

Electronic Commerce

The first mover window closes

*By Alan Rose**

The clearest indication that on-line commercial activity has started to mature was provided by the High Court in *Telstra v APRA*.¹ By a majority of three to two, the court decided Telstra was liable under the *Copyright Act 1968 (Cth)* for royalty payments for use of music-on-hold transferred over telephone lines or mobile phones.

That the matter was litigated to such a 'solution' says much about the priority the government has given to Australia's involvement in electronic commerce. The court established, in terms of legal policy, that it can move faster than the federal government and legislature.

The decision will be looked back on as the closing of the initial window of opportunity for those commercial interests seeking a first mover premium from the Internet.

If telecommunications carriers and other infrastructure service providers are - in addition to copyright liabilities - responsible for what is transmitted over their networks, regardless of whether they originated that content, then the spontaneity of new commercial developments will have been dealt a blow. We can, as a consequence, expect Internet costs to rise steeply and the ease of starting new entrepreneurial applications to be severely curtailed.

The notion that the Internet is 'free' in both senses of that word - open, largely unregulated and without significant charges - has threatened many interests. Considerably greater creative initiatives in legal regulation are now called for to ensure that, for Australia, the Internet's global commercial genie is not confined in a bottle of stifling regulation.

The warnings of the *Business Review Weekly's* cover story of February 24 and that of the *Economist* of July 5 in this regard were timely. The undoubted potential for significant additional wealth creation is in danger of being still-born as established interests work feverishly to bring the new boy on the block back to the pack. Instead of the concentration of effort being on how to capitalise on the productive potential of the Internet, too much of the initial reaction has been on how to rein in its alleged and feared capacities to precipitate social, financial and commercial change. The competitive spur that it has provided must not be lost by hedging it with non-tariff barriers and other 'protection' regulations.

It would have been preferable for legislators, rather than litigators in aid of established interests, to strike first and not only in the field of intellectual property. The ALRC has indicated to successive Attorneys-General and other responsible ministers that there was a need to focus on what the necessary legal regime should be to support commercial development over the Internet.

In May last year, the ALRC delivered a feasibility study on cross border civil remedies (ALRC 80). Among other things, it recommended further work on a new legal regime for electronic commerce, the development of a regulatory 'safe haven' for electronic securities trading and a global finance law inquiry. It also renewed with the incoming government its long standing proposal for a review of the civil liability of telecommunications carriers for the content transmitted over their networks. The ALRC has received none of these references.

In a speech to the Australian Securities Commission (ASC) electronic commerce conference *Regulating the Marketspace!* in February, I outlined the need for an effective legal regime to support the rapid development of electronic commerce and noted that, in particular, there needed to be work concerning:

- identification, authorisation and digital signatures;
- security;
- the protection of privacy;
- finance, corporations and securities regulation;
- jurisdiction, applicable law and evidence;
- intellectual property; and
- taxation.

Since then, there have been notable developments in a number of areas, but little real progress. Government effort over the past six months has been characterised by a proliferation of inquiries, rather than by integrated action to capitalise on the Internet's potential. Often where reports have been received, implementation action is yet to proceed. As a consequence, Australia unfortunately has not been a pace-setter in the information economy stakes.

It was, however, pleasing to note the Prime Minister's announcement on September 16, of the establishment of a National Office for the Information Economy and giving the Minister for Communications and the Arts overall responsibility for electronic commerce.

This year's record in outline is set out in the remainder of this article.

Censorship: In July, the federal government announced it would implement a national framework for on-line content regulation, based on industry codes supervised by the Australian Broadcasting Authority. This arrangement has the support of the States and Territories. The primary objective of the national framework is to ensure that material refused classification in traditional media is treated similarly on-line.

Consumer protection: The Australian Competition and Consumer Commission (ACCC) released a discussion paper on September 2 on how to protect consumers in the new global marketplace on the Internet, international tele-marketing and mail order.²

Identification, authorisation and digital signatures:

The Minister for Communications and the Arts announced on August 13 that he would put proposals to the government for the Commonwealth to take a leading role in developing a national framework to authenticate the identities of parties to electronic transactions.³ This would occur through coordinating the establishment of a peak body, to be known as the Policy and Root Registration Authority. The proposal follows the release by Standards

Australia late in 1996 of *Strategies for the Implementation of a Public Key Authentication Framework (PKAF) in Australia* (SAA MLP 75-1996).

Security: The Council of the Organisation for Economic Cooperation and Development (OECD) released the *Recommendation of the Council concerning Guidelines for Cryptography Policy* on March 27. This followed recommendations concerning the protection of privacy and transborder flows of personal data (September 1980), a declaration on transborder data flows adopted by OECD member governments (April 1985) and recommendations on the security of information systems (November 1992). Australia has adopted the OECD guidelines for security of information systems and cryptography and has played a leading role in the development of each of the OECD's instruments.

Privacy protection:

Despite recommendations from the Privacy Commissioner, the ALRC, the Administrative Review Council and tacit support from the federal Attorney-General's Department, the Prime Minister announced in March that the federal government would not introduce legislation for uniform private sector privacy laws. He also suggested to the States that they not pass privacy laws for their public sectors to complement the federal Privacy Act. Consequently, apart from some exceptions concerning credit reporting, Australia has neither a legislative regime meeting the above-mentioned OECD guidelines (outside the federal public sector), nor the requirements of the European Union's Framework (Data Protection) Directive. This directive

establishes equivalent standards to permit the exchange of data among institutions and individuals in its member States and importantly between them and other States.

The Privacy Commissioner, in response to the Prime Minister's announcement, recently released a consultation paper outlining proposals for voluntary codes of conduct to meet appropriate privacy standards, to be followed by private sector bodies, such as business and the professions.⁴ (Ed's note: *The ALRC's views on the government's response to private sector privacy laws are expressed elsewhere in this publication.*)

Finance, corporations and securities regulation:

The Wallis inquiry's report (*Financial Systems Inquiry Final Report*, March 1997) recognised the importance of providing a legal framework to facilitate the development of electronic commerce in the banking and finance industry. In particular, it proposed the review and amendment of existing legislation to allow the use of digital signatures and electronic notices and documents. The report also recommended the review of the law of evidence to take account of electronic transactions and recordkeeping. All these recommendations have now been accepted by the government.

For a little over two years, the ASC has been advancing its Electronic Commerce Project on applying the technology to corporate and securities regulation. There are, however, a growing number of further inquiries and reviews being undertaken in this area. In March, the federal Treasurer announced the

Corporate Law Economic Reform Program, which included among its areas for concentrated effort electronic commerce and the role to be played by the Corporations Law. Two months later, nine people were appointed to the new Business Regulation Advisory Group. The group will advise the government on proposals for reform of corporate regulation arising from the Corporate Law Economic Reform Program and again highlighted electronic commerce as an area of concentrated effort.

The Parliamentary Joint Committee on Corporations and Securities has also embarked on a review of securities markets in the electronic age.

Jurisdiction, applicable law and evidence:

The Attorney-General announced, in a news release of July 13, the appointment of an Electronic Commerce Expert Group to consider the need for legislation within the framework of international standards to regulate electronic commerce. The terms of reference direct attention to a range of basic legal matters, many of which flow from the work of the United Nations Commission on International Trade Law (UNCITRAL). UNCITRAL has produced a model law on electronic commerce and is presently working on a model law on digital signatures. The Expert Group has, unfortunately, not been given any time limit for the production of its report, although many subjects of its concern are vital to Australia's ability to provide an effective legal base for electronic commerce over the Internet.

Intellectual property:

Many relevant reforms necessary to update Australian copyright law to cope with digital dissemination of creative works were included in a Copyright Amendment Bill, proposed by the previous government. However, the Bill lapsed when the parliament was prorogued for the 1996 election.

The Department of Communications and the Arts and the Attorney-General's Department released a discussion paper *Copyright Reform and the Digital Agenda* in August this year. It included proposals for the implementation of a new transmission right and a right of making available to the public, which is in line with the new standards provided in treaties concluded in December 1996 by the World Intellectual Property Organisation (WIPO).

The proposed transmission right would cover cable and wireless broadcasting and certain on-line transmissions. The making available right would cover uploading copyright material to a worldwide web site and the linking of a server with copyright material to the worldwide web. Under the proposals, Internet service providers would not be directly liable for the transmission and making available to the public of copyright material accessed through their networks, except if they were found by the courts to have authorised their users to transmit material or make it available to the public.

In addition, the House of Representatives Standing Committee on Legal and Constitutional Affairs

commenced in early August an inquiry into copyright royalties for music played by small business.

Taxation: The Australian Tax Office's (ATO) report, *Tax and the Internet* (AGPS, August 1997) indicated it would closely monitor industries with a burgeoning Internet presence such as news and information, music, gambling, travel services, computer software and retail goods. It suggested no new tax be imposed on electronic commerce, but emphasised the need to quickly create a tax regulatory environment that would keep on-line industries in Australia, rather than driving them to more lenient tax jurisdictions.

The report was released as the basis for discussion and as an attempt to prevent further undermining of the revenue base. In that regard, the ATO recommended Australia, in concert with other countries, particularly those in the OECD, consider a strengthening of taxation administration regimes. It was suggested this might be done in Australia by:

- having Australian company numbers displayed on web sites;
- licensing commercial Internet sites;
- introducing denomination limits for electronic cash similar to those existing for physical cash; and
- reviewing the current wholesale sales tax categories to cope with new digitised products.

Besides the other Australian inquiries and those being undertaken by international organisations in which Australia is a regular and active participant, federal parliament's Joint Committee of Public Accounts has recently commenced an inquiry into implications of the expected growth in Internet commerce. The Committee will look at a range of taxation, competition, industry development and intellectual property issues in the light of the international regulation of electronic commerce.

Conclusion

It seems that despite the best endeavours of those who were alert early to the legal, regulatory and business implications of the Internet, Australian government has not grasped the first mover opportunities available to a technology-based country such as ours. By contrast, the

private sector in the United States has shown the way and gained the effective support of its government. Similarly, Singapore, having developed much with respect to the application of technology from its close association with Australia, has, through a government-endorsed national strategy, the efforts of its National Computer Board, its Attorney-General and Chief Justice (with respect to the law), determined to carve out an international leadership position in electronic commerce and is effectively going about doing just that!

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End-notes

1. *Telstra Corporation Limited v Australian Performing Right Association Limited* (1997) 146 ALR 649.
2. Report in *The Australian*, September 3, 1997.
3. Speech by the Minister to the Internet World Australia Pacific Conference 1997, Sydney.
4. *Information Privacy in Australia: A National Scheme for Fair Information Practices in the Private Sector*, Consultation Paper, August 1997.

Arresting Posters

Streetwize Comics' set of legal information posters gives young people in NSW straightforward information on important legal rights and obligations, as well as relevant



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