

Communications & Media Law Association Incorporated

Contributions & Comments

The Communications and Media Law Association (CMLA) brings together a wide range of people interested in law and policy relating to communications and the media. CMLA includes lawyers, journalists, broadcasters, members of the telecommunications industry, politicians, publishers, academics and public servants.

Issues of interest to CMLA members include:

- defamation
- broadcasting
- copyright
- advertising
- information technology
- telecommunications
- censorship
- film law
- telecommunications
- the Internet & on-line services
- privacy
- contempt

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

Shane Barber

c/- Truman Hoyle Lawyers
Level 18, ANZ Building
68 Pitt Street
SYDNEY NSW 2000
Tel: +612 9232 5588
Fax: +612 9221 8023
email: sbarber@trumanhoyle.com.au

Page Henty

C/- Allens Arthur Robinson
The Chifley Tower
2 Chifley Square,
Sydney NSW 2000
Tel: +61 2 9230 4000
Fax: +61 2 9230 5333
Email: Page.Henty@aar.com.au

CMLA Website

The Communications Law Bulletin is the journal of the Communications and Media Law Association (**CMLA**) 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 CMLA 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.

Disclaimer

Speakers have included Ministers, Attorneys-General, members and staff of communications regulatory authorities, senior public servants, executives in the communications industry, lawyers specialising in media and communications law, and overseas experts.

CMLA 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 CMLA, or to subscribe to the Communications Law Bulletin, complete the form below and forward it to CMLA.

Application for Membership

To The Secretary, CMLA, Box 545, Glebe NSW 2037
Tel/Fax: +61 2 9660 1645

Name:.....

Address:

Telephone:

Fax:

Email:

Principal areas of interest:

I hereby apply for the category of membership ticked below, which includes a Communications Law Bulletin subscription, and enclose a cheque in favour of CMLA for the annual fee indicated:

- Ordinary membership \$130.00 (includes GST)
- Student membership \$45.00 (includes GST)
(please provide photocopy of student card - full-time undergraduate students only)
- Subscription without membership \$150.00 (includes GST)
(list names of individuals, maximum of 5)
(library subscribers may obtain extra copies for \$10.00 each + GST and handling)

Signature:.....

Communications & Media Law Association Incorporated

Print Post Approved PP-234093/00011

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

Communications Law

The Emergence of Wireless Broadband in Australia and its regulation

Broadband in Australia is beginning to take-off at last. The latest figures from the Australian Competition and Consumer Commission (**ACCC**) show that as at December 2004 total broadband take-up was 1.5 million subscribers, which is more than double the number from a year earlier.¹

The Federal Government is working hard to drive the roll out and take-up of broadband in Australia. The National Broadband Strategy was launched in 2004 with a vision that:

"Australia will be a world leader in the availability and effective use of broadband, to deliver enhanced outcomes in health, education, community, commerce and government to capture the economic and social benefits of broadband connectivity".²

The Government has now also released the National Broadband Strategy Action Plan which outlines more than \$300 million in Federal initiatives to encourage the roll out of broadband infrastructure³. This is in addition to the Higher Bandwidth Incentive Scheme (**HIBS**) which is a Federal program aimed at providing access to higher bandwidth services for people in regional, rural and remote Australia at prices comparable to those available in metropolitan areas.

Broadband means different things to different people. In general terms, it defines the capacity to transmit large quantities of information quickly over a communications network. It is a reference to capacity rather than the form (analogue or digital) in which or the means by which information is transmitted⁵.

For reporting purposes, the ACCC defines broadband as any high speed connection providing more than 200kbit/sec over a mix of media. This definition excludes PSTN dial-up connections that run at 56 kbit/sec and ISDN dial-up connections which run at either 64 or 128 kbit/sec⁶.

Broadband enables the provision of rich multimedia services and greater

volumes of data to subscribers. The deployment of always-on, high-speed

internet access has the potential to spur the information economy in areas

as diverse as business, healthcare, education and research⁷.

Volume 24 No 1
June 2005

Inside
This Issue

The State of Play in
Games Regulation

Movement at the Stations
Digital Radio Update

Digital Rights Management
in Television

Introducing Your New
Regulator: ACMA

The ACCC Approaches
Telecom Broadband Policy

The Industry's Why?

Communications Law Bulletin
Editor: Shane Barber & Page Henty

Printing & Distribution: BEP Printers
<http://www.bep.com.au>

Contents

The Economics of Wireless Broadband in Australia

Peter Mulligan looks at wireless broadband in Australia and its regulation.

The State of Play in Games Regulation

Some telecommunications issues in the evolution of Australian game laws and policies – Part 1

Movement towards Digital Sector Update

The Federal Government is on its way to developing a policy and regulatory framework for the digital sector.

Carola Henderson's position

Regulation of the Australian Communications and Media Authority Act 2005 and related legislation, from a practitioner's perspective.

Introducing New Regulation in Television

Revised focus on efficient regulation from Australian broadcasters' perspective.

Clarke O'Neill gives an overview of the Australian Communications and Media Authority Act 2005 and related legislation, from a practitioner's perspective.

The ACCC's Approach to Telstra Broadband Pricing – The Industry ASKS Why?

Angus Henderson and Michelle Rowland look at the ACCC's recent decision to settle a complaint against Telstra over its broadband pricing.

The Rise of Wireless Broadband

Wireless broadband is simply a broadband internet service provided over a wireless connection. It can be provided from a number of bands of the radio-frequency spectrum and using various wireless technologies. Examples include the 2.4GHz, 5.2GHz and 5.8GHz class-licensed bands for wireless fidelity (or 'WiFi') services, 3G telephony systems which use wideband digital radio technology and Telstra's Mobile Broadband service which uses Ev-DO (evolution-data optimized) technology from Nor-

tel. They have great potential for hours. They have great potential for rural and regional areas where the cost of deploying new fixed line services is prohibitive.

Technologies and Standards

A number of different technologies and standards have emerged for the delivery of wireless broadband services. They include WiFi and WiMAX (Worldwide Interoperability for Microwave Access). WiFi is a local area service while WiMAX is a wide area service.

The Institute of Electrical and Electronic Engineers (IEEE) is the US standards-making body responsible for the development of standards for WiFi and WiMAX. WiFi generally refers to the IEEE 802.11 series of standards covering wireless short-range communications equipment. WiMAX refers to the 802.16 series of standards currently being finalised by the IEEE⁸.

Short-range or local area services are generally provided using equipment that complies with the 802.11 series from a base station¹⁰. With a range such

of standards. This includes 802.11a in the 5.2GHz and 5.8GHz bands and 802.11b & g in the 2.4GHz band.

The 802.11 standards support the transmission of information by radio signals from a laptop computer (using a network access card or embedded chip) to a nearby access point. This enables users to access the internet within a dwelling, a wireless local area network (WLAN) of a business or a WiFi 'hotspot'. Network coverage of up to 100 metres from a base station is often available.

WiFi hotspots have been installed in locations such as cafes, airport lounges, restaurants, shopping centres and university campuses. Some hotspots provide free access to the internet while others charge a time-based fee. Examples of wireless services include SkyNetGlobal's wireless hotspots service, BigAir's wireless broadband service, the Telstra Wireless Hotspots' service and the 'Optus Wireless Connect' service.

When released, the 802.16e version of WiMAX will be a significant improvement upon WiFi. It will extend coverage over longer distances and at higher speeds, enabling subscribers to access the internet up to about 50 kilometres from a base station¹⁰. With a range such

status in Australia's telecommunications-specific competition law. This is probably the first time any industry participant, practitioner or commentator has heard the regulator use the term. There is no evidence of any legislative intention that encourages the ACCC to address anti-competitive conduct in the method or for the purpose set out in the Protocol.

It is curious that the ACCC has treated as a novelty an issue which could have been addressed through the application of its explicit powers, noted above. This irregularity is particularly noticeable since, in its submission to the Productivity Commission's review of telecommunications-specific competition regulation in 2000, the ACCC argued that just because the provision had thereto never been used, this was no reason to lessen its powers. It was important for regulators to have such statutory powers, which it described as "insurance" to assist efficient information-gathering and enforcement. In this case, the ACCC does not appear to want to rely on its "insurance" powers when it would have appeared appropriate to do so.

The Protocol also raises the following practical limitations:

- The Protocol only applies to 'list price reductions' and 'market-wide' specials. It does not apply to price reductions to a significant proportion of customers where there may be a price squeeze with significant anti-competitive consequences.
- The Protocol only applies to Big-Pond ADSL pricing.
- The ACCC has not extracted from the settlement the ability for it to stop Telstra from proceeding with pricing notwithstanding any ACCC view that the pricing is anti-competitive. The Protocol is only a notification device. Admittedly, an injunctive power would have gone beyond the powers the ACCC has under Part XIB, but given Telstra's conduct and the accruing potential penalties against it, it would have seemed within reach for the ACCC to obtain such a power.



Some of the benefits of wireless broadband for the provider are the relatively low cost of establishing a network (compared with rolling out a new cable network) and the speed with which it can be deployed. For the customer, the service is simple to set up and in many cases allows the customer to change locations without having to reconnect. It has the potential to provide higher data rates over greater distances than DSL or cable technologies⁸.

Wireless systems are a viable alternative to Telstra's copper pairs for last mile access to the internet. They are attrac-

The ACCC's settlement with Telstra effectively ends any action that is likely to follow on from the price squeeze of February 2004. While private parties

Michelle Rowland is a Lawyer in the Sydney office of Gilbert + Tobin, where Angus Henderson is a Partner

Broadband Product	Notice Period	Information Required	ACCC Response
BigPond ADSL list price reductions	15 working days prior notice	Supporting information required (see below)	ACCC will express a preliminary view no later than 5 working days prior to proposed public announcement
BigPond market-wide specials of more than 2 months duration	15 working days prior notice	Supporting information required	ACCC will express a preliminary view no later than 5 working days prior to proposed public announcement
BigPond market-wide specials of more than 2 months duration	5 working days prior notice	Supporting information required	No time limit on ACCC to express a view
Extending a BigPond special beyond 2 months duration	10 working days prior notice	Reasons for extension and, if applicable, updated imputation testing	ACCC will express a preliminary view no later than 5 working days prior to proposed public announcement

are engaging in a process for deciding the appropriate retail and wholesale relatives.

Confidentiality and Access

The ACCC is required to treat all information provided by Telstra under the Protocol as confidential and is not permitted to disclose any materials provided by Telstra under the Protocol (except as required by law). This contrasts with the ACCC's ability to publicly disclose tariff information under the telecommunications specific sections of Australian competition law if the public benefit exceeds the public detriment in doing so (see discussion below).

- How will the Protocol work in practice to identify and stop anti-competitive conduct?

Importantly, a tariff filing direction would have provided two important additional benefits to the ACCC and the industry:

- Does the settlement kill off the issue?

As to the first question, under Part XIB of the TPA the ACCC can issue tariff filing directions to any carrier or carriage service provider with a substantial degree of power in a telecommunications market. The notification effect of such a tariff filing direction is very similar to the Protocol; in that the relevant carrier or carriage service provider must notify the ACCC of its pricing conduct as described in the tariff filing direction.

- It would have allowed the ACCC to disclose information collected from Telstra if the public benefit in doing so had outweighed the public detriment.

This contrasts with the Protocol, which prohibits disclosure of information collected from Telstra. Such a restriction raises the clear question of how the ACCC can assess anti-competitiveness without making enquiries of Telstra's competitors.

- Part XIB has an enforcement mechanism for tariff filing directions, whereas the enforcement mechanism for a breach by Telstra of the Protocol is unclear.

We would argue, however, that issuing a tariff filing direction would have been a more appropriate regulatory response to the problem in this case. The ACCC had already found that Telstra had market power in the wholesale broadband market, thus allowing the ACCC to issue a tariff filing direction to Telstra. In this way it could have gathered the same level of information it is proposing to gather under the Protocol.

as this, WiMAX will be an attractive solution for sparsely populated areas such as rural and regional Australia.

Two new means of obtaining wireless broadband access are through the services provided by Unwired and Personal Broadband Australia, respectively. Unwired provides wireless broadband using spectrum licences in the 3.4-3.5GHz band of the radiofrequency spectrum. To access the service, the user installs a USB or ethernet modem into a laptop. At this stage, this service is intended for stationary users only. Personal Broadband Australia provides wireless broadband using spectrum licences in the 2.1GHz band of the radiofrequency spectrum. This is the same frequency as that employed for 3G mobile phones. It uses iBurst technology from Arraycomm to provide internet access to users that are either stationary or mobile. To access the service, the user installs an insertable PC card or a portable modem into a laptop top.

Compared to WiFi, the Unwired and iBurst services have the potential to provide better coverage with greater security and quality of service. This makes them a real threat to Telstra's dominance of the local loop.

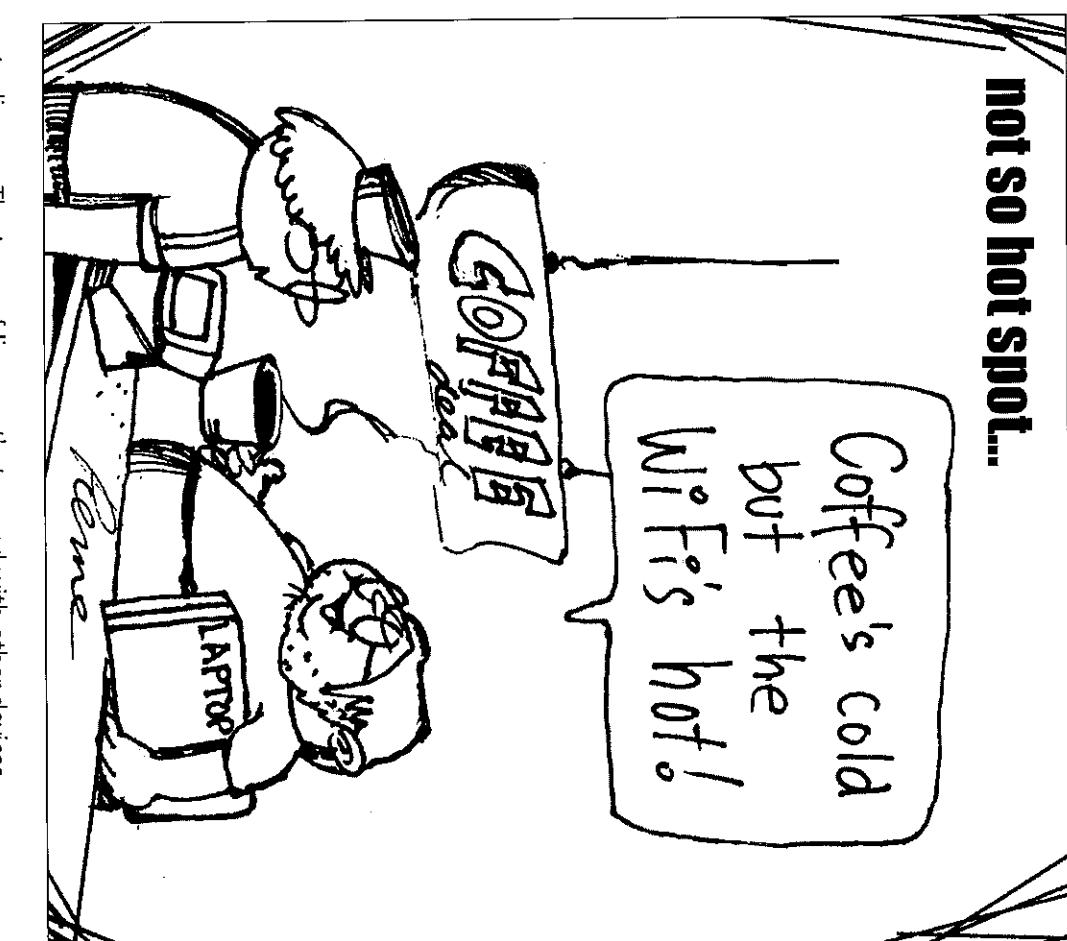
The Regulatory Regime

The Commonwealth Government has recently stated that it favours a responsible regulatory regime which maximises flexibility in the development and application of broadband supporting technologies¹¹. However, some have argued that the rapid emergence of wireless broadband presents challenges for regulators, especially in meeting the demand for new spectrum¹².

Wireless broadband is affected by two discrete but related regulatory regimes: the *Radiocommunications Act 1992 (Radiocommunications Act)*, which regulates access to and use of the radiofrequency spectrum and the *Telecommunications Act 1997 (Telecommunications Act 1997 (Telecommunications Act))*, which regulates the provision of telecommunications services.

The settlement and Protocol immediately raises a number of questions:

- Why didn't the ACCC exercise its powers under its tariff filing powers, instead of entering into a commercial agreement with unclear enforceability?



not so hot spot...

Coffee's cold
but the WiFi's hot!

Two people are sitting at a table. One person is holding a coffee cup and says "Coffee's cold". The other person is holding a laptop and says "but the WiFi's hot!".

The caption "not so hot spot..." is written in a stylized font above the people.

are mandated are spectrum apparatus licences and class licences.

Class licences and apparatus licences authorise the operation of radiocommunications equipment, while spectrum licences authorise the use of spectrum space.

Class licences

The operation of WiFi equipment is authorised by a class licence under the Radiocommunications Act. Class licences are a form of licence that do not have to be applied for, and no licence fees are payable. They are open, standing authorities allowing anyone to operate particular radiocommunications equipment, provided that the service and the device satisfy the relevant licence conditions¹³.

As an example, users of 802.11b equipment share the same spectrum with equipment such as household microwave ovens, cordless phones, barcode readers, biomedical telemetry, video surveillance and other devices in the industrial, scientific and medical (ISM) band¹⁴. The potential for interference is obvious.

Class licences are regulated under Part 3.4 of the Radiocommunications Act. The Australian Communications Authority (ACA) issues, imposes conditions, varies and revokes class licences by way of a notice published in the Commonwealth Gazette.

The relevant class licences for the operation of WiFi equipment are the *Radiocommunications (Spread Spectrum Devices) Class Licence 2002 (SSD Licence)* and the *Radiocommunications (Low Interference Potential Devices) Class Licence 2000 (LIPD Licence)*.

The SSD licence specifies conditions of operation for short-range devices using spread spectrum techniques.

In general terms, the Radiocommunications Act prohibits the operation of radiocommunications equipment with-

the same limits. Users compete to access the same spectrum and this often results in interference between users

The State of Play in Games Regulation

Simone Brandon identifies some of the problems with Australia's multi-level approach to regulating games on mobile phones and elsewhere and outlines Hutchison's position

Instructions

When the Greek government introduced a law banning any form of electric, electro-mechanical or electronic game devices many people wondered what the regulatory world was coming to. The Greek government passed the law because it said it was incapable of distinguishing innocuous video games from illegal gambling machines and so it was best to ban all games¹. Whilst the law was subsequently held to be unconstitutional² it begs the question - what is the best way to regulate games? In the Australian context the issue is broader than distinguishing games from gaming or gambling. The key question is how to achieve regulatory consistency across game content regardless of the means of delivery.

Level 1

The first regulatory stage is the Commonwealth Classification (Publications, Films and Computer Games) Act 1995. A "computer game" is defined as a computer program and associated data capable of generating a display on a computer monitor, television screen, a computer monitor, television screen.

"The key question is how to achieve regulatory consistency across game content regardless of the means of delivery"

Games are available to purchase and play using a variety of technologies. Platforms include PC, console (eg XBox, PS2), handheld (eg GameBoy Advance), mobile proprietary handsets (eg N-Gage) and miscellaneous applications (eg toys such as Tamagotchi and PDAs).

In the mobile telecommunications arena games are offered via SMS, WAP and Java applications. Many mobile phones offer sophisticated games for users – the advent of 3G technology even allows for real-time multiplayer game experiences to occur between users who do not know each other and may be in different locations within Australia³. Apart from the range of games and the quality of game experience the main difference to the user is how the game is accessed. PC, console and handset games are purchased on physi-

The second regulatory framework is found within Schedule 5 of the Broadcasting Services Act 1992 (Online Provisions). These provisions regulate the provision of 'Internet Content' – defined somewhat circumspectly as stored information provided by means of a listed carriage service that enables end-users to access the internet.

Under the Online Provisions, a person may complain to the ABA about "prohibited content" or "potential prohibited content" on the internet, and the ABA must investigate the complaint. "Prohibited content" is content that has been classified Refused Classification or X by the OFLC, or as R where access to the content is not subject to a restricted access system. As there is no R rating for games, any game available on the Internet that has been refused classification would be prohibited content. A game will be potential prohibited content if it has not been classified by the OFLC, but if it were to be classified, there is a substantial likelihood that the content would be prohibited content.

If the ABA is satisfied that the game contains potential prohibited content, the ABA must request the OFLC to classify the content.

The Online Provisions clearly apply to the provision of games by Australian providers in Australia on the world wide web. Whether the Online Provisions extend to the provision of games (or content in general) delivered by a mobile carrier to a mobile phone has been a topic of debate between regulators and mobile carriers and is a topic that goes beyond the scope of this article.

The Department of Communications, Information Technology and the Arts (Department) is undertaking a review of the regulation of content delivered over mobile communications devices⁴. This review seeks to capture information about the range of convergent mobile devices, the breadth of content available, report on the extent to which existing regulatory approaches apply to new services and consider what additional regulation may be necessary.

Members

The ABA is restricted to a maximum of 7 members⁵, who can only be re-appointed once for a total appointment period of 10 years. In the ABA, the members can only be dismissed on very limited grounds, such as misbehaviour. The ACA has capacity for up to 5 members⁶, who may be dismissed on a number of grounds, including unsatisfactory performance for a significant period of time.

ACMA will be able to have up to 9 members, with an unlimited number of associate members¹⁰. There is no limit on the number of times that ACMA members can be reappointed, although there is still a total appointment time of 10 years (which includes any time as a member of the ABA or ACA)¹¹. The members will also be subject to provisions relating to disclosure of interests (both a standing obligation to disclose¹² and an obligation to disclose before deciding a particular matter¹³) and, like the ACA, the termination provisions are broader than those currently in operation in the ABA. ACMA members may be terminated for, among other things, unsatisfactory performance for a significant period of time, physical or mental incapacity, or misbehaviour¹⁴.

Divisions

The ACMA Act allows for the creation of Divisions of the Authority¹⁵. The Authority chooses which members are to comprise the Division, although the Chair of ACMA may nominate to be part of any Division¹⁶. The Authority determines which of ACMA's powers and functions are to be dealt with by each Division, and must make a determination with regard to the type of matters that a Division may deal with¹⁷. There is no restriction on the matters which may be delegated to a Division, provided that the matters delegated accord with the kinds of matters the Division can deal with¹⁸. Although neither the ACA nor ABA have the ability to create Divisions, the work presently undertaken by specialised committees in these agencies (involving their Authority members) represents an informal divisional structure in many instances. It is possible that formal ACMA Divisions will undertake much of the work of these existing Committees of the ABA (such as the

Planning & Licensing Committee) and the ACA (such as the Radiocommunications Steering Committee), although any decision to create and delegate to Divisions will ultimately be a matter for the ACMA members.

What Will Stay the Same?

The creation of ACMA is intended to be a minimal change model in terms of the impact it will have on the consumers, audiences and industries concerned. Detailed below are some of the key features of ACMA which will continue existing ACA or ABA arrangements.

Regulatory Regime

There will be no significant change to the existing regulatory regimes²³, so the current legislation and rules will still apply. One of the major recommendations of the ECITA Committee was that the ACMA Act be amended to require a major review of ACMA's operations and the entire regulatory policy for communications within 18 months of its establishment. This recommendation was reflected in an amendment made to the ACMA Act in the Senate, however it was not accepted by the House of Representatives and did not ultimately become part of the legislation. In its submission

"The merger will assist in dealing with present challenges facing the ACA and ABA in regulating new and emerging technologies"

to the Committee, DCITA indicated that changes to the regulatory frameworks will be addressed as and when they are needed²⁴.

Because there are not going to be any significant changes to the Acts that the ACMA will administer, ABA and ACA staff skills and knowledge will remain relevant, ensuring that the new Agency commences with the necessary corporate and historical knowledge concerning the operation, interpretation and application of the regulatory regimes.

Location and Staff Arrangements

In the first instance, ACMA will have three main offices located in Sydney, Canberra and Melbourne, with regional offices in Coffs Harbour, Newcastle, Brisbane, Cairns, Townsville, Darwin, Rockhampton, Adelaide, Hobart, Wodonga,

the ACA (such as the Radiocommunications Steering Committee), although any decision to create and delegate to Divisions will ultimately be a matter for the ACMA members.

Corporate Structure

Currently the ACA and ABA are government agencies prescribed under the Commonwealth Authorities & Companies Act 1997 (CAC Act). ACMA is to be prescribed under the Financial Management & Accountability Act 1997 (FMA Act). What does this mean in practice? Essentially, ACMA will be subject to a different, slightly more rigorous set of financial controls regarding issues such as procurement, expenditure, and budgeting, and it will also be subject to the Commonwealth Legal Services Directions in their entirety. The Chair, who will also be the Chief Executive of ACMA¹⁹, will have ultimate legal and financial responsibility for the management of the agency. Under the CAC Act, the ABA and ACA members bear collective responsibility for the strategic management of each agency. This will not be the case in ACMA. In ACMA, the role of Authority members will be

to perform the statutory functions of ACMA as set out in Division 2 of the CAC Act. Reflecting this position, the Authority members may not direct the Chair in relation to the performance of his or her functions and powers under the FMA Act or Public Service Act 1999²⁰.

Ability to Charge For Expenses

The ACMA Act allows ACMA to make determinations fixing charges for a range of services and matters in relation to which expenses are incurred by ACMA under the legislation it administers²¹. This represents a change only insofar as it relates to matters and services concerning the Broadcasting Services Act 1992. Presently, the ACA has the power to make determinations in the same terms as ACMA will be able to²² but the ABA has no such power.

Introducing Your New Regulator: ACMA

Clare O'Neil gives an overview of the Australian Communications and Media Authority Act 2005 and related legislation, what will change and what will stay the same

On 2 December 2004, the Australian Communications & Media Authority Bill 2004 (ACMA Bill) and related legislation¹ was introduced into the House of Representatives. The introduction of the ACMA Bill was the culmination of a lengthy and considered process commencing with the Department of Communications, Information Technology & the Arts (DCTA) discussion paper *Options for Structural Reform in Spectrum Management* in August 2002. The purpose of the legislative package is to create a new Australian media regulator by merging the Australian Broadcasting Authority (ABA) and Australian Communications Authority (ACA). Both the ABA and ACA have supported the merger, and Authority

hearings, the Committee reported on 10 March 2005. The report made 18 recommendations, some of which are discussed below.

A total of 9 amendments to the primary ACMA Bill (based largely on the ECTA Committee report recommendations) were made in the Senate on 16 March by the Australian Democrats and the Labor Party. These were disagreed to by the House of Representatives on the same day. The Senate did not insist on the amendments, and the ACMA Bill and related legislation were passed in their original form on 17 March 2005. It received assent on 1 April 2005³. ACMA will commence upon proclamation, or by 1 July 2005 at the latest⁴. A

"The creation of ACMA is intended to be a minimal change model in terms of the impact it will have on the consumers, audiences and industries concerned"

members and senior management of both organisations welcomed the decision to create a converged regulator. This paper will canvass some of the more significant provisions of the ACMA Bill and discuss the process of the Australian Communication & Media Authority's (ACMAS) creation.

Where is the Process up to?

Following its introduction, the legislative package passed the House of Representatives on 10 February. The provisions of the ACMA Bill and related legislation were referred to the Senate Standing Committee on the Environment, Communications, Information Technology & the Arts (ECTA Committee) on 8 December 2004². Following the receipt of submissions and public

speech to the 2005 Australian Broadcasting Summit, ACMA will be operating in a regulatory environment that is highly dynamic, unpredictable and varied - new digital technologies are

allowing previously distinct sectors to

compete across increasingly convergent markets, using a range of different delivery platforms⁵. A primary example of these new technologies are the third generation mobiles, which may offer telephony, online and broadcasting-type services carried on the same network to a single piece of equipment. In such an environment, the maintenance of two separated regulators dealing with different sectors of the media is neither practical nor effective⁶.

In its submission to the ECTA Committee, DCTA noted that the formation of ACMA will facilitate a co-ordinated response to converged technologies, and that a combined Authority will be better positioned to understand and respond to emerging market trends in the area⁷. A single regulator for media and communications issues will also be advantageous as it will provide a single point of contact for industry on relevant matters.

The new merged authority will also be in a position to consolidate arrangements in areas such as the planning of the radiofrequency spectrum (currently the ACA plans all spectrum other than the broadcasting services bands, which are the responsibility of the ABA) and the issuing of apparatus licences under the Radiocommunications Act 1992

(this is currently the responsibility of the ACA, with some powers delegated to the ABA in respect of apparatus licences for broadcasters). It will also be able to work through content issues where currently both the ABA and the ACA have areas of jurisdiction, such as new mobile services.

Why Merge?

Digital convergence issues and the increasing overlap of functions between the ABA and ACA (for example, in areas such as mobile and internet content regulation, licensing, spectrum planning, and the regulation of telephone sex services) provide the primary basis for the merger of the ACA and ABA. The merger will assist in dealing with present challenges facing the ACA and ABA in regulating new and emerging technologies. As pointed out recently by ABA Acting Chair Lyn Maddock in a

The closing date for submissions to this review was in early September 2004 however it is not known when a report will be delivered. The mobile content regulation review follows on from the Department's review of the Online Provisions which commenced in September 2002 - the report was made public in May 2004.

First person shooter

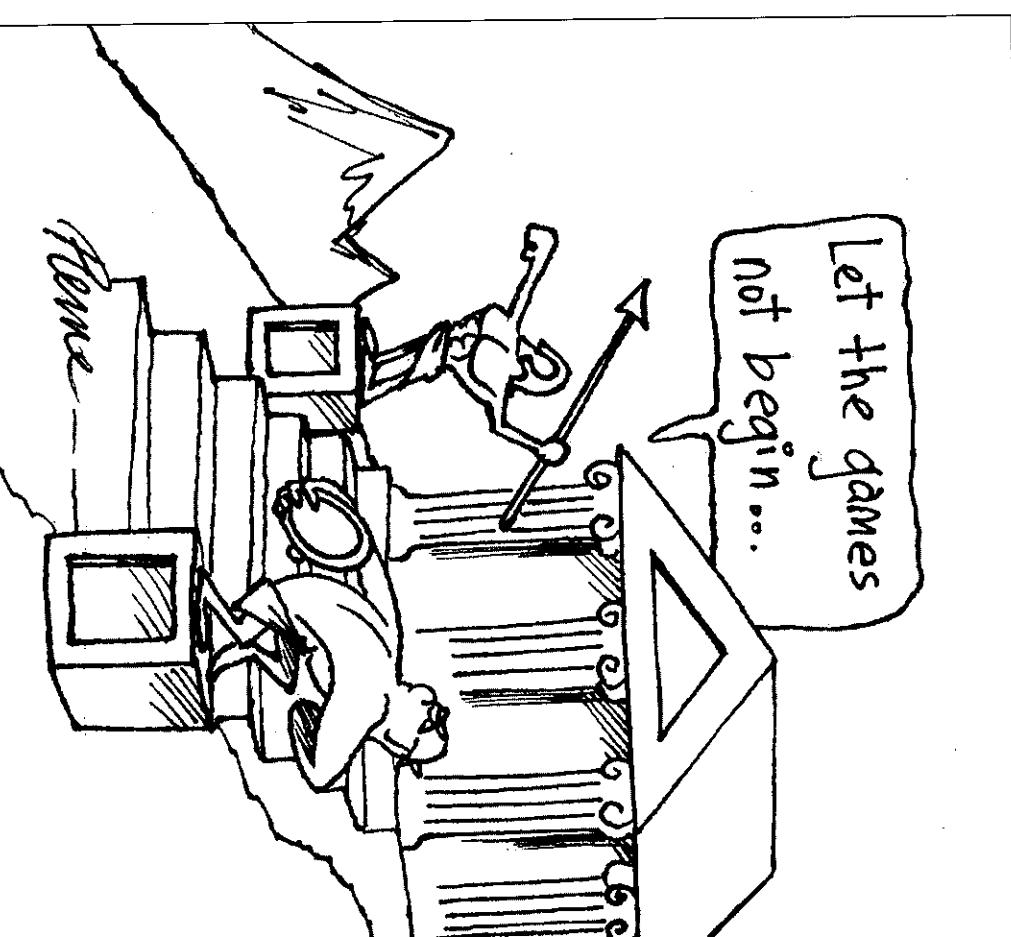
The Department has stated that the "nature of the access device (whether it is a PC, games device or 3G mobile phone) does not affect the question of whether the content is regulated by Schedule 5"⁸. Consistent with this reasoning, Hutchison's view is that the Online Provisions and supporting Code of Practice developed by the Internet Industry Association (IIA) provide a working model of government and self-regulation including complaints investigation and initiatives such as education and research. This model can similarly be adapted to cover new developments in content delivery, including games, both to fixed and mobile devices whether or not they are telecommunications devices. It would be a curious result if the games used by purchasers of a Nokia N-Gage as a games console (and to make a few calls) were regulated by a different regime to the games used by a the purchaser of a mobile.

A revised IIA Code of Practice in relation to Internet Content (IIA Code) was available for public comment and was registered by the ABA at the end of May 2005. The IIA Code incorporates new provisions specifically aimed at the regulation of content including games delivered to mobile devices. These provisions have been drafted with the protection of consumers against the inappropriate supply of adult content in mind, and with the objective of maintaining regulatory consistency.

Hutchison and other industry players were actively involved in the drafting of the IIA Code. The underlying intent of that code is to enable the assessment of content including games by authorised assessors based on the OFLC categories but not to incorporate the formal OFLC pre-classification scheme, requiring classification by the OFLC.

Where text, visual images and games are likely to contain sex, violence,

Let the games not begin...



nudity, drug use or adult themes, an appropriately qualified (OFLC trained) person within the carrier, content provider or a third party should assess the relevant content. Hutchison supports an 'assessment' regime as opposed to a 'classification' regime for content provided over mobile devices as it would be commercially unmanageable to require all content to be reviewed by the OFLC.

Games sold on physical media are more suited to pre-classification as the game cannot be changed once on the market (a new version must be physically created and released). Mobile game development is such that new versions or new content can easily be introduced and put to market. However the assessment model would allow regulatory continuity by reference to the OFLC Guidelines and an alignment with the regime set out in the Online Provisions.

The Minister's concern is to regulate adult content and the ACA has been directed to make a service provider determination putting in place appropriate measures to require restricted access to adult services⁹. However the Minister has determined that 'adult' content available over mobile devices should include content that would be assessed as MA or R under the OFLC Guidelines. This means that in addition

to the three potential regulatory frameworks for games, there is an inconsistent approach to providing access to games. The result is that games that fall within the MA15+ category are:

- restricted to purchasers over the age of 15 when provided on cartridge;
- restricted to users over the age of 18 when provided on a mobile phone;
- not restricted when provided on the world wide web.

Again, Hutchison and other industry players have been actively involved in providing input to the ACA to assist in developing the proposed service provider determination, expected to be issued by the ACA in June 2005.

There are four key elements for the effective regulation of content services, including games:

• Age verification

Providers of age restricted content should verify any request to access such content is made by the account holder for the relevant service and that the account holder is 18 years or over. Age verification processes would differ between providers however the same principles would apply to all.

• Pre-assessment of content type

An 'assessment' process is the most viable solution. A recognised expert industry association could undertake the administration of the content assessment scheme and accreditation standards could be overseen by ACMA. The association could maintain a register of accredited assessors and ensure accreditation standards for assessors are maintained in consultation with the ACMA.

• Complaint handling and issues resolution

Where there is a complaint about game content ACMA (currently the ABA) could receive escalated complaints and issue take down notices as is the case for internet content. Similarly, content classification matters could be referred to the OFLC.

Classification Categories

G	suitable for all ages
G(8+)	suitable for ages under 15 but may not be appropriate for those under 8
M15+	recommended for mature audiences 15 and over

MA15+ – restricted to person 15 years and over

RC – refused classification – cannot legally be shown in any medium

Note: There is no R rating for games

- Enforcement
- Under the ACMA arrangements it is assumed the current activities of the ABA in relation to content assessment, escalated complaints and take down notices would continue in dealing with internet content. There is an ongoing role for ACMA to deal with games in the context of Online Provisions. ACMA could undertake its own investigations and deal with breaches of any determination.

It is these elements that the industry have been debating with the ACA over a long period of time. Despite the prolonged process Hutchison expects the ACA's determination to be a workable interim solution pending the outcome of the Department's review of content regulation for mobiles.

Hints on game play

The merger of the ABA and the ACA to form the Australian Communications and Media Authority (expected to be established by 1 July 2005) is an opportunity to establish and implement rational regulatory policy. However, as converged industries (communications, media and content) are already operating in the market place, the industry is best placed to identify practical approaches to implementing sound public policy for content services including games supplied via various devices (mobiles, PCs, PDAs, laptops) and network platforms (2G, 2.5G, 3G, internet, telephony services). It is important for structures and measures to be established that address the government's immediate public policies and provide

where the device is not user programmable except that the viewer can choose which tracks to watch in which order. To the user, a DVD player is a closed device. The personal computer is also likely to be connected to millions of other personal computers via the internet. Networked DVD player is currently a non-trivial exercise.

Once in a personal computer, content can be copied, reformatted and redistributed via the internet. In general there is little security within a personal computer to enforce the digital rights management associated with content. This is particularly true in the case of broadcast content where a digital television tuner card in a personal computer can be used with the free programming and to subsequently burn it on to a DVD or redistribute it using peer to peer technology such as Bit Torrent.

Broadly then, if content is delivered to a personal computer it is delivered to an open box and the content is no longer secure, no longer protected, and is available for redistribution. Once again, this contrasts to delivery to a closed box, such as a DVD player, and leads to the logical conclusion that, from a broadcaster's perspective, both set-top boxes and personal video recorders should be "closed" if the contractual obligations to rights holders such as the studios are going to be able to be implemented.

Game Over

Simone Brandon is Corporate Counsel at Hutchison Telecoms

(Endnotes)

¹ Kathimerini, 30 May 2002, <http://www.ekathimerini.com/4dcgi/news/content.asp?aid=17011>

² BBC News, 10 September 2002, <http://news.bbc.co.uk/1/hi/technology/2249656.stm>

³ see www.badlands.com.au

⁴ Discussion Paper available at www.dca.gov.au

⁵ Department of Communications, Information Technology and the Arts, "Review of the operation of Schedule 5 to the Broadcasting Services Act 1992", May 2004

⁶ Premium Service Determination 2004 (No. 1)

⁷ Australian Communications Authority (Service Provider Determination) Direction 2004 (No.2)

Table 1 – Comparison of personal computer and DVD player

Personal Computer	DVD Player
User programmable	Non-user programmable
Software-based operating system	Hardware-based operating system
Software-based protection	Hardware-based protection
Less tamper resistant	More tamper resistant
Few licensing obligations	Many licensing obligations

not been addressed by Australian copyright law, there are not large numbers of infringers.

Closed devices are of benefit to both commercial and subscription broadcasters. However, at this stage at least, it is the subscription broadcasters who have a better mechanism for practical control.

Viewers' Needs

The vast majority of viewers use video cassette recorders to play pre-recorded tapes and to do time shifting. The redistribution of content received from FOXTEL or from commercial television is not common in this country and this situation is not expected to change. This presents a challenge to all broadcasters to enable time shifting to occur without endangering the supply of programming. The aspects of this challenge include the fact that we need to come to terms with mechanisms that allow time shifting but prevent the leakage of valuable content in a country which has far less interventionist regulation of consumer devices than the US or Europe.

Subscription broadcasters have set a lead in this regard. For example, FOXTEL supplies personal video recorders to its viewers (FOXTEL iQ) but the personal video recorders themselves encrypt the recorded programming on the hard disk of the personal video recorder. This does not limit subscribers' ability to time shift and to watch recorded programs as many times as they wish. What is does, however, is limit the export of recorded programs from that hard disk to the internet. From the commercial broadcasters perspective it makes sense for personal video recorders and set-top boxes to be closed to allow them to continue using the business models that they currently operate.

Rob Nicolls is a professional engineer and works as a consultant in the Sydney office of Gilbert + Tobin

that some competition for eyes will exist

tions of protections of rights are initially set by those protections provided under United States law. Whereas it might be argued that Australian law applies to rights in Australia, the reality is that contracts for the supply of programming will reflect US assumptions.

There has been a major change recently in the technical model associated with commercial broadcasting, that is reflected in the quality of video received at the home. In the analog world, commercial broadcasters did their very best to deliver to the transmitter the highest quality video and audio services that they could. As the analog mode programming was transmitted from the towers to the antennas at viewers' homes, it degraded and the pictures that were received were not of the same quality that was delivered to the transmitter. This has changed. In the digital world, the quality of pictures and of audio that arrives at the home is identical in every respect to that which leaves the com-

business model is different. Rather than viewers watching the service and putting up with advertisements, consumers pay to watch. There is revenue from the sale of advertising space but subscription revenue is the predominant source of revenue.

The technical model for subscription broadcasters has also changed. In analog cable systems, the best possible quality transmission is delivered to the cable head ends. Therefore, while the business model is different, the technical issues are the same. The major issue which differentiates the operation of commercial television from subscription television, at least from the digital rights management perspective, is that subscription television providers determine the specifications of consumer equipment. Further, the set-top box used to watch FOXTEL is specified, owned and controlled by FOXTEL.

From a consumer perspective, the basic set-top box cost forms part of the sub-

- datacasting and other forms of enhancement for commercial broadcasters;
- multi-channel and additional connectivity systems for subscription broadcasters;
- multi-channel and additional conditional access systems for subscription broadcasters.

It may be that there is not a single solution. However, the degree to which there is interoperability and commonality between subscription television and commercial and national broadcasting, particularly in a market as small as Australia, can influence the cost of implementation.

Any widely used digital rights management system requires simple compliance mechanisms. It must be simple for consumers to comply with the rules. It must in addition be as invisible to viewers as is technically and operationally feasible.

As a practical matter consumers are not primarily interested in illegally exploiting rights holder's content. In general, the rights management system will be used by an audience which is seeking to be entertained or informed.

The challenge faced in designing a digital rights management system is to balance the threat posed by the very small minority who would abuse the delivery of programming against the reasonable expectations of the majority of viewers.

Open and Closed Devices

Digital rights management systems for television need to be effective and robust. That is, the system must work and must continue working even when circumstances change - and this includes the concept of renewability. If there are cryptography aspects in a digital rights management system these need to be able to be changed if the system is "hacked". An example of renewability in conditional access systems in subscription television broadcasting is the replacement of a single element of the system, such as a smartcard, when there is a degree of piracy introduced. Importantly, digital rights management systems need to have that level of renewability without creating a population of legacy devices which are no longer useable by consumers.

Movement at the Stations: Digital Radio Update

The Federal Government is on its way to developing a policy and regulatory framework for digital radio. Carolyn Lidgerwood notes recent progress

Another step along the path towards the introduction of digital radio in Australia was made on 20 December 2004. On that date, the Minister for Communications, Information Technology and the Arts (Minister) announced a new consultation process for the development of a policy and regulatory framework for digital radio¹. This article provides an overview of those developments.

Since late 2003, digital radio trials have been taking place in Sydney² (co-ordinated by Commercial Radio Australia) and Melbourne³ (co-ordinated by Broadcast Australia). However, prior to the Minister's announcement it was unclear (at least from a consumer perspective) what regulatory directions were being considered by the Government in relation to digital radio.

For instance, it was not clear whether the Government would consider a similar scheme for digital radio to that for digital television conversion, which includes mandatory start dates, bars of spectrum and defined simulcast periods prior to a "surrender" of the analog spectrum.

The Minister's announcement of 20 December 2004 (**Minister's announcement**) outlined some policy developments in this area, and was accompanied by the release of two papers. The first was the report of the Digital Radio Study Group, which focussed on technical issues and implementation issues in relation to digital radio⁴. The second was an Issues Paper entitled "Introduction of Digital Radio"⁵, which seeks comment on a range of digital radio policy issues.

"there will be a substantial period during which analog and digital radio platforms will co-exist" and that "digital radio may never be a complete replacement for analog radio"

It is useful to understand the difference between open and closed devices by comparing a personal computer and a DVD player. Where most new desktop personal computers sold today include at least a DVD player and often a DVD recorder, this comparison is easier than comparing a computer with a set-top unit or personal video recorder.

The contrast is set out in Table 1. Broadly speaking, a general purpose computer is not terribly secure. The user can have access to everything and there is a low level of tamper resistance. There are minimal licensing obligations and those licensing obligations tend not to have cross requirements for other people's content. Contrast this with a DVD player

In addition to some of the more obvious statements in the Policy Principles (which recognise that digital radio services can offer consumer benefits not available through analog radio, such as enhanced quality and diversity of services), there are also some significant acknowledgments.

For instance, the Policy Principles state that "there will be a substantial period during which analog and digital radio platforms will co-exist" and that "digital radio may never be a complete replacement for analog radio". The Policy Principles also expressly recognise the intersection to digital radio by all incumbent broadcasters, with a view to switching off the analog service at some point in the future (linked to the take-up of digital receivers). This is similar to the approach taken in relation to digital television in Australia;

Among the more interesting matters raised by the Issues Paper is the question of what regulatory approach should apply to the implementation of digital radio in Australia. The Issues Paper identifies three different approaches (drawing from the work of the Digital Radio Study Group). These three approaches are summarised in the Issues Paper as follows:

- Full Conversion

This approach views digital radio as a replacement technology for analog technology and would require full transition to digital radio by all incumbent broadcasters, with a view to switching off the analog service at some point in the future (linked to the take-up of digital receivers). This is similar to the approach taken in relation to digital television in Australia;

• Market-Based development of new digital services.

This approach would involve minimal regulation (ie relating to interference management, technology standards, spectrum allocation and some content matters eg decency), and the auctioning of spectrum (with no mandated "version" of existing services); and

- Managed-Introduction

This approach would be the "middle ground" between the approaches outlined above, and would be based on an assumption that digital radio would operate alongside analog services "for a period beyond a reasonable policy development horizon". Priority access to digital spectrum could be provided for incumbent analog radio broadcasters (who presently operate in the broadcasting services bands), but those broadcasters would not necessarily be required to use that spectrum to rep-

Subscription Broadcasters
Contrast the commercial broadcasters with the subscription broadcasters. The

commercial broadcaster's facility. Further, that quality is comparable to DVD quality in the case of standard definition signals and substantially better quality than DVD in the case of high definition signals.

Commercial broadcasters understand this paradigm shift. However, it is only recently that rights holders are starting to be concerned that these perfect quality television programs could be redistributed by consumers unless steps are taken to prevent it.

At the same time that the rights holders have realised the potential for consumers to copy, it is has become much more apparent to the commercial broadcasters that they have little or no involvement in consumer equipment. Indeed, the move by the commercial broadcasters to "seed" the market for digital set-top boxes at the start of digital broadcasting in Australia was unusual and anomalous. It was not the operation of the commercial broadcasters in their normal course of business.

Subscription Broadcasters
Contrast the commercial broadcasters with the subscription broadcasters. The

llocate their analog services (in contrast with the approach adopted for commercial television at the present time).

The Issues Paper notes that either the Full Conversion approach or the Managed-Introduction approach would be consistent with the Government's commitment to a five year moratorium on the issue of new digital commercial radio licences (see discussion below) and the role that incumbent operators will play in a digital environment. It also suggests that of these two approaches, the Managed-Introduction approach may be better able to address the current limits on available spectrum as it may be implemented over time. It appears from the Issues Paper that at present, the Government may prefer the Managed-Introduction approach (although this is a matter for consultation and has not yet been determined).

A selection of some other policy observations and issues arising from the Issues Paper are noted below:

- The Digital Radio Study Group has concluded that Eureka 147 (currently being used for digital radio trials) is a mature technology and that it would be a "least risk" strategy to select this technology if a decision is taken to implement terrestrial digital radio in the short term. It also noted that it is important for Australia to adopt a digital radio system that is being successfully deployed in other major markets, and that support from broadcasters is important.
- International comparisons indicate that most countries that have adopted the Eureka 147 technology have a mixture of simulcast services and "unique to digital" services, and there are no international examples of a regulatory framework that either requires or prohibits full simulcasting.
- The option of separating content licences from multiplex (ie carriage) licences is being considered by the Government, as well as "must carry" obligations upon multiple licensees and access rights for non-commercial broadcasters.

DIGITAL RADIO



(in consultation with industry) and to undertake further technical work. The Issues Paper also indicates that the Government will consider the outcomes of the current and future digital radio trials.

Submissions in response to the Issues Paper close on 20 April 2005 and can be accessed from the website of the Department of Communications, Information, Technology and the Arts⁵.

Carolyn Lidgerwood is Special Counsel (Broadcasting) at Gilbert + Tobin. Carolyn is enjoying being a

Digital Rights Management in Television

Rob Nicholls focuses in on digital rights management from an Australian broadcaster's perspective

- This article addresses some of the issues associated with digital rights management that face commercial and subscription television broadcasters, having regard to their particular business needs and constraints. In so doing, it looks at differences between the digital rights management issues faced by broadcasters and those concerned with the treatment of content on personal computers, including issues raised by open boxes, broadcast flags and the problem of the analog hole.

It concludes by looking at some of the practical issues raised by keeping personal video recorders and set-top boxes connected to the television rather than the internet and addressing the balance between the needs of viewers (who are important to both commercial and subscription television broadcasters) and those of the rights holders.

Next Steps
The Minister's announcement stated that "further work is required on a range of technical and other issues before the full policy framework for digital implementation can be determined, but the Government expects to be in a position to elaborate on the framework within 12 months." In that context, the Government has asked the ABA and ACA to commence a detailed investigation of spectrum issues associated with the introduction of digital radio

- time delay and watch once;
- time delay and watch many times;
- copy once to an external medium;
- copy many times to specified external media; and/or
- watch, but only on the condition that the viewer has watched some other content (such as an advertisement).

This is an indicative rather than exhaustive list.

Digital rights management includes four core elements:

- Persistent Protection - technology for protecting files via encryption and allowing access to them only after the entity desiring access has had its identity authenticated and its rights to that specific type of access verified;

- Business rights - the capability of associating business rights with content by contract;
- Access tracking - the capability of tracking access to and operations on content; and

- Rights licensing - the capability of defining specific rights to content and making them available by contract.

• watch once as the content goes to air.

consumer participant in the current digital radio trials in Sydney and thinks the sound quality of digital radio is fabulous.

(Endnotes)

- 1 http://www.minister.dcta.gov.au/media/media_releases/introducing_digital_radio_to_australia_.htm
- 2 In Sydney, a consortium of commercial and public radio broadcasters is conducting trials to test listener and advertiser responses to the new technology and a range of digital receivers. The trial is being coordinated by Commercial Radio Australia on behalf of commercial radio as well as the ABC and SBS, and is being broadcast on channel 9A in Band III spectrum. More details are available at <http://www.commercialradio.com.au/>

http://www.dcta.gov.au/broadband/digital_radio_-_issues_paper/digital_radio_study_group.htm

5

6

7

8

9

The term technology is used here to mean protecting files via encryption. In the television sense this should probably be technology for protecting programs via encryption. However, commercial broadcasting cannot be encrypted unless there are widely available decryption devices (which rather defeats the point of encryption). However, encryption applying to copying could be sent with a free-to-air program and this is dealt with this below in the discussion on broadcast flags.

Clearly, if there is going to be use of content then there needs to be technology to provide for business rights covering all of contracting for content, access tracking and rights licensing.

Commercial Television Broadcasting

The business of commercial television is the sale of advertising. There is an exchange of value whereby consumers watch advertisements in return for enjoyable programming. That is, programming that is designed to entertain, inform or educate in addition to advertising (which is other than this).

Although commercial broadcasters in Australia make television programming, they also buy programming. In particular, commercial broadcasters acquire drama, particularly movies, from the major studios. Popular dramas such as "Lost", "ER" and even "The Simpsons" are acquired from a small number of organisations (mainly the studios) which have their headquarters in the United States. The importance of the United States in this regard is that the expecta-

³ Broadcast Australia is also conducting a digital radio trial in Melbourne on channel 9A in Band III spectrum, in conjunction with third party content providers (including the ABC and the SBS). More details are available at <http://www.broadcastaustralia.com.au/>

⁴ The Digital Radio Study Group was comprised of Departmental and agency representatives (DoCITA, ABA, ACA). Its report is at http://www.dcta.gov.au/broadband/digital_radio/introduction_of_digital_radio_-_issues_paper/digital_radio_study_group.htm

⁵ http://www.dcta.gov.au/broadband/digital_radio_-_issues_paper/digital_radio_study_group.htm

⁶ http://www.aba.gov.au/abanews/news_releases/2003/60m03.htm