conclusion that all copying from unpublished work is per se infringement."

Indeed this issue is important to the media as well as to historians and biographers who argue that they should be able to use such unpublished material belonging to

public figures as a fair dealing. The argument is that the media should not have to pay those public figures for the use of the previously unpublished material. The argument is presumably strongest in the United States where the First Amendment is a factor. In Nation the court held that there was no reason to expand the fair use doctrine to what amounted to a public figure exception to copyright.

Geoff Dilworth is a lawyer at Taperell Rutledge in Gosford. This is an edited extract of the original article without footnotes.

Kenny's pal is missing

ASTRA has had the unpleasant task of explaining the disappearance of Cartman to his pal, Kenny and to his mates at the Comedy Channel.

Cartman's disappearance seems to have followed a rather big night at the CAMLA Dinner held at the Australian Museum. Nobody was keeping a close eye on Cartman's behaviour and during the final rounds of trivia, it appears that he left the premises arm-in-arm with an unidentified new-found "friend".

Cartman may well have presented himself as an available long-term companion, however his true friends at the Comedy Channel are most upset and unamused by his disappearance and seek your assistance in convincing Cartman to return to his real home.

If anyone knows the whereabouts of Cartman could they please contact Debra Richards or Emma McDonald at ASTRA on 9200 1494 or 0407 389 639. We are only concerned for his safe return. He will be grounded for disappearing, but his "friend" will only be thanked for being a responsible adult.

The Communications Law Bulletin is the journal of the Communications and Media Law Association (CAMLA) which is an independent organisation which acts as a forum for debate and discussion and welcomes the widest range of views. The views expressed in the Communications Law Bulletin and at CAMLA functions are personal views of the respective authors or speakers. They are not intended to be relied upon as, or to take the place of, legal advice.

Contributions and Comments

are sought from the members and non-members of CAMLA, including features, articles, and case notes. Suggestions and comments on the content and format of the Communications Law Bulletin are also welcomed.

Contributions in hard copy and on disk and comments should be forwarded to:

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CAMLA provides a useful way to establish informal contacts with other people working in the business of communications and media. It is strongly independent, and includes people with diverse political and professional connections. To join CAMLA, or to subscribe to the Communications Law Bulletin, complete the form below and forward it to CAMLA.

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