

law applicable to DRM. These are outlined below:

- *Expansion of protection of encoded broadcasts*

The USFTA Act expands the range of criminal and civil penalties for the unauthorised manufacture, distribution and use of broadcast decoding devices relating to cable or wireless subscription television signal piracy. These actions will now be available to content owners and channel providers, in addition to broadcasters.

- *Carriage service provider liability*

The USFTA Act provides that the liability of ISPs and carriers for infringement by subscribers will be limited if they satisfy certain conditions. Under the new provisions, a court must determine that infringement has occurred before an ISP will be required to 'take down' material from its servers.

- *Definition of 'material form'*

This USFTA Act expands the concept of 'material form' to apply to all forms of storage of a work or other subject matter, whether or not they allow further reproductions.

- *Electronic rights management information (ERMI)*

The USFTA Act expands both the definition of ERMI and the scope of actions that may be taken by rights holders against the removal of ERMI.

Of course, the effectiveness of the legislation to some extent depends on consumer awareness. Rights holders are engaged in ongoing campaigns to educate consumers about their rights and obligations under the Act.

CONCLUSION

As DRM continues to evolve, we can expect to see stakeholders seeking

solutions which balance their needs and drive DRM development. The call to standardise the applicable technology, the development of accessible, affordable and user friendly DRM technology, the need to educate consumers as to their rights and obligations, the impact of the recent changes to the relevant law and the continuing proliferation and use by consumers of unauthorised content, can all be expected to play a part in this development of DRM.

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"I'll Have Two Playmates and an Emoticon Please"

Nick Abrahams, Glenda Stubbs and Alan Arnott provide an overview of mobile content regulation in Australia.

INTRODUCTION

The mobile telephone has been transformed from a brick-sized cellular telephone to a slimline sophisticated multi-purpose device weighing less than 75 grams. Today's mobile phone is armed with polyphonic ring tones (polyphonic and now "true tones"), radios, mp3 players, cameras, flashlights and blue tooth headsets, capable of instantaneous wireless transmission of text, audio, images, video and most recently the Multimedia Messaging Service (MMS).

Alongside this progression in technology has been a significant increase in the quality of transmissions, most apparent with the advent of 3G technology. 3G technology is faster than prior mobile technologies like GPRS (2.5G), and offers enhanced multimedia capabilities like videoconferencing, streaming video and broadband-type speeds.

Commercially, mobile technologies are presenting a plethora of avenues for financial exploitation. Known as m-commerce, mobile phone users can use their mobile to acquire a range of goods and services. A good example is Telstra and Coca Cola's "Dial-a-Coke" vending machine. This allows Telstra mobile customers to purchase soft drinks via mobile phones. The cost of the drink plus the cost of the call is debited to the user's mobile phone account.

Other areas where providers have been experiencing stellar growth in revenues include SMS/MMS voting/promotions and content such as ringtones, wallpapers, games and emoticons (the ":)") that people put in emails – yes it has a name).

Like the internet, mobile technologies are also facilitating the wireless transmission of raunchy content. For example, 3G-enabled carrier, Hutchison, is offering "the captivating beauty of every Playmate of the Year since 1960,

every Cybergirl of the Month since 2001 and Videogalleries featuring Playboy videoclips ...". This novel area of mobile adult content definitely presents new challenges for regulators.

Adult content available through mobile phones is currently accessible via the premium rate SMS/MMS 19x services and proprietary network range that is independent of the internet. The range of types of services available include SMS sex, downloadable sexually explicit mobile phone wallpaper, and the "Naked News", a Canadian strip-news program available on m-Vision, Australian media and communications company GoConnect's mobile video distribution platform.

While m-commerce means added convenience for purchasing goods and services, the availability of premium services clearly poses risks to some mobile phone users. Two major concerns have been identified by the Australian Communications Authority

(ACA): credit management and the need to protect young mobile phone users from unsuitable content. This article will focus on what is being done to regulate content available through mobile phones.

ACA'S DRAFT PRINCIPLES

In late 2003, the ACA was empowered to make service provider rules for premium services². Since that time the ACA has called for public and industry comment on a number of issues concerning premium services. In February 2004 the ACA released its draft Interim Consumer Protection Principles and Procedures for Premium Rate and Intranet Services (**First Draft Principles**). These Principles were intended to regulate mobile content.

On 10 March 2004, following consideration of over 30 submissions on the First Draft Principles, the ACA released a second draft of the Principles (**Second Draft Principles**). The First Draft Principles placed an obligation on mobile carriers and content providers not to send MA or R classified content to children and youths. The Second Draft Principles do not contain this obligation. Instead, mobile carriers are required to have their customers opt-in for adult content services and for each transaction the customer is required to show proof of age.

The Second Draft Principles places the responsibility of classifying content of premium services on telecommunications companies and related content providers. Text messaging services and voice services are to be classified in accordance with the Telephone Information Service Standards Council Code of Practice (**TISSC Code**), while multimedia content (being any combination of text, sound, and/or motion video content) will be classified using the National Classification Code³ as explained in the Office of Film and Literature Classification Guidelines (**OFLC Guidelines**).

The Second Draft Principles contain a dual level access arrangement where content is rated as General or Restricted. There is a blanket prohibition on mobile content rated as X or Refused Classification (**RC**) in

accordance with the OFLC Guidelines. Level One General access is granted to all mobile customers. Level Two Restricted access is granted to mobile customers 18 years and over.

Interestingly, the regulation of mobile content for persons 16 or 17 is more stringent under the Second Draft Principles than under the National Classification Code. This is because the ACA has included content classified as MA/MA15+ (being content that can only be viewed or hired by persons under 15 years if they are in the company of an adult) as Restricted Content. This means that persons aged 16 or 17 are prevented from viewing mobile content which in a different medium, say a film or computer game, would be available to them. This sends a confusing message that says adult content is acceptable to minors in some mediums. There is also confusion in relation to convergent technologies, where a computer game that is ported via mobile Java could be played by minors using one device but not another. The ideal would be a standardised classification code underpinning all protocols, technologies and platforms.

According to the ACA, "*the aim of the Principles will underpin the regulatory framework for premium services*"⁴. Neither the First Draft Principles nor the Second Draft Principles have legal force. To give the Second Draft Principles some teeth, the ACA requires mobile carriers to enter into an agreement whereby they are bound by the Principles. To date the ACA holds no executed agreements.

The ACA is currently preparing a draft Determination with respect to the regulation of mobile content. Originally it was expected in November, but it looks likely to be released for comment in mid-December.

DCITA REVIEW OF MOBILE CONTENT

DCITA issued a paper titled "Review of the Regulation of Content Delivered over Mobile Communications Devices" and called for submissions. Those submissions were due on 3 September 2004. The terms of reference include assessing:

- the commercial availability and viability of filtering technologies; and

- whether existing regulatory approaches with respect to regulating content apply to the new emerging technologies.

While all publicly available submissions support regulation of mobile content, there are a number of different approaches as to how that regulation should be undertaken. Some have called for the TISSC Code and Second Draft Principles to be law⁵. While submissions from carriers have noted that, in determining the regulation of content available on mobile devices, it should not matter that the device is mobile. The regulation of content should be the same whether it is available on a mobile device or a PC or a film at the cinema⁶. As to the use of filtering technology Hutchison Telecoms had this to say, "*no system can guarantee the entire blocking of undesirable material*". Hutchison Telecoms went on to point out that the aim of using filtering technology should be to empower the user to make choices for their own (or children's) mobile experience.

DCITA is still accepting submissions and there is no timeframe set for when DCITA will finalise its report.

ABA AND IIA

Another regulatory body which plays a part in the regulation of content available on mobile phones is the Australian Broadcasting Authority (**ABA**). The ABA has jurisdiction under the *Broadcasting Services Act 1992* (Cth) to close down illegal web sites hosted in Australia (including those of an adult nature that do not provide acceptable access controls). Adult web sites available via the internet are one of, if not the, most lucrative e-commerce revenue models. As a result of convergence in IT, telecommunications and media, that same model is being applied in the m-commerce market. This means that web content, including adult web sites, can be accessed via web-enabled mobile phones.

In an issues paper released in September 2002 DCITA noted that a number of mobile devices which allow internet content do not accommodate end-user filtering⁷. Further while

software installed on computers like LookSmart's "NetNanny" has been found to be effective in preventing minors from accessing adult content on computers, the Internet Industry Association (IIA) has found that similar software cannot currently be installed on most mobile phones.

The IIA is about to release a draft Industry code for comment that is intended to address regulatory issues surrounding content available on mobile phones. While the current IIA Content Code of Practice is not mandatory, the ABA is empowered to direct an internet service provider or content host to comply. Depending on the content, a failure to comply could result in the ABA referring the matter to State or Federal police. Unfortunately, the ABA is little more than a blunt instrument in this regard, in light of the proliferation of adult web sites housed on servers in foreign jurisdictions, where the ABA and Australian law has no force and there is no equivalent regulatory regime. As a result adult web sites are now, more than ever, available to all consumers including minors, to access via any web-enabled device.

THE TISSC CODE

The Telephone Information Service Standards Council Limited (TISSC) is a company limited by guarantee. It is an independent regulatory body consisting of three community members, three telecommunications industry members and an independent chairman. TISSC sets "fair and independent standards" for the message content and advertising of any Australian telecommunication service with 190 prefix. This is reflected in the TISSC Code.

The TISSC Code includes consumer protection arrangements that apply to recorded services, live services, variable charge services, data services, fax services, closed user access services, children's premium rate services and internet dialler services. This includes ensuring that minors are not exposed to unsuitable material that may be contained in premium rate services. Compliance with the TISSC Code is achieved through a service agreement between each service provider and a carriage service provider.

ACIF CODES

The Australian Communications Industry Forum (ACIF) is an independent industry owned company that implements and manages the communications industry's self-regulation within Australia via codes and standards. Part 6 of the *Telecommunications Act 1997* (Cth) provides that the ACA can register an industry code if it meets the criteria set out in section 117. Once a code is registered the ACA can direct carriers and carriage service providers to comply with that code.

Codes are developed by the ACIF Board, Reference Panels, Working Committees and the ACIF Executive, and intend to reflect the needs and concerns of all stakeholders, including the public. ACIF has implemented numerous codes in relation to a range of telecommunications issues including those relating to mobile phone technologies.

There are no ACIF Codes that aim to regulate mobile content. ACIF Code C580:2002 was registered with the

ACA on 11 June 2003 and is the industry code for SMS (**SMS Code**). The principal objective of the SMS Code is to ensure that, as far as practicable, end users of services which support the reception of SMS messages do not receive unsolicited SMS Marketing Messages. However, the SMS Code does not deal with the sending of SMS messages by end users.

OTHER JURISDICTIONS

On 19 January 2004 the UK Code of Practice for the self-regulation of new forms of content on mobiles was released (**UK Code**). The UK Code was developed by Orange, O2, T-Mobile, Virgin Mobile, Vodafone and 3 for use in the UK market. Among other things, the UK Code requires mobile operators to provide information to customers so that they can control the access to the services available on a mobile phone and provide parents/carers with opportunities to apply a filter to the mobile operator's internet access and thereby filter out restricted content. This suggests that filtering technology is available for mobile phones accessing the internet.



Ireland is seeking to control mobile content with Vodafone and two other mobile networks taking part in a trial of content-blocking applications that aims to prevent children from accessing adult content on their mobiles, and denies access to blacklisted web sites and filters images based on skin tones, body positions and other relevant factors. The success of such filtering is yet to be documented.

CONCLUSION

In Australia, the absence of a single set of rules that govern mobile content is yet another example of how the regulation of convergent services can give rise to a confusing regulatory environment for consumers and content providers. The ACA's Second Draft Principles aim to regulate the novel and previously unregulated area of premium mobile content. However, the current regulatory framework can be confusing and lacks legislative clout. Sections of

the population are calling for regulators to lay down an enforceable set of technology-neutral laws that govern content effectively so that minors are prevented from accessing inappropriate content whether it be via mobile phone, PDA or personal computer irrespective of the protocol or technology used.

At the same time, though, parents who provide children with mobile phones should take steps to ensure that they are providing mobile phones that have limited or no access to sources that might contain inappropriate content such as the world wide web. Most parents cite safety as the primary reason for providing mobile phones to children. After speaking with a number of mobile phone companies, it is clear that there are several options available to parents so that functionality of a mobile phone is limited to receiving and making calls to mobiles or fixed phones, thereby reducing the risk of children viewing inappropriate mobile content.

(Endnotes)

¹ Hutchison 3G Australia Pty Ltd, *Playboy – Premier content service on 3* <<http://www.three.com.au/index.cfm?pid=2217&pageid=2103&sid=2237>> accessed 18 June 2004.

² *Telecommunications Amendment Regulations 2002 (No 3)*

³ Schedule to the *Classification (Publications, Films and Computer Games) Act 1995*

⁴ Background Statement to the ACA Interim Consumer Protection Principles and Procedures for Premium Rate and Intranet Services, (Second Draft Principles)

⁵ Submission by Australasian Performing Right Association Limited & Australasian Mechanical Copyright Ownership Society Limited dated September 2004.

⁶ Submission by Hutchison Telecoms to DCITA Review dated 3 September 2004.

⁷ Department of Communications, Information Technology and the Arts Issues Paper,

A review of the operation of Schedule 5 to the Broadcasting Services Act 1993, Canberra September 2002.

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Looking Forward: Challenges for Telecommunications Regulation

Holly Raiche looks at the themes and outcomes of the ACA Self-Regulation Summit held recently in Sydney¹.

The overall theme of the Summit was straight forward: what will future telecommunications systems and services look like, and what needs to be done – if anything – to the current regulatory framework to accommodate a new telecommunications environment. Fittingly, the conference had two hosts: the telecommunications regulator, the Australian Communications Authority (ACA) and the major telecommunications industry organization, the Australian Communications Industry Forum (ACIF). Also fittingly, there were two keynote addresses by the heads of both the ACA and ACIF.

TELECOMS PAST AND FUTURE

Dr Bob Horton, Acting Chairman of the ACA, looked both forward and backward. The achievements of the last seven years have included a range of industry codes providing both

operational rules for industry and significant protections for consumers. With the achievements have come lessons in the time and resources taken to develop those codes and, because of that, the fact that smaller players simply cannot afford to sit at the table. He also briefly looked forward, towards a greater emphasis on industry compliance with the rules, and a new converged environment (including the convergence of the ACA with the Australian Broadcasting Authority to form ACMA). The real challenge, looking forward, is to ensure that self-regulation matures, adapts and responds to the changing environment in a way which reflects and fulfils the needs of all the parties.

ACIF CEO Anne Hurley started very firmly in the future - 2011 to be exact – and looked back to tell how we got there. There were clear agreed goals with a converged regulator: participation of all stakeholders, a cost effective process, with open and

transparent processes. Interestingly, Part XIB and XIC had been removed from Trade Practices Act, suggesting the arrival of a truly competitive market. Compliance had been successfully addressed by industry, working together with the TIO to identify and address issues behind complaints data. Importantly, consumers had been trained and funded to play a significant role in the self-regulatory regime. Perhaps more controversially, Hurley foresaw a regime where the new regulator no longer mandates the development of codes and standards by industry, and there is be no back up regulatory powers by the new regulator to enforce codes, or develop an industry standard if a code fails. Clearly, the compliance strategy will have worked.

Third on the agenda, and an equally important part of looking forward, were the presentations by Paul Roberts from the ACA on the ACA Vision 20/20 Project, and by Peter Darling, who managed the ACIF Next Generation