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Minister's Address to the Communications and Media Law Association

On 25 March 2009, Senator Stephen Conroy, Minister for Broadband, Communications and the Digital Economy, addressed the Communications and Media Law Association at the offices of Henry Davis York in Sydney.

The media sector, and indeed the entire communications industry, is undergoing a period of seismic change.

New technologies and delivery platforms are raising a whole range of new challenges and opportunities for traditional media providers.

They are also providing opportunities for emerging players and services.

Production chains are changing and so too are media consumption habits.

More generally, from an economic standpoint, we are currently living in challenging and uncertain times.

In this context, the digital economy has been identified by global leaders as a stimulus for future economic and social prosperity.

In this environment we have the potential to achieve new efficiencies, jobs and innovation.

We have the potential to drive trade and productivity growth.

And, we have the potential to reduce the distance between those at the extreme ends of the economic spectrum.

To prepare for this future, governments around the world need to lay foundations.

We need to facilitate investments in digital infrastructure and undertake the necessary planning to ensure those investments are utilised.

The Rudd Government fully recognises the economic and social potential of digital technologies.

We have placed broadband at the forefront of a nation-building infrastructure agenda.

We have committed to invest up to $4.7 billion in a National Broadband Network to be constructed in partnership with the private sector.*

The National Broadband Network will provide high-speed broadband access across the country.

It will support emerging applications in health and education.

It will support new developments in entertainment.

It will open new opportunities for business and trade.

This project will be a vital building block for Australia's future economic productivity and prosperity.

Certainly, recent economic turmoil has highlighted the need for swift and decisive action when it comes to economic stimulus.

However, the Rudd Government has always understood the importance of planning and building for the future.

Long-term infrastructure investments are essential to drive productivity and secure prosperity for the years to come.

This is certainly the case with communications infrastructure and is exactly why the government is engaging in the National Broadband Network project.

As you will appreciate, the Government is locked down, finalising our very close and careful consideration of the Panel of Experts report on the five NBN proposals.

This process is very much live and I am therefore highly restricted in what I can say.

* On 7 April 2009, the Prime Minister, Treasurer and Minister for Communications jointly announced that the Government would build a $43bn Fibre-To-The-Premises Network.

Inside This Issue:

Minister's Address to the Communications and Media Law Association

Landmark Copyright Case: ISP Liability for Copyright Infringement?

Do You Need to be Licensed to Operate Your Internet Discussion Site?

Government Focuses on Consumer Law Changes

Fakery and Deception in Participation TV – Lessons Learned from the UK's TV Phone-line Scandals

Sports Broadcasting in the Digital Era

Trade Practices Amendment: Achieving Clarity in Pricing

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Contents

Minister's Address to the Communications and Media Law Association

On 25 March 2009, Senator Stephen Conroy, Minister for Broadband, Communications and the Digital Economy, addressed the Communications and Media Law Association at the offices of Henry Davis York in Sydney.

Landmark Copyright Case: ISP Liability for Copyright Infringement?

Anita Cade and Maya Port consider some of the issues raised in a recent Federal Court Action against ISP iiNet. And also review approaches taken to ISP responsibility for users' copyright infringement in certain other countries.

Do You Need to be Licensed to Operate Your Internet Discussion Site?

Matthew McMillan and Howard Cheung discuss the ASIC's recent proposals on regulating internet discussion sites.

Fakery and Deception in Participation TV - Lessons Learned from the UK's TV Phone-line Scandals

Gavin Smith examines the background and regulatory response to one of the UK's worst television public relations disasters involving the faking of winners in on-air phone competitions and broadcasters receiving revenue from premium-rate phone votes which were never counted.

Government Focuses on Consumer Law Changes

Nick Abrahams and Kylie Howard provide an update on recent proposals to reform Australian Consumer Protection Laws.

Sports Broadcasting in the Digital Era

Trade Practices Amendment: Achieving Clarity in Pricing

Bridget Edghill reviews recent amendments to the Trade Practices Act 1974 (Cth) concerning component pricing.

Long-term infrastructure investments are essential to drive productivity and secure prosperity for the years to come.

What I can say, however, is that the Government stands 100 per cent behind to its election commitment to deliver the National Broadband Network.

We will ensure that Australia reaps the full competitive benefits that a national broadband network can provide.

We will ensure that we unlock the potential of the digital economy for all Australians.

You will be aware of much speculation in the media – and I'm enjoying the daily updates – on the possible timing and outcomes of the NBN process.

Our ambition for the timing of an announcement has always been contingent on the complexity of the considerations, and this remains the case.

The National Broadband Network will be one of the largest infrastructure investments undertaken by any Australian Government.

It is therefore imperative and only right that the Government give this decision the full attention, scrutiny and care that it deserves.

Our investments in broadband are driven by our recognition that digital technologies promise considerable benefits for our economies and communities.

To paraphrase Nicholas Negroponte, the movement of atoms is steadily giving way to the transmission of bits.

These bits do not comply with the rules of geography that we learnt in school.

For countries like Australia, this holds tremendous potential to overcome our physical distance from the rest of the world and the vast distances between our own cities and towns.

It offers the potential to participate in the creativity and collaboration required to stimulate the growth of this new environment.

And ultimately, it offers the potential to open up global markets at the click of a mouse.

The effective use of technology to manage digital information improves our productivity and social wellbeing.

Today, ICT is one of the largest drivers of economic growth.

Broadband in particular has been shown[1] to reduce costs, improve information flows, and streamline communications.

The end result is higher levels of productivity and greater efficiency.

This goal however, will not be achieved without overcoming some challenges.

Challenges arise because of two trends that we are witnessing in how we use technology, particularly the internet.

The first key trend is that – as more households take up broadband – people increasingly become 'heavy users' of the internet.

That is, the amount of time they spend online increases.

In 2007, for the first time, Australian internet users spent more time using the internet, than watching television.[2]

For online businesses, some argue that the next wave of growth will be driven mainly by increasing the revenues generated by each user rather than specifically attracting new users.

For Governments the challenge is how to ensure our citizens enjoy the same benefits and protections online as they have offline.

This requires targeted and appropriate regulation that addresses online risks but still allows the transformative nature of technology to add value to society.

This balancing act is even more pressing because of the second key trend that we are witnessing in internet usage.

Current and future generations are increasingly 'digital natives' who do not know life without a computer, the internet and MP3s.

'Digital natives' will have their first online experiences earlier in their lives than previous generations, and significantly, they rarely log-off.

When they are online, they participate in a different way than older generations – posting up-to-the-minute status updates, photos and videos to an array of web sites.

To quote from *Born Digital: Understanding the First Generation of Digital Natives*:

"Digital natives' almost never distinguish between the online and offline version of themselves".[3]

This lack of a distinction between the online and offline impacts how digital natives interact with people.

Friendships are often formed first online, without the traditional safeguards.

Digital natives also engage with media differently – always looking for the 'edit' button.

Web 2.0 empowers our children with the tools, and the expectation, that they can collaborate and remix anything they read, hear or view.

Both of these trends present new challenges for businesses and new challenges for Government.

As our lives and those of our children are increasingly spent online, the challenge becomes: How do we build trust to maximise the commercial, community and personal benefits of the future growth of digital life?

In the offline world, we have a long tradition of laws, markets and norms that regulate our behaviour.

But online, Governments and industry around the world are grappling with how best to translate these offline modes.

To allow companies and citizens alike to play a strong role in the next wave of growth, it is important that governments and industry collaborate.

We need to work together to ensure that people are as confident to engage via the internet as they are offline.

This requires 'digital confidence'.

A business with digital confidence expands its online service offerings.

A citizen with digital confidence increasingly finds information, communicates and transacts online.

Developing citizen and consumer confidence requires a focus on cyber-safety and e-security.

Some of this requires cross-jurisdictional collaboration.

The internet is global.

It transcends national boundaries and is therefore hard to regulate.

However, the internet does require rules to support a civil society.

Just because it is a challenge does not mean there should be no regulation.

It requires a global response.

Australia continues to engage on an international level through forums such as the OECD, APEC and CeBIT.

In 2008, Australia joined with other OECD countries in adopting the Seoul Declaration, which guides international collaboration in promoting cyber-safety and e-security.

In addition to international co-operation, Governments around the world are developing national strategies to promote consumer confidence.

Our investments in broadband are driven by our recognition that digital technologies promise considerable benefits for our economies and communities.

The Rudd Government is working to promote consumer confidence through our own $125 million dollar Cyber-Safety Plan.

This plan contains a comprehensive set of measures to combat online threats and help parents and educators protect children from inappropriate material.

It includes funding for education and information measures, law enforcement and content filtering.

We also provide a range of information about online safety through our e-security websites.

These sites provide advice on how to protect against malicious spam, phishing and spyware that can lead to identity theft and financial loss.

The Rudd Government is also developing and implementing several other e-security initiatives which are aimed at awareness raising and education.

In collaboration with the private sector, we share technical information to develop a greater understanding of the online environment.

We work together to identify potential threats to core infrastructure and services in banking, telecommunications, water and power.

These e-security measures should contribute to the digital confidence of both citizens and businesses.

However, to build the digital confidence of industry, the question must be asked whether more can be done to facilitate their increased online engagement.

This is particularly important for those industries that are strong drawcards for the digital economy such as the content industry.

We are, no doubt, all familiar with the adage that 'content is king'.

Content companies are increasingly experimenting with new online distribution and commercialisation models.

These models encompass exclusive channels operated by content owners, as well as highly popular platforms like *iTunes*, *YouTube* and *MySpace*.

But the digital confidence of the content industry is undermined by reports that indicate that a large amount of internet traffic is peer-to-peer file sharing.

They have a concern that a large proportion of that activity may be infringing content ownership rights.

This level of infringement would be difficult to replicate in the offline world and, if it did occur, would likely be dealt with by laws and norms.

But in the online space, the activity persists in ways that potentially undermine the commercial sustainability of the entertainment industry and promote an uncivil disregard for law.

The question becomes – how do we establish the norms to quell infringing activity online?

A number of different approaches are being considered.

Some stakeholders are advocating a more active role by Internet Service Providers to 'police online file sharing'.

Others advocate that business models need to change and that content owners adapt to new technologies.

As many of you may be aware, content industry players recently commenced legal action in Australia against an ISP arguing precisely this issue.

This legal battle and the broader debate it forms part of, looms large in the digital economy.

It symbolises the important challenge we face today.

It embodies the challenge of how to lay down the rules for tomorrow.

The Government is obviously watching developments with interest.

The paths that we carve out today will allow companies and citizens alike to confidently enjoy the full benefits of the digital economy.

Just as we enjoy a civil society in our everyday physical worlds, we should all work towards promoting civility in the online environment.

We should also all be doing all that we can to plan for the digital future.

The Rudd Government has determined to take a strong role to invest in infrastructure and to develop policy to ensure that we maximise the return on those investments.

Only by combining all of these factors can we fully harness the benefits that digital technology can deliver.

Senator Conroy is the Minister for Broadband, Communications and the Digital Economy and Deputy Leader of the Government in the Senate

(Endnotes)

1 Department of Communications, Information Technology and the Arts *The Economic Effects of Broadband: an Australia Perspective* (2007)

2 13.7 hours per week on the Internet v. 13.3 hours per week watching TV. Nielson Online *Aussie Internet Usage Overtakes TV Viewing for the First Time* News Release (March 2008).

3 John Palfrey and Urs Gasser *Born Digital: Understanding the First Generation of Digital Natives* (2008) at 20.

Landmark Copyright Case: ISP Liability for Copyright Infringement?

Anita Cade and Maya Port consider some of the issues raised in a recent Federal Court Action against ISP iiNet. And also review approaches taken to ISP responsibility for users' copyright infringement in certain other countries.

Copyright infringement in the digital age is a growing concern for copyright owners, Internet Service Providers (**ISPs**) and legislators alike. Copyright owners are facing increased availability and transmission of copyright material, particularly music and video files, between Internet users over peer-to-peer protocols. ISPs are developing policies and practices to help reduce such conduct over their networks and to distance themselves from all forms of illegal activity in which their customers engage. Legislators and industry bodies worldwide are assessing how to balance the interests of copyright owners with those of ISPs and users of modern technology. The current proceedings in the Federal Court of Australia brought by an alliance of film and televisions studios against iiNet is likely to be a test case for ISP liability for copyright infringement in Australia.

The studios v iiNet: ISP liability for copyright infringement?

Background

On 20 November 2008, an alliance of film and television studios commenced proceedings in the Federal Court of Australia for copyright infringement against one of Australia's largest ISPs, iiNet[1] (*Roadshow Films Pty Ltd & Ors v iiNet Ltd*).

The studios claim that:

- iiNet authorised its users' infringement of the copyright in their cinematograph films under section 101 of the *Copyright Act 1968* (Cth) (**Copyright Act**);[2] and
- iiNet directly infringed the copyright in their cinematograph films by making and dealing with infringing copies of the films.[3]

The case concerns iiNet users[4] downloading and sharing television show episodes and films using the peer-to-peer protocol BitTorrent, and follows the music industry's successful action against Kazaa for illegal music file sharing.[5]

The studios are seeking various forms of relief:

- declarations that iiNet infringed the copyright in their films;
- permanent injunctions to restrain iiNet from future acts of copyright infringement;
- orders requiring iiNet to disable its customers' access to sites containing the copyright infringing material;
- orders requiring iiNet to terminate the accounts of certain customers who have engaged in infringing conduct;
- damages;[6] and
- relief for iiNet's alleged conversion and/or detention of "infringing copies" of their films.[7]

The authorisation claim

The studios' claim

Each applicant has particularised films and/or television episodes in its catalogue in which copyright subsists and for which it owns copyright (by way of exclusive licence)[8] – facts that iiNet does not dispute.[9]

The essence of the authorisation claim is that iiNet authorised its users' conduct of downloading and sharing the applicants' copyright material without their permission or licence. The key issue is whether iiNet *authorised* its users' conduct pursuant to section 101(1) of the Copyright Act, not what that conduct entails.

However, at the time of writing, the parties are engaged in a preliminary dispute as to the exact underlying conduct of the iiNet users.[10] Pursuant to section 86 of the Copyright Act, copyright in each of the studios' films comprises the exclusive rights to make a copy of the film, cause the film to be seen and heard in public, and communicate the film to the public. The studios claim that iiNet users made copies of the films with each download, made the films available online to fellow users of BitTorrent, and electronically transmitted the films to fellow users.[11] The studios claim that the iiNet users therefore reproduced, copied and communicated copies of, or substantial parts of, the applicants' films and that iiNet authorised that conduct. On the other hand, iiNet claims that BitTorrent is a legitimate software tool that is primarily used for non-infringing conduct, including open-sourced file sharing.[12] The proceedings may therefore raise interesting questions as to how Internet usage aligns with the rights comprised in copyright, such as what "communicate to the public" means in the context of increasing traffic over peer-to-peer networks.

Authorisation liability

"Authorise" in the context of copyright infringement means to "sanction, approve [or] countenance".[13] The question of authorisation is based on legislative and other factors developed in recent case law:

- the extent of the respondent's power to prevent the primary infringing conduct;[14]
- the nature of any relationship between the respondent and the primary infringer;[15]
- whether the respondent took any reasonable steps to prevent the infringing conduct, including whether the respondent complied with any relevant industry codes of practice;[16]
- the respondent's knowledge, or lack of knowledge, of the infringing conduct;[17]
- the respondent's inactivity or indifference, whether exhibited by acts of omission or commission, toward the infringing conduct;[18] and
- where applicable, the respondent's level of control over the operation of its facilities or services that are used to commit the infringing conduct.[19]

The studios argue that iiNet's conduct satisfies each of these criteria.[20] The studios engaged an investigator from the Australian Federal Against Copyright Theft (**AFACT**) to set up an iiNet account and connect to other iiNet users to download and share copies of the films using BitTorrent.[21] Then, over the course of months, the studios sent

The current proceeding brought by an alliance of film and televisions studios against iiNet is likely to be a test case for ISP liability for copyright infringement in Australia.

iiNet spreadsheets detailing each instance of alleged infringement, the copyright material affected and the customers involved.[22] The studios argue that iiNet therefore knew of, or reasonably suspected, its users' infringing conduct but did not act on the infringement notices, and therefore not only failed to take any action to prevent ongoing infringements but positively encouraged continuing infringements.[23] The studios also argue that iiNet failed to enforce its own terms and conditions of use that prohibit illegal file sharing.[24]

On the other hand, iiNet argues that its actions do not constitute authorisation liability because:

- it did not have any power to prevent its users' alleged infringing conduct;[25]
- its relationship with its subscribers is contractual;[26]
- its relationship with iiNet users who are not subscribers is neither direct nor commercial;[27] and
- it took reasonable steps to prevent or avoid the alleged infringing conduct, including by implementing internal training, policies and procedures for dealing with infringement notices, the terms of its Customer Relationship Agreement, and operating a "Freezone Service" for its subscribers to legitimately download or stream copyright material.[28]

The proceedings raise interesting questions as to how Internet usage aligns with the rights comprised in copyright

iiNet argues that it is merely a conduit that provides the "pipes only" for users' online conduct.

Possible defence – providing facilities only

iiNet argues that it is merely a conduit that provides the "pipes only"[29] for users' online conduct. In defence of the authorisation claim, iiNet seeks to rely on section 112E of the Copyright Act, arguing that it is a carriage service provider that is merely providing facilities which its customers have allegedly used to infringe copyright.[30] However, the Federal Court in the Kazaa proceedings made it clear that section 112E does not confer a general immunity to authorisation liability.[31] The owners and operators of the Kazaa file sharing system were found to be more than messengers – they knew that Kazaa was predominantly used for sharing copyright-infringing material, they were capable of curtailing infringing conduct by using filters, and they had a financial interest in maintaining the system. iiNet argues that it derives no commercial advantage from its customers using its services to deal with copyright material over and above payment of their subscription fees.[32] In fact, iiNet argues that increased sharing of large music and video files reduces bandwidth and probably the speed of service iiNet can offer its customers. Similarly, the respondent in *Cooper v Universal Music*[33] could not rely on section 112E in a more overt case of authorisation liability, where the Court found that the respondent actively invited use of his site in a way that would infringe copyright in music files (by downloading mp3s for free).

Possible assistance – safe harbour provisions

iiNet also seeks to rely on the "safe harbour" provisions in Division 2AA of the Copyright Act,[34] which limit the remedies available against carriage service providers for copyright infringement regarding online activities. iiNet argues that its alleged authorising conduct falls within the Category A activity for which safe harbour is granted[35] to a carriage service provider that provides facilities or services for transmitting, routing or providing connections for copyright material where the carriage service provider complies with the prescribed conditions set out in section 116AH(1) of the Copyright Act. iiNet claims that it satisfies the prescribed conditions because: it did not initiate the transmission of copyright material over its network; it did not substantively modify the copyright material; it implements a policy for terminating the accounts of repeat infringers; and there is no relevant industry code of practice.[36] iiNet may also point to the qualifier in section 116AH(2) - these conditions do not require an ISP to actively "monitor its service or to seek facts to indicate infringing activity". The iiNet proceeding is likely to be a test case for the application of the safe harbour provisions, which have not been judicially tested since their implementation as part of the Australia-United States Free Trade Agreement in 2004.[37]

The direct infringement claim

The studios have recently amended their Statement of Claim to allege that iiNet provides services for transmitting and therefore storing or caching copyright material; and by reason of the operation of those services, iiNet has distributed, transferred and made copies of the films without the studios' permission or licence.[38] The studios claim that this constitutes direct infringement by iiNet of their copyright.[39] In addition, the studios claim that these copies of the films constitute "infringing copies"[40] for which iiNet is liable in conversion or detention pursuant to section 116 of the Copyright Act.[41] If this novel claim is made out, iiNet would not be able to rely on either section 112E or the safe harbour provisions, as each of those protections apply to authorisation liability only. It may be possible for iiNet to claim that it is an "innocent infringer" pursuant to section 115(3) of the Copyright Act. However, it would need to establish that it was not aware, and had no reasonable grounds for suspecting, that *its* conduct constituted copyright infringement. iiNet may contest that the applicants' infringement notices referred to the conduct of its *users* only,[42] and did not put iiNet on notice that it was potentially liable for direct infringement.[43]

Implications

The overarching context of the question of ISP liability is the balancing of the interests of copyright owners, ISPs and users of technology. On a practical level, which party should bear the burden of policing online copyright infringement?

On the one hand, copyright owners are frustrated by the frequency of online infringement of their works and for some, their resulting loss of royalties. Industry bodies and representative groups of copyright owners, such as the applicants in the iiNet proceedings, are increasingly turning this frustration toward ISPs and their alleged indifference toward their customers' infringing conduct. The studios argue that iiNet could have taken a variety of actions to prevent or cease its users' alleged infringing conduct: send a warning notice, limit their bandwidth so they are unable to easily download large film and music files or terminate the accounts of repeat infringers. Copyright owners argue that these steps would merely be a cost of doing business – but a cost that would ultimately be passed on to consumers.

On the other hand, ISPs argue that the practicalities and costs involved in "policing" copyright infringement on their networks are unworkable. First, ISPs argue that they should not be responsible for determining whether particular conduct constitutes copyright infringement and in effect enforcing

iiNet also seeks to rely on the "safe harbour" provisions in the Copyright Act, which limit the remedies available against carriage service providers for copyright infringement

The overarching context of the question of ISP liability is the balancing of the interests of copyright owners, ISPs and users of technology

the copyright owners' rights on their behalf. Second, ISPs argue that illegal downloading and sharing of copyright material is only one way in which consumers use the Internet – suspending or terminating a customer's account for copyright infringement would also remove their ability to utilise legitimate Internet facilities. iiNet argues that only a portion of the Internet traffic exchanged via its facilities was via BitTorrent and only a portion of that was the alleged infringing conduct.[44] iiNet also argues that BitTorrent is a legitimate program that has "many non-infringing uses and facilities" and "is elegantly designed for the delivery of large files like TV program and films", many of which contain legitimate content.[45] ISPs argue that to reduce bandwidth, or suspend or terminate customers' accounts, are disproportionate and costly responses to alleged infringing conduct in the majority of cases. This raises a broader question as to why other forms of online illegal activity are not subject to the same degree of scrutiny as copyright infringement.[46] Third, ISPs distinguish their position from that of the respondents in the Kazaa and Cooper proceedings, who the courts found were intimately involved in, and directly benefited from, users' infringing conduct. General ISPs argue that they provide a range of Internet services and do not receive any financial benefit from infringing customers over and above their usual subscription fees. In fact, some ISPs are also content providers that generate licence fees for customers' purchase of legitimate content – a revenue stream that is undercut by illegal file sharing.

The underlying question is where the risks and costs should lie. On the one hand, the copyright industry argues that ISPs are in the best position to control and monitor online infringement. On the other hand, taking into account the time, labour, technology and administration involved, ISPs argue that the costs involved are significant and should not be passed on to their customers as the price of enforcing third parties' rights.

Overseas development

Not surprisingly, it is a topic that is also occupying the minds of similar industries and players overseas.

New Zealand

Across the Tasman, the New Zealand government has taken a legislative approach to the problem of online copyright infringement. The *Copyright Amendment (New Technologies Act) 2008 (*NZ) (the **NZ Amending Act**) amends the *Copyright Act 1994* (NZ) (the **NZ Copyright Act**) and aims to update copyright law to align with advances in digital technology.[47] The new section 92B of the NZ Copyright Act introduces a similar defence to those in sections 39B and 112E of the Australian Copyright Act – that an ISP is not liable for copyright infringement (either direct or authorisation liability) "merely because" a person uses the ISP's Internet service to infringe copyright in a work.

Of greater significance is the new section 92A of the NZ Copyright Act, which requires ISPs to "adopt and reasonably implement a policy that provides for termination, in appropriate circumstances, of the account… of a repeat infringer". A "repeat infringer" is a person "who repeatedly infringes the copyright in a work by using 1 or more of the Internet services of the Internet service provider to do a restricted act without the consent of the copyright owner". The language of section 92A is very similar to that of section 116AH(1) of the Australian Copyright Act. Whilst the provisions operate in different ways,[48] the ultimate result may be the same in both jurisdictions – ISPs must actively combat copyright infringement in a way that directly affects their bottom line. Further, questions remain regarding the standard of proof and practical operation of section 92A. Various industry groups (including APRA) are currently developing a code of practice for ISPs to deal with alleged "repeat infringers".[49] Section 92A is due to come into effect on 27 March 2009; however, its implementation may be suspended if an industry code of practice is not agreed by that time.[50]

the NZ Copyright Act requires ISPs to adopt and reasonably implement a policy that provides for termination of the account of a repeat infringer

Ireland

In Ireland, four major recording companies have settled proceedings commenced in the High Court against the Irish ISP, Eircom, regarding its users' copyright infringement.[51] Warner Music (Ireland), Sony BMG Music Entertainment (Ireland), EMI Records (Ireland) and Universal Music (Ireland) sought court orders compelling Eircom to install filtering software to prevent the sharing of music files over its network. Under the terms of the settlement, the recording companies agreed to collect data regarding users who allegedly infringe their copyright and pass that information on to Eircom. Eircom agreed to implement a "three strikes" policy against its customers – inform customers that they are infringing copyright, warn customers that Eircom may terminate their accounts, and ultimately disconnect customers who fail to cease their infringing conduct. Eircom also stated that the record companies agreed to take all necessary steps to put similar agreements in place with all other Irish ISPs.[52]

France

France has also adopted an adaptation of the "three strikes" approach. French authorities, ISPs and copyright owners' representative bodies agreed a memorandum of understanding in November 2007 (the "Olivennes Agreement") setting out a "three strikes" graduated approach to dealing with repeat infringers.[53] This approach provides: for a web user's first copyright infringement, he or she will be sent a warning email; for the second infringement within 6 months, he or she will be sent a second warning email and formal warning letter; and for the third infringement within one year, the government regulator may impose various sanctions. These sanctions include ordering the user's ISP to suspend the user's Internet access for a period ranging from three months to one year (the length of which may be reduced if the user provides written undertakings not to engage in copyright infringement), and imposing a fine of a maximum of €5,000. Significantly, the *regulator* sends the warnings and imposes the sanctions, not the ISPs. Further, the regulator's actions are coordinated with all ISPs so that repeat infringers are placed on a "blacklist" and cannot simply subscribe to an alternate ISP if their Internet access is suspended. ISPs must check this "blacklist" before entering new customer contracts. Whilst web users have a right of appeal against sanctions, the scheme has been criticised for lacking procedural fairness, as well as conflicting with data protection, privacy and competition laws. It remains to be seen how effective

Eircom agreed to implement a "three strikes" policy against its customers – inform customers that they are infringing copyright, warn customers that Eircom may terminate their accounts, and ultimately disconnect customers who fail to cease their infringing conduct.

(and costly) this novel scheme will be in practice to prevent and reduce online copyright infringement.

Conclusion

Overseas developments, together with the iiNet proceeding in Australia, indicate an increasing industry focus on ISPs as the gatekeepers of Internet users who participate in copyright-infringing conduct. Their underlying logic is that ISPs are in the best position to control their customers' conduct and therefore should be directly engaged to develop best practices to combat online infringement. Alternatively, New Zealand and French practices demonstrate the introduction of legislative schemes to deal with online copyright infringement. While legislative developments inevitably lag behind technological ones, some argue that they may nevertheless be useful in the copyright context to align statutory rights with the public's practices, and in a digital economy to balance the interests of copyright owners, ISPs and users of technology.

Anita Cade is a Senior Associate and Maya Port a Lawyer at Blake Dawson

(Endnotes)

1 iiNet is the third largest Australian ISP by number of customers, was listed on the Australian Stock Exchange in 1999 and supports approximately 700,000 services: "About iiNet", iiNet website, available at http://www.iinet.net.au/about/.

2 Applicants' Statement of Claim, paras 63-67, filed 20 November 2008.

3 Applicants' Amended Statement of Claim, paras 67A-67F, filed 19 February 2009.

4 The applicants claim that iiNet authorised the infringing conduct of all iiNet users, being iiNet's customers and other users of its Internet services: Applicants' Statement of Claim, para 59. iiNet, however, distinguishes between the acts of its subscribers and other persons who may use its services but with whom it has no direct relationship and whom it cannot identify: Respondent's Defence, para 63(t).

5 *Universal Music Australia Pty Ltd & Ors v Sharman License Holdings Ltd & Ors* (2005) 220 ALR 1; (2005) 65 IPR 289.

6 At the second directions hearing held in the Federal Court of Australia on 6 February 2009, counsel for the Applicants submitted that the quantum of damages available (in the event the Applicants are successful) is currently in dispute. At the time of writing, the applicants are seeking an order that all issues of the quantum of any pecuniary relief be heard and determined separately from all other issues in the proceeding (Applicants' Notice of Motion, filed 23 February 2009).

7 Applicants' Amended Statement of Claim, paras 71-77.

8 Applicants' Statement of Claim, paras 15-56.

9 Respondent's Defence, paras 15-56.

10 Pursuant to the parties' submissions at the second directions hearing, Federal Court of Australia, 6 February 2009.

11 Applicants' Statement of Claim, para 59.

12 Respondent's Defence, para 63.

13 *University of New South Wales v Moorhouse* (1975) 133 CLR 1; 6 ALR 193 per Gibbs J.

14 Section 101(1A)(a) of the Copyright Act.

15 Section 101(1A)(b) of the Copyright Act.

16 Section 101(1A)(c) of the Copyright Act.

17 *Universal Music Australia v Sharman*, note 5.

18 *Universal Music Australia v Sharman*, note 5; *Australasian Performing Right Association Ltd v Metro on George Pty Ltd* (2004) 210 ALR 244; (2004) 61 APR 575.

19 *Universal Music Australia v Sharman*, note 5.

20 Applicants' Statement of Claim, paras 63-64.

21 Applicants' Particulars to the Statement of Claim, paras 61, 63-65, 73.

22 Applicants' Particulars to the Statement of Claim, paras 69-77. The applicants used DtectNet Software to identify iiNet users who were making copies of the copyright material available online using BitTorrent, connect to those users and then transmit the films to a computer operated by DtecNet for download from those users.

23 Applicants' Statement of Claim, paras 63-67.

24 iiNet's Customer Relationship Agreement provides: a customer must not use iiNet Internet Services to infringe another person's rights, and iiNet can cancel or suspend a customer's Internet Services if iiNet suspects illegal conduct or is required to do so by law. There is also a notice on iiNet's website stating that the hosting or positing of illegal or copyright material using an iiNet service constitutes a breach of the Customer Relationship Agreement and may result in the suspension or termination of a customer's service without notice: Applicants' Particulars to the Statement of Claim, paras 66-68.

25 Respondent's Defence, para 63(r).

26 Respondent's Defence, para 63(s).

27 Respondent's Defence, para 63(t).

28 Respondent's Defence, para 63(u); Respondent's Particulars to Paragraph 63(u) of the Defence, filed 5 February 2009.

29 Pursuant to submissions of counsel for the Respondent at the second directions hearing, Federal Court of Australia, 6 February 2009.

30 Respondent's Defence, paras 57(g) and 75.

31 *Universal Music v Sharman*, note 5.

32 Respondent's Defence, para 58(d).

33 *Cooper v Universal Music Australia Pty Ltd* [2006] FCAFC 187; (2006) 156 FCR 380; (2006) ALR 714; (2006) 71 IPR 1.

34 Respondent's Defence, paras 57(h); 76-85.

35 Section 116AC of the Copyright Act. Categories B-D activities are set out in sections 116AD-116AF respectively.

36 Respondent's Defence, paras 80-83.

37 *US Free Trade Agreement Implementation Act 2004* (Cth); *Copyright Legislation Amendment Act 2004* (Cth).

38 Applicants' Amended Statement of Claim, paras 67A-67D.

39 Applicants' Amended Statement of Claim, para 67F.

40 See definition of "infringing copy" of a cinematograph film in section 10(1) of the Copyright Act.

41 Applicants' Amended Statement of Claim, paras 67E and 75.

42 Applicants' Particulars to the Statement of Claim, paras 70-77.

43 At the time of writing, the Respondent has not filed an amended Defence in response to the applicants' Amended Statement of Claim.

44 Respondent's Defence, paras 63 (b)-(c).

45 Respondent's Defence, paras 63(d)-(e).

46 ISPs may soon be more actively engaged in addressing online illegal content as part of the proposed mandatory content filtering scheme in Australia. The Federal Government has engaged ISPs to conduct live pilot tests of filtering software with the aim of introducing a two-tier scheme: the first tier being the mandatory filtering of content contained on a "blacklist" of URLs provided by the Australian Media and Communications Authority which contain "prohibited content" (as that term is defined in the *Broadcasting Services Act 1992* (Cth)); and the second tier being the optional filtering of other forms of inappropriate content (the details of which remain unclear). See the website of the Federal Department of Broadband, Communications and the Digital Economy for further details, available at <www.dbcde.gov.au>.

47 Except for the new section 92A, the NZ Amending Act came into effect on 31 October 2008: New Zealand Government, "Copyright (New Technologies) Amendment comes into force", 3 October 2008, available at <beehive.govt.nz>.

48 The New Zealand provision operates as a positive obligation on ISPs to adopt a policy dealing with repeat infringers, whereas the Australian provision is a condition for ISPs to rely on the safe harbour provisions in Division 2AA of the Australian Copyright Act.

49 Pilcher P, "Copyright law dust-up turns into a war of words", *New Zealand Herald*, 22 January 2009, available at <www.nzherald.co.nz>.

50 "Controversial internet law on hold – Key", *New Zealand Herald*, 23 February 2009, available at <www.nzherald.co.nz>.

51 Gergley A, "ISP cuts off illegal music downloader's", *Australian IT*, 8 February 2009, available at <www.australianit.news.com.au>; "Downloader's face disconnection following Eircom settlement", *Irish Times*, 28 January 2009, available at <www.irishtimes.com>

52 Ibid.

53 Baden-Powell E, "Three strikes and then what?", *Copyright World*, Issue no. 187, February 2009. The French Senate adopted the "Olivennes Bill" in October 2008, which is expected to be approved by the National Assembly to become law in early 2009.

Do You Need to be Licensed to Operate Your Internet Discussion Site?

Matthew McMillan and Howard Cheung discuss the ASIC's recent proposals on regulating internet discussion sites.

Operators of internet discussion sites on which users post information, recommendations or opinions about financial products will need to take heed of the latest proposals being put forward by the Australian Securities & Investments Commission (**ASIC**) – including, most notably, the requirement for some operators (regardless of whether or not they are financial services professionals) to hold an Australian financial services (**AFS**) licence.

ASIC's proposals are set out in its Consultation Paper 104: Internet discussion sites (**CP104**) released on 2 March 2009.

Internet discussion sites

ASIC's proposals affect operators of "internet discussion sites" (**IDSs**).

IDSs are defined in CP104 to mean:

> *internet websites that provide a forum for people who are not financial services professionals to display information, recommendations and opinions about financial products.*[1]

This includes web-based bulletin boards, blogs and chat rooms.

A shift in ASIC policy

Currently, under Regulatory Guide 162: Internet discussion sites (**RG162**), operators of IDSs who are not financial services professionals are not required to be licensed provided they comply with certain guidelines. These include:

- having appropriate disclosures and warnings for the benefit of readers (eg disclosures that the IDS operator does not endorse the accuracy of the postings on the site and that the postings are general information at best, and not professional advice);
- having appropriate disclosures and warnings for the benefit of persons making postings on the sites (eg warning that the person posting is personally responsible for their posting and should, therefore, ensure that it is not misleading or deceptive); and
- ensuring the IDS operators regulate the use of their sites (eg by keeping information about the identity of persons making postings and the contents of actual postings).

These guidelines were developed in 2000 and are based on the Corporations Law as it stood. Since then, however, the Corporations Law has been replaced by the *Corporations Act 2001* (**Corporations Act**). The Corporations Act has also been amended by the *Financial Securities Reform Act 2001*, which introduced the current financial services licensing regime.

In reviewing its policy on IDSs, ASIC has formed the view that IDS operators should not be granted relief from the financial services licensing regime introduced by reforms to the Corporations Act. Under the new CP104 proposals, therefore, operators of IDSs will be required to hold an AFS licence if they are providing advice about financial products.

As to what constitutes "financial product advice", ASIC errs on the side of caution and takes the view that informal commentary posted on IDSs about financial products may constitute such advice – that is, a recommendation or a statement of opinion that is intended to influence users in the process of making decisions in relation to financial products.

This view is consistent with the case of *ASIC v Matthews* [2000] NSWSC 201 where Windeyer J found that certain postings about securities in an online chatroom facility, although informal in nature, constituted "reports about securities" and, as such, amounted to the giving of investment advice.

Whether statements posted on an IDS do, in fact, amount to "financial product advice" will ultimately depend on the particular circumstances in question and the extent of the operator's involvement in the postings. For example, an operator which is involved in contributing, editing, modifying or filtering postings on its site (as opposed to merely providing an online forum), or which authorises or arranges others to make postings, which involve recommendations or opinions about financial products, is likely to require an AFS licence. As holder of an AFS licence, the operator will be liable for ensuring that the advice is efficient, honest and fair and otherwise in compliance with its obligations under the *Corporations Act 2001*.

What exemptions apply?

Under the new CP104 proposals, an IDS operator may operate an IDS without a licence if it falls into one of the exemptions. These exemptions can be found in the Corporations Act and are the same as those which apply to the requirement of holding an AFS licence in general.

Two exemptions of relevance to IDS operators are the following:

- The "media" exemption under section 911A(2) of the Corporations Act, which provides that a person is exempt from holding an AFS licence if it provides general advice in a:
  (i) newspaper or periodical;
  (ii) news or information broadcast; or
  (iii) sound, video or data recording,

  which is publicly available and where the sole or principal purpose is not to provide financial product advice.

  An IDS which is a part of a broader communication medium, such as an online newspaper, is likely to fall within this exemption.
- The "passing on" exemption under regulation 7.1.31 of the Corporations Regulations which provides that a person is not to be considered as providing a "financial service" if that person:
  (i) is not a holder of an AFS licence; and
  (ii) merely "passes on" documents (which would likely also include postings) containing financial advice,

  and a reasonable person would not consider that person to have provided, endorsed or otherwise assumed responsibility for the financial advice.

  An IDS operator who merely provides a forum and does not contribute, edit, modify, or filter any postings on its IDS is likely to fall within this exemption.

What minimum standards are to be imposed on IDS operators?

CP104 also proposes introducing minimum standards in relation to operating an IDS, regardless of whether the operator requires an AFS licence or not.

an operator which is involved in contributing, editing, modifying or filtering postings on its site which involve recommendations or opinions about financial products, is likely to require an AFS licence

Compliance with these standards requires an IDS operator to:

- maintain the IDS in a fair and efficient manner, which includes:
  - (i) having the ability to identify people making or altering postings, and withdrawing posting rights if necessary;
  - (ii) having the ability to review content in postings on a regular basis, and removing any postings that are illegal or likely to be misleading or deceptive; and
  - (iii) displaying warnings that postings will be archived for at least 2 years, that copies of postings may be provided to the ASIC, and that serious penalties apply for posting material that is misleading or deceptive;
- have good record-keeping practices, which includes keeping records of:
  - (i) information about the identity of people making or altering the postings for at least 2 years; and
  - (ii) actual postings and session information for at least 2 years; and
- display appropriate warnings and disclosures, which include:
  - (i) for IDS operators which do not require an AFS licence: a warning to users that the IDS operator does not endorse or vouch for the accuracy or authenticity of the postings on the site and that readers should not rely on advice contained in the postings alone; and
  - (ii) for IDS operators which do require an AFS licence: an additional warning to users that any advice given is general advice only, and that the advice does not take into account the user's personal circumstances.

CP104 sends a clear message that ASIC intends to regulate the provision of financial product advice through social media and the self-publishing capabilities of the internet

What do the proposals mean for IDS operators?

CP104 sends a clear message that ASIC intends to regulate the provision of financial product advice through social media and the self-publishing capabilities of the internet in the same way it regulates other means of giving advice.

Under the proposed reforms, current unlicensed operators of an IDS will need to check whether they:

- fall into any of the exemptions; or
- are required to obtain an AFS licence in order to continue to operate the IDS.

In any case, all IDS operators, whether licensed or unlicensed, will need to ensure that they comply with the new minimum standards set out in CP104.

ASIC is currently seeking the views of IDS operators and users on the proposals. Submissions on the proposals closed on 27 April 2009.

Matthew McMillan is a Senior Associate and Howard Cheung is a Lawyer at Henry Davis York in Sydney

(Endnotes)

1 Australian Securities & Investment Commission, March 2009, Consultation Paper 104: Internet discussion sites, page 6.

Government Focuses on Consumer Law Changes

Nick Abrahams and Kylie Howard provide an update on recent proposals to reform Australian Consumer Protection Laws.

February and March has been busy reading for those interested and affected by consumer protection law – and ultimately, that is everyone. Not all of us sell products and services to the consumer market however, all of us at some point, are consumers. As to whether the changes are good or bad, it really depends on which hat you are wearing – one thing is for sure, there are likely to be some noticeable changes to the current state of play.

On 17 February 2009, the Minister for Competition Policy & Consumer Affairs released an information and consultation paper, *An Australian Consumer Law: Fair market – Confident consumers.* Only two weeks later, the Minister announced a review of the adequacy of statutory conditions and warranties. This article will provide an update on both of these initiatives and help you make an assessment on how these changes might impact you.

Australian Consumer Law – Reforms and Consultation Paper

The information and consultation paper, *An Australian Consumer Law: Fair market – Confident consumers* (**Consultation Paper**) is a step toward the reform process to develop a new national consumer law for Australia. The Consultation Paper, prepared by the Standing Committee of Officials of Consumer Affairs, shares the Council of Australian Governments' agreed consumer reforms and seeks to obtain public and stakeholder comment on further suggestions for reform (however, the deadline for responses was by 17 March 2009). The Minister is looking to fast track these amendments with legislation to go before Parliament mid-year and be in operation by 1 January 2010.

There are some key themes in the Consultation Paper – enhancing consumer protection, reducing regulatory complexity and having a consistent national approach to facilitate a seamless national economy. The key components of the framework involve a new national consumer law, to be called the *Australian Consumer Law*, based on the existing consumer protection provisions of the *Trade Practices Act* (**TPA**). In addition, there will be some new consumer laws including:

- a new national product safety regulatory system;
- provisions which regulate unfair terms in consumer contracts; and
- new penalties, enforcement powers and redress options for consumers (ultimately, what every supplier *doesn't* want to hear).

There are strong reasons to have a national approach to consumer protection in Australia. The obvious reason is to ensure a consistent approach for both suppliers and consumers. Many organisations that supply consumer products and services, supply to consumers nationally and this is an increasing trend. It can become a logistical nightmare to manage different regimes in different states, not to mention the compliance costs associated. In *it is likely that there will be uncertainty on what is and is not an unfair contract term*

addition, there is no rational explanation for why consumers are offered different levels of protection just because they live in a certain state or territory.

Unfair contract terms can be quite common, particularly in standard form contracts (often made available to customers through click-wrap agreements). Customers simply click "I accept" and are not provided with the opportunity to negotiate the terms. Given that standard form contracts are prevalent in the information, communications and technology industry, these reforms should be of particular interest to this space.

According to the Council of Australian Governments (**COAG**), an "unfair contract term" is one which causes significant imbalance in parties' rights and obligations arising under a contract and are not reasonably necessary to protect the legitimate business interests of the supplier. In getting up to speed on this change, it will be important for organisations to assess the meaning of an "unfair contract term" – the Consultation Paper provides some examples but in practice, it is likely that there will be uncertainty on what is and is not an unfair contract term. Some examples that have been provided in the Consultation Paper include:

- clauses which permit the supplier to unilaterally vary the terms of the contract;
- clauses that prevent the consumer from cancelling the terms of the contract;
- clauses that require the payment of fees when the service is not being provided;
- clauses that permit the supplier to change the price of goods or services contracted for without allowing the consumer to terminate the contract;
- clauses that deem something as a fact or that something will be a fact, such as acknowledgement that certain information has been provided to the consumer prior to the agreement being made, regardless of whether or not it was.

Despite these examples being given, organisations supplying to consumers will need to make a judgement call on whether terms would be considered as "unfair contract terms". The Consultation Paper recognises that in determining whether a term is an "unfair contract term", all of the circumstances of the contract are to be considered, taking into account the broader interest of consumers as well as particular consumers affected. One thing is for sure - it won't always be black and white and it is likely that suppliers will be prepared to take on some risk. Reviewing and amending contracts (as well as forming a risk analysis as to which terms could be considered as "unfair contract terms") is likely to be a timeline exercise – as we all know, time is money. But that initial spend might just keep you out of trouble, particularly given the enhanced enforcement powers proposed in the Consultation Paper.

The good news for suppliers (well, at least in comparison to the potential compliance costs), is that COAG proposes that remedies will only be available where the claimant (an individual or a class) shows detriment to the consumer (individually or as a class) or a substantial likelihood of detriment, not limited to financial detriment. This means that more than a theoretical case of potential detriment would need to be made out. It seems that there is a difference between potential detriment, substantial likelihood of detriment and actual detriment – the first two categories of detriment (potential and substantial likelihood) may be a shade of grey that suppliers have to work through to really understand risk of including particular clauses in their agreements. In addition, the provisions on "unfair contract terms" will only relate to standard form, non-negotiated contracts. If a supplier alleges that the contract at issue is not a standard form contract, then the onus will be on the supplier to prove that it is not. There is some guidance in the Consultation Paper as to what is a standard form contract.

the provisions on "unfair contract terms" will only relate to standard form, non-negotiated contracts

Review of Statutory Conditions and Warranties

In addition to the release of the Consultation Paper, the Minister announced that The Commonwealth Consumer Affairs Advisory Council (**CCAAC**) will review the adequacy of existing laws on conditions and warranties that are implied into consumer contracts under the TPA.

It seems the review has been brought about because of concerns that:

- suppliers are misleading consumers in their terms and conditions as to what the consumers' entitlements are under law; and
- the rise in the "extended warranty" business has led to some retailers charging consumers for "extended warranties" that offer no more than what the consumer has under the TPA anyway. Let us ask you - did you agree to purchase an extended warranty on that new plasma you just bought? If yes, perhaps this initiative will help you save a bit of cash next time – something to put towards the upgraded model.

The TPA implies into contracts for the supply of goods and services to consumers certain conditions and warranties. Some of these implied terms are non-excludable and others are non-excludable but are able to be limited. Some examples are:

In relation to goods:

- an implied condition that goods supplied by description will correspond with the description;
- an implied condition that the goods are of merchantable quality; and
- an implied condition that, where the purpose for which the goods are being acquired is made known to the corporation, the goods are reasonably fit for that purpose.

In relation to services:

- an implied warranty that the services will be rendered with due care and skill; and
- an implied warranty that, where the purpose for which the services are required is made known to the corporation, the services supplied and any material supplied in connection with those services will be reasonably fit for that purpose.

CCAAC will review the adequacy of the current laws and determine whether there is a need for any amendments and, more generally, it will consider how the operation of the statutory implied terms can be improved. CCAAC will also consider if there is a need in Australia for 'lemon laws' in order to protect consumers against goods that repeatedly fail to meet expected standards in relation to performance and quality. These laws could apply to specific goods such as motor vehicles.

CCAAC is set to consult with specific industry stakeholders and is scheduled to provide its report to the Minister by 31 July 2009.

Conclusion

It seems that change is well on its way with various proposals and reviews which are likely to significantly change consumer protection law in Australia. Our main comment is that suppliers of products and services should stay on top of these changes – we think this will be a real focus, which is in line with the proposed enhancement of enforcement powers. It may take some initial investment of time and money at first, but we say, better than the wooden spoon.

Nick Abrahams is a Partner and Sydney Chairman and Kylie Howard a Senior Associate at Deacons in Sydney

Fakery and Deception in Participation TV – Lessons Learned from the UK's TV Phone-line Scandals

Gavin Smith examines the background and regulatory response to one of the UK's worst television public relations disasters involving the faking of winners in on-air phone competitions and broadcasters receiving revenue from premium-rate phone votes which were never counted.

Introduction

Television broadcasting in the UK has recently emerged from one of the most damaging scandals in its history. All four of the UK's major TV broadcasters – the BBC, ITV, Channel 4 and Five – were found to have breached the Office of Communications (**Ofcom**) Broadcasting Code relating to the conduct of certain on-air phone-in votes and competitions, resulting in the imposition by Ofcom of record fines. Separately, the UK's premium rate phone-line regulator PhonepayPlus[1] has found several premium-rate phone companies who operated the competition and voting lines for broadcasters to be in breach of its Code of Practice, also levying record fines in the process. The consequences of the scandal have been severe: aside from the record fines imposed, both Ofcom and PhonepayPlus have issued new regulatory codes and the country's largest free-to-air broadcaster, ITV, was forced to make an £18 million provision in its 2008 accounts not only to pay the fines but also to return premium phone-line revenue to its viewers. The scandal has struck at the heart of the UK public's trust in broadcasters and served as a blow to a relatively nascent, but significant revenue stream for TV broadcasters already struggling with a precipitous drop in advertising revenue.

Participation TV – The Commercial Context

In August 2008, Ofcom published its annual Communications Market Report (**CMR**).[2] The CMR found that TV advertising spend, as a proportion of total advertising spend, reduced from 30.9% in 2002 to 26.8% in 2007. The report also found that net advertising revenue for TV in the UK remained relatively static between 2001 and 2007, increasing only slightly from £3.471 billion in 2004 to £3.544 billion in 2008, a figure which itself represented a decrease from a high point in 2006 of £3.548 billion. Within this overall net advertising revenue, the UK's commercial public service broadcasters (ITV, Channel 4 and Five) reported a decrease in their net advertising revenue of 9.6% in 2006 and 2.4% in 2007. Adjusted for inflation over this period, these changes represent a significant drop in overall revenues for TV broadcasters.

More recently, in March 2009, Carat, the media buying network owned by Aegis, reported that TV advertising expenditure would fall by 12.5% in the UK during 2009.[3] This figure was contrasted against a rise (notwithstanding the prevailing economic climate) in internet advertising spend of 4.8% during the same period.

This downwards pressure on TV advertising revenues has been a key driver in broadcasters searching for alternative revenue streams. In Volume 27 Issue No 3 of the Communications Law Bulletin, Lesley Hitchens looked at the recent developments in product placement. One of the other major new revenue streams developed by broadcasters to counter the downward pressure on TV advertising revenues has been participation TV – the use of premium-rate phone services (both via telephone and SMS text) and paid "red button" interactivity for TV voting and competitions. According to research undertaken by Fathom Partners for PhonepayPlus and published in February 2008, TV voting and competitions generated £139 million in revenue during 2007 in the UK.[4] This amounted to as much as 13% of the overall £1.1 billion UK market in premium-rate phone services behind only directory and adult services.

Regulatory jurisdiction

Two regulatory bodies held jurisdiction over participation TV in the UK: Ofcom and PhonepayPlus (formerly known as the Independent Committee for the Supervision of Standards of Telephone Services, or **ICSTIS**).

Ofcom is required under section 319 of the UK's Communications Act 2003 (***Communications Act***) to draft, maintain, and monitor compliance with, a code governing the standards of broadcast content, programme sponsorship, and fairness and privacy.[5] Known as the Broadcasting Code,[6] it covers a wide range of matters including the protection of minors, prevention of harm and offence in broadcasting, rules on due impartiality, due accuracy and undue prominence of opinions, the treatment of religion and politics in broadcasting, sponsorship and rules governing cross-promotion between services and platforms. In scope, it is not dissimilar to Australia's Commercial Television Industry Code of Practice. Under the terms of all licences issued by Ofcom pursuant to the Communications Act, licensed TV and radio broadcasters are required to comply with the provisions of the Broadcasting Code and any breach of the Broadcasting Code accordingly can result in the same sanctions as for a breach of the licence itself.

Between 26 June 2007 and 18 December 2008, Ofcom issued numerous adjudications in participation TV cases. Two particular provisions of the Broadcasting Code (as then in force) were specifically relevant to this spate of cases:

- Rule 2.2: "Factual programmes or items or portrayals of factual matters must not materially mislead the audience"; and
- Rule 2.11: "Competitions should be conducted fairly, prizes should be described accurately and rules should be clear and appropriately made known".

Under sections 120-124 of the Communications Act, Ofcom also has responsibility for the regulation of premium rate services,[7] premium rate services being defined in the UK broadly as services which offer some form of content, product or service that is charged to users' telephone bills.[8] Ofcom has appointed PhonepayPlus as its agency for regulating the premium rate services market under a formal framework agreement. PhonepayPlus is an independent agency, with up to three members of its board being appointed on the basis of contemporaneous industry knowledge. PhonepayPlus publishes a Code of Practice[9] (the **PRS Code**) which sets out the manner in which premium rate services must be operated and has the power to impose sanctions, including levying fines, for breach of the PRS Code.

Although the PRS Code has been amended on a number of occasions (and is now in its eleventh iteration), the version in force which applied in respect of the majority of the participation TV cases heard during 2007 by PhonepayPlus contained the following provision:

- Rule 4.3.1: "Services and promotional material must not:
  a. mislead, or be likely to mislead in any way,
  b. take unfair advantage of any characteristic or circumstances which may make consumers vulnerable."

The PRS Code applies to all "service providers" (the providers of the relevant premium rate service) and the "network operators" of the communications infrastructure over which the service provider offers the relevant premium rate service.[10]

The Infringements

Fines issued by Ofcom for breaches of the Broadcasting Code and the PRS Code relating to deception and irregularities in the use of premium rate services in participation TV, have reached £11,577,000 to date, almost £11 million of which has been levied by Ofcom. The sheer level of these financial sanctions is unprecedented both in the history of Ofcom, which was established in 2003, and of its predecessor organisation, the Independent Television Commission (***ITC***). A brief synopsis of some of the key cases which gave rise to these sanctions is set out below:

- 26 June, 2007: Ofcom found that Channel Five had faked the winners of a phone-in quiz on daytime show Brainteaser, in breach of Rule 2.11 of the Broadcasting Code.[11] The rule was breached when fake names were used as competition 'winners' on three occasions; and production staff posed as 'winners' on air another two occasions, despite viewers paying premium rate service call charges to enter the competition. In its adjudication, Ofcom found that there had been what it called a "*longstanding history of similar conduct in seven previous competitions on Brainteaser, dating back to 2003; and four competitions on a spin-off programme, Memory Bank, in 2004*".[12] Ofcom fined Channel Five £300,000.
- 9 July 2007: Ofcom found that the BBC had faked the winner of a phone-in competition on the childrens' TV show, Blue Peter and fined the BBC £50,000 for breaches of Rules 2.11 and 1.26 (due care of people under eighteen) of the Broadcasting Code.[13] Ofcom found that "*during a premium rate telephone competition conducted as part of the programme, technical problems prevented genuine callers being put to air to answer the competition question. Instead, a child visiting the studio was asked to call in and pose as the 'winner' of the competition*." The adjudication found that the problem had been further compounded when the same show was retransmitted at a later time on the BBC's sister channel, CBBC when a further 3,574 entrants called, and were charged to use, the premium rate telephone line to enter the competition when it had already closed because the on-screen caption showing the entry number had not been sufficiently obscured. This case was particularly notable for the fact that it was the first time an independent media regulator had imposed a fine on the BBC.[14]
- 26 September 2007: Ofcom found that GMTV (the morning provider of TV programming on ITV) had charged viewers for their entries to on-air phone-in competitions when they had no chance of winning, and fined GMTV £2 million for a number of breaches of Rule 2.11 of the Broadcasting Code stretching over a 4 year period.[15] According to Ofcom's adjudication, the breaches fell into three broad categories: competition finalists were regularly selected before lines closed, meaning that viewers phoning-in towards the end of the entry period had no chance of winning; a method of selecting finalists was used that resulted in those viewers who called to enter between 8:30am and 9:00am having significantly less chance of being selected as a finalist than those who entered before 8:30am; and, on some occasions, the competition finalists were all selected up to three minutes before lines closed. Two days earlier, PhonepayPlus had also fined Opera Telecom Limited, the premium-rate phone line operator which provided the telephone phone line service to GMTV, £250,000 in respect of the same competitions.
- 20 December 2007: Ofcom fined Channel 4 a total of £1.5 million for misconduct in the daytime quiz show "Deal or No Deal" and the phone-in contest "You Say We pay" which formed a part of the daytime chat TV show, Richard and Judy.
- 8 May 2008: Ofcom issued ITV with a £5.65 million fine – the highest fine ever imposed on a UK broadcaster – for what it described as "*some of the most serious breaches of [its] Broadcasting Code*". Ofcom stated that the fine was "*by far the highest imposed by Ofcom or any of the previous regulators [and] reflects not only the seriousness of ITV's failures but also their repeated nature*".[16] Ofcom's findings were informed, in part at least, by ITV's own independent report commissioned from Deloitte[17] which identified breaches of Rule 2.11 of the Broadcasting Code on repeated occasions in a number of phone-in competitions in prime-time TV shows (including Ant and Dec's Saturday Night Takeaway, Gameshow Marathon and Soapstar Superstar), and also identified a total of £7.8 million in revenues received by ITV through premium rate services which ought to be refunded to viewers or, if unclaimed, donated to charity. The list of breaches was long:
  - selecting competition finalists before telephone lines were announced as closed;
  - staggering selection of competition finalists so that all viewers did not have an equal chance of winning;
  - selecting finalists for competitions based on suitability to be on television and where they lived, rather than randomly;
  - selecting individuals already known to production teams to win competitions or be on short-lists;
  - ignoring viewers choices in phone-in votes by finalising counts before lines were closed; and
  - failing to adequately inform viewers that participation competition were finished during repeat broadcasts.

  The adjudication was also accompanied by some of Ofcom's most strongly worded statements on the subject. Philip Graf, Chairman of Ofcom's content sanctions committee said: "*ITV programme makers totally dis-*

downwards pressure on TV advertising revenues has been a key driver in broadcasters searching for alternative revenue streams

regarded their own publishing terms and conditions … there was a complete inadequate compliance system in place … millions of paying entrants were misled into believing they could fairly interact with some of ITV's most popular programmes." And Ed Richards, Chief Executive of Ofcom, said: "*this was a thorough set of investigations which uncovered institutionalised failure within ITV that enabled the broadcaster to make money from misconduct on mass audience programmes*."

- 30 July 2008: Ofcom fined the BBC £400,000 for a breach of Rule 2.11 of the Broadcasting Code in viewer and listener competitions across 8 different TV and radio shows, including the Children in Need and Comic Relief charity "telethon" events[18]. The breaches included production team members standing-in as winners of competitions to which viewers had entered using premium rate services and broadcasting fictitious names as winners of competitions.

A New Regulatory Regime

In March 2007, having already identified a number of breaches of the Broadcasting Code in the conduct of participation TV premium rate service competitions and voting by that juncture, Ofcom commissioned an independent inquiry (the **Ayre Inquiry**) into the use by broadcasters of premium rate phones services. The report was published on 18 July 2007[19] and concluded that there were "*systemic*" problems and an "*absence of systems designed to require, ensure and audit compliance. In the absence of such systems individual mistakes, whether the result of technical failure, misjudgement, negligence or deliberate deceit, too often went unnoticed or unreported and sometimes ignored.*"[20] The report contained a number of key findings. In particular, it stated that broadcasters had to do more to recognise the contractual relationship it had with viewer-consumers when it provided premium rate services and the obligations which that imparted on them.[21] It criticised what it said was significant confusion over the division of powers between PhonepayPlus and Ofcom. PhonepayPlus only had jurisdiction over the service provider of the premium rate service but not the broadcaster which had contracted with the service provider to offer that premium rate service.[22] In most cases, broadcasters therefore refused to accept that the PRS Code applied to them.[23] It also criticised the fact the PhonepayPlus was only capable of levying a maximum £250,000 fine, the amount it had imposed on Opera Telecom Limited on 24 September 2007.[24] The report posed a number of key options and recommendations to Ofcom:

Fines issued by Ofcom for breaches of the Broadcasting Code and the PRS Code relating to deception and irregularities in the use of premium rate services in participation TV, have reached £11,577,000 to date

- to make broadcasters "*directly responsible for PRS compliance right through the supply chain, just as they would be for broadcast content*". The report said that this was the only way to "*give broadcasters the incentive to exercise due diligence in the design, commissioning, delivery and auditing of PRS based programming, together with effective contractual oversight of producers, service providers and telephony operators*". It would "*place responsibility firmly where the audience already believes it to rest – with the people who commission the programmes and put them to air*".[25]
- Potentially make ICSTIS have formal jurisdiction over broadcasters' use of premium rate services[26], or, alternatively, to amend existing broadcast licences to include a specific obligation requiring broadcasters to have responsibility for consumer protection in respect of all aspects of the provision of premium rate services.[27] The consequence of this second alternative would be to make Ofcom responsible for the regulation of all broadcast-related premium rate services rather than PhonepayPlus.
- Regular third party, independent audit of all broadcasters' use of premium rate services.[28]
- Updated guidance from Ofcom regarding the manner in which competitions are run (including recommendations as to the timing of counting of votes, the manner in which votes are counted, transparency of pricing of the relevant premium rate service, and general principles of fairness in the conduct of all premium rate service phone-in competitions and voting processes).[29]

Ofcom issued a consultation paper on the findings from the Ayre Inquiry[30] and, after considering responses received from stakeholders, issued a statement on 19 February 2008[31] setting out new measures to "*protect consumers and to help restore confidence in programmes that invite members of the public to participate in them via telephony, the internet or any other form of communication*".[32] On the same date, PhonepayPlus also issued its own policy statement.[33]

Ofcom's statement introduced almost all of the findings from the Ayre Inquiry report. New licence conditions were introduced which require that:

- "*Licensees shall be responsible for all arrangements for the management of communication, including telephony, between members of the public and the Licensee or the Licensee's contractors or agents… where such communication is publicised in programmes*"; and
- "*Arrangements for the management of methods of communication between members of the public and the Licensee must ensure, in particular, that: (i) reasonable skill and care is exercised by the Licensee in the selection of the means of communication and in the handling of communications received; (ii) voting, competitions, games or similar schemes are conducted in such ways as to provide fair and consistent treatment of all eligible votes and entries; and (iii) publicity in programmes for voting, competitions, games or similar schemes is not materially misleading*."

A new verification requirement has been introduced via a further licence condition. This requires licensees to implement and maintain appropriate compliance procedures to ensure compliance with the new licence provisions set out above. This verification must be via an independent third party, and must also "*include appropriately regular reviews by the third party of individual programmes … [and] track all votes or competition entries through all stages from receipt, and the results of each review must be fully documented*." A board member is required to have responsibility for the verification and the third party verification results are to be presented to that board member. Where irregularities are discovered, the board member must report them to Ofcom and also provide any other information requested by Ofcom. Each Licensee is also required to publish an annual statement signed by the relevant board member confirming that he is "*satisfied that the Licensee has in place suitable procedures to fulfil the requirements of paragraph 3(b) and confirming the name of the third party engaged [in the verification]*".

In conjunction with the new licence conditions described above, Ofcom also accepted the proposals from the Ayre Inquiry report to introduce new guidance to give further detail to the manner in which Ofcom expects premium rate services to be used in broadcasting.

PhonepayPlus has, at the same time, introduced a new requirement for service providers who are contracted by broadcasters to provide the premium rate services communicated to viewers in programming to seek prior permission before they are permitted to provide broadcasting related premium rate services[34]. This new regime requires service providers to comply with certain conditions attached to their prior permission. These include:

- Connectivity and capacity: An ability to adequately deal with peak-time traffic when votes and competition entries are being received and to ensure that all votes/competition entries are considered and reflected in time for the relevant outcome.
- Conduct: Calls and SMS must not be counted before or after lines are officially opened and closed; lines must not remain open when programmes are being repeated.
- Coherence: contractual arrangements with broadcasters must identify which party has responsibility for all aspects of each activity associated with the service; there can be no changes to the operational structure without senior management approval; all personnel must be aware of the PhonepayPlus code of conduct and have suitable training; procedures must be in place to deal with backup of operational systems; and service providers must permit PhonepayPlus staff and/or its agents to visit the service provider's premises and have access to any documents or records relevant to the service.

Even following the introduction of the new Ofcom and PhonepayPlus regulatory regimes in February 2008, both entities found themselves trying to unravel yet more past misdemeanours of the major public broadcasters until the end of 2008. In what many hoped would be the final major investigation into broadcast-related premium rate service scandals, Ofcom fined the BBC £95,000 on 18 December for breaches of the Broadcasting Code arising from programming which had been broadcast in 2006. But it remains to be seen whether the sheer scale of the fines imposed by Ofcom and PhonepayPlus during 2007 and 2008, together with the new regulatory regime, will ensure that the UK has seen the end of this series of scandals.

Gavin Smith is a Senior Overseas Practitioner in the Communications, Media and Technology Group at Allens Arthur Robinson

(Endnotes)

1 http://www.phonepayplus.org.uk/

2 http://www.ofcom.org.uk/research/cm/cmr08/

3 http://www.telegraph.co.uk/finance/newsbysector/mediatechnologyandtelecoms/media/5050270/Carat-says-UK-advertising-market-to-fall-7.1pc-in-2009.html

4 http://www.phonepayplus.org.uk/pdfs_research/Phone_paid_services_Fathom.pdf

5 s319 Communications Act 2003, which can be found at: http://www.opsi.gov.uk/ACTS/acts2003/ukpga_20030021_en_29#pt3-ch4-pb16-l1g319

6 http://www.ofcom.org.uk/tv/ifi/codes/bcode/

7 ss.120-124 Communications Act 2003, which can be found at: http://www.opsi.gov.uk/ACTS/acts2003/ukpga_20030021_en_13#pt2-ch1-pb19-l1g120

8 Ibid, section 120 Communications Act 2003.

9 http://www.phonepayplus.org.uk/service_providers/cop/default.asp

10 s.120 Communications Act, and section 1.2 of the PRS Code.

11 http://www.ofcom.org.uk/tv/obb/prog_cb/obb88/

12 http://www.ofcom.org.uk/tv/obb/prog_cb/obb88/

13 http://www.ofcom.org.uk/tv/obb/prog_cb/obb89/

14 The BBC is not licensed by Ofcom and is principally regulated by the independent BBC Trust. As a consequence, Ofcom has limited powers over its activities having jurisdiction over the BBC in only two areas: (i) competition issues relating to the BBC's activities; and (ii) the BBC's compliance with the Broadcasting Code.

15 http://www.ofcom.org.uk/tv/obb/prog_cb/obb94/

16 http://www.ofcom.org.uk/tv/obb/prog_cb/obb108/bb108.pdf

17 http://www.itvplc.com/files/itvnews/1146/2007_10_18.pdf

18 http://www.ofcom.org.uk/tv/obb/prog_cb/obb115/

19 http://www.ofcom.org.uk/tv/ifi/prsinquiry/ayrereport/report.pdf

20 Paragraph 1.9 of the Ayre Inquiry into PRS, Ibid.

21 Paragraph 1.14 of the Ayre Inquiry into PRS, Ibid.

22 Paragraphs 1.20-1.24 of the Ayre Inquiry into PRS, Ibid.

23 Paragraphs 1.20-1.24 of the Ayre Inquiry into PRS, Ibid.

24 Paragraphs 1.20-1.24 of the Ayre Inquiry into PRS, Ibid.

25 Paragraph 1.36 of the Ayre Inquiry into PRS, Ibid.

26 Paragraph 1.38 of the Ayre Inquiry into PRS, Ibid.

27 Paragraph 1.39 of the Ayre Inquiry into PRS, Ibid.

28 Paragraphs 1.45-1.47 of the Ayre Inquiry into PRS, Ibid.

29 Paragraphs 1.48-1.53 of the Ayre Inquiry into PRS, Ibid.

30 http://www.ofcom.org.uk/consult/condocs/participationtv/consultation.pdf

31 http://www.ofcom.org.uk/consult/condocs/participationtv/statement/ptvstatement.pdf

32 Paragraph 1.1, Ibid.

33 http://www.phonepayplus.org.uk/upload/statement_on_participation_tv.pdf

34 The new form of Prior Permission Notice for service providers of broadcasting related premium rate services can be found here: http://www.phonepayplus.org.uk/pdfs_news/Participation_TV_Prior_Permissions_Notice.pdf

Sports Broadcasting in the Digital Era

We're not in the business of keeping media companies alive, we're in the business of connecting with consumers.

- Trevor Edwards, Nike (New York Times, 14 September 2007)

Sports is the battering ram of pay-TV

- Rupert Murdoch (1996 message to shareholders)

The amounts spent on broadcasting rights and sponsorship for the Beijing Olympic Games and the extent of the audience reach of the Games, was a compelling reminder of the importance placed on sport and sports marketing globally. Although the Sydney and Athens Olympics provided limited online offerings for audiences (mostly commentary and results), the Beijing Olympics were the first Games to truly harness the power of new media and to enable sports broadcasting to make its first confident step into the digital future.

This paper examines the changing landscape of sports broadcasting in the digital era and the implications for traditional models of sports advertising, content distribution and licensing. It uses the Beijing Olympics as a case study to explore how far sports broadcasting has come and to forecast where it might lead in the future.

The nature and importance of sports broadcasting

A lot of Australians watch a lot of sport. In 2008, 36 of the 50 highest rating free-TV programs in Australia involved sporting coverage.[1] The Games always attract massive audiences and the 2008 Beijing Olympics did not disappoint. According to Free TV Australia,

> 17.2 million people watched all or part of Seven's coverage – the largest in Australian television history - and an average of over 11.6 million tuned into the commercial television coverage every single day.[2]

However, whilst the Olympics contributed to the amount of sport Australians watched last year, the relative amount of sports viewing to the viewing of other programs in 2008 was not unusual. Even without the Olympics, sporting events occupied all top ten places of the highest rating programs in 2007.[3]

In Australia, as in many countries, televised sports provides 'a form of social cohesion'.[4] However, the notion that sport suggests 'some degree of unity in shared national values'[5] highlights only part of what has become a complex matrix of often competing roles, players, interests and constraints. Above all, sports nowadays are a big business for the majority of stakeholders. Major sporting events are the most significant content drawcard – the "battering-ram" – for television broadcasters.

In addition to conferring prestige, differentiating among competing services and building a positive brand name for a network,[6] for broadcasters, carrying sporting events ultimately mean more eyeballs. More eyeballs mean more advertisers and more pay-TV subscribers. High-rating events also tend to be a more successful platform for the promotion of prime time programs, so the process is self-generating.[7]

At the same time, sports themselves rely heavily on the support of television. Network television contracts provide both the largest source of revenue for sports franchises, as well as the most important exposure vehicle for professional sports leagues.[8] Similarly, advertisers and sponsors are also the beneficiaries of wide exposure and the positive branding associated with major sporting events.

Despite the seeming commonality of interest amongst stakeholders, external constraints nonetheless affect and shape the framework for sports broadcasting. Consumer preferences, the tension between maximising revenue and maximising audience reach, the availability and quality of delivery platforms (quality sports broadcasts need high bandwidth) and the impact of government regulation, all heighten the importance of obtaining exclusive rights. Ironically, the expense of production and dealing with these constraints limits rights fees on the one hand and informs exclusivity on the other.

The value of sporting rights as event television and ephemeral content is greater than most other types of premium content such as film because the value of sporting content derives from being delivered in real time. As such, there is less risk of digital piracy. However, while interest in live broadcasts may reduce (although not eliminate) the risk of piracy for sports broadcasts, it also increases the urgency of targeting digital piracy if and when it does occur. The ease with which content can be digitally distributed and the increase in the ways of delivering pirated content (for example by DVD, mobile and IPTV) means that considerable expense is also required to effectively combat the piracy of sporting broadcasts as close to the time of the relevant sporting event as possible.

The changing broadcasting model

Traditional model

Traditionally, sporting organisations owned all of the copyright in the broadcast and cinematograph film rights for a sporting event or competition and then licensed strictly defined rights to broadcasters to be exploited over various platforms. That is, free-TV and pay-TV rights were either licensed to the one 'host' broadcaster along with the right to sub-licence those rights, or were packaged and licensed separately from the outset. Generally, sporting organisations would hold back all other rights because of the pressure placed on them by broadcasters who feared that the proliferation of new media options would fragment audiences and undermine the value of their television rights. As a consequence, websites, when used, were merely informational and complementary.

The new media market

A series of both technical and legislative developments over the past decade has meant that the traditional framework for sports broadcasting has undergone a radical transformation.

The introduction of digital television, HDTV and the multi-channelling of free-to-air channels over the past few years, has increased the capacity for sports content to be broadcast and has also had

Even without the Olympics, sporting events occupied all top ten places of the highest rating programs in 2007

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implications for some of the traditional distinctions between free-to-air and pay-TV. In the lead up to the review of the anti-siphoning regime,[9] the government has controversially suggested, despite strong opposition from pay-TV and sporting lobby groups, that it is considering removing anti-siphoning restrictions on free-to-air multi-channels[10] in order to drive the uptake of digital television.[11] This has the potential to reduce the amount of sport available to pay-TV channels which have traditionally used sporting events as a primary driver for subscriptions. It also threatens to impact sporting organisations that rely on subscriptions to drive up the amount that they can charge for broadcast rights.

In addition to developments in digital television, a 'new media' market for sports broadcasting has emerged as a viable platform. The increased penetration of high bandwidth internet connection (both wired and wireless) has caused both a shift in the way content is created, distributed and accessed, as well as an increase in the type and amount of content that is now available. Remote, wireless and mobile applications are now making it possible for people to access online content anywhere, anytime and on any platform.

Not only do these new technologies offer greater interactivity, personalisation and customisation of content,[12] they also offer the opportunity for rights holders to distribute their content to a far larger audience than was previously possible via free-to-air or pay-TV broadcasting. At time of writing, there are approximately 3.3 billion mobile phone subscribers and 1.3 billion internet users worldwide and market penetration is increasing exponentially.[13] The technical convergence of platforms (as demonstrated by the advent of the iPhone, the 3 Skype Phone, the Nokia N95 and the Google Android) has therefore given content service providers the opportunity to leverage the market share enjoyed by mobile carriers. At the same time, mobile carriers are now increasingly using content services (including more recently, killer apps like social networking, Presence and video) to sell connectivity.[14]

The unique characteristics of the internet – specifically, the growth in internet eyeballs, the availability of significant revenue through targeted advertising, the opportunities for viral marketing particularly through social networking sites and the ability to collect precise real-time user metrics – have meant that internet advertising is experiencing the fastest growth of all advertising platforms.[15] In fact, the fastest growing portion of online advertising is advertising on mobile phones.[16] As advertising is the primary driver for free-to-air broadcasters, the internet is now a platform that can no longer be ignored or successfully resisted by broadcasters and sporting organisations. The adoption of a 3-screen approach enabling consumers to view sports on television, internet (via a PC) and mobile has become increasingly attractive to consumers, broadcasters and advertisers alike.

a 'new media' market for sports broadcasting has emerged as a viable platform

Licensing new media rights

The recognition of new media as a viable and competitive market has presented both legal and commercial challenges for content management and distribution. There is a complex interaction between contractual frameworks, new technologies and legislation. As a result, rights owners, legislators and courts are increasingly grappling with whether licensing within the new media market should operate differently to licensing within traditional markets. Contractual definitions of new media, technical attempts to counter jurisdictional challenges through geo-blocking, and interpretations of the legislated fair dealing exception, are all examples of measures emerging from the new media context that are having a direct and significant impact on the value of purchasing and exploiting online rights.

The adoption of a 3-screen approach enabling consumers to view sports on television, internet and mobile has become increasingly attractive to consumers, broadcasters and advertisers

Definitional issues – future-proofing

Defining 'new media' rights for the purpose of licensing them, poses a challenge in itself. Traditionally sports broadcasting rights are licensed several years in advance of the actual event to be broadcast. The rapid development of new media technologies makes it difficult to license rights in relation to a platform that is by its very nature dynamic and that may therefore have changed by the time the event takes place, or even over the duration of that licence period. Rights-holders therefore need to future-proof definitions and possibly reduce the duration of new media licences. To date, rights packages have tended to articulate rights in terms of 'the internet', 'interactive TV' or 'mobile' rights.

In a recent case in the US District Court in New York,[17] the Court used the 'new use' principle to interpret a pre-existing licence and determine whether it covered digital downloads. The Court held that language of a licence should be construed to include new technologies if they could reasonably be said to fall within the medium as described in the licence. In this case, the use of the language 'now or hereafter known' in the clause authorising Ramones Productions 'to manufacture, advertise, sell, distribute, lease, license or otherwise use or dispose of the Masters and phonograph records…by any method *now or hereafter known*', indicated that an expansive definition was intended. Although there have been no similar cases in Australia, this is an example of both the benefits for rights-holders of future-proofing definitions, as well as the practical approach that courts may take in relation to such definitions.

Jurisdictional issues – geo-blocking

In 2005, Dick Pound, a former IOC Vice-President was reported to have said the following:

> *Until the technology changes to allow the video to be restricted, we have a problem...Historically, we have sold rights in a particular territory. Unless and until you can guarantee that the signal will be restricted to your territory, then you cannot put real time video or real time audio on the Internet.*[18]

Geo-location technologies are providing a technical solution to the difficulties associated with acquiring geographically restricted online rights packages

Licensing content based on geography makes sense (and has been commonplace for years[19]) for television broadcasters because broadcast licences are usually granted in relation to a particular geographical location. What seems unusual, is that the licensing of content rights to online content service providers has often also been granted in relation to a geographical location, even though the internet has traditionally been regarded as a 'borderless' communications medium.[20] This raises both jurisdictional and practical issues.

However, internet-based geographic access control systems (**Geo-location technologies**), which have been available since 1999, are increasingly providing a technical solution to the difficulties associated with acquiring geographically restricted online rights packages. Enabling website operators to restrict access to websites based on the geographic location of the access-seeker, these technologies have alleviated some of the fears articulated by Dick Pound and in doing so, helped to cement the role of the internet as a vital platform for sports broadcasting. However while geo-location technologies have quickly become an essential part of content rights management, they are not fool-proof. It is still difficult technically to simultaneously minimise the incidence of false positives (erroneous permission of access) and false negatives (erroneous denial of access).[21] Furthermore, as Edelman notes, 'the commercial incentives of an advertising driven business model strongly disfavour false negatives, causing still greater impediments to attempts to minimise false positives'.[22] There are also numerous ways of circumventing geo-location technologies.[23] The effectiveness of geo-location technologies can have a significant effect of the success of online sports broadcasting because an inability to prevent false positives undermines the value of exclusivity, whilst an inability to prevent false negatives can result in a loss of consumer confidence.

Telstra contended that old world accommodations about the use of copyright material by rival television broadcasters do not constitute an appropriate approach to the question of fair dealing in the so-called digital age

Fair Dealing

The operation of the fair dealing exception relating to the reporting of news online illustrates the tension between rights holders and the broadcast of sports online. Further, the scope of the fair dealing exception can have a direct impact on the rights-holders perception of exclusivity and the consequent value of online rights. The exception provides that a fair dealing with an audio-visual item does not constitute an infringement of the copyright in the item or a work or other audio-visual item included in the item, if it is for the purpose of, or is associated with, the reporting of news *by means of a communication or in a cinematograph film*.[24] The technology neutral concept of 'communication' covers film and broadcast copyright subject matter available (whether by streaming or downloading) over the internet, as well as wireless internet applications such as 3G mobile phone content services.

Although conventions exist which provide guidance as to the accepted duration and nature of content highlights that might fall within this fair dealing exception in relation to television,[25] there is no similar convention in relation to the broadcast of sport over the internet. As with the television industry,[26] it is likely that internet industry practice will develop out of industry practice and disputes, although technical difficulties and a lack of incentive to share footage amongst internet service providers means that it may not be as seamless.[27] Distinctions may also need to be drawn between ephemeral real time streams and permanently archived video on demand, as the latter runs a greater risk of infringement.

There has also been a paucity of litigation to date that may provide relevant guidance in this area. The only case in Australia that has dealt specifically with this issue is *Telstra Corporation Pty Ltd v Premier Media Group Pty Ltd* [2007] FCA 568. Telstra Bigpond held exclusive rights to broadcast national rugby league matches to the public via the internet and 3G mobile phones.[28] Telstra applied for an interlocutory injunction on the basis that the reports of NRL matches (sourced from highlights packages broadcast on the Fox Sports news channel) made available from the Fox Sports website and provided by Premier Media Group (PMG) to Hutchison and Vodafone for their 3G telephony services,[29] were an infringement of its copyright.[30] The respondents (PMG and the publisher of the Fox Sports website, www.fox.sports.com.au) argued that the reports constituted fair dealing. Telstra contended that 'old world accommodations about the use of copyright material by rival television broadcasters do not constitute an appropriate approach to the question of fair dealing in the so-called digital age'.[31]

In the circumstances and on the balance of convenience, the Court was not prepared to conclude that there was a case that injunctive relief would be granted.[32] Although it was not persuaded that there was a case to distinguish delivery of relevant content on 'new media' (internet and mobile) and 'old media' (free-to-air and pay-TV),[33] the Court did concede that this was a real and arguable issue. Similarly, although it was unpersuaded by the argument for interlocutory purposes, the Court also noted that whether the provision of reports by Fox Sports News to Hutchison and Vodafone, precluded a fair dealing defence because the respondents were simply broking or selling content, not delivering news, was 'also a point that may be made good on a final hearing'.[34]

In relation to what the fair dealing exception actually means in terms of the duration and timing of news broadcasts, the Court noted that what commercial participants in any given industry think is fair is unlikely to be necessarily determinative of the issue of fair dealing. However, a general view about the legitimacy of a certain length of use of audio-visual footage will certainly be a relevant consideration to fairness.[35] It is possible therefore that a UK-type Code or an internet industry equivalent of the Convention, might serve this purpose.[36] The issue as to whether parties can legislate out fair dealing exception altogether was also left for another time.[37]

in the lead-up to Beijing, the IOC acknowledged that the Internet can enhance the quality, presentation, immediacy and comprehension of Olympic broadcasts

The success of the new media offerings during Beijing was largely dependent on how well the rights holders utilised the new media platform

As the case was settled before a final hearing, the scope and operation of the fair dealing exception in the context of the internet remains unresolved.[38] Nevertheless, it seems that copyright owners or licensees who want to argue that fair dealing in the context of the internet should be treated differently from traditional media, should be prepared to prove why different considerations should apply.[39]

A Case Study – the Beijing Olympics

Introduction

Paradoxically, although broadcast and sponsorship rights to the Olympic Games are amongst the most highly valued in the world,[40] the primary aim for the IOC is not to maximise revenue. Rather, the Olympic Charter compels the IOC to 'ensure the fullest coverage by the different media and the widest possible audience in the world.'[41] However, notwithstanding the IOC's global imperative, Olympics broadcasters, sponsors and the IOC fiercely protect their property and in doing so, the value of their deals.

IOC restrictions

Although limited online coverage (mainly competition statistics and results) was available prior to the Beijing Olympics, Beijing was the first time new media coverage was made widely available. This was due to increased technical capabilities, a growing recognition by both broadcasters and sponsors of the potential to leverage a far larger internet audience, and, perhaps most significantly, the IOC's liberalisation of the licensing of digital and new media rights for Beijing.

In guidelines released in the lead-up to Beijing, the IOC acknowledged that 'the Internet can enhance the quality, presentation, immediacy and comprehension of Olympic broadcasts' and it encouraged rights-holders to 'use the internet for cross-promotion'.[42] However non-licence holders were explicitly prohibited from disseminating moving images or play-by-play audio coverage of any Olympic events at the Games, including over the internet.[43] The guidelines noted that should any fair dealing or similar provisions in applicable national law permit the use of such content for news purposes on the internet, then any such broadcast must be restricted to the territory in which the law applies; that is, it had to be geo-blocked.[44]

Rights structure

Despite the increased role to be played by new media in Beijing, the structure of rights packages remained largely unchanged. Typically, to broadcast the Olympics, a three-way deal is arranged between the IOC, the host broadcaster and other broadcasters. For the Beijing Olympics, in major markets like the US, Western Europe, China and Australia, digital rights (that is, online and mobile rights) were packaged with television deals. For example, in the US, the Olympic broadcaster (the NBC) retained its online rights and provided footage via its NBCOlympics.com site. In Australia, the Seven Network was awarded all rights (free, pay, internet and mobile). Whilst it hoarded the pay-TV rights, it granted internet and mobile rights to Yahoo7. Yahoo7 sub-licensed the mobile rights to Telstra Big Pond.

However, there were exceptions to the packaging of digital rights with television rights. The IOC awarded a few web-only licences, including to the internet arm of China's state broadcaster CCTV (cctv.com).[45] The IOC also entered into an agreement with YouTube (the video sharing service owned by Google) to offer online video in 77 countries where digital rights had not been sold or had been acquired only on a non-exclusive basis.[46]

Online viewing

The success of the new media offerings during Beijing was largely dependent on how well the rights holders utilised the new media platform. NBC was particularly successful. Spurred on by geo-blocking capabilities and cost-efficient technologies which enabled editors in the US to extract high resolution material from low resolution files of Olympic footage, the NBC broadcast a record 3,600 hours of linear TV coverage and 2,200 hours of live-streaming on its website. This was more than all of the previous summer Olympics combined. Online coverage also included live streams, podcasts, video-on-demand, email alerts, mobile phone content and RSS feeds. Although the viewing experience on NBCOlympics.com was different to that on TV – users saw the standard world feed sent to broadcasters and without commentary or slick production – almost 10 million viewers watched more than 6 million hours or more than 56 million online videos of the NBC Olympics coverage.[47]

Yet even with the abundance of live streams, prime time on NBC was protected. Live gymnastics, track and field, swimming, diving, volleyball and beach volleyball were reserved for prime time television and could only be downloaded from the site on demand, after the event.[48] Despite this, or maybe because of it, figures suggest that viewers used online video primarily to supplement rather than replace their television viewing. According to Nielsen, on August 9, a Sunday, there were 858,000 unique visitors to the video section of NBC's Olympic site. The next day, when people were back at work, the total surged to two million. Meanwhile, the average US television audience for the first 5 days of the Games was above 30 million on every evening except Saturday, typically a slow night.[49]

Web 2.0

The role of the internet in exploiting the value of the Olympics was not limited to the broadcast of events. The Beijing Games were the first Olympics since the term Web 2.0 entered the marketing vernacular and sites like MySpace, Facebook and YouTube have become household names.[50] Sponsors accordingly harnessed the power of social media services by using these platforms for user-generated content and viral marketing tactics to engage consumers and leverage Olympic rights.[51] However, the relatively unregulated online environment also opened up further opportunities for ambush marketing. Pepsi's online campaign 'Everyone can be on the can for China' encouraged users to upload pictures, poems and articles about their love for China without ever mentioning the Olympics. According to research by CMR Group conducted in 10 Chinese cities, 60% of respondents thought that Pepsi was the official drink of the Olympics, with only 40% naming the actual sponsor, Coca-Cola.[52]

Looking forward to London

Digital rights for the Beijing Olympics accounted for only a tiny proportion of the $1.7 billion the IOC estimated it would make from broadcast rights in Beijing. Nonetheless, the recognition that digital media is increasingly important in enabling the IOC to realise its goal of ensuring the widest possible audience, means that the IOC is likely to award rights in different ways in the future.[53] As consumers demand more from broadcasters and business

the relatively unregulated online environment also opened up further opportunities for ambush marketing

models for sports broadcasting change, the prospect of emerging new media titans (such as Google and Apple) bidding for future Olympic Games against international broadcasts, is becoming increasingly real.[54] The greatest challenge for the IOC will be attempting to forecast how people might be watching the Olympics in 2014 or 2016 as it attempts to negotiate those rights agreements today.

Conclusion

The modern context for sport can be characterised as a professional and intensely commercial network of activity, regulated by an ever-expanding web of sporting federations, governments, and agencies. Further contributing to this network are lucrative sponsorship contracts, broadcasting rights and national pride, all of which assert their own priorities. However the one factor underlying these competing interests is the need to maintain the interest and (financial) support of the public.

Advertisers and sponsors are increasingly recognising that in order to connect with the public, they need to respond to their demands. This has had a flow-on effect for broadcasters, who are now beginning to find ways to monetise online eyeballs and embrace the strong growth in the digital media market. However the value of digital rights is still unclear. Further, the shift in business models from traditional content distribution to online distribution, requires significant investments. As a result, digital rights continue, for the most part, to be bundled with traditional media rights and sold to the incumbent media broadcasters.

However, according to the Accenture Consumer Broadcast Survey 2008, 'Television is shifting from its origins as a clearly identifiable stand-alone medium towards a future in which it is just one of an expanding array of devices through which people will choose to consume the content they want.'[55] It is likely therefore that the future will see both a change in the ways in which rights are awarded to account for increased importance of digital and new media, as well as the emergence of new partnerships to leverage various platforms and enable cost-sharing. The winners for sports broadcasting in this environment will be those that are willing to exploit change and the opportunities that new media brings. Whilst it is impossible to predict how the digital world will transform sports broadcasting in years to come, what is certain is that the classic broadcasting model has changed irreversibly.

Valeska Bloch is a Lawyer in the Communications, Media and Technology Group at Allens Arthur Robinson in Sydney.

the recognition that digital media means that the IOC is likely to award rights in different ways in the future

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10 Under the *Broadcasting Services Act 1992* (Cth) (BSA), subscription television broadcasting licensees are subject to a licence condition that the licensee cannot acquire rights to events on the anti-siphoning list unless a national broadcaster has the right to televise the event, or a commercial television broadcasting licensee (other than a licensee operating under a licence issued under subsection 40(1) of the BSA) covering more than 50 per cent of the population has the right to televise the event. Similarly, during the simulcast period, a commercial television broadcaster must not televise the whole or part of an anti-siphoning event on a multi-channelled commercial broadcasting service, unless the whole or part of the event has been previously televised on the core service, the event is televised simultaneously on the core service and the multi-channel, or the broadcaster televises the part of the anti-siphoning event in a news or current affairs program; *BSA*, Sch 4, cl 41A.

11 Just as sporting events were a driver for the uptake of pay-TV, so too does the government hope that it will be a driver for the uptake of digital television.

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22 Ibid.

23 For example, through anonymisers and proxy servers; Svantesson, n18 at 25-26.

24 *Copyright Act* 1968 (Cth) s103B(1)(b).

25 The Australian TV Access Convention (the ***Convention***) is an undocumented 'gentleman's agreement' between broadcasters. It is specific to the television industry and it arose within the context of broadcasters providing each other with feeds for the purpose of compiling news bulletins, which form a small part of larger programs and programming schedules. The Convention contrasts with the UK which has a formal code of practice signed by participating television broadcasters (the ***Code***). Neither the Convention nor the Code would have direct application to the internet.

26 The UK Code was developed following the decision in *British Broadcasting Corporation v British Satellite Broadcasting Ltd* [1991] All ER 833.

27 Whereas there is a need for reciprocity and the sharing of feeds to compile news bulletins on the basis of agreed rules in the television industry, in the internet industry there is not the same incentive amongst broadcasters to share footage.

28 *Telstra v Premier Media Group* [2007] FCA 568 at 4.

29 Ibid at 12, 13. The reports were placed on the internet or were available on the telephony for about 48 hours after being put up, which was about 48 hours after the matches on the highlights. Although the length of the footage varied, the parties argued on the basis of two-minute footages; [2007] FCA 568 at 26, 27.

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Trade Practices Amendment: Achieving Clarity in Pricing

Bridget Edghill reviews recent amendments to the Trade Practices Act 1974 (Cth) concerning component pricing.

On 12 November 2008, Federal Parliament passed the Trade Practices Amendment (Clarity in Pricing) Bill 2008 (**Clarity in Pricing Amendment**) which inserts an amended section 53C into the *Trade Practices Act 1974* (Cth) and in doing so, introduces significant changes to the practice of component pricing.

With the proliferation of new media and forums for advertising, particularly the growth in online advertising, the practice of component pricing has become increasingly common, notably in relation to the telecommunications industry and e-commerce.

Component pricing is an important tool for businesses when vying for the attention of consumers as it enables businesses to advertise their most competitive base price and demonstrate the price difference between the goods and services they offer and those offered by competitors. With websites dedicated to allowing consumers to easily compare prices, the need to promote the most competitive base price is heightened.

In recent years online advertising expenditure has experienced significant growth. Research by the Commercial Economic Advisory Service of Australia released on 2 April 2009 found that in the Australian media industry online advertising is the fastest growing advertising sector with a 27% increase in online advertising expenditure to $1.7 billion.

What is Component Pricing?

Component pricing refers to the practice of displaying or advertising the price of goods or services by breaking down the components of the price and separately displaying all of the cost-elements that form the total price of such goods or services.

A number of examples of component pricing practices can be found in the telecommunications industry – such as the price display for a mobile phone plan as being, "*Available on a $15 Plan for 24 months*". In this example, the total price for the 24 months is not stated.

The travel industry provides additional examples such as a price display for a flight as being, "*$375 plus taxes and charges*." In this example, the cost of the other components, being the taxes and charges, is not made known to the consumer.

While component pricing is attractive to businesses because it enables them to display the lowest possible base price for products and service that they offer, this does not mean that the business advertising the lowest base price is offering the lowest total price payable by the consumer. For example, two travel agents may advertise the same flight with the first travel agent advertising the total price for the flight as "$*400 including all taxes and charges*" and the second travel agent advertising the flight as "*$375 plus taxes and charges*". In the second example the additional taxes and charges may bring the total value in excess of the $400 stated by the first travel agent.

Under the Clarity in Pricing Amendment, businesses may still make representations that the price is "*$x plus taxes and charges*" but this representation must be accompanied by the final total selling price and must also satisfy other specified criteria. In this regard, the practice of component pricing is not prohibited but is regulated and restricted to ensure that consumers are made aware of the final total selling price (or full cost price) whenever component pricing is used.

The motivation for the changes

The changes to the legislation concerning the display of the full cost price arose from concerns of the Australian Government in relation to the display of prices excluding Goods and Services Tax (**GST**).

As described in the Explanatory Memorandum, in 1999 the Australian Government received legal advice concerning the introduction of the GST that displayed prices would include any GST payable. The Explanatory Memorandum states:

> *Implicitly, it was understood that section 53C would also prohibit other forms of component pricing (e.g. excluding compulsory 'taxes, fees and charges' from prices).*

However, subsequent decisions of the Federal Court of Australia, such as the in decision in *Australian Competition and Consumer Commission v. Dell Computer Pty Ltd* [2002] FCAFC 434 concerning the charge of a compulsory delivery fee by Dell Computer Pty Limited, have eroded the intention that the existing section 53C of the *Trade Practices Act 1974* (Cth) would adequately address situations of component pricing.

In light of the apparent erosion of the intention of the existing section 53C, the Australian Government has amended the section and strengthened the law concerning component pricing.

What are the changes?

As noted above, the Clarity in Pricing Amendment amends section 53C by requiring businesses which make price representations concerning consumer goods and services in which the price representation reflects an amount that is less than the final selling price, to also *prominently* display the *single price*. That is, the total price payable by the consumer must be prominently stated.

The important elements to consider when engaging in component pricing are:

(a) the single price must be displayed: there is a requirement to specify the price as a single figure. Such figure must include all amounts that are "quantifiable" at the time of the price representation including, without limitation:

(i) all charges and additional fees payable by the consumer in order to acquire the goods or services; and

(ii) all taxes, duties and other charges that are imposed on the business

component pricing has become increasingly common, notably in relation to the telecommunications industry and e-commerce

the Clarity in Pricing Amendment amends section 53C by requiring businesses which make price representations… to prominently display the single price.

making the representation and that are included in the final selling price;

While the Clarity in Pricing Amendment does not define "quantifiable", the Explanatory Memorandum explains that:

> *The total price is not quantifiable if, at the time of the representation concerned, it cannot be readily converted into a dollar amount.*

The effect of this is that where the total amount is not known, the minimum price payable by the consumer must be disclosed as a single figure. In circumstances where the final price is a combination of quantifiable and non-quantifiable charges, the charges that are quantifiable must be represented as a single figure and it will be necessary for the single figure to be accompanied by a statement that not all charges are included in the single figure.

The Explanatory Memorandum provides the following example of when the total price of goods or services will be considered to be quantifiable:

> *In the case of a mobile phone contract, where a consumer must commit to (for example) a 12 month contract to obtain a specific monthly price, the aggregate minimum amount the consumer will be required to pay over 12 months can be quantified.*

(b) the single price must be prominently displayed: the single figure must be displayed "in a prominent way". To comply with this requirement, the single price must be at least as prominent as the most prominent part of the component price figure. This means that displaying a component price and publishing the single price figure in the fine print will be prohibited.

An exception to this requirement, which relates to contracts that are for the supply of services for the term of a contract, which also provide for supply of the services by periodic payments, is discussed further below.

(c) the amendments apply to advertising of consumer goods only: the new provisions are intended to apply to the advertising of consumer goods only as the obligation to quote all inclusive prices applies only to goods or services of a kind "ordinarily acquired for personal, domestic or household use or consumption". In this regard, the Clarity in Pricing Amendment is not intended to apply to price representations exclusively between businesses or exclusively between businesses and government.

It is important to note that the changes do not prohibit component pricing, provided that the single price is also displayed.

Who does it affect?

The changes affect all businesses which advertise the price of their goods or services to consumers in component parts. Businesses which commonly engage in component pricing include:

1. mobile phone and telecommunications service providers;
2. airlines and online travel agents; and
3. the motor vehicle industry.

When introducing the amendments, the Federal Government identified the advertising of cheap airfares as a key concern that the new legislation may seek to address.

In practice, the amendments may prove problematic for businesses given the increased compliance burden on businesses and the criminal penalties which may result from a breach of the proposed provisions.

Exceptions

The Clarity in Pricing Amendment contains certain exceptions to the requirement that a single price must be specified and the requirement to display the single price in a prominent way. In this regard:

- there is an exception for charges relating to sending goods from the supplier to a customer. However, where a corporation does not include a delivery charge in the single price, but a delivery charge must be paid by a consumer and the amount is known, the corporation must disclose the minimum amount of those charges as a separate component of price. A corporation may also choose to include the minimum amount of such charges in the single price
- as set out above, the new section 53C does not apply to representations that are made only to bodies corporate or governments. However, section 53C will apply where a representation is made to both consumers and businesses or governments (i.e. the exception only applies where the representation is made exclusively to a corporation or governments);
- the 'at least as prominently' disclosure requirement contained in subsection 53C(4) of the Clarity in Pricing Amendment does not apply to services to be supplied under a contract if the contract provides for the supply of services for the term of the contract, which also provides for periodic payments for the services to be made during the term of the contract and if goods are also supplied under the contract - they must be directly related to the supply of services (such as a mobile telephone is directly related to a mobile telecommunications service). A good example of this is mobile phone contract which may be for a fixed term with a minimum monthly payment. The Explanatory Memorandum sets out the following example relation to telecommunications services:

> *a corporation may offer telecommunications services at a cost of $20 per month, provided that the customer enters into a contract for provision of those services for a minimum of 24 months. The single price for those services is $480 ($20 x 24 months). The corporation is still required to state the $480 single price prominently, but it may also display the $20 per month more prominently, if it chooses to…*

The effect of this is that while the total amount payable over the fixed term must be displayed, it need not be as prominent as the minimum monthly payment. A word of caution: this exception may not be sufficient to avoid a claim of misleading and deceptive conduct if the display of the total price is so small or placed in such a way as to be almost unnoticeable by a consumer.

Offences

The Clarity in Pricing Amendment also amends the criminal provisions of the *Trade Practices Act 1974* (Cth) to create an offence of strict liability for a breach on the new section 53C. Under the Clarity in Pricing Amendment a breach of the new section 53C is punishable by a fine of up to $1.1 million per offence for a company and $220,000 for an individual. Injunctions, declarations and damages to recover loss are also available for breach of the new section 53C, in addition to other remedial orders including, without limitation corrective advertising orders and orders to implement compliance programs.

What should businesses do?

The changes will impose an increased burden on business to ensure its compliance with the legislation.

To assist with ensuring a businesses compliance, advisors of corporations should work with the corporations to review pricing, promotional and business practices.

Such review must include, among other things:

- an examination of all costs a consumer must necessarily incur if they purchase the goods or service;
- ongoing monitoring of all costs and charges associated with enabling a consumer to obtain the relevant goods or services to ensure that such costs and charges are accurately reflected in the single-price;
- an assessment of the methods used for communicating the single price of goods and services to the consumer to ensure that it satisfies the requirement that the single figure be displayed "in a prominent way";
- consideration of all media used by a corporation to ensure the appropriate changes are made including, without limitation, changes to catalogues, websites, radio advertisements and email messages. For example, email templates that are populated with information before an advertising campaign may require reformatting;
- a review of existing or long-running campaigns to ensure they do not contain representations that may breach the new section 53C;
- where a supplier offers bundled products and services, such a telecommunications service provider, analysis of the minimum components required in order enable a consumer to use the goods or receive the service advertised and the single price attached to same;
- offering training to the marketing teams and agencies of corporations to ensure they understand the obligations and consequence introduced by the new section 53C.

When will it become operative?

The component pricing changes to the *Trade Practices Act 1974* (Cth) will come into effect on a date to be proclaimed, but no later than 25 May 2009.

Bridget Edghill is a Senior Lawyer at Truman Hoyle in Sydney

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Matt Vitins

C/- Allens Arthur Robinson
Deutsche Bank Place
Corner Hunter & Phillip Streets
SYDNEY NSW 2000
Tel: +612 9230 4000
Fax: +612 9230 5333
email: matt.vitins@aar.com.au

Lesley Hitchens

C/- Faculty of Law,
University of Technology Sydney
PO Box 123
BROADWAY NSW 2007
Tel: +61 2 9514 3694
Fax: +61 2 9514 3400
Email: lesley.hitchens@uts.edu.au

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